The role of international human rights law in the development of South Africa's legislation on juvenile justice[1]

JULIA SLOTH-NIELSEN
Professor of Law, University of the Western Cape

1 INTRODUCTION

The recognition that children accused of committing offences should be treated differently to adults is now over a century old. The 1899 Illinois Juvenile Court Act, which is widely credited as providing the first example of legislation establishing a separate juvenile justice system (Clement 1977:11–18; Dorhne & Gewerth 1995:54–70), celebrated its centenary in 1999. During the first years of the twentieth century, many jurisdictions followed the Illinois example and enacted legislation dealing with aspects of juvenile justice, as well as establishing separate institutions for the treatment of children in conflict with the law. Amongst the common law countries, these included the other states in the United States, the United Kingdom, Australia, and Canada.[2]

Historically, before the eighteenth century, childhood was not recognised as having special status at common law, and age did not generally afford any special protection where children were charged with the commission of criminal offences. As regards juvenile justice, save for the presumption that children under the age of seven could not be held criminally responsible, which derived from Roman law,[3] children were theoretically subject to the same procedures and penalties[4] as adults, and little attempt was made to separate them from adults during incarceration. Even as recently as the nineteenth century, in most parts of the world, children could be jailed in adult jails, executed, flogged, and sentenced to

1 Some of the research for this paper was undertaken during a fellowship at the Centre for Public and International law, Australia National University, Canberra.

2 The children's court in the United Kingdom dates from 1908 (Morris & Giller 1997:6), Canada's legislation from the same year (Bala & Kirvan 1991:7474), and various states enacted legislation to establish children's courts in Australia between 1895 and 1918 (Cuneen & White 1995:19). See further Seymour 1996; Corrado & Markwart 1996, Hirschel 1996 and Seymour 1988.

3 The rule concerning the irrebuttable presumption that a child under the age of 7 lacks criminal capacity dates from the 5th century AD, and formerly was based on the incapacity to speak (Jolowicz 1957; Bernard 1992:29).

4 Although it has been asserted that children below puberty (12 for girls and 14 for boys) were given reduced punishment under Roman law from the time of Justinian (Bernard 1992:29).

transportation in the same way as any adult (Morris & Giller 1987:6; Seymour 1988:8–9, Ottenhof & Renucci 1996). Youth was, however, held to be a mitigating factor in sentencing in many jurisdictions.

From 1850 onwards, a trend towards greater and greater age segregation and age-specific treatment began to develop, and the stage of life between infancy and maturity came to be vested with a set of specific qualities that served to distinguish children from adults.

The emergence of a reformist movement[5] in the early nineteenth century in the USA, Canada, Australia, the United Kingdom[6] and many civil law countries as well, gave the impetus to the development of child welfare agencies, institutions[7] for child offenders, and, ultimately, the first juvenile court. Thus the "concept of the young offender, with all that it implies for penal policy, is a Victorian creation" (Radzinowicz & Hood 1986:133).

The reformers of this time considered their paramount objective to be saving destitute and wayward children from a life of poverty, destitution and crime. The early nineteenth century was an era during which welfare-oriented individuals and organisations founded refuge houses, orphan houses, asylums and places of safety, which received children who had been convicted in state and local courts into their care, instead of their being committed to prison. However, many of the children were sent there for vagrancy, destitution and other crimes of poverty; rather than for the commission of any substantive offence (Seymour 1988:18–19). The "child savers", as they have been called (Platt 1977:52), stressed the connection between idleness and temptation, and attempts to induct children in the beneficial habits of labour were linked to the moral reformation of the child.

The second half of the nineteenth century was characterised by the establishment in many jurisdictions of separate institutions specifically designed to deal with juvenile offenders. Reformatories, industrial schools, borstals and so forth were intended to teach children the value of discipline, work, thrift and self-reliance, and thus to "cure" the delinquency. As has been amply demonstrated by modern day researchers, the reform movement, far from being based solely on ideals of benevolence and charity, was intended to ensure that poor youths grew up to be honest, hard workers (Platt 1977:52).[8]

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5 The social problem targeted by the reformers was regarded as being pauperism, rather than crime or delinquency, and paupers were thought to be lazy, dissolute, deceitful and wicked. A 1819 report on children in prison concluded that "the penitentiary cannot but be a fruitful source of pauperism, a nursery of new vices, a college for the perfection of adepts in guilt" (quoted by Bernard 1992).

6 For a comparative analysis of the development of penal institutions for children in France, India, Hong Kong, and many other jurisdictions at more or less this time, see the relevant chapters in Shoemaker 1996.

7 For example, houses of refuge and industrial schools. See generally Bernard 1992:58–82.

8 These were hardly benign institutions, and little reformation of those youth who were committed to these institutions actually took place, as research has shown. See, for example, Clement 1977:11 and Krisberg & Austin 1993:25.

The establishment of the Illinois juvenile court was preceded not only by the introduction of specialised children's institutions, but also, in many jurisdictions, by legislation which sought to establish special procedures for dealing with child offenders. From the middle of the nineteenth century onwards, state and municipal governments had taken over the administration of the institutions of correction for juvenile delinquents,[9] and many jurisdictions had already passed legislation providing for different procedures to be followed in criminal courts for dealing with juvenile offenders.[10]

By the end of the century, the scene was set for the foundations of the welfarist philosophy of juvenile justice that was to last nearly three quarters of a century. The juvenile court movement attempted to remove children altogether from the adult criminal justice system, and to provide them with individualised treatment. In the USA,[11] this entailed the presiding judge giving sound advice to the child, using probation and supervision, authorising institutionalisation in an orphanage or foster home, or sentencing the child to one of the penal institutions that existed by then (Clement 1977:18). Characteristic of the ideology of the system was the focus on the child's "needs" rather than the child's "deeds" (Muncie 1999:254). The Illinois court was followed rapidly in other states in the USA, which too proceeded to set up separate juvenile courts,[12] and thereafter by statutes setting up juvenile justice systems in a number of countries.

Three common themes can be identified in the development of juvenile justice systems internationally during the initial phases, all of which continue to be influential in juvenile justice today. First, the emergence of the notion of *separation*, that is, that juveniles warrant separate treatment in law, and further, that different legislation, institutions and principles should apply to children accused of offences:

> ". . . [I]t is clear there were fundamental shifts during the late nineteenth century and early twentieth centuries in the relationship between young people and the law. There was a separate method of punishment for young people, including new penal institutions . . . Separate sentencing regimes were established, including the use of indeterminate sentencing. Separate children's courts were established, not only to determine criminal matters but also to assess neglect and welfare matters" (Cuneen & White 1995:27).

Separation of children from the adult system was thus the culmination of the development of the institutions of juvenile justice.

Second, and linked to the above, was the idea that there should be jurisdictionally distinct juvenile justice *courts*, which, in the *procedure* they

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9 Thus by the time of that the Illinois Court was founded, the majority of juvenile institutions in the USA were in the control of state authorities.

10 Thus, for example, England in 1847 passed the Juvenile Offenders Act, which increased the powers of magistrates to hear summary offences committed by persons under the age of 14, and the Australian state of Victoria enacted legislation in 1850 which, in addition to extending the summary jurisdiction of the magistrates courts for juvenile offenders, allowed different and lesser penalties to be applied to convicted juveniles.

11 Under the *parens patriae* doctrine, still the key philosophical premise of the USA juvenile justice system.

12 For example, Wisconsin and New York in 1901, Maryland and Ohio in 1902.

follow, are distinguishable from the conventional adult criminal trial process. Thus, as in England and in Australia, for example, magistrates were at an early stage given summary jurisdiction[13] to try children charged with offences. The Illinois court and its successors elsewhere in the USA also pioneered different procedures for dealing with children in conflict with the law, although these were to form the subject of several well-known constitutional challenges in the 1970s.[14]

One justification for the perceived need for different courts which followed alternative procedures was the professed need for a speedy trial (Cuneen & White 1995:19). Another was the goal of reducing the stigmatisation of a criminal conviction in adult court, a "brand [the child] sticks with for life" (Morris & Giller 1987:12). A third was addressing the harmful effects of contamination by adult accused persons.

A third commonality was the recognition of the *role of social workers* in the practice and policy of juvenile justice. This was a direct result of the philosophy of welfarism that had spawned the birth of the juvenile justice movement in the first place, and the importance of the social worker was consequently statutorily enshrined in many jurisdictions.

However, children's or juvenile courts (as they were differently named in different jurisdictions), did vary in the way in which they were set up across different jurisdictions. Broadly speaking, they either functioned as combined child neglect and criminal courts, or as welfare courts, or as summary criminal courts. But it must be remembered that whatever the form juvenile courts took, they were uniformly vested with what are now recognised as being harsh and coercive powers, unlike welfare services, which have always been characterised by voluntary access.

Until as recently as 1989, most theorists in the juvenile justice field[15] would analyse juvenile justice legislation and practices in terms of the dichotomy of the "welfare-justice" continuum, and various systems or characteristics of systems were graded in terms of this classification. "Welfarism" and "justice" are presented as antinomies, as describing diametrically opposite and mutually exclusive approaches to juvenile justice. There is a tendency to analyse legislative shifts in this area as illustrating a swing towards either the one or the other model. But it has also been recognised that both welfare and justice models are ideal types, meaning that they do not exist in a pure form.

2 BACK TO JUSTICE

After the constitutional challenge to the welfare ideology of the juvenile court in the USA in *In re Gault*,[16] due process guarantees that were introduced into juvenile court procedures as a consequence of the Supreme

13 That is, without the necessity of juries.

14 Regarding the absence of legal representation, the absence of the right to challenge evidence, the lack of a formal adjudicatory process in the children's court, and so forth.

15 See, for example, Muncie 1999, O'Connor 1997 and Naffine 1993.

16 387 US 1 (1967).

Court ruling fundamentally changed the parameters of debate, not just in the USA, but across the globe. Subsequent to *Gault*, a wider disillusionment with the dominance of welfarism came to prevail. In the United Kingdom, Canada[17] and Australia too, welfare approaches "lost momentum" (Fortin 1997:436ff) as a number of criticisms emerged to undercut the dominance of the welfare ideal. The principle thrust of these arguments was that the juvenile court process was in fact highly punitive and stigmatising, that it could be more injurious than curative, and that there was a need to safeguard children against the "excesses" of the children's court (Naffine 1993:6). Mounting evidence pointed to the injustices of individualistic and indeterminate sentencing which was not linked proportionately to the deed allegedly committed by the child. The apparent benevolence of welfarism came to be seen as masking a system as coercive as the adult criminal justice system.

Further, a growing disillusion with the effectiveness of welfare's promised treatment developed, as treatment seemed to have no effect on actual recidivism or delinquency rates. One study concluded that with a few isolated exceptions, the "rehabilitative efforts that had been reported had had no appreciable effect on recidivism" (Muncie 1999:268). There were also perceptions that the welfare approach was too lenient: "magistrates expressed concern about juveniles being 'set free' by the social workers" (Pratt 1989:236–238). Finally, the so-called expertise of the probation officer, child care worker and social work professional came under attack (Morris & Giller 1987), with the realisation that the social work understanding of delinquency served to reinforce the principle of individual pathology and the need for working class youth to accept a given position of social and material inequality (Muncie 1999:270).

The alternative discourse, which has been termed the "justice" approach, gained ascendance during the 1970s and 1980s. This approach emphasises the need for juvenile justice processes to encompass visible and accountable decision making, including a proper adjudication of guilt. In this model, which finds its home in traditional liberal theory, people are regarded as being free, rational and self-determining agents, who are thus responsible for their own circumstances. Consequently, the role of law and the state is to secure the liberty and agency of its citizens, and the task of the criminal court is to adjudicate upon a fitting punishment for rational and deliberate antisocial acts on the part of a defendant. The culpability of the defendant sets the limit of punishment, the principal concern being how much the action of the citizen has infringed the rights of others.

Therefore, a key characteristic of the trend towards the justice philosophy included the abolition of individual penalties and an end to disparity in sentencing, the eradication of indefinite periods of supervision, treatment, detention and control, and the curtailment of the wide discretion previously accorded the social work profession to manage this. In the

17 Bala & Kirvan 1991.

USA, the United Kingdom and elsewhere, the "back to justice debate" held that the specificity of the offence should determine the nature and form of the punishment, heralding a swing away from the treatment model which had regard only to the "needs" of the defendant. Social work reports still had an advisory role to play in assisting the judicial officer determine sentence, but the necessity for exactitude in sentence led to the development of various determinate alternative programmes. A key change in thinking evident in the justice model was that the juvenile offender was not perceived as needing protection, but as being personally responsible for his or her actions (Naffine 1993:14), which deserved the sanction of a punishment, rather than being seen as warranting treatment. The gradual introduction of due process guarantees – or procedural protections – into juvenile court proceedings themselves were an important part of the justice theory. This included such procedural rights as the right to legal representation in the juvenile court, the right to have prior insight into social work reports, and the higher standard of proof required for interference with liberty and freedom, which were derived from *Gault*, but found resonance in a large variety of jurisdictions.[18]

3 THE THIRD MODEL: "CORPORATISM"

By the end of the 1980s, the expansion of diversion and the steady diminution of youth incarceration in many jurisdictions abroad, along with broader shifts in penal policy, signalled that the time was ripe for reappraisal of the traditional welfare/justice dichotomy. The welfare/justice debate was increasingly being viewed as sterile, and, moreover, as masking the social biases (race and gender) in juvenile justice law and its application. A more recent addition to the theoretical debate, put forward in 1989, has therefore been the "corporatist"[19] theory of juvenile justice.[20]

"Corporatism" held that it made little sense to view youth justice as offering either welfare or justice. The new strategies of diversion[21] were characterised by greater administrative decision making, greater sentencing diversity, decentralisation of authority, growing involvement of non-juridical and voluntary sector agencies, and, contrarily, high levels of containment and control in sentencing programmes. The aims of juvenile justice were described as striving towards the most effective and

18 See Naffine 1993, Muncie 1999 and Morris & Giller 1987.

19 Also (perhaps better) described as a *systems management* approach. This approach is "based around multi-agency interaction by social services, probation, the voluntary services, the police and crown prosecution service to lower the amount of individuals processed into the most intensive parts of the juvenile justice network" (Morrison 1998:293). According to Morrison, this approach was influenced by several factors, including the overwhelming conclusion that custodial and institutional measures were especially damaging to young people and should be avoided as much as possible.

20 Pratt "Corporatism: The Third Model of Juvenile Justice" *op cit.*

21 In the United Kingdom, based on huge growth in police cautioning which, according to Pratt (1989), was then the most predominant sanction for juvenile offenders.

efficient way of managing delinquency. For instance, a whole range of "alternatives to custody"[22] programmes were developed in the United Kingdom (and subsumed under the name "intermediate treatment"), resulting in a substantial reduction in incarceration rates of young offenders.

During the 1970s and 1980s, the use of the least restrictive alternative had become an important principle,[23] leading to increasing attempts to place limits on sentencing discretion (Pratt 1989:242). Attempts to divert from custody by discouraging courts from adding to an overcrowded prison system commenced in the United Kingdom in 1982, when community service orders were introduced for young offenders. The 1988 Criminal Justice Act in England and Wales was a more detailed attempt to prevent the judiciary from imposing unnecessary custodial sentences, as it required not only that custodial sentences be merited by the nature and gravity of the offence, but also that the offender "qualified" for such a sentence by virtue of his or past failure to respond to non-custodial penalties, or because a custodial sentence was needed to protect the public from serious harm (Pratt 1989:242).[24] In the USA, too, the use of custody as a last resort was furthered by the adoption of a policy of requiring children to be held separately from adults in correctional facilities, as Congress moved in 1980 to mandate the complete removal of juvenile from adult facilities.[25]

All of the above were cited as evidence of the ascendance of *managerial* ideas, which it was alleged provided a far better explanation of the shape and contours of juvenile justice practice than the more simplistic justice or welfare orientation. It has also been stated that managerialism[26] represented a significant lowering of expectations of what youth justice could be expected to achieve. So, preference for diversion was based not on any commitment to norm or principle (such as avoidance of the adult criminal justice system), but because it made sense on the grounds of "value for money". Sifting out minor offenders and diverting them into low cost programmes, or giving them cautions, was a sensible way of making resources go further in other ways.

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22 In the USA the subject of decarceration has been much researched. See Muncie 1999:276 and the sources cited there.

23 In the 1980s, the notion that many young offenders simply grow out of crime as they mature into adulthood came to be widely believed, so that practitioners were able to demonstrate that a strategy of non-intervention was both feasible and effective (Rutherford 1992).

24 See, too, Muncie 1999:279.

25 This was brought about as a result of amendments (in 1980) to the 1974 Juvenile Justice and Delinquency Prevention Act 1974, which required states to comply with the requirement of deinstitutionalisation of status offenders, provided for a ban on regular contact between juveniles and incarcerated adults, and encouraged the so-called "jail removal mandate", requiring the removal within a specified time period of juveniles from any jail or lock-up for adults, in order to qualify for federal grants (Krisberg & Austin 1993:177).

26 Lorraine Gelsthorpe and Allison Morris refer to the three "Es" which encapsulate the ethos of managerialism: economy, efficiency and effectiveness (Gelsthorpe & Morris 1999:209).

A further notable trend identified by Pratt as part of his corporatist theory is what has been termed "bifurcation", an official and recognised separation between so-called "hard core" offenders for whom custody was required, and the remainder of arrested children who constituted a group of non-violent, petty offenders, for whom custody was not appropriate.

> "Youth Justice was reconceptualised as a delinquency management service in which the hard core were still locked up, whilst an expanding range of statutory and voluntary community-based agencies tailor-made non-custodial sentences which they hoped would be stringent enough to persuade magistrates not to take the (more expensive) custodial option" (Muncie 1999:288).

In sum, the advancement of corporatism as an explanation for juvenile justice theory and practice revealed that the wider philosophical arguments of welfarism and justice had been replaced in reality by greater diversity in juvenile justice practice and policy. In addition, the theoretical recognition of the centrality of diversion to juvenile justice practice set the scene for the consideration of a far more extensive mapping of the scope of juvenile justice in the 1990s, previously rather fettered to juvenile or children's court practice. Further, corporatism showed that the former modes of analysis were not just sterile, but also unquestionably simplistic. The way was thus opened to the emergence of new analyses.

But the significance of corporatism *qua* theory should not be overestimated,[27] as it appears to have found little favour outside the UK.[28] Hence, corporatism has largely been eclipsed in recent texts[29] in preference of new ideas concerning philosophical frameworks and explanations in the juvenile justice field.

4 INTERNATIONAL HUMAN RIGHTS AND JUVENILE JUSTICE

From 1989, the year in which the UN Convention on the Rights of the Child[30] came into force, traditional theories of juvenile justice have had a new framework within which to situate juvenile justice: a children's rights model. As an international standard, the CRC and the other accompanying instruments[31] represent a general consensus as to what the minimum standards embodied by governments in juvenile justice legislation and policy should be (Crosthwaite 1999:172). Regardless of how enforceable

27 Corporatism's limitations appear to derive from the fact that, as a purported theory of juvenile justice, it is merely explanatory of existing policy, rather than putting forward any particular philosophy – it does not espouse a concept of rationality or choice, give reasons for the causes of delinquency, or provide any justification for the imposition of punishment.

28 Thus, in his overview of models of juvenile justice in an Australian context, O'Connor (1997) does not refer to Pratt's thesis at all.

29 This is a very recent trend, but a good example is Jane Fortin's chapter on youth justice in the United Kingdom (Fortin 1997).

30 CRC.

31 The non-binding Beijing Rules for the Administration of Juvenile Justice (1985), the Standard Minimum Rule for the Protection of Juveniles Deprived of their Liberty (1990) and the Riyadh Guidelines on the Prevention of Juvenile Delinquency (1990).

international law may be in any given municipal context, this set of human rights rules and principles provides a fresh yardstick against which legislation and policies can be measured.

Thus, introducing the idea of child-oriented juvenile justice systems based on international law, Geraldine van Bueren (1992) noted that international law had ushered in a (silent and largely unheralded) revolution for the administration of juvenile justice.[32] It has been asserted that the CRC transcends the justice/welfare paradigms that prevailed during the preceding 90 years, because it places strong emphasis on the child as an individual with inalienable human rights, and expresses these rights in erms which are assertive, rather than merely protective (Cohen & Mijleteig-Olssen 1991:367). One commentator has viewed the significance of the new paradigm as being its capacity to set defined limits upon interventions formerly justified by welfarist ideology (Nelken 1998:325). In other words, wide discretion, indeterminate sentencing which penalises children more harshly than adults, and incarceration for status offences[33] can now be held to be contrary to human rights.[34]

The language of the applicable sections of the Convention bears striking similarity to the *Gault* tradition, and entails considerable emphasis on procedural guarantees.[35] But, moving beyond the justice paradigm, notable

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32 Carney 1997 asserts that "juvenile justice has been influenced by the rights framework adopted in international treaties".

33 That is, offences which can be committed only by children, such as truancy, promiscuity, and uncontrollability.

34 See, for an illuminating example of the increasing relevance of international human rights norms in juvenile justice – the judgment of the European Court of Human Rights in *T v United Kingdom* (Application no 24724/94), *V v United Kingdom* (Application no 24888/94), handed down in December 1999. The Court did not find that the treatment of the two applicants went so far as to constitute inhuman and degrading treatment in contravention of Article 3 of the European Convention on Human Rights in respect of either the trial or the sentence, but it did hold that the trial in an adult court was not fair. The government's arguments that public trial and open justice served the public interests was rejected in favour of a greater concern for the well-being of young defendants. Finding a violation of Article 6(1) of the Convention, guaranteeing the right of an accused person to participate effectively in his criminal trial, the court held that a child charged with an offence should be dealt with in a manner which takes into account his age, maturity and intellectual and emotional capacity. Given the age of the children concerned, the circumstances of their trial and the fact that both were suffering from post-traumatic stress syndrome, it was regarded as being highly unlikely that they were able to brief their lawyers or participate during their trial as required by article 6. As regards the sentence imposed, two breaches of the European Convention on Human Rights were identified. First the fixing of a tariff (by the Secretary for the Home Office) for detention "at Her Majesty's leisure" amounted to a sentencing exercise, and thus attracted the guarantee that sentence be imposed by an "independent and impartial tribunal", not a member of the executive. Second, Article 5.4 of the European Convention was held to have been violated in that children held in detention for preventive reasons were entitled to periodic review by a judicial body in order to challenge the continuing legality of their detention.

35 For example, the right to notice of charges (article 40(2)(ii)), the right to a formal hearing (article 40(2)(iii)), to protection against self- incrimination (article 40(2(iv)) and to confront and challenge witnesses (article 40(2)(iv)), as well as the right to legal counsel (article 40(2)(ii)), which were the core due process rights detailed in *Gault*, have

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additional features are evident in the children's rights approach which compel a rethink of the theoretical basis of juvenile justice. It could be argued that there are at least six crucial areas in which new normative standards for juvenile justice derived from international law can be discerned.[36]

First, the Committee on the Rights of the Child,[37] in its consideration of country reports submitted under the Convention, has played a role in setting standards for law and policy relating to the minimum age of criminal responsibility. In its concluding observations to country reports, CROC has consistently criticised States Parties whose minimum age is less than ten years.[38]

Second, international law leaves no doubt as regards the relevance to juvenile justice of the "best interests of the child" principle, especially in relation to other compelling interests in the criminal justice sphere, such as the interests of the community or society. (This is described by Jane Fortin (1997) as children's rights vs society's right to protection.) The Convention is thus a useful benchmark in mediating and shaping the principles and objectives of "Convention-compliant" juvenile justice legislation.

Third, as international law now requires that detention be used as a measure of last resort and for the shortest period of time only, the critical area of pre-trial detention of children and how it is provided for in municipal law may come under scrutiny.

Fourth, John Platt's corporatist model of juvenile justice (1989) highlighted the growth of diversion as support for his thesis about the emergence of cost-effective managerialist strategies in juvenile justice. What international human rights law adds to the equation is the recognition of the desirability of diversion as a binding obligation. There is thus a corresponding obligation of ratifying state parties to ensure the continued development of diversion.

Fifth, the CRC requires that alternative dispositions be available and applicable to children convicted of offending, and this has played a significant role in shaping legislative reform in post-Convention juvenile justice statutes of late. Adherence to international law also entails limitations on certain forms of sentencing, such as the prohibition on the imposition of capital punishment for those convicted of crimes committed while below the age of 18 years, and the ban on life imprisonment without the possibility of parole.

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counterparts (as reflected here) in comparable provisions in the Convention. Many also have counterparts in the international Covenant on Civil and Political Rights (see Detrick 1999:676ff). See also for an allusion to the influence of American child rights advocates on the Convention drafting process Hafen & Hafen (1996:485).

36 Some of the thinking behind this framework is based on the headings developed by Jane Fortin (1997) in the chapter dealing with juvenile justice.

37 CROC.

38 See, for example, CROC's response to the Australia country report and to the country report of the United Kingdom in respect of the minimum age of responsibility in Hong Kong and Scotland.

Finally, at a very basic level, the Convention requires that ratifying countries establish separate juvenile justice systems for children under the age of 18. It is this last imperative that leads logically to a discussion of the South African experience of juvenile justice reform.

5 A HUMAN RIGHTS RATIONALE FOR JUVENILE JUSTICE REFORM IN SOUTH AFRICA

The history of juvenile justice law reform in South Africa is barely a decade old, in contrast to shifts and changes that have taken place in juvenile justice philosophy elsewhere in the developed world over the last century. However, this statement (which has been made before)[39] masks the fact that the Victorian child saver's ideals found a ready home on this soil too. In exactly the same way as her colonial counterparts, South Africa had enacted child protection legislation in the early part of the century.[40] In addition, a predictable succession of child welfare statutes followed in 1933, 1960 and 1983.[41] The various enactments provided for a possible routing for children charged with offences from as early as the 1930s – by conversion of criminal matters to a children's court hearing at which the welfare needs of the child could be considered.[42] In addition, the reform schools and institutions linked to juvenile justice, established in this country from the 1870s onwards, were regulated under child protection legislation from the time of Union in 1910. But, in sharp contrast to the clearly defined systems of juvenile justice that followed the development of the juvenile penal institutions and the establishment of separate courts for children charged with offences in other parts of the world, South Africa failed for the most part to link juvenile justice to this statutory system for children. The reasons for this divergence are not clear, but they appear to be linked to the racial divide. Welfare services were originally established for, and provided to, white and mixed race children only, thereby disqualifying black children from the sphere of influence of the social worker, and consequently from the ambit of the nascent Children's Court. The alternative welfare process in child protection legislation was (and is still) used for child offenders only by way of exception, and the equivalent statutory framework which gave rise to what became termed juvenile justice in the rest of the world, was not perceived as constituting that here.

Indeed, most arrested children are dealt with under the Criminal Procedure Act 51 of 1977 that governs all criminal procedures, although some provisions do allow for concessions for those under 18, such as the requirement of the notification of parents of the arrest of any children under

39 See, for example, Skelton 1999:90.

40 Ct 13 of 1911; Act 25 of 1911.

41 The Children's Act 31 of 1937, The Children's Act 33 of 1960, and the Child Care Act 74 of 1983.

42 Now in s 254 of the Criminal Procedure Act 51 of 1977.

the age of 18 years, the requirement that proceedings to be held in camera, and provisions which enable the imposition of different sentence options.[43]

It can safely be stated that the gestation of calls for a juvenile justice system in South Africa date from the political detentions of children during the turmoil of the 1980s. Schoolchildren were at the vanguard of the struggle, and were consequently arrested and detained without trial under the security legislation that had been put in place to repress the increasing ungovernability of the nation. The Detainees Parents Support Committee, for example, was a pressure group of anti-apartheid activists that was organised in the mid-1980s to focus world attention on conditions of detention of young people detained under the repressive legislation. The International Committee of the Red Cross sent a delegation of human rights experts to report on the position of detainees in prison, including children, who were being held along with adults in prisons. Thus a signal feature of this period was the international spotlight on the political detentions of large numbers of children.[44]

In 1987, the international anti-apartheid movement convened a conference specifically aimed at examining the position of children under apartheid. Held outside the country in Harare, as the African National Congress was then still a banned organisation, this conference is widely regarded as having heralded the birth of the children's rights movement in South Africa. But, as result of the pressures of the historical moment, it also meant that the parameters of the children's rights debate was tied to the role of children during the struggle. The concern of children's rights advocates was not viewed in any private law sense – for example, in relation to access, custody, and family law disputes, or with reference to claims to children's autonomy or their participation rights – nor were status and maturity debates really explored. The central issue was the repression of children as victims of apartheid.

As the conditions for transition to democracy began to unfold during the early 1990s, the ban on the liberation movements was lifted, and, as a crucial precondition for the commencement of negotiations, a moratorium on executions was announced. Detention without trial of political activists slowed, as did the need to focus on children as victims of repression. Over the next three years, advocacy groups used the expertise and knowledge gained from monitoring and visiting children detained under

43 The vast majority (estimated at 95 per cent) of children are dealt with under the provisions of the Criminal Procedure Act 51 of 1977, which applies equally to adults. Some examples of provisions which mitigate the adult criminal procedure insofar as children are concerned are s 50(5) which requires that parents or guardians of as arrested child be notified of such arrest; s 74(3) which provides for parental assistance during court proceedings; the holding of the trial of a child under the age of 18 years *in camera* (s 153(4)), and the range of different sentencing options available to persons under the age of 18 years appear in s 290. See, further, for legislation providing for young offenders, the Probation Services Act 16 of 1991, and the Correctional Services Act 8 of 1959, especially s 29 thereof (as amended).

44 It has been estimated that 11 000 children were detained under the infamous security legislation of the time (Mosikatsana 1998:341).

security legislation to examine the situation of children in prison for ordinary criminal law offending. These children were portrayed as being victims of the unjust apartheid system too. They were often charged with petty offences linked to poverty, such as stealing and shoplifting in courts staffed predominantly by white magistrates with little sympathy for the socio-economic conditions that prevailed. Well-orchestrated and notably successful campaigns to highlight especially prison conditions under which children were being held before trial were mounted by these non-governmental organisations (Community Law Centre 1992; Lawyers for Human Rights *et al* 1992; The Drafting Consultancy 1994).

With hindsight, the entire children's rights movement came, during the years 1990–1994 to be characterised by a dominant concern with issues around juvenile justice. It was juvenile justice and detention that took centre stage, rather than child abuse, domestic violence, child labour, children and customary law, or any other of the pressing social problems besetting children that could potentially have formed the focus of children's rights advocacy. Both before and after the 1994 elections, conferences, seminars and workshops examining various aspects of juvenile justice were hosted and proceedings disseminated to further the process of policy development. A major function of all of this activity was advocacy for law reform aimed at the creation of a separate juvenile justice system, a call which was heeded when the Minister of Justice appointed a project committee of the South African Law Commission to draft proposals for a juvenile justice system in 1996.

In respect of the first half of the 1990s, several conclusions can be drawn about the contribution of international law to reform of juvenile justice.

First, as mentioned, the juvenile justice reform movement was tied by virtue of its birth and immediate history to the children's rights movement. The children's rights lobby, in turn, was much envigorated by the rapid ratification by many countries of the 1989 UN Convention on the Rights of the Child. There was great optimism about the development of children's rights in international law, and expectation that the rights enshrined in the CRC would materially alter the conditions under which children grow up. As early as 1991, President de Klerk and president-to-be Mandela together signed the 1990 World Summit Goals for Children, signalling their joint commitment to implement children's rights in this country. Ratification of the CRC once South Africa rejoined the international community of nations was more or less a foregone conclusion, and juvenile justice was an intended beneficiary of this connection. The link to the emerging children's rights regime was an important rallying call for domestic juvenile justice reform.

Second, the children's rights advocacy movement in the country drew heavily upon the CRC's provisions and its status as a treaty in lobbying for the inclusion of a clause on children's rights to be included in the Constitution. Other important treaties (for example, the International Covenant on Civil and Political Rights, the International Covenant on Social and Economic rights, and the Convention on the Elimination of all forms of Discrimination) were all being considered in formulation of the new

Constitution that would include a Bill of Rights. It was argued by the children's rights lobby that international law now included a legally binding document concerning children's rights, and (especially given the effects of apartheid's legacy upon children), their legal claims should not be overlooked.[45] When children's rights groups were asked to propose possible constitutional provisions for consideration by the negotiators of the 'interim' (1993) Constitution, they suggested juvenile justice provisions drawn from the Convention. The inclusion of key rights in the interim[46] and 'final' (1996) Constitution[47] relevant to juvenile justice has thus ensured the lasting significance[48] of international law provisions in domestic law.

Third, it became a pattern from 1993 onwards to cite international law provisions at conferences, workshops, seminars, and policy initiatives. It must be remembered that South Africa enjoyed pariah status in international law until then, which explains general irrelevance of the international law arena until it suddenly crept out of the woodwork as the odds for successful transition to democracy emerged. The principles not only of the CRC, but also those contained in the Beijing Rules and the Standard Minimum Rules for the Deprivation of the Liberty of Juveniles became quite familiar through their repetition to those engaged in juvenile justice policy development. There was an expectation that law reformers would take account of, and incorporate, international law in the drafting of a new juvenile justice statute.

6 THE ROLE OF INTERNATIONAL LAW SINCE 1996

The Project Committee of the South African Law Commission has, since its first meeting in early 1997, producing an issue paper,[49] a discussion paper with an attached draft Bill,[50] and finally a Report and Bill on Juvenile Justice which was released on 8 August 2000.[51] At each stage, thorough consultation has been conducted with various interest groups and government departments and groups involved in provisioning for juvenile

45 As an observer at those constitutional negotiations has written elsewhere, this argument seemed to be particularly attractive to "female negotiators", and lead to an expansion of the original rather limited proposals for a children's rights clause in the 1994 interim constitution – see Du Plessis and Corder 1994:186.

46 For a discussion of the process leading to the formulation of children's rights in the interim constitution, see Sloth-Nielsen 1996.

47 The juvenile justice provisions in s 28 of the 1996 Constitution were actually expanded with the addition of the right not to be detained except as a matter of last resort and for the shortest period of time only, and the right to be held separately from adults whilst in detention. These augmented the rights provided for in the equivalent section of the 1993 Constitution, that is, the right whilst in detention to be kept in conditions and treated in a manner appropriate to the age of the child.

48 The constitutionalisation of procedural guarantees for all persons accused of the commission of offences has probably forever stifled any spectre of the once dominant ideology of welfarism taking root in South Africa.

49 South African Law Commission 1997.

50 South African Law Commission 1998.

51 Available at www.wits.ac.za/salc/salc.html.

justice,[52] and even with children themselves.[53] A detailed costing of the proposed provisions was commissioned (Barberton & Stuart 1999), regarded as a somewhat of a groundbreaking initiative in respect of law reform proposals emanating from the Law Commission in this country.

Although the murky waters of the parliamentary process still lie ahead for the Report and Bill,[54] probably early next year, the impact of international law upon the report can nevertheless be discerned at several levels. It is to this analysis that I now turn, and five contributions of international law to the drafting process (in particular) that I wish to highlight.

6.1 Direct incorporation

Firstly, the Report and Bill reflect, in certain direct provisions, the specific requirements of certain international law precepts, where these are not already encompassed in the Constitution.[55] Examples in point are:

- the prohibition on the sentence of life imprisonment for children who commit offences whilst under the age of 18[56]
- the raising of the minimum age of criminal liability from seven years to ten years[57]
- a statutory requirement that social inquiry reports be made available at the pre-sentence stage in all except minor cases[58]
- the compulsory provision of legal representation of all children who are remanded awaiting trial in detention, who are expected to face trial in a court if the likelihood exists that a residential sentence may be imposed upon conviction, or who, by virtue of being aged between 10 and 14 are presumed to lack criminal capacity but are being tried in court pursuant to the issuing of a certificate of prosecution[59]
- provisions compelling high court review of *any* sentence with a residential element imposed upon a child, or any sentence involving correctional supervision, irrespective of the status of the sentencing

52 Such as the departments of Justice, Welfare, Safety and Security, Correctional Services, diversion service providers, probation officers and so forth.

53 The consultation process with children is described in Community Law Centre 2000.

54 The Bill is likely to be tabled by June 2001, according to informal communications by the Department of Justice.

55 Either in the children's rights sections, or in the sections dealing with the rights of accused, detained or sentenced persons, which are also applicable to children.

56 A requirement of the International Covenant on Civil and Political Rights as well as Article 37(a) of the Convention on the Rights of the Child, reflected in clause 95 of the Bill.

57 The CRC obliges a ratifying state to set a minimum age of criminal responsibility, and the Committee on the Rights of the Child has, in its concluding observations, consistently criticised countries where this age has been set below ten years. Many states have reviewed their minimum age upwards in accordance with what could be an emerging norm of international customary law.

58 Required by Rule 16.1 of the Beijing Rules for the Administration of Juvenile Justice, and incorporated in clause 85 of the Bill.

59 Article 40(2)(b)(iii) of the CRC and clause 98(1) of the Bill.

officer, his or her length of service, suspension of the sentence in whole or in part, or the fact that the child was legally represented at the trial.[60]

6.2 Principles and orientation

Secondly, the influence of international law may be readily detected in the objects, principles and orientation of the proposed legislation. For example, the short title to the Bill commences with the statement that the purpose of the statute is "[t]o establish a criminal justice process for children accused of committing offences which aims to protect the rights of children entrenched in the Constitution and provided for in international instruments . . ." The objectives clause (clause 4) spells out that a rights model[61] underlies the spirit of the legislation, overriding any possibility of a retreat to welfarism. Further, the objectives clause confirms an acceptance of the values that should underpin a juvenile justice system as derived from the CRC's philosophy.[62] Finally, the principles[63] which apply to "any court or to any person exercising any power conferred by the Act" include such accepted human rights standards as the right of the child subject to procedures under this Act to participate when decisions affecting him or her are taken,[64] and the right to maintain contact with family.[65] The principle of equal access to services, and equal treatment where children are accused of having committed similar offences, is derived from both the Constitution and from the non-discrimination clause of the CRC.[66]

6.3 Separation and the juvenile justice system

A third influence can be deduced from the CRC requirement that a separate system of juvenile justice should be implemented for children under the age of 18 years.[67] This provision is increasingly being regarded as implying that distinct and dedicated legislation itself is required upon

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60 Article 40(v) of the CRC (providing for the right "if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to the law") and Chapter 11 of the Bill.

61 "The objectives of this Act are to –
(a) protect the rights of children who are subject to the provisions of this Act;
(b) promote *ubuntu* in the child justice system through –
(i) fostering the child's sense of dignity and worth
(ii) reinforcing the child's respect for the human rights and fundamental freedoms of others . . ."

62 Article 40(1): "States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others . . ."

63 Clause 5 of the Bill lists 13 principles.

64 Article 12 of the CRC.

65 Article 37(c) of the CRC.

66 Article 2 of the CRC and clause 5(h) of the Bill.

67 Article 1 of the CRC provides that its provisions are applicable to all children under this age.

ratification of the Convention,[68] and that has certainly been the prevailing view in South Africa during the law reform process.

But during consultations that followed on the release of the discussion paper, some respondents argued that what was required is not new legislation, but rather a series of amendments to existing procedural laws to better protect or cater for children accused of offending.[69] The strongest argument against this approach, which could be termed the "tinkering with existing legislation" route, remains the requirement in international law that separate legislation for children accused of offences is desired, not piecemeal amendments. An additional selling point is that such separate legislation has the goal of creating a separate juvenile justice *system* that is consistent with the aims of CRC, rather than simply changing segments of laws, sentencing provisions or adding new sections, without affecting the philosophy or children's rights framework of the system as a whole. In any event, government informed the Committee on the Rights of the Child at the consideration of the first country report in January this year that it understands its obligations to include adopting separate juvenile justice legislation,[70] and it is difficult to envisage a retreat from that commitment.

Further, international law's message that a child is defined as a person below the age of 18 years has resulted in legislation that will be applicable to *all* children accused of offences who fall within this definition,[71] without exception, without any possible waiver of juvenile jurisdiction, and without the possibility of early exit from juvenile status for whatever reason. Although this is a highly contentious issue in many countries, especially in those which permit waiver of juvenile court jurisdiction, an equally notable trend in recent law reform projects in the juvenile justice field has seen the upper age at which children exit the juvenile justice system into adult criminal justice raised to18 years in accordance with the tenets of a children's rights approach. Some examples in point are the Ugandan Children's Statute 1996, the 1998 Crime and Disorder Act and 1999 Youth Justice and Criminal Evidence Act in the United Kingdom,[72] the Youth Criminal Justice Bill in Canada,[73] as well as new legislation that has

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68 See, for example, Skelton 1996. Article 40(3) of the CRC provides that "State Parties shall seek to promote the establishment of *laws*, procedures, authorities and institutions specifically applicable to juvenile justice" [emphasis added].

69 Several such amendments to legislation (chiefly s 29 of the Correctional Services Act 8 of 1959) concerning pre-trial detention of children have been brought about since 1994, but in practice the segmental approach to amending legislation has not proved successful. See, for example, Muntingh 2000:3.

70 Government of the Republic of South Africa. 2000. *Supplement to the initial country report on the Convention on the Rights of the Child.*

71 Previously, differently ages for the ending of childhood were provided for in different statutes that were of relevance to juvenile justice, and the words youth, juvenile, child and so forth were used interchangeably. See South African Law Commission 1997 par 3.1–3.4 for a discussion in this regard.

72 See Ball 2000:21 and Fionda 1999:36.

73 Bill C–68, reintroduced in October 1999 as Bill C–3, but as far as can be ascertained, not finalised by Parliament at the time of writing. See http/canada.justice/gc.ca/en/ps/yj/bul3.html/ and *Criminal Law Quarterly* 43 2000.

[continued on next page]

recently been adopted in New South Wales (1997), Tasmania (1997) and the Australian Capital Territory (1999).

Flowing from international law's recommendation that not only separate *legislation*, but also separate *procedures* be established for children in conflict with the law, the drafters of the proposed statute have grasped the opportunity to distance the emerging juvenile justice system from some of the more objectionable features of the present adult criminal justice system, and to try to achieve something different. Whilst our criminal courts are presently mired in backlogs, repeated remands, and lengthy trials that often don't produce convictions, the Report and Bill propose a new pre-trial judicial procedure termed the preliminary inquiry[74] which will be mandatory in all cases involving children under the age of 18 years.

Described in full in an entire chapter of the Bill,[75] the preliminary inquiry has four key functions, all of which are linked to human rights requirements at one or another level. Thus the presiding judicial officer is required to ensure[76] the acquisition of social welfare information on the child as early as possible in the proceedings; to ensure that the prospects of diversion are considered in each and every case; to arrange diversion, if necessary, where this has been agreed, and to speedily dispense with cases that can be diverted from the outset, without any recourse to court proceedings. Forecasters predict that up to 50 per cent of all children arrested for offending could in future benefit from the individualised consideration of their cases at this pre-trial conference,[77] which is premised on the participation[78] of all role players[79] in finding solutions other than criminal proceedings if at all possible.

The new inquisitorial role accorded the judicial officer in the preliminary inquiry proceedings has been designed to achieve several goals, only one of which will be highlighted here. This is the unique mandate that he or she may, in addition to referral to the standard diversion programmes on offer, and once diversion has been agreed upon, "develop an individual

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Legislative developments in criminal law:15–16. However, the Canadian Criminal Justice Association has argued that despite lip service being paid to the maximum age of 18 for the protection of the youth justice system, that age is in fact eroded in a roundabout way, and under circumstances that are less and less exceptional, by increasing the number of cases for which there would be presumptive automatic transfer to the adult system, and for a greater number of offences. They conclude that content of these proposals cannot be seen other than as violations of the CRC provision requiring separation from the adult system (Canadian Criminal Justice Association. 1999. *Comment on the strategy*.

74 It is submitted that features such as this can only be implemented as part of a "composite package", and would not have been able to be effected by means of limited amendments grafted onto the existing system.

75 Chapter 8 of the Report and clauses 56–70 of the Bill.

76 For a complete list of the objectives of the preliminary inquiry, see s 56(4) of the Bill.

77 Barberton & Stuart 1999:28.

78 Clause 56(g) provides that the "views of all persons present must be considered before a decision is taken" and clause 56(h) gives as one of the objectives "encouraging the participation of the child and his or her parent or an appropriate adult in decisions concerning the child".

79 Persons who may attend, and persons who must attend are listed in clauses 57(1) and 58 respectively.

diversion option which meets the purposes of and standards applicable to diversion"[80] set out elsewhere in the Bill. This places the judicial officer in a pivotal position to secure the development of diversion, especially in rural areas where welfare services are less readily available. Linked to this is the next contribution of international human rights law, which concerns the whole area of diversion.

6.4 Inventing new law: Diversion

Requiring that states parties take measures to ensure that "wherever appropriate and desirable, measures for dealing with children without resorting to judicial proceedings" are put in place, has influenced the legal development of diversion universally, as there is now the stamp of approval of international law for mainstream statutory incorporation of diversion procedures. Hence, it can be argued that diversion from the juvenile court can no longer be dealt with as merely a matter for welfare organisations, the personal preference of individual prosecutors or magistrates, or the goodwill of the police. It is in fact an area of concern of the ratifying state itself, which at the very least, must ensure that directives, guidelines or, at best, legislation on diversion is enacted. The CRC does not appear to contemplate that diversion can be left entirely to individual discretion.[81]

The new legislation consequently includes a host of "home-grown" and "purpose-built provisions", without precedent in our present legal annals, aimed at regulating and promoting diversion. Sections outlining what the purposes of diversion are,[82] the minimum standards applicable to diversion options,[83] human rights compliance in the diversion process,[84] record keeping,[85] registration of formal diversion programmes,[86] principles to be applied in the selection of specific diversion options[87] diversion, and procedures upon non-compliance with diversion conditions are all spelt out. Providing far more detail that is to be found elsewhere in juvenile justice statutes, the Bill creates a hierarchy of diversion options,[88] and fills in the identified classes (as it were) by listing as many inexpensive, easy

80 Clause 61(3).

81 Also, maybe more importantly, compliance with the CRC may require the state to take responsibility for funding diversion, in order to ensure that the "measures" referred to are not just legislative measures on paper. This is of some import in South Africa, as diversion has by and large been an NGO-funded activity with limited state financial support. Once it becomes part of the legislation, there will of necessity be a governmental commitment to delivery of the required services and provision of the essential resources.

82 Clause 48.

83 Clause 49.

84 Clause 51 and clause 49(3).

85 Clause 50.

86 Clause 49(5).

87 Clause 52(1).

88 With level one comprising the least onerous and level three the most onerous (clause 52(2)).

to implement, administratively possible, choices that could be dreamt up or borrowed from elsewhere.[89]

This elaboration of diversion builds on the fact that diversion here is in practice rather in its infancy. There are also genuine financial constraints upon a more prolific and intensive programme of development of diversion options, and diversion should ideally be available to children accused of offending in less well-resourced and more remote areas of our country as well. The Bill thus provides far more than a mere framework for diversion, going the extra step of actually devising new options and placing them in primary legislation for future use by welfare and justice officials.

6.5 Putting flesh on the bones of international law norms

The principle that detention should be a matter of last resort has been a leitmotif of juvenile justice reform since the resurgence of "justice" approaches to the topic in the 1970s and 1980s. Now enshrined in both international law and our Constitution, the last resort principle has important consequences for legislative approaches to juvenile detention, both before trial and as a sentence. Without detailing here the tortuous pre-trial detention saga in which South Africa is still enmeshed,[90] suffice it to say that the inclusion of the equivalent principle in the Constitution and in successive amendments to the Correctional Services Act since 1994 does not, it would appear, sufficiently articulate the niceties of juvenile detention policy in the absence of far more comprehensive domestic legal regulation. A coherent and more detailed chapter on pre-trial release and pre-trial detention[91] in the proposed Bill has arguably achieved this. These provisions would replace and repeal the piecemeal enactments since 1994 that have sought to ensure that detention of children is a matter of last resort and then only for the shortest appropriate period of time.

Three examples illustrate how the Bill endeavours to tackle implementation of the ethos of detention as a last resort. The first example concerns bail. Always resistant to including provisions on bail by virtue of the fact that, generally, arrested children (and their parents) in this country lack the means to pay, meaning that the setting of bail becomes a detention mechanism, rather than a release mechanism, the Commission referred to bail for children somewhat disparagingly in the Issue Paper.[92] This has changed, and in the Report, the option of children securing their release by paying bail is retained.[93] The rationale motivating the change of heart is that, given that all non-custodial release alternatives[94] should first be

89 The reference here in particular is to the various "orders" enumerated in clause 52(3), (4),(5) and (6).

90 Urgent High Court applications have recently been launched in two jurisdictions concerning the validity and conditions of detention of children awaiting trial in prisons. Prominent media coverage accompanied the court appearances of the member of Parliament who drew attention to the children's plight.

91 Chapter 5 of the Report and clauses 19–37 of the Bill.

92 South African Law Commission 1997 par 6.19.

93 Clauses 29 and 35.

94 That is, all possibilities for release other than the possibility of paying monetary bail.

explored, the opportunity to set an amount of bail which could secure release should not be excluded from the picture altogether, as this might infringe the imperative of viewing detention as the last resort.[95] Thus, the retention of bail is ultimately intended to accomplish adherence to the last resort principle.

In a similar vein, the last resort standard provides the authority for the inclusion of a complete ban on the sentence of imprisonment for children below the age of 14.[96]

Third, it is clear from recent debates and United Nations interventions in Australia surrounding the mandatory sentencing laws for juveniles implemented in Western Australia and the Northern Territory that, where mandatory sentencing provisions are applicable to persons under the age of 18 years, there is a contravention of the principle of detention as a matter of last resort, and for the shortest appropriate period of time. Mandatory sentencing provisions by their very nature limit any judicial discretion to consider individual circumstances, and to apply detention as a matter of last resort.[97] Thus, the South Africa Bill overrides the minimum sentencing provisions of the Criminal Laws Amendment Act 105 of 1997 insofar as they presently relate to children under the age of 18.

7 CONCLUSION

The above analysis of the role of international law in the formulation of proposals for a new juvenile justice system does not include two obvious, but less tangible, influences.

Firstly, there is the possible effect of international law norms in changing hearts and minds over time. Primary research presently being analysed appears to indicate that because legislation has since 1996 prevented pre-trial detention of children aged under 14 years in prisons, a surprisingly widespread view has taken root amongst the magistracy that it is untoward and increasingly rare to subject children of this age or younger to the criminal process at all.[98] Similarly, diversion, which a short while ago was viewed with the usual antagonism that lawyers reserve for anything that smacks of social worker "do-goodism" is now being hailed as the answer by erstwhile sceptics. Some judicial officers are stepping out of their umpire garbs to play an active role in arranging referrals and organising diversion, even prior to the adoption of any statutory framework.[99] This "buy in" to the desirability of diversion appears to have filtered down at least partially through the domestic internalisation of international principles.

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95 This rationale is explained in the Report at par 5.32 and 5.37.

96 Clause 92(1). This is supported by arguments that there are other facilities and options available, and that the abolition of imprisonment for younger children is a concrete way of putting the principle of detention as a matter of last resort into effect (Report par 10.31).

97 Australian Human Rights and Equal Opportunities Commission 1999.

98 Mayer & Sloth-Nielsen 2000.

99 See, for example, Roberts 2000 and Mayer & Sloth-Nielsen 2000.

Secondly, the key lesson has been the use of the Convention on the Rights of the Child in shaping the debate[100] (and continuing to shape future debates) as being located within the domain of children's rights, and avoiding to some extent the trials (if I may use that word) occasioned by the avalanche of anti-human rights sentiments in the criminal justice arena in South Africa at the moment. This strategy is only possible, perhaps, because of the unique history of juvenile justice in this country, and the fact that juvenile justice reform emerged within the context of children's rights at a particular juncture in history when the political inclination was informed by the belief that children in conflict with the law were also victims of a repressive apartheid regime.

There will always be an "Achilles heel" to legislative reform in the juvenile justice arena: that is, the reality that the subject matter really has another equally plausible home in criminal justice, criminal procedure, criminal law and criminology, not to mention police science and corrections management. But domiciled in those traditions, juvenile justice law becomes especially vulnerable to the political shifts of the moment. For this reason, international children's rights law represents a powerful normative discourse for the promotion of human rights in the juvenile justice system.

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100 A variation of a mandatory sentencing regime was put into operation from 1 May 1998, after legislation was hastily developed in Parliament in late 1997. In this milieu, international law on juvenile justice has already demonstrated its value. During parliamentary debates in the proposed legislation, which initially provided that the new sentencing regime would apply to all persons 16 years and older, the argument was raised that this would contravene international law and the Constitution if applied to persons under 18. The legislation implied that detention and imprisonment would be the first resort (the prescribed sentence) for children aged 16 and 17 years in respect of offences covered in the Act, with the judiciary unable to depart from this unless the accused child satisfied the onus of proving substantial and compelling circumstances. In addition, the length of prison terms that the legislation envisaged (ranging from five years to life) would infringe the principle that custody be used only for the shortest appropriate period of time. Finally, the argument was adduced that the proposals were (for children under 18) a retrogressive step, which constituted a breach of obligations under the CRC. These arguments were to some extent successful and the legislation was altered just before its introduction into Parliament. The effect of the changes has been that the prosecution must show substantial and compelling reasons why the minimum prescribed sentence should be imposed, rather than the onus resting on the accused. For a more detailed account, see Skelton 1999:101–2.

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