



The protection of the rights of child offenders in  
pursuit of juvenile justice in selected African  
countries

**Tombo K**

 **orcid.org 0000-0003-0929-3068**



Dissertation accepted in fulfilment of the requirements for  
the degree *Master of Laws with International Aspects of  
Law* at the North-West University

Supervisor: Dr MC Stoffels

Co-supervisor: Adv RHC Koraan

Graduation: July 2025

## **DEDICATION**

This research is a testament to the love and support of my parents, family and friends. Thank you for being my rock and confidant. You are the inspiration behind this research. Your actions throughout my studies have made a lasting impression on me and I am forever grateful.

The information used and presented in this dissertation was correct and up to date as of 26 November 2024, when the research was concluded. Any later political, social and/ or legal developments have not been considered.

## **ABSTRACT**

Children are among the most vulnerable populations in the world. Their vulnerability worsens when they are exposed to the law. Children in conflict with the law face numerous challenges and violation of their fundamental rights. The protection of their rights is a cause for concern and requires urgent attention from states, policymaker and social and civil organisations. In their quest to ensure that the rights of children are protected, the United Nations and African Union enacted several legal instruments. These legal instruments were enacted as a measure to preserve the rights of children. International standards provide a critical framework guiding national practices. These laws are binding to member states who are signatories to the legal instruments and who have ratified the legal instruments in their distinct jurisdictions.

Previous studies that have been conducted have revealed that, although member states are signatory to the United Nations and African Union legislations and have made attempts to ratify these legal instruments, to date some of these member states are not effectively implementing these legal instruments. Consequently, the purpose of signing and ratifying these international law instruments is not being fully realised. Research has also proven that in some selected African countries, children in conflict with the law are ill-informed about their rights and end up being exploited.

This study was therefore an attempt to bring to light a few of international laws that deal with the rights of child offenders, their purposes and aims. Findings of a comparative analysis of four selected African countries namely: South Africa, Kenya, Zambia and Zimbabwe are a confirmation of the gap that exists between enactment of legislation and implementation thereof. While these countries should be applauded for enacting legislation to protect the rights of children, there is evidence that they fall short of implementing the legislation thus failing to realise the purpose of the legislation. As a result, there is need to adopt best practice that resonates with the needs of children in conflict with the law.

**KEYWORDS:**

rights of a child, juvenile justice, child offenders, children in conflict with the law, international laws, Africa, protection of rights

**Table of Contents**  
**LIST OF ABBREVIATIONS**

.....

**1. Introduction.....1**  
**Error! Bookmark not defined.**

*1.1. Problem Statement .....1*

*1.2. Motivation or Rationale for Study.....7*

*1.3. Premises, assumptions, and hypothesis .....9*

*1.3.1. Premises ..... 10*

*1.3.2. Assumptions..... 11*

*1.3.3. Hypothesis ..... 12*

*1.4. Research methodology ..... 13*

**2. Chapter 2: International law perspective on the rights of child offenders ..... 15**

**2.1. Introduction ..... 15**

**2.2. The legal development of juvenile justice in international law..... 16**

*2.2.1. The Beijing Rules ..... 16*

*2.2.2. The United Nations Convention on the Rights of the Child ..... 19*

*2.2.3. The African Charter on the Rights and Welfare of the Child..... 20*

*2.2.4. The United Nations Guideline for the Prevention of Juvenile Delinquency..... 23*

*2.2.5. The United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules) ..... 25*

*2.2.6. Guidelines on Action for Children in Justice System in Africa ..... 27*

*2.2.7. The Model Law on Juvenile Justice and Related Commentary..... 29*

*2.2.8. The Committee on the Rights of the Child General Comment No 24 of 2019 on Children’s Rights in the Child Justice System..... 32*

*2.2.9. Other international legal instruments pertaining to children in conflict with the law..... 35*

**2.3. Conclusion ..... 35**

**3. Chapter 3: Juvenile justice in South Africa, Zambia, Kenya, and Zimbabwe ..... 36**

**3.1. The administration of juvenile justice in South Africa ..... 38**

*3.1.1. The development of juvenile justice in South Africa..... 38*

*3.1.2. South Africa’s contemporary juvenile justice system ..... 41*

*3.1.3. Conclusion ..... 46*

<b>3.2. The administration of juvenile justice in Zambia</b> .....	47
3.2.1. Zambia’s history and background .....	47
3.2.2. Zambia’s contemporary juvenile justice system .....	48
3.2.3. Conclusion .....	55
<b>3.3. The administration of juvenile justice in Kenya</b> .....	56
3.3.1. Kenya’s history and background .....	56
3.3.2. Kenya’s contemporary juvenile justice .....	58
3.3.3. Summation .....	64
<b>3.4. The administration of juvenile justice in Zimbabwe</b> .....	64
3.4.1. History and Background of juvenile justice in Zimbabwe .....	64
3.4.2. Zimbabwe’s contemporary juvenile justice system.....	66
3.4.3. Conclusion .....	72
<b>3.5. Summation</b> .....	72
<b>4. Chapter 4: A comparative analysis of the juvenile justice systems in South Africa, Kenya, Zambia, and Zimbabwe</b> .....	74
<b>Introduction</b> .....	74
<b>4.1. Ratification of international legislation and possible motivations</b> 75	
4.1.1. Ratification of international legal instruments.....	75
4.1.2. Possible motivation for the ratification of legal instrument.....	76
<b>4.3. Minimum age of criminal capacity</b> .....	79
<b>4.4. The principle of diversion from the juvenile justice system</b> .....	82
<b>4.5. Detention of children in conflict with the law</b> .....	83
<b>4.6. Special treatment of juvenile offenders and the right to legal assistance</b> .....	86
<b>4.7. Conclusion</b> .....	90
<b>5. Chapter 5: Conclusions and Recommendations</b> .....	92
<b>5.1. Introduction</b> .....	93
<b>5.2 Conclusions</b> .....	92
5.2.1 International law perspective on the rights of child offenders .....	94
5.2.2 Juvenile justice in South Africa, Zambia, Kenya, and Zimbabwe .....	95
5.2.3 A comparative analysis of the juvenile justice systems in South Africa, Kenya, Zambia, and Zimbabwe. ....	96
<b>5.3 Recommendations</b> .....	96
5.3.1. Establishing a Minimum Age of Criminal Capacity.....	96

<i>5.3.2. Learning from Best Practices: South Africa as a Model</i> .....	97
<i>5.3.3. Strengthening Enforcement Mechanisms</i> .....	97
<i>5.3.4. Prioritizing Rehabilitation and Reintegration</i> .....	98
<i>5.3.5. Enhancing Access to Legal Aid</i> .....	98
<i>5.3.6. Fostering Continuous Improvement</i> .....	98
<i>5.3.7 Crime Database</i> .....	98
<b>BIBLIOGRAPHY</b> .....	99

## **LIST OF ABBREVIATIONS**

AHRLJ	African Human Rights Law Journal
AJSW	African Journal of Social Work
AJS	American Journal of Sociology
BJC	British Journal of Criminology
CA	Criminology Australia
CCJ	Criminology and Criminal Justice
DJ	De Jure
IJCJSD	International Journal for Crime, Justice, and Social Democracy
IJCR	International Journal of Children's Rights
IJPH	International Journal of Prisoner Health
IJLCL	International Journal of Law, Crime and Justice
JCR	Journal of Conflict Resolution
LDD	Law, Democracy and Development
LJ	Law Journal
SAJHR	South African Journal on Human Rights
TC	Theoretical Criminology
YJ	Youth Justice
YJIJ	Youth Justice an International Journal

## Chapter 1 Introduction

### 1.1. Problem Statement

The United Nations Office on Drug and Crime<sup>1</sup> defines juvenile justice as a system of policies, laws and procedure intended to regulate the treatment and processing of juvenile offenders for violations of law and to provide legal remedies that protect the interest of juvenile offenders in situation of neglect and conflict. Bowd<sup>2</sup> states that the purpose of the justice system is to identify rules that define the limits of socially acceptable behaviour and the measure of punishment to be used in order to prohibit the behaviour that falls outside of those limits. Muncie<sup>3</sup> asserts that, before the 21<sup>st</sup> century AD, the justice system punished both adults and young offenders in the same manner. This means that both adults and young offenders were exposed to the same legal system and there was no differentiation of treatment between the adults and the young offenders.<sup>4</sup> Zimring<sup>5</sup> affirms the above by stating that young persons (persons below the age of eighteen) in conflict with the law were dealt with in terms of a general criminal justice system wherein they were treated with little to no distinction from adults as it pertains to the applicable rules, procedures, and sentencing options. This means that there was no distinction between rules, sentencing and procedures applied to young and adult offenders.

Muncie<sup>6</sup> adds that the operation of a new legal system which has been introduced, now guarantees that although young offenders are punished for their crimes, their welfare must at the same time be promoted and safeguarded, taking into consideration the human rights provisions. According to Burke *et al*,<sup>7</sup> one of the major reasons for a new legal system can be attributed to scientific research<sup>8</sup> which brought to light the fact that the brain of the young offender is underdeveloped as compared to that of an adult offender. This means that given the underdevelopment of young offender's

---

<sup>1</sup> United Nations Office on Drug and Crime *Juvenile Justice: United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)* 119-186.

<sup>2</sup> Bowd 2009 <http://www.files.ethz.ch/isn/112459/NO13OCT09.pdf>.

<sup>3</sup> Muncie 2013 *IJCJSD* 43-62.

<sup>4</sup> Muncie 2013 *IJCJSD* 43-62.

<sup>5</sup> Zimring 'The Common Thread: Diversion in the Jurisprudence of Juvenile Courts' 142.

<sup>6</sup> Muncie 2013 *IJCJSD* 43-62.

<sup>7</sup> Burke *et al Introduction to the American Criminal Justice System* 390-391.

<sup>8</sup> Burke *et al Introduction to the American Criminal Justice System* 390-391.

brains, the comprehension of such a person's actions and appreciation of the consequences that follow is different from how an adult offender comprehends and understands his or her actions. Young offenders, therefore, do not fully comprehend their criminal capacity as compared to adult offenders. Criminal capacity, according to Snyman,<sup>9</sup> refers to the mental abilities that a person must have at the time of commission of the act and these mental abilities include the ability to appreciate the wrongfulness of one's actions and the ability to act in accordance with such appreciation. As a result, there was a need to implement a separate and new legal system specifically for young offenders, given that their thinking capacity and appreciation of their actions cannot be put on the same level as adult offenders.

Odongo,<sup>10</sup> is of the view that although most countries in Africa, such as Kenya, Zambia, Zimbabwe, and South Africa, to mention a few, have their own justice system, they have also adopted the justice system implemented by the United Nations. Odongo,<sup>11</sup> submits that the countries that adopted the justice system implemented by the United Nations have one thing in common, and that is the practice of "legal pluralism". The selected African countries are victims of British colonialism and Odongo<sup>12</sup> states that they have consequently adopted the British statutes such as the *Children Act of 1908* which was later repealed by the *Children and Young Person's Act of 1933* to mention but a few. One can argue that the main focus of the British legal framework is the welfare of the children who are in conflict with the law and the provision and protection of the rights of children thereof. For instance, article 37 of the *United Nations Convention on the Rights of the Child* (1989), hereinafter the CRC,<sup>13</sup> makes provision for juvenile offenders<sup>14</sup> to be protected against degrading or inhumane treatment, torture, and capital punishment, to mention but a few.

Section 39 of the *Constitution of the Republic of South Africa, 1996*<sup>15</sup> states that in the

---

<sup>9</sup> Snyman *Criminal Law* 32-33.

<sup>10</sup> Odongo G 'Kenya' 29-43.

<sup>11</sup> Odongo G 'Kenya' 29-43.

<sup>12</sup> Odongo G 'Kenya' 29-43.

<sup>13</sup> Article 37 of the *United Nations Convention on the Rights of the Child* (1989). Hereafter referred to as the *CRC*.

<sup>14</sup> In this dissertation, the references to young offenders and juvenile offenders will be used interchangeably.

<sup>15</sup> Section 39 of the *Constitution of the Republic of South Africa, 1996*.

course of interpreting the Bill of Rights, a court, tribunal or forum must consider international and foreign laws. This consideration means that when dealing with the rights of juvenile offenders, the courts are required to consider international laws. International laws were put in place as recourse to standardise the international landscape on matters related to young offenders.<sup>16</sup> For instance, the *United Nations Convention on the Rights of the Child* (1989)<sup>17</sup>, the *United Nations Guidelines for the Prevention of Juvenile Delinquency* (1990),<sup>18</sup> the *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2000),<sup>19</sup> the *African Charter on the Rights and Welfare of the Child* (1990), hereinafter the ACRWC,<sup>20</sup> the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985) hereinafter the Beijing Rules,<sup>21</sup> to mention but a few, have been put in place to ensure that the rights of young offenders are preserved. The above-mentioned international legal framework places an obligation on countries to protect the rights of young offenders.<sup>22</sup> The international legal framework will be discussed in chapter 2.

### 1.1.1. *Implementation of domestic laws in South Africa, Kenya, Zambia and Zimbabwe*

In order to adhere to the international legal framework, most countries in Africa such as South Africa, Zimbabwe, Zambia, and Kenya have implemented domestic laws aimed at protecting the rights of children who are in conflict with the law. South Africa passed the following statutes as laws that deal with juvenile offenders: the *Constitution of the Republic of South Africa*, 1996,<sup>23</sup> *Child Justice Act 75 of 2008*,<sup>24</sup> *Children's Act 35 of 2008*,<sup>25</sup> and the *Criminal Procedure Act 51 of 1977*.<sup>26</sup> Kenya's juvenile justice

---

<sup>16</sup> *United Nations Convention on the Rights of the Child* (1989).

<sup>17</sup> *United Nations Convention on the Rights of the Child* (1989).

<sup>18</sup> *United Nations Guidelines for the Prevention of Juvenile Delinquency* (1990).

<sup>19</sup> *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2000).

<sup>20</sup> *African Charter on the Rights and Welfare of the Child* (1990) hereinafter the ACRWC.

<sup>21</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985) hereinafter the *Beijing Rules*.

<sup>22</sup> Article 2 of the *United Nations Convention on the Rights of the Child* (1989).

<sup>23</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>24</sup> *Child Justice Act 75 of 2008*.

<sup>25</sup> *Children's Act 35 of 2008*.

<sup>26</sup> *Criminal Procedure Act 51 of 1977*.

system is governed by several statutes including the *Children's Act* of 2001<sup>27</sup>, *Community Service Orders Act* no 10 of 1998<sup>28</sup> and the *Borstal Institution Act*.<sup>29</sup> The main legal statutes that govern the juvenile justice system in Zambia are the following: *Constitution of Zambia (Amendment)* no 2 of 2016,<sup>30</sup> the *Criminal Procedure Code Act*,<sup>31</sup> the *Juveniles Act* 3 of 2011,<sup>32</sup> the *Code*,<sup>33</sup> and the *Probation of Offenders (Amendment) Act* no 14 of 2022.<sup>34</sup> The various legal instruments dealing with children in conflict with the law in Zimbabwe include but are not limited to, the *Constitution of Zimbabwe Amendment (no 20) Act*, 2013,<sup>35</sup> the *Children's Act* (Chapter 5:06) of 2001,<sup>36</sup> the *Criminal Law (Codification and Reform) Act* (Chapter 9:23) of 2005,<sup>37</sup> and the *Criminal Procedure and Evidence Act* (Chapter 9:07) as amended in 2016.<sup>38</sup> These legal instruments serve as yardsticks for juvenile justice in the selected countries and one can submit that they make provision for the protection of the rights of children in conflict with the law, amongst other things. The above-mentioned legal framework will be discussed in chapter 3.

Njoku<sup>39</sup> argues that, although most African countries including South Africa, Kenya, Zimbabwe, and Zambia have domesticated laws that have been mentioned above which are aimed at protecting the rights of children in conflict with the law, most of these countries are failing to implement the laws in an effective manner. Njoku<sup>40</sup> adds that these countries realise that there is a need to move from the previous system where juveniles and adult offenders were treated in the same manner, but they fail to apply the new rules and guidelines which they set. One of such countries which fails to implement these laws is Zimbabwe.<sup>41</sup> Njoku<sup>42</sup> further submits that little to no action

---

<sup>27</sup> *Children's Act* of 2001.

<sup>28</sup> *Community Service Orders Act* no 10 of 1998.

<sup>29</sup> *Borstal Institutions Act*.

<sup>30</sup> *Constitution of Zambia (Amendment)* no 2 of 2016.

<sup>31</sup> *Criminal Procedure Code Act*.

<sup>32</sup> *Juveniles Act* 3 of 2011.

<sup>33</sup> *Penal Code (Amendment) Act* 15 of 2005.

<sup>34</sup> *Probation of Offenders (Amendment) Act* no 14 of 2022.

<sup>35</sup> *Constitution of Zimbabwe Amendment (no 20) Act*, 2013.

<sup>36</sup> *Children's Act* (Chapter 5:06) of 2001.

<sup>37</sup> *Criminal Law (Codification and Reform) Act* (Chapter 9:23) of 2005.

<sup>38</sup> *Criminal Procedure and Evidence Act* (chapter 9:07) as amended in 2016.

<sup>39</sup> Njoku 2014 [www.dailytrust.com.ng](http://www.dailytrust.com.ng).

<sup>40</sup> Njoku 2014 [www.dailytrust.com.ng](http://www.dailytrust.com.ng).

<sup>41</sup> Ruparaganda and Ruparaganda 2016 *AJSW* 7-13.

<sup>42</sup> Njoku 2014 [www.dailytrust.com.ng](http://www.dailytrust.com.ng).

is being taken by some African countries such as Zimbabwe to realise the purpose of international laws in relation to children in conflict with the law. This means that most of the countries are simply enacting legislation which serves no purpose because the laws are not being implemented. These countries are enacting national laws giving effect to their international duties but there is a shortfall in applying the national laws. Mensa-Bonsu<sup>43</sup> submits that the approach to combatting youth crimes fails to protect the rights of the youth who find themselves in conflict with the laws. Vengesai,<sup>44</sup> for instance, asserts that juvenile offenders in Zimbabwe are being detained for longer than what is stipulated under both national and international laws. This means that the approach taken to curb youth crimes is failing short of being successful since, the focus is placed on curbing the youth crimes and not on the protection of the right of the young offenders. There is, therefore, a need to come up with new ways in which the protection of the rights of juvenile offenders is prioritized alongside curbing the frequency at which youth crimes occur.

It is therefore submitted that the implementation of both international and domestic laws by South Africa, Zimbabwe, Zambia and Kenya falls short of serving its purpose, which is to make provision for the protection of the rights of children in conflict with the law. This will be analysed and it will show that most juvenile offenders in countries like Zimbabwe, are ill-informed about their rights and fall victim to exploitation whenever they are in conflict with the law. It is, therefore, important to carry out a comparative study of the functionality of the juvenile legal system in South Africa, Zimbabwe, Zambia, and Kenya. The reason why these countries have been selected for such a study will be addressed below. This analysis will examine whether the said countries are adhering to international laws that seek to preserve the rights of young offenders in both practice and law.<sup>45</sup> The research will also show the formal acceptance of the abovementioned international laws through the domestication of international laws by South Africa, Kenya, Zimbabwe, and Zambia. The research will also point out additional approaches that can be taken to deal with children in conflict with the law

---

<sup>43</sup> Mensa-Bonsu 1995 *Human Rights and the Juvenile Justice System – the Ghanaian Experience* 321-347.

<sup>44</sup> Vengesai *Juvenile Justice in Zimbabwe* 33-43.

<sup>45</sup> This will be discussed in chapter 3.

in the selected African countries in order to realise the international goal of protecting and safeguarding children in conflict with the law.

*1.1.2. Motivations that drove the elected African countries to adopt international laws*

This research will examine the possible motivations that led the selected African countries to adhere to the international laws and to enact domestic laws to safeguard the rights of juvenile offenders. Goldson *et al*<sup>46</sup> argue that conducting research such as this facilitates a debate on the structure, politics, culture, and dynamics within which policies and justice systems are constructed. Goldson *et al*<sup>47</sup> further assert that such research paves the way for countries to reassess issues pertaining to juvenile offenders through the provision of comparative and comprehensive insight into the matters concerned. This study will thus, make provision for a comparative insight into the aforementioned selected African countries.

South Africa and Kenya are in the top ten countries in Africa that have the best juvenile system and for that reason, these two countries have been selected to pursue the purpose of this research.<sup>48</sup> The Internal Panel on Juvenile Justice system within the office of the United Nations,<sup>49</sup> states that the evaluation criteria for the best juvenile system include the following: efficiency of the system, effectiveness, impact, sustainability and relevancy of the system's policies and objectives. Hence, part of this study will conduct research on how the two countries improved their juvenile systems, since it can be submitted that they are two of the countries whose justice system has progressed in a better direction in the post-colonial era as opposed to fellow African countries like Zimbabwe.<sup>50</sup>

Zambia was chosen to be part of the research because it is one of the countries where

---

<sup>46</sup> Goldson and Muncie 2006 *YJIJ* 91-106.

<sup>47</sup> Goldson and Muncie 2006 *YJIJ* 91-106.

<sup>48</sup> Child Right International Network 'date unknown' <http://archive.crin.org/en/access-justice-children-global-ranking.html>.

<sup>49</sup>Internal Panel on Juvenile Justice UN 2010 [http://www.unodoc.org/pdf/criminal\\_justice/Criteria\\_for\\_the\\_Design\\_and\\_Evaluation\\_of\\_Juvenile\\_Justice\\_Reform\\_Programmes.pdf](http://www.unodoc.org/pdf/criminal_justice/Criteria_for_the_Design_and_Evaluation_of_Juvenile_Justice_Reform_Programmes.pdf).

<sup>50</sup> Child Right International Network 'date unknown' <http://archive.crin.org/en/access-justice-children-global-ranking.html>.

customary laws still play a crucial role in the juvenile justice system.<sup>51</sup> It is important to do research on Zambia's juvenile system since it is one of the African countries still applying customary laws and traditional punishment as opposed to the standardised international laws as they pertain to children in conflict with the law. Ruparaganda<sup>52</sup> argues that Zimbabwe's juvenile justice system is retributive and focused on punishing the juvenile or young offender but has been going through a reform phase and for that reason Zimbabwe has been selected to be part of the current research. The reform phase entails bringing about changes to the manner in which juvenile offenders are treated in Zimbabwe, including the realization of their rights and implementation of such rights. It is submitted that although there are some attempts to reform the juvenile justice system in Zimbabwe, it remains one of the countries that has not made any significant changes, seeing that it has failed to apply its national laws that make provision for the protection of child offenders.<sup>53</sup> This research draws on literature written post the colonial era as a guide to assessing the influence that colonialism had on the selected African countries and to examining the extent to which the ratification of international laws has impacted the juvenile justice systems in the four selected countries. This research will also shed light on the customary laws that still play a crucial role in the juvenile justice system in the selected African countries.

## 1.2. *Motivation or Rationale for study*

Since the domestication of international laws addressed above by African countries, it has become necessary to investigate and indicate how the selected African countries have progressed or regressed on matters affecting child offenders. In order to avoid the catastrophic effects of juvenile justice, it is crucial to address injustice stressors. These injustice stressors will form part of chapter three and four's discussion. The taking into effect of aforementioned international laws, was a security measure introduced to protect the privileges and rights of child offenders. However, as pointed out above, countries like Zimbabwe have not effectively implemented these laws.<sup>54</sup> As a result, the purpose of enacting these laws has not yet been fully recognized in some

---

<sup>51</sup> Section 1 of the *Juveniles Act* 3 of 2011.

<sup>52</sup> Ruparaganda and Ruparaganda2016 *AJSW* 7-13.

<sup>53</sup> Ruparaganda and Ruparaganda2016 *AJSW* 7-13.

<sup>54</sup> Ruparaganda and Ruparaganda2016 *AJSW* 7-13.

African countries. For instance, article 40 of the *United Nations Convention on the Rights of the Child*<sup>55</sup> makes provision for the right to access education by child offenders regardless of them being deprived of their liberty due to detainment. Vengesai<sup>56</sup>, however asserts that in Zimbabwe, this right is not being realised given that there is only one juvenile prison namely Khami Medium that offers four years of secondary education; as a result, most child offenders do not have access to education if detained elsewhere.

A comparative study of the rights of child offenders in Africa has received little to no attention, hence there is a need for such research to be conducted. As Odongo<sup>57</sup> states, there is a disconnection between the enactment of national laws that protect child offenders and the application of such laws thereof. Mensah- Bonsu<sup>58</sup> is of the view that welfare and justice approaches (for example detainment of juvenile offenders) to combating youth crimes have fallen short of protecting the rights of the children who find themselves in conflict with the law. Freeman<sup>59</sup> on the other hand, perceives that the domestication of international laws has had a huge impact on the manner in which laws are enforced in light of the preservation of the rights of the children who are in conflict with the law. Hence, this research is aimed at assessing the results of the domestication of international laws by the selected African countries.

In addition, there is a need for such research in order to address the root cause of the failure to implement enacted laws by some countries in Africa and to see how the gap between the enactment of laws and the implementation thereof can be filled. It is also necessary to consider why Zambia has opted to keep to its customary laws when dealing with children in conflict with the law, with the possible benefits of applying customary laws when dealing with child offenders instead of international laws. In addition, the failure by Zimbabwe to implement international laws that preserves the rights of child offenders is worth investigating. In this manner of investigating the said issue, the research will shed more light on the current state of the juvenile justice

---

<sup>55</sup> A 40 of the *United Nations Convention on the Rights of the Child* (1989).

<sup>56</sup> Vengesai *Juvenile Justice in Zimbabwe* 33-43.

<sup>57</sup> Odongo G 'Kenya' 29-43.

<sup>58</sup> Mensa-Bonsu 1995 *Human Rights and the Juvenile Justice System – the Ghanaian Experience* 321-347.

<sup>59</sup> Freeman *Children's Rights Ten Years After Ratification* 97-120.

system in Zimbabwe, see whether there is a need for intervention through international laws, and assess whether the rights of child offenders are in fact being preserved through the application of domestic laws or other means.

Research into the ratification of international laws pertaining to children in conflict with the law by Kenya, Zimbabwe, South Africa, and Zambia will help to foster an understanding of the possible motivation behind the ratification. In addition, the research will help bring to light the consequences of formally accepting international laws related to the administration of juvenile justice in Africa. The research will also shed light on possible alternative approaches that may be taken when professionals are dealing with child offenders. Moreover, the research will encourage a debate on the dynamics within which juvenile justice and systems are constructed and allow society to think deeply about issues that are related to child offenders through comparative insights.

The purpose of this dissertation is to determine to what extent South Africa, Kenya, Zimbabwe and Zambia do adhere to international laws protecting the right of child offenders in pursuit of juvenile justice. The main aim of this research is to ascertain the extent to which international laws have been domesticated in South Africa, Kenya, Zambia, and Zimbabwe in light of addressing the issue of protection of child offenders in pursuit of juvenile justice. Secondary objectives were also identified in order to achieve the main objectives, and these are:

- i. to provide a theoretical analysis of international laws in relation to child offenders, their purposes and aims,
- ii. to independently investigate the juvenile justice of the four countries independently,
- iii. to provide an in-depth discussion of juvenile justice system in the selected four African countries.
- iv. To determine the extent of implementation of international laws affecting child offenders, and
- v. to raise awareness on measures that can be taken protect children in conflict with the law.

### *1.3. Premises, assumptions, and hypothesis*

### 1.3.1. Premises

The contemporary juvenile justice system seems to operate under the premise that juveniles are different from adults and require unique treatment and attention.<sup>60</sup> The present juvenile justice system is premised on the belief that since juvenile offenders are young there is a greater chance for them to be rehabilitated.<sup>61</sup> As a result, the juvenile justice systems in Africa appear to operate under the premise that public safety is effected through the emphasis on rehabilitation instead of incapacitation and punishment of juveniles. Unfortunately, in some countries, the sensationalistic role of the media in exposing juvenile crimes has led to the implementation of tougher laws targeted at juvenile offenders and this can be attributed to factors that prevent countries like Zimbabwe from progressing in terms of its handling of juvenile offenders.

Burke *et al*<sup>62</sup> is of the view that, some hundred years back, the youth were treated just the same as adult offenders and were considered capable of appreciating their actions and the consequences thereof. Burke *et al*<sup>63</sup> adds that recent research, however, has proven that there is a need to treat juveniles differently from adults simply because juveniles are different. Burke *et al*<sup>64</sup> goes on to state that the section of the brain that governs the characteristics associated with moral culpability only cease to mature when a person reaches his or her early twenties. Although the research conducted by Burke *et al* was centred on American Criminal Justice, it is also relevant to this research, given that it brings out the distinction between adults and juveniles irrespective of geographical constraints. It seeks to demonstrate why a distinction should be drawn regarding the treatment rendered to adult and juvenile offenders. Consequently, it is submitted that the brains of the young offenders are underdeveloped as compared to those of adult offenders.

With that in mind, juvenile justice operates under the premise that there should be differentiation of treatment between a young and an adult offender. In Africa, juvenile

---

<sup>60</sup> Burke *et al* *Introduction to the American Criminal Justice System* 390-391.

<sup>61</sup> Burke *et al* *Introduction to the American Criminal Justice System* 390-391.

<sup>62</sup> Burke *et al* *Introduction to the American Criminal Justice System* 390-391.

<sup>63</sup> Burke *et al* *Introduction to the American Criminal Justice System* 390-391.

<sup>64</sup> Burke *et al* *Introduction to the American Criminal Justice System* 390-391.

justice is operating under the same premise. However, some African countries are still failing to implement legislation that calls for such differentiation in treatment. Not all countries are failing to do so though. If one takes a look at South Africa, it can be argued that it has made huge progress in its juvenile justice system because of the appreciation that young offenders are different from adult offenders.

### 1.3.2. Assumptions

The justice system as it pertains to young offenders operates under assumptions about the welfare of the children, which are in most cases based on scientific knowledge and carries authority from both the law and science. Hackler<sup>65</sup> asserts that the basic assumption which led to a distinct justice system for young as opposed to adult offenders was the following: that children ought to be seen as different from adults as they are less mature and therefore there is less culpability and intent in their commission of a crime. The assumption concerning the juvenile justice system is thus drawn from science and law. In most instances, Hackler<sup>66</sup> is of the view that juvenile justice operates under the assumption that when dealing with a young offender one must look at mitigating circumstances, as they play a huge role in the way in which the offender behaved or what led to an offence being committed. Hackler<sup>67</sup> adds that another assumption is that a judge must be kept in the dark about a youth's background until a point when such a youth has been found guilty of committing a crime. This means that in dealing with a juvenile, there is an assumption that he or she committed a crime because of the situation that he or she was in, and that to avoid a biased decision by a judge, the judge must not be informed about the background of the young offender in court. Due to these assumptions, the justice system in Africa is assumed to be more lenient to young offenders as opposed to adult offenders. However, this research will provide a comparison of the lenient attitude towards young offenders in the selected countries and will seek to shed light on whether such leniency is just theory or is being applied in practice too.

---

<sup>65</sup> Hackler 1990 CA 7-8.

<sup>66</sup> Hackler 1990 CA 7-8.

<sup>67</sup> Hackler 1990 CA 7-8.

To sum it up, the following are assumption on which juvenile justice operates:

- i. Science (brings to light the fact that children's brains are underdeveloped as compared to adult offenders) and that young offenders cannot fully comprehend their criminal capacity in the same manner as adult offenders (law).
- ii. One must consider the mitigating circumstances. Mitigating circumstances play a huge role in assessing the events that led to the commission or omission of a crime. These mitigating circumstances includes but not limited to, poverty, lack of parental supervision, limited access to education, community violence and bullying.
- iii. Information pertaining to the background of a child offender must be withheld to avoid a biased judgement. This is crucial as it avoids the labelling of a juvenile offender and prevents stereotyping whilst in pursuit of juvenile justice. Withholding the background of a child offender places emphasis on the child's current behaviour, performance and needs and enables an objective assessment of the child's situation. It also encourages new beginnings and unbiased opportunities without prejudice or discrimination.

### 1.3.3. Hypothesis

It is submitted that the juvenile justice system in Africa has been Westernised in the sense that the same international laws that these countries should adhere to are westernised. It is submitted that most African countries have ratified the United Nations laws regarding juvenile justice and that ratification serves as evidence of their willingness to westernize the juvenile justice system and to adopt international laws. It is a submission that the ratification of international laws has led to changes in the operation of juvenile justice in Africa. Post the westernisation of the juvenile justice system, South Africa and Kenya have excelled in implementing international laws and this has seen the two countries doing well in their handling of young offenders. Although Zimbabwe has adopted international laws, the implementation of the laws is still slow-paced. Zambia on the other hand, still prefers to apply its customary laws when professionals are dealing with young offenders.

Overall, the adoption of international laws promotes juvenile justice. International laws provide a framework for the protection of not only children in general but also those in conflict with the law. As will be addressed below, international laws promote alternative measures to detention, rehabilitation and reintegration and prohibits torture and cruel treatment of children in conflict with the law.

#### **1.4. Research methodology**

This research is relevant to the Law Faculty's Research Unit, *Law, Justice, and Sustainability*, particularly the sub-projects of *Justice in Practice* and *Vulnerable Societies*. The proposed work centres on the rights of children in conflict with law and seeks to investigate flaws within the juvenile justice systems in Africa and steps that can be taken to mitigate the oppression of child offenders in countries like Zimbabwe. In addition, a comparison of different juvenile justice systems in Africa will bring to light how other countries can improve their own juvenile justice systems and why it is important to safeguard the rights of child offenders bearing in mind that they form part of the vulnerable people in society.

The research project is to be concluded through a comparative method. A comparison between the different juvenile justice systems in Africa will be conducted. A critical comparison will be made between the domestic laws of the selected four countries and their implementation of international laws in the quest to protect child offenders. As pointed out above, South Africa and Kenya are two countries in the top ten that have made huge progress in affording protection to child offenders. Zambia is said to be applying more of its customary laws than international laws, whilst Zimbabwe has made little progress in protecting the rights of child offenders.<sup>68</sup> As a result, it is important to compare the juvenile justice system of the four countries in order to determine the steps taken by countries like South Africa and Kenya to reach the point they are at right now and the reason why Zimbabwe and Zambia have shown little progress in implementing international laws.

---

<sup>68</sup> Rugaraganda and Rugaraganda2016 *AJSW* 7-13.

This research will start off by way of an introduction in chapter one which will consist of an introduction, background of the study, problem statement, aims and objectives, and the research question. In chapter two a review of International Laws relating to child offenders will take place. This chapter will address in detail some of the International Legal Framework that deals with the protection of the rights of children in conflict with the law. This will be followed by chapter three where the distinct juvenile justice systems as they pertain to South Africa, Kenya, Zambia and Zimbabwe will be addressed. Chapter four will consist of a comparative analysis of the juvenile justice systems in South Africa, Zimbabwe, Kenya, and Zambia. This chapter will be closely connected to the preceding chapters in the sense that the discussion in preceding chapters will shed light on the similarities and differences between the juvenile justice systems of the four selected countries; however, such similarities and differences will be given much greater consideration in this chapter. Chapter five will be the concluding chapter of this research and chapter will consist of a reflection on the discussion and formulation of the writer's opinion and recommendations on the issue.

## **Chapter 2 International law perspective on the rights of child offenders**

### **2.1. Introduction**

As a result of the exploitation and abuse of people by Nazi Germany during World War II, governments brought their heads together and formed the United Nations for the purpose of developing and protecting human rights.<sup>69</sup> However, less attention was given specifically to the rights of children until the intervention of the United Nations. Goldson and Kilkelly,<sup>70</sup> state that historically and contemporarily, there is evidence of the fact that children detained in prisons and other penal establishment often face human rights violations which includes but are not limited to abuse and violence. This brings to light the fact that children all around the world need to be protected regardless of their actions. Muncie<sup>71</sup> argues that, while most governments stand dedicatedly against child abuse and the exploitation of children, the same logic is not applied when these children are accused of committing crimes. This means that most of these governments do not put as much effort into protecting the rights of child offenders as they do in cases of child exploitation and abuse. Muncie,<sup>72</sup> further asserts that governments have shifted their focus from being custodians of the best interests of children to punishing and criminalising child offenders. Consequently, the government ends up punishing children and fails to consider their rights. This leaves room for the children in conflict with the law to be abused, tortured and given punitive punishments.<sup>73</sup>

An overview of the legal development of a juvenile justice system as it pertains to international law will thus be the starting point for this chapter's discussion. A framework for the administration of juvenile justice faces constant updates to cement gaps within the juvenile justice system. Hence, the development of international laws will bring to light what instigated the concept of juvenile justice and where juvenile justice stands today, including updates thereof. It is important to note that the discussion of this chapter stems from international legal instruments and that only the parts that address children in conflict with the law will form part of the discussion.

---

<sup>69</sup> Goldson and Kilkelly 2013 *IJCR* 35-71.

<sup>70</sup> Goldson and Kilkelly 2013 *IJCR* 35-71.

<sup>71</sup> Muncie 2005 *TC* 35-64.

<sup>72</sup> Muncie 2005 *TC* 35-64.

<sup>73</sup> Muncie 2005 *TC* 35-64.

International instruments that have brought major changes to the administration of juvenile justice will be the subject of attention in this chapter.

## **2.2. The legal development of juvenile justice in international law**

### *2.2.1. The Beijing Rules*

The needs and gaps in addressing issues pertaining to juvenile justice sparked the first step taken by the United Nations to develop a framework in international law targeted at juvenile justice namely the *Beijing Rules* in 1985. The *United General Assembly worked on the United Nations Standard Minimum Rules for the Administration of Justice (Beijing Rules)*,<sup>74</sup> as a guideline to member states on juvenile justice when developing or reviewing international legislation. Goldson and Muncie<sup>75</sup> asserts that the *Beijing Rules* introduced a distinction between the juvenile justice system and the adult justice system. This implies that before the *Beijing Rules* came into effect, children in conflict with the law were treated in the same manner as adult offenders. According to Kethineni,<sup>76</sup> the *Beijing Rules* stand as a model and guideline for the operation of juvenile justice when professionals carry out investigations and prosecute children in conflict with the law, adjudicate juvenile court cases, and deal with children in conflict with the law regardless of them being institutionalised. With the introduction of the *Beijing Rules*, professionals dealing with children in conflict with the law had to follow certain procedures from the beginning of a case until its conclusion.

It is contained in article 1 of the *Beijing Rules*<sup>77</sup> that State Parties should promote the well-being of a juvenile and that juvenile justice should be seen as an integral part of the development of a nation. This is an implication that a well-founded policy for juvenile justice administration should be developed by all member states. The *Beijing Rules* in article 2<sup>78</sup> further provide that effort should be put into the formulation of

---

<sup>74</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules 1985)*.

<sup>75</sup> Goldson and Muncie 2012 *IJLCJ* 47-70.

<sup>76</sup> Kethineni *International Handbook of Juvenile Justice* 173-175.

<sup>77</sup> Article 1 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules 1985)*.

<sup>78</sup> Article 2 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules 1985)*.

legal instruments specifically applicable to juvenile offenders and all bodies responsible for the administration of justice. This rule burdens Member States with the task to formulate legislation that specifically deals with children in conflict with the law. In addition, article 5 of the *Beijing Rules*<sup>79</sup> states that the aim is to promote the well-being of a juvenile offender and includes the notion of proportionality. As a result, when a juvenile is in conflict with the law, the personal circumstances of the offender, the offence as well as the well-being of the juvenile should be given due consideration.<sup>80</sup>

Moreover, article 7 of the *Beijing Rules*<sup>81</sup> contains the rights of a juvenile offender such as the right to be presumed innocent until proven guilty, the right to remain silent, the right to counsel, and the right to the presence of a parent or guardian, amongst others. The inclusion of these rights place emphasis on the importance of a fair trial and sets out the minimum standards of care that should be given to all children in conflict with the law. Article 8 of the *Beijing Rules*<sup>82</sup> states that children in conflict with the law should be protected from undue publicity. In conformity with this is article 21 of the *Beijing Rules*,<sup>83</sup> which makes provision for the rights of juvenile offenders to have their records kept confidential and for third parties to not have access to these records. Criminal proceedings and their records are often public serve for exceptional circumstances. Hence, these two articles are of paramount importance as they protect a child offender from being victimised and from negative effects that may arise because of publicity.

Warner *et al*<sup>84</sup> state that, prior to the formulation and development of international legislation dealing specifically with child offenders, the theories of traditional justice were put in place, and these are: deterrence, retribution, and rehabilitation, to mention

---

<sup>79</sup> Article 5 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>80</sup> Article 5 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>81</sup> Article 7 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>82</sup> Article 8 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>83</sup> Article 21 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>84</sup> Warner *et al* 2019 CCJ 27.

just a few. Sloth-Nielsen,<sup>85</sup> who affirms these traditional theories, is of the view that since 1989, these traditional theories of juvenile justice had to align with contemporary legislation. It is therefore important to take note of how these theories have been included in contemporary international laws. For instance, article 13<sup>86</sup> read along with article 7 of the *Beijing Rules*<sup>87</sup> draws attention to alternative measures that can be put in place instead of detaining juvenile offenders. Some of the alternative measures that can be taken are stated in article 18 of the *Beijing Rules*<sup>88</sup> which includes community service, probation, and counselling, among others. These alternative measures enumerate steps that assist in facilitating social rehabilitation, deterrence and re-integration of juvenile offenders into the community.<sup>89</sup>

In addition, article 10 of the *Beijing Rules*<sup>90</sup> contains the idea that contact between a juvenile offender and law enforcement officer shall take place in a manner that not only promotes the well-being of the juvenile but will also avoid harm befalling the child offender. This implies that there must be procedures in place that law enforcement agencies must heed when dealing with a child in conflict with the law. When dealing with children, one must exercise patience and show compassion towards the child. Hence, it is crucial for law enforcement officials to deal with a juvenile offender in such a manner that the child is not harmed in any way. Article 11 of the *Beijing Rules*<sup>91</sup> stresses that when dealing with a juvenile in conflict with the law, State Members should give due consideration to the principle of diversion. This principle entails consideration of viable alternatives to juvenile justice without resorting to criminal proceedings in a court of law.<sup>92</sup> This principle serves to hinder the negative impact that criminal proceedings can have on a juvenile offender, for instance the stigma

---

<sup>85</sup> Sloth-Nielsen *LDD* 50-70.

<sup>86</sup> Article 13 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>87</sup> Article 17 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>88</sup> Article 18 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>89</sup> Sloth-Nielsen *LDD* 50-70.

<sup>90</sup> Article 10 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>91</sup> Article 11 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>92</sup> Article 11 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

associated with an arrest, court proceedings and a conviction.

It is contained in article 15 of the *Beijing Rules*<sup>93</sup> that a child accused of committing a crime has a right to legal counsel and if the child cannot afford one, the State must make one available; and to have the parents or guardians present and participate in the proceedings. It is submitted that there is no doubt that while the right to legal counsel provides assurance that the juvenile understands the legality of the proceeding, having a parent or guardian present during the proceedings gives assurance to the child that he or she have emotional support. However, this right is not absolute, as article 15 of the *Beijing Rules*<sup>94</sup> states that parents and guardians may be denied participation during proceedings by the authority if compelling reasons exist. Hence, the right to have a parent or guardian present during proceedings may be thwarted if it serves to be in the best interests of the child.

Article 16 of the *Beijing Rules*<sup>95</sup> is of great importance as it states that in all cases excluding those where minor offences have been committed, before authorities take a final decision; such an authority must consider the following: the background and circumstances that the child is living in and the circumstances under which the crime was committed. This rule strikes a balance between upholding the laws of a State and the promotion of adequate social services. One can, therefore, conclude that the formulation of the *Beijing Rules* was a very important first step towards the full realisation of children's rights and the protection of the rights of children in conflict with the law.

### *2.2.2. The United Nations Convention on the Rights of the Child*

After the adoption of the *Beijing Rules*, the *United Nations Convention on the Rights of the Child*<sup>96</sup> (hereinafter *CRC*) was passed in 1989 and it makes provision for the

---

<sup>93</sup> Article 15 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>94</sup> Article 15 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>95</sup> Article 16 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>96</sup> *United Nation Convention on the Rights of Child* (1989) hereinafter *CRC*.

rights of children in all areas. According to the Council of Europe Portal,<sup>97</sup> the *CRC* has been ratified by every country in the world except for one,<sup>98</sup> and it incorporates all types of children's rights into one single document. The fact that almost every country in the world chose to ratify the *CRC*, shows its force and the realisation that children are vulnerable, and rights awarded to them must be explicitly stated, recognised and protected to curb violation and abuse of children. In charge of monitoring the implementation of the *CRC* is the United Nations Committee on the Rights of the Child.<sup>99</sup> Kilkelly<sup>100</sup> states that the passing of the general comments makes provision for comprehensive and detailed guidance on systemic measures that must be taken to guarantee that juvenile justice is administered in line with the rights that children possess.

To start with, article 37<sup>101</sup> read along with article 47 of the *CRC*<sup>102</sup> states the following with regard to children accused of committing a crime: that every child who is accused of committing a crime should be presumed to be innocent until proven guilty; have a right to legal assistance; not be compelled to give a testimony or to make any confession; to have his or her right to privacy fully respected; no child below the age of 18 can be sentenced to death nor a life sentence without the possibility of release and every child has a right to be dealt with in a manner appropriate to the child's age, well-being and circumstances. This means that all the countries that ratified the *CRC* are compelled to enforce the rights mentioned above when dealing with a child in conflict with the law. One cannot, therefore, ignore the fact that due process in the administration of juvenile justice is expected from all the countries that ratified the *CRC*. Article 31 of the *CRC*<sup>103</sup> states that the best interests of a child should be upheld in all matters concerning a child. The implication thereof, is that regardless of what a child is accused of doing, all professionals dealing with a child in conflict with the law must be aware that the best interests of a child may trump whatever offence the child

---

<sup>97</sup> Council of Europe "date unknown" <https://www.coe.int/en/web/compass/convention-on-the-rights-of-the-child>.

<sup>98</sup> United States of America is the only country has not yet ratified the *CRC*.

<sup>99</sup> Paragraph 1 of the *United Nation Convention on the Rights of Child* (1989).

<sup>100</sup> Kilkelly 2018 *YJ* 180-200.

<sup>101</sup> Article 37 of the *United Nation Convention on the Rights of Child* (1989).

<sup>102</sup> Article 47 of the *United Nation Convention on the Rights of Child* (1989).

<sup>103</sup> Article 31 of the *United Nation Convention on the Rights of Child* (1989).

is accused of committing.

### 2.2.3. *The African Charter on the Rights and Welfare of the Child*

In the African region, which is the focus of this research, the *African Charter on the Rights and Welfare of the Child* (1989) (hereinafter *ACRWC*)<sup>104</sup> was developed a year after the *CRC* was adopted and serves the purpose of providing for and maintaining of children's rights. Kaime<sup>105</sup> argues that the *ACRWC* was formulated to cater for the needs of children in Africa which were not properly addressed in the view of the drafters. Lloyd<sup>106</sup> is of the opinion that, since the *CRC* was drafted in the absence of most African countries, it was only necessary and important for the *ACRWC* to be passed and enforced. The *CRC* and *ACRWC* are the two legal instruments that addresses the whole spectrum of the economic, political, civil, social and cultural rights of children. The two international legal instruments aim to protect and to promote the well-being and the rights of children. Lloyd<sup>107</sup> further holds that certain problems that children face is restricted to certain jurisdictions; for that reason African countries had to draft a legal instrument that caters for problems faced by children who are specifically in Africa. The implementation of this instrument shows a quest by African countries to preserve the rights of children and to curb the abuse and violation of children's right in Africa. The *ACRWC* echoes and affirms most of the provisions in the *CRC*. For instance, the *ACRWC* reinforces the concept that the best interests of a child should always be upheld,<sup>108</sup> and the death penalty should not be imposed on a child found guilty of committing a crime,<sup>109</sup> amongst others. These provisions do not only preserve the life of juvenile offenders, but they also echo the importance of considering their best interests. However, scholars like Kaime<sup>110</sup> are of the opinion that even though there are striking similarities between the *CRC* and the *ACRWC*, the latter offers greater protection for children than the former.

---

<sup>104</sup> *African Charter on the Rights and Welfare of the Child* (1990) hereinafter *ACRWC*.

<sup>105</sup> Kaime *The African Charter on the Right and Welfare of a Child – A Socio-Legal Perspective* 36.

<sup>106</sup> Lloyd 2002 *AHRLJ* 14.

<sup>107</sup> Lloyd 2002 *AHRLJ* 14.

<sup>108</sup> Article 4 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>109</sup> Article 5 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>110</sup> Kaime *The African Charter on the Right and Welfare of a Child – A Socio-Legal Perspective* 36.

Article 16 of the *ACRWC*,<sup>111</sup> condemns all forms of child abuse and in addition, article 17 of the *ACRWC*,<sup>112</sup> states that every child in conflict with the law has a right to special treatment that is in line with such a child's sense of dignity and worth. This means that not only should children be treated with respect, but they also deserve special treatment not awarded to adult offenders. The provision of article 16 of the *ACRWC*,<sup>113</sup> thus, implores the State Parties to take the necessary steps to condemn the abuse of children. This provision also brings to light the fact that children and adults are not equal and in cases involving children, their rights must be given due consideration.

The *ACRWC* states in article 17 that,<sup>114</sup> all the State Parties should ensure that: children detained or imprisoned shall not be tortured or subjected to inhumane or degrading treatment; children should be separated from adults in detainment or prison facilities; children in conflict with the law should be presumed to be innocent until they are proven guilty; children should be made aware of the charges against them in a language that they understand and alternatively an interpreter for them should be provided; children in conflict with the law have a right not only to legal assistance but other forms of assistance they may require, matters involving children should be resolved speedily; the public and press should be prohibited from attending court proceedings in cases where children are being accused of committing a crime; every member state should set the minimum age of criminal capacity and lastly; the aim of punishing a child should be to re-integrate the child into his or her family, to reform the child and to facilitate social rehabilitation.

As mentioned above, child offenders were previously treated the same as adult offenders and that made them more vulnerable to abuse, especially in holding facilities.<sup>115</sup> This resulted in children being tortured and exploited.<sup>116</sup> Formulation and passing of laws such as this, highlighted the fact that children should be separated from adult offenders and that a separate body of laws should apply to children in conflict with the law. This provision is also aimed at the prohibition against any form

---

<sup>111</sup> Article 16 *African Charter on the Rights and Welfare of the Child* (1990).

<sup>112</sup> Article 17 *African Charter on the Rights and Welfare of the Child* (1990).

<sup>113</sup> Article 16 *African Charter on the Rights and Welfare of the Child* (1990).

<sup>114</sup> Article 17 *African Charter on the Rights and Welfare of the Child* (1990).

<sup>115</sup> Goldson and Kilkelly 2013 *IJCR* 35-71.

<sup>116</sup> Goldson and Kilkelly 2013 *IJCR* 35-71.

of malicious treatment that diminishes the dignity and worthiness of children. This article also shows that the main aim of the *ACRWC* is to facilitate reformation, social rehabilitation and re-integration of the child into the family. This aim is an important shift from the traditional punishment of children to reformation of children. As discussed above,<sup>117</sup> the implementation of instruments dealing with children in conflict with the law, most children were detained and imprisoned in the same facility as adults. However, the implementation of the *ACRWC*,<sup>118</sup> made it clear that for a sound administration of juvenile justice, it is only fair that juvenile offenders be handled and kept separate from adult offenders. Allowing children to have their own detention and prison facilities makes them less vulnerable to abuse whilst in general detention and prison facilities.

#### *2.2.4. The United Nations Guideline for the Prevention of Juvenile Delinquency*

In 1990, the *United Nations Guideline for the Prevention of Juvenile Delinquency*<sup>119</sup> (hereinafter referred to as the *Riyadh Guidelines*) was adopted. The *Riyadh Guidelines*<sup>120</sup> were implemented to tackle problems associated with juvenile delinquency. As stated in article 2 of the *Riyadh Guidelines*,<sup>121</sup> the successful prevention of juvenile delinquency requires great efforts from the society. According to paragraph I of the *Riyadh Guidelines*,<sup>122</sup> emphasis should not be placed on criminalising children who commit minor offences, instead member states should focus on a detailed strategy for the prevention of juvenile delinquency. Article 5 of the *Riyadh Guidelines*<sup>123</sup> maintains that there is a need for Member States to develop policies that deal with the prevention of juvenile delinquency, and such policies should involve measures such as the provision of opportunities that meet the development needs of young persons; and philosophies and approaches for juvenile delinquency; amongst others.

---

<sup>117</sup> See 1.1.

<sup>118</sup> *African Charter on the Rights and Welfare of the Child* (1990).

<sup>119</sup> *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990. Hereinafter *Riyadh Guidelines*.

<sup>120</sup> Paragraph 1 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>121</sup> Article 2 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>122</sup> Paragraph I of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>123</sup> Article 5 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

Article 9 of the *Riyadh Guidelines*<sup>124</sup> states that Member States should formulate detailed prevention plans that includes an in-depth analysis of the problem, methods for effectively reducing juvenile delinquency, and involvement of the community in a wide range of programs. There is no doubt that if the State develops such plans, the number of young people committing crimes before they attain the age of majority will significantly reduce. Such plans are also of great importance as they not only educate society on juvenile delinquency and its effects but encourage society to participate in programs that help young persons to be custodians of the law.

In addition, the *Riyadh Guidelines*<sup>125</sup> acknowledges the role a family plays in preventing juvenile delinquency and the importance thereof. The *Riyadh Guidelines* in articles 11-19<sup>126</sup> encourages Member States to focus on developing policies that assist in creating stable families. These articles state that where a family, for some reason, fails to be stable and there is a need for a child to be removed from the care of their parents or relatives, such child should for instance be placed in the foster care system.<sup>127</sup> This is important as it encourages the creation of a conducive environment for the development and growth of young persons. The aforementioned articles in the *Riyadh Guidelines*<sup>128</sup> also encourage Member States to educate the society on parental duties in relation to child development, among others. Article 18 of the *Riyadh Guidelines*<sup>129</sup> also emphasise the need to acknowledge the future responsibilities, role, partnership as well as participation of the young persons in the society. The *Riyadh Guidelines* thus acknowledges that to tackle the problem of juvenile delinquency, focus should be given to the family as it plays a major role in the development of a child. Educating society on parental roles and responsibilities is very important because family members will, in turn, educate young persons on why it is important for them to refrain from committing crime. Furthermore, involving the family in plans to prevent juvenile delinquency promotes the well-being of a child as family members are sensitised to the problems that usually befall children and measures, they can take to prevent such

---

<sup>124</sup> Article 9 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>125</sup> Paragraph A of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>126</sup> Article 114-119 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>127</sup> Article 114-119 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>128</sup> Article 114-119 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>129</sup> Article 18 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

problems.

Paragraph B of the *Riyadh Guidelines*<sup>130</sup> focuses on education and its importance in the development of a child. Article 20 of the *Riyadh Guidelines*<sup>131</sup> obliges the State Members to make public education accessible to every young person. In article 21 of the *Riyadh Guidelines*<sup>132</sup> Member States are encouraged to take a step further in not only focusing on academic and vocational training activities but to also paying attention to aspects such as the promotion and development of talent and undertaking programs that foster young persons with a sense of identity, among others. The *Riyadh Guidelines* in article 24<sup>133</sup> and article 25<sup>134</sup> further encourage State Members to formulate curricula for young persons who are at social risk and to formulate detailed policies and strategies for the prevention of drug, alcohol and substance abuse, amongst others. It is also important for young persons to be involved in activities that shun the committing of crimes. Hence, in article 29 of the *Riyadh Guidelines*,<sup>135</sup> Member States together with the co-operation of community groups are encouraged to develop and establish extra-mural activities for young persons. The creation of extra-mural activities for children drives the attention of young person's away from committing crimes and towards participation in activities that fit in with their interests.

The *Riyadh Guidelines*<sup>136</sup> also encourages media houses to publish and broadcast positive contributions made by young persons in the society. One cannot ignore the role of the media houses and their impact on young children. Hence, publishing positive content about contributions made by young children will encourage other children to follow in the footsteps of those depicted in these broadcasts. The *Riyadh Guidelines*<sup>137</sup> further provide that media houses should minimise the broadcasting and publishing of content and material that can lead to the exploitation of children and that are harmful to children. The media have a huge influence on society; hence if the broadcasting and publishing of material that can be harmful to children is minimised, this step will

---

<sup>130</sup> Paragraph B of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>131</sup> Article 20 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>132</sup> Article 21 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>133</sup> Article 24 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>134</sup> Article 25 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>135</sup> Article 29 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>136</sup> Article 41 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

<sup>137</sup> Article 43 of the *United Nations Guideline for the Prevention of Juvenile Delinquency* 1990.

aid in minimising juvenile delinquency and exploitation of children.

It is submitted that the development and formulation of the *Riyadh Guidelines* played a major role in assisting Member States with the prevention of juvenile delinquency. The focus of the *Riyadh Guidelines*, as shown above, was not on the rights of the child but on how the child can be prevented from committing crimes. The *Riyadh Guidelines* are important as they assist Member States with some measures that they can put in place to avoid juvenile delinquency. Although not all the provisions of the *Riyadh Guidelines* were exhausted in the above discussion, it is important to acknowledge that from the few elements discussed above, if all Member States were to follow them, there would be a decrease in juvenile delinquency.

#### *2.2.5. The United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules)*

In 1991, the United Nations passed the *United Nations Rules for the Protection of Juvenile Deprived of their Liberty* (hereinafter referred to as the *Havana Rules*).<sup>138</sup> Goldson and Kilkelly<sup>139</sup> state that the *Havana Rules* were put in place in order to address the social integration of children in conflict with the law. They further state that the main focus of these rules is to proclaim that the deprivation of freedom should be regarded as the last resort, and one must also consider the minimum time allowed for the deprivation of freedom.<sup>140</sup> Article 1 of the *Havana Rules*<sup>141</sup> states that an ideal juvenile justice system should uphold the rights and safety of juveniles. It also goes on to state that an ideal juvenile justice system should promote the physical and mental well-being of juveniles.<sup>142</sup> This article thus stresses the point that it is fundamental for Member States to create a juvenile justice system that not only safeguards and protects children physically but mentally, too. The purpose of the *Havana Rules* is to establish the minimum standard of protection of juveniles who have

---

<sup>138</sup> *United Nations Rules for the Protection of Juvenile Deprived of their Liberty* 1991. Hereinafter referred to as the *Havana Rules*.

<sup>139</sup> Goldson and Kilkelly 2013 *IJCR* 35-71.

<sup>140</sup> Goldson and Kilkelly 2013 *IJCR* 35-71.

<sup>141</sup> Article 1 of *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules)* 1991.

<sup>142</sup> Article 1 of *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules)* 1991.

been deprived of their liberty, that is in conformity with human rights, freedom and not detrimental to juveniles.<sup>143</sup> Hence, the *Havana Rules* were put in place to bring to light how children deprived of their liberty should be treated.

The *Havana Rules*<sup>144</sup> discuss how children under arrest or awaiting trial should be processed in the system. For instance, in article 18 of the *Havana Rules*<sup>145</sup> it is held that certain conditions like the right to legal counsel, the granting of opportunities to work or attend educational classes, the receipt and retention of materials for their leisure and entertainment among others, should be put in place. This is an indication that even when a child who is in conflict with the law has been deprived of his or her liberty, such a child should retain freedom to a certain degree, for instance, by being involved in routines that a child who is not in detention has, for instance having an opportunity to go to work or attend school classes.

Article C of the *Havana Rules*<sup>146</sup> addresses the classification and placement of children in detention. It, provides, for instance that when detaining a child, officials need to consider factors such as the age of the child, the alleged offence committed, and the mental and physical health of the child, to mention but a few. The legislator intentionally provided a broad list of factors that should be considered to cover any predictable circumstance that a child in conflict with the law might face. Article 29 of the *Havana Rules*<sup>147</sup> places emphasis on separating juvenile offenders from adult offenders. It states that juvenile offenders can be put together in detention facilities with adult offenders only under controlled conditions were doing such forms part of a special programme that has been proven to be of benefit to juvenile offenders.<sup>148</sup> This means that only when the above condition is met can child offenders and adult

---

<sup>143</sup> Article 3 of *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules) 1991.*

<sup>144</sup> Article III of *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules) 1991.*

<sup>145</sup> Article 18 of *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules) 1991.*

<sup>146</sup> Article C of *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules) 1991.*

<sup>147</sup> Article 29 of *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules) 1991.*

<sup>148</sup> Article 29 of *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules) 1991.*

offenders be kept in the same detention facility. This is a clear obligation on State Parties to ensure that they put in place separate detention facilities for children which are far away from facilities for adults.

Another important provision can be found in articles 63-65 of the Havana Rules.<sup>149</sup> The said article provides that, using force and instruments of restraint should take place only when all other alternatives have been exhausted.<sup>150</sup> It also goes on to state that even in circumstances where restraint materials are used or force is applied, that should take place in a manner that is not degrading to the child and should be done in a manner authorized by law.<sup>151</sup> This provision guarantees the physical protection of children and should be seen as shunning the abuse of children by state officials whilst they are in the custody of the State.

#### *2.2.6. Guidelines on Action for Children in Justice System in Africa*

In 2011, the African Union developed the *Guidelines on Action for Children in Justice System in Africa*<sup>152</sup> and this will be referred to as the *AU Guideline*. According to the African Union,<sup>153</sup> this soft law was designed to achieve the full implementation of international laws and the African Union legislation, among other things. Article 8 of the *AU Guideline*<sup>154</sup> states that when decisions and actions are taken in matters concerning children, such decisions and actions should be taken in a child-friendly manner. In addition to that, it also states that State Parties should note the significance of the child's family and the child's development.<sup>155</sup> The *AU Guideline*<sup>156</sup> goes on to provide that when officials are dealing with children in conflict with the law, such children should be treated with respect, sensitivity and care regardless of the children's legal status or how their contact with the justice system came about. The *AU*

---

<sup>149</sup> Article 63-65 of *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules)* 1991.

<sup>150</sup> Article 63-65 of *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules)* 1991.

<sup>151</sup> Article 63-65 of *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules)* 1991.

<sup>152</sup> *Guidelines on Action for Children in Justice System in Africa* 2011 hereinafter *AU Guideline*.

<sup>153</sup> Article 1 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

<sup>154</sup> Article 8 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

<sup>155</sup> Article 8 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

<sup>156</sup> Article 19 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

*Guideline*<sup>157</sup> makes provision for every child in conflict with the law to have legal assistance and if it is in the best interests of the child, a parent or legal guardian should be in attendance of the proceedings in the matter relating to the child.

One of the most important suggestions is, however, the minimum age of criminal capacity. Most pieces of legislation like the *CRC*<sup>158</sup>, state that a child is a person below the age of 18; however, there seems to be no consensus regarding the minimum age of criminal capacity in such legislation, and seemingly leave the matter open for State Parties to determine their own national minimum age of criminal capacity.<sup>159</sup> A suggestion relating to this matter was addressed in the *General Comment*,<sup>160</sup> which stipulates that Member States should set 14 years as the minimum age of criminal capacity. The *AU Guideline*<sup>161</sup> suggests that State Parties should set 15 years as the minimum age for criminal capacity. This minimum age of criminal responsibility thus surpasses the one suggested by the Committee on the Rights of the Child. Setting 15 years as the minimum age of criminal capacity, will see a decrease in the number of children in conflict with the law.

In addition, the *AU Guideline*<sup>162</sup> shuns the imposition of a life sentence on children who committed crimes before attaining the age of majority. It also shuns the imposition of corporal and capital punishment on children who commit crimes before attaining the age of majority.<sup>163</sup> This suggestion alone goes to show that there are some countries which still impose corporal and capital punishment on children. Research, however, has been done to show that people who commit crimes as juveniles have a higher chance of being rehabilitated.<sup>164</sup> Imposing a life sentence or capital punishment thus defeats the purposes of social rehabilitation. This suggestion thus plays a major role in promoting rehabilitation as opposed to punishment.

---

<sup>157</sup> Article 38 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

<sup>158</sup> Article 40 of the *United Nation Convention on the Rights of Child* (1989).

<sup>159</sup> Article 40 of the *United Nation Convention on the Rights of Child* (1989).

<sup>160</sup> Article 1 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System*.

<sup>161</sup> Article 46 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

<sup>162</sup> Article 59 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

<sup>163</sup> Article 59 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

<sup>164</sup> Article 27 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

The *AU Guideline*<sup>165</sup> also makes provision for diversion measures to be taken instead of having children exposed to the formal justice system. Instead of merely implementing diversionary measures, the *AU Guideline*<sup>166</sup> also advises State Members to apply alternative measures that are educative, re-integrative in nature and vocational. Hence, diversionary measures that can be taken by State Parties should have a sound purpose. The *AU Guideline*<sup>167</sup> suggests that mediation, conciliation, traditional dispute resolution mechanisms, issuing of a warning and cautioning a child are some of the diversionary measures that can be taken. The *AU Guideline* in article 24<sup>168</sup> asserts that when professionals apply traditional or customary justice mechanisms, certain factors must be considered such as the inherent dignity of the child, special vulnerability of the girl child, and gender equality amongst others. The *AU Guideline* was crafted specifically for members of the African Union; this makes it a handy tool in administering juvenile justice in Africa. The array of diversion measures raised in the *AU Guideline* is a clear indication of how children in conflict with the law should be treated.

### *2.2.7. The Model Law on Juvenile Justice and Related Commentary*

In 2013, the *Model Law on Juvenile Justice and Related Commentary*<sup>169</sup> (hereinafter referred to as the Model Law) was passed and sets out how the juvenile justice system is ought to be developed by State Parties. According to the United Nations Office on Drugs and Crime,<sup>170</sup> the purpose of the *Model Law* is to assist Member States in reforming the administration of juvenile justice and to assist Member States in drafting legislation that deals with juvenile justice. Consequently, it is not a binding legislation, but it serves to guide State Parties in matters relating to juvenile justice. The impact of the *Model Law* cannot be ignored as it speaks volume on the expected standard of juvenile justice internationally.<sup>171</sup> It is also aimed at harmonising State Parties' national legislation with international law.<sup>172</sup> Although not all the provisions of the Model Law

---

<sup>165</sup> Article 27 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

<sup>166</sup> Article 27 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

<sup>167</sup> Articles 28 & 50 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

<sup>168</sup> Article 24 of the *Guidelines on Action for Children in Justice System in Africa* 2011.

<sup>169</sup> *Law on Juvenile Justice and Related Commentary* 2013.

<sup>170</sup> United Nations Office on Drugs and Crime 2013 [www.unodc.org](http://www.unodc.org).

<sup>171</sup> Article 1 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>172</sup> Article 1 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

can be exhausted in this discussion, some of the key provisions will be addressed.

Article 13(1) of the *Model Law*<sup>173</sup> states that a child who is in conflict with the law shall not be exposed to any form of discrimination irrespective not only of the child's but also the parents' or legal guardians' race, color, religion, language, and disability, amongst others. This article sets a high standard of expected treatment that is afforded to children in conflict with the law, by soft international laws. As a guideline, the article sets out to eliminate any form of discrimination that a child might face during the administration of juvenile justice. It thus, protects a child offender from having his or her rights infringed upon because of factors such as race, political views, and religion to say the least.

In addition, article 13 (4) of the *Model Law*<sup>174</sup> makes it clear that whenever non-judicial measures or actions are taken as alternatives, such measures or actions should guarantee that the human rights of the child and legal safeguards are fully respected. The fact that this provision is explicitly stated in *the Model Law*, clearly shows the stance taken by international lawmakers in protecting children who are in conflict with the law. The use of alternative measures or actions as opposed to judicial proceedings, lessens the excruciating pain associated with judicial proceedings and where such measures or actions are taken, the rights of the child should always be fulfilled.

Moreover, article 14 of the *Model Law*<sup>175</sup> states that children in conflict with the law shall not enjoy fewer legal rights and safeguards than those awarded to adult offenders. It goes on to state that children in conflict with the law are entitled to special protection and proceedings at all stages of the administration of juvenile justice.<sup>176</sup> This entails that in addition to the fulfilment of legal rights awarded to children in conflict with the law, rights enjoyed by adult' offenders should also be enjoyed by juvenile offenders. The said provision serves as solace to children in conflict with the law as they get to enjoy special treatment in terms of the law at all levels of the proceedings.

---

<sup>173</sup> Article 13 (1) of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>174</sup> Article 13 (4) of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>175</sup> Article 14 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>176</sup> Article 14 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

Furthermore, the *Model Law* covers all phases of the juvenile justice system, starting from the moment children are apprehended to the conclusion of their matters.<sup>177</sup> Another key element of the *Model Law* is its extensive emphasis on alternatives to judicial proceedings and the detention and imprisonment of children.<sup>178</sup> In line with the preceding international legal instruments, the *Model Law*<sup>179</sup> recognises the principle of restorative justice.<sup>180</sup> This entails the use of alternative measures and actions that keeps children away from the formal justice system.<sup>181</sup> Article 15 of the *Model Law*<sup>182</sup> states the purpose of the alternative measures which is to influence proper development of a child, enhancing the child's personal responsibility so as to promote the child's re-integration and for the child to assume a constructive role in the community. Article 16<sup>183</sup> read along with article 17 of the *Model Law*<sup>184</sup> states how the diversionary measures should be applied, and stipulates certain conditions that must be fulfilled, for instance, compelling evidence that the child committed an offence, or the child voluntarily admits responsibility, among others.<sup>185</sup> Instead of just advising State Parties to put in place alternative measures that can be taken in the administration of juvenile justice, what is seen here is also how and when can those alternative measures be taken. What is also stressed throughout the *Model Law* is the notion that deprivation of the right to liberty should be regarded as a last measure and when taken, it should be for the shortest possible duration.<sup>186</sup>

#### *2.2.8. The Committee on the Rights of the Child General Comment No 24 of 2019 on Children's Rights in the Child Justice System*

<sup>177</sup> Article 19-45 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>178</sup> Article 15-17 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>179</sup> Article 15-17 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>180</sup> According to the University of Wisconsin-Madison, restorative justice is a set of principles and practices to create a different approach to dealing with crime and its impacts. The University of Wisconsin-Madison further alludes that instead of viewing a criminal act as a violation of rules, restorative justice sees the action as a violation of relationships and people. See University of Wisconsin-Madison "date unknown" <https://law.wisc.edu/fjr/rjp/justice.html#:~:text=Restorative%20justice%20seeks%20to%20examine,to%20repair%20the%20harm%20done>.

<sup>181</sup> Article 15-17 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>182</sup> Article 15 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>183</sup> Article 16 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>184</sup> Article 17 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>185</sup> Article 17 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

<sup>186</sup> Article 13 of the *Model Law on Juvenile Justice and Related Commentary* 2013.

In 2019, the Committee on the Rights of the Child met once again and published *General Comment No 24 (2019) on the Children's Rights in the Child Justice System* (hereinafter the *General Comment*).<sup>187</sup> This General Comment should be interpreted in conformity with the provisions of the CRC. It should be noted that it is also one of the most contemporary international soft laws which addresses juvenile justice. This discussion will not, however, exhaust all the comments passed by the Committee; instead, the comments that are most relevant to this discussion will be addressed below. The *General Comments* document scraps the General Comment No 10 passed in 2007. According to article 1 of the *General Comment*<sup>188</sup> of the CRC, this promulgated soft law reflects changes that have taken place in the administration of juvenile justice since 2007. Another aim of the *General Comments* is to reiterate the importance of protecting children's rights and the importance of early intervention and prevention of juvenile offences as contained in article 6 of the *General Comment*.<sup>189</sup> In addition, article 6 of the *General Comment*<sup>190</sup> goes on to state that one of the main objects of the *General Comment* is to promote steps that can be taken to reduce the negative effects of children's contact with the criminal justice system, bearing in mind the in-depth knowledge pertaining to children's development, expansion of non-custodial measures to ensure that deprivation of freedom is taken as the last measure, to mention but a few. According to the Committee in article 11 of the *General Comment*,<sup>191</sup> early intervention can be taken for children who are below the minimum age of criminal capacity, and this will deter them from committing crimes once they attain the age of criminal capacity. It is important for Member States to consider the provision of the *General Comment* of the Committee as they were passed after an assessment into the welfare of children was conducted. The implementation of intervention measures will lessen juvenile offences.

---

<sup>187</sup> *General Comment No 24 (2019) on the Children's Rights in the Child Justice System.*

<sup>188</sup> Article 1 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System.*

<sup>189</sup> Article 6 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System.*

<sup>190</sup> Article 6 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System.*

<sup>191</sup> Article 11 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System.*

The Committee in article 5 of the *General Comment*<sup>192</sup> asserts that all State Parties should develop and formulate a very detailed policy on juvenile justice which deals with the following elements: early prevention of juvenile offences, interventions that prevent judicial proceedings, determination of minimum age for criminal capacity, deprivation of freedom, and other issues such as indigenous, customary and non-State forms of justice. The formulating of comprehensive policy for the administration of juvenile justice promotes the maintenance of children's welfare and protection of the rights of children who are in conflict with the law. The Committee further asserts in article 15 of the *General Comment*<sup>193</sup> that diversion of juvenile cases from judicial proceedings, curbs the risks associated with criminal proceedings such as having a criminal record and stigmatisation. One cannot turn a blind eye to these risks because they will have a detrimental impact on the child for the rest of his or her life; for instance, when a potential employee applies for employment, some employers do background checks on the potential employees and once a criminal record is discovered such a person may be deemed not suitable for employment. The Committee<sup>194</sup> suggested that some of the diversion routes that State Parties can take include but are not limited to, community services, the payment of reparations to victims, and supervision. However, this suggestion has been criticized by scholars like Van der Merwe<sup>195</sup> who is of the view that expecting children to pay compensation is not sustainable, as most children who commit crimes are from poor families and may not be able to raise the necessary funds. Van der Merwe<sup>196</sup> offers a solution for instances where a child cannot satisfy a monetary order by suggesting that children be offered part-time work if they are old enough to be employed so that they may compensate for loss incurred and this gives children household tasks as a way of paying back.

---

<sup>192</sup> Article 5 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System*.

<sup>193</sup> Article 15 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System*.

<sup>194</sup> Article 113-115 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System*.

<sup>195</sup> Van der Merwe 2013 *DJ* 1030-1040.

<sup>196</sup> Van der Merwe 2013 *DJ* 1030-1040.

The Committee<sup>197</sup> in its *General Comment* also stressed the importance of continuous monitoring of children's rights by State Parties. Continuous monitoring of children's rights paves the way for progress towards eliminating any forms of child abuse and facilitates the full realisation of children's rights. The Committee<sup>198</sup> further emphasises the need for independent monitoring of children's rights by third-party bodies such as schools, and youth groups, amongst others. By continuously monitoring whether children's rights are being protected, State Parties will also undertake the raising of awareness on child abuse, and the need for protection of children's rights includes rights awarded to children in conflict with the law. Findings of independent third parties will also assist in the following ways: developing legislation aimed at protecting juvenile offenders, early prevention of juvenile offences, forms of interventions that can be taken, amongst others.

As indicated above, the Committee<sup>199</sup> suggested that the customary, indigenous and non-State forms of justice be implemented. The Committee<sup>200</sup> added that the provisions of the *CRC* should be infused with these forms of justice so that they yield positive results. The Committee<sup>201</sup> asserted that implementation of other forms of the justice system will help achieve the objectives of restorative justice and will increase respect for the traditions of indigenous societies. A suggestion made to State Parties by the Committee was that they should design interventions and reforms specifically for issues faced in their jurisdiction. Every country has traditions that are unique to its jurisdictions, hence application of some of these traditions to resolve conflicts between children and the law might yield positive results.

### *2.2.9. Other international legal instruments pertaining to children in conflict with the law*

---

<sup>197</sup> Article 113-115 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System*.

<sup>198</sup> Article 113-115 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System*.

<sup>199</sup> Article 102-104 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System*.

<sup>200</sup> Article 102-104 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System*.

<sup>201</sup> Article 102-104 of the *General Comment No 4 (2019) on the Children's Rights in the Child Justice System*.

In 2005, the *United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes*<sup>202</sup> were published and they address rights, such as the right to be protected from justice process hardship,<sup>203</sup> the right to safety,<sup>204</sup> and the right to effective assistance,<sup>205</sup> amongst others. The Council of Europe passed the *Guidelines on Child-Friendly Justice* in 2010;<sup>206</sup> these guidelines were adopted to help professionals within the justice system and they set out how professionals must approach cases involving children in conflict with the law. The Child-Friendly Justice<sup>207</sup> guidelines stipulates that all professionals working with children must receive training. In article 11,<sup>208</sup> it states that when professionals deal with children, special prevention measures should be taken to protect children from harm, for example reprisals, intimidation, and secondary victimisation.

### **2.3. Conclusion**

In summation, this chapter laid a foundation of the international laws relating to the administration of juvenile justice. This study has proven that matters relating to the treatment and protection of children in conflict with the law have been given much attention by international and regional lawmakers. It has also been shown that regional law makers such as the African Union, went an extra mile to ensure the protection of children in conflict with the law. As discussed earlier, child offenders get to enjoy not only the rights afforded to them as children but also the rights afforded to adult offenders. Muncie,<sup>209</sup> asserts that the transition of juvenile justice in Africa was made possible due to the ratification of international laws that seek to universalise state laws. For instance, the African Union put in place laws relating to the protection of children, including those in conflict with the law following the several United Nations laws and

---

<sup>202</sup> *United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes* 2005.

<sup>203</sup> Article 29- 31 of the *United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes* 2005.

<sup>204</sup> Article 32- 34 of the *United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes* 2005.

<sup>205</sup> Article 22- 25 of the *United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes* 2005.

<sup>206</sup> *Guidelines on Child-Friendly Justice* 2010.

<sup>207</sup> Article 67-69 of the *Guidelines on Child-Friendly Justice* 2010

<sup>208</sup> Article 11 of *Guidelines on Child-Friendly Justice* 2010.

<sup>209</sup> Muncie 2005 TC 35-64.

guidelines on matters relating to children. Aas<sup>210</sup> is of the view that States are now more inclined to ratify and give effect to international laws after seeing the influence that international law has on the protection of children's rights. Hence, it is submitted that the introduction of international laws and guidelines and their ratification makes Member States accountable to international bodies for any inaction or action pertaining to children in conflict with the law.

Although some of the provisions of international laws might be seen as identical and repetitive, it is submitted that this was an attempt by international lawmakers to put emphasis on the welfare of the children in conflict with the law and to stress the obligation that State Parties must protect the rights of children in conflict with the law. These international laws address the measures that should be taken right from the point when a child is accused of committing a crime to the point where such a child is released from the custody of the State. International laws as seen above, also place emphasis on the actions of officials taking diversionary measures where necessary instead of detaining a child. International laws, thus, recognises that children require support and guidance to address underlying issues. Restorative justice as will be addressed below, will prove that focus should be placed on repairing harm and promoting healing as an effective way to address child committing crimes. They also stress the importance of separating juvenile offenders from adult offenders. Although not all international laws or provision thereof were discussed, one cannot ignore the fact that international lawmakers put countless hours of effort into stressing the rights of children and to setting a minimum standard of the administration of juvenile justice.

Aas<sup>211</sup> argues that effective ratification and implementation of international laws largely depends on nation states who are expected by international law makers to incorporate and enforce international laws in their domestic jurisdiction. Hence, the following chapter will be a discussion of the administration of juvenile justice in South Africa, Kenya, Zambia and Zimbabwe. Consequently, the point of a discussion on this matter is to bring to light the domestication of international laws by the said countries and to establish whether they are effectively enforcing the aforementioned

---

<sup>210</sup> Aas *Globalization and Crime: A Key Approaches to Criminology* 129-157.

<sup>211</sup> Aas *Globalization and Crime: A Key Approaches to Criminology* 129-157.

international laws. The following chapter will also attempt to examine the possible range of factors that led the four mentioned countries to ratify international laws and thereby voice their support for international legislation.

## **Chapter 3 Juvenile justice in South Africa, Zambia, Kenya, and Zimbabwe**

There is no question that children in conflict with the law face various challenges by virtue of them brushing elbows with the administration of juvenile justice. As pointed out in earlier chapters,<sup>212</sup> children should be treated differently from adults because of they are so vulnerable and consequently, they require a separate legal system that wholly caters for their needs and protection of their rights. As pointed out above, the *CRC* provisions called for the establishment of a separate juvenile justice system to facilitate and promote the rights of the children in conflict with the law.<sup>213</sup> The provisions of international laws have pointed out what the ideal juvenile justice system should be and that will not form part of this chapter's discussion.

This chapter outlines that historical background of the administration of the juvenile justice systems of South Africa, Zambia, Kenya, and Zimbabwe. It addresses the legal framework that applies in the criminal proceedings in the four selected countries. The juvenile justice system is a product of philosophy and history. With the emergence of human rights concerns, a lot of issues had to be addressed, such as the welfare and protection of children's rights. This chapter will address how the four selected countries developed their juvenile justice systems since the ratification and domestication of international laws as discussed in the previous chapter. The main objective of this chapter is to provide an overview of the past and contemporary juvenile justice systems of the four selected countries. The discussion will not address every aspect of the four selected juvenile justice systems but will address major details of the juvenile justice systems.

### ***3.1. The administration of juvenile justice in South Africa***

#### ***3.1.1. The development of juvenile justice in South Africa***

Skelton<sup>214</sup> submits that prior to colonialism, transgressions and disputes were dealt with in the traditional courts and children were never institutionalised. During the

---

<sup>212</sup> See chapter 1-2.

<sup>213</sup> See chapter 2.

<sup>214</sup> Skelton 2002 *BJC* 496-513.

colonial era, Chisholm cited by Cooper<sup>215</sup> submits that boys who were found guilty of committing crimes were sent to Porter Reformatory for crimes that were regarded to be reformable such as petty theft, and girls who were sent to the same place were mostly guilty of prostitution, murder, amongst others. Chisholm cited by Cooper<sup>216</sup> also adds that racial profiling took place during this time as white boys who were institutionalised at the Porter Reformatory were directed towards industrial training whilst black boys had to do hard labour.

Cooper<sup>217</sup> submits that during the apartheid era large numbers of children who were arrested, were detained due to their political affiliation. This suggests that during the apartheid era, the distinction between political affiliation and crime was not crystal clear. Cooper<sup>218</sup> states that there were increasing differences in juvenile justice policies and practices between races and groups, and most young people were dealt with through the use of violence and repression. Skelton<sup>219</sup> affirms this point by stating that during the repressive apartheid era African-customary legislation was infused with racial discrimination and this led to punitive child justice practices and policies. Cooper<sup>220</sup> is of the view that many children were inhumanely treated during the apartheid era, for instance, corporal punishment was used to deal with children who transgressed. It is therefore clear that there were no laws that safeguarded the welfare of the children during this time, and if there were laws enacted in relation to this matter, such laws were not being implemented. As a result, most children who were in conflict with the law became victims of the juvenile justice system.

Another scholar who agrees with the above is Sloth-Nielsen<sup>221</sup> who argues that the development of juvenile justice in South Africa was not without problems. Sloth-Nielsen<sup>222</sup> points to the racial discrimination in South Africa and shows how it affected the enactment and implementation of legislation for children in conflict with the law. For instance, white and mixed-race children were seen to benefit more from the system

---

<sup>215</sup> Cooper "*Juvenile Justice in South Africa*" 65-75.

<sup>216</sup> Cooper "*Juvenile Justice in South Africa*" 65-75.

<sup>217</sup> Cooper "*Juvenile Justice in South Africa*" 65-75.

<sup>218</sup> Cooper "*Juvenile Justice in South Africa*" 65-75.

<sup>219</sup> Cooper "*Juvenile Justice in South Africa*" 65-75.

<sup>220</sup> Cooper "*Juvenile Justice in South Africa*" 65-75.

<sup>221</sup> Sloth-Nielsen *LDD* 50-70.

<sup>222</sup> Sloth-Nielsen *LDD* 50-70.

as compared to black children.<sup>223</sup> Skelton<sup>224</sup> asserts that this however, came to an end with the intervention of anti-apartheid activists who sought to end racial profiling of children in conflict with the law. Sloth-Nielsen<sup>225</sup> argues that even with the mounting of pressure from the anti-apartheid activists, the political situation led to focus being put on the repression of children as victims of the apartheid system and not on individual autonomy. However, a significant change took place when the new democratic government was elected and assumed power.

Over the last few years, juvenile justice has evolved all around the world, with significant changes to ensure that children in conflict with the law are treated in a fair and humane manner. Scholars like Nielsen-Sloth,<sup>226</sup> however, argue that South Africa dragged its feet when following juvenile justice system precedents set by other countries. Skelton,<sup>227</sup> ascertains that the delay happened because South Africa wanted to implement basic human rights and a democratic society, which in turn would help in pursuing juvenile justice in a sound manner and safe environment. After the implementation of basic human rights and the establishment of a democratic society, legislation was put in place to protect children. Sloth-Nielsen<sup>228</sup> state that South Africa enacted legislation dealing with the welfare of children as measures to safeguard children in conflict with the law and to ensure that children in conflict with the law are sent to a children's court to cater for their welfare needs. It is submitted that the contemporary juvenile justice system in South Africa is couched in restorative justice, and that the values which underpins the contemporary primary law have shaped the juvenile justice legal framework in such a way that at the forefront of juvenile justice is the implementation of basic human rights. Below, the contemporary juvenile justice in South Africa will be addressed. With South Africa ratifying most of the international laws such as the *CRC*, most of its domestic laws are a mirror reflection of these international laws.

---

<sup>223</sup> Sloth-Nielsen *LDD* 50-70.

<sup>224</sup> Skelton 2002 *BJC* 496-513.

<sup>225</sup> Sloth-Nielsen *LDD* 50-70.

<sup>226</sup> Sloth-Nielsen *LDD* 50-70.

<sup>227</sup> Skelton 2002 *BJC* 496-513.

<sup>228</sup> Sloth-Nielsen *LDD* 50-70.

### 3.1.2. *South Africa's contemporary juvenile justice system*

A starting point for this discussion will be the *Constitution of the Republic of South Africa, 1996*<sup>229</sup> hereinafter referred to as the *Constitution*. The preamble of the *Constitution*<sup>230</sup> acknowledges the atrocities that took place in the past and addresses the need for healing from those atrocities. It is further held in the preamble of the *Constitution*<sup>231</sup> that of importance are the principles of social justice, democracy and fulfilment of fundamental human rights. Section 1 of the *Constitution*<sup>232</sup> states that South Africa is founded on the values of human dignity, equality and advancement of fundamental human rights and freedoms. As the supreme law of South Africa, all other legal instruments should be in conformity with it.<sup>233</sup> This means that all the laws passed after 1996 must adhere to and be consistent with the *Constitution*, and any law contrary to that shall be regarded as invalid. Hence, one can conclude that the implementation of the *Constitution* was the first step towards addressing basic human rights and transforming the justice system as a whole. It was also the first step towards addressing the welfare of children.

Section 7<sup>234</sup> of the *Constitution* states that the Bill of Rights is at the cornerstone of democracy and mandates the State with the duty to protect, respect, advance and fulfil the rights contained in the Bill of Rights. Therefore, the *Constitution* obliges the State to ensure that all rights that apply to children in terms of the Bill of Rights and any other law secondary to the *Constitution* are fulfilled. Section 9 of the *Constitution*<sup>235</sup> provides for the right to equality, whilst section 10 of the *Constitution*<sup>236</sup> states that everyone has a right to human dignity and for their dignity to be respected and promoted. Hence, the *Constitution* brought racial discrimination to an end and abolished all the laws that promoted racial segregation. As discussed earlier, before the transformative *Constitution* was passed, most juvenile policies and practices were filled with racial discrimination so the coming into operation of the *Constitution* brought

---

<sup>229</sup> *Constitution of the Republic of South Africa, 1996*. Hereinafter referred to as the *Constitution*.

<sup>230</sup> Preamble of the *Constitution of the Republic of South Africa, 1996*.

<sup>231</sup> Preamble of the *Constitution of the Republic of South Africa, 1996*.

<sup>232</sup> Section 1 of the *Constitution of the Republic of South Africa, 1996*.

<sup>233</sup> Section 2 of the *Constitution of the Republic of South Africa, 1996*.

<sup>234</sup> Section 7 of the *Constitution of the Republic of South Africa, 1996*.

<sup>235</sup> Section 9 of the *Constitution of the Republic of South Africa, 1996*.

<sup>236</sup> Section 10 of the *Constitution of the Republic of South Africa, 1996*.

that to an end. The provision of the right to human dignity also brought to an end all practices that diminishes this right. As addressed above, children who transgressed were subjected to inhumane treatment and that diminished their dignity. Thus, the *Constitution* abolished any policy and practice that does not advance human dignity.

In addition, it is maintained in section 28 of the *Constitution*<sup>237</sup> that in all matters concerning children, their best interests are of paramount importance. This right is affirmed in section 7 of the *Children's Act* 38 of 2005<sup>238</sup> hereinafter the *Children's Act*. Section 7 of the *Children's Act* sets the standard of the best interest of children.<sup>239</sup> It states that whenever there is a need to consider what the best interests of a child might be in any given matter, some factors that must be considered includes but are not limited to, any disability a child might have, any chronic illness that a child suffers from, and any family violence that involves the child or any member of the child's family.<sup>240</sup> The fact that the best interests of a child have been cemented in so many pieces of legislation shows a new shift from the past to the new constitutional era.

In addition, section 28 of the *Constitution*<sup>241</sup> further states that detainment of children should be used as a last resort and children should be kept separate from adults in detention facilities. In addition, the *Constitution*<sup>242</sup> further provides that children should always be protected from being mistreated, being neglected, and being abused. It also provides that children in conflict with the law have a right to legal representation paid for by the government.<sup>243</sup> The implication therefore is that when a decision concerning a child is taken, the most important aspect is to further the interests of the child. A child cannot be detained if it is unnecessary and such detainment should be for the least possible time.

---

<sup>237</sup> Section 28 of the *Constitution of the Republic of South Africa*, 1996.

<sup>238</sup> Section 7 of the *Children's Act* 38 of 2005.

<sup>239</sup> Section 7 of the *Children's Act* 38 of 2005.

<sup>240</sup> Section 7 of the *Children's Act* 38 of 2005.

<sup>241</sup> Section 28 of the *Constitution of the Republic of South Africa*, 1996.

<sup>242</sup> Section 28 of the *Constitution of the Republic of South Africa*, 1996.

<sup>243</sup> Section 28 of the *Constitution of the Republic of South Africa*, 1996.

Against the backdrop of the *Constitution*, the *Child Justice Act* 75 of 2008<sup>244</sup> hereinafter the *CJA*, was formulated and enacted. Skelton and Courtenay<sup>245</sup> state that the *CJA* is the yardstick for the administration of juvenile justice in South Africa. Skelton and Courtenay<sup>246</sup> further state that the main aim of the *CJA*'s is to divert youth from the criminal justice system. According to the preamble of the *CJA*,<sup>247</sup> one of its aims is to further the principle of restorative justice and to ensure that children in conflict with the law are held accountable for their actions. It is submitted that the *CJA* reflects the provisions and principles of the *CRC*. Hence, one can conclude that as it stands today, the administration of juvenile justice in South Africa is rooted in international law.

Section 7 of the *CJA*<sup>248</sup> sets the minimum age of criminal capacity at 12 years. Previously, the common law provided that the minimum age of criminal capacity was 7 years.<sup>249</sup> Burchell<sup>250</sup> states that only a person who possesses criminal capacity can legally be liable for criminal conduct. The implication therefore is that children under the age of twelve years cannot be held responsible for criminal conduct. In addition, section 7<sup>251</sup> further sets out that children between the ages of 12 and 14 are presumed to not possess criminal capacity and the onus rests on the State to prove their criminal capacity; also, that children above the age of 14 but below the age of 18 have criminal capacity. This means that a child below the age of twelve years cannot be arrested regardless of the circumstances. Children above the age of twelve years but below 18 years can be arrested, prosecuted, and detained. Where the child has no formal documentation to prove his or her age, section 12 - 15 of the *CJA*<sup>252</sup> implores the police officer, probation officer, magistrate or child justice court and other court to determine the age of the child, for instance by referring to school registration forms and a medical practitioner, among others. This ensures that children who are under twelve cannot

---

<sup>244</sup> *Child Justice Act* 75 of 2008.

<sup>245</sup> Skelton and Courtenay "South Africa's New Child Justice System" 321-342.

<sup>246</sup> Skelton and Courtenay "South Africa's New Child Justice System" 321-342.

<sup>247</sup> Preamble of the *Child Justice Act* 75 of 2008.

<sup>248</sup> Section 7 of the *Child Justice Act* 75 of 2008.

<sup>249</sup> Skelton and Courtenay "South Africa's New Child Justice System" 321-342.

<sup>250</sup> Burchell *Principles of Criminal Law* 358-424.

<sup>251</sup> Section 7 of the *Child Justice Act* 75 of 2008.

<sup>252</sup> Section 12-15 of the *Child Justice Act* 75 of 2008.

be arrested and that those between 12 years and 18 years are treated as children with respect to the legal provisions whilst they are in the juvenile justice system.

Moreover, the juvenile justice system in South Africa is set in three stages: pre-trial, trial, and post-trial. During the pre-trial phase, section 18-19 of the *CJA*<sup>253</sup> states that a child in conflict with the law must be issued a notice and or summons which clearly sets out aspects such as dates for preliminary inquiries, among other things, and the notice and summons should be served directly to the child in the presence of a parent or guardian, save for exceptional circumstances. Moreover, section 20 of the *CJA*<sup>254</sup> sets out the way in which a child can be arrested. It provides that a warrant of arrest should be issued and that when the warrant of arrest is executed, the child must be informed of his or her rights such as the right to legal representation, among others. The *CJA* thus obliges the State to follow the measures in place during the pre-trial phase when dealing with a child in conflict with the law. Failure to follow the provisions of the *CJA* will amount to a contravention and may yield negative results in the administration of juvenile justice.

During the pre-trial phase, section 43 of the *CJA*<sup>255</sup> provides that a preliminary inquiry may take place, and this procedure is inquisitorial in nature. It is usually the first point of contact that a child in conflict with the law has with the court and is an opportunity for the court to gather information and to decide on the best possible way to proceed with the case.<sup>256</sup> Section 45 of the *CJA*<sup>257</sup> instructs that information gathered during the preliminary inquiry should be kept confidential. Section 44 of the *CJA*<sup>258</sup> provides that various person such as the child in conflict with the law, the parents, guardian or appropriate adult, and the probation officer should be in attendance. This stresses the importance of the participation by the child and his or her parents or legal guardian in the administration of juvenile justice. Other aims of the preliminary inquiry as contained in section 43 of the *CJA*<sup>259</sup> are to determine the age of the child in conflict

---

<sup>253</sup> Section 18-19 of the *Child Justice Act* 75 of 2008.

<sup>254</sup> Section 20 of the *Child Justice Act* 75 of 2008.

<sup>255</sup> Section 43 of the *Child Justice Act* 75 of 2008.

<sup>256</sup> Section 43 of the *Child Justice Act* 75 of 2008.

<sup>257</sup> Section 45 of the *Child Justice Act* 75 of 2008.

<sup>258</sup> Section 44 of the *Child Justice Act* 75 of 2008.

<sup>259</sup> Section 43 of the *Child Justice Act* 75 of 2008.

with the law where such is not clear, to decide whether further assessments in respect of the child must take place, and to determine diversionary measures, amongst others. The preliminary inquiry should thus be handled in a cautious manner, bearing in mind that this is the first contact the child has with the law and as a result, may make or break the child mentally.

Section 1 of the *CJA*<sup>260</sup> defines the child justice court as any court provided for in the Criminal Procedure Act which deals with issues such as plea, trial, and the sentencing of a child in conflict with the law. Section 35 of the *Constitution*<sup>261</sup> makes provision for time limits which are imposed on the State, for instance an alleged offender should be brought before the court before the lapse of 48 hours from the time when he or she is arrested. Section 66 of the *CJA*<sup>262</sup> also stresses that trial in the children's justice court should be concluded as speedily as possible and the court should try to avoid the postponement of the matter. The *CJA* makes provision for the court to take diversionary measures from prosecution and to give the child in conflict with the law time to fulfil the diversionary order.<sup>263</sup> Section 67 of the *CJA*<sup>264</sup> instructs the court to stop criminal proceedings if a probation officer has confirmed that the child has complied with and fulfilled the diversion order.

During the trial, the court has the power to prevent the attendance of persons whose presence may be a contravention of the child's best interests.<sup>265</sup> This enables the child to testify freely without fear or pressure from the audience's presence. Section 63 of the *CJA*<sup>266</sup> also affirms that the best interests of the child are promoted. In line with this, the *Criminal Procedure Act* 51 of 1977<sup>267</sup> provides that no person is allowed to publish the identity of a child in conflict with the law, and that contravention of this provision may lead to the imposition of a fine or an imprisonment sentence. It is

---

<sup>260</sup> Section 1 of the *Child Justice Act* 75 of 2008.

<sup>261</sup> Section 35 of the *Constitution of the Republic of South Africa*, 1996.

<sup>262</sup> Section 66 of the *Child Justice Act* 75 of 2008.

<sup>263</sup> Section 51-62 of the *Child Justice Act* 75 of 2008.

<sup>264</sup> Section 67 of the *Child Justice Act* 75 of 2008.

<sup>265</sup> Section 63 of the *Child Justice Act* 75 of 2008.

<sup>266</sup> Section 63 of the *Child Justice Act* 75 of 2008.

<sup>267</sup> Section 153 of the *Criminal Procedure Act* 51 of 1977.

important that the identity of a child in conflict with the law is kept confidential to avoid the stereotypes that come with a child being in the juvenile justice system.

Section 72-77 of the *CJA*,<sup>268</sup> makes provision for the sentencing options available to the court. These sentences include the following: community-based sentences, restorative justice sentences, fine, correctional supervision, residence in a child and youth care centre to mention but a few. Section 69 of the *CJA*<sup>269</sup> states that the aim of sentencing a child is to: encourage the principle of accountability and promote the reintegration of the child into the society and family, to mention but a few. Section 77 of the *CJA*<sup>270</sup> states that a child under the age of 14 years at the time of sentencing cannot be sentenced to imprisonment. When imposing an imprisonment sentence, section 69 of the *CJA*<sup>271</sup> states that the court must consider factors such as the desirability of keeping the child out of prison, and the protection of the community, amongst others.

In addition, after the trial phase, a child can appeal the conviction or sentence.<sup>272</sup> Section 85 of the *CJA*<sup>273</sup> states that a review can also take place post the trial proceedings. Section 86 of the *CJA*<sup>274</sup> further provides that a child awaiting the outcome of an appeal or review, may be released on bail.

### *3.1.3. Conclusion*

Skelton and Courtenay<sup>275</sup> hold that the administration of juvenile justice in South Africa has been tailored in such a way that children are treated differently from adults due to the vulnerability of children, and the special care and attention that children require, bearing in mind that children can be rehabilitated easily. It is therefore submitted that, the above discussion brought to light the administration of juvenile justice in South Africa. The legislation dealing with the administration of juvenile justice has been

---

<sup>268</sup> Section 72-77 of the *Child Justice Act* 75 of 2008.

<sup>269</sup> Section 69 of the *Child Justice Act* 75 of 2008.

<sup>270</sup> Section 77 of the *Child Justice Act* 75 of 2008.

<sup>271</sup> Section 69 of the *Child Justice Act* 75 of 2008.

<sup>272</sup> Section 84 of the *Child Justice Act* 75 of 2008.

<sup>273</sup> Section 85 of the *Child Justice Act* 75 of 2008.

<sup>274</sup> Section 86 of the *Child Justice Act* 75 of 2008.

<sup>275</sup> Skelton and Courtenay "South Africa's New Child Justice System" 321-342.

tailored in such a way that it complies with the provisions of international law such as the *CRC*, and the *Havana Rules*, amongst others. In theory and in practice, the administration of juvenile justice promotes the concept of protecting children's rights and ensures that children are treated fairly.

South Africa's contemporary juvenile justice system speaks volumes about the need for the fulfilment of basic human rights. The ethos of the juvenile justice system is a well-structured restorative justice policy and practice. It ends the repressive structure of the past juvenile justice system. Cooper<sup>276</sup> cites Nelson Mandela who stated that, "there can be no keener revelation of a society's soul than the way in which it treats its children." If one looks at South Africa's juvenile justice system, it is unquestionable that no stone was left unturned in pursuit of a sound juvenile justice system.

### **3.2. The administration of juvenile justice in Zambia**

#### *3.2.1. Zambia's history and background*

Mbagaya<sup>277</sup> submits that colonialism in Zambia started in the 1880s when the British colonialists deceitfully encouraged Chief Lewanika to sign a concession. Mbagaya<sup>278</sup> submits that the British South Africa Company encouraged Europeans to settle in Zambia through the selling of land at a very low price, that this company had in possession. Mbagaya<sup>279</sup> adds that with time most of the Zambian natives lost their farms and they had no means to support their livelihoods. Most of the people hence, had to work for the European settlers, who paid them very low wages.<sup>280</sup> However, in the year 1963, there was a strike by the workers against low wages and unfavourable working conditions.<sup>281</sup> In 1953, Mbagaya<sup>282</sup> asserts that the African National Congress was formed, and this led to white settlers giving preferential treatment to educated Africans, including Zambian natives.

---

<sup>276</sup> Cooper "Juvenile Justice in South Africa" 65-75.

<sup>277</sup> Mbagaya 2015 [www.globalblackhistory.com](http://www.globalblackhistory.com).

<sup>278</sup> Mbagaya 2015 [www.globalblackhistory.com](http://www.globalblackhistory.com).

<sup>279</sup> Mbagaya 2015 [www.globalblackhistory.com](http://www.globalblackhistory.com).

<sup>280</sup> Mbagaya 2015 [www.globalblackhistory.com](http://www.globalblackhistory.com).

<sup>281</sup> Mbagaya 2015 [www.globalblackhistory.com](http://www.globalblackhistory.com).

<sup>282</sup> Mbagaya 2015 [www.globalblackhistory.com](http://www.globalblackhistory.com).

Like any other country that was colonised, the justice system in Zambia was adopted from the colonial settlers.<sup>283</sup> Simaluwani<sup>284</sup> states that prior to the settling of the British colonialists in Zambia, there was nothing formally known as crime. Simaluwani<sup>285</sup> is of the opinion that what is now known as crime was previously perceived as one's behaviour that was, however, very detrimental to the well-being of the society as whole. As a result, the chiefs and elders did not treat such behaviour lightly and they felt that it was their duty to lead the society in harmony and peace.<sup>286</sup> Children who exhibited unacceptable behaviour were reprimanded by the elders in the society and were strictly monitored and warned.<sup>287</sup> Mumba submits that,<sup>288</sup> the British settlers ensured that the laws that existed for children in conflict with the law were not as repressive as those that existed for adults. Mumba,<sup>289</sup> however, is of the opinion that in their quest for juvenile justice, British settlers in Zambia failed to provide the much-needed infrastructure, and as a result children in conflict with the law were often grouped together with adult offenders in detention and holding facilities.

### 3.2.2. *Zambia's contemporary juvenile justice system*

As required by international laws that pertain to children, Zambia has shown its commitment towards preserving children's rights by adopting and ratifying several international pieces of legislations to ensure that children's rights are protected and respected. Zambia has enacted and passed a legal framework and procedure for the administration of juvenile justice. According to the UNICEF website,<sup>290</sup> Zambia ratified the *CRC* in 1991 and signed the *ACRWC* in 1992. The government of Zambia took a step to ratify the Constitution of Zambia (*Amendment*) no 2 of 2016<sup>291</sup> hereinafter

<sup>283</sup> Simaluwani 1997 *ZLJ* 71-88.

<sup>284</sup> Simaluwani 1997 *ZLJ* 71-88.

<sup>285</sup> Simaluwani 1997 *ZLJ* 71-88.

<sup>286</sup> Simaluwani 1997 *ZLJ* 71-88.

<sup>287</sup> Simaluwani 1997 *ZLJ* 71-88.

<sup>288</sup> Mumba *The Juvenile Criminal Justice System in Zambia Vis-à-vis the International Protection of Children's Rights* 19-44.

<sup>289</sup> Mumba *The Juvenile Criminal Justice System in Zambia Vis-à-vis the International Protection of Children's Rights* 19-44.

<sup>290</sup> UNICEF "date unknown" <https://www.unicef.org>.

<sup>291</sup> *Constitution of Zambia (Amendment)* no 2 of 2016. Hereinafter the Constitution of Zambia.

referred to as the *Constitution of Zambia*, in order to heed the provisions of international laws.

To start with, the *Constitution of Zambia* declares its supremacy in article 1(3).<sup>292</sup> This means that it is supreme to such an extent that any law that is inconsistent with it is void and invalid. The *Constitution of Zambia* contains the Bill of Rights in Chapter III<sup>293</sup> and it provides for the protection of everyone's fundamental rights and freedom in the country. In addition to this, the *Constitution of Zambia* provides for the right to life,<sup>294</sup> protection from discriminatory laws,<sup>295</sup> protection from being tortured or subjected to inhumane treatment or degrading punishment,<sup>296</sup> and the right to personal liberty,<sup>297</sup> among other rights. Although Part III of the *Constitution of Zambia* does not explicitly mention children, the articulation of these rights covers children as these rights are extended to everyone. Hence, children also enjoy these rights. The afore-mentioned rights offer protection to children since they place an obligation on the State to protect children when they are accused of committing a crime. These rights also abolish corporal punishment and any form of discipline that may be degrading to a child and any form of discipline that may be regarded as inhumane. These rights also bring to an end any legislation that may be discriminatory in nature and advance the need for and importance of preserving human life.

As it pertains to criminal proceedings, the *Constitution of Zambia* has provided adequate security to everyone charged with a criminal offence. Article 18 of the *Constitution of Zambia*<sup>298</sup> states that everyone who has been accused of committing a criminal offence shall be: presumed to be innocent until proven guilty; informed of the nature of the offence in an understandable language; given enough time and facilities to prepare his defence; and have legal representation, amongst others. This article extends to circumstances where children are in conflict with the law. Article 18 of the *Constitution of Zambia*<sup>299</sup> also states that when a person has been charged with a

---

<sup>292</sup> Article 1 (3) of the *Constitution of Zambia (Amendment)* no 2 of 2016.

<sup>293</sup> Article 11 of the *Constitution of Zambia (Amendment)* no 2 of 2016.

<sup>294</sup> Article 12 of the *Constitution of Zambia (Amendment)* no 2 of 2016.

<sup>295</sup> Article 23 of the *Constitution of Zambia (Amendment)* no 2 of 2016.

<sup>296</sup> Article 15 of the *Constitution of Zambia (Amendment)* no 2 of 2016.

<sup>297</sup> Article 13 of the *Constitution of Zambia (Amendment)* no 2 of 2016.

<sup>298</sup> Article 18 of the *Constitution of Zambia (Amendment)* no 2 of 2016.

<sup>299</sup> Article 1 of the *Constitution of Zambia (Amendment)* no 2 of 2016.

criminal offence, such a person deserves a fair hearing which must take place within a reasonable time and the hearing must take place in an independent and impartial court established in terms of the law. This means that when a child has been charged with a criminal offence, unless the case is withdrawn, the child deserves to have his or her matter settled in a court of law and in a timely manner. The provision of these rights allows for the protection of not only adults but children's rights as well.

The *Juveniles Act* was enacted on 4 May 1956 and amended in 2011 (hereinafter referred to as the *Juveniles Act*).<sup>300</sup> Article 1 (2) of the *Juveniles Act*<sup>301</sup> provides that whilst officials apply the Act, African customary laws shall be observed, except in cases where the observation African customary law does not serve the best interests of a child. The *Juveniles Act* makes provision for the safeguarding and protection of children who need care, and the correction of juvenile delinquency. In article 2 of the *Juveniles Act*,<sup>302</sup> a child is defined as someone below the age of 19 years. This raises the age normally accepted from eighteen years to nineteen years. The *Penal Code of Zambia (Amendment) Act* of 2023 (hereinafter the *Penal Code*)<sup>303</sup> retains the common law criminal age of capacity. According to the *Penal Code*,<sup>304</sup> the minimum age of criminal capacity is 8 years. It specifically states that any child who is below the age of eight years lacks criminal capacity.<sup>305</sup> This broadens the brackets of children who can be tried for criminal cases. Although the minimum age of criminal capacity has been set at eight years in Zambia, the State has an obligation to prove that the juvenile intentionally committed a crime, and possessed the ability to understand the act, to know or appreciate the consequence, and to act within the scope of that appreciation.<sup>306</sup> It should be noted that international legislators have left a gap in setting the minimum age at which a child possesses criminal liability, for instance article II of the *ACRWC*<sup>307</sup> only defines a child as any person under the age of eighteen. It is silent on the exact minimum age of criminal capacity. It gives Member States authority

---

<sup>300</sup> *Juveniles Act* 3 of 2011 hereinafter the *Juveniles Act*.

<sup>301</sup> Article 1 (2) of the *Juveniles Act* 3 of 2011.

<sup>302</sup> Article 2 of the *Juveniles Act* 3 of 2011.

<sup>303</sup> Article 14 (2) of the *Penal Code (Amendment) Act* of 2023. Hereinafter the *Penal Code*.

<sup>304</sup> Article 14 of the *Penal Code (Amendment) Act* of 2023.

<sup>305</sup> Article 14 (2) of the *Penal Code (Amendment) Act* of 2023.

<sup>306</sup> Article 14 (2) of the *Penal Code (Amendment) Act* of 2023.

<sup>307</sup> Article II of the *African Charter on the Rights and Welfare of the Child* (1990).

to decide at national level what the minimum age of criminal capacity shall be. As a result, Member States such as Zambia must set the minimum age of criminal capacity, taking into consideration social and cultural factors unique to that country.

A subordinate court that sits as the juvenile court has been appointed as the court of law which has jurisdiction and power to try criminal cases where a juvenile has been charged with a criminal offence, except in instances where the child offender has been charged with homicide or attempted murder.<sup>308</sup> The *Juveniles Act* provides rules and procedures that are unique to the proceedings in the juvenile court. Article 64 of the *Juveniles Act*<sup>309</sup> provides for the procedure that must be followed during the criminal proceedings where the accused is a juvenile. Criminal proceedings involving a child offender must take place in a separate room from where ordinary court cases are heard, unless there is no availability of such a room.<sup>310</sup> Criminal proceedings take place in the form of adversarial proceedings. The onus is on the State to prove that the accused is guilty of committing a crime.

In article 64 of the *Juveniles Act*,<sup>311</sup> the parents or guardians of a juvenile being accused of committing a crime have the right to be present during the proceedings. Of importance is the authority which is given to not only the accused juvenile but also the parents and guardians to cross-examine the witnesses brought forward by the prosecutor.<sup>312</sup> In instances where the juvenile fails to cross-examine the prosecutor's witnesses, the court has authority to cross-examine the witnesses; thereafter the public prosecutor is given the platform to re-examine the witnesses.<sup>313</sup> In most cases, the accused or the legal representative acting on his or her behalf possess the power to cross-examine the witnesses. The commendable initiative taken by the Zambian lawmakers to encourage the participation of parents and guardians during the criminal proceedings is a step further taken to protect the rights of accused juvenile offenders. This initiative is commendable because it allows the parents and guardians to ask questions that might have been missed by the legal representative or the accused

---

<sup>308</sup> Article 73 of the *Juveniles Act* 3 of 2011.

<sup>309</sup> Article 64 of the *Juveniles Act* 3 of 2011.

<sup>310</sup> Article 64 of the *Juveniles Act* 3 of 2011.

<sup>311</sup> Article 64 of the *Juveniles Act* 3 of 2011.

<sup>312</sup> Article 64 of the *Juveniles Act* 3 of 2011.

<sup>313</sup> Article 64 of the *Juveniles Act* 3 of 2011.

himself or herself. However, a study carried by Simaluwani<sup>314</sup> shows that the juvenile court is reluctant to enforce this article and insists that juveniles must cross-examine witnesses and if they fail to do so the court orders them to sit down and be silent.

In addition, article 58 of the *Juveniles Act*<sup>315</sup> makes it unlawful to keep adults and juveniles at the same detention facilities and police stations, or during the transportation to and from criminal courts. Furthermore, the provisions of the *Juveniles Act*<sup>316</sup> prohibit the association of adult offenders with juvenile offenders who are not related to the latter except for an offender with whom the juvenile offender is charged with. Additionally, a female juvenile offender must be under the care of a woman whilst in detention and when awaiting court proceedings.<sup>317</sup> This Act thus makes provision for the separation of child offenders from adult offenders unless the adult offender is jointly charged and tried with the child offender. As stated above, female juvenile offenders also get to enjoy being in the care of a woman.

Article 119 (2) of the *Juveniles Act*<sup>318</sup> prohibits the publicising of matters adjudicated in juvenile courts. This section, however, allows the parents and guardians of the accused juvenile to be present during the proceedings, the selection also allows the victim to be present, but only if the victim is a juvenile too.<sup>319</sup> The juvenile on trial is also not supposed to be put in the dock during the proceedings; however, he or she should be in a designated place at the front of the courtroom.<sup>320</sup> Hence, the act makes a clear distinction on how the setting of a juvenile court should be and that of other courts should be. The prohibition on publicising the proceedings in a juvenile court protects the identity and vulnerability of children; and also protects children from being discriminated against.

---

<sup>314</sup> Simuwalani 1997 LJ71-88.

<sup>315</sup> Article 58 of the *Juveniles Act* 3 of 2011.

<sup>316</sup> Article 58 of the *Juveniles Act* 3 of 2011.

<sup>317</sup> Article 58 of the *Juveniles Act* 3 of 2011.

<sup>318</sup> Article 119 (2) of the *Juveniles Act* 3 of 2011.

<sup>319</sup> Article 119 (2) of the *Juveniles Act* 3 of 2011.

<sup>320</sup> Article 119 of the *Juveniles Act* 3 of 2011.

According to Simaluwani,<sup>321</sup> studies have shown that the judiciary in Zambia is ignorant of the above provisions of the *Juveniles Act*. Simaluwani,<sup>322</sup> gives an example of how juvenile matters are heard in open court, at the same time and day as adults. Simaluwani<sup>323</sup> also submits that juveniles are transported to and from the courthouse in the same vehicle as adult offenders. Simaluwani,<sup>324</sup> adds that, children and adults are put in the same holding cells subsidiary to courthouses. During the proceedings, the general public is told to go outside only after the identity of the juvenile on trial has been revealed.<sup>325</sup> Adult offenders who are also not connected to juvenile proceedings are allowed to sit-through and at no stage are they separated from juvenile offenders.<sup>326</sup> The fact that the courts are reluctant to enforce the provisions of the *Juveniles Act* defeats the whole purpose of the Act. It also shows the disconnect between theory and practice. The basic requirements are simply ignored. The legislator has theoretically provided for a distinction between the treatment of children in conflict with the law and adult offenders. However, the juvenile courts neither appreciate the distinction nor do they act in accordance with the *Juveniles Act*.

In addition to the above, the *Juveniles Act* states that no juvenile should be handed a prison or detention sentence if there are alternative ways to deal with the matter.<sup>327</sup> This means that the juvenile courts are implored to exhaust alternative ways of dealing with a juvenile offender where necessary, before a child is sentenced to imprisonment and detention. Methods of dealing with a juvenile offender contained in article 73 of the *Juveniles Act*,<sup>328</sup> includes but are not limited to, dismissal of the charge; a probation order; sending the offender to an approved school; an order for the offender pays a fine, damages or costs; and an order that the parent or guardian of the offender to pay a fine, damages or costs. This section extends the means of discipline to the parents or guardians of the offender. It is submitted that the passing of an order for the parents or guardians to pay fine, damages or costs is not the most effective method

---

<sup>321</sup> Simaluwani 1997 *LJ* 71-88.

<sup>322</sup> Simaluwani 1997 *LJ* 71-88.

<sup>323</sup> Simaluwani 1997 *LJ* 71-88.

<sup>324</sup> Simaluwani 1997 *LJ* 71-88.

<sup>325</sup> Simaluwani 1997 *LJ* 71-88.

<sup>326</sup> Simaluwani 1997 *LJ* 71-88.

<sup>327</sup> Article 72 of the *Juveniles Act* 3 of 2011.

<sup>328</sup> Article 73 of the *Juveniles Act* 3 of 2011.

of dealing with a child offender. It defeats the purpose of disciplining a child, as the parents or guardians are the ones left with dealing with the repercussions of the juvenile offenders act or omission.

In addition, article 3 of the *Probation of Offenders Amendment Act no 14 of 2022* (hereinafter the Probation of Offenders Act)<sup>329</sup> makes provision for a court to pass a probation order after considering aspects such as the youth, his or her character, health, environment among others. Mumba<sup>330</sup> submits that a probation order is one of the common methods adopted by most of the juvenile justice systems. Mumba adds that,<sup>331</sup> the *Probation of Offenders Act* requires that a juvenile is kept under strict supervision by a probation officer who has the obligation to ensure that the juvenile undertakes to reform, exhibits exemplary behaviour, and does not set out to commit any more offences. It should be noted that this order applies to both juvenile and adult offenders. During the probation period, the probation officer allocated to the case is expected to provide educational and counselling services to the juvenile offender.<sup>332</sup> The only time when a child offender is ordered to submit to a reformatory centre after which a probation order was first issued, is when a child offender behaves contrary to the probation order.<sup>333</sup> The purpose of the probation order is thus to rehabilitate the juvenile offender. The provision of educational services drives the attention of the juvenile offender from a life of crimes to educational responsibilities. In addition to educational services, counselling services are equally important as they will help the juvenile offender to deal with underlying issues if any and to educate the juvenile offender on coping mechanisms.

In addition to the above, article 3 of the *Probation of Offenders Act*<sup>334</sup> in some instances requires that both the offender and the victim attend counselling sessions together. This, however, is mostly required where the offence committed was assault or

---

<sup>329</sup> Article 3 of the *Probation of Offenders Amendment Act no 14 of 2022*. Hereinafter *Probation of Offenders Act*.

<sup>330</sup> Mumba *the Juvenile Criminal Justice System in Zambia Vis-à-vis the International Protection of Children's Rights* 19-44.

<sup>331</sup> Mumba *the Juvenile Criminal Justice System in Zambia Vis-à-vis the International Protection of Children's Rights* 19-44.

<sup>332</sup> Article 3 of the *Probation of Offenders Amendment Act no 14 of 2022*.

<sup>333</sup> Article 3 of the *Probation of Offenders Amendment Act no 14 of 2022*.

<sup>334</sup> Article 3 of the *Probation of Offenders Amendment Act no 14 of 2022*.

sexual.<sup>335</sup> In cases where the court is of the opinion that the parents or guardians of the juvenile offender aided in the commissioning of a crime by the juvenile, the parents and guardians may be ordered to attend counselling sessions.<sup>336</sup> There is no question that these counselling sessions are aimed at encouraging the offender to be remorseful and seek forgiveness on the one hand, and on the other to encourage the victim to forgive the offender. If the probation officer orders parents and guardians to attend counselling sessions, this also helps them to draw the line between what is lawful and what is not lawful. By aiding their children in the commissioning of a crime, parents and guardians are in fact accessories to the crime. Hence, they also need to be helped through counselling.

It should be noted that article 303 of the *Criminal Procedure Code Act of 2023*<sup>337</sup> permits the judiciary to sentence an offender to death. This section, however, only applies to adult offenders. Adult offenders thus, do not enjoy the right to life in its full extent. Children in conflict with the law in Zambia, however, cannot be sentenced to death. Article 87 of the *Penal Code*<sup>338</sup> makes it unlawful to condemn a child to death. Children in Zambia thus enjoy the right to life in its full ambit. A death sentence is unlawful for all the persons who committed a crime that warrants the death penalty when that person was under the age of eighteen at the time when he or she committed the crime.<sup>339</sup> This section thus protects children from being subjected to a death penalty. This is in harmony with international laws that are in favour of the advancement of basic human rights and the protection of children in conflict with the law.

### 3.2.3. Conclusion

In summation, the theoretical framework that sets out the administration of juvenile justice has been given much attention by the Zambian legislators. As shown above, the legal framework in Zambia has been developed to safeguard the welfare of the

---

<sup>335</sup> Mumba *the Juvenile Criminal Justice System in Zambia Vis-à-vis the International Protection of Children's Rights* 19-44.

<sup>336</sup> Article 3 of the *Probation of Offenders Amendment Act no 14 of 2022*.

<sup>337</sup> Article 303 of the *Criminal Procedure Code (Amendment) Act of 2023*.

<sup>338</sup> Article 87 of the *Penal Code (Amendment) Act of 2023*.

<sup>339</sup> Article 87 of the *Penal Code (Amendment) Act of 2023*.

children in conflict with the law and to protect the rights of child offenders. It has been pointed out above, that there is a disconnect between the provisions of the legal framework and the implementation thereof. These differences have not been exhausted and will form part of the next chapter's discussion.

### **3.3. The administration of juvenile justice in Kenya**

#### *3.3.1. Kenya's history and background*

Kenya is a very diverse country as it has over seventy different ethnicities.<sup>340</sup> As a result of the huge ethnic diversity there is disproportionate representation of these groups which has led to the rise of lots of conflict and these conflicts have had a hugely negative effect on children in general.<sup>341</sup> According to the Kenyan National Bureau,<sup>342</sup> over half of the Kenyan population is accounted for by children. Therefore, one cannot ignore how the ethnic division brought many problems to over half of the country's population.

According to Gatheru,<sup>343</sup> colonialism can be dated back to the late 1880's when the Berlin Conference was held, and this marked the first arrival of the Germans in Kenya. Gatheru further submits that,<sup>344</sup> during that time, the Europeans saw fit to divide East Africa into five distinct territories. Gatheru<sup>345</sup> states that this is when the East African Protectorate was founded and in 1920 it was officially recognised as the British Colony. As a result, the British Colony began to rule Kenya and officially banned Kenyan natives from participating in politics.<sup>346</sup> This, however, came to an end when the Kenyan natives came together and fought against the British Colony.<sup>347</sup> Kenya finally got its independence back in 1963 and Kenyatta became the Prime Minister.<sup>348</sup> Gerard<sup>349</sup> submits that the rule of Kenyatta was not without fault. It marked the beginning of a

---

<sup>340</sup> Gatheru *Kenya: From Colonization to Independence 1888-1970* 1-200.

<sup>341</sup> Gatheru *Kenya: From Colonization to Independence 1888-1970* 1-200.

<sup>342</sup> Gatheru *Kenya: From Colonization to Independence 1888-1970* 1-200.

<sup>343</sup> Gatheru *Kenya: From Colonization to Independence 1888-1970* 1-200.

<sup>344</sup> Gatheru *Kenya: From Colonization to Independence 1888-1970* 1-200.

<sup>345</sup> Gatheru *Kenya: From Colonization to Independence 1888-1970* 1-200.

<sup>346</sup> Gatheru *Kenya: From Colonization to Independence 1888-1970* 1-200.

<sup>347</sup> Gatheru *Kenya: From Colonization to Independence 1888-1970* 1-200.

<sup>348</sup> Gatheru *Kenya: From Colonization to Independence 1888-1970* 1-200.

<sup>349</sup> Gerard 2008 [https://www.opendemocracy.net/article/democracy\\_power/kenya\\_roots\\_crisis](https://www.opendemocracy.net/article/democracy_power/kenya_roots_crisis).

long ethnic conflict. Kenyatta was said to belong to the dominant ethnic group, and hence, he put in place policies that favoured this group over all the other groups.<sup>350</sup>

Odongo<sup>351</sup> asserts that the occupation of Kenya by British people led to the introduction of English common law in Kenya and they fulfilled their quest to promote behaviour that was common among this vastly diversified group. Odongo<sup>352</sup> states that the Kenyan natives had their own laws that they applied to maintain peace and order in the society, and these varied from one ethnic group to another. Okechi<sup>353</sup> states that although most of these laws called for heinous punishment such as death, they mostly applied to adult offenders. Aside from these heinous punishments, some less severe punishments were also applied such as restitution, social exclusion and public ridicule, and religious sanctions, amongst others.<sup>354</sup> Okechi<sup>355</sup> states that with the passage of time, native Kenyans began resisting the application of English common law and this led to a dual system of justice, with certain courts applying English common law and others applying English and traditional laws. This means that there was no unanimity in the application of the law. Each person approached the court which he or she felt applied laws that the individual could relate to. This implies a disorganised justice system. With the application of a dual system, juveniles in conflict with the law were often left in between.

The quest to ensure that children who were in conflict with the law did not pose as a negative influence on the others led to the establishment of penal institutions.<sup>356</sup> These institutions were guided by the English models and were also suitable for the African context.<sup>357</sup> They were also put in place to create a separation of adult offenders from child offenders.<sup>358</sup> Okechi states that among these penal institutions were schools, youth centres and borstal institutions which held people under the age of nineteen

---

<sup>350</sup> Gerard 2008 [https://www.opendemocracy.net/article/democracy\\_power/kenya\\_roots\\_crisis](https://www.opendemocracy.net/article/democracy_power/kenya_roots_crisis).

<sup>351</sup> Odongo G 'Kenya' 29-43.

<sup>352</sup> Odongo G 'Kenya' 29-43.

<sup>353</sup> Okechi 2017 [www.unafei.or.jp](http://www.unafei.or.jp).

<sup>354</sup> Okechi 2017 [www.unafei.or.jp](http://www.unafei.or.jp).

<sup>355</sup> Okechi 2017 [www.unafei.or.jp](http://www.unafei.or.jp).

<sup>356</sup> Okechi 2017 [www.unafei.or.jp](http://www.unafei.or.jp).

<sup>357</sup> Okechi 2017 [www.unafei.or.jp](http://www.unafei.or.jp).

<sup>358</sup> Okechi 2017 [www.unafei.or.jp](http://www.unafei.or.jp).

years who were in conflict with the law.<sup>359</sup> Okechi states that children in conflict with the law faced corporal punishments, and probation, among other forms of dispute resolution measures.<sup>360</sup>

### 3.3.2. Kenya's contemporary juvenile justice

Odongo<sup>361</sup> states that after the ratification of the *CRC* in 1990, Kenya enacted legislation that guides the juvenile justice system. One of the interesting pieces of legislation is the *Children's Act* of no 29 of 2022.<sup>362</sup> This framework deals with all matters concerning children and is aimed at domesticating international laws.<sup>363</sup> It is submitted that this might have been the reason that led to a very *detailed children's clause in the Constitution of Kenya, 2010 (hereinafter Kenya's Constitution)*.<sup>364</sup> The starting point for this discussion will thus be *Kenya's Constitution*.

Article 2 of *Kenya's Constitution*<sup>365</sup> declares that *Kenya's Constitution* is the supreme law and any law that is not in conformity with it shall be regarded as invalid. This means that all the laws that pertain to the administration of juvenile justice should be consistent with *Kenya's Constitution*. Just like the South African Constitution, *Kenya's Constitution* contains the right to life,<sup>366</sup> equality and freedom from discrimination,<sup>367</sup> and human dignity.<sup>368</sup> These rights apply to everyone including children in conflict with the law. *Kenya's Constitution* in article 48<sup>369</sup> imposes a duty on the State to ensure that everyone has access to justice. Article 49 of *Kenya's Constitution*<sup>370</sup> list the rights of the arrested persons such as the right to remain silent, the right to legal representation, the right to be kept separate from people serving sentences, amongst others. In addition, article 50 of *Kenya's Constitution*<sup>371</sup> states that everyone who has

---

<sup>359</sup> Okechi 2017 [www.unafei.or.jp](http://www.unafei.or.jp).

<sup>360</sup> Okechi 2017 [www.unafei.or.jp](http://www.unafei.or.jp).

<sup>361</sup> Odongo G 'Kenya' 29-43.

<sup>362</sup> *Children's Act* of no 29 of 2022.

<sup>363</sup> Odongo G 'Kenya' 29-43.

<sup>364</sup> *Constitution of Kenya, 2010*. Hereinafter referred to as *Kenya's Constitution*.

<sup>365</sup> Article 2 of the *Constitution of Kenya, 2010*.

<sup>366</sup> Article 26 of the *Constitution of Kenya, 2010*.

<sup>367</sup> Article 27 of the *Constitution of Kenya, 2010*.

<sup>368</sup> Article 28 of the *Constitution of Kenya, 2010*.

<sup>369</sup> Article 48 of the *Constitution of Kenya, 2010*.

<sup>370</sup> Article 49 of the *Constitution of Kenya, 2010*.

<sup>371</sup> Article 50 of the *Constitution of Kenya, 2010*.

been arrested has a right to a fair hearing, which includes having the trial adjudicated without unreasonable delay, to be present during the court proceedings unless the conduct of the accused makes it impossible for the trial to proceed, amongst others. Article 53 of *Kenya's Constitution*<sup>372</sup> states that the best interests of children are of paramount importance. It goes on to state that children have a right to not be detained unless that is done as a measure of the last resort.<sup>373</sup> Article 250 of *Kenya's Children Act* lists factors that should be taken into consideration when professionals evaluate what the best interests of the child are in each circumstance, which includes but are not limited to the preference of the child, provided that the child is old enough to express the preference; the age, background, gender and maturity of the child; distinct special needs of a child.<sup>374</sup> Article 53 of *Kenya's Constitution*<sup>375</sup> further states that when a child has been detained, the child has a right to be detained for the least amount of time and should be kept separate from adults. Hence, from the provisions of *Kenya's Constitution* it is unarguable that the provision set a standard for the administration of the juvenile justice system, and that although these provisions are not specific to children, they still apply to children. Against the backdrop of *Kenya's Constitution*, it is important to turn to other legal frameworks for the administration of juvenile justice in Kenya.

Article 2 of the *Children's Act* no 29 of 2022 (hereinafter referred to as Kenya's Children Act)<sup>376</sup> acknowledges a child as a person who is under the age of eighteen years. *Kenya's Children Act* does set out the minimum age of criminal liability as twelve years.<sup>377</sup> However, article 14 of the *Penal Code Act: Chapter 63* of 2023 (hereinafter Kenya's Penal Code)<sup>378</sup> states that eight years of age should be regarded as the minimum age of criminal liability. It goes on to state, however, that children below the age of fourteen years should not be held criminally liable unless the State leads evidence that children understand their actions and the legality of such actions and

---

<sup>372</sup> Article 53 of the *Constitution of Kenya*, 2010.

<sup>373</sup> Article 53 of the *Constitution of Kenya*, 2010.

<sup>374</sup> Article 250 of the *Children's Act* no 29 of 2022.

<sup>375</sup> Article 53 of the *Constitution of Kenya*, 2010.

<sup>376</sup> Article 2 of the *Children's Act* no 29 of 2022. Hereinafter referred to as *Kenya's Children Act*.

<sup>377</sup> Article 221 of the *Children's Act* no 29 of 2022.

<sup>378</sup> Article 14 of the *Penal Code Act: Chapter 63* of 2023. Hereinafter *Kenya's Penal Code*.

acted in appreciation of that.<sup>379</sup> This is also affirmed in article 221 of *Kenya's Children Act*,<sup>380</sup> which states that a child under the age of fourteen years is considered to not possess criminal liability unless the prosecutor proves otherwise. This minimum age of criminal capacity set by Kenya's legal framework is on the very low side considering that most international laws set the age of criminal capacity as twelve years, as shown in the preceding chapter. Another interesting aspect of Kenya's legal framework is article 14 of *Kenya's Penal Code*,<sup>381</sup> which states that a male child under the age of twelve shall be considered to not possess carnal knowledge. This leaves a lot of unanswered questions, such as: was the intention of the legislator to exclude female children from enjoying the same right? Are there exceptions to this rule or can male children under the age of twelve never be tried for sexual offences? among other questions. In addition, where a child's age is under scrutiny, article 228 of *Kenya's Children Act*<sup>382</sup> sets out procedures that can be taken to estimate the child's age, such as reference to baptism certificates, reports by medical practitioner, and reports social workers amongst others. This is done to ensure that the correct legal framework is applied to the child.

Article 217 of *Kenya's Children Act*<sup>383</sup> states that the Children's Court has jurisdiction to try matters involving children in conflict with the law unless they are charged with murder. Article 218 of *Kenya's Children Act*<sup>384</sup> makes provision for the assessment of a child, when arrested, for instance, a child assessor should be employed to put the child at ease and make the child comfortable. One cannot argue that going through the justice system as an accused person is mentally taxing, hence putting in place laws that put at ease the child who is in conflict with the law at is very important and beneficial to the child.

In addition, article 220 of *Kenya's Children Act*<sup>385</sup> provides the rights afforded to children in conflict with the law. It states that child offenders have a right to privacy

---

<sup>379</sup> Article 14 of the *Penal Code Act: Chapter 63* of 2023.

<sup>380</sup> Article 221 of the *Children's Act* no 29 of 2022.

<sup>381</sup> Article 14 of the *Penal Code Act: Chapter 63* of 2023.

<sup>382</sup> Article 228 of the *Children's Act* no 29 of 2022.

<sup>383</sup> Article 217 of the *Children's Act* no 29 of 2022.

<sup>384</sup> Article 218 of the *Children's Act* no 29 of 2022.

<sup>385</sup> Article 220 of the *Children's Act* no 29 of 2022.

at all stages of the matter and information pertaining to the matter should be kept private.<sup>386</sup> These rights are in addition to the rights provided for in other legislations. The fact that these rights are affirmed in different legislation, stresses the importance of fulfilment of these rights and places an obligation on the State to ensure that the rights are fulfilled.

In addition, article 222 of *Kenya's Children Act*<sup>387</sup> states that a child in conflict with the law has the right to a fair trial; to be heard in the proceedings; to be assisted by the parents, guardians and any fit person; and places an obligation on the State to have sound facilitating mechanisms such as interpreters. This advances the participation of parents, guardians, and any other fit person during the proceedings. In line with this provision, is article 233 of *Kenya's Children Act*<sup>388</sup> which states that children in conflict with the law have a right to legal aid or legal representation, the right to be assisted by the parent or guardians or close relative or probation officer, and the right to remain silent. This is reaffirmation of not only the persons who can be present during the proceedings but can assist the child. It also places an obligation on the State to ensure that the child has legal assistance or aid and for the State to pay for the services of a legal representative or aide.

Furthermore, article 223 of *Kenya's Children Act*<sup>389</sup> states that detention should be used as a last resort. This reaffirms the provision of *Kenya's Constitution* mentioned above. Whilst a professional determines whether the child should be detained, certain factors must be considered such as the age, status, and special needs of the child, amongst others.<sup>390</sup> This is in line with international laws that promote diversionary measures instead of detention or detainment. Article 224 of *Kenya's Children Act*<sup>391</sup> states that a child in conflict with the law can be ordered to have a trial held in the Children's Court or for diversionary measures to be applied. Article 230 of *Kenya's Children Act*<sup>392</sup> provides some of the diversionary measures that can be taken. It states

---

<sup>386</sup> Article 220 of the *Children's Act* no 29 of 2022.

<sup>387</sup> Article 222 of the *Children's Act* no 29 of 2022.

<sup>388</sup> Article 233 of the *Children's Act* no 29 of 2022.

<sup>389</sup> Article 223 of the *Children's Act* no 29 of 2022.

<sup>390</sup> Article 223 of the *Children's Act* no 29 of 2022.

<sup>391</sup> Article 224 of the *Children's Act* no 29 of 2022.

<sup>392</sup> Article 230 of the *Children's Act* no 29 of 2022.

that: a child can be ordered to attend counselling and psychotherapy sessions for a period of not more than three months; the child can offer oral or written apology; or the child can also undergo supervision for a specified time; amongst others.<sup>393</sup> These diversionary alternatives were put in place to ensure that children in conflict with the law are not unreasonably detained or imprisoned.

In addition, article 226 of *Kenya's Children Act*,<sup>394</sup> sets out the objectives of the diversionary measures. Some of the objectives included in this article are to facilitate reconciliation between the child and the victim or the wronged community; to promote rehabilitation of the child; and to minimise the stigmatisation of the child, amongst others. It is crystal clear that the diversionary measures are not lacking in aim or benefit. The advantages of diversionary measures outweigh the advantages of detaining a child or sending a child to prison facilities. In addition, article 227 of *Kenya's Children Act*<sup>395</sup> provides for the instances where diversionary measures should be considered. Some factors that should be considered are that the child is indeed guilty, that the child admits that he or she is guilty, that a child is a first- or second-time offender.<sup>396</sup> This means that before diversionary measures are considered, factors listed in the article mentioned, should be fulfilled.

Article 228 of *Kenya's Children Act*<sup>397</sup> states that before a child in conflict with the law takes a plea, a preliminary hearing should take place. This is an opportunity given to scout for more information pertaining to the matter<sup>398</sup>. During the preliminary hearing, factors such as the age of the child, the criminal capacity of the child, and diversionary measures, should be considered.<sup>399</sup> This ensures that trivial matters are not taken to court when other available alternative measure can be taken. A preliminary hearing also ensures that some aspects of the matter as pointed out above, are addressed. A preliminary hearing also ensures that fewer cases end up being tried in the Children's Court.

---

<sup>393</sup> Article 230 of the *Children's Act* no 29 of 2022.

<sup>394</sup> Article 226 of the *Children's Act* no 29 of 2022.

<sup>395</sup> Article 227 of the *Children's Act* no 29 of 2022.

<sup>396</sup> Article 228 of the *Children's Act* no 29 of 2022.

<sup>397</sup> Article 228 of the *Children's Act* no 29 of 2022.

<sup>398</sup> Article 228 of the *Children's Act* no 29 of 2022.

<sup>399</sup> Article 228 of the *Children's Act* no 29 of 2022.

Article 236 of *Kenya's Children Act*,<sup>400</sup> states that the State has a duty to provide for the welfare of the child. When a child who is in remand or in the custody of the State becomes ill, the State has a duty to attend to that child and to ensure that the child is okay.<sup>401</sup> It also goes on to stipulate that the State should also consider some important matters exclusive to a child with special needs, such as special attention being given to their personal and special needs.<sup>402</sup> It also states that the parents and guardian of a child offender who has been placed in remand or custodial care have the right to access the child in the interest and wellbeing of the child.<sup>403</sup> This is to ensure that at all times when the State has custody of the child, the welfare of such a child is given much attention. It also puts the parents and guardians at ease, knowing that their child is being given the attention he or she requires. It advances the protection of the rights of children who are in conflict with the law.

In addition, article 239 of *Kenya's Children Act*,<sup>404</sup> read along with article 35 of *Kenya's Penal Code*,<sup>405</sup> lists the methods of dealing with a child in conflict with the law. Some of these methods include but are not limited to, discharge of the case, sending the child to rehabilitation facilities, ordering the child to pay a fine, ordering the child to be on supervision or probation among others.<sup>406</sup> In addition to that, if it is evident that the child requires mental health assistance, the court should order that the child receive the assistance.<sup>407</sup> In other circumstances, the court can also order that the parents pay a fine, amongst other things.<sup>408</sup> The methods addressed here of dealing with a child in conflict with the law are not exhaustive. The provisions of *Kenya's Children Act* carry a long list of the methods that can be applied to deal with a juvenile in conflict with the law.

---

<sup>400</sup> Article 236 of the *Children's Act* no 29 of 2022.

<sup>401</sup> Article 236 of the *Children's Act* no 29 of 2022.

<sup>402</sup> Article 236 of the *Children's Act* no 29 of 2022.

<sup>403</sup> Article 236 of the *Children's Act* no 29 of 2022.

<sup>404</sup> Article 239 of the *Children's Act* no 29 of 2022.

<sup>405</sup> Article 35 of the *Penal Code Act: Chapter 63* of 2023.

<sup>406</sup> Article 239 of the *Children's Act* no 29 of 2022.

<sup>407</sup> Article 240 of the *Children's Act* no 29 of 2022.

<sup>408</sup> Article 241 of the *Children's Act* no 29 of 2022.

It is also important to point to article 242 of *Kenya's Children Act*<sup>409</sup> which establishes the need for a special police unit. This unit has an obligation to deal with children's matters; to apprehend child offenders; to investigate child offences; to prevent and control offences committed by children; and other functions listed in the act or in other law instruments.<sup>410</sup> The establishment of such a special police unit is very important, as it guarantees that the officials dealing with matters relating to child offenders are well versed in matters relating to children. It also shows that there is a body whose sole purpose is to deal with matters involving children in conflict with the law and hence, can offer undivided attention to such matters.

### *3.3.3. Summation*

It is obvious that *Kenya's Children Act* has dealt extensively with matters relating to children in conflict with the law. Kenya has done a good job in explicating the process and procedures to be followed to effectively treat children who are in conflict with the law. The discussion above has proven that pieces of legislation in conformity with international laws have been put in place to ensure that children in conflict with the law are protected and that their welfare is guaranteed. Although it has not been addressed above, there are some notable inconsistencies between the policies and the implementation of these policies. This will form part of the following chapters discussion.

## **3.4. The administration of juvenile justice in Zimbabwe**

### *3.4.1. History and Background of juvenile justice in Zimbabwe*

According to Mukungurutse, four colonial powers were interested in Zimbabwe in the late nineteenth century, and these were Britain, Germany, Portugal, and the Boers.<sup>411</sup> All these colonial powers were interested in Zimbabwe for various reasons for instance, the British Colony was interested in gold whilst the Germans and the Boers wanted to

---

<sup>409</sup> Article 242 of the *Children's Act* no 29 of 2022.

<sup>410</sup> Article 242 of the *Children's Act* no 29 of 2022.

<sup>411</sup> Mukungurutse 2023 [Colonization of Zimbabwe: Introduction - Free ZIMSEC & Cambridge Revision Notes](#).

expand their territories into Central Africa.<sup>412</sup> The British Colony was successful in colonising Zimbabwe and named the country Rhodesia.<sup>413</sup> The aims of the occupancy by the British Colony were to acquire gold, to possess rich soils and natural resources, to take cattle, to spread British imperialism, to fulfil the Cape-to-Cairo project that was initiated by Rhodes, to invest surplus capital, and to promote civilisation.<sup>414</sup> The British Colony perceived Zimbabwe as a lucrative marketing country as there was high demand for European goods.<sup>415</sup> In addition, Cecil John Rhodes regarded British people as the finest race and thus infested Zimbabwe with racism.<sup>416</sup> Missionaries who were also working in Zimbabwe pleaded with their mother government to colonise Zimbabwe because they wanted to spread Christianity.<sup>417</sup> Not much attention was given to juvenile justice and the laws that applied to adult offenders also applied to juvenile offenders.<sup>418</sup> As a result, juvenile justice was aimed at crushing and punishing juvenile offenders.<sup>419</sup>

According to Rugaruganda and Rugaruganda<sup>420</sup> children in conflict with the law in Zimbabwe often face stigma and are shunned by the community as they are perceived to be a threat. The two add that,<sup>421</sup> when they looked at the history of the administration of juvenile justice in Zimbabwe, it has been retributive and focused on punishing children in conflict with the law.<sup>422</sup> As a result, a lot of critics have voiced their viewpoints in relation to the sentencing of children in conflict with the law, and

---

<sup>412</sup> Mukungurutse 2023 [Colonization of Zimbabwe: Introduction - Free ZIMSEC & Cambridge Revision Notes.](#)

<sup>413</sup> Mukungurutse 2023 [Colonization of Zimbabwe: Introduction - Free ZIMSEC & Cambridge Revision Notes.](#)

<sup>414</sup> Mukungurutse 2023 [Colonization of Zimbabwe: Introduction - Free ZIMSEC & Cambridge Revision Notes.](#)

<sup>415</sup> Mukungurutse 2023 [Colonization of Zimbabwe: Introduction - Free ZIMSEC & Cambridge Revision Notes.](#)

<sup>416</sup> Mukungurutse 2023 [Colonization of Zimbabwe: Introduction - Free ZIMSEC & Cambridge Revision Notes.](#)

<sup>417</sup> Mukungurutse 2023 [Colonization of Zimbabwe: Introduction - Free ZIMSEC & Cambridge Revision Notes.](#)

<sup>418</sup> Mukungurutse 2023 [Colonization of Zimbabwe: Introduction - Free ZIMSEC & Cambridge Revision Notes.](#)

<sup>419</sup> Mukungurutse 2023 [Colonization of Zimbabwe: Introduction - Free ZIMSEC & Cambridge Revision Notes.](#)

<sup>420</sup> Rugaruganda and Rugaruganda2016 *AJSW* 7-13.

<sup>421</sup> Rugaruganda and Rugaruganda2016 *AJSW* 7-13.

<sup>422</sup> Rugaruganda and Rugaruganda2016 *AJSW* 7-13.

the lack of legal statutes that provide for the rights of children in conflict with the law, amongst other aspects.

Zimbabwe's juvenile justice system is under construction from a retributive juvenile justice system to a transformative one. This process has been marked and infused by the introduction of legal instruments and policies that cater for the rights of children who find themselves in conflict with the law. Despite these reforms, there are still notable gaps that remain in the current system. These gaps will, however, be addressed in the following chapter.

### 3.4.2. *Zimbabwe's contemporary juvenile justice system*

The implementation of the *Constitution of Zimbabwe Amendment Act, 2018* (hereinafter the *Constitution of Zimbabwe*)<sup>423</sup> signified the birth of a new era of hope for children, as it brought to light children's rights which were previously not acknowledged. The *Constitution of Zimbabwe* sends a very strong message to the nation that children are vulnerable and thus are deserving of protection in law. Apart from the protection of children's rights, the *Constitution of Zimbabwe* contains rights that are exclusive to children in conflict with the law. To start with, article 2 of the *Constitution of Zimbabwe*<sup>424</sup> declares the *Constitution of Zimbabwe* as the supreme law and any law that is not in conformity with it should be regarded as invalid. Article 37 of the *Constitution of Zimbabwe*<sup>425</sup> states that international treaties that are domesticated by the President and have been approved by the Parliament forms part of Zimbabwe's domestic law and are binding on the State. It is important to note that Zimbabwe signed and ratified the *CRC* in 1990, but the Parliament has not yet taken action to give the *CRC* effect.<sup>426</sup>

Article 19 of the *Constitution of Zimbabwe*<sup>427</sup> places the State under the obligation to ensure that policies and measures relating to children are in the best interests of

---

<sup>423</sup> *Constitution of Zimbabwe Amendment Act, 2018*. Hereinafter the *Constitution of Zimbabwe*.

<sup>424</sup> Article 2 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>425</sup> Article 37 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>426</sup> UNICEF "date unknown" <http://www.unicef.org/Zimbabwe/press-release/Zimbabwe-launches-pre-trial-diversion-programme>.

<sup>427</sup> Article 37 of the *Constitution of Zimbabwe Amendment Act, 2018*.

children. Article 81 of the *Constitution of Zimbabwe*<sup>428</sup> affirms that in all matters pertaining to children, their best interests are of paramount importance. The State thus has an obligation to cater for the protection of children through formulation of legislation. It further provides that the State has an obligation to ensure that there are adequate resources to ensure that children are fully protected.<sup>429</sup> The objectives of putting in place legislation relating to children and providing enough resources for the protection of children are ways to ensure that children are protected from all forms of abuse, be it in the care of the family or in the care of the State.

Article 81 of the *Constitution of Zimbabwe*<sup>430</sup> is the first of its kind given the history and background of the country. This article of the *Constitution of Zimbabwe*<sup>431</sup> provides that a child has a right to a name and a family name; citizenship based on birth; education, health care services, nutrition, and shelter; amongst others. The list of the rights of the children is extensive. One cannot argue that Zimbabwe is going in the right direction in providing for the protection of children in terms of legislation.

In addition, article 81 of the *Constitution of Zimbabwe*<sup>432</sup> provides that detaining a child should be taken as a measure of last resort and if it happens that a child has been detained, the detention period should be as short as possible. This was affirmed in the case of *S v FM* (CRB 415/14) [2015] ZWHHC 112 (hereinafter *S v FM*).<sup>433</sup> where the court believed the passing of a nine-year jail sentence on a juvenile was not in line with the principles of the *Constitution of Zimbabwe* as it infringes on the right a child has, not to be detained for a very long time. This means that the law denounces the detention of children for a period longer than necessary.

Additionally, article 81 of the *Constitution of Zimbabwe*<sup>434</sup> states that children in conflict with the law have a right to be kept separate from adult offenders. It goes on to state that whilst in the care of the State, children in conflict with the law have a right to be treated in a manner and be kept in a conducive environment, taking into consideration

---

<sup>428</sup> Article 19 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>429</sup> Article 81 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>430</sup> Article 81 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>431</sup> Article 81 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>432</sup> Article 81 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>433</sup> *S v FM* (CRB 415/14) [2015] ZWHHC 112. Hereinafter referred to as *S v FM*.

<sup>434</sup> Article 81 of the *Constitution of Zimbabwe Amendment Act, 2018*.

the age of the child.<sup>435</sup> This is also affirmed in article 63 of the *Prison and Correctional Service Act 9 of 2023*<sup>436</sup> that states that young prisoners should be kept separate from adult prisoners. These provisions thus call for the special handling of children in conflict with the law. At no point should children in conflict with the law be kept in the same and immediate vicinity as adult offenders.

Moreover, article 69-70 of the *Constitution of Zimbabwe*<sup>437</sup> further provides that everyone has a right to a fair trial and a fair hearing. Article 70 of the *Constitution of Zimbabwe*<sup>438</sup> provides an extensive list of rights afforded to accused persons such as the right to be present during court proceedings; the right to have legal representation; the right to be informed of charges against him or her; and the right to adduce and challenge evidence, to mention but a few. Article 53 of the *Constitution of Zimbabwe*<sup>439</sup> denounce physical or psychological torture or cruelty and punishments that are inhumane and degrading. These rights apply to everyone including children. Hence, in addition to the rights exclusive to children, rights awarded to adult offenders are also enjoyed by children in conflict with the law.

In addition to the *Constitution of Zimbabwe*, the *Children's Act Chapter 5:06 of 1972* (hereinafter *Zimbabwe's Children Act*),<sup>440</sup> provides for the rights and protection of children. Whilst *Zimbabwe's Children Act* defines a child as any person under the age of sixteen years,<sup>441</sup> the *Constitution of Zimbabwe* defines a child as any boy or girl under the age of eighteen years.<sup>442</sup> Given the incoherence between the two provisions, the latter's definition of a child shall be taken as the prevailing definition considering that it is the supreme law of Zimbabwe. In cases where the age of the child comes to question, article 387 of the *Criminal Procedure and Evidence Act Chapter 9:07 no 2 of 2016* (hereinafter the CPEA)<sup>443</sup> states that the magistrate may estimate the child's age taking into consideration the physical appearance of the child and information that

---

<sup>435</sup> Article 81 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>436</sup> Article 63 of the *Prison and Correctional Service Act 9 of 2023*.

<sup>437</sup> Article 69-70 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>438</sup> Article 70 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>439</sup> Article 53 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>440</sup> *Children's Act Chapter 5:06 of 1972*. Hereinafter *Zimbabwe's Children Act*.

<sup>441</sup> Article 2 of the *Children's Act Chapter 5:06 of 1972*.

<sup>442</sup> Article 81 of the *Constitution of Zimbabwe Amendment Act, 2018*.

<sup>443</sup> Article 387 of the *Criminal Procedure and Evidence Act Chapter 9:07 no 2 of 2016*.

may be available to the magistrate. In the case of *S v FM*,<sup>444</sup> the High Court of Zimbabwe submitted that the lower court had erred when it passed a 12-month imprisonment sentence with hard labour on two juveniles who were aged between 16 and 17 without the factual knowledge of the children's ages. The court went on to state that the lower court had erred by not taking time to estimate the ages of the children and act in that knowledge.<sup>445</sup> The High Court added that it is crucial that courts consider the age of the children when they assess the proper sentence for a child found guilty of committing a crime.<sup>446</sup> Hence, the provisions of legal statutes and case precedents show that when a child is in conflict with the law, the authorities must take all the necessary steps to determine the child's age in order to ascertain the applicable laws and pass the appropriate sentences.

In addition, the *Criminal Law (Codification and Reform) Act 23 of 2004*<sup>447</sup> deems that a child who is under the age of seven years lacks criminal capacity. It adds that children above seven years but below fourteen years should be presumed to lack criminal capacity unless proven to the contrary by the State.<sup>448</sup> Children above the age of fourteen years are considered to possess criminal capacity.<sup>449</sup> An interpretation of these provisions entails that at no point can a child under the age of seven be held criminally liable for an offence. However, a child between the ages of seven and fourteen can be held liable for criminal misconducts provided that the State proves beyond a reasonable doubt that during the commission or omission of the crime, the child was aware of his or her conduct, the legality of such conduct, and acted in appreciation of that. In addition, the interpretation of article 68 of the *CPEA*<sup>450</sup> leads to the conclusion that there is a rebuttable presumption that a boy over the age of twelve but below the age of fourteen is not capable of performing a sexual offence unless there is evidence to the contrary. This provision causes discrimination between boys and girls. This only affords protection to the male child and not the female child.

---

<sup>444</sup> *S v FM* (CRB 415/14) [2015] ZWHHC 112.

<sup>445</sup> *S v FM* (CRB 415/14) [2015] ZWHHC 112.

<sup>446</sup> *S v FM* (CRB 415/14) [2015] ZWHHC 112.

<sup>447</sup> Article 6 of the *Criminal Law (Codification and Reform) Act 23 of 2004*.

<sup>448</sup> Article 6 of the *Criminal Law (Codification and Reform) Act 23 of 2004*.

<sup>449</sup> Article 6 of the *Criminal Law (Codification and Reform) Act 23 of 2004*.

<sup>450</sup> Article 68 of the *Criminal Procedure and Evidence Act Chapter 9:07* no 2 of 2016.

Article 195 of the *CPEA*,<sup>451</sup> provides that the identity of a juvenile who is in conflict with the law should not be disclosed unless exceptional circumstances exist. However, article 195 of the *CPEA*<sup>452</sup> permits the disclosure of the identity of a juvenile tried or being tried in a court of law if a judge or magistrate adjudicating the matter or the Minister at any time after the trial, consents to the disclosure of the minor's identity and is of the opinion that disclosure of the identity of the juvenile is in the public interest or any particular person's interest, and that disclosure of the minor's identity is regarded as just and equitable. Without consent of the judge or magistrate or the Minister, disclosure of a minor's identity is unlawful and impermissible.

In line with the provision of international laws, Zimbabwe came up with a pre-trial diversion programme which was initiated and incorporated in the *CPEA*. According to article 9 of the *CPEA*,<sup>453</sup> the prosecutor may refuse to prosecute a matter where the accused person is under the age of 18 years; where the accused has admitted to the commission of the crime, and where the crime that was committed would not in ordinary circumstances attract a custodial sentence of more than a year. In terms of the provisions of the *CPEA*,<sup>454</sup> the diversion should take place with the support of the probation officer and in such cases, the matter should be heard in a closed court and sentences that should be imposed, should be in line with the principles of rehabilitation. This programme came about because of the influence of UNICEF and Save the Children organizations that piloted the project.<sup>455</sup> As pointed out in article 9 of the *CPEA*,<sup>456</sup> this program only applies to children who have committed less serious offences and children who are not repeat offenders only, hence, children who commit serious offences such as murder and rape are not eligible for the program. According to the Ministry of Justice, Legal and Parliamentary Affairs,<sup>457</sup> the aims of the pre-trial diversion program are to make juveniles accountable for their actions; to prevent the acquisition of a criminal offence by a child, and to facilitate the notion of rehabilitation, amongst

---

<sup>451</sup> Article 195 of the *Criminal Procedure and Evidence Act Chapter 9:07* no 2 of 2016.

<sup>452</sup> Article 195 of the *Criminal Procedure and Evidence Act Chapter 9:07* no 2 of 2016.

<sup>453</sup> Article 195 of the *Criminal Procedure and Evidence Act Chapter 9:07* no 2 of 2016.

<sup>454</sup> Article 9 of the *Criminal Procedure and Evidence Act Chapter 9:07* no 2 of 2016.

<sup>455</sup> UNICEF "date unknown" <http://www.unicef.org/Zimbabwe/press-release/Zimbabwe-launches-pre-trial-diversion-programme>.

<sup>456</sup> Article 9 of the *Criminal Procedure and Evidence Act Chapter 9:07* no 2 of 2016.

<sup>457</sup> Ministry of Justice, Legal and Parliamentary Affairs "date unknown" <http://.www.justice.gov.zw/index.php/departments/policy-legal-research?showall=&start=4>.

other aims. Measures have also been put in place to assist beneficiaries of this programme such as the attendance of counselling sessions, attendance of educational and vocational institutes, amongst others.<sup>458</sup>

Article 28 of *Zimbabwe's Children Act*<sup>459</sup> provides that children in conflict with the law should be kept in safe remand and detention facilities whilst awaiting trial and they should be brought before the Children's Court within seven days. These remand and detention facilities should be established by the Minister with the necessary authority to do so.<sup>460</sup> Subject to the nature of the offence, sex, race, character and age of the child, article 84 of *Zimbabwe's Children Act*<sup>461</sup> prohibits the detention of children whilst they are awaiting the trial proceedings. In essence, children in conflict with the law should not be detained or remanded to holding facilities unless there are exceptional circumstances that warrant the detention and remanding of children in conflict with the law.

In terms of the provisions of the *CPEA*,<sup>462</sup> the court is clothed with discretion on suitable sentences that can be imposed on a juvenile offender. Article 351 of the *CPEA*<sup>463</sup> provides that a person who is under the age of eighteen years who has been convicted of an offence can either be sentenced to imprisonment or a fine or such a person can be dealt with in accordance with the terms of the Children's Court. An alternative would be placement of the child in a training institute located in Zimbabwe or a reform school in South Africa for a period not exceeding three years or until a release licence is issued in line with the provisions of the *Children's Act*.<sup>464</sup> The court also have the authority to discharge a case against a child in conflict with law with reprimand or caution.<sup>465</sup> The *CPEA* also gives the court the authority to postpone the passing of a sentence and to also suspend the operation of the sentence that was passed.<sup>466</sup> There is no doubt that

---

<sup>458</sup> Ministry of Justice, Legal and Parliamentary Affairs "date unknown"  
<http://www.justice.gov.zw/index.php/departments/policy-legal-research?showall=&start=4>.

<sup>459</sup> Article 28 of the *Children's Act Chapter 5:06* of 1972.

<sup>460</sup> Article 28 of the *Children's Act Chapter 5:06* of 1972.

<sup>461</sup> Article 84 of the *Children's Act Chapter 5:06* of 1972.

<sup>462</sup> Article 351 of the *Criminal Procedure and Evidence Act Chapter 9:07* no 2 of 2016.

<sup>463</sup> Article 351 of the *Criminal Procedure and Evidence Act Chapter 9:07* no 2 of 2016.

<sup>464</sup> Article 352 of the *Criminal Procedure and Evidence Act Chapter 9:07* no 2 of 2016.

<sup>465</sup> Article 358 of the *Criminal Procedure and Evidence Act Chapter 9:07* no 2 of 2016.

<sup>466</sup> Article 358 of the *Criminal Procedure and Evidence Act Chapter 9:07* no 2 of 2016.

these sentences give the child adequate opportunity to reform and rehabilitate. In addition to custodial sentences mentioned above, non-custodial sentences can also be imposed. These sentences are in terms of the provision of the *CPEA*, and include but are not limited to, community service, family group conference, victim-offender mediation, reparation, and police caution.<sup>467</sup> The writer is of the view that non-custodial sentences are likely to be passed for less serious crimes.

### *3.4.3. Conclusion*

In conclusion, it has been shown that Zimbabwe underwent a thorough transformation when one looks at how previously, the juvenile justice system was focused on retribution and now the contemporary juvenile justice system provides for the protection of the rights of the children in conflict with the law. The legal framework put in place by Zimbabwe caters for the rights and welfare of children in conflict with the law.

### **3.5. Summation**

In a nutshell, this chapter has addressed the historical development of juvenile justice in South Africa, Kenya, Zambia and Zimbabwe. The history of the four chosen countries shows that one common aspect of the countries under discussion is the colonisation of the countries. As shown above, these countries, as a result of being colonised, ended up adopting English laws and incorporating them into their national legal instruments. This chapter has given a brief overview of the administration of juvenile justice in the selected countries. These countries are guided by international laws and the new era of the administration of juvenile justice systems was ushered in by distinct Constitutions.

The following chapter will address the similarities and differences between the selected countries for the purpose of this ongoing study. Attention will be given to the implementation of the aforementioned legal framework of each country. The writer

---

<sup>467</sup> Ministry of Justice, Legal and Parliamentary Affairs "date unknown"  
<http://.www.justice.gov.zw/index.php/departments/policy-legal-research?showall=&start=4>.

will also point out the similarities and differences between the implementation and enforcement of the legal frameworks addressed above.

## **Chapter 4 A comparative analysis of the juvenile justice systems in South Africa, Kenya, Zambia, and Zimbabwe**

### ***4. Introduction***

The juvenile justice systems in the four selected countries under discussion are the result of colonialism to some extent. As pointed out in the preceding chapter, the focus of the colonialists when developing the justice system was the notion of retribution instead of rehabilitation.<sup>468</sup> The colonialists paid little to no attention to formulation and enforcement of children's rights.<sup>469</sup> With this in mind, all four countries under study saw it fit to formulate constitutions exclusive to their jurisdiction and to declare them as supreme.<sup>470</sup> This was probably their first attempt to promote human rights. Some of the constitutions have been amended to give effect to and comply with, international legal provisions. There is no doubt that the contemporary juvenile justice systems of the selected countries have an element of cultural norms and practices exclusive to the selected countries. However, from the discussion above, it can be noted that South Africa, Kenya, Zambia, and Zimbabwe have attempted to abide by the standards of international juvenile justice in their exclusive jurisdiction. This was done through the domestication of international statutes and the amendment of existing legal statutes to give effect to the international statutes.

The focus of this chapter is to compare the administration of justice in the countries under study. The starting point will be the ratification of international legal instruments by the selected countries and the possible motivation for the ratification thereof. In this section, attention will be given to other aspects of the administration of juvenile justice such as the minimum age of criminal capacity, and the principle of diversion, amongst others. This chapter will also expose the gaps between the adoption of international instruments and the implementation thereof.

#### ***4.1. Ratification of international legislation and possible motivations***

---

<sup>468</sup> See chapter 3.

<sup>469</sup> See chapter 3.

<sup>470</sup> See chapter 3.

#### 4.1.1. Ratification of international legal instruments

Below is a table of the admission dates of the relevant African countries under study to the United Nations:<sup>471</sup>

Body	Country	Admission Date
United Nations	Kenya	16 December 1963
	South Africa	07 November 1945
	Zambia	01 December 1964
	Zimbabwe	25 August 1980

Below is a table of the admissions dates of the countries under study to the African Union (AU) or Organisation of the African Union (OAU):<sup>472</sup>

Body	Country	Admission Date
AU or OAU	Kenya	25 May 1963
	South Africa	06 June 1994
	Zambia	16 December 1964
	Zimbabwe	18 June 1980

Below is a table of the ratification of the *CRC*:<sup>473</sup>

Name of legal instrument	Country	Ratification date	Domestication of the legal instrument
CRC	Kenya	30 July 1990	<i>Children's Act No 29 of 2022</i>
	South Africa	16 June 1995	<i>Children Act 38 of 2005</i>
	Zambia	06 December 1991	<i>Juveniles Act 3 of 2011</i>

<sup>471</sup> United Nations "date unknown" <https://www.un.org/en/about-us/member-states>.

<sup>472</sup> African Union "date unknown" <https://oau60.au.int/en/member-states>.

<sup>473</sup> United Nations "date unknown" [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC).

	Zimbabwe	11 September 1990	<i>Children's Act [Chapter 5:06]</i>
--	----------	-------------------	--------------------------------------

Below is a table of the ratification of the *ACRWC*:<sup>474</sup>

Name of the legal instrument	Country	Signatory Date	Ratification date
ACRWC	Kenya		25 July 2000
	South Africa	10 October 1997	07 January 2000
	Zambia	28 February 1992	02 December 2008
	Zimbabwe		19 January 1995

#### 4.1.2. Possible motivation for the ratification of legal instrument

Some scholars like Hafner-Burton and Tsutsui<sup>475</sup> submit that countries are quick to ratify international legal instruments because they align with their domestic laws and views. Countries, therefore, strategically opt to ratify legal instruments that are consistent with their domestic interests.<sup>476</sup> This makes logical sense as countries would not be willing to ratify international instruments if they had gone against their countries' interests and views.

Moreover, there is no doubt that colonialism played a huge role in the countries under study and some of the legal instruments were shaped around the effects of colonialism.<sup>477</sup> For instance, if one considers South Africa, there is a clear assertion in the Constitution<sup>478</sup> of how the law is designed to heal the wounds of the past and acknowledge the importance of curating the divisions that existed in the past. Skelton and Courtenay<sup>479</sup> are of the view that if one considers at South Africa, there is no doubt that the focus of the legal framework post-apartheid has been to establish and

<sup>474</sup> African Union "date unknown" <https://www.acerwc.africa/en/member-states/ratifications>.

<sup>475</sup> Hafner-Burton and Tsutsui 2005 *AJS* 1373-1420.

<sup>476</sup> Hafner-Burton and Tsutsui 2005 *AJS* 1373-1420.

<sup>477</sup> See chapter 3.

<sup>478</sup> Preamble of the *Constitution of South Africa*, 1996.

<sup>479</sup> Skelton and Courtenay "South Africa's New Child Justice System" 321-342.

advance the basic human rights as well as a democratic society. As a result, this might have been a motivating factor for South Africa to ratify statutes such as the *CRC* and *ACRWC*, seeing that one of the interests was to advance human rights and to protect children from all forms of abuse. UNICEF<sup>480</sup> submits that the *CRC* was one of the first legal instruments that South Africa ratified, and it brought positive changes, for instance, corporal punishment was abolished after the ratification of the *CRC*. Zambia on the other hand dealt with massive discrimination and exploitation of human rights during the colonialism era.<sup>481</sup> Its interest in preserving human rights might have arisen from the struggles the country faced during colonialism at the hands of the British.<sup>482</sup> From the analysis of the contemporary juvenile justice systems of Kenya, South Africa, Zambia, and Zimbabwe there is no question that they willingly joined the United Nations and the African Union bodies in the quest to promote and provide for human rights. The ratifications of the international legal instruments and guidelines is a clear indication of the countries' willingness to cure past wounds and to ensure that human rights are prioritised. Colonialism might have played a part in the ratification of legal instruments as countries feared being colonised again and having their human rights violated. Ratification of the international statutes results in the expectation that the countries will adhere to the ratified statutes and find ways to domesticate them, thereby giving effect to the laws. Ratification of international legal instruments signified most countries stance on the provision and fulfilment of human rights. It was the sign of a shift from systematic violation of human rights to a full realisation of human rights.

Apart from colonialism, some countries like Kenya and Zimbabwe experienced ethnic battles. In Zimbabwe, war was waged between the Shona and Ndebele people (famously known as "Gukurahundi"), with 20 000 to 80 000 people losing their lives.<sup>483</sup> Evans states that there was a rumoured coup to oust Mugabe which was led by Nkomo.<sup>484</sup> As a result, Mugabe struck first and instructed the Fifth Brigade to kill the Ndebele'.<sup>485</sup> Gatheru<sup>486</sup> submits that Kenya has a vast diversity of ethnicities which

---

<sup>480</sup> UNICEF "date unknown" <https://www.unicef.org>.

<sup>481</sup> See paragraph 3.2.

<sup>482</sup> See paragraph 3.2.

<sup>483</sup> Evans 2019 <https://www.thoughtco.com/what-is-gukurahundi-43923>.

<sup>484</sup> Evans 2019 <https://www.thoughtco.com/what-is-gukurahundi-43923>.

<sup>485</sup> Evans 2019 <https://www.thoughtco.com/what-is-gukurahundi-43923>.

<sup>486</sup> Gatheru *Kenya: From Colonization to Independence 1888-1970* 1-200.

often lead to disproportionate representation. It was inevitable that wars arose in Kenya due to tribal differences and beliefs. Brownsell an Al Jazeera journalist,<sup>487</sup> reported that 1 400 people died and at least 600 000 people were displaced from their homes due to a civil war between tribes. These wars are tribal and often fuelled by factors such as hunger for power and acquisition of resources.<sup>488</sup> During the wars, some people were beheaded in public and burnt alive by mobs.<sup>489</sup> There were reports of people losing their lives in places where they took shelter and hid from mobs, such as church buildings.<sup>490</sup> Hence, there is no question that a possible motivation for ratifying legal statutes in countries such as Kenya and Zimbabwe was their interest to protect and promote human rights. The promotion of human rights is an attempt to bring to an end ethnic and tribal wars and to reunite people at large.

However, it is important to examine how most ratified international statutes are not enforced. Scholars like Muncie<sup>491</sup> assert that, even though countries were very quick to ratify international legal instruments, they have been reluctant to enforce them. Hafner-Burton and Tsutsui<sup>492</sup> argue that the reason why countries do not enforce ratified statutes is because the international statutes are not designed to ensure that Member States comply with them or at least are held liable for non-compliance. This is the reason why there are so many difficulties to date in the administration of justice. State Parties are aware of this flaw or legal gap and use this to get away with not complying with their duties and obligations. Hathaway<sup>493</sup> asserts that some States ratify statutes based on the way other states will react to such a commitment and not necessarily because they want to ratify the statutes. Hathaway<sup>494</sup> adds that it is easier for States to ratify statutes when they are aware that they will not be held liable for non-compliance neither will they be forced to change their behaviour towards human

---

<sup>487</sup> Brownsell 2013 <https://www.aljazeera.com/features/2013/3/3/kenya-what-went-wrong-in-2007>.

<sup>488</sup> Brownsell 2013 <https://www.aljazeera.com/features/2013/3/3/kenya-what-went-wrong-in-2007>.

<sup>489</sup> Brownsell 2013 <https://www.aljazeera.com/features/2013/3/3/kenya-what-went-wrong-in-2007>.

<sup>490</sup> Brownsell 2013 <https://www.aljazeera.com/features/2013/3/3/kenya-what-went-wrong-in-2007>.

<sup>491</sup> Muncie 2013 *IJCISD* 43-62.

<sup>492</sup> Hafner-Burton and Tsutsui 2005 *AJS* 1373-1420.

<sup>493</sup> Hathaway 2007 *JCR* 588-621.

<sup>494</sup> Hathaway 2007 *JCR* 588-621.

rights.

In addition, another motivation for ratifying international statutes and guidelines can be attributed to the rise in international trade. States have connected on a global level due to trading. Consequently, it is quite easy for States to follow similar trends be it in law, infrastructure, or any other matter. States are likely to ratify international statutes when the regional commitment is high. It is submitted that underdeveloped countries look up to developed countries and they will do all they can to be recognised as developed and to comply with some of the global norms. Goldson and Muncie<sup>495</sup> submit that State Parties are too quick to sign and ratify international instruments to avoid being seen as deviant from the international norms; however, their willingness to enforce the laws is less than expected internationally. Goldson and Muncie<sup>496</sup> add that States are quick to ratify international laws knowing that non-compliance does not equate to the imposition of sanctions. Without considering the feasibility of the enforcement of human rights norms, States feel like they have an obligation to ratify human rights treaties by virtue of their wanting to be globally recognised. Hathaway<sup>497</sup> states that countries are quick to ratify international statutes if they strengthen their foreign aid, foreign trade, and foreign relationships. Hathaway<sup>498</sup> adds that another factor that might influence the ratification of statutes is common history, and similarities in culture and politics. Hathaway<sup>499</sup> asserts that States become signatory to international pieces of legislation because of the need to maintain a clean reputation and material interests. The goal for ratifying legal instruments should surpass the need to form relationships. Human rights trump material gains and relationships. Hence, promotion of human rights should be the core of the ratification of international instruments.

#### **4.2. Minimum age of criminal capacity**

Skelton and Tshehla<sup>500</sup> submit that a child's criminal capacity should be based on

---

<sup>495</sup> Goldson and Muncie 2006 *YJIJ* 91-106.

<sup>496</sup> Goldson and Muncie 2006 *YJIJ* 91-106.

<sup>497</sup> Hathaway 2007 *JCR* 588-621.

<sup>498</sup> Hathaway 2007 *JCR* 588-621.

<sup>499</sup> Hathaway 2007 *JCR* 588-621.

<sup>500</sup> Skelton and Tshehla *Child Justice in South Africa* 1-50.

whether the child can distinguish between right and wrong and act in that appreciation. As pointed out earlier, the *Beijing Rules*<sup>501</sup> stipulate that the minimum age of criminal capacity should not be fixed too low taking into consideration the mental maturity, intellectual maturity and emotional state of a child. The reasoning behind this is to prevent the negative effect that a justice system has on a child who comes in contact with it. The interesting capacity of international legal instruments, however, is that the specific age of criminal capacity is not explicitly mentioned.

As pointed out above, in South Africa a child below the age of twelve years is presumed to lack criminal capacity; whilst children between twelve and fourteen are refutably presumed to not possess criminal capacity.<sup>502</sup> Skelton and Tshehla<sup>503</sup> are of the opinion that children between the ages of the set minimum age of criminal capacity and fourteen years can be charged with a criminal offence provided that the prosecutor can prove beyond a reasonable capacity that the child has criminal capacity. *Kenya's Penal Code*<sup>504</sup> stipulates that children under the age of eight years lacks criminal capacity and those between the ages of ten and fourteen are incapable of forming the intention to commit a crime. The *Penal Code of Zambia*<sup>505</sup> sets the minimum age of criminal capacity as eight years. It also stipulates that a child between the ages of eight and twelve refutably lacks criminal capacity.<sup>506</sup> Zimbabwe has set the age of criminal capacity at seven years, which means that children under the age of seven years cannot be held criminally liable for any offences.<sup>507</sup> Zimbabwe also stipulates that the child between the ages of seven and fourteen rebuttably lacks criminal capacity unless proven otherwise.<sup>508</sup>

From the above it can be noted that from the selected countries of study, Zimbabwe has the lowest minimum age of criminal capacity whilst South Africa has the highest. Zambia and Kenya are similar in that in both countries, the minimum age of criminal

---

<sup>501</sup> Article 4 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>502</sup> Skelton and Tshehla *Child Justice in South Africa* 1-50.

<sup>503</sup> Skelton and Tshehla *Child Justice in South Africa* 1-50.

<sup>504</sup> Article 14 of the *Penal Code Act: Chapter 63* of 2023.

<sup>505</sup> Article 14 of the *Penal Code (Amendment) Act* of 2023.

<sup>506</sup> Article 14 of the *Penal Code (Amendment) Act* of 2023.

<sup>507</sup> Article 2 of the *Children's Act Chapter 5:06* of 1972.

<sup>508</sup> Article 2 of the *Children's Act Chapter 5:06* of 1972.

capacity has been set at eight years of age. Another notable aspect is that South Africa, Kenya, and Zimbabwe stipulate that children between the ages of the exclusive minimum age of criminal capacity and fourteen are presumed to lack criminal capacity unless proven.

From the previous chapter, it appears that South Africa, Kenya, Zambia, and Zimbabwe have set the ways in which a child's age can be determined, the provisions of which will not be repeated here as they have been given due attention in Chapter three.<sup>509</sup> At this juncture it is important to turn to the enforcement of the legal instruments. Skelton and Tshehla<sup>510</sup> submit that whilst the possession of criminal capacity for children below fourteen was set to protect the children, in practice this provision is easily trampled on in South Africa as it can be easily rebutted. In addition, Skelton and Tshehla<sup>511</sup> argue that in most cases the mother of a child is called to the stand to attest to whether the child charged with a criminal offence can distinguish between what is right and what is wrong. A flawed procedure also takes place in Kenya. Kariuki<sup>512</sup> argues that in most cases a child is called to answer questions on his background, his view on right and wrong and his activities. This is clearly not enough to prove that a child indeed possesses criminal capacity since it ignores the ability that a child has to act in accordance with his or her appreciation of what can be considered right or wrong. Kariuki<sup>513</sup> further submits that there is evidence that in Kenya, children's ages are not proved correctly, and this often leads to children being tried as adults or vice versa. Zambia and Zimbabwe on the other hand leaves the court to determine the age of a child where such an issue arises. Mumba<sup>514</sup> states that there are not, however, any properly laid out steps that the court must take in Zambia when determining the age of a child. It is therefore, submitted that there are to some extent, gaps between the provisions of law and implementation thereof in the selected countries of study. Hence, there is room for improvement in relation to the steps that courts must take

---

<sup>509</sup> See page 42,49,58 and 67.

<sup>510</sup> Skelton and Tshehla *Child Justice in South Africa* 1-50.

<sup>511</sup> Skelton and Tshehla *Child Justice in South Africa* 1-50.

<sup>512</sup> Kariuki 2015 [www.su-plus.strathmore.edu](http://www.su-plus.strathmore.edu).

<sup>513</sup> Kariuki 2015 [www.su-plus.strathmore.edu](http://www.su-plus.strathmore.edu).

<sup>514</sup> Mumba *the Juvenile Criminal Justice System in Zambia Vis-à-vis the International Protection of Children's Rights* 19-44.

for instance in Zambia to determine a child's age. Consideration should be given to having a uniform age of criminal capacity in Africa.

### **4.3. The principle of diversion from the juvenile justice system**

Article 40 of the *CRC*<sup>515</sup> stipulates that when dealing with a child in conflict with the law, the State must consider, maintain and promote the dignity of a child. It is undoubtable that the intention of the *CRC* legislature was to prevent stereotyping of children in conflict with the law, which may in turn put their future in jeopardy. Article 40 of the *CRC*<sup>516</sup> is in conformity with the provision of the Beijing Rules,<sup>517</sup> as both instruments encourage State Members to take implement ways to deal with a child in conflict with the law, without having to resort to criminal proceedings. Alternative measures that can be taken as addressed above, includes but are not limited to, probation and supervision orders, counselling sessions and vocational training.

Skelton<sup>518</sup> provides that in South Africa, the legislature has done a good job of setting a well-structured diversion system in terms of the Child Justice Act. Skelton<sup>519</sup> further states that South Africa has provided many options that can be taken to deal with a child in conflict with the law and that these options facilitate restoration and rehabilitation of children instead of retribution. The following are some of the ways in which South African's diversion system stands out: community-based diversion programs such as the Western Cape diversion which focuses more on rehabilitation, reintegration and restorative justice; collaborations between the State and society organisations and the victim-offender mediation. *Kenya's Children's Act*<sup>520</sup> makes provision that diversionary measures without resorting to judicial solutions should be taken; however, the Act does not provide clear and detailed provisions for diversion. According to UNICEF,<sup>521</sup> Zimbabwe launched a Pre-Trial Diversion project aimed at

---

<sup>515</sup> Article 40 of the *United Nation Convention on the Rights of Child* (1989).

<sup>516</sup> Article 40 of the *United Nation Convention on the Rights of Child* (1989).

<sup>517</sup> Article 11 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>518</sup> Skelton 2002 *BJC* 496-513.

<sup>519</sup> Skelton 2002 *BJC* 496-513.

<sup>520</sup> Article 228 of the *Children's Act* no 29 of 2022.

<sup>521</sup> UNICEF "date unknown" <http://www.unicef.org/Zimbabwe/press-release/Zimbabwe-launches-pre-trial-diversion-programme>.

diverting children from the formal criminal justice system. UNICEF<sup>522</sup> stipulates that from 2016 when the project was launched to 2019, over 3000 children were assisted with the project. However, this project has not been launched across all areas of Zimbabwe.<sup>523</sup> Some hardest-to-reach areas with the most vulnerable and marginalised populations have not been the recipients of the project and hence are excluded from the benefits that stem from the project.<sup>524</sup> This is a huge problem as children across Zimbabwe come into contact with the juvenile justice system, hence, piloting the project in some areas and excluding others will not yield as many results as could be achieved. It is submitted that save for South Africa, the other countries under study are failing to properly enforce diversionary measures. South Africa on the other hand has done an exceptional job to cater for a well-detailed plan on diversionary measures and to implement them. Wood<sup>525</sup> suggests that South Africa is the State in which diversionary measures are most likely taken due to the detailed structure set. Although Zimbabwe is trying by virtue of initiating the Pre-Trial Diversion, there is need for the State to ensure that all provinces of the State benefit from the program. Kenya, Zambia, and Zimbabwe thus have a lot to learn from South Africa.

#### **4.4. Detention of children in conflict with the law**

As previously stated, article 37 of the *CRC*<sup>526</sup> affirmed by article 19 of the *Beijing Rules*<sup>527</sup> and article 2 of the *Havana Rules*<sup>528</sup> all emphasise that detention should be regarded as a measure of last resort and for the shortest possible time. As a result of the ratification of international legal instruments by the countries under the study, all have acknowledged the importance of detaining juveniles in conflict with the law as a means of last resort and have domesticated this in their exclusive legal instruments.

---

<sup>522</sup> UNICEF "date unknown" <http://www.unicef.org/Zimbabwe/press-release/Zimbabwe-launches-pre-trial-diversion-programme>.

<sup>523</sup> UNICEF "date unknown" <http://www.unicef.org/Zimbabwe/press-release/Zimbabwe-launches-pre-trial-diversion-programme>.

<sup>524</sup> UNICEF "date unknown" <http://www.unicef.org/Zimbabwe/press-release/Zimbabwe-launches-pre-trial-diversion-programme>.

<sup>525</sup> Wood *Diversion in South Africa: A Review of Policy and Practice* 79.

<sup>526</sup> Article 37 of the *United Nation Convention on the Rights of Child* (1989).

<sup>527</sup> Article 19 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules 1985).

<sup>528</sup> Article 2 of the *United Nations passed the United Nations Rules for the Protection of Juvenile Deprived of their Liberty* (*Havana Rules*) 1991.

Human Rights Watch,<sup>529</sup> however, submits that most countries including the ones under the study, are failing to enforce this provision and in practice, many children are being held in detention centres and facilities. Human Rights Watch<sup>530</sup> further states that there is a lack of record-keeping in most countries and the exact number of children detained in detention facilities and centres cannot be accounted for.

Based on South Africa’s and Kenya’s legal statutes, it is submitted that the two countries have detailed policies when it comes to using detention as a means of last resort. Fambasayi and Moyo,<sup>531</sup> submit that in their research, they found out that South Africa is adhering to the provisions of the *Constitution* by applying the best interests of a child, which entails that children should not be arbitrarily detained unless other alternatives of dealing with a child in conflict with the law have been exhausted. Although South Africa has a detailed policy on juvenile justice, some scholars submit that there is room for improvement since some juvenile offenders are still being tried and detained as adults.<sup>532</sup> Fambasayi and Moyo<sup>533</sup> submit that there are children in South Africa who are still being unjustifiably detained in policing cells. Fambasayi and Moyo<sup>534</sup> who cite the case of *S v N*, submits that in this case a juvenile was detained due to the fact that the docket indicated that the accused was 18 years old, when in fact the accused was only seventeen years old. As a result, the trial took long to be concluded with the accused remaining in a welfare facility.<sup>535</sup> Commenting on the same case, Julia Sloth-Nielsen cited by Fambasayi and Moyo<sup>536</sup> argues that the ‘detention of the child offender was not necessary in this instance, and it was not in the best interests of the child. Fambasayi and Moyo<sup>537</sup> submit that although the accused was detained in a welfare facility, and not a correctional centre, the officials failed to comply with the principle of detention as a measure of last resort. It is, therefore, important

---

529 Human Rights Watch2016 [www.hrw.org](http://www.hrw.org).  
530 Human Rights Watch2016 [www.hrw.org](http://www.hrw.org).  
531 Fambasayi and Moyo 2020 *SAJHR* 1-27.  
532 Fambasayi and Moyo 2020 *SAJHR* 1-27.  
533 Fambasayi and Moyo 2020 *SAJHR* 1-27.  
534 Fambasayi and Moyo 2020 *SAJHR* 1-27.  
535 Fambasayi and Moyo 2020 *SAJHR* 1-27.  
536 Fambasayi and Moyo 2020 *SAJHR* 1-27.  
537 Fambasayi and Moyo 2020 *SAJHR* 1-27.

for law enforcement officers to adhere to legal instruments and to verify the age of the accused persons in order to follow the proper steps.

Fambasayi and Moyo<sup>538</sup> further asserts that Kenyan courts have made great progress in their interpretation of the principle of the best interests of the child as a special protection mechanism in the context of using detention as a measure of last resort and for the shortest period possible. However, just like South Africa, there is still room for more improvement. The Strathmore Law Clinic<sup>539</sup> submits that juveniles in Kenya are kept in detention facilities for prolonged periods whilst awaiting trial. There are reports that in detention facilities, juvenile offenders are not separated from adult offenders. In a study conducted by the Strathmore Law Clinic,<sup>540</sup> juvenile offenders are also tried as adults. Fambasayi and Moyo<sup>541</sup> argues that in cases involving child offenders', delays are inevitable, and the court is reluctant to speed up the proceedings. This paints a picture of lack of harmony between legal provisions and the enforcement thereof.

There is lack of proper record-keeping of juvenile justice in Zimbabwe and as a result the known facts are based on little information that is made public. In their observation, Fambisayi and Moyo<sup>542</sup> submit that Zimbabwe has a different way in which the courts approach cases concerning child offenders.<sup>543</sup> In some instances, there is evidence that the judiciary adhere to the right not to be detained unless that is the last option, given the circumstances of the case.<sup>544</sup> However, there is also evidence that the judges use detention as a punitive punishment given to child offenders and at times detention is used as a measure of first and not last resort, without considering the best interests and other less restrictive available alternatives.<sup>545</sup> One cannot deny

---

<sup>538</sup> Fambasayi and Moyo 2020 *SAJHR* 1-27.

<sup>539</sup> Strathmore Law Clinic 2022 *Girls in Kenya's Juvenile Detention System: Recommendations for Abolition and Reform* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4218730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218730) accessed 05 April 2024.

<sup>540</sup> Strathmore Law Clinic 2022 *Girls in Kenya's Juvenile Detention System: Recommendations for Abolition and Reform* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4218730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218730) accessed 05 April 2024.

<sup>541</sup> Fambasayi and Moyo 2020 *SAJHR* 1-27.

<sup>542</sup> Fambasayi and Moyo 2020 *SAJHR* 1-27.

<sup>543</sup> Fambasayi and Moyo 2020 *SAJHR* 1-27.

<sup>544</sup> Fambasayi and Moyo 2020 *SAJHR* 1-27.

<sup>545</sup> Fambasayi and Moyo 2020 *SAJHR* 1-27.

that this is a violation of constitutional provisions. Rupaaraganda and Rupaaraganda<sup>546</sup> state that 62% of juveniles are placed in institutions without a court order. In Zimbabwe, it is a requirement that a court should make an order for a child to be placed in an institution or detention facilities; however, as Rupaaraganda and Rupaaraganda<sup>547</sup> submit, children are being detained and placed in institutions in the absence of the court order. In addition to that, Rupaaraganda and Rupaaraganda<sup>548</sup> further submits that about 52% of juveniles are being kept in detention facilities for up to two years without any legal intervention. This has the effect that over half of juvenile offenders are being kept in detention facilities for a long period of time without rescue. This is evidence that, although there is legal acknowledgment of detaining children as a last resort and for a short time, in practice this is not being followed. It is therefore, of no use to enact legislation that cannot be enforced. Thus, there is need for reformation in the justice system.

Zambia is failing to adhere to its constitutional provisions in the context of using detention of children in conflict with the law as a measure of last resort and for the shortest possible time. Tordys and Amon<sup>549</sup> submit that children in Zambia are held in the same detention facilities as adults and clearly there is no separation of adult and juvenile offenders in the detention facilities. Tordys and Amon<sup>550</sup> further submit that juvenile offenders face their trial in the adult court system and the process in the court is excruciatingly slow with most juvenile offenders denied their right to court appearance within twenty-four hours after arrest and most wait for a period of two months for their initial appearance before the court. In addition, the process of release of juvenile offenders from detention facilities is slow-paced, with reports that most juveniles are at times kept in detention facilities for a period of up to eighteen months after they have been found not guilty.<sup>551</sup> This infringes on the right to be detained for the shortest period of time. Evidently, juveniles who have been exonerated by the law are kept in detention centres where they should not have set foot in the first place.

---

<sup>546</sup> Rupaaraganda and Rupaaraganda 2016 *AJSW* 7-13.

<sup>547</sup> Rupaaraganda and Rupaaraganda 2016 *AJSW* 7-13.

<sup>548</sup> Rupaaraganda and Rupaaraganda 2016 *AJSW* 7-13.

<sup>549</sup> Tordys and Amon 2011 *IJPH* 10-19.

<sup>550</sup> Tordys and Amon 2011 *IJPH* 10-19.

<sup>551</sup> Tordys and Amon 2011 *IJPH* 10-19.

This is clear evidence that although the legal instruments acknowledge that detainment of children should be used as a means of last resort and for the shortest time, there is lack of implementation of this provision in practice.

#### **4.5. Special treatment of juvenile offenders and the right to legal assistance**

Article 37 of the *CRC*<sup>552</sup> obligates State Members to ensure that children in conflict with the law are treated with dignity considering their age and their needs as children. This is affirmed in article 17 of the *ACRWC*,<sup>553</sup> which provides that juveniles in conflict with the law have a right to special treatment in a manner that is consistent with the juveniles' dignity and worth, and which reinforces the juveniles' respect for fundamental rights. Article 40 of the *CRC*<sup>554</sup> maintains that State Parties should have separate personnel dealing with the administration of juvenile justice and the professionals should have adequate training and knowledge about the development of children. Children in conflict with the law who have been deprived of their liberty, have a right to be kept separate from adult offenders in detention and holding facilities.<sup>555</sup> Hence, State Parties have a duty to ensure that juvenile offenders enjoy rights awarded to adult offenders on top of the rights that are exclusively awarded to children. Thus, the treatment that juvenile offenders must get, should be distinct from that of adult offenders. Those in charge of the administration of juvenile offenders must therefore take note of provisions that solely apply to children in conflict with the law.

In line with the provision of the right to special treatment afforded to children in conflict with the law, there is a need for children to have access to hygiene and a sanitary environment.<sup>556</sup> Children have a right to not be tortured whilst in the care of the State.<sup>557</sup> Children also have a right to basic necessities such as food<sup>558</sup> and water<sup>559</sup> to

---

<sup>552</sup> Article 37 of the *United Nation Convention on the Rights of Child* (1989).

<sup>553</sup> Article 17 *African Charter on the Rights and Welfare of the Child* (1990).

<sup>554</sup> Article 40 of the *United Nation Convention on the Rights of Child* (1989).

<sup>555</sup> Article 37 of the *United Nation Convention on the Rights of Child* (1989).

<sup>556</sup> Article 24 of the *United Nation Convention on the Rights of Child* (1989).

<sup>557</sup> Article 16 *African Charter on the Rights and Welfare of the Child* (1990). Article 37 of the *United Nation Convention on the Rights of Child* (1989).

<sup>558</sup> Article 24 of the *United Nation Convention on the Rights of Child* (1989).

<sup>559</sup> Article 24 of the *United Nation Convention on the Rights of Child* (1989).

mention but a few. The *CRC*<sup>560</sup> also emphasises that children in conflict with the law have a right to legal assistance provided for by the State and to have support from people such as probation officers and parents, amongst others. It is important to take note that the countries under study have included these rights in their legal instruments.

Acting in line with article 188-189 of *Kenya's Children's Act*,<sup>561</sup> Kenya undertook to build a separate court which hears matters concerning children in conflict with the law. The article sets an obligation that juvenile courts be setting friendly.<sup>562</sup> This means that it should be easily accessible to the children in conflict with the law. There is evidence however, that these courts in Kenya are only located in two major cities, hence most children do not have access to the children's juvenile justice courts.<sup>563</sup> In research conducted by Strathmore Law Clinic, there is evidence that children in conflict with the law do not have legal representation in most cases.<sup>564</sup> As a result, children in conflict with the law appear in the court proceedings in the absence of legal help and they languish because in most cases the court proceedings are a nightmare to them and leave them stressed.<sup>565</sup> The research has also shown that children in conflict with the law are often abused in the detention facilities, some of which are exposed to the application of corporal punishments.<sup>566</sup> There is evidence that children are kept in the same holding and detention facilities as adults, and this has led to the facilities being overcrowded.<sup>567</sup> There is also evidence that female and male offenders are at times kept in the same cells. In addition, there is a lack of basic necessities such as food,

---

<sup>560</sup> Article 14 of the *United Nation Convention on the Rights of Child* (1989).

<sup>561</sup> Article 188-189 of the *Children's Act* no 29 of 2022.

<sup>562</sup> Article 188-189 of the *Children's Act* no 29 of 2022.

<sup>563</sup> Kariuki 2015 [www.su-plus.strathmore.edu](http://www.su-plus.strathmore.edu).

<sup>564</sup> Strathmore Law Clinic *2022 Girls in Kenya's Juvenile Detention System: Recommendations for Abolition and Reform* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4218730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218730) accessed 05 April 2024.

<sup>565</sup> Strathmore Law Clinic *2022 Girls in Kenya's Juvenile Detention System: Recommendations for Abolition and Reform* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4218730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218730) accessed 05 April 2024.

<sup>566</sup> Strathmore Law Clinic *2022 Girls in Kenya's Juvenile Detention System: Recommendations for Abolition and Reform* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4218730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218730) accessed 05 April 2024.

<sup>567</sup> Strathmore Law Clinic *2022 Girls in Kenya's Juvenile Detention System: Recommendations for Abolition and Reform* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4218730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218730) accessed 05 April 2024.

clothes and water<sup>568</sup>. Some girls have reported that they were sexually abused by police officers whilst in the custody of the State.<sup>569</sup> This is proof that most children in Kenya who find themselves in conflict with the law are denied their rights to enjoy special treatment and legal assistance.

Tordys and Amon<sup>570</sup> submit that in Zambia, 73% of juvenile offenders are denied their right to legal assistance. This means that over half of the children in conflict with the law do not have legal assistance.<sup>571</sup> Some children have reported that their first contact with the justice system was horrendous and scary because they did not know what to say to the officials and in court, and they ended up pleading guilty when they should not have done so.<sup>572</sup> Children in conflict with the law also report that they were physically abused by prison officials and adult inmates.<sup>573</sup> There are reports that juvenile offenders were kept in penal block as punishment for not following prison rules.<sup>574</sup> In the penal block, the offender is locked in a room alone, water is poured over them, and for the duration of their stay in the penal block they are often left to survive in wet rooms. There are reports that at times, the children are caned as a form of punishment for not adhering to prison rules.<sup>575</sup> Some of the children reported that they were raped by adults because they were detained in the same facilities as adult offenders.<sup>576</sup> Tordys and Amon also submit that due to lack of food, juveniles are left with no option but to engage in sexual activities in exchange of food.<sup>577</sup> Just like Kenya, Zambia is lacking when it comes to safeguarding the welfare of children in conflict with the law. Zambia is infringing on the right that juveniles should have, to special

---

<sup>568</sup> Strathmore Law Clinic *2022 Girls in Kenya's Juvenile Detention System: Recommendations for Abolition and Reform* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4218730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218730) accessed 05 April 2024.

<sup>569</sup> Strathmore Law Clinic *2022 Girls in Kenya's Juvenile Detention System: Recommendations for Abolition and Reform* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4218730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218730) accessed 05 April 2024.

<sup>570</sup> Tordys and Amon 2011 *IJPH* 10-19.

<sup>571</sup> Tordys and Amon 2011 *IJPH* 10-19.

<sup>572</sup> Tordys and Amon 2011 *IJPH* 10-19.

<sup>573</sup> Tordys and Amon 2011 *IJPH* 10-19.

<sup>574</sup> Tordys and Amon 2011 *IJPH* 10-19.

<sup>575</sup> Tordys and Amon 2011 *IJPH* 10-19.

<sup>576</sup> Tordys and Amon 2011 *IJPH* 10-19.

<sup>577</sup> Tordys and Amon 2011 *IJPH* 10-19.

treatment and legal assistance. The well-being of children when they encounter the justice system, is not important to the officials.

Ruparaganda and Ruparaganda<sup>578</sup> state that children in Zimbabwe who encounter the justice system often attend court proceedings without legal assistance or support from the probation officer. According to Mangwiwo and Chitereka<sup>579</sup> although children can apply for legal aid, the Legal Aid Act does not however, mandate that legal assistance will be provided to them. As a result, juveniles in conflict with the law face challenges such as not having a right to free legal representation at all times, children are being tried jointly with adults as lawyers are opposed by courts, and some children are not legally represented, hence are prosecuted.<sup>580</sup> Mangwiwo and Chitereka<sup>581</sup> add that juvenile offenders are often placed in the same correctional facilities with adult offenders whilst in transit to juvenile correctional facilities such as Hwahwa Prison. As a result, children are vulnerable to being abused by adult offenders.<sup>582</sup> Mangwiwo and Chitereka add that children in conflict with the law, are detained for lengthy periods before trial.<sup>583</sup> There is evidence that children in conflict with the law are also exposed to corporal punishments and often abused whilst in the care and custody of the State.<sup>584</sup> There are reports of poor access to water and sanitation facilities.<sup>585</sup> Food provided to children in conflict with the law is not on par with a good diet that they should take.<sup>586</sup>

#### **4.6. Conclusion**

In summation, this chapter has shown the similarities and differences between the administration of justice in the selected countries for this research. This chapter has shown that these countries have exclusive constitutions and were signatories to the CRC and ACRWC. The possible motivation for the ratification of international legal

---

<sup>578</sup> Ruparaganda and Ruparaganda 2016 *AJSW* 7-13.

<sup>579</sup> Mangwiwo and Chitereka "Juvenile Justice and Social Work" 180-207.

<sup>580</sup> Mangwiwo and Chitereka "Juvenile Justice and Social Work" 180-207.

<sup>581</sup> Mangwiwo and Chitereka "Juvenile Justice and Social Work" 180-207.

<sup>582</sup> Mangwiwo and Chitereka "Juvenile Justice and Social Work" 180-207.

<sup>583</sup> Mangwiwo and Chitereka "Juvenile Justice and Social Work" 180-207.

<sup>584</sup> Mangwiwo and Chitereka "Juvenile Justice and Social Work" 180-207.

<sup>585</sup> Mangwiwo and Chitereka "Juvenile Justice and Social Work" 180-207.

<sup>586</sup> Mangwiwo and Chitereka "Juvenile Justice and Social Work" 180-207.

provisions has been addressed as including the need to shift from systematic violation of human rights to a full realisation of human rights, the need to maintain a positive reputation, and pursuit of international trade relations, amongst others. This chapter has also shown that the ratification of international legislation was and still is fraught with problems. For instance, it has been highlighted above that most countries are quick to be signatories to international treaties but are reluctant to enforce them domestically. As pointed out above, the countries under study can be applauded for enacting legislation dealing with juvenile justice. However, these pieces of legislation are not being rigorously followed. In practice, there is deviation from the legal provisions by those who are tasked with applying and enforcing them. The following chapter will touch base on what can be done to close the gap between the provisions of legislation and the enforcement of the provisions of law.

## **Chapter 5: Conclusions and Recommendations**

### ***5. Introduction***

International legislators saw a need to address the rights of the children. This need might have arisen as a result of the vulnerability of children. Whilst addressing the standard of rights that should be afforded to children, these international legislators saw it fit to also include rights that children in conflict with the law must enjoy. Most states became signatories to the international legal instruments enacted by bodies such as the United Nations and the African Union. These states also took a step further by ratifying the legal instruments dealing with the rights of children and domesticating them in their respective jurisdictions. However, as research has shown, there is still a gap between enactment of legislation and implementation thereof. The purpose of this research was to bring to light the rights of children in conflict with the law and to expose whether states are adhering to international standards of protection of the rights of children in pursuit of juvenile justice.

Having examined the adherence to international laws concerning the rights of child offenders within the juvenile justice systems of South Africa, Kenya, Zambia, and Zimbabwe, in this chapter the writer now turns the focus towards synthesizing the key findings. We will reflect on the discussed aspects, drawing connections between the strengths and weaknesses identified in each country. Following this, we will propose concrete recommendations for improvement, aiming to bridge the gap between international legal frameworks and their practical implementation within the juvenile justice systems of these nations. These recommendations will be tailored to address the specific challenges identified throughout the study.

## 5.2 Conclusions

### 5.2.1 International law perspective on the rights of child offenders

Chapter two of this research explored the development of international legal frameworks for juvenile justice.<sup>587</sup> The chapter traced the evolution from the focus on punishment and deterrence to a rights-based approach that prioritizes rehabilitation and social reintegration.<sup>588</sup> Key instruments such as the *Beijing Rules*, the *Convention on the Rights of the Child*, and the *African Charter on the Rights and Welfare of the Child* established minimum standards for fair treatment and protection of children in conflict with the law.<sup>589</sup> The *Riyadh Guidelines* provided guidance on the prevention of juvenile delinquency through social programs and community involvement.<sup>590</sup> The *Havana Rules* addressed the specific needs of children deprived of their liberty, emphasizing separation from adults and humane treatment.<sup>591</sup> The African Union Guidelines on Action for Children in Justice System in Africa offered a framework specifically tailored to the African context, advocating for a higher minimum age of criminal capacity and restorative justice practices.<sup>592</sup> Finally, the *Model Law on Juvenile Justice and Related Commentary* served as a blueprint for States to reform their juvenile justice systems in accordance with international human rights standards.<sup>593</sup> These instruments collectively represent a significant shift towards a more just and humane approach to juvenile justice on a global scale.

This study has proven that matters relating to the treatment and protection of children in conflict with the law have been given much attention by international and regional lawmakers.<sup>594</sup> It has also been shown that regional law makers such as the African Union, went an extra mile to ensure the protection of children in conflict with the law.<sup>595</sup> As discussed earlier, child offenders get to enjoy not only the rights afforded to

---

<sup>587</sup> See Chapter 2.

<sup>588</sup> See Chapter 2.

<sup>589</sup> See paragraph 2.2.1. – 2.2.3.

<sup>590</sup> See paragraph 2.2.1.

<sup>591</sup> See paragraph 2.2.5.

<sup>592</sup> See paragraph 2.2.3.

<sup>593</sup> See paragraph 2.2.7.

<sup>594</sup> See Chapter 2.

<sup>595</sup> See paragraph 2.2.3.

them as children but also the rights afforded to adult offenders.<sup>596</sup> Muncie,<sup>597</sup> asserts that the transition of juvenile justice in Africa was made possible by the ratification of international laws that seek to universalise state laws. For instance, the African Union put in place laws relating to the protection of children including those in conflict with the law following the several United Nations laws and guidelines on matters relating to children.<sup>598</sup> Aas<sup>599</sup> is of the view that States are now more inclined to ratify and give effect to international laws after seeing the influence that international law has on the protection of children's rights. Hence, it is submitted that the introduction of international laws and guidelines and their ratification makes Member States accountable to international bodies for any inaction or action pertaining to children in conflict with the law.

### *5.2.2 Juvenile justice in South Africa, Zambia, Kenya, and Zimbabwe*

The juvenile justice systems of the four selected countries have come a long way from their colonial roots of punishment and racial bias. As noted in the previous chapters, all four selected countries were victims of colonialism and that in turn had a huge influence on the development of their juvenile justice systems in their respective jurisdictions.<sup>600</sup> Prior to colonization, transgressions by young people were handled within communities. However, colonialism and apartheid both used the justice system to control and repress, with harsher sentences often handed down to children of colour.<sup>601</sup> Now, with a focus on restorative justice principles outlined in the *United Convention on the Rights of the Child*,<sup>602</sup> the system prioritizes the well-being of the child. This means protecting their rights throughout the legal process, from pre-trial diversion programs to rehabilitation-focused sentencing. While still under development, this rights-based approach signifies a significant shift towards a more just system for young people in South Africa.

---

<sup>596</sup> See Chapter 2.

<sup>597</sup> Muncie 2005 *TC* 35-64.

<sup>598</sup> See Chapter 2.

<sup>599</sup> Aas *Globalization and Crime: A Key Approaches to Criminology* 129-157.

<sup>600</sup> See Chapter 3.

<sup>601</sup> See Chapter 3.

<sup>602</sup> *United Convention on the Rights of the Child* 1989.

### *5.2.3 A comparative analysis of the juvenile justice systems in South Africa, Kenya, Zambia, and Zimbabwe.*

Chapter four examined the motivations behind why countries ratify international legal instruments and how these instruments are enforced in practice.<sup>603</sup> The chapter analysed the minimum age of criminal capacity, diversion from the juvenile justice system, detention of children in conflict with the law, and the right to special treatment and legal assistance.<sup>604</sup> The findings reveal a gap between legal provisions and enforcement in all four analysed areas.<sup>605</sup> While all four countries under study ratified the relevant international conventions, there are discrepancies in how well these rights are translated into practice for children in conflict with the law. South Africa emerged as the country with the most well-developed and well-enforced juvenile justice system, while Zambia showed the most concerning gaps between legal promises and the reality experienced by children. Kenya and Zimbabwe fell somewhere in between. There is a clear need for all four countries to improve the enforcement of existing legal protections for children in conflict with the law.

## **5.3 Recommendations**

### *5.3.1. Establishing a Minimum Age of Criminal Capacity*

The study identified a critical gap in all four countries: the absence of a clearly defined minimum age of criminal capacity. While the *United Nations*<sup>606</sup> and the *African Charter*<sup>607</sup> leave this determination to individual states, a standardized minimum age across African nations would enhance consistency and align with the spirit of the *African Union Guidelines*. Setting a common minimum age of criminal capacity in African would be seen as a step towards the realization of a child's mental development and intellectual capacity before a child is prosecuted in the juvenile justice system. It also helps to ensure that children are not tried for offences they committed before they could even understand the nature and consequences of their actions. This study

---

<sup>603</sup> See paragraph 4.2.2.

<sup>604</sup> See paragraph 4.3.

<sup>605</sup> See paragraph 4.2. – 4.6.

<sup>606</sup> See Chapter 2.

<sup>607</sup> See paragraph 2.2.3.

recommends setting the minimum age of criminal capacity at 14 years old. This aligns with the growing international consensus on prioritizing rehabilitation over punishment for young adolescents. As identified in previous discussions, some children are exposed to the adult justice systems therefore, setting a uniform minimum age of criminal capacity across Africa, will protect such children from unfair treatment and punishment.

### *5.3.2. Learning from Best Practices: South Africa and Kenya as a Model*

South Africa and Kenya's rights-based juvenile justice system, emphasizing restorative justice principles and diversion programs, showcases a successful model. The other two nations can benefit by learning from South Africa's and Kenya's implementation strategies. Sharing of best practices through regional workshops, knowledge exchange programs, and collaborative research, can foster a more unified approach to juvenile justice across Africa. Although there are still some flaws in South Africa's and Kenya's juvenile justice systems, one cannot ignore the good works that both States have put in, as the good works trump the flaws.

### *5.3.3. Strengthening Enforcement Mechanisms*

The analysis highlighted discrepancies in enforcement across all four countries. The strengthening of oversight mechanisms is crucial to ensure that legal protections translate into tangible improvements for children in conflict with the law. This includes the establishment of independent monitoring bodies to evaluate adherence to international standards and national legislation. Financing of the monitoring bodies will also guarantee their independence. Additionally, arrangements for the training of law enforcement and judicial personnel on the specific rights of child offenders is vital for effective implementation. Trained personnel will help in recognizing the root causes of juvenile offences and identifying the exclusive needs of a child in conflict with the law. Identification of the needs of a child also helps in identifying the type of intervention the juvenile needs. As discussed above, there are still ongoing problems in relation to implementation of laws, thus strengthening enforcement ensures that laws and policies related to juvenile justice are effectively implemented and it promotes accountability among law enforcement, judiciary and other stakeholders.

#### *5.3.4. Prioritizing Rehabilitation and Reintegration*

All four countries should move away from punishment-focused systems, and all should prioritize rehabilitation and reintegration programs. This includes investment in educational opportunities, vocational training, and mental health support for children in the justice system. Community-based programs that address the root causes of delinquency and promote positive social re-integration, are essential for preventing recidivism. Rehabilitation is crucial for child offenders as it helps them to work towards a better and more positive future for themselves. Detention of a child has a detrimental effect on the child's physical and mental health, hence, a focus on rehabilitation and reintegration helps counter the effects of detainment.

#### *5.3.5. Enhancing Access to Legal Aid*

The right to legal representation is fundamental for ensuring fair treatment. All four countries should strive towards providing effective legal aid to all children in conflict with the law. This can involve the establishment of dedicated legal aid clinics that specialize in juvenile justice, the training lawyers of to handle child-related cases, and the raising of public awareness about the importance of legal representation for young offenders. Legal aid assists the children and ensures that their best interests are of paramount importance. During the proceedings, it is important that a child has legal assistance, as it helps to build confidence and trust in the juvenile justice system. It also ensures protection of the child from human rights violations and exploitation. For a child navigating the justice system can at times be overwhelming, and if a child has legal assistance, this will help the child to navigate through the juvenile justice system; and it also encourages active participation by the child during the proceedings.

#### *5.3.6. Fostering Continuous Improvement*

Effective juvenile justice systems require ongoing evaluation and adaptation. Implementation of regular data collection and analysis mechanisms will enable each country to track progress, identify areas for improvement, and tailor interventions accordingly. Additionally, the fostering of collaboration with civil society organizations and community leaders, can provide valuable insights and support for continuous

improvement. By implementing these recommendations, South Africa, Kenya, Zambia, and Zimbabwe can create more just and humane juvenile justice systems that uphold the rights of child offenders and prioritize rehabilitation over punishment. This will contribute to a safer and more positive future for all young people in the region. Zimbabwe should consider establishing a dedicated board or commission responsible for monitoring and reporting on the state of juvenile justice in the country. This body could be tasked with collecting data on juvenile arrests, detentions, diversion programs, and rehabilitation efforts.

This dedicated body should generate regular reports on its findings. These reports should be made public and submitted to relevant stakeholders, including parliament, civil society organizations, and the UN Committee on the Rights of the Child. Publicly available data allows for independent monitoring and advocacy efforts to ensure children's rights are upheld. Monitoring and evaluation help identify areas of improvement ensuring that the juvenile justice system remains effective and responsive. Collaboration with NGOs and civil society organizations working on juvenile justice issues is crucial. These organizations can provide valuable data and insights into the lived experiences of children in the justice system. Partnering with them can strengthen the reporting process and ensure a comprehensive picture of the system's effectiveness.

#### *5.3.7. Crime database*

It is crucial for States to invest in crime databases for juveniles. The data collected from child offenders over time will lead to important insights. The database will bring to light the nature of crimes committed by juveniles, the circumstances surrounding the cases and the decisions made regarding the cases. This will also assist in identifying areas that need to be improved. The data can also provide insights into the statistics of juvenile crimes and assist professionals within the juvenile justice system to understand whether their initiatives are successful. A database can also assist in decisions regarding policing budgets. A detailed report of juvenile offenders can also assist the juvenile justice system in making follow-ups and ensuring that States are adhering to set regulations. Crime statistics can be used as a tool to help criminal

justice professionals to anticipate increased risks of crime and areas that need monitoring. This will help law enforcement officers to come up with intervention and prevention methods. A database of juvenile offences will also help track outcomes of crimes, make strategic changes, reflect on the status of juvenile offences and diagnose the root cause of juvenile crimes.

In summation, these recommendations are interconnected and requires a comprehensive approach to juvenile justice. These recommendations address multiple aspects of juvenile justice simultaneously. Implementing these elements in tandem can create synergic effects, leading to improved outcomes and a more effective juvenile justice system; and will contribute to safer and more equitable communities.

## **BIBLIOGRAPHY**

### ***Literature***

*Aas Globalization and Crime: Key Approaches to Criminology*

Aas K.F. *Globalization and Crime: Key Approaches to Criminology* 2<sup>nd</sup> ed (SAGE, 2013)

*Burchell Principles of Criminal Law*

Burchell J *Principles of Criminal Law* 3<sup>rd</sup> ed (Juta & Company Ltd Cape Town 2013)

*Burke et al Introduction to the American Criminal Justice System*

Burke A et al *Introduction to the American Criminal Justice System* 1<sup>st</sup> ed (Open Oregon Educational Resources, 2019)

*Cooper Juvenile Justice in South Africa*

Cooper A in Juvenile Justice in South Africa in Krohn M.D and Lane J. (eds) *The Handbook of Juvenile Delinquency and Juvenile Justice* (Online 2015) 65-75

Fambasayi and Moyo "The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe"

Fambasayi R and Moyo A "The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe" 2020 *SAJHR* 1-27

*Freeman Children's Rights Ten Years After Ratification*

Freeman M *Children's Rights Ten Years After Ratification* 1<sup>st</sup> ed (Routledge, 2001)

*Gatheru Kenya: From Colonization to Independence 1888-1970*

Gatheru R.M. *Kenya: From Colonization to Independence 1888-1970* 1<sup>st</sup> ed  
(Jefferson NC & MC Farland &Co 2005)

Goldson and Kilkelly "International Human Rights Standards and Child Imprisonment: Potentialities and Limitations"

Goldson B and Kilkelly U "International Human Rights Standards and Child Imprisonment: Potentialities and Limitations" 2013 *IJCR* 35-71

Goldson and Muncie" Rethinking Youth Justice: Comparative Analysis, International Human Rights and Research Evidence"

Goldson B and Muncie J" Rethinking Youth Justice: Comparative Analysis, International Human Rights and Research Evidence" 2006 *YJIJ* 91-106

Goldson and Muncie "Towards a global child friendly juvenile justice?"

Goldson B and Muncie J "Towards a global child friendly juvenile justice?" 2012 *IJLCJ* 47-70

Hackler "Questionable Assumptions in Juvenile Justice"

Hackler J "Questionable Assumptions in Juvenile Justice" 1990 *CA* 7-8

Hafner-Burton and Tsutsui "Human Rights in a Globalizing World: The Paradox of Empty Promises"

Hafner-Burton EM and Tsutsui K "Human Rights in a Globalizing World: The Paradox of Empty Promises" 2005 *AJS* 1373-1420

Hathaway "Why do Countries Commit to Human Rights Treaties?"

Hathaway "Why do Countries Commit to Human Rights Treaties?" 2007 *JCR* 588-621

Kaime *The African Charter on the Right and Welfare of the Child – A Socio-Legal Perspective*

Kaime T *the African Charter on the Right and Welfare of the Child – A Socio-Legal Perspective* 1<sup>st</sup> ed (Pretoria University Law Press 2009)

Kethineni 'India' *International Handbook of Juvenile Justice*

Kethineni 'India' *International Handbook of Juvenile Justice* 2<sup>nd</sup> ed (Switzerland: Springer 2017)

Kilkelly "Youth Justice and Children's Rights: Measuring Compliance with International Standards"

Kilkelly U. "Youth Justice and Children's Rights: Measuring Compliance with International Standards" 2018 *YJ* 180-200

Lloyd "A Theoretical Analysis of the Realities of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child"

Lloyd A. "A Theoretical Analysis of the Realities of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child" 2002 *AHRLJ* 14

Mangwiro and Chiterekwa "Juvenile Justice and Social Work"

Mangwiro and Chiterekwa "Juvenile Justice and Social Work" in Mabvurira M.W, Fahrudin A & Mtetwa E (eds) *Professional social work in Zimbabwe, past present and the future* (Harare: National Association of Social Workers 2021) 180-207

Mensa-Bonsu "*Human Rights and the Juvenile Justice System – the Ghanaian Experience*"

Mensa-Bonsu "*Human Rights and the Juvenile Justice System – the Ghanaian Experience* in African Society of International and Comparative Law Conference" (1995 Ghana)

Mumba *The Juvenile Criminal Justice System in Zambia Vis-à-vis the International Protection of Children's Rights*

Mumba D.C. *The Juvenile Criminal Justice System in Zambia Vis-à-vis the International Protection of Children's Rights* (LLM-Dissertation University of Zambia 2011)

Muncie "The Globalization of Crime Control – the Case of Youth and Juvenile Justice: Neo-liberalism, policy convergency and international conventions"

Muncie J "The Globalization of Crime Control – the Case of Youth and Juvenile Justice: Neo-liberalism, policy convergency and international conventions" 2005 *7C* 35-64

Muncie "International Juvenile (in) Justice: Penal Severity and Rights Compliance"

Muncie J "International Juvenile (in) Justice: Penal Severity and Rights Compliance" 2013 *IJCJS* 43-62

Odongo "Kenya"

Odongo G "Kenya" in Scott H Decker and Marteache *International Handbook of Juvenile Justice* 2<sup>nd</sup> ed 29-43

Ruparaganda and Ruparaganda "Reformations in Zimbabwe's Juvenile Justice System"

Ruparaganda B and Ruparaganda L "Reformations in Zimbabwe's Juvenile Justice System" 2016 *AJSW* 7-13

Simaluwanni "The Criminal Process in Juvenile Courts in Zambia"

Simaluwani E.M. "The Criminal Process in Juvenile Courts in Zambia" 1997 *LJ* 71-88

Skelton "Restorative justice as a framework for juvenile justice reform: A South African perspective"

Skelton A "Restorative justice as a framework for juvenile justice reform: A South African perspective" 2002 *BJC* 496-513

Skelton and Courtenay "South Africa's new child justice system"

Skelton A and Courtenay R.M. "South Africa's new child justice system" in Winterdyk J.A. (eds) *Juvenile Justice: International Perspective, Models and Trends* (CRC Press London, New York 2015) 321-342

Skelton and Tshehla *Child Justice in South Africa*

Skelton A and Tshehla B *Child Justice in South Africa* (Institute for Security Studies Pretoria 2008)

Sloth-Nielsen "The Role of International Human Rights Law in the Development of South Africa Legislation in Juvenile Justice"

Sloth-Nielsen J "The Role of International Human Rights Law in the Development of South Africa Legislation in Juvenile Justice" 2005 *LDD* 50-60

Snyman *Criminal Law*

Snyman CR *Criminal Law* 6<sup>th</sup> ed (Lexis Nexis 2014)

Tordys and Amon "Human Rights and Health among Juvenile Prisoners in Zambia"

Tordys K.W. and Amon J.J "Human Rights and Health among Juvenile Prisoners in Zambia" 2011 *IJPH* 10-19

Van der Merwe "A New Role for Crime Victims? An evaluation of Restorative Justice Procedures in the Justice Act 75 of 2008"

Van der Merwe A. "A New Role for Crime Victims? An evaluation of Restorative Justice Procedures in the Justice Act 75 of 2008" 2013 *DJ* 1030-1040

Vengesai "Juvenile Justice in Zimbabwe"

Vengesai S *International and European Public Law: Accent: Human Rights Law* (LLM- dissertation Tilburg University "date unknown")

Warner "Why Sentence? Comparing the views of jurors, judges and legislature on the purpose of sentencing in Victoria, Australia"

Warner K *et al* "Why Sentence? Comparing the views of jurors, judges and legislature on the purpose of sentencing in Victoria, Australia" 2019 *CCJ* 27

Wood *Diversion in South Africa: A Review of Policy and Practice*

Wood C *Diversion in South Africa: A Review of Policy and Practice* (Institute for Security Studies Pretoria 2003)

Zimring "The common thread: Diversion in the jurisprudence of juvenile courts"

Zimring F.E "The common thread: Diversion in the jurisprudence of juvenile courts" in Rosenheim MK *et al* (eds) *A Century of Juvenile Justice (2002)* 142-150

### **Legislation**

*Child Justice Act* 75 of 2008

*Children's Act* 38 of 2005

*Constitution of the Republic of South Africa*, 1996

*Criminal Procedure Act* 51 of 1977

### **International instruments**

*African Charter on the Rights and Welfare of the Child (1989)*

*Borstal Institutions Act*

*Children's Act* of 2001

*Children's Act* no 29 of 2022

*Children's Act* (Chapter 5:06) of 2001

*Children's Act Chapter 5:06* of 1972

*Community Service Orders Act no 10 of 1998*

*Constitution of Kenya, 2010*

*Constitution of Zambia (Amendment) no 2 of 2016*

*Constitution of Zimbabwe Amendment (no 20) Act, 2013*

*Criminal Law (Codification and Reform) Act 23 of 2004*

*Criminal Procedure and Evidence Act (chapter 9:07) as amended in 2016*

*Criminal Procedure Code (Amendment) Act of 2023*

*General Comment No 24 (2019) on the Children's Rights in the Child Justice System*

*Guidelines on Child-Friendly Justice 2010*

*Guidelines on Action for Children in Justice System in Africa 2011*

*Juveniles Act of 3 of 2011*

*Model Law on Juvenile Justice and Related Commentary 2013*

*Penal Code (Amendment) Act of 2023*

*Penal Code Act: Chapter 63 of 2023*

*Prison and Correctional Service Act 9 of 2023*

*Probation of Offenders (Amendment) Act no 14 of 2022*

*United Convention on the Rights of the Child 1989*

*United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters 2000*

*United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes 2005*

*United Nations Guidelines for the Prevention of Juvenile Delinquency 1990*

*United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules) 1991*

*United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules 1985)*

### ***International case law***

*S v FM* (CRB 415/14) [2015] ZWHHC 112

### ***Internet sources***

African Union "date unknown" <https://oau60.au.int/en/member-states>

African Union "date unknown" Member State

<https://oau60.au.int/en/member-states> access date 07 April 2024

African Union "date unknown" <https://www.acerwc.africa/en/member-states/ratifications>.

African Union "date unknown" Ratification Table

<https://www.acerwc.africa/en/member-states/ratifications> access date 07 April 2024

Bowd 2009 <http://www.files.ethz.ch/isn/112459/NO13OCT09.pdf>

Bowd R 2009 *Access to Justice in Africa: Comparison between Sierra Leone, Tanzania, and Zambia* <http://www.files.ethz.ch/isn/112459/NO13OCT09.pdf>

accessed 23 March 2023

Brownsell 2013 <https://www.aljazeera.com/features/2013/3/3/kenya-what-went-wrong-in-2007>

Brownsell J 2013 *What went wrong in 2007?*

<https://www.aljazeera.com/features/2013/3/3/kenya-what-went-wrong-in-2007> accessed 07 April 2024

Child Right International Network 'date unknown' <http://archive.crin.org/en/ccess-justice-children-global-ranking.html>

Child Right International Network 'date unknown' *Access to Justice for Children: Global Ranking* <http://archive.crin.org/en/ccess-justice-children-global-ranking.html> accessed 13 March 2023

Council of Europe "date unknown" <https://www.coe.int/en/web/compass/convention-on-the-rights-of-the-child>

Council of Europe  
[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CR)  
*C. Manual for Human Rights Education with Young People*  
<https://www.coe.int/en/web/compass/convention-on-the-rights-of-the-child>  
accessed 19 February 2024

Evans 2019 <https://www.thoughtco.com/what-is-gukurahundi-43923>

Evans AB 2019 *What was Gukurahundi in Zimbabwe?*  
<https://www.thoughtco.com/what-is-gukurahundi-43923> accessed 07 April 2024

Gerard 2008  
[https://www.opendemocracy.net/article/democracy\\_power/kenya\\_roots\\_crisis](https://www.opendemocracy.net/article/democracy_power/kenya_roots_crisis)

Gerard P 2008 Kenya: Roots of Crisis  
[https://www.opendemocracy.net/article/democracy\\_power/kenya\\_roots\\_crisis](https://www.opendemocracy.net/article/democracy_power/kenya_roots_crisis)  
accessed 11 March 2024

Human Rights Watch 2016

Human Rights Watch 2016 *Children Behind Bars, The Global Overuse of Detention of Children* [www.hrw.org](http://www.hrw.org) accessed 05 April 2024

Internal Panel on Juvenile Justice UN 2010 *Criteria for the Design and Evaluation of Juvenile Justice Reform Programme*

Internal Panel on Juvenile Justice UN 2010 *Criteria for the Design and Evaluation of Juvenile Justice Reform Programme*

[http://www.unodoc.org/pdf/criminal\\_justice/Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes.pdf](http://www.unodoc.org/pdf/criminal_justice/Criteria_for_the_Design_and_Evaluation_of_Juvenile_Justice_Reform_Programmes.pdf) accessed 18 June 2023

Kariuki 2015 [www.su-plus.strathmore.edu](http://www.su-plus.strathmore.edu)

Kariuki F 2015 [www.su-plus.strathmore.edu](http://www.su-plus.strathmore.edu) Customary Law Jurisprudence from Kenyan Courts: Implication for Traditional Justice System accessed 05 April 2024

Mbagaya 2015 [www.globalblackhistory.com](http://www.globalblackhistory.com)

Mbagaya T 2015 Colonialism, Nationalism & Independence in Zambia [www.globalblackhistory.com](http://www.globalblackhistory.com) accessed 09 March 2024

Ministry of Justice, Legal and Parliamentary Affairs "date unknown"

<http://www.justice.gov.zw/index.php/departments/policy-legal-research?showall=&start=4>

Ministry of Justice, Legal and Parliamentary Affairs "date unknown" Pre-trial Diversion <http://www.justice.gov.zw/index.php/departments/policy-legal-research?showall=&start=4> accessed 12 March 2023

Mukungurutse 2023 Colonization of Zimbabwe: Introduction - Free ZIMSEC & Cambridge Revision Notes

Mukungurutse K 2023 Colonisation of Zimbabwe [Colonization of Zimbabwe: Introduction - Free ZIMSEC & Cambridge Revision Notes](https://www.cambridge.org/core/books/colonisation-of-zimbabwe-introduction-free-zimsec-cambridge-revision-notes) accessed 13 March 2024

Njoku 2014 [www.dailytrust.com.ng](http://www.dailytrust.com.ng)

Njoku G 2014 *25 Years of Children's Rights in Nigeria* [www.dailytrust.com.ng](http://www.dailytrust.com.ng)  
accessed 02 May 2023

Okechi 2017 [www.unafei.or.jp](http://www.unafei.or.jp)

Okechi C 2017 *Juvenile Justice in Kenya: Growth, System and Structures.*  
Visiting Expert Papers [www.unafei.or.jp](http://www.unafei.or.jp) accessed 11 March 2024

Strathmore Law Clinic 2022

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4218730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218730)

Strathmore Law Clinic 2022 *Girls in Kenya's Juvenile Detention System:  
Recommendations for Abolition and Reform*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4218730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218730) accessed 05  
April 2024

UNICEF *Convention on the Rights of the Child* "date unknown"

UNICEF *Convention on the Rights of the Child* "date unknown" available at  
<https://www.unicef.org> accessed on 08 March 2024

UNICEF "date unknown" [http://www.unicef.org/Zimbabwe/press-release/Zimbabwe-  
launches-pre-trial-diversion-programme](http://www.unicef.org/Zimbabwe/press-release/Zimbabwe-launches-pre-trial-diversion-programme)

UNICEF "date unknown" Zimbabwe launches pre-trial diversion programme  
[http://www.unicef.org/Zimbabwe/press-release/Zimbabwe-launches-pre-trial-  
diversion-programme](http://www.unicef.org/Zimbabwe/press-release/Zimbabwe-launches-pre-trial-diversion-programme) accessed 13 March 2024

United Nations "date unknown"

[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CR  
C](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CR<br/>C)

United Nations "date unknown" United Nations Treaty Body Database

[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Trea  
ty=CRC](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Trea<br/>ty=CRC) accessed 07 April 2024

United Nations "date unknown" <https://www.un.org/en/about-us/member-states>

United Nations "date unknown" Member States <https://www.un.org/en/about-us/member-states> accessed 07 April 2024

United Nations Office on Drug and Crime *Juvenile Justice: United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*

United Nations Office on Drugs and Crime *Juvenile Justice: United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)* (2006) available at [https://www.unodc.org/pdf/compendium/.compendium\\_2006\\_part\\_01\\_02.pdf](https://www.unodc.org/pdf/compendium/.compendium_2006_part_01_02.pdf) accessed on 15 November 2023

United Nations Office on Drugs and Crime *Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary* 2013

United Nations Office on Drugs and Crime *Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary* 2013 available at [www.unodc.org](http://www.unodc.org) accessed on 14 February 2024

University of Wisconsin-Madison "date unknown" About Restorative Justice <https://law.wisc.edu/fjr/rjp/justice.html#:~:text=Restorative%20justice%20seeks%20to%20examine,to%20repair%20the%20harm%20done>

University of Wisconsin-Madison "date unknown" About Restorative Justice <https://law.wisc.edu/fjr/rjp/justice.html#:~:text=Restorative%20justice%20seeks%20to%20examine,to%20repair%20the%20harm%20done>