TRANSFORMATION OF THE LESOTHO JUVENILE JUSTICE SYSTEM SINCE RATIFICATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD 1989: LEGISLATION AND PRACTICE

by

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ABSTRACT

Lesotho ratified the United Nations Convention on the Rights of the Child 1989 (hereafter 'the CRC') in 1992. By virtue of ratification of the CRC Lesotho has undertaken to harmonise its national laws with the CRC provisions.

This study looks into the transformation of the Lesotho juvenile justice system since the ratification of the CRC. Some of the provisions of the Children's Protection Act No. 6 of 1980 (hereafter 'the CPA') which established the Lesotho juvenile justice system are not fully compliant with the CRC. This study shows that some major topics in the current Lesotho juvenile justice such as the age of criminal responsibility, procedures in the children's court, legal representation and diversion do not meet the standards of the CRC. Further, the general principles of the CRC are inadequately applied.

In order to address these inadequacies Lesotho has drawn the Children's Protection and Welfare Bill 2004 (hereafter 'the Bill'). Some of the provisions of the Bill relevant to juvenile justice are analysed through the standards of the CRC. While the Bill still has some short falls, in the majority of provisions it sufficiently addresses gaps between the current juvenile justice system and the provisions of the CRC.

The study concludes by arguing that the enactment of the Bill should not be delayed further. Professionals in juvenile justice should be trained. Further, some provisions of the Bill like designation of magistrates for the Children's Courts can be put into practice and the use of diversion and restorative justice continued. The CPA provisions which are compatible with the CRC should be used.

CONFIRMATION OF ORIGINAL WORK

I certify that the whole dissertation unless specifically indicated to the contrary in the text, is my own work.

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……..

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Date:

DEDICATION

I dedicate this dissertation to my children; Nkeane and Tlalane Ntlatlapa for understanding that mummies sometimes have to go to school too and to my husband Dr. Ntsibane Ntlatlapa for his unwavering support and encouragement.

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LIST OF ACRONYMS

CGPU- Child and Gender Protection Unit.

CJC – Child Justice Bill B49 of 2004.

CPA – Children's Protection Act No. 6 of 1980.

CP&E – Criminal Procedure and Evidence Act No. 9 of 1981.

CRC – Convention on the Rights of the Child 1989 U.N. Doc. A/44/49 1989.

CRC Committee- Committee on the Rights of the Child.

CSTS- Correctional Services Training School.

DPP – Director of Public Prosecutions.

JTC- Juvenile Training Centre.

LMPS- Lesotho Mounted Police Service.

OHCHR- Office of the High Commissioner for Human Rights.

VCJC- Village Child Justice Committees.

CHAPTER 1

INTRODUCTION

1.1 Introduction

The United Nations Convention on the Rights of the Child (hereafter 'the CRC') was adopted on the 20th November 1989, and entered into force on the 2nd September 1990.[1] Lesotho ratified the CRC on the 12th March 1992.[2] By becoming party to this international treaty, Lesotho signalled her consent and willingness 'to be bound by its terms to take all political, legal and administrative steps necessary to implement the core imperatives of the treaty as contained in its articles'.[3] Lesotho is, therefore, bound to take legislative measures ensuring that children's rights contained in the CRC are realized and implemented in national law[4].

This forms the context within which this study is conducted. More specifically, the focus is on the examination of the Lesotho's juvenile justice since the ratification of the CRC and the efforts made to implement its provisions in legislation and practice. Such examination is designed to identify possible gaps in the implementation of the CRC in juvenile justice. The key question in this regard is: how the Children's Protection and Welfare Bill of 2004 (hereafter 'the Bill') has addressed these gaps and its compliance with CRC. Answers to this question have potential to inform further legislation and practice developments in the efforts to harmonise national law with the CRC in juvenile justice. There is also potential for the study to assist with advocacy for enactment of the Bill and what could be done in the interim to improve juvenile justice.

Specific CRC articles dealing with juvenile justice are, first, art 37 which prohibits torture, cruel and inhuman or degrading punishment and provides for the regulation of deprivation

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[1] OHCHR *United Nations Convention on the Rights of the Child* at www2.ohcr.org/english/law/crc.htm accessed on the 15th March 2008.
[2] *Ibid.*
[3] G O Odongo *The Domestication of International Law Standards on the Rights of Child with Specific Reference to Juvenile Justice in the African Context.* A Thesis submitted in fulfillment of the requirements for the degree of Doctor of Law in the Faculty of Law of the University of the Western Cape, South Africa 18th October 2005 at 2 at www.etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_9110_1176963955.pdf accessed on the 03rd March 2008.
[4] *Ibid* at 2

of liberty. Second, art 40 provides for the administration of juvenile justice. Both of these are analysed in this study. To gain a fuller understanding of the juvenile justice system under the CRC, arts 37 and 40 are read together with arts 2, 3 and 12, which respectively provide for non-discrimination, the best interests of the child and the right of the child to be heard. It is in this context that the child's views in all proceedings affecting him/her are given due weight, and this is always in accordance with the child's age and maturity.

This context forms the framework within which the legislation and practices governing the Lesotho juvenile justice system are analysed and discussed in this study. Furthermore, clauses relevant to juvenile justice in the Bill are analysed against the CRC and the current system. Discussions on the Bill occasionally touch on the South African Child Justice Bill B49 of 2002 and commentaries to it because it has largely influenced the making of the Bill.

1.2 Statement of the Problem

The basic principle adopted in this study is that the law should undoubtedly protect children from the full rigours of the criminal justice system until they are old enough to take full personal responsibility for their actions.[5] To this end, Lesotho established the juvenile justice system through the Children's Protection Act No. 6 of 1980 (CPA). It is the contention of this study, as will be discussed in later chapters that the CPA falls short of complying fully with the CRC. This is particularly in terms of the provisions of art 40 (3) of the CRC, which stipulate that there should be laws, procedures, authorities and institutions set up specifically for children's well being. It is for this reason that in Lesotho, child offenders often face the justice system that inadequately serves their needs. The Bill has proposed provisions that bridge the gaps between the current juvenile justice system and the provisions of the CRC.

This is the motivation for my study: an examination of the transformation of the Lesotho juvenile justice, a strategy that is part of the efforts designed to harmonise national law with the CRC. It identifies gaps in the current Lesotho juvenile justice system and analyses ways in which the provisions of the Bill propose to address the concerns

[5] J Fortin *Children's Rights and the Developing Law* (2005) 545.

regarding juvenile justice in terms of compliance with the administration of juvenile justice as envisaged in the CRC.

1.3 Motivation

A similar study (Chaka-Makhooane, 2003) was conducted in Lesotho as part of the preparation process for the drafting of the Bill. Its purpose was to assess the compatibility of the Lesotho juvenile justice system with the CRC and other international treaties.[6] This study established that the Lesotho juvenile justice system is incompatible with the CRC and recommended the overhaul of juvenile justice legislation to bring it in line with the CRC.[7] Subsequent to this exercise, the Bill was drafted. This study, on the other hand, seeks to establish whether the Bill sufficiently addresses gaps identified in the current juvenile justice system in compliance with the provisions of the CRC.

It is in this context that this study has the potential to influence the development of specific legal policy, attitude and judicial reform in juvenile justice. It is very important, furthermore, for Lesotho to be sensitized to its obligations under the CRC and to strive for practice developments in the juvenile justice system which will be in accord with the CRC. Moreover, the findings of this study are expected to form an important platform for enhancing awareness building for the enactment of the Bill which is overdue. It is essential that the Bill is enacted so that provisions of the CRC in juvenile justice are incorporated into national law for the better protection of the children of Lesotho who often come into conflict with the law.

1.4 Aims of the Study

1- To identify areas in the Lesotho juvenile justice system which are still in conflict with the provisions of the CRC;

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[6] L Chaka-Makhooane 'Administration of Juvenile Justice' in Lesotho Law Reform Commission *Child Legislation Reform Project: Issue papers Project 6* (2003) 1.
[7] *Ibid.*

2- To investigate the extent to which the provisions of the CRC pertaining to juvenile justice are incorporated in the Bill to implement the CRC at national level and;
3- To inform further legislation and practice developments for the implementation of juvenile justice provisions provided by the CRC.

1.5 Methodology

1.5.1 Data Collection Methods

The nature of this study required that a qualitative research methodology be adopted. It involves an in-depth analysis and description of data about juvenile justice under the CRC. The study relies mainly on documentary evidence from libraries. The CRC and other international instruments relevant to juvenile justice, the states reports made to the Committee on the Rights of the Child (hereafter 'the CRC Committee'), the concluding observations by the CRC Committee, and the works of commentators in the juvenile justice sphere, for example, represent documentary evidence used in this study.

In addition to these data sources, several other documentary evidence which formed the primary sources, were from Lesotho. These included reports to, and comments by the CRC Committee, legislation and regulations relating to juvenile justice, and law reform proposals for the informed analysis of the juvenile justice transformation. To further enhance the data collected, the researcher identified more study participants for interview purposes: first, the senior officer in the Child and Gender Protection unit, second, the senior officer of the Probation Unit, thirdly, the chief magistrate and, thirdly, the chair person of the Child Law Reform. As an exercise of ethical considerations, the researcher received an oral consent from the study participants to use their names in the writing up of the research findings.

1.5.2 Limitations

One limitation that seems to stand out in this study is that there is very little literature on the Lesotho juvenile justice system. Secondly, there is no statistics on juvenile justice cases. Other than these, there seems to be no other limitation.

1.6 Chapter Layout

Chapter 2 offers an analysis and discussion of the provisions of juvenile justice in articles 37 and 40 of the CRC and the recommendations of the CRC Committee on how those provisions should be implemented at national level. This discussion, however, is primarily on selected topics that are difficult to implement in the context of the Lesotho juvenile justice system.

Chapter 3 discusses in detail the current Lesotho Juvenile Justice and the focus is the on standards which are difficult to implement and not protected under the Constitution.

Chapter 4 discusses the proposed administration of juvenile justice in the Bill in terms of how it proposes to fill the gaps in the current system and the extent to which the proposed provisions will harmonise national law with the CRC on the administration of juvenile justice. Discussion in this chapter follows the topic structure set out in chapter 2. The chapter further argues that juvenile justice clauses in the Bill could bring the Lesotho juvenile justice system to compliance with the CRC, with a few short falls that can be cured by amendments.

Chapter 5- This chapter contains general conclusions and recommendations.

CHAPTER 2

JUVENILE JUSTICE UNDER THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (1989)

2.1 Introduction

The purpose of this chapter is to present an analysis of articles of the CRC, the 1989 treaty that provided for the regulation of juvenile justice within the international context. Although all the provisions are in arts 37 and 40, for the purposes of this study, not all provisions are analysed. Among other things, this is due to the limitations relating to the research length.[1] It is for this reason that the articles selected from the CRC are those that are relevant to the Lesotho juvenile justice, particularly as they are difficult to implement. Some of these articles, for example, are provided for in legislation, and this complies with the CRC, but such provisions are not invoked in practice. These topics have, as a result, not been specifically provided for under the Constitution of Lesotho Act No. 5 of 1993 (hereafter the 'Constitution'). The articles that are not discussed already comply with the CRC and are provided for in s 12 of the Constitution under general '[r]ight to fair trial'.

In this study the administration of juvenile justice is placed in the context of the general principles of the CRC contained in arts 2, 3, 6 and 12.[2] These principles should be ensured in national legislation.[3] The analysis also refers to the implementation provisions

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[1] The death penalty and life imprisonment in art 37(a) will not be discussed. All provisions of art 40 will be discussed with the exception art 40(2)(a) which provide that [n]o child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of act or omissions that were not prohibited by national or international law at the time they were committed;' art 40 (2)(b)(i) which states that an accused child has to be 'presumed innocent until proven guilty according to law;' art 40(2)(b)(ii) which provides that a child has to be 'informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians;' art 40(2)(b)(iv) which states that a child should not 'be compelled to give testimony or to confess guilt; to examine or have examine adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;' and art 40(2)(b)(v) which states that if the child is 'considered to have infringed the penal laws to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law...'

[2] CRC Committee *General Comment No. 10 (2007) Children's Rights in Juvenile Justice CRC/C/GC/10* 25 April 2007 para 5 at www2.ohchr.org/English/bodies/crc/docs/CRC.C.GC.10.pdf accessed on the 10th March 2008.

[3] CRC Committee *General guidelines for periodic reports: Form and Contents of Periodic Reports to be Submitted by States Parties under Article 44 Paragraph 1 (b) of the Convention CRC/C/58* 20November 1996 para 132 which states that CRC committee seeks information on legislative and other measures taken to ensure the rights of every child involved with the juvenile justice system to be treated in a manner 'which

of the CRC contained in articles 4 and 44. Furthermore, as art 40(2) of the CRC requires states to have regard to relevant international treaties in the administration of juvenile justice, in this study, reference is made to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (hereafter the 'Beijing Rules').[4] The general comments of the Committee on the Rights of the Child (hereafter the 'CRC Committee')[5] on juvenile justice, together with the CRC Committee's comments on individual states parties, form the basis for the analysis of data in this study. The study offers further analysis in terms of the manner in which the states have adopted the mentioned CRC provisions and the hurdles they face in the implementation process.

To clarify the coming into being and the significance of the CRC for juvenile justice field, a few introductory words are necessary. The CRC is the product of deliberations of the international community on growing concerns over the violations of children's rights across the globe.[6] It was adopted by the United Nations General Assembly in November 20, 1989.[7] Having entered into force only in 1990,[8] the CRC has since been ratified by all the states of the world, with the exception of Somalia and the United States of America.[9]

In the juvenile justice sphere, the CRC protects children's rights by setting standards against which the states' efforts to improve the juvenile justice system is measured.[10] In

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ensures respect for the general principles of the Convention, namely non-discrimination, the best interests of the child, respect for the views of the child and the right to life, survival and development to the maximum extent' at www.unhchr.ch/tbs/doc.nsf/(Symbol)CRC.C.58.En?OpenDocument accessed on the 10th April 2008.

[4] The Beijing Rules at www.hri.ca/uninfo/treaties/48.shtml accessed on the 20th February 2008. See also CRC Committee *Concluding observations of the Committee on the Rights of the Child: Georgia* CRC/C/15/ Add. 124 28 June 2000 para 69.
At http://tb.ohchr.org/default.aspx accessed on the 20th February 2008. The other relevant international instrument are: United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 (hereafter 'the JDL') at www.unhcr.ch/htm/menu3/b_comp37.htm accessed on the 20th February 2008.
The United Nations Guidelines for the Prevention of Juvenile Delinquency (hereafter the 'the Riyadh Guidelines') at www.unhchr.ch/htm/menu3/b/h_comp47.htm accessed on the 20th February 2008.
The United Nations Resolution1997/30 Administration of Juvenile Justice 1997 (hereafter the 'Vienna Guidelines') at www.juvenilejustice.org/resource/items/E/C/ECOSOCResolution199730.pdf accessed on the 20th April 2008.

[5] The Committee on the Rights of the Child has been established under art 43 of the CRC. See also Office of the High Commissioner for Human Rights (hereafter 'the OHCHR') *Committee on the Rights of the Child: Monitoring children's rights,* according to which, the CRC Committee 'is the body of independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties.' At www2.ohchr.org/english/bodies/crc/index.htm accessed on the 4th November 2008.

[6] J Fortin *Children's Rights and the Developing Law* 2nd ed (2005) at 36.

[7] OHCHR *United Nations Convention on the Rights of the Child* at www2.ohcr.org/english/law/crc.htm accessed on the 15th March 2008.

[8] *Ibid.*

[9] *Ibid.* OHCHR *Status of Ratification of the Convention on the Rights of the Child- Number of States Parties as of 14 November 2003: 192* at www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm accessed on the 18th April 2008.

[10] Fortin (note 6 above) at 36.

order to properly analyse the transformation of the juvenile justice system in Lesotho since the ratification of the CRC,[11] it is necessary to lay out topics under selected CRC articles which make provisions for the administration of juvenile justice. It is this strategy that informs the structure of data analysis in chapters 3 and 4 of this research. This chapter discusses the following topics: the general principles of the CRC, the definition of a child and the age of criminal responsibility, legal representation, diversion, the judicial process (which includes the specialised court), procedure in the children's court and sentencing. Discussion now turns on general principles that informed the CRC.

2.2 General Principles

Discussion in this section is on the best interests of the child provided in art 3, non-discrimination in art 2, child participation in art 12, and development in art 6 which is discussed briefly in this section because it is also covered under the section entitled 'Sentences with Institutional Element' below. Particular focus is on the relevance of the mentioned articles which are general principles of the CRC, to the juvenile justice system. It is important to point out at this stage that the CRC Committee supports the application of the general principles to juvenile justice that: '[i]n the administration of juvenile justice, states parties have to apply systematically the general principles contained in arts 2, 3, 6 and 12 of the CRC, as well as the fundamental principles of juvenile justice enshrined in arts 37 and 40.'[12]

2.2.1 The Best Interests of the Child

Article 3(1) provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child should be a primary consideration. It may be noted, furthermore, that the wording of art 3 reads that the best interests of the child shall be *a* primary consideration and not *the* primary consideration. This wording is the result of debate borne out of concerns that there could be cases where children's interests might compete with other interests.[13] As McGoldrick puts it, '[i]t was generally noted that there were situations in which the competing interests, *inter alia*, of justice and

[11] OHCHR (note 9 above). Lesotho ratified the CRC on the 10th March 1992.
[12] CRC Committee (note 2 above) para 5.
[13] Fortin (note 6 above) at 38.

society at large should be of at least equal, if not, greater importance than the interests of the child.'[14]

Thus, the wording referred to above represents a compromise as the best interests of the child remained *a* primary consideration.[15] This formulation has important consequences. In situations where the courts of law and other administrative authorities decide on matters affecting children, such as issues concerning juvenile justice, they must attach a particular importance to the best interests of the child, but these interests will not systematically take over all other interests.[16]

It is on the basis of art 3(1) that it is the responsibility of each state to ensure that all three arms of government: the legislature, judiciary and executive, take the best interests of the child into consideration when making decisions pertaining to juvenile justice.[17] The best interests principle guides the application of all other provisions of the CRC, including those relevant to juvenile justice.[18] Instead of limiting it to judicial decisions, its application needs to be broadly applied to administrative decisions and diversion measures.[19]

This indicates clearly that the best interests of the child principle should be invoked in all stages of the juvenile justice system. The CRC Committee has stressed that in the administration of juvenile justice, the best interests of the child must mean that the traditional aims of criminal justice of suppression and retribution must be replaced by rehabilitation and restorative justice.[20] Although the best interests of the child is marginally mentioned in both arts 37 and 40, both of which contain the guidelines for the administration of juvenile justice, the principle of best interests must be a primary consideration in dealing with children in conflict with the law. The CRC Committee states that:

> The principle of the best interests of the child was reaffirmed by the Convention in the context of juvenile justice, particularly when it stressed

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[14] D McGoldrick 'The United Nations Convention on the Rights of the Child' in MDA Freeman (ed) *Children's Rights* (Volume 11) (2003) 79 at 108.
[15] *Ibid.*
[16] J Zermatten *The Best Interests of the Child from the Literal Analysis to the Philosophical Scope* (2003) at 8 at www.childright.org/html/documents/wr/2003-3_en.pdf accessed on the 9th July 2008.
[17] *Ibid* at 6. See also J Sloth-Nielsen 'Children's Rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *The International Journal of Children's Rights* 137 at 138.
[18] J Sloth-Nielsen and J Gallinetti *Child Justice in Africa: A Guide to Good Practice* (2004) at 22.
[19] *Ibid.*
[20] CRC Committee (note 2 above) para 10.

> that the child should be treated in a manner consistent with the promotion of his or her sense of dignity and worth which reinforced respect for the child's human rights and fundamental freedoms and took into account the child's age and special needs.[21]

It is against this background that the best interests of the child has to be invoked in juvenile justice to ensure that the decisions made in regard to the child, legal safeguards, non-discrimination and participation rights, dignity, and development of the child are protected.

2.2.2 Non- Discrimination

The discussion so far indicates that one of the pillars that should guide the implementation of the CRC is art 2. This article, for example, makes the provision that children should be protected from all kinds of discrimination, whether such discrimination is on the bases of race, sex, language, religious or political opinion, or social and ethnic origin, property, birth or other status. As Van Bueren states:

> In implementing the Convention, States Parties must refer to the requirements of Article 2 of the Convention which places them under a duty to 'respect and ensure' the rights in the Convention to each child. The term 'respect' implies a duty of good faith to refrain from actions which would breach the Convention. The duty to 'ensure', however, requires States Parties to take whatever measures are necessary in order to enable children to enjoy their rights.[22]

The extent of state responsibility is further defined by stressing that the CRC should apply to all children 'within their jurisdiction',[23] nationals, as well as aliens.[24] However, art 2 has not been fully accepted by some states parties due to its general nature[25] and, as such, some states have shown reluctance to guarantee foreign children the same rights as children of their own countries.[26] Reservations to art 2 of the CRC, for example, indicate

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[21] CRC Committee *Reports on the tenth session of the Committee on the Rights of the Child: CRC.C. 46.* 18 December 1995 para 219 at www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.46.En?OpenDocument accessed on the 18th July 2008.

[22] G Van Bueren ' The United Nations Convention on the Rights of the Child: An Evolutionary Revolution' in CJ Davel (ed.) *Introduction to Child Law in South Africa.* (2000) 202 at 211.

[23] Article 2(1).

[24] M Santos Pais ' Convention on the Rights of the Child' in OHCHR *Manual on Human Rights Reporting: Under Six Major International Human Rights Instruments* HR/PUB/91/1 (Rev. 1) Geneva (1997) at 418 at www.unhchr.ch/pdf/manual_hrr.pdf accessed on the 20th July 2008.

[25] JD Van der Vyver 'Municipal Legal Obligations of States to the Convention on the Rights of the Child' (2006) 20 *Emory International Law Review* 9, at 12 it was stated that states like the Bahamas and the Cook Islands made reservations to this provision.

[26] OHCHR *Declarations and Reservations to the Convention on the Rights of the Child* (1996- 2007, last updated 12 February 2008) at www2.ohchr.org/English/bodies/ratification/11.htm#reservations accessed

the states' reluctance in implementing the principle of non-discrimination with regards to children. Some of the most frequent grounds for discrimination in the juvenile justice system are related to: nationality,[27] gender[28] and social status.

The CRC Committee recommended that State parties undertake to ensure that protection is afforded to economically and socially disadvantaged children in conflict with the law, and that alternatives to institutionalization are available.[29] For example, unlike children who live within families, in many cases street children do not qualify for diversion and other alternative measures to detention due to lack of adult supervision and fixed domicile for monitoring purposes.[30] Pais observed that disadvantaged children, such as those from rural areas, girls, and street children, often suffer discrimination. It is on these bases that he argues that 'specific positive measures have to be considered to address the situation of children in a disadvantaged situation.'[31]

Such discrimination on the grounds of social status needs to be addressed by using creative approaches to ensure that street, and other disadvantaged children, enjoy pre-trial diversion and benefit from restorative justice options along with other children.[32] The CRC Committee has urged that states 'take all necessary measures to ensure that all children in conflict with the law are treated equally' and that particular attention should be paid to discriminatory practices involving vulnerable groups of children such as street children and girl children.[33]

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on the 19th May 2008 in making reservations to art 2, Belgium declared that non discrimination on grounds of citizenship does not imply an obligation on the state to guarantee foreigners the same rights as to its citizens.

[27] CRC Committee *Concluding observations of the Committee on the Rights of the Child: Italy CRC/C/15/Add 198* 18 March 2003 para51 in which concern was raised 'at the existing discrimination against children of foreign origin and Roma children within the justice system....' at http://tb.ohchr.org/default.aspx accessed on the 17th November 2008.

[28] CRC Committee *Concluding Observations: Lesotho CRC/C/15/Add.147* 21 February 2001 para 61 (k) at http://tb.ohchr.org/default.aspx accessed on the 2nd March 2008 in which the CRC committee observed the discriminatory practice of judicial corporal punishment for boys only.

[29] CRC Committee *Concluding observations of the Committee on the Rights of the Child: Bolivia CRC/C/15/Add* 1 18 February 1993 para 16 at http://tb.ohchr.org/default.aspx accessed on the 26th July 2008. See also CRC Committee *Concluding observations of the Committee on the Rights of the Child: Kenya CRC/C/KEN/CO/2* 19 June 2007 para 64 (d) in which it was commented that state party has to raise awareness of the issue of street children in order to change stigma and negative attitudes, particularly among law-enforcement officers, further in para 64 (e) it was stated that it has to be ensured that street children are provided with recovery and reintegration services at http://tb.ohchr.org/default.aspx accessed on the 5th November 2008.

[30] M Wernham *An outside Chance: Street Children and Juvenile Justice- An International Perspective* (2004) at www.streetchildren.org.uk/reports/Book%20SUMMARY.Doc accessed on the 20th July 2008.

[31] M Santos Pais 'Monitoring the Children's Rights from within' in E Verhellen (ed) *Monitoring Children's Rights* (1996) 113 at 136.

[32] *Ibid.*

[33] CRC Committee (note 2 above) para 6.

2.2.3 Child Participation

Article 12 provides that children who are capable of forming their views have the right to freely express such views. This, however, has to be given due weight in line with the children's age and maturity with regard to all the matters affecting them.[34] It is in this context that I argue in this study that the child must be provided with the opportunity to be heard in any judicial and administrative proceedings affecting them either directly or through a representative or an appropriate body.[35] The CRC Committee has stated, furthermore, that alleging that the child has capacity for criminal responsibility implies that the child should be competent and able to take part in the decisions concerning the most appropriate response to allegations of the contravention of penal law.[36] To treat a child as a passive entity would not recognize the child's rights and contributes to an effective response to offensive behaviour.[37] The CRC Committee further stated that:

> [i]t is obvious that for a child alleged as, accused of, or recognized as having infringed the penal law, the right to be heard is fundamental for a fair trial. It is equally obvious that the child has the right to be heard directly and not only through a representative or an appropriate body if it is in her/his best interests. This right must be fully observed at all stages of the process, starting with pretrial stage when the child has the right to remain silent, as well as the right to be heard by the police, the prosecutor and the investigating judge. But it also applies to the stages of adjudication and of implementation of the imposed measures.[38]

This suggests that where a child has come into conflict with the law and the case against that child is being dealt with administratively, for example, in diversion a child must be able to voice his/her opinion. Where the child appears before the criminal court, he or she has to be able to participate in his/her trial, especially where the child wishes to give evidence in person.

Muller argues that evidence by child witnesses in court creates two problems.[39] First, the child will be traumatized by the hostile procedures and unfamiliar court room language. Second, the accuracy of the evidence may be affected by the inability to communicate

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[34] Article 12(1).
[35] Article 12 (2).
[36] CRC Committee (note 2 above) para 45.
[37] *Ibid.*
[38] *Ibid* para 44.
[39] K Muller 'An Inquisitorial Approach to the Evidence of Children' (2001) 4 (4) *Crime Research in South Africa,* 1 at 2.

freely.[40] Even though Muller was focusing on the child witness, especially a victim of a crime, the same argument can be applied for an alleged child perpetrator of an offence. Research shows that children who had come into conflict with the law felt 'lost', 'scared' and 'afraid to go inside, and felt anxious' when they went to court.[41]

Child offenders suffer the same vulnerabilities experienced by other children. Moreover, courtroom atmosphere may be even more hostile towards a child perpetrator, and this might lead to trauma and lack of effective participation. The European Court of Human Rights in the case of *T V United Kingdom* concluded that the child T had not been able to participate effectively in the public adult court characterized by highly adversarial procedures at the age of eleven. Where a young child was charged with a serious offence which attracted high public interest and media coverage, the hearing has to be conducted in a way which reduced the child's intimidation and inhibitions.[42]

To facilitate effective participation at a trial, Rule 14.2 of the Beijing Rules recommends that proceedings should be conducive to the best interest of the child and carried out in an atmosphere of understanding to allow the child to participate and to express herself/ himself freely. This requires modified courtroom procedures and practices. The court needs to be child friendly; less accusatorial and more inquisitorial; intermediaries should assist children through examination and cross examination and the child should be assisted by parents and legal representation.

Together with non- discrimination principles, the right to be heard stresses the equal right of children to freely express their views and have them taken seriously.[43] The child's language or disability must not hamper the respect for the right to participate in the proceedings. The state must secure interpreters, including the sign language interpreters and the provision of special technology, where necessary.[44]

2.2.4 Development

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[40] *Ibid.*
[41] Child Development Agency *Contribution to the Jamaica Justice System Reform* (2007) at 4 at www.cda.gov.jm/downloads/JSRP_20070329 accessed on the 15th May 2007.
[42] *T v United Kingdom* (2000) 2 ALL ER 1024 at 1024 para f.
[43] R Hodgkin & P Newell *Implementation Handbook for the Convention on the Rights of the Child* (2002) at 167.
[44] *Ibid.*

Article 6 of the CRC provides for the right to life, survival and development, and since death penalty is not discussed in this study, the discussion of this article is limited to development. In the context of this study, child development should influence state parties in the making of effective national policies for the prevention of juvenile offence as delinquency that impacts negatively on child development.[45] National policies, furthermore, should respond to juvenile delinquency in ways that consider child development.[46] In the administration of juvenile justice, all children should be provided with 'care, protection, and all necessary individual assistance - social, educational, vocational, psychological, medical and physical they may require in view of their age, sex and personality.'[47]

The CRC Committee highlights the fact that deprivation of liberty has very negative consequences to child's harmonious development and hampers reintegration into society. This is the reason art 37(b) provides that the deprivation of liberty should be a measure of last resort and for a shortest appropriate period of time.[48] Arrendondo argues that when a child is detained for prolonged periods, that child adapts to institutional setting and not to the community that the child is expected to return.[49] This is partly the reason it is important that delinquency interventions occur in the community.[50] The European network of ombudspersons for children made the observation that:

> [t]he only legitimate reason for detaining children, before or after trial, must be that they pose a serious and immediate risk to others. In these rare cases, the use of custody should be constantly reviewed and other alternatives of close supervision considered. Conditions in custody must respect all human rights as set out in the CRC and in the United Nations

[45] CRC Committee (note 2 above) para 11.
[46] *Ibid.*
[47] HA Strydom & JL Pretorius &ME Klinck *International Human Rights Standards Volume 1: Administration of Justice* (1997) at 139.
[48] CRC Committee (note 2 above) para 11.
[49] DE Arrendondo 'Principles of Child Development and Juvenile Justice: Information for Decision Makers' *Journal of the Center for Families Children and the courts* (2004) 127 at 132 at www.courtinfo.co.gov/programs/cfcc/pdffiles/Jvol5-Arredondo.pdf accessed on the 8th January 2009.
[50] *Ibid.*

> rules and guidelines on juvenile justice; all children must in particular have equal access to appropriate full-time education.[51]

It is for this reason that state parties should ensure that policy and legislation protect child development in the administration of juvenile justice. Professionals, furthermore, should use community based sanctions as they are the most effective strategies in the process of addressing personal and societal factors that are essential for healthy child development.[52]

2.3 Definition of a Child and Age of Criminal Responsibility

Article 1 of the CRC provides the definition of a child. This provision is fundamentally important because substantive rights in the CRC are only applicable to children.[53] It sets the end of childhood at the end of eighteen years of age, and leaves the starting point open.[54] This allows for the minimum ages to be put under various circumstances to balance the child's evolving capacities with special protections which states are obliged to provide.[55] In juvenile justice, children's limitation of age is critical to determine their legal status, and whether they can be categorised as children or adults.[56] However, there should be certainty in the law regarding the minimum age of criminal capacity so that errors in arrests, investigations, prosecutions and judgement are avoided.[57] The minimum age of criminal responsibility is critical in the juvenile justice system. If it is set too high, the law may be flaunted and disrespected, and if too low, the law may be too harsh.[58] In the criminal process the welfare rights of children should increase as their ages

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[51] The European Network of Ombudspersons for Children "Juvenile Justice: Europe's Children's Champions Challenge Governments to Respect Young Offender's Rights" 2003 at www.crin.org/docs/juvenile_justice_final_statement.doc accessed on the 28 April 2008.
[52] Arrendondo (note 49 above) at 134.
[53] D McGoldrick (note 14 above) at 80.
[54] Hodgkin & Newell (note 43 above) at 1.
[55] Department of Women and Child Development, Ministry of Human Resource Development: Government of India *India: First periodic Report* 2001 at 41 at http://wcd.nic.in/crcpdf/CRC-2.PDF accessed on the 20th December 2008.
[56] H Mardite *The Juvenile Justice in Indonesia* at 192 at www.unafei.or.jp/english/pdf/PDF_rms/no68/12_indonesia-p188-195.pdf accessed on the 7th January 2009.
[57] *Ibid.*
[58] Fortin (note 6 above) at 551,

decrease.[59] Further minimum age of criminal capacity should be set as high as possible.[60]

2.3.1 Definition of a Child

Article 1 of the CRC defines a child as a human being below the age of eighteen years, unless he/she attains the age of majority earlier under domestic law. This view is a compromise made to accommodate the provision that the earlier age of the majority according to national law had to be respected.[61] This creates a loophole through which discrimination amongst children of the same age in the same state is made permissible in national law.[62]

It has been argued that the age of the majority reached earlier than eighteen years should not compromise protection awarded to children in conflict with the law.[63] The United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 (hereafter 'the JDL Rules') provide that a juvenile is every person under the age of eighteen years.[64] Although the JDL Rules do not have the same international legal force as the CRC (hard law) because they are soft law,[65] this definition is significant because the JDL Rules are subsequent to the CRC and do not maintain the qualification in art 1 of the CRC. [66] The JDL Rules are adopted by a resolution of the United Nations General Assembly and, as such, complement the meaning and substance of the CRC.[67] This interpretation was

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[59] D Walsh *Balancing Process values with Welfare Objectives in Juvenile Justice Procedure: Some Strengths and Weaknesses in the Irish Approach* a Paper presented to Irish Youth Services Bennial Conference Cava 6-7th March 2008 at 2 at www.iyjs.ic/en/IYJS/Dermot Walsh Presentation.pdf/Files/Dermot Walsh Presentation.pdf accessed on the 7th January 2009.
[60] Hodgkin & Newell (note 43 above) at 6.
[61] T Buck *International Child Law* (2005) at 57.
[62] For instance, a sixteen years old married girl in states where majority is reached at marriage, cannot be treated similarly with a sixteen years old unmarried girl, the prior, by virtue of marriage is deemed to be an adult and treated like one, while the latter is treated like a child.

[63] JW Tobin 'Time to Remove Shackles: The Legality of Restraints on Children Deprived of their Liberty under International Law' (2001) 9 *The International Journal of Children's Rights* 213 at 216.
[64] JDL Rules Rule 11 (a) at www.unhcr.ch/htm/menu3/b_comp37.htm accessed on the 20th February 2008.
[65] D Sheldon 'International Law and Relative Normativity' in MD Evans *International Law* (1st ed) (2003) 145 at 166.
[66] Tobin (note 63 above) at 216.
[67] *Ibid.*

supported by the Human Rights Committee in that 'all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice'.[68]

The rationale behind a similar treatment of all persons under the age of eighteen years who come in conflict with the law stems from the fact that they lack full capacity and responsibility for their criminal acts.[69] As such, they still need protection against the full repercussions and strict enforcement of the law in the criminal justice arena.[70] Attaining the age of the majority before reaching the age of eighteen does not mean that the child automatically attains full capacity for his/her criminal acts or that he/she can shoulder full responsibility for them. Treating children who have attained the majority, but still below the age of eighteen as adults, means denying them protection awarded to their age mates. This is discriminatory and contrary to the provisions of art 2 of the CRC, and this is discussed in the diversion section.

2.3.2 Age of Criminal Responsibility

Article 40(3)(a) provides that state parties should establish a minimum age below which children shall be presumed not capable of infringing the penal law. In addition, Rule 4 of the Beijing Rules provides that the age of criminal responsibility should not be too low and must be set with the emotional, mental and intellectual maturity of children in mind. Within this context, a correct approach would be:

> to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour. If the age of criminal responsibility is fixed too low or if there is no age limit at all, the notion of responsibility would become meaningless. [71]

In other states, children in conflict with the law who at the commission of the crime are at or above the lower minimum age, but below the higher minimum age are assumed to be criminally responsible if they have the required maturity in that regard (the *doli incapax*

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[68] OHCHR *Human Rights Committee General Comment No. 21 Article 10* 10 April 1992 para 13 at www.unhchr.ch/tbs/doc.nsf/(Symbol)/3327552b9511fb98c12563ed004cbe59?Opendocument accessed on the 07th May 2008.
[69] Fortin (note 6 above) at 545.
[70] *Ibid.*
[71] J Pickford *Juvenile Justice: Theory and Practice* (2000) at 104.

rule).[72] The CRC Committee pointed out to the weaknesses in the *doli incapax* rule used in various states. In such cases the assessment of maturity is left to the judiciary, often without the requirement of assistance of psychological experts.[73] This results in prosecution of very young children for serious crimes.[74] The *doli incapax* rule is confusing and leaves a lot to the discretion of the courts. This, however, might result in discriminatory practices.[75]

When there is no expert assistance, findings of criminal capacity of children of the same age and development may differ, depending on the experiences and individual views of magistrates. An illustration of the problematic application of the *doli incapax* rule is reflected in the South African case of S *V Ngobese.*[76] In this case, a thirteen years old child was prosecuted before the magistrate court and convicted.[77] The trial magistrate decided that the child's criminal capacity could be inferred from the fact that he ran away from the crime scene.[78] On review, the judge disagreed and found that the facts raised by the magistrate related to the child's action and not to his state of mind or criminal capacity. As a consequence, the conviction was set aside.[79] This shows that some courts do not always seek expert evaluation of children's capacity, but make arbitrary decisions.

The age of criminal responsibility varies greatly among states. Despite the observations of the CRC Committee that setting up the age of criminal responsibility at the age of ten years was too low and not in the spirit of the CRC,[80] some states continue to maintain this position. They argue that this approach contributes to child development by stimulating responsibility and good conduct. and it is not just a measure taken in the

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[72] CRC Committee (note 2 above) para 30, further the *doli incapax* rule is currently used in Lesotho under common law which sets the age of criminal responsibility at seven years, it has also been proposed in clause 83(4) of the Bill proposes retaining the *doli incapax* rule for children between the ages of 10 and 14 years.
[73] CRC Committee (note 2 above) para 30.
[74] *Ibid.*
[75] *Ibid.*
[76] *S v Ngobese and Others* 2001 (1) SACR 562.
[77] *Ibid at* 562 J.
[78] *Ibid* at 563E
[79] *Ibid* at 565H-I.
[80] CRC Committee *Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland CRC/C/GBR/CO/4* 20 October 2008 para 77 the CRC Committee commented with concern that '[t]he age of criminal responsibility is set at 8 years of age in Scotland and at 10 years for England, Wales and Northern Ireland.' At http://tb.ohchr.org/default.aspx accessed on the 23rd May 2008. See also R Croke & A Crowley (eds) *Stop, Look, Listen: the road to realising children's rights in Wales- Wales NGO alternative.* Save The Children Fund 2007 at 62 at www.savethechildren.org.uk/en/docs/wales_stop_look_listen20071119.pdf accessed on the 17th May 2008.

interest of justice and victims.[81] Fortin argues that although there is a general agreement that society has a right to protect itself from youth crime, it is obviously inhumane and of little practical value to hold very young children responsible for breaking the law.[82] However, the CRC Committee has suggested the age of twelve years as the 'absolute minimum age' of criminal responsibility and has urged states to continue to raise it to a higher level.[83]

Not withstanding the guidance by the CRC committee, states are urged to use a balanced approach between the capacity and development of the child and the respect for the fundamental rights and freedoms of others in determining an appropriate minimum age of criminal capacity.[84]

2.4 Pre-trial Detention

Pre- trial detention is one of the main concerns of the CRC Committee, owing to prolonged periods of deprivation of liberty and lack of protection of fundamental rights. [85] The length of pre-trial detention has to be limited by law, and the lawfulness of this deprivation of liberty has to be reviewed by judicial officers regularly without delay.[86] States should also guarantee separation of detained children from adults in all pre-trial places.[87] Furthermore, states must protect the rights of detained children and ensure that detention conditions are suitable to their age and needs.[88]

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[81] United Kingdom Government *The Consolidated 3rd and 4th periodic Report to UN Committee on the Rights of a Child* (2007) at 160 para 8.55 at www.everychildmatters.gov.uk/resources-and-practice/IG00249/ accessed on the 16th May 2008.
[82] Fortin (note 6 above) at 551.
[83] CRC Committee (note 2 above) para 32.
[84] A Skelton 'Developing Juvenile Justice System for South Africa: International Instruments and Restorative Justice' in R Keightley (ed) *Children's Rights* (1996) 180 at 187.
[85] J Doek 'Child Justice Trends and Concerns with a Reflection on South Africa' in J Gallinetti,D Kassan &L Ehlers *Child Justice in South Africa: Children's Rights Under Construction* Conference Report August 2006 11, at 14 at www.childjustice.org.za/publications/CJ_ConferenceReport.pdf accessed on the 12th August 2008
[86] CRC Committee *Concluding observations of the Committee on the Rights of the Child: Brazil CRC/C/15/Add. 241* 3 November 2004 para 70 (c).
[87] *Ibid* para 70 (e).
[88] *Ibid.*

2.5 Diversion

Article 40(3)(b) provides that state parties should establish everywhere appropriate measures for dealing with children, without resorting to judicial proceedings. This is the cornerstone of what is now commonly known as diversion.[89] Juvenile diversion has been explained as the process that moves children in conflict with the law away from formal authoritarian process of the juvenile justice system[90] into other programmes and procedures.[91]

Article 40(3)(b) aims to ensure that the juvenile justice systems should not only consider the need of society for protection from unlawful behaviour of juveniles, but should also take into consideration the child's need for reform and capacity for change.[92] Diversion recognizes that children must be treated differently from adults due to their age and immaturity, and to avoid their stigmatization as criminals.[93] Diversion has the potential to encourage them to be accountable for their actions, to promote reconciliation with the victim and to foster reintegration into family and community, to save the judicial system time and money and to ensure that the child's schooling is not interfered with.[94] Further, diversion prevents children from spending time in custody, which has a negative impact on them and it is often associated with abuse, labelling and increased deviance.[95]

The CRC Committee stated that diversion is suited (but should not be limited) to children who commit minor offences such as shoplifting or other property offences with limited damage, and first-time offenders.[96] Further, the CRC Committee directs that a variety of measures which involve diversion and referral to alternative social services should be a

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[89] JP Williams *Without Resorting to Judicial Proceedings (CRC Art. 40 (3) (b)) How most Child Offenders can be Treated* (Paper iii World Congress on Children and Adolescents Rights. Barcelona Nov 14- 19th 2007) at 1 at www.crin.org/docs/diversion.docs on the 10th July 2007.
[90] G Martin *Juvenile Justice: Process and Systems* (2005) at 291.
[91] Skelton (note 84 above) at 183. See also Fortin (note 5 above) at 560-561 where it was argued that '[c]hildren have not yet completed their growth and development. With appropriate education, training or psychological treatment, those involved in criminal acts may be helped to grow into law-abiding citizens, without the stigma of criminality attaching to them. Technical and formalistic legal procedures are ill-equipped to take account of these special factors applying to young offenders.'
[92] Fortin (note 6 above) at 560.
[93] Williams (note 89 above) at 3.
[94] *Ibid.*
[95] *Ibid.*
[96] CRC Committee (note 2 above) para 25.

well established practice, used in most cases.[97] Diversion should also be used without discrimination. In some states, for example, diversion is not used for street children. The CRC Committee recommended that state parties should ensure that negative attitudes of law enforcement officers towards street children are addressed and that alternatives to institutionalization are made available to such children.[98]

According to the CRC Committee, it is at the discretion of state parties to decide on the exact nature and content of diversion measures.[99] However, a variety of options have so far been adopted, such as community service, supervision and guidance by social-workers or probation officers, family conferencing and restorative justice.[100] When diversion takes the form of restorative justice measures, it offers children in conflict with the law the chance to reconcile themselves with their actions, appreciate the harm done to the victim through face-to-face encounters and through actual or symbolic restitution to restore relationships.[101]

In the use of diversion there is danger that children can be influenced unduly into accepting responsibility for the offences, thus compromising the right to due process and fair trial.[102] Article 40(3)(b) of the CRC provides for human rights and legal safeguards that have to be adhered to in the administration of diversion programmes to guard against such potential human and procedural rights infringements. The CRC Committee has commented that diversion:

> should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally that the admission will not be used against him/her in any subsequent legal proceedings.[103]

Furthermore, the child and the person responsible for the child must consent to diversion and diversionary programme suited for the child should be identified.[104] It is essential that the child who does not admit the offence retains his/her right to be presumed innocent

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[97] *Ibid* para 24.
[98] CRC Committee (note 29 above) para16.
[99] CRC Committee (note 2 above) para 27.
[100] *Ibid.*
[101] A Shearar & R Graser 'A critical view of Diversion programmes in context of restorative Justice' (2005) 41 (2) *Social work/ Maatskaplike Werk* 155 at 157.
[102] J Gallinetti, L Muntingh & A Skelton 'Child Justice Concepts' in J Sloth-Nielsen and J Gallinetti *Child Justice in Africa: A Guide to Good Practice* (2004) 32 at 33.
[103] CRC Committee (note 2 above) para 27.
[104] Williams (note 89 above) at 6.

until proven guilty in court proceedings, for this right out-weighs the desirability of diversion.[105]

The law, however, has to specifically indicate cases where diversion is possible and the powers of the police, prosecutors and other agencies, in order to make decisions regarding diversion to protect the child from discrimination.[106] The child must also be given a chance to seek legal or other appropriate assistance to assess the suitability of the diversion programme offered.[107] The result of diversion must be a closure of the case and a diverted child should not be subjected to further criminal sanctions. This means diversion records should not be viewed as criminal records.[108] Access to the records of diversion should be limited to competent authorities who deal with children in conflict with the law.[109]

Because diversion has become an international obligation for the states, its pplication cannot be discretionary; although it has to be regulated by law. Commitment to the CRC obliges states 'to ensure that, at the very least, directives, guidelines, or legislation, are developed to promote the use of diversion'.[110] It is in this context that diversion must become the central principle in any juvenile justice system and, as such, should be considered in every case. It should only be rejected where the safety or interests of the society require that the case to be prosecuted.[111] I now turn to a discussion on issues surrounding actual processes involved in prosecuting children.

2.6 Judicial Process

In this section discussion is on the Children's Court, the procedures in the Children's Court and legal representation.

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[105] Sloth-Nielsen & Gallinetti (note 18 above) at 28. See also J Gallinetti, L Muntingh & A Skelton (note 102 above) at 33 where it is argued that '[i]t is, therefore. imperative that children are not diverted to a programme or other informal diversion option *in lieu* of the possibility of prosecution. In other words, if the state does not have sufficient evidence to prosecute a matter, it cannot resort to diverting a child as a 'second prize'.'

[106] CRC Committee (note 2 above) para 27.

[107] *Ibid.*

[108] *Ibid.*

[109] *Ibid.*

[110] Sloth-Nielsen & Gallinetti (note 18 above) at 28.

[111] Skelton (note 84 above) at 189.

2.6.1 Speedy Trial

Articles 37(d) and 40(2)(b)(iii) stipulate that judicial decisions should be prompt and without delay. This is seen as having potential to assist in minimizing the time in which the child is burdened with the impending decision or trial against; and the time the child spends in the pre-trial detention centre where he/she may be at risk.[112] States should have time limits between the commission of the offence and the completion of police investigations, between the decision to prosecute or take administrative measures against the child, and the final sentencing.[113] These time limits should be shorter than those for adults.[114] Unfortunately, however, processes and decisions in juvenile justice are not always prompt.[115]

2.6.2 The Specialised Court

Article 40(3) of the CRC provides that the criminal justice system dealing with children - the laws, procedures, authorities and institutions; should be specifically established for children. Children should be tried before a trained judicial officer by a specially trained prosecutor in a special court for children. All the other officers of the court, social workers, rehabilitation officers, defence lawyers, including the police, need specialized training to effectively handle matters concerning children in conflict with the law. The provision for specialised court for children provision has not been welcomed by some states,[116] and are thus still prosecuting children in adult courts.[117]

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[112] L Chaka-Makhooane 'Administration of Juvenile Justice' in Lesotho Law Reform Commission *Child Legislation Reform Project: Issue paper Project 6* (2003) 1 at 16 where it was argued that in detention children 'are faced with being held in cells with adult offenders under unhealthy conditions. Since there would be no activity programmes, they are doomed to closed facilities for many hours at a time. They are also exposed to torture and interrogation by the police. The girls are at an even greater risk because they face the danger of physical assault and sexual abuse.'

[113] CRC Committee (note 2 above) para 52.

[114] *Ibid.*

[115] *Dyer v Watson* 2002 WL 45284 (Privy Council 2000) this United Kingdom case portrayed lack of consideration of prompt action. The case had been allowed to drag for three and a half years before it went on trial without reasonable cause being stated. The Privy Council stated that the fair trial must be read in the light of the provisions of the CRC; in particular the court referred to art 40(2)(b)(iii).

[116] R Croke & A Crowley (eds) *Stop, Look, Listen: the road to realising children's rights in Wales- Wales NGO alternative.* (2007) at 62 it was stated that the United Kingdom still fails to comply with the provision that children should have a distinct criminal system at www.savethechildren.org.uk/en/docs/wales_stop_look_listen20071119.pdf accessed on the 17th May 2008.

[117] *Ibid* 62 which reads 'since 2002 the United Kingdom's compliance with the CRC has worsened.... it is not able to develop a distinct system that is sympathetic to children and young people or one that uses the Convention as a frame work....Children are routinely brought before the adult magistrates' courts when co-accused with an adult or when there is no youth court sitting and may be tried in the adult (crown) court, despite practice direction to the contrary.'

2.6.3 The Trial

2.6.3.1 Procedure in the Specialised Court

Rule 14.2 of the Beijing Rules emphasizes that proceedings against the child offender should be in the best interests of the child and be conducted in an atmosphere of understanding so that the child may participate freely. It is essential, therefore, for the juvenile justice hearings to be held in private as provided for under art 40(2)(vii). This provision is further expanded by Rule 8(1) and (2) of the Beijing Rules, which state that the juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her/him by undue publicity or by the process of labelling. Furthermore, no information that may lead to the identification of a juvenile offender should be made public.[118]

2.6.3.2 Legal Representation

Legal representation is important to children in conflict with the law at all stages of the criminal justice system. For the purpose of this research, however, discussions will be confined to the trial due to this research length constraint. Further this is because the trial carries with it more serious consequences that may include deprivation of liberty. Furthermore, a trial is accompanied by labeling and stigma and a prosecuted child may end up with a criminal record, which often impact negatively to development. When a child is put on trial, alternatives with less harsh consequences like caution and diversion have failed or deemed not appropriate due to the circumstances of the child and/or the seriousness of the offence.

In the case where a child faces the criminal justice system, art 40(2)(b)(ii) provides that the child should 'have legal or other appropriate assistance in the preparation of his or her defence'. A child who has assistance would have a better understanding of the procedures in court and how to participate in court in his/her defence, and it is under these circumstances the child's rights will be protected and due process guaranteed.[119] As

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[118] CRC Committee (note 21 above) para 227 which reads: '[t]he privacy of the child should be fully respected in all stages of the proceedings, including in relation to criminal records and possible reporting by the media.'

[119] *In re Gault* 387 U.S. 1 (1967) the judgment of the Supreme Court of Arizona in JE Smithburn *Cases and Materials in Juvenile Law* (2002) 220 in which it was stated that ' [t]he Juvenile needs the assistance of counsel to cope with problems of the law, to make skilled inquiry into facts, to insist upon regularity of the

mentioned above and according to the CRC Committee, the principles of due process and fair trial require that the child alleged as or accused of being in conflict with penal law be able to effectively participate in the trial.[120] It is for this reason that the child needs to fully understand the charges, possible outcomes and the penalties in order to instruct the legal representative, to cross-examine witnesses, to give defence evidence and to make appropriate decisions regarding evidence, there are particular testimony and the measures that need to be imposed.[121] Furthermore, children's due process rights, particularly their active participation in court, become strengthened when they have lawyers.[122] Lawyers are familiar with the court language and etiquette. This is so that they facilitate a smooth flow of the case and make it easier for the magistrate to get information than to get it from the child offender.[123]

Furthermore, in the spirit of art 40(2)(b)(ii), states should determine how legal assistance is provided and make it free of charge.[124] According to Van Bueren, art 40(2)(b)(iii) is qualified by the words *unless it is not considered to be in the interests of the child* in order to allow the more informal processes to function without hindrance.[125] The representation may be by legal professionals or persons with no legal training. Of real concern is the quality of representation and the confidence of the child in a 'well-trained independent professional on whom the child can rely both for advice and representation.'[126]

The representation, according to art 12(2) of the CRC, shall be in a manner consistent with procedural rules of national law. There is a concern that the qualification 'in a manner consistent with the procedural rules of national law' gives states parties the scope to legislate representation in a way that may undermine participation rights of the child.[127] Even though the commentator has not outlined how this could come about, it may happen where there are no representation procedures laid out, such as conducting the

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proceedings, and to ascertain whether he has a defense and to prepare and submit it. The Child requires the guiding hand of counsel at every step in the proceedings against him.'

[120] CRC Committee (note 2 above) para 46.

[121] *Ibid.*

[122] N Naffine 'Children in the Children's Court: Can there be Rights without a Remedy?' in P Alston *et al* (eds.) *Children, Rights and the Law* (1995) 77 at 87.

[123] *Ibid.*

[124] *Ibid* para 49.

[125] G Van Bueren *A Commentary on the United Nations Convention on the Rights of the Child: Article 40 Child Criminal Justice* (2006) at 19. See also Fortin (note 5 above) at 557- 558 it was stated that in the United Kingdom the child safety orders criminalizes young children who are neither allowed to be parties to the proceedings nor to have legal representation in court even though the orders are passed over them.

[126] *Ibid.*

[127] *Ibid.*

defence according to the child's instructions. Thus, the child's participation rights may be frustrated and the child treated like a welfare case and not a bearer of rights as intended by the CRC. On the other hand, the qualification is said to have been

> intended to stress the need for the national law to include specific procedures to allow for the implementation of the right as recognized by article 12, and naturally not to be interpreted as a means of allowing possible inadequate solutions contained in the procedural law to prevent the full enjoyment of this fundamental right. In fact, such an interpretation would again be contrary to article 4 of the Convention.[128]

Some states have made reservations to art 40(2)(b)(iii), thus denying children a fair trial and the full protection of the CRC.[129] Representation is vital in the juvenile justice, as without it fair trial is jeopardised and there is a risk that courts could make arbitrary decisions and fail to act in the best interests of the child. Fair trial is the primary indispensable foundation of individual freedom; for it defines the rights of the individual and limits the powers which the state may exercise.[130] Therefore, a child in conflict with the law, by virtue of immaturity and inexperience in the criminal justice system, should have legal representation to enable him/her to participate effectively in the proceedings and to ensure that his/her rights of a fair trial are protected.

2.6.4 Sentencing

The purpose of children sentencing is to hold a young person accountable for an offence through an imposition of sentences that have meaningful consequences for the young person and promote his or her rehabilitation and reintegration into society, thereby contributing to the long term protection.[131]

2.6.4.1 The Basis of Sentencing

Sentencing children is a difficult practice.[132] The court has to decide what weight it places on rehabilitation or deterrence, has to decide on how to hold children responsible for their actions, and at the same time take into consideration their reduced responsibility because of age and immaturity. Furthermore, the court has to balance the need of society for

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[128] M Santos Pais (note 24 above) at 430.
[129] OHCHR (note 26 above) the Kingdom of Netherlands ratified the CRC with reservation to art 40 and declared that in cases involving offences, children may be tried without the presence of legal assistance and no provision for review of any measures imposed as a consequence of the trial will be made for all cases.
[130] *In Re Gault* (note 119 above) at 216.
[131] Canada Department of Justice *YCJA Explained, Youth Sentence: Explanatory Text* (2002) at 2 at www.justice.gc.ca/eng/pi/yj-jj/repos-depot/pdf/3040301.pdf accessed on the 01st March 2008.
[132] C Cunneen & R White *Juvenile Justice: Youth and Crime in Australia* (2003) at 281.

protection against the rehabilitation of the child.[133] In the process of sentencing children, as provided for in art 40(4), dispositions should be in a manner appropriate to the well-being of children and proportionate both to their circumstances and the offence. This is further instilled by Rule 5.1 of the Beijing Rules. The rule refers to two important objectives of the juvenile justice system: promotion of proportionality and well-being.

The principle of proportionality is an instrument used to prevent punitive sanctions expressed in terms of just desserts in relation to the gravity of the offence.[134] Furthermore, '[t]he effects of disproportionate intervention are described as... overreaching, resulting in more intervention than could be justified.'[135] In juvenile justice, consideration should not be based only on the gravity of the offence, but also on a report on personal circumstances of the child offender; the child's social status, family situation, the harm caused by the offence, or any other factor affecting personal circumstances.[136] The offender's efforts to indemnify the victim or the offender's willingness to reform should also be considered when assessing the proportionality of a response.[137] This report assessment is termed pre- sentencing report.

The second principle advocates for the well-being of the child, thus contributing towards the avoidance of merely punitive sanctions.[138] According to Trepanier, the well-being of the child must be the guiding factor in the decision of the child's case.[139] The ideal approach is one that gives first consideration to the child's welfare. In this approach, the child offender's accountability is not considered a priority.[140] This suggests that the court should have a comprehensive report on the circumstances of the child before passing sentence.[141]

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[133] *Ibid.*
[134] Beijing Rules (note 4 above) Commentary on Rule 5.1.
[135] J Prinsloo 'Young Offenders and Presentencing Reports: A Criminological Perspective' (2005) 18 (3) *Acta Criminologica* at 6.
[136] Beijing Rules (note 4 above) Commentary on Rule 5.1.
[137] *Ibid.*
[138] *Ibid.*
[139] J Trepanier 'Children's Rights in Juvenile Justice: A Historical Glance' In A Alen et al (eds) *The UN Children's Rights Convention: Theory meets Practice* (2007) 509, at 525. See also CRC Committee *Concluding observations of the Committee on the Rights of the Child: Mongolia CRC/C/ SR. 266* 12 March 1996 para 38 which reads 'the rehabilitation of offenders should be the primary objective, not the third, following the protection of society and the punishment of the child in the interest of society, as appeared to be the case' at http://tb.ohchr.org/default.aspx accessed on the 4th November 2008.
[140] *Ibid.*
[141] *S V Kwalase* 2000 (2) SACR 135 at 139D to E Van Heerden J stated that ' [t]he Commentary to this rule indicates that these so-called ' social enquiry reports' (ie what would be known as pre-sentence report in South Africa) are 'an indispensable aid' in legal proceedings involving juveniles.'

2.6.4.2 Sentencing Options

2.6.4.2.1 Sentences without Institutional Element

The CRC directs that a variety of dispositions mentioned in art 40(4) should be made available by states parties. The article requires that for sentencing purposes, a variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care, should be made available. Article 40(4) should be read with art 40(1), which advocates consideration of the child's age and the promotion of child's dignity and worth. It strives to strike a balance between the responsibility of the child, which cannot be divorced from the child's age and the rights of others, and reforming and reintegrating the child into society.[142]

Article 37(a) of the CRC provides that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.' The provision further prohibits the death penalty. For the purpose of this research, death penalty will not be discussed because it is not a problem in the Lesotho juvenile justice system.[143] It is the 'immediate and unqualified obligation of state parties' to eliminate the punishment of children that is violent and humiliating through legislative measures.[144] The CRC Committee observed that in some states, corporal punishment is still authorized as a sentence for child offenders under the guise of serving the best interests of the child. [145] The best interest principle must not be invoked to justify torture and cruel practices, which include corporal punishment of children, because it conflicts with the dignity and right to physical integrity of the child.[146]

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[142] Beijing Rules (note 4 above) Rule 17.1 provides that the dispositions in juvenile justice must always be proportionate not only to the circumstances and gravity of the offence, but also to the circumstances and needs of the child and the needs of society.

[143] Section 297(2)(b) of the CP&E 1981 provides that the court shall not pronounce death sentence if the convicted person was under the age of 18 years at the commission of the offence.

[144] *Ibid.* See also CRC Committee *Concluding observations of the Committee on the Rights of the Child: Grenada CRC/ C/ 15/ Add. 121* 28 February 2000 para 21 it was recommended that State Parties take all measures including enactment of laws to prohibit corporal punishment in the administration of juvenile justice at http://tb.ohchr.org/default.aspx accessed on the 30th July 2008.

[145] CRC Committee *General Comment No. 8 (2006) The Rights of the Child to Protection from Corporal Punishment and other Cruel and Degrading forms of Punishment* para 32 at www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.C.GC.8.En?OpenDocument accessed on the 28th July 2008. In Lesotho corporal punishment is still legal. It will be discussed in detail in chapter 3.

[146] *Ibid* para 26.

2.6.4.2.2 Sentences with Institutional Element

Article 37 outlines standards to be followed when children are deprived of their liberty. This includes not only imprisonment, but covers other forms of institutional care such as referrals to reform schools, schools of industry, residential, vocational or educational institutions.[147] Article 37(b) requires that deprivation of liberty is used as a measure of last resort and for the shortest appropriate time. Rule 17 of the Beijing Rules elaborates further that a juvenile shall not be deprived of liberty unless he/she has been prosecuted for a serious act involving violence against another person or for persistent commission of other serious offences. There is no other appropriate response that will protect the public safety.

Article 37(c) requires that in cases where detention is used, children should be separated from the adults and be treated in a manner that takes into account their needs and age. Most importantly, children should be detained separately from adults. According to Liefaard, the separation of children from adults is not only important for the protection of the children, but it also helps create an atmosphere specifically designed for children to meet their special needs.[148] The purpose of the article is to shield children from the negative influence of adult criminal. It also attempts to prevent the great physical and psychological risks of detaining children in the same facility with adults.[149]

There is a strong indication that the separation of children detainees from adult detainees is crucial to safeguard against ill-treatment and abuse, but is still ignored by some states.[150] Some states have ratified the CRC with reservation to art 37(c), and this is contrary to the spirit of the CRC.[151] When custody is necessary, cases should be reviewed constantly and alternatives of close supervision should be considered.[152]

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[147] Sloth-Nielsen & Gallinetti (note 18 above) at 28.
[148] T Liefaard 'The Right to be Treated with Humanity' In A Alen et al (eds) *The UN Children's Rights Convention : Theory Meets Practice* (2007) 576 at 576.
[149] M Leeman *The Right of the Child in Switzerland* (2002) at 24 -25 at www.omct.org/pdf/cc/suisseEng.CC.pdf accessed on the 13th May 2008.
[150] *Ibid* at 25.
[151] OHCHR (note 26 above) it was stated that the United Kingdom, Netherlands, and Switzerland have ratified the CRC with reservations to art 37 (c). See also Child Rights Information Network *South Africa: Ministers Sued for teen Incarceration* (20 /05/ 2008) recently a fifteen years old boy had been detained in the maximum security section of Durban's Westville prison for adults. The boy was reported to have been 'repeatedly raped by the prisoners and is receiving post- prophylactic treatment, as there was a very high risk that he had been infected with HIV.' At www.crin.org/resources/infoDetail.asp?ID=17346 accessed on the 21st May 2008).
[152] The European Network of Ombudspersons for Children *Juvenile Justice: Europe's Children's Champions Challenge Governments to Respect Young Offender's Rights* (2003) at www.crin.org/docs/juvenile_justice_final_statement.doc accessed on the 28 April 2008.

Conditions in custody must respect children's rights contained in the CRC and the Beijing Rules.[153]

Arguably, when the detention conditions do not meet the special needs of children, the imposition of custodial sentences breaches the right to survival and development, as enshrined in art 6 of the CRC. All children, including child offenders, should be provided with 'care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical and physical they may require in view of their age, sex and personality.'[154] However, children remanded in custody live under very restrictive regimes where educational facilities and recreational activities are severely limited.[155] Some of these children are bullied and harassed on arrival at the detention centers where they are far from their homes and often denied the possibility to maintain ties with their families.[156] It has been commented that

> [w]hile it may be necessary to employ compulsory measures in responding to juvenile offenders, it is neither in the interests of children nor of the broader society to pursue measures which are purely punitive in intent, including the use of custody. Research tells us that rates of re-offending and in particular violent offending are increased by depriving children of their liberty. The only legitimate reason for detaining children, before or after trial, must be that they pose a serious and immediate risk to others.[157]

The basis for using deprivation of liberty as a measure of last resort lies in the best interests of the child principle and that a child should not be separated from his/her parents.[158]

2.7 Implementation Provisions

Article 4 requires states parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the CRC. The measures undertaken to implement the economic, social and cultural rights should be to the maximum extent of the state's available resources. The question of what measures are

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[153] *Ibid.*
[154] H A Strydom & J L Pretorius & M E Klinck *International Human Rights Standards Volume 1: Administration of Justice* (1997) at 139.
[155] Fortin (note 6 above) at 570.
[156] *Ibid* at 571.
[157] The European Network of Ombudspersons for Children (note 152 above).
[158] G Van Bueren *The International Law on the Rights of the Child* (1998) at 185.

appropriate is at the discretion of the state party and also subject to the scrutiny of the CRC Committee.[159] Todres argued that

> Since the second part of Article 4 addresses the economic, social, and cultural rights embodied in the Convention, the first sentence must therefore address all other provisions-most notably those on civil and political rights and some of the provisions on special protection measures. A state's obligations with respect to the rights and special protections covered by the first sentence of Article 4 are not subject to availability of resources.[160]

Articles 37 and 40 contain civil rights, and therefore such rights are not subjects to the progressive implementation according to art 4. When outlining the obligations in art 4, there is no specific reference to the judiciary or to judicial remedies. This is a serious oversight since the *courts* are specifically mentioned in art 3. [161] The courts are a major part of juvenile justice and best interests of the child, which is a primary consideration demand that judicial measures receive equal recognition as legislative and administrative measures in implementation. However, it can be argued that the issue of judicial process is covered by *other measures.*[162]

The implementation provisions of the CRC are weak as they do not provide for state or individual complaints.[163] Without these provisions, the CRC will have to rely on the national judicial systems to interpret and implement the CRC.[164] This will generate a broad range of interpretations, including narrow interpretations which may further restrict the rights of the child.[165]

The CRC Committee has been established under art 43 with the function to monitor the implementation of the CRC.[166] Article 44 provides that states parties should report to the CRC Committee on measures taken to give effect to the rights contained in the CRC. The first state report should be submitted within the two years of ratification of the CRC, thereafter reports should be submitted at five years intervals. The submitted reports should point out the progress and the difficulties affecting the degree of fulfilment of the CRC obligations.[167] This would help the states to identify their weaknesses and strengths in the implementation process and helps the CRC Committee in making recommendations to the states parties.

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[159] Van Bueren (note 22 above) at 211.
[160] J Todres ' Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and its Early Case Law' in M D A Freeman (ed) *Children's Rights* (Volume 11*)* (2003) 139 at 158.
[161] *Ibid.*
[162] *Ibid.*
[163] *Ibid* at 161.
[164] *Ibid.*
[165] *Ibid.*
[166] Note 4 above.
[167] McGoldrick (note 14 above) at 102.

States reports, however, often lack information concerning juvenile justice.[168] When juvenile justice is included, the information is limited to legal provisions and rarely addresses social factors leading to the involvement of children in the juvenile justice system and the consequences thereof.[169] Furthermore, parties do not report on the difficulties encountered towards the effective realization of children's rights.[170] Reports show that the general principles are not adequately included in the national legislation or practice, and the general safeguards in arts 37 and 40 are to a large extent not guaranteed.[171] The CRC Committee therefore suggests that states carry out intensive research at national level to address the contents of specific rights recognized in arts 37, 39 and 40, and inform the CRC Committee about projects carried out, the successes and difficulties encountered.[172]

The professional quality of people involved in administration of juvenile justice is key to the implementation of juvenile justice guarantees in the CRC. They should have knowledge of the children's physical, psychological, mental and social development and be acquainted with special needs of vulnerable children.[173] Professionals in the juvenile justice system, moreover, should be trained in individual professional groups and collectively so that all professionals posses an in-depth knowledge of their roles in the juvenile justice system. Furthermore, professionals will understand and appreciate each other's roles. This will facilitate speedy decisions in matters concerning children in conflict with the law. The common understanding and collaboration will enhance capacity and use of diversion, restorative justice and appropriate sentencing.[174] Generally, working together will improve the functioning of the juvenile justice system and, more particularly support the principle of the best interests of the child.

The ratification of the CRC, like any other international Convention, does not always mean the automatic operation of its provisions. The effects of an international convention in national law depend on the type of legal system operating in each state. As Harris points out:

> In monist states, ratification is sufficient to render the provisions of the ratified instrument enforceable within the ratifying state, whereas in

[168] CRC Committee (note 21 above) para 217.
[169] *Ibid.*
[170] *Ibid.*
[171] *Ibid* para 218.
[172] *Ibid* para 209.
[173] CRC Committee (note 2 above) para 40.
[174] United Nations Devepopment Programme- South Africa *Capacity Building in the Area of Youth Justice* 1 at www.undp.org.za/docs/reports/saf97-034.html accessed on the 12th November 2008.

> dualist states, the provisions of the ratified instrument can only become enforceable in the courts of the ratifying state if such provisions have been made part of municipal law through an enactment of the state's legislature.[175]

Because the CRC has been ratified by all states except for the two already mentioned, it would be expected that its implementation into national law by states parties will be equally universal.[176] Today the provisions of the CRC on juvenile justice should be a global common value and the CRC provisions should help to achieve uniform justice for children.[177] This expectation, however, is far from being achieved. Hamilton notes:

> While the rate of ratification of the UN Convention on the Rights of the Child has been a triumph for the human rights world, those working in the field are well aware that there is little cause for complacency. Ratification does not carry with it an assurance that the rights contained in the convention will be implemented. It does not translate into an improvement in the situation or status of children.[178]

State parties still struggle under financial constraints to implement juvenile justice provisions in accordance with the CRC provisions. It has been suggested that state parties set time-bound objectives with corresponding plans, programmes budgets and measurement mechanisms for ensuring minimum standards set for children's rights.[179] The most conceivable strategy is for the states to have a National Action Plan for children as part of implementing the commitments made at the World Summit for Children.[180] One of the most important outcomes of a National Action Plan for children could be the improvement of the national juvenile justice system and the independent monitoring system for children's rights.[181]

All efforts towards the implementation are relative to individual states and must be interpreted according to the socio-economic or cultural context of a particular nation.[182]

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[175] K Mohau ' Human Rights' in Lesotho Justice Sector *Lesotho Justice Sector Conference: A Full Report of Conference Proceedings and the Recommendations* (2004) Maseru 26th -30th July 2004 93 at 96.
[176] S Goonesekere ' National Policies on Children's Rights and International Norms' in S Asquith & M Hill (eds.) *Justice for Children* (1994) 73 at 73.
[177] *Ibid.*
[178] C Hamilton 'Implementing Children's Rights in a Transitional Society' in C J Davel (ed) *Children's Rights in a Transitional Society* (1999) 13 at 36.
[179] R J Ledogar 'Realizing Rights through National Programmes of Action for Children' in J R Himes (ed) *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low-income Countries* (1995) 55 at 55.
[180] *Ibid* at 56 where it was stated that heads of states declared that 'We will work to promote the earliest possible ratification and implementation of the Convention on the Rights of the Child.'
[181] *Ibid* at 63.
[182] Goonesekere (note 176 above) at 73.

Any state seeking to implement the CRC faces a list of problems which might include lack of political will, finances and the relevant public's attitude.[183] Odongo argues that the implementation of the CRC is slow because the obligation to reform juvenile justice depends on the 'socio-political and legal terrain of a particular country.'[184] States should undertake revision of national laws and practices to include the administration of juvenile justice as provided under the CRC. For some states, this will not be easy. However, it could be achieved through international assistance.[185]

2.8 Conclusion

Paragraph 1 of the CRC preamble provides that children have equal value as human beings. That read with the principles of the best interests of the child, child participation, non-discrimination and development are of great importance.[186] These principles should guide decision making and employed as interpretation standards of state policy and legislation in juvenile justice. As stated by the Amnesty International '[t]ogether they form nothing less than a new attitude towards children. They give an ethical and ideological dimension to the convention.'[187] Therefore, the implementation of the CRC in regard to children in conflict with the law must not be limited to arts 37 and 40; its approach should be holistic, with art 3, 2, 6 and 12 being the 'integral part of the administration of child justice.'[188]

The discussion of the juvenile justice provisions of the CRC indicate that when dealing with children in conflict with the law, an approach based on control and punishment is not acceptable. State parties have to establish policies which provide for diversion and embrace the philosophy of restorative justice.[189] However, diversion should not be forced on children against the legal safeguards in art 40(3)(b). Where responsibility for the

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[183] Hamilton (note 178 above) at 35.
[184] G O Odongo *The Domestication of International Law Standards on the Rights of Child with Specific Reference to Juvenile Justice in the African Context* A Thesis submitted in fulfillment of the requirements for the degree of Doctor of Law in the Faculty of Law of the University of the Western Cape, South Africa 18th October 2005 at 257 at www.etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_9110_1176963955.pdf accessed on the 03rd March 2008.
[185] CRC Committee (note 2 above) para 208.
[186] T Hammarberg 'Justice for Children through the UN Convention' in S Asquith & M Hill (eds.) *Justice for Children* (2005) 59 at 63.
[187] *Ibid.*
[188] Doek (note 85 above) at 11.
[189] Skelton (note 84 above) at 192.

offence is disputed, it is essential to establish quilt for crimes through prosecution.[190] Children should be held responsible for their actions taking into account the concept of evolving capacities; the age of criminal responsibility should be set as high as possible, the decisions made in regard to children in conflict with the law should take into account the age of children while at all times respecting children's views.[191]

The specialised juvenile justice court has to be child friendly and ensure privacy and non publication of the child's identity. Legal representation and interpretation services which are essential to fair trial and facilitate effective participation of a child in decisions affecting him/her in the administration of juvenile justice should be ensured. There should be a range of dispositions which are alternatives to institutional sentencing so that the deprivation of liberty can only be used as a measure of last resort. Where children are deprived of their liberty, conditions in detention centres should be fit for the age and needs of children. Further, detention should be for a shortest appropriate time. Treatment of children in juvenile justice should be free of torture and cruel inhumane treatment.

There is nothing more nourishing to the child's development than family and community life.[192] It is therefore essential that states develop a system that empowers the families and communities in the moulding of the child's life, especially when the child is in conflict with the law. This could be achieved through the use of restorative justice measures which demand the collaboration of various stakeholders in the juvenile justice system. Although the concept of collaboration and linkage has been well established and understood in the placement of children in need of care, the same has not been the case in the juvenile justice system.[193] The CRC emphasizes the importance of developing a new solidarity between all departments acting in matters that affect children in conflict with the law, so that the child's best interests receive primary consideration.[194]

> Such a system must include: a realistic age of criminal responsibility which takes into account the maturity of the child; a juvenile law based on Children's Rights; sanctions adopted to juveniles which prioritize education and training over detention and retribution; a separate court system with specially trained judges and lawyers who are aware of the particular needs of children and the different stages of their development; special training of the police and military; separate

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[190] *Ibid.*
[191] *Ibid.*
[192] CRC Preamble 1 paras 4 and 5.
[193] Goonesekere (note 176 above) at 81.
[194] *Ibid.*

> detention facilities for children, including rehabilitation centers; and proper follow up and coordination with social services.[195]

States parties should comply with the requirement of periodical reporting to receive recommendations and guidance on how to proceed in the task of harmonising the CRC provisions in juvenile justice in national legislation. Harmonisation is not always easy due to lack of political will and resources; however this may be achieved through international assistance.

[195] Amnesty International, International Secretariat *The Best Interests of the Child: Human Rights and the Juvenile Justice System* (YEAR) at www.amnesty.org/en/library/asset/ACT76/006/1998/en/dom-ACT760061998en.html accessed on the 12th April 2008.

CHAPTER 3

THE CURRENT LESOTHO JUVENILE JUSTICE SYSTEM

3.1 Introduction

As mentioned previously, Lesotho ratified the CRC in 1992 and from then has been under the obligation to incorporate the provisions of the CRC into national law. In this chapter, the Lesotho's juvenile justice provisions are assessed against the standards of the CRC discussed in the previous chapter. The topics discussed in this chapter are topics the researcher thinks are problematic in terms of compliance with the administration of juvenile justice under the CRC.

The chapter begins with a discussion of the Children's Protection Act 1980 (hereafter 'the CPA'), which contains the basis of juvenile justice in Lesotho. Further, the topics that are discussed are the general principles of the CRC reflected in the Lesotho juvenile justice system, definition of a child and the age of criminal responsibility, pre-trial detention, and diversion. After this, the discussion moves on to the judicial process and sentencing. In this chapter the researcher will address the issues identified as important in the previous chapter.

3.2 The establishment of the Juvenile Justice System in Lesotho: The Children's Protection Act 1980

Prior to 1980 Lesotho has not had a criminal justice system dealing separately with children.[1] The juvenile justice provisions were introduced for the first time by the CPA. From the preamble, it is clear that the aim of the CPA is '[t]o make provision for the protection of children in need of care and for connected purposes.' This application includes juvenile justice issues. The researcher argues that the CPA provides inadequate protection for children in conflict with the law. Some of its sections are incompatible

[1] I Kimane ' Child Justice in Lesotho' in Lesotho Justice Sector *Lesotho Justice Sector Conference: A Full Report of Conference Proceedings and the Recommendations* (26th – 30th July 2004)250 at 250.

with the provisions regarding the administration of juvenile justice provided in the CRC.[2] After ratification of the CRC, Lesotho did not enact any legislation in relation to the administration of juvenile justice, but carried forth with the provisions of the CPA. Discussion in the following paragraphs will focus on the compatibility of the Lesotho juvenile justice system as provided for in the CPA and other legislation with arts 37 and 40 of the CRC. It will be shown that although the CPA has some child-friendly provisions, it also has numerous short falls. and this makes the legislation incompatible with the CRC.

3.3 General Principles

The general principles of the CRC; the Best interests of the child, non-discrimination, participation rights and right to survival and development, are not mentioned in the CPA. These principles are not recognized in the Constitution, with the exception of non- discrimination reflected in s 18, which applies to all persons, not just children. The practices in the juvenile justice system show minimal observance of the best interests of the child. The CRC Committee observed with concern that the principle of the best interests of the child is generally not respected in Lesotho and that this is worsened by limited implementation of the children's right to be heard.[3] For this reason it is not possible to dedicate discussion to each general principle individually.

3.4 Definition of a Child and Age of Criminal Responsibility

Following the rationale behind discussion of definition of a child and the age of criminal responsibility in chapter part 2.3 above, these topics are discussed in this section. According to s 2 of the CPA, a child 'means an unmarried person under the age of eighteen years'. This definition implies that married persons below the age of eighteen years will not be treated as children and, as such, fall outside the protective ambit of the

[2] I Kimane ' Overview of Child Justice System in Lesotho at Present' in G Kunda *Good Governance and Development* Conference Report at Maseru Lesotho (7th -8th May 2004) at 21 at www.sadclawyers.com/pdfs/conferencereport.pdf accessed on the 5th March 2008.
[3] CRC Committee *Initial Reports of state Parties due in 1994: Lesotho CRC/C/11/Add 20* 20 July 1998 para 27 at http://tb.ohchr.org/default.aspx accessed on the 2nd March 2008.

CPA.[4] However, s 22 provides that if within the course of the trial the child attains the age of eighteen years or gets married, thereby attaining majority, the child will be dealt with by a Children's Court. Section 2 of the CPA complies with art 1 of the CRC,[5] but a more protective stance could have been taken by the CPA. The international guidelines in juvenile justice urge that all persons below the age of eighteen be treated as children in the juvenile justice system.[6] Such people need protection from adult criminal system because they have not developed fully emotionally and cognitively. This makes their capacity to offend less than that of adults, and therefore should not be expected to bear full criminal responsibility.[7] This concern has been addressed in clause 3 of the Bill which proposes that a child should mean '(a) a person under the age of eighteen years.' This will be discussed in detail in chapter four.

The CRC Committee advises that the age of twelve years should be minimum age of criminal responsibility.[8] The CPA is silent on the issue of the age of criminal responsibility. Since there is no legislation in this regard, the courts revert to the Roman Dutch law which is the common law in Lesotho.[9] According to common law, children below the age of seven years do not have criminal capacity. However, there is a rebuttable presumption of criminal capacity in children from seven years to fourteen years old.[10] In its comments to Lesotho the CRC Committee observed with concern this extremely low age of criminal responsibility.[11]

This low age of criminal responsibility is aggravated by the superficial determination of the capacity of the child. If the child between the ages of seven and fourteen knowingly and intentionally committed a crime, understanding the consequences of the wrongful act, he or she can be held criminally responsible once sufficient evidence has been

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[4] Section 27 of the Marriage Act no. 10 of 1974 provides minimum marriage age for boys as 18 years and 16 years for girls.
[5] Chapter 2 note 61 and corresponding text.
[6] JDL Rules Rule 11 (a) at www.unhcr.ch/htm/menu3/b_comp37.htm accessed on the 20th February 2008.
[7] Chapter 2 in part 2.3.
[8] Chapter 2 note 83 and corresponding text.
[9] L Chaka-Makhooane 'Administration of Juvenile Justice' in Lesotho Law Reform Commission *Child Legislation Reform Project: Issue papers Project 6* (2003) 1 at 13.
[10] CR Snyman *Criminal Law* (3rd ed) (1995) at 165.
[11] CRC Committee *Concluding Observations: Lesotho CRC/C/15/Add.147* 21 February 2001 para 61 (a) at http://tb.ohchr.org/default.aspx accessed on the 2nd March 2008.

adduced.[12] This assessment should be supported by expert evaluation. This, however, is rarely done.[13]

In cases where children have admitted to diversion, however, there are no means of establishing capacity because the incapacity of children between the ages of 7 and 14 can only be rebutted by the prosecution in court. This means that even children who do not have capacity may be dragged through the criminal system as there are no rules for determination of capacity out of court.

Further, the age limit of seven years is contrary to the intention of the CRC. It puts the interests of society and the need for retribution ahead of the best interests of the child. It is therefore important that the age of criminal capacity be increased as the CRC Committee recommended.[14] Lesotho is in the process of bringing its age of criminal responsibility in line with the CRC as discussed in chapter four.

3.5 Pre- Trial Detention

Section 6(1) of the Lesotho Constitution Act No. 5 of 1993 (hereafter 'the Constitution') states that every person shall be entitled to personal liberty except when detention is provided for in a court order or sentence in respect of a criminal offence. A person under the age of eighteen years, however, may be deprived of liberty for the purpose of his/her education or welfare. The Constitution may therefore be construed as meaning that, unlike adults; children can be detained without having contravened any penal statute, and only for furthering their education or welfare.

Besides the above constitutional provisions, there are no other rules with regards to child arrest and the CPA is silent on the subject. Therefore, children are arrested in the same way as adults, with the exception that children are never hand-cuffed. [15] Normally, they are not taken to police cells, but they are released into the custody of their parents. Children are kept in police custody after arrest if they were arrested by a warrant and cannot be kept under control, their safety is in danger, or neither parents nor guardians

[12] CRC Committee (note 3 above) para 26.
[13] This is a personal professional experience of the researcher, for general observations see Chapter 2 note 22 and corresponding text.
[14] Chapter 2 note 83 and corresponding text.
[15] Interview with Inspector Theko of the Maseru Central Charge Office at Maseru on the 27th June 2008.

can be found.[16] This police practice shows inclination towards using detention as a measure of last resort in accordance with art 37(b) of the CRC. In cases where detention is needed, children are kept at the police station in any available rooms as there are no facilities for holding children in the Lesotho police stations.[17]

Detaining children in adult cells leads to violations of juvenile offender's rights.[18] A study has shown that in adult cells children are exposed to verbal and physical abuse and receive very little food.[19] The CRC Committee has observed that this practice of mixing juvenile offenders with adult offenders in crowded conditions brings the children in contact 'with harmful behaviour that can contaminate and dissocialize the child.'[20] Sometimes children are detained beyond forty eight hours dictated in s 6 (3)(b) of the Constitution due to police ignorance[21]. The practice is against s 21 of the CPA which provides that arrested children should be kept separate from adults and against art 37(b) of the CRC providing that children should be detained for a shortest appropriate time.

The police need to acknowledge s 21 of the CPA. The establishment of the Child and Gender Protection Unit (hereafter 'the CGPU') in 2002 within the Lesotho Mounted Police Service (hereafter 'the LMPS')[22] has provided a good forum for intensive training on the treatment of juvenile offenders.[23] It is recommended that the LMPS' budget should include the construction of places of detention for children so that the provisions of art 37(c) of the CRC is complied with.

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[16] *Ibid.*
[17] *Ibid.*
[18] L Chaka-Makhooane (note 9 above) at 15.
[19] *Ibid.* Also see NGO Coalition for the Rights of the Child - Save the Children UK *Complementary Report on the Implementation of the UN Convention on the Rights of the child in Lesotho* 2000 at 34 at www.law.yale.edu/rcw/rcw/jurisdictios/afs/lesotho/lesotho-ngo-report-2000.pdf' accessed on the 22nd February 2008.
[20] CRC Committee (note 3 above) para 115. See also Chaka-Makhooane (note 7 above) at 7 where it was stated that juveniles are at a greater risk during the pre-trial period in comparison with those already serving a sentence. They are faced with being held in cells with adult offenders under unhealthy conditions. Since there would be no activity programmes, they are doomed to closed facilities for many hours at the time. They are also exposed to torture and interrogation by the police.
[21] Chaka-Makhooane (note 9 above) at 16.
[22] UNICEF *Reference Guide for Lesotho Mounted Police Officers on the Protection of Children and Women's Rights* (2005) at 3.
[23] *Ibid* '[t]he Ministry of Home Affairs, through the Lesotho Mounted Police Service (LMPS), established the CGPU in November 2002 to respond to the increasing cases of abuse, exploitation, neglect and violence among children and youth'.

3.6 Diversion

In the Lesotho juvenile justice system diversion is not regulated by statute. However, the practice has increased considerably in Maseru, with rare occurrences in other jurisdictions.[24] Diversion is sometimes used for minor offences by the police officers at first contact with the child in conflict with the law, which results in the withdrawal of charges.[25] This kind of diversion occurs early in the juvenile justice system and saves the child the stress of coming into contact with many professionals before the finalization of the matter. This practice has the advantage of not leaving any criminal record that may prejudice the child in the future.

Where police have failed to divert the child, the child is brought to the prosecutor who, together with the police, put the child's case before the probation officer.[26] When presented with the child's case, the probation officer compiles a social inquiry report and assesses the suitability of the child for diversion.[27] Based on the evaluation report, the probation officer will either divert (mostly depending on the victim) or refer the matter for prosecution.[28] The majority of cases diverted are of minor offences.[29]

The probation unit's efforts are hampered by shortage of staff and inadequate decentralization of services.[30] This results in children living in other areas, but Maseru not being diverted. Furthermore, diversion is never an option with regard to street children in Lesotho.[31] This amounts to discrimination against these two groups of children and is against art 2 of the CRC and the recommendations of the CRC Committee.[32] This is another challenge in the application of diversion. Diversion is understood only by a few magistrates.[33] Qhubu argued that:

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[24] Interview with F Mokoteli the Director of Probation Unit Lesotho at Maseru on the 04th July 2008. In major cases like murder, sexual offences, robbery and even serious theft that reoccur, the children are prosecuted

[25] Interview with Inspector Theko (note 15 above).

[26] Interview with Mokoteli (note 24 above).

[27] *Ibid.*

[28] *Ibid.*

[29] CRC Committee (note 3 above) para 229.

[30] *Ibid.*

[31] Interview with Mokoteli (note 24 above). Street children are not diverted because they do not have neither permanent addresses for monitoring nor adults to ensure that they attend diversion programmes.

[32] Chapter 2 in part 2.4.

[33] N Qhubu *The Development of Restorative Justice in Lesotho* (15-17 March 2005) at 12 it was stated that a pilot project was run with some magistrates and prosecutors in the northern and southern regional offices, however the project collapsed when the assigned probation officers left to study. At www.doj.gov.za/alraesa/conferences/papers/s4B_qhubu.pdf accessed on the 8th March 2008.

> [t]he main constraint was the reluctance of the criminal justice sector to accept restorative justice principles. This was mostly so with the prosecution and magistracy. The two agencies wield most power and are the most instrumental for the success of any transformations in the criminal justice system.[34]

Because diversion is not regulated, there are no standard guidelines, and this is contrary to good practice in the implementation of art (40)(3)(b) of the CRC.[35] Diversion practices need to be supported by developing the skills of juvenile justice practitioners and services and decentralized to the rest of the country so that all children can benefit the same services and not be discriminated on the basis of their residences. It is also of great importance that there should be measures taken to ensure that diversion is a possibility for street children.[36]

3.7 The Judicial Process

3.7.1 Remands and speedy trial

Generally, the child offenders are released to their parents or legal guardians while awaiting trial.[37] The courts cannot hear a case involving a child unless the parents or guardian of the child are present.[38] However, there are still cases where children appear for the first time before court in the absence of a parent or guardian because they had not been notified of the arrest. Such children find themselves in an impossibility to apply for and pay the bail.[39] This results in the child being remanded in custody until the parents or guardians can be found. The remands are not carried out in the Children's Court, but in public in the adult court.[40] This denies children the special institution for them provided in art 40(3) of the CRC. This practice, furthermore, leads to the publication of the child's identity against the provisions of s 6 of the CPA and contrary to art 40(2)(b)(vii) of the

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[34] *Ibid.*

[35] Diversion should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally that the admission will not be used against him/her in any subsequent legal proceedings.

[36] J Sloth-Nielsen & J Gallinetti *Child Justice in Africa: A Guide to Good Practice* (2004) at 28 in which it was argued that there are still many cases of children in conflict with the law which are processed through the judicial system; these are the cases in which diversion is not desirable or not considered altogether.

[37] Researcher's professional knowledge.

[38] CRC Committee *Summary Record of the 686th Meeting: Lesotho 2001CRC/C/SR.*686 24 January 2001 para 51 at http://tb.ohchr.org/default.aspx accessed on the 2nd March 2008.

[39] Chaka-Makhooane (note 9 above) at 17.

[40] *Ibid* at 24.

CRC, which provide that the child's privacy should be respected fully at all stages of the proceedings.[41]

The management and handling of Children's Court records is done by the Magistrates Courts clerks, however, it is neither structured nor consistent. Furthermore, there is no separate filing and recording system for the Children's Court.[42] The clerks are not sensitive to the 'urgency, importance, priority' of the Children's Court cases and there is no evidence of planning or supervision.[43] In this chaos, juvenile justice cases are not given any priority or treated with any urgency, so prompt decision making anticipated by arts 40(2)(iii) and 37(d) of the CRC is not observed.[44]

It would be advisable to have a separate court roll and filling system for the Children's Court. This would make it easy for the remands of children to be held in private in the Children's Court. The children's cases would receive deserved priority and processed much faster. This arrangement does not need any money to facilitate, just a will for change. This has been addressed in the Bill and will be discussed in detail in chapter four.

3.7.2 The Trial

3.7.2.1 Procedure in the Children's Court

The Children's Court was established under s 5 of the CPA which states that every Subordinate Court (Magistrate Courts)[45] shall be Children's Court within its area of jurisdiction and shall have jurisdiction to determine a charge against a child. The establishment of the Children's Court is in conformity with art 40(3) of the CRC, which requires the establishment of special courts for children.[46]

Section 6(1) of the CPA provides that the Children's Court should sit in a room other than that in which the court ordinarily sits. Criminal proceedings instituted against a child

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[41] Chapter 2 note 118 and corresponding text.
[42] Lesotho Justice Sector *The National Vision and Strategy for the Justice Sector* (2007) at 9.
[43] *Ibid.*
[44] This goes against the recommendations of the CRC Committee. See chapter 2 note 91 and corresponding text.
[45] Section 4(1) of the Subordinate Courts Act No. 9 of 1988 provides that a Subordinate Court shall be presided over by a magistrate, which is why they are called Magistrate Courts.
[46] Chapter 2 notes 94-95 and corresponding text.

should be *in camera* and not in public.[47] Besides this the CPA does not provide any procedures in the Children's Court but has in s 25 given powers to the Chief Justice to make rules regulating the Children's Court which would supersede any other legal procedures in criminal cases. The Chief Justice has not made such regulations.[48] Chaka-Makhooane stated that in the Children's Court 'the procedure is the same as that of the Subordinate Court. The language does not change, the format in the record is the same and even the sitting in court is really the same'.[49] The procedure in court is not child-friendly, the language and antagonistic attitude of the prosecutors and the 'theatrical antics of the lawyers' are highly intimidating.[50] Even though the Children's Court proceeds in private in accordance with art 40(2)(b)(vii) of the CRC, such privacy does not help create a child friendly environment due to the hostile environment explained above.

Section 6(2) of the CPA provides that the proceedings of any criminal case against a child shall not be published by radio, in document, print or any other means; neither shall the identity of the child involved in such proceedings be published. The CPA is therefore in conformity with the mentioned art 40(2)(b)(vii) of the CRC and in line with Rule 8 (Beijing Rules).[51] In practice though, these provisions are sometimes disregarded; journalists are usually allowed in court and children's identities are published with disregard to the children's privacy.[52]

The above discussion shows that some magistrates do not follow the provisions of the CPA and deal with children as they do with adults.[53] Hence, the observation of the Committee that there are no Children's Courts in some regions or that the Children's Courts are not always used in Lesotho.[54] Chaka–Makhooane argues that this negative attitude of magistrates towards child justice is the result of 'lack of awareness and training in juvenile justice.'[55] According to the Chief Magistrate of the central region,

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[47] Section 6(3) of the CPA provides that proceedings in the children's court should be in the presence of a parent or guardian, legal representative, prosecutor and magistrate.
[48] Chaka –Makhooane (note 9 above) at 9.
[49] *Ibid.*
[50] *Ibid.* See also CRC Committee (note 3 above) para 224 where it was commented that prosecutors are too aggressive and intimidating.
[51] Chapter 2 in part 2.6.3.1.
[52] Chaka-Makhooane (note 9 above) at 19.
[53] *Ibid* at 9.
[54] CRC Committee (note 11 above) para 61 (c).
[55] Chaka-Makhooane (note 9 above) at 9.

magistrates are not specially trained to handle juvenile justice matters.[56] The effective running of the Children's Court depends on the creativity of individual magistrates and their degree of appreciation of children's rights.[57] It is expected of them to be conversant with all laws and ready to preside over any case within their jurisdiction without any special training.[58]

Section 5(1)(a) and (b) of the CPA provides that where children are accused with adults, such children may be charged in the adult courts. According to s 5(2), for the child to be charged with an adult in the adult court, the Director of Public Prosecutions (hereafter 'the DPP') must direct that the charge be heard by that court where, in his opinion, it is in the public interest or that court is more suitable having regard to the circumstances of the case. In practice, prosecutors do not seek DPP's directive because it takes too long, especially for children awaiting trial in custody.[59] This translates into children accused with adults being dealt with in the adult courts.

Section 5(2) of the CPA is in contradiction with art 40(3) of the CRC which advocates for child specialist laws, procedures, authorities and institutions. Further, the section prioritises the public interests but is silent on the best interests of the child. This makes it easy for the best interests of the child provided for in art 3 of the CRC to be overridden by the interests of the public.[60] This procedure is not favourable to the protection of children because: they lose privacy, are exposed to negative publicity and they may end up being sentenced like adults. The essence of the special criminal system for children is compromised in these cases.

The Government of Lesotho has admitted in its initial report to the CRC Committee that 'the Children's Protection Act is not much respected by the courts. The police and prosecutors are also known to ignore this Act.'[61] This lack of consideration for the CPA has undermined the establishment of a special court that was meant to deal with juvenile justice separately from the general criminal system suited to adults. This is contrary to art

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[56] Interview with M Makara the Chief Magistrate Maseru 04th July 2008.
[57] *Ibid.*
[58] *Ibid.*
[59] Chaka- Makhooane (note 9 above) at 21.
[60] I remind here that art 3 of the CRC leaves space for other interests to be prioritised at the expense of the best interests of the child see Chapter 2 note 40 and corresponding text.
[61] CRC Committee (note 3 above) para 222.

40(3) of the CRC which requires the establishment of laws, procedures authorities and institutions specifically for children in conflict with the law.

3.7.2.2 Legal Representation

Section 12(2)(d) of the Constitution provides for a general right to legal representation. Access to legal representation is not free of charge and the CPA is silent on whether legal representation is free for children. Section 5 of the Legal Aid Act of 1978, however, provides that a person who cannot afford legal representation but whose representation is in the interests of justice shall be represented by a legal aid practitioner at the trial. Viner reported that there are serious problems in the manner in which Lesotho legal aid functions as it deals more with the civil cases than criminal matters.[62] Children offenders are usually from poor families which cannot afford to pay the services of defence lawyers.[63] Kimane argued that Lesotho has a small legal profession which is able to serve only a small section of the population and further that legal aid is under-developed.[64] This means that children 'cannot be guaranteed legal representation or legal aid services. It means their opportunities to access to justice are limited by economic and other factors.'[65]

Absence of legal representation for children in conflict with the law in Lesotho does not comply with art 40(2)(b)(ii) of the CRC which guarantees legal or other representation. This has been observed by the CRC Committee that expressed concern at the 'absence of systematic free legal advice and representation for children accused of criminal offences ...'[66]

The Lesotho criminal procedure is accusatorial, harsh and thus not appropriate for children.[67] It implies conflict and hostility.[68] The language used in court is 'technical and

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[62] P Viner 'The Lesotho Justice Sector- A situation Report by the Secretariat of the Lesotho Justice Sector Development Programme' in Lesotho Justice Sector *Lesotho Justice Sector Conference: A Full Report of Conference Proceedings and the Recommendations* (26th – 30th July 2004) 1 at 13.
[63] Kimane (note 1 above) at 252.
[64] *Ibid* where it was argued that the fact that Legal Aid is only in the capital Maseru amplifies the problem.
[65] *Ibid.*
[66] CRC Committee (note 11 above) para 61(d).
[67] Chaka-Makhooane (note 9 above) at 1.
[68] J M Reyneke & H B Kruger 'Sexual Offences Courts: Better Justice for Children?' (2006) 31 (2) *Journal for Juridical Sciences* 73 at 74.

familiar to legal professionals alone.'[69]This means that without legal representation the child is not able to follow or participate in the proceedings. Further, that child is denied fair trial because the child cannot make informed decisions about the presentation of his/her case.[70] This is inconsistent with the provisions of art 40(2)(b)(iii) of the CRC.[71]

It is essential for children in the juvenile justice system to have legal representation.[72] The system should ensure that children have free legal assistance. While provision of free legal representation may take a long time to accomplish, the Children's Court magistrates should play an inquisitorial role in the proceedings. The magistrates should protect children from the court room hostilities and ensure that the child is fully informed of his/her rights, the trial process and expected outcomes so that the child effectively participates in the trial.

3.7.2.3 Participation Rights and Interpreters

Section 12(d) of the Constitution provides that every accused has a right to defend himself before the court in person or through legal representation. This gives children the right of participation in juvenile justice cases. However, no legislation in Lesotho makes provision for the child's views to be taken into consideration and given due weight as provided for under art 12 of the CRC. This has allowed the tradition of the child 'being seen and not heard' to permeate itself into the Lesotho juvenile justice to the point of undermining due process and fair trial safeguards.[73] Children are allowed to participate but, participation is hampered by court proceedings that are not child friendly and legal representation that is not free as seen from discussions above. Even though presiding officers make final decisions, child participation often contribute to positive result.[74] Further the CRC Committee recommended that Lesotho takes effective measures to encourage respect of children's views especially in the judicial systems.[75]

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[69] Kimane (note 1 above) at 254. Further the practice is contrary to the comments of the CRC Committee see Chapter 2 note 55.
[70] Chapter note 120-122 and corresponding text.
[71] Chapter 2 in 'Legal Representation'.
[72] Chapter 2 in part 2.6.3.2.
[73] CRC Committee (note 3 above) para 72.
[74] CRC Committee *General Comment No. 10 (2007) Children's Rights in Juvenile Justice CRC/C/GC/10* 25 April 2007 para 45 at www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf accessed on the 10th March 2008.
[75] CRC Committee (note 11 above) para 27.

Section 12(2)(f) of the Constitution states that every accused person shall be guaranteed the service of an interpreter at the expense of the state if the person cannot understand the language used. The language used in the Subordinate Courts is English as required by s 7(1) of the Subordinate Courts Order No. 9 of 1988. This is one of the unfortunate inheritances from the English colonial legacy.[76] At present, all the magistrates but one and all judges in the High Court are Sesotho speaking. [77] Most parties who appear before the Lesotho courts, especially the Children's Court, are Sesotho speaking and often not conversant in English.[78] This compulsion for the courts to use English makes the presence of an interpreter in all cases mandatory. The accused child, already disadvantaged by not being familiar with the legal language, faces a further hurdle of having to follow proceedings and communicate through an interpreter.[79] The mandatory use of English increases costs of prosecution unnecessarily because a large number of interpreters have to be hired for all courts to function.

This situation has not been altered. On the contrary it has been confirmed by the highest court in the country- the Court of Appeal in the case of *Thamae Lenka*.[80] In this case Plewman J.A. with judges Ramolibeli and Melunsky concurring decided that 'it is absolutely mandatory that sworn interpreters be used...whatever difficulties there may be.'[81] This sometimes causes delays in trials.[82] The only positive effect is that foreign children and children who are not Sesotho speaking are guaranteed the services of an interpreter in accordance with art 40(2)(b) (vii) of the CRC.[83] However, it would be more logical and cost effective to provide interpretation only where necessary instead of providing it to everybody.

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[76] N Mohale 'Access to Justice, its Delivery, Adequacy and Suitability' In Lesotho Justice Sector *Lesotho Justice Sector Conference* Held at Maseru 26th to 30th July 2004 49 at 52.
[77] *Ibid.*
[78] *Ibid.*
[79] WCM Maqutu 'Access to Justice (Process, Procedures and Delivery thereof)' In Lesotho Justice Sector *Lesotho Justice Sector Conference* Held at Maseru 26th to 30th July 2004 17 at 44 Justice Maqutu (as he then was) argued that interpreters are not always accurate.
Chief Magistrate Mohale observed that in Lesotho witnesses are in the majority Sesotho speaking Basotho and could either not understand English or would be more comfortable with Sesotho Mohale (Note 76 above) at 52.
[80] *Thamae Lenka v Rex* C of A (CRI) No. 2 of 2004 (Unreported).
[81] *Ibid.*
[82] Kimane (note 1 above) at 255 it was argued that '[t]he use of the English Language creates the need for interpretation services which as experience demonstrates leads to another set of problems such as excessive delays, protracted court proceedings, distortion of evidence...'
[83] Chapter 2 note 44 and corresponding text.

3.7.3 Sentencing

3.7.3.1 Pre-sentencing Reports

In practice upon a return of a guilty verdict, the court stays proceedings for the probation officer to prepare and present the pre-sentencing report.[84] This practice is provided as the function of the probation officer 'to enquire into and report to a Children's Court upon the character and environment of any child on trial....'[85] The importance of taking into account the circumstances of the offender in determining the sentence cannot be overemphasized, and the probation officer's pre-sentence report is essential as it helps the judicial officers to reach a sentence appropriate to the circumstances of the offence and the well-being of the child.[86] The importance of pre-sentencing reports has been acknowledged in a South African case - *S V Jansen and Another,*[87] in which Botha JA stated:

> The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society. To enable a court to determine the most appropriate form of punishment in the case of a juvenile offender, it has become the established practice in the courts to call for a report on the offender by a probation officer in, at least, all serious cases...[88]

The presentation of pre-sentencing reports is compliant with art 40(4) of the CRC which provides that sentences should be appropriate to the well-being of the children. Further, this practice upholds the provisions of art 3 of the CRC, by giving consideration to the best interests of the child.

As mentioned the probation officers' services are strong in Maseru but very weak in the other districts,[89] so is the practice of presentation of pre-sentencing reports. This calls for the full decentralization and empowerment of the probation unit. Further it would be advisable to regulate the practice so that time limits within which to present the report should be put in place. This would help to avoid protracted waiting periods between conviction and sentencing.

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[84] Interview with Mokoteli (note 24 above).
[85] Section 4(1)(a) of the CPA.
[86] Chapter 2 in part 2.6.4.1.
[87] *S v Jansen and Another* 1975 (1) SA 425 (A).
[88] *Ibid* at 427 H- 428 A.
[89] CRC Committee (note 3 above) para 229.

3.7.3.2. Sentencing Options for Children

3.7.3.2.1 Sentences without Institutional Element

The CPA does not offer any of the alternatives to institutional sentences enlisted in art 40(4) of the CRC.[90] Sentencing options for children are contained in the Criminal Procedure and Evidence Act No.9 of 1981 (hereafter 'the CP&E') and will be discussed below.

Section 306(1) of the CP&E provides that children below the age of 13 years who have been found guilty of an offence may not be punished, but be placed in the custody of any suitable person designated in the order for a specific period. Such custody may not extend beyond the child's eighteenth birthday as provided in s 306(2) of the CP&E. The other alternative sentences are discharge with caution or reprimand provided for under s 319 of the CP&E and whipping, fine and recognizance, which are provided in s 297(4) of the CP&E. This section was amended to include community service as an alternative to custodial sentence.[91] Further in practice child offenders are also sentenced to supervision and probation orders.[92]

These sentencing options laid out above, with the exception of whipping, are in the spirit of art 40(4) of the CRC. They provide a fair range of alternatives to institutional sanctions. Judicially sanctioned whipping is prohibited in art 37(a) of the CRC, which bans torture and cruel punishment, but is still a concern in the Lesotho juvenile justice system. According to s 309 of the CP&E, no female person may be sentenced to whipping. Further, as per s 308 no person above the age of 21 may be sentenced to corporal punishment. While the law thus permits corporal punishment which is torture and cruel punishment, it is further discriminatory on the bases of age and sex, being reserved for male juvenile offenders, with the exclusion adults and female child offenders. Unfortunately, although s 8 of the Constitution prohibits torture and or degrading punishment, it qualifies that by stating:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description punishment that was lawful in Lesotho immediately before the coming into action of this constitution.

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[90] Chapter 2 in part 2.6.4.2.1.
[91] Section 3 and 4 of the Criminal Procedure and Evidence (Amendment) Act No. 10 of 1998.
[92] Interview with F Mokoteli (note 24 above).

The CRC Committee noted this with concern and recommended that Lesotho 'amend the law as soon as possible in order to abolish the sanctions of flogging for juvenile delinquents and, in the meantime, provisionally suspend the application of this form of sanction.'[93] The comments of the CRC Committee in this regard have to be heeded. [94]

Section 71 of the Subordinate Court Order No. 9 of 1988 which also provided for corporal punishment was repealed in 1998 by s 6 of the Subordinate Courts (Amendment) Act No. 6 of 1998. The explanatory memorandum reads:

> The Bill is also intended to amend the Subordinate court Order No. 9 of 1988, in order to bring it in line with the 1993 Constitution of Lesotho and the international human rights instruments, ratified by the government of the Kingdom of Lesotho...Section 8 (1) of the Constitution provides that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment... Corporal punishment is considered inhuman and degrading punishment and should be abolished.[95]

Since then, as an effect of this law, the Children Courts in Lesotho have stopped sentencing children to corporal punishment. However, the above amendments have altered only the sentencing powers of the Subordinate Courts. The powers of the High Court have remained unaltered by the above legislation.[96] Further there are special offences over which the Children's Courts do not have jurisdiction therefore such cases are tried in the High Court.[97] This means that the High Court can still sentence children to corporal punishment. Moreover, s 308 of the CP&E which provides for corporal punishment is still in force and a formal repealing is overdue.

3.7.3.2.2 Sentences with Institutional Element

Section 26 of the CPA prohibits imprisonment of children. It provides that when the court is satisfied that the previous conduct of the child and circumstances of the offence warrant expedient rehabilitation and prevention of crime, the court may order a period of training in an approved school.[98] Section 32 of the CPA; however, provides that a child may not be detained therein beyond the age of 18 years. Section 26 of the CPA was

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[93] CRC Committee (note 11 above) para 62 (b).
[94] Chapter 2 note 144-146 and corresponding text.
[95] Explanatory Memorandum to the Subordinate Court (Amendment) Bill 1997.
[96] According to s 2(1) (a) of the High Court Act No.5 of 1978, the High Court of Lesotho has unlimited jurisdiction to hear and determine civil or criminal matters under any law in force in Lesotho.
[97] Under s 59 of the Subordinate Courts Order No.9 of 1988 murder, armed robbery, sedition and treason can only be tried by the High Court.
[98] According to s 30 of the CPA approved schools are juvenile rehabilitation schools which were supposed to be classified according to the discipline and training required by children to be detained therein.

enforced by the Court of Appeal of Lesotho where the sentence of imprisonment was overturned and replaced by detention in JTC in the case of *Rex V Nozabalese 'Moso.*[99]

Section 29 of the CPA places the supervision of approved schools under the Chief Probation Officer. The Juvenile Training Centre (hereafter 'the JTC') which pre- exists the CPA is the only approved school in Lesotho and its management and objectives have not been changed to meet the requirements of the CPA. Therefore, Lesotho does not have *approved schools* as intended in the CPA.[100] Sloth-Nielsen argued that '[t]he situation envisaged by s 29 and 30 respectively does not exist. In practice the JTC is run by the prisons department, furthermore the facility is available to boys only. The girls have a separate wing in the female prison where they are also supervised by prison personnel.'[101]

In a study carried out in 2003 by Malea and Stout, the conditions of JTC were found to be questionable. Children at the JTC indicated that they were harshly punished when they broke the institution rules and they were whipped severely.[102] Children from all over the country who received custodial sentences are taken to Maseru, and it is impossible for some children to keep in contact with their families.[103] At the time of the mentioned study, children interviewed ranged from as young as twelve years old to eighteen years old.[104] In its initial report of 1998 to the CRC Committee the government of Lesotho admitted that:

> [i]n practice juvenile offenders are treated like prisoners, in that they are not offered rehabilitation programmes. The Juvenile Training Centre in which they are detained does not operate as a training and rehabilitation centre, but mainly as a prison or detention centre.[105]

This practice is in contradiction of art 37 (a) and (c) of the CRC which provide that no child shall be subjected to torture or degrading treatment or punishment, further detained

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[99] *Rex v Nozabalese 'Moso* CR/ T/46/94 (unreported) Judgment delivered by Justice G M Mofolo on the 14th April 1995. The High Court Judge sentenced a 15 years old girl who had murdered her infant baby to imprisonment. On appeal the sentence was set aside on the ground that a 15 years old was a child and should not be imprisoned in accordance with s 26 (1) of the CPA.
[100] CRC Committee (note 3 above) para 220.
[101] J Sloth-Nielsen *Harmonisation of laws relating to children: Lesotho* 2007 at 24 at www.africanchild.info/documents/lesotho%20Reportfinal%20sarah.doc accessed on the 6th March 2008.
[102] M Malea & B Stout 'The treatment of Children in Custody in Lesotho' (2003) *The International Child and Youth Care Network* 1at 3 at www.cyc-net.org/cyc-online/cycol-0603-lesotho.html accessed on the 12th March 2008.
[103] *Ibid.*
[104] *Ibid* at 2.
[105] CRC Committee (note 3 above) para 108.

children should be treated humanely with dignity, taking into regard their needs and age.[106]

Since the CPA is silent on the maximum time a child may be detained in an approved school, the duration of stay at the JTC is governed s 9 (2) of the Prison Proclamation No. 37 of 1959 which requires that a child cannot be detained at the JTC beyond three years from the time of sentencing and the child cannot leave the JTC before the expiration of nine months. In practice, many Children's Courts sentence children to a term of three years imprisonment under the guise of JTC.[107]

It is further evident that the JTC is not an approved school in that s 297 (4) (d) and s 297 (6) of the CP&E which appear under the heading *Punishments* both provide for detention in JTC subject to Prisons Proclamation 1957, not subject to the CPA . This analysis is made keeping in mind that the CP&E is subsequent to the CPA, therefore the wording is deliberate. The JTC is a prison institute under the prisons department (now called the Lesotho Correctional Services) regulated by prison laws and children detained in JTC are kept under prison conditions.[108]

It should be noted that in Lesotho there are no holding centers for children awaiting trial, all detained children are put in one facility - the JTC - whether awaiting trial, serving sentence or put there by magistrates on the request of parents of delinquent children.[109] These delinquent children had not actually offended; they are mostly children in need of care whose parents cannot handle parenting.[110] As discussed above, this practice is allowed by the Constitution.[111] For these children, deprivation of liberty is not a measure of last resort, and this is in contradiction with art 37(b) of the CRC.[112]

The point of concern is that JTC is a remand centre, a prison and a rehabilitation centre all at the same time. Obviously there is overcrowding at JTC as observed by the Committee.[113] Putting these classes of children in one establishment under the same treatment opens unconvicted children to contamination; they are exposed to criminal

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[106] Chapter 2 in part 2.2.4.
[107] Chaka- Makhooane (note 9 above) at 21.
[108] CRC Committee (note 3) para 228.
[109] Chaka-Makhooane (note 9 above) at 25.
[110] *Ibid.*
[111] Section 6(1)(f) of the Constitution.
[112] Chapter 2 note 157-158 and corresponding text.
[113] CRC Committee (note 11 above) para 61 (f) the Committee was concerned at the 'overcrowding in detention facilities, and the holding of minors in these facilities.'

behaviour of convicted children. There should be separate facilities with different services for different groups of children to maximize the efforts of pulling children out of criminal behaviour. Detention of children for their welfare and education at JTC, which is allowed by the Constitution, should be stopped until there are proper facilities for children in need of welfare or educational attention/services.

The Lesotho Correctional Service is however to be commended for its relentless efforts to provide rehabilitative measures to the children at JTC. According to Khalema, guidance and counseling is provided by social workers at the JTC.[114] Children are further offered vocational skills.[115] Formal education which follows the Lesotho educational system for primary and high school is compulsory to all children and all expenses are paid by the JTC with the help of UNICEF.[116] However, the JTC does not have sufficient teachers.[117] The JTC further offers life-skills programmes based on sports. Matches are arranged for these children with schools in the community, in this way contact between children in JTC and the outside community is maintained.[118] Through play with other children, detained children have more respect for the rights and fundamental freedoms of other. This shows appreciation of children's development and the promotion of their dignity and worth and efforts to ease reintegration into society as intended in art 40(1) of the CRC.

The Board of Management which has been revived in 2007 may, based on the report by social workers, determine release from JTC at any time after nine months.[119] This helps to ensure that detention is for the shortest appropriate time in accordance with art 37(b) of the CRC.

The CPA goes beyond the provisions of art 37(a) which allow for imprisonment but as a measure of last resort. However, despite the provisions of the CPA, the CP&E makes child imprisonment legal according to s 306(4)(c). This provides that if the child placed under custody of another person by the court absconds, the court may commit that child

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[114] Interview with L Khalema, the Director of Rehabilitation in the Lesotho Correctional Services at Maseru on the 31st May2008.
[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.*
[119] *Ibid* the director stated that the Board of Management consists of a Magistrate, a Principal Chief and the Commissioner of Correctional Services.

to prison for the remaining period of the order. There are also practices of unregulated child imprisonment in Lesotho as discussed below.

Sometimes it is impossible to transfer children sentenced to JTC from other districts to Maseru due to lack of transportation. Sometimes parents request that children should not be transferred to enable them to visit.[120] In such situations children are not transferred to JTC, but are put in adult prisons in their districts.[121] The main concern with children placed in adult prisons is that they can easily be forgotten and therefore spend the maximum of three years sentence in prison without their cases being evaluated for consideration of early release by the Board of Management. Further the children forfeit the benefits of continued education and sports enjoyed by children at JTC. The Committee recommended that Lesotho should

> [c]onsider deprivation of liberty as a measure of last resort and for the shortest possible time, reduce the maximum custodial sentence to a period shorter than three years, ensure that children are separated from adults and boys separated from girls, and ensure that children remain in contact with their families while in the juvenile justice system.[122]

The justice system has to find its way back to the spirit of CPA in s 26 which prohibits imprisonment of children.

3.8 Implementation Efforts: The Lesotho National Vision and Strategy for the Justice Sector

It has been recommended that to implement the CRC at national level, states need National Action Plans for children.[123] The Lesotho National Vision and Strategy for the Justice Sector though not the equivalent of the National Action Plan,[124] addresses issues in the administration of justice. This justice strategy is general for the whole justice system, not just children; it does not have a distinct section that addresses juvenile justice.

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[120] Chaka-Makhooane (note 9 above) at 22.
[121] *Ibid.*
[122] CRC Committee (note 11 above) para 62 (c).
[123] Chapter 2 note 180 and corresponding text.
[124] The researcher tried in vain to find the National Action Plan.

The following recommendations relevant to juvenile justice have been made in the National Vision:[125] Firstly the enactment of the Bill has to be prioritised.[126]Secondly, police officers should be trained to use restorative justice,[127] further that CGPU be decentralized to all police stations.[128] Thirdly, the prosecutors have to be sensitized to deal with children and that referrals to the DPP where children are co-accused with adults should be reviewed as they cause delays.[129] Further, prosecutors should be trained to use restorative justice in the pre-trial stages.[130]

Fourthly, it has been recommended that judicial officers presiding over juvenile justice matters be trained, empowered to divert at the trial stage and make more use of non-custodial sentences.[131] Further judicial officers should ensure child friendly courts and that newly constructed courts have child friendly facilities.[132] Fifthly, the probation office should be decentralized to all districts, [133]JTC should be a proper rehabilitation centre not part of prison,[134] and that there should be an office within the ministry of justice dedicated to child justice issues.[135] Generally, training should be provided for all professionals in juvenile justice,[136] further the National university of Lesotho should provide child justice courses.[137]

Though the recommendations above are generally good for juvenile justice, they should not be intermingled with the rest of the criminal justice system. The established trend of failure to separate juvenile justice from the adult criminal justice system is prejudicial to the best interests of children, it does not afford juvenile justice the attention it deserves and its issues may be over clouded by others. Juvenile justice ought to be a distinct institution as per art 40(3) of the CRC.

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[125] Justice Sector (note 42 above) at35.
[126] *Ibid.*
[127] *Ibid* at 43.
[128] *Ibid* at 36.
[129] *Ibid.*
[130] *Ibid* at 43.
[131] *Ibid* at 35.
[132] *Ibid* at 36.
[133] *Ibid* at 39.
[134] *Ibid* at 40.
[135] *Ibid* at 36.
[136] *Ibid* at 43.
[137] *Ibid* at 36.

3.9 Conclusion

Juvenile justice was established in Lesotho by the CPA. However, most of its good provisions are not followed in practice. This neglect has rendered Lesotho juvenile justice harsh and inappropriate for children's needs, contrary to the CRC.[138]

The established system is still not humane and the concept of best interests of the child is almost non-existent. The laws and practices in the Lesotho juvenile justice system are to a large extent still not compatible with the provisions of the CRC. The country has so far failed to uphold the principle of non discrimination in art 2 of the CRC. There should be a revised juvenile justice law which should enshrine the best interests of the child and focus on the protection of children. The age of criminal responsibility should be considerably raised at least to twelve years as advised by the CRC Committee.[139] It is important that while awaiting the enactment of revised juvenile justice law, the Chief Justice make rules for procedure in the Children's Court. The rules could include the suspension of the: use of corporal punishment, need to seek DPP's directive in separation of trials suspended use of counter productive sections in the CP&E on child imprisonment. The Children's Court should have a separate management of cases and filing system. Persons under the age of eighteen years in conflict with the law should be treated as children regardless of majority status according to the national law.

At the heart of juvenile justice there should be the professionals who understand and make use of diversion and restorative justice as provided in art 40 of the CRC. However, in Lesotho most magistrates still do not understand these concepts. Diversion and restorative justice should be regulated by law. This will ensure that deprivation of liberty is used as a measure of last resort as required in art 37(b) of the CRC. The Lesotho probation unit has made strides in advocating for diversion and restorative justice.[140] However, the unit is labouring under shortage of staff and resources especially outside

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[138] Kimane (note 1 above) at 21.
[139] Chapter 2 note 83 and corresponding text.
[140] J Sloth- Nielsen, D Chirwa, C Mbazira, B Mezmur & R Kamidi *Report On Child Friendly Laws in African Context- Good and Promising Indicators and Practices* 2007 at 65 at http://uwcportaltest.uwc.ac.za/usrfiles/importcms/gen11Srv7Nme54_8909_1210050527/child_friendly_laws.pdf accessed on the 10th October 2008.

Maseru.[141] The probation unit needs to be fully established in all the districts of Lesotho so that all children can benefit equally from its services.

The accusatorial adult procedures used in the Children's Courts hinder effective participation of the child in his/her trial provided for in art 12(1) of the CRC. Child participation is hindered further by legal representation that is not free and therefore unavailable to most children. This means that due process guarantees are greatly compromised. The Children's Court magistrates need to ensure that the children on trial understand the nature of charges against them, the procedure in court and the expected outcomes of the trial. Further, magistrates should protect children from intimidating aggressive prosecution. These efforts would make it easier for the child to participate effectively in the trial.

The lack of approved schools for juvenile offenders have resulted in the imprisonment of children under the guise of detention at JTC which houses delinquents, children on remand and convicted children. These groups of children ought to be held in different institutions which will address the needs of individual groups. The detention centers and police holding cell for children should be available in all the districts of the country to avoid detention of children with adults. While detained, children should be treated with dignity and provided with needed services.

The Committee recommended that training programmes on relevant international standards be introduced for all professionals involved in the juvenile justice system.[142] Compliance with this recommendation would create a commitment to keeping with the standards of the existing laws and forging forward for full compliance with the provisions of the administration of juvenile justice under the CRC. Leaving the fate of the children on the good will of service providers should not be allowed. There should be competent specialized administration of juvenile justice as envisaged under art 40(3) of the CRC.

[141] Justice Sector (note 42 above) at 15.
[142] CRC Committee (note 11 above) para 62 (d). See also Chapter 2 note 167 and corresponding text.

CHAPTER 4

JUVENILE JUSTICE PROVISIONS OF THE LESOTHO CHILD PROTECTION AND WELFARE BILL 2004

4.1 Introduction

Researchers have expressed concern with the incompatibility of the CPA with international standards guidelines.[1] Prompted by the need for compatibility with the CRC, the Lesotho Law Reform Commission undertook the task of revising all laws relating to children in Lesotho, including the administration of juvenile justice. This resulted in the Children's Protection and Welfare Bill 2004 (hereafter 'the Bill').[2] Clause 2 of the Bill states that '[t]he objects of this Act are to extend, promote and protect the rights of children as defined in the 1989 United Nations Convention on the Rights of the Child....to which Lesotho is a signatory'

In this chapter the proposed administration of juvenile justice under the Bill is discussed against the CRC standards outlined in chapter two. The provisions of the Bill will also be critically analysed. The Bill is the product of intensive consultations and tour studies, especially with South African professionals. It 'draws substantially from South African Child Justice Bill.'[3] Reference is therefore going to be made to the South African Child Justice Bill B49 of 2002 in its latest version (hereafter 'the CJB')[4] and the works of commentators on child justice in South Africa. This is necessary in order to compensate for the absence of research and literature on Lesotho.

In this chapter the researcher analyses the topics over which the Bill will bring changes which will affect the present laws and practices. The topics are; definition of a child and the age of criminal responsibility, the incorporation of general principles of the CRC as proposed under the Bill, arrest and detention, and diversion. The judicial process is discussed with focus on remands and speedy trial, then the trial phase which will consist

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[1] L Chaka-Makhooane 'Administration of Juvenile Justice' in Lesotho Law Reform Commission *Child Legislation Reform Project: Issue papers Project 6* (2003) 1 at 6.

[2] I Kimane 'Child Justice in Lesotho' in Lesotho Justice Sector *Lesotho Justice Sector Conference: A Full Report of Conference Proceedings and the Recommendations* (26th – 30th July 2004) 250 at 251.

[3] J Sloth- Nielsen *Harmonisation of laws relating to Children: Lesotho* (2007) at 19 at www.africanchild.info/documents.asp?page=6 accessed on the 12th April 2008.

[4] Child Justice Bill B49 of 2002 the National Assembly version as at the 25th June 2008 at www.childjustice.org.za/downloads/b49b-2002.pdf accessed on the 28th August 2008.

of; procedure in the Children's Court, joinder and separation of trials and legal representation. Further, sentencing which consists of pre-sentencing reports and sentencing options as envisaged by the Bill is analysed. Lesotho's efforts to comply with the CRC's implementation provisions in relation to the administration of juvenile justice, is analysed. Lastly the chapter ends with a conclusion.

4.2 The Incorporation of the General Principles of the Convention on the Rights of the Child in the Bill

Unlike the current legislation, the Bill gives recognition and incorporates the general principles of the CRC as detailed below. These principles are general interpretation standards of the Bill. In the light of discussions in chapter 2, general principles should be applied systematically with the provisions of administration of juvenile justice in arts 37 and 40 of the CRC.[5]

4.2.1 Best Interests of the Child

The Bill proposes that the best interests of the child should be *the* primary consideration in all actions concerning the child.[6] This should be applied by all courts, all persons including parents and institutions or other bodies in any matters and actions concerning the child.[7] This provision goes beyond the standards of art 3 of the CRC, by giving the best interests of the child paramount importance.[8] The best interests of a child is a principle of interpretation, 'which should guide the treatment of all children in conflict with the law.'[9]

This elevated standard of the best interests of the child has the potential to improve the present administration of juvenile justice by putting children's need for protection above other interests which the CPA did not. As seen in chapter two, making best interests the primary consideration in the CRC has been met with resistance, one reason being the

[5] Chapter 2 note 12 and corresponding text.
[6] Clause 4 (1).
[7] Clause 4 (2).
[8] Chapter 2 part 2.2.1.
[9] Amnesty International *'The Best Interests of the Child' Human Rights and the Juvenile Justice System* at 2 at www.amnesty.org/en/library/info/ACT76/006/1998 accessed on the 15th November 2008.

potential conflict between the interests of child offenders and society.[10] Similarly this proposal may introduce tensions with the interests of society, if the provision is enacted as it is, it is not certain how it will be applied and it is open to constitutional challenge because it is not protected under the Constitution and may therefore be successfully attacked as unconstitutional. One solution would be to amend s 32 of the Constitution in order to give a more comprehensive protection of children's rights and include the best interests of a child as the primary consideration in all matters concerning the child.

The proposed best interests of the child would transform the Lesotho juvenile justice system. This principle would guide procedures in the justice systems such as in diversion, restorative justice and the judicial process.[11] Its general aim would be to protect children's fundamental rights and to provide possibility of rehabilitation and reintegration into society.[12]

4.2.2 Non- Discrimination

Clause 5 of the Bill proposes that a child should not be discriminated against on the grounds of gender, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status or other status. Like the best interests principle, the non-discrimination is a new principle and an improvement to the CPA standards. Of concern in this discussion is discrimination based on nationality and social status.

The Bill has not included citizenship as one of the grounds for discrimination, perpetuating therefore a weakness of the Constitution.[13] The likely impact is that foreign children will not be treated equally with nationals in the juvenile justice system which would contravene art 2(1) of the CRC which provides that non discrimination should apply to all children within the jurisdiction of the state.[14]

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[10] Chapter 2 note 14 and corresponding text.
[11] Amnesty International (note 9 above) at 4.
[12] *Ibid.*
[13] Constitution of Lesotho Act No. 5 of 1993 in s 18 (4) allows discrimination on the basis of for non-citizenship at www.lesotho.gov.ls/documents/Lesotho_Constitution.pdf accessed on the 10th April 2008.
[14] Chapter 2 in part 2.2.2.

The proposal would likely remedy the current discrimination against children in the rural areas.[15] These children do not currently benefit equally from the services offered by the probation office because those services have not been successfully decentralized.[16] Other services that need decentralisation to ensure that rural children do not suffer discrimination are detention centres and the legal aid office.[17] Another discriminatory practice is the denial of diversion option for street children, this is a status based discrimination which though prohibited in clause 5 above, has specifically been allowed in clause 132 (1) which denies street children diversion as it will be seen in the discussions on diversion below.

4.2.3 Participation

Clause 13 of the Bill incorporates art 12 of the CRC.[18] It proposes that a child should have a right to express his or her opinion freely in any matter or procedure affecting him or her and to have that opinion taken into account and given due weight in accordance with the age and maturity of the child. Discussion in chapter three showed that this principle is not fully recognized in the current juvenile justice system.[19] Although this principle applies to the entire provisions of the Bill, it is an improvement over the current system; moreover, it is included in specific clauses relating to juvenile justice.

Additional guarantees for child participation are contained in provisions pertaining to juvenile justice, in compliance with art 12(2) of the CRC. For example, in considering the assessment report and submissions by the prosecutor or any other party, the inquiry magistrate 'must take account of the principle that the child has the right to participate in all decisions affecting him or her.'[20] The Bill specifically proposes a child friendly court to allow the active participation of the child in proceedings.[21] Further proceedings should be carried out in an informal manner to encourage maximum participation of the child and to ensure that the child's procedural rights are observed.[22] Further, the judicial

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[15] For example, clause 131(1) specifically provide that in diversion no child may be unfairly discriminated against.
[16] Probation services referred to are diversion, pre sentencing reports, counseling and supervision.
[17] In chapter two it was discussed that children JTC and Legal Aid are in Maseru and not accessible to most children in the rural areas.
[18] Chapter 2 note 38 and corresponding text.
[19] Chapter 2 in part 2.2.3.
[20] Clause 114 (3).
[21] Clause 137 (3).
[22] Clause 142 (3).

officers should assist the children to participate in the proceedings, by protecting them from 'hostile or intimidating cross-examination' where it is prejudicial to the wellbeing of the child or the fairness of proceedings.[23] If the child's participation is hampered by the presence of parents or guardians; in the best interests of the child the parents or guardian should not be in court.[24] These will be an improvement over the current juvenile justice system which does not provide the procedure to be followed to allow for effective participation of children.[25]

Further clause 142(5) of the Bill proposes that children should speak in their own languages with the assistance of the interpreter, where necessary, and the presiding judicial officer should ensure that the children are addressed in the language that they understand. While this is not a new provision as it is provided in s 12(d) of the Constitution,[26] being proposed specifically for children in conflict with the law reinforces the right in the juvenile justice system. The Bill has proposed that an expert in sign language should be engaged to assist children with speech or hearing impairments.[27] This is an improvement to the current laws and practice in regard to participation rights. These proposals for child participation will enable children to take part and be heard in all decisions affecting them in compliance with art 12 of the CRC.

Mandatory use of English in courts has not, however, been challenged in the Bill. This means that although children and magistrates might speak the same language, communication will continue to take place through interpreters.[28] This has been a serious oversight which needs to be attended to preferably before the Bill is enacted to avoid future amendments.

4.2.4 Development

Clause 10 of the Bill proposes that the child should have access to education preventive healthcare services, adequate food, clothing shelter, medical attention and services required for the child's development. This principle like the others, is general to the provisions of the Bill and therefore applies to juvenile justice provisions as

[23] Clause 142 (12).
[24] Clause 142 (4).
[25] Chapter 3 note 48- 50 and corresponding text.
[26] Chapter three in 'Participation Rights and Interpreters'.
[27] Clause 146 (6).
[28] Chapter 3 note 78 and corresponding text.

well. The principle is reflected in clause 107 of the Bill which is discussed in detail in part 4.4 below.

With the best interest of the child guiding all decisions taken in the juvenile justice system and the children given the opportunities and support to participate in those decisions which affect them and all children given equal treatment, juvenile justice as proposed by the Bill if enacted will considerably increase the chances of rehabilitation for all children which is the main aim of juvenile justice.

4.3 Definition of a Child and Age of Criminal Responsibility

According to clause 3 of the Bill and in relation to criminal responsibility, a child means a person under the age of eighteen years who has attained the age of criminal responsibility proposed in clause 83. This is an improvement over the CPA because it extends its protective ambit to persons who have attained the age of majority before reaching the age of eighteen years,[29] and it is compliant with international standards discussed in chapter two above.[30]

Clause 83(1) of the Bill proposes that the age of criminal responsibility be set at ten years. This is an improvement over the current situation where the age of criminal responsibility is seven years as established in chapter three.[31] The above clause, however, falls short of the recommendations made by the CRC Committee, that the age of ten years is still too low as the age of criminal responsibility.[32]

Kimane stated that the Lesotho child law reformers considered setting the minimum age of criminal responsibility at twelve years, but political pressure from the civil society through consultations forced it to be put at ten years, allegedly to curb increasingly serious offences committed by younger children.[33] Sloth-Nielsen argues that alleged committal of serious offences by young children does not warrant a child justice system

[29] Chapter 3 under 'Definition of a Child and Age of Criminal Responsibility'.
[30] Chapter 2 note 64 and corresponding text.
[31] Chapter 3 note 10 and corresponding text.
[32] Chapter 2 note 80 and corresponding text.
[33] Interview with the chair person of the Child Law Reform Committee Dr. I Kimane at Roma Lesotho on the 02nd July 2008.

which is structured to cater for exceptional and rare instances by means of low minimum age of criminal capacity.[34] Kimane suggests that the law can be later reviewed when the public has more knowledge about children's rights.[35] Unfortunately, unlike the CJB, the current draft of the Bill does not guarantee the revision of the provision on age of criminal responsibility.[36]

Furthermore, clause 83 (2) of the Bill carries forward the *doli incapax* rule. Children between the ages of ten and fourteen years will not be prosecuted unless the inquiry magistrate is satisfied that the child has capacity to appreciate the difference between right and wrong and the ability to act in accordance with such appreciation. Clause 83(5) & (6) proposes that prosecution has to prove criminal capacity beyond reasonable doubt, further that magistrates may have the report evidence of an expert witness. It is not clear whether expert evidence is compulsory or not, the provision only says that such evidence will be 'relevant'; that means it will be admissible in court not that it must be tendered. This is contrary to the recommendations of the CRC Committee.[37] Without binding force the provision does not improve the current common law standards as the CPA does not have such provision, expert evidence on child criminal capacity is not used in Lesotho. Therefore, there will still be danger of discrimination as children of the same age will not be systematically treated in the same way.[38]

According to Doek, the 2001- 2007 chair person of the CRC Committee,[39] the CRC Committee does not favour the *doli-incapax* rule; the minimum age should be set 'at the level where the States Parties would like it to be in principle.'[40] As discussed in chapter two, the minimum age recommended by the CRC Committee is twelve years.[41]

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[34] J Sloth-Nielsen *Submission to the Portfolio Committee on Justice and Constitutional Development: The Child Justice Bill 2007* at 4 at www.childjustice.org.za/submissions/2008Submissions/Julia%Sloth-Nielsen.pdf accessed on the 15th May 2008.

[35] Interview with Kimane (note 33 above).

[36] Unlike the Bill, the CJB has such a provision in Clause 8 which states that the age of criminal responsibility will be reviewed five years after its coming into effect. See also J E Doek *Harmonisation of National Laws and the CRC: Some Challenges* at 5 at www.jaapdoek.nl/publications/keynotes/keynote_383.pdf accessed on the 18th September 2008 it is argued that where appropriate it should be ensured that legislative provisions are evaluated regularly 'in order to check whether the goals have been achieved and to amend, if necessary, the law to make it more effective.'

[37] Chapter 2 in part 2.3.2.

[38] Chapter 2 in part 2.3.2.

[39] Doek (note 36 above) at 1.

[40] J Doek ' Child Justice Trends and Concerns with a Reflection on South Africa' in J Gallinetti, D Kassan &L Ehlers *Child Justice in South Africa: Children's Rights Under Construction* Conference Report August 2006 11 at 13 at www.childjustice.org.za/publications/CJ_ConferenceReport.pdf accessed on the 12th August 2008.

[41] Chapter 2 note 83 and corresponding text.

The Bill reflects that political pressure influences decisions in children's rights.[42] Although participation of the civil society is good, decision making should still be the responsibility of professionals in the law reform to draft laws that comply with international standards. There should be continuing public education facilitated by the ministry of justice on the administration of juvenile justice under both the CRC and the Bill to sensitise the society of state's obligation to the CRC.

4.4 Pre- Trial Detention

In chapter three it was established that child arrest is not regulated except for the general provision in the Constitution.[43] Further there are no holding cells for children in the police cells, they are exposed to harmful behaviour and conditions are not suitable for children.[44] The Bill has proposed procedures for child arrest and separate cells for children's detention which will have suitable services and facilities for children.

In clause 98 the Bill has proposed alternatives to arrest which complies with art 37(b) of the CRC that deprivation of liberty should be a measure of last resort. Instead of arresting a child, the police officer may orally or by written notice request the child and his/her parents to attend assessment at the given time or place. [45] The recognizance will be recorded.[46] These alternatives reflect upholding the best interests of the child without disregarding the concerns of society.

In cases where children have to be arrested, the Bill has proposed procedure to be followed.[47] According to clause 96 of the Bill, the police may arrest the child with or without warrant. This is so that children should be treated with humanity and respect for their dignity as provided under art 37(c) of the CRC. The arrest must be effected with

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[42] Justice and Constitutional Development Portfolio Committee *Report on Child Justice Bill 23rd* June 2008 1 at www.childjustice.org.za/parl_reports/PC%20Report%20on%20CJ%20Bill%20-%2023%20June%202008.pdf accessed on the 25 August 2008 it has been stated that the capacity of children to commit crimes and the opinion of the public that the government is failing to protect the citizens from crime also influenced the provisions in the CJB.
[43] Chapter 3 in part 3.5.
[44] Chapter 3 note 20 and corresponding text.
[45] Clause 98 (1) (a), (b) and (d).
[46] Clause 98 (c).
[47] Clause 96.

regard to the child's dignity and well-being, and minimum force should be used.[48] This is an improvement over the CPA which does not provide any procedures in child arrest which have resulted in children being arrested like adults.[49] Clause 102 of the Bill proposes that after arrest the police have the duty to inform the probation officer within twelve hours of the arrest. The parent or guardian of the child must also be given written notice to attend the assessment session.[50] Notification of the probation officer within twelve hours is an improvement over the current practice and will help speed up the assessment process. Notification of parents will ensure that the child receives assistance early in the procedures.

According to clause 107 of the Bill, detention in police custody will be used as a measure of last resort and for a shortest possible period of time. Further, the provision states that children will be kept in separate cells from the adults, boys separate from girls.[51] This will ensure that children are no longer subjected to the dangers accompanied by being locked up in adult cells.[52] This complies with art 37(c) of the CRC which provides that children deprived of their liberty should be separated from adults.[53] The conditions of cells and treatment of children will be in a manner appropriate to children's ages.[54] Children will have the right to medical treatment, adequate food, visitation, adequate exercise and adequate clothing and bedding.[55] This proposed treatment will considerably improve the poor present state of children in police custody as seen from the previous chapter.[56] The services mentioned call for the creation of separate facilities for children in all police stations as currently no such facilities exist.[57]

The proposed legislation contains mechanisms for enforcing minimum detention times by attachment of penalty for police officer for non-compliance with detention time limits.[58] This is a positive measure that will ensure that the law is observed, it will improve the current practice and it can be implemented at no extra cost.[59] Further this provision is likely to work because of the proposed independent Children's

[48] Clause 96 (7).
[49] Chapter 3 in 'Pre-trial Detention' part.
[50] Clause 103.
[51] Clause 107 (4) (b).
[52] Chapter 3 note 20 and corresponding text.
[53] Chapter 2 note 149 and corresponding text.
[54] Clause. 107 (4) (a). Clause 107(4) further proposes that
[55] Clause 107 (4) (d).
[56] Chapter 3 in ' Pre-trial Detention' part.
[57] Chapter 3 in part 3.5.
[58] Clause 107 (7).
[59] Chapter 3 note 21 and corresponding text.

Commission which will investigate national and individual issues pertaining to violation of children's rights.[60] This Commission shall make appropriate referrals following investigations; however it is not clear what kind of referrals can be made.[61]

4.5 Diversion

As seen from chapter three, diversion in Lesotho is not regulated. It is practiced discretionarily by the police and the probation officers. Diversion is used only in Maseru with rare occurrences in the other districts. The Bill proposes that along with alternatives to judicial process, diversion should include restorative justice.

Diversion is proposed for under clause 131. This will give statutory recognition to existing unregulated discretionary diversion practice. Diversion is proposed with the purpose of encouraging the child to be accountable for the harm caused by her/him and to promote response which is appropriate to the child's circumstances and proportionate to the child and the harm caused.[62] Another objective of the Bill is to promote reintegration into family and community and to prevent stigmatization of a child which may occur through contact with the criminal justice system.[63] This rationale is in line with the definition of diversion laid out in chapter two.[64] Further, clause 131(2) of the Bill proposes that 'diversion shall include restorative justice elements which aim at healing relationships, including the relationships of the victim(s) and offender(s)'. This is in line with art 40(3)(b) of the CRC which requires that measures dealing with children without resorting to judicial proceedings should be established.

Clause 131(4) of the Bill proposes that all children should have equal access to diversion without discrimination. Further, clause 132(2) of the Bill proposes that diversion should be considered as 'a first resort'; however there should be safeguards which will protect children from coercion into diversion against their due process rights as laid out in chapter two.[65] The negative fact is that the present discrimination against children without a fixed domicile and street children will be carried forward into the future; their homeless status disqualifies them for consideration of diversion,[66] mainly 'due to their frequent lack

[60] Clause 246(2).
[61] *Ibid.*
[62] Clause 131(1) (b).
[63] Clause 131 (1) (d).
[64] Chapter 2 note 90 and corresponding text.
[65] Chapter 2 in part 2.4.
[66] Clause 131(1)(d).

of support structures which are necessary to implement many of the alternatives.'[67] Clause 131(1)(d) makes it evident that children shall not have equal access to diversion options, and this is against the purport of the Bill.[68] Article 2 of the CRC dictates that children within the state should be dealt with without discrimination of any kind.

The Bill has not proposed any other alternatives for dealing with street children without resorting to judicial proceedings, which is in contradiction with art 40(3)(b) of the CRC .[69] Most street children end up in conflict with the law in their struggle for survival.[70] Depriving street children of the possibility of applying to them the protective provisions on diversion the Bill fails them.

The powers of professionals in the juvenile justice should be laid out in regard to diversion.[71] In the current system, there are no written regulations for diversion especially among the police and prosecutors. The practice is mainly carried out discretionarily.[72] Clause 132 of the Bill proposes that diversion be administered by probation officers, prosecutors, inquiry magistrates and presiding magistrates of the Children's Court. This suggests that diversion may occur at both pre-trial and pre-sentencing levels. This has the advantage of shielding some children in the pre-trial stage from the rigours of trial proceedings and preserving the chance for diversion for those children who have not been diverted before trial.

Probation officers can divert children alleged of committing minor offences only.[73] Decision to use diversion will be reached by the probation officer at his/her sole discretion without preliminary inquiries.[74] If the probation officer has not diverted the

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[67] M Werrham *An Outside Chance: Street Children and Juvenile Justice- An International Perspective* (2004) at 67 at www.juvenilejusticepanel.org/resource/items/C/S/CSCOutsidechance_Part1.pdf accessed on the 15th June 2008.

[68] Clause 131(4) provides that in diversion children should not be discriminated against on the basis of race, gender, sex, ethnic or social origin, colour, sexual orientation, religion, conscience, belief, culture, language, birth or socio- economic status.

[69] This is not in line with the comments of the CRC Committee. See also Chapter 2 note 77 and corresponding text

[70] Werrham (note 67 above) at 11.

[71] Chapter 2 note 106 and corresponding text.

[72] Interview with F Mokoteli the Director of Probation Unit Lesotho at Maseru on the 04th July 2008.

[73] Clause 94 (1) such offences listed under schedule 1 are: assault without grievous bodily harm, malicious damage of property worth not more than M1000.00, possession of not more than 25grams of drugs, theft of property worth less than M100.00, any statutory offence where a fine is less than M300.00 or three months imprisonment and conspiracy, incitement or attempt to commit one of these mentioned offences

[74] Clause 94 (2).

case, he/she will hand over the assessment report to the prosecutor to institute preliminary inquiry proceedings before an inquiry magistrate.[75]

Clause 110(3)(c) proposes that preliminary inquiries be held to enable inquiry magistrate to establish whether the matter can be diverted before institution of charges. Further the importance would be to determine suitability of diversion and options appropriate to the offence and circumstances of the child.[76] As per clause 110(1) preliminary inquiry are proceedings of the Children's Court. This is a judicial process, [77] and it implies that the purpose of diversion is defeated. Diversion after preliminary inquiry does not abide by the dictates of art 40(3)(b) of the CRC which require that children's cases be dealt with, whenever possible, without resorting to judicial proceedings.[78]

Some commentators argue that when the child is diverted by the presiding magistrate rather than the inquiry magistrate, the child has been charged in court and it defeats the purpose of diversion which is to steer children away from judicial proceedings.[79] While this may be so, the child will still be protected from being burdened with the criminal record which stigmatizes and may impact negatively on the future education and career development of the child. This will be an improvement because in the present practice, few cases are diverted by magistrates as only few of them understand diversion.[80]
It can be noted that in the current formulation, the Bill excludes police officers from using diversion at their discretion as opposed to the present situation. The police can issue a formal caution only upon recommendation to do so.[81] The police are placed strategically at the doorway of the criminal justice process, and if the purpose of diversion to shield children from the judicial proceedings should be realized, the police ought to be given

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[75] Clause 95 (1).
[76] C Frank & S Waterhouse *Promoting Crime Prevention and Responding to Sexual Offending in the Child Justice Bill* at 8 at www.rapcan.org.za/File_uploads/Resources/RAPCAN%20submission%20Child%20Justice%20Bill%20Jan%202008.pdf accessed on the 04th November 2008.
[77] Under the Interpretation Section in Clause 3 of the Bill, a preliminary inquiry 'means the compulsory procedure which takes place before charges are instituted in relation to the alleged offence and which is held in all cases involving a child over the minimum age of criminal responsibility, where diversion, conversion to a children's court inquiry or a decision to decline to charge the child has not yet been taken in accordance with this Act.'
[78] Sloth-Nielsen (note 10 above) at 7 argued that 'if the decision is to be made an order of court, it is by definition a judicial process and not an alternative' and that the involvement of the magistrate; a criminal justice role player in a non judicial decision 'is unwarranted bureaucracy, and flies in the face of the exhortation in art 40 (4) of the CRC to deal with cases wherever possible without resorting to judicial proceedings.' These comments can be applied similarly to the proposals of the Bill.
[79] Doek (note 40 above) at 15.
[80] Chapter 3 in part 3.6.
[81] Clause 105 (2) which states the police can issue formal cautions at the directive of the probation officer, prosecutor or the magistrate.

more powers to do so.[82] The GCPU is a specialized unit established within the Lesotho police to handle amongst others, cases of children in conflict with the law. With training the GCPU will be capable of effectively diverting children.

It is not clear when and how the prosecutor will use diversion. What is evident is that the decision to divert will be made by the inquiry magistrate, the prosecutor can only present the recommendation made by probation officer to the magistrate. In the criminal justice system, it is the prosecutor's mandate to decide to prosecute. Decision by a magistrate to divert or to prosecute is encroachment of the judiciary into executive functions of state, which undermines the principle of separation of powers. Prosecutors' powers in diversion should be clarified.

It would be to the best interests of the child to provide the police and prosecutors with more powers in diversion. Diversion process would be faster without judicial involvement. However since the probation officers can divert cases of children alleged to have committed minor offences, which are the majority of cases in the juvenile justice system, preliminary inquiries are a necessity for more serious offences so that diversion will not be considered by the society as an easy-way-out option.

The Bill proposes a four level system of diversion and contains numerous alternatives to institutionalization,[83] as required by art 40(3)(b) of the CRC. Some commentators argue that there is no need for so many diversion levels;[84] others however argue that this four tier approach allows for children who have committed serious offences to be considered

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[82] Doek (note 40 above) at 15 it is argued that 'When the child has first contact with the police, the judicial proceedings have not yet been initiated. In other words, there is the possibility that the police may issue an informal warning. There is not enough attention paid to the role of the police in the diversion process.'

[83] Clause 133. Level 1 diversion consists of (a) apology, (b) formal police caution with or without conditions, (c) placement under supervision and guidance, (d) placement under reporting order, (e) compulsory school attendance, (f) family time order, (g) positive peer association order, (h) good behaviour order, (i) prohibition from visiting certain places, (j) compulsory attendance of a certain centre for vocational or educational purposes and (k) restitution. Level 2 diversion consists of all level one options with increased durations. Further level 2 includes community service without remuneration and victim offender mediation Level 3 diversion options are: level 1options (c), (j) with increased durations and (k) where payment is to the maximum of M10,000, community service and victim-offender mediation, family group conference or any other restorative justice process and referral to a programme with residential element not exceeding three months. Level 4 options can only be applied for children over the age of fourteen years and must be only imposed by the inquiry magistrate where sentence could be a term of imprisonment exceeding six months or reform school sentence. The options at this level are referral to a programme wit residential element for a maximum of six months, community service to the maximum of 250 hours, compulsory attendance at the specified centre for educational or vocational training for a maximum of 35 hours per week and victim-offender mediation, family group conference or any other restorative justice programme which can use all level 1, 2, and 3 options.

[84] Doek (note 40 above) at 15. See also the CJB (note 4 above) Chapter 8 Clause 53 diversion options in the CJB have been reduced from three levels to two levels by Parliament.

for diversion.[85] This last argument is supported by clause 131(4) of the Bill, which proposes that all children should have equal access to diversion options. One drawback of the Bill is the omission of therapy and counselling in the proposed diversion options. This might result in all the other options having little effect if the root source of criminal behaviour is not established and addressed.

Despite the liberal provision for diversion under the Bill, not all children in conflict with the law will benefit from diversion.[86] Prosecutors and judicial officers might use the discretion recognized by the Bill to take children to court rather than use restorative justice alternatives.[87]

Experience elsewhere indicates that the use of diversion is very limited in rural areas,[88] and Lesotho is no exception.[89] Diversion is mostly practiced in the urban areas where it responds to the unique urban characteristics which cannot be applied to the rural communities, therefore diversion in the rural areas should adapt to the rural setting.[90] Mbambo argues that 'in practical terms this involves close collaboration with local traditional leaders...'[91]

Clause 125 of the Bill proposes the incorporation of restorative justice as a mode of diversion in villages. This is a 'substantive and innovative provisions on restorative justice.'[92] Restorative justice in this setting will involve the establishment of the Village Child Justice Committees (hereafter 'the VCJCs')[93] which according to clause 125(3) of the Bill shall comprise of the village chief and six other villagers elected by the community. It has been commented that

> [t]he Bill intitutionalises restorative justice by empowering chiefs and families to take greater responsibility for the control and supervision of delinquency. It enables offending behaviour to be

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[85] Sloth-Nielsen (note 3 above) at 21.
[86] A Skelton *The influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (2005) Unpublished Thesis Submitted in Partial fulfillment of the degree of Doctor Legum in the Faculty of Law, University of Pretoria at 422 the observation was made in the context of the CJB in SA but applies to Lesotho as well.
[87] *Ibid.*
[88] B Mbambo ' Communities as Role Players' in J Sloth-Nielsen & J Gallinetti (eds.) *Child Justice in Africa: A Guide to Good Practice* (2004) 144 at 145.
[89] Chapter in 'Diversion' part.
[90] Mbambo (note 88 above) at 145.
[91] *Ibid* at 144.
[92] Sloth-Nielsen (note 3 above) at 21.
[93] Clause 125 (2). The Village Child Justice Committee shall be responsible for handling all restorative justice processes at village level.

> dealt with in the child's local environment through newly created 'village child justice committees.[94]

The Bill is the most advanced African instrument in the entrenchment of restorative justice measures in the juvenile justice field.[95] The Lesotho model 'draws from the traditional structures but incorporates them into the modern context.'[96] The VCJC has been described by Sloth-Nielsen as 'a form of local courts'.[97] She further argued that

> [t]he creation of the role for local courts in the restorative justice process in the CPWB is reminiscent of a reliance on the local community structure....and supports the argument that the CPWB seeks to incorporate African traditional mechanisms of adjudication, in a fashion which can decidedly be regarded as constituting a best practice. Moreover, the possible objections to patriarchal and authoritarian structures forming alternative dispute resolution are considerably ameliorated.[98]

The establishment of the VCJC will empower families and communities to deal with criminal offences of their children without interference from the state. This will curb the tendency of depriving the child of his/her liberty only because the parents cannot cope with the child's delinquency.[99] However, the Bill does not propose training of the VCJC which raises concerns over the protection of human rights safeguards mentioned in relation to diversion in chapter two,[100] and there is no reference as to the kind of offences that can be dealt with by the VCJCs. Lack of training may prejudice children especially in light of clause 125(6) which proposes that VCJC shall determine its own procedure. This will create inconsistency in how children are dealt with throughout the country. It would be important for all VCJCs to be offered the same training and empowered to draw up standard procedures. The training of the VCJC is required by art 40(3) of the CRC which calls for laws, procedures, authorities and institutions specifically applicable to children in conflict with the law.

Qhubu argues that the general 'non-state justice through the 'chief's court' is still widely practiced in Lesotho.'[101] There is a pilot project of village based restorative justice in two

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[94] UNICEF *Realising Rights for Children: Good Practice- Eastern and Southern Africa* (2007) at 6 at www.africanchildforum.org/Documents/Good_Practice.pdf accessed on the) 5th June 2008.
[95] *Ibid.*
[96] *Ibid* at 7.
[97] Sloth-Nielsen (note 3 above) at 22.
[98] *Ibid.*
[99] Chapter 3 note 109-110 and corresponding text.
[100] Chapter 2 note 101 and corresponding text.
[101] N Qhubu 'Restorative Justice: What Prompted this Global Revival Movement?' Lesotho Justice Sector *Lesotho Justice Sector Conference: A Full Report of Conference Proceedings and the Recommendations* (26th – 30th July 2004) 240 at 248.

villages though the project does not target children only.[102] The Khubetsoana village project shows that the custom of communal responsibility can be successfully revived.[103]There is therefore reason to belief that the VCJCs will succeed.

Because the VCJCs do not contain professionals, it is submitted that their work should be monitored through automatic reviews of all cases handled. This would ensure quality administration of restorative justice in the villages. Regulations governing matters such as manner of appointment of VCJCs, tenure of office, disciplinary actions for misconduct of the member and procedures in the VCJC will need to be made. These aspects are important for transparency and the smooth running of the VCJCs even though they have not been addressed by the Bill.

Under clause 131 (5) of the Bill propose that corporal punishment and public humiliation should not be elements of diversion. This is acknowledgement of risks that may accompany diversion. This will ensure that art 37(a) of the CRC which requires that children in conflict with the law are not subjected to torture or cruel degrading punishment is complied with.

Further under clause 131 (6) the Bill proposes that diversion for children below the age of thirteen years will not comprise of community service or any other type of work.[104] This will safeguard young children from labour that is not suited to their ages, it therefore upholds art 40(1) of the CRC which provides that a child should be treated in a manner that takes account of his/her age.

As Odongo argued, the Bill endeavours to comply with the CRC as firstly it proposes provision for preliminary inquiry to strengthen diversion referral procedures through participation of all role players.[105] This will promote uniformity in the referral process

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[102] *Ibid.*
[103] *Ibid.*
[104] Section 3 of the Labor Code order No 24 of 1992 establishes 15 years as the minimum age for industrial work or private undertakings involving family members, although children between the ages of 13 and 15 may perform light work if it is done in a technical school or institution approved by the Department of Education.
[105] G O Odongo *The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context.* A Thesis submitted in fulfillment of the requirements for the degree of Doctor of Law in the Faculty of Law of the University of the Western Cape, South Africa 18th October 2005 at 257 at www.etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_9110_1176963955.pdf accessed on the 03rd March 2008.

while ensuring pre-trial diversion.[106] Secondly a wide range of options will ensure a wider access to diversion and innovative diversion programmes which may not be costly considering scarce resources of Lesotho.[107] Thirdly, restorative justice practices into the African context which will promote reconciliation have been included in the Bill.[108]

Lesotho will face the task of creating and strengthening diversion programmes, which will be a major challenge especially in the rural areas where diversion is not used.[109] There will be need for resources to develop effective diversion especially at level two upwards, level one will not require substantial resources as the role players will mostly be the community and family.[110]With flexibility and creativity existing programmes like the alcohol and drug rehabilitation centres can be used for diversion.[111] Diversion providers will have to be registered and regulated; minimum standards 'based on restorative justice principles' set and high quality programmes emphasized to avoid malpractice instances.[112]

As already mentioned, there will be cases in which diversion is not an option, in such cases children will have to be prosecuted.

4.6 The Judicial process

The same structure as in the previous chapter will be followed to make the comparison easier. Issues discussed are presenting reports and sentencing options which consist of sentences without institutional element and institutional sentences.

4.6.1 Remands and Speedy Trial

Currently children are remanded in adult courts without due regard to their privacy provided under art 40(2)(b)(vii) of the CRC. Their cases are dealt with in the similar

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[106] *Ibid.*
[107] *Ibid* at 257-258.
[108] *Ibid* at 258.
[109] B Mbambo ' Diversion: A Central Feature of the New Child Justice System' in T Maepa (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* Monograph No. 111, February 2005 at 4 at www.iss.co.za/Monographs/No111/chap7.htm accessed on the 20th October 2006.
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*

manner as those of adults without regard to speedy trial to satisfy prompt decisions in art 40(2)(b)(iii) of the CRC .

Clause 136 of the Bill has proposed that children should be remanded in the Children's Court. This will address the current situation outlined in chapter three where children are remanded in adult courts and children's cases are not given priority.[113] This can be implemented prior to the enactment of the Bill by having two remand sessions; the first being remands of the Children's Court then remands of the adult court.[114]

Clause 136(4) of the Bill proposes that remand in custody be for the shortest period possible and not exceed three months, which is in conformity to art 37(b) of the CRC. Children will be remanded and detained in institutions in the area of the remanding Children's Court.[115] If implemented, the Bill could result in children no longer being remanded to the adult prisons.[116] Being detained closer to their place of residence will enable children to keep contact with their families which is consistent with art 37(c) of the CRC.[117]

Clause 146(1) of the Bill proposes that the court should finalise all trials of accused children as speedily as possible and ensure that remands are limited in number and duration. Trials against children remanded in custody should be finalized within a period not exceeding three months.[118] Even though the Bill conforms to the requirements of art 40(2)(b)(iii) of the CRC it is important that maximum time for the investigation, decision to put the child on trial and the trial of a child remanded out of custody are stipulated as discussed in chapter two.[119]

4.6.2 The Trial

In the current juvenile justice system there are no procedures for the children's court trials, the Bill has addressed the problem by proposing such procedures. The Bill has

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[113] Chapter 3 in part 3.7.1.
[114] This is permissible under s 5 of the CPA which establishes the Children's Court.
[115] Clause 184.
[116] Chapter 3 note 40 and corresponding text. because the JTC is situated in Maseru Explain that the situation occurred because there is just one JTC.
[117] Chapter 2 note 158 and corresponding text.
[118] Clause 146 (4).
[119] Chapter 2 part 2.6.1.

addressed the problem of joint trials of adults and children in the adult court while co-accused and further the Bill has developed on the current sentencing options.

4.6.2.1 Procedure in the Children's Court

The Bill in clause 137 proposes that Children's Courts be retained. Clause 137(1) of the Bill however suggests improvement of the CPA standards. It proposes that magistrates presiding in the Children's Courts should be designated by the Chief Magistrate. The advantage of this is that it will be easier to provide specific training to the designated magistrates so that they become experts in the field. Clause 137(3) will give effect to art 40(3) of the CRC which provide for establishment of *inter alia* authorities and institutions especially applicable to children in conflict with the law. [120]

Clause 140 of the Bill proposes that parents or guardian of an accused child should attend the trial proceedings unless exempted by the presiding officer. If the presence of a parent or guardian would discourage maximum participation of the child, then the parent or guardian should be ordered to recuse himself/herself from the proceedings.[121] This is a new dimension which is compliant with art 40(2)(b)(iii) of the CRC. Under the current system parents have to attend the children's trials even when it negatively affects the child's participation.[122]

Unlike the current accusatorial juvenile justice system,[123] clause 142(1) of the Bill proposes a more inquisitorial system.[124] The presiding magistrate should, if it is deemed to be in the best interests of the child, actively participate in eliciting evidence from any person involved in the proceedings.[125] Further the presiding officer should protect child witnesses from aggressive intimidating cross-examination where it becomes prejudicial to the well-being of the child or to the fairness of the proceedings.[126] This will enable the child to participate effectively in the trial without extra cost to the state especially since provision of legal representation may take a long time to implement.

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[120] Chapter 2 in ' the Specialised Court'.
[121] Clause 142 (4).
[122] Researcher's professional experience is that children are not able to defend themselves effectively against sexual offences charges in the presence of their parents /guardians.
[123] Under the current system children are usually subjected to aggressive cross examination by prosecutors- see chapter 3 note 50 and corresponding text.
[124] Clause 142 (1).
[125] *Ibid.*
[126] Clause 142 (12). See also Chapter 3 note 50 and corresponding text.

Another innovative proposal is the use of intermediaries.[127] This, according to Kimane, will afford the children in the administration of justice the ability

> to cope and manage with some of the traumatizing experiences of the justice system. They provide children with support to cope with the language codes of the courtroom prepare children for courtroom appearance and for interaction with the functionaries of the justice system (judicial officers, prosecutors, lawyers, probation officers, etc.) and help them speak without being traumatized by the courtroom environment.[128]

Clause 142 of the Bill proposes the retention of privacy provisions in s 6(3) of the CPA, [129] and non publication in clause 149(2).[130] As seen in the previous chapter, the CPA has at times not been adhered to in this regard.[131] Clause 149(6) proposes the creation of a criminal offence with heavy penalty for contravention of the provisions regarding publication of the child's identity.[132] This will ensure that art 40(2)(b)(vii) of the CRC and Rule 8 of the Beijing Rules both of which provide for the protection of the child's privacy are conformed with.[133]

Clause 144 of the Bill proposes that where a child is co –accused with an adult, the cases must be separated automatically.[134] This is a great improvement to the current situation where separation of trials has to be applied for to the DPP, the procedure which is lengthy and prejudicial to the speedy completion of cases against children.[135] According to clause 144(6) whichever court will preside over the joint trial shall have to adopt procedure in the Children's Court in relation with the child; [136] the child friendly court, privacy, child proportionate sentences, participation and best interests principles should be adhered to. Sloth-Nielsen stated that the automatic separation of trials was maintained in order to

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[127] Clause 150 provides that intermediaries be used whenever it appears that a child testifying at a trial will suffer undue mental stress or suffering.
[128] Kimane (note 2 above) at 263.
[129] Chapter 3 in part 3.7.2.1. See also Clause 111(4) which states that only the accused child, that child's parent or guardian, the prosecutor, a legal representative, the police officer who effected the arrest of the child, a medical officer and any other person whose presence is necessary may attend the trial in the children's court.
[130] Chapter 3 in part 3.7.2.1.
[131] Chapter 3 note 52 and corresponding text.
[132] If found guilty, the convicted person will be liable to imprisonment not exceeding two years or to a fine not exceeding M20,000.
[133] Chapter 2 note 118 and corresponding text.
[134] Joinder may be allowed through application if separation of trials will result in the miscarriage of justice or prejudice to the victim of the offence would occur.
[135] Chapter 3 note 59 and corresponding text.
[136] Clause 144 (6).

promote a separate specialized administration of justice for children.[137] Further she maintained that

> [t]his arrangement has obvious benefits to children, some of whom may have been used by those same adults in the commission of crime...and who may then conceal this due to the presence of the adult at the trial. Further, separation can promote the possibility of diversion during the course of proceedings, which would be far less likely to occur whilst an adult co- accused was still before court.[138]

The best interests of the child can be seen coming to the fore in the above discussion. The Bill proposes that even where the child is charged with an adult, that child should still have all the benefits of the Children's Court.

4.6.2.2 Legal Representation

Though legal representation is allowed under the Constitution, it is very expensive.[139] In the current Lesotho juvenile justice system most children do not have access to legal representation because it is not offered freely as suggested in chapter two under 'legal representation' discussions.[140]

Clause 151 of the Bill proposes that all children should have a right to legal representation. The Bill proposes that such representation should be at state expense through legal aid.[141] For this arrangement to work, Legal Aid Unit's mandate will have to change.[142] Secondly, lawyers in the unit will have to be specifically trained in juvenile justice. Lastly the legal aid unit has to be decentralized to the districts. All these will demand the unit's empowerment in human resource and facilities; more lawyers will have to be hired, more vehicles bought and more offices established in all districts, which will be costly.

The Bill proposes that a child remanded in detention and a child who will stand trial should not waive legal representation.[143] The Bill recognizes that both decisions that a child should be remanded in detention and stand trial reflect that the offence with which

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[137] Sloth Nielsen (note 34 above) at 15 though commenting on the CJB, the comment can be applied to the Bill.
[138] *Ibid* at 15.
[139] Chapter 3 note 66 and corresponding text.
[140] Chapter 2 note 124 and corresponding text.
[141] Clause 151.
[142] Chapter 3 in 'Legal Representation'.
[143] The Bill Clause 153.

the child is charged is serious and may bring serious consequences like custodial sentence. In such cases legal representation is essential. The child may say that he/she does not want representation and it is the child's right to be heard, however, the best interests principle may supersede that right and waiver of legal representation should be denied. The child would be able to waive legal representation if charged of minor offences.[144] The Bill proposes guaranteed legal representation for children in conflict with the law in the spirit of art 40(2)(b)(iii) of the CRC and in accordance with the CRC Committee's recommendation that a fair hearing according to law should be carried out in the presence of legal assistance.[145]

Clause 151 of the Bill proposes that the legal representative appearing on behalf of a child should allow the child to give independent instruction on a manner in which the case is to be conducted. The legal representative should clearly explain the child's rights and responsibilities in the proceedings against him/her in a language that the child will understand.[146] Further the legal representative should encourage informed decisions by explaining possible options and consequences of the decisions and ensure that the child is able to communicate in his/her language.[147] Further this will give the child the participatory role in the decision concerning him or her as provided for in art 12 of the CRC.[148]

The legal representative should also be acquainted with diversion and alternative sentencing options and promote diversion where appropriate without unduly influencing the child to acknowledge responsibility for the offence.[149] As Kimane argued, Lesotho has an '[i]indifferent, unknowledgeable/ uninformed legal fraternity' on issues of child rights and restorative justice.[150] Legal practitioners in the juvenile justice need to become familiar with the laws and procedures in the Children's Court. This will ensure

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[144] Offences listed under schedule 1 are: assault without grievous bodily harm, malicious damage of property worth not more than M1000.00, possession of not more than 25grams of drugs, theft of property worth less than M100.00, any statutory offence where a fine is less than M300.00 or three months imprisonment and conspiracy, incitement or attempt to commit one of these mentioned offences

[145] Chapter 2 note 119 and corresponding text.

[146] The Bill Clause 151 (2).

[147] *Ibid.*

[148] Chapter 2 note 128 and corresponding text.

[149] Clause 151 (2).

[150] I Kimane *Experiences of the Child Law Reform Process in Lesotho* an unpublished paper presented at the Regional Symposium on Harmonisation of Laws on Children in Eastern and Southern Africa 9 -10 May 2007 at 15 at www.africanchildforum.org/Documents/LesothoReform.pdf accessed on the 20th October 2008.

compliance with art 40(3) of the CRC which calls for specialization in the juvenile justice system.

Currently the Faculty of Law in the National University of Lesotho (hereafter 'the NUL'), which is the only institution that offers legal degrees, does not offer courses relevant to juvenile justice in its curriculum. It is imperative that the NUL offers child law courses and child care and protection courses for social workers so that when the Bill is enacted there is no gap in expertise in the juvenile justice system. There is need for a change of attitudes and approach of the lawyers who are generally trained 'within a retributive and adversarial paradigm,'[151] which the Bill is proposing to eradicate in the juvenile justice system.

4.6.3 Sentencing

4.6.3.1 Pre-Sentencing Report

Like the CPA, clause 154 of the Bill has maintained presentation of pre-sentencing reports to the Children's Court.[152] The pre- sentencing reports contain the background of the child, the circumstances of the offence and the recommended disposition.[153] These reports help the court to ensure that the sentence is appropriate and proportionate to the child's well-being, circumstances of the child and the offence in compliance with art 40(4) of the CRC and Rule 5.1 of the Beijing rules.[154]

The Bill has proposed that for custodial sentences to be imposed, pre sentencing reports should be mandatory.[155] This reflects added caution while contemplating deprivation of liberty as a sentence for a child. It is essential in order to establish whether the circumstances of the child and the effects of the offence disqualify the child from the use of alternatives to imprisonment. Muntingh argued that

> [w]hen we send a child to prison, we need to ask critically whom we are punishing, for what and how this action will contribute to a safer society in which children can enjoy their full rights and benefits. In other words we need sentencing options that are serious about the best interests of the child and true to the principle of using custody as a measure of last resort.[156]

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[151] Skelton (note 85 above) at 135.
[152] Chapter 3 in 'Pre- sentencing Reports'.
[153] Chapter 2 in 'Basis of Sentencing'.
[154] Chapter 2 in part 2.6.4.1.
[155] Clause 155 (3).
[156] L Muntingh ' Alternative sentencing' in J Sloth-Nielsen & J Gallinetti (eds.) *Child Justice in Africa: A Guide to Good Practice* (2004) 86, at 86.

The Bill does not impose a time limit for the presentation of the pre-sentencing report. This may cause undue delays in the progress of the cases. However, since the practice is already established, no challenges should occur in its implementation, except the lack of decentralization of the probation office.

4.6.3.2 Sentencing Options

4.6.3.2.1 Sentences without Institutional Element

Discussion in chapter three shows that the Lesotho juvenile justice system already has a good range of sentencing options under the CP&E which are alternatives to institutional sentences.[157] These alternatives are maintained in the Bill with e few variations and new additions.

The Bill has proposed additions to the existing sentencing options available in the administration of juvenile justice.[158] Clause 157 of the Bill proposed that diversion options in all levels under clause 133 can be used in sentencing children. It has been suggested in the Bill that there should be restorative justice sentences available which should include victim offender mediation, family group conferencing or any other restorative justice process.[159] The advantage of the proposal is that it leaves room for resourceful judicial officers to formulate sentences that are appropriate to individual children without being restricted by prescribed uniform sentences. The Bill, further, proposes that postponement or suspension of sentences with or without conditions can be imposed on children.[160] More community based sentences should be available for children.[161] These are similar to those enlisted in clause 133.[162]

It is worth noting that the Bill in clause 165 has proposed the abandonment of fines. Instead the damage caused by the offence should be redressed by restitution in full or

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[157] Chapter 3 in part 3.7.3.2.1.
[158] Chapter 3 in part 2.6.4.2.1.
[159] Clause 160.
[160] Clause 159 proposes that conditions for postponement or suspension of sentence should be restitution, apology, obligation not to re- offend, being of good behavoiour, school attendance, attendance at a victim-offender mediation, family group conference or any other dispute resolution process, guidance or counseling, supervision or guidance and any other condition appropriate to the circumstances of the child.
[161] Clause 158.
[162] These community based sentences include restitution, symbolic restitution, apology, correctional reprimand, compulsory school attendance order, peer association order, good behaviour order, counseling and therapy for child and his or her family, compulsory attendance at a specified centre for a specified vocational or educational programme, to be placed under care and control of a specified adult by the court, performance of service without remuneration for children over the age of thirteen years

symbolically as provided under clause 158. This proposal will be cost effective in that the victim of offences would no longer have to institute different cases for damages. This addresses the frustration of the victims of crime with the current system.[163]

In Clause 166(2) of the Bill, it has been proposed that corporal punishment or any form of punishment that is cruel, inhumane and degrading be abolished. This will be a marked improvement over the current situation where judicial corporal punishment is legal in some courts.[164] The proposed abolition will bring Lesotho's law in line with art 37(a) of the CRC.[165] The Bill has acted upon the obligation of state parties to eliminate punishment of children that is violent and humiliating through legislative measures as urged by the CRC Committee.[166] Since corporal punishment has been in disuse for a long time in Lesotho except in rare isolated incidences, its abolishment will be welcomed among practitioners.

Clause 167 of the Bill proposes use of probation orders which should have effect for a period not exceeding a year from the date of the order. However, the Bill has not proposed foster care placement as an alternative sentence as advised in art 40(4) of the CRC.[167] It would benefit children without a fixed domicile to include foster care as a sentencing option because they do not qualify for diversion. It would be a good alternative to institutional sentences especially because such children are mostly in need of care. The proposed sentences are better and far reaching than the present as they allow for flexibility and creative sentences to fit individual children.

4.6.3.2.2 Institutional Sentences

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[163] Kimane (note 2 above) at 254 argued that 'separation of civil and criminal processes is absurd, misleading, counter-productive to the desired outcomes of Sesotho dispute settlement processes and does not feature in its legal discourse.'

[164] Chapter 3 note 96 and corresponding text.

[165] CRC Committee *General Comment on Corporal Punishment* 2nd June 2006 at 1 at www.everychildcounts.org.nz/docs/summary accessed on the 24th July 2008. See also Chapter 2 note 142 and corresponding text.

[166] *Ibid.* See also CRC Committee *Concluding Observations: Grenada CRC/ C/ 15/ Add. 121* 28 February 2000 para 21 the CRC Committee recommended that State Party take all measures including enactment of laws to prohibit corporal punishment in the administration of juvenile justice. At http://tb.ohchr.org/default.aspx accessed on the 30th July 2008.

[167] Clause 52 of the Bill proposed establishment of foster care placement, therefore foster care would be a possible option.

As seen from chapter three, child imprisonment is allowed in Lesotho.[168] The Bill has proposed a range of detention institutions as alternatives to imprisonment and proposed child imprisonment that takes into account the age of the child. This is a good proposal that acknowledges the importance of evolving capacity of a child outlined in chapter two under the 'Definition of a Child and Age of Criminal Responsibility'.

Clause 162 of the Bill provides that sentences with custodial or residential nature may be imposed on children where the offence is severe, where society needs protection and where the child fails to respond to non-custodial alternatives sentences. The Bill has proposed that children sentenced to detention in an approved school should be detained for a minimum of six months and a maximum of two years.[169] These proposed time limits are shorter and an improvement over the current ones which are a minimum of nine months and a maximum of three years.[170] While two years cannot be said to be a 'shortest period', this is an effort on the proposed legislation to ensuring that deprivation of liberty is for the shortest appropriate time in compliance with art 37 (b) of the CRC.

Children below sixteen years may be sentenced to an approved school for longer than two years for serious crimes which would otherwise warrant imprisonment,[171] however, they cannot be detained beyond eighteen years of age.[172] The proposed approach to detention takes the ages of children into account, which will be a different and welcome approach from the current practice where age of children in detention is not relevant to detention time.[173] Clause 164 and takes into cognisance the provision in art 37(c) which states that detained children should be treated in a manner taking account of his or her age.

The Bill has not proposed periodic evaluations to determine if the child can be released from custody as the current law does.[174] This is risky as such evaluation may be carried out arbitrarily, if ever, which may lead to children spending the maximum term of two years in custody. This will not give effect to art 37(b) providing that detention be for a shortest appropriate time.[175]

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[168] Chapter 3 note 108 and surrounding text.
[169] Clause 164.
[170] Chapter 3 in part 3.7.3.2.2.
[171] Clause 164 (2).
[172] Clause 164 (3).
[173] Chapter 3 note 104 and surrounding text.
[174] Chapter 3 note 122 and corresponding text.
[175] Chapter 2 note 152 and corresponding text.

The Bill has proposed the establishment of the following institutions: places of remand and detention,[176] approved schools,[177] and probation hostels.[178] Children below the age of thirteen years, however, will not be detained in these institutions. The Bill has proposed the appointment of 'fit and proper persons' who will periodically visit detained children.[179] The phrase 'fit and proper persons' does not clarify who these persons are and what authority they are invested with. Further a commission of inquiry, will be appointed on any place of detention should need arise.[180] The composition and purpose of this commission is not mentioned. These latter two additional institutions may help to curb cruel and inhumane treatment of children in detention centres and ensure that the provisions for the treatment of detained children are adhered to as suggested in chapter two. It is submitted that the members of these institutions should be knowledgeable in the field of juvenile justice.

Implementation of the provision proposed above will be costly. As already mentioned, there is only one approved school in the country. Setting up such schools in every district will take time and resources, both human and financial. Existence of the approved schools in the districts will help children to be in contact with their families, which is essential for the child's rehabilitation and eventual reintegration into society as dictated in art 37(c) of the CRC.

The Bill endorses the use of imprisonment for children. Public pressure leads to a change in the position adopted by s 26(1) of the CPA which currently prohibits imprisonment of children.[181] Clause 161 of the Bill proposes that children over fourteen years but below sixteen years at the time of the offence may be imprisoned for not more than three years. This suggests that Children below the age of fourteen years cannot be imprisoned. Further, the Bill proposes that no child above the age of sixteen years should be sentenced to imprisonment for a period exceeding fifteen years.[182]

The Bill proposes different maximum sentences for different age groups. This shows appreciation for the need for differential treatment of children according to their age,

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[176] The Bill Clause 183.
[177] Clause 191.
[178] Clause 187.
[179] Clause 184 (4).
[180] Clause 183 (5).
[181] Interview with Kimane (note 33 above).
[182] Clause 164 (9).

requested by art 40(1) of the CRC. Some commentators suggested that ten to fifteen years is a realistic maximum period for child imprisonment.[183]

Under this proposal, all children sentenced to a maximum of fifteen years will spend more than a decade of their adult life in prison. This will necessitate transfer to the adult prison and forfeiture of children's prison benefits. This will result in child offending being addressed by adult sanctions. The maximum imprisonment term of fifteen years is not in the spirit of the CRC which maintains that child sentencing should be rehabilitative rather than retributive.[184]

The discussion above indicates that Lesotho has put a lot of effort in advancing the use of imprisonment a measure of last resort. The several levels of diversion proposed by the Bill, which may become applicable even the serious offences, and the numerous options of restorative justice sentencing prove this approach, and could bring Lesotho's legislation in line with arts 37(b) and 40(4) of the CRC.

There are currently no child prisons in Lesotho due to the banning of this form of punishment by the law. Therefore the implementation of the Bill in this respect would demand setting up juvenile prisons in all districts. This will be a major undertaking which may take a long time. However, it is essential to avoid children being imprisoned with adults or being imprisoned far from their homes where they would lose contact with family.

Chapter two discussions show that juvenile prisons should be more rehabilitative than punitive; children should be ensured continued education and offered life-skills, counselling and vocational training. To effectively run juvenile prisons, there will be need for specially trained correctional officers. The Correctional Services Training School (hereafter 'the CSTS') will need to include juvenile justice in its curriculum. As the Bill proposes, the state's responsibility will be to 'ensure that every child alleged as, accused of or recognised as having infringed the penal law is treated in a manner consistent with he/she[sic] sense of dignity or worth and that he or she is reintegrated into society.'[185]

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[183] Sloth-Nielsen (note 43 above) at 3.
[184] Chapter 2 in 'Basis of Sentencing'.
[185] Clause 22 (q).

4.7 Implementation Efforts of the CRC provisions in the Administration of Juvenile Justice in the Bill and Potential challenges

Article 4 of the CRC provides that states parties should undertake all legislative, administrative and other measures for the implementation of the rights under the CRC. According to Doek, the international community has not set out the 'blueprint' for the harmonisation of the national laws with the CRC, allowing each state to enact laws that are most effective and which fit into their legal systems and cultures.[186]

Lesotho has made a commendable effort to bring the law governing the administration of juvenile justice in line with the CRC. The proposed provisions in the Bill incorporate standards set by the CRC. Moreover, they embrace the Basotho culture through the establishment of Village Child Justice Committees. This has to some extent addressed the concerns raised by Kimane that the current justice system in Lesotho is 'alien to the cultural and social practices' and it disempowers the Basotho.[187]

The Bill is an all encompassing instrument for all aspects relating to children's rights and is therefore very ambitious.[188] This comprehensiveness might even be its enemy. Doek fears that a comprehensive bill may take a long 'time in the consultative stage and runs the risk that some parts may face serious opposition in parliament, meaning that the adoption of acceptable parts will be delayed significantly.'[189] Indeed, the Bill was introduced to Parliament in 2004; it is currently in the offices of the General Attorney where it is being reviewed.[190] There is no indication as to when the Bill will be enacted.[191] Afrol News reported that according to Kimane, 'the main source of the problem in enacting the Child Protection and Welfare Bill is caused by lack of political commitment.'[192]

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[186] Doek (note 36 above) at 3.
[187] Kimane (note 2 above) at 254.
[188] Doek (note 36 above) at 3.
[189] *Ibid* at 4.
[190] L Parker *Lesotho Explores Restorative Justice in Draft Bill* (August 2008) at 1 at www.restorativejustice.org/editions/2008/aug08/lesotho accessed on the 22nd September 2008.
[191] *Ibid.*
[192] Afrol News *Lesotho Government Cornered to Enact Child Legislation* (9th July 2008) at 2 at www.afrol.com/articles/29756 accessed on the 10th October 2008.

According to Chief Magistrate Makara, juvenile justice sections in the Bill are very ambitious and they complicate the juvenile justice system rather than simplify it.[193] The Bill disregards the Lesotho adversarial criminal justice system, 'it is more social welfare oriented and over simplistic given the complexity of the criminal justice system.'[194] These opinions reflect that some changes brought about by the Bill may not be readily accepted by some role players in the juvenile justice field. It is imperative that an all inclusive training be carried out to avoid the resistance in the use of the provisions of the Bill.

Another concern with regards to the implementation of the Bill is the financial aspect. In the exercise of drafting the Bill, the Lesotho Law Reform Commission had donor assistance provided by UNICEF, Save the Children Sweden (Pretoria Office) and Save the Children UK.[195] Even though it has been suggested that while drafting the Bill an estimate of implementation costs should be included,[196] the Bill has not been costed. The costing will be carried out after the enactment of the Bill.[197] Costing the Bill after enactment is problematic; it defeats the purpose of viability evaluation. What is necessary after enactment is budgeting. The bulk of the expenses will go to building of institutions, decentralization of services and training of personnel.[198] Implementation of the Bill may be very expensive and it may be necessary to seek international cooperation as provided under art 4 of the CRC. However, there are sections that can be implemented without extra costs.[199] Further, implementation will be carried out in steps.[200]

4.8 Conclusion

The Bill has to a large extent proposed the incorporation of the CRC standards on juvenile justice in the Lesotho legislation. The Bill introduces clarity with regards to the definition

[193] Interview with M Makara the Chief Magistrate Maseru on the 04th July 2008.
[194] *Ibid.*
[195] UNICEF (note 94 above) at 6.
[196] Doek (note 36 above) at 5.
[197] Kimane(note 150 above) at 13.
[198] Interview with Kimane (note 33 above) social workers, police officers, prosecutors, legal representatives and judicial officers need to be trained.
[199] Some of the proposed provisions of the Bill that can be implemented with no additional costs are the designation of magistrates for the Children's Court, the inquisitorial rather than accusatorial proceedings and protection of children from hostile prosecution, remanding children in Children's Court, adhering to prompt trials, abandonment of corporal punishment and abandonment of fine sentences in preference of restitution.
[200] Interview with Kimane (note 33) above.

of a child within juvenile justice sphere. Although the Bill proposes raising the age of criminal responsibility from seven years to ten years the later is still too low according to the requirements of the CRC. This age should be reviewed and preferably replaced by the age of 12 years as the age of criminal responsibility.

Diversion, the cornerstone in the administration of juvenile justice under the CRC, has been given statutory recognition and precise guidelines are formulated with regards to its administration, professionals and institutions. Diversion will be accessible as a first resort for all children in conflict with the law, regardless of their age or the nature of offences committed. However, street children still seem to be excluded from diversion and no alternatives to judicial proceedings are made available for them. This is contrary to the recommendations of the CRC Committee and contravenes the principle of non-discrimination outlined in the CRC and the Bill.

The novel introduction of diversion as a mode of restorative justice in the villages will go a long way to ensuring equal access to diversion for children in urban and rural areas. The communities will resolve juvenile justice issues without recourse to criminal justice and upholding the dignity and the well-being of the child and the rights of others. This reinforces the responsibilities of the parents and communities in the raising of their children, which should, in an ideal society, precede the state's involvement. Further this devolvement of authority to the local level is seen as 'a suitable and appropriate approach in the African context.'[201]

In the judicial process, the Bill proposes that the Children's Court shall be presided over by specialised magistrates, which is a new and important suggestion. It has provided that the voices of children shall be heard and their opinions given consideration in accordance with their age and development. This provision is strengthened by the proposal to provide legal representation to children in conflict with the law at state's expense. Children will be able to communicate in their own languages and interpreters including sign language specialists for children with hearing impairments will be used at state's expense. Through the implementation of the provisions discussed, specialist administration of the juvenile justice will be ensured.

[201] UNICEF (note 94 above) 6.

The Bill proposes a wide range of alternatives to custodial sentencing, making imprisonment a last resort. Although the Bill does not provide for counselling and foster care, the other options are in conformity with art 40(4) of the CRC. Corporal punishment and degrading punishment will be abolished.

The Bill improves the standards of art 3 of the CRC by providing that the best interests of the child shall be *the* primary consideration in all actions involving the child. These interests will be upheld without any discrimination. Unfortunately by not prohibiting discrimination on grounds of nationality, children who are not citizens of Lesotho are still exposed to discrimination within the juvenile justice field.

The Bill has proposed many institutions that such as detention centres, probation hostels, approved schools and prisons in all districts. To implement this may not be easy; there may be need for international corporation. Further the increased scope of the probation unit and the legal aid unit will demand that both units are fully decentralized to the districts. For these to be implemented there needs to be high scale training of lawyers, social workers, and all professionals in the juvenile justice system on child justice issues.

There are provisions of the Bill such as designation of magistrates for the Children's courts, the inquisitorial rather than accusatorial proceedings and protection of children from hostile prosecution, adhering to prompt decisions, abandonment of corporal punishment and diversion form fine sentences in preference of restitution that can be implemented without extra cost.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

The CRC requires that children in conflict with the law should be treated with dignity taking into account their welfare and their age. It is essential that all persons under the age of eighteen years are treated as children in the juvenile justice system for they have not developed fully into adults.[1] Though children who have attained majority are treated as adults in Lesotho,[2] the Bill proposes that all persons below the age of eighteen years be treated as children in the juvenile justice system.[3]

Children's capacity to offend corresponds with their age and development.[4] Under the current Lesotho law, the age of criminal responsibility is extremely low at seven years.[5] The Bill attempts to remedy this but the proposed age for criminal responsibility - ten years - is still too low and not in compliance with the CRC.[6] The current *doli incapax* rule which has been retained in the Bill, poses further problems. Currently, the expert evidence required in the establishment of the child's criminal capacity is not available to courts.[7] Although this has been provided for in clause 83(2) of the Bill, it may be difficult to obtain expert evidence in every case. To alleviate this obstacle, the age of criminal responsibility should be set as high as possible, preferably at twelve years as recommended by the CRC Committee.[8]

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[1] OHCHR *Human Rights Committee General Comment No. 21 Article 10* 10 April 1992 para 13 at www.unhchr.ch/tbs/doc.nsf/(Symbol)/3327552b9511fb98c1256 3ed004cbe59?Opendocument accessed on the 07th May 2008.

[2] Section 2 of the CPA.

[3] Clause 3.

[4] United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 Rule 4 at www.hri.ca/uninfo/treaties/48.shtml accessed on the 20th February 2008.

[5] CRC Committee *Concluding observations of the Committee on the Rights of the Child: Lesotho CRC/C/15?Add.147* 21 February 2001 para 61(a) at http://tb.ohchr.org/default.aspx accessed on the 2nd March 2008.

[6] CRC Committee *Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland CRC/C/GBR/CO/4* 20 October 2008 para 77 At http://tb.ohchr.org/default.aspx accessed on the 23rd May 2008.

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[8] CRC Committee (note 5 above) para 32.

Lesotho police stations do not have separate holding cells for children, which leads to children being held in the same cells as adults.[9] This disregards art 37(c) of the CRC. The Bill has proposed that every police station have separate cells for detained children, boys separate from girls.[10]

Children in the juvenile justice system need protection from the full rigours of the criminal justice system to avoid possible labeling, stigmatization and destruction of their future development.[11] Therefore, all children should be considered for diversion, which largely avoids the negative impact of the criminal justice system on children.[12] Though not statutorily regulated, diversion, which is still in its infancy, is practiced in Lesotho. Unfortunately, it is only practiced in the capital Maseru and it is never used for street children.[13] The Bill has proposed extensive diversion programmes with four levels applicable to both minor offences and serious offences.[14] The Bill provides legal safeguards in diversion which will ensure that their rights are respected.[15]

The proposed diversion programmes will be considered for children in conflict with the law in order to deal with such children without resorting to judicial processes in accordance with art 40(3)(b) of the CRC.[16] However, proposed diversion under the Bill still excludes street children.[17] There is need for diversion to be decentralized and alternatives sought to protect street children so that diversion can be applied to all children in the country, without discrimination based on place of residence or social status.

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[9] L Chaka-Makhooane 'Administration of Juvenile Justice' in Lesotho Law Reform Commission *Child Legislation Reform Project: Issue papers Project 6* (2003) 1 at 15.
[10] Clause 107(4).
[11] JP Williams *without Resorting to Judicial Proceedings (CRC Art. 40 (3) (b)) How most Child Offenders can be Treated* (Paper iii World Congress on Children and Adolescents Rights, Barcelona Nov 14- 19th 2007) at 3 at www.crin.org/docs/diversion.docs on the 10th July 2007.

[13] T Ntlhakana *Probation Unit: Legal Protection* 3 unpublished paper with the authour.
[14] Clause 133.
[15] GO Odongo *The Domestication of International Law Standards on the Rights of Child with Specific Reference to Juvenile Justice in the African Context.* A Thesis submitted in fulfillment of the requirements for the degree of Doctor of Law in the Faculty of Law of the University of the Western Cape, South Africa 18th October 2005 at 200 at www.etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_9110_1176963955.pdf accessed on the 03rd March 2008.
[16] Clause 131(4) proposes that all children must have equal access to diversion options without discrimination. (The researcher could not get statistics on the number of street children who come into conflict with the law).
[17] Clause 132(2) excludes children without fixed addresses from diversion.

The proposed establishment of VCJCs[18] is a most welcome method of dealing with children in conflict with the law in the African context.[19] As established in chapter four the successful pilot projects run in some villages on general restorative justice may indicate the success of the VCJCs.[20]The VCJCs will enable the offending behaviuor of the child to be addressed in the village by the community, without state interference. This method will be more attuned to the Basotho traditional way of dealing with anti-social behaviuor than the foreign judicial system. However, there will be need for the VCJCs to be trained and assisted to draw standard procedures for all villages.

According to art 40(2)(b)(vii) of the CRC, children ought to be prosecuted in child friendly environment and in private, in order to protect the dignity of the child. This facilitates child participation in the proceedings. Although these protective measures are currently provided by the CPA, they have been routinely overlooked, leading to children being tried like adults.[21] The Bill reaffirms and improves the protective provisions above.[22] It proposes an automatic separation of trials where a child is co-accused with an adult and rectifies the present practice where joinder of trials is automatic in the adult court.[23] The juvenile justice professionals have to be specially trained as required in art 40(3) of the CRC. There are a few specially trained professionals in the Lesotho juvenile justice system.[24] The Bill proposes that specially designated magistrates should preside over Children's Courts.[25] This will necessitate training and specialization.

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[18] Clause 125.
[19] J Sloth-Nielsen, D Chirwa, C Mbazira, B Mezmur & R Kamidi *Report on Child Friendly Laws in African Context- Good and Promising Indicators and Practices* (2007)at 58 at http://uwcportaltest.uwc.ac.za/usrfiles/importcms/gen11Srv7Nme54_8909_1210050527/child_friendly_laws.pdf accessed on the 10th October 2008.
[20] Chapter 4 note 101 and corresponding text.
[21] Chaka-Makhooane (note 9 above) at 9.
[22] Clause 142. See also chapter 3 note 59-60 and corresponding text.
[23] Clause 144.
[24] N Qhubu *The Development of Restorative Justice in Lesotho* (2005) at 12 it was stated that a pilot project on diversion and restorative justice was run with some magistrates and prosecutors in the northern and southern regional offices, however the project collapsed when the assigned probation officers left to study. At www.doj.gov.za/alraesa/conferences/papers/s4B_qhubu.pdf accessed on the 8th March 2008.
[25] Clause 137(1).

Articles 37(d) and 40(2)(b) of the CRC require speedy decisions, adjudication and disposal of children's cases. Lack of separate management of the Children's Court from the main stream Magistrates Court negatively affects this.[26] Children's cases are not given priority on the roll; therefore they take as long as adult cases to be completed. By proposing that children be remanded in the Children's Court,[27] the Bill will facilitate the separation of records. Children will have distinct courts that will be appropriate to their privacy rights and effective to their participation rights which will comply with art 40(2)(b)(vii) and art 12 of the CRC respectively. The Bill further proposes that cases of children, especially those remanded in custody, be disposed off in three months.[28] This proposal acknowledges the provision of art 37(b) that detention should be for a shortest period. Implementation of these mentioned proposals can be carried out without extra cost to the state.

The best interests of the child in the Lesotho juvenile justice system is still an unknown concept. The Bill attempts to introduce the principle that the best interests of the child shall be *the* primary consideration in all matters affecting the child.[29] This complies with the spirit of art 3 of the CRC as seen from analysis in chapter two. The best interests of the child will guide all decision making in the field of juvenile justice; in the VCJCs, in arrest and detention, diversion and the judicial process. However the best interests of the child principle needs to be included in the Constitution to avoid being attacked as unconstitutional.

Discussions in chapter three showed that the current Lesotho juvenile justice system does not conform to art 12 of the CRC which requires that the children's views should be heard and respected in all decisions affecting them.[30] This is more so because legal representation is not provided as required in art 40(2)(b)(ii) and (iii).[31] Participation provisions will be dramatically improved by the Bill which proposes for legal

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[26] Lesotho Justice Sector *The National Vision and Strategy for the Justice Sector* (2007) at 9.
[27] Clause 136.
[28] Clause 146(4).
[29] Clause 4.
[30] Chapter 3 note 73 and corresponding text.
[31] I Kimane 'Child Justice in Lesotho' in Lesotho Justice Sector *Lesotho Justice Sector Conference: A Full Report of Conference Proceedings and the Recommendations* (26th – 30th July 2004) 250 at 252.

representation,[32] enforcement of privacy,[33] interpreters and sign language specialists[34] and the judicial officers' duty to protect children from aggressive prosecution.[35]

The CRC in art 40(4) provides that a range of dispositions be used in sentencing children as alternatives to institutionalization. A good range of these alternatives are already in use in Lesotho, some of which are not regulated by law. The Bill has proposed their codification with some innovations such as the elimination of fines in favour of restitution to the victim[36] and restorative justice sentences.[37] Further the Bill has proposed abolishment of corporal punishment which is in full compliance with art 37(a) of the CRC.

Article 37(b) provides that children should be imprisoned as a measure of last resort and for the shortest appropriate time. In Lesotho children are imprisoned even though under the CPA no child should be imprisoned.[38] Essentially children on remand and delinquents who are put in JTC along with convicted offenders suffer imprisonment conditions in JTC as seen form chapter three.[39] The Bill has proposed a range of alternative institutions to imprisonment. Children below the age of 13 years will neither be institutionalized nor imprisoned. Under proposed imprisonment provisions, the Bill has set different maximum terms for different age groups, thus ensuring that children are treated according to their ages as provided for in art 40(1) of the CRC outlined in chapter two.[40]

Lesotho has strived through practice to implement some of the provisions of the CRC in the administration of juvenile justice such as diversion and restorative justice even though they are not regulated by law. The Bill attempts to bring the Lesotho laws in line with the CRC, as required by art 4.

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[32] Chapter 4 in 'Legal Representation'.
[33] Chapter 4 note 132 and corresponding text.
[34] Chapter 4 in part 4.2.3.
[35] Chapter 4 note 126 and corresponding text.
[36] Clause 165.
[37] Clause 160(1).
[38] Chapter 3 note 99 and corresponding text.
[39] Chapter 3 in part 3.7.3.2.2. See also CRC Committee - *Initial Reports of state Parties due in 1994: Lesotho CRC/C/11/Add 20* 20th July 1998 para 108 at www.hri.ca/fortherecord1999/documentation/bodies/crc-c-11-add20.htm accessed on the 2nd March 2008.
[40] Chapter 4 in 'Institutional Sentences'.

Lesotho is a very small and poor country.[41] It will not be easy to reach the aspirations of the Bill all at once due to economic constraints. Further the fact that there are few trained professionals in the juvenile justice system will slow down progress. It will take time for all provisions of the CRC to be implemented in practice. Below are some recommendations for an efficient implementation of the Bill.

5.2 Recommendations

It has been four years since the drafting of the Bill was completed and the Bill was introduced to parliament. To date the Bill is still awaiting enactment. Enactment of the Bill should be the first and most important move towards the implementation of the administration of the juvenile justice system as provided by the CRC.

As seen from the discussions in chapter two, the best way to implement the CRC is through the National Action Plan together with national legislation that conforms to the CRC. The Lesotho National Vision and Strategy for the Justice Sector 2005, (though not the national plan but relevant),[42] has not put deserved focus on the improvement of juvenile justice in the country. It would be best for future planning to treat juvenile justice independently from the general criminal justice system. This would help the Children's Court to have its distinct budget in the sectors' allocation of resources.

The probation officers are important role players in the Lesotho juvenile justice system. Therefore, the probation office should be decentralized and reinforced by human resources and facilities in order to operate effectively and that all children in the country benefit equally from its services. There is also need for restructuring and decentralization of the Legal Aid so that it can undertake its proposed mandate under the Bill all over the country.

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[41] Food and Agriculture Organisation of the United Nations *Lesotho* (2009) at www.fao.org/isfp/country-information/lesotho/en accessed on the 7th January 2009.
[42] The researcher tried in vain to find the National Action Plan from all relevant departments, nobody has any knowledge of its existence.

There is need for amendment s 32 of the Constitution to include the principle of the best interests of the child so the principle may not be attacked as unconstitutional. Further, the ground of citizenship in s 18(4) of the Constitution should not be used to justify discrimination of children in conflict with the law.[43]

This research has shown that Lesotho has few professionals specializing in juvenile justice. There is a great need for training of professionals in juvenile justice. The existing institutions can be used to provide such training. The National University of Lesotho should include children's rights and child care and protection in the curriculum of the faculty of law and social sciences.[44] This would ensure that all legally trained personnel and social workers have requisite knowledge to work in the juvenile justice system.

Other institutions that can provide specialized courses in juvenile justice are the Police Training College and the Correctional Services Training School. This way all incoming police officers and correctional officers would have the basic knowledge in the field of juvenile justice. The GCPU should ensure that all its officers have received in-depth training in handling children in conflict with the law.

The professionals who are already serving in the juvenile justice system should receive relevant training through workshops and seminars. It is important that different categories of professionals are trained together so that they understand and appreciate each other's roles. The Bill should be used to draw a training manual in all proposed trainings.

While awaiting the enactment of the Bill, some provisions in the Bill which do not require extra resources should be put into practice such as the continuation of the use of diversion and restorative justice sentences. Chief Magistrates should designate magistrates for the Children's Courts and the Children's Courts should adopt an

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[43] Chapter 4 in part 4.2.2.

[44] I Kimane *Experiences of the Child Law Reform Process in Lesotho* an unpublished paper presented at the Regional Symposium on Harmonisation of Laws on Children in Eastern and Southern Africa (9 - 10 May 2007) at www.africanchildforum.org/Documents/LesothoReform.pdf accessed on the 20th October 2008.

inquisitorial approach. Judicial officers should protect children from aggressive prosecution and ensure that publicity of proceedings against children is controlled and that privacy of children is protected.

Implementation of juvenile justice provisions of the CRC is a long, hard process which does not end with enactment of laws. Practice in Lesotho has shown that good laws do not mean good practice. Lesotho first has to enact the Bill, which is already overdue. Secondly, the professionals in the juvenile justice have to stand together in collaboration to advocate for and enforce the dictates of the Bill into practice. This will not be easy as seen from the previous chapter.[45] It may help to ensure that professionals in the juvenile justice system are not randomly appointed; the professionals should show specific interest to work in the field and be specifically trained to gain appreciation for children's rights in the juvenile justice system. The Lesotho juvenile justice system should be built on the foundation of the best interests of the child which should be paramount according to the Bill, and supported on the pillars of diversion and restorative justice.

[45] Chapter 4 note 192-193 and corresponding text.

BIBILIOGRAPHY

Books

Buck, T *International Child Law* (London, Cavendish Publishing 2005).

Cunneen, C & White, R *Juvenile Justice: Youth and Crime in Australia* (Victoria, Oxford University Press, 2003).

Fortin, J *Children's Rights and the Developing Law* (2nd ed) (Cambridge, Cambridge University Press 2005).

Hodgkin, R & Newell, P *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 2002).

Martin, G *Juvenile Justice: Process and Systems* (London, Sage Publications 2005).

Pickford, J *Youth Justice: Theory and Practice* (London, Covendish Publishing 2000).

Sloth-Nielsen, J & Gallinetti, J (eds.) *Child Justice in Africa: A Guide to Good Practice* (University of Western Cape, Community Law Centre 2004).

Smithburn, JE *Cases and Materials in Juvenile Law* (Cincinnati, Anderson Publishing Company 2002).

Snyman, CR *Criminal Law* (3rd ed) (Durban, Butterworths 1995).

Strydom, HA & Pretorius, JL & Klinck, ME *International Human Rights Standards Volume 1: Administration of Justice* (Durban, Butterworths 1997)

The Lesotho Justice Sector *The National Vision and Strategy for the Justice Sector* (Maseru, Lesotho Justice Sector 2007).

UNICEF *Reference Guide for Lesotho Mounted Police Officers on the Protection of Children and Women's Rights* (Morija Printing Works, 2005).

Van Bueren, GA *Commentary on the United Nations Convention on the Rights of the Child: Article 40 Child Criminal Justice* (Leiden, Martinus Nijhoff Publishers 2006).

Van Bueren, G *The International Law on the Rights of the Child* (Hague, Martinus Nijhoff Publishers 1998).

Chapters in Books

Chaka- Makhooane, L 'Administration of Juvenile Justice' in same comment for all above Lesotho Law Reform Commission *Child Legislation Reform Project: Issue Paper Project 6* (Maseru, Lesotho Law Reform 2003)1.

Gallinetti, J, Muntingh, L & Skelton, A ' Child Justice Concepts' In Sloth-Nielsen, J and Gallinetti, J *Child Justice in Africa: A Guide to Good Practice* (University of Western Cape, Community Law Centre 2004) 32 .

Goonesekere, S ' National Policies on Children's Rights and International Norms' In Asquith, S. & Hill, M. (eds.) *Justice for Children* (London, Martinus Nijhoff Publishers 1994) 73.

Hamilton, C ' Implementing Children's Rights in a Transitional Society' In Davel, C J (ed) *Children's Rights in a Transitional Society* (Pretoria, Protea Book House 1999) 13.

Hammarberg, T 'Justice for Children through the UN Convention' In Asquith, S & Hill, M (eds.) *Justice for Children* (London, Martinus Nijhoff Publishers 1994) 59.

Kimane, I 'Child Justice in Lesotho' In Lesotho Justice Sector *Lesotho Justice Sector Conference: A Full Report of Conference Proceedings and the Recommendations* 26th – 30th July 2004 (Morija, Morija Printing 2004) 250.

Ledogar, RJ 'Realizing Rights through National Prograrmmes of Action for Children' In Himes, J R (ed) *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low-income Countries* (London, Martinus Nijhoff Publishers1995) 55.

Liefaard, T 'The Right to be Treated with Humanity' In Alen, A *et al* (eds) *The UN Children's Rights Convention: Theory Meets Practice* (Antwerpen- Oxford, Intersentia 2007) 576.

Maqutu, WCM ' Access to Justice (Process, Procedures and Delivery thereof)' In Lesotho Justice Sector *Lesotho Justice Sector Conference* Held at Maseru 26th to 30th July 2004 (Morija, Morija Printing 2004) 17.

Mbambo, B ' Communities as Role Players' In Sloth-Nielsen, J & Gallinetti, J (eds.) *Child Justice in Africa: A Guide to Good Practice* (University of Western Cape, Community Law Centre 2004) 144.

McGoldrick, D 'The United Nations Convention on the Rights of the Child' In Freeman, MDA (ed) *Children's Rights* (Volume11) (Hants England, Ashgate Publishing Limited 2003) 79.

Mohale, N 'Access to Justice, its Delivery, Adequacy and Suitability' In Lesotho Justice Sector *Lesotho Justice Sector Conference* Held at Maseru 26th to 30th July 2004 (Morija, Morija Printing 2004) 49.

Mohau, K 'Human Rights' In Lesotho Justice Sector *Lesotho Justice Sector Conference: A Full Report of Conference Proceedings and the Recommendations* (2004) Held at Maseru on the 26th -30th July 2004 (Morija , Morija Printing 2004) 93.

Muntingh, L 'Alternative sentencing' In Sloth-Nielsen, J & Gallinetti, J (eds.) *Child Justice in Africa: A Guide to Good Practice* (University of Western Cape, Community Law Centre 2004) 86.

Naffine, N 'Children in the Children's Court: Can there be Rights without a Remedy?' In Alston, P *et al* (eds.) *Children, Rights, and the Law* (2nd ed) (New York, Oxford University Press 1995) 77.

Qhubu, N 'Restorative Justice: What Prompted this Global Revival Movement?' In Lesotho Justice Sector *Lesotho Justice Sector Conference: A Full Report of Conference Proceedings and the Recommendations* (26th – 30th July 2004) (Morija, Morija Printing 2004) 240.

Santos Pais, M 'Monitoring the Children's Rights from within' In Verhellen, E (ed) *Monitoring Children's Rights* (London, Martinus Nijhoff Publishers 1996) 113.

Sheldon, D 'International Law and Relative Normativity' In Evans MD *International Law* (1st ed) (New York, Oxford University Press 2003)

Skelton, A 'Developing Juvenile Justice System for South Africa: International Instruments and Restorative Justice' In Keightley, R (ed) *Children's Rights* (Cape Town, Juta & Co. LTD 1996) 180.

Todres, J 'Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and its Early Case Law' In Freeman, M D A (ed) *Children's Rights* (Volume 11) (Hants England, Ashgate Publishing Limited 2003) 159.

Trepanier, J 'Children's Rights in Juvenile Justice: A Historical Glance' In Alen, A et al (eds) *The UN Children's Rights Convention: Theory meets Practice* (Antwerpen Oxford, Intersentia 2007) 509.

Van Bueren, G 'The United Nations Convention on the Rights of the Child: An Evolutionary Revolution' In Davel, C J (ed) *Introduction to Child Law in South Africa* (Western Cape, Juta 2000) 202.

Viner, P 'The Lesotho Justice Sector- A situation Report by the Secretariat of the Lesotho Justice Sector Development Programme' In Lesotho Justice Sector *Lesotho Justice Sector Conference: A Full Report of Conference Proceedings and the Recommendations* 26th – 30th July 2004 (Morija , Morija Printing 2004) 1.

Journal Articles

Arrendondo, DE 'Principles of Child Development and Juvenile Justice: Information for Decision Makers' *Journal of the Center for Families Children and the courts* (2004) 127.

Muller, K 'An Inquisitorial Approach to the Evidence of Children' (2001) 4 (4) *Crime Research in South Africa* 1.

Prinsloo, J 'Young offenders and Pre-sentencing Report: A Criminological Perspective' (2005) 18 (3) *Acta Juridica* 1.

Reyneke, JM & Kruger, H B 'Sexual Offences Courts: Better Justice for Children?' (2006) 31 (2) *Journal for Juridical Sciences* 73.

Shearar, A & Graser, R 'A critical view of Diversion programmes in the Context of Restorative Justice' (2005) 41 (2) *Social work/ Maatskaplike Werk* 155.

Sloth-Nielsen, J 'Children's Rights in the South African Courts: An Overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *The International Journal of Children's Rights* 137.

Steinberg, L 'Juveniles on Trial. Mac Arthur Foundation Study calls Competency into Question' (2003) 18 (3) *Criminal Justice Magazine* 1 at www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html accessed on the 6th March 2008.

Tobin, JW 'Time to Remove Shackles: The Legality of Restraints on Children Deprived of their Liberty under International Law' (2001) 9 *The International Journal of Children's Rights* 213.

Van der Vyver, JD 'Municipal Legal Obligations of States to the Convention on the Rights of the Child' (2006) 20 *Emory International Law Review* 9.

Unpublished Thesis

Odongo, GO *The Domestication of International Law Standards on the Rights of Child with Specific Reference to Juvenile Justice in the African Context* (Unpublished PhD thesis ,University of the Western Cape, South Africa 18th October 2005) at www.etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_9110_1176963955.pdf accessed on the 03rd March 2008.

Skelton, A *The influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (Unpublished PhD thesis, University of Pretoria 2005).

Internet sources

Afrol News Lesotho *Government Cornered to Enact Child Legislation* (9th July 2008) at www.afrol.com/articles/29756 accessed on the 10th October 2008.

Amnesty International, International Secretariat *The Best Interests of the Child: Human Rights and the Juvenile Justice System* (1st November 1998) at www.amnesty.org/en/library/asset/ACT76/006/1998/en/dom-ACT760061998en.html accessed on the 12th April 2008.

Child Development Agency *Contribution to the Jamaica Justice System Reform* (2007) at www.cda.gov.jm/downloads/JSRP_20070329 accessed on the 15th May 2007.

Child Rights Information Network *South Africa: Ministers Sued for teen Incarceration* (20 /05/ 2008) at www.crin.org/resources/infoDetail.asp?ID=17346 accessed on the 21st May 2008).

Croke, R & Crowley, A why initials first? (eds) *Stop, Look, Listen: the road to realising children's rights in Wales- Wales NGO alternative* (2007) at www.savethechildren.org.uk/en/docs/wales_stop_look_listen20071119.pdf accessed on the 17th May 2008.

Canada Department of Justice *YCJA Explained, Youth Sentence: Explanatory Text* (2002) at 2 at www.justice.gc.ca/eng/pi/yj-jj/repos-depot/pdf/3040301.pdf accessed on the 01st March 2008

Department of Women and Child Development, Ministry of Human Resource Development: Government of India *India: First periodic Report* 2001 at http://wcd.nic.in/crcpdf/CRC-2.PDF accessed on the 20th December 2008.

Doek, J *Harmonisation of National Laws and the CRC: Some Challenges* at www.jaapdoek.nl/publications/keynotes/keynote_383.pdf accessed on the 18th September 2008.

Doek, J ' Child Justice Trends and Concerns with a Reflection on South Africa' In Gallinetti, J Kassan, D & Ehlers, L *Child Justice in South Africa: Children's Rights Under Construction* Conference Report August 2006 (University of Western Cape, Child Justice Alliance 2006) at www.childjustice.org.za/publications/CJ_ConferenceReport.pdf accessed on the 12th August 2008.

European Network of Ombudspersons for Children *Juvenile Justice: Europe's Children's Champions Challenge Governments to Respect Young Offender's Rights* (2003) at www.crin.org/docs/juvenile_justice_final_statement.doc accessed on the 28 April 2008.

Frank, C & Waterhouse *Promoting Crime Prevention and Responding to sexual offending in the Child justice Bill* 2008 at www.rapcan.org.za/File accessed on the o4th November 2008.

Global Initiative to end all Corporal Punishment of Children *Lesotho Report: Lawfulness of corporal punishment* (2007) at www.endcorporalpunishment.org/pages/progress/reports/lesotho.html accessed on the 03rd March 2008.

Justice and Constitutional Development Portfolio Committee *Report on Child Justice Bill* (23rd June 2008) at www.childjustice.org.za/parl_reports/PC%20Report%20on%20CJ%20Bill%20-%2023%20June%202008.pdf accessed on the 25 August 2008.

Kimane, I *Experiences of the Child Law Reform Process in Lesotho* an unpublished paper presented at the Regional Symposium on Harmonisation of Laws on Children in Eastern and Southern Africa (9 -10 May 2007) at www.africanchildforum.org/Documents/LesothoReform.pdf accessed on the 20th October 2008.

Kimane, I ' Over view of Child Justice System in Lesotho at Present' in G Kunda *Good Governance and Development* Conference Report at Maseru Lesotho(7th - 8th May 2004) at www.sadclawyers.com/pdfs/conferencereport.pdf accessed on the 5th March 2008.

Leeman, M *The Right of the Child in Switzerland* (2002) at www.omct.org/pdf/cc/suisseEng.CC.pdf accessed on the 13th May 2008.

Malea, M & Stout, B 'The treatment of Children in Custody in Lesotho' *The International Child and Youth Care Network* (2003) at www.cyc-net.org/cyc-online/cycol-0603-lesotho.html accessed on the 12th March 2008.

Mardite, H *The Juvenile Justice in Indonesia* at www.unafei.or.jp/english/pdf/PDF_rms/no68/12_indonesia-p188-195.pdf accessed on the 7th January 2009.

Mbambo, B 'Diversion: A Central Feature of the New Child Justice System' in T Maepa (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* Monograph No. 111 (February 2005) at www.iss.co.za/Monographs/No111/chap7.htm accessed on the 20th October 2006.

Parker, L *Lesotho Explores Restorative Justice in Draft Bill* (August 2008) at www.restorativejustice.org/editions/2008/aug08/lesotho accessed on the 22nd September 2008.

Qhubu, N *The Development of Restorative Justice in Lesotho* (15-17 March 2005) at www.doj.gov.za/alraesa/conferences/papers/s4B_qhubu.pdf accessed on the 8th March 2008.

Sloth-Nielsen, J Chirwa, D Mbazira, C Mezmur, B & Kamidi, R *Report On Child Friendly Laws in African Context- Good and Promising Indicators and Practices* (2007) at

http://uwcportaltest.uwc.ac.za/usrfiles/importcms/ger11Srv7Nme54_8909_12100 50527/child_friendly_laws.pdf accessed on the 10th October 2008.

Sloth-Nielsen, J *Submission to the Portfolio Committee on Justice and Constitutional Development: The Child Justice Bill 2007* at www.childjustice.org.za/submissions/2008Submissions/Julia%Sloth-Nielsen.pdf accessed on the 15th May 2008.

Sloth- Nielsen, J *Harmonisation of laws relating use of capital letters inconsistent to Children: Lesotho* (2007) at 19 at www.africanchild.info/documents.asp?page=6 accessed on the 12th April 2008.

UNICEF *Realising Rights for Children: Good Practice- Eastern and Southern Africa* (2007) at www.africanchildforum.org/Documents/Good_Practice.pdf accessed on the) 5th June 2008.

Walsh, D *Balancing Process values with Welfare Objectives in Juvenile Justice Procedure: Some Strengths and Weaknesses in the Irish Approach* a Paper presented to Irish Youth Services Bennial Conference Cava (6-7th March 2008) at www.iyjs.ic/en/IYJS/Dermot Walsh Presentation.pdf/Files/Dermot Walsh Presentation.pdf accessed on the 7th January 2009..

Wernham, M *An outside Chance: Street Children and Juvenile Justice- an International Perspective* (London, Consortium for Street Children 2004) at www.streetchildren.org.uk/resources/details/?type=publication&publication=25 accessed on the 20th July 2008.

Williams, JP 'Without Resorting to Judicial Proceedings (CRC Art. 40 (3) (b)) How most Child Offenders can be Treated- Paper iii' In *World Congress on Children and Adolescents Rights,* Barcelona (Nov 14- 19th 2007) 1 at www.crin.org/docs/diversion.docs on the 10th July 2007.

Zermatten, J *The Best Interests of the Child from the Literal Analysis to the Philosophical Scope* (2003) at www.childright.org/html/documents/wr/2003-3_en.pdf accessed on the 9th July 2008.

United Nations Documents

Committee on the Rights of the Child *Consideration of reports submitted by States Parties under Article 44 of the Convention - Concluding observations of the Committee on the Rights of the Child: Bolivia CRC/ C/ 15//Add. 1* 18 February 1993 at http://tb.ohchr.org/default.aspx accessed on the 26th July 2008.

Committee on the Rights of the Child *Consideration of reports submitted by States Parties under Article 44 of the Convention - Concluding observations of the Committee on the Rights of the Child: Brazil CRC/C/15/Add.* 3 November 2004 at http://tb.ohchr.org/default.aspx accessed on the 26th July 2008.

Committee on the Rights of the Child *Consideration of reports submitted by States Parties under Article 44 of the Convention - Concluding observations of the Committee on the Rights of the Child: Georgia CRC/ C/15/Add. 124* 28th June 2000 at http://tb.ohchr.org/default.aspx accessed on the 30th July 2008.

Committee on the Rights of the Child *Consideration of reports submitted by States Parties under Article 44 of the Convention - Concluding observations of the Committee on the Rights of the Child: Grenada CRC/ C/ 15/ Add. 121 28* February 2000 at http://tb.ohchr.org/default.aspx accessed on the 30th July 2008.

Committee on the Rights of the Child *Consideration of reports submitted by States Parties under Article 44 of the Convention - Concluding observations of the Committee on the Rights of the Child: Italy CRC/C/15/Add 198* 18 March 2003 at http://tb.ohchr.org/default.aspx accessed on the 17th November 2008.

Committee on the Rights of the Child *Consideration of reports submitted by States Parties under Article 44 of the Convention - Concluding observations of the Committee on the Rights of the Child: Kenya CRC/C/KEN/CO/2* 19 June 2007 at http://tb.ohchr.org/default.aspx accessed on the 5th November 2008.

Committee on the Rights of the Child *Consideration of reports submitted by States Parties under Article 44 of the Convention - Concluding observations of the Committee on the Rights of the Child: Lesotho CRC/C/15?Add.147* 21 February 2001 at http://tb.ohchr.org/default.aspx accessed on the 2nd March 2008.

Committee on the Rights of the Child *Consideration of reports submitted by States Parties under Article 44 of the Convention - Concluding observations of the Committee on the Rights of the Child: Mongolia CRC/C/ SR. 266* 12 March 1996 at http://tb.ohchr.org/default.aspx accessed on the 4th November 2008.

Committee on the Rights of the Child *Consideration of reports submitted by States Parties under Article 44 of the Convention - Concluding observations of the Committee on the Rights of the Child: Sierra Leone CRC/C/SLE/CO/2* 20 June 2008 at http://tb.ohchr.org/default.aspx accessed on the 29th July 2008.

Committee on the Rights of the Child *Consideration of reports submitted by States Parties under Article 44 of the Convention - Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland CRC/C/GBR/CO/4* 20 October 2008 at http://tb.ohchr.org/default.aspx accessed on the 07 November 2008.

Committee on the Rights of the Child *General Comment No. 10 (2007) Children's Rights in Juvenile Justice CRC/C/GC/10,* 25 April 2007 at

www2.ohchr.org/English/bodies/crc/docs/CRC.C.GC.10.pdf accessed on the 10th March 2008.

Committee on the Rights of the Child *General Comment No. 8 (2006) The Rights of the Child to Protection from Corporal Punishment and other Cruel and Degrading forms of Punishment* at www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.C.GC.8.En?OpenDocument accessed on the 28th July 2008.

Committee on the Rights of the Child *General Guidelines for Periodic Reports: 20/11/96. CRC/C/58: General Guidelines to States Parties – General Guidelines regarding the Form and Contents of Periodic Reports to be Submitted by States Parties under Article 44 Paragraph 1 (b) of the Convention* At www.unhchr.ch/tbs/doc.nsf/(Symbol)CRC.C.58.En?OpenDocument accessed on the 10th April 2008.

Committee on the Rights of the Child *Initial Reports of state Parties due in 1994: Lesotho CRC/C/11/Add 20* 20th July 1998 at http://tb.ohchr.org/default.aspx accessed on the 2nd March 2008.

Committee on the Rights of the Child *Reports on the tenth session of the Committee on the Rights of the Child: 18/12/95. CRC.C. 46 (Sessional or Annual Reports of the Committee)* at www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.46.En?OpenDocument accessed on the 18th July 2008.

Committee on the Rights of the Child *Summary Record of the 686th Meeting: Lesotho 2001CRC/C/SR.686* 24 January 2001 at http://tb.ohchr.org/default.aspx accessed on the 2nd March 2008.

NGO Coalition for the Rights of the Child - Save the Children UK *Complementary Report on the Implementation of the UN Convention on the Rights of the child in Lesotho* 2000 at www.law.yale.edu/rcw/rcw/jurisdictios/afs/lesotho/lesotho-ngo-report-2000.pdf accessed on the 22nd February 2008.

Office of the High Commissioner for Human Rights *Committee on the Rights of the Child: Monitoring children's rights* at www2.ohchr.org/english/bodies/crc/index.htm accessed on the 4th November 2008.

Office of the High Commissioner for Human Rights *Declarations and Reservations* Office of the High Commission for Human Rights (1996- 2007, last updated 12 February 2008) at www2.ohchr.org/English/bodies/ratification/11.htm#reservations accessed on the 19th May 2008.

Office of the High Commissioner for Human Rights *Status of Ratification of the Convention on the Rights of the Child- Number of States Parties as of 14*

November 2003: 192 at www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm accessed on the 18th April 2008.

United Kingdom Government *The Consolidated 3rd and 4th periodic Report to UN Committee on the Rights of a Child* (2007) at www.everychildmatters.gov.uk/resources-and-practice/IG00249/ accessed on the 16th May 2008.

International Instruments

United Nations Convention on the Rights of the Child, 1989 U.N. Doc. A/44/49 (1989) at www2.ohchr.org/english/law/crc.htm accessed on the 15th March 2008.

United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 at www.unhchr.ch/htm/menu3/b/h_comp47.htm accessed on the 20th February 2008.

United Nations Resolution1997/30 Administration of Juvenile Justice 1997 at www.juvenilejustice.org/resource/items/E/C/ECOSOCResolution199730.pdf accessed on the 20th April 2008.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 at www.unhcr.ch/htm/menu3/b_comp37.htm accessed on the 20th February 2008.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 at www.hri.ca/uninfo/treaties/48.shtml accessed on the 20th February 2008.

Statutes and Bills

Lesotho

Children's Protection Act No. 6 of 1980.

Children's Protection and Welfare Bill 2004.

Children's Protection and Welfare Bill 2004.

Criminal Procedure and Evidence Act No. 9 of 1981.

Legal Aid Act of 1978.

High Court Act no. 5 of 1978.

Lesotho Constitution No. 5 of 1993.

Lesotho Labour Code Order No. 24 of 1992.

Marriage Act no. 10 of 1974

Subordinate Court (Amendment) Act No. 6 of 1998.

Subordinate Court (Amendment) Bill 1997.

Subordinate Court Order of No. 9 1988.

South Africa

Child Justice Bill B49 of 2002

TABLE OF CASES

Dyer v Watson 2002 WL 45284 (Privy Council 2000).

Rex v Nozabalese 'Moso CR/ T/46/94 (unreported) Judgment delivered by Justice G M Mofolo on the 14th April 1995.

S v Jansen and Another 1975 (1) SA 425 (A).

S v Kwalase 2000 (2) SACR 135 (c).

S v Ngobese and others 2001 (1) SACR 562.

T v United Kingdom (2000) 2 ALL ER 1024.

Thamae Lenka v Rex C of A (CRI) No. 2 of 2004 (unreported).