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To what extent do South Africa and Scotland comparatively respect, protect and fulfill children's rights in the context of youth justice and in light of their international and regional obligations?

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ABSTRACT

Juvenile justice is a core facet of international child law aimed at protecting children who come into conflict with the law. The international and regional juvenile justice frameworks outline the standards expected of States party to the international instruments. Both South Africa and Scotland are obligated to adhere to these rules and principles by way of creation and implementation of domestic laws in furtherance of a child-centered approach to justice. This dissertation analyses the effectiveness of both national systems and assesses the extent to which they respect, protect and fulfill children's rights in the context of international child law. This study also aims to highlight areas in which South Africa and Scotland fail to meet the prescribed standards and proposes various recommendations in order to do so more effectively.

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CHAPTER 1

INTRODUCTION AND OVERVIEW OF THE STUDY

1. INTRODUCTION

The United Nations Convention on the Rights of the Child (CRC or the Convention) is the most widely ratified human rights document under which states are obligated to take all appropriate legislative, administrative and other measures for the implementation of the rights recognised therein.¹ Thus the responsibility rests with the States party to the CRC, to ensure that domestic laws are both in compliance with, and in inclusion of, all of the rights outlined within the CRC. The United Nations (UN) has stated that there need not be ‘a duality between human rights and juvenile justice,’² emphasising the need to address the issues³ in a context of rising criminality of children.⁴ The Committee on the Rights of the Child (CRC Committee) reiterates the holistic nature of implementation, the indivisibility of rights and the necessity of cooperation in realising rights.⁵

There are also significant variances in the theoretical and practical implementation of national child justice systems, particularly in respect of the minimum age of criminal capacity.⁶ These depend on the conceptions of childhood within the society and the ways in which this view translates into law.⁷ Additionally, ‘political organisation and systems of governance, as well as the social organisation and economic situation of countries, have a bearing on their capacity and efforts to fulfill treaty obligations and realise the human rights of children.’⁸ These are some of the issues that have created

¹ Article 4.

² G. Van Bueren, *The United Nations and Juvenile Justice: A Guide To International Standards and Best Practice* (1999), at 8.

³ 8th and 9th U.N. National Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and 1995, respectively.

⁴ See: A. L. Pillay, *Criminal Capacity in Children Accused of Murder: Challenges in the Forensic Mental Health Assessment*, *Journal of Child. & Adolescent Mental Health* Vol. 18 (2006), at 17.

⁵ See generally: *CRC General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5. (General Comment 5).

⁶ *Ibid*, at VII.

⁷ Pillay (supra note 4) at 18.

⁸ See: S. Goonesekere, *Law Reform and Children’s Rights in Plural Legal Systems: Some Experiences in Sub-Saharan Africa*, *Protecting The World’s Children: Impact of the Convention on the Rights of the Child*, *Diverse Legal Systems* 209, (2007) at 214.

the necessity for a standardised approach of dealing with young people who commit crimes. The development of child-specific rights and an international framework of juvenile justice have played an important role in achieving this.

This study outlines the international framework pertaining to child justice, both by way of the binding and non-binding instruments. The CRC is at the centre of the international law and has been ratified by both South Africa and Scotland. It is the standards expressed within this instrument, buttressed by a plethora of recommendatory General Comments, Rules and Guidelines that creates the law, against which the effectiveness of the respective domestic juvenile justice systems must be measured.

South Africa has recently undergone reform of its procedure and substantive provisions of juvenile justice. It followed from the end of apartheid that restorative justice and a 'new South Africa' was considered of paramount importance in the process of legislating. This is reflected in the Constitution and child law generally, as well as the youth justice framework. Many aspects are therefore extremely positive and demonstrate a drastic improvement on the once punitive approach; yet, South Africa continues to struggle with high crime rates amongst both adults and children.⁹

In contrast, the Scottish system of child justice has been relatively constant since 1971, following publication of the revolutionary Kilbrandon Report.¹⁰ The guiding principle of child justice then, and now, is that the welfare of the child should be of paramount concern in all decisions.¹¹ This led to a 'needs' not 'deeds' approach, encompassing a deft understanding of the factors involved in a child turning to crime and using this to prevent crime where possible. The approach is effective in numerous ways, yet gaps remain and the lack of incorporation of the CRC into domestic law continues to create challenges.

2. STATE OBLIGATIONS

⁹ <http://www.crimestatssa.com/>

¹⁰ Scottish Government, The Kilbrandon Report, (1964). Found at: <http://www.gov.scot/Publications/2003/10/18259/26880>

¹¹ Ibid.

Upon ratification of an international human rights treaty, State Parties are duty bound to respect, protect and fulfil the human rights of their citizens.¹² A State's duty to *respect* human rights is a negative obligation in that a State must refrain from interfering with the realisation or enjoyment of human rights.¹³ The obligation to protect confers on States a duty to adopt preventative and remedial measures if and when violations of human rights occur.¹⁴ Finally, States must facilitate enjoyment of basic human rights in order for them to be *fulfilled*, a positive obligation.¹⁵ These are the standards which South Africa and Scotland are obligated to meet in respect of international children's human rights law.

3. REASONS BEHIND COUNTRIES CHOSEN FOR ANALYSIS

The reasons behind the choice of South Africa and Scotland as jurisdictions to compare, stem from the marked similarities between them. Firstly, for such a study to take place, it is important that both countries are required to adhere to the same international principles and norms. Similarly, Scotland and South Africa have signed and ratified the CRC, the leading international child rights instrument. The fact that the regional frameworks are different creates an interesting opportunity to explore the law in light of the differing conceptions of childhood and crime. The social contexts are drastically different and the ways in which the respective States choose to address youth crime in light of international law warrants further exploration. Furthermore, both South Africa and Scotland belong to a select few countries with civil-common law mixed legal systems and bear remnants of the early English influences. Importantly, Scotland and South Africa both implement low ages of criminal responsibility; the point at which a child is deemed to have the capacity to commit a crime. Moreover, the jurisdictions similarly put diversion of children from judicial proceedings at the centre of their youth justice systems. This comparative analysis will consider whether a system that protects children through diversion and a barrage of safeguards can still be considered to be an effective framework when the ages of criminal capacity remain so low.

¹² O. De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge; Cambridge University Press, 2010), at 242.

¹³ <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

¹⁴ De Schutter (*supra* note 12) at 367.

¹⁵ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>.

4. SOCIO- ECONOMIC CONTEXT

4.1 South Africa

Historically in Africa, the conception of childhood was such that children were considered to be almost an extension of their parents within a family, vulnerable and in need of protection.¹⁶ Contemporary South Africa has seen a shift in this attitude, yet a strong respect for hierarchical structures remains prevalent, particularly in rural areas and children are often not respected as autonomous beings.¹⁷ Further, the links between poverty and delinquency are clear where, often, areas of economic deprivation suffer from the worst rates of crime.¹⁸ Child poverty remains high in South Africa, where two-thirds of children live in households with less than 1200r income per month.¹⁹ Consequently, it is unsurprising that youth crime pervades South African society in the way that evidence suggests.²⁰

4.2 Scotland

Research suggests that, comparatively, the European conception of a child is more autonomous, with a focus on a child's development into adulthood, yet with an understanding of the balance between this and the need of protection.²¹ There seems to be a strong understanding of children as individual people, with self-determination rights based on the capacity of the child to become autonomous.²² This conception of childhood relates to the ways in which children are treated and the laws under which

¹⁶ A. Boakye-Boaten, Changes in the Concept of Childhood: Implications on Children in Ghana, *The Journal of International Social Research*, Vol. 3(10), (2010), at 110.

¹⁷ *Ibid*, at 113.

¹⁸ J. F. Short Jr, Poverty, Ethnicity, and Violent Crime, National Crime Justice Reference Service (1997). Found at: <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=169786>

¹⁹ H. Meintjes & S. Giese, Spinning the epidemic: The Making of Mythologies of Orphanhood in the Context of AIDS, *Childhood: A global journal of child research* Vol.13(3) (2006), at 407-430 .

²⁰ E. Pelsler, Learning to be lost: Youth Crime in South Africa, Discussion Paper for the HSRC Youth Policy Initiative, (Pretoria, May 2008). Found at:

[http://cjcjcp.skinthecat.co.za/articlesPDF/25/HSRC%20Youth%20Crime%20Discussion%20Paper\(2\).pdf](http://cjcjcp.skinthecat.co.za/articlesPDF/25/HSRC%20Youth%20Crime%20Discussion%20Paper(2).pdf)

²¹ A. Moores and N. A. Pace, Children's rights in Europe, *European Journal of Anaesthesiology*, Vol. 22(4) (2005), at 245. Found at: <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=299400> (in the context of medical decisions).

²² M. Freeman, Freedom and the Welfare State: Child-Rearing, Parental Autonomy and Intervention, *Journal of Social Welfare Law* Vol. 70 (1983), at 54-57.

they rely. Scotland is not without its problems however. As was discussed above, poverty plays a key role in the preconditioning of delinquency. It is estimated that one in five children are growing up in poverty, amounting to over 220 000 children.²³ As with South Africa, much needs to be done to improve the lives of children and guarantee minimum standards, particularly within juvenile justice.

5. CHAPTER SYNOPSIS

Chapter 1 has focused on contextualisation of the topic and introducing the specifics of what will be discussed within the dissertation. This Chapter outlined the reasons behind choosing South Africa and Scotland and the standards of state obligations. Chapter 2 delineates the international and regional standards that states are expected to fulfill, considering both binding and non-binding instruments, and focusing on child law principles and specific justice provisions. Chapters 3 and 4 outline and consider the effectiveness of the South African and Scottish systems of youth justice, using international standards to measure against. Finally Chapter 5 concludes the dissertation and encompasses recommendations for both States.

CHAPTER 2

INTERNATIONAL LEGAL FRAMEWORK

²³https://www.savethechildren.org.uk/sites/default/files/images/child_poverty_facts_2013.pdf

1. HISTORICAL DEVELOPMENT OF INTERNATIONAL CHILD JUSTICE

Generally, before the 18th century, a young offender would be treated in the same way as an adult with no special dispensation, subject to the same procedures and sanctions as adult counterparts.²⁴ The 19th Century saw a shift and the emergence of a concept that young people should benefit from different treatment by virtue of their youth.²⁵ The approach in this sense was to treat as oppose to punish children, looking at their social backgrounds and collaborating with various professionals to find a solution.²⁶ The current approach, now considered rights-based, or restorative, encompasses acknowledgement of a child as autonomous but also that socio-economic factors can be determinative, the importance of procedural rights but also a protective element which places the best interests of the child at the forefront of any decision taken, representing a high standard of protection of children in conflict with the law.²⁷

2. BINDING LEGAL INSTRUMENTS

2.1 The United Nations Convention on the Rights of the Child

The CRC is the seminal international children's human rights law instrument and has been described as not only 'a landmark for children and their rights',²⁸ but also as a 'widely acclaimed and almost universally endorsed Convention',²⁹ with currently 193 state signatories.³⁰ Since adoption of the CRC in 1989, there has been a notable shift

²⁴ See: J. Sloth-Nielsen, *Juvenile Justice* 51-52 (2001) (unpublished L.L.D. thesis, UWC). Found at: http://www.slothnielsen.com/images/stories/uploader/juliathesisChapter_1.doc

²⁵ D. L. Mills, *United States v. Johnson: Acknowledging the Shift in the Juvenile Court System From Rehabilitation to Punishment*, 45 *DePaul Law Review*, 903 (1996), at 904-905.

²⁶ O. G. Odhiambo, *The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context* 7 (Oct. 18, 2005) (unpublished L.L.D. thesis, University of the Western Cape), at 22. Found at: http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_9110_1176963955.pdf

²⁷ V. Odala, *The Spectrum for Child Justice in the International Human Rights Framework: From 'Reclaiming the Delinquent Child' to Restorative Justice*, *The American University Law Review*, Vol. 27(3) (undated).

²⁸ <http://www.ohchr.org/Documents/Publications/FactSheet10Rev.1en.Pdf>

²⁹ M. Freeman, *The Moral Status of Children*, *Essays on the Rights of the Child*, Vol.2, (1997).

³⁰ L. Schafer, *Child Law in South Africa and International Perspectives* (LexisNexis, Durban, 2011), at 90. Currently only two countries have not ratified the Convention, Somalia and USA (USA have signed the Convention but not yet ratified).

from the doctrine of *parens patriae* to the acknowledgement that state intervention is justifiable in the guardianship and protection of children.³¹ This has led to the emergence of the perspective of children as right-holders where ‘the notion that children have rights is no longer an issue of debate or contention’ is widely accepted.³² In respect of child justice, the CRC framework protects the rights of children within the judicial process through both general principles and justice-specific provisions. There are four guiding principles that underpin the CRC and are considered to be general requirements for all child rights³³ as well as the leading principles of a comprehensive policy for juvenile justice.³⁴ These include; non-discrimination,³⁵ respect for the views of the child (or the right to participate)³⁶, the right to life, survival and development³⁷ and the best interests of the child principle.³⁸ These will be discussed briefly with a view to ascertaining the extent to which these principles strengthen the protection of express juvenile justice provisions.

There are also a number of relevant provisions in the Convention that require the establishment of specific measures, laws, procedures and institutions for children in conflict with the law.³⁹ Most relevant, are the protections outlined in Article 40 which specifically require that State Parties address juvenile justice in a manner consistent with the promotion of a child's sense of dignity and worth, respect for the human rights of others and in support of a child's reintegration into society.⁴⁰ To this end, the specific guarantees are outlined in Article 40(2) and 40(3) and include the minimum age of legal capacity, the right to privacy, the right to free legal assistance, the use of an interpreter and a number of other safeguards.

³¹ Odhiambo (supra note 26) at 3-4.

³² African Child Policy Forum, *Realising Rights For Children: Harmonisation of Laws on Children in Eastern and Southern Africa* (2007). Found at: http://www.sarpn.org/documents/d0002744/ACPF_children_rights.pdf

³³ http://www.unicef.org/crc/files/Guiding_Principles.pdf

³⁴ *CRC General comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, at articles 5-12. (General Comment 10).

³⁵ Article 2.

³⁶ Article 12.

³⁷ Article 6.

³⁸ Article 3.

³⁹ Article 3 (best interests), Article 16 (privacy), Article 40 generally.

⁴⁰ Article 40(1).

The CRC is strengthened, and expanded upon, by a number of General Comments drafted by the CRC Committee.⁴¹ Despite the lack of enforceability, these contribute to the general awareness and understanding through the provision of interpretative guidelines to the Treaty and contribute to the broad-ranging international legal framework pertaining to child justice.

3. NON-BINDING LEGAL INSTRUMENTS

3.1 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)

The Beijing Rules, adopted in 1985,⁴² constitute the first international instrument to outline normative standards for the administration of juvenile justice and represent the development of youth justice as a concept.⁴³ As the adoption of the guidelines predate the Convention a number of the rules have been incorporated into the CRC and despite the lack of enforceability, the importance of the Beijing Rules in the establishment of a progressive system of youth justice, is palpable, particularly in respect of providing more detail to the context of existing legally binding norms.⁴⁴

3.2 United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)

⁴¹ See: UNICEF Innocenti Research Centre, General Comments of the Committee on the Rights of the Child Including with Concluding Observations in Europe and Central Asia (undated). Found at: <http://www.unicef-irc.org/publications/pdf/crcgencommen.pdf>.

⁴² Adopted by General Assembly resolution 40/33 of 29 November 1985.

⁴³ UNICEF, Innocenti Digest: Juvenile Justice (1998). Found at: <http://www.unicef-irc.org/publications/pdf/digest3e.pdf>.

⁴⁴ G. Van Bueren, The United Nations and Juvenile Justice: A Guide to International Standards and Best Practice, International Review of Criminal Policy, no.s 49 & 50 (United Nations, New York, 1999). Found at: <http://www.law.qmul.ac.uk/pirch/ACROBATS/A%20guide%20to%20international%20standards%20and%20best%20practice.pdf>

The early intervention and prevention of youth crime is at the centre of modern juvenile justice discourse and research.⁴⁵ The Riyadh Guidelines were adopted in 1990⁴⁶ as a response to growing concerns about youth crime framed in the context of development.⁴⁷ The Guidelines emphasise the importance of the creation of progressive delinquency prevention policies as well as the systematic study and expansion of practical measures towards such policies.⁴⁸ Moreover, recommendations are made by these Guidelines towards the development of social welfare policies, particularly in education, labour and health, that children should have an active role and partnership with society and highlight the associated risks with labelling child offenders as deviants.⁴⁹ The importance of the Guidelines has been held to lie in the acknowledgement of children as right-bearers and the proactive, as opposed to reactive, approach to child justice, to facilitate child development.⁵⁰

3.3 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)

Adopted in 1990,⁵¹ the Havana Rules clarify the universally accepted minimum standards in respect of the circumstances under which children can be deprived of their liberty. The Rules outline the specifics of the conditions required in cases of juvenile detention in line with children human rights standards, stressing that deprivation of liberty should categorically be a measure of last resort.⁵² The rules require that in such cases as deprivation is deemed necessary, each child must be treated as an individual, have his or her needs met where possible and from the

⁴⁵ A. Zagar, R. John, K. G. Busch & J. R. Hughes, Empirical Risk Factors for Delinquency and Best Treatments: Where Do We Go from Here? *Psychological Reports*, Vol. 104(1) (2009), at 279-308.

⁴⁶ United Nations General Assembly resolution 45/112 of 14 December 1990.

⁴⁷ Ibid.

⁴⁸ J. Gallinetti, Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime, in T. Boezaart (ed), *Child Law in South Africa* (Lansdowne: Juta & Co Ltd, 2009), at 635-664.

⁴⁹ Van Bueren (supra note 44), at 53-55.

⁵⁰ M. G. Karels, V. Basdeo, M.T. Mokoena, J.P. Swanepoel, *Child Offenders in South African Criminal Justice: Concepts and Process* (Juta & Co Ltd, 2015), at 10.

⁵¹ Adopted by the General Assembly, without a vote, by its resolution 451113 of 14 December 1990.

⁵² Havana Rules, at articles 1 & 2.

moment of entry into detention facilities, efforts must be made to foster relations with the community⁵³ and support the child's return into society.⁵⁴

3.4 Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines)

The Vienna Guidelines were adopted in 1997, aimed at assisting states with the implementation and enforcement of the CRC, Beijing Rules, Riyadh Guidelines and Havana Rules. The Vienna Guidelines are divided into the following subsets: measures of general application; specific targets; measures to be taken at the international level; mechanisms for the implementation of technical advice and assistance projects; further considerations for the implementation of country projects; and plans concerned with Child victims and witnesses. The Guidelines also emphasise the importance of partnerships between Governments, UN bodies, Non-governmental organisations (NGOs), professional groups, the media, academic institutions, children and other members of civil society, whilst making clear that ultimate liability and responsibility for implementation lies with State Parties to the CRC.⁵⁵

The amalgamation of the aforementioned legal and quasi-legal instruments forms a comprehensive international juvenile justice legal framework, which encompasses both fundamental principles of child law and detailed provisions specific to child justice. The CRC as the principle enforceable body of law is consolidated and expanded through the recommendatory Rules and Guidelines to create a system of protective norms for children in conflict with the law.

4. REGIONAL FRAMEWORKS

The CRC is the main instrument that directs the development of child justice, however it is also relevant to discuss the protection offered to juvenile offenders at the regional level; in this context, the African and the European frameworks. In many

⁵³ Rule 8.

⁵⁴ A. Skelton & B. Tshehla, *Child Justice in South Africa, Institute for Security Studies* (2008). Found at: <http://www.issafrica.org/pgcontent.php?UID=2341%2632>

⁵⁵ Guideline 6.

respects, the regional systems replicate much of what is guaranteed by the CRC with varying differences. With the avoidance of undue repetition in mind, the regional frameworks shall be analysed in the context of the international system and the differences (expansive or restrictive in nature) highlighted to convey the effectiveness of protection to youth offenders.

4.1 African Legal Framework

The African Union Charter on the Rights and Welfare of the Child (African Children's Charter or ACWRC) offers complementary and, in some instances, higher international standards on the rights of the child,⁵⁶ described as 'the most progressive of the treaties on the rights of the child.'⁵⁷ It could be argued that this high level of protection reflects the reality that 'African children are more likely to be victims than children on other continents.'⁵⁸ Similar to the CRC, the African Children's Charter is an instrument that sets out rights and defines universal principles and norms for the status of children.⁵⁹ In particular, the ACWRC prides itself on its 'African perspective of rights'⁶⁰, taking into consideration African cultural idiosyncrasies in child rights matters.⁶¹ In respect of juvenile justice, the protection to children in the international and African regional systems is largely similar, however there are a number of key variances. For example, article 17(2)(c)(iv), 'entails a pace that is over and above that applicable to adults'⁶² in respect of determination of matters and that children should be separated from adults when detained.⁶³ There is express mention in the African Children's Charter that reintegration and reformation must be the aim of treatment throughout the justice process implying that rehabilitation should be a right

⁵⁶ D. Olowu, Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child, *International Journal of Child Rights* Vol. 10 127 (2002) at 128.

⁵⁷ Van Bueren (supra note 44) at 402.

⁵⁸ F. Viljoen, The African Charter on the Rights and Welfare of the Child, in an Introduction to Child Law in South Africa (C.J. Davel ed. 2000) at 214.

⁵⁹ D. Chirwa, The Merits and Demerits of the African Charter on the Rights and Welfare of the Child, *The International Journal of Children's Rights*, Vol. 10(2) (2002) at 157.

⁶⁰ J. Sloth-Nielsen, Children's Rights and the Law in African Context: An Introduction, in *Children's Rights in Africa: A Legal Perspective* (2007) at 3.

⁶¹ *Ibid* at 23.

⁶² *Ibid* at 166.

⁶³ *Ibid*. Also see: *Moyo v. Attorney General* (2007) Cons. Case No. 12 (Malawi).

guaranteed to child offenders.⁶⁴ Other relevant variations will be discussed through principles and specific rules below.

Overall, the nuances between the international framework and the regional framework create distinct systems of protection with differing strengths and weaknesses. The African Children's Charter is, arguably, more limited in scope than the CRC in respect of child justice but it contains provisions that break new ground for restorative practices and policies in juvenile justice⁶⁵ particularly with regards to issues specific to the African context.

4.2 European Legal Framework

In contrast to the African regional system, general human rights provisions relevant to both adults and children regulate the position of children in the context of juvenile justice in Europe. Moreover, there is no specific codified child rights instrument (in spite of a recommendation to create one)⁶⁶ which means that protection is derived from a multitude of legal and quasi-legal sources based on the European Union Charter of Fundamental Rights (EU Charter)⁶⁷ and the Council of Europe's European Convention on Human Rights (ECHR).⁶⁸ Taken together, the international and European frameworks provide a well-established model for child justice, developing practice and formulating policy to the relevant State Parties.⁶⁹

4.2.1 European Union

⁶⁴ African Children's Charter, article 17(3).

⁶⁵ Sloth Nielsen (supra 60) at 25.

⁶⁶ Council of Europe Recommendation 874 (1979), also see discussion by G. Van Bueren, *The International Law on the Rights of the Child*, *International Studies in Human Rights*, Vol. 35, (Save the children Martinus Nijhoff Publishers, 1998), at 403.

⁶⁷ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, binding to all Member States of the European Union of which there are 28.

⁶⁸ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, binding to all Council of Europe Member States of which there are 47.

⁶⁹ B. Goldson & G. Hughes, *Sociological Criminology and Youth Justice: Comparative Policy analysis and academic intervention*, *Criminology and Criminal Justice*, 10(2) (2010) at 211-230.

The EU Charter outlines a number of important rights for both adults and children throughout the justice system. These include; the right to an effective remedy and to fair trial⁷⁰, presumption of innocence and right of defence,⁷¹ prohibition of torture, inhuman and degrading treatment,⁷² the right to liberty⁷³ and principles of legality and proportionality of criminal offences and penalties.⁷⁴ These, taken with the specific justice EU directives⁷⁵ and the principle of the best interests of the child⁷⁶ form the EU framework of youth justice. There is also a proposal for a further procedural safeguards directive which would provide children mandatory access to a lawyer throughout criminal proceedings, require that children should be entitled to prompt information about their rights, the assistance of parents and special questioning procedures.⁷⁷ As well as the legally enforceable rights, the EU has supported a number of NGO ventures (including the European Council for Juvenile Justice) and implemented numerous policies in favour of child-friendly justice.⁷⁸

4.2.2 Council of Europe

The ECHR guarantees the right to a fair trial under Article 6⁷⁹ for all persons and is expanded upon and clarified by the European Court of Human Rights (ECtHR) in a number of key cases related to child justice.⁸⁰ The Court, importantly, deliberates on cases alleging that a state actor has breached one or more of the protected human rights provisions. There are no express child-specific rights in the Convention the extensive jurisprudence of the court has resulted in the guarantees to children of the

⁷⁰ Article 47

⁷¹ Article 48

⁷² Article 4

⁷³ Article 6

⁷⁴ Article 49

⁷⁵ Right to Interpretation and Translation Directive (2010/64/EU), Right to Information Directive (2012/13/EU), Access to a Lawyer Directive (2013/48/EU).

⁷⁶ Article 24 EU Charter.

⁷⁷ European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM (2013) 822 final, Brussels, 27 November 2013.

⁷⁸ See discussion at: <http://www.oijj.org/en/european-policies-on-juvenile-justice/european-policies-on-juvenile-justice>

⁷⁹ As well as rights related to children in detention, article 3 (torture, inhuman and degrading treatment) and article 5 (right to liberty)

⁸⁰ *T. v. the United Kingdom* [GC], No. 24724/94, 1999 (children in court), *Panovits v. Cyprus*, No. 4268/04, 2008 (access to a lawyer), *Bouamar v. Belgium*, No. 9106/80, 1988 (detention for educational supervision), *D.G. v. Ireland*, No. 39474/98, 2002 (detention for educational supervision), *Nart v. Turkey*, No. 20817/04, 2008 (pre-trial detention), *Güveç v. Turkey*, No. 70337/01, 2009 (conditions of detention).

right of access to court,⁸¹ freedom of expression⁸² and the right to education⁸³ amongst others. The Council of Europe has adopted the European Rules for Juvenile Offenders subject to Sanctions or Measures (the European Rules), which set out principles to be followed by Member States in their treatment of juveniles.⁸⁴ These have been buttressed by Committee of Ministers' adoption of 'Guidelines for Child Friendly Justice'⁸⁵ with the purported objective of making youth justice, 'accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child.'⁸⁶ Though not legally binding they represent development towards child-specific justice.⁸⁷

The European regional laws on juvenile justice are structured in a vastly different way to both the international and African systems yet guarantee many of the same rights. There is, arguably, less of a focus on child-specific rights under the European jurisdiction, yet with the variety of juvenile justice policies in place, young offenders are protected nonetheless.

5. CHILD LAW PRINCIPLES

5.1 Non-discrimination

The principle of equality and non-discrimination pervades not only child law,⁸⁸ but human rights law generally.⁸⁹ It would follow that this principle applies to juvenile

⁸¹ Chamber judgment *Stagno v. Belgium* (07.07.09)

⁸² Grand Chamber judgment *Cyprus v. Turkey* (10.05.01)

⁸³ Chamber judgment *Timishev v. Russia* (13.12.05); Chamber judgment *Ali v. the United Kingdom* (11.01.11).

⁸⁴ Recommendation (2005) 5 on the rights of children living in residential institutions; Recommendation (2006) 2 on the European Prison Rules.

⁸⁵ Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice, (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers Deputies)(Strasbourg: Council of Europe, 2010).

⁸⁶ *Ibid*, at section 11(c)

⁸⁷ Handbook on European law relating to the rights of the child, European Union Agency for Fundamental Rights and Council of Europe (2015), at 199. Found at: http://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf

⁸⁸ CRC, article 6, ACWRC article 3.

⁸⁹ See discussion at: Chapter 13, The Right to Equality and Non-Discrimination in the Administration of Justice Human Rights in the Administration of Justice: A Manual on Human Rights for Judges,

justice provisions and this is evidenced by way of substantive provisions, particularly in CRC General Comment 10, which states that, ‘States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally’.⁹⁰ This includes the training of professionals, the establishment of rules, regulations or protocols that provide redress, remedies and compensation and improve equal treatment and the abolishment of Status Offences (offences only applicable to children).⁹¹ The CRC Committee adopts a holistic approach to non-discrimination, extending the scope of application to include ‘vulnerable children’, street children, children belonging to minorities, indigenous children, girl children, children with disabilities and recidivists.⁹² The General Comment also notes the importance of measures to counteract the inherent disadvantage experienced by former child offenders in access to education and work.⁹³

5.2 Life, Survival and Development

The right to life is protected specifically in this context, through express prohibition of the death penalty and a life sentence without parole for those under the age of 18.⁹⁴ Notably this limitation applies to the age at which a person commits a crime and not the age at trial, sentencing or execution of the sanction.⁹⁵ The African Charter is more limited in that the prohibition of life sentences without parole⁹⁶ (connected to the prohibition of the death penalty as a facet of the right to life)⁹⁷ is absent. In respect of maximum survival and development, it is stressed that deprivation of liberty is profoundly detrimental to a child’s development and, as mentioned in the Havana Rules, should be a measure of last resort and for the shortest appropriate period of time.⁹⁸ Therefore, the General Comment requires that States adopt a ‘policy of responding to juvenile delinquency in ways that support the child’s development.’⁹⁹

Prosecutors and Lawyers. Found at:
<http://www.ohchr.org/Documents/Publications/training9chapter13en.pdf>.

⁹⁰ Paragraph 6.

⁹¹ At paragraphs 6-9, also Riyadh Guidelines, article 56.

⁹² Paragraph 6.

⁹³ Paragraph 7.

⁹⁴ Article 37(a) of CRC, also see article 6(5) of ICCPR.

⁹⁵ General Comment 10, at paragraph 75.

⁹⁶ CRC, article 37(a), ICCPR, article 6(5).

⁹⁷ General Comment 10, paragraph 77

⁹⁸ CRC, article 37(b), Havana Rules, articles 1 & 2.

⁹⁹ General Comment 10, at paragraph 11.

5.3 Participation

International child law dictates that every child has the right to be heard¹⁰⁰ and, equally importantly, the right to participate in decisions affecting their lives.¹⁰¹ This principle underpins juvenile justice protection and is considered to be fundamental to the right to a fair trial.¹⁰² The principle concurrently guarantees the right to remain silent¹⁰³ and any expressions should be made freely without undue pressure.¹⁰⁴ It is deemed important that the right to be heard is applied at every stage of the judicial process and in accordance with the age and maturity of the child.¹⁰⁵ The application of this principle is general. However, there are numerous explicit participatory rights guaranteed under international law, which will be discussed in greater detail at a later stage.

5.4 Best Interest of the Child

The principle of the best interests of the child has been argued to be the guiding principle adjudicating matters concerning the welfare of the child¹⁰⁶ and exists as a worldwide standard.¹⁰⁷ The best interest principle permeates juvenile justice standards and norms, and is required, under the CRC, to be made a primary consideration in ‘all decisions taken within the context of the administration of juvenile justice’.¹⁰⁸ Interestingly, General Comment No. 10 makes specific reference to the qualification of the rule that whilst pursuing rehabilitation and restorative justice objectives (in

¹⁰⁰ Ibid, article 12(2).

¹⁰¹ General Comment 10, paragraph 46.

¹⁰² Ibid, at paragraph 44.

¹⁰³ Ibid, at paragraph 10.

¹⁰⁴ CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, at paragraph 21.

¹⁰⁵ CRC, article 12(1), General Comment 10, paragraph 44.

¹⁰⁶ C. Breen, *The Standard of the Best Interests of the Child: a Western Tradition in International and Comparative Law* (The Hague: Martinus Jijhoff, 2002), at 1.

¹⁰⁷ Article 3(1) CRC, (it existed before in the Declaration of the Rights of the Child 1959, para 2) See generally: UNHCR Guidelines on Formal Determination of the Best Interests of the Child (2006). Found at: <http://www.unicef.org/violencestudy/pdf/BID%20Guidelines%20%20provisional%20release%20May%202006.pdf>

¹⁰⁸ General Comment 10, paragraph 10.

replacement of repression and restoration), States may take public safety into consideration.¹⁰⁹ This reflects the choice of semantics in that the best interests is ‘a primary’ consideration, which indicates that other competing interests remain relevant in decision-making processes concerning children and specifically young offenders. In contrast, under the ACWRC, the best interests of the child is ‘the primary consideration’,¹¹⁰ which suggests a greater weight given to the paramountcy of the principle.

6. CORE ELEMENTS OF A JUVENILE JUSTICE SYSTEM

In accordance with General Recommendation 10, a comprehensive policy for child justice must comprise of certain key elements: prevention of juvenile delinquency; diversion; a minimum age of criminal responsibility and maximum age of applicability; fair trial safeguards (including pre-trial detention and post-trial incarceration). These components will be discussed further through use of both the aforementioned binding and non-binding legal instruments, in order to elucidate the standards to which national legal systems must aspire to meet.

6.1 Prevention of juvenile delinquency

The prevention of youth crime has been shown to be a key aspect of juvenile justice with overwhelming evidence in support of the benefits of proactive approaches to justice.¹¹¹ Consequently, the CRC Committee has recognised that that, ‘a juvenile justice policy without a set of measures aimed at preventing juvenile delinquency suffers from serious shortcomings’.¹¹² One of the fundamental aims of the CRC is to promote the development of a child’s personality, talents and mental and physical abilities in such a way as to prepare a child to assume a constructive role in society

¹⁰⁹ Ibid.

¹¹⁰ Article 4(1).

¹¹¹ R. Loeber, D. P. Farrington & D. Petechuk, *Child Delinquency: Early Intervention and Prevention*, *Child Delinquency Bulletin Series*, (2003). Found at: <https://www.ncjrs.gov/pdffiles1/ojjdp/186162.pdf>
G. A. Wasserman, K. Keenan, R. E. Tremblay, J. D. Coie, T. I. Herrenkohl, R. Loeber, and D. Petechuk, *Risk and Protective Factors of Child Delinquency*, *Child Delinquency Bulletin Series*, (2003). Found at: <https://www.ncjrs.gov/pdffiles1/ojjdp/193409.pdf>.

¹¹² General Comment 10, paragraph 17.

with respect for the human rights of others.¹¹³ It is argued that this will be impeded if children grow up exposed to increased risk factors of becoming involved in crime.¹¹⁴ It is accepted that successful prevention measures are centred on the creation of social conditions of non-discrimination, inclusion and access to basic services that, in turn, mitigate, exclusion, exploitation, marginalisation and social injustice generally.¹¹⁵

As discussed above, the Riyadh Guidelines are the principal governing instrument pertaining to the prevention of youth crime.¹¹⁶ These guidelines advise governments to not only enact an enforce specific child rights laws but also prioritise the development of social policy aimed at young people and the effective delivery of services, facilities and staff for adequate medical and mental health care, nutrition, housing and other services.¹¹⁷ As well as this, the guidelines require that efforts be made in terms of research, policy development and coordination in respect off prevention of juvenile delinquency and the promotion and protection of child rights.¹¹⁸

6.2 Interventions/diversion

Diversion is ‘an attempt to divert, or channel out, youthful offenders from the juvenile justice system’¹¹⁹ and is based on the theory that processing certain youth through the juvenile justice system may do more harm than good.¹²⁰ It follows that the Convention requires that States Parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings when appropriate.¹²¹ This is a reflection of the Beijing Rules, which express the importance of utilising diversion measures, where appropriate.¹²² Conversely, there is no express obligation under the African

¹¹³ CRC, Preamble, article 6, article 29 & article 40.

¹¹⁴ General Comment 10, paragraph 16.

¹¹⁵ <http://www.ipjj.org/juvenile-justice/priorities-strategies/>

¹¹⁶ See Chapter 2, 2.2 above.

¹¹⁷ Paragraph 45.

¹¹⁸ Paragraphs 60-66.

¹¹⁹ J. E. Bynum & W.E. Thompson, *Juvenile Delinquency: A Sociological Approach* (Needham Heights, Allyn & Bacon, 1996).

¹²⁰ R. J. Lundman, *Prevention and Control of Delinquency*. (New York, Oxford University Press, 1993).

¹²¹ Article 40(3)(b).

¹²² Beijing Rules, rule 11.1.

Charter to divert children from the formal justice system. State intervention in this context can be categorised into two main subsets; measures without resorting to judicial proceedings and measures in the context of judicial proceedings.¹²³

6.2.1 Interventions without resorting to judicial proceedings

It is averred that numerous measures should be employed to both remove children from judicial proceedings and refer children to alternative social services, particularly in respect of minor offences committed.¹²⁴ It is left largely to the discretion of State Parties to determine the specifics of the alternative measures for children in conflict with the law,¹²⁵ though suggestions include: care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care.¹²⁶ Despite the widely recognised benefits of diversion, it is stressed by the CRC Committee that such interventions must ensure that the human rights of the relevant child are protected by way fulfilment of a number of conditions. Firstly, there must be compelling evidence to prove that the child is in fact guilty of the alleged crime and the child must freely admit to commission of the offence and voluntarily consent to diversion proceedings with full knowledge of what that entails.¹²⁷ Secondly, the law must outline the parameters of diversionary measures and the powers of the relevant actors within the domestic context. Thirdly, the child is entitled to legal advice and allowed to ask questions openly. Finally, diversion measures, once completed must result in a definite closure of the case.¹²⁸

6.2.2 Interventions in the context of judicial proceedings

¹²³ General Comment 10, paragraph 22.

¹²⁴ General Comment 10, paragraphs 24-25.

¹²⁵ Ibid, paragraph 27.

¹²⁶ CRC, Article 40(4).

¹²⁷ It is argued that community service enforced without ascertaining consent contravene Article 1(a) of the International Labour Organisation Convention No.105 Concerning the Abolition of Forced Labour, 1957. See G. Van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff, 1995), at 174.

¹²⁸ General Comment 10, paragraph 27.

Similarly, States are encouraged to adopt measures that, whilst guaranteeing the right to a fair trial, create opportunities to use social and educational programmes and where deprivation of liberty is avoided where possible.¹²⁹ It is also stressed that to ensure that a child integrates fully back into society to play a constructive role, barriers such as negative publicity, stigmatisation and social isolation should be avoided.¹³⁰ These trial and pre-trial safeguards are in place to offset some of the potentially negative consequences of these alternative measures, to guarantee the right to a fair trial and other fundamental freedoms.

6.3 Age and children in conflict with the law

Generally, international standards of child justice are applicable to those under the age of 18; difficulty arises only at the point of determining a suitable minimum age of criminal responsibility.¹³¹ The concept of a minimum age of criminal responsibility (MACR) stems from the idea that children should be held responsible for a crime only at the point of being able to understand the consequences of said crime.¹³² The stark variance in national MACRs¹³³ are indicative of two main opposing viewpoints of juvenile justice; that a low age represents a repressive, punitive approach versus the idea that a low age is not inherently harmful because of the existence of special child measures in juvenile justice systems which are aimed specifically at protecting children's rights.¹³⁴

Pursuant to Article 40(3)(a) of the CRC, States are required, *inter alia*, to determine a minimum age below which children are deemed to not have the capacity to commit a crime under domestic penal law. The CRC Committee has decisively refrained from proffering a recommendatory minimum age, though have proposed that the age of twelve years should be considered the absolute minimum, below which is deemed not internationally acceptable.¹³⁵ The Beijing Rules also express that imputing a

¹²⁹ Article 37(b), General Comment 10, paragraph 28.

¹³⁰ Paragraph 29.

¹³¹ CRC, article 1, General Comment, paragraphs 36-39.

¹³² Van Bueren (supra note 44), at 173.

¹³³ MACRs range from 0-18, see: [http://www.nationmaster.com/country-info/stats/Crime/Age-of-criminal-responsibility-\(notes\)](http://www.nationmaster.com/country-info/stats/Crime/Age-of-criminal-responsibility-(notes)).

¹³⁴ D. Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*, (Ashgate Publishing, Ltd., 2013).

¹³⁵ Paragraph 32.

reasonable age of responsibility to a child should refer to the emotional, mental and intellectual maturity of children and, if set too low, undermines the concept of responsibility entirely, rendering the notion meaningless.¹³⁶

Furthermore, the two standards of minimum criminal responsibility often adopted by States, which includes the doctrine of *doli incapax* (the rebuttable presumption of criminal incapacity)¹³⁷ are condemned by the CRC Committee.¹³⁸ It is averred that this dual standard is not only confusing, but also highly discretionary and has the potential to result in discriminatory application.¹³⁹ This stance is both supported and disputed and remains a contentious issue in modern legal discourse, with opponents arguing that the removal of the standard reduces the level of protection to young offenders.¹⁴⁰ This ostensible divergence in opinion manifests itself in a variety of standards across jurisdictions worldwide¹⁴¹ and, arguably, an international standard is yet to be reached in this regard.

6.4 The guarantees for a fair trial

Article 40(2) of CRC contains a number of guarantees intended to ensure the right to a fair trial for every young offender. This provision emulates Article 14 of the International Covenant on Civil and Political Rights (ICCPR).¹⁴² Children accused of offences are entitled to ‘have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law’.¹⁴³ The guarantees discussed below are prescribed minimum standards and States are encouraged to establish and observe higher standards where possible.

¹³⁶ Beijing Rules, Rule 4.

¹³⁷ S. Bandalli, Abolition of the Presumption of Doli Incapax and the Criminalisation of Children, *The Howard Journal of Criminal Justice*, Vol. 37(2) 114–123 (1998), at 114.

¹³⁸ Paragraph 30.

¹³⁹ Ibid.

¹⁴⁰ For various discussions see: T. Crofts, Doli incapax: Why Children Deserve its Protection, *Murdoch Electronic Journal of Law* (2003); E. Stokes, Abolishing the presumption of doli incapax: Reflections on the death of a doctrine, *Youth Justice: Theory and Practice*, (London, 2000).

¹⁴¹ See: A. Skelton, C. Badenhorst, The Criminal Capacity of Children in South Africa: International Developments & Considerations for a Review. Found at: <http://www.communitylawcentre.org.za/projects/childrensrightsproject/Publications/Other%20publications/The%20criminal%20capacity%20of%20children%20in%20South%20Africa%20%20International%20developments%20and%20considerations%20for%20a%20review.pdf>

¹⁴² Elaborated upon by CRC *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13.

¹⁴³ CRC, at article 40(2)(b)(iii).

The international framework on the minimum standards pertaining to the right to a fair trial are comprehensive, detailing each aspect of the trial in need of child-specific protection. These include; non-retroactivity,¹⁴⁴ the presumption of innocence,¹⁴⁵ participation and the right to be heard,¹⁴⁶ prompt and direct information of the charge,¹⁴⁷ free legal assistance,¹⁴⁸ decisions without delay and with the involvement of parents,¹⁴⁹ freedom from compulsory self-incrimination,¹⁵⁰ the right to appeal,¹⁵¹ and the right to privacy.¹⁵²

Due to the fact that many of the trial rights at the domestic level follow the international standards, replication exists in many instances. To avoid undue repetition and, in light of the fact that the South African and Scottish systems place emphasis on diversion, (thus intend that most juvenile offenders avoid trial altogether), the guarantees for a fair trial shall be outlined only when the relevant domestic systems diverge from the international norms. These are, specifically, the rights to participation, privacy and legal representation.

6.4.3 Participation and the right to be heard

As discussed above, the right to be heard and to participate is one of the guiding principles of the CRC¹⁵³ but can also be viewed as a specific right. Children must be able to understand the charges against them, in order to fully participate and express themselves freely within the trial proceedings and this includes; directing the legal representative, challenging witnesses, providing an account of events making appropriate decisions about evidence, testimony and the measures to be imposed.¹⁵⁴

¹⁴⁴ ICCPR, article 15.

¹⁴⁵ CRC, article 40(2)(b)(i), ICCPR, article 14(2), UDHR, article 11.

¹⁴⁶ Beijing Rules, Article 14.

¹⁴⁷ Article 40(2)(b)(ii).

¹⁴⁸ Article 40 (2)(b)(ii).

¹⁴⁹ Article 40(2)(b)(iii).

¹⁵⁰ Article 40(2)(b)(iii), in line with ICCPR, article 14(3)(g).

¹⁵¹ Article 40(2)(b)(v)

¹⁵² Articles 16 & 40(2)(b)(vii).

¹⁵³ Article 40 (2)(b)(iv), Rule 17(1) Beijing Rules., Article 7 AWRWC.

¹⁵⁴ Beijing Rules, article 14.

6.4.5 Legal or other appropriate assistance

Children in conflict with the law are guaranteed legal or other appropriate assistance in the preparation and presentation of his or her defence.¹⁵⁵ Article 14(3)(b) of ICCPR requires that the child and the person providing the assistance should have adequate time and facilities for the preparation the defence. Unique to the African system, there is a right to legal representation for children in the preparation and presentation of a defence devoid of any apparent stipulations or caveats.¹⁵⁶ Emphasis is placed on the fact that the legal assistance should be free and by trained professionals but States are given discretion as to exactly how such assistance should be provided.¹⁵⁷ Children have the right to the assistance of an interpreter for free, when unable to understand or speak the language used by the juvenile justice system¹⁵⁸ as well as the right to the presence and examination of witnesses, normally through legal representation.¹⁵⁹

6.4.6 Right to Privacy

The right to privacy exists for all children throughout each stage of the criminal justice system.¹⁶⁰ This includes the rule that information as to the identity of the child offender should remain private, due to the possible stigmatisation or other negative consequences of publication. Further, the CRC Committee recommends that hearings involving children should take place behind closed doors and the automatic removal of criminal records for crimes committed by those under the age 18.¹⁶¹ The ACWRC offers additional protection by way of prohibiting the attendance of the media and the public at youth trials, prioritising the privacy rights and best interests of the affected children over the benefits of the media at trials,¹⁶²

6.5 Sentencing

¹⁵⁵ Article 40 (2)(b)(ii).

¹⁵⁶ D. Chirwa, *The Merits and Demerits of the African Charter on the Rights and Welfare of the Child*, *The International Journal of Children's Rights*, Vol. 10(2) (2002) at 157.

¹⁵⁷ General Comment 10, paragraph 49.

¹⁵⁸ Article 40(2)(vi).

¹⁵⁹ Article 40(2)(b)(iv).

¹⁶⁰ (arts. 16 and 40 (2) (b) (vii))

¹⁶¹ GC 10 para 64-66

¹⁶² Article 17 ACWRC, discussed at Chirwa (supra note 156) at 166.

As a child's rights based system, one of the main aims of the international framework is to promote reintegration; therefore, a punitive sentencing policy aimed at deterrence seems at odds with this principle.¹⁶³ The CRC stipulates that children in conflict with the law should be treated in a manner consistent with their sense of dignity and worth, reinforcing their deference towards human rights.¹⁶⁴ Ways in which this can be achieved through sentencing includes promotion of non-custodial measures (in line with the internationally recognised principle of detention as a measure of last resort) and the prohibition of certain sentences. Notably, the ACWRC does not mention the importance of protecting children from the adverse effects of sanctions and justice proceedings and protecting rights under the ICCPR, nor does it provide for alternative measures or state that imprisonment must be a last resort and for the shortest period of time for children.¹⁶⁵

A variety of non-custodial measures are recommended to States and these include: probation; community service orders; care, guidance and supervision orders; financial penalties or compensation; group counselling; treatment orders or orders related to foster care or other living arrangements.¹⁶⁶ These must be administered in a manner proportionate to both the child's age and the nature of the offence.

As was discussed above, the death penalty is strictly prohibited by a number of instruments under international child law.¹⁶⁷ This rule is now so universally accepted and abided by, that it has now reached the level of a *jus cogens* norm and thus immune from derogation by states.¹⁶⁸ Life sentences without parole are condemned

¹⁶³ Van Bueren (supra note 44) at 170.

¹⁶⁴ CRC, article 40(1).

¹⁶⁵ Chirwa (supra note 156) at 167.

¹⁶⁶ CRC, article 40(4), Beijing Rules, rule 18.1.

¹⁶⁷ CRC, article 37(a); ICCPR, article 6(5); Beijing Rules, rule 17.2 & Safeguards Guaranteeing Protection of the Rights of those facing the Death Penalty, (UN Doc ECOSOC Res. 1984/50, adopted 25 May 1984).

¹⁶⁸ The Inter-American Commission on Human Rights stated that the ban on executing juveniles has become a *jus cogens* norm in: Report No. 62/02, Case No. 12.285 Michael Domingues and the United States, October 22, 2002. See also: Vienna Convention on the Law of Treaties, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 under Article 53, on norms constituting customary international law.

and this includes minimum or mandatory sentences for children.¹⁶⁹ Also, corporal punishment as a form of a reprimand for child is prohibited, as it is deemed to be a form of inhuman or degrading treatment¹⁷⁰ and is in conflict with a child's right to physical integrity and dignity.¹⁷¹

7. CONCLUSION

This Chapter has served to summarise the main components of both the international and regional frameworks pertaining to juvenile justice. Protection at the international level is centred on the CRC, which binds all State Parties. This is further reinforced and expanded upon by the recommendatory General Comments and the other non-binding instruments; the Beijing Rules, the Riyadh Guidelines, the Havana Rules and the Vienna Guidelines. The CRC Committee stipulates that the underlying principles of the best interest of the child, participation, non-discrimination and life, survival and development must exist in domestic systems of juvenile justice. Moreover, the instruments outline elements that are key to a successful system and recommend that States encompass all of these whilst protecting children's rights generally. It is clear that at the centre of the international law, is the idea that the normal adult judicial process often does more harm than good and that children should be protected from the negative effects, by enabling reform and reintegration within the system. Both regional systems replicate protections guaranteed under the international framework to a great extent (particularly the African system) yet envelop continental idiosyncrasies related to child law. This only serves to strengthen the framework, requiring a higher standard of protection at the national level.

¹⁶⁹ CRC, article 37(a); Concluding Observations: Australia CRC/C/15/Add.79, 21 October 1997, paragraph 22.

¹⁷⁰ Discussed further at: *CRC General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*, 2 March 2007, CRC/C/GC/8.

¹⁷¹ CRC article 37(a), Beijing Rules, rule 17(3) & JDL Rules, rule 67.

CHAPTER 3

SOUTH AFRICAN SYSTEM OF JUVENILE JUSTICE

1. INTRODUCTION

This Chapter is aimed at assessing the South African system of youth justice, particularly in the ways that it succeeds and fails to meet these prescribed norms. Due to a recent overhaul of the South African system, and with a modern and progressive Constitution in force, juvenile justice is approached with the rights and needs of the child at the forefront of decision-making. The extent to which this results in widespread fulfilment of children's rights when in conflict with South African criminal law, is another question entirely and is discussed below.

2. HISTORICAL DEVELOPMENT

In an attempt to comprehensively outline the South African juvenile justice system, the context in which the current legislation was drafted, is key to understanding the law in its current form. In recent years, the South African youth justice system has undergone dramatic substantive structure-wide reform, culminating in the adoption of the most recent of three versions¹⁷² of the Child Justice Act.¹⁷³ This Act represented the legislative promise of procedural revolution, corrective to the fact that 'before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children.'¹⁷⁴ In the years following the entrenchment of apartheid, achieving widespread realisation of fundamental human rights in South Africa was a main focus for social, political and legal reformers. In the 1970s and 1980s, children were frequently arrested and held in custody on political charges or were incarcerated without trial.¹⁷⁵

¹⁷² The unenacted 2002 and 2007 versions of the Act are both identified as Child Justice Bill, no. 49 of 2002.

¹⁷³ Child Justice Act 75 of 2008, commencement 1 April 2010.

¹⁷⁴ Ibid. Preamble.

¹⁷⁵ Discussed at: A. Skelton, Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective, *The British Journal of Criminology*, Vol. 42(3) (2002), at 496-513.

The pre-reform system was largely focused on detention, reformatories and imprisonment and was devoid of separate juvenile courts.¹⁷⁶ A further example was illustrated by research, which indicated that fines were used regularly as punishment for juvenile offenders unable to pay.¹⁷⁷ The minimum age of criminal capacity stood at seven years (one of the lowest in the World at the time) with a rebuttable *doli incapax* presumption up to the age of 14 that a child was capable of committing said offence.¹⁷⁸ Moreover, the lack of rehabilitation programmes outside of prisons¹⁷⁹ was particularly problematic in light of the fact that apartheid had intensified many of the progressions towards the causes of family breakdown and the consequent conditions for entry into crime¹⁸⁰ These are just some examples of identified failures of the old youth justice system, where piece-meal attempts to initiate legislative reform in pursuance of child offenders were recognised as ineffective.¹⁸¹ South Africa's ratification of the CRC in 1995 provided the initial impetus for the country to create a distinct, cohesive youth justice system.

Much of South Africa's criminal justice system reform can be attributed to the mobilisation, development and pressure from NGOs,¹⁸² leading to the 'dismantling... of the apartheid regime's nexus of security and policing institutions,'¹⁸³ For example, the collective known as Juvenile Justice Consultancy produced a document entitled 'Juvenile Justice for South Africa: proposals for policy and legislative change' proposing the creation of a separate youth justice system centred on family group conferences.¹⁸⁴ Despite the lack of official status, these guidelines dominated the child

<http://content.time.com/time/magazine/article/0,9171,911814,00.html>,
<http://www.theguardian.com/world/2010/mar/21/south-africa-jub-jub-riot>
<http://news.bbc.co.uk/1/hi/world/africa/8573267.stm>

¹⁷⁶ F. Cassim, Formulating new juvenile justice legislation in South Africa, *The Comparative and International Law Journal of Southern Africa*, Vol. 31(3) (1998), at 334.

¹⁷⁷ South African Law Commission Issue Paper 9 Juvenile Justice (March 1997) at 33.

¹⁷⁸ A. Skelton, C. Badenhorst, The Criminal Capacity of Children in South Africa International Developments & Considerations for a Review, *The Child Justice Alliance* (2011). Found at: http://www.childjustice.org.za/publications/criminalcapacity_SA.pdf.

¹⁷⁹ Cassim (supra note 176) at 335.

¹⁸⁰ Nearly 15 000 Gauteng children arrested in 1995 (1996/14 July, *The Star*).

¹⁸¹ South African Law Commission Issue Paper 9 Juvenile Justice (March 1997) at 33.

¹⁸² D. Van Zyl Smit, Criminological Ideas and South African Transition, *British Journal of Criminology*, Vol.39(2) (1999) at 198-215.

¹⁸³ P. Silva, South African English: Oppressor or Liberator? *The Major Varieties of English, Papers from MAVEN* (Vaxjo, 1997) 20-22.

¹⁸⁴ Juvenile Justice Consultancy, *Juvenile Justice for South Africa: Proposals for Policy and Legislative Change*. (Cape Town: Allies Printers, 1994).

justice discourse at the time¹⁸⁵ and were followed by a notable shift in the commitment from the government in addressing the issue. The transition to the implementation of the constitutional democracy of South Africa expectedly coincided with the creation of an independent Juvenile Justice system.¹⁸⁶ The Project Committee had an acute awareness of the political climate at the time and thus drafted a Bill that, whilst respecting children's rights, balanced (and importantly was seen to be balancing) the interests of crime control.¹⁸⁷

The timing of establishment of the justice framework was such that many themes and principles prominent in the political transformation of South Africa permeate the legislation. This, in a context of the growing momentum of restorative justice at the international level, led to reconciliation and restoration as fundamental principles of juvenile justice reform.¹⁸⁸ The principle of restorative justice has further been associated with the Truth and Reconciliation Commission (TRC)¹⁸⁹ and linked closely to the African philosophy of *ubuntu*; unity and reconciliation rather than revenge and punishment.¹⁹⁰ The context of democracy, reconciliation and *ubuntu* facilitates the framing of the Constitution and the Child Justice Act within the restorative justice paradigm and is clear in the framework as it currently exists.

3. SOUTH AFRICAN LEGAL INSTRUMENTS

3.1 *Child Justice Act*

This paper will now outline the Act, as it exists in its current form. It has created a new procedural framework in South Africa for dealing with youth offenders, representing a child's rights based approach. The Act purportedly aims to, 'establish a criminal justice system for children, who are in conflict with the law and are accused

¹⁸⁵ D. Pinnock, A. Skelton & R. Shapiro, New Juvenile Justice Legislation for South Africa—Giving Children a Chance, *South African Computer Journal*, Vol. 3 (1994) at 338.

¹⁸⁶ A. Skelton, Developing a Juvenile Justice System for South Africa, *Internal Instruments and Restorative Justice*, (Cape Town, 1995).

¹⁸⁷ J. Sloth-Nielsen, The Juvenile Justice Law Reform Process in South Africa: Can a Children's Rights Approach Carry the Day? *Quinnipiac Law Review*, Vol. 18 (1999) at 469.

¹⁸⁸ A Skelton, (supra note 186) at 497.

¹⁸⁹ A. Boraine, (2000), *A Country Unmasked: The Story of South Africa's Truth and Reconciliation Commission*. (South Africa: Oxford University Press, 2000).

¹⁹⁰ *Ibid* at 423.

of committing offences, in accordance with the values underpinning the Constitution and the international obligations of the Republic'.¹⁹¹ The Act came into force in April 2010, 15 years after South Africa's ratification of the CRC. Thus, there appears to be a strong recognition of the importance of South Africa's obligations under international and regional law and many of both the principles and specific provisions have been taken directly from international sources. The guiding principles of the Act include the important concepts of proportionality, non-discrimination, participation of both parent and child and the importance of a trial without undue delay.¹⁹² The comprehensive, 89 page document concerns all stages of the judicial process from admissibility and the age of capacity to diversions to trial safeguards and sentencing for children. With diversion at the centre of the legislation, the Act attempts to create a system of entrenched restorative justice whereby children are afforded opportunities to reform and reintegrate into society. The effectiveness of the system and the extent to which it satisfies criteria under international frameworks and applies in practice is less evident. The Act mandates the Minister of Justice and Constitutional Development submit annual reports to the Parliamentary Portfolio Committee on Justice and Constitutional Development on the progress of implementation, an important procedure.¹⁹³ The vast majority of the juvenile justice framework in South Africa stems from the Child Justice Act, the specifics of which are discussed below.

3.2 Constitution of South Africa

It is generally accepted that South Africa has one of the most progressive national constitutions in the World.¹⁹⁴ The South African government's ratification of the CRC in 1995 allowed for broad-reaching policy and legislative change at the domestic level. The Constitution of the Republic of South African (the Constitution) guarantees a broad range of human rights to everyone, including children. More specifically it guarantees the principle that in decisions involving a child, the paramount consideration should be that child's best interests, in concurrence with international

¹⁹¹ Regulations under the Child Justice Act at p1.

¹⁹² Section 3.

¹⁹³ L. Wakefield, Is the Act Working for Children? The first year of implementation of the Child Justice Act, *South African Crime Quarterly* Vol. 38 (2011).

¹⁹⁴ A. A. Dani, A. de Haan, Inclusive States: Social Policy and Structural Inequalities, *World Bank Publications*, (2008) at 376.

and regional standards.¹⁹⁵ As well as this, it embodies numerous child-specific rights, which include the right not to be detained except as a measure of last resort and for the shortest appropriate period of time, separate from adults and in conditions and treated in a manner that takes account of their age. In more recent juvenile justice case law, the Constitutional Court made clear that, ‘children embody society’s hope for, and its investment in, its own future. The Bill of Rights recognises this. This is why it requires the state to afford them special nurturance, and affords them special protection from the state’s power’.¹⁹⁶

3.3 Children’s Act

The Children’s Act 38 of 2005 and Amendment is the most comprehensive addition to the general child rights framework, which fortifies provisions in the Bill of Rights. The Act encompasses a range of different child-law issues and measures, including Chapter 4 on children’s courts. However, due to the fact the South Africa has a specific Act dedicated to the jurisdiction of juvenile justice, the Children’s Act is most useful in respect of the general principles which are relevant, not only to the Act but any legislation applicable to children as well as proceedings, actions or decisions made by state actors which concern children.¹⁹⁷ The section will consider the extent to which this Act protects the guiding principles of the CRC in the child justice context namely; best interests, participation, non-discrimination and life, survival and development. The best interests principle permeates the Act and is considered to be of paramount importance, as with the Constitution.¹⁹⁸ The right to participation exists as a qualified right of expression in the Children Act, depending on a child’s age, maturity and development, where views expressed will be given due consideration. Notably, non-discrimination is protected against on any ground for all matters concerning children. Finally the right to life, survival and development manifests itself in a number of different provisions, particularly centered on socio-economic rights that should be provided for guaranteed to facilitate development. The Act

¹⁹⁵ South African Constitution, article 28(2).

¹⁹⁶ *Centre for Child Law v Minister for Justice and Constitutional Development and Others* (CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477 (CC) ; 2009 (6) SA 632 (CC) ; 2009 (11) BCLR 1105 (CC) (15 July 2009) at paragraph 36.

¹⁹⁷ Children’s Act Section 6(1).

¹⁹⁸ Section 9.

protects a number of important child rights through these principles and follows international law closely, requiring higher standards of protection in some instances.

4. AGE AND CHILDREN IN CONFLICT WITH THE LAW

Scott and Steinburg state that, ‘developmental research clarifies that adolescents, because of their immaturity, should not be deemed as culpable as adults ... but they also are not innocent children whose crimes should be excused.’¹⁹⁹ The distinction between excuse and mitigation is not clear-cut and determining an appropriate age for capacity at the domestic level is dependent on a multitude of relevant factors. The Child Justice Act expressly amended the common law principle of criminal capacity by raising the MACR from of seven to 10,²⁰⁰ thus any child under the age of 10 is deemed incapable of committing a crime and cannot be held responsible. The retention of the *doli incapax* principle,²⁰¹ applicable to those between 10 and 14 years of age, is a presumed lack of capacity, which requires rebuttal beyond reasonable doubt that the child appreciates the difference between right and wrong and acted within that appreciation.²⁰² The Act also stipulates conditions under which the establishment of capacity must be done to ensure that the child is treated in accordance with his or her rights.²⁰³ Notwithstanding these procedural safeguards, the provision maintaining the dual standard of *doli incapax* in the South African domestic system is contrary to recommendations from the CRC Committee on this issue. The concept was initially implemented as a protective measure, but practitioners have averred that it is easily rebutted and, in practice, does not impede the prosecution or conviction of young people.²⁰⁴ For example, evidence is not necessarily required as is the case in England and Australia;²⁰⁵ a mother, asked to indicate whether her child can

¹⁹⁹ E. S. Scott & L. Steinberg, L (2008) Adolescent Development And The Regulation Of Youth Crime, *The Future Of Children*, (2008) at 15-33.

²⁰⁰ Section 7(1).

²⁰¹ Section 7(2).

²⁰² Section 11(1).

²⁰³ See: generally Sections 11-16.

²⁰⁴ C. McClain Problems relating to age and criminal capacity in J Sloth-Nielsen (ed) South African Juvenile Justice: Law Practice and Policy (Johannesburg, 1995).

²⁰⁵ L. Schetzer, National Children and Youth Law Centre: A review of the law on the age of criminal responsibility of children Discussion Paper, OO3/OO (2000, The University of New South Wales) Found at: <http://www.ncylc.org.au/publicat/discpapers/A%20review%20of%20the%20law-%20Oct%202000.pdf> at p14

distinguish between right and wrong, providing an affirmative answer can be sufficient to rebut the presumption.²⁰⁶ Courts recognise the need to exercise caution with children who have limited understanding of proceedings.²⁰⁷ For the above reasons, and in accordance with international law, practice and standards, the retention of the *doli incapax* doctrine is, not only functionally superfluous, but also potentially detrimental to child rights and should thus be removed as a doctrine from South African law relating to criminal capacity and replaced with a higher MACR.²⁰⁸

The Act also includes a provision that requires a review of the minimum age no more than 5 years after commencement of section 8. This was intended as a compromise by the drafting Committee following the decision to set the minimum age at 10, in spite of compelling arguments to raise the age to 12.²⁰⁹ One of the main reasons given by the Committee for not raising the MACR was because of a lack of reliable crime statistics on children between 10 and 13 years of age.²¹⁰ It was suggested that the gathering of this information was crucial and that the Child Justice Alliance should make contributions in this regard.²¹¹ Other practical challenges to the application of the criminal capacity age provisions of the Act include; a shortage of resources to conduct capacity evaluations,²¹² issues with mental health capacity assessment of children,²¹³ problems with vagueness of criteria for prosecutors' and magistrates'

²⁰⁶ South African Law Commission, *Juvenile Justice*, Issue Paper 9, project 106 (1997), at 15.

²⁰⁷ *S v M* 1982 (1) SA 240 (N).

²⁰⁸ This would follow other African countries such as Uganda (s88 Ugandan Children's Act 1997) and Ghana (s4 of the Criminal Code (Amendment) Act 1998).

²⁰⁹ Ann Skelton & Charmain Badenhorst, *The criminal capacity of children in South Africa:*

international developments & considerations for a review. Found at:

<http://www.communitylawcentre.org.za/projects/childrensrightsproject/Publications/Other%20publications/The%20criminal%20capacity%20of%20children%20in%20South%20Africa%20%20International%20developments%20and%20considerations%20for%20a%20review.pdf>, at 21.

²¹⁰ Parliamentary Monitoring Group, *Child Justice Bill: Department Briefing & Public Hearings*, (2008). Found at <http://www.pmg.org.za/node/10170>

²¹¹ Parliamentary Monitoring Group, *Child Justice Act Implementation: Briefing by Department of Justice* (2011). Found at <http://www.pmg.org.za/node/27353>

²¹² C. Badenhorst, *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes*, *Open Society Foundation for South Africa, Criminal Justice Initiative, Occasional Paper 10* (2011).

²¹³ A. L. Pillay, *Criminal Capacity in children accused of murder: challenges in the forensic mental health assessment*, *Journal of Child and Adolescent Mental Health* Vol.18(1) (2006), at 17-22.

consideration of criminal capacity²¹⁴ and the issues with guilty pleas²¹⁵ and capacity regarding diversion.

As discussed above, under international child law, the CRC have recommended that a MACR below the age of 12 is unacceptably low.²¹⁶ It may be concluded that the *de facto* acceptable lowest minimum age for criminal responsibility is 12 years, thus, the South African minimum age of 10 under the Child Justice Act does not meet this standard. This incompatibility with international law was confirmed in 2000 when South Africa was urged by CRC Committee to reassess age of criminal capacity in its draft legislation with a view to increasing the proposed minimum age.²¹⁷

Relevant to this discussion are the reasons or arguments behind this decision to disregard the recommendations and maintain 10 as the age of criminal capacity and the *doli incapax* principle. Firstly, that with the *doli incapax* presumption as a safeguard, children who lack capacity are protected and more mature, developed children deserving of punishment can be held responsible for crimes committed.²¹⁸ Further, it is argued that this process allows for greater flexibility in that age is not the definitive characteristic in the determination, particularly relevant in a culturally and ethnically diverse country such as South Africa.²¹⁹ Another argument stems from the fear that a higher age of criminal capacity would lead to greater numbers of adults using to commit crimes.²²⁰

In contrast, a number of reasons have been given in favour of replacement of the *doli incapax* doctrine and the 10 years old minimum with the age of 14 as a minimum for capacity. Firstly, a number of procedural safeguards, proposed during the drafting process, do not appear in the current Child Justice Act that significantly reduces the

²¹⁴ Skelton & Badenhorst (supra note 209), at 24 & 26 respectively.

²¹⁵ See discussion at ibid at 24 of caselaw - *S v Moya* 2004 (2) SACR 257 (W); *Obakeng v S*, Case number CA11/2009, North West High Court, Unreported; *Mshengu v S* 2009 (2) SACR 316 SCA.

²¹⁶ See Chapter 2 on the minimum age of criminal responsibility.

²¹⁷ United Nations Committee on the Rights of the Child (2000). Concluding Observations of the Committee on the Rights of the Child, South Africa. UN Doc. CRC/C/15/Add.122 (2000).

²¹⁸ South African Law Commission (2000) Juvenile Justice Report Project 106. Found at: http://salawreform.justice.gov.za/reports/r_prj63_insolv_2000apr.pdf , at 29.

²¹⁹ Ibid.

²²⁰ Addressed by the Child Justice Act in Section 92, which provides for the reporting of such an adult to the South African Police Service (SAPS) and the prosecution of the adult in terms of Section 141(1)(d) read with section 305(1)(c) of the Children's Act 38 of 2005.

supposed benefits of the system to child rights. Additionally, this change would simplify the issue, eliminate challenges in the determination process, contribute to legal certainty, reduce the risk of discriminatory practice and lead to more standardised, predictable outcomes. Case law has shown that, the more serious the offence, the more likely that a child will be deemed to have capacity, which is problematic, particularly in light of the fact that this is often when the child is at a young age.²²¹ There have also been concerns raised that upon removal of the *doli incapax* presumption without a significant rise in the age of capacity resulting in indiscriminate prosecution of young children without consideration of levels of maturity.²²² In addition to this, practically, problems would arise in respect of the training of mental health professionals and presiding officers in determining capacity as well as a lack of psychiatric facilities, which would cause undue delay.²²³

Therefore, notwithstanding the utility of the flexibility and accountability of the *doli incapax* presumption and a low MACR, the arguments in favour of adoption of 12 as a minimum, in line with international recommendations, are compelling, particularly from a child-rights based perspective.

5. PREVENTION

5.1 Social Context

In order to fully assess the effectiveness of the South African youth crime prevention policies, it is necessary to consider the extent of the existence of youth crime generally as well as some of the contributing factors to such rates in South Africa. Familiarisation with these country-specific social and environmental causes and implementing measures to address them, are key to crime prevention. Young people in South Africa make up both the largest group of victims of violent crime as well as

²²¹ Obakeng v S case number CA11/2009 North West High Court. Unreported and Mshengu v S 2009(2) SACR 316 SCA.

²²² Ibid.

²²³ Child Justice Alliance, Workshop Report on Criminal Capacity of Children, (Pretoria 2011). Found at: <http://www.childjustice.org.za/publications/CriminalCapacityWorkshopRpt.pdf>

the perpetrators of crime in South African cities.²²⁴ Due to the interconnectedness of victimisation and criminality, particularly amongst young people, addressing this duality is key to crime prevention policy.²²⁵ Accurate crime statistics are somewhat difficult to come by, due to the fact that the South African Police Services' crime data does not include the age of offenders, though based on the numbers of young people detained in prison, it is possible to make estimations with the caveat that the official statistics are likely to underrepresent the contribution of young people to crime.²²⁶ It is shown that around 35% of the prison population and 53% of the awaiting trial population in South Africa is under the age of 26.²²⁷ Research has indicated that South Africa has a particularly low age of first offence amongst juvenile offenders with 43.5% having committed their first crime between the ages of ten and 15 and 35.9% between 16 and 18.²²⁸ Moreover, reoffending is consistent, with contemporary criminal justice discourse putting the South African rate of recidivism at between 80% and 90%. However this figure is yet to be scientifically quantified and the exact definition of recidivism remains contested.²²⁹ A barrage of international literature centres on individual, family, school, and environmental factors which lead to criminal activity²³⁰ and this has been adopted into the South African rhetoric.²³¹ Unfortunately, many of the identified risk factors (addressed in the Global North mainly) describe the living conditions of the majority of South Africans therefore haven't been prioritised and analysis has become too broad for practical application.

²²⁴ I. Palmary, C. Moat, Preventing Criminality Among Young People, A resource book for Local Government, Centre for the Study of Violence and Reconciliation, (2002). Found at: <http://www.csvr.org.za/docs/youth/preventingcriminality.pdf> at p4.

²²⁵ L. Segal, J. Pelo & P. Rampa, Into the Heart of Darkness: Journeys of the Amagents in Crime Violence and Death in J. Steinberg, J. (ed.), Crime Wave: The South African Underworld and its Foes, (Johannesburg, Witwatersrand University Press, 2001).

²²⁶ Ibid at 3.

²²⁷ Department of Correctional Services Basic Statistics: Prisoners in Custody. Report on prison statistics (30 June 2002. South Africa)

²²⁸ Pelsler (supra note 20), at 11.

²²⁹ Report on the Open Society Foundation for South Africa (OSF-SA) conference on recidivism and reoffending in South Africa, (29 and 30 November 2010, Johannesburg). Found at: http://osf.org.za/wp/wp-content/uploads/2012/09/Meeting-Report_-Recidivism-conference_20101.pdf.

²³⁰ D. Farrington & B. Welsh, Saving Children from a Life of Crime. Oxford: University Press, 2007).

²³¹ See: C. Ward, Young people's violent behaviour: social learning in context in P. Burton (ed) Someone stole my smile. An exploration of the causes of youth violence in South Africa. (Cape Town: Centre for Justice and Crime Prevention, 2007).

The factors which contribute to the predisposition or likelihood of committing crime in South Africa are numerous and varied. The legacy of apartheid has led to a commonality of marginalisation amongst South African children, where 43% of youths could be defined as being 'at risk' of engaging in anti-social behaviour.²³² It has been shown that crime is often a primary tactic adopted by many young South Africans to connect and bond with society, in order to acquire 'respect', 'status', sexual partners and to demonstrate 'achievement' amongst peers and friend groups within their communities.²³³ This is particularly relevant in a country with a pervasive gang culture.²³⁴ In addition, much evaluative research has shown that 'parenting variables' mediate some 80% of the factors like 'family dissolution, unemployment, geographic mobility and household crowding on juvenile participation in crime'.²³⁵ Thus, when 42% of children under the age of seven live in low income, single parent female-headed households²³⁶ and an estimated 40% of children who live in townships are left without any supervision during the day,²³⁷ stable familial circumstance is an area of concern in South Africa. Finally, quality of education and academic success is a crucial factor in whether children make decisions to commit crimes.²³⁸ South Africa continues to struggle with truancy, which leads to an uneducated youth population, as well as violence, sale of drugs, gun violence and vandalism within the school environment.²³⁹

5.2 Current Youth Crime Prevention Policy and Law

²³² D. Everatt, School reject or eject? Contextualising 'Out of School Youth' in the New South Africa, prepared for *DISKURS* and Prospects: Case (undated).

²³³ See, for example, G. Simpson, Shock troops and bandits. Youth crime and politics' in Steinberg, J. (ed) *Crime Wave – the South African Underworld and its Foes*. (Witwatersrand University Press, 2001).

²³⁴ <http://news.bbc.co.uk/1/hi/world/africa/1919382.stm>
<http://www.csvr.org.za/wits/papers/paplvsl.htm>

²³⁵ J. H. Laub & R. J. Sampson, Unraveling families and delinquency: a reanalysis of the Gluek's data, *Criminology*, (1998) at 26.

²³⁶ R. Nyman, The tender years... In a harsh society, *Rights Now*. Vol. 6 (1999) at 4.

²³⁷ N. Duncan & B. Rock, Commission of Inquiry regarding the prevention of public violence and intimidation: Inquiry into the effects of public violence on children. Preliminary report. (Undated).

²³⁸ A. Dawes & D. Donald, Improving children's chances: Developmental theory and effective interventions in community contexts, *Addressing Childhood Adversity* (Cape Town: David Phillips, 1999).

²³⁹ I. Palmay & C. Moat, Preventing Criminality Among Young People, Centre for the Study of Violence and Reconciliation (2002), at 6. Found at:
<http://www.csvr.org.za/docs/youth/preventingcriminality.pdf> .

As the above evidence shows, normalisation of South Africa's 'culture of violence' remains at the forefront of academic rhetoric, but it has been argued that it is exactly this problem that the South African crime reduction policy, or, implementation of the policy, fails to address.²⁴⁰ The 1998 governmental White Paper on Safety and Security purportedly aims to 'reduce the social, economic and environmental factors conducive to particular types of crime'.²⁴¹ This multidisciplinary approach implemented by local government in partnership and collaboration with the South African Police Service (SAPS), the Metropolitan Police Service (MPS) and Community Policing Forums (CPFs). The policy involved 4 pillars: make the criminal justice system more efficient and effective; reduce crime through environmental design; introduce initiatives aimed at changing the way communities react to crime and violence and improve the controls over cross border traffic related to crime.²⁴² However, it was argued that by making the police at the centre of the so-called 'war against crime' it allowed other government departments (Health, Education, Social Development Housing and Transport among others) to either ignore or abdicate crime prevention responsibilities.²⁴³ It followed that The South Africa's National Crime Prevention Strategy had been 'compromised at its inception in 1996 by the differing political needs of the new politicians and bureaucratic competition in the newly created Department of Safety and Security' and rapidly became more 'a statement of vision than a strategy'.²⁴⁴

The current framework, fortunately, envelops a developmental approach to the law and policy on the issue. For example, the Preamble to the Child Justice Act recognises, 'the present realities of crime in the country and the need to be proactive in crime prevention, by placing increased emphasis on the effective rehabilitation and reintegration of children'. The Children's Act²⁴⁵ contains a number of provisions that protect social and economic, civil and political rights of children, important to the

²⁴⁰ Pelser (supra note 20) at 9.

²⁴¹ Department of Safety and Security. (1998). In Service of Safety: White Paper on Safety and Security 1999-2004. (Pretoria, Government printers, 1998) at 12.

²⁴² http://www.crime-prevention-intl.org/fileadmin/user_upload/Evenements/10th_ICPC_Colloquium/Proceedings/Bilkis_Omar.pdf at 4.

²⁴³ Pelser (supra note 20) at 10.

²⁴⁴ J. Rauch, Changing step: crime prevention policy in South Africa, in E. Pelser (ed.) Crime Prevention Partnerships: Lessons from Practice, (Pretoria: Institute for Security Studies, 2000).

²⁴⁵ (No.30 of 2005 and its Amendment Act of 2006 [B19F-2006]).

prevention of crime as well as specific crime prevention policy provisions.²⁴⁶ Further, the Education Laws Amendment Act No. 31 of 2007 amends certain aspects of national education policy relevant to juvenile crime prevention. The South African Government Department of Education has also implemented a R10-billion Early Childhood Development Programme as well as including crime prevention provisions in the Urban Renewal Programme sites and within the Integrated Development Programmes. These legal and policy additions to the initial National Crime Prevention Strategy contribute to a more comprehensive, coherent developmental approach towards the prevention and reduction of youth crime. Improving the management and quality of South African schools with a comprehensive early childhood programme, facilitates positive learning and socialisation of young people. Prevention of youth crime remains a challenge for South Africa, both within the context of social inequality, following apartheid, and with the lack of available resources to implement measures to address the identified risk factors.

Assessing and addressing relevant risk factors is crucial,²⁴⁷ as well as moving from deterrence tactics²⁴⁸ and implementing the measures that maintain the positive effects as well as initial prevention.²⁴⁹

Arguably, the South African framework meets the international legal requirements, particularly with regards to the binding CRC with the existence of policy and law aimed at crime prevention. The main issues with the system of crime reduction in South Africa lie in the implementation and enforcement of the policy in light of such high youth criminality. Based on the aforementioned interpretations of *respect, protect and fulfil* under international law, South Africa can be said to *protect and respect* children's rights through these preventative measures, but rights remain unfulfilled due to the fact that in spite of such remedial measures, the rates of social problems and crime remain so high. The most discernible reason behind this lack of

²⁴⁶ See Chapter 8 on Prevention and Early Intervention generally, section 45(1)(e)(ii), section 150(3), s155(4)(b).

²⁴⁷ A. Petrosino, C. T. Petrosino & J. Beuhler, Scared Straight and other Juvenile Awareness Programmes, in B. Welsh & D. Farrington, Preventing Crime: What works for children, offender, victims and places (Springer Press, 2007) at 168.

²⁴⁸ See: *ibid*; D. R. Lynman, R. Milich, R. Zimmerman et al, Project DARE: No effects at 10-year follow up, *Journal of Consulting and Clinical Psychology*, Vol. 67(4). (1999) at 590-593.

²⁴⁹ See A. Hayes, Why early in life is not enough: timing and sustainability in prevention and early intervention (France & Hommel, 2007) at 214-216.

implementation must be lack of resources, however when considering the significant cost of improvement of such an overhaul of the current system, it may be more pertinent to consider the effects (or costs) of not making these vital improvements.

6. DIVERSION

Diversion is a central feature of the current of the South African juvenile justice system. In fact, the implementation of diversion programmes preceded any specific legislation mandating such action. Since 1992, the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) used diversion as an alternative to imprisonment, particular for those guilty of less serious offences. The range of diversion programs have expanded steadily since then based on the acknowledgement that, 'there is clearly much scope for the further development of diversion'.²⁵⁰

The modern system of diversion under the Child Justice Act is an embodiment of the restorative justice paradigm, arguably the most effective aspect of child justice.²⁵¹ This is in line with a 'growing continental emphasis on diversion and alternative programmatic responses to children in conflict with the law,'²⁵² which has seen the incorporation of restorative justice as a core facet of comprehensive child justice regime.²⁵³ As mentioned above, the CRC Committee recommends that states 'adopt and encourage restorative justice and rehabilitation schemes for child offenders, focusing on diversion from the criminal justice system at all stages.'²⁵⁴ Importantly, the international framework gives States substantial discretion in respect of the specifics of the diversion measures for children entering into the judicial process. Research has also shown that recidivism rates are lower for children who have

²⁵⁰ See L. M. Muntingh, *Prosecutorial Attitudes Towards Diversion*, (NICRO National Office, Cape Town, 1998).

²⁵¹ See UNICEF Welcomes Signing of Child Justice Bill into Law, UNICEF (May 18, 2009). Found at: http://www.unicef.org/media/media_49695.html

²⁵² J. Sloth Nielsen, *Children's Rights and the Law in African Context: An Introduction*, in *Children's Rights in Africa: A Legal Perspective 3* (2008)

²⁵³ See A. Skelton, *Restorative Justice in Child Justice Systems in Africa*, in J. Sloth-Nielson (ed.) *Children's Rights in Africa* (2008) at 129.

²⁵⁴ African Child Policy Forum, *Realsing Rights for Children, Harmonisation of Laws on Children in Eastern and Southern Asia* (2007). Found at: http://www.sarpn.org/documents/d0002744/ACPF_children_rights.pdf

complied with diversion programmes.²⁵⁵ Consequently, the fact that South Africa applies a comprehensive diversion policy and prioritises interventions where possible, is sufficient to meet the majority of the international and regional standards. In fact the Child Justice Act was hailed by UNICEF as ‘a major step in strengthening the administration of justice for South Africa’s children’,²⁵⁶ largely due to the emphasis in the Act on diversion.

Additionally, ‘the process of channelling children away from the formal criminal justice systems and can take place 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 child justice system.’²⁵⁷ The relevant stages which diversion in which diversion or interventions can be utilised are police diversion, prosecutorial diversion, intake diversion and judicial diversion.²⁵⁸ This falls in line with the international distinction of interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings.

The Child Justice Act offers three ‘levels’ of diversion. Level one diversion includes less intense, interventions of short duration and these can be implemented at the preliminary stages by magistrates through various orders, which include school attendance orders, written apologies, family time orders, payment of compensation and placement under guidance or supervision.²⁵⁹ Level two diversion become more intense and include compulsory attendance at a specified centre or place for vocational, educational or therapeutic purposes or performance of tasks without remuneration for the benefit of the community under the supervision of an individual or an institution.²⁶⁰ Level three diversion involves only those over the age of 14, who have committed a crime likely to incur a sentence of less than six months and can include referral to counselling or programmes with a residential requirement.²⁶¹ A

²⁵⁵ L Muntingh, *The effectiveness of diversion programmes: A longitudinal evaluation of cases*, (NICRO, Cape Town, 2000).

²⁵⁶ http://www.unicef.org/media/media_49695.html

²⁵⁷ Odhiambo, (supra note 26) at 13.

²⁵⁸ M. M. McShane & F. P. Williams, *Diversion Programmes*, *Encyclopedia of Juvenile Justice*, (Sage Publications 2004). Found at: http://www.academia.edu/1006263/Diversion_and_Diversion_Programs at 136

²⁵⁹ Child Justice Act, section 53(3).

²⁶⁰ *Ibid*, at section 53(4).

²⁶¹ *Ibid*, at section 53.

benefit of these types of programmes is that communities play an important role and resultantly become more aware of the importance of raising young people appropriately.²⁶² However, what has been problematic is inconsistency in South Africa. The National Directorate of Public Prosecution conducted research that identified areas where diversion is not practiced due to lack of appropriate programmes.²⁶³ Other challenges facing diversion programmes in South Africa include a lack of resources for costly programmes, difficulties with training and changing the attitudes of judicial actors and ensuring quality, so as to maintain the credibility of the system.²⁶⁴

Importantly, the Child Justice Act requires that there must be a *prima facie* case against the child and that he or she must freely acknowledge responsibility for the crime,²⁶⁵ that from the moment that the diversion order has been completed, criminal proceedings based on the same facts may not be founded.²⁶⁶ These safeguards, taken with numerous rights and guarantees for children's rights within diversion, create a comprehensive and reliable diversion framework. This is fortified with various minimum standards, applicable to diversion, to make the system effective and beneficial to all children in South Africa, 'structured in a way so as to strike a balance between the circumstances of the child, the nature of the offence and the interests of society'.²⁶⁷

7. GUARRANTEES FOR A FAIR TRIAL

The South African framework guarantees a plethora of child rights within the trial context, much of which is required under international and regional laws. Due to the broad range of provisions protecting rights, and the constraints of this paper, three will be considered specifically; participation, privacy and legal representation. It is

²⁶² A. Skelton, Setting standards for diversion, *Online Journal of the International Child and Youth Care Network*, Issue 29, 2001). Found at:

<http://www.cyc-net.org/cyc-online/cycol-0601-skelton.html>

²⁶³ See: H. Mukwevho, The role of prosecutors in enabling diversion, *Article 40 Journal*, Vol.3(3) (2001).

²⁶⁴ B. Mbambo, Diversion, a central feature of the new child justice system, *Beyond Retribution – Prospects for Restorative Justice in South Africa* (undated). Found at: <https://issafrica.org/pubs/Monographs/No111/Chap7.pdf>.

²⁶⁵ Child Justice Act, section 52(1).

²⁶⁶ Section 59(1)(a).

²⁶⁷ Section 55.

striking that The Child Justice Act does not expressly establish specific juvenile justice courts or overtly require that juvenile offenders be tried and sentenced in a separate court dedicated solely to offences committed by children.²⁶⁸ Other such gaps in legislation and implementation will be discussed below.

7.1 Participation and the right to be heard

Participation and the right to be heard are guiding principles, guaranteed by the Child Justice Act for every child.²⁶⁹ This right is further protected by the Children's Act that enables children not only to participate in civil proceedings but also to institute proceedings themselves.²⁷⁰ However, interestingly, participation is not a child right mentioned in the Constitution, perhaps reflective of the understanding that a balance must be struck between child autonomy and parental autonomy. Contemporary South Africa encompasses a strong respect for hierarchical structures, particularly in rural areas where views of children and the rights of children to participate in decisions affecting them can often be overlooked.²⁷¹ Consequently, there is a disjuncture between the purpose and actual implementation and results of the legislation.²⁷² This is evidenced by the frequent failure to actually act upon contributions made by children.²⁷³

7.2 Privacy

Section 14 of the South African Bill of Rights contains detailed provisions on the right to privacy, defining the scope as follows: 'Everyone has the right to privacy, which includes the right not to have the person or their home searched; their property

²⁶⁸ See: South African Law Commission *Discussion Paper* clause 53; South African Law Commission *Report*, clause 71

²⁶⁹ Section 3(c).

²⁷⁰ Children's Act, section 14. Discussed at: Access to justice for children Report of the United Nations High Commissioner for Human Rights Human Rights Council Annual report of the United Nations High Commissioner for Human Rights A/HRC/25/35, 16 December 2013, at 12

²⁷¹ *Ibid*, at 113.

²⁷² R. Bray & S. Moses, Children and participation in South Africa: Exploring the Landscape, *Perspectives in Education*, Vol. 29(1) (2011).

²⁷³ C. Nomdo & H. Roberts, Children's involvement in government policy and budget analysis, in R. B. L. Jamieson, South African Child Gauge (Children's Institute. The University of Cape Town, 2011). Found at: http://www.ci.org.za/index.php?option=com_content&view=article&id=868&Itemid=224&phpMyAdmin=xGIUwSo1y0U00fk9xyQp8iqGULa.

searched; their possessions seized; or the privacy of their communications infringed.’ The Child Justice Act stipulates that as far as possible judicial proceedings should be conducted in private.²⁷⁴ In addition, provision is made for the expunging of criminal records after certain time periods depending on the crime committed. Arguably, five and 10 years are too long for children as it goes against the idea of restorative justice and reintegration.

7.3 Legal or other appropriate assistance

The child’s right to legal assistance in South Africa has undergone dramatic reform following the enactment of the Child Justice Bill. In 1995 research was conducted which indicated that over 80 per cent of accused children would appear before the courts unrepresented.²⁷⁵ Once a regressive policy, the current system now guarantees legal assistance from the preliminary inquiry,²⁷⁶ prevents pleas without prior legal consultation, mandates referrals to the Legal Aid Board and, most importantly, guarantees that all children facing charges in court shall benefit from legal representation.²⁷⁷ In fact, the child’s right to legal assistance, at State expense, extends to civil matters.²⁷⁸ The current framework surpasses the requirements at international and regional levels, yet implementation remains challenging due to limited resources and South Africa coordinates with private legal aid providers to mitigate the negative consequences of this.²⁷⁹

8. SENTENCING

The sentencing of juveniles charged with committing crimes in South Africa is rooted in the recognition of abundant evidence that the lesser involvement in the formal

²⁷⁴ Section 37(2).

²⁷⁵ J. Raulinga, D. Siditi & T. Thipanyane, Legal Representation of Children, in L. Pollecut et al, Legal Rights of Children in South Africa, (National Institute for Public Interest Law and Research, 1995) at 63, 86 & 101.

²⁷⁶ Section 82(1).

²⁷⁷ Section 81.

²⁷⁸ Article 28(1)(h).

²⁷⁹ UN Office on Drugs and Crime, Access to Legal Aid in Criminal Justice Systems in Africa, New York 2011, at 11. Found at: https://www.unodc.org/pdf/criminal_justice/Survey_Report_on_Access_to_Legal_Aid_in_Africa.pdf .

criminal justice system, the more likely that a child can be reformed and reintegrated into society.²⁸⁰ It follows, that one of the guiding principles of sentencing in the Child Justice Act is that children should not be treated more severely than adults; a principle not seen in either the international or regional frameworks.²⁸¹ Notably, there is an attempt, not only to promote and protect the child in sentences, but also to balance this with the nature of the offence and interests of society.²⁸² This judicial discretion could be problematic, in the sense that the interests of society could direct the decision-making process, to the point of impeding on the rights of the juvenile offender.

8.1 Non-Custodial Measures

The Act envelops the international standard that detention should be a measure of last resort and for the shortest period of time,²⁸³ with emphasis on promotion of non-custodial measures. The Act prescribes the following sentences for children; community-based sentences, restorative justice sentences, a fine, correctional supervision, residence in a child and youth care centre, and imprisonment.²⁸⁴ The Child Justice Act is not self-contained and is read with the more general Criminal Procedure Act 51 of 1977 (CPA) for certain important provisions of which there are no equivalents.²⁸⁵ However, as there is no clear guidance on incorporation of the relevant provisions, it remains unclear the extent to which children can rely the conditions outlined in the CPA.²⁸⁶

²⁸⁰ B. Goldson & J. Muncie (eds) Youth Crime and Juvenile Justice, *Children's Rights and State Responsibilities* (Sage Publications London 2009) .

²⁸¹ Section 3(b).

²⁸² Section 69(1)(b).

²⁸³ Child Justice Act, Preamble & section 69(e).

²⁸⁴ Sections 72-78.

²⁸⁵ Criminal Procedure Act 51 of 1977, section 274(1) (the authority to permit evidence necessary for the court to be properly informed about an appropriate sentence), section 274(2) (the right of the defence to produce evidence on sentencing and to address the court on a proper sentence), section 275 (the power of one presiding officer to impose sentence when the officer who convicted the offender is not available), 280 (the power to order sentences to be served concurrently), section 298 (power to correct an incorrectly passed sentence).

²⁸⁶ See discussion at: S. S. Terblanche, The Child Justice Act: a detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders. *PER: Potchefstroomse Elektroniese Regsblad*, Vol.15(5) (2012). Found at: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812012000500014&lng=en&tlng=en , at 435-475.

8.2 Prohibited Sentences

With regards to prohibited sentences, the Constitutional Court of South Africa abolished the death penalty in 1995 for all persons.²⁸⁷ Additionally, as of 1997, any form of corporal punishment within the justice system of South Africa is prohibited.²⁸⁸ This followed from the Constitutional Court decision in *S v Williams and Others* that caning of juveniles was unconstitutional.²⁸⁹ The Child Justice Act amended the common law position and introduced a limitation on the number of years of imprisonment that a child can be sentenced to. Section 77 prohibits imprisonment for any child under the age of 14 and requires that imprisonment for any child over the age of 14 must be a last resort and for the shortest possible time. The maximum prison sentence is set at 25 years, which meets international standards of prohibiting life imprisonment. However, arguably a sentence of this length for children runs contrary to South Africa's aspirations of restorative justice, 'Sentencing a child to life imprisonment means that we no longer recognise that their youthfulness contributed to reckless and immature behaviour and that such behaviour can be corrected through rehabilitation. We have effectively given up on that child, but we still expect him or her to become a productive and responsible member of society after serving 25 years in prison'.²⁹⁰

9. CONCLUSION

Overall, the framework itself is comprehensive and focused on restorative justice (*ubuntu*) and the best interests of the child with only a few legislative gaps. Due to its recent enactment, much of the legislation envelops a child's-rights based approach and is driven by recognition of its international and regional obligations, as expressed in the Preamble to the Child Justice Act. The juvenile justice system is centred on

²⁸⁷ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), [1996] 2 CHRLD 164, 1995 (2) SACR 1 (CC) the judgment invalidated section 277(1)(a) of the Criminal Procedure Act 51 of 1977 in line with the Interim constitution.

²⁸⁸ The Abolition of Corporal Punishment Act, 1997 (Act No. 33 of 1997).

²⁸⁹ [1995] ZACC 6, 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC).

²⁹⁰ J. Gallinetti, D. Kassan & L. Ehlers, *Child Justice in South Africa: Children's Rights Under Construction*, Child Justice Alliance (2006) at 77. Found at: http://www.childjustice.org.za/publications/CJ_ConferenceReport.pdf

diversion, a process that is prioritised from the moment that the child comes into conflict with the law. However, the biggest issue remains implementation and enforcement of this framework and the need to change South Africa's 'culture of violence' for children's rights to be realised substantively.

CHAPTER 4

SCOTTISH SYSTEM OF JUVENILE JUSTICE

1. INTRODUCTION

In the same way that South Africa's juvenile justice system has been critiqued in light of international norms, this Chapter will consider the extent to which Scotland succeeds at meeting these required standards. It must be noted that Scotland's youth justice system is much more established than that of South Africa's. This means that there has been greater opportunity to assess and develop the principles and laws but at the same time, the framework does not position itself as precisely under international standards as that of South Africa because it wasn't designed specifically to comply. As Scotland is governed, based on devolution from the UK, a number of reserved matters remain outwith its legislative competence. One such matter is human rights; therefore it is necessary to consider the human rights element to this from a UK wide perspective.

2. HISTORICAL DEVELOPMENT

The historical development of Scotland's approach to juvenile justice is key to understanding the system as exists today. The first legislation to acknowledge the necessity of dealing with young offenders separately from adults was the Children Act 1908.²⁹¹ This was followed by the Morton Committee recommendations of 1925, which advocated the creation of specific justice of the peace juvenile courts, where cases would be considered by justices specifically qualified to deal with child law issues.²⁹² The implementation of the system was inconsistent in respect of the jurisdiction of various general or child-specific courts which resulted in 'inherent difficulties in a model which tried to combine the processes of a criminal court with

²⁹¹ See: Children's Act 1908 [8EDW 7 CH 67] at Part V.

²⁹² Sir G. Morton KC Sheriff of Forfarshire (Chairman): Young Offenders, Scotland (Committee of Enquiry), *Hansard HC*, 29 July 1925, Vol. 187, at 43-432.

treatment of children who offended on a basis of prevention and education.’²⁹³ Justice and welfare existed almost as dichotomous variables whereby most cases before the courts were on offence rather than care grounds.

The late 1960s saw the inception of fundamental reforms to the ways in which the courts both managed child offenders and delivered youth justice. The most notable of these developments was the eminent Kilbrandon Report, conducted by the Kilbrandon Committee. The remit of the Committee was: ‘to consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control and, in particular, the constitution, powers and procedure of the courts dealing with such juveniles, and to report’.²⁹⁴ The result of recommendations made by the Kilbrandon Report was the establishment of the Children’s Hearing System (CHS) was seen as ‘an important departure from the models of youth justice operating in other jurisdictions at the time.’²⁹⁵

According to the Committee, referring young people to the criminal courts for so-called delinquency should be characterised as a failure in the social education of children for whom voluntary measures of social support and correction had failed. Moreover, it was felt that criminal courts were unable to make decisions for the disposal of the child or the society, generally,²⁹⁶ thus the system was both unnecessary and time-consuming.²⁹⁷ The Report put forward a set of pioneering recommendations for a new nationally- coordinated system that proposed (in a radical departure from the retributive, punishment model of youth justice) the divorce of adjudication from disposition with increased assistance to families without recourse punitive measures against either parents or the accused child. The outcome was the creation of the CHS,

²⁹³ The Children’s Hearing System in Scotland: Children’s Hearing Training Handbook, Training Resources Manual, No. 2, (2013). Found at: <http://www.gov.scot/Resource/0041/00419420.pdf> at 8.

²⁹⁴ Kilbrandon Report (supra note 10).

²⁹⁵ M. Burman, P. Bradshaw, N. Hutton, F. McNeill & M. Munro, Trends and Developments in Youth Justice in Scotland (draft) (undated). Found at: www.esceurocrim.org/files/juvenile_justice_Scotland.doc

²⁹⁶ J. McGhee, L. Waterhouse & W. Whyte, Children’s Hearings and Children in Trouble’ in S. Asquith (ed.) Children and Young People in Conflict with the Law, Research Highlights in Social Work 30. (London: Jessica Kingsley, 1996) at 56-72.

²⁹⁷ Kilbrandon Report (supra note 10).

‘a unique and radical system of non-adversarial lay tribunals as the decision-making forum for children in need of compulsory state intervention.’²⁹⁸

The recommendations instituted by the Kilbrandon Report were premised on a number of key values. The Committee felt that the underlying situation of children who appeared before the courts, whether in need of care or as a result of an offence, were fundamentally similar.²⁹⁹ It was argued that, it was unnecessary to maintain the legal distinction and institutional separation of young offenders and those in need of care. Instead a single, welfare-orientated approach was proposed which would include children beyond parental control, those in need of care and protection and young offenders without distinction.³⁰⁰ The single most important principle of the scheme was that welfare was the paramount concern in decision-making processes and compulsory intervention in relation to the child, regardless of the reasons behind the child entering into the system.³⁰¹

Testament to its success, Scotland retained this largely unchanged strategy of juvenile justice for more than 30 years, ‘The Kilbrandon Report was, and still remains, one of the most influential policy statements on how a society should deal with ‘children in trouble’.’³⁰² The CHS was entrenched in a statutory framework by the Social Work (Scotland) Act 1968 followed by the Children (Scotland) Act 1995 and has undergone recent reform and exists as a system under the Children’s Hearings (Scotland) Act 2011, the details of which will be discussed below.

Though widely heralded as an innovation in juvenile justice,³⁰³ the system has not been without its critics; this has led to further development and reform. The system was often critiqued for constant switching between welfare and punitive

²⁹⁸ J. McGhee, Forty-four years on: Reflections on the Scottish Children’s Hearings System, Child Care law reporting Project, (Law Society of Ireland, International Conference: Child Protection and the Law Dublin, April 13 2015). Found at: <http://www.childlawproject.ie/wp-content/uploads/2015/04/international-conference-janice-mcghee.pdf>, at 28.

²⁹⁹ Kilbrandon Report (supra note 10).

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² S. Asquith (ed.), Preface to the The Kilbrandon Report. Edinburgh, HMSO (1995).

³⁰³ http://www.heraldsotland.com/opinion/13525220.Children_s_Hearing_System_has_a_legacy_of_old_and_positive_decisions/?ref=rss

approaches,³⁰⁴ failing to implement adequate prevention processes and focusing the approach on political ideologies.³⁰⁵ A study conducted in 1990 found that decision-making lacked clarity. There was a failure to prevent escalation in offending amongst certain groups and time limits were often not met.³⁰⁶ Further research in the early 2000s suggested that resources were strained under the system, there were frequent delays, lack of services and it was becoming increasingly difficult to recruit social workers and lay person panel members to implement the system.³⁰⁷ These, taken with a comprehensive review of the system by the Scottish Government in 2003,³⁰⁸ led to a Scottish Executive '10 Point Action Plan on Youth Crime'³⁰⁹ and the recent Youth Justice Inquiry'.³¹⁰

3. SCOTTISH LEGAL INSTRUMENTS

3.1 *Children's Hearings (Scotland) Act 2011*

The Children's Hearing system created based on recommendations from the Kilbrandon Committee, remains principally the same under the Children's Hearing Act 2011. This sets out the principles, aims, scope, functions and limitations of the hearing system and created the role of National Convener to act as a figurehead for panel members. The CHS is essentially a legal meeting arranged outside of the formal justice system to deliberate and make decisions about young people who have problems or issues in their lives. They are held in private, with only relevant people who have a legal right to be present.³¹¹ The hearing is made up of a panel of laypersons, usually from the local community, who make determinations based on

³⁰⁴ See for example: the introduction of the 'ASBO' under the Antisocial Behaviour (Scotland) Act 2004 or electronic tagging of young offenders.

³⁰⁵ S. Asquith & M. Docherty, Preventing Offending by Children and Young People in Scotland in P. Duff (ed.) Criminal Justice in Scotland, (Aldershot: Ashgate, 1999).

³⁰⁶ L. Waterhouse, J. McGhee, B. Whyte, N. Loucks, H. Kay & R. Stewart, The Evaluation of Children's Hearings in Scotland: Children in Focus, Vol.3, (Edinburgh: Scottish Executive, 2000).

³⁰⁷ Audit Scotland, Edinburgh, Audit Scotland, A baseline Report, (2001). Found at: [Youth Justice in Scotland: A Baseline Report](#); Audit Scotland Edinburgh, Audit Scotland, A follow Up Report, (2003). Found out: [Dealing with offending by young people. A follow up report.](#)

³⁰⁸ Scottish Executive, Edinburgh: A Partnership for A Better Scotland, Partnership Agreement, Scottish Executive (2003). Found at: [A Partnership for A Better Scotland: Partnership Agreement.](#)

³⁰⁹ Scottish Executive Edinburgh: 10 Point Action Plan for tackling youth crime and disorder, Scottish Executive (2000) [10 -Point Action Plan for tackling youth crime and disorder](#)

³¹⁰ Youth Justice, House of Commons, Seventh Report of Session 2012–13, Volume I: Report, together with formal (February 2013).

³¹¹ Relevant persons under section 74.

discussions at the hearing as to whether a compulsory supervision order is appropriate for the child. A child enters into the CHS by way of referral to the Children's Reporter by the police, social work department, education professionals, family members or even the children themselves. The Children's Reporter then receives the referral and gathers information about the perceived issue and the child's life generally, to decide whether a hearing is necessary. The Children's Reporter can decide either that a hearing is not necessary, that a hearing is not needed but make a referral to the local authority for support or that a hearing is required along with a likely compulsory supervision order. There are numerous grounds by which a child can be brought before the Children's Panel. Importantly, committing an only offence is one of such reasons amongst; is likely to suffer harm to health or development, has a close connection with a person who has carried out domestic abuse or committed a sexual offence,³¹² is misusing drugs or alcohol, is forced into a marriage, is not attending school regularly or has behaved in a way that is likely to have an adverse effect on the health, safety or development of themselves or others.³¹³ The CHS can then make a number of different decisions: state that no action is necessary; request more information or make a legally enforceable compulsory measure of supervision, under which the local authority becomes responsible and conditions are outlined.³¹⁴

The paramountcy of welfare is reaffirmed by the Act, 'The children's hearing, pre-hearing panel or court is to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration'³¹⁵ The system, governed by this Act, is at the heart of juvenile justice in Scotland for children under the age of 16, with 27,538 referrals in 2014/15, it diverts the vast majority of children from formal judicial proceedings on the basis that 'Children and young people are at the centre of everything we do'.³¹⁶

3.2 Human Rights Act 1998

³¹² Under the Sexual Offences (Scotland) Act 2009 or a 'Schedule 1 Offence', a physical, emotional or sexual offence against a child, listed in Schedule 1 to the Criminal Procedure (Scotland) Act 1995.

³¹³ section 67(2) of the Children's Hearings (Scotland) Act 2011,

³¹⁴ <http://www.gov.scot/Publications/2003/01/16151/16388>

³¹⁵ Children Hearings Act 2011, section 25(2).

³¹⁶ <http://www.chscotland.gov.uk/media/90786/chs-framework-for-participation-of-children-and-young-people-v10.pdf>

The Human Rights Act 1998 (HRA) is composed of a number of provisions which, in effect, enshrine the human rights protections under the ECHR into UK domestic law. This requires that all public bodies comply with the European Convention and, due to its effective horizontal effect, individuals can institute human rights proceedings in national courts as opposed to the European Court of Human Rights that sits in Strasbourg.³¹⁷ In Scotland, human rights are given legal effect through the Scotland Act 1998, which stipulates that, ‘A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights...’³¹⁸ The ECHR contains no reference to child-specific rights, thus the protections offered to young offenders by the Convention and consequently the HRA is limited to general human rights guaranteed to everyone.³¹⁹ Article 6 mandates the presumption of innocence, the minimum rights to be informed promptly, to have adequate time to prepare a defence, the right to free legal assistance in the interests of justice and to examine witnesses. These minimum standards satisfy many of the criteria of the CRC in respect of guarantees for a fair trial. However, the human rights system in the UK is based on the European Convention framework and thus approaches human rights differently to the UN, arguably, making compliance more difficult to achieve.

3.3 Children and Young People (Scotland) Act 2014

The drafting process of the Children and Young People (Scotland) Act 2014 saw The Scottish Government make a public commitment to the vision of making Scotland, ‘the best place in the World for children to grow up... where the rights of children and young people are not just recognised, but rooted deep in our society and our public services’.³²⁰ The Act, purportedly based in part on the CRC,³²¹ followed a 2012 Progress Report in response to the 2008 CRC Committee’s Concluding

³¹⁷ Horizontality of the HRA discussed at: G. Phillipson, The Human Rights Act, ‘Horizontal Effect’ and the Common Law: a Bang or a Whimper?, *The Modern Law Review*, Vol 62, (1999), at 824–849.

³¹⁸ Section 57(2).

³¹⁹ ECHR, article 1.

³²⁰ A. Campbell, A Scotland for Children: A Consultation on the Children and Young People Bill, (Ministerial Forward). Found at: <http://www.gov.scot/Resource/0039/00396537.pdf> at 3.

³²¹ <http://www.gov.scot/Topics/People/Young-People/families/rights>

Observations.³²² However, in spite of calls to fully enshrine the CRC into Scottish law by way of this Act,³²³ full implementation is yet to materialise, instead, there is an obligation on Scottish Ministers to ‘keep under consideration’ UNCRC requirements³²⁴ (arguably a lesser duty than previously mandated under the Scotland Act 1998 to ‘observe and implement international obligations’).³²⁵ Essentially, the Act gives recognition of the CRC in domestic legislation and therefore when applying Scots law consideration must be given to the relevant juvenile justice CRC rights. This is concerning in light of the CRC General Comment No. 5 which states, ‘States parties need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal systems.’³²⁶ Notwithstanding this obligation, it is argued that, full incorporation of the CRC into domestic law is both difficult due to the aspirational nature of many of the provisions and legally incompatible with devolution under the Scotland Act.³²⁷ The Act provides for appeals of detention of children in secure accommodation³²⁸ and creates the power of Scottish Ministers to modify circumstances in which children’s legal aid to be made available.³²⁹

4. AGE AND CHILDREN IN CONFLICT WITH THE LAW

In recent years, both the CRC Committee and the UN Human Rights Committee have criticised the fact that Scotland has one of the lowest ages of criminal responsibility in the world.³³⁰ Under the current law, the MACR is understood and applied in two

³²² Section 57(2)

³²³ UN CRC Concluding Observations on the UK in 2002 CRC/C/15/Add.188 and in 2008 CRC/C/GBR/CO/4.

³²⁴ Section 1.

³²⁵ Scottish Government, *Consultation on Rights of Children and Young People Bill* (2011). The standard was originally higher but a weaker duty was mandated in the final draft of the Bill. Scotland Act 1998, section 126(10).

³²⁶ General Comment 5, at paragraph 19.

³²⁷ K. Norrie, Education and Culture Committee Children and Young People (Scotland) Bill, 3 August 2013. Found at: [http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20\(Scotland\)%20Bill/NorrieProfKennethMcK.pdf](http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20(Scotland)%20Bill/NorrieProfKennethMcK.pdf) at paragraphs 5-9.

³²⁸ Section 91.

³²⁹ Section 92.

³³⁰ Human Rights Committee, Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, advanced version, adopted by the Committee at its 114th session, (2015), at paragraph 23; Concluding Observations of the Committee on the Rights of the Child on the United Kingdom of Great Britain and Northern Ireland, CCR/C/GBR/CO/4, (2008), at paragraph 77.

different ways.³³¹ The first denotes the age below which a child is deemed to lack capacity to commit a crime and can therefore not be held responsible for said crime and is currently set at eight.³³² The second is 12 and refers to the age under which no child can be prosecuted in the criminal courts for an offence committed prior to reaching that age.³³³ Children under the age of eight can only be referred to the CHS on care or protection grounds, children between the ages of eight and 12 can be referred on offence grounds but not prosecuted and children over the age of 12 can be prosecuted. With international rules setting the *de facto* absolute minimum acceptable age of capacity at 12, the minimum age under Scots law is clearly inconsistent with that standard. A proposal was made by a Member of the Scottish Parliament (MSP) for an amendment to the Criminal Justice (Scotland) Bill that would see the age of criminal capacity rise to 12 years old.³³⁴ She argued, ‘The law, as it currently stands, is woefully outdated in its perception of children's capacity to make decisions, understand and be deemed responsible for their actions’.³³⁵ Raising the age would honour the international obligations conferred on Scotland by the CRC and the Beijing Rules.

The age of criminal capacity is ‘a sensitive and controversial issue on which people’s views are often quite polarised’.³³⁶ Those in favour of retention of 8 as the MACR utilise the argument that if a child under the age of 12 commits a serious offence, the proposed increase would mean there could be no retribution or legal consequence by virtue of the rule. A Scottish Government spokesperson argued that, ‘There is a particular need to retain confidence where eight to 11-year-olds are involved in the most serious violent or sexual cases. Further consultation will be required on any future change in respect of minimum age.’³³⁷ An English example often cited is the well-known ‘James Bulger case’, which involved the abduction, torture and murder of a two-year-old boy at the hands of two 10-year-old boys, Jon Venables and Robert

³³¹ The distinction is discussed more fully at: Report on the Age of Criminal Responsibility (Scot Law Com. No. 185, 2001).

³³² Criminal Procedure (Scotland) Act 1995, section 41.

³³³ Criminal Justice and Licensing (Scotland) Act 2010, section 52(2).

³³⁴ Scottish Parliament Bill 35, Session 4 (2013).

³³⁵ http://www.heraldscotland.com/news/13414799.Bid_to_raise_age_of_criminal_responsibility_from_eight_to_12/

³³⁶ J. Graham, S. Perrott & K. Marshall, A Review of the Youth Justice System in Northern Ireland, (Belfast, Department of Justice, 2011).

³³⁷ <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-33298900>

Thompson.³³⁸ ‘The politicisation of juvenile crime has had a direct bearing on the way in which child ‘offenders’ have been socially constructed and this, in turn, is particularly salient for any discussion concerning the minimum age of criminal responsibility’³³⁹ The argument offered is that; had the proposed increase been in force at the time, the two boys would have legally lacked capacity to commit the crime and no criminal sanction could be imposed. However, this reasoning fails, due to the minimum age of prosecution, and therefore no practical advantage would be gained from raising the MACR to 12. Instead of referral to the CHS on the offence ground,³⁴⁰ referral would be based on ‘causing harm to another person’³⁴¹ and the result would be identical.

Furthermore, there are compelling reasons supporting the proposed minimum age rise. Goldson argues that increasing the age would support inter-jurisdictional consistency, the minimalise social harm and decriminalise social need.³⁴² Twelve has been described as ‘a landmark age in Scottish child law.’³⁴³ It is the age at which a child is deemed capable of making a range of significant decisions, including living arrangements following divorce of parents³⁴⁴ or consent to medical treatment,³⁴⁵ make a will³⁴⁶ or consent to his or her own adoption.³⁴⁷ In respect of consistency and uniformity in Scots law, it would be reasonable to set the age of criminal responsibility at a similar level to other aspects of capacity, particularly as capacity is supposedly based on the point at which a child reaches sufficient understanding and maturity to make determinations.³⁴⁸ As well as this, retaining this MACR of eight is not without consequence, despite the safeguard that prosecutions are permissible after the age of 12. This is due to the fact that the Scottish rules on non-disclosure of past

³³⁸ *Reg. v. Secretary of State for the Home Department, Ex parte V. and Reg. v. Secretary of State for the Home Department, Ex parte T.* (1997) UKHL.

³³⁹ B. Goldson, Unsafe, Unjust and Harmful to Wider Society: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales, *Youth Justice*, Vol.13(2) 2013, at 111-130.

³⁴⁰ Children’s Hearings (Scotland) Act 2011, section 67(2)(j).

³⁴¹ *Ibid*, section 67(2)(m).

³⁴² Goldson (supra note 339).

³⁴³ E. E. Sutherland, Time to raise the age of criminal responsibility, The Law Society of Scotland: *The Journal*, (14 September 2015). Found at: <http://www.journalonline.co.uk/Magazine/60-9/1020694.aspx>

³⁴⁴ Children (Scotland) Act 1995, section 11(7)(b).

³⁴⁵ Age of Legal Capacity (Scotland) Act 1991, section 2(4).

³⁴⁶ *Ibid*, section 2(2).

³⁴⁷ *Ibid*, section 2(3) & Adoption and Children (Scotland) Act 2007, section 32.

³⁴⁸ See the seminal case of children’s capacity: *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112.

offences do not apply in all circumstances,³⁴⁹ i.e. in civil proceedings or entering certain professions.³⁵⁰ Therefore, a child who commits a crime, however trivial, between the age of eight and 12, participated in the CHS, could find that this could disadvantage him or her in later life. This is not consistent with the international provisions requiring measures that facilitate reintegration into society.

5. PREVENTION

5.1 Social Context

In comparison to South Africa, the Scottish youth crime rates are fairly low where the vast majority of young people not only avoid committing crime but also, arguably, contribute positively to society. Scottish Government statistics estimate that around 4.7% of those aged between eight and 17 (23,726 children) were involved in offending behaviour in 2012/13.³⁵¹ Somewhat auspiciously, these numbers have followed a steady downward trajectory since the first police reports and statistics in 2008. In fact, police statistics suggest that youth crime rates have fallen by 45% between 2008 and 2014, whilst adult offending fell by a lesser 4%.³⁵² In the interest of reliability, it is useful to consult other statistical sources. Recorded police data indicated that crime had fallen by 27.8% since 2008,³⁵³ whereas the Scottish Crime and Justice Survey of 12,000 adults suggested a 22% reduction of crime in 2013 since 2008.³⁵⁴ Research shows that the majority of juvenile offending can be attributed to teenage development, and offending is mainly short-lived and low-level.³⁵⁵ Most offences are trivial in nature (littering, drunkenness, common assault).³⁵⁶ Violent

³⁴⁹ Rehabilitation of Offenders Act 1974, this is despite the case of *R (on the application of T and other) (Respondents) v Secretary of State for the Home Department and another (Appellants)* where it was held that criminal convictions should not continue to affect their life chances into adulthood when seeking to secure employment and training opportunities.

³⁵⁰ Sutherland (supra note 343).

³⁵¹ Scottish Government, Scottish Policing Performance Framework, 2012-13. (Edinburgh: Scottish Government Publications, 2013). Found at: www.scotland.gov.uk/Publications/2013/11/6914

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Scottish Government, Scottish Crime and Justice Survey 2012/13: Main Findings, (2014). Found at: www.scotland.gov.uk/Publications/2014/03/9823

³⁵⁵ S. McVie, Criminal Careers and Young People, in M. Barry and F. McNeill (eds.) *Youth Offending and Youth Justice, Research Highlights* Vol. 52 London, 2009).

³⁵⁶ Scottish Government Policing Framework (supra note 351).

crimes including murder, attempted murder, robbery and more serious forms of assault actually only make up around 1% of all offences committed by those between the ages of eight and 17.³⁵⁷ Additionally, whilst the aforementioned crime rates saw an overall reduction of 45%, the same research showed that serious violent crimes actually dropped by 57% suggesting that the severity of crime was also on the decline.³⁵⁸

Much research was conducted in the hope of determining the exact socio-cultural factors responsible for the changing trends in both youth and adult crime related to crime rates and recidivism. These studies have been used by the Scottish Government to implement legal and policy measures of prevention and early intervention targeted at specific socio-economic issues. Some of these factors have included; crack cocaine usage³⁵⁹ high unemployment levels and the lack of meaningful economic participation.³⁶⁰ Conditions of poverty were shown to increase the probability that a person will become a victim of crime, be apprehended and commit offences.³⁶¹ A survey conducted by the Scottish Crime Survey revealed that half of the 12 to 15 year olds surveyed had been victims of crime at some stage. Further, it was more probable that children who admitted to having committed crimes would be victims of crime (65%) than non-offenders were (41%).³⁶² A study showed that poor parental supervision and monitoring is a key feature for young people who offend³⁶³ and that parents play a key role in prevention.³⁶⁴ The vast majority of anti-social behaviour and youth offending takes place in areas of economic and social deprivation in Scotland.³⁶⁵ It was further shown that 11% of children were categorised as having

³⁵⁷ Ibid.

³⁵⁸ Ibid.

³⁵⁹ B. Bowling, The rise and fall of New York murder: Zero tolerance or crack's decline? *British Journal of Criminology*, Vol.39(4) (1999), at 531-554.

³⁶⁰ S. Machin & C. Meghir, Crime and economic incentives. *Journal of Human Resources*, Vol.39 (2004), at 958-979.

³⁶¹ R. J. Sampson & J. H. Laub, *Crime in the making: Pathways and turning points through life* (London: Harvard University Press, 1993).

³⁶² Scottish Crime Survey: Overview Report, Scottish Executive Central Research Unit, Edinburgh, 2002. Found at: <http://www.gov.scot/Publications/2002/05/14407/1462>.

³⁶³ R. L. Matsueda Testing Control Theory and Differential Association, *American Sociological Review*, Vol.47 (1982), at 489-507.

³⁶⁴ D. Smith, The Edinburgh Study of Youth Transitions and Crime. Research Report No 3. (University of Edinburgh. 2004). Found at: [Parenting and Delinquency at Ages 12 and 15](#).

³⁶⁵ M. Barry, *Youth offending in transition: The search for social recognition*. (Routledge, 2006).

emotional and behavioural issues, where a further 25% were categorised as having low life satisfaction.³⁶⁶

These factors, in light of the fact that 20% of children (or roughly 200,000 children) in Scotland still live in poverty,³⁶⁷ require an established and comprehensive prevention policy to see reduction of crimes in Scotland. A review of the available research led the Scottish Government to the conclusion that, ‘Early intervention should be acknowledged as a key guiding principle on which to devise a strategy for preventing crime by children and young people’.³⁶⁸

5.2 Current Prevention Policy and Law

The importance of social welfare and educational intervention to prevent antisocial behavior and crime was implicit in the Kilbrandon Report. ‘On purely practical grounds it would seem essential to provide for preventive and remedial measures at the earliest possible stage if more serious delinquencies are not to develop.’³⁶⁹ There was recognition of an underlying incompatibility between the principle of establishing guilt and innocence and appropriate punishment and introducing future preventative measures³⁷⁰ Criticisms of the system were that, from the outset, the resources were insufficient to achieve the goals outlined and the aspiration of preventing youth crime through welfare-based initiatives were unachievable.³⁷¹

The Advisory Group on Youth Crime produced a report in 2000 that strongly advised the Scottish Parliament to place ‘greater emphasis on prevention, diversion and the concept of restorative justice, including the victim perspective’³⁷² It followed that prevention played a key role in Scotland’s 10 point Action Plan to Reduce Youth

³⁶⁶ A. Parkes, H. Sweeting & D. Wight, *Growing Up in Scotland: Family and school influences on children’s social and emotional well-being*, (2014). Found at: <http://www.gov.scot/resource/0045/00452548.pdf>

³⁶⁷ G. Mooney, *Poverty in Scotland* in J. H. McKendrick, G. Mooney, J. Dickie, G. Scott and P. Kelly (eds.) published: Child Poverty Action Group. Found at: <http://www.cpag.org.uk/sites/default/files/CPAG-PovertyinScotland2014-sample-chapter.pdf>

³⁶⁸ S. Asquith et al. Edinburgh: The Scottish Office, Central Research Unit (1998). Found at: [Children, Young People and Offending in Scotland](#)

³⁶⁹ Kilbrandon Report (supra note 10).

³⁷⁰ Ibid, at conclusion.

³⁷¹ <http://www.unison-scotland.org.uk/response/childrenshearingreview.html> .

³⁷² Scottish Executive, *It’s a criminal waste: stop youth crime now*, report of the Advisory Group on Youth Crime, Scottish Executive, Edinburgh (2000).

Crime, requiring both early intervention measures to address the root causes of criminal behavior and opportunities for children to fulfill their potential.³⁷³ This was a national framework of objectives and standards with a commitment of £26.5 million budget dedicated to it.³⁷⁴ One fact of this was the establishment of the Youth Crime Prevention Fund that supported civil society initiatives aimed at reducing juvenile offending rather than responding to current problems.³⁷⁵

There are two key juvenile Scottish policy initiatives in respect of prevention worth mention: Getting It Right for Every Child (GIRFEC) and the Early Years Collaborative (EYC). In recognition of the need to improve outcomes for children and their families, GIRFEC originated from the publication of 'It's everyone's job to make sure I'm alright'³⁷⁶ and For Scotland's Children.³⁷⁷ GIRFEC is entrenched in a set of values and principles and has ten main components, 'which bring meaning and relevance at a practice level to single-agency, multi-agency and inter-agency working across the whole of children's services'.³⁷⁸ These central components emphasise: effective information sharing and joint working; placing children, young people and their families at the centre of any assessment and/or intervention; improving outcomes; robust co-ordination of service provision; and, an overarching focus on the wellbeing indicators. Known to practitioners as the 'SHANARRI indicators', they stress that all young people should be: Safe; Healthy; Active; Nurtured; Achieving; Responsible, Respected; and, Included.³⁷⁹ The Government has maintained that the system embeds, 'a consistent, personalised, holistic, timely and effective approach to meeting children's needs with a focus on early intervention'.³⁸⁰

³⁷³ Scottish Executive Edinburgh: Scottish Executive (2000). Found at: [10 –Point Action Plan for tackling youth crime and disorder](#)

³⁷⁴ Scottish Executive (2002) Scotland's Action Programme to Reduce Youth Crime, Edinburgh, Scottish Executive (2000), at 6.

³⁷⁵ Some examples of initiatives funded include Renfrewshire Primary Support Project. Found at: <https://www.actionforchildren.org.uk/resources-and-publications/research/evaluation-of-action-for-childrens-renfrewshire-primary-support-project/>. National Parenting Development Project. Found at: http://www.aberlour.org.uk/assets/0000/8367/Early_Years_Debate_Parliamentary_Briefing.pdf.

³⁷⁶ Scottish Executive, It's everyone's job to make sure I'm alright: Report of the Child Protection Audit and Review, (Edinburgh, Scottish Executive, 2002).

³⁷⁷ Scottish Executive (2001) For Scotland's Children: Report of Action Team on Better Integrated Children's Services, Parts I & II, Edinburgh: Scottish Executive.

³⁷⁸ Scottish Government (2012a) A guide to Getting it right for every child, Edinburgh: Scottish Government. At 7

³⁷⁹ See: <http://www.gov.scot/Topics/People/Young-People/gettingitright/background/wellbeing>.

³⁸⁰ <http://www.gov.scot/Topics/People/Equality/18507/EQIASearch/ChildrensHearings>

The Early Years Collaborative can be viewed as a practical manifestation of the GIRFEC and Early Years Framework³⁸¹ leading principles. The initiative aims to build success and shift, ‘from intervening only when a crisis happens, to prevention and early intervention’.³⁸² It is based on core principles such as; aiming for similar outcomes not similar opportunities, working with families to develop solutions and identifying risks and preventing them before they materialise, particularly in light of an articulated recognition of the role of social inequality in offending. The aim under EYC would be to significantly reduce factors such as poverty and social inequality in order to create these better outcomes for all children, regardless of familial background.

The international obligations in respect of prevention require that states implement a prevention policy, focusing on socialisation and integration to mitigate marginalisation, exploitation, exclusion and social injustice.³⁸³ Overall, the Scottish system of prevention of juvenile offending has seen significant success. The acceptance of the importance of prevention in the Kilbrandon Report paved the way for preventative measures with the welfare of the child a paramount concern. The GIRFEC and EYC initiatives mentioned have been relatively recently implemented thus it is premature to gauge the success. However, there have been efforts to analyse developments, with early indicators producing both positive and negative results. Most notable are the crime statistics, which indicate a clear downward trend as well as evidence showing significant reduction in the number of referrals to the Children’s Reporter and the numbers of children on the Child Protection Register.³⁸⁴ Research showed that GIRFEC had led to greater shared focus on outcomes, through collaboration,³⁸⁵ improved upon the system in England and Wales by a strong focus on risk factors³⁸⁶ and contributed to lower recidivism in young people.³⁸⁷ Areas of

³⁸¹ Scottish Government The Early Years Framework, Edinburgh: Scottish Government, (2008).

³⁸² Ibid, at 3.

³⁸³ See chapter 2.

³⁸⁴ B. Stradling M. MacNeil H. Berry, Changing professional practice and culture to get it right for every child: An evaluation of the early development phases of Getting it right for every child in Highland, 2006–2009. (Scottish Government, Edinburgh, 2009).

³⁸⁵ A. Edwards, The new multi-agency working: collaborating to prevent social exclusion of children and families, *Journal of Integrated Care*, Vol.12(5) (2004) at 3–9.

³⁸⁶ Her Majesty’s Government, The Common Assessment Framework for children and young people: Practitioners’ guide, Department for Education and Skills: London, (2006).

improvement have been highlighted and these include overlooking people at risk,³⁸⁸ particularly those experiencing abuse or neglect,³⁸⁹ leaving children unsafe for longer³⁹⁰ particularly in the poorest areas, which did not benefit from the recent crime rate fall.³⁹¹ Notwithstanding these individual concerns, and acknowledging the lack of recent concrete evidence, it is an auspicious beginning for the Scottish system of prevention and early intervention, with an approach that encompasses the importance of socialisation and addressing risk factors.

6. DIVERSION

The Scottish juvenile justice provides two distinct ways of dealing with children in conflict with the law, by the formal judicial via a report by the Procurator Fiscal or through the CHS following a referral by the Children's Reporter. It would follow, based on the philosophy of the CHS, that the majority of cases follow the second path; it was estimated that less than 1% of all children under the age of 16 years face prosecution for crimes committed.³⁹²

When a case presents itself, the Children's Reporter and the Procurator Fiscal decide which route the child will follow, based on the circumstances of the case and the situation of the child. Generally, in line with the welfare paramountcy principle, the case will be retained for trial only in exceptional circumstances. In fact many of the children referred on the offence ground have experienced significant social difficulties and often have non-offence history within the CHS³⁹³ and last year 1,163 were actually referred on both an offence ground and at least one care ground.³⁹⁴

³⁸⁷ Audit Scotland, Reducing reoffending in Scotland, Auditor General for Scotland and the Accounts Commission (2012). Found at:

http://www.audit-scotland.gov.uk/docs/central/2012/nr_121107_reducing_reoffending.pdf

³⁸⁸ N. Parton, Safeguarding children: a socio-historical analysis, in Wilson K, James A (eds). *The Child Protection Handbook*, in Bailliere Tindall: Edinburgh 2007; 9–30.

³⁸⁹ K. McInnes, *A Practitioner's Guide to Interagency Working in Children's Centres: A Literature Review*. (Barnardos: Barking, 2007)

³⁹⁰ Stradling et al (supra note 384).

³⁹¹ L. McAra, S. McVie, Edinburgh Study of Youth Transitions and Crime, *British Journal of Criminology*, Vol. 43(1) (2003).

³⁹² Burman et al (supra note 295).

³⁹³ L. Waterhouse, J. McGhee, B. Whyte, N. Loucks, H. Kay & R. Stewart, *The Evaluation of Children's Hearings in Scotland Vol.3 (2000) Children in Focus*, Edinburgh: Scottish Executive

³⁹⁴ http://www.scra.gov.uk/cms_resources/SCRA%20Statistical%20Analysis%202013-14.pdf

Diversion is a central part of the CHS, both in the initial action by Reporters in response to referrals and also in diverting cases from the courts to the less formal children's hearing in the form of the lay panel. Initially, it is the job of the Reporter to assess whether the child needs to be referred to the hearings system due to the prima facie necessity of a compulsory supervision order. The decision is based on the welfare of the child and further, the minimum intervention principle which stipulates that decisions to act should be made, 'only if the children's hearing considers that it would be better for the child if the order, interim variation or warrant were in force than not.'³⁹⁵ Upon the decision that a hearing is not necessary, the Reporter has a range of informal options available; giving a warning or having an informal discussion with the child and or the family, through the police or otherwise or referring to the local authority for voluntary support.

As was mentioned above, the vast majority of children who commit an offence are diverted to the CHS. However, the small number of cases retained by the Procurator Fiscal can also potentially be diverted from the justice system. There are numerous diversionary measures available to the Procurator Fiscal; a conditional fixed fine or penalty or a verbal warning (usually more formal than that of a Reporter). Notably, it is fairly rare for a Procurator to apply one of these diversionary measures as the small number of cases retained is usually done so with the intention to prosecute with the primary form of diversion to the Reporter and CHS.

Overall, the use of diversion in Scotland is key to the success of the entire system. Having the welfare of the child of paramount importance when making these types of determinations leads to the diversion of the vast majority of children who commit crimes and, from that point, the approach is no longer punitive but restorative.

7. GUARANTEES FOR A FAIR TRIAL

As with the South African system, the majority of rights guaranteed by international law are protected by UK human rights or Scots child law. However, owing to a lack of specific codified child human rights provisions, when analysing the right to a fair

³⁹⁵ Children's Hearings Act 2011, section 28(2).

trial in the UK, the rights and freedoms protected apply to everyone and not only children. This is potentially problematic due to the wide coverage and lack of concern towards issues faced only by children and deserving of extra legislative protection. Also worth noting from the outset, is the difference between the European and international concept of human rights. The clear focus on civil political rights in the Global North generally, but specifically Europe in this context, views socio-economic rights as standards to aspire to as opposed to inalienable rights. This corresponds to the positive/negative obligation distinction. As the UK apply human rights through a European model of the ECHR, there is practically no mention of any socio-economic rights within the human rights paradigm. This signifies a noteworthy gap in the law.

7.1 Participation

As was discussed in Chapter 1, children are seen as autonomous being, and at varying stages of development towards adulthood, capable of making sensible and informed contributions to society. Children and families are encouraged to participate in the CHS wherever possible. The setting is designed to be suitably informal so as not to feel like a trial and to facilitate the child expressing his or her views and actively participating in the process. Within the trial setting, it is recognised that, ‘All possible steps should be taken to assist a vulnerable defendant to understand and participate in those proceedings. The ordinary trial process should, so far as necessary, be adapted to meet those ends.’³⁹⁶ There are three main issues with the system as it exists today: children with difficulties understanding or communicating aren’t given adequate extra support or ‘special measures’, insufficient regard is given to the age and maturity of the child and the low age of criminal capacity undermines the right to a fair trial.³⁹⁷

7.2 Privacy

The right to privacy is protected in the CHS as only deemed ‘relevant persons’, connected to the child, are allowed to attend. In a formal trial, dispensation is made for juveniles specifically under Article 6(1) ECHR which states that ‘the press and

³⁹⁶ UK Government, Ministry of Justice, Part III: Further Practice Directions Applying in The Crown Court And Magistrates’ Courts (2012), at section 30.

³⁹⁷ http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr_article_6.pdf

public may be excluded from all or part of the trial' under certain circumstances. The international normative standards expect that the identity of the child should be kept private and the criminal record of anyone under the age of 18 should be automatically removed. This is not provided for under UK law.

7.3 Legal Representation

The international standards across the CRC and ICCPR require that children be given free legal assistance, adequate time to prepare a defence and special arrangements when unable to understand, hear or communicate. The CHS allows for free legal representation of children, for the child to be able to effectively participate and when the circumstances of the case and disposable income of the family have been assessed. The right to legal representation within the trial context is similar in that each person has a right to be represented and this representation will be considered necessary to be free, if justice requires it. The child-specific rights are lacking in respect of the fair trial definition, particularly with the special arrangements, including lack of a provision guaranteeing a translator.

8. SENTENCING

The vast majority of children who commit an offence in Scotland do not reach the criminal justice system due to being diverted into the Children's Hearing System. It is through this that measures in the best interest of the child and based on the welfare of the child are suggested and implemented. Children within the formal judicial process are subject to many of the same rules as adults and this applies to sentencing in many regards. Despite this, there is emphasis on alternative sanctions to detention and the creation of pilot youth court schemes has facilitated child-orientated justice to a greater extent.³⁹⁸

8.1 Non- custodial measures

³⁹⁸ <http://www.gov.scot/Topics/Justice/crimes/youth-justice/16905/6819>

Currently, the available sanctions to the courts in Scotland are: prison, community service orders, probation, drug treatment and testing, restriction of liberty orders, supervised attendance orders, fines, structures deferred sentences, absolute discharge, caution and admonition. Though not explicit as policy, the statistics reveal that the sentence of custody of young people is extremely rare and only applies to the most serious of offences. A study of disposals in the Youth Court revealed that of 100 sentences given out only 7 were custodial, with the court opting to make use of available community-based options.³⁹⁹ A Scottish Executive spokeswoman said sending young people to prison was ‘a last resort’ and ‘not a decision that is taken lightly’.⁴⁰⁰

8.2 Prohibited Sentences

In the UK, the death penalty for murder was prohibited by the Murder (Abolition of Death Penalty) Act 1965, replacing it with mandatory life imprisonment.⁴⁰¹ Corporal punishment by parents is legal in Scotland under a limited number of circumstances,⁴⁰² in spite of recommendations from the CRC to prohibit the practice entirely.⁴⁰³ With regards to juveniles within the justice system, corporal punishment is now prohibited as a form of state-sanctioned punishment of children and is only permissible under limited circumstances in the family setting. Scots law mandates that children be treated in the same way as long-term adults when it comes to sentencing, in that those incarcerated for more than four years must be considered for early release.⁴⁰⁴ However, the law also allows the sentencing of a young offender, convicted of murder, to an indefinite period of detention,⁴⁰⁵ with a minimum sentence of 12 years imprisonment.⁴⁰⁶ This sentence would normally take place for under 21s at either of Scotland’s two single sex juvenile detention centres. The UK is one of

³⁹⁹ Burman et al (supra note 295) at 24.

⁴⁰⁰ <http://www.cyc-net.org/features/ft-re-scotlandprisonsshame.html>

⁴⁰¹ The death penalty was abolished entirely by the Human Rights Act 1998 and the Crime and Disorder Act 1998.

⁴⁰² The Criminal Justice (Scotland) Act 2003, section 52(3).

⁴⁰³ CRC Concluding Observations United Kingdom UN Doc. CRC/C/15/Add, 188 2002, at 9.

⁴⁰⁴ Criminal Justice Act 2003, at section 269.

⁴⁰⁵ <http://www.gov.scot/Publications/2012/11/5336/42>.

⁴⁰⁶ Criminal Practice Directions [2013] EWCA Crim 1631.

three countries in Europe to continue to detain children ‘without limit of time’ despite calls from the CRC Committee for all countries to repeal such rules.⁴⁰⁷ Due to the fact that minimum sentences exist for children, that corporal punishment exists, even if not directly as a part of the justice system and that those children can be sentenced to indefinite periods of time, the sentencing rules fail to meet international stan

9. CONCLUSION

The Scottish system, in many respects, encompasses a contemporary approach to youth justice following the Kilbrandon Report in 1964. The move away from punitive justice and an understanding of the circumstances under which a child is most likely to offend and reoffend, has allowed for effective implementation of both prevention and diversion measures. The Children’s Hearing System creates an informal environment to facilitate a determination process with the welfare of the child of paramount importance. However, the low age of criminal responsibility remains a concern and the rights of children who are not diverted from the formal judicial proceedings could be strengthened significantly.

⁴⁰⁷ T. Bateman, UK One of Just Three European Countries to Retain the Use of Life Imprisonment for Children, *Youth Justice*, Vol. 15(3) (2015), at 294.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

This paper has assessed the extent to which the respective legal frameworks of Scotland and South Africa have succeeded in legislating to international normative standards and also assessing their compliance with those standards in *respecting*, *protecting* and *fulfilling* children's rights.

Grounded in the CRC, the international normative structure consists of numerous guiding principles and specific core justice-related elements. These can be paraphrased as to *respect* (refrain from interfering), *protect* (adopt preventative and remedial measures) and *fulfil* (facilitate enjoyment of) children's rights.

Despite differing views on the definitions of the child and childhood, both States can see a strong correlation between crime and poverty. Further, from the outset of this conclusion, it is important to emphasise the key impact of the economic and social differences between Scotland and South Africa in the context of youth crime. This is particularly relevant for implementation, as a perfect legislative framework with limited means of application is of very little practical benefit to children in conflict with the law.

The South African system of youth justice is significantly newer than Scotland's and therefore less established principally and less engrained in a practical sense. Accordingly it is more contemporary and progressive, cast by international and African frameworks and rooted in the restorative justice paradigm.

Scotland's Children's Hearing System was revolutionary in the 1960s and 1970s and remains relevant to modern views towards children in conflict with the law, particularly through the recent amendments in 2011. However, there are areas, in which a deeper acknowledgement of the international and regional standards would improve juvenile justice in Scotland, particularly in respect of trial rights.

5.1 Age and children in conflict with the law

International law requires that States determine, under domestic law, an age below which children are deemed to not have the capacity to commit crimes. Further, it is recommended that setting this at anything below the age of twelve be considered not to be internationally acceptable. As well as this, for various reasons, the *doli incapax* principle should be abolished, according to the CRC committee. South Africa has set the age at 10 and has retained the *doli incapax* presumption. Therefore, this aspect of the justice system fails to comply with international normative standards and, resultantly, undermine the rights of children.

Similarly, Scotland has retained a minimum age of 8 for when responsibility for crime begins. This is applied with a minimum age of prosecution of 12 is still in contravention of international law. Both Scotland and South Africa have been advised against retention of these ages and this paper argues that the ages should be increased to align with the CRC recommendations. This would facilitate a stronger child-centred approach by recognising the limited capacity of children at such a young age.

Both systems attempt to justify the younger age of capacity by way of bipartite criminal responsibility ages (*doli incapax* and criminal prosecution) but despite mitigating the potential harm of such low ages, these do not remove it altogether. It is interesting to view the other elements of the respective systems in light of these low ages in order to gauge whether setting a low age of criminal capacity can be offset effectively by progressive policy in other areas.

5.2 Prevention

Prevention of juvenile crime at the international level is largely governed by the Riyadh Guidelines, which stresses the importance of integration, socialisation and mitigation.

South Africa has implemented a significant number of prevention policies and has committed to facilitate change, yet the continuation of the same socio-economic issues in society indicates that current strategies fall short of addressing the problems.

With this in mind, there is a failure from South Africa to *fulfil* children's rights. A lack of resources has severely limited the extent to which the existing programmes have been enforced effectively. Further, research to detect the exact causes of the crime would help create specific target areas of development. Moreover, support within dysfunctional families and an emphasis on socialisation and positive learning within the education system would improve the current system.

Scotland, on the other hand, emphasised the importance of prevention from the publication of the Kilbrandon Report. Unfortunately, limited funding continues to be an issue, however crime rates are still at their lowest since 1974, a testament to the success of the preventative measures that are already in place.⁴⁰⁸ Poverty rates in Scotland remain unacceptably high and hence juvenile delinquency remains an issue, however the policies in place indicate some degree of continual improvement and, in that regard, *respects, protects* and *fulfils* children's rights.

5.3 Diversion/Intervention

South Africa and Scotland have in common, a shared recognition of the importance of diversion as a core element to a child justice framework. At the international level, States are required to create and implement diversionary measures and programmes for children at every point of the judicial process, incorporating the safeguards of voluntary consent, participation and access to legal advice.

The emphasis on restorative justice in South Africa has put diversion at the centre of the system. The three-tiered diversion programme provides flexibility with minimum standards and procedural safeguards as required by the CRC.

Scotland facilitates diversion by both the Procurator Fiscal and the Children's Reporter in such a way that the vast majority of children avoid formal judicial proceedings. The Children's Hearing System is essentially a structure of diversion and encompasses the prescribed safeguards.

⁴⁰⁸ <http://www.bbc.co.uk/news/uk-scotland-34185425>

Both systems succeed at prioritising and implementing diversion for a high proportion of children, albeit through significantly different systems (the Scottish formal, centralised lay-panel and the South African series of projects and programmes). South Africa continues to lack resources for full applicability and this has led to inconsistency. Overall, the respective systems go a long way in *respecting, protecting* and in some senses *fulfilling* children's justice rights. Diversion frames each system around the rights and best interests of the child, protecting young offenders from the harmful consequences of the formal judicial process. Therefore, the prioritisation of state intervention, at this stage, by South Africa and Scotland can only be seen as a positive component of juvenile justice systems, from a child-rights perspective.

5.4 Guarantees for a fair trial

This paper considered three different trial rights within the domestic legal systems in light of international rules, namely; participation, privacy and legal representation.

South Africa implements a strong system of child-specific rights, guaranteed by legislation and the progressive Constitution. Participation is protected under statute, but not constitutionally, which weakens the right somewhat. Legal representation is seen as an important right and the scope of application extends to civil proceedings, unlike in the UK. The human rights guarantees in South Africa exceed the international minimum standards in many regards. In particular, child trial rights are strong within the juvenile justice framework, with few legislative oversights. Implementation of this overarching system of rights remains the biggest challenge faced by South Africa. As mentioned above, the mere existence of comprehensive human rights legislation does not, in itself, guarantee that such rights will be realised.

Scotland (as part of the UK) has not directly incorporated the CRC into domestic law and does not have a set of prescribed child-specific rights. Accordingly, gaps appear in terms of trial right guarantees for children. The age and maturity of children in Scotland is not given sufficient attention and, in particular, the low minimum age of capacity undermines the right to a fair trial. Additionally, special measures (such as free translators) are often overlooked. However, the Scottish system of juvenile justice is largely successful when children are diverted to the Children's Hearing

System and it is only the small percentage being dealt with by the formal judicial process, whose rights are compromised as a result of this unwillingness to incorporate internationally prescribed standards at the national level.

5.5 Sentencing

International standards are premised on the principle that detention is a measure of last resort and therefore other sentences should be both available and used wherever possible. Both South Africa and Scotland meet this requirement.

International law prohibits sentences such as; the death penalty, corporal punishment and life sentences without parole. South Africa abolished the death penalty, corporal punishment and minimum and mandatory sentences, yet still has high maximum sentence of 25 years. Despite this, South Africa meets the required minimum standards under the CRC and Beijing Rules.

Scotland also abolished the death penalty and corporal punishment in the judicial context, yet continues to allow corporal punishment by parents, allows for detention without prescribed time period limitations and has mandatory minimum sentences for murder. For these reasons, Scotland fails to comply with international juvenile justice law.

5.6 Overall

Both South Africa and Scotland have strengths and weaknesses within their juvenile justice systems. However, the low ages of criminal responsibility remain problematic for both States and, undermine purported child-centered approaches, despite strong diversionary programmes. With a strong, internationally compliant framework in place, South Africa is too often let down by poor implementation. This remains challenging in the socio-economic context of the country. Scotland implements the system well, yet continues to oppose full incorporation of the CRC into domestic law with a corresponding limiting impact on children's rights

In moving forward, it may be advantageous to consider the frameworks jointly, as opposed to independently. Essentially, this ‘best of both worlds’ approach would allow both Scotland and South Africa to learn from the strengths of the other. Thus, on the one hand, Scotland’s robust preventative approach and accomplished enforcement and implementation would be of great value to South Africa and on the other hand, South Africa’s comprehensive framework of child rights, based on international principles and rules, represents a level of human rights law legislation that Scotland should aspire. These improvements would transform the fulfillment of children’s human rights in the juvenile justice context from an aspiration to a reality, setting new world-leading standards for both countries.

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