
**THE SPECTRUM FOR CHILD JUSTICE IN THE
INTERNATIONAL HUMAN RIGHTS
FRAMEWORK: FROM “RECLAIMING THE
DELINQUENT CHILD” TO RESTORATIVE
JUSTICE**

VIOLET ODALA*

INTRODUCTION	543
I. HISTORICAL BACKGROUND TO CHILD JUSTICE	549
II. THE INTERNATIONAL FRAMEWORK FOR CHILD JUSTICE.....	558
III. THE REGIONAL FRAMEWORK FOR CHILD JUSTICE IN AFRICA	563
IV. RESTORATIVE JUSTICE	571
CONCLUSION	579

INTRODUCTION

In 2002, twenty-year-old Evance Moyo was convicted of murder and sentenced “at the pleasure of the President” in the High Court of Malawi for a crime he committed in 1997 while he was sixteen years old.¹ While attending a party, Moyo stabbed and killed Moses Chibwana during a fight involving friends from both sides.² Moyo was arrested and remanded at Chichiri Maximum Prison alongside adults wherein he remained incarcerated following his conviction in a 2002 trial.³ Under Section 26(2) of the Penal Code (Cap 7:01) and

* Doctoral Candidate (University of Pretoria), LL.M (UMN), LL.M (Notts), LL.B, BA (Wits); Senior Programme Coordinator (The Child and the Law Programme), The African Child Policy Forum, Ethiopia

1. *Moyo v. Att’y Gen.* (2007) Cons. Case No. 12 (Malawi).

2. *Id.* at 3.

3. *Id.*

Section 11(1) of the then Children and Young Persons Act of 1969 (Cap 26:03) of the Laws of Malawi, children convicted of homicide were sentenced “during the President’s pleasure.”⁴ The trial judge ordered that Moyo be sent to an approved school,⁵ but he was nonetheless sent to Chichiri prison where he remained alongside adult prisoners.

With the help of human rights organizations, Moyo applied to the Constitutional Court for a determination that his constitutional rights as a child “to treatment consistent with the special needs of children” and to “be imprisoned only as a last resort and for the shortest period of time” had been violated by keeping him on remand in an adult prison from 1997 to 2002 while still a juvenile and incarcerated for nearly eleven years.⁶ Among other things, Moyo sought to declare sentences “at the pleasure of the President” unconstitutional based on the fact that sentencing is an integral part of a trial and cannot be independent if the President dictates the sentence. In its judgment, the Court focused on whether a sentence “at the pleasure of the President” constitutes a mandatory life sentence and concluded that it did not, but “rather can be equated to an indeterminate sentence which cannot be held to be unconstitutional.”⁷ Despite acknowledging that Moyo’s remand and incarceration in adult prison for years was in blatant disregard of his welfare, his special needs as a juvenile, and his best interests, the court refused to make an order for compensation, saying the incarceration was a function of poor implementation of the court’s judgment.⁸ Such is the plight of children who find themselves in conflict with the law.

Among the many protections in the Convention on the Rights of

4. *Id.* at 7.

5. At the approved school, a “board of visitors” would have assessed his progress and rehabilitation so as to make an informed decision about when he should be released. *Id.* at 7-8.

6. *See id.* at 2 (explaining that the Court must consider whether Moyo’s incarceration was a violation of Section 42(2)(g)(iii) of the Constitution, Article 3 of the Convention on the Rights of the Child, and Section 31 of the Children and Young Persons Act).

7. *Id.* at 8.

8. *See id.* at 8 (determining that the system ignored its statutory duty because when a court sentences a juvenile to be held at the pleasure of the President, the law mandates that the juvenile’s case be reviewed so that he can be released at any stage depending on the recommendation made to the President, which did not occur in Moyo’s case).

the Child (“CRC” or “Convention”)⁹, those pertaining to justice for children seem to be the most curtailed worldwide, despite effort in the international arena to develop safeguards in the field of child justice.¹⁰ Nonetheless, it is evident that things are changing for the better in most places. The 1969 Act under which Moyo was sentenced has since been replaced by the Child Care, Protection and Justice Act,¹¹ which does not bear any provision of sentencing children at the pleasure of the President. Even though this sentence still exists under the Penal Code, it is evident that the new Act provides more protection for children.¹² This as well as other safeguards developing for children in Malawi and other nations bear testimony to the fact that children’s rights have become an accepted phenomenon, even where children are in conflict with the law. However, as observed by the Africa Child Policy Forum (“ACPF”), “while there has been progress in developing appropriate measures for children, there are still significant gaps in dealing with children in the criminal justice system.”¹³ The United Nations (“UN”) has said that there need not be “a duality between human rights and juvenile justice,”¹⁴ and that restorative justice is the best way to deal with children in conflict with the law in a manner that ably respects children’s rights as well as promotes justice in society. This is

9. See generally Convention on the Rights of the Child, art. 3, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC] (identifying the rights of children and mandating that states parties implement them).

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

11. See *Malawi Parliament Passes Child Care, Protection and Justice Bill*, NETNEWSPUBLISHER (June 29, 2010), <http://www.netnewspublisher.com/malawi-parliament-passes-child-care-protection-and-justice-bill/> (explaining that the bill seeks to improve problems of child trafficking and abduction, as well as recognize principles of the Convention on the Rights of the Child).

12. Child Care, Protection, and Justice Act No. 22 of 2010 (Malawi).

13. AFR. CHILD POLICY FORUM, *REALISING RIGHTS FOR CHILDREN: HARMONISATION OF LAWS ON CHILDREN EASTERN AND SOUTHERN ASIA* 6 (2007), *available at* http://www.sarpn.org/documents/d0002744/ACPF_children_rights.pdf.

14. GERALDINE VAN BUEREN, *THE UNITED NATIONS AND JUVENILE JUSTICE: A GUIDE TO INTERNATIONAL STANDARDS AND BEST PRACTICE*, at 8, U.N. Doc. ST/ESA.SER.M/49-50, U.N. Sales No. E.99.IV.7 (1999).

evidenced by the jurisprudential developments in the international framework for child justice which, while recognizing that “mankind owes to the child, the best it has to give,”¹⁵ has culminated into the principle of “the best interests of the child.”¹⁶ Regarding the purpose of child justice, the philosophy has moved from merely reclaiming the delinquent child to restoring children in conflict with the law.¹⁷ The difference being that “reclaiming,” meaning “retrieve,” “recover,” or “repossess,” is more limited than “restoring,” which has elements of reinstating, re-establishment and repair.¹⁸

Why then has the idea of human rights for children been important in the field of child justice? A report of one of the general discussions of the Committee on the Rights of the Child acknowledges that “the police officer or judge who took the decision to keep a youth in prison instead of returning him immediately to his parents assumed a heavy responsibility and the direction of an entire life might depend on a decision that was usually taken a few hours after the youth had been stopped in the street.”¹⁹ This explains the need to “minimize the contact of children with the criminal justice system at all levels and this necessitates the importance of the traditional justice system in improving the situation of children in conflict with the law.”²⁰ The fresh influence of restorative justice has arguably been most effective in the arena of child justice.²¹ It is

15. Geneva Declaration of the Rights of the Child ¶ 3, Sept. 26, 1924, [hereinafter Declaration of the Rights of the Child] available at <http://www.un-documents.net/gdrc1924.htm>.

16. CRC, *supra* note 9, at art. 3.

17. See U.N. Human Rights Council [UNHRC], Human Rights in the Administration of Justice, in Particular Juvenile Justice, ¶ 9, U.N. Doc. A/HRC/10/L.15 (Mar. 20, 2009) (calling upon states to prevent and address juvenile delinquency using inter alia restorative justice).

18. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1896, 1936 (3d ed. 1993).

19. U.N. Committee on the Rights of the Child [C.R.C.], 10th Sess., 254th mtg. ¶ 2, U.N. Doc. CRC/C/SR.254 (Nov. 17, 1995).

20. *Id.* at ¶ 11.

21. See UNICEF Welcomes Signing of Child Justice Bill into Law, UNICEF (May 18, 2009), http://www.unicef.org/media/media_49695.html (explaining that restorative justice is more effective than “retributive” approaches because restorative justice encourages the child offender, the victim, the families, and the community to work together to repair harm done and prevent further criminal acts, rather than focusing solely on punishment); cf. Ann Skelton, *For the Next*

recommended that states “adopt and encourage restorative justice and rehabilitation schemes for child offenders, focusing on diversion from the criminal justice system at all stages.”²² On the outset, let it be explained that while the terminologies of “juvenile justice” and “youth justice” have been the dominant terms in most places, especially in the West, the current trend, especially in Africa, is to use the term “child justice.”²³ “Child justice” is the preferred term in this paper, although both terms will be used interchangeably when necessary, especially when referring to international documents and jurisdictions that use the term “juvenile” or “youth.”

The UN has highlighted the seriousness of the problem of juvenile delinquency and youth crime in a number of its Congress meetings.²⁴ Child-perpetrated crimes have been on the rise.²⁵ Child offenders are dealt with in a wide range of ways from place to place.²⁶ Also, there are major practical and theoretical differences between systems and countries regarding the minimum age of criminal responsibility,²⁷ depending on how a particular society views the developmental

Generations: Remaking South Africa's Juvenile Justice System, in TO REPAIR THE IRREPARABLE: REPARATION AND RECONSTRUCTION IN SOUTH AFRICA 211, 215 (Erik Doxtader & Charles Villa-Vicencio eds., 2004) (contrasting the Western world's tough restorative justice approach to criminal behavior with the restorative justice model that was used in pre-colonial South Africa and to which South Africa is arguably returning; the restorative justice model emphasizes reconciliation, restitution, healing, and harmony).

22. AFR. CHILD POLICY FORUM, *supra* note 13, at 10.

23. For example, the United States uses the term “juvenile” while Canada, Australia, and New Zealand mainly use the term “youth justice.”

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

25. See Anthony L. Pillay, *Criminal Capacity in Children Accused of Murder: Challenges in the Forensic Mental Health Assessment*, 18 J. CHILD. & ADOLESCENT MENTAL HEALTH 17, 17 (2006) (discussing children's perpetration of violent crimes, particularly murder, and the role and challenges of forensic mental health assessments of children accused of murder).

26. See John A. Winterdyk, *Introduction*, in JUVENILE JUSTICE SYSTEMS: INTERNATIONAL PERSPECTIVES vii, xi (John A. Winterdyk ed., 1997) (comparing juvenile justice models between ten countries by analyzing differences in general features, key personnel and agencies, tasks, understanding of client behavior, purpose of intervention, and objectives and categorizing the countries on a continuum from “participatory” to “crime control”).

27. See *id.* at viii (contrasting the age at which children can be found guilty of an offense and the justification of each approach in the United Kingdom, the United States, and South Africa).

capacity of children to understand the societal prescripts of right and wrong and to act in accordance with that appreciation.²⁸ The Committee on the Rights of the Child reiterates the indivisibility of rights, holistic implementation, and the concept of partnership and cooperation in realizing rights.²⁹ “Political organization and systems of governance, as well as the social organization and economic situation of countries, have a bearing on their capacity and efforts to fulfill treaty obligations and realize the human rights of children”.³⁰ All these issues and more justify the need for a standardized way of dealing with children who find themselves in conflict with the law where the development of children’s rights and an international framework for child justice has been a key factor.

When it comes to justice for children, there have been several shifts in the policy approaches since the nineteenth century. The child justice system internationally has developed from an initial welfarist approach, to a justice model, then to a rights-based approach, and now there is a shift towards a restorative model. The welfarist approach mainly operated until around the 1960s and it was based on the doctrine of *parens patriae*, considering the state as a “kind and just parent.”³¹ The “justice” model³² was based on a law and order agenda.³³ Following this, perceptions of justice for children

28. See Pillay, *supra* note 25, at 18 (stating that the various definitions of “juvenile” or “young offender” are often influenced by “cultural, historical, political and social differences”).

29. See generally C.R.C., General Measures of Implementation for the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003) [hereinafter C.R.C., General Measures of Implementation] (assessing states parties’ measures of implementation of the Convention on the Rights of the Child and recommending approaches to further successful implementation of the Convention).

30. See Savitri Goonesekere, *Law Reform and Children’s Rights in Plural Legal Systems: Some Experiences in Sub-Saharan Africa*, in PROTECTING THE WORLD’S CHILDREN: IMPACT OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN DIVERSE LEGAL SYSTEMS 209, 214 (UNICEF 2007) (exploring the CRC’s unique feature that places obligations not only on states and their agencies, but also on non-state actors, and examining how political instability, internal conflict, and violence have affected children’s lives in Benin, Ghana, and Zimbabwe).

31. Ann Skelton, *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* 260 (2005) (unpublished L.L.D. thesis, University of Pretoria) (on file with author) [hereinafter Skelton Thesis].

32. *Id.* at 256.

33. Allison Morris & Henri Giller, *Conclusion*, in PROVIDING CRIMINAL

took a rights-based approach where competing interests were presented in terms of the cultural understanding of children as objects of rights and the modern understanding of children as subjects of rights. At the moment, most child justice jurisdictions are shifting to restorative justice, which among other things aims at involving the victim, the offender, and the community in dealing with crime, and strives for the reparation of harm and reintegration of the offender into society. Restorative justice is described as “a buzzword in progressive criminal justice reform throughout the world.”³⁴ It is generally defined as “a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of an offence and its implications for the future.”³⁵ In a context where the public is expecting the criminal justice system to provide a remedy, restorative justice as an approach involves “giving communities a greater stake in justice.”³⁶

I. HISTORICAL BACKGROUND TO CHILD JUSTICE

Sociologist Ellen Key predicted that the twentieth century would be a century of the child.³⁷ The idea of rights for children accused of committing offenses, and of treating them differently from adults, has philosophical underpinnings, the origins of which can be traced to the welfare model and the justice model.³⁸ Initially, a welfarist

JUSTICE FOR CHILDREN 151, 153 (Morris & Giller eds., 1983).

34. Ann Skelton, *Restorative Justice in Child Systems in Africa*, in CHILDREN'S RIGHTS IN AFRICA: A LEGAL PERSPECTIVE 129 (Julia Sloth-Nielsen ed., 2008).

35. Tony F. Marshall, *The Evolution of Restorative Justice in Britain*, 4 EUR. J. ON CRIM. POL'Y & RES. 22, 37 (1996).

36. See Ann Skelton, *Setting Standards for Diversion*, CHILD AND YOUTH CARE WORKERS ONLINE (June, 2001), <http://www.cyc-net.org/cyc-online/cycol-0601-skelton.html> (last visited Aug. 1, 2011) (explaining that communities are more likely to take responsibility and play an active role in raising children if they are given the opportunity to participate in justice outcomes).

37. Ann Skelton, *Restorative Justice as a Unifying Force for Child Justice Theory and Practice*, UNICEF <http://www.unicef.org/tdad/4annskelton.pdf> (last visited July 21, 2011); see also ELLEN KEY, THE CENTURY OF THE CHILD 7 (1909), available at <http://ia700308.us.archive.org/11/items/centuryofchild00keyeuoft/centuryofchild00keyeuoft.pdf>.

38. Odhiambo, *supra* note 10.

approach was employed, as initiated by the United States, until the 1960s when there was a shift towards a justice oriented model.³⁹ The debate on these theories concentrates on western criminal law systems.⁴⁰ Before the 18th century, childhood was not recognized as having special status at common law and age did not generally afford any special protection where children were charged with the commission of criminal offences. Children were theoretically subject to the same procedures and penalties as adults and little attempt was made to separate them from adults during incarceration.⁴¹ In 1835, the House of Lords Committee on Goals and Houses of Correction recommended the segregation of adult and child offenders, leading to the passing of the Parkhurst Act of 1838 and the setting up of a separate penitentiary for young offenders.⁴² Following this, reformist activity for separate institutions for children flourished such that at the end of the nineteenth century the first juvenile courts were established and institutions for young offenders were established as an alternative to deportation or imprisonment.⁴³ These reforms were initiated by “child savers,” two of which introduced the first juvenile court in the world, namely Lucy Flower and Julia Lathrop.⁴⁴

There was an emerging idea that children should be treated

39. Skelton Thesis, *supra* note 31, at 256.

40. Odhiambo, *supra* note 10, at 5.

41. See Julia Sloth-Nielsen, Juvenile Justice 51-52 (2001) (unpublished L.L.D. thesis, University of the Western Cape), available at http://www.sloth-nielsen.com/images/stories/uploader/juliathesisChapter_1.doc (explaining that although childhood was considered a mitigating factor during sentencing, children could be jailed with adults, flogged, and even executed as recently as the nineteenth century).

42. GILES PLAYFAIR, THE PUNITIVE OBSESSION: AN UNVARNISHED HISTORY OF THE ENGLISH PRISON SYSTEM 152 (1971).

43. See generally ALLISON MORRIS & HENRI GILLER, UNDERSTANDING JUVENILE JUSTICE (1987); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 9-10 (1969); DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 3-22 (2004).

44. Ann Skelton, *Restorative Justice as a Unifying Force for Child Justice Theory and Practice*, UNICEF <http://www.unicef.org/tdad/4annskelton.pdf> (last visited July 21, 2011). The court was first manned by two women, Jane Adams and Florence Kelley. One of the first probation officers at the court was also a woman: Ida Barnett Wells. Its first woman judge, Mary Bartelme, adjudicated girls' cases from 1913 and was appointed as the presiding judge for the Chicago Juvenile Court in the 1920s. Bernardine Dohrn, *All Ellas: Girls Locked Up*, 30 FEMINIST STUD. 302, 302 (2004).

differently due to their youth.⁴⁵ Under the principle of *parens patriae*, parental control was substituted by state control, the rationale being that the state would act in the child's best interests and would thereby enhance the child's welfare.⁴⁶ In 1891, a probation system was developed in Massachusetts in which criminal courts were required to appoint probation officers in cases involving children.⁴⁷ In 1899, the Illinois Juvenile Court Act was embodied with the theme that neglected, dependent, and delinquent children should all be dealt with in a separate children's court.⁴⁸ A juvenile court was thus established and with the inception of the court, "a sympathetic judge could now use his discretion to apply individualized treatments to rehabilitate children, instead of punishing them."⁴⁹ According to Zimring, the juvenile court system was the "most successful of American legal innovations."⁵⁰ The juvenile court's reaction to the problem of delinquency was viewed not as "punishment" but as "treatment," and an expert juvenile court judge, social service personnel, clinicians and probation officers would all work together to find a treatment plan suitable for a particular child's needs.⁵¹ The "rehabilitative ideal" thus required that the juvenile court look at the social and economic background of every child it was dealing with.⁵² As Odhiambo says, "the juvenile court would involve itself with the issue of 'what had to be done in

45. Odhiambo, *supra* note 10, at 24 (citing Deborah L. Mills, United States v. Johnson: *Acknowledging the Shift in the Juvenile Court System From Rehabilitation to Punishment*, 45 DEPAUL L. REV. 903, 904-05 (1996)).

46. Odhiambo, *supra* note 10, at 25.

47. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century*, in A CENTURY OF JUVENILE JUSTICE 42, 47 (Margaret K. Rosenheim et al. eds., 2002) [hereinafter Tanenhaus, *The Evolution of Juvenile Courts*].

48. Skelton Thesis, *supra* note 31, at 259.

49. See Tanenhaus, *The Evolution of Juvenile Courts*, *supra* note 47, at 42 (describing the juvenile court in Illinois, which lacked many important features added later, including private hearings, confidential records, the complaint system, detention homes, and probation officers).

50. See FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE xi (2005) (noting that the American model for the juvenile court is used as the basis for juvenile courts in legal systems throughout the world).

51. Odhiambo, *supra* note 10, at 22.

52. CLAIRE BREEN, THE STANDARD OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW 195 (2002).

the child's interests' and not that of guilt in a strict sense."⁵³ As summed up by Feld, the juvenile court, by virtue of the doctrine of *parens patriae*, placed emphasis on treatment, supervision and control rather than on punishment and allowed the state to intervene affirmatively in the lives of more young offenders.⁵⁴ Reformatories and industrial schools were founded to which children could be referred.⁵⁵ Early reformers stressed the responsibility of the state towards its children and although this has been criticized for over-reliance on institutionalization, Feld describes the reforms as important because they insisted on the separation of child and adult offenders and also recognized the interconnectedness of delinquency and neglect.⁵⁶

With a focus on looking at children as immature because of their age, welfarism did not regard children as rational or self-determining agents.⁵⁷ Such a view was also based on the moral intellectual development theory in criminology, which suggests that the younger the actor, the less probable their behavior is to always be informed by a sense of right and wrong.⁵⁸ However, under the welfare system, children were not allowed the due process safeguards of the law.⁵⁹ For example, children were not accorded procedural safeguards like legal representation and rules of evidence.⁶⁰ The system was full of protectionist policies and this, coupled with extensive reliance on the use of institutionalization often for indeterminate periods of time, led to a lot of criticism of welfarism.⁶¹ Despite its rehabilitative agenda,

53. Odhiambo, *supra* note 10, at 24.

54. BREEN, *supra* note 52, at 198 (citing Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 475 (1987)).

55. Ann Skelton, *From Cook County to Pretoria: A Long Walk to Justice for Children*, 6 NW. J. L. & SOC. POL'Y 413, 413 (2011) [hereinafter Skelton, *From Cook County to Pretoria*] (stating that sixty-four reformatories were created by 1867 in Scotland, England, and Wales).

56. *Id.* at 413.

57. Odhiambo, *supra* note 10, at 24.

58. *Id.* at 25.

59. *Id.* at 26.

60. *Id.*

61. *See, e.g.*, Application of Gault, 387 U.S. 1 (1967) (finding that a child's due process rights, right to counsel, privilege against self-incrimination, and protections under the Confrontation Clause of the U.S. Constitution were violated when he was sentenced to a maximum of six years in a state industrial school after an informal hearing in which no witnesses participated, the child did not have

there was a violation of rights and the potential for discriminatory treatment in the welfare system.⁶² As a result, the justice model developed in the late 1970s and early 1980s.⁶³

The justice approach adopted a law and order agenda. Punishment, and not “treatment of offenders” was its principal ideal.⁶⁴ Children were no longer to be regarded as immature, but as rational or self-determining.⁶⁵ Such a conceptualization of children mainly took ground after the celebrated 1967 decision of the U.S Supreme Court in *In Re Gault*, wherein it was declared that juveniles have a right to counsel and other due process rights because, “under the Constitution, the condition of being a boy does not justify a kangaroo court.”⁶⁶ Prior to *In Re Gault*, a juvenile delinquency proceeding was not considered a criminal proceeding and children did not need an attorney “because juvenile justice was intended to reform or rehabilitate a child rather than to punish,” despite the fact that “a child’s liberty is at just as much risk in a delinquency proceeding as an adult would be in a criminal proceeding.”⁶⁷ The court eventually acknowledged that “departures from established principles of due process have frequently resulted not in enlightened procedure, but arbitrariness. . . .”⁶⁸ In general, “the welfare model can be understood as one polarity on a theoretical continuum of possible models of regimes of juvenile justice.”⁶⁹

access to counsel, and the judge relied mostly on hearsay statements made by a probation officer).

62. See Odhiambo, *supra* note 10, at 28 (citing Nicholas Bala & Rebecca Jaremko Bromwich, *Introduction: An International Perspective on Youth Justice*, in *JUVENILE JUSTICE SYSTEMS* 1, 7 (Nicholas Bala et al. eds., 2002) (describing informal proceedings that violated the presumption of innocence and the right to counsel)).

63. Odhiambo, *supra* note 10, at 29.

64. Odhiambo, *supra* note 10, at 29.

65. *Id.*

66. *Gault*, 387 U.S. at 28 (Fortas, J.).

67. Stephen S. Schofield, 40 Years After *Gault*, Still Searching for True Justice (May 21, 2007) (unpublished term paper) (on file with The Juvenile Justice Foundation), available at <http://janetsisk.forumup.org/about821-janetsisk.html>.

68. *Gault*, 387 U.S. at 18-19.

69. See Odhiambo, *supra* note 10, at 34. See generally Thomas Crofts, *The Rise of the Principle of Education in the German Juvenile System*, 12 INT’L J. CHILD. RTS. 401, 401 (2004) (noting that the justice model is based on “individual responsibility” and focuses on punishing criminal acts while the welfare model focuses on intervention and the behaviors behind criminal acts).

As a rights culture developed in various countries, there was re-orientation on the philosophical basis for child justice, hence the development of a justice model as an alternative discourse.⁷⁰ This discourse did not regard child delinquents as victims of the environment in which they lived, and it gave priority to the liberty and agency of its individual citizens, which included children.⁷¹ In that regard, the justice model regarded children as “reasoning agents who are fully responsible for their actions and should be held accountable before the law.”⁷² As such, juvenile justice would therefore work to assess the degree of culpability of the individual child offender and apportion punishment in proportion to the offense, while according the full rights to due process to the individual child as per *Gault*, thereby restraining the power of the state.⁷³ Priority was given to suppression and deterrence of policies, and this was strengthened by the just deserts emphasis that gave academic legitimacy to punishment.⁷⁴ In line with the “just deserts” philosophy, child justice entails the balancing of the need to protect society against criminal behavior on the one hand and the need to pay special attention to the personal circumstances of the child offender on the other hand.⁷⁵ Bearing in mind the free will endowed on each individual, the focus is not on how to protect the best interests of the child but on retribution as the primary goal of justice for purposes of ensuring the protection of society.⁷⁶ In summation, under the welfare model, the state, as *parens patriae*, was responsible for the “immature” and “innocent” child, whose best interest had to be protected, whereas under the justice model, the capacity of the child to commit crime and thus bear the consequences of his actions was affirmed.⁷⁷

The principle set forth in *Gault* offers only limited procedural safeguards to delinquent youth.⁷⁸ The main criticism of the juvenile

70. Odhiambo, *supra* note 10, at 29.

71. *Id.* at 29-30.

72. *Id.* at 30.

73. *Id.*

74. GORDON BAZEMORE & MARA SCHIFF, *JUVENILE JUSTICE REFORM AND RESTORATIVE JUSTICE* 9 (2005).

75. Odhiambo, *supra* note 10, at 31.

76. *Id.*

77. *Id.*

78. Odhiambo, *supra* note 10, at 33 (citing BARRY KRISBERG, *JUVENILE*

court was that it still reflected some elements of *parens patriae*, and so it did not totally mirror its regular or adult counterpart in that it failed to fully extend the applicable due process rights to criminal trials of juveniles, thereby limiting the range of procedural rights to which children were entitled and subjecting them to “the worst of both worlds” in the process.⁷⁹ As a result, in the late 1980s, diversion of child offenders became common as an alternative to incarceration in many western jurisdictions.⁸⁰

Singer says that “it is difficult to gauge the needs of juveniles within a criminal justice system because that system is geared towards adult offenders.”⁸¹ He continues to say that the stated intent of juvenile justice was never just to provide a second chance but also to provide rehabilitative treatment, which refers to a system of dealing with the emotional, psychological, or sociological factors that lead individuals to commit serious acts of violence.⁸² According to Singer, a rehabilitative-treatment ideology makes sense in a system of juvenile justice where something is done to deal with whatever troubled behavior led to an act of delinquency or crime.⁸³

At the heart of the justice model is the United States of America, which, together with Somalia, has not ratified the CRC.⁸⁴ As Skelton

JUSTICE: REDEEMING OUR CHILDREN 57 (2005)).

79. *Id.*

80. This led to views of corporatism as a third model of juvenile justice, which did not gain much significance as a theory. See John Pratt, *Corporatism: The Third Model of Juvenile Justice*, 29 BRIT. J. CRIMINOLOGY 236, 245 (1989) (identifying a new model of juvenile justice found in advanced welfare societies in which “the capacity for conflict and disruption is reduced by centralization of policy, increased government intervention, and the co-operation of various professional and interest groups”).

81. See Simon I. Singer, *Youthful Offender Status and the Reproduction of Juvenile Justice Within Systems of Criminal Justice: The Case of William Shrubbsall*, 17 BUFF. PUB. INT. L.J. 107, 116 (1999) (arguing that a seventeen-year-old who murdered his mother and was initially identified as a criminal, but was later given a youthful offender status without any rehabilitation or treatment, returned to violent crimes later in life because of the failure to address the underlying causes of his crime).

82. *Id.* at 108.

83. *Id.* at 118-19.

84. The United States and Somalia signed the treaty in 1995 and 2002 respectively. Among other things, the United States’s reasoning for not ratifying the treaty is based on “right-wing” concerns bordering on fears that the CRC’s provisions potentially disempower parents in the upbringing of their children and

says, the most concerning feature of the law and order agenda for children in the United States' criminal justice system has been the tendency to include increasing numbers of children in the adult criminal justice system, referred to as a "waiver," of the jurisdiction of the juvenile court.⁸⁵ As a result, there has been a radical shift from a focus on the "needs" of the child to the "deeds" of the child, because the system is offense-driven,⁸⁶ thereby ignoring the differences in development, maturity, capacity, and culpability between children and adults.⁸⁷ In trying children as adults, children are subject to minimum sentences which places the American criminal justice system at odds with international standards.⁸⁸ A case in point is that of *State v. Pittman* where a thirty year sentence, the minimum sentence for murder in South Carolina, was given to Pittman, who was twelve-years-old when he committed murder.⁸⁹ Although Pittman's convictions were vacated on July 27, 2010 when the Court of Common Pleas for the Sixth Judicial Circuit⁹⁰ granted Pittman post-conviction relief based on the fact that his Counsel was constitutionally ineffective for failing to pursue a plea agreement where Pittman could have pled guilty to voluntary manslaughter and potentially received a lighter sentence,⁹¹ the system of trying children

undermine the family. Susan Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 437, 438-41 (1996).

85. Skelton Thesis, *supra* note 31.

86. See generally PATRICK GRIFFIN ET AL., TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 17 (1998) (describing the conditions for waiver, including mandatory waiver in some states or statutory exclusion from juvenile court jurisdiction for certain offenses and under specified conditions).

87. See Barry C. Feld, *Rehabilitation, Retribution and Restorative Justice: Alternative Conceptions of Juvenile Justice*, in RESTORATIVE JUSTICE FOR JUVENILES: REPAIRING THE HARM OF YOUTH CRIME 17, 32 (G. Bazemore & L. Walgrave eds., 1999) (arguing that the developmental and psychological differences between children and adults affects children's ability to make sound judgments).

88. Johan D. Van der Vyver, *International Standards for the Promotion and Protection of Children's Rights: American and South African Dimensions*, 15 BUFF. HUM. RTS. L. REV. 81, 84 (2009).

89. *State v. Pittman*, 647 S.E.2d 144, 151-53 (S.C. 2007).

90. *Pittman v. South Carolina*, No. 07-CP-12-00444, at 40 (S.C. Ct. Com. Pl. 6th Jud. Cir. Aug. 4, 2010) (order granting applicant's petition for post-conviction relief).

91. *Id.* at 40.

as adults and subjecting them to minimum sentences still stands.⁹² In other jurisdictions, the law is more progressive in terms of minimum sentences for children. For example, in South Africa, the Constitutional Court has held in the case of *S v. B* that “the minimum sentencing regime limits the discretion of sentencing officers by orienting them away from non-custodial options, by interfering with the individualization of sentences, and by giving rise to longer prison sentences.”⁹³ The court, however, stated that the traditional aims of punishment for child offenders have to be re-appraised in the light of international instruments.⁹⁴ However, following this decision, the Criminal Law (Sentencing) Amendment Act 38 of 2007 was passed, reinstating minimum sentences for sixteen and seventeen-year-olds. This was challenged by the Centre for Child Law and, the case having gone through the High Court⁹⁵ and the Constitutional Court,⁹⁶ the Criminal Law Amendment Act (as amended) was declared to be invalid to the extent that it included sixteen and seventeen-year-olds. Justice Cameron reasoned that “the Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children’s greater physical and psychological vulnerability.”⁹⁷ This vulnerability therefore merits consideration when handling children in the justice system. Thus, minimum sentences are not applicable to children below the age of eighteen in South Africa.

Perhaps, the difficulty with the United States is that it has a limited acceptance of children’s rights, having not ratified the CRC. As such, it is not easy to see child offenders through the prism of international human rights for children. However, positive changes are taking place in the child justice system of the United States. Having abolished capital punishment for children (under eighteen years of age) in 2005 in the popular case of *Roper v. Simmons*,⁹⁸ the Supreme

92. See GRIFFIN, *supra* note 86, at 1 (stating that all states allow the criminal prosecution of juveniles as adults under certain circumstances).

93. Skelton, *From Cook County to Pretoria*, *supra* note 55, at 424.

94. *Brandt v. State* 2004 (513/2003) SA 1 (SCA) at ¶ 13-15 (S. Afr.).

95. *Centre for Child Law v Minister of Justice and Others* 2008 JOL 22687 (T) (S. Afr.).

96. *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 477 CC (S. Afr.).

97. *Id.* ¶ 26.

98. 543 U.S. 551, 575-78 (2005).

Court has recently abolished life sentences for children without the possibility of parole for non-homicide cases as impermissible under the Eighth Amendment's cruel and unusual punishment clause in *Graham v. Florida*.⁹⁹ The court had recourse to the judgments of other nations and the international community and considered the absence of such sentences in other countries, the United States being the only nation that imposed this type of sentence.¹⁰⁰ Perhaps, this reference to the international community, which by the way has ratified the CRC which prohibits life imprisonment without the possibility of parole and the death penalty for children,¹⁰¹ is evidence that the United States will soon be ascribing to the international framework for child justice.

II. THE INTERNATIONAL FRAMEWORK FOR CHILD JUSTICE

The General Assembly of the United Nations by its Resolution 44/25 of November 20, 1989, adopted the Convention on the Rights of the Child¹⁰² ("CRC" or the "Convention"), which has come to be described not only as "a landmark for children and their rights,"¹⁰³ but also as a "widely acclaimed and almost universally endorsed Convention."¹⁰⁴ In the words of Michael Freeman, the CRC is a "landmark in the history of childhood."¹⁰⁵ The CRC "constitutes a common reference point against which progress can be measured and results compared."¹⁰⁶ For example, one of its distinctive features is

99. *Graham v. Florida*, No. 08-7412, slip op. at 31-32 (U.S. May 17, 2010).

100. *Id.* at 29, 31. This approach of referring to other countries has been used before in Eighth Amendment cases. *See, e.g., Roper*, 543 U.S. at 575-78.

101. CRC, *supra* note 9, art. 37(a).

102. *Id.* art. 3.

103. *Fact Sheet No. 10, The Rights of the Child*, OFF. OF THE HIGH COMM'R FOR HUM. RTS., <http://www.ohchr.org/Documents/Publications/FactSheet10Rev.1.en.pdf> (last visited July 21, 2011).

104. MICHAEL FREEMAN, *THE MORAL STATUS OF CHILDREN: ESSAYS ON THE RIGHTS OF THE CHILD* 2 (1997).

105. Michael Freeman, *Introduction: Children as Persons*, in *CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE* 1 (Michael Freeman ed., 1996) [hereinafter Freeman, *Introduction*].

106. Marta Santos Pais, *A Vision for Children: The Convention on the Rights of*

that its monitoring and implementation by the Committee on the Rights of the Child (the “Committee”) gave rise to a new model of implementation called the General Measures of Implementation.¹⁰⁷ It is said that the CRC constitutes a true challenge for the States because unlike many other international instruments, besides requiring legislative amendments and institutional adjustments, it also requires the adoption of and adjustment to a child rights oriented philosophy.¹⁰⁸ Freeman rightly points out that “it would be wrong to assume that the CRC is itself the last word on children’s rights.”¹⁰⁹ This is evidenced by the adoption of the African Charter on the Rights and Welfare of the Child (“ACRWC” or the “Children’s Charter”)¹¹⁰ which, as a regional treaty, has been described, in comparison with others, as a pioneering treaty and “the most progressive of the treaties on the rights of the child.”¹¹¹ But how did this journey start and how has this philosophy been adopted in line with child justice?

Prior to the CRC’s adoption, the international community adopted the UN Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”),¹¹² which provided a very significant basis for the development of child justice. Immediately after the

the Child, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND 131, 132 (Yael Danieli et al. eds., 1999).

107. C.R.C., General Measures of Implementation, *supra* note 29, ¶ 2. The general measures are: non-discrimination (Art. 2), respect for the views of the child (Art. 12), the best interest of the child (Art. 3) and the right to life (Art. 6). *Id.* at ¶ 12.

108. See *Making Children’s Rights Work in North Africa: Country Profiles on Algeria, Egypt, Libya, Morocco and Tunisia*, INTERNATIONAL CHILDREN RIGHTS BUREAU (Mar. 2007), <http://www.e-joussour.net/en/node/474> (last visited Aug. 4, 2011) (arguing that implementing and following the CRC is a “continuous and long-term exercise” that is made easier through the sharing of successful measures and experiences among states with similar circumstances).

109. Freeman, *Introduction*, *supra* note 105, at 4.

110. Organization of African Unity [O.A.U.], African Charter on the Rights and Welfare of the Child, 1990, O.A.U. Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999) [hereinafter African Charter].

111. See GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 402 (1995) (describing the unique features of the Charter, such as its focus on the rights and duties of individuals and its advanced system of implementation via an independent committee).

112. See G.A. Res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 96, U.N. Doc A/RES/40/33 (Nov. 29, 1985) (providing a guide for states to promote juvenile welfare and minimize the necessity of intervention by the juvenile justice system).

CRC's adoption, the UN Guidelines for the Prevention of Juvenile Delinquency (the "Riyadh Guidelines"),¹¹³ and the UN Rules for the Protection of Juveniles Deprived of their Liberty (the "JDL Rules"),¹¹⁴ were adopted in 1990 thereby enriching the international justice system for children. In 1997, the UN Economic and Social Council adopted the UN Guidelines for Action on Children in the Criminal Justice System.¹¹⁵ Among other things, these rules and guidelines provide for the circumstances under which children can be deprived of their liberty and the conditions under which they should be kept while respecting children's human rights.¹¹⁶

In 1989, the CRC revolutionized children's rights, and the area of child justice was significantly altered.¹¹⁷ Over the centuries, there has been a clear move from the doctrine of *parens patriae* which by and large entrusted parents with rights over their children, and the State as the ultimate guardian of children.¹¹⁸ In many cases, young people in the child justice system are generally viewed only in the narrow perspective as law breakers and a threat to the public.¹¹⁹ However, children are now a subject of human rights and law rather than an object of it.¹²⁰ This has therefore led to the emergence of a rights-based model of child justice. As is required of Article 40(3) of the CRC, a "juvenile justice system" requires the institution of separate laws, procedures, and institutions that apply specifically to children as opposed to adults.¹²¹ "By acknowledging children as bearers of certain minimum universally agreed standards that have now crystallized as children's human rights, the CRC and other

113. See G.A. Res. 45/112, U.N. GAOR, 45th Sess., Supp. No. 68, U.N. Doc A/RES/4/112 (Dec. 14, 1990) (creating a partnership between young persons and society by emphasizing socialization, education, and life in the family and the community to prevent juvenile delinquency).

114. See G.A. Res. 45/113, U.N. GAOR, 45th Sess., Supp. No. 68, U.N. Doc. A/RES/45/113 (Dec. 14, 1990) (ensuring that juvenile imprisonment only be used as a last resort, and prescribing standards for the facilities and conditions of juvenile imprisonment).

115. E.S.C. Res. 1997/97, U.N. Doc. E/RES/1997/97 (Jan. 23, 1997).

116. *Id.* at 87-88.

117. Odhiambo, *supra* note 10, at 45 (citing VAN BUEREN, *supra* note 108, at 169).

118. Odhiambo, *supra* note 10, at 3-4.

119. *Id.* at 8.

120. *Id.* at 4.

121. CRC, *supra* note 9, at art. 40(3).

international norms on the rights of the child stand firmly in the theoretical justification of any issue regarding the child,” including child justice.¹²² Odhiambo argues that “by placing juvenile justice laws on this continuum, devoid of children’s rights discourse, a number of violations of children’s rights have been inevitable.”¹²³ Thus, the children’s rights model comes as an “alternative theoretical basis through which child justice can now be viewed, both in light of the CRC and other “soft law” derived from child justice instruments.”¹²⁴ Olowu also attests to the fact that the adoption of the CRC, “signaled the beginning of an era of concrete efforts by nations of the modern world to give legal recognition and protection to the rights of children, although the subject had been on the international agenda since shortly after the First World War.”¹²⁵

When the CRC first came into force, it established a framework for sweeping changes in the way children’s rights were recognized across the world.¹²⁶ The fact that “children’s rights have come full circle, at least in principle” and “the notion that children have rights is no longer an issue of debate or contention” is a common understanding.¹²⁷ The CRC heralded a critical shift in perspectives on children, from victims and recipients of welfare to individual rights holders.¹²⁸

There have been a number of Declarations and Resolutions concerning children’s rights and wellbeing.¹²⁹ Thus, in the development of child rights, there have been three significant phases

122. Odhiambo, *supra* note 10, at 5.

123. *Id.* at 7.

124. *Id.* at 12.

125. 'Dejo Olowu, *Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child*, 10 INT'L J. CHILD RTS. 127, 127 (2002).

126. AFR. CHILD POLICY FORUM, *supra* note 13, at 4.

127. *Id.* at 4.

128. WHAT AFRICAN CHILDREN AND YOUTH THINK AND FEEL: AN OPINION POLL OF CHILDREN AND YOUTH IN EASTERN AND SOUTHERN AFRICA 6 (2006), *available at* <http://www.africanchildforum.org/Documents/PollPressConferenceSummary.pdf>.

129. See Julia Sloth-Nielsen, *Children's Rights and the Law in African Context: An Introduction*, in CHILDREN'S RIGHTS IN AFRICA: A LEGAL PERSPECTIVE 3 (Julia Sloth-Nielsen ed., 2008) [hereinafter Sloth-Nielsen, *Children's Rights and the Law*] (referring to those Declarations and Resolutions adopted by the OAU/African Union).

from the beginning of the last century to the present,¹³⁰ starting with the adoption of the Geneva Declaration on the Rights of the Child by the League of Nations in 1924, also known as the beginning of “the formal establishment of an international movement for children’s rights.”¹³¹ This phase was followed by the adoption of the Declaration on the Rights of the Child in 1959, and the International Year of the Child in 1979 to celebrate the Declaration’s twentieth anniversary.¹³² Also in 1979, the drafting of the Convention on the Rights of the Child began, which was finally adopted in 1989 by the UN General Assembly.¹³³ Now, the development of children’s rights is in its third phase, where the focus is on implementation, accountability, and monitoring of the CRC following its unprecedented and near universal ratification, which demonstrates the global commitment to the rights of children as a basis for action.¹³⁴ “One of the most innovative features of the CRC is the emphasis on children’s right to participate, to be heard, and to have their views considered.”¹³⁵ Following the Beijing Rules,¹³⁶ the CRC has now made diversion practices a binding feature of child justice systems. Diversion, which refers to “the process of channeling children away from the formal criminal justice systems and can take place at any stage of the criminal procedure, is now universally seen

130. AFR. CHILD POL’Y FORUM, IN THE BEST INTERESTS OF THE CHILD: HARMONISING LAWS IN EASTERN AND SOUTHERN AFRICA 11 (2007), available at http://www.crin.org/docs/acpf_best_interests.pdf. [hereinafter AFR. CHILD POL’Y FORUM, IN THE BEST INTERESTS OF THE CHILD].

131. ALISON M.S. WATSON, THE CHILD IN POLITICAL ECONOMY: A PLACE AT THE TABLE 17 (2009).

132. See Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/RES/1386(XIV) (Nov. 20, 1959) [hereinafter U.N. Declaration of the Rights of the Child]; see also Jesse B. Barber, *The International Year of the Child-1979*, 71 NAT’L MEDICAL ASS’N 427, 427 (1979), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2537253/pdf/jnma00025-0015.pdf>.

133. *Overview: Convention on the Rights of the Child*, UNICEF, http://www.unicef.org/ceecis/overview_1583.html (last visited July 21, 2011). Soon after the CRC’s adoption, there was a World Summit on Children in September 1990, which had the effect of enhancing a record number of ratifications of the CRC.

134. See AFR. CHILD POLICY FORUM, *supra* note 13, at 2; see also *Convention on the Rights of the Child: Frequently Asked Questions*, UNICEF (Feb. 10, 2006), http://www.unicef.org/crc/index_30229.html (stating that the CRC remains the most rapidly and widely ratified international human rights treaty).

135. *Id.* at 7.

136. G.A. Res. 40/33, ¶ 11, U.N. Doc. A/RES/40/33 (Nov. 29, 1985).

as an integral aspect of the rehabilitative and reintegrative parts of each and every child justice system.”¹³⁷ The idea of having a system dealing with child offenders can be traced back to the 1924 Declaration which provided that a “delinquent child must be reclaimed.”¹³⁸ The 1924 Declaration recognizes that “mankind owes to the Child the best that it has to give,” and provides five principles.¹³⁹ Similarly, the 1959 Declaration reaffirms that “mankind owes to the child the best it has to give.”¹⁴⁰ Principle 2 of the Declaration states that “the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.”¹⁴¹ “In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.”¹⁴²

III. THE REGIONAL FRAMEWORK FOR CHILD JUSTICE IN AFRICA

Member states of the Organization of African Unity (“OAU”) adopted a Declaration on the Rights and Welfare of the African Child in 1979,¹⁴³ which recognized the need to take all appropriate measures to promote and protect the rights and welfare of the African child. This formed the basis for the African Charter on the Rights and Welfare of the Child (“ACRWC”),¹⁴⁴ which was adopted in 1990 by the Assembly of Heads of State of the then OAU and which entered into force in 1999.¹⁴⁵ Although inspired by trends in the UN system, the ACRWC prides itself on its “African perspective

137. Odhiambo, *supra* note 10, at 13.

138. Geneva Declaration of the Rights of the Child, *supra* note 15, at 2. The Geneva Declaration was adopted by the League of Nations on September 26, 1924 and only had 5 paragraphs.

139. *Id.* (highlighting principles of: (1) child development; (2) providing for hungry, sick, backward, delinquent, and orphan children; (3) relief to distressed children; (4) earning a livelihood and protection against exploitation; and (5) service to fellow men).

140. U.N. Declaration of the Rights of the Child, *supra* note 132, at pmb1.

141. *Id.* at 2.

142. *Id.*

143. African Charter, *supra* note 110, at pmb1.

144. *Id.*

145. *Id.*

of rights,”¹⁴⁶ and rather than replacing the existing standards in the CRC, it adds to them.¹⁴⁷ It was intended to be a complementary mechanism to that of the UN in order to enhance the enjoyment of the rights of children in Africa.¹⁴⁸ Its conceptualization of the rights and welfare of the African child takes into consideration the virtues of the African cultural heritage, historical background, and the values of the African civilization.¹⁴⁹ Such a focus on African children is important because in many respects, “children are more likely to be victims of human rights violations than adults, and African children are more likely to be victims than children on other continents.”¹⁵⁰ Causes of human rights violations in Africa, such as poverty, HIV/AIDS, warfare, famine, and harmful cultural practices have a disproportionate impact on the continent’s children.¹⁵¹ However, since the entry into force of the ACRWC, considerable progress has been made towards making children’s rights visible in a variety of domains on the continent.¹⁵² As a regional treaty, the ACRWC has been described, in comparison with others, as a pioneering treaty and “the most progressive of the treaties on the rights of the child.”¹⁵³

The CRC and the ACRWC are bringing about a paradigm shift in attitudes and understanding of child rights.¹⁵⁴ The challenge is to translate the provisions in the charters into concrete improvements in children’s day-to-day lives.¹⁵⁵ African states need to ensure that they move away from seeing the provisions as standards to aspire

146. Sloth-Nielsen, *Children’s Rights and the Law*, *supra* note 129, at 3.

147. See Amanda Lloyd, *Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet*, 10 INT’L J. CHILD. RTS. 179, 179-80 (2002) (explaining that the African Charter represents the “‘African’ concept of human rights” and can be interpreted alongside the CRC, which takes a more general and global stance).

148. *Id.*

149. *Id.* at 180.

150. Frans Viljoen, *The African Charter on the Rights and Welfare of the Child*, in INTRODUCTION TO CHILD LAW IN SOUTH AFRICA 214, 214-15 (C.J. Davel ed., 2000).

151. *Id.*

152. Sloth-Nielsen, *Children’s Rights and the Law*, *supra* note 129, at 4.

153. VAN BUEREN, *supra* note 111, at 402.

154. See generally Sloth-Nielsen, *Children’s Rights and the Law*, *supra* note 129 (describing briefly the evolution of children’s rights in Africa leading up to the creation of the ACRWC).

155. Geneva Declaration of the Rights of the Child, *supra* note 15, at 7.

towards, to operational obligations.¹⁵⁶

Like the CRC, the ACRWC is a comprehensive instrument that sets out rights and defines universal principles and norms for the status of children.¹⁵⁷ The ACRWC and the CRC are the only international and regional human rights treaties that cover the whole spectrum of civil, political, economic, social and cultural rights.¹⁵⁸ Both the ACRWC and the CRC define a child as a human being under the age of eighteen,¹⁵⁹ although the CRC goes further to say unless majority is attained earlier under the law applicable to the child.¹⁶⁰ In view of the divergent criminal justice systems in Africa, having a definitive age for children under the ACRWC is applauded as commendable.¹⁶¹ It is a second global and first regional binding instrument that identifies the child as a possessor of certain rights and makes it possible for the child to assert those rights in domestic proceedings.¹⁶² The Charter therefore adopts a holistic approach to

156. See AFR. CHILD POLICY FORUM, *supra* note 13, at 7 (noting that there are few “formalised institutional mechanisms for children’s participation”).

157. Danwood Mzikenge Chirwa, *The Merits and Demerits of the African Charter on the Rights and Welfare of the Child*, 10 INT’L J. CHILD. RTS. 157, 157 (2002).

158. *The African Charter on the Rights and Welfare of the Child: For Children and Youth*, UNICEF, http://www.unicef.org/esaro/children_youth_5930.html (last visited July 10, 2011).

159. African Charter, *supra* note 110, art. 2; CRC, *supra* note 9, art. 1.

160. This provision has been criticized as ambiguous and weak and lacking specific protection within the African context, such as its relation to child betrothals, child participation in armed conflict and child labor. See Amanda Lloyd, *A Theoretical Analysis of the Reality of Children’s Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child*, 2 AFR. HUM. RTS. L.J. 11, 20 (2002) [hereinafter Lloyd, *Theoretical Analysis of the Reality of Children’s Rights*]. Lloyd also explains that the ACRWC has a “comprehensive, inclusive and progressive provision for general obligations and responsibilities of state parties” and that it adopts “a modern human rights-centric approach, bestowing many rights directly on the child by entitlement,” which highlights the importance of states adhering to the principles and putting them into effect. See also Amanda Lloyd, *The African Regional System for the Protection of Children’s Rights*, in CHILDREN’S RIGHTS IN AFRICA: A LEGAL PERSPECTIVE 33, 35-36 (Julia Sloth-Nielsen ed., 2008) [hereinafter Lloyd, *The African Regional System*].

161. Cf. AFR. CHILD POLICY FORUM, *supra* note 13, at 9 (recommending that African nations define a child as “any person under the age of eighteen” to bridge the gap between the CRC and the African Charter and to ensure adequate protection of children’s rights).

162. Chirwa, *supra* note 157, at 157.

issues relating to the rights and welfare of the child by affirming the principle that rights are indivisible and interdependent.¹⁶³ Article 4(1) of the ACRWC takes a more comprehensive approach to the protection of children's rights by making the best interests principle under the Charter, whereas the CRC regards the principle as "a primary consideration," meaning that other considerations are equally determinative.¹⁶⁴ The lower standard in the CRC has been interpreted as a procedural fairness requirement.¹⁶⁵

Children in most African countries constitute fifty percent of the population,¹⁶⁶ and in recent years, there has been a lot of creation of children's rights and law across the continent.¹⁶⁷ Until recently, most African juvenile justice systems were modeled on the ideology of the justice-welfare model as they existed at the time of reception of these laws.¹⁶⁸ In recent years, domestication of children's rights across the continent continues to take place at different paces and in varied fashions. While some states elaborate children's rights in African constitutions, others do not.¹⁶⁹ Further, some states have enacted children's laws either covering both welfare and justice of children in one statute or separately. For example, the South African constitutional clause pertaining to children's rights has been "hailed as the most extensive constitutional protection for children anywhere," while the first comprehensive children's act on the continent was adopted in Uganda in 1996.¹⁷⁰ According to Sloth-Nielsen, "these endeavours have the aim of reshaping the colonial heritage, of modernizing and synthesizing child law, and of domesticating international human rights standards, and of targeting especially vulnerable groups of children for enhanced protection."¹⁷¹

163. *Id.*

164. Lloyd, *supra* note 147, at 183; Chirwa, *supra* note 157, at 160.

165. Lloyd, *supra* note 147, at 183.

166. Sloth-Nielsen, *Children's Rights and the Law*, *supra* note 129, at 6.

167. *Id.*

168. Odhiambo, *supra* note 10, at 42.

169. Compare THE CONSTITUTION OF SIERRA LEONE, (Oct. 1, 1991), available at <http://www.sierra-leone.org/Laws/constitution1991.pdf> (providing for human rights generally, without any specific mention of children's rights) with CONSTITUTION OF THE REPUBLIC OF UGANDA, (Oct. 8, 1995), available at http://www.ugandaembassy.com/Constitution_of_Uganda.pdf (providing for specific children's rights as opposed to general human rights).

170. Sloth-Nielsen, *Children's Rights and the Law*, *supra* note 129, at 4-5.

171. *Id.*

This protection is as important when the child is in conflict with the law, as it is when his welfare is in jeopardy. The modernization of laws in Africa has seen a lot of cross-border fertilization, which has most extensively been in the field of child justice both from the programmatic and legislative points of view.¹⁷² Successful child justice reforms have been introduced in many African jurisdictions, with a “growing continental emphasis on diversion and alternative programmatic responses to children in conflict with the law,”¹⁷³ which has seen the incorporation of restorative justice as an important element of a comprehensive child justice regime.¹⁷⁴

In 2000, Steiner and Alston described the African regional human rights system as “the newest, the least developed or effective. . .the most distinctive and the most controversial.”¹⁷⁵ However, the African regional system for the protection of children’s rights has been hailed as the most progressive achievement of all regional systems, as it is the only system to provide a comprehensive mechanism for the protection and promotion of children’s rights at a regional level, which is an innovation in the arena of children’s rights.¹⁷⁶

The ACRWC stresses the need to consider African cultural peculiarities in matters relating to the rights of children.¹⁷⁷ Many scholars have rightly observed that the ACRWC offers a higher level of protection than that offered by the CRC.¹⁷⁸ The ACRWC recognizes children as direct bearers of rights who in turn bear

172. *Id.*

173. *Id.* at 6. Sloth-Nielsen commends such approaches as suitable for Africa because they “overcome resource constraints that prevail in African context.” *Id.*

174. See Ann Skelton, *Restorative Justice in Child Justice Systems in Africa*, in CHILDREN’S RIGHTS IN AFRICA 129, 132-35 (Julia Sloth-Nielsen ed., 2008) [hereinafter Skelton, *Restorative Justice Systems in Africa*] (explaining the application of restorative justice models in Uganda, Ghana, and South Africa).

175. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 920 (2d ed. 2000).

176. Lloyd, *The African Regional System*, *supra* note 160, at 33.

177. See Sloth-Nielsen, *Children’s Rights and the Law*, *supra* note 129, at 23 (stating that the ACRWC was drafted due to the belief that the CRC did not adequately address the unique socio-cultural and economic situations in Africa).

178. See *id.* (acknowledging that the incorporation of African socio-economic situations and cultural values into the African Charter provides more protection to African nations than the CRC); see also Olowu, *supra* note 125, at 128 (noting that the Charter includes African experiences when considering children’s rights).

responsibilities to others.¹⁷⁹ Its monitoring body, the African Committee of Experts on the Rights and Welfare of the Child (“ACERWC”), has an extensive mandate to ensure state parties comply with their treaty obligations.¹⁸⁰ The ACEWRC can receive state reports, individual communications as well as conduct ad hoc missions and onsite visits to states considered to be violating their treaty obligations and it also has standing before the African Court of Human and People’s Rights.¹⁸¹ The ACRWC, so far ratified by forty-five out of the fifty-three African nations, is a combination of the values of the CRC and the African historical and cultural values, drafted due to the fact that some of the CRC provisions are vague because the CRC had to satisfy the culturally diverse international community involved in its drafting.¹⁸² The preamble to the ACRWC reaffirms the proclamations of the 1979 Declaration and explicitly recognizes that the child in Africa “occupies a unique and privileged position in society.”¹⁸³

The ACRWC’s juvenile justice provisions are similar to those in the CRC and in certain respects the CRC provides for more obligations than the Charter, such as the express provision on diversion (Article 40(3)), which is not similarly included in the ACRWC (Article 17).¹⁸⁴ In Article 5, which provides for the inherent right to life, the ACRWC prohibits the death penalty for crimes committed by children,¹⁸⁵ but is silent regarding its position on life imprisonment.¹⁸⁶ This omission is unfortunate because contemporary human rights law establishes that life imprisonment without a

179. African Charter, *supra* note 110, art. 31.

180. This mandate extends further than that of the UN Committee on the Rights of the Child, which only has jurisdiction to receive and comment on state reports submitted periodically.

181. Lloyd, *The African Regional System*, *supra* note 160 at 33.

182. *Id.* at 34-35.

183. African Charter, *supra* note 110, at pmbl.

184. Odhiambo, *supra* note 10, at 3.

185. *See* African Charter, *supra* note 110, art. 5.; *see also* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 6, U.N. Doc. A/6316 (Dec. 16, 1966); Organization of American States, American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

186. *See* African Charter, *supra* note 110, art. 5 (providing a right to life, but lacking regulation regarding life imprisonment).

possibility of release is unacceptable for children.¹⁸⁷

Article 17 of the ACRWC incorporates a number of basic principles on which a juvenile justice system should be based. A child accused or found guilty of a crime is entitled to “special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others.”¹⁸⁸ Chirwa’s analysis of Article 17 is that it breaks new ground for the protection of children’s rights in three respects.¹⁸⁹ In the first place, it provides for the speedy determination of matters involving children.¹⁹⁰ Secondly, unlike the CRC, Article 17(3) expressly and clearly provides that reformation and re-integration of the child must be the essential aim of treatment of the child during trial and after conviction. This strengthens the contention that “rehabilitation is a right of every prisoner.”¹⁹¹ Thirdly, Article 17(2)(c)(iii) guarantees every child the right to be afforded legal and other appropriate assistance in the preparation and presentation of his defense.¹⁹² Again, as observed by Chirwa, “this formulation is not qualified in any way and finds no comparison in any other human rights instrument.”¹⁹³ Another safeguard in Article 17 is that the press and the public are prohibited from the trial of a child, although this has been described as a weakness for its effect of preventing human rights violations from being exposed.¹⁹⁴ However, the strictness of the child’s privacy is more in the best interests of the child than is the need for exposing human rights violations through the media.¹⁹⁵ Needless to say, the exposure of the violations can still be achieved without the media necessarily being present at trial and divulging the identity of the child. South Africa provides a good example of ensuring the right to privacy regarding the identity of

187. See Chirwa, *supra* note 157, at 161-62 (noting that the Charter should therefore have included a provision similar to article 37(a) of the CRC to protect children from life imprisonment without a possibility of release).

188. African Charter, *supra* note 110, art. 17(1).

189. Chirwa, *supra* note 157, at 166.

190. See African Charter, *supra* note 110, art. 17(2)(c)(iv); see also Chirwa, *supra* note 157, at 166 (suggesting that this “entails a pace that is over and above that applicable to adults”).

191. Chirwa, *supra* note 157, at 166.

192. *Id.*

193. *Id.*

194. *Id.* at 167.

195. *Id.*

child offenders as seen in the case of *DPP KZN v. P*,¹⁹⁶ where a twelve-year-old girl was convicted of her grandparent's murder, but her identity has remained private to date.¹⁹⁷ Article 17 also provides that children be "separated from adults in their place of detention or imprisonment."¹⁹⁸ The importance of this provision cannot be emphasized enough as it is a significant problem in Africa, as seen in the case of Evance Moyo described at the beginning of this paper.

Amongst its weaknesses, the ACRWC does not provide for alternative measures of dealing with children to criminal proceedings nor does it say that imprisonment of the child must be used as a measure of last resort and for the shortest period of time.¹⁹⁹ It also does not discuss the importance of protecting children from the adverse effects of criminal proceedings and sanctions and it does not reiterate all rights surrounding the administration of justice, especially those in the ICCPR.²⁰⁰ For state parties that ratified the ICCPR, perhaps the omission does not really have much effect on them, as they are bound by the provisions of the ICCPR when it comes to these rights.

Both the CRC and the African Children's Charter impose two general obligations on states: to adopt legislation and to formulate and implement other measures to realize children's rights.²⁰¹ The CRC is the primary instrument that guides the development of child justice and it is "seen as the overarching framework for a child rights approach."²⁰² According to the Committee, many States parties still have a long way to go in achieving full compliance with the CRC when it comes to child justice.²⁰³ Of concern are areas of procedural

196. *Kwazulu-Natal v. P* 2005 (363/2005) SA 1 (SCA) (S. Afr.).

197. *Id.*

198. African Charter, *supra* note 110, art. 17.

199. Chirwa, *supra* note 157, at 167.

200. For example, the right against self-incrimination and retrospective criminal laws and punishment, and the right to be compensated for miscarriage of justice.

201. Danwood M. Chirwa & Thoko Kaime, *Where Are the Missing Pieces? Constructing a Mosaic of the CRC and the African Children's Charter in Malawi's Law and Policy*, 2 MALAWI L.J. 85, 86 (2008).

202. Julia Sloth-Nielson, *The International Framework*, in CHILD JUSTICE IN AFRICA: A GUIDE TO GOOD PRACTICE 18, 18 (J. Sloth-Nielson & J. Gallineti eds., 2004), available at <http://protection.unsudanig.org/> [hereinafter CHILD JUSTICE IN AFRICA: A GUIDE TO GOOD PRACTICE].

203. C.R.C., Children's Rights in Juvenile Justice, ¶ 1, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).

rights, the development and implementation of alternative measures to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort.²⁰⁴ The ACRWC, as the regional framework for children's rights, is more limited in scope than the CRC with regard to child justice, but it contains provisions that pave the way for restorative practices and policies in child justice.²⁰⁵

IV. RESTORATIVE JUSTICE

Many countries have been able to mandate the use of restorative justice processes for significant proportions of juvenile justice.²⁰⁶ By the mid-1990s, restorative justice had become popular in a number of jurisdictions in the United States due to its focus on reparation of harm, and the extent to which communities increase their capacity to respond to crime and conflict, which offers a broader framework that challenges the role of punishment and treatment as the primary currencies of intervention.²⁰⁷ Zehr, one of the premier scholars of restorative justice,²⁰⁸ identifies three basic principles that guide restorative justice: (1) crime is a violation of people and of interpersonal relationships, (2) violations create obligations, and (3) the central obligation is to put right the wrongs.²⁰⁹

The restorative agenda provides a distinctive new standard for gauging intervention success that has apparently been perceived as neither soft on crime nor supportive of expanded punishment.²¹⁰ While agreeing with advocates of rehabilitation and treatment in affirming the need to actively respond to a range of problems that

204. *Id.*

205. See CHILD JUSTICE IN AFRICA: A GUIDE TO GOOD PRACTICE, *supra* note 202, at 25 (noting that the concepts of treatment and of restoring the child to his or her family and society are important African values that help promote the best practice of child justice).

206. See BAZEMORE & SCHIFF, *supra* note 74, at 7 (stating that countries mandating the use of restorative justice processes require that "decision makers provide reasons for *not* referring cases to restorative programs in writing.").

207. *Id.* at 10.

208. Tina S. Ikpa, Note, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J.L. & POL'Y 301, 301 (2007).

209. HOWARD ZEHR & ALI GOHAR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 19 (2003), available at www.justpeaceint.org/contents/msword%20files/Restorative%20Justice.pdf.

210. BAZEMORE & SCHIFF, *supra* note 74, at 10.

may be related to offending, restorative justice goes further to insist that the complex problems of youth crime and deviant behavior cannot be resolved by policies based on offender-driven services alone.²¹¹ As such, restorative justice principles have implications for redefining the role of boundaries of juvenile justice and providing a new continuum for gauging the success of juvenile justice reform.²¹² Restorative justice views intervention as a community agenda to be achieved through government and community action.²¹³ Other principles of restorative justice have been identified as healing, participation, and government and community responsibility.²¹⁴ In the same vein, values of restorative justice are: amends, assistance, collaboration, empowerment, encounter, inclusion, moral education, protection, reintegration, and resolution.²¹⁵ More than anything else, the principles and values are consistent with dealing with children and preparing them to be responsible citizens, bearing in mind that they are still developing mentally.²¹⁶

Restorative justice emphasizes recovery of the victim through redress, vindication, and healing and recompense by the offender through reparation, fair treatment and rehabilitation.²¹⁷ Its methods include encounter, victim-offender mediation, family group conferencing, circles, and impact panels, and these are used in diversion processes.²¹⁸ In making amends, restorative justice uses such elements as apology, changed behavior, restitution and generosity.²¹⁹ However, restorative justice has its critics.²²⁰ Due to the fact that it is voluntary and non-punitive, restorative justice presents

211. *Id.* at 11.

212. *Id.*

213. See DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE* 43-50 (3d ed. 2006) (arguing that the needs of victims and the injuries of offenders must be addressed and that communities and governments must take an active role in establishing safety).

214. *Id.* at 43-46.

215. *Id.* at 49-50.

216. African Charter, *supra* note 110, at pmbl.

217. BAZEMORE & SCHIFF, *supra* note 74, at 57.

218. Bennett Burkemper & Nina Balsam, *Examining the Use of Restorative Justice Practices in Domestic Violence Cases*, 27 ST. LOUIS U. PUB. L. REV. 121, 123-25 (2007).

219. *Id.* at 85.

220. Ikpa, *supra* note 208, at 305.

problems with regard to due process rights in criminal justice, hence there is a danger of human rights violations in the absence of set standards and guidelines for restorative justice.²²¹ This then calls for a broader construct of rights in criminal justice to go beyond merely due process rights. As noted by other scholars, “human rights such as dignity and equality may be enhanced through acknowledging responsibility in a restorative justice process”²²²

Garland has remarked that “rehabilitation programmes no longer claim to express the overarching ideology of the [penal] system, nor even to be the leading purpose of any penal measure.”²²³ This could be because of the punitive nature of penal measures which in most cases leave those in conflict with the law in a worse off position than before. The United States was the leading state in the welfarist approach, but it has “the less admirable record of having led the way on increasingly retributive, tough-on-crime attitudes towards child offenders.”²²⁴ In order to avoid the employment of retributive standards on child offenders, many societies are shifting to restorative justice as a model for child justice.²²⁵ This is seen as a return to the traditional way of community care for children,²²⁶ wherein traditional ways were used to deal with the vast majority of children in conflict with the law in a number of developing countries, especially in Africa and South-East Asia. According to Skelton and Sekhonyane, “a number of restorative justice writers have sought to

221. See Ann Skelton & Cheryl Frank, *How Does Restorative Justice Address Human Rights and Due Process Issues?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 203, 203-13 (Howard Zehr & Barb Toews eds., 2004) (asserting that the restorative justice process “requires the offender to acknowledge responsibility before referral to a restorative justice program,” meaning that the offender is no longer protected by a presumption of innocence and the right to remain silent).

222. Ann Skelton & Makubetse Sekhonyane, *Human Rights and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE 580, 591 (Gerry Johnstone & Daniel W. Van Ness eds., 2007).

223. Odhiambo, *supra* note 10, at 38 (citing D. GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 8 (2001)).

224. Skelton Thesis, *supra* note 31 .

225. See Skelton, *Restorative Justice Systems in Africa*, *supra* note 174, at 132-39 (highlighting the application of restorative justice principles in various countries including Namibia, Lesotho, Uganda, Ghana, and South Africa).

226. Gina Lucarelli, *Good Practices in Juvenile Justice Beyond EAPRO*, UNICEF (2003) (presented at EAPRO Regional Review for Juvenile Justice) (on file with Juvenile Justice Panel) available at <http://www.juvenilejusticepanel.org> (last visited July 21, 2011).

show that, although retributive crime control dominates in the West, if we look back far enough in our collective history, we will find a time when disputes belonged to the people and restitution was the normal resort.”²²⁷ Thus, few cases were referred to the central justice system and the major benefits of the traditional justice system included the fact that children remained with their families and their communities to ensure minor disruption to their lives. Skelton and Sekhonyane further state that traditional justice systems are generally restorative in nature and while they do not hold up to a critique of due process rights protection expected from the criminal justice system by western legal philosophy, “the processes are generally protective and healing and aim at restoring harmony in society.”²²⁸ This was ably discussed at the 254th meeting of the Committee on the Rights of the Child, where it was said that the traditional justice system included such components as the restoration of equilibrium in the community, forgiveness and reconciliation.²²⁹ It was agreed at the same meeting that restorative justice might be a good paradigm for giving life to the standards set out in the international instruments, because of the emphasis placed on reconciliation, rest and healing, on participation by the young person, family and community, and on the spirit of *ubuntu* or the community approach.²³⁰ Referring to arguments about the risks involved in traditional systems, it was said that customary law was a living system that could be broadened to take new standards into consideration.²³¹ There were, however, challenges involved in integrating traditional systems: informal justice methods must include due process; a community-based, individualized approach must also achieve equality and efforts should aim at ensuring that culture and custom did not clash with the CRC.²³² It was highlighted that what was in the best interests of the child was in the best interests of society, hence a juvenile justice system that did not function well failed not only the children, but society as a whole, for, far from protecting society, it merely generated criminals to prey

227. Skelton & Sekhonyane, *supra* note 222, at 580.

228. *Id.* at 587.

229. C.R.C., *supra* note 19, ¶¶ 11-12.

230. *Id.* ¶ 24.

231. *Id.*

232. *Id.*

upon it. This 254th meeting of the Committee of the Rights of the Child in 1995 offers a groundbreaking discussion of the use of restorative justice in child justice at the international level. It is therefore appropriate to explore the development of restorative justice in international instruments at this point.

As noted by Smith, the Vienna Declaration, published in the year 2000 after the tenth UN Congress, is a milestone for restorative justice within UN paradigms.²³³ Preparatory UN congress reports noted “that the concept of restorative justice should be a fundamental element of discussions of accountability and fairness to offenders and victims in the justice process.”²³⁴ “The philosophy behind restorative justice was to manage the harm done and to restore the offender and victim to their former state as far as possible.”²³⁵ “Restorative justice presented the criminal justice process with an alternative to the established modes of trial and punishment and sought to include the community and society as a whole in the restorative process.”²³⁶ It was also noted in the preparatory reports that, in recent years, “restorative justice had attracted the interest of policy makers, practitioners, researchers and individual actors in the criminal justice process.”²³⁷ Restorative justice “as an ancient practice was largely used for young offenders and less serious offences that had re-emerged in new forms such as mediation, family group conferencing and healing circles.”²³⁸ The participants discussed possible applications of restorative justice in cases involving adult offenders and more serious crimes.²³⁹

In 2009, Resolution 10/2 on “Human Rights in the Administration of Justice, in Particular Juvenile Justice”²⁴⁰ was adopted by the UN Human Rights Council (“UNHRC”), which is the most recent

233. Melodee A. Smith, *Restorative Justice is a Human Right: A Transformative Discourse Within UN Paradigms 4* (Apr. 20, 2005) (working paper) (presented to the Eleventh United Nations Congress on Crime Prevention and Criminal Justice), available at <http://www.pfi.org/cjr/about-cjr/un-initiatives/11thcongress/other/humanright/view>.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. UNHRC, *supra* note 17, at 1.

international resolution dealing with child justice.²⁴¹ The Resolution states in paragraph 7 that “the Council recognizes that every child and juvenile in conflict with the law must be treated in a manner consistent with his or her rights, dignity and needs, in accordance with international law, and relevant international standards on human rights in the administration of justice, and calls on state parties to the CRC to abide strictly by its principles and provisions and to improve the status of information on the situation of juvenile justice.”²⁴² Thus, the UNHRC underscores the importance of rights-based systems of justice for children in conflict with the law and Gallinetti applauds this as a significant development because it reaffirms the UN approach to children in conflict with the law as clearly provided for in the CRC, and also links child justice with the importance of the administration of justice generally, which falls under the purview of the UNHRC.²⁴³ Most significantly, the Resolution further encourages states to use of alternative measures, such as diversion and restorative justice and to ensure the principle that detention of children should be a measure of last resort and for the shortest appropriate period of time.²⁴⁴ Furthermore, states are urged to include rehabilitation and reintegration strategies for former child offenders in juvenile justice policies, and “that under their legislation and practices, neither capital punishment nor life imprisonment without the possibility of release is imposed for offences committed by persons below eighteen years of age.”²⁴⁵

As such, as Gallinetti says, in line with the approach of UN Committee on the Rights of the Child, “the UNHRC emphasizes two key elements of an effective child justice system, namely, the use of alternative dispositions to the formal criminal justice system, and the avoidance of detention of children unless as a last resort and for the shortest appropriate time.”²⁴⁶ Accordingly, the UNHRC “should be commended for its decisive stance on child justice and for identifying the critical issues that pose challenges for criminal justice

241. *The Child Justice Act 75 of 2008*, CHILDREN’S RIGHTS PROJECT, 6 (Aug. 2009), available at http://www.communitylawcentre.org.za/clc-projects/childrens-rights/article-40/archives/Art11_2.pdf/.

242. UNHRC, *supra* note 17, at ¶ 7.

243. *Id.* at 6-8.

244. UNHRC, *supra* note 17, at ¶ 9.

245. *Id.* ¶¶ 10-11.

246. *The Child Justice Act 75 of 2008*, *supra* note 241, at 8.

systems across the world.”²⁴⁷ The resolution is an important addition to “international jurisprudence on children in the criminal justice system, and is welcomed as another clear statement on the need for domestic compliance with international norms and standards, as well as the proper implementation thereof.”²⁴⁸

Smith chronicles the growing interest and increased attention given to restorative justice constructs in UN paradigms²⁴⁹ and propounds that a transformative discourse is emerging that recognizes restorative justice as a human right.²⁵⁰ Restorative justice, “no longer spoken of as a possible fad or passing trend, is widely recognized in a variety of ways and in many contexts by most member states and the international community.”²⁵¹ Principles of criminal justice and human rights collide as adversarial systems seek retribution. In agreeing with Smith, “while the criminal justice system focuses on broken laws, who is guilty and how the guilty should be punished, the UN is in the embryonic stages of embracing a restorative justice paradigm that focuses on broken relationships, who is in need and how well-being and social harmony may be restored.”²⁵² “Restorative justice, and not just justice designed to punish, is being recognized as an emerging human right for victims, offenders and the community.”²⁵³ It is a viable response to human

247. *Id.*

248. *Id.*

249. Smith, *supra* note 233, at 1-6. As seen in documents such as the draft discussion guide for regional preparatory meetings published in 1998; the 1999 draft resolution for the administration of juvenile justice; the 1999 draft resolution on the development and implementation of mediation and restorative justice measures; the 2001 Reports of preparatory meetings and activities at the international, regional and national levels; the 2004 Discussion Guide for the 11th UN Congress (Workshop 2 was titled “Enhancing Criminal Justice Reform, Including Restorative Justice”); and the Draft Salvador Declaration. The U.N. Congress on Crime Prevention and Criminal Justice also recognizes the importance of preventing youth crime, supporting the rehabilitation of young offenders and their reintegration into society, and recommends “the broader application, as appropriate, of alternatives to imprisonment, restorative justice and other relevant measures that foster the diversion of young offenders from the criminal justice system.” See U.N. Congress on Crime Prevention and Criminal Justice, Draft Salvador Declaration on Comprehensive Strategies for Global Challenges, ¶¶ 20-21, U.N. Doc. A/CONF.213/L.6/Rev.1 (Apr. 16, 2010).

250. Smith, *supra* note 233, at 2.

251. *Id.* at 6.

252. *Id.* at 2.

253. *Id.* at 2.

rights violations and inadequate justice systems. In preparation for the 10th UN Congress on the Prevention of Crime and the Treatment of Offenders, the Secretary-General reported that “paradigm shifts within all facets of the criminal justice system needed to be addressed.”²⁵⁴ “Restorative justice might be a good paradigm for giving life to the standards set out in the international instruments because of the emphasis placed on reconciliation, rest and healing, on participation by the young person, family and community, and on the spirit of *ubuntu* or the community approach.”²⁵⁵ The Preamble to the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters²⁵⁶ recalls that there has been “worldwide, a significant growth of restorative justice initiatives” and emphasizes that that “restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities.” The preamble also recognizes that that this restorative justice “provides an opportunity for victims to obtain reparation, feel safer and seek closure; allows offenders to gain insight into the causes and effects of their behaviour and to take responsibility in a meaningful way; and enables communities to understand the underlying causes of crime, to promote community well-being and to prevent crime.”²⁵⁷ However, the “retributive process that has traditionally focused on the offender and the State is seen as archaic and still too rarely resorts to non-custodial sanctions or other alternatives, including restorative justice.”²⁵⁸ Significantly, “the UN documents recognize a need to restore well-being and social harmony in the community.”²⁵⁹ When restorative justice is recognized as a human right, access to justice for victims, offenders and members of the community enhances the prospects for a justice that heals and a peace that endures.²⁶⁰

254. *Id.* at 3.

255. C.R.C., *supra* note 19, at ¶ 24.

256. E.S.C. Res. 2002/12, at pmbl., U.N. Doc. E/RES/2002/12 (Aug. 13, 2002).

257. *Id.* at pmbl.

258. Smith, *supra* note 233, at 6.

259. *Id.* at 6.

260. *Id.* at 2.

CONCLUSION

In conclusion, it is clear that children, as a vulnerable group of society, have their rights curtailed from time to time, and children in conflict with the law experience this to a much greater extent, particularly children in Africa. In providing safeguards for children in conflict with the law, two important and progressive instruments, the CRC and the ACRWC, have crystallized human rights for children and provide for the administration of child justice. Child justice is a field that has undergone several theoretical shifts since the end of the nineteenth century. There has been a shift from an initial welfarist model of child justice to a justice model and then a children's rights mode, and now the theory of restorative justice is at the helm of the child justice jurisprudential development, as evidenced by its incorporation in several UN documents. It is herein submitted that restorative justice is the best approach for dealing with children in conflict with the law because of its emphasis on reparation of harm, as children are better placed to be reformed than adults. Restorative justice has therefore become a model of child justice.