Juvenile Justice in Africa: An Assessment of Adherence to International law on Preserving the Rights of Child Offenders

By

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Abstract

The United Nations in their quest to ensure that the rights and privileges of children are respected have enacted a number of Acts that seek to preserve the rights of children, especially children in conflict with the law. These laws are universally binding, and every state associated with the UN is expected to domesticate the laws into their legal systems. However, past studies have revealed that, though states have ratified these international laws and have made numerous attempts to domesticate the laws, the laws are not being implemented effectively. Consequently, the purpose for which these laws are enacted is not being realized as expected. Most African children especially those who find themselves in conflict with the law are not well informed about their rights and are therefore easily exploited when they find themselves in conflict with the law.

This study was therefore an attempt to find out how relevant the ratification of the UNCRC has been to juvenile justice systems in Africa. Findings from a comparative analysis of three selected countries, specifically South Africa, Kenya, and Zambia, confirms the existing gap between policy and practice of the CRC in the three countries. While all three countries have done a reasonably good job to ensure that their laws on child justice are representative of the best practices that have been laid down by international law on child justice and rights, there is evidence that they have not been able to fully implement these laws in practice. It is argued that in order to ensure better compliance with the CRC, these and potentially other African countries would need to adopt best practices that resonate with the needs of youth in conflict with the law, while taking into account the continuing importance of tradition and customary law.

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Dedication

Glory and praise to the Almighty God for seeing me through this journey successfully. This thesis is dedicated to my loving parents Mr & Mrs Agotse for their selfless love and support throughout my entire life, I wouldn't have been here today without the solid foundation you provided me. I also dedicate this project to my sweet husband Michael Ofosu Anim for his love, support and encouragement throughout the entire journey. God bless you all.

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Chapter 1

Introduction

The justice system is arguably the commonest way of ensuring law and order around the world today. The underlying principle of the justice system is to provide a medium where disputes can be resolved, this system also exists to test and enforce laws in a fair and rational manner (CSCJA, 2006). The justice system has been long established and has proved to serve its purpose effectively in most parts of the world of which Africa is not an exception. By the twenty first century A.D., juvenile justice in many parts of the world has evolved into a "significantly complex state of affairs" (Muncie, 2013:47). The justice system which previously punished both adults and young offenders together has created a separate system where young offenders are supposed to be punished and at the same time ensure that their welfare is safeguarded and promoted as the primary objective (Muncie, 2013).

In addition to their primary (traditional) justice systems, the majority of African countries adopted the justice systems that were practiced by their colonial masters after they had been colonized (Odongo, 2017). Researchers like Odongo, (2017) have argued that, most African countries practice what they term as "legal pluralism". Likewise, juvenile justice systems in Africa have been informed by the colonial legacy left behind by the colonizing countries. Thus, most Anglophone countries in Africa that were colonized by the British initially adopted the "Children Act" (of 1908) and later the "Children and Young Person's Act" (of 1933) as the legal framework for juvenile justice in their countries (Muncie and Goldson, 2006; Odongo, 2017). This legal framework however focused less on the rights of children and concentrated mostly on the welfare of children who were in conflict with the law (Odongo, 2017).

However, the introduction of international legal frameworks like the United Nations Convention on the Rights of the Child (UNCRC), the United Nations Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the United Nations Guidelines on the Prevention of Juvenile Delinquency (Riyadh Guidelines), the United Nations Rules for the

Protection of Juveniles deprived of their Liberty (Havana Rules), the United Nations Basic Principles on the use of restorative Justice programs in Criminal Matters and the Guidelines for Action on children in the Criminal Justice System (Vienna Guidelines) obligates states to give special attention to the rights of children and more importantly the rights of children in conflict with the law (Ruparaganda & Ruparaganda, 2016). Among these legal frameworks listed above, the Convention on the Rights of the Child places the most emphasis and mandates all states that have ratified the Act to include children's rights in their juvenile justice system (Ruparaganda & Ruparaganda, 2016). In compliance to this legal framework, most African countries in the past decade have enacted several laws and Acts which aim to protect the rights of children (Mensa-Bonsu, 2017; Odongo, 2017; Ruparaganda & Ruparanda, 2016; Njoku, 2014). These laws are universally binding and every state associated with the UN is expected to domesticate the laws into their legal system (UNICEF, 2012).

However, most studies have revealed that, though states have ratified these international laws and have made numerous attempts to domesticate the laws, the laws are not being implemented effectively (Mensa-Bonsu, 2017; Odongo, 2017; Zeija, 2017; Ruparaganda, 2016; Skelton, 2015; Njoku, 2014). Consequently, the purpose for which these laws are enacted is not being realized as expected. Most African children especially those who find themselves in conflict with the law are not well informed about their rights and are therefore easily exploited when they find themselves in conflict with the law.

Quite a number of studies have been conducted regarding the administration of juvenile justice in Africa. However, very little research has been done to compare the juvenile justice systems in Africa with particular interest in the impact the ratification of the UNCRC has had on the administration of juvenile justice. Past researchers have revealed that there is a disconnect between policy and practice of juvenile justice administration in Africa (Odongo, 2017; Mensah-Bonsu, 2017; Zeija, 2017; Ruparaganda, 2016; Skelton, 2015; Njoku, 2014). It has again

revealed that the justice and welfare approaches to combating youth crime have not served to protect the rights of youth who find themselves in conflict with the criminal law (Mensah-Bonsu, 2017). On the other hand, past research has also revealed that the ratification of the UNCRC has had a significant influence on law enforcement in the area of preserving the rights of children in conflict with the law (Fortin, 2002; Freeman, 2002; Fortin, 2008; Ratledge, 2012). As such, it is worthwhile to undertake further research aimed at assessing the outcomes to date of the ratification of the UNCRC in African countries. This study undertakes this task through a comparative study of the influence of the UNCRC on the operation of juvenile justice systems in South Africa, Kenya and Zambia. In doing so, the study aims to contribute to existing literature by filling significant gaps in knowledge. In particular, the current study examines whether these African countries are in law and practice adhering to international conventions on preserving the rights of child offenders.

An investigation of this question will enable us to understand the range of possible motivations which influenced the African countries to ratify the UNCRC and give support to other UN-based conventions and guidelines related to the treatment of children in conflict with the law. In addition, it will shed light on outcomes of the formal acceptance of these UN conventions and guidelines on the administration of juvenile justice in the selected African countries and the possible alternatives that exists to the UN-prescribed juvenile justice systems and practices that currently exist in African countries and the extent to which countries should consider introducing alternative approaches to dealing with youth in conflict with the law. In order to answer this question better, an in-depth comparative criminal justice approach to qualitative inquiry will be employed to assess the current operations of juvenile justice in Kenya, South Africa and Zambia. Goldson & Muncie (2006) suggest that comparative youth justice research encourages debate of the structural, cultural and political contexts and dynamics within which youth justice policies and systems are constructed and allows us to rethink issues related

to youth justice by providing both general and specific comparative insights. Thus, the current study will provide important comparative insights regarding policy and practice of youth justice in the three selected African countries. Kenya and South Africa have been selected as the primary focus because they have been lauded as being among the top ten countries in Africa with the best juvenile justice systems, though it is still evident that they have quite a number of their youth held in detention (Kyendo, 2008). These two countries have also gone through several phases of conflicts which have increased the chances of their youth to be involved in criminal activities. Zambia was selected as the third country for comparative analysis because it stands out as one of the African countries where customary law continues to play a significant role in its juvenile justice system.

This thesis draws on literature on post-colonial theory as a guide to analyze and examine how the ratification of the UNCRC has impacted the juvenile justice systems in Africa. The current study is also informed by relevant theoretical and empirically-based literature on customary law and legal pluralism, particularly as it relates to African countries. The thesis is organized into 8 chapters. Chapter one introduces the study, chapter two presents the literature review and theoretical framework of the current study. Chapter three discusses the research design and methodology used in conducting the study. Chapters four, five and six examine the development of juvenile justice systems in the three selected African countries, in part by evaluating children's rights and juvenile justice practices and legislation before and after the ratification of the UNCRC in these countries. Chapter seven presents a comparative analysis of the juvenile justice systems in the selected African countries and a comparative discussion of the findings from gathered data. Finally, chapter eight presents the conclusion of the study with a summary and some recommendations on what can be done in these African countries to fill the existing gaps.

Chapter 2

2.0 Literature review and theoretical framework

This chapter focuses on the literature on the development of youth justice systems in order to ensure that the appropriate theoretical, methodological and empirical contexts are addressed in the current study. It examines relevant literature on comparative youth justice, international law and the rights of children in conflict with the law. It also explores African conceptions of culture, customary law and children's rights, and examines the development of juvenile justice in Africa before and after the ratification of the UNCRC. Finally, it discusses the theoretical underpinnings that guide the current study.

2.1 Literature on comparative youth justice

Global youth justice systems have evolved over time. Today, the structure of juvenile justice remains essentially the same as it did decades ago; what has evolved are the interpretations of the rights that juveniles possess as they work their way through the system (Krisberg, 2006). Originally juvenile courts existed mainly to act in the best interest of the child. However, in most countries this traditional "child-welfare" approach has since been replaced with directives that focus on their legal rights as humans (Smandych, 2006; Krisberg, 2006; Muncie & Goldson, 2006; Goldson & Muncie, 2006). Acquiescent with this shift in focus was the growing uncertainty about the ability of the juvenile court to effectively respond to a variety of youth issues (Krisberg, 2006). Scholars began to question whether the juvenile justice system did more harm than good after Becker's (1963) labelling theory gained popularity in academia (Krisberg, 2006).

Consequently, the interest of researchers in comparative studies of the operations of youth justice systems across the globe is on the increase (Skelton, 2015; Skelton & Coutenay, 2015; Reichel, 2013; Hill et al, 2007; Goldson & Muncie, 2006). It is however problematic for international law enforcement agencies and researchers to dwell on international statistical

comparisons of the operations of youth justice in the world. This is problematic because it is not easy to collect such statistics and interpret them considering the differences in the codification and recording of crime, differences in judicial systems for defining who a young offender is and the processes developed by each country in their quest to rehabilitate these young offenders (Ratledge, 2012; Goldson & Muncie, 2006 & Muncie, 2005). Again, despite the increasing interest of researchers in comparative youth justice research and the benefits this may have, attempts that have been made to unravel national differences rarely go beyond describing the historical emergence and the powers and procedures of particular national jurisdictions (Goldson & Muncie, 2006; Muncie, 2005). Such comparative studies consequently focus very little on how the different practices of youth justice are translated and transmitted in different states (Goldson & Muncie, 2006).

Muncie and Goldson (2006), further argue against a national comparative analysis which tends to obscure local and regional differences within jurisdictions. Hence, it is woefully inadequate to document national similarities and differences in international youth justice, rather it is important that researchers unpack the contradictions and inconsistencies that exist in youth justice systems across the globe and delve below political rhetoric in order to discover the practical operations of youth justice in various states (Goldson & Muncie, 2006). A practical example is the extensive differences that exist among jurisdictions with regards to the minimum age of criminal responsibility. The minimum age for criminal responsibility is set for seven in Zimbabwe, eight in Scotland, Kenya and Zambia, ten in England and Wales, Northern Ireland and South Africa, twelve for Canada, Netherlands, Turkey and Ghana, thirteen for France, fourteen for Germany, Italy, Japan, New Zealand and Spain, fifteen for Denmark, Finland, Norway and Sweden and eighteen for Belgium and Luxembourg (Goldson & Muncie, 2006; Ratledge, 2012). On the other hand, Nigeria does not have a specific age for criminal responsibility and this even varies across the various states in Nigeria (Ratledge, 2012).

Hence, though the age of criminal responsibility may enable researchers to determine how repressive or progressive the youth justice system of a state is, it may be misleading if further enquiry is not made into how effective these juvenile justice systems operate in various jurisdictions (Goldson & Munice, 2006). Thus, though neo-liberal economics, conservative politics and policy transfer may have created some standardized and homogenized international responses to youth justice, it is significant to note that youth justice is also localized through national, regional and local enclaves of differences (Aas, 2013; Hughes and Follet, 2006; Muncie, 2005 in Goldson & Muncie, 2006). Hence, the political underpinnings and cultural influences of the various youth justice policies must also be considered.

2.2 International law and the rights of children in conflict with the law

The idea of human rights was developed after the atrocities that were committed by Nazi Germany during the World War II, the world was horrified by such horrendous acts. Consequently, Governments decided to come together to establish the United Nations with the ultimate goal of reinforcing international peace and preventing conflict. However, much attention was not paid to the rights of children until the drafting of the UNCRC in 1989, which was 41 years after the Universal Declaration of Human Rights was drafted (Shiman, 1993).

Historical and contemporary international evidence reveals that children in institutions and most especially children who are detained in prisons and other penal facilities, are particularly vulnerable to human rights violations and countless forms of violence and abuse (Goldson & Kilkelly, 2013). This issue does not only pertain to the so called underdeveloped world but happens to be prevalent within and across the so called advanced industrialized democratic states in the world (Goldson & Kilkelly, 2013). Some researchers in their quest to find answers to the prevalent detention and penalization of youth have argued that, public opinion about the involvement of children in illegal activities and the search for immediate answers have led to the introduction of excessively repressive methods of punishment that foster

violence against children in the justice system (United Nations, 2005 In Goldson & Kilkelly, 2013; Goldson & Muncie, 2006; Muncie, 2005).

International conventions, standards, treaties and rules have provided specific rights for children and young people who find themselves in conflict with the law. In 1985, the United Nations adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) to provide guidance for the protection of children's rights and the development of separate juvenile justice systems (Goldson & Muncie, 2015; Goldson & Muncie, 2006; Muncie, 2005). This was in response to a call made by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders which was held in 1980. The rules operate within a framework of two other sets of international youth justice standards which were adopted in 1990; thus, the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) (Goldson & Muncie, 2015; Goldson & Muncie, 2006; Muncie, 2005). Additionally, in 1990, the 1989 United Nations Convention on the Rights of the Child (UNCRC) outlined far-reaching minimum standards for the treatment of all children (UNICEF, 2005; Muncie, 2005).

Again, in 2007, the UN adopted the General Comment of the Committee on the Rights of the Child; which is an expert body that monitors the implementation of the Convention on the Rights of the Child (Muncie, 2005). This document provides a detailed and comprehensive statement of the relevant principles and provisions of the CRC on youth justice, and it again offers guidance on the systemic measures that are essential to ensure that youth justice is administered in line with a children's right approach (Kilkelly, 2008). In addition to these international instruments, African countries have furthered the quest to preserve the rights of children through the African Children's Charter, whose provisions on juvenile justice under Article 17 applies to all persons under the age of 18 (Odongo, 2017). These actions taken by

international actors and African leaders clearly depict the sense of urgency and importance attached to youth justice and children's rights. It also indicates a "growing legal globalization of juvenile justice" (Muncie, 2005: 46). These international instruments clearly advocate against the imprisonment of children and any actions that violate the rights of children. However, most states including those that have ratified the UNCRC continually imprison youth who find themselves in conflict with the law (Goldson & Kikelly, 2013; Ratledge, 2012; Du Toit, 2006; Muncie & Goldson, 2006; Muncie, 2005) with some children being maltreated during the period of their detention (Odongo, 2017; Ratledge, 2012). Rules 17.1 (b) and 17.1 (d) of the "Beijing Rules" for example provides that:

> restrictions on the personal liberty of the juvenile shall … be limited to the possible minimum, and the well-being of the juvenile shall be the guiding factor in her or his case.

This rule is reiterated at Article 40.4 of the UNCRC. Again, Rule 19.1 of the "Beijing Rules" provides that:

> the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period and Article 37 of the UNCRC states: imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time, every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age.

In compliance to these international instruments, most African states have developed policies, Acts and laws that govern the administration of juvenile justice in their countries (Odongo, 2017). However, according to research findings, most of these states are adhering to the international laws theoretically but have failed to put these human rights instruments into practice (Odongo, 2017; Mensa-Bonsu, 2017; Njoku, 2014).

Though these international instruments clearly establish that imprisonment is not the best punishment, there is evidence that the rate of imprisonment of juveniles in some countries is on

the increase (CRIN, 2012; Ratledge, 2012) though some other countries are making significant progress (Smandych, 2006). This, coupled with increased recidivism despite all the efforts being made to curb youth crime through imprisonment (CRIN, 2012; Ratledge, 2012) poses a question of whether detention of youth in conflict with the law should be considered at all. Consequently, researchers, international law enforcement bodies and states are increasingly becoming worried about the increasing rate of detention and the number of mishaps occurring in detention centers (Goldson & Kilkelly, 2013; CRIN, 2012; Ratledge, 2012; Du Toit, 2006; Smandych, 2006; Nelken, 2006; Lappi-Seppala, 2006). Several commentators have in this regard emphasized considerable cacophony between the rhetoric of human rights discourse and the reality of youth justice interventions especially regarding penal detention of youth (Goldson & Kilkelly, 2013).

With notable exceptions of the USA and South Sudan, by 2015 the CRC has been ratified by 195 countries including Somalia who was unable to ratify it earlier because it did not have an internationally recognized government until 2015 (UN News center, 2015). Undeniably, the UNCRC is the most ratified human rights convention in the world today (UN New center, 2015; Goldson & Kilkelly, 2013; Muncie, 2013; Goldson & Muncie, 2006; Muncie, 2005; Freeman, 2002) and most African states (Emelonye, 2014), although arguably easily breached by states because, though very persuasive, its breach attracts no formal sanction (Muncie, 2005). Consequently, 73 states across the globe retain life imprisonment as a penalty for offences committed while under the age of 18. Forty-nine other states permit sentences of fifteen years or longer and ninety states permit sentences of 10 years or longer (CRIN, 2012). Thus, a number of states despite their ratification of the UNCRC and their obligation to adhere to article 37 of the UNCRC still retain life imprisonment as a penalty for offences committed while under the age of 18 and long-term sentences in their criminal codes (Goldson & Kikelly, 2013; CRIN, 2012; Du Toit, 2006; Muncie, 2005).

Legal history and culture has been clearly influential in the retention of life imprisonment and often punitive legal codes that govern juvenile justice in the world today (Odongo, 2017; CRIN, 2012). Among the 73 states that permit life imprisonment and long-term sentences, 46 are in the British Commonwealth. This statistic is not surprising considering the impact the British criminal legal tradition has had on Commonwealth states, and that this tradition generally included a punitive approach to sentencing of children, which at times even retained the sentence of life imprisonment for young offenders (Ratledge, 2012). It is again not surprising that the UK continues to have reservations to the requirements to separate children from adults in detention and remains the only European country that extensively targets children under 18 for recruitment into the armed forces (Muncie, 2005). This pattern obviously has an effect on the administration of juvenile justice in Africa considering the extensive colonial history of criminal justice in Africa. In juxtaposition to this, states within the jurisdiction of Portuguese language countries, who were influenced by Estado Novo's reaction against the use of detention have almost all prohibited life imprisonment for children (CRIN, 2012). Similar to this is the hostility of the Spanish legal tradition towards life imprisonment (CRIN, 2012).

Scholars such as Mensa-Bonsu (2017), Odongo (2017), Goldson & Kilkelly (2013), Kikelly (2008), Goldson & Muncie (2006) and Muncie (2015) have tried to find reasons for the gap that exists between policy and practice of juvenile justice despite all efforts being made to have a less punitive and more restorative system, and have argued that international legal instruments have a number of short comings that states take advantage of. For example, the international instruments are too vague on detention as a last resort; too weak on the age of criminal responsibility and they are incomplete on the trial process, sentencing and serious crime (Kikelly, 2008); and as already mentioned earlier, its breach hardly attracts any serious punishment (Muncie, 2005). Some countries for instance do not have any clearly established rules or principles of sentencing which leaves sentencing unclear and left to the discretion of the

courts (CRIN, 2012; Ratledge, 2012). Hence, it is difficult to hold states that detain youth accountable since the law does not prohibit detention altogether (Goldson & Muncie, 2006; Goldson & Kilkelly, 2013).

Despite these shortcomings, these international instruments can be said to have purposefully served as minimum standards on which states can build and establish more successful youth justice systems. Arguably, these international instruments serve as a constant reference point to states and are not susceptible to the whims and caprices of public opinion which makes them credible and timeless (Kilkelly, 2008; Goldson & Hughes, 2010; Muncie, 2010). Undoubtedly, the mass ratification of the CRC among other things have to a large extent influenced the development of children's rights in Africa. This influenced the Constitutive Act of the Organization of African Unity which led to the adoption of the African Charter on Human and Peoples Rights (ACHPR) and the consequential adoption of the African Charter on the Rights and Welfare of the Child (ACRWC) (Emelonye, 2014). The ACRWC explicates the contents of the CRC in the African context and serves as an ambassador of the CRC in the African context (Emelonye, 2014).

The situation is not too different in the Western world. Despite calls from the UN towards a youth justice system that addresses the needs of juveniles, it is apparent that most Western states continue to focus on the deeds of juveniles instead of their needs (Muncie & Goldson, 2006). This is evident in the current practices in the juvenile justice systems of some Western states. The United Kingdom for example happens to have one of the lowest ages of criminal responsibility. Despite recurring complaints from the UN, England and Wales also abolished the principle of doli incapax for juveniles between the ages of 10 to 14 in 1998 while Japan in the year 2000 also lowered its age of criminal responsibility from 16 to 14 (Muncie & Goldson, 2006). Holland, following the implementation of early intervention projects such as "STOP" and a reduction in the possibility of transferring juvenile cases to adult courts has lowered its

minimum age of penal responsibility from 12 to 10 years (Muncie & Goldson, 2006). These examples show how Western states gradually have moved away from a welfare-oriented juvenile justice system towards a juvenile justice system that focused more on the deeds of juveniles with an ultimate goal of protecting society. This, some scholars have argued led states to focus more on developing harsh punishments which most times undermine the rights of the child.

The UNCRC has been used as a springboard by many countries in the West to improve protections for children in their countries, and some have appointed ombudsmen to handle issues regarding the rights of children (Muncie & Goldson, 2006). The Council of Europe Committee of Ministers for example has issued formal guidelines for child friendly justice that reaffirm fundamental provisions of the UNCRC and particular guidelines that specify how the human rights of children should be recognized and promoted through participation, best interests of the child, dignity, protection from discrimination and the rule of law (Muncie & Goldson, 2015). However, a report issued by Human Rights Watch and Amnesty international revealed that states do not wholeheartedly implement the UNCRC (Muncie & Goldson, 2006). According to Muncie & Goldson, (2006; P. 211), "countries give lip service to rights simply to be granted status as a modern developed state and acceptance into world monetary systems". Could this be a reason why most African states are in a hurry to ratify international laws even when clearly, they do not have the infrastructure and means to implement them effectively?

Interestingly thirty-three countries in the Global North continue to have some reservations despite their ratification of the UNCRC (Muncie & Goldson, 2006). Article 37c of the UNCRC asserts that:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner, that takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.

However, the Netherlands, Canada and the UK are not in full compliance to this Article, and have issued reservations on the requirement to separate children from adults in detention due to several reasons including the lack of funds and infrastructure to build suitable places for girls and young women (Muncie & Goldson, 2006). Australia also maintains a reservation to Article 37c of the UNCRC which allows it to keep juveniles in adult prisons where necessary for geographic or practical reasons (Cunneen, Goldson & Russell, 2016). The United States on the other hand has processed around 200,000 children under the age of 18 as adults despite the UN's call to separate juveniles from adults in the justice system (Muncie & Goldson, 2006). Again, the United Kingdom for example as mentioned above has a low age of criminal responsibility which accounts for an increasing number of children in detention at an earlier age, for lesser offences and for longer periods (Muncie & Goldson, 2006). Australia also sets its minimum age of criminal responsibility at ten (Cunneen, Goldson & Russell, 2016) which is again on the low side considering the UN committee's argument that;

> a higher minimum age of criminal responsibility of 14 or 16 years contributes to a juvenile justice system which, in accordance with article 40(3) (b) of the CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected (UNCRC, 2007 P.33 In Cunneen, Goldson & Russell, 2016).

Statistics from the European context supports this argument put forward by the UN Committee. A 1996 study conducted by the Council of Europe revealed that Ireland, Turkey, England and Scotland have the highest percentage of their prison population under the age of 21, Ireland had 24.7% of its prison population under age 21, Scotland 18.8%, England 17.8%, France 10%, Italy 4.5% and Finland 3.6% (Muncie, 2005). Muncie (2015) hereby notes a correlation between the age of criminal responsibility in these European countries and the number of young people found

in their prisons. Thus, the countries with the lowest ages of criminal responsibility happen to have their prisons filled with more young people (Muncie, 2015).

Finally, it is worthy of note that Latin America saw a number of legal reforms during the 1990's that were associated with a distinctive affirmation of human rights while Venezuela and Argentina are recognized as key activists of the UN Convention (Muncie, 2005). Evidently, both states in the Global North and South are working hard towards adherence to the UNCRC which is clear in their current policies and the transitioning of juvenile justice globally. However, it is apparent that these states are yet to fully comply with the UNCRC for various reasons which this study seeks to unravel in the African context.

2.3 The African conception of culture, customary law and children's rights

People all over the world are distinguished by their culture, values, beliefs and practices which makes them distinctive from other people. In the simplest way possible, culture can be understood as the way of life of a group of people. The culture of a people encompasses particular traits and characteristics that are peculiar to a group of people and these traits and characteristics makes them different from other people (Idang, 2015). Consequently, societies are identified by their culture which includes their language, way of dressing, music, customs, traditions, religion, values, norms and beliefs. Some scholars in an attempt to explain the uniqueness of societies have defined culture in very different but similar terms. Bello, (1991; 189) for example defines culture as,

> the totality of the way of life evolved by a people in their attempt to meet the challenge of living in their environment, which gives order and meaning to their social, political, economic, aesthetic and religious norms thus distinguishing a people from their neighbors.

Aziza (2001: 31) also refers to culture as,

> the totality of the pattern of behavior of a particular group of people. It includes everything that makes them distinct from any other group of people for instance, their greeting habits, dressing, social norms and taboos, food, songs and dance patterns, rites of passages from birth through marriage to death, traditional occupations, religious as well as philosophical beliefs.

Fafunwa (1974) also views the acquisition of culture as a result of the socialization process, hence the culture of a people is passed on from one generation to the other. He asserts that:

> The child just grows into and within the cultural heritage of his people. He imbibes it. Culture, in traditional society is not taught; it is caught. The child observes, imbibes and mimics the action of his elders and siblings. He watches the naming ceremonies, religious services, marriage rituals, funeral obsequies. He witnesses the coronation of a king or chief, the annual yam festival, the annual dance and acrobatic displays of guilds and age groups or his relations in the activities. The child in a traditional society cannot escape his cultural and physical environments.

This definition clearly shows how people pick up the culture and values of the societies they grow up in as they interact with the people around them and even with their environment, and how it becomes part of them. These groups of people acquire their identity through this socialization process which makes them distinctive from members of different societies and binds them together with members of their own society. Members of the group are expected to seek the common good of their fellow members and the group as a whole. This definition also reiterates the fact that the African customary laws which existed before the introduction of European laws has been passed on from generation to generation. The difference now is how the introduction of foreign culture and laws have changed the perception and identity of the African people. To a large extent their culture has been infiltrated and though it still exists, it is not the same as what existed many years ago.

Based on the numerous definitions of culture, it can be said that Africa has a rich variety of culture based on the various nationalities and ethnic groups that exist. The African culture

clearly defines their way of life as a people and demarcates the boundaries of acceptable behavior and also defines the rewards and sanctions that will be meted out to people who breach any of the societal norms (Idang, 2015). The African continent is the world's second largest with 56 countries (Chepkemoi, 2017). All these 56 countries have their own ethnic groups, belief systems, practices and social control systems that distinguish them from each other. However, despite these differences across jurisdictions, Africans share some dominant traits, belief systems and values that make them similar and distinguishes them from people in other parts of the world.

The African culture encourages communism since it is perceived that it is impossible to cater for the welfare and needs of each member of the society without placing premium on the larger community to which these individuals belong to. Consequently, Africans believe that the community's interest supersedes that of the individual and once the interest of the community is fulfilled the interest of the individuals within the community will also be fulfilled. In addition, African's perceive of ethics as a duty or responsibility and not as a right (Gyekye, 2010). Thus, African's do not perceive human rights as an individual affair, human rights according to Gyekye, (2010, 25) are perceived by African's as

> A morality of duty that requires each individual to demonstrate concern for the interests of others. The ethical values of compassion, solidarity, reciprocity, cooperation, interdependence and social well-being, which are counted among the principles of the communitarian morality, primarily impose duties on the individual with respect to the community and its members. All these considerations elevate the notion of duties to a status similar to that given to the notion of rights in Western ethics. African ethics does not give short-shifts to rights as such; nevertheless, it does not give obsessional or blinkered emphasis on rights. In this morality duties trump rights, not the other way around, as it is in the moral systems of Western societies. The attitude to, or performance of, duties is induced by a consciousness of needs rather than of rights. In other words, people fulfill –and ought to fulfill –duties to others not because of the rights of these others, but because of their needs and welfare.

Thus, Africans think about human rights differently from the way it is perceived by the Western world. Children in the African society are perceived to be the responsibility of their

parents. Consequently, their rights are tied to that of their parents which does not exist outside the rights of the community. This sometimes does not allow them to enjoy the full benefits outlined in the Convention on the Rights of the Child. However, it can be said that, due to the internationalization of human rights, things have improved drastically. African states are beginning to see the need to protect the rights of their children. This is evident in their positive response to the United Nation's calls to develop child friendly policies that seek to preserve and protect the rights of children.

Accordingly, Himonga, (2008) asserts that, since the colonization of the African continent, Africans have adopted the European law they received from the colonial settlers and have combined it with their customary laws which most especially focuses on family law, succession and land law. Consequently, the African customary law played a significant role in the regulation of children's lives for many centuries and has significantly impacted child rearing in Africa. In addition, Himonga, (2008) argues that, the development of Children's Rights instruments coupled with the existence of the African Customary law which plays a significant role in child rearing in Africa has brought about a new era which is characterized by a connection between customary laws and human rights in Africa. This new connection sets the tone for the recognition of African customary laws by international and constitutional laws, children's rights legislation and internal conflicts of law. Himonga, (2008) further asserts that, African customary laws play a significant role in exposing the cultural rights of Africans which to a large extent makes it recognized by international law. This is evident in Article 22 of the Universal Declaration of Human Rights (UDHR) which states that "Everyone, as a member of society is entitled to the realization of the economic, social and cultural rights indispensable for his dignity and the free development of his personality" and Article 27 accords everyone the liberty to involve themselves in "the cultural life of the community" thus, the international human rights law recognizes the significant role the culture and customary laws play in jurisdictions where they

exist. They have been duly recognized by international human rights law and the constitutional laws of the various African states which makes them legal and binding. However, it will be interesting to note how much effort is being made by these African states to ensure that the custodians of these customary laws are fully complying to the provisions of the CRC and protecting the rights of children. It is argued that in order to ensure better compliance with the CRC, these and potentially other African countries would need to adopt best practices that resonate with the needs of youth in conflict with the law, while taking into account the continuing importance of tradition and customary law. This includes ensuring that, the custodians of these customary laws are actively involved and informed about the best practices introduced by the CRC.

2.4 Juvenile justice in Africa before and after the UNCRC

Juvenile justice systems in African countries cannot be evaluated without considering the pre-colonial treatment of child offenders in Africa. The definition of a child under the African customary law was not by age but by rituals and stages in life (Kariuki, 2010; Skelton, 2015). Rites of passages played a very significant role in African socialization delineating the different stages of an individual's development. The major stage in African life is the transition from childhood to adulthood where the African child becomes fully institutionalized to the ethics of their culture and society (Skelton, 2015). The African system was communal and community interest took precedence over individual interest. The African child belonged to the community and could be reprimanded by any member of the community. Children who committed offences were brought before the elders of the community and were punished accordingly (Kariuki, 2010). The worst form of punishment at the time was ex communication from the tribe which was very rare in the case of children (Kariuki, 2010). Crimes were treated as wrongs between individuals and families and were resolved in ways that promoted the well-being of the society

(Skelton, 2015) The main aim here was always to seek the best interest of the community, thus, children did not have rights outside that of the community (Kenyatta, 1962 in Kariuki, 2010).

However, with the introduction of colonization things took a drastic turn. The settler community that moved to most parts of Africa were outnumbered by the indigenous people, hence they lived in constant fear of attacks by the African majority (Kariuki, 2010). Consequently, the customary law system was shrouded by the Roman-Dutch and English legal systems. They began to punish criminal offenders using corporal punishments, deportation and imprisonment (Skelton, 2015). Thus, the African customary approach to punishing offenders was replaced by a far more punitive form of justice. This obviously had an influence on how children who got into trouble were also punished (Skelton, 2015, Kariuki, 2010). Accordingly, they introduced the juvenile justice system with a genuine need to protect and rehabilitate child offenders and to protect society from delinquent children (Kariuki, 2010). However, this system they introduced was influenced by racial stereotypes that treated African offenders differently from those of other races. Most of the African youth placed in prisons were there for offences that could be resolved without institutionalization (Kariuki, 2010). With time, they decided to adopt places of detention where juveniles could be kept separate from adults (Skelton, 2015).

Most of the juvenile justice systems that existed in Africa in the period before the UNCRC in 1990 were based on the welfare approach (Odongo, 2017; Mensa-Bonsu, 2017; Skelton, 2015; Kariuki, 2010). The aim of this approach was to meet the needs of the child as opposed to focusing on the deeds of the child (Mensah-Bonsu, 2017; Kariuki, 2010). The welfare approach was characterized by the notion of protecting the child from the adult criminals which was the main justification for the separate institution for the child offender. The child, under the welfare system was presented as a misguided being with minimum intelligence needing rescue from him or herself and the task of rescuing the child fell on the state (Odongo, 2017; Mensa-Bonsu, 2017; Skelton, 2015; Kariuki, 2010). The child was seen as incapable of legal

responsibility and could not be held culpable for their criminal conduct. This led to a paternalistic legal regulation of child offenders (Mensa-Bonsu, 2017). The juvenile court was tasked to intervene forcefully in the lives of all children at risk to affect a rescue (Mensah-Bonsu, 2017). Whenever it was considered necessary, measures were taken to rehabilitate child offenders, the severity of each case depended on the circumstances of the child (Mensah-Bonsu, 2017). The state who was seen as the ultimate guardian was supposed to guide the child towards good citizenship (Odongo, 2017; Mensa-Bonsu, 2017; Kariuki, 2010).

Remarkably, what was considered at one point to be helpful to the child ended up violating the rights of the child. The welfare approach exempted children from trial by jury and all the constitutional rights accorded to the criminal defendant (Kariuki, 2010). This system did not regard them as people with rights that needed to be respected. Evidently, before the introduction of international laws that required that states give recognition to the rights of children, most African countries had laws that governed their own juvenile justice systems however a children's rights ideology was not part of these laws (Odongo, 2017). Nevertheless, since the ratification of the UNCRC, the concept of children's rights has developed significantly, and African countries have begun to view children as subjects with rights of their own (Odongo, 2017). This new development counters the old system (welfare system) where children could be viewed or treated as objects of highly discretionary state intervention (Odongo, 2017).

Evidently, the ratification of the UNCRC by African states has positively impacted policy and legal laws regarding children's rights in the selected African countries and these states have been working hard to ensure that they domesticate the provisions of the CRC. However, despite these efforts being made, reviewed literature has shown that these African states have not fully implemented the provisions of the CRC (Odongo, 2017; Mumba, 2011; Kariuki, 2010; Kankasa, 2006). This poses the question of whether human rights are universally applicable or subject to

cultural sensitivities, taking into consideration the fact that customary law still plays a significant role in the African legal system.

2.5 Theoretical framework

In order to explain the gap that exists between policy and practice in the administration of juvenile justice in Africa, it is important that the historical foundations of juvenile justice in Africa is understood. The development of juvenile justice systems in Africa was shaped by a colonial legacy under which the legal framework in most of the countries reflected laws received from the colonizing country (Odongo, 2017). Due to this colonial legacy, the juvenile justice systems in most African countries are bounded by international legal frameworks that the lay African child is not aware of or barely understands. The systems are predominantly bounded by policy and legal documents that are only known to the legal practitioners while the young offenders are left in the dark and at the mercy of the law (Hoffman & Baerg, 2011). It is therefore relevant that the juvenile justice system in Africa be studied from an African perspective, taking into consideration Africa's colonial historical background and excessive adoption of westernized ideas and "one size fits all" solutions to the challenges faced in the continent.

2.5.1 Postcolonial theory

The postcolonial theoretical perspective was employed as a guide to analyze and examine how the ratification of the UNCRC has impacted the juvenile justice systems in Kenya, South Africa and Zambia. This perspective was very useful in this study because as espoused by Cunneen (2011, p. 253), "it draws our attention to the connections between the colonial development of the modern political state and the globalized nature of gross violations of human rights of indigenous and former colonized people." Again, post-colonial theorists argue against the universalization of Western crime control models because crime basically occurs in specific

contexts (Agozino, 2003) hence, it must be tackled based on the specific context in which it occurred and not based on universalized ideals.

Post-colonial theory has been employed by critical criminologists who advocate for a criminology that will remain relevant in the lives of people all over the world, and seek to change the field of criminology by studying areas of critical research that are "begging" for attention (Oriola, 2006: 121). Post-colonial theorists and researchers in criminology aim to critically and reflexively question the centrality of Western understanding of crime and control and also to create a greater understanding of society (Agozino, 2014; Khapoya, 2012; Cunneen, 2011; Oriola, 2006). They also aim to create awareness of how law has been used historically and continues to be used as an instrument of cultural imperialism (Smandych, 2005).

Furthermore, post-colonial theorists including Agozino (2014), Khapoya (2012) & Cunneen (2011) argue that history plays a very significant role in unraveling the long-term impact of colonialism and imperialism in countries that were colonized. Hence, in order to explain the current state of juvenile justice in South Africa and Kenya, it is important to consider the role of colonialism in the development of juvenile justice in these two countries. Scholars like Tauri, (2013), Medina (2011) & Agozino (2003) therefore criticize criminology as a discipline for focusing on issues that further marginalize African's and indigenous people. They argue that criminology is an imperialist tool that the Western world adopts to continually oppress, dominate and further marginalize African's and indigenous people. Consequently, Agozino (2003) advocates for a type of criminology that focuses more on relevant issues like the legacy left behind by colonialism and its lasting effects on the African people. This includes the need for reevaluating the history of colonialism specifically from the viewpoint of the people who suffered its contemporary effects and social and cultural impact (Young, 2001 in Smandych, 2005).

The Western culture has always been regarded as superior to all other forms of cultures and has been upheld as a standard to which all other societies must strive to match up to (Agozino, 2014). Societies that decide to stick to their cultural and indigenous ways of doing things are regarded as backward and not willing to accept change. This has created a lasting impression among people in indigenous societies and challenges them to strive to become modern by adopting Western culture and catch up with the Western world (Agozino, 2014). Consequently, post-colonial theorists are interested in countering the impression that has been created by the Western world by creating counter-discourses that will empower African and indigenous people.

Agozino (2014) therefore argues that criminology is an imperialist science that was created purposefully for the control of the "other" and is therefore an accomplice to persistent neocolonial epistemologies, while Aas (2013) adds that the economies of the colonized countries were shaped in such a way that they will continue to be dependent on the West while the West continues to exploit them for resources that will build the Western economy at their expense. Similarly, Cunneen (2011) argues that the Western world in a deliberate attempt to exploit, constructed the "other" in reference to non-European people, and propagated the view that anything connected with the "other" was inferior to the West. In an earlier critique of the practice engaged in by criminologists of exporting Western crime control models to Third World countries, Cohen (1988) argued that this practice could be accounted for by the supremacy accorded to anything Western, even though evidence often pointed to the failure of these crime control models in the countries where they were transplanted. More recent post-colonial theorists and researchers in criminology, including Agozino (2003), Cunneen (2011) and Tauri (2013), therefore critique Western criminological theory that presents the criminal justice system as a fair and universal solution to controlling crime everywhere and advocate for a counter

colonial criminology that will benefit indigenous and colonialized peoples in both the Global North and South.

In summary, the postcolonial perspective demands a critical examination of the ongoing and enduring effects of colonialism on the colonized and the colonizers (Cunneen, 2011). Postcolonial theorists argue that, colonization and the postcolonial are not historical events but rather they are ongoing social, political, economic and cultural processes that still influence the occurrences among the colonized and colonizers (Cunneen, 2011). The postcolonial exists as an aftermath of colonialism which manifests itself in a range of areas from the cultures of the former imperial powers to the psyches of those that were colonized (Cunneen, 2011).

Furthermore, postcolonial theory provides a useful perspective to guide my study because it provides insights as to whether the ratification of the UNCRC has practically brought about any significant improvement in the administration of juvenile justice in Africa. It was also employed to reveal whether the extensive exportation of Western crime control models to third world countries, particularly Africa was just another form of imperialism or a significant way of eliminating and preventing criminal activities. This is very relevant considering the fact that African countries before colonialism had traditional social control mechanisms that worked very well in preventing crime (Odongo, 2017; Cohen, 1988).

Agozino (2003) argues for a postcolonial critique of criminology because it has served colonialism more directly than many other social science disciplines that have been critiqued by postcolonial theorists. Agozino (2003) further argues that Western criminology was developed at the heart of colonialism to serve imperialist interests and facilitate the exploitation of the colonized. Thus, criminology is underdeveloped in Africa because mainstream positivist criminology was never and is still not in Africa's interest but an imposition on African countries by imperialist Western countries which consequently explains the disconnect between policy and practice in the juvenile justice system of Africa (Agozino, 2003). Postcolonial theory argues

against a “one size fits all” perspective and encourages African criminology to re-examine and wean itself from an imperialist criminology that primarily focuses on crime prevention methods that do not reflect African idiosyncrasies.

2.5.2 Literature on customary law and legal pluralism

My research was also informed by relevant theoretical and empirically-based literature on customary law and legal pluralism, particularly as it relates to African countries. One of the most effective colonial tools that continues to have rippling effect in post-colonial Africa is religion (Khapoya, 2012). The Europeans through their missionaries and mission schools managed to ridicule and suppress the African culture, and in doing so began to make converts who were gradually alienated from their own cultural traditions and practices. This caused most young people to undermine the traditional authorities that existed at the time since they believed they had become more superior (Khapoya, 2012). Evidently, colonialism in Africa did not end with the advent of independence, but instead its impact is still greatly felt by successive generations, and this has made the decolonization process very challenging (Khapoya, 2012).

African’s before the advent of colonialism had a rich variety of social control, social pressure, custom, customary law and judicial procedures that were used to maintain law and order (Merry, 1988). However, due to the marginalizing effect of colonialism in Africa, and the indirect rule of Africans by the Europeans through preexisting sources of political authority and the creation of native courts (Tamanaha, 2008), most African countries today are found to be practicing legal pluralism (Odongo, 2017). Thus, the system allowed indigenous societies to integrate their indigenous legal systems with those they inherited from their colonial masters. As a result, in many African countries today, both the African traditional legal systems and European laws coexist and operate side by side with various points of overlap, conflict and mutual influence (Tamanaha, 2008).

Legal pluralism in most colonial societies is arguably as a result of the imposition of legal frameworks from imperialist nations on colonial societies. These imperialist nations equipped with a centralized and codified legal system imposed these systems on societies with far different legal systems that were often not documented and lacked formal structures of judging and punishing (Merry, 1988). Accordingly, Merry (1988) describes the kind of legal pluralism practiced by colonial societies as resulting from unequal power relations between colonial and imperialist societies. Thus, the Europeans saw the legal system of the colonial societies as inferior to the European law and intended that their legal systems be replaced with the laws, they imposed on them. Clearly, they succeeded in suppressing the legal systems that were being practiced in most African countries. This is evident in the current state of law and crime control in Africa and the continued pursuit of Western imperialist interests by African leaders which continues to promote dependency, exploitation and marginalization of countries in the global south.

Tamanaha (2008) however argues that, legal pluralism has existed since time immemorial in different forms and can be found from the lowest local level to the most extensive global level. For example, European historical practices of law clearly depict the existence of plural legal systems for at least two thousand years. Gradually, state building processes led to the absorption or elimination of these heterogeneous forms of law (Tamanaha, 2008). However, customary law which constituted a bulk of the law during the early period got incorporated within the state legal system. Though it lost its former equal standing and independent legal status, customary law, together with religious law, became norms which were still socially influential but had a different status from the official state law (Tamanaha, 2008). Legal pluralism in the African context is quite interesting in that the customary laws practiced by the African people in themselves are legally plural. That is, customary law is usually tied to ethnicity hence, it varies among different groups of people and changes over time (Devon, 2015).

The beginning of the 20th century saw a new wave of legal pluralism which has been linked to globalization, thus, the advent of globalization some scholars have argued has led to states losing power in various ways (Tamanaha, 2008). Justice systems before the 20th century vested much power in the state, the state was held responsible for its citizens and was supposed to ensure and maintain law and order (Odongo, 2017; Mensah-Bonsu, 2017; Aas, 2013; Kariuki, 2010). However, in modern times, globalization affecting states and political systems has led to the overruling of state sovereignty (Aas, 2013). States continue to function locally but often relinquish their authority to a global order that has expectations of them (Aas, 2013). Nelken (2011) further argues that it is senseless to perceive criminal justice systems as separable national jurisdictions in an era where there are increasing links between crime threats and criminal justice response. Thus, justice transcends the boundaries of states and has become the business not only of the state involved but all others globally (Aas, 2013). Aas (2013) adds that this phenomenon is not new and has been evident in past anti-slavery campaigns that found people in Britain and other countries politically engaging in issues that did not directly pertain to them.

In relation to juvenile justice, several scholars have examined the role globalization has played in the convergence of juvenile justice systems and practices across the globe (Muncie, 2005). These recent developments in juvenile justice have been examined within the context of the broader effects of globalization, including the development of international economic, political, legal and cultural interconnectedness which is as a result of increased technological know-how, elimination of trade barriers and borders reinforced by neo-liberal economics and politics and the creation of directives in international law (Moore & Mitchell, 2009; Temanaha, 2008; Muncie, 2005). This has intensified global interdependence and has caused states to lose their role as the sole centers of legitimate political power (Aas, 2013).

Neoliberalism for example which is one of the main driving forces of globalization has made it easier for the indirect rule and control of states especially in the Global South. By

accepting foreign aid, grants, free markets and signing treaties, states indirectly open up themselves to stringent conditions that bind them and by so doing subject themselves to a higher authority (Tamanaha, 2008). The transitioning of juvenile justice systems across time and space has arguably been made possible as a result of neo-liberalism, policy convergence among states and the ratification of international conventions that seek to universalize state laws (Muncie, 2005). The introduction of international conventions and their ratification clearly make states accountable to international bodies for their actions and inactions. One consequence of this is that states are now more likely to be influenced by international governmental bodies and interest groups who seek to protect human rights (Aas, 2013). More specifically, critical global criminologists like Aas (2013) argue that the sovereignty accorded international bodies gives them a sense of responsibility to protect and has led to conceptualizing human rights and human security as universal values which justify protection irrespective of the will of the state. Hence, for example, citizens seeking redress against their own states are now able to file law suits with the help of supranational human rights courts like the European Court of Human Rights or the Inter-American Court of Human Rights (Tamanaha, 2008) or even with the International Court of Justice which causes the norms of one legal system to be pitted against another. However, Aas (2013) argues that, the effective implementation of human rights laws largely depends on nation states who are expected to incorporate them into their local laws and enforce them, especially in situations where the local laws do not provide for them. While human rights advocates see its universalism as a major strength, critical postcolonial scholars like Agozino (2003) raise concerns about dominant Western human rights discourses and legislation and the attempts made by international bodies to apply them universally.

In the current study the relevance of the ratification of the UNCRC to juvenile justice systems in Africa is examined within the broader context of the theoretical perspectives and

historical factors discussed above. Consequently, the specific research questions to be addressed include:

1. What are the range of possible motivations that influenced the selected African countries to ratify the UNCRC and give support to other UN-based conventions and guidelines related to the treatment of children in conflict with the law?
2. What have been the outcomes to date of the formal acceptance of these UN conventions and guidelines on the administration of juvenile justice in the African countries I have selected to study?
3. What are some of the possible alternatives that exist to the UN-prescribed juvenile justice systems and practices that currently exist in African countries, and to what extent should countries consider introducing (or re-introducing) alternative approaches to dealing with youth in conflict with the law that build more on traditional indigenous African forms of customary law and legal pluralism?

Accordingly, this study developed the argument that African countries in adherence to the UNCRC's mandate to preserve the rights of children have put in place policies and acts after they ratified the UNCRC. However, due to several reasons they have not been able to fully comply to the UNCRC in practical terms. Hence, it is relevant to examine in detail the laws and juvenile justice policies the selected African countries have enacted since they ratified the UNCRC and how successful they have been in preserving the rights of children in conflict with the law in their countries. As gathered from previous studies, it appears that the need to ratify international laws and acts rises from the increasing globalization of the world and the desire to find a fit in the world Global order. Consequently, this study attempted to examine the possible range of factors that motivated African governments to ratify and voice their support for UN-based conventions and guidelines on the treatment of children in conflict with the law, despite

significant evidence of their inability to effectively implement these laws. Again, considering the historical and contemporary factors that influence juvenile justice systems in Africa, and the increasing desire of international actors to universalize crime control models, this thesis explored whether the Western-influenced juvenile justice reform in Africa has been beneficial in terms of youth crime prevention and recidivism and if African countries should in hindsight consider moving more toward juvenile justice practices that incorporate forms of indigenous African customary law and legal pluralism.

Chapter 3

Research design and methodology

This chapter outlines the research design and methods that were employed to conduct the current study. It begins by explaining the methodology that was chosen and gives reasons why the method was relevant to the study and continues to outline the sources of the data used to conduct the study, how the data was selected, and the method used to analyze and interpret the selected data.

3.1 Methodology

As required by a well-designed social science study, the research design and methodology for this study outlines the research objectives, data collection procedures, data quality procedures and data analysis and analytical tools that were incorporated in the study and potentially serve as a basis for further research by future researchers. This approach is undertaken to ensure transparency and accountability in the research process and to increase the reliability and validity of the results of the findings of the current study (Neuman, 2011; Cresswell, 2013).

In light of the comparative nature of the questions that inform my research, a comparative criminal justice approach to qualitative inquiry is the appropriate methodology for conducting this study. In social science research, the methodology adopted is often primarily linked to the theoretical underpinnings of the study, and a qualitative methodological approach is better suited to carrying out research that is informed by post-colonial and legal pluralist theoretical frameworks.

In addition to complementing these theoretical perspectives, a qualitative approach is essential for exploring the state of juvenile justice in Africa after the ratification of the UNCRC. In general, the main aim of qualitative research is to explore and understand social phenomena in greater depth from the insiders' perspective (Cresswell, 2013). It is important to conduct a

qualitative inquiry because it allows researchers to understand the everyday activities and social settings of the people they study. Also, qualitative inquiry involves the non-numerical examination of phenomena using words rather than numbers and focuses on the fundamental meanings of patterns of relationships (Marlow, 2005).

More specifically within the context of the current study, qualitative inquiry can potentially provide deeper, more realistic and integrated meanings behind crime statistics and patterns and more in depth understanding of crime problems and control modes, including those linked to the development and operation of juvenile justice systems in African countries (Pakes, 2010; Shearing & Marks, 2011).

The primary objective of this study is to seek to understand how relevant the ratification of the UNCRC has been to the administration of juvenile justice in Africa and the protection of the rights of children in conflict with the law, taking into account how juvenile justice in Africa has been shaped by historical, contemporary, contextual and global forces. Conducting a qualitative study therefore provides the opportunity to acquire in-depth understanding of the complex interplay of occurrences regarding juvenile justice in Africa before and after the ratification of the UNCRC.

As noted above, the current study involves a comparative examination of three African countries that have ratified the UNCRC and an analysis of how the ratification of the UNCRC has influenced policy and practice of juvenile justice in their respective countries. The countries were selected based on their ratification of the UNCRC, the existence of an active juvenile justice system, their British colonial background and their geographical location. The study provides an in-depth examination of similarities and differences in the administration of juvenile justice in Africa based on the selected countries. Shahidullah, (2014) defines comparative criminal justice as the study of how criminal justice is perceived, practiced and pursued in different countries. In light of this definition and suggestions highlighted by Shahidullah, (2014)

on how to compare criminal justice systems, the study incorporates a comparative analysis of indigenous customary and later British-influenced juvenile justice systems in these countries before the ratification of the UNCRC. Thus, the history of juvenile justice in each country is examined, taking into consideration the effect colonialism had on the juvenile justice systems in these countries, and how these colonial legacies still shape post-colonial realities of criminal justice in these countries today.

In addition, the current study incorporated a comparative analysis of how similar or different the three countries are in terms of their structures of law and justice taking into consideration how they have incorporated the provisions of the UNCRC and other legal frameworks provided to guide the administration of juvenile justice. This was done by selecting themes from the provisions of the international legal frameworks regarding the administration of juvenile justice and finding out how the three selected states have managed to domesticate these provisions and also investigating whether the domestication of the provisions has had any impact on the administration of juvenile justice in their respective countries. The study further analyzed the various motivational factors that may have influenced these African States to ratify the CRC and other UN treaties. It also examined some of the reasons behind the gap between policy and practice of juvenile justice administration in the three selected countries. Finally, the study analyzes some alternatives to the current juvenile justice system in Africa and makes recommendations for Africans to consider such alternatives since they are best understood by their people.

3.2 Data type, selection, and interpretation strategies

The current study is predominantly literature based and draws on relevant secondary data such as scholarly research, published articles, policy documents, journal articles, information on government and media websites and relevant legal documents to elucidate the discussion of

juvenile justice in the three selected African countries. Using secondary data was very valuable in exploring a wide range of data sources that helped to ascertain possible patterns and differences that were useful in answering the specific research questions posed in this study. The secondary data was selected based on its availability and relevance to the research objectives and questions. Consequently, the convenience sampling technique which is a non-probability sampling method of qualitative research design was used to select data for the study until data saturation was achieved. The secondary data was subject to scrutiny in order to ensure that all the data used in the study was authentic, hence the current study used data from credible sources such as peer-reviewed articles published in genuine academic journals. This was to ensure that the information reported is credible and void of misrepresentation (Neuman, 2011).

The current study assumed an interpretive analysis through a systematic discovery of the factors that motivated the selected African countries to ratify the UNCRC, the outcomes of accepting and ratifying the UNCRC and the possible alternatives that exist to the UN-prescribed juvenile justice systems and practices that currently exist in African countries. This method is fundamental to qualitative inquiry hence it was best suited for the current study. Also, the thematic analysis method was suitable for analyzing the secondary data collected considering the qualitative nature of the study. Coffey & Atikinson (1996) define analysis as the systematic procedure to identify essential features and processes, thus, it is a way of transforming the data through interpretation. This method was used to explore the various discussions gathered through secondary data on juvenile justice in Africa. Interpretation of the data is supported by quotes from individual documents depending on their relevance to the research objectives and questions.

Finally, the study brought together the deductions in the summarized thematic analysis and these deductions and relevant theory were used to explore significant themes, concepts, patterns and structures that emerged from the data.

Chapter 4

4.0 Child justice in South Africa

This chapter investigates the development of juvenile justice in South Africa, it begins with an analysis of the South African context the historical and postcolonial underpinnings that have shaped the development of juvenile justice in South Africa and the role that customary law continues to play in the administration of juvenile justice in South Africa. It then offers a thematic analysis of the current state of juvenile justice in South Africa dwelling on the minimum age on criminal capacity and the procedural stages of juvenile justice administration in South Africa, while considering relevant themes like: the best interest of the child; the rights of the child; detention as a measure of last resort; and diversion and other alternative sentencing measures as required by international law regarding juvenile justice administration and the preservation of the rights of the child.

4.1 The South African context

South Africa is geographically located on the southern point of Africa with the Atlantic and Indian Ocean serving as her boundaries on the west and east respectively. It occupies a land area of approximately 1.21 million square kilometers (Skelton & Potgieter, 2006) and has a population in excess of 55.7 million (Statistics South Africa, 2016). South Africa has a fairly diverse population compared to other African countries, with the majority of citizens (79.2 percent) being Africans, followed by the colored and white population (8.9 percent) and Indian and Asian population (2.5 percent) (Statistics South Africa, 2016). With respect to gender and age, 48.9 percent of the population are male and 51percent female, while South Africa has a relatively young population with the highest number recorded between the ages of ten and fourteen (Skelton & Potgieter, 2006). Ethnically, South Africa is very diverse having nine provinces and eleven official languages including Afrikaans, English, Ndebele, Pedi, Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa and Zulu (Statistics South Africa, 2016). In terms of

religion, 86% of the South African population are Christians, 6% are African traditionalists, 5.2% are non-affiliated, 1.9% are Muslims and 0.9% are Hindus (Statistics South Africa, 2016). South Africa has one of the best economies in Africa contributing about 25% of the entire GDP of the African continent (Skelton & Potgieter, 2006).

South Africa's historical record is generally divided into five distinct eras, these include the pre-colonial era, the colonial era, the post-colonial and apartheid eras and the post-apartheid era. The colonial and post-colonial eras are predominantly characterized by clashes of culture, violent regional disputes between European settlers and indigenous people, dispossession and suppression and other racial and political tensions (Encyclopedia, 2016). The colonial era began in the 1600s with the arrival of the Dutch colonial settlers who established a Dutch colony at the Cape of South Africa which is currently known as Cape Town. The early 1700s marked the arrival of other European settlers who moved to the central part of South Africa. With time, the European population multiplied whiles the population of the Bushmen and Hottentots who were the original settlers in South Africa declined. The spread of European settlers all over the country led to the development of separate white and black communities. This segregation was also as a result of the reign of the National party that came into power in 1948 which was led by white South Africans who oppressed the black South Africans by infringing on their rights as humans. This struggle between the white and black South African's went on for several years and did not only disregard the rights of adults but that of the children as well (Encyclopedia, 2016; Skelton & Potgieter, 2006).

In the year 1990, Nelson Mandela together with some other political leaders began negotiations following their release from prison. They reached an agreement in 1994 and South Africa became a constitutional democracy after it held its first democratic elections, however, the final South African constitution was adopted in 1996 (Skelton & Potgieter, 2006). South African's prior to colonialism were governed by customary law. This customary law varied

across the various tribes that existed and was basically a system that was based on restorative justice and harmonious living (Skelton & Potgieter, 2006). They had customary courts which were led by elder community members or chiefs whose tasks were to settle all kinds of disputes whether criminal or civil. Interestingly, the European settlers upon their arrival co-opted these customary courts as part of the criminal justice system they imposed on the South African people (Skelton & Potgieter, 2006). Despite the gradual phasing of customary courts and laws in South Africa's justice system, it is significant to note that quite a number of children in South Africa continue to live under customary law today, because most of these customary courts survived in the rural parts of the country (Van Eden, 1995 in Skelton & Potgieter, 2006).

The current legal system in South Africa originated from the Roman Dutch law with some influence from the British and continental systems. The national government is mainly responsible for law making though the provincial governments also have power to make some laws. The highest court in South Africa is the constitutional court and all laws are subject to the Bill of Rights in the South African constitution (Skelton & Potgieter, 2006).

4.2 The development of juvenile justice in South Africa

Over the last century, juvenile justice systems all over the world have evolved significantly with lots of changes taking place to hopefully ensure that youth who get themselves involved in the juvenile justice system do not become long-term offenders. However, the history of juvenile justice law reform in South Africa is barely a decade old. South Africa for some reason failed to follow the pattern of juvenile justice that was being established by other states in the world (Nielsen-Sloth, 2001). This was basically because South Africa's main focus was to establish basic human rights and a democratic society (Skelton & Coutenay, 2015; Skelton, 2002), which is very laudable considering how impossible it would have been to secure justice for children in a politically unstable environment.

Just like her colonial counterparts, South Africa enacted child protection legislation as early as 1911 with the introduction of Roman Dutch and European laws by the colonial settlers (Skelton & Potgieter, 2006; Skelton & Coutenay, 2015). In addition, South Africa enacted other child welfare statutes including The Children's Act 31 of 1937, followed by the enactment of The Children's Act 33 of 1960 and The Child Care Act 74 of 1983 (Sloth-Nielsen, 2001). These Acts were enacted as early as the 1930's to ensure that children who found themselves in conflict with the criminal law could be sent to a children's court hearing where their welfare needs could be catered for (Sloth-Nielsen, 2001). South Africa has been predominantly noted for her racial divide which led to discrimination against black South Africans. This was evident even among children who found themselves in conflict with the criminal law, as it was only the white and mixed-race children who benefited from the welfare services that were established at the time while the black children were disqualified from receiving welfare services and even from being processed at the children's court (Nielsen-Sloth, 2001).

Though several Acts and laws existed in South Africa to govern children who found themselves involved in the criminal justice system, it was not until the 1980's with the increased political detention of children that formal juvenile justice institutions and processes began to be more commonly used with children in conflict with the law. (Skelton, 2015; Nielsen-Sloth, 2001). During this period, children were actively involved in the politics of the state which gave them an identity and a sense of belonging (Skelton & Potgieter, 2006). Their involvement in the political turmoil that was ongoing resulted in their frequent arrest and detention without trial under the laws that were put in place to repress opposition to apartheid (Skelton & Potgieter, 2006; Nielsen-Sloth, 2001). Anti-apartheid activists formed a pressure group in order to create awareness to the international world concerning the atrocities faced by children at the time. The activities of this group led to the formation of the international anti-apartheid movement which led to the birth of the children's rights movement in South Africa (Skelton, 2015; Skelton &

Coutenay, 2015; Skelton & Potgieter, 2006; Sloth-Nielsen, 2001). However, due to the political situation of the state, the focus of the children's rights movement was on the repression of children as victims of apartheid and not on their autonomy or rights as individuals (Sloth-Nielsen, 2001).

Again, the National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) launched an initiative in 1992 which was very remarkable in the development of juvenile justice in South Africa. Specifically, they negotiated for the use of restorative justice processes that could be achieved through diversion and alternative sentencing options (Skelton & Coutenay, 2015). This initiative led to the diversion of a significant number of children away from the criminal justice system (Skelton and Tshehla, 2008 in Skelton & Coutenay, 2015).

In retrospect, it is clear that the children's rights movement during the years 1990-1994 developed a major concern for issues regarding juvenile justice. That is, children's rights advocates focused more on juvenile justice and detention than the other social problems like child abuse, child labor, and domestic violence that they could have advocated against (Nielsen-Sloth, 2001). At the center of their activism was a call for the state to create a separate juvenile justice system for children, and this aim was finally achieved after the Minister of Justice appointed a project committee of the South African Law Commission to draft proposals for a modern juvenile justice system in 1996 (Nielsen-Sloth, 2001).

In addition to all the activism that was ongoing, the state after her first democratically elected government assumed power in 1994 focused on the need to protect children in conflict with the law and consequently the introduction of the constitution further set the stage for a new approach to child justice in South Africa (Skelton & Coutenay, 2015) Section 28 (1) (g) of South Africa's constitution provides that

> Every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be

> detained only for the shortest appropriate period of time, and has the right to be …... (i) kept separately from detained persons over the age of 18 years and …… (ii) treated in a manner, and kept in conditions that take account of his or her age.

Section 28(2) also provides that, "a child's best interests are of paramount importance in every matter concerning the child".

Clearly, these provisions were influenced by South Africa's ratification of the United Nations Convention on the Rights of the Child (CRC) in 1995 (Skelton, 2015; Skelton & Coutenay, 2015). Following this development, the Child Justice Act (2008) was enacted in response to the increasing desire of the state to develop a new and rights based juvenile justice system (Skelton, 2015). The section on Children's Rights that was developed in the constitution was further developed to better satisfy the requirements of international law, since in the opinion of child rights activists it did not go far enough. However, an increasing fear of the escalating crime rate at the time led to the development and introduction of new minimum sentence legislation which led to an infringement of the rights of the child offender (Skelton, 2015). Thus, the political turmoil at the time had negative influences on rights related legislation and did not allow full compliance to the CRC.

4.3 The current state of juvenile justice in South Africa

The Child Justice Act of South Africa also known as the Child Justice Act, no 75 of 2008 was officially launched on April 1, 2010 and serves as the yardstick for juvenile justice in South Africa, its main aim is to divert youth who find themselves in conflict with the criminal law away from the criminal justice system (Skelton & Coutenay, 2015; Willman, 2012). The Child Justice Act promotes the principles of restorative justice[1] and ensures that children who get into

[1] "means an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting

conflict with the criminal law are held responsible and accountable for the offenses they commit (Skelton & Coutenay, 2015). The act also makes special provisions for children in conflict with the criminal law by establishing children's rights to family or appropriate care, their rights to be protected from maltreatment and again their rights to be protected from practices that will compromise their well-being and development.

Clearly, the Child Justice Act of South Africa serves as the domesticated version of the United Nations Convention on the Rights of the Child (CRC). It explicates clearly the provisions of the CRC at the national level which suggests that the current state of juvenile justice in South Africa is based on the provisions of international law that governs children in conflict with the criminal justice system. The provisions of the Child Justice Act have been described as divergent from that of the traditional criminal justice system which focused on retribution and deterrence. Under the new legislation these punishment rationales were replaced with restorative justice approaches that focused on the importance of understanding children through examining their personality and determining the type of care they need, and by correcting them through diversion, community-based programs, and the application of restorative justice processes and reintegration (Skelton & Coutenay, 2015).

4.3.1 The minimum age of criminal responsibility in South Africa

The minimum age of criminal responsibility before the promulgation of the Child Justice Act under the common law was set at 7 years (Skelton & Coutenay, 2015; Willman, 2012; Skelton & Potgieter, 2006). However, this was raised to 10 years by the Child Justice Act as a result of its enforcement in April 2010, consequently, any child under the age of 10 is regarded as lacking criminal capacity and cannot be prosecuted by the court (Skelton & Coutenay, 2015; Willman, 2012). According to the South African law, only persons who are proven beyond

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responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation" (Child Justice Act, 2008)

reasonable doubt by the court to possess criminal capacity[2] can be held liable for criminal conduct (Burchell, 2011 in Skelton & Coutenay, 2015). The Child Justice Act 2008 in Section 7 (1) 7(2) and 7(3) distinguishes the criminal capacity of children according to their age at the time of committing an offence and explicitly outlines how children who fall in the different age categories should be dealt with. Remarkably, the South African government introduced measures that ensure that the age of children can be easily determined, and it is important to note that this was one of the biggest challenges the country faced (Skelton & Coutenay, 2015).

The Child Justice Act 2008 outlines ways in which the age of children may be determined in cases where they do not have documents to prove their age. Thus Section 12 of the Child Justice Act clearly outlines the responsibilities of a police official where the age of the child is uncertain. The police official must first determine whether the child is under the age of 10 or above the age of 10. If the child is under age 10 the police officer must follow the provisions in Section 9 (1a) and (1b) which provides that

> He or she may not arrest the child, and must, in the prescribed manner, immediately hand the child over to his or her parents or an appropriate adult or a guardian; or if no parent, appropriate adult or a guardian is available or if it is not in the best interests of the child to be handed over to the parent, an appropriate adult or a guardian, to a suitable child and youth care center and must notify a probation officer.

However, if the child is 10 years old or between 10 and 14 years old or between 14 and 18 years then the police official is expected to treat the person as a child with due respect to the provisions stipulated in the Child Justice Act relating to arrest (Chapter 3), release or detention (Chapter 4) and Section 27 of the Act which requires that the child is given placement options before his or her first appearance in court.

[2] The ability of an individual to distinguish between right and wrong at the time he or she commits an offence (Burchell, 2011 in Skelton & Coutenay, 2015)

The probation officer is also required by the Act to ensure that the age of the child is determined prior to the sentencing of the child. Section 13 of the Child Justice Act (2008) sets requirements for the probation officer to determine the age of the child either through statements made by the parents or guardians, or statements made by the child, the child's school registration form or report, his or her baptismal certificate or an estimation made by a medical practitioner. The probation officer is then required to submit the estimation on the prescribed form together with any supporting documents to the court before the child's first appearance.

The Child Justice Act (2008) again has provisions for the inquiry magistrate or child justice court to follow in their quest to determine the age of a child in a case where the age of the child is uncertain during a preliminary inquiry or during proceedings before a child justice court. The inquiry magistrate is expected in Section 14 (2 a-d) to determine the age of the child by considering any kind of documentation submitted by the probation officer, to request for any relevant documentation, information or statement from any person or if necessary, refer the child to a medical practitioner for an estimation of the age of the child. These provisions have been made by the Child Justice Act to ensure that, prosecutors do not prosecute children without establishing their age with the hope of proving their criminal capacity later (Skelton & Tshela, 2008; Skelton & Potgieter, 2006). These provisions are evidence of how the Child Justice Act 2008 improved on the previous law that existed, since the previous law left the estimation of the age to the discretion of the magistrate without any laid down provisions to follow (Kariuki, 2010).

Despite these provisions made by the Child Justice Act which is evidently a major improvement to the Criminal Procedure Act and requires that children below the age of 18 are treated separately from adults in the criminal justice system in South Africa, there has been constant public outcry and displeasure about the low minimum age of criminal responsibility (Gallnetti, 2009) considering the fact that, the UN Committee on the Rights of Children in its

General Comment No 10, (2007) recommends that the minimum age of criminal responsibility be set at 12 years or above. Section 8 of the Child Justice Act provides that, the minimum age of criminal capacity can be reviewed only after five years from the time the section takes effect. This clearly shows the unwillingness of the state to increase the minimum age for criminal capacity despite the concern shown by civil society and the recommendations made by the committee on the Rights of the Child. In addition, there have been several practical difficulties in the individual assessment of children who get in conflict with the law, this is due to South Africa's limited number of qualified professionals who can assess the capacity of these children (Skelton & Baden horst, 2011).

4.3.2 Procedural stages of juvenile justice in South Africa

There are three stages of the juvenile justice process that children who are suspected to have committed a criminal offence go through. These are the pre-trial, trial and post-trial stages and each of these stages are regulated by different procedural rules and regulations (Kariuki, 2010). One of the primary objectives of the Child Justice Act is to prevent children from being exposed to the negative effects of the formal criminal justice system. This is done by providing alternative ways in which the arrest of children can be handled (Skelton & Coutenay, 2015), this is also in accordance to the provisions made in Article 40 (1) of the United Nations Convention on the Rights of the Child (CRC) which provides that a child who is alleged to have committed an offence shall be treated

> in a manner, consistent with the promotion of the child's sense of dignity and worth which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child assuming a constructive role in society

In order to meet these requirements, the Child Justice Act has made special provisions that need to be followed when dealing with children alleged of committing a crime.

Section 28 of South Africa's constitution makes specific provisions that aim to protect the rights of children in South Africa. Section 28 (g) provides that every child has the right

> Not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time and has the right to be ___ kept separately from detained persons over the age of 18 years, and treated in a manner, and kept in conditions, that take account of the child's age.

In adherence to this constitutional provision which is also a provision made in Article 37 (b) of the CRC, the Child Justice Act makes several provisions to check the detention of children. Section 20 (1) of the Act makes it clear that the arrest of a child should be the least option, Section 20 (3) further elaborates on the prescribed manner in which a child should be arrested and this should be done only after all other options have proved futile and even in such cases, section 29 and 30 provide that, the child should be detained at either a child and youth care center or a prison. In addition, Article 2 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL) recognizes that

> because of their high vulnerability, juveniles deprived of their liberty require special attention and protection and that their rights and well-being should be guaranteed during and after the period when they are deprived of liberty.

In accordance to this provision, Section 18 and 19 of the Child Justice Act provides that a child be informed through a written notice and a summons of the offences he or she committed, the summons must be presented in the presence of his or her parent, an appropriate guardian or adult. The child must be duly informed of the nature of the allegation, his or her rights, the required procedures to be followed as prescribed by the Act without detaining the child for any period of time prior to his or her appearance to the court. The provisions in Section 18 and 19 of the Act are to prevent the previous occurrences of children being detained without the knowledge of their

parents or without them knowing the offence they have been charged with (Skelton & Potgieter, 2006).

Prior to the implementation of the Child Justice Act, numerous concerns were raised regarding the development of a child justice system for South Africa. Consequently, various initiatives including a new section 29 of the Correctional Services Act, 1959, the abolition of corporal punishments and the establishment of an Inter-Sectoral Committee on Child Justice (ISCCJ) was made to improve the predicaments of children in conflict with the law (Badenhorst, 2011). These initiatives significantly led to a reduction in the number of children awaiting trial from 2,176 in the year 2000 (which represents the number of children awaiting trial before the Act came into operation) to 979 in the year 2010 when the Act came into operation, and this number was further reduced during the first two years of the implementation of the Act (Muntingh & Ballard, 2011).

4.3.2.1 Pre-trial detention

In regard to pre-trial detention, the Child Justice Act 2008 outlines provisions that intend to limit the detention of children before their first appearance at a preliminary inquiry. Article 21(2a) clearly stipulates that where it is appropriate a police official must release a child on written notice into the care of his or her parent or guardian. Article 21 (3a) also instructs a presiding officer to release a child into the care of his or her parent, guardian or an appropriate adult at the child's first appearance a preliminary inquiry. These provisions made by the Child Justice Act 2008 are in line with the principles presented in the CRC regarding pre-trial detention of children. Article 37 of the 1989 Convention on the Rights of the Child provides that

> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

In addition, the UN Committee on the Rights of the Child in its general comment no 10 adds that State parties should continuously explore the possible alternatives that can be made available other than detaining children and that if detention is necessary at any given time, the state should ensure that the child is released as soon as possible (UN Committee on the Rights of the Child, General comment No. 10, 2007). The United Nations Rules for the Protection of Juveniles Deprived of their Liberty also provides rules for the management of juvenile facilities. Among these rules, the JDL requires all states to ensure that the physical and environmental conditions of the detention centers are very sanitary and conducive for the juveniles, they should provide education, health care an independent complaint procedure and also be regularly monitored through unannounced inspections. Contrary to these provisions that suggest that children should only be detained in facilities that meet all these requirement, the Child Justice Act 2008 in Section 27 (a ii) mentions that a child may be detained in a police cell or lock-up in instances where there is no vacancy at the youth detention center, Section 27 (b) also provides that children who are 14 years or older and have committed an offence that is considered very serious must be detained in a police cell or lock-up before his or her preliminary inquiry. In addition, Section 30 also provides that a child can be detained in prison as a measure of last resort after considering some factors pertaining to the case of the child including his or her best interest, the interests of justice or the safety and protection of the community or another child in detention and the likelihood that the child may receive a prison sentence. Despite these provisions, it is

clear that the Child Justice Act recommends that a child be detained at youth care centers rather than prisons (Skelton & Coutenay, 2015). Remarkably, evidence from statistics made available by the community law center in Cape Town, South Africa have shown that these provisions in the Child Justice Act together with some practical actions that have been undertaken have resulted in a reduction of children in pre-trial detention (Muntingh & Ballard, 2012 in Skelton & Coutenay, 2015).

4.3.2.2 Diversion

As recommended by the CRC, the Child Justice Act of South Africa makes provisions for alternative forms of punishments in order to ensure that children are moved away as much as possible from the criminal justice system into programs that will allow them to reintegrate into society (Skelton & Coutenay, 2015). One of the alternative means used in South Africa is diversion, this option is employed when a child accepts responsibility for his or her offence, the child is diverted through such programs and this prevents stigmatization and harsh treatments that are sometimes meted out in the criminal justice system (Skelton & Coutenay, 2015). Another advantage of adopting diversion is to prevent children from having criminal records which may end up jeopardizing their future.

The Child Justice Act ensures that diversion is central to the child justice process by providing a number of innovative diversion options. Section 53 (a-f) of the Child Justice Act outlines the various forms in which diversion takes place, these include “a compulsory school attendance order”, “a family time order”, “a good behavior order”, “a peer association order”, “a reporting order”, and “a supervision order”. These diversion options are applied under two levels. Level one applies to offences like perjury, contempt of court, blasphemy, defamation, public indecency among others mentioned in schedule one of the Child Justice Act, while the offences categorized under level two include public violence, culpable homicide, arson,

abduction, sexual assault, murder, extortion, kidnapping and all other offences referred to in schedules 2 and 3 (Child Justice Act, 2008). Section 53 (6) further includes provisions on how the various forms of diversion should be selected based on the age of the child and the level of offence that the child commits.

4.3.2.3 Preliminary inquiry

The Child Justice Act 2008 in Section 43 defines a preliminary inquiry "as an informal pre-trial procedure which is inquisitorial in nature; and may be held in a court or any other suitable place". This is usually the first contact the child has with the court and it is an opportunity for the inquiry magistrate to gather as much information as possible and also to decide on the options available with respect to how the case can be handled effectively (Child Justice Act, 2008). At this stage, the court provides an opportunity for the child and his or her parents to participate in the proceedings by providing any necessary information they have regarding the case, the inquiry magistrate may also decide whether to divert the case or to refer the case to the Child Justice Court (Child Justice Act, 2008). Some other objectives of the preliminary inquiry outlined in Section 43 (2) of the Child Justice Act includes an opportunity to estimate the age of the child in cases where the age is uncertain, the perspective of the probation officer regarding the criminal capacity of the child, whether the child needs further assessment or not, to identify a suitable diversion option and to ensure that the opinions of all person's present are considered before any decision is made.

Section 45 (1) of the Child Justice Act requires that information gathered at the preliminary inquiry is kept confidential. This requirement is in accordance to Section 154 of the Criminal Procedure Act which provides regulations regarding confidentiality and the identity protection of a child under the age of 18. It further provides in Section 45 (2) of the Child Justice

Act that “No information furnished by any person at a preliminary inquiry in relation to the child may be used against the child in any bail application, plea, trial or sentencing proceedings”.

4.3.2.4 Child justice court

Section 1 of the Child Justice Act, 2008 refers to the child justice court as “any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child”. In accordance to Article 35 (1d) of South Africa’s constitution which provides that any one alleged to have committed an offence must be brought before a court not later than 48 hours after the arrest has been made, Section 66 (1) of the Child Justice Act provides that, “a child justice court must conclude all trials of children as speedily as possible and must ensure that postponements in terms of this Act are limited in number and in duration”. It further outlines the exact timelines that must be followed depending on whether the child is detained in prison, is detained at a child and youth center or whether the child has been released from custody. The child justice court is also provided with the option of diverting the case from prosecution and must postpone proceedings while waiting for the child to comply with the diversion order that has been served. The court is also charged by the Child Justice Act to make an order to stop the proceedings provided it is confirmed by the probation officer that the child has complied with the diversion order that was served (Section 67, CJA).

The court can also prevent the attendance of persons whose presence it deems is not in the interest of the child. This is to ensure that the child is able to testify freely in court without any pressure or fear from the presence of the audience. The court must also ensure that the best interest of the child is upheld at all times during the proceedings and the information gathered at the court is highly confidential and must not be published (Section 63, CJA).

Section 71 of the Child Justice Act, 2008 further requires that the court requests for a pre-sentence report which should be prepared by a probation officer prior to the imposition of the

sentence. However, the child justice court can impose a sentence other than the one recommended in the pre-sentence report and provide reasons for imposing a different sentence.

The Child Justice Act 2008 again makes provisions regarding sentencing of children involved in conflict with the criminal law. These sentencing options are provided to ensure that the children are rehabilitated and reintegrated into society fully and in accordance to Article 37 of the UNCRC and that detention is used as a last resort and for the shortest time possible. The Child Justice Act in Sections 72 to 77 provides sentencing options for the court, including community-based sentences, restorative justice sentences, fines or alternatives to fines, correctional supervision, compulsory residence in a child and youth care center and imprisonment.

The court must however consider factors like the nature of the offence committed, benefits of detaining the child at the child and youth care center, the extent to which the child poses a danger to his or her community and whether the harm caused by the offence specifies that a residential sentence is appropriate (Section 69 (3), CJA). In addition, the Section 77 (1) of the Child Justice Act prohibits the imposition of a sentence of imprisonment on a child who is under the age of 14 years at the time he or she is being sentenced for the offence committed. On the other hand, children 14 years or older may be sentenced to imprisonment, however, this must be done as a measure of last resort and for the shortest time possible. Section 77 (6) provides that

> In compliance with the Republic's international obligations, no law, or sentence of imprisonment imposed on a child, including a sentence of imprisonment for life, may, directly or indirectly, deny, restrict or limit the possibility of earlier release of a child sentenced to any term of imprisonment.

These are clear evidences of how the Child Justice Act has been tailored to comply with the provisions of the United Nations Convention on the Rights of the Child, the United Nations Standard Rules for the Administration of Juvenile Justice and the United Nations Minimum

Rules for the Protection of Juveniles Deprived of their Liberty. In theory, the child justice court ensures that children are treated differently from adults because children are more vulnerable and require special care and attention, they are also easily rehabilitated compared to adults (Skelton & Coutenay, 2015). The Child Justice Act in Section 82 also requires that children are legally represented in court. In addition, the state is required to provide legal representation for the child in instances where the child's parent is unable to afford legal representation.

Chapter five

5.0 Child justice in Kenya

This chapter explores the development of juvenile justice in Kenya. It begins with an analysis of the Kenyan context, the historical and postcolonial underpinnings that have shaped the development of juvenile justice in Kenya, and the role that customary law continues to play in the administration of juvenile justice in Kenya. It continues with a thematic analysis of the current state of juvenile justice in Kenya dwelling on the minimum age of criminal capacity and the procedural stages of juvenile justice administration in Kenya while considering relevant themes like the best interest of the child, the rights of the child, detention as a measure of last resort, diversion and other alternative sentencing measures as required by international law regarding juvenile justice administration and the preservation of the rights of the child.

5.1 The Kenyan context

Kenya is a multi-ethnic state located in the Great Lakes region of East Africa. It is officially known as the Republic of Kenya and is a founding member of the East African Community. Kenya is geographically located on the equator and overlies the East African Rift; its land area expands from Lake Victoria to Lake Turkana and further south-east to the Indian Ocean. Kenya shares its borders with Tanzania to the south and south-west, Uganda to the west, South Sudan to the north-west, Ethiopia to the north and Somalia to the north-east. Kenya covers a land area of 224,225 square million (Statista, 2018; Central Intelligence Agency, 2012) and is the 7th most populated country in Africa with a population of approximately 46.73 million people (Statista, 2018).

Kenya is diversely populated with most of the major ethnic, racial and linguistic groups found in Africa, it has over 70 distinct ethnic groups which can broadly be divided into three linguistic groups, thus, Bantu, Nilotic and Cushite (Kurian, 1992). The largest ethnic groups in Kenya include the Kikuyu, Luo, Luhya, Kamba and Kalenjin (Kenya National Bureau of

Statistics, 2015). Kenya has suffered a lot of ethnic conflicts due to the disproportionate representation of the ethnic groups in public life, government, business and the professions, and these conflicts obviously had some negative impacts on children in Kenya (Kurian, 1992), considering the fact that the country's population is very young with children below the age of 18 constituting over half of the population (Kenya National Bureau of Statistics, 2015). Kenya has two official languages namely English and Swahili, these two languages are spoken among the various ethnic groups though they have their own native languages. The dominant religion in Kenya is Christianity representing 83% of the country's population, 11.2% of the population identify as Muslims whiles 1.7% are traditionalist (Central Intelligence Agency, 2012). Kenya has the largest economy in eastern and central Africa and is said to be among the African countries with the fastest growing economies (Central Intelligence Agency, 2012).

Colonialism in Kenya can be traced back to the Berlin Conference in 1885, which marked the arrival of the Germans to Kenya. At that time, the Europeans divided East Africa into five different territories and founded the East African protectorate in 1895. In 1920, the East African Protectorate was officially declared a British colony and the settlers began to rule while the Africans and Asians who were original settlers were banned from political participation until 1944. The members of the Kikuyu, Embu, Meru and Kamba came together in 1942 to fight against British rule until they gained independence in the year 1963 and Jomo Kenyatta became Kenya's first Prime Minister (Gatheru, 2005).

Unfortunately, Jomo Kenyatta's tenure marked the beginning of the long-term ethnic conflicts that Kenya has suffered. Jomo Kenyatta belonged to the dominant ethnic group (the Kikuyu) hence nearly all his policies favored them above the other ethnic groups. The Kikuyu together with the Embu and the Meru formed the Gikuyu-Embu-Meru Association (GEMA), though they comprised only 30% of the entire population in Kenya, they possessed most of the country's wealth and power. In addition, the Kikuyu, with Kenyatta's support, acquired

traditional territories that were said to have been stolen by the colonial settlers, though these lands belonged to other ethnic groups. These other ethnic groups who constituted the 70% majority, were irritated by the occurrences and this marked the beginning of the ethnic conflicts in Kenya (Gerard, 2008).

5.2 The development of juvenile justice in Kenya

The British settlers introduced the English common law to Kenya in their quest to promote common lawful behavior among a widely diverse population (Okechi, 2017). Before the introduction of the English common law, the indigenous people of Kenya had their own forms of laws that were used to maintain law and order, these laws however varied from one society to the other (Okechi, 2017; Odongo, 2017). Though these customary laws that existed warranted severe punishments including harsh penalties, corporal punishments and sometimes death of the culprits, the juveniles at that time were not punished the same way as the adults (Okechi, 2017). Aside the severe punishments that were used to maintain law and order, the Kenyans at the time also used punishments including reconciliation, restitution, compensation by the individual or community, social exclusion and public ridicule and religious sanctions to ensure that members of the various societies obeyed their norms (Okechi, 2017).

With time, the indigenous people of Kenya began to fight for their independence. This forced the British to introduce a dual system of justice where they had courts that applied only the English common law and African courts that applied both the English and traditional justice systems which were guided by English laws. These courts were also used to process youth who were perceived as delinquents (Okechi, 2017). These structured courts had formal procedures that were set up to prosecute youth who committed acts the colonial rulers termed as criminal. Prior to these structured establishments, the African traditional system was organized in a way that encouraged communal ownership and supervision of the delinquent child. The child belonged to the entire community, hence his or her supervision was not limited to the nuclear

family. Every member of the community played a common role of correcting the delinquent child. Clearly this system was disrupted during the colonial era and has impacted the current juvenile justice system that exists in Kenya (Okechi, 2017).

The growth of perceived juvenile delinquency and the quest to ensure that children who were regarded as delinquent do not contaminate other children in their communities led the colonial government to introduce penal institutions where children who came into conflict with the law were kept. These institutions were based on the English models which were modified to suit the African context, they were also established to ensure that children were treated separately from adults in the criminal justice system. Among these institutions were approved schools, borstal institutions and youth corrective centers which took care of offenders falling below the age of 19 (Okechi, 2017). Aside institutionalization they also employed other measures like corporal punishments, discharge, compensation or probation (Okechi, 2017).

5.3 The current state of juvenile justice in Kenya

The previous juvenile justice system in Kenya was bounded by the Children and Young Persons Act, 1969, which did not have any component for recognizing the rights of children (Odongo, 2017). However, after ratifying the CRC in July 1990, Kenya's current juvenile justice system is bounded by several statutes including the Children's Act of 2001, the Borstal Institutions Act, Community Service Orders and the Probation of Offenders Act. The Children's Act is the most recent of them all which was enacted in 2001 as the new legal framework that deals with issues concerning children, including children in conflict with the law and aimed at domesticating the rights of children in Kenya under international law (Odongo, 2017). This eventually led to the inclusion of a comprehensive children's rights clause in Kenya's constitution in 2010. Thus, Article 53 of Kenya's Constitution provides for the "rights of every child". While Article 53(2) of that same constitution provides that "a child's best interests are of paramount importance in every matter concerning the child." And with regards to juvenile

justice, the Kenyan Constitution provides for the child's "right not to be detained, except as a matter of last resort and when detained, to be held for the shortest appropriate period of time; separate from adults and in conditions that take into account the child's sex and age."

The Children's Act 2001 provides for issues including the realization of the rights of the child, best interests of the child, non-discrimination, the child's rights to health, the protection from child labor and the protection from torture and the deprivation of liberty. It also explicates the duties and responsibilities of a child, the child's rights to privacy and parental care among others. Evidently, the Children's Act of Kenya was prepared to follow the precepts of the provisions made by the CRC and in addition to the other statutes and policies designed ensures that Kenya meets the full international and regional obligations regarding children and their rights.

5.3.1 Minimum age of criminal responsibility in Kenya

Section 2 of the Children's Act of Kenya defines a child as "any human being under the age of eighteen years", while Article 260 of the Kenya's constitution defines an adult as "an individual who has attained the age of eighteen years." These two definitions are in accordance to the CRC's definition of a child in Article 1 of its guiding principles. Unlike the Child Justice Act of South Africa, the Children's Act of Kenya does not set a minimum age of criminal responsibility, as this has been set by the penal code of Kenya which in Article 14 refers to it as an "immature age". The Penal Code of Kenya sets the minimum age of criminal responsibility to age 8 years; however, it goes ahead to provide for the doctrine of doli incapax[3] which provides that children who are older than 10 years but below 14 years are not held criminally responsible for their actions unless it can be proved otherwise by the prosecution. This is on the low side considering the recommendation of the UN Committee on the Rights of the Child that State

[3] the rebuttable presumption that a child more than 10 but under 14 years is incapable of forming the intent to commit a crime.

parties should set their minimum age of criminal capacity at 12 (UN Committee on the Rights of the Child, 2007) and Rule 4.1 of the Beijing Rules which provides that the age of criminal responsibility should not be fixed too low bearing in mind the juveniles emotional, mental and intellectual maturity.

However, in compliance to the recommendation of the UN Committee on the Rights of the Child, the Penal Code of Kenya further provides that, male children below the age of 12 cannot be charged for committing a sexual offence because at that age they are incapable of committing such an offence. The Criminal Law Amendment Act of 2003 amends section 124 of the Evidence Act (Cap 80, Laws of Kenya) by adding that;

> Provided that where a criminal case involves a sexual offense, the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.

This amendment therefore means that, in cases of sexual abuse, where the child is the victim, there is no need to corroborate the child's evidence.

Just like the case of South Africa, determining the age of a child in conflict with the law is an unstructured process that is left for the magistrate to decide. The commonest ways of proving the child's age is by ordering a medical report from a qualified health professional. Section 143 of the Children's Act 2001 of Kenya explicates the process and provides that;

> Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person.

However, evidence from some cases have shown that, the health professionals are not always successful in predicting the age of the child (Kariuki, 2010).

5.3.2 Procedural stages of juvenile justice administration in Kenya

Just like the case of South Africa, children who get into conflict with the law in Kenya are also taken through three stages of the criminal justice process and each of these stages are governed by different sets of rules. Article 53(2) of Kenya's constitution provides that "A child's best interests are of paramount importance in every matter concerning the child" and this obviously includes the interests of children who find themselves in conflict with the law. In view of this provision, Kenya's legal system has several statutes that provide the various procedures that children who come into conflict with the law to go through and during each stage.

5.3.2.1 Pre-trial stage

Rule 13.1 of the Beijing Rules provides that "detention pending trial shall be used as a measure of last resort and for the shortest possible period of time" this provision is reiterated in Article 37(b) of the CRC and Rule 2 of the JDL. While Beijing Rule 13.2 adds that, "whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home". Section 53(f) of Kenya's Constitution also provides that;

> every child has the right not to be detained, except as a measure of last resort, and when detained, to be held- for the shortest period of time; and separate from adults and in conditions that take account of the child's sex and age.

Section 190 of the Children's Act 2001 of Kenya also provides that "no child shall be ordered to imprisonment or to be placed in a detention camp; no child shall be sentenced to death; no child under the age of ten years shall be ordered by a children's court to be sent to a rehabilitation school". Section 18 of the Children's Act 2001 of Kenya further provides that,

> No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty, notwithstanding the provisions of any other law, no child shall be subjected to capital punishment or to life imprisonment, a child offender shall be separated from adults in custody, a child who is arrested and detained shall be accorded legal and other assistance by the government as well as contact with his family.

However, Section 191 of the same Act provides among the methods of dealing with offenders that, children be held in remand homes and borstal institutions. The Children's Act of Kenya does not make any provision for diversion and according to reports from previous studies, the commonest form of punishment for child offenders in Kenya is detention (Odongo, 2017; Kariuki, 2010), which clearly deviates from some of the documented legal provisions. However, with the support of development partners like the Swedish International Development Agency (SIDA) and the Oak Foundation, the government of Kenya has implemented a pilot diversion program which seeks to divert children who are alleged to have committed criminal acts from the juvenile justice system into community based alternatives (Odongo, 2017). These development partners provided funds and technical support and program implementation advice to all the stake holders involved in the program (Rutere & Kiura, 2009).

The Children's Act of Kenya also makes provisions for children to be released on bail while they await trial except in cases where their release will pose a threat and defeat the ends of justice (Fifth Schedule, Section 5 of the Children Act, 2001), this provision leaves the magistrate to determine whether a child deserves bail or not, and this limits bail to very few cases. In reality, most children are no aware of their rights before trial and because of their ignorance may be detained unlawfully, and also due to the poor ratio between the number of correctional officers and the amount of work to be done, this provision is hardly adhered to in practical terms (Kariuki, 2010)

5.3.2.2 Trial Stage

The international and regional laws that govern juvenile justice in Kenya lay a strong emphasis on the separation of children from adults in the criminal justice system. In compliance to these laws, Kenya's children's Act has provisions in Section 73 that require that the state provides a separate court known as the children's court that will be in charge of processing the cases of child offenders, hearing any charge against a child with the exception of murder cases or

charges that involve a child together with someone who is 18 years or above. Section 74 of the Children's Act of Kenya adds that a children's court should be a separate building or room from that of the adults. It also takes the privacy and confidentiality of the child very seriously by prohibiting all persons from attending a child's hearing with the exception of members and officers of the court, the parties involved in the case, their advocates, witnesses or other persons the case directly concerns, parents or the guardians of any child brought before the court, registered representatives of newspapers or media agencies and other persons authorized by the court. The Children's Act in Section 76(3) adds that any court handling children should take particular note of the

> Ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding, the child's physical; emotional and educational needs and in particular, where the child has disability; the ability of any person or institution to provide any special care or medical attention that may be required for the child; the likely effect on the child of any change in circumstances; the child's age, sex, religious persuasion and cultural background; any harm the child may have suffered, or is at risk of suffering; the ability of the parent, or any other person in relation to whom the court considers the question to be relevant, to provide for and care for the child; the customs and practices of the community to which the child belongs; the child's exposure to, or use of drugs or other psychotropic substances and in particular, whether the child is addicted to the same, and the ability of any person or institution to provide any special care or medical attention that may be required for the child.

Obviously, the Children's Act 2001 of Kenya has done a good job explicating the processes required to effectively treat children who get in conflict with the criminal law. It is however, worthy of note that there has been growing international concern regarding the lack of separate courts and procedures in Kenya (UN Committee, 2007; Human Rights Watch, 1997). These inconsistencies between the policy that exists and the reality on the ground has been blamed on the government's inability to allocate funds towards the creation and operation of separate courts for children as required by the Children's Act 8 of 2001, and the limited number of officials and magistrates present. In addition, these magistrates have not been trained and

equipped with the requisite training and experience that comes with hearing child offender cases considering the fact that children are more sensitive than adults (Odongo, 2017; Kariuki, 2010).

The Children's Act 2001 of Kenya further provides in Section 185 for the remission of child offender cases at any point of the proceedings from other courts to the children's court provided the child is not charged with an offence of murder or together with a person or persons of or above the age of eighteen. In addition, Section 186 of the Children's Act 2001 of Kenya provides that every child accused of infringing the law must be informed immediately and directly about the charges pressed against him or her, if the child is unable to obtain legal assistance, the state is supposed to provide him or her with legal assistance and prepare him or her for the court hearing. This provision is also found in Article 50(2) (h) of Kenya's constitution, though in practical terms it has been observed that most child offenders go to court without legal representation which places them at a disadvantage considering the nerve-wracking atmosphere and complex proceedings at the court (Odongo, 2017; Kariuki, 2010). In order to curb this issue, the National Legal Aid Program was set up, however, nothing much has changed since it was launched in 2007 (Kariuki, 2010).

Again, Section 186 of the Children's Act of Kenya requires that the court deals with the case promptly with no delays and the child offender must not be forced to give a testimony or confess guilt, the child is entitled to have an interpreter free of charge if he or she does not understand the language used during the court hearing. If the children's court finds the child guilty, the decisions and any measures taken by the magistrate must be reviewed by a higher court, the child must have his or her privacy respected at every stage of the proceeding. The court also requires that, disabled children be treated specially and with the same dignity as a child who has no disability. The Children's Act 2001 of Kenya again provides that the children's court provides a friendly setting to the child offender (Section 188); the language used during proceedings must not be too harsh, thus words like "conviction" and "sentence" should not be

used in relation to a child dealt with by the Children's Court (Section 189). These provisions of the Children's Act 2001 of Kenya clearly show compliance to Article 40 of the CRC however in practical terms they are not being adhered to (Okech, 2017).

5.3.2.3 Post trial stage

The Children's Act 2001 of Kenya in accordance to article 37(b) of the UN Convention on the Rights of the Child, article 17 of the African Children's Charter and Rule 17(1)(b) of the Beijing Rules prohibits the use of the death penalty for children, the use of corporal punishment and any form of detention or imprisonment (Section 18). The Children's Act 2001 of Kenya provides a number of alternative sentencing options which the Children's Court must adhere to when dealing with child offenders, these include probation orders, committing the offender to the care of a fit person, an order to attend a rehabilitation school, placing the offender under the care of a qualified counselor, an order to pay a fine or compensation, an order to attend a vocational school or a borstal institution (Section 191).

The probation officer plays a very significant role in the post-trial stage by assisting the court to make decisions regarding child offender cases, their supervision and rehabilitation in the community. Research on the outcomes of proceedings in the Children's Court has shown that probation is the most common outcome representing 42 percent, with offenders usually under probation for periods ranging between three months to three years. The next common outcome was discharge or withdrawal representing 27 percent, while 12 percent of the cases ended up in Borstal or Children's homes usually for a period of three years (National Council on the Administration of Justice, 2016).

Just like South Africa, an analysis of the administration of juvenile justice in Kenya also clearly reveals that they have domesticated the required provisions of the CRC however a lot still needs to be done in order to ensure that the provisions are put into effective practice.

Chapter 6

6.0 Child justice in Zambia

This chapter explores the development of juvenile justice in Zambia. It begins with an analysis of the Zambian context, the historical and postcolonial underpinnings that have shaped the development of juvenile justice in Zambia and the role that customary law continues to play in the administration of juvenile justice in Zambia. It continues with a thematic analysis of the current state of juvenile justice in Zambia dwelling on the minimum age of criminal capacity and the procedural stages of juvenile justice administration in Zambia while considering relevant themes like the best interest of the child, the rights of the child, detention as a measure of last resort, diversion and other alternative sentencing measures as required by international law regarding juvenile justice administration and the preservation of the rights of the child.

6.1 The Zambian context

Zambia is a landlocked tropical country bordered by the Democratic Republic of Congo and Tanzania to the north, Zimbabwe to the South, Malawi and Mozambique to the east and Namibia and Angola to the West and is located in the Southern part of Africa. Geographically, Zambia is one of the biggest countries in sub-Saharan Africa covering a land surface area of about 752,614 square kilometers and is also accredited as one of the most urbanized countries in Africa (Mbagaya, 2015). Zambia has a population of about 10.7 million with about 40 percent of the population living in urban areas which poses a stress to the available amenities including education. Interestingly, more than 50 percent of Zambia's population is below the age of 15 which makes it prudent to make access to education readily available (Central Statistics Office, 2015). However, this is a challenge both in the urban and rural areas and may lead to a high risk of children getting involved in the criminal justice system (TNN, 2016; Holzman-Escareno, 2009; Lochner & Moretti, 2003).

Zambia is a multicultural country with 73 officially recognized ethno linguistic groups. The major groups include the Bemba, Nynja, Kaonde, Lozi, Tonga and Lunda. The country is also made up if some number of whites, Indians and people from other races. Being a multicultural country, Zambia also has a diverse number of ethnic groups which means there are also a vast number of traditions and cultural practices that continues to influence the livelihood of the people of Zambia. In terms of religion, approximately 87 percent of the population identify as Christians while the second largest religious group comprises of people who identify with the indigenous traditional religions, and a small proportion of the population identify as Muslims and other religions (Durham, Ferrari, Cianitto & Thayer, 2016).

Colonialism in Zambia began in the 1880s when the British deceitfully got the Lozi Chief Lewanika to sign a concession. Upon signing the concession, the British South Africa Company invaded the land and began mining activities (Mbagaya, 2015). The British South Africa Company also gained access to the Zambian lands and began to sell them at very low prices to encourage more European settlers to move to Zambia. In 1924, the control of the land was transferred from the British South Africa Company to the British government, they however continued to develop copper mines which generated huge profits that were sent overseas (Mbagaya, 2015; Gascoigne, 2001). With time, the indigenous people of Zambia lost their livelihoods as farmers because the British took over large portions of the land leaving them with just a small portion to farm and feed their families. They had no choice than to work for the British in their mines in order to earn a living. However, in 1936, the workers went on strike to protest against low wages and poor working conditions. The continuous discontent over the colonial system of government led to the emergence of nationalist movements whose aim was to end racial discrimination and to protect the rights of Africans which led to the formation of the Northern Rhodesian Africa Congress (NRAC) (Mbagaya, 2015; Gascoigne, 2001).

In 1951, the white settlers encouraged Northern and Southern Rhodesia and Nyasaland indigenous peoples to come together and form a federation, but they were initially skeptical because they perceived it as another avenue the white settlers would use to dominate them (Mbagaya, 2015). Nevertheless, these groups came together in 1953 and formed the African National Congress which was of immense benefit to the Southern Rhodesia and mine owners but also continued to inspire the Northern Rhodesia workers union to fight for their rights in the British owned organizations. The white settlers began to offer preferential treatment to educated middle class Africans by offering them better access to jobs (Mbagaya, 2015; Gascoigne, 2001). This led to disunity among nationalists and was the beginning of riots and protests that led to the formation of the United Independence Party (UNIP) led by Kenneth Kanuda, and he eventually won the first ever election in Zambia and became the first African President in Zambia in 1964 (Mbagaya, 2015).

6.2 The development of juvenile justice in Zambia

Like other postcolonial African countries, the criminal justice system in Zambia was inherited from the British colonial settlers who obviously had a great influence in the economic, social and political life of Zambians. The colonial settlers after taking over the land and being in charge of the state introduced repressive European-based legislation in Zambia that tended to undermine the already existing legal traditions that Zambia's indigenous people followed (Mumba, 2011).

Prior to the arrival of the colonial settlers in Zambia (which was formerly known as Northern Rhodesia), there was nothing known as crime (Simaluwani, 1985). Social anthropologists through their studies have revealed that, crime in most parts of Africa was perceived as a form of behavior that was physically or spiritually detrimental to social relationships, and any form of behavior that threatened this social harmony was considered offensive (Simaluwani, 1985). Consequently, the chiefs and elders of Zambia were not very

lenient with anyone who sought to break up this social harmony, and they saw it as their duty to maintain and preserve peace and order by ensuring that indigenes lived a morally upright life (Simaluwani, 1985). Hence like the other African countries, addressing deviant behavior and dealing with its social consequences were not regarded as the responsibility of the offender but that of the entire community (Simaluwani, 1985). Children were strictly warned and monitored by the entire community to ensure that they did not break societal norms, and in instances where these norms were broken, they were given punishments that fitted the offense they committed (Simaluwani, 1985).

The British settlers during the colonial period however ensured that the laws regarding juveniles in Zambia were not as repressive as the ones that existed for adults (Mumba, 2011). They however failed to provide the necessary infrastructure that was needed to treat child offenders specially, and as a result children were mixed with adults during criminal proceedings even though the Juvenile Offenders Ordinance enforce from 1933 required that children be treated separately from adults in the criminal justice system (Mumba, 2011).

6.3 The current state of juvenile justice in Zambia

The current juvenile justice system of Zambia is governed by a number of statutes that provide for the administration of juvenile justice in the country. The main legal documents related to children who get into conflict with the law are the Constitution of Zambia, the Penal Code, the Criminal Procedure Code, the Probation of Offenders Act and the Juveniles Act. The Juveniles Act Cap 53 of the laws of Zambia is however the primary law that governs child offenders in Zambia, it was enacted to protect children in general and more specifically children in conflict with the law (Kankasa, 2006). The Juveniles Act was enacted on 4th May 1956 (Kankasa, 2006; Mumba, 2011) and provides in Act 1(2) that, the African customary law should be observed in the application of the Act to juveniles unless its observance does not serve the best interest of the child. Though it has undergone some minor amendments since it was enacted,

it has been referred to as an antiquated piece of legislation which happens to be a replica of the British legislation of 1933 (Mumba, 2011; Kankasa, 2006).

The Juveniles Act makes provisions for the custody and protection of children in need of care and the correction of juvenile delinquents (Kankasa, 2006). In Zambia, there are different definitions of a child depending on the legislation that is being considered. The Juveniles Act in Section 2 defines a child as someone below the age of 16 years. It also defines a young person as someone who has attained the age of 16 but is below the age of 19 years. It further defines a juvenile as someone who is below the age of 19 years and this includes both a child and a young person. Article 24(4) of the Zambian Constitution also defines a young person as anyone below the age of 15 years. However, in a 2016 report presented at the 71st Session of the Convention on the Rights of the Child in Geneva, the attorney general of the Republic of Zambia reported that, the constitution has undergone some amendments and most importantly has aligned the definition of a child with the definition contained in the CRC (Kalaluka, 2016).

As required by international law governing children, Zambia has committed to the preservation of the rights of the child by adopting a number of legislative and administrative measures to ensure that the rights of children are preserved. Zambia ratified the CRC in December 1991 (UNICEF, 2012) and signed the African Charter on the Rights and Welfare of the Child in February 1992 (African Commission on Human and Peoples' Rights, 2017). The government also began to reform the constitution to ensure that it is aligned with the provisions of the Convention on the Rights of the Child (Committee on the Rights of the Child, 2016). Nonetheless, despite these positive commitments made by the country, the CRC has not yet been domesticated in full. The government of Zambia has also refused to enact a comprehensive children's code as recommended by the Committee on the Rights of the Child (UNICEF, 2012). Zambia practices both legal and customary law which results in the poor implementation of the

rights of the child and has been a major challenge in terms of full compliance to the CRC (UNICEF, 2012).

6.3.1 The minimum age of criminal responsibility in Zambia

Just like South Africa and Kenya, the Juveniles Act, Cap 53 in section 118(1) requires that the court makes due inquiry as to the age of any juvenile brought before the court for any purpose other than to give evidence. In view of this requirement, Article 14 (1) of the Penal Code of Zambia provides that, "a person under the age of 8 years is not criminally responsible for any act or omission." This age is referred to by the Act as an immature age. Article 14(2) of the Penal Code of Zambia further provides that,

> a person under the age of 12 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or make the omission.

The Penal Code in Article 14(3) also provides that "a male person under the age of 12 years is presumed to be incapable of having carnal knowledge". Evidently, the minimum age for criminal responsibility in Zambia, just like that of South Africa and Kenya is too low considering the recommendation of the UN Committee on the Rights of the Child not to set the minimum age of criminal responsibility below the age of 12 years as this is considered by the committee as internationally unacceptable (General Comment No 10, 2007).

The Juveniles Act of Zambia makes provisions for the determination of the age in Article 118(1) which provides that,

> Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a juvenile, the court shall make due inquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, but an order of judgement of the court shall not be invalidated by any subsequent proof that the age of that person has been correctly stated to or estimated by the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age od that person and, where it appears to the court that the person so brought before it has attained the age of nineteen years, that person shall, for the purposes of this Act be deemed not to be a juvenile.

However, there is evidence that, the court sometimes fails to inquire about the age of the juvenile and goes ahead to prosecute them (Center for Law and Justice et al, 2014). In such instances, the Juveniles Act in Article 118(2) requires that the sentence be immediately annulled and the right procedure be followed. It is obvious however, that lots of juveniles have been tried as adults' due to such negligence of the court (Mumba, 2011).

6.3.2 Procedural stages of juvenile justice administration in Zambia

Just like Kenya and South Africa, the legal documents that have been enacted to guide the administration of juvenile justice in Zambia provide the procedures that should be followed to ensure that juveniles who find themselves in conflict with the law are treated according to international requirements. The constitution of Zambia recognizes and protects the fundamental rights and freedoms of Zambians under the Bill of Rights (Constitution of Zambia, Article 11). The rights and freedoms that the Bill of Rights provide includes the right to life, liberty, security of persons and the protection of the law, freedom of conscience, expression, assembly, movement and association and also the protection of young persons from exploitation (Article 11).

This is very remarkable considering the fact that the constitution is the highest law of the land and these provisions made are fundamental to any juvenile justice system. They are also in compliance to human rights law and more specifically to the Convention on the Rights of the Child. The constitution further has provisions in Articles 12 and 15 that generally protect the rights of individuals who find themselves in conflict with the law. Though the constitution does not have specific provisions for children apart from Article 24 which provides for the protection of young persons from exploitation, the provisions in the Bill of Rights are applicable to all persons in the Zambian territory of which children are included.

6.3.2.1 Pretrial stage

The UN Committee on the Rights of the Child in its general comment No 10 regarding the pretrial stage suggests that, states should explore pretrial alternatives like diversion instead of resorting to judicial proceedings (UN Committee, 2007). The Juveniles Act therefore provides that child offenders should only be processed in court if it is in their best interest or if the removal of the case from the court will defeat the ends of justice. The Juveniles Act requires in Section 58 that the juvenile should not be associated with or charged together with any adult in court. The Act further requires in Section 60 that the juvenile should only be detained when it is necessary, and in such circumstances, the juvenile should be kept in a place of safety by the police officer until he or she is ready to be brought before the court. Section 60 of the Juveniles Act further makes provisions for instances where the police officer is unable to detain the child offender in a place of safety and may rather prefer that the child be imprisoned while awaiting trial. In such an instance, the police officer is required to provide a certificate stating the reasons why the child offender cannot be detained in a place of safety. Some of the lawful reasons provided by the Juveniles Act include, "that it is impracticable to do so", "that the juvenile is of so unruly or depraved a character that he cannot safely be so detained", "that by reason of the state of heath or of the mental or bodily condition of the juvenile it is inadvisable so to detain him". Thus, the magistrate is supposed to demand this certificate in court to ensure that the police officer did not detain the offender against the requirements of the law. However, in practical terms it has been shown that often magistrates do not even request to see the certificate, and that they do not seem interested in ensuring that detention before trial is used as a measure of last resort (Mumba, 2011).

However, there is evidence that there are no such places in Zambia that can be described as places of safety for such juveniles, the only place that existed has been transformed into a place of transition for both adults and children who find themselves in conflict with the law

(Mumba, 2011). In instances where juveniles are detained, they are kept in facilities that lack good sanitary conditions, while some of these juveniles are even mixed up with adults which sometimes further exacerbates the problem rather than solve it (Mumba, 2011). This is despite the provision in Section 62 that in an instance where the police officer is unable to separate the juveniles from adult in a remand prison, the juvenile awaiting trial should be detained in a suitable dwelling other than a prison or a detention camp. The Juveniles Act clearly emphasizes in different sections the importance of separating the juvenile form adults in detention, which is also in compliance to provisions made by international law however this is not been adhered to.

6.3.2.2 Trial stage

It is required by every state that has ratified the CRC to ensure that their juvenile courts engage in a fair and just trial that complies to the provisions of Article 40 of the CRC. In addition to the provisions made by the CRC, the Committee on the Rights of the Child also recommends that the reaction to an offence should always be proportionate not only to the circumstances and gravity of the offence, but also other factors like the age of the child, lesser culpability, the circumstances and needs of the child and that of the society be considered (UN Committee, 2007). Just like South Africa and Kenya, Zambia has provisions made in the Juveniles Act to ensure that child offenders are treated fairly in the juvenile justice system.

The Juveniles Act in Section 64 makes provisions for the procedure of juvenile court proceedings in Zambia. The Act requires that, a subordinate court presided over by a senior resident magistrate, a resident magistrate or any other magistrate hear and determine all charges against a juvenile offender with the exception of cases involving homicide or attempted murder. The Act further provides that, the proceedings should be held in a room different from the ones used for ordinary court sitting, unless such is a room is unavailable and the juvenile court should sit on different days or at different times from those on which ordinary sittings are held. It is

rather unfortunate that unlike South Africa and Kenya who have a children's court, Zambia does not have a dedicated juvenile justice system or a children's court, which means that children may have to wait for months or even years for their cases to be concluded (Human Rights Watch. 2016). However, just like South Africa and Kenya, Zambia's Juveniles Act also requires that cases involving child offenders be accorded maximum privacy during court hearing. Thus, only members and officers of the court, parties to the case, their legal advisors and witnesses, other persons directly concerned in that case, bona fide representatives of newspapers and news agencies, and other persons authorized by the court are allowed to be present during the court hearing (Juveniles Act, Section 119). The Act also prohibits children from being present in court during the trial of any other person charged with an offence except in cases where the child's presence is required as a witness or otherwise for the purposes of justice (Juveniles Act, Section 120).

In addition to the provisions made by the Criminal Procedure Code Cap. 88, the Juveniles Act has some special rules and procedures that apply to juvenile court proceedings which do not apply to adult court proceedings. The Juveniles Act requires that juvenile court proceedings be held in camera, and that in cases where the juvenile is not legally represented, the magistrate is supposed to ask the juvenile, and the juvenile's parents or guardians to put any questions to the witness (Juveniles Act, Section 64(4)). Again, the Juveniles Act in Section 64(7) provides that;

> If the court is satisfied that the offence is proved, the juvenile shall then be asked if he desires to say anything in extenuation or mitigation of the penalty or otherwise. Before deciding how to deal with him, the court shall if practicable, obtain such information as to his general conduct, home surroundings, school record, and medical history as may enable it to deal with the case in the best interests of the juvenile, and may put to him any question arising out of such information. For the purpose of obtaining such information or for special medical examination or observation, the court may from time to time remand the juvenile on bail or to a place of detention so, however, that he appears before a court at least once in every twenty-one days.

The Act further prohibits the use of the words "conviction and sentence" in relation to child offenders who have been found guilty of an offence (Juveniles Act, Section 68). It also prohibits children from being sentenced to imprisonment and further provides that, alternatives to imprisonment be adopted (Juveniles Act, Section 72).

6.3.2.3 Post-trial stage

As already mentioned, the Juveniles Act requires that child offenders should not be sentenced to imprisonment. In adherence to the provisions of international law, Zambia has enacted the Probation of Offenders Act, Cap. 93 (1964) which makes provisions for one of the alternative forms of punishments provided by the Juveniles Act. The Juveniles Act provides that, where a juvenile charged with any offence is tried by any court, and the court is satisfied of his guilt, the court should either dismiss the charge, make a probation order in respect of the offender, send the offender to an approved school, order the offender to be caned, order the offender to pay a fine, damages or costs, order the child's parent or guardian to pay a fine, damages or costs, or order the child's parent or guardian to give security for the good behavior of the offender or by sentencing the offender if he is a young person.

Probation is one of the commonest alternatives adopted by most juvenile justice systems. This requires that, the juvenile offender is kept under the supervision of a probation officer who will make sure that the juvenile exhibits good behavior, undertakes to reform and does not commit any more crimes during the probation period (Mumba, 2011). The Probation of Offenders Act in Section 3(1) provides that;

> Where a court by or before which a person is convicted of an offence, not being an offence the sentence for which is fixed by law, is of the opinion that, having regard to the youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to do so, the court may, instead of sentencing him, make an order, hereinafter in this Act referred to as a "probation order", requiring him to be under the supervision of a probation officer for a period to specified in the order of not less than one year nor more than three years.

Though this provision is made for both adult and child offenders, it has mostly been used for child offenders. During the probation period, the probation officer is required to provide counseling and education services to the juvenile for a minimum of one year and a maximum of three years. Child offenders who are sentenced to probation by the court may not also be ordered to be sent to a reformatory or approved school or prison unless he or she behaves contrary to the term of the probation order.

Over all, there is evidence that child offenders in Zambia have received inadequate protection of their rights during the entire criminal process. There is evidence that the country lacks the necessary infrastructure to ensure that youth are separated from adults during the criminal justice process and that most do not have access to legal representation. There is also evidence that they are ill-treated, tortured and kept in unsanitary conditions (Mumba, 2011). For example, according to a study conducted by Mumba in 2011 in Lusaka, the children held in police custody reported that they were badly beaten by police officers. Some of these beatings were to get the children to confess, and they were also beaten as punishments for the offences they committed. The children reported that they were hardly provided with food and water to drink, and that since their cells had no toilets, they had to defecate in plastic bags or on newspapers (this was allowed only once a day). Since they had no bathrooms, they also did not have the opportunity to take a bath. Such treatments obviously are not in the best interest of the child and clearly will only traumatize these child offenders instead of rehabilitating them.

Chapter 7

Comparative analysis

This chapter entails a comparative analysis of the juvenile justice systems in South Africa, Kenya and Zambia. It explores various themes that countries that have ratified the UNCRC are supposed to adhere to in the administration of juvenile justice in their countries and it also seeks to answer the key research questions that were posed in order to guide the current study.

7.1 Comparative analysis of South Africa, Kenya and Zambia

The juvenile justice systems in Kenya, South Africa and Zambia are to a large extent the colonial legacies they inherited from their British colonial settlers. The system they inherited focused more on retribution rather than rehabilitation and did not have any consideration for the rights of the children involved. All three countries had their own ways of correcting children who behaved contrary to the norms of society. Though some of these forms of correction were regarded as barbaric by the international world, they served their purpose of keeping the children on the right track. The customs and traditions in all three countries are such that children do not have rights of their own, but rather their rights exist in that of their parents which exists in that of the larger communities they belong to. From the analysis of the juvenile justice systems in South Africa, Kenya and Zambia, it is evident that they have attempted to abide by the developing international standards regarding the administration of juvenile justice in their respective countries. However, clearly, they have not been able to put these policies and standards into effective practice.

7.1.1 Minimum age of criminal capacity

The minimum age for criminal capacity is defined as the age at which a child can differentiate between right and wrong (Hartley, 2016). As already mentioned in previous chapters, the Beijing Rules require that the minimum age of criminal capacity should not be fixed too low considering the emotional, mental and intellectual maturity of the child. This is

aimed at preventing children from the negative effects of coming into contact with the criminal justice system. Despite this provision made in the Beijing Rule and the General Comment No 10 by the Committee of the Rights of the Child, all the three selected countries have set their minimum age for criminal capacity very low, thus below 12 years, considering the international standards and requirements. Though the minimum age of criminal capacity is not stated specifically by any of the international legal instruments, the UN Committee on the Rights of the Child recommends that the minimum age of criminal capacity should not be set below the age of 12 (UN Committee, 2007).

The legal documents that guide the administration of juvenile justice in South Africa and Kenya make provisions for proving the child's age and for rebutting the presumption of the lack of criminal capacity for children considered doli incapax. For South Africa, a child under the age of seven is irrefutably presumed not to have criminal capacity, secondly, a child between the ages of seven and fourteen is refutably presumed not to have criminal capacity. To this end, the court proceedings begin with the presumption that the child lacks criminal capacity, however in the case of children between the ages of 7 and 14, the prosecutor can charge the child with proof that he or she has criminal capacity (Skelton & Tshehla, 2008). Though these provisions have been to protect children who find themselves in conflict with the law, some scholars have argued that the second presumption refutes the goal of protecting the child since it is easily rebutted (Skelton & Tshehla, 2008). In practical terms, one of the commonest ways in which the criminal capacity of the child is proven is by asking the mother of the child to testify whether the child can differentiate between right and wrong. If the mother answers positively then the child will be considered as having criminal capacity (Skelton, Tshehla, 2008). This practice has been challenged as not being enough to prove that the child has criminal capacity, since it ignores the child's ability to control his or her behavior in line with what he or she understands to be right or wrong (Van OOsten & Louw, 1997 in Skelton & Tshehla, 2008).

The Child Justice Act in Section 35 in the quest to remedy this flawed practice makes provisions on how to prove the criminal capacity of the child. The Act requires that a qualified person usually the probation officer investigate the child's background and prove to the magistrate beyond reasonable doubt that the child has or does not have criminal capacity. The same flawed procedure is used in Kenya as well. The child is usually asked some questions on his background, his activities and his ability to tell what is wrong from right (Kariuki, 2010). The Children's Act of Kenya does not make provisions for rebuttal of criminal capacity; however, the Penal Code of Kenya makes provisions for the rebuttal presumption that a child more than 10 but under 14 years is incapable of forming the intent to commit a crime (Article 14, Penal Code of Kenya).

The Child Justice Act of South Africa, the Children's Act of Kenya and the Juveniles Act of Zambia make provisions for determining or estimating the age of the child in court. However, the Child Justice Act of South Africa provides a much more elaborate procedure for determining the child's age compared to the Children's Act of Kenya and the Juveniles Act of Zambia. The Child Justice Act of South Africa in Section 13 requires that the probation officer consider any previous determination of age by a magistrate, statements made by a parent or any appropriate adult, statements made by the child concerned, school registration forms and other relevant documents like baptismal certificates or an estimation of the child's age by a medical practitioner. Kenya's Children's Act on the other hand only provides that the age be proven by a qualified medical practitioner. This limitation has adversely affected proceedings in Kenya since there has been evidence of cases where children's ages are not proved correctly and these children end up being tried as adults and some adults also end up being tried as children (Kariuki, 2010). There is also evidence that some police officers in Kenya increase the age of repeat offenders and treat them as adults in order to teach them a lesson (Kariuki, 2010). Zambia however, leaves the determination of the age of the child to the court, but it does not go further to

state the ways in which the court is supposed to inquire about the age of the child. Research has shown that since there are no laid down procedures for determining the age of the child, they mostly ignore this requirement and sometimes end up trying children as adults and vice versa (Mumba, 2011).

7.1.2 Detention as a measure of last resort and for the shortest period of time

As already mentioned in previous chapters, Article 37(b) of the Convention on the Rights of the Child, Article 19(1) of the Beijing Rules and Article 2 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL) all provide emphatically that detention be used as a measure of last resort and if it becomes necessary, it should be for the shortest appropriate period of time. Consequently, all the three selected countries have acknowledged the importance of using detention as a measure of last resort by domesticating this principle in their constitution and other legal documents. However, there is evidence that one of the struggles these countries continue to face is to practically ensure that detention is used as a measure of last resort (Human Rights Watch, 2016). This is evident in the number of children that have been held in detention in these countries despite the continuous calls to use alternative forms of punishments instead. Lots of children all over the world continue to suffer behind bars sometimes for long periods of time (Human Rights Watch, 2016). Unfortunately, due to the lack of record keeping in most countries, the exact number of children held under such conditions is unknown which makes it very challenging (Human Rights Watch, 2016).

From the analysis of the various legal documents regarding juvenile justice administration, it is clear that South Africa and Kenya have more elaborate policies when it comes to using detention as a measure of last resort. Zambia on the other hand also has some provisions stated in its legal documents, however, it does not explicate any provisions that ensure that detention is used as a measure of last resort. This may also be explained by the absence of a dedicated juvenile justice system for child offenders (Human Rights Watch, 2016) and Zambia's

refusal to enact a comprehensive children's code as recommended by the CRC (UNICEF, 2012). All three countries have however been accused of detaining child offenders together with adults, though their legal documents and international standards prohibit this act in an attempt to avoid the criminal contamination of the child (Odongo, 2017; Human Rights Watch, 2016; Mumba, 2011; Kariuki, 2010). Thus, there is much evidence to prove that, detaining children in adult prisons compromises their basic safety, well-being and future to stay away from crime and reintegrate into society (Committee on the Rights of the Child, 2007).

There is also evidence that all three countries continue to detain child offenders prior to their trial though it is prohibited. Though pretrial detention was supposed to be used in exceptional cases where the release of the child will not be in his or her best interest or serve the purpose of justice, it has been reported to be a standard practice in all the three selected countries (Odongo, 2017; Human Rights Watch, 2016; Mumba, 2011; Kariuki, 2010; Committee on the Rights of the Child, 2007; Kankasa, 2006). Though the Section 21 of South Africa's Child Justice Act, Section 5 of Kenya's Children's Act and Section 59 of Zambia's Juveniles Act provide for the release of child offenders on bail, there is evidence that most of these child offenders are denied bail for very flimsy reasons (Odongo, 2017; Mumba, 2011; Kariuki, 2010; Kankasa, 2006).

7.1.3 Diversion from the criminal justice system

In order to prevent stereotyping of child offenders which may end up jeopardizing their future goals and aspirations, the UNCRC in Article 40(1) provides that, in dealing with child offenders, all states must ensure that the dignity of the child is promoted and not destroyed. Consequently, Article 40(3) of the UNCRC and Beijing Rule 11.1 provide that, states should find alternative and more appropriate and desirable ways of dealing with child offenders without resorting to judicial proceedings. It provides that states resort to alternative forms of punishments

such as supervision orders, counselling, probation, foster care, education and vocational training programs. Consequently, all three selected countries have made such alternative provisions in their legal documents that show compliance on paper to the provisions of the CRC.

South Africa's juvenile justice system has a very well-structured diversion system which is provided by the Child Justice Act. The Child Justice Act in its provisions offers a lot of options that aim to divert children away from the court towards more restorative justice options that will hold children accountable for their crimes outside the confines of the court or prison (Skelton, 2015). The Children's Act 2008 of Kenya and the Juveniles Act of Zambia on the other hand do not make clear and detailed provisions for diversion, however, they do make provisions for the magistrate to divert cases and resort to alternative forms of punishments. It is however evident that, on the practical level, all three states fail to adequately consider alternative forms of punishments (Odongo, 2017; Mumba, 2011; Kariuki, 2010). The extent to which they are likely to consider diversion may however vary with South Africa being the most likely state to divert a case from the court because diversion in South Africa was being practiced before the Child Justice Act was enacted (Wood, 2003).

7.1.4 Special treatment of child offenders

As required by Article 37(c) of the UNCRC, States that have ratified the CRC are to ensure that children who find themselves in conflict with the law are treated with dignity, taking into consideration their age and needs as children. They are not supposed to be deprived of their liberty, however when the need arises, such children are to be separated from adults unless it is in the child's best interest not to do so. The child also has the right to remain in touch with his or her family through visits except in exceptional cases. This provision therefore requires that states establish a separate facility for children deprived of their liberty, and that they should ensure that

they have “distinct, child-centered staff, personnel, policies and practices” (Committee on the Rights of the Child, 2007).

Article 40 of the CRC outlines such provisions that states must adhere to, in order to ensure that children are treated differently from adults in court. It further provides that all professionals involved in the administration of juvenile justice, have adequate knowledge and training about child development and the pathways that are appropriate to their well-being. This provision has been adhered to in different ways by different states. South Africa for example requires that juvenile cases are heard separate from adult cases, and there is evidence that this is done at times when there are no other cases ongoing (Child Justice Act, Section 66(1)). Despite this provision, children in South Africa still do not enjoy the full benefit of having an entirely separate court as required by the CRC. Kenya on the other hand has built a separate court building and requires that the setting is friendly (Children’s Act Section 188-189). However, research has revealed that, these children’s courts are located in only two major cities, hence children do not fully benefit from having a separate court in the majority of the cities and even in the two major cities where the courts are located, there is usually pressure on the facilities (Kariuki, 2010). Zambia however has been chastised for not making any efforts to improve the infrastructure left behind by the colonial settlers, let alone build a separate system for juveniles (Human Rights Watch, 2016; Mumba, 2011; Kankasa, 2006). Despite the absence of infrastructure, the Juveniles Act does include provisions for a child friendly court procedure (Section 68, 119, 120).

With regard to training professionals to handle issues concerning children, South Africa has established the “one stop child justice centers” with the quest to train police officers and get them to acquire knowledge regarding how child offenders should be handled. This is a major development considering the fact that the police in South Africa have a bad record of abusing and torturing child offenders (Gallinetti, 2009). Civil society groups in Kenya have also taken

positive steps towards the training of officials involved in the juvenile justice process. For example, they undertook several pilot projects in 2001 in police stations in Nairobi, however, the project collapsed after some time due possibly to the absence of monitoring and evaluation to ensure sustainability (Kariuki, 2010). Others are of the view that the project collapsed because it was not initiated by the government, thus after the initial funders left, it collapsed (Kariuki, 2010). Police officers in Zambia on the other hand have been accused of mishandling and torturing accused child offenders before they are arraigned in court (Mumba, 2011), which clearly shows that they may not have received any training on how to treat child offenders specially as required by the CRC.

7.1.5 Legal aid

Article 12(2) of the CRC provides that children should "be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law". Thus, State parties that have ratified the CRC are expected to ensure that children are given the opportunity to express themselves, which includes most especially children who find themselves in conflict with the law. The complexity of the justice system coupled with the intimidating atmosphere in most courts makes it necessary for child offenders to be provided legal representatives who will make them heard and ensure that they are treated fairly.

The Child Justice Act of South Africa, Juveniles Act of Zambia and the Children's Act of Kenya all make provisions that give the child offender an opportunity to be heard in court. In the cases of South Africa and Kenya, the child is entitled to have a legal representative at all times, and where the child is unable to afford a legal representative, the state is required to bear the cost of acquiring a legal representative. Zambia on the other hand also makes room for the child to be represented by a legal representative, however in the absence of a legal representative, the

magistrate is required to question the juvenile, his or her parents or guardians or the witness (Juveniles Act, 64(4)). However, in practice, it has been reported that children continually appear before court without any legal representation and sometimes even without the presence of their parents or guardian. Most of them are not even aware of their right to have a legal representative in court (Mumba, 2011; Kankasa, 2006). In cases where lawyers are provided by the state, the children find it hard to open up to them because they are being paid by the state and are not trusted by the children (Mumba, 2011). Some of these state lawyers also do not meet the children personally for a briefing of the case before appearing in court (Mumba, 2011). All these flaws do not serve the best interest of the child as required by the CRC; and moreover, they end up intimidating children and further marginalizing them.

7.1.6 Sentencing

The UNCRC requires that states that have ratified it treat children special in the criminal justice system. The CRC includes special requirements regarding the detention of child offenders and the types of sentences that should be given out to them. The CRC is against the imposition of long-term sentences on child offenders and consequently does not allow any child to be sentenced for life in prison (CRC, Article 37). The Beijing Rule 17 also provides that, before any child is sentenced his or her well-being must be taken into serious consideration and the sentence must be limited to the barest minimum. Rules 17.2 and 17.3 further provide that, no child should be subjected to any form of capital or corporal punishment.

All three selected States can be lauded for prohibiting the imposition of life imprisonment on a child offender (Juveniles Act, Article 72; Children's Act of Kenya, Section 18(4); Child Justice Act, Chapter 10). The legal documents of both Kenya and South Africa have also made provisions to ensure that no form of corporal or capital punishments are imposed on child offenders. Zambia's Juveniles Act however provides in Section 73(e) that a juvenile who is

guilty of an offence may be ordered by the court to be caned. Zambia has also been chastised for not making any provisions against the torture of child offenders, and it has been alleged most of the children who find themselves in conflict with the law are subject to torture and inhumane treatment (Mumba, 2011). However, in practice, studies have revealed that South Africa and Kenya are not any different from Zambia. Though they have made provisions in their legal documents, they do not adhere to them in practice. A study conducted in South Africa revealed that children are sometimes sentenced to life imprisonment while others are detained for very long periods of time (Gallinetti, 2009). Though Kenya's Children's Act prohibits any form of imprisonment of children in conflict with the law and recommends that child offenders be sent to rehabilitation schools and borstal institutions (Section, 90), it has been reported that, due to the poor measures in place to determine the age of the child, some children end up being sentenced as adults (Kariuki, 2010). Section 25(2) of the Penal Code of Kenya also provides that children convicted for capital offenses will be detained at the pleasure of the president. This sometimes leads to long periods of detention which end up infringing on the rights of the child and the provisions made by international law.

7.2 Possible range of motivations for ratifying the UNCRC and other UN based conventions and guidelines related to the treatment of children in conflict with the law

Undoubtedly, the history of colonialism and the existence of international law continues to play a significant role in developing countries all over the world. From the analysis of the legal documents of the three selected countries, it is evident that all three states willingly ratified the UNCRC and other legal documents regarding the administration of juvenile justice in their countries. Consequently, by signing and ratifying these international treaties, they have agreed to adhere to their provisions by domesticating the laws and putting them into effective practice.

Clearly, though these states have done an adequate job domesticating these international legal documents, they have not been able to put them into practice fully.

Other studies have also shown that states all over the world find it very difficult to enforce international laws though they are very quick to sign and ratify these laws (Mensa-Bonsu, 2017; Odongo, 2017; Cunneen, Goldson & Russell, 2016; Muncie, 2015; Kilkelly, 2013; Kilkelly, 2008). This, some scholars argue is because international laws are not designed to ensure that member States comply to them, rather they are designed in such a way that States are motivated to only ratify them (Hafner-Burton & Tsutsui, 2005). States are aware of this flaw and therefore do not mind ratifying the laws even when they do not have the capacity to implement them (Hafner-Burton & Tsutsui, 2005).

Different schools of thought have arisen in the quest to find the motivating factors that cause states to ratify international treaties. This section of my study is therefore an attempt to examine the possible motivating factors behind the selected state's decisions to commit to international treaties regarding juvenile justice administration and issues relating children's rights. Some scholars argue that states usually commit to international laws that they intend to implement domestically since they already align with their domestic practices, thus making implementation and compliance very easy (Lightfoot, 2012). This argument is in line with the rationalist perspective which asserts that states strategically choose to commit to the norms and international regimes that align with their national interests and when international institutions are designed to enforce observance of law (Lightfoot, 2012; Downs, Rocke, & Barsoom, 1996 in Hafner-Burton & Tsutsui, 2005).

South Africa for example had a long struggle with human rights abuses during the apartheid period. Children most especially black children were the main victims of human rights violations at the time (Mosikatsana, 1988). Hence, in the post-apartheid era the main focus has been to establish basic human rights and a democratic society (Skelton & Coutenay, 2015;

Skelton, 2012). Consequently, this might have been a motivating factor for their ratification of the UNCRC, since South Africa already had a national interest to better protect the basic human rights of its citizens. This is again evident in how the UNCRC influenced the drafting of the South African constitution which focused on children's rights in Section 28 and the direction later taken by the development of the country's juvenile justice system (Skelton & Coutenay, 2015). A report by UNICEF further states that the CRC was the first international convention ratified by South Africa and this led to the South African government making changes such as the prohibition of corporal punishment and the development of a separate juvenile justice system which was incorporated in the Child Justice Act (Seymour, 2010).

Kenya as a state has also had its struggles with ethnic conflicts which lead to the violation of the rights of the people. In most of these circumstances, children are the most affected (Kurian, 1992). Though Kenya continues to be one of the countries accused of violating the rights of their children (CRIN, 2012), there is also evidence from Kenya's constitutional mandate to protect the rights of children (Constitution of Kenya, Part 5), that the country has some interest in ensuring that the rights of the citizens especially children are protected. This might also be a motivational factor for Kenya's compliance to the UNCRC through policy domestication.

Zambia's interest in the preservation of the rights and dignity of its citizens can be traced to the colonial era where the country faced massive discrimination and exploitation, which led to a movement aimed at ending the exploitation by the British settlers and ensuring that citizens enjoyed fair and just treatment (Mbagaya, 2015; Gascoigne, 2001). This kind of motivation to stop citizens from being exploited by colonial settlers can be found across all three selected states and also across most post-colonial states in Africa. Consequently, it can be said that these states have an innate interest in protecting the rights of their citizens, which includes children though how they perceive human rights in general may be different. All three states have clearly

been influenced by the occurrences during and after the colonial era which continues to have an impact on the decisions they make as post-colonial states.

Obviously, all states have personal interests and goals that they seek to achieve, and that as such they will be motivated to ratify an international law if the law resonates with their own goals. Proponents of the constructivist school of thought on the other hand are of the view that, states' commitments to human rights norms happen gradually as the human rights norms align with global norms overtime and eventually leads to compliance (Lightfoot, 2012; Hafner-Burton & Tsutsui, 2005).

The constructivist perspective is also very worthy of note considering the historical background of the selected African states and the fact that the world is gradually becoming globalized due to neoliberalism, globalization and international trade. States have become interconnected to each other and somehow tend to follow the precepts of other states. With the continuous desire of most developing states to become recognized as developed states, they will do anything that they suppose will present their countries as compliant to global norms. As Mutua, (2007) puts it "human rights are imprisoned in universality" it is birthed out of democracy which states all over the world have gladly embraced. Hence, without considering the feasibility of implementing human rights norms, states feel obligated by virtue of their being part of a global village to ratify human rights treaties.

Some other scholars have argued that states that have unstable democracies are more likely to advocate for a binding human rights regime, while established democratic states and authoritarian states are very likely to resist human rights laws due to the relative balance of sovereignty cost against the marginal benefits of enhanced political stability (Moravcsik, 2000 in Hathaway, 2007). Hathaway (2007) however disagrees with this argument and asserts that, in states where the executives have more control over the process of making and committing to treaties, the government is more likely to work towards achieving some policy goals by

committing to treaties. Stable democratic states usually have the executives of the state making and enforcing the majority of the laws. South Africa, Kenya and Zambia are democratic states where decisions are made in parliament by the executive body of the government. These states have also ratified a number of human rights treaties including the UNCRC which questions Moravcsik's (2000) argument. It is true that authoritarian states are likely to resist human rights norms since they do not usually want any form of international interference. Moravcsik's (2000), argument is also very valid for a well-established democratic state like the USA which is mostly reluctant to sign human rights treaties including the UNCRC.

Simmons (2009) in Lightfoot (2012) also identify some other reasons why states commit to international law. According to her, states have two commitment behaviors which include "false positive commitment" and "false negative commitment". A state's commitment behavior can be described as "false positive" when it strategically ratifies international treaties in order to avoid international or domestic criticism. This assertion is supported by a study conducted by Hathaway (2007) of 160 states in order to find the various reasons that influenced a state's decision to ratify human rights treaties. His study revealed that states will make a decision to ratify human right treaties based on how individuals and other states and organizations will react to the state's decision to commit to the treaty and how they will react in the event of compliance or noncompliance to the terms of the treaty. Hathaway argued that the more likely states have to change their human rights behavior as a result of committing to a treaty, the less likely it is for the state to ratify the treaty in the first place. Consequently, it is easier for states to ratify human rights treaties when they know they will not be forced to change their human rights behavior or be criticized for non-compliance.

Considering the fact that the UNCRC is supposed to be domesticated and enforced by individual nation states, and its breech usually attracts no sanctions (Goldson & Muncie, 2012), states will domesticate international laws so that they are not perceived as deviant in the

international world and such ratification does not guarantee compliance to the provisions of the law (Hafner-Burton & Tsutsui, 2005). “False negatives” on the other hand occur when states are unable to commit to a treaty that is already in line with their values and behavior by reason of their ratification of an international law (Lightfoot, 2012). In addition, states that have a lot of human rights NGOs are more likely to ratify human rights treaties. The reverse can however also be true in instances where the state is reluctant to ratify human rights treaties because they know the NGOs will help individuals file complaints when the provisions of the treaties are not adhered to (Hathaway, 2007; Hafner-Burton & Tsutsui, 2005). States are also more likely to ratify human rights treaties when they know their ratification of such treaties will have an influence on their links to foreign aid, trade or other transnational relationships (Hathaway, 2007; Hafner-Burton & Tsutsui, 2005). Hathaway (2007) further adds that, transitional states for the sake of their international reputation and their material interests (foreign investment, aid donation and international trade) are more likely to ratify human rights treaties, thus they are very likely to take actions that give the impression that they are good international citizens in order for them to attract some attention from the international world.

These arguments can again be connected to the influence and power of globalization. Civil society, NGO’s and INGO’s have played a very significant role in the protection of human rights of people all over the world, and they provide a critical foundation for holding states accountable and ensuring that they comply to international law (Aas, 2013). It is evident that the increased presence of NGO’s, INGO’S and multinational companies in most African countries has some influence on their decision to ratify international legal documents. The fear of being branded as a non-compliant state, which can risk the state’s eligibility for trade partnership, foreign aid and investments may also be one motivating factor for states especially those in developing countries to readily ratify international legal documents. All of the three selected countries have very active NGOs and INGOs that report occurrences of human rights violations

in these states (Uwhejevwe-Togbobo, 2005). In addition, as already mentioned in chapter 2, the economies of these three African states have been shaped in such a way that they continue to depend on the West for economic development, and that consequently they will do anything possible to ensure that they do not lose the current economic opportunities they have.

Furthermore, states are more likely to commit to a treaty if the commitment rate of the other states in its region is high. Other factors, aside from the commitment rate of other countries which can influence a state's decision to commit to a treaty, include the influence of a common history and culture or economic and political similarities (Hathaway, 2007; Hafner-Burton & Tsutsui, 2005). Consequently, it is very possible that these selected African states were motivated to ratify the CRC because other members in their region (Africa) were ratifying it. Thus, the creation of the African Union can also be said to have influenced African States decisions to ratify international treaties since the African Union tends to encourage these states to ratify international treaties and hold them responsible through the African Union Law (Oliver, 2015). Lightfoot (2012) further corroborates the reasons why these African states may be motivated to ratify the CRC by virtue of them belonging to the African Union. She argues that states engage in what she terms "selective endorsement" when the interests of the states compete with international human rights norms. In such instance's states choose to engage in "selective endorsement" in order to avoid the international and domestic political cost of not complying and preserve their identity as human rights supporting states. Thus, in order to avoid any issues with the African Union or other African states, such states will be motivated to ratify the CRC but may not have any intention of implementing it.

Another motivational factor is the era that the state finds itself in. Newer political regimes are more likely to commit to human rights treaties compared to older political regimes. This is because newer political regimes have more to gain from establishing a reputation for a commitment to human rights. They are also more likely to want to distance themselves from the

abuses of older regimes in order to obtain collateral benefits such as investment, trade, aid and political support (Hathaway, 2007).

From the analysis of the legal documents of the three selected states, there is evidence that these states either enacted or strengthened their domestic legislation regarding the rights of children after ratifying the CRC and that these subsequent statutes clearly included provisions that were required by the CRC. Significantly, this was also done in line with other African countries that reformed their legislation on juvenile justice after they ratified the CRC to ensure that their legislation adhered to the provisions of the CRC.

In relation to South Africa, it is clearly stated in the regulations under which the Child Justice Act 75 of South Africa was enacted that the act was meant

> to establish a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the constitution and the international obligations of the Republic; to provide for the minimum age of criminal capacity of children; to provide a mechanism for dealing with children who lack criminal capacity outside the criminal justice system; to make special provision for securing attendance at court and the release or detention and placement of children; to make provision for the assessment of children, to provide for the holding of a preliminary inquiry and to incorporate, as a central feature, the possibility of diverting matters away from the formal criminal justice system, in appropriate circumstances; to make provision for child justice courts to hear all trials of children whose matters are not diverted; to extend the sentencing options available in respect of children who have been convicted; to entrench the notion of restorative justice in the criminal justice system in respect of children who are in conflict with the law; and to provide for matters incidental thereto. (Child Justice Act of 2008 P.1).

This quote provides some substantial evidence which shows that ratification of the CRC was a motivational factor for the South African government to enact the Child Justice Act of South Africa. As already mentioned in previous chapters, South Africa had long suffered human rights violations, hence their government was doing everything possible to protect the rights of the citizens and one of the things they did was to ratify the CRC and amend their constitution (Skelton & Coutenay, 2015).

Just like the Child Justice Act of South Africa, the preamble of the Children's Act of Kenya clearly shows that the CRC was one of the reasons why the government of Kenya enacted the Act. The preamble of the Children's Act No 8 of 2001 states that, the Act was enacted "…….. to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes". This statement also attests to the fact that the CRC was part of the reasons why the government of Kenya enacted the Children's Act. Zambia on the other hand does not have a dedicated legislation for children in conflict with the law except the Juveniles Act which has been amended severally to include the requirements of the CRC. In addition to this, the attorney general of the republic of Zambia reported at the 71st session of the convention on the rights of the child in Geneva, that the constitution of Zambia has undergone some amendments and most importantly has aligned the definition of a child with the definition contained in the CRC (Kalaluka, 2016). Again, a 2016 report presented by the Committee on the Rights of the Child has it that, the government of Zambia has begun to reform their constitution to ensure that it is aligned to the provisions of the CRC (Committee on the Rights of the Child, 2016).

To provide a comparison with other countries, Table 7.1 below shows the years in which other African states ratified the CRC and the legislation they enacted in compliance with the CRC. It is evident from this table that all of these countries domesticated the CRC as required after ratification. In light of this data, it would appear that many African states, including the three selected for this study, by virtue of belonging to the United Nations, saw the need to embrace the UNCRC and domesticate it in their local legislation.

Table 7.1 African Countries that Ratified and Domesticated the UNCRC

COUNTRY	DATE RATIFIED CRC	DOMESTICATED CRC
Benin	August 3, 1990	Code de l'enfant du Benin, 2007
Botswana	March 14, 1995	Children Act 08, 2009
Egypt	July 6, 1990	Children's Act 162 of 2008
The Gambia	August 8, 1990	Children's Act No 38, 2005
Ghana	February 5, 1990	Children's Act, 1998
Kenya	July 30, 1990	The Children Act No 8, 2001
Lesotho	March 10, 1992	Children's Protection and Welfare Act, 2011
Libya	April 15, 1993	Child Protection Act No5, 1997
Madagascar	March 19, 1991	Sur les droits et la protection des enfant, 2007
Malawi	January 2, 1991	Children and Young Persons Act, 2001
Mali	September 20, 1990	Code de protection de l'enfant, 2002
Mozambique	April 26, 1994	Lei de Promocao e Protec cao dos Direitos da Crianca, 2008
Namibia	September 30, 1990	Child Care and Protection Act, 2015
Nigeria	April 19, 1991	Children's Right Act, 2003
Rwanda	January 24, 1991	Law Related to the Rights of the Child, 2012
Sierra Leone	June 18, 1990	The Child Right Act, 2007
South Africa	June 16, 1995	Children's Act 2005
Togo	August 1, 1990	Children's Code, 2007
Uganda	August 17, 1990	The Children Act, 1997.
Zambia	December 6, 1991	Juveniles Act 53

Source: United Nations (2018)

7.3 Outcomes of the ratification of the UNCRC on the administration of juvenile justice in South Africa, Kenya and Zambia.

The comparative analysis done earlier in this chapter clearly reveals the outcomes of the ratification of the UNCRC and how this has impacted juvenile justice in South Africa, Kenya

and Zambia. It is evident that the UNCRC has guided policy and the development of legal documents that guide juvenile justice in these countries. This evidence is clear with South Africa raising its minimum age of criminal responsibility to 10 years. Even though it is low considering the recommendation made by the UN Committee, it is still the highest among the three selected countries. Countries like Ghana (12 years), Uganda (12 years), Tunisia (13 years), Togo (13 years), South Sudan (12 years) and Sierra Leone (14 years) (CRIN, 2018), have relatively higher minimum age of criminal capacity as required by the CRC.

Another outcome of the ratification of the UNCRC is the recognition of the legal rights of child offenders in the three selected countries. This has significantly allowed the voices of children in conflict with the law to be heard and has also ensured that the rights of these child offenders are respected. South Africa, Kenya and Zambia have also adopted alternative sentencing methods like diversion from the criminal justice system, community service, probation and parole in order to prevent child offenders from facing criminal charges in court and to reduce the use of incarceration as a sentence if they are convicted of a criminal offence. They have also given recognition to the importance of separating adults from children in the criminal justice system and provide rules and regulations that makes child offenders distinct from adult offenders (Child Justice Act of South Africa, Juveniles Act of Zambia, Children's Act of Kenya). In addition to these improvements in policy, the constitutions of these countries have been amended to include provisions that protect the rights of children in conflict with the law.

However, as already revealed by my study, the analysis of the juvenile justice systems in these countries also reveals a clear gap between the policy documentation of the provisions of the UNCRC and the practical implementation of these provisions. Some of the reasons for this gap include lack of education and sensitization on the part of professionals and the general public. Most especially on the importance and value of protecting the rights of children in conflict with the law.

Particularly unfortunate is the lack of training among professionals like court judges, probation officers, the police and diversion providers who have been charged with the implementation of the new laws, and the lack of funding from the national, regional and local levels to support the effective implementation of juvenile justice laws and to ensure that the systems are periodically monitored and evaluated. Such monitoring is needed to access the success of procedural reforms within state juvenile justice institutions and to ensure that there is constant innovation and dedication in the implementation of juvenile justice policies and processes. In addition, this type of monitoring can help to ensure that children are separated from adults in the criminal justice system and also to prevent overcrowding and using the same courts for both adults and children (Odongo, 2017; Mumba, 2011; Kariuki, 2010; African Human Security Initiative, 2009; Wadri, 1998 in Odongo, 2008).

In addition to the above-mentioned reasons that account for the existing gap, post-colonial theorists and TWAIL[4] scholars have also made some arguments that explain the current gap that exists between policy and implementation of the UNCRC in African countries. Clearly all three selected countries were colonized by the British and had their own forms of justice systems which were understood and trusted by everyone in the communities. However, the western legal systems which came to replace the African customary law system remain very unclear to the lay person (Hoffman & Baerg, 2011). Most people are not aware of the provisions of these complicated legal documents and procedures and therefore tend to be exploited when they find themselves in conflict with the criminal law. Children are the most vulnerable in such situations since they are mostly not aware of their rights and entitlements.

It is in view of such occurrences that Agozino (2014) and other post-colonial theorists argue that Africa is not ready for western legal systems. This is also because most of the international legal conventions that are signed do not consider the culture and traditions of the

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African people. The laws are termed as universal, when in actual sense the law does not resonate with Africans or their culture and values. Some of the provisions made by the law are contrary to the culture and traditions of the African people (Agozino, 2014; Khapoya, 2012; Cunneen, 2011).

Like post-colonial theorists, TWAIL scholars argue against the current trend of universalizing specific cultures under the pretense of promoting global order, peace and security. Rather, they advocate for a type of international law that will have provisions that cut across all cultures and are accepted by all states across the globe and not just laws that are based on European guidelines and principles (Agozino, 2014; Khapoya, 2012; Cunneen, 2011; Mutua, 2001; Mutua, 2000). As already mentioned, this is one reason for the gap that exists between the policy documentation and implementation of the UNCRC in African countries. TWAIL scholars and post-colonial scholars further argue that, these international laws that are supposedly universal are just new ways of colonizing and exploiting people in third world countries (Agozino, 2014; Khapoya, 2012; Cunneen, 2011; Mutua, 2001; Mutua, 2000). Such arguments may help us understand why African states will not put these laws into practice.

Aside the glaring reasons which have already been mentioned above, it is evident that most African countries are still recovering from the destruction caused by colonialism and the presence of these international laws seem as a threat to their own culture and values (Agozino, 2014). In a report published by the "East African", it is evident that some Africans feel that international laws are biased against Africans, arguing that it is a means by which the developed world continues to maintain sovereignty over African states (Mbaraga, 2016). Such perceptions that exist contribute to the negative outcomes of implementing the UNCRC. Consequently, Gordon (2018), like Agozino (2014), argues that in order to ensure positive outcomes from international law, the laws should respect the need for cultural pluralism and should consider

how different cultures, race, class or religions can be put together to develop international law that will resonate with people from all spheres of the world.

Anghie (2007) argues that, international law was created as a result of the problems that states faced including war, genocide and terrorism. He however argues further that, though international laws were created for a good cause, the creators did not envisage the problems that would arise from creating a system of law that does not account for relations between societies that have different cultural backgrounds, different perspectives about governance and human rights. Scholars in third world countries therefore argue for a kind of international law that will acknowledge and accommodate their uniqueness and cultural relativism such that the laws represent them as well. Thus, international law continues to disempower non-Europeans by disregarding their sovereignty as a people, and in essence represents a continuation of the mission of Europeans to civilize non-Europeans (Agozino, 2014; Anghie, 2007). These arguments clearly show that it is not a coincidence that many African states are not implementing provisions of the UNCRC and other international laws. They may comply on the surface by ratifying such international laws and even go to the extent of domesticating them locally. However, their implementation depends on the commitment of all parties involved, including the lay person who feels his or her culture is being disrespected by "the white man".

7.4 Alternative approaches to dealing with youth in conflict with the law

The African traditional system of justice which was practiced before the arrival of the colonial settlers is very similar to what is now popularly known as restorative justice. Within this type of justice system, the focus is mostly on reconciliation between the victim, the offender and even the entire community (Skelton, 2008). The system ensures that offenders take responsibility for their actions, and also ensures that the offenders understand the harm they have caused by virtue of their actions, and in doing so it gives them an opportunity to reflect on their actions and to discourage them from repeating it (Webber, 2009; Skelton, 2008). This is opposed to the

western idea of retributive justice which was introduced with the arrival of the colonial settlers, which focused more on punishing the offender for their deeds and not how to rehabilitate them. Instead, forms of restorative justice in practice across African countries focused on bringing all people involved together in a co-operative process (Skelton, 2008), which led to reconciliation, restoration and compromise (Webber, 2009; Skelton, 2008). Encouragingly however, with the rise of global restorative justice movements in recent years, interest groups in many countries are advocating more for a justice system that focuses less on punishments and moves towards ensuring that offenders are rehabilitated, and parties involved are reconciled with each other.

Though an ancient paradigm largely used by African and other indigenous people in the past, restorative justice has currently been given a lot of consideration by law makers and justice practitioners all over the world (Skelton, 2008). A report from The Center for Justice and Reconciliation (2018) on the current state of restorative justice around the world shows that, restorative justice in North America was birthed out of the indigenous practices of the First Nations people, a discontent with the prevailing justice system, and a need to meet the needs of victims, and that it is currently being used in prisons, schools and also to deal with child welfare issues.

For example, the report states that, Canadians have drawn on the traditions of the First Nations and employed the use of sentencing circles. It again provides evidence that people in the Middle East have also begun to experiment with restorative justice by applying it to traditional conflict resolution processes, child welfare issues and juvenile justice issues. In addition, Latin Americans, after several years of violence have also employed restorative justice processes to combat the increasing crime and violence rates. Through their national reconciliation efforts, they are building the confidence of citizens in the justice systems and adopting alternative ways of addressing violence and conflict in order to create a "culture of peace" (Center for Justice and Reconciliation, 2018, p. 2). The report further states that, countries in Europe and Asia have also

experimented widely with restorative justice especially in the area of juvenile justice. African countries have also been noted for the revival of indigenous justice practices, the adoption of community services to address the chronic prison overcrowding that exists in many African countries, and the implementation of national reconciliation processes to ensure peace after civil war.

While customary law processes are still widely used in most African countries today, though they are often formally under-recognized (Tamanaha, 2008). They are used in conjunction with the Western legal system in both traditional and local courts in countries like Zambia (African Human Security Initiative, 2009). In other countries like South Africa, Kenya, Ghana, Uganda and Namibia they are used mostly in the Chief's courts in rural areas (Skelton, 2008). The African customary law process in Africa mostly emphasizes on problems rather than offences. Local customary courts listen to the stories of the parties involved and make decisions regarding outcomes, the aim of these outcomes is to heal relationships and ensure restitution and compensation to the victims. They usually conclude the process by making animal sacrifices or sharing a meal which is an indication that the problem has been solved and the offender can now be reintegrated into the community (Kgosimore, 2001 in Skelton, 2008). It is also worthy of note that, NGOs or even governments in some countries have developed other forms of dispute resolution structures that are used as alternatives to the formal justice system (Skelton, 2008).

In South Africa for example, the Child Justice Act has been referred to as an "Africanised" Statute which emphasizes the use of restorative justice processes through diversion from the Criminal Justice System and the importance of preserving the rights of the child since these rights were neglected under the apartheid period (Sloth-Nielsen & Gallinetti, 2011). The Child Justice Act incorporates the concept of Ubuntu which is a Zulu term for humanness which is based on the maxim that "a person is a person through other persons" (Allen, 2008). Hence the Child Justice Act seeks to promote a sense of community responsibility

by ensuring that the child's dignity is not destroyed through punishment, that children are held responsible and accountable for their actions and that reconciliation and reintegration is paramount when dealing with child offenders (Allen, 2008; Skelton, 2008)

Customary law continuous to play a very significant role in Zambia as well. However, while it is used in both traditional and local courts, the justice delivery systems in these courts are unfortunately not backed by the state (African Human Security Initiative, 2009). Despite this challenge, most people patronize the customary criminal justice system compared to the local courts. This is because the traditional courts are perceived to be more democratic, the people are also more familiar with them, and they are believed to deliver justice more promptly and efficiently. The chiefs and elders are mostly in charge of the customary law system and they ensure that it is accessible to all members of the community, regardless of their background or social status. The languages used in these courts are familiar to the local people and the system of justice delivered is restorative in nature (African Human Security Initiative, 2009). However, Zambia's customary law system has been criticized for being gender biased, and the traditional courts run on very low funds due to lack of support from the state. In addition, their method of enforcing judgements has been regarded as problematic and they have been referred to as having a lack of legal status (African Human Security Initiative, 2009). Some of these criticisms are however only valid when the traditional customary law system is measured against the western legal system which arguably makes the criticisms flawed. The system should be considered autonomously and the flaws that will be identified should be addressed for the good of society. When perceived autonomously, with enough support from the state and constant sensitization to ensure that practices that violate the rights of the child are avoided, they may be able to serve justice very effectively, especially because they have the trust of people.

The customary law system in Kenya was treated as inferior to the western formal legal system until 2010 when it was recognized by Kenya's constitution (Kariuki, 2015). Previously,

after independence, there were attempts made to codify the customary laws of the land however, these attempts failed, as they did not adequately interpret and codify pre-existing customary laws. Problematically, these later quasi-codes were treated by judges as authoritative and binding, and consequently the law is interpreted with very little or no flexibility and without considering how the Kenyan society has evolved over time (Malik, 2017; Kariuki, 2015; Kamau, 2010). Kenyan legal scholars argue that this continuous reliance on customary law codes which are supported by the doctrine of precedent has changed the real nature of customary law and hindered its growth and development in Kenya (Malik, 2017; Kamau, 2010). Customary law in Kenya therefore has focused mostly on marriage, succession and land tenure since it was codified, and has not been developed to include other areas of justice (like juvenile justice) which it covers in other African countries like Zambia (Malik, 2017).

A number of scholars have observed that, restorative justice is very effective when it is used to enable diversion of child offenders compared to other areas of justice such as domestic violence (Skelton, 2008). However, there have also been some concerns raised about the existence of some traditional practices which violate the rights of children and do not constitute an ideal restorative justice practice in a modern world (Skelton, 2008). As already mentioned in previous chapters, children do not have rights of their own in the African traditional society, hence they may not be allowed to participate in customary courts. Instead, the decisions are made on their behalf by their parents or elders which makes children's rights activists concerned about the use customary law to rehabilitate children. Some of these traditional courts have also been criticized for meting out punishments (for example, corporal punishments) that infringe on the rights of the child.

A community with a fully vibrant restorative justice must however ensure that, during the process of administering justice the rights of children are protected at the same time. This is because restorative justice processes entrust a lot of power into the hands of communities which

can be dangerous, especially in cases where the community members are not made aware of their roles and limits in terms of raising children. Thus, according to Skelton, (2002: 508 in Skelton, 2008);

> The idea that it takes a village to raise a child seems to be mutating into it takes a village to punish a child as community members, frustrated with high levels of crime, from time to time take the law into their own hands. A report by the Restorative Justice Center (an NGO based in Pretoria) records the findings of a field study of four incidents during the year 2000 in which children accused of offences were assaulted, degraded and in one instance, killed by community members taking the law into their own hands.

In view of such circumstances, some advocates have suggested that some standards be set in order to guide restorative justice processes, however caution must be taken to ensure that the system does not become rigid or destroy the cultural aspect in the process. The UN Commission on Crime Prevention and Criminal Justice was therefore tasked to develop basic principles on restorative justice. The basic principles were developed such that they can be amended at any time when the need arises since restorative justice is an ongoing process which is yet to develop. Some of the basic principles developed include a requirement that the restorative justice process be generally available to everyone, and it should be voluntary. It places emphasis on fairness for both victims and offenders and also emphasizes that all parties be protected from intimidation. It further provides that, restorative justice programs protect the fundamental due process rights of all parties involved, that all discussions during proceedings be kept confidential and that all facilitators of the process be selected from the community, they should be people who are familiar with the local traditions and cultures of the communities they represent (U.N. Doc 2000). It is also recommended that a bottom up approach be adopted when discussing shared values and approaches and how they comply with international, regional and national norms on human rights. In the African context, it is necessary that the custodians of customary law are involved in discussions that lead to the drafting of human rights instruments, as this will ensure

that they are also aware of the new developments that take place and they can be held responsible for any acts that breach the laws.

Chapter 8

Conclusion

The concluding chapter of this study presents an overview of the major research findings and theoretical reflections of the motivating factors that influence African states to ratify the CRC and the outcomes of ratifying the CRC. It further presents some of the challenges faced during the study and makes some suggestions and recommendations for future researchers.

8.1 Review of major research findings and theoretical reflections

The UN Convention on the Rights of the Child states that all children have the same rights as adults and these rights must be respected. In addition to this, it provides distinct rights for children in conflict with the law which all states must incorporate in their legal systems to ensure that the rights of these children are preserved. The African child in the past had no rights of their own. They were regarded as vulnerable people who were the responsibilities of their parents, the communities they belonged to and the state. However, the introduction of international laws regarding the rights of children has set the tone for remarkable developments in legislation concerning children rights in Africa. The current study was therefore an attempt to comparatively analyze the juvenile justice systems in South Africa, Kenya and Zambia in order to find out how the ratification of the CRC has impacted the administration of juvenile justice and the rights of children in these countries. It was also an attempt to unravel the reasons behind the ratification of the CRC in these African countries, to find out the reasons for the existing gap between policy and practice of the CRC in the selected African countries and to find out whether it will be more beneficial for African countries to readopt the justice systems that existed prior to the introduction of western legal systems.

The current study revealed that juvenile justice systems in Africa have been developed based on the colonial legacy left behind by the British colonial settlers and continues to be shaped by western legal ideals that tend to relegate African traditional customary laws to the

background though they still exist behind the scenes and are mostly preferred by rural folks in Africa. Consequently, most post-colonial countries practice what legal scholars term as legal pluralism. An evaluation of the justice systems of the three selected countries revealed that, they all still have active customary laws that are used to maintain law and order mostly in the rural parts of their countries. South Africa and Zambia happen to have it translating gradually into their juvenile justice systems, while Kenya on the other hand has not yet developed it to include issues of juvenile justice because the customary laws were put into a quasi-code which made them rigid and difficult to interpret them innovatively.

The current study also confirms the existing gap between policy and practice of the CRC in the three selected countries. All three countries have done a good job to ensure that their laws on child justice issues are representative of the best practices that have been laid down by international law on child justice and rights issues but have not been able to fully implement these laws in practice. Comparatively, the legal documents of Kenya and South Africa have more detailed information on the administration of juvenile justice than that of Zambia. Zambia as a country has gone through a lot of economic challenges which badly affected its economy, hence it continuous to struggle largely in terms of infrastructural development which makes it hard for them to acquire the necessary infrastructure needed to have an ideal juvenile justice system hence they have been noted for mixing children with adults in the criminal justice system.

The study further revealed that, among the three selected countries, South Africa has made more efforts to protect the best interest of the child through restorative justice mechanisms. This may be attributed to their long history of discrimination among black and white children during the apartheid period which brought about the need to develop reconciliatory measures of restoring peace in their communities.

An analysis of the reasons why states ratify international laws revealed that, states are more likely to commit to international laws that fit their personal interests, thus the three selected

states might have been motivated to ratify the CRC because they had personal interests which they perceived will be accomplished by ratifying the CRC. Evidence from their colonial histories and the struggles they had with human rights issues might have set the tone for them to embrace the CRC in order to address human rights violations in their countries. As asserted by Agozino (2014), it is also evident that the leaders of these three selected states continuously strive to become modern since the world has gradually become a global village. Hence, they might have been motivated to ratify the CRC because it was proposed by the Western world and in order for them to be recognized by the West, they must follow the precepts of Western states.

As argued by the constructivist school of thought, it is also very likely that these states decision to commit to the CRC is as a result of the current global occurrences that portray human rights as universal and have gradually become the concern of many states globally. States also perceive themselves to be part of a global village due to globalization which has connected all states together through trade, hence a state which does not support human rights norms is seen as "deviant" since these human rights norms have gradually aligned with global norms overtime. These selected African states for example largely depend on international trade and aid to develop their economies, consequently, their goal will be to portray themselves as compliant to international laws in order to secure their interests of attracting foreign aid, investors and trade partners. Hence, they will be motivated to ratify the CRC even if they do not intend to fully implement it.

The study also reveals that, the selected African states may be motivated to ratify the CRC by virtue of them belonging to the African Union. Thus, they are motivated by other member States in their region who have ratified the CRC, and also because they are bounded by the African Union law which requires them to ratify international laws. Again, their quest to preserve their identity as human rights supporting states may also be a motivating factor for their compliance.

The study further reveals that the gap that exists between policy and practice of the CRC is as a result of the Eurocentric nature of human rights laws including the CRC. Thus, the laws do not resonate with the people in the selected African countries, and it is also clear that for these international laws to be effective all stakeholders must be actively involved including the people at the grass roots. Hence, in these instances where they do not even understand what these laws expect of them, how do they ensure that they do not breach the laws? Hence the need to heed to the advice of post-colonial theorists, TWAIL scholars and other human rights scholars who argue against the Eurocentric nature of human rights. In order to ensure that human rights provisions like the CRC are successful, the cultural relativism of all states must be considered in order to produce a document that will resonate with all state parties in the world. African leaders must also resolve to let go of the idea that anything western is superior, and instead they should focus on developing their states by providing the basic needs of the citizens and making them proud of who they are and what they have.

The study has clearly revealed that the African customary laws still exist passively in the three selected states, however custodians of these laws and the people at the grassroots are not considered when decisions to ratify international legal documents are being made. Thus, though they are neglected, they are needed to ensure the successful implementation of legal documents like the CRC. Consequently, it is necessary that the leaders in Africa consider the educational levels of their citizenry and embark on projects to sensitize and inform them of current developments in basic ways that will get them involved and committed to engaging in practices that seek the best interest of children in conflict with the law.

The study has also revealed that, states all over the world are beginning to adopt restorative systems of justice which is very remarkable. These systems of justice are also very similar to the systems that were being practiced by African states before the arrival of the European settlers. Hence, it is prudent that African states revive their African customary systems

of maintaining law and order. However, in reviving the systems caution should be taken to ensure that though the communities have the power to correct children, they are sensitized on the dangers of treating children in ways that destroy their dignity and self-worth.

8.2 The future of children's rights and customary law in Africa

The United Nations Convention on the Rights of the Child has certainly impacted legislation on children's rights in Africa. It is regarded as a universal children's rights document which becomes legal and binding for states that ratify and sign it. The question however is how universal the UNCRC is? The UNCRC and other human rights instruments are usually drafted by actors in the Western World without considering the needs, culture and values of all the member states who are supposed to comply to its provisions. It also appears that the selected African states have basic issues that need to be addressed in order to prepare the grounds for effective policy implementation. It is again very important that the African traditional customary law is not measured against any western laws. It should be considered autonomous and capable just as other western legal laws are revered. Until such changes are made, it is very likely that human rights legislation including the CRC will continue to receive signatures and ratification but may not be fully implemented.

Furthermore, I personally think it will be very difficult for Africa to do away entirely with the formal European justice system since the system has been perpetuated as being part of democracy which has been extensively embraced. African leaders also continue to believe the only way to attain development is for them to become like the West. Hence, all efforts are being made to ensure that the western culture infiltrates the African culture which is a major problem because everything African is perceived to be inferior. The only possibility I foresee is a hybrid system which will allow minor cases to be handled by African courts. This is currently ongoing in most rural parts of Africa though it is not yet formalized. Hence, there is a possibility that as

the world moves towards the use of restorative justice systems, African states will also revive and formalize the positive aspects of their customary laws and make them more recognized.

8.3 Limitations of the study

The current study was conducted based on secondary data sources and it was very hard for the researcher to verify information from media websites and other online sources that were used. This could have some impacts on the findings that were derived from the study, however most of the information that was reported online was corroborated by information found in journal articles and books.

The findings of the study cannot be generalized since it is qualitative in nature. Also, the three countries are not representative of the African continent. However, the results are transferable because most African countries have similarities in terms of their colonial history, culture, values and practices.

8.4 Recommendations

In my view, all the three countries need to develop a database that will keep track of children in conflict with the law and include information on the kinds of punishments that were meted out to them, how they fared and how they are currently doing after serving their time of punishment. This can be done by training special officials who will be in charge of developing such a database, and constantly monitoring and evaluating the sentencing options and programs that are intended to rehabilitate child offenders.

Massive awareness should also be created in all three countries regarding the importance of preserving the rights of children. All stakeholders should be made aware of the various legal provisions that exist in their countries. All citizens should be abreast with their rights and obligations to children. The awareness should also be extended to the children themselves to ensure that they know their rights and understand what it means to have their rights violated.

All three states should ensure that officials are trained especially on how children in conflict with the law should be treated. It is clear that most of the officials who deal with children in these countries are the same people who deal with adults. It is therefore necessary that standards are set to ensure that any official who deals with children in conflict with the law is well trained on the new standards that have been set regarding children in conflict with the law. The officials should also be given constant refresher training so that they don't become rusty in their duties. They should also be constantly monitored to ensure that they are implementing the best practices that have been laid down for them.

All the three states also need to invest in the development of their juvenile justice systems. Separate courts should be built for children, and they should also build facilities that can help rehabilitate the child offenders. They should also ensure that the children take part diversion and court-related processes and that they are educated to understand the implications of their actions, as this can help to prevent them from reoffending.

It is very common in Africa for people in rural areas to be marginalized and alienated from developments that take place in the urban centers. The leaders of the states should therefore ensure that they decentralize the application of best practices from the urban areas to rural areas as well. This will ensure that people have access to justice no matter where they find themselves. Also, the positive aspects of the African customary laws should be revived and formalized.

The states should also ensure that they develop their diversion programs extensively so that detention will always be used as a measure of last resort. Also, it is important that states have a national data base that registers the births in the country, and that this database be made available to officials in charge of child offender cases so that the age of the child can be more easily determined by the court.

8.5 Suggestions for further research

Future researchers should attempt employing a mixed method approach to data collection and analysis so that both new relevant qualitative and quantitative data can be gathered for different countries and compared to what has already been reported about these countries. In particular, with regard to finding out the motivating factors for ratifying the CRC, it would be useful to interview the policy makers in various African countries in order to find out from their own perspective why they are quick to ratify international law and why they think it is hard to put these laws into practice. This would very likely enable future researchers to more adequately test the theories that have been propounded to explain these occurrences.

8.6 Concluding remarks

Juvenile justice systems in Africa have clearly been developed based on the foundation that was built by the European settlers who introduced it to Africans. These colonial projects clearly did not end with the advent of colonialism, and the Western world continues to rule the affairs of the African people indirectly and they control a lot of decisions and policies that are made in Africa today. In addition to this, the current era of globalization, international trade and neoliberalism continues to change African social organization and systems. Their culture, practices and values have been infiltrated gradually by the western culture. In order to ensure that Africans gain real autonomy from the West, African leaders must take responsibility for the affairs of their countries. Most importantly, they need to ensure that the basic needs of their citizens are met and embark on infrastructural developments that make the existing systems better and ready to support new systems.

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