The detention of sentenced juveniles

S Nel
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No one who achieves success should do so without acknowledging the help of others. To acknowledge someone’s help is an important way of saying thank you.

With that in mind I would first like to give thanks to my Almighty Father. Without his hands of guidance over me and his blessings that he has graced upon me during this time, I would not have been able to accomplish this milestone.

To my supervisor, Adv René Koraan, thank you for all your guidance and support throughout this journey. Without your guidance, wisdom and passion for the work that you do, this would not have been possible. Thank you for granting me the opportunity to work with you and to learn something new every step of the way.

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Last but not least, to my love Lee-Ann Louw, I cannot thank you enough for all your unconditional support and love through this time. You were always there right by my side with the right words, support and encouragement when times got tough. For that I say thank you.
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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>ACRWC</td>
<td>African Charter on the Rights and Welfare of the Child</td>
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<td>AHRLJ</td>
<td>African Human Rights Law Journal</td>
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<td>CC</td>
<td>Constitutional Court</td>
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<td>CJA</td>
<td>Child Justice Act</td>
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<td>Criminal Law Amendment Act</td>
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<td>CPA</td>
<td>Criminal Procedure Act</td>
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<td>CRC</td>
<td>United Nation’s Convention on the Rights of the Child</td>
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<td>IIRP</td>
<td>International Institute for Restorative Practices</td>
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<td>IJJO</td>
<td>International Juvenile Justice Observatory, 2008</td>
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<td>ISSUU</td>
<td>Indiana Series Secure Utilities Underground</td>
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<td>NPA</td>
<td>National Prosecuting Authority</td>
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<td>SAPL</td>
<td>South African Public Law</td>
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<td>SCA</td>
<td>Supreme Court of Appeal</td>
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<td>UNAFEI</td>
<td>United Nations Asia and Far East Institute</td>
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ABSTRACT

This study examines the various factors that the courts need to take into consideration before placing a sentenced juvenile. These factors will be discussed within the scope of the Constitution and other legislation in the context of the provision that detention should be considered only as a measure of last resort.

Section 28(1)(g) of the Constitution provides that every child has the right not to be detained except as a measure of last resort. If the detention of a child is then deemed to be the only suitable punishment, such detention may be for only the shortest appropriate period of time. The Children's Act was created to give effect to certain rights of children as contained in the Constitution and to set out principles relating to the care and protection of children. One of the most important provisions in the Children's Act is the best interests of the child principle. This confirms the provision in the Constitution that a child's best interests are of paramount importance in every matter concerning the child. The CRC, ACRWC, Beijing Rules and Havana Rules were studied as being relevant to this context. The CJA states that when considering the placement of a child in a youth care centre, the age and maturity of the child are factors in need of consideration. Legislation also provides for alternative sanctions that should be considered first before detainment. This dissertation, therefore, also examines these sanctions in the context of the principle of restorative justice and the role it plays within the society. The juvenile justice system of the Netherlands was examined in order to determine whether there are any lessons to be learned, for South Africa. It was found that although South Africa has ratified most of the international instruments studied, there are still valuable lessons to be learned with regards to the implementation of children's rights.

Key words: Juvenile justice; detention; sentencing factors; constitutional rights; international law; foreign law
SAMEVATTING

Hierdie studie ondersoek die verskillende faktore wat die howe in ag moet neem voordat 'n gevonnisde jeugdige geplaas word. Hierdie faktore sal bespreek word binne die omvang van die Grondwet en ander wetgewing binne die konteks van die bepaling dat aanhouding net as 'n maatreël van laaste uitweg oorweeg behoort te word.

Artikel 28(1)(g) van die Grondwet maak daarvoor voorsiening dat elke kind die reg het om nie aangehou te word nie, behalwe as maatreël van laaste uitweg. As die aanhouding van 'n kind dan blyk die enigste geskikte straf te wees, mag sodanige gevangenhouding net vir die kortste toepaslike tydperk wees. Die Kinderwet is gemaak om uitvoering te gee aan sekere regte van kinders soos in die Grondwet vervat en om beginsels met betrekking tot die versorging en beskerming van kinders uiteen te sit. Een van die belangrikste bepalings in die Kinderwet is die beste-belang-van-die-kindbeginsel. Dit bevestig die bepaling in die Grondwet dat 'n kind se beste belange oorheersend belangrik is in elke saak rakende die kind. Die CRC, ACRWC, Beijing Rules en Havana Rules is met betrekking tot hierdie konteks bestudeer. Die CJA verklaar dat, wanneer die plasing van 'n kind in 'n jeugsorgsentrum oorweeg word, die ouderdom en mate van volwassenheid van die kind faktore is wat in ag geneem moet word. Wetgewing maak ook voorsiening vir alternatiewe strafmaatreëls wat eers oorweeg behoort te word voor aanhouding. Hierdie skripsie ondersoek daarom hierdie strafmaatreëls binne die konteks van die beginsel van herstellende geregtigheid en die rol wat dit in die samelewing vervul. Die Nederlandse jeugregstelsel is ondersoek om vas te stel of Suid-Afrika enige lesse daaruit sou kon leer. Daar is bevind dat hoewel Suid-Afrika die meeste van die internasionale instrumente wat bestudeer is onderskryf, daar steeds waardevolle lesse geleer kan word met betrekking tot die implementering van kinderregte.

Sleutelwoorde: Jeugregstelsel; aanhouding; faktore rakende vonnisopleggings; grondwetlike regte; internasionale reg; buitelandse reg
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1 Introduction

Charles Dickens wrote:

In the little world in which children have their existence, whosoever brings them up, there is nothing so finely perceived and so finely felt as injustice.¹

This statement was based on the fact that, historically, a child did not have specific rights or protection and was seen as an object of the law. Although Dickens had the psychology of the child in mind, this can also influence the legal position of the child. This position changed when the United Nation's Convention on the Rights of the Child² came into effect on 20 November, 1989. A child was seen as a subject of the law and a holder of rights. In 1994 South Africa became a democracy and with that the Constitution of the Republic of South Africa, 1996³ was created, based on the new values of South Africa. Section 28 of the new Constitution was created for children. It states that every child has the right to a name and nationality, family or parental care etc.

Section 39(1)(b) of the Constitution states that the court must consider international law when interpreting the Bill of Rights. The Constitution further provides that the court may also consider foreign law.⁴ These matters will be discussed below, as will the relevant articles in the African Charter on the Rights and Welfare of the Child of 1999,⁵ as this regional charter is complementary to the international protection of children's rights and has bearing on the South African system. The ACRWC is important as it focuses on the unique and specific challenges and circumstances faced by African continents. Article 17(1) of the ACRWC specifically states that when juvenile justice is administered, every child shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth.

¹ Karels "Introduction to South African child justice" 1.
⁴ Section 39(1)(c) of the Constitution.
The *Child Justice Act 75* of 2008⁶ came into operation on the 1st of April 2010. The Preamble of the CJA stipulates that the state has an obligation concerning the well-being of children in terms of international instruments that bind the Republic. The purpose of this act was to create a separate criminal justice system for children.

The *Children's Act* 38 of 2005⁷ was also created to give effect to certain rights of children as contained in the Constitution and to set out principles relating to the care and protection of children. One of the most important provisions in the *Children's Act* is the best interests of the child principle.⁸ This confirms the Constitution’s provision that a child’s best interests are of paramount importance in every matter concerning the child.⁹ This provision is further supported by international and regional instruments such as the CRC¹⁰ and the ACRWC.¹¹

For the purposes of this study the terms "minor" and in certain circumstances "juvenile" will be used with reference to children. Both of these are described as persons who are under the age of 18.¹² Furthermore, juveniles are referred to as minors who are in conflict with the law, and for that purposes the CJA will be used. Reference will be made to the *S v DD*¹³ court case, where a minor was in conflict with the law and was sentenced according the CJA. According to the CJA a child is any person under the age of 18 years, and in some circumstances a person who is older than 18 years but under the age of 21.¹⁴

The current problem is the placement of these juveniles. Section 28(1)(g) of the Constitution states that a child should be detained only as a measure of last resort and then only for the shortest appropriate period of time. As in the case of the

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⁶ *Child Justice Act 75* of 2008 (hereafter the CJA).
⁷ *Children’s Act 38* of 2005 (hereafter the *Children’s Act*).
⁸ Section 7 of the *Children’s Act*. (This particular section will be discussed in length in Chapter 2).
⁹ Section 28(2) of the Constitution.
¹⁰ Article 3(1) of the CRC provides that in all actions concerning children, the best interests of the child shall be a primary consideration.
¹¹ Article 4(1) of the ACRWC provides that in all actions concerning children, the best interests of the child shall be the primary consideration.
¹² *S v DD* 2015 1 SACR 165 (NCK) (hereafter the *Griekwastad* case).
¹³ Section 1 of the CJA.
¹⁴ Section 1 of the CJA.
minor who murdered his family in Griekwastad, there was no other option but to sentence him to prison, which happened. However, during the case the minor became an adult and the placement was now a consideration which the court had to take into account. Placing the child, who was an adult now, in a detention centre would constitute a violation of the rights of those minor children already in detention. According to section 28(1)(g)(i) of the Constitution a child has the right to be kept separately from detained persons over the age of 18. Section 29(2)(a) of the CJA states that when considering the placement of a child in a youth-care centre, the age and maturity of the child is a factor in need of consideration. In practice this is often not the case, which constitutes a violation of a child's rights.

After being convicted, the accused in the Griekwastad case was placed at the youth detention centre at the Kimberley Correctional Centre, and was then transferred following allegations that he was enjoying special privileges and also violating some of the other minors' privileges by showing some angry behaviour.\(^{15}\)

The procedure being followed in these cases is of the utmost importance, as are the factors that need consideration as well. These factors will be examined and discussed during this study, to determine what should be taken into consideration by the court when placing a sentenced juvenile who has become an adult at the time of sentencing. To answer the research question adequately, one will need to look at the applicable International and regional instruments, such as the CRC and the ACRWC. The research question deals with the different factors that the court must consider when placing a sentenced juvenile who is an adult at the time of sentencing.

The juvenile justice system in the Netherlands and how children's rights are administered in that country will be scrutinised.\(^{16}\) The administration of children's rights is highly developed in the Netherlands. They rely on the *International Juvenile*...
Justice Observatory of 2008,\textsuperscript{17} which was created because they were of the view that children and young people are in need of protection and special care. The IJJO states that detention should be considered the exception rather than the rule.\textsuperscript{18} Furthermore, the Netherlands can be used as an example for South Africa in the application of children's rights. The purpose of this study is to determine whether there are any lessons to be learned for South Africa in regard to the implementation of children's rights. These lessons will be analysed during this study in order to determine the benefits thereof for implementation within South African law.

It is important to state that this is not a comparative study between the different legal systems, but that the legal system of the Netherlands with regard to this position is used as a guideline for South Africa to discover if there are possible ways of improving the South African system of supporting children's rights.

In order to answer the research question adequately one also needs to look at the historical background of juvenile justice and its development in the South African legal system.

\textsuperscript{17} International Juvenile Justice Observatory of 2008 (hereafter the IJJO).
\textsuperscript{18} Kilkelly 2011 http://www.oijj.org.
2 Position of detained juveniles' and their Constitutional rights in SA

2.1 Introduction

According to Rawoot, there are around 1000 children under the age of 18 years in prison in South Africa.¹⁹ There is a problem in this regard, though, in that prisoners occasionally falsely claim to be under the age of 18 and lie about their age and are then placed with juveniles.²⁰ This is contradictory to the provisions of the Constitution, which provides that every child has the right to be kept separately from detained persons over the age of 18.²¹ It was also discovered, during the performance of this research that in certain prisons juveniles are detained with other inmates up to the age of 25 and is just told that the juvenile section is full and cannot accommodate them.²²

A further problem in the juvenile facilities is that there is no formal access to education or any other support programmes, which leaves juveniles who are freed from prison with a 50% chance of recidivism.²³ Reference will be made to the learning programmes offered by the Dutch government to juveniles in order to eliminate the continuing of crime amongst juveniles.

The conditions in the juvenile facilities can be at best described as horrific. Juveniles are placed in single cells, together with other inmates, where the toilet doesn't work properly, and they contract all sorts of diseases.²⁴ At certain juvenile institutions, children are left to sleep on stretchers or blankets as a result of the overpopulation in the cell.²⁵ There is also the issue of separation according to the offence. This does not happen in the juvenile facilities. Everyone is put together: a rapist, a thief

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¹⁹ Rawoot 2012 http://www.mg.co.za.
²⁰ Community Law Centre "Children in Prison in South Africa" 11.
²¹ Section 28(g)(i) of the Constitution.
²² Community Law Centre "Children in Prison in South Africa" 13.
²³ Rawoot 2012 http://www.mg.co.za.
²⁴ Rawoot 2012 http://www.mg.co.za.
²⁵ Community Law Centre "Children in Prison in South Africa" 16.
who stole groceries from a supermarket, and a person who killed someone – all of them are placed together in one cell.\textsuperscript{26}

The biggest concern is the risk these children are faced with when being placed in the same cell as older persons, or even with someone who committed a more serious crime such as murder. Some of these juveniles are sentenced for short periods, and during those periods they should be enabled to complete rehabilitation programmes, but instead they are assaulted and raped because of the conditions that they are placed in.\textsuperscript{27}

The development of juvenile justice in South Africa and the influence of various international instruments cannot be ignored. The approach by the South African courts as well as the different role players involved in the process of dealing with child offenders will be discussed in this chapter.

\section*{2.2 Background to the position of juveniles}

The experience of a fourteen year-old, captured in the words of a poem by Glen Leedenberg, reads as follows:

\begin{quote}
I have been sent to
Sea Point Police Station,
Where I was beaten by civil servants,
I have been to Polsmoor Prison,
Where I was sodomised
And left bleeding
On the damp floor.
I have been to
Places of Safety and Reformatories
Where I was hardened by
Warders and fellow inmates,
Where I learned to hold on
To what was mine and take
From those who could not fight.
I am now the perpetrator of violence
And not the victim.
On the streets
\end{quote}

\textsuperscript{26} Rawoot 2012 http:www.mg.co.za.
\textsuperscript{27} Adkins 2004 http:www.iol.co.za.
I am a law unto myself.  

Before 1994, South Africa was in the forefront of a political struggle and the effect and reality of the struggle is reflected in the attitudes of the juveniles of this country. During the apartheid era, children charged with ordinary crimes would spend long periods in detention in the most horrific conditions imaginable. At the time there was no legislation specifically dealing with children who were in conflict with the law, and these children were dealt with and handled in the same way as adults. Numerous factors influenced the change towards an improved system of dealing specifically with children in conflict with the law, the most important of which was Constitutional granting of rights to children, which has had a considerable influence on reforming the juvenile justice system in South Africa.

The urgency of a changed attitude towards children in the criminal justice system came in 1992 with the death of Neville Snyman. Neville was a thirteen year-old boy who was charged with theft after breaking into a local shop in Robertson, down in the Cape, and stealing some sweets and soft drinks. Whilst in pre-trial detention he was beaten to death by older cellmates with whom he was detained. Some of the offenders responsible for his death were over the age of eighteen years but under the age of twenty-one years. The death of Neville and the circumstances under which he died led to the reform of the child justice system in South Africa.

The transformation in the approach towards children and the birth of the new democracy, came in 1994, when a new government came into power under the
leadership of President Nelson Mandela. In his first address to Parliament, Mandela said the following:

The Government will, as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison. The basic principle from which we will proceed from now onwards is that we must rescue the children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders.

Little did we realise what the impact of these words would be on South Africa and how the manner in which children were treated in the criminal justice system would change. Among the biggest changes that arose from the vision of the late President Mandela was the change in the sentencing options of child offenders and the increased importance of the role of restorative justice. The change in attitude can clearly be seen in the provisions made in the new democratic Constitution.

2.3 Change in attitude towards juvenile offenders

2.3.1 Detainment of juveniles

The Constitution makes provision in section 28 for the rights of the child. Section 28(1)(g) reads as follow:

Every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age.

Conjoining with this provision is section 28(2) of the Constitution, which states that the best interest of the child is of paramount importance in every matter concerning the child. Furthermore, the Constitution also provides for the recognition and

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39 Skelton 1999 UNAFEI 1.
41 Karels "Introduction to South African child justice" 2. (Restorative justice and its meaning will be discussed in detail later in this chapter).
consideration of international instruments, and for foreign law to be taken into account. Although these provisions in the Constitution led to positive developments, they were still not enough to bring about a real change of attitude in relation to the rights of children, especially in regard to the sentencing of children.

This was the reason for drafting the Child Justice Bill, the main aim of which is to establish a criminal justice process for children accused of committing offences. The Bill was drafted to protect the rights of children as provided for in the Constitution, as well as to promote ubuntu in the children's justice system. The South African Law Commission drafted a proposal on juvenile justice in July 2000, and the difficulties in regard to the sentencing of juveniles were discussed. One of the first cases to be heard after the coming into effect of the new Constitution relating to the sentencing of children was the case of S v Williams. In this case the Constitutional Court was seized with the issue of the sentencing of children. The Court declared that corporal punishment was unconstitutional and that such punishment was cruel, inhuman and degrading.

The difficulty that the court needs to deal with when sentencing child offenders was acknowledged by the court in the case of Director of Public Prosecutions, Kwazulu-Natal v P. The court stated that sentencing child offenders is even more complex than sentencing adult offenders because of the provisions of section 28 of the

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42 Section 39 of the Constitution (the international law aspect will be dealt with and discussed in Chapter 3).
43 Karels “Introduction to South African child justice” 3.
44 Skelton 1999 UNAFEI2.
45 Thompsell 2015 http://www.africanhistory.about.com. Ubuntu can be described as the connectivity between people, or the desire for such connectivity. This refers to the behaviour of people towards one another and suggests that individual people should behave in a manner that it will benefit the people of a community as a group. Correct behaviour can be as simple as helping someone in need. A person behaving in such a manner towards other is said to have ubuntu.
46 Skelton 1999 UNAFEI2.
48 S v Williams 1995 3 SA 632 (CC).
49 Skelton 1999 UNAFEI2.
50 Director of Public Prosecutions, Kwazulu-Natal v P 2006 1 SACR 243 (SCA).
Constitution and the international support and protection afforded to children in this regard.\textsuperscript{51}

The main aim of the CJA is to establish a criminal justice system for children who are in conflict with the law and are accused of committing offences.\textsuperscript{52} The Act also deals with the detention and placement of children found guilty of a crime. In terms of the CJA a child is defined as any person under the age of eighteen years, and in certain circumstances, a person older than eighteen years but under the age of twenty-one. For convenience's sake, in this study a "child" will mean any person who is older than eighteen years, at the time of sentencing, but younger than twenty-one. The question to ask, however, is what the principle of the best interests of the child contains. An attempt to answer the question will be made in the next section, in order to create clarity to the readers.

2.3.2 Best interests of the child

The best interests of a child refer to the welfare of the child, and as elaborated in \textit{Van Deijl v Van Deijl},\textsuperscript{53} it must include economic, social, moral and religious considerations.\textsuperscript{54} It is clear that according to the Constitution the best interest of the child is very significant and important and not just a mere consideration.\textsuperscript{55}

When considering the best interests of the child, the court sets out four very important categories that need to be considered.\textsuperscript{56} The most important factor is the sense of security of the child and how it will best be preserved. The most important factor is that the wishes of the child must be heard and respected in determining his or her best interests.\textsuperscript{57}

\begin{thebibliography}{99}
\bibitem{51} Van Eeden \textit{An Analysis of the Legal Response to Children} 27.
\bibitem{52} Child Justice Act 75 of 2008.
\bibitem{53} \textit{Van Deijl v Van Deijl} 1966 4 SA 260 (R).
\bibitem{54} Robinson "Children and divorce" 73.
\bibitem{55} Skelton "Constitutional protection of children's rights" 280.
\bibitem{56} Robinson "Children and divorce" 73.
\bibitem{57} Robinson "Children and divorce" 73.
\end{thebibliography}
Section 7 of the *Children’s Act* 38 of 2005 has a list of factors that may be helpful in determining the child’s best interests.\(^{58}\)

(1) Whenever a provision of this Act requires the best interest of the child standard to be applied, the following factors must be taken into consideration where relevant, namely:

(a) The nature of the personal relationship between –
   (i) the child and the parents, or any specific parent; and
   (ii) the child and any other care-giver or person relevant in those circumstances;

(b) The attitude of the parents, or any specific parent, towards –
   (i) the child; and
   (ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from –
   (i) both or either of the parents, or
   (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child –
   (i) to remain in the care of his or her parent, family and extended family; and
   (ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child’s –
   (i) age, maturity and stage of development;
   (ii) gender;
   (iii) background; and
   (iv) any other relevant characteristics of the child;

(h) the child’s physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by –

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\(^{58}\) *Children’s Act* 38 of 2005.
(i) subjecting the child to maltreatment, abuse, neglect, exploitation or
degradation or exposing the child to violence or exploitation or
harmful behaviour; or
(ii) exposing the child to maltreatment, abuse, degradation, ill-
treatment, violence or harmful behaviour towards another person;
(m) any family violence involving the child or a family member of the child;
and
(n) which action or decision would avoid or minimise further legal or
administrative proceedings in relation to the child.

These factors have been used by the courts as guidelines to establish the best
interests of the child. However, it is important to note that this is not a closed list,
which means that courts are not compelled to use only these factors.59 The use of
these guidelines will differ in each case, because the situation regarding children
differs in each case, as each case has its own priorities and attention is placed on
different aspects in determining the best interest of the child. Schäfer is of the
opinion that the impact of section 7 of the Children’s Act has been disappointing.60
He indicates that the courts still make use of the criteria set out in the McCall case,61

59 Also see McCall v McCall 1994 3 SA 201 (CPD), where the court gave a similar list of criteria
which read as follow:
(a) the love, affection and other emotional ties which exist between parent and
child, and the parent's compatibility with the child;
(b) the capabilities, character and temperament of the parent, and the impact
thereof on the child's needs and desires;
(c) the ability of the parent to communicate with the child and the parent's insight
into, understanding of and sensitivity to the child's feelings;
(d) the capacity and disposition of the parent to give the child the guidance which
he or she requires;
(e) the ability of the parent to provide for the basic physical needs of the child,
the so-called "creature comforts", such as food, clothing, housing and the
other material needs – generally speaking, the provision of economic security;
(f) the ability of the parent to provide for the educational wellbeing and security
of the child, both religious and secular;
(g) the ability of the parent to provide for the child's emotional, psychological,
cultural and environmental development;
(h) the mental and physical health and moral fitness of the parent;
(i) the stability or otherwise of the child's existing environment, having regard to
the desirability of maintaining the status quo;
(j) the desirability or otherwise of keeping siblings together;
(k) the child's preference, if the court is satisfied that in the particular
circumstances the child's preference should be taken into account;
(l) the desirability or otherwise of applying the doctrine of same-sex matching;
and
(m) any other factor which is relevant to the particular case which is before the
court.

60 Schäfer Child law in South Africa 159.
61 See note 58 above.
and that it seems the courts ignore the more extensive criteria found and described in section 7 of the *Children's Act*.62

### 2.3.3 Principle of restorative justice

The CJA defines restorative justice as the approach to justice which aims to involve the child offender, the victim, the family concerned and the members of the community in order to identify the harm that was caused and the needs and obligations to correct it by accepting responsibility for the harm caused.63 Restorative justice also aims to take measures to prevent a recurrence of the incident and to promote reconciliation.64 Therefore, restorative justice can be identified as a theory which focuses on reconciliation rather than punishment.65

The CJA relies on certain objects66 and guiding principles67 as stated in the Act.68 These concepts include:

- a) A commitment to constitutional values;
- b) A restorative justice approach that takes into account rehabilitation and the prevention of recidivism;
- c) The best interests of the child standard; and
- d) A pragmatic approach that encourages co-operation between various governmental departments.69

Restorative justice was already vested in African customary law, where the central purpose was to acknowledge that something wrong had been done, and to address the possibilities of amending the wrongdoing.70 The statement has been made that restoration, reconciliation and harmony lie at the heart of African adjudication in traditional justice systems in Africa.71 Not only does restorative justice finds its place in African traditional systems, but international law has also dealt with the concept. The United Nations has defined restorative justice as the process where the victim,

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62 Section 7 of the *Children’s Act*.
63 Section 1 of the CJA.
64 Section 1 of the CJA.
66 Section 2 of the CJA.
67 Section 3 of the CJA.
68 Karels “Introduction to South African child justice” 16.
69 Karels “Introduction to South African child justice” 15.
71 Van Eeden *An Analysis of the Legal Response to Children* 77.
offender and the members of the community affected by the crime participate in a possible resolution of the effects arising from the crime.72

Over time there has been a clear indication that South African courts incorporated restorative justice in their sentencing functions.73 One of the cases where restorative justice was used in sentencing was *S v Shilubane,*74 where the judge stated that:

Restorative justice, seen in the context of an innovative approach to sentencing, may become an important tool in reconciling the victim and offender and the community and the offender.75

The concept of restorative justice was also linked to the concept of *ubuntu* by the Constitutional Court in the case of *Dikoko v Mokhatle.*76 In this case it was stated, by the minority, that the dignity of a person could not be restored through monetary claims and that one should rather take restorative justice into account.77 The key elements of restorative justice were also identified in this case, and said to be reparation, encounter, participation and reintegration.78 The main aim of reparation is to repair the harm that has been done rather than to focus on the punishment, which falls into the definition of restorative justice, as discussed above.79

The *Shilubane* case highlights the potential of the restorative justice process in sentencing juvenile offenders.80 However, the success of a restorative justice regime places an obligation on certain state organs and requires active participation by government department officials.81 Without certain role-players in the implementation of restorative justice regarding juveniles, the underlying principles and objectives of the CJA would be ineffective.

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72 Karels "Introduction to South African child justice" 19.
73 Karels "Introduction to South African child justice" 19.
74 *S v Shilubane* 2008 1 SACR 295 (T) (hereafter the *Shilubane* case).
75 Skelton 1999 *UNAFEI*46.
76 *Dikoko v Mokhatle* 2006 6 SA 235 (CC).
77 Skelton 1999 *UNAFEI*46.
78 Karels "Introduction to South African child justice" 19.
79 Karels "Introduction to South African child justice" 19.
80 Karels "Introduction to South African child justice" 19.
81 Skelton 1999 *UNAFEI*46.
2.3.4 Important role-players in the South African child justice process

In the CJA there are certain role players, each with an assigned task and responsibility when dealing with juveniles. The first and certainly most important officials are police officers. 82 These officials are at the centre of the child justice process and their obligations start with the child's first contact and encounter with the criminal justice system. 83 The CJA places a positive duty on police officers to carry out their duties and obligations in terms of the CJA in such a manner that will support the restorative justice approach preferred by the CJA. 84 Some of these duties include that the police officials must ensure that a child offender appears at the preliminary inquiry using the mechanism provided; bearing in mind that arrest should be a matter of last resort. 85 A very important task of any police official is to inform a child and his or her parent or guardian of the child's right to legal representation and to have this representation appointed at the state's expense. 86

The next important role-player in the child justice process is the Department of Social Development (DSD). Certain duties are placed on the DSD when working with juveniles in conflict with the law. These duties include the management of child and youth care centres for both children awaiting trial and those sentenced in terms of the CJA. 87 The DSD is also responsible for all the diversion programmes and for providing educational programmes for child offenders awaiting trial. 88

The DSD will assign a probation officer to the case. The probation officer's job is to assess children who are detained for criminal conduct and to make recommendations to the appropriate parties with regards to the referral, release and/or

82 Karels "Introduction to South African child justice" 21.
83 Karels "Introduction to South African child justice" 21.
84 Karels "Introduction to South African child justice" 21.
86 Karels "Introduction to South African child justice" 23.
87 Karels "Introduction to South African child justice" 23.
88 Karels "Introduction to South African child justice" 23.
diversion of the child. Probation officers also supervise children in the community.

Another of the important role-players is the prosecutor. The National Prosecuting Authority (NPA) is responsible for appointing a prosecutor who acts on behalf of the state in all criminal trial proceedings including children. One of the most important responsibilities of a prosecutor is to establish the age of the child and thereby to determine if the child has the criminal capacity to stand trial for the offence committed. A prosecutor can also withdraw the charges against a child and recommend that the case be referred to the children's court.

Should the charges not be withdrawn by the prosecutor, the child will then appear before a presiding officer. The presiding officer is appointed by the Department of Justice and Constitutional development. It is expected from the presiding officer to implement the provisions of the CJA, with specific reference to Section 68, as well as the relevant procedures of the *Criminal Procedure Act*. The presiding officer must inform a child offender of his or her rights with regard to the appeal process as well as legal representation, before convicting the child offender. When the child offender is convicted and is to be detained, the presiding officer must at every subsequent appearance of the child, or at any time thereafter:

a) Determine whether or not the detention is or remains necessary and whether the placement is or remains appropriate;
b) Enter the reasons for the detention or further detention on the record of the proceedings;
c) Consider a reduction of the amount of bail, if applicable;
d) Inquire whether or not the child is being treated properly and being kept in suitable conditions, if applicable;
e) If not satisfied that the child is being treated properly and being kept in suitable conditions, order that an inspection or investigation be undertaken into the treatment and conditions and make an appropriate remedial order; and

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89 Skelton "Children accused of crimes" 189.
90 Skelton "Children accused of crimes" 189.
91 Karels "Introduction to South African child justice" 25.
92 Karels "Introduction to South African child justice" 25.
93 Skelton "Children accused of crimes" 196.
94 Karels "Introduction to South African child justice" 25.
95 *Criminal Procedure Act* 51 of 1977 (hereafter the CPA).
f) Enter the reasons for any decision made in this regard on the record of the proceedings.\textsuperscript{96}

If these above mentioned officials do not conduct their work in a proper manner the provisions and ideas of the CJA would not be realised in the way they were intended to. Therefore, it is important that all officials are aware of the principles that inform the CJA, and consciously attempt to realise them in every aspect of a case against a child. Certainly, the most important aspect in dealing with child offenders is the aspect of sentencing. The importance of the sentencing regime cannot be emphasised enough.

\subsection*{2.4 Sentencing of juveniles}

Before the coming into effect of section 28(1)(g) of the Constitution, children were sentenced in accordance with the CPA. This meant that there were no distinctions between children and adults when considering sentencing. This position was confirmed by the court in \textit{S v B}.\textsuperscript{97} In this case it was stated that the South African justice system had never created a separate system when dealing with child offenders. In terms of the CPA, even the death penalty was considered to be an appropriate sentence for children under the age of eighteen who committed a crime.\textsuperscript{98} However, this section was later amended to prohibit the imposition of the death penalty as a competent sentence for children.\textsuperscript{99}

The applicability of minimum sentences, in terms of the \textit{Criminal Law Amendment Act} 105 of 1997, to child offenders was, therefore, not in accordance with the values of the new Constitution, as confirmed by the court in \textit{Centre for Child Law v Minister of Justice and Constitutional Development}.\textsuperscript{100} Section 28(1)(g) of the Constitution clearly states that imprisonment must be considered only as a last resort. However, Justice Yacoob, in his minority judgment

\textsuperscript{96} Section 32(a)-(f) of the CJA.
\textsuperscript{97} \textit{S v B} 2006 1 SACR 311 (SCA) para 14.
\textsuperscript{98} Section 227 of the CPA.
\textsuperscript{99} Section 227 of the CPA was amended through the \textit{Criminal Law Amendment Act} 107 of 1990 (hereafter the CLA).
\textsuperscript{100} \textit{Centre for Child Law v Minister of Justice and Constitutional Development} 2009 2 SACR 477 (CC).
in the latter case, described the difficulty courts experience with the interpretation of this specific section.\(^{101}\) He states the following:

Certain pronouncements by our courts on the meaning of the phrase "last resort" imply that the phrase renders appropriate a distinction between "first resort" and "last resort". This approach implies that a court is obliged to consider all options other than imprisonment, exclude them one by one and consider imprisonment as a form of punishment only after it has concluded that each of the other methods of punishment are inappropriate in the circumstances. This approach is, with respect, somewhat mechanical and not conducive to giving the constitutional provision its full effect in the protection of children.\(^{102}\)

Justice Cameron concurred with his learned colleague and stated that the principle of last resort deals not only with the question of whether imprisonment is an appropriate sentence, but also with the nature of the incarceration to be imposed.\(^{103}\) The question then remains, what factors should be taken into account when considering an appropriate sentence for child offenders?

In the case of \(S \ v \ Zinn\)\(^{104}\) it was stated that, when considering the propriety of a sentence, one should take into account the seriousness of the crime, the offender and the interests of society.\(^{105}\) A further indication of the need for development, when considering an appropriate sentence for child offenders, was seen in \(S \ v \ Kwalase\)\(^{106}\) where Judge Van Heerden referred to three elements to be considered, namely:

1) The requirement of proportionality between the gravity of the offence, the interests of the child, and the sentence;
2) The importance of a sentence that assists with the rehabilitation of the child and with his reintegration into society and the family;
3) Renewed employment of innovative sentences other than imprisonment.\(^{107}\)

\(^{101}\) Van Eeden *An Analysis of the Legal Response to Children* 73.

\(^{102}\) Centre for Child Law v Minister of Justice and Constitutional Development 2009 2 SACR 477 (CC) paras 87-88.

\(^{103}\) Centre for Child Law v Minister of Justice and Constitutional Development 2009 2 SACR 477 (CC) para 31.

\(^{104}\) \(S \ v \ Zinn\) 1969 2 SA 537 (A).

\(^{105}\) Karels & Swanepoel "Pre-trial, trial and post-trial child justice process" 142.

\(^{106}\) \(S \ v \ Kwalase\) 2000 2 SACR 135 (C).

\(^{107}\) \(S \ v \ Kwalase\) 2000 2 SACR 135 (C) para 139(i-g).
These factors were taken into account by the CJA, which expanded the factors to be considered before the imposition of a sentence involving imprisonment:

1) The seriousness of the offence, with due regard to;
   i) The amount of harm done or risked through the offence; and
   ii) The culpability of the child in causing or risking the harm;
2) The protection of the community;
3) The severity of the impact of the offence on the victim;
4) The previous failure of the child to respond to non-residential alternatives, if applicable; and
5) The desirability of keeping the child out of prison.¹⁰⁸

Therefore, the CJA makes provision for a number of alternative sentencing options in order to avoid imprisonment. These options include: community-based sentences,¹⁰⁹ restorative justice sentences,¹¹⁰ fines or alternatives to fines,¹¹¹ sentences involving correctional supervision,¹¹² sentences of compulsory residence in a child and youth care centre,¹¹³ a sentence of imprisonment,¹¹⁴ and the postponement or suspension of sentence.¹¹⁵ For the purposes of this study, only the sentence of imprisonment will be discussed and investigated.

2.4.1 Imprisonment as a sentence

Imprisonment can be described as the admission of a person or child into a certain prison for a certain period of time, as decided by the court.¹¹⁶ When a court considers the option of direct imprisonment as a sentence, it cannot do so without considering the factors contained in section 69(4) of the CJA.¹¹⁷ The CJA goes even further than these factors by creating age categories under which children are

¹⁰⁸ Section 69(4)(a-e) of the CJA.
¹⁰⁹ Section 72 of the CJA.
¹¹⁰ Section 73 of the CJA.
¹¹¹ Section 74 of the CJA.
¹¹² Section 75 of the CJA.
¹¹³ Section 76 of the CJA.
¹¹⁴ Section 77 of the CJA.
¹¹⁵ Section 78 of the CJA.
¹¹⁶ Van Eeden An Analysis of the Legal Response to Children 92.
¹¹⁷ These factors have been mentioned above. See note 89.
specified and dealt with. For example; children under the age of fourteen may not be sentenced to imprisonment, and if children over the age of fourteen are sentenced it may be as a measure of last resort only, and for the shortest appropriate period of time.

A child who is over fourteen at the time of being sentenced for an offence may be sentenced to imprisonment for a period not longer than 25 years. This may also be considered in the case of serious and violent offences only. However, the mentioning of this time period is described as unfortunate, because according to Galinetti, it now lures the courts' attention to this period. The courts' discretion to impose a sentence is influenced to the effect that lengthier sentences are imposed than would otherwise have been imposed.

It is also important to note that the minimum sentence provisions as regulated by the CLA do not apply to children under sixteen and also between the ages of sixteen and seventeen who are convicted of a crime. In such an instance it is important to determine whether a child offender is declared to be a dangerous criminal and if the restorative justice principle would be applicable.

2.4.2 Griekwastad case

In the Griekwastad case the minor child was convicted and sentenced for three counts of murder, one count of rape and one count for defeating the ends of justice. His combined sentence was 20-years to run concurrently. At the time when the accused committed these crimes he was 15 years and eight months old, and so he was tried as a child and protected by the CJA. However, due to the brutality of the crimes that he committed as well as a lack of remorse and his aggressive attitude,

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118 Section 77(1)(a) of the CJA.
119 Section 77(1)(b) of the CJA.
121 Section 77(3)(b) of the CJA.
123 Van Eeden An Analysis of the Legal Response to Children 92.
124 Karels & Swanepoel "Pre-trial, trial and post-trial child justice process" 147.
125 Karels & Swanepoel "Pre-trial, trial and post-trial child justice process" 147.
126 S v DD 2015 1 SACR 165 (NCK) par 1.
as argued by the state, there was simply no way such a convicted criminal could be placed amongst other juveniles.\textsuperscript{127} The risk to the other inmates in the juvenile facility would simply be too high, and for that reason the accused was sent to Kimberley prison.\textsuperscript{128}

\textbf{2.5 Conclusion}

It is evident that the position on juveniles has drastically changed since 1994 in the light of the development of the "new" Constitution. The main change came with the inclusion of provisions in the Constitution affording protection to children and also regulating the way that child offenders should be dealt with within the legal framework. Apart from the Constitution there is also legislation such as the \textit{Children's Act} and the CJA that provides a great amount of assistance to the important role players within the child justice system.

The Constitutional Court has also been given the opportunity on numerous occasions to deal with the rights of children and the importance thereof. One example is seen in \textit{C v Department of Health and Social Development, Gauteng},\textsuperscript{129} where the court was very clear on the fact that the best interests of a child must prevail in every decision which includes and affects a child.\textsuperscript{130}

The development of juvenile justice and the emphasis on children’s rights can be connected to various instruments providing assistance to South African courts on the interpretation thereof. However, one should not exclude or disregard international or regional instruments which provide further assistance in this matter and shed light on the importance of the rights of children and their role in society.

\textsuperscript{127} Kwon Hoo 2015 http://www.iol.co.za.
\textsuperscript{128} Kwon Hoo 2015 http://www.iol.co.za.
\textsuperscript{129} \textit{C v Department of Health and Social Development, Gauteng} 2012 2 SA 208 (CC).
\textsuperscript{130} \textit{C v Department of Health and Social Development, Gauteng} 2012 2 SA 208 (CC) para 114.
3 International and Regional instruments applicable to the detainment of juveniles

3.1 Introduction

There are numerous international and regional instruments pertaining to children's rights that provide assistance to South African courts. These instruments place specific focus on children's rights all over the world and can be used as valuable guidelines. Some of them, such as the CRC, were created before 1994 and actually provided for the constitutionalism of certain rights, especially those of children, in South Africa's new Constitution.\(^\text{131}\)

One must remember that South Africa has ratified a number of international and regional instruments which have led to a substantial amount of law making regimes in 1994, such as the CRC and the ACRWC.\(^\text{132}\)

Section 39(1) of the Constitution states that when a court, tribunal or forum interprets the Bill of Rights, it (court) must:

a) Promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
b) Consider international law; and
c) May consider foreign law.

The importance in this provision is subsection (b) which confirms that the international instruments must be considered by the court. The problem is created when international law does not concur with national law and a decision needs to be made which law must be interpreted or followed. In such a situation, section 233 of the Constitution is of assistance. It provides that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

\(^{131}\) Van Eeden *An Analysis of the Legal Response to Children* 38.

\(^{132}\) Skelton "Constitutional protection of children's rights" 266.
These international instruments are used as guidelines in order to determine whether South Africa complies with international standards. Therefore, it is important to note that the Constitution provides that:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an act of Parliament.

These provisions of the Constitution have led to the consequence that international law cannot be ignored, especially where South Africa has ratified such sources. In accordance with international law the Constitution states that every child has the right not to be detained, and should a child be detained this may occur only as a matter of last resort and for the shortest appropriate period of time. This particular wording with regards to the detaining of juveniles, and the factors that should be taken into account when deciding on detention, are seen in both international and regional instruments. The international and regional instruments that are applicable will now be discussed.

### 3.2 United Nations Convention on the Rights of the Child

The formulation of the CRC has led to the recognition of the needs and rights of children all over the world. The CRC is described as one of the most unique treaties ever, due to the fact that it is the most ratified human rights treaty in history. A treaty is defined as a written agreement between states which operates within the field of international law. The uniqueness of the CRC is defined by the impact the instrument has on the behaviour by states towards the rights of children.

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133 Van Biljon *The state's legal responsibility* 47.
134 Section 231(4) of the Constitution.
135 Van Biljon *The state's legal responsibility* 48.
136 Section 28(1)(g) of the Constitution. (See the full discussion of this section in chapter 2.3.1).
139 Dugard *International Law* 25.
The CRC in its preamble confirms that children are entitled to special care and assistance and further provides that:

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.\textsuperscript{141}

The CRC defines a child as every human being below the age of eighteen years, unless majority is attained earlier.\textsuperscript{142} This instrument also places a duty on states to ensure that a child is protected against all form of punishment, which includes the detainment of children.\textsuperscript{143} Therefore, there can be no doubt that the main aim of the CRC is to cater for the specific needs of children, and to emphasise and protect the rights of children.\textsuperscript{144}

The CRC places an obligation on states to undertake all appropriate legislative, administrative and other measures to ensure the implementation of the rights recognised by the Charter.\textsuperscript{145} Furthermore, the implementation of these rights must also be done in the light of the best interests of the child principle.\textsuperscript{146} Article 37 of the CRC specifically deals with the subject of child justice and the protection of children against cruel and inhuman treatment.\textsuperscript{147}

3.2.1 Article 37 of the CRC

Article 37 of the CRC refers to the protection of a child's bodily integrity against cruel and inhumane treatment. This article specifically prohibits capital punishment as well as life imprisonment, in that it may not be imposed on persons under the age of eighteen years without the possibility of release.\textsuperscript{148} One of the most

\textsuperscript{141} The preamble of the CRC.
\textsuperscript{142} Article 1 of the CRC.
\textsuperscript{143} Article 2(2) of the CRC.
\textsuperscript{144} Van Biljon \textit{The state's legal responsibility} 49.
\textsuperscript{145} Article 4 of the CRC.
\textsuperscript{146} Van Biljon \textit{The state's legal responsibility} 52. (the best interests of the child principle as discussed in chapter 2.2.2).
\textsuperscript{147} Van Eeden \textit{An Analysis of the Legal Response to Children} 43.
\textsuperscript{148} Article 37(a) of the CRC.
fundamental changes the CRC has brought about in the fight against violence against children is that children, like adults, now have fundamental rights including protection of their inherent human dignity, physical and mental integrity.\textsuperscript{149}

This article further states that no child shall be deprived of his or her liberty, and should this happen, the arrest, detention or imprisonment of a child shall be in accordance with the law and shall be exercised only as a measure of last resort and for the shortest appropriate period of time.\textsuperscript{150} The provisions of this specific subsection is in consensus with the provisions made in section 28(1)(g) of the Constitution and can one clearly identify the influence of the CRC in the development of the South African Constitution.

Further influence by the CRC can be identified in article 37(c) which provides that every child deprived of his/her liberty shall be treated with humanity and respect. This section goes further by providing that every child deprived of their liberty shall be separated from adults. The provisions made in section 28(1)(g)(i-ii) of the Constitution is in agreement with the CRC regarding this rights and protection of children.

As mentioned, the CRC is described as one of the most unique human rights treaties due to the fact of the influence this document has had on numerous countries. According to statistics, 193 countries have committed themselves to this treaty in order to respect, fulfil and protect the rights of children.\textsuperscript{151} The CRC has influenced South Africa in our approach to developing children's rights and the fundamental protection of children. The various countries, who have committed themselves to the CRC are bound to the following:

State 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 and which take

\textsuperscript{149} Doek 2009 \textit{Science Direct}776.
\textsuperscript{150} Article 37(b) of the CRC.
\textsuperscript{151} Doek 2009 \textit{ScienceDirect} 776.
into account the child's age and the desirability of promoting the child's reintegration and the child's constructive role in society.\textsuperscript{152}

However, the CRC is not the only human rights treaty created in order to protect children who are in conflict with the law. The \textit{United Nations Standard Minimum Rules for the Administration of Juvenile Justice}\textsuperscript{153} deals with the minimum conditions regarded as suitable when dealing with juvenile offenders.\textsuperscript{154}

\textbf{3.3 United Nations Standard Minimum Rules for the Administration of Juvenile Justice}

In 1980, during a United Nation Congress on the Prevention of Crime and Treatment of Offenders, certain basic principles were discussed in order to set out some rules for the development of the administration of juvenile justice with the main aim of protecting the fundamental human rights of juveniles who are trouble with the law.\textsuperscript{155} The \textit{Beijing Rules} were adopted by the General Assembly on 29 November 1985, after being approved by the Seventh Congress on 6 September 1985.\textsuperscript{156} The \textit{Beijing Rules} can be described as a comprehensive social policy which is aimed at promoting juvenile welfare to the greatest possible extent.\textsuperscript{157}

The \textit{Beijing Rules} also provides certain definitions for the sake of convenience to those member states applying these rules in a manner which is compatible with their respective legal systems.\textsuperscript{158} Firstly, a juvenile is defined as a child or young person who may be punished, for an offence committed, in a manner different from adults.\textsuperscript{159} Secondly, an offence is described as any behaviour that is punishable in terms of the law system of the respective state.\textsuperscript{160} A juvenile offender is then

\begin{itemize}
\item \textsuperscript{152} Article 40(1) of the CRC.
\item \textsuperscript{153} \textit{United Nations Standard Minimum Rules for the Administration of Juvenile Justice} (hereafter the \textit{Beijing Rules}).
\item \textsuperscript{154} USDJ 1986 http:www.ncjrs.gov.
\item \textsuperscript{155} USDJ 1986 http:www.ncjrs.gov.
\item \textsuperscript{156} USDJ 1986 http:www.ncjrs.gov.
\item \textsuperscript{157} Gallinetti "Child Justice in South Africa" 636.
\item \textsuperscript{158} USDJ 1986 http:www.ncjrs.gov.
\item \textsuperscript{159} Rule 2(2)(a) of the \textit{Beijing Rules}.
\item \textsuperscript{160} Rule 2(2)(b) of the \textit{Beijing Rules}.
\end{itemize}
defined as a child or young person who has committed, or who has been found to have committed, such a punishable offence.\textsuperscript{161}

The \textit{Beijing Rules} provides certain essential elements that must be present when striving for an effective child justice system.\textsuperscript{162} The aim of juvenile justice is described as follow:

The juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.\textsuperscript{163}

Rule 5 of the \textit{Beijing Rules} deals with two very important objectives, namely the promotion of the well-being of the juvenile as well as the principle of proportionality.\textsuperscript{164} The promotion of the well-being of juvenile offenders focus at avoiding merely punitive sentencing of juveniles and rather follow a procedure known as "due process of law" which refers to a "fair and just trial".\textsuperscript{165}

The second objective is the principle of proportionality. This principle states that the response to young offenders should take into consideration the gravity of the offence in accordance with the personal circumstances of the offender.\textsuperscript{166} The circumstances of the offender include, amongst others, the social status, family situation, the harm caused by the offender and any other factors which may affect his/her personal circumstances.\textsuperscript{167}

With one of the fundamental principles being the protection of juvenile offenders, the \textit{Beijing Rules} determines that there must be certain basic procedural safeguards in place which form part of the rights of juveniles. Such rights include the presumption of innocence, the right of a juvenile to be informed of the charges, the

\begin{flushleft}
\textsuperscript{161} Rule 2(2)(c) of the \textit{Beijing Rules}.
\textsuperscript{162} USDJ 1986 http://www.ncjrs.gov.
\textsuperscript{163} Rule 5(1) of the \textit{Beijing Rules}.
\textsuperscript{164} USDJ 1986 http://www.ncjrs.gov.
\textsuperscript{165} Rule 14 of the \textit{Beijing Rules}.
\textsuperscript{166} Van Eeden \textit{An Analysis of the Legal Response to Children} 39.
\textsuperscript{167} USDJ 1986 http://www.ncjrs.gov.
\end{flushleft}
right to legal representation, the right to have his or her parent or guardian present, and the right to appeal to a higher authority.\textsuperscript{168}

The most important provision of the \textit{Beijing Rules}, with regards to this research study, is contained in Rule 13. It is stipulated that detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.\textsuperscript{169} Rule 13(2) states that wherever possible, detention pending a trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home. The purpose of this rule is to encourage the development of new and innovative measures to avoid pre-trial detention.\textsuperscript{170} It is further clearly stated that juveniles under detention shall be kept separate from adults and shall also be detained in a separate institution or part of such an institution which is separate from the adults.\textsuperscript{171}

Where a juvenile offender has not been diverted, in terms of the \textit{Beijing Rules} he or she will be dealt with on the basis of a fair and just trial, with the best interests of the juvenile kept in mind.\textsuperscript{172} Where a juvenile is then sentenced to an institution it is once again required by the \textit{Beijing Rules} that such placement shall always be as a measure of last resort and for the minimum necessary period.\textsuperscript{173}

It is evident from this that the \textit{Beijing Rules} did have an impact on South Africa when drafting the new Constitution. One can clearly see the resemblance between Rule 13 and Rule 19 and section 28 of the Constitution, and can one directly identify the influence of the \textit{Beijing Rules} generally on the South African justice system.\textsuperscript{174}

\begin{flushleft}
\textsuperscript{168} Rule 7(1) of the \textit{Beijing Rules}.
\textsuperscript{169} Rule 13(1) of the \textit{Beijing Rules}.
\textsuperscript{170} Doek "Juvenile Justice: International Rights and Standards" 230.
\textsuperscript{171} Rule 13(4) of the \textit{Beijing Rules}.
\textsuperscript{172} Rule 14(1) of the \textit{Beijing Rules}.
\textsuperscript{173} Rule 19(1) of the \textit{Beijing Rules}.
\textsuperscript{174} The provisions of s 28 of the Constitution as discussed in Chapter 2.
\end{flushleft}
3.4 United Nations Rules for the Protection of Juveniles Deprived of their Liberty

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990\textsuperscript{175} was adopted by the General Assembly in December 1990.\textsuperscript{176} The Havana Rules were created in order to establish the minimum standards which should be complied with when depriving juveniles of all forms of their liberty.\textsuperscript{177} Furthermore, this must also occur in consistence with human rights and fundamental freedoms. The focus is to counteract the effects of detention on juveniles, to rehabilitate them and to reintegrate them into society.\textsuperscript{178}

The Havana Rules consists of detailed rules and standards for the management of juvenile facilities, the physical environment, their accommodation, and the use of physical restraint and force.\textsuperscript{179}

According to the report submitted to the National Assembly in 2012, which dealt with violence against children, children in the custody of the police or in criminal justice institutions are at a high risk of violence.\textsuperscript{180} It is estimated that around 1 million children around the world are deprived of their liberty.\textsuperscript{181} There is an urgent need to reduce the number of children in detention across the world, but according to the international normative framework, many countries invest too much money in building detention facilities for children, rather than investing in prevention measures.\textsuperscript{182}

Although South Africa has not yet ratified the Havana Rules, it is none the less an international instrument which can be used as a guideline by the South African

\textsuperscript{175} United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (hereafter the Havana Rules).
\textsuperscript{176} UN 1990 http://www.tavaana.org.
\textsuperscript{177} UN 1990 http://www.tavaana.org.
\textsuperscript{178} UN 1990 http://www.tavaana.org.
\textsuperscript{179} Doek "Juvenile Justice: International Rights and Standards" 244.
\textsuperscript{180} Resolution on Violence against Children GA RES 18/12 UN Doc A/HRC/21/25 par 1.3.
\textsuperscript{181} Resolution on Violence against Children GA RES 18/12 UN Doc A/HRC/21/25 par 1.3.
\textsuperscript{182} Resolution on Violence against Children GA RES 18/12 UN Doc A/HRC/21/25 par 1.8.
courts when taking international legal instruments into account before sentencing a juvenile offender.

3.5 **African Charter on the Rights and Welfare of the Child**

The ACRWC was created in support of the CRC. The ACRWC was adopted to ensure that children's rights are respected and protected on a regional level as well as globally.\(^{183}\) In terms of the ACRWC a child is defined as every human being under the age of eighteen years.\(^{184}\) What made the ACRWC so significant was the fact that it contained some provisions that were more comprehensive than the equivalent provisions in the CRC.\(^{185}\) Furthermore, the ACRWC deals with certain issues which are unique to the African continent and also takes into account children's cultural heritage and background.\(^{186}\) However, just as is the case with the CRC, the implementation of these rights is in the hands of the specific state members.

This is why the African Committee of Experts on the Rights and Welfare of the Child was created. This Committee’s primary focus is to monitor the general application and realisation of the rights of children within a specific state.\(^{187}\) The functions of the Committee are described in article 42 of the ACRWC. They include the monitoring of the implementation of children’s rights, establishing regulations to protect these rights, and providing states with the correct interpretation of the provisions contained in the ACRWC.\(^{188}\)

The African monitoring system is based on the principle that the ACRWC recognises children in Africa as bearers of rights and people who are in need of care and protection.\(^{189}\) Article 43 requires states to report every three years on their progress

\(^{183}\) Lloyd 2002 *AHRLJ*13.
\(^{184}\) Article 2 of the ACRWC.
\(^{185}\) Lloyd 2002 *AHRLJ*14.
\(^{186}\) Lloyd "The African regional system for the protection of children's rights" 34.
\(^{187}\) Article 43 of the ACRWC.
\(^{188}\) Article 42 of the ACRWC.
\(^{189}\) Lloyd "The African regional system for the protection of children's rights" 34.
with regard to the implementation of children's rights.\textsuperscript{190} These reports must describe the measures which were implemented to realise these rights in practice, as well as any complications that may have occurred in trying to implement the rights.\textsuperscript{191} The provision for communications, as provided for in article 44 of the ACRWC, is complicated by the unique and specific conditions and circumstances faced in the African continent.\textsuperscript{192} Furthermore, article 45 provides the Committee with the right to conduct an investigation in order to determine if states comply with the provisions of the Charter.\textsuperscript{193}

### 3.5.1 Detention of juveniles in the ACRWC

The ACRWC is clear on the fact that every child shall be entitled to enjoy the rights and the freedom guaranteed by the Charter, free from any discrimination with regards to race, colour, sex, age etc.\textsuperscript{194} The ACRWC further parallels the provisions of the CRC and the Constitution in providing that the best interest of the child shall be the primary consideration in all actions concerning the child.\textsuperscript{195}

Most African countries do allow the use of pre-trial detention under carefully described circumstances, after they have ratified international human rights instruments.\textsuperscript{196} This means that there are certain restrictions with regard to the use of pre-trial detention. The protection of these restrictions, especially in the process leading to pre-trial detention, is vital to preserving one of the main cornerstones of the rights-based criminal justice system, namely the presumption of innocence.\textsuperscript{197}

Article 17(1) of the ACRWC states that every child found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth. Further provision is made by ensuring that no

\textsuperscript{190} Article 43(1)(b) of the ACRWC.
\textsuperscript{191} Article 43 (2) of the ACRWC.
\textsuperscript{192} Lloyd 2002 \textit{AHLR} 27-28.
\textsuperscript{193} Article 45 of the ACRWC.
\textsuperscript{194} Article 3 of the ACRWC.
\textsuperscript{195} Article 4(1) of the ACRWC.
\textsuperscript{197} Schönteich 2003 http://www.ohchr.org.
child who is detained, imprisoned or deprived of his or her liberty in any other way is subjected to torture, inhuman or degrading treatment or punishment.\textsuperscript{198}

The \textit{African Charter on Human and Peoples' Rights}, 1986\textsuperscript{199} states that every person shall have the right to have his or her human dignity respected. It further provides that all forms of exploitation and degradation, such as torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited.\textsuperscript{200} Across Africa it has been argued that the arrest, detention and imprisonment of children, who are in need of care and protection rather than being accused of specific offences, runs counter to international legal principles.\textsuperscript{201}

Another problem is the fact that pre-trial detention can be particularly discriminatory against the indigent, because of their lack of access to private counsel.\textsuperscript{202} This contradicts the provision made in article 17(2)(b)(iii) of the ACRWC, which states that every child shall be afforded legal and other appropriate assistance in the preparation and presentation of his or her defence.

This is not possible, however, where the relevant resources are not available. Another reference to a lack of resources, especially in Africa, is the limitation of the availability of detainment and pre-detainment cells or centers. In Nigeria women and juveniles are held together with male prisoners, especially in the more rural areas.\textsuperscript{203} In other African countries, like Ethiopia, children are not separated from adult prisoners because of a lack of space or because the nearest prison is too far away from the courthouse.\textsuperscript{204}

The ACRWC also refers to alternative measures to be taken into account when considering detention and how it should be used as a last resort. However, placing awaiting-trial juveniles under the supervision or care of their parents or close

\textsuperscript{198} Article 17(2)(a) of the ACRWC.
\textsuperscript{199} \textit{African Charter on Human and Peoples' Rights}, 1986 (hereafter the \textit{Banjul Charter}).
\textsuperscript{200} Article 5 of the \textit{Banjul Charter}.
\textsuperscript{201} Sloth-Nielsen "Children in African prisons" 123.
\textsuperscript{203} Sloth-Nielsen "Children in African prisons" 123.
\textsuperscript{204} Schönteich 2003 http://www.ohchr.org.
relatives whose supportive structures have been ravaged by civil war or poverty might not work.\textsuperscript{205} This can arguably add value to an African regional system.

### 3.5.2 Added value of an African regional system

This research paper attempts to establish what factors the court should take into account when sentencing a juvenile. Should one of the factors considered be the fact that a child comes from an African country, and if so, how would that influence the court? The argument is that there is an added value to the African regional system and that the court should take all necessary factors into account. The ACRWC is important as it focuses on the unique and specific challenges and circumstances faced by African children.

In terms of the ACRWC, as mentioned above, children are regarded as human beings who are entitled to acknowledgement of their humanity, dignity and respect. It is also emphasised that children are to be recognised as being valuable in society, and that childhood is a special and fragile stage which requires special protection.\textsuperscript{206} Further, it is argued that the ACRWC has got the potential to reverse any practices that discriminate against African children, and to educate school, administrative and judicial institutions in how to honour children's rights.\textsuperscript{207} Educating these institutions in the way in which children should be viewed and treated within the community and society is important.\textsuperscript{208}

A very important comparison, between the CRC and the ACRWC, in arguing the added value of the ACRWC, is seen in the respective provisions dealing with the best interest of the child. The CRC states that the best interests of the child shall be a primary consideration in matters concerning children.\textsuperscript{209} The ACRWC goes even

\textsuperscript{205} Schönteich 2003 http://www.ohchr.org.
\textsuperscript{206} Sloth-Nielsen & Mezmur 2007 \textit{AHRLJ}342.
\textsuperscript{207} Lloyd "The African regional system for the protection of children's rights" 34.
\textsuperscript{208} Lloyd "The African regional system for the protection of children's rights" 34.
\textsuperscript{209} Article 3(1) of the CRC.
further by providing that the best interests of the child will be considered as trumping any other provision or consideration.\(^{210}\)

Mention must be made with regards to the criticism that the ACRWC has received since its implementation. Gose, for one, finds flaws in the drafting and points out that the dates of the adoption and the coming into effect have been confused.\(^{211}\) Another criticism is that the charter has failed to attract attention from scholars and not many academics have been prepared to discuss and explain the ACRWC.\(^{212}\)

However, the ACRWC confirms the proclamations of the Declaration, it makes specific reference to the child in Africa, and it recognises that the child occupies a unique and privileged position in African society.\(^{213}\) It acknowledges the situations that children are faced with in Africa, which are caused by the socio-economic, cultural, traditional and development circumstances of the continent, and the natural disasters that sometimes occur.\(^{214}\)

When we look at the harmful practices that children in Africa are exposed to, article 21 of the ACRWC clearly provides for a normative standard of appropriate measures to be taken to eliminate any harmful social and cultural practices which can affect the child's welfare, dignity, normal growth and development. This is indeed an important provision because of the fact that many children in Africa are regulated by traditional and customary practices.\(^{215}\)

Children in Africa face unique challenges and often live in difficult circumstances. One of the challenges faced by many of these children is extreme poverty, which often leads to them getting into conflict with the law. As a result of the uniqueness and often difficult challenges faced by these children, one has to argue that the court should in fact consider the circumstances of a child and where he or she comes from when sentencing a child.

\(^{210}\) Article 4(1) of the ACRWC.
\(^{211}\) Mezmur 2008 SAPL 5.
\(^{212}\) Mezmur 2008 SAPL 4.
\(^{213}\) Lloyd "The African regional system for the protection of children's rights" 35.
\(^{214}\) Lloyd "The African regional system for the protection of children's rights" 35.
\(^{215}\) Mezmur 2008 SAPL 18.
3.5.3 **Strengths of the ACRWC**

The main function and goal of the African Human Rights Committee, when drafting the ACRWC, was to promote and protect the rights of children, as enshrined in the ACRWC.\(^\text{216}\) The Committee must do this by collecting and documenting information and assess the situation of African children with regard to their rights and welfare.\(^\text{217}\) Principles and rules must be formulated with the aim of protecting the rights and welfare of children in Africa.\(^\text{218}\) There must be cooperation with African and International Institutions and organisations which are concerned with the protection and the promotion of the rights and welfare of the child.\(^\text{219}\)

Strengths, in the ACRWC context, have been identified in areas such as the relation to juvenile justice and restorative justice practices.\(^\text{220}\) However, the focus needs to be on vulnerable groups such as street children and children deprived of their liberty. Therefore, in my opinion, the ACRWC has got positive characteristics and provides for those circumstances and challenges faced by children which are unique to the African continent.

### 3.6 Conclusion

As discussed above, there are numerous instruments on the international and regional frontier which can be used as assistance when dealing with juvenile offenders. Most of these instruments concur with one another, and a repetition of the provisions is evident. When it comes to child offenders, the detention of such offenders, the conditions of their detention, and the factors to be considered by the courts, it is common cause that the best interests of the child are always to be kept in mind.

The difficulty arises where international provisions are contradictory to the provisions of the Constitution. It can be argued that although the Constitution

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\(^{216}\) Article 42 of the ACRWC.

\(^{217}\) Article 42(a)(i) of the ACRWC.

\(^{218}\) Article 42(a)(ii) of the ACRWC.

\(^{219}\) Article 42(a)(iii) of the ACRWC.

\(^{220}\) Sloth-Nielsen & Mezmur 2007 *AHRLJ* 342.
provides for the consideration of international law, this can only be applied for as long as international law is consistent with the provisions of the Constitution and other national instruments.221 However, when the wording of these specific instruments is carefully read, this could lead to a positive interpretation by the courts.222

221 Van Biljon The state’s legal responsibility 47.
222 Skelton "Constitutional protection of children's rights" 266.
4 Lessons to be learned from foreign law

4.1 Introduction

As already pointed out, South Africa may consider foreign law when interpreting the Bill of Rights.\textsuperscript{223} The Netherlands has ratified most of the relevant international instruments and used these instruments as guidelines when dealing with children in conflict with the law.\textsuperscript{224} As will be seen, most of the guidelines used by the Netherlands are similar to the guidelines used by South Africa, which is why the legal system of the Netherlands is discussed here.

The focus of the Dutch courts, when dealing with juveniles, is vested in the principle of restorative justice. In this regard the Netherlands makes use of a number of alternative sanctions instead of detention in order to achieve the reintegration of its juveniles back into the society. In order for the courts to achieve this there are a few important role-players who need to take it upon themselves to achieve the realisation of this ideal. They do so, as they feel that the role of children in society is very important for the development of the country.

However, in this chapter it will be highlighted that there are certain aspects of the juvenile justice system of the Netherlands which are emphasised more and are regarded as vitally important for the promotion of children's rights. The question is whether South Africa can learn anything from the approach followed by the Dutch government in order to improve its own position.

4.2 Background of juvenile justice in the Netherlands

In terms of the Netherlands juvenile system, a child is defined as a young person up till the age of eighteen years.\textsuperscript{225} Before the Dutch government ratified certain international instruments for support and guidance in the field of juvenile justice,

\begin{itemize}
\item \textsuperscript{223} Section 39(1)(c) of the Constitution.
\item \textsuperscript{224} Boev 2002 \textit{ISSUU}.
\item \textsuperscript{225} Van der Linden 1999 http:www.qu.edu.com.
\end{itemize}
children were left to the authority of their parents.\textsuperscript{226} The effect was that according to law, a minor child or children had practically no legal status.\textsuperscript{227} However, that position quickly changed when the CRC addressed issues such as the best interests of the child.\textsuperscript{228}

The position in the Netherland then provided that there must be a distinction between child offenders and adult offenders.\textsuperscript{229} Child offenders between the ages of 12 years and 17 years, who commit an offence in terms of the law system applicable are tried and penalised under the relevant juvenile criminal law.\textsuperscript{230} It is further determined that children under the age of 12 years cannot be prosecuted and are deemed to be below the age of criminal capacity.\textsuperscript{231} If a child below the age of 12 does commit a crime, and it is not a serious offence, such as theft, then the police will speak to the child's parents or the child will be sent for counselling.\textsuperscript{232} However, should a child under the age of 12 make him or herself guilty of more serious offences then a court can and will intervene and can then order a family supervisor to be appointed in order to monitor the child.\textsuperscript{233}

The Netherland juvenile justice system is also in favour of the consideration of alternative sanctions,\textsuperscript{234} which can include community service or training programmes.\textsuperscript{235} Juveniles who have been sentenced are sent to a Juvenile Justice Detention Institute (JJI).\textsuperscript{236} The maximum sentence for juveniles aged 16 and 17

\begin{itemize}
\item \textsuperscript{226} Wolthuis 2000 \textit{IIRP} 1.
\item \textsuperscript{227} Wolthuis 2000 \textit{IIRP} 1.
\item \textsuperscript{228} Article 3(1) of the CRC.
\item \textsuperscript{229} Boe 2002 \textit{ISSU} 1.
\item \textsuperscript{230} GTN 2014 http:\textt{www.government.nl.}
\item \textsuperscript{231} Van der Linden 1999 http:\textt{www.qu.edu.com. (Criminal capacity is defined as the mental capacity of children to distinguish between right and wrong and to act upon that distinction).}
\item \textsuperscript{232} Wolthuis 2000 \textit{IIRP} 1.
\item \textsuperscript{233} GTN 2014 http:\textt{www.government.nl.}
\item \textsuperscript{234} In terms of the CJA there are numerous alternative sanctions or options to be considered by South African courts when sentencing juveniles, such as Community-based sentences (s 72); Restorative justice sentences (s 73); Fines or alternatives to fines (s 74); Sentences involving correctional services (s 75); and Postponement or suspension of passing sentences (s 78).
\item \textsuperscript{235} GTN 2014 http:\textt{www.government.nl.}
\item \textsuperscript{236} Rigter 2014 http:\textt{www.reclaimingfutures.org.}
\end{itemize}
years is two years in the JJI, whilst juveniles aged between 12 and 15 years can be sentenced to only one year in the JJI.\textsuperscript{237}

The number of juveniles sentenced to a JJI has decreased rapidly. Where the Netherlands had 16 active JJI sites in the year 2007, they are left with only 11 JJI sites still in operation.\textsuperscript{238} The number of JJI sites has decreased due to the fact that the number of juvenile offenders has decreased over the years. Where 1300 juveniles were detained in 2007, only about 800 juveniles were detained in the Netherlands, in the year 2014, according to research.\textsuperscript{239} One has to ask the question, what might be the possible reason for this? Well according to the Multidimensional Family Therapy Academy,\textsuperscript{240} the decrease could be as a result of juvenile judges tending to favour the imposition of alternative sanctions instead of incarceration.\textsuperscript{241}

The question remains whether the CRC had any influence on the Dutch law system and the way it is practised? Did it have any effect on the legal proceedings in the Netherlands? There are opinions from academics that the CRC has shown the way to Dutch courts with regard to the interpretation of both international and national law.\textsuperscript{242}

### 4.3 Influence of the CRC

During the year 1995 new amendments to juvenile criminal law were passed in the Netherlands.\textsuperscript{243} The Netherlands officially ratified the CRC on 8 March 1995, and ever since a child’s right to human dignity has been recognised by the Dutch

\textsuperscript{237} GTN 2014 http:www.government.nl.
\textsuperscript{240} Multidimensional Family Therapy Academy (MDFT) is an integrated, comprehensive, family-centered treatment for teen and young adult problems and disorders. MDFT addresses issues such as substance abuse, antisocial and aggressive behaviours, mental disorders and school problems in an attempt to prevent out-of-home placements.
\textsuperscript{242} Limbeek & Bruning “The Netherlands: Two decades of the CRC in Dutch case law” 89.
\textsuperscript{243} Wolthuis 2000 IIRP1.
government. After the CRC was ratified by the Dutch government it took immediate effect, and the Netherlands has applied the international principles relating to juvenile justice successfully for the last 20 years. Up and until the ratification of the CRC, the juvenile system in the Netherlands was described as a welfare system, but after the implementation of the CRC it is regarded as a more punitive system.

The CRC is not the only international instrument ratified by the Netherlands, which also makes use of the Beijing Rules and the Havana Rules. The Netherlands is very clear on the fact that all decisions which affect or concern child offenders must take into account the best interest of the child. This means not only taking into account the offence but also give due consideration to the child's social circumstances, his or her including psychological, educational and family background.

The CRC establishes international rights and standards when dealing with juvenile justice. Certain provisions of the CRC influenced the juvenile justice system of the Netherlands to a great extent and still form part of the basic characteristics of the Netherland juvenile justice system. For the purpose of this study we will narrow this field down and deal specifically with the deprivation of liberty and detention or imprisonment as a sentence.

4.4 Characteristics of the juvenile justice system of the Netherlands

In the Netherlands there is a close relationship between the different law systems such as the Children’s Act, the law on youth welfare, the penal law for children and the criminal law applying to children. Just as there is a close relationship between

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244 Limbeek & Bruning "The Netherlands: Two decades of the CRC in Dutch case law" 89.
245 Boev 2002 ISSUU/1.
247 Limbeek & Bruning "The Netherlands: Two decades of the CRC in Dutch case law" 90. (Both the Beijing Rules and Havana Rules are discussed in Chapter 3.3 and 3.4 respectively.)
250 Doek "Juvenile Justice: International Rights and Standards" 229.
the different law systems, there also needs to be a close relationship between the different role-players in order to ensure that the implementation of the different law systems happens accordingly. Some of the characteristics of the law system include the following:

- Different role-players

The different role-players who are responsible for the implementation of the relevant law are the court officials, meaning the judge, the prosecutor and the police officers.\(^{252}\) The judge is the person who decides on whether the juvenile will be punished and sentenced to the JJI and or the juvenile will receive an alternative sanction such as community service, will work to pay for the damages incurred, or will attend a relevant learning programme.\(^{253}\)

The public prosecutor, in terms of Dutch criminal law, can make the decision on whether the juvenile is to be taken to court or released.\(^{254}\) The prosecutor has a great deal of flexibility in the Dutch criminal system, and has got the power to suspend prosecution, or even withdraw the charges, with or without the consent of the judge.\(^{255}\) In the event of the juvenile making him or herself guilty of petty crime, such as theft or vandalism, the police have the power and discretion to impose alternative sanctions on the juvenile.\(^{256}\) The power of the police in this regard, however, is limited to very specific crimes and the value of the damages incurred.\(^{257}\)

\(^{252}\) Boev 2002 *ISSUU*2.

\(^{253}\) Wolthuis 2000 *IIRP*3.


\(^{255}\) Wolthuis 2000 *IIRP*3.

\(^{256}\) Wolthuis 2000 *IIRP*3.

\(^{257}\) The crimes for which the police are empowered to impose alternative sanctions are restricted to the following:

a) arson with danger to the public on objects causing up to NLG 1500 worth of damage;
b) simple theft and receiving stolen goods up to a value of NLG 250;
c) fraudulent labelling up to a value of NLG 250;
d) simple damage to property, including Graffiti, up to a value of NLG 1500;
e) despoilment of streets and disorderly conduct up to a value of NLG 1500;
f) unlawful entering of a restricted area;
g) firework misdemeanours.

(NLG refers to Dutch Guilders, which is the official currency of the Netherlands).
- **Diversion**

Diversion determines that all possibilities for criminal responsibility, such as community-based measures and social rehabilitation, must first be sought before judicial proceedings are considered.\(^{258}\) The CRC\(^{259}\) accordingly provides that State Parties must make this provision a reality by developing alternative methods for juveniles as opposed to criminal procedures.\(^{260}\) In the Netherlands alone around 40% of all juvenile cases which are reported to the police are diverted by the police, and in the process judicial proceedings are avoided.\(^{261}\)

- **Respect for the rights of juveniles**

This goes back to the best interest of the child, and shows that it is of the utmost importance in all matters concerning the child. In terms of the juvenile justice system of the Netherlands, juveniles have the right to participate in proceedings affecting them, to be supported by their parents or guardians, and to have legal representation.\(^{262}\) All relevant international instruments, as well as the Netherlands, agree that the deprivation of a child's liberty must always be ordered as a measure of last resort, and only for the shortest appropriate period of time.

- **Educating juvenile offenders**

Dutch academics are of the opinion that educating children who are in conflict of the law is about the best thing that a juvenile justice system can do.\(^{263}\) In this system the courts can impose alternative sanctions, with reference to learning programmes specifically, which are beneficial to the child's development.\(^{264}\) The Dutch authors on this topic believe that this should be taken into account when determining what is in the best interests of the child.\(^{265}\)

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\(^{258}\) Boev 2002 *ISSUU*2.  
\(^{259}\) Article 40(3)(b) of the CRC.  
\(^{260}\) Doek "Juvenile Justice: International Rights and Standards" 237.  
\(^{261}\) Doek "Juvenile Justice: International Rights and Standards" 238.  
\(^{262}\) Boev 2002 *ISSUU*3.  
\(^{263}\) Boev 2002 *ISSUU*3.  
\(^{264}\) Boev 2002 *ISSUU*3.  
• **Sentencing**

Where the court finds that none of the alternative sanctions will be an appropriate sentence and a juvenile is then sentenced to imprisonment, there are a few provisions that are applicable. Juveniles sentenced to youth detention are sent to a young offenders’ institution.\(^{266}\) The age of the particular juvenile will determine the time the juvenile will spend within the particular institution.\(^{267}\) As mentioned before, where the juvenile is between the ages of 12 and 15 years, the maximum time to be spent in detention in the JJI is one year.\(^{268}\) Juveniles between the ages 16 and 17 years will spend a maximum of two years in the JJI.\(^{269}\) While in detention, whether for one year or two years, they will attend school and be taught certain life skills such as social skills and anger management.\(^{270}\)

### 4.5 Lessons to be learned from the Netherlands

According to a report submitted to the National Assembly in 2012, which dealt with violence against children, children in the custody of the police or in criminal justice institutions are at a high risk of violence.\(^{271}\) It is estimated that around 1 million children around the world are deprived of their liberty worldwide currently.\(^{272}\) There is an urgent need to reduce the number of children in detention across the world, but according to the international normative framework, many countries invest more money in building detention facilities for children than in prevention measures.\(^{273}\)

Whether in pre-trial detention, administrative detention or punitive detention, there is a significant risk of that the child will be subjected to violence, including sexual

\(^{266}\) GTN 2014 http:www.government.nl.
\(^{268}\) GTN 2014 http:www.government.nl.
\(^{269}\) GTN 2014 http:www.government.nl.
\(^{270}\) GTN 2014 http:www.government.nl.
\(^{271}\) Resolution on Violence against Children GA RES 18/12 UN Doc A/HRC/21/25 par 1.3.
\(^{272}\) Resolution on Violence against Children GA RES 18/12 UN Doc A/HRC/21/25 par 1.3.
\(^{273}\) Resolution on Violence against Children GA RES 18/12 UN Doc A/HRC/21/25 par 1.B.
abuse by staff members, or violence by adult detainees.\textsuperscript{274} Children in detention facilities are also more vulnerable to violence where there is overcrowding.\textsuperscript{275}

In the General Comment \#10 of Children’s Right in Juvenile Justice,\textsuperscript{276} the Committee notes that in many countries children suffer in pre-trial detention for months, or even years, which constitutes a violation of article 37(b) of the CRC. States parties should take adequate legislative and other measures to reduce the use of pre-trial detention.\textsuperscript{277} The General Comment further provides that whether a child is arrested, detained or imprisoned, the action should be performed in conformity with the law.\textsuperscript{278} Furthermore, if any of the above occurs, it should be as a measure of last resort and for the shortest appropriate period of time, taking into account that no child should be deprived of his or her liberty unlawfully.\textsuperscript{279}

It is evident that children in detention facilities are extremely vulnerable, which is why the CRC makes it clear that the justice system owes a higher standard of care to children.\textsuperscript{280}

Another example is found in a judgment of the European Court of Human Rights, where the court requested Poland to stop the practice of pre-trial detention.\textsuperscript{281} This came in the case of \textit{Grabowski v Poland} (application number 57722/12),\textsuperscript{282} where a 17 year-old boy was kept in pre-trial detention for almost a year. The court relied

\textsuperscript{274} \textit{Resolution on Violence against Children} GA RES 18/12 UN Doc A/HRC/21/25 par 1.I.
\textsuperscript{275} Boev 2002 ISSUU7.
\textsuperscript{276} \textit{General Comment \#10 of the CRC Committee on Children’s Right in Juvenile Justice} CRC/C/GC/10 (2007). (A General comment can be described as a publication by a treaty party where they discuss their interpretation of the provisions contained in the respective human right treaty in the form of general comments).
\textsuperscript{277} \textit{General Comment nr 10 of the CRC Committee on Children’s Right in Juvenile Justice} CRC/C/GC/10 (2007) par 80.
\textsuperscript{278} \textit{General Comment nr 10 of the CRC Committee on Children’s Right in Juvenile Justice} CRC/C/GC/10 (2007) par 79.
\textsuperscript{279} \textit{General Comment nr 10 of the CRC Committee on Children’s Right in Juvenile Justice} CRC/C/GC/10 (2007) par 79.
\textsuperscript{280} Joshi & Keillor 2012 \url{https://www.opensocietyfoundations.org}. (The vulnerability of children in detention centres was exposed when the Pozanti Juvenile Detention Centre in Adana, Turkey, was shut down after children were raped and regularly beaten by prison guards and other inmates. The youngest of these victims were 12 years old.).
\textsuperscript{281} Ilinska 2015 \url{https://www.opensocietyfoundations.org}.
\textsuperscript{282} \textit{Grabowski v Poland} (application number 57722/12 ECHR).
on the *Havana Rules*, which clearly states that juvenile cases must be expedited in order to minimise the time spent in pre-trial detention.\(^{283}\)

### 4.5.1 Possible changes in South Africa

In terms of the position in South Africa, it is in most aspects in accordance with the international standard. South Africa tends to favour the ARCWC over the CRC because of the fact that the ACRWC focuses more on responsibilities and rights and also on the collective idea of rights and justice.\(^{284}\) Furthermore, the ACRWC follows the concept of restorative justice, which deals with diverting children away from the criminal justice system and detention.\(^{285}\) The desire to protect children and their rights went hand in hand with the period of transition into a democratic society. The position changed in 1994, because the new legislation had to be aligned with the CRC and the Constitution.\(^{286}\)

An example of some of the changes South Africa has made is to be found in section 35 of the Constitution, which states that everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least the provision, at state expense, of adequate accommodation. This is in accordance with *UN Rule 31*, which states that every juvenile deprived of his or her liberty has the right to facilities and services that meet all the requirements of health and human dignity.\(^{287}\)

The success of the juvenile justice system in the Netherlands is based on the alternative sanction methods which is followed and supported by the Dutch government. The Dutch government are firm believers that children should be reformed and restorative justice should be applied with children in conflict with the law.\(^{288}\) The Dutch government, therefore, invests time and money into alternative

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\(^{283}\) Ilminska 2015 [https://www.opensocietyfoundations.org](https://www.opensocietyfoundations.org).


\(^{286}\) Skelton "Children accused of crimes" 188-195.

\(^{287}\) Skelton "Children accused of crimes" 188-195.

responses to children's misdirected actions such as providing them with learning programmes which teach them the consequences of their actions, how to come to terms with what happened, and how to interact with other people.  

This is a more effective way of reforming juveniles and enabling them to go back into society with the necessary skills to deal with the challenges of the world. Clearly the approach followed by the Dutch government, (the maximum sentence for juveniles aged 16 and 17 years is two years in the JJI, and juveniles aged between 12 and 15 years can be sentenced to only one year in the JJI) must be working, as five JJI's have been closed over the last ten years due to the fact that there is a lack of juveniles in the country needing to be detained.

The approach followed by the Dutch government should be considered by the South African government. Investment should be made into developing alternative sanctions which may be imposed on juveniles, and when a sentence of detention is imposed attention should paid to its duration as well as to the learning programmes which could be combined with the detainment in order to restore the juvenile back into the community.

Furthermore, the South African government should also look into the conditions of the juvenile facilities in the country as well as the manner in which children are being treated in such facilities. The international instruments are very clear in their position on this. They determine that juveniles should be kept separate from untried prisoners, and separate refers to separate institutions or separate parts of an institution. When a juvenile has reached the age of eighteen and is still to serve a few years in the institution it is possible to transfer such a juvenile to an adult facility in order to protect the younger juveniles in the institution.

Wolthus 2000 IIRP 3.
The international instruments have been discussed in Chapter 3 of this study.
The Netherlands created a law for juveniles who are being detained in terms of which they are protected whilst in detention and are in a position to file complaints if any of the provisions are being contravened by the officials. Such measures can and should be considered by the South African government in order to ensure that all the relevant provisions, on both the international and the national level, are being adhered to and are being implemented in accordance with the purpose for which they were created for, which is to offer protection to children who are in conflict with the law.

4.6 Conclusion

The Dutch government places a lot of emphasis on alternative sanctions to be imposed on children as opposed to detention, thus recognising the international position that the detention of juveniles should be considered only as a measure of last resort. The Dutch government goes further by imposing a time limit on the duration of juveniles' detention in a JJI, which recognises the view that should detention be imposed on a child offender it must be for the shortest appropriate period of time.

South Africa supports the international point of view pertaining to the detention of juveniles and the period of detention. However, there are no provisions in the local legislation placing a limit on the duration of the detention of juveniles, which is instead decided by the courts on a case by case basis. South Africa also needs to make provision for alternative sanctions that could be imposed, but the success of such programmes relies heavily upon the different role-players within the juvenile justice system. Should these different role-players not do their work properly, alternative methods such as diversion will not be prescribed, and the child offender will end up in a detention centre and be exposed to negative circumstances and a negative environment.

295 Doek "Juvenile Justice: International Rights and Standards" 244.
The solution to these problems, as proposed above, is that facilities for alternative methods to sentencing should be developed and implemented.296 There should be rehabilitation programmes in place, and these programmes must be adhered to by the social workers and other relevant authorities who focus on basic emotional and social requirements.297 The one lesson to be learned from this, and to which serious consideration must be given, is the importance of children in society.
5 Conclusion and recommendations

5.1 Conclusion

The focus of this study was to determine the different factors that the court should take into consideration when sentencing a child offender. This question was answered by looking at the current position in South Africa as well as the international and regional position in the field of juvenile justice. The juvenile justice system of the Netherlands was also discussed in order to determine where South Africa stands in the matter of children's rights and whether the South African government can do anything to improve the current position.

Section 28(1)(g) of the Constitution received a lot of attention, as this section specifically provides that children should not be detained except as a measure of last resort, and that such detention should be only for the shortest appropriate period of time. In addition to this, a child also has the constitutional protection to be housed in detention separately from persons over the age of 18 years\(^{298}\) and to be treated in a manner which gives recognition to the child's age.\(^{299}\)

The principle of the primacy of a child's best interests cannot be emphasised enough, and throughout this study reference was made to the support of this principle nationally and internationally. The best interests of children should be the starting point when considering a sentence of direct imprisonment of a child. Then, once an appropriate sentence has been determined by the court, the principle should be considered again to determine whether it was achieved or not.

The factors that a court must take into account when sentencing a juvenile changed on the day that a separate justice system was created in this regard. This system for children, namely the CJA, highlights the fact that children should be protected and their human rights, including their dignity and freedom, should be protected.

\(^{298}\) Section 28(1)(g)(i) of the Constitution.

\(^{299}\) Section 28(1)(g)(ii) of the Constitution.
promoted, respected and fulfilled as provided for by the Constitution.\(^{300}\) The CJA is clear on the position that direct imprisonment should be considered only as a measure of last resort.

The main focus, when deciding on the detention of a juvenile or juveniles, should be vested in the principle of restorative justice. This approach aims to involve all the relevant parties affected by the crime of the juvenile and to make the juvenile recognise and accept responsibility for his or her actions. As confirmed by the Constitutional Court, the key elements of restorative justice are reparation, encounter, participation and reintegration.\(^{301}\) The CJA makes provision for numerous alternative sanctions that should be considered in preference to and instead of direct imprisonment.

The international community is in agreement with the fact that children should be detained only as a measure of last resort. Various international treaties were discussed during this study, and what may be concluded from this survey is that there is consensus that children are holders of human rights, like any other human being. It is the responsibility of the government to protect children. When children are tried for an offence they may have committed, such children must be handled with the necessary care and protection.

When the court decides on a sentence of imprisonment, the international instruments make the position very clear with regard to the period of detention as well as the conditions in which children are detained. In addition, the various international instruments regard the education of the child whilst being detained as very important, in order to ensure the full development of the child and to provide assistance for when the child is reintegrated back into the community.

The detention of juveniles is a sensitive situation all over the world, and it is not unusual to read about the circumstances children are detained in or what happened to certain children whilst being detained. The national and international legal

\(^{300}\) Section 7(2) of the Constitution.

\(^{301}\) Karels "Introduction to South African child justice" 19.
provisions provide clear guidelines and assistance when the authorities deal with child offenders. These guidelines must be used correctly by the relevant role-players and interpreted correctly by the court if one wants to see the realisation of former President Nelson Mandela’s vision of the position of children in the new South African social system.

5.2 Recommendations

It has been made clear in this study that although South Africa does have appropriate legislation pertaining to the detention of juvenile offenders, the state is failing to make appropriate use of the legislation.

In the Netherlands the number of juveniles sentenced to detention in a JJI has decreased rapidly over the last 10 years. Where there were 16 active JJI sites in the Netherlands in 2007, there are only 11 JJI sites still in operation.\(^{302}\) This invites the question as to why 5 JJI sites were closed in the Netherlands. The answer is simple, it is as a result of the lack of juveniles offenders to detain. These institutions are empty and are thus being closed down. This is a positive event for the Dutch government.

The reason for the lack of this class of juvenile offenders can be ascribed to the use of the alternative sanctions by the Dutch courts. The similar sanctions and methods are in place in South Africa, but it is the enforcement and promotion of these alternatives that are lacking. The South African government should take note of the change that occurred in the Netherlands as a result of positive enforcement. As already said, the CJA makes provision for options other than direct imprisonment, and those methods should be considered and implemented more comprehensively by the South African courts.

Another positive lesson to take from the Netherlands can be regarded as the imposition of age-related limits to the periods that juveniles may be required to

spend in detention. This is a factor that the Dutch courts have to take into account when determining the sentence of a juvenile. If the juvenile is below the age of 16 years he or she will be detained for a period of one year only. If the child offender is older than 16 years and below 18 years, he or she will be detained for a period of two years only. The reason for this is because the Dutch government believes in positive reinforcement. They strive to promote the role of children in society and highlight the importance thereof for both the child and the community. The hope is that when a child is reintegrated into society he or she will have been rehabilitated properly as a result of the programmes presented by the JJI sites.

In South Africa a child from the age of 14 may be sentenced to imprisonment for a period of no longer than 25 years. The problem is that when such a child is released from prison after 25 years he has got no social skills or any life development, and will have difficulty in coping with the real world. This is not to say that children should not be detained. In certain cases, such as the *Griekwastad case*, the court had no option other than to impose direct imprisonment. In such an instance it is necessary for such a child to receive access to the rehabilitation programmes, education and developmental programmes to ensure that when the child is eventually released he or she has all the necessary skills to cope with life outside prison.

The detention of juveniles should be considered in certain cases, but one cannot ignore the influence that the use of alternative methods can have, when implemented correctly. One has to endorse the words of former President Nelson Mandela, who said that the detention and imprisonment of juveniles must be a very last resort, and that our children should be protected.
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5 November 2016

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I am Professor Alan Brimer, DLitt (UPE), Professor Emeritus of UKZN.

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