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Lund University

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Master thesis

By

Karin Ödquist

Detention- a measure of last resort only and for the shortest period of time? A field study of children held in police cells while awaiting trial in South Africa

Supervisor: Professor Michelo Hansungule
Supervisor in the field: Advocate Ann Skelton

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Summary

Detention as a measure of last resort only for the shortest period of time? This is the title of the thesis and also the key question to be investigated. Children involved in the criminal justice system are far too often infringed upon their fundamental human rights. As a result children are subject to maltreatment, neglect and abuse. According to the law, the rights of the child shall in all situations be promoted in order to implement their welfare and well-being.

South Africa is no exception to this neglect of protection. It may in some ways be considered as a country notorious for its prisons and long periods of detention for both children and adults. Regarding the juvenile justice system, the principle of detention as a measure of last resort only for the shortest period of time shall be the point of departure. Strict separation of adults and children in detention, as well as treatment according to age and maturity are essential human rights protection of the child. In theory one may witness these principles as universally recognised and stated in international, regional and domestic law. Practice and theory however seldom coincide. My field study of the criminal justice system in South Africa evidentially illustrates systematic infringements of children's rights. The main issue studied is children detained in police cells while awaiting trial. This is by no means legally justified violating the fundamental human rights of the child.

This thesis will firstly introduce the theoretical approach to children's rights with reference to detention. This will be followed by a presentation of my experience from the field in South Africa with particular reference to children held in police cells while awaiting trial. These cases illustrate not only legal faults but also lack of communication between responsible institutions as a main fault, followed by lack of sufficient knowledge and in some cases pure ignorance. A discussion of the juvenile justice situation in South Africa and its future prospects including the Child Justice Bill, followed by the acts of courts and recommendations for children in the juvenile justice system will conclude my thesis.

Preface

This thesis would not have been able to accomplish without help from the Centre for Child Law, University of Pretoria, South Africa. I hereby wish to thank advocate Ann Skelton and her colleague Upkaar Mungar for receiving me at the Centre and openly inviting me to involve in their cases. Thanks to their enthusiasm and hard work I was able to carry out my field study in a satisfying manner. Besides being great supporters and supervisors they proved to be a great source of inspiration for writing my thesis as well as seeing the importance and value of working with child rights. Thank you!

I also wish to thank Professor Michelo Hansungule, Centre for Human Rights and visiting professor at the Raoul Wallenberg Institute, for the theoretical support of my thesis.

Abbreviations

ACHPR	African Charter on Human and People's Rights
CRC	International Convention on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JDL	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
NGO	Non-Governmental Organisation
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders
SALC	South African Law Commission
UDHR	Universal Declaration of Human Rights

1 Introduction

1.1 Introduction to subject

It is not breaking news that children within the criminal justice procedure are infringed upon the fundamental human rights. According to international law, children are to be protected and cared for in a special manner in order to promote their welfare and well-being. The principle of the best interest of the child shall always be of primary importance when dealing with children. Despite the establishment of the International Convention on the Rights of the Child (CRC) in 1990, following almost complete universal ratification, children are still often unfairly and inhumanely treated.

One of the main problems of South Africa today is the situation of children convicted of criminal offences and held in detention for long periods of time. This is not only against the international standards stated in the CRC, but also in contradiction of the Bill of Rights stated in the Constitution of South Africa.

The Convention on the Rights of the Child entered into force in South Africa in 1995. The ratification was considered a child justice reform, laying great emphasis on the child as an individual with proper procedural rights and guarantees. Although the Constitution of South African explicitly deals with children's rights, its implementation into institutional law gives rise to many questions regarding child justice, as the developments are not sufficiently satisfying. Even though there are more children in total awaiting trial than actually sentenced, the legal tools are predominantly focused on the latter. Despite various efforts to rectify the situation, the amount of children awaiting trial rapidly increases with time.¹ I therefore find it of great importance to study the concept of pre-trial detention of children and the violations of human rights that arises. There is growing public concern in relation to these issues and certainly enough reasons to demand new law reforms in order to abide by the international commitments that South Africa have undertaken. Detention should definitely be seen as a matter of last resort only, especially when it comes to children. Viable alternatives, such as diversion systems and restorative justice, should instead be promoted.

¹ Based on statistics presented by NICRO (National Institute for Crime Prevention and the Reintegration of Offenders) in *Article 40, Volume 5, Number 4, December 2003*, pp 14-15, and by Professor Julia Sloth-Nielsen issued to the Justice and Constitutional Portfolio Committee during the public hearings on the Child Justice Bill stated in *Article 40, Volume 5, Number 1, March 2003*, p 5.

1.2 Aim and Purpose

According to local NGOs and lawyers involved with children's rights and juvenile justice, it is a well-known fact that children are illegally held in custody and victims of serious human rights violations. I therefore wish to analyse these conditions in the light of international legal instruments, as well as South African law. I also wish to engage on a more practical basis and carry out a field study in South Africa concerning juvenile justice and children awaiting trial. Statistics are scarce but it is eminent that children are held in police cells, sometimes together with adult offenders, awaiting trial for an unspecific and often lengthy period of time. This by all means contradicts the fundamental human rights principle that detention shall only be used as a measure of last resort and for the shortest period of time. Children should according to the law rather be speedily transferred to a place of safety or even into the custody of their parents or guardian.

I have been given the opportunity to follow lawyers working in the field raising public awareness on the infringement of children's rights when awaiting trial. I will thus be able to show examples of how children are treated in the awaiting trial procedure in South Africa and the violations of their fundamental human rights. The overall aim of the project is primarily to focus on related cases and how the process proceeds, as well as analyse the international and domestic legal instruments regulating the rights of the child under these conditions. The cases have the potential to improve public awareness of such abuse as well as contribute to the release, or at least an improvement of conditions, of the children in question.

1.3 Research Questions

The main research question asked in this thesis will be: Why are awaiting trial children detained for long periods of time? The succeeding questions will be: What is the correct procedure for children accused of crimes and awaiting trial? What are the relevant legal instruments and how are they implemented into South African domestic law? How are the rights of the welfare and well-being of children promoted within the pre-trial procedure? Is the actual procedure and practice respected by law and sufficient to protect the fundamental human rights of children?

1.4 Hypothesis

Although children are given a separate legal framework to serve as special protection, children are still infringed upon many of their fundamental human rights. Children accused of committing crimes are no exception. Instead of being protected and respected in a fair and humane manner, by for example being placed into the custody of their parents or guardian or to secure care facilities, they are often detained for long periods of time. The

procedure of detention is to be used as a measure of last resort only and for the shortest period of time. Children in these situations are especially vulnerable, victimised and treated in an unfair and inhumane manner. Accused and non-convicted children are even more targeted as they are introduced into the criminal environment without actually being convicted of committing crimes.

1.5 Method and Theory

The theoretical framework used in this project will be derived from a legal perspective studying international law and domestic regulations and its practice. An analysis will be carried out concerning how these regulations are applicable to children on pre-trial detention and the protection of human rights. Further investigation will be carried out finding the possible loopholes and areas where the law is ambiguous, or even silent.

I will analyse and present legislation from an international, regional as well as domestic perspective, focusing on child justice and the procedure of children awaiting trial. My case study will illustrate the situation from a more practical basis evaluating the legal sources and the actual implementation of the law in the field. I will focus on cases involving the detention of the children illegally held in police cells under unacceptable conditions while awaiting trial. My method will constitute of an analysis of the cases based on the facts gathered during the time in the field, as well as its correspondence to international and national law. I will follow lawyers working in the field meeting children and receiving first hand information on their experiences while in detention. This will provide valuable insight information crucial to the outcome of the study. I will also be able to follow how the lawyers in the field work towards improving the situations of the children and possibly realise where the system of child justice fails and who may be held accountable.

1.6 Limitations

Although there are many aspects of children's rights of interest, I have decided to focus on the juvenile justice system and the awaiting trial procedure. There are many other aspects within the juvenile justice system of interest, but due to time restraints this paper will focus on the legal aspects of the awaiting trial procedure and the situation of children ending up detained in police cells due to maladministration of justice. Events arising out of these situations will be highlighted such as the consequences of long detention periods and the concept of childcare.

1.7 Literature review

Regarding the theoretical part of my thesis the main literature used mainly involves commentaries to legal documents as well as practical guides on the definitions and implementation of the law. Manfred Novak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, and Sharon Detrick, *A Commentary on the International Convention on the Rights of the Child*, are of particular interest regarding international law. Other commentaries involving South African domestic law is also highlighted.

Regarding the topic detention as a measure of last resort only for the shortest period of time and child rights in detention as such, no main literature has been found. The subject has not been studied to a great extent and neither is their many cases stating jurisprudence in this matter. There is however a growing public concern in relation to this subject. My field study carried out in co-operation with my supervisor in the field, Advocate Ann Skelton, may be of great reference as an initiative of raising public awareness and highlighting the subject. Her experiences and work as a child rights advisor, highly approved academic and member of South African Law Commission have definitely proved an asset in this matter. My field study as such may otherwise be based on my personal experiences followed by discussions with my supervisor and other legal professionals on the founding of these cases in relation to the law.

1.8 Overview

This paper will first introduce the reader to the subject by presenting the legal instruments on an international, regional and domestic level. With theoretical presentation fresh in mind, a more practical approach will follow introducing the field report carried out in South Africa concerning cases of children awaiting trial in police cells. The cases will be presented and later analysed illustrating the infringements of the law and responsible authorities.

Finally a general conclusion, including the overall picture of the cases and future prospects and recommendations will be discussed. The Child Justice Bill will be presented and its impact on future South Africa and the juvenile justice system. New problems will be identified as well as a discussion on the old constant problems ever since democracy was introduced to the country.

2 International Law and Child Justice

2.1 Introduction

The international instruments dealing with child justice were established in order to protect juvenile offenders from harm and treat them in a fair manner. The overall purpose also included promoting the concept of diversion from imprisonment and punishment, suggesting treatment and rehabilitation as alternative measures.

The main international legal provisions concerning the rights of the child within the criminal justice system are the International Covenant on Civil and Political Rights (ICCPR)² in general civil matters, and the International Convention on the Rights of the Child (CRC)³ with specific reference to children.⁴ There are also a number of non-binding instruments within the field stating recommendations for states dealing with juvenile justice. These main provisions are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice⁵ (also called “The Beijing Rules”), United Nations Rules for the Protection of Juveniles deprived of their Liberty⁶ and the United Nations Guidelines for the Prevention of Juvenile Delinquency⁷ (also called “The Riyadh Guidelines”). Finally the more general United Nations Standard Minimum Rules for the Treatment of Prisoners⁸ could be of interest for children and their rights as prisoners.

When reading the international instruments one can easily see that they all derive from each other declaring the same fundamental human rights and freedoms, as well as promoting the need for special protection of the child. The conventions are all based on the principle of non-discrimination and equality, with the principle of the best interest of the child as the primary obligation and point of departure. These rules should hence be read in conformity with each other in order to reach its outermost aims and a successful implementation.

² Adopted by the UN General Assembly Resolution 2200 (XXI) 16 December 1966 and entered into force 23 May 1967.

³ Adopted by the UN General Assembly Resolution 44/25 20 November 1989 and entered into force 2 September 1990.

⁴ Other international human rights legal instruments such as the International Covenant on Economic, Cultural and Social Rights (ICESCR) and the Convention Against torture (CAT) are also of relevance to children being individuals under the provisions of the conventions. These do not however specifically refer to special treatment for children.

⁵ Adopted by the UN General Assembly Resolution 40/33 of 29 November 1985.

⁶ Adopted by the UN General Assembly Resolution 45/113 of 14 December 1990.

⁷ Adopted by the UN General Assembly Resolution 45/112 of 14 December 1990.

⁸ Approved by the Economic and Social Council of the United Nations, resolution 663 CI (XXIV) of 31 July 1957.

2.2 The International Covenant on Civil and Political Rights

The ICCPR⁹ was the first legal instrument that obliged state parties to establish a unique procedure for young persons in the administration of justice. Concerning children's rights in general, the Convention includes a specific article stating that every child has the right to special protection and shall be treated in a non-discriminatory manner.¹⁰

In relation to the deprivation of liberty and juvenile justice, the ICCPR presents various articles where children are given the right to special treatment and protection. Article 10.2 (a) specifically relates to persons deprived of their liberty and obliges the state to segregate accused persons from convicted persons in relation to their treatment. This refers to pre-trial detainees and to a certain extent persons in custody. Sub-section (b) states an absolute segregation policy where accused children shall be separated from adults at all times, and treated in accordance to their age and maturity. The child's adjudication process shall furthermore be carried out as urgently as possible to avoid spending long time in detention. The article further promotes social rehabilitation and reintegration for children instead of detention and imprisonment.¹¹

2.3 International Convention on the Rights of the Child

2.3.1 Introduction

The International Convention on the Rights of the Child (CRC)¹² is the leading and most respected international convention within child law. It was the first international instrument that legally recognised children as individuals of equal value but with special needs, attention and protection. Ever since it entered into force in 1990, it has gained impressive state approval, and today it is in the unique position of almost universal ratification.¹³ Given this unique character it can not only bring about significant changes within its mandate but also, most importantly, advocate

⁹ See note 2 above.

¹⁰ Article 24, ICCPR.

¹¹ Novak, M, *UN Covenant on Civil and Political Rights, CCPR Commentary*, (1993), pp 189-192.

¹² See note 3 above.

¹³ Only the United States of America and Somalia have not yet become parties to the Convention.

for the rights children that are established in many other international human rights instruments.

The provisions of CRC are not new initiatives per se, but derive from fundamental human rights conventions being the UDHR¹⁴, ICCPR¹⁵ and ICESCR¹⁶. It hereby presents most aspects of human rights law including civil, political as well as social, economic and cultural rights. CRC should not however be considered as a duplicate provision of rights but rather as a supplement specifically dealing with rights related to children.

CRC defines a child as any person under the age of eighteen, if no other applicable law states another age of majority.¹⁷ The provisions set out in the Convention are to apply both in times of peace and conflict and the best interest of the child shall at all times be of primary concern.¹⁸

Another important part of the Convention is the establishment of the Committee on the Rights of the Child with the main function to monitor the implementation of the rights of children. States are obliged to submit reports to the Committee on their progress on the realisation and implementation of relevant legal measures.¹⁹

2.3.2 Children and the Deprivation of Liberty

When dealing with child justice, there are two important articles of the Convention to be considered, namely articles 37 and 40. They refer to the administration of juvenile justice and contain various procedural guarantees and fundamental human rights of significant importance to the child.

2.3.2.1 Article 37

Article 37(a) explicitly prohibits torture, capital punishment and life imprisonment of children. Torture refers to both mental and physical actions and in some cases corporal punishment. Torture and capital punishment are absolutely prohibited regarding persons under the age of eighteen. The prohibition of life imprisonment is not absolute but can be accomplished if conditioned with a possible release. States are however obliged to avoid this

¹⁴ The Universal Declaration of Human Rights, adopted by the United Nations General Assembly Resolution 217(III) 10 December 1948.

¹⁵ See note 2 above.

¹⁶ International Covenant on Social, Economic and Cultural Rights. Adopted by the United Nations General Assembly Resolution 2200 (XXI) 16 December 1966 and entered into force 3 January 1976.

¹⁷ Article 1, CRC.

¹⁸ Article 3, CRC.

¹⁹ See Articles 43-45, CRC.

measure following the principle of imprisonment as a measure of last resort only and for the shortest period of time.²⁰

Subsections (b), (c) and (d) concern children deprived of their liberty. This refers not only to imprisonment but also to arrest and detention. Deprivation of liberty shall in all situations be used as a measure of last resort only and for the shortest period of time. If yet imprisoned, children have the right to be treated with respect and dignity according to their age and maturity. If it is for the best interest of the child, children shall by all means be separated from adults and shall be permitted to keep in contact with their family or guardian at all times. Cases involving children should be of highest priority in the court and hence brought up as speedily as possible. More technical rights include the right to legal and other forms of assistance as well as the right to appeal to relevant authorities.²¹

2.3.2.2 Article 40

Based on articles 14-15 of the ICCPR, article 40 deals with the administration of juvenile justice. It enforces the due process of law and the principle of the right to a fair trial. When a child is accused of committing a crime he or she shall be treated in a proper manner in accordance with human rights standards and with respect to their age and development. The article indirect refers to relevant provisions in the CRC and other fundamental human rights instruments.

Article 40.2 states the procedural guarantees that every child is entitled to. The legal guarantees include principles such as prohibition of retroactive application of law, presumption of innocence, right to a fair hearing, right to appeal and the right to privacy. The procedure per se shall be considered with reference to the age of the child and promote rehabilitation rather than imprisonment.²²

States are furthermore obliged to establish laws that are specifically applicable to children in trouble with the law. The obligations include the important process of deciding on a minimum age of criminal responsibility. Although the determination of the age of criminal capacity is decided independently by states, it must be reasonable and legally justified. Other legal decisions shall also be in accordance with international legal standards and principles. Diverting juveniles out of court to avoid trial shall always be promoted and used when possible.²³

²⁰ Detrick, S, *A Commentary on the International Convention on the Rights of the Child*, (1999), pp 226-8.

²¹ These significant provisions are identically stated in articles 10.2 (b) and article 10.3, ICCPR.

²² See further article 40.2 (b), (i)- (vii), CRC and article 10.3, ICCPR.

²³ Article 40.3, CRC.

Finally, article 40.4 concerns the final judgement and dispositions of the child. Proceeding from the principle of imprisonment as a measure of last resort only, alternative arrangements such as guidance, care, counselling, education and vocational training are to be appropriate measures for the best interest and well-being of the child. The possibility for the child to rehabilitate in society is a norm that should be valued and followed to the greatest extent possible.

2.4 United Nations Standard Minimum Rules for the Administration of Juvenile Justice

Adopted by the United Nations General Assembly in 1985, the Standard Minimum Rules for the Administration of Juvenile Justice, (even called “The Beijing Rules”), are specific set of rules related to juvenile offenders. Although they are not legally binding per se, they are set as a blueprint of how juvenile justice should be administered. They stress the importance of dealing with children in a fair and humane manner with specific reference to their age and maturity.

Promoting an effective and fair juvenile justice administration, the rules are formulated in a manner to suit different national legal systems. The resolution recommends states to adapt their national legislation and practices to the rules of juvenile justice presented, and bring them to attention to relevant authorities and the public.²⁴

In general the rules relate to matters such as the definition of a juvenile, minimum age for criminal responsibility, the aims and objectives of juvenile justice, administration of juvenile justice and the human rights principles to be applied.²⁵

There are also detailed rules on how juveniles should be treated in the criminal offence procedural context, closely related to the legally founded principles enshrined the CRC and other fundamental human rights instruments. Although the least possible use of institutionalisation is highly recommended, the resolution states specific rules on how to protect juveniles that for certain reasons are placed in an institution. Rule 13 stresses the need for alternative methods to imprisonment as for the best interest and well being of the child. Since children are exposed to great risks when imprisoned, detention should, when possible, be avoided and shall only be used as a measure of last resort and for the shortest period of time. If yet detained, children shall be kept separated from adults and entitled to treatment according the UN Standard Minimum Rules for the Treatment of Prisoners²⁶. Alternative measures to imprisonment shall according to rule

²⁴ See rule 1, Fundamental Perspectives, The Beijing Rule.

²⁵ See for example rules 2, 4 and 5, The Beijing Rules.

²⁶ See note 8 above.

17 always, when possible, be used.²⁷ Capital and corporal punishment is absolutely prohibited. Institutionalisation as such shall always be avoided and only be used as a measure of last resort for minimum period of time, promoting rehabilitation and avoiding the deprivation of liberty.

Diversion is a highly recommended method to remove children from the criminal justice proceeding, avoiding involvement in the criminal justice administration to the greatest extent possible.²⁸ If a criminal proceeding still is to occur, procedural guarantees in rule 7 entitles to the basic minimum standards for a fair trial such as the presumption of innocence, right to counsel, right to appeal and right to examine witnesses. Rule 8 stresses the importance of the right to privacy to be protected from unfair accusations and stigmatisation. Legal representation is to be given to the child and free legal aid if it is available in the country. Parents are to participate in the proceedings if it is in the best interest of the child. Rule 10 stresses the importance of a speedy process and high priority of juvenile cases. Once in court, the accused is further entitled to a fair trial including an impartial court²⁹.

2.5 United Nations Rules for the Protection of Juveniles Deprived of their Liberty

Another set of significant, but non-binding, rules within the juvenile justice field are the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL)³⁰. Compared to the other conventions, this resolution goes one step further by specifically dealing with juveniles who have already been imprisoned or by other means institutionalised. They are closely related to the Beijing Rules with frequent cross-references, or by simply stating that children should only be deprived of their liberty in accordance to the rules set forth in the Beijing Rules.³¹ They repeat the important principle of imprisonment as a measure of last resort only and for a minimum period of time, and shall only be used in exceptional cases.³²

The aim of the resolution is to establish minimum standards for how children who are deprived of their liberty should be treated, certifying that children are treated with dignity and not infringed of their fundamental human rights and freedoms. The rules are intended to serve as guidance and reference to professionals working within the field as well as implemented into national legislation for the best interest of the child.³³ It defines the

²⁷ Details on alternatives to imprisonment are discussed in rule 17 of The Beijing Rules.

²⁸ Rule 11, The Beijing Rules.

²⁹ Rule 14, The Beijing Rules.

³⁰ See note 6 above.

³¹ Rule 2.2, fundamental perspectives, JDL.

³² Rules 1-2 and 17, JDL.

³³ Rule 7, JDL.

concept of a juvenile as well as the meaning of the term deprivation of liberty.³⁴

Besides serving as a reference for fair treatment of imprisoned juveniles, the JDL also protects juveniles awaiting trial or in arrest. Rule 17 certifies the presumption of innocence and that pre-trial detention shall be avoided to the greatest extent possible limiting to exceptional cases only, strongly encouraging alternative measures. If however detained, the process should be made of highest priority to ensure shortest time of detention. Children on pre-trial detention should furthermore always be separated for convicted offenders.

2.6 United Nations Guidelines for the Prevention of Juvenile Delinquency

The United Nations Guidelines for the Prevention of Juvenile Delinquency³⁵ (also called “The Riyadh Guidelines”) refers to the juvenile criminal process within the social context, setting out standards for the prevention of criminality among juveniles. They should be read in reference to fundamental human rights instruments with special attention to the Convention on the Rights of the Child. Other aspects such as social, religious and cultural aspects should also be taken into consideration in each specific community.³⁶

With a child centred approach involving family and the community, it advocates for children to be brought up in a peaceful and safe environment to avoid criminal activity and great problems in society. It wishes to avoid penalising children and placing them within the criminal context, conditioned it does not cause severe harm to others. Promoting opportunities such as education and activities for children who are at social risk should serve as a model to prevent youth crime, involving community based services and programmes.³⁷

³⁴ Rule 11, JDL.

³⁵ See note 7 above.

³⁶ Articles 7-8, The Riyadh Guidelines.

³⁷ Articles 1-6, The Riyadh Guidelines.

3 Regional Law and Child Justice

3.1 Introduction

Africa is the only continent in the world that has adopted a specific regional charter on the legal rights of the child. It is a relatively new document since it only entered into force in 1999. It is thus difficult to see its real impact and influence over the continent. Although the continent is provided with a specific charter for children's rights, it does not refer to children within the juvenile justice system as such. The more general African Charter on Human and Peoples' Rights³⁸ (ACHPR) entails the fundamental human rights and duties of both individual and peoples as a group. In this context, children are not seen as a special group entitled to specific rights and freedoms, but entitled to the rights and duties of the Charter as individuals. Neither does the Charter include specific provisions in relation to juvenile justice. The African Charter on the Rights and Welfare of the Child does however specifically protect the rights of children including the situation of children in trouble with the law.

3.2 The African Charter on the Rights and Welfare of the Child

3.2.1 General implications in comparison to the CRC

As the second legally binding instrument for children, the African Charter on the Rights and Welfare of the Child³⁹ (The African Children's Charter) was adopted in 1990 and entered into force by late 1999. All state parties bound to the Children's Charter are also parties to the CRC. Rather than opposing the CRC, the African Charter serves as a complementary provision providing protection and care for African children, catering for their specific needs on the continent. The African Children's Charter improves certain ambiguous provisions of the CRC and introduces new human rights provisions as binding and present within the legal context.

The structure and language of the African Children's Charter is similar to CRC, laying great emphasis on the four pillars of non-discrimination, best

³⁸ African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), adopted on 27 June 1981, entered into force on 21 October 1986.

³⁹ OAU Doc. CAB/LEG/24.9/49. Adopted by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) on 11 July 1990 and entered into force on 29 November 1999.

interests of the child, right to life and to promote the views of the child.⁴⁰ Being different from the CRC, it however takes a rather unique turn and lays great emphasis on the cultural, historical and traditional values of the African people as a collective charter, including customary law in addition to the general principles of international law. It does however claim its supremacy over customary, traditional and religious practices, and discourages rules that are inconsistent with the Charter.⁴¹

One of the great strengths and progressive developments of the African Children's Charter is the holistic approach to human rights being of equal value and indivisible by nature. Unlike former conventions and charters, the status of social, cultural and economic rights are of equal value to the civil and political rights. States are in addition immediately enforced to implement these rights in the best interest of the child without any special ranking.⁴²

Another remarkable feature is the implementation mechanism. The African Children's Charter establishes a committee (called the Committee), which is entitled to an extended mandate not only interpreting the Charter, but also formulating principles and laws promoting the protection and welfare of the child. It is also mandated to examine state reports, as well as given the power to receive individual and interstate communications and to conduct investigations. The African Children's Charter thereby has wider powers and mandate compared to the Committee of the CRC.⁴³

Besides being the first regional binding instrument on children's rights, the African Children's Charter is together with the ACHPR in the unique position of explicitly including duties in its provisions. Children also have responsibilities and duties depending upon their age and maturity. In addition, the common principle of the best interest of the child goes a step further stating that it should be *the* primary consideration rather than *a* primary consideration stated in CRC.⁴⁴

3.2.2 Children and the Deprivation of Liberty

The African Children's Charter does not differ significantly to the CRC in reference to juvenile justice. Neither does it present new reforms nor major

⁴⁰ See articles 3-5, The African Children's Charter and articles 2,3,6,12, CRC.

See further Olowu, 'Dejo: *Protecting children's rights in Africa: a critique of the African Charter on the Rights and Welfare of the Child*, in *The International Journal of Children's Rights*, 2002, volume 10, pp 129-130.

⁴¹ Article 1.3, The African Children's Charter.

⁴² Chirwa, DM: *The merits and demerits of the African Charter on the Rights and Welfare of the Child*, in *The International Journal of Children's Rights*, 2002, volume 10, pp 157-158

⁴³ Articles 42-45, The African Children's Charter.

See further Olowu, (2002), pp 130-131.

⁴⁴ Article 4.1, The African Children's Charter.

improvement within the administration process. It may rather be referred to as a convention restating fundamental principles.

As the African Children's Charter unconditionally applies to all persons under the age of eighteen, the rights of juvenile offenders equally apply to all children.⁴⁵ Article 17 provides a detailed pre-trial and trial rights scheme for arrested or detained children constituting the basic legal principles for children in trouble with the law. Article 4.2 gives an additional right to children guaranteeing the right to be given an opportunity to express their views in all judicial and administrative proceedings. Children accused or convicted of a crime shall be entitled to be treated with dignity and respect to human rights and fundamental freedoms. Furthermore, children are prohibited from being tortured and shall by all means be separated from adults in detention or prison facilities. Fundamental procedural guarantees are furthermore stated including the presumption of innocence and the right to legal and other relevant assistance in the preparation for his or her defence. Cases concerning children are given priority over adult cases and shall be determined as speedily as possible. Reintegration and rehabilitation are preferred measures of treatment rather than traditional aspects of punishment. The family is to play an important role in the future destiny of the child.⁴⁶

The main weakness of the African Children's Charter within the juvenile justice context is the provision prohibiting the press and public from the trial. The trial is only public when the best interests of the child require so. Furthermore it lacks the restatement of certain rights involved with administrative justice, such as the prohibition of retroactive application of law, the right to compensation for child victims and the right against self-incrimination.⁴⁷

⁴⁵ Compare article 2, The African Children's Charter to article 1, CRC where the age of 18 is not absolute.

⁴⁶ Article 17, The African Children's Charter.

⁴⁷ See articles 36 and 40, CRC.

4 South African Legislation and Child Justice

4.1 Historical Background

South Africa currently stands in a transitional phase in relation to child justice law. With its unfortunate history of political oppression, the old legislation reflects the apartheid era and inhibits freedom and the promotion of human rights. Children were particularly vulnerable during the apartheid years and became victims of suppression and treated in a most cruel manner. In relation to the democratic change of government, South Africa signed the International Convention on the Rights of the Child in 1995. In order to live up to its international obligations there was an urgent need for law reform within child law. The newly established Constitution of South Africa included a special provision for the rights of children. It reflects the provisions of the CRC and serves as a complement to the other rights granted as individuals through the Bill of Rights.⁴⁸ The provisions of the Constitution brought about great reform, especially within the child justice field and entitled children to internationally recognised fundamental human rights when in trouble with the law. The remaining legislation within child justice however remained unchanged. The South African Law Commission was requested to investigate into juvenile justice and propose provisions of reform consistent with its international obligations. A separate bill, The Child Justice Bill, was presented to the Minister of Justice but is still in the process of promulgation.⁴⁹

In reference to this background, there is a current move towards child justice reform with the suggested abolishment of old historical legislation replaced by new legislation. The new legislation shall promote the protection and welfare of children and their need to be treated in a more delicate manner in specifically vulnerable situations. With the old legislation however still in force, there is no separate body of legislation dealing with child justice today. The relevant statutes affecting children in trouble with the law are the Correctional Services Act, the Criminal Procedure Act and the Child Care Act. These provisions together with the Constitutional law will be presented, examining the current rights of South African children in the criminal justice system.

⁴⁸ See section 28, 1996 Constitution of South Africa.

⁴⁹ See section 6.3.1 of this paper for a presentation of the Child Justice Bill.

4.2 The Constitution of South Africa and Child Justice

4.2.1 Introduction

The Constitution of South Africa⁵⁰ entered into force in 1996 in relation to the democratic transformation of government. One of the Constitution's most important features is the Bill of Rights, which aims to protect human rights and fundamental freedoms of all individuals living in South Africa. The Bill of Rights specifically recognises that children are more vulnerable in certain situations and shall thus be entitled to special treatment. In relation to children's rights in general, the Constitution aims to serve as a framework with necessary complements from specific institutional mechanisms.⁵¹

Section 28 of the Bill of Rights is specially designed to children's rights, stating the main international human rights principles and freedoms. These are however not the only rights that children are entitled to. The remaining rights stated in the Bill are obviously also applicable to children as their rights as individuals. Section 28 may thus be seen as an additional section stating specific rights of particular importance to children in vulnerable situations. Besides presenting fundamental human rights for children, section 28 explicitly recognises that the best interest of the child shall not only be considered, but shall be of *paramount* importance in every matter concerning the child. A child is furthermore defined as any person under the age of 18.⁵² In addition to the rights guaranteed in section 28, section 9 of the Bill can also be seen as an advantage to children's rights explicitly prohibiting discrimination on account of age. If children are to be treated indifferently from adults there must thus be a well-founded legitimate reason for this manner.⁵³

4.2.2 The Constitution and Children Deprived of their Liberty

In relation to child justice, the purpose of the Constitution is to protect children from the negative influences of being in contact with older criminals by promoting diversion and rehabilitation of children. Section 28.1 (g) states that a child may be detained as a measure of last resort only and for the shortest period of time. All other possible remedies have to have been considered before deciding on detention. If a child is yet placed in detention, he or she is to be separated from detained adults and to be treated

⁵⁰ Constitution of the Republic of South Africa Act 108 of 1996.

⁵¹ De Vaal, J et al, *The Bill of Rights Handbook*, (2000), pp 411-412.

⁵¹ Section 28.1 (h), 1996 Constitution of South Africa.

⁵² Section 28.2 and 3, 1996 Constitution of South Africa.

⁵³ De Vaal, (2000), pp 411-412.

in a manner appropriate to age and maturity. Furthermore, every child has the right to free legal assistance in civil and criminal proceedings provided by the state, if substantial injustice would otherwise result (thereby said to include a majority of situations).⁵⁴

By explicitly referring to sections 12 and 35 of the Constitution, children are further protected by the fundamental human rights of security and freedom of person as well as the rights of arrested, detained and accused persons. Section 12 specifically refers to physical restraint such as detention or imprisonment. It provides both procedural and substantive guarantees making the state obliged to provide good reasons for deprivation as well as guaranteeing fair and just procedures of arrest. The provision further protects against cruel, inhumane and degrading treatment including the prohibition of death penalty and corporal punishment. Detention may not be accomplished without due process of law.⁵⁵ Section 35 furthermore sets out the legal basic norms of a fair criminal procedure. It for example states that everyone who is arrested for committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.⁵⁶

Regarding limitation of rights, section 36 states that this may only be performed in terms of law and considered reasonable and justifiable in an open and democratic society based on dignity, equality and freedom. No law may furthermore limit the rights enshrined in the Bill of Rights.

4.3 The Correctional Services Act

The Correctional Services Act⁵⁷ serves the important task of regulating the arrest and custody procedures. Regarding the procedure for children there have been two significant amendments concerning the time allowed for arrest and pre-trial detention. This was very welcomed in line with the reform process of child justice. Children were formally held in detention in horrific conditions for very long periods without specific legislation prohibiting the procedure. Many reform measures have been considered and implemented for children, but the problem of children held in prisons awaiting trial, still remains a problem in South Africa today. Due to the two amendments made, the provision is rather complicated but will be explained below.

⁵⁴ See section 28.1 (h), 1996 Constitution of South Africa. Section 35.3(g) of the Constitution further entails the right to be legally represented in criminal proceedings.

⁵⁵ De Vaal, (2000), p 502-505.

⁵⁶ Section 35.1 (f), 1996 Constitution of South Africa.

⁵⁷ Correctional Services Act no 8 of 1959.

4.3.1 The Correctional Services Amendment Act of 1994

In order to abide by the Constitution and international legal conventions, the government of South Africa passed Act 17 of 1994 amending section 29 of the Correctional Services Act. This amendment entered into force in 1995 creating legal guarantees of children to be treated differently from adults. Children were only allowed to be detained in prisons or police cells if necessary and in the interests of justice, or if not possible to place the child with parents or guardian, or not possible to be referred to a place of safety. If yet detained, children under the age of 14 were only allowed to be held in prison or police cells for the first 24 hours of their arrest. Children between 14 and 18 were also subject to this provision, but the time limit could however be extended to 48 hours in their cases, conditioned that the child was charged with a serious offence.⁵⁸

Accordingly, children were to be removed from prisons and police cells as soon as possible and rather placed at home with their parents awaiting trial, or alternatively placed in a place of safety if no parents or guardian were found. Children were furthermore to be kept separate from adults in custody at all times.⁵⁹

This amendment was unfortunately a bit too drastic and spontaneous for the situation in the country and it was thus not possible to implement it in a manageable manner. The Government did not receive the necessary time to co-ordinate their activities and the departments were not properly prepared for this reform. Instead of a positive response and reform for the child and society, it led to confusion and crisis with over crowded places of safety and children escaping.⁶⁰

4.3.2 The Correctional Services Amendment Act of 1996

In order to make the previous provision function in a satisfactory and practical manner, the Government passed the second Amendment Act no 14 of 1996. It was intended to be a temporary measure, to give the Government time to develop a new strategy and provide resources to implement the provisions in the 1994 Amendment Act. The Act of 1996 did not change the situation for children under the age of 14. It was only possible to deprive older children between the ages 14-18 of their liberty and hold them in prison while awaiting trial. The time could only exceed 48 hours if they were accused of serious offences and the magistrates believe that the child's detention is necessary for the administration of justice and safety of the community. Another condition is the absence of a secure place

⁵⁸ Section 29.1,2 and 5, 1994 Correctional Services Amendment Act. Serious offences refer to Schedule 2 of the Act and include offences such as murder, rape, robbery, kidnapping and assault.

⁵⁹ Section 29.6, 1994 Correctional Services Amendment Act.

⁶⁰ Skelton, A: *Children, young persons and the criminal procedure*, in Robinson, JA (ed.), *The law of Children and Young Persons in South Africa*, (1997), p 162

of safety within a reasonable distance from the court to allow this procedure.⁶¹

In order to determine whether it is necessary to detain the juvenile the following criteria must be considered; risk of escaping the place of safety, risk of harm to other young persons in place of safety, and the disposition of the accused to commit offences.⁶² Children in these situations are only to be detained in prisons and not police cells or lock-up, and must furthermore be given the highest priority, promoting as speedy cases as possible. The court is required to offer the juvenile an opportunity to obtain legal representation as soon as possible after arrest. Although the regulation does not guarantee the legal representation per se, it gives the child a fair opportunity to apply for legal aid.⁶³

Besides the problem of tightening the freedom of liberty of juvenile and placing children in a criminal environment, the Amendment Act also presented problems of vague statements leaving broad interpretation mechanisms for the courts. The possible sentences for being detained extended not only to the serious cases presented in Schedule II of the Act⁶⁴, but also included vague offences such as “situations of serious nature as to warrant detention”. This is intended to include cases where several less serious offences have been committed, but it may also provide for a possibility for the courts to detain more juveniles committing offences in society and hold them for long period of time.⁶⁵

Although the 1996 Amendment Act was written as a temporary measure, it is still the current applicable law in South Africa today. The South African Law Commission has however developed new law within the child justice system, which is in the process of implementation in parliament. The suggested Child Justice Bill provides law reform in all fields within the criminal justice area, with no exception to the situation of children held on pre-trial detention for long periods of time. The Child Justice Bill will be presented in more detail below.

4.4 The Criminal Procedure Act

The Criminal Procedure Act⁶⁶ regulates the procedure of persons in trouble with the law and their corresponding rights. The Act is not exclusively designed for children, but may rather be seen as a general provision of the

⁶¹ Section 5 (a), 1996 Correctional Services Amendment Act.

⁶² Section 5A (a) (i)-(iii), 1996 Correctional Services Amendment Act.

⁶³ Section 5(a) and (5A) (c) and (d), 1996 Correctional Services Amendment Act.

⁶⁴ Offences included are acts such as murder, rape, robbery with dangerous weapon, kidnapping and assault. For an exhausting list see Schedule II of section 29.5, 1996 Correctional Services Amendment Act.

⁶⁵ Skelton, (1997) pp 162-163.

⁶⁶ Criminal Procedure Act 51 of 1977.

criminal justice system. Neither is a specific court provided to deal with children's matters. There are however certain rules provided that are set aside for children only, giving them additional protection in particular vulnerable situations. These include the role and responsibility of parents, the right to private legal proceedings as well as provisions regulating sentences for convicted children.

4.4.1 Custody and Detention

Accused children should avoid being placed in custody to the greatest extent possible. Children may be released from custody after arrest through section 71, which states that children should rather be released on bail or placed in a place of safety or under the supervision of a probation officer, rather than remain in detention. Children may furthermore be placed into the care of the person in whose custody he or she is in, if the child is brought to court at a set time and place by this person.⁶⁷ To avoid children being placed in custody, the police may further set bail within the first 48 hours for non-serious crimes committed and release the child. Any accused child held in custody for offences where bail can be set, may be released and transferred to a place of safety or under the supervision of a probation officer.⁶⁸

4.4.2 Criminal Proceedings

There are two main provisions that explicitly refer to children and the criminal procedure. Section 153.4 regulates the confidential and private aspects of the proceeding and allows juvenile proceedings to be held in camera, only allowing the accused, his parents or guardian and legal representative present in court. In addition, section 154.3 prohibits the media to publish any material that could reveal the identity and person of an accused person under the age of 18.

4.4.3 The Role of the Parent or Guardian

The role of the parent or guardian in criminal matters is emphasised within the Act. Section 74 states that the parent or guardian should be informed and warned by the police to attend court proceedings. This is regulated in line with the best interest of the child who shall be protected by a significant other in court to be able to be taken back into the custody of the parent after presented in court. In some situations this is however a significant drawback for the child. If there is no parent or guardian to be found, the proceeding will be postponed, leaving the child to wait in custody for the proceedings to be completed. Section 50.5 is said to be applicable in these unfortunate situations. The police are obliged to inform a probation officer when a child is arrested in order to facilitate a speedy process of investigating about the

⁶⁷ Section 72.1(b), 1977 Criminal Procedure Act.

⁶⁸ Section 59.1(a), 1977 Criminal Procedure Act.

existence of parents and other relevant social conditions. If the court further wishes to fasten the process and proceed without the parent or guardian, it may be legitimate through the negative reading of sub-section 2 of section 74. This allows for the court to proceed if parents are not residing within the magistrate area and cannot be contacted without delay.⁶⁹

The Criminal Procedure Act also regulates the right to legal representation with specific reference to parents or guardian. Children are given a special right to be represented by their parents or guardian at criminal proceedings.⁷⁰ This does not however include the pre-trial stage. It is however uncertain whether this is in the best interest of the child and replaces the need for legal representation. Parents are not always suitable for the task due to the possibly of lacking general knowledge about the law and the consequences for the child. The presence of a parent or guardian may however at least provide moral support the child, which is also of significant value.

4.4.4 Sentencing

Regarding the possible sentences of convicted children, the Criminal Procedure Act provides a number of alternatives to traditional imprisonment. The death sentence is completely prohibited as a sentence to persons under the age of 18.⁷¹ The act of whipping is also said to be an unconstitutional sentence.⁷² A probation officer is in certain cases asked to prepare a pre-sentence report regarding the recommended sentencing for the child, promoting individual assessment of the child and the specific interests considered in each specific case. In general, the guiding principle is to divert children from the criminal environment and sentence to rehabilitation programmes and other positive sentences. The absence of specific set of rules for children sentenced to imprisonment furthermore offers strong reasons for avoiding this punitive approach.

A possible sentence that is mainly used with juveniles, who committed their first offence, is sentencing for postponement of passing a sentence either conditionally or unconditionally. This may be constituted as paying compensation, serving community sentence or held under supervision of a probation officer.⁷³ Other alternative sentences could be placing children under the supervision of a probation officer or any other suitable person designed by court, or placing children in a reform school.⁷⁴ Supervision

⁶⁹ Skelton A, *Children in Trouble with the Law: A practical guide*, (1993), pp 7-10.

⁷⁰ See section 73, 1977 Criminal Procedure Act, specifically section 73.3 regulating the parent or guardian as the legal representative. See further section 28.1 (h), 1977 Criminal Procedure Act, regulating the child's right to a legal representative.

⁷¹ Section 277, 1977 Criminal Procedure Act.

⁷² The act of whipping is stated in section 290.2, 1977 Criminal Procedure Act, but was abolished through the Constitutional Court case of *S v Williams 1995 (2) SACR 251 (CC)*.

⁷³ Section 297, 1977 Criminal Procedure Act.

⁷⁴ Section 290.1, 1977 Criminal Procedure Act.

under a probation officer is usually to be preferred if there is no reference to parental discipline that may be a probable cause for committing the offence as such. Since reform school is a serious sentence and resembles imprisonment in many ways, it should not be provided for first time criminals, but be carefully considered by certain criteria before deciding on this sentence. General correctional supervision in terms of house arrest, community services or compulsory attendance of a specially designated course also functions as an alternative to imprisonment.⁷⁵

4.4.5 Children's Court

Due to the lack of specific children's courts within the criminal procedure in South African law, children are to be tried within the same environment as adults. In some larger places there can be a room set aside for juveniles and the prosecution of children. The officers do not however have specialised training, and the courts are accordingly run in more or less the same way as ordinary proceedings. Under South African legislation there is however reference to a children's court. Although it does not specifically refer to criminal proceedings, the Criminal Procedure Act refers to the transfer of certain cases to the children's court where the child may be protected in a certain manner. This is possible under section 254 if a child lacks parents or guardian, or if they are not appropriate to care for the child. The trial may then be stopped and the child ordered to be transferred to the children's court. This is possible even after conviction, giving the present verdict no legal force.⁷⁶

4.5 The Child Care Act

The main aim of the Child Care Act⁷⁷ is the legal establishment of a children's court, the appointment of commissioners of child welfare and the general promotion of the protection, welfare and treatment of certain children.

Regarding children and the justice system, the Child Care Act is mainly considered for its establishment of children's court. Although not directly part of the criminal justice system, children who are accused of committing crimes and fall under section 11 may be, according to section 14.4, transferred to the children's court for further assessment. The court is a good alternative for juveniles who are accused of crime and lack parents or a guardian needing additional protection. Section 11 allows children to be brought to the court if they lack parents or a guardian, or they are not able to

⁷⁵ See section 276 (A), 1977 Criminal Procedure Act and Du Toit, Etienne, *Commentary on the Criminal Procedure Act*, (1993), pp 28-31.

⁷⁶ Section 254, 1977 Criminal Procedure Act read together with sections 11 and 14.4, 1983 Child Care Act.

⁷⁷ Child Care Act no 74 of 1983.

provide appropriate care for the child⁷⁸, and that it is in the best interest of the safety and welfare of the child. The child has accordingly the right to be taken to a place of safety and thereafter to a children's court. Children are in this way diverted from the criminal system and instead assessed by a social worker if he or she is in need of special care.

The children's court is to be held at the magistrate court and every magistrate is automatically a commissioner of child welfare. The main procedure at a children's court should, if possible, be held in another room than the court. It results in an inquiry, rather than a conviction or sentence, where the court makes an order of placement to the child. The order is based on the assessment report presented by the social worker. The child may be ordered by the court to be placed with parents under supervision, with foster parents or at a children's home, or alternatively at a school of industries. While awaiting the inquiry the child is to be held in a place of safety.

To what extent the Child Care Act and its provisions protects and promotes the well-being of the child and diversion from the criminal justice system may be questioned. Using the definition of place of safety may illustrate the possible problems. A place of safety shall be used for custody, observation, examination and treatment of children and for detention while awaiting trial, and is generally defined as:

Any place suitable for the reception of a child into which the owner, occupier or person in charge thereof is willing to receive a child⁷⁹.

This is a very broad definition and may include prison or police cells. Children may also come in contact with police or prisons while waiting to be placed in a place of safety. The children's court is furthermore criticised for being good in theory but unfortunately not used as often as required.⁸⁰

One good improvement to the Act is the child's right to legal representation at any stage of the proceedings and shall be informed that he or she may request this at any time during the proceedings. This was established through the 1996 Amendment Act, section 8A.

⁷⁸ The assessment whether the parent or guardian is able to have custody of the child is determined upon criteria such as mental health, possible assault of child, economic possibilities to support the child or risk of abandonment of child. See further section 14.4, 1983 Child Care Act and in Bosman-Swanepoel HM and Wessels PJ, *A Practical Approach to the Child Care Act*, (1995).

⁷⁹ Definition found in section 1, 1983 Child Care Act.

⁸⁰ Skelton, (1993), pp 13-16.

5 Field study

5.1 Background

It is well-known that children are illegally detained and victims of serious human rights violations in South Africa. Rumours have further stated that children are unlawfully held in police cells together with adult offenders awaiting trial for an unspecified and often lengthy period of time. Not only is this a breach against the principle of detention as a measure of last resort only and for the shortest period of time, but it is also in contradiction of the national legislation prohibiting the detention of children in police cells awaiting trial for longer than 48 hours. Children below the age of 14 may only be held for 24 hours with no exceptions.⁸¹ The possible procedures are thus clearly wrong and unlawful and have to be regulated and investigated further. This was my point of departure when initiating the field study.

Before my arrival in South Africa, I came in contact with Advocate Ann Skelton who is currently working at the Centre for Child Law, University of Pretoria. The centre established a Children's Litigation Project in 2003 in order to undertake impact litigation work in the children's rights sector. Ann Skelton informed me about the problem that children are unlawfully held in police cells while awaiting trial. The Centre for Child Law therefore wished to highlight this matter raising public awareness and showing that these are not only isolated cases but rather occur on a frequent basis in many parts of the country. I was hereby given the privilege to involve in this project and follow the Centre for Child Law and participate in their work on children held in police cells. The purpose was to find more cases of children in police cells and furthermore prove that these are not only isolated cases but happening all over South Africa on a regular basis. After a collection of cases the future intention was to bring about a civil action case and hold responsible authorities accountable. In addition the question of damages to the children were to be considered, making the state compensate for their lack of responsibility and the infringement of law.

I will hereby present my experiences from the field where I have had the opportunity to follow the Centre for Child Law and their legal partners, investigating the predications of children who have been seriously infringed upon their human rights and held in police cells for lengthy periods of time while awaiting trial. Through a number of cases, I wish to illustrate how children are actually treated in the awaiting trial procedure in South Africa and the violation of their fundamental human rights. I will also illustrate the serious nature of these actions following severe implications on the children and their future. Finally I ask myself, where does the implementation of law fail and who may accordingly be held responsible for these infringements?

⁸¹ Section 29, 1996 Correctional Services Amendment Act.

Due to limited amount of time, I was only present for the investigation of certain cases and could not follow up all the cases found in terms of accountability and compensation. I did however witness serious violations of law and neglect of children in the social and criminal justice system in South Africa. A selection of these cases will be presented below. Due to the respect and right to personal integrity, the names of the children mentioned are changed and made fictional.

5.2 “Two lads from Amsterdam”

These were the two cases that initiated the project of investigating the possible fact that children are unlawfully held in police cells while awaiting trial. The cases were running when I arrived at the Centre for Child Law and although the cases were already finalised in the criminal matter, I have been greatly involved in the civil claims arising regarding quantum of damages and compensation for the victims.

The cases concern two boys who were both held unlawfully in police cells with adults for a long period of time. This occurred at the same police station in a small town called Amsterdam in the Mpumalanga province.⁸² Although it became a well-known fact after the first boy was found in a police cell, the same police station allowed another boy to be placed with adults in the same police cell for a significant period of time.

5.2.1 Case of Jan

Jan was 15 years old at the time of the incident. He comes from a socially poor family background with a father on the road and an unknown mother. The family is under social work supervision. Jan was arrested for stealing a purse valued R200.⁸³ When arrested, the court ordered that he should be taken to a place of safety to await trial.⁸⁴ The nearest placement was in another small town called Hendrina⁸⁵, and it was confirmed they had space and were able to take him. Jan was however never taken to this place of safety, but detained at the police station in Amsterdam in a police cell for six weeks.

The cell as such was built for six people but there were a total of 13 people inside. There was no bath and only one toilet. He was never allowed out of the cell to exercise. Jan was placed in a cell with adults. These adults turned out to be serious criminals accused of rape and murder. Jan was raped by

⁸² See “Supplement A” for a map of South Africa and “Supplement B” of the location of Mpumalanga province and Amsterdam.

⁸³ At the time of writing the value of the South African Rand is approximately \$1= R6.50.

⁸⁴ The Child Care Act of 1983 defines a place of safety as “*any place established under s28 [of the Child Care Act] and includes any place suitable for the reception of a child, into which the owner, occupier, or person in charge thereof is willing to receive a child*”.

⁸⁵ See “Supplement B” of Mpumalanga province and the location of Hendrina.

these men several times in the cell and had to continue sharing a cell with them even after the incidents.

A lawyer working on another case in court overheard the Magistrate talking about Jan wondering how long he was to be held in police cells. The lawyer investigated the matter and immediately acted by filing an urgent application demanding the release of the boy. Jan was released and placed at a school of industries. When we met him at school several months later he seemed to enjoy himself there and doing well at school. The problems on the contrary seemed to be back at home with his family. As a result of his time and experiences in the police cell, Jan is planning to sue the Government by claiming R3 000 000 from the Minister of Safety and Security. Whether or not he will be taking an HIV test is under consultation. For the moment the boy is unaware of his HIV status.

5.2.1.1 How Could This Happen?

This case seems to have occurred due to faults by the police and their ignorance for dealing with this matter in a responsible legal manner. Firstly, the police who placed the boy with the adults knew about their allegations of rape and murder and still decided to place the boy there. The social worker that took the report of the rape did not do anything to move the boy away from the rapists. Jan was instead left in the cell experiencing even more rapes. The social worker explained that the reason for her decision to leave him in the cell was because of lack of space at the place of safety where he should have been taken. Since she did not know of any other alternative placements she decided to leave the boy in the cell. I was further told that when the social worker came to take the report of rape, she literally shouted out loud and asked whom the person who had been raped was. She then took the statement from Jan through the bars of the cell. This is by all means a humiliating procedure being both unacceptable and inhumane.

Further ignorance was reported when the police were ordered to take Jan to the hospital for an examination. The policeman who took him there decided to visit his mother instead since the queue at the hospital was too long.

This is by far one of the most serious cases I witnessed when investigating children held in police cells awaiting trial. The consequences were extreme due to ignorance of the police and state authorities.

5.2.1.1.1 Legal Breaches

Not only does this case show the lack of cooperation between authorities and ignorance of staff, but it also shows serious breaches of fundamental human rights law.

Children shall not under any circumstances be held together with adults while in detention. This is a fundamental legal breach from both an

international and domestic point of view. International law clearly states the illegality of placing children with adults in detention in the almost universally ratified Convention on the Rights of the Child, as well as in the International Covenant on Civil and Political Rights. According to South African legislation this procedure is illegal and against the Constitution. Further detailed South African law emphasises the importance of separating children from adults.⁸⁶

One may question the actual legality of placing Jan in detention in the first place. The crime itself may not be considered as a serious crime that justifies detention. According to the Correctional Services Act, detention of young offenders may only be permitted if they are a danger to the public, or necessary for the administration of justice or if no place of safety is available within reasonable distance from the court.⁸⁷ Furthermore detention in police cells may not be permitted for more than 48 hours. If further detention is legally justified it should take place in a prison and only refer to accusations of serious crimes listed in Schedule II to the Act. The schedule does not list theft of R200 as a serious crime.

Since the court ordered him to be sent to a place of safety able and willing to take him, the blame may be put on the police for not following orders. Furthermore, being aware of the risks of placing a child with hardened criminals accused of rape and murder is by no means acceptable and the police must therefore be held responsible for their ignorance and failures to protect the child. If the child should be placed in another institution it would in any case be the court and judicial authorities responsibility to make this decision and simply for the police to follow orders. The police may not itself interpret the law and issue different orders than those of the court.

5.2.2 Case of Steven

Two months later Steven was detained in a police cell with adults at the same police station in Amsterdam. The initial order from the court was to move him to Hendrina place of safety, but this did not happen. Not even after a second court order to move the boy was he removed from the police cell to a suitable place of safety.

Steven is 17 years old. He was charged of theft and taken to Amsterdam prison to await trial. This placement was not suitable for a child. Two women from Amsterdam, who knew about the fate of Steven, contacted a lawyer to ensure that the boy was to be released. He was to be removed from the prison to a youth prison in Barberton⁸⁸, but due to his incomplete documents, he was referred back to the police station in Amsterdam. At the police station he was placed in a police cell with adults who assaulted him

⁸⁶ See for example section 10.2 (b), ICCPR; section 37, CRC; section 28, 1996 Constitution of South Africa and section 29, 1996 Correctional Services Amendment Act.

⁸⁷ Section 29, 1996 Correctional Services Amendment Act.

⁸⁸ See "Supplement B" of Mpumalanga province and the location of Barberton.

and stole his clothes. He was not sexually assaulted but treated in an inhumane manner both by his inmates and the staff.

He was ordered by the court to be removed from the cell but the police did not follow the order. Due to lack of internal discipline by the police and the ignorance of court orders, Steven was detained in a police cell for 30 days. He was placed together with hardened criminals in a police cell and exposed to the great risks evidently shown in the previous case. Although the police had witnessed rape and significant maltreatment of Jan, Steven was not moved to a place of safety, but placed in the cell until further notice.

5.2.2.1 Legal Breaches

Besides the fundamental right of children not be mixed with adults while in detention and detention as such as a measure of last resort only for the shortest period of time, further fundamental breaches may be highlighted. All people, including children have the inherent right to dignity and should be respected and protected at all times. All people have the constitutional right to freedom and security of person including the right not to be treated or punished in a cruel, inhumane or degrading way.⁸⁹

Section 29 of the Correctional Services Act specifically dealing with the legality of detention of accused children has also seriously been breached. Not only were the boys held in detention for more than 48 hours, but they were also held with adults.

5.2.2.2 Legal Consequences

When this came to the lawyer's attention, he once again asked the court to order the release of the boy. This was thereby the second order to remove the boy from the police cell. The police did still not immediately remove the boy from the cell. As a result, a civil claim was initiated to hold the police responsible for their deeds. In addition, two other boys found in police cells at the station and were added as applicants. A warrant was later issued for the arrest of the National Commissioner of Police accused of contempt of court. He blamed his officers for not following his orders. Despite the ignorance of not following instructions or not, the police may be held responsible for the unlawful detention of the boy in a police cell with adults. The boys were hereby moved to a place of safety to await their conviction.⁹⁰

⁸⁹ Section 10 and 12.1 (e), 1996 Constitution of South Africa.

⁹⁰ B and Others v Minister of Safety and Security and Others

5.3 Case of Neo

This is a clear example of an abandoned child in need of care, but instead ends up in the criminal system and drifts in the system for an unreasonable period of time. As a result of this maltreatment, the child is in risk of falling deeper into the system and being exposed to the criminal environment at an early stage in life. Instead of diverting and taking care of the child in a proper manner, he is exposed to the endangered crime environment.

Neo is 14 years old. His mother died when he was 12 and his father is unknown. Due to his mother's death he was placed together with his older brother in the care of their grandmother. Living with his grandmother was not an ideal situation. The grandmother could not always live up to the challenging demands of raising teenagers and was also limited financially, since she did not receive any childcare grants for the two boys.

Earlier this year in May, at the age of 13, Neo stole his grandmother's radio to get money to buy food (according to his statement). The grandmother caught him and was very upset and did not know what to do with the boy. She decided to report him to the police. The police charged him with housebreaking with intention to steal and theft. For the awaiting trial period the grandmother refused to take him back since she said she could not deal with him. Neo was therefore placed in a secure care facility⁹¹ in Sonop⁹². This was on the 6 of May 2004 (he stole the radio on the 5 of May) and this was his first offence committed ever.

Neo did not like his placement and tried to run away several times. He managed to run away three times in total and he always ran home to his grandmother. The last time he escaped his grandmother brought him back to the secure care facility and insisted that they take care of him.

Neo was not to appear in court again until 20 October 2004, being more than five months from the day of the incident. Due to his repeated escapes he was not taken back to the secure care facility, but reminded into police custody at Mabupane⁹³ police station. He was told that his next appearance would be on 26 November 2004.

Police custody for Neo meant being placed in a police cell until his next appearance in court. The cell he was taken to was a big cell with 20 people. There were mostly adults there and he was the only small boy in the cell.

⁹¹ According to the Child Care Amendment Act 13 of 1999, a secure care facility is defined as *'the physical, behavioural and emotional containment of children offering an environment and programme conducive to their care, safety and healthy development'*. Section 28A of the same Act further states that secure care facilities are intended to be used for the reception and secure care of children awaiting trial or sentence.

⁹² See "Supplement D" of Gauteng province and the location of Sonop.

⁹³ See "Supplement D" of Gauteng province and the location of Mapubane.

The adults were not very nice to him and stole his food and forced him to give away his pants in return for another pair of old trousers.

On 25 October, the Centre for Child Law was told about this case by a social worker from the secure care facility that was worried about Neo. There was an immediate call to the police station in order for the boy to be removed, firstly from the adults in the cell and secondly to explain why he was placed in a police cell in the first place, considering his age and the petty crime he committed. The adults were removed from Neo's cell the same day and he was left with one boy only who was about 18 years old. He was however told to remain in police custody until his next appearance in court.

Knowing that this was unlawful, the choice was either to file an urgent application to the High court or to transfer the case to a children's court inquiry. This procedure is aimed at facilitating a placement for a child in need of care.⁹⁴ In the case of Neo this would be a very suitable procedure due to his background and risk of falling deeper into the criminal system due to the broken relationship with his grandmother. The Magistrate of the court agreed to transfer the case into a children's court inquiry and thereby withdrawing the criminal charges and remove the criminal record. The case was thus transferred to an earlier date and until his next appearance in the court ordered him to be removed from the police cell and moved back to the secure care facility.

At court, the charges were withdrawn and Neo's criminal record deleted. His case was transformed into a children's court inquiry according to section 254 of the Criminal Procedure Act. Neo was released back into the custody of his grandmother pending the children's court inquiry. She agreed to this, conditioned that she will be assisted by staff from social services to help manage the child.

5.3.1 How Could This Happen?

This was a relatively happy ending for Neo as he was taken back home and obviously learnt a lesson from his grandmother. He did however spend six days in a police cell and he could have ended up in a far more serious situation in the environment he was placed in. He was removed from his school, witnessed the criminal justice system and was deprived of his liberty in an unlawful manner, including serious human rights violations. The malfunctioning system could have ruined him completely. Fortunately this was prevented, but Neo was obviously traumatised of his recent experiences.

Lack of knowledge is perhaps one of the main reasons for the outcome of the situation in this case. Looking at the failures of the procedure, the

⁹⁴ See sections 11, 14.4 of the 1983 Child Care Act.

probation officer is one of the persons failing to do her job correctly. According to her pre-sentence report, she recommended that a normal court procedure should be followed rather than a children's court inquiry. She referred Neo to be detained at a secure care facility due to lack of space at a place of safety.

The Magistrate's knowledge may also be questioned. He might not even have known about the legal implications of section 29 of the Correctional Services Act stating the prohibition of keeping children in police cells at the of 12 age for more than 24 hours.⁹⁵ He might also have failed to realise that a children's case can be referred to a children court enquiry according to the Criminal Procedure Act, if the child's social situation urges the need for an evaluation.⁹⁶ When the Magistrate was told about this Act he was more than willing to carry out the procedure and remove Neo from the criminal system and rather question his need of care and responsible guardians. Would he perhaps have done this if he were familiar with the procedure at the initial stage?

The principle of proportionality should also be questioned in this case. Does the theft of a radio in your own home legitimise being exposed to the criminal justice system in this manner? Is it furthermore appropriate for the child to spend six months drifting in the criminal system when he is actual need of care and should be in school?

According to my view this is a clear case of diversion and need of proper care rather than a criminal person being held responsible for his deeds. People and authorities involved in this field should know about the alternatives and seriously consider them rather than treated all cases in same manner, disregarding the discrepancy of minors and adults.

5.3.1.1 Legal Breaches

Who ever might be responsible for the fate of Neo, children of this age should not fall victims under the criminal justice system at any time. The common law principle of criminal capacity has to be evaluated. According to South African law, children between the age of seven and 14 are presumed to lack criminal capacity, if it cannot be proven beyond reasonable doubt that the child was aware of its actions and able to understand the consequences. One may question if this was investigated properly.

Regarding the actual crime, the decision to detain Neo was also unlawful. Firstly one may question if it is a crime to break into the house where you are residing and steal something from this particular home, being your own home. Secondly one must evaluate the crime as such and its proportionality.

⁹⁵ See section 4.3.2 above discussing the meaning of this provision.

⁹⁶ See section 254, 1977 Criminal Procedure Act.

Regarding the decision to place Neo in detention was also wrong. According to South African law⁹⁷, detention should only be used as a measure of last resort and for the shortest period of time. Detention of children in police cells may not occur for more than 24 or 48 hours. Detention may be allowed for certain types of offences but should in that case be transferred to a prison and not police cell or lock-up. “*Breaking or entering any premises with intent to commit an offence*” has been removed from the Schedule of offences where detention may be permitted, making Neo’s case further illegal. Places of safety should be considered as an alternative to parental care when dealing with minors.⁹⁸

To place him with adults in the police cell is not only against South African general legislation but also most importantly against the rights of the Constitution. Children shall never under any circumstances be held together with adults when arrested and detained. This is an internationally recognised principle and considered as a fundamental human right for children all over the world.⁹⁹

Although the law may allow for detention in a prison for cases where there is a substantial risk of absconding for a place of safety, this is only permitted in cases where children are above the age of 14. Children below the age of 14 accused of crime shall always be released into the care of the parents or guardian or as an alternative transferred to a place of safety. Incarceration is by all means permitted.¹⁰⁰

One may also question the possible lack of a proper pre-sentence report, made by the probation officer. According to section 4B of the Probation Services Act¹⁰¹, the probation officer must assess the arrested child in order to evaluate the possible orders made against him or her. Assessment is according to the Act defined as:

*a process of developmental assessment or evaluation of a person, the family circumstances of the person, the nature and circumstances surrounding the alleged commission of an offence, its impact on the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor.*¹⁰²

Although an assessment as such was made according to law, one may question the intensity and time spent with Neo in order to reach the decision she did during her assessment. To decide that Neo should follow a normal court procedure rather than a children’s court inquiry despite his poor social conditions and young age, must be questioned as to the law in this matter.

⁹⁷ For example see section 28.1 (g), 1996 Constitution of South Africa; section 29, 1959 Correctional Services Act and section 71, 1977 Criminal Procedure Act.

⁹⁸ Section 29, 1996 Correctional Services Amendment Act.

⁹⁹ See for example article 10.2(b), ICCPR and article 37 (c), CRC.

¹⁰⁰ Section 29.5A(a)(i), 1996 Correctional Services Amendment Act.

¹⁰¹ Probation Services Act 116 of 1991.

¹⁰² Section 1, 1991 Probation Services Act.

An additional comment to Neo's case may be his treatment at court while waiting for his case to be called. The day Neo was to appear in court the police came to collect him at the secure care facility. At court he was put in a holding cell together with adults until his case was called. This was for a significant number of hours. Luckily he was not maltreated by any of the other inmates, but this is by all means an unlawful procedure. There are well known cases of rapes occurring in holding cells where not only adults are victims, but also children. Mixing children with adults in this matter is evidently a big risk for the proper protection and well being of the child.¹⁰³

5.4 Case of Stella

Stella is a 14-year-old girl who has been placed in state custody ever since she was six years old. At the age of six she was raped by her father, which led to the break up of the family and the divorce of her parents. Due to her troubled family background, she was placed in special social care at a so-called school of industries¹⁰⁴. She is still today in state care under this form of supervision. Stella recently became a victim of serious legal breaches, when detained in police custody for over 30 days due to misbehaviour at her school. The Centre for Child Law went to visit her with her lawyer from Ermelo¹⁰⁵. He has decided to legally represent her and bring about a civil claim in the matters arising from her recent experiences in police custody.

Stella is currently at a school of industries in Standerton¹⁰⁶. She has been there for 1½ year. She is not always happy with the situation at school. She often feels that that the school is very strict and treat the girls in a condescending way. Once she came into conflict with the matron. They had a fit where the matron physically abused her for stealing the only mobile phone on campus the students were allowed to use to make phone calls. Stella lost control of the situation and threw three plates on the floor. She also admitted breaking a small window. The principle of the school said he could not take this kind of misbehaviour and vandalism and reported the matter to the police. Stella was taken by the police to the station in Standerton and placed in a police cell pending trial. Two days later she was charged with intentional damage to property. The matter was postponed to a month later awaiting the report from the social worker and department of health and social care before sentence. She was ordered a placement in

¹⁰³ I was for example told about a case where a boy who was suspected for rape was raped himself when held in a police holding cell. He was severely sodomised several times and heavily traumatised. He has been tested HIV positive after his rape experiences and is still awaiting trial for his own case. When this case will be finalised is still unknown.

¹⁰⁴ A school of industries is defined under the 1983 Child Care Act as "*a school maintained for the reception, care, education and training of children sent or transferred thereto under the Act.*" Children placed in the care under this Act are children from broken families and other social problems or disadvantages.

¹⁰⁵ See "Supplement A" for map of South Africa and "Supplement B" for the location of Ermelo.

¹⁰⁶ See "Supplement B" for a map of the location of Standerton.

custody at a place of safety in Hendrina to await the order. Stella was however for some reason not brought to Hendrina Place of Safety, but remained in the police cell for 30 days.

Stella was placed in a police cell together with adults. There were 12 female offenders in the cell at the most, but no one was a child like Stella. She lived under inhumane conditions. They were to sleep two on each mattress and shared one toilet that was not even separated from the cell. There was one sink for them to share and no towels were provided. She was not allowed out of the cell at any time and could therefore not exercise at any time during her stay. She was further restrained from receiving books, even though she was a student supposed to attend school and prepare for exams. She experienced the police as behaving rude towards her. When she asked how long she was going to sit in the cell the police said that did not know and that she would probably stay there for a long time to teach her a lesson.

After 30 days she was finally released from the cell and placed at Hendrina Place of Safety and then back to the school of industries. This all happened during school vacation leaving Stella in an even more delicate situation. Not only was she deprived of her liberty as such, but she also lost the opportunity to go home during the holidays to see her family. She has contact with her mother and Stella wants to go home to live with her. She has however not lived with her mother since she was six and due to her vague family situation this is most probably not a feasible solution.

5.4.1 How Could This Happen?

Stella ended up spending 30 days in a police cell with other adults awaiting trial caused by misbehaving at school. She was completely forgotten during the process and left in a police cell in Standerton. She did not know why this happened and was not given any clear explanation by the police officials. As a result, she missed out her school vacation and experienced a long period of time in a criminal environment not suitable for her vulnerable state as a troubled child. These actions are most definitely in violations of the law and in contradiction of the principle of the best interests of the child.

This girl has since the age of six been in state care whereby the state, as her legal guardian, is responsible for her and her well-being. The state has however failed in this matter and due to reasons of administrative problems left the girl in a police cell for 30 days.

5.4.1.1 The Question of Legal Responsibility of the Police and Justice Department

Although it was ordered that Stella should be placed in a place of safety in Hendrina to await trial, this never happened. The investigating officer who was responsible for transferring Stella blamed the staff at the place of safety for not providing a bed for her. He claimed that the police are obliged to

ensure that a bed is made available to the child at the place of safety before transferring him or her there. According to him, the staff at Hendrina Place of Safety had said that they were not able to take her since they had a financial crisis and could thus not house the child. Only children prior to the shortage could be helped.

The investigating officer then questioned the responsibility of placing her with her parents, but this was not feasible since they are not her legal guardians. The legal guardians of Stella would be the school of industries but they refused to take her.

In the officer's view the only remaining alternative was detention at the police station where Stella accordingly remained for 30 days in a cell with adults. This is not a legal alternative and should not be able to happen. If by all means it is decided that a child shall be detained while awaiting trial, he or she cannot be held in police cell but should be moved to a proper prison. The child furthermore has the right to be treated in a humane manner and according to his or her age and development. Children may never be held with detained persons over the age of 18. Other procedures contradict the fundamental rights of the Constitution.¹⁰⁷ In addition, detention of children for more than 48 hours can only be legally permitted if the child is accused of committing a crime of very serious nature listed in the Schedule II of the Correctional Services Act. "Intentional damage to property" is not included as a crime in Schedule II.¹⁰⁸

While in detention, Stella was placed in a cell with adults. All were female but no one was a minor like Stella. This is in contradiction of both international and national legislation. Children shall under no circumstances be placed together with adults while in detention. The police admit that they were aware of this situation at a later stage but were unable to do anything about it since they are not provided with specific youth facilities. Children who are accused of committing crimes and held in police cells are therefore always placed with adults at this police station. This apparently seems to be a common problem for the police in the province and country as such, but nothing has been done to improve the situation and follow the legal provisions. Furthermore one may question the conditions of the detention in this case. Where they consistent with human dignity stated in the Constitution? According to the Constitution detention conditions shall allow at least exercise, adequate accommodation, reading material and medical treatment. This was evidently not followed in the case of Stella.

To investigate this matter further we contacted the place of safety in Hendrina where Stella was supposed to be taken. We enquired about the procedure and it was shown in the records that Stella was to be accepted on 16 September, but did not arrive until 14 October. The facility was not full

¹⁰⁷ Section 28.1, 1996 Constitution of South Africa and Chapter 4 above.

¹⁰⁸ See section 29, 1996 Correctional Services Amendment Act explaining situations when children may and may not be detained while awaiting trial.

as the police argue. The police also claim they had a transport problem which is meant to explain the fate of Stella never arriving.

In addition, the Magistrate who dealt with this case claimed that he was not aware of the fate of the girl and stated that it is the duty of the police to look after the children in a correct manner. He ordered the girl to be placed at a place of safety institution making the police obliged to follow this order.

5.4.1.2 The Question of Legal Responsibility of the School

The school say they were aware of the fact that Stella was referred to the police and in their custody. They claim that it was not their responsibility but an issue between the police and justice system. Stella does not know of any other student who has been treated in this manner, even though there has been one student who has been accused of stealing a car and other far more serious accusations than breaking a few plates.

Even though the school knew about the fate of Stella they did not show any actions of trying to release her. They also apparently refused to take her back after her charge due to the fact that she has given them too much trouble. Being given this refusal, the police could therefore exclude the option of placing her at the school of industries to await sentence. The principle agrees that the detention procedure was wrong. He claimed that he tried to contact the police in this matter, but was never given a proper answer to the reason why Stella was detained in a police cell.

Compared to other schools of industries this school seems to have a rather strict approach to misbehaviour of students. In other similar schools with children of this kind, matters of vandalism and misbehaviour are not reported to the police. They rather deal with the problems within the school itself and punish the child by withdrawing pocket money etc. Only in situations of very serious nature, where other children are affected negatively or their well-being is threatened, will the police be involved. This could for instance be a drug dealing issue or other very serious matters of this nature. By knowing that the involvement of the police could bring about severe consequences for the children, the schools usually act reluctantly in these matters.

5.5 Case of Simon

This was a boy who we met upon our visit to Hendrina Place of Safety. The main purpose of this visit was to investigate the general procedure for children brought there. We were shown a list of the children currently held there. The interesting part of the list was the differences in dates when the children were said to be brought there by police, compared to the actual date they arrived at Hendrina. In many cases it seemed that the children were

held in police cells for long periods of time before arriving to Hendrina without a legitimate cause.

We met with Simon who had a very irregular record of his actual placement and situation while awaiting trial. According to his story he was accused of housebreaking and rape and arrested by the police on a number of occasions. He was referred to Hendrina place of safety by the court in order to await trial, but the actual referral process was delayed on a number of occasions. He was kept in police cells in Carolina¹⁰⁹ for at least two periods each about two weeks, concluding about one month in total. When held in police cells he was on both occasions placed together with adults in an overcrowded cell. As a minor the older men gave him a hard time when he arrived. He was forced to wash the inmate's clothes and wash their dishes. He was on several occasions beaten by his inmates and humiliated by having to participate in punishment games. He was not raped, but assaulted several times. He did not report any of these occasions since he was scared of the older men. The amount of people kept in the cell varied and they were 27 at the most. There were not enough mattresses for them, so they all had to share. Simon was given a blanket that he used as both a mattress and cover. The food he was given was decent, but when they were given meat, he was never able to eat it since the older men took it from him and he was left with the porridge.

Simon has been sent back and forth between Hendrina Place of Safety and the police cells of Carolina. His next appearance in court was in one week's time. He is charged with three cases in total. He does not have any legal representation. He has applied through the legal aid board but he has never heard anything from them.

5.5.1 How Could This Happen?

Simon's story shows a very common reality of the procedures carried out in the awaiting trial process in South Africa today. According to the staff at Hendrina Place of Safety, they witness many situations where the Magistrate of the court transfers a child to a place of safety but they never arrive. If they arrive they usually arrive late and the child has spent this time in a police cell. They have witnessed a significant amount of children arriving to their institution with vast experiences from long time periods in police cells following inhumane treatment. Some children are open and tell their stories to the staff members, while others may still be traumatised and withdrawn. There are many cases of children being raped or sodomised by fellow inmates, or beaten and treated badly due to the minor age of the child. It also seems to be a common procedure to place minors with adults

¹⁰⁹ See "Supplement B" for the location of Carolina.

unaware of its illegality or quite frankly ignoring the fact that it is unconstitutional in this country.¹¹⁰

5.5.1.1 Legal breaches

Three warrants of detention were found in his file including charges of housebreaking, robbery and intent of rape. The robbery charges have been withdrawn. Simon is definitely a naughty and misbehaving boy but shall not under any circumstances be treated in this manner. According to the law, Simon should have been placed in Hendrina Place of Safety throughout the time awaiting trial and not in police cells at any time. He was even held with adults and treated in an inhumane and unfair manner. This is a clear contradiction of the law and a failure of the police to carry out a proper procedure and following orders from the court. Simon told us that most of his inmates had experienced long periods of time in police cells.

Not only have there been serious breaches of national legislation of the Criminal Services Act and Correctional Services Act, but there have also been serious breaches of Constitutional law and fundamental internationally recognised human rights law. This may not be blamed on the criminal procedure and court decisions, but rather on the communication between various institutions involved and responsible for the children and their well-being.

5.6 Case of Girls in Wolmaransstad

Another very horrifying but interesting case came to our attention at the Centre for Child Law. We were told by a social worker that a number of girls currently residing at a school of industries in Wolmaransstad¹¹¹ had been unlawfully and inhumanely treated when absconding from school. They had all spent at least one week in police cells and some of them even spent another week in prison. Given this information we decided to urgently visit the girls and hear their stories. They were on this particular day appearing in court in Wolmaransstad so we met with them there. We found six of the girls in a holding cell at the court who were charged with malicious injury to property by breaking a window. The charges were apparently withdrawn that day and they were sent back to the school.

We accompanied them to the school to take their statements. The girls all had an independent story to tell us related to absconding from school. We therefore interviewed them one by one to hear about their experiences in order and to, at a later stage, bring about a civil action case holding responsible authorities accountable for their actions.

¹¹⁰ According to section 28.1(g), 1996 Constitution of South Africa “...*children have the right to be kept separately from detained persons over the age of 18 years.*”

¹¹¹ See “Supplement C” for the location of Wolmaransstad.

Although the girls had different stories to tell they all absconded from school and were accordingly left in a police cell for one week without the school doing anything about it, despite the fact that they knew about the fate of the girls. This can by no means be legally correct and the situation clearly needed further investigation.

5.6.1 Case of Sandra

Sandra is 17 years old. She was placed at the school of industries due to misbehaving at her former school and involving with bad friends. She told us that the reason she ran away from this school was because of their system, the atmosphere and the grouping of students constantly favouring certain students from others. They apparently have a system where every student is placed into a group depending on their behaviour. They are treated accordingly, and loose benefits such as dessert and pocket money as they descend on the scale. Being part of the lowest group Sandra felt humiliated and hopeless about the situation and decided to abscond.

According to her story she ran away on a Friday together with four other girls from her hostel. They climbed out of a window, (without breaking it), and went into town to a friend's house and spent the night there. The next day they met other girls from school at a tavern, who also had run away. The police found four of the girls, including Sandra, outside the pub and brought them back to school. At the school one of the staff members said that he didn't want to see them and that he was tired of them and their behaviour. He said they were to go to the police and be taken to jail.

He took them to the police station and opened a case charging them with malicious injury to property. He left them there in the hands of the police. The police then took the girls to another police station in Bloemhoff¹¹², but the staff there said that they do not take care of children. They then went back to Wolmaransstad and spent the night in the living room of the police station. They were fastened together with leg-irons in pairs the whole night. This made it almost impossible to walk and Sandra thought that it was very uncomfortable and heavy. There were no pillows or blankets in the room, only a bench that they were supposed to sleep on. There was one policeman in the room who was to watch them. He was not however a pleasant man since he sexually harassed Sandra touching her legs and telling her that she should go home with him etc. He lifted her skirt and she screamed being terrified of what could happen to her.

On the Sunday morning the other girls who had escaped, came to the police station. They were all moved to another police station in Buffelshoek¹¹³ where they were told that they should stay until they were to go to court. This was very far away and they spent one night in a cell there. The next

¹¹² See "Supplement C" for the location of Bloemhoff.

¹¹³ See "Supplement C" for the location of Buffelshoek.

day they were told that they should go to court in Wolmaransstad. They were all charged with malicious injury to property and told by the prosecutor that they were to be sent to a place of safety until they had to appear in court again. They did not however go to any place of safety, but were taken back to the police cell in Buffelshoek where they spent one week in detention.

The conditions at the police station were decent. They were not mixed with adults in the cell but put in a separate cell where the eight girls were held together. They had a blanket and a mattress each and were allowed to shower every day. They were however not given any books or allowed out from the cell to do exercise during the whole stay.

On the following Friday the police from Wolmaransstad came to see them and told them they were to be moved. They were not all going to the same places but were separated. Three of them including Sandra, were sent to prison, three of them were sent back to school, and two of them were sent to a place of safety. All the girls thought this was very strange and questioned the police. They were then told that all places of safety had been asked, but that they were full and could not take all of them. The police further told them that they had separated them according to age. This was could not however be a true reason since one of the youngest girls went to prison with Sandra, who is one of the oldest. According to all the girls it was quite clear that they had been separated according to race. They didn't find any other reason why the black girls were sent to jail, the coloured back to school and the white girls to a place of safety. Sandra felt very much discriminated and unfairly treated.

Sandra was sent to Potchefstroom¹¹⁴ prison together with two other black girls. The prison was for adults only, but the staff treated them in a nice way. They were given a separate cell and not mixed with any adults at any time. The staff said that they were not supposed to be there and treated them in a fair way. They were however not given anything to do and Sandra felt it was very boring to sit there and just wait for time to pass. The girls were kept in prison for ten days until the following Monday when they were to appear in court again.

At the court in Wolmaransstad they met the other two girls who had been to the place of safety. They were all locked up in a holding cell and not knowing what was going to happen to them.

In court they were told that the charges were withdrawn and that they were to be taken back to school. Sandra felt that she was not treated well. She does not know why she was charged with malicious injury to property since she didn't break anything. She also felt that it was wrong that they were placed with leg-irons and that the policeman sexually harassed her. She finally also felt that it was very wrong and discriminating that she and the

¹¹⁴ See "Supplement C" for the location of Potchefstroom.

other black girls were the only girls sent to prison since they were all charged for doing the same thing.

5.6.2 Case of Christina

Christina has recently turned 13 years. She was 12 years old when this happened. The reason why she was placed in this school was due to problems of misbehaving and having a hyperactive disorder. She is now on medication helping her to concentrate and do better in school.

Christina also absconded from school on the Friday but from a different hostel together with three other friends. They waited until supper and left by walking out of the back door, which was left open, and went to a tavern in town. The police managed to catch them outside the tavern and took them back to school. The staff locked them up in the “lock-up” as punishment. Christina explained the lock-up as a very small room that looks like a prison cell. There are no lights and it smells bad since the toilet doesn’t flush.

The girls spent the night in the lock-up and the next morning they managed to get out by kicking the door open. Christina broke a window so that they could run away again. This time she went to stay at a friend’s boyfriend’s house. She met the other girls there and they all went to a pub. The police caught some of the girls outside the pub including Christina. They were sent back to the school, but there they were told that they were not wanted but they should be sent to jail. They were taken to the police station and charged with breaking seven windows, stealing R2400 and a mobile phone. Christina knew this wasn’t true since she broke one window and the other girls didn’t do anything.

Christina spent the night at the police station in the living room with the other girls. She experienced the same events as Sandra being forced to wear leg-irons to prevent them from running away. She was also sexually harassed by the policeman at the station and was terrified from this experience.

She was also in detention at Buffelshoek police station for a week. When they were told that they were to be moved, Christina was taken to a place of safety together with another girl called Francis. They did not abscond together or related in any other way. The only reason for them being placed together was, according to Christina, due to their race. Christina felt that this was a very racist decision of the police and unfair to be separated at all and especially in this way.

She spent ten days at the place of safety before she was taken to court again in Wolmaransstad. At the court Christina was also placed in the holding cell and then told in court that the charges were withdrawn. Christina admits that she broke a window but doesn’t understand why everyone was punished for that. The punishment was anyway wrong and very serious for

such a thing. She also felt that putting leg-irons on girls and keep them in police cells was wrong and unfair.

5.6.3 Case of Francis

Francis is 16 years old. She has absconded several times, mostly because she has felt lonely during the holidays. She told us that she doesn't have a family and nowhere to go during the holidays. She used to stay in children's homes before coming to this school but since she became naughty and did drugs Francis was transferred to this school of industries.

This time she absconded with a girl called Winnie on the Sunday. She was not part of the girls who went into town during the weekend. These two girls absconded to go and see Winnie's aunt in Pretoria. The police caught them on the road and took them to the police station. Francis thought this was strange since the usual procedure when absconding is to be taken back to school.

At the police station they met the other girls who had absconded earlier that weekend. They were automatically placed with those girls and were also forced to wear leg-irons. Francis furthermore told us that she was not only put in leg-irons at the police station but also hit by one of the policemen. He hit her hard straight in the face for no particular reason.

Together with the other girls she was also taken to Buffelshoek and spent a week in a police cell there, after going to court and been told that she was charged with malicious injury to property.

When the girls later were separated she went to a place of safety with Christina. Francis also felt that it was obvious that the separation was decided according to race and nothing else. She was further convinced when she later saw empty beds and new girls coming to the place of safety while she was there. The explanation that the place of safety was full could therefore not have been true.

Her experiences at the place of safety were mixed. She in general though it was a relatively nice place and even said she would rather stay there than at the school of industries. She also experienced bad things. She woke up one morning and found that another girl had kicked her in her forehead. She was bleeding quite badly. We could still see the sore and her swollen eye. She was also hit in the face by another girl and had some of her clothes stolen. She herself did not hurt anybody at the place.

Francis thought that being put in a police cell and then taken to a place of safety for absconding was very unfair. She doesn't understand why all this had happened. She missed a lot of school and being just before the exams this was not in their best interest. She further confirmed that her injuries at the place of safety would never have happened if she hadn't been put there

in the first place. Being charged with malicious injury to property was also wrong since she didn't break anything. She just walked out of the front gate with Winnie and was not at all involved with the girls who ran away earlier that weekend.

5.6.4 Case of Winnie

Winnie is 13 years old. She was placed at this school of industries since she used to be naughty and do drugs. She was earlier at a children's home since she has lost contact with her biological parents.

Winnie absconded from school on the Sunday with Francis. This was the first time she ran away. She told us about their plan to go to Pretoria to see her aunt. She was taken to the police station with Francis and also thought this was strange. She experienced the same accusations at the police station wearing leg-irons for no particular reason. She was also assumed part of the other girls from the school and sent to court, charged with malicious injury to property, and in detention in a police cell for a week.

When they were told that they were to be moved, Winnie did not leave with her absconding friend Francis, but was taken back to school. Winnie was rather convinced that the only reason for this division was based on racial grounds. There was simply no other way to explain these groups. She questioned why Francis didn't go back with her since they absconded together and should in that case be treated in the same way.

Once she got back to school she wasn't given any additional punishment, the school said she had already served her punishment in the police cell. She did not understand why they were sent to a police cell for absconding. She felt it was very unfair and wrong to treat her in this way. The school obviously knew about her time in the police cells and didn't do anything about it.

5.6.5 Case of Denise

Denise will be turning 15 this year. She was however 14 when this happened. Similar to Sandra she also ran away because of the grouping system at school, which she thinks is unfair and very bad for the children here.

She absconded on the Friday night with Christina and Thandi. She was also caught on the same night and sent back to school and placed in the lock-up. She escaped the following morning with Christina and Thandi and witnessed Christina breaking a window in order for them to get out.

The police did not catch Denise until Sunday morning when she was walking on the street together with another girl called Sara. They were taken

to the police station where they met the other girls who had been caught the day before. She was not placed in leg-irons but was forced to join the other girls to the police station in Buffelshoek where they were placed in the well-mentioned police cell.

When they were to be separated by the police Denise was one of the girls who were sent to prison. She did not understand why. She was told that there was not place for all of them at the place of safety. She felt discriminated based on racial grounds, since they were only black girls going to prison.

She was very scared since she had never been to a prison before. She explained that they were put in a separate cell and treated in a nice way by the staff. They did not mix with any criminals or any other adults. The staff said that his was place for old people and not children. Denise stayed in the prison until the following Monday when she was taken back to court in Wolmaransstad with the other girls and eventually told that the charges were withdrawn and that they should go back to school and behave.

Denise admits that she ran away from school twice that weekend, but doesn't think it is fair that she was treated in this way. She is a child and should be in prison but rather in school.

5.6.6 Case of Martha

Martha is 14 years old. She was placed in a school of industries since she used to run away from home and misbehave in school.

Martha belonged to the group of girls who absconded on the Friday by climbing out of the window. They went to town and spent the night at a friend's house. She went out on the Saturday night with some of the other girls and was found by the police together with Sandra, Christina and Thandi and taken back to the school. The school however said that they did not want them there but that they should go to jail.

Martha also spent the night at the police station wearing leg-irons accused of malicious injury to property. Not only was it uncomfortable for Martha to wear leg-irons, but she also had bad experience with the policeman who harassed them.

After being charged with malicious injury to property and spending a week in the police cell in Buffelshoek she was taken back to the school. She was scared she would be put in the lock-up since they usually end up there after absconding. Fortunately this did not happen. She does however feel that she has been treated in a very bad way and doesn't understand why she was placed in a police cell for a week and charged with malicious injury to property. She did not break anything.

5.6.7 Case of Sara

Sara is 16 years old. She has been at a school of industries for most of her life. She was moved to this after misbehaving in the old school by drinking and being naughty.

She absconded from school on the Friday with Sandra and Martha by climbing out of a window. She was not arrested until Sunday morning together with Denise. They were taken to the police station where they were grouped together with the other girls who had absconded from school.

Sara's story corresponds with the other girl's stories of the charges and the placements in a police cell. When they were divided she belonged to the group who was to be sent back to school. This also corresponds with the other girls' theory of racial division since Sara is so called "coloured".

Sara thought it was strange that the school knew about them being in police cells and not doing anything about it. One of the hostel mothers told one of Sara's friends that she was in jail when she asked about her. She also felt it was wrong and unfair to be charged with malicious injury to property since she didn't break anything. She was not with the girls who broke a window in order to run away. Being put in a police cell for a week for running away from school was according to Sara wrong and a very bad experience.

5.6.8 Case of Thandi

Thandi is 17 years old. She has been at the school of industries for five years. The reason she was placed here was due to the fact that she used to be stalked and started doing drugs.

She absconded together with Christina and Sandra on the Friday night and then the following Saturday morning. She witnessed Christina breaking a window so that they could get out. They went to the other girls who had also run away earlier and met them at night. The police caught Thandi on the Saturday night together with Christina, Sandra and Martha. She was also accused of malicious injury to property and spent the first night at the police station. She was also fastened with leg-irons and said that this was a very bad experience. The leg-irons hurt and were very heavy. She also complained about the sleeping arrangements with no mattress, pillows or even blankets to use.

Thandi also spent a week in a police cell for this incident and later an additional ten days in prison. No one came to visit her or the other girls during the whole detention period, not even anybody from the school.

Thandi felt it was very unfair that she was held in a police cell for five nights for absconding from school. She found it even worse that she and the other black girls were placed in a prison for ten days without any proper

reason. She missed out a lot at school and will have to catch up with a lot of work for the exams.

5.6.9 How Could This Happen?

In sum, eight girls were placed in a police cell for absconding from school whereby one of them broke a window in order to get out. For the girls who were involved in the breaking of a window there is a criminal charge that can be made, but the other girls who did not involve in damaging property, cannot be criminally charged for their actions. All the girls admit they absconded from school, but they do not understand why and how they were punished in this manner. This case shows a pattern of serious legal breaches for relatively innocent matters.

One may primarily question the principle of proportionality. Does absconding and breaking a window legitimise being held in detention for over 14 days? These girls, who are already troubled and on the edge of society, ended up detained in the criminal system without any legal reason. This does certainly not improve their situation. The girls were exposed to a very serious environment and in great risk to fall deeper into to the system of criminality.

5.6.9.1 Fundamental Legal Breaches

According to domestic legislation, absconding from school is not a criminal charge. If a child absconds from school the case can be brought to a commissioner of child welfare who will either order the child to be placed back to the school, or in certain cases be placed in a place of safety while awaiting any action by the responsible Minister. Since it is not a criminal charge the procedure does not involve any serious criminal consequences.¹¹⁵

The charge as such does not either hold as a proper reason for detaining the girls. “Malicious injury to property” is not considered to be a serious crime according to the law. According to section 29 of the Correctional Services Act, children may only be placed in detention if he or she is accused of having committed an offence or category of offences mentioned in Schedule II, or of such a serious nature as to warrant such detention. Schedule II includes crimes of rather serious nature and does not include “malicious injury to property”. The crime cannot be considered to be of other serious nature and included as a special warrant of detention. If yet the crime would have been considered of serious nature, detention could only be allowed for 24-48 hours in a police cell.¹¹⁶

¹¹⁵ Section 38, 1983 Child Care Act.

¹¹⁶ Section 29, 1996 Correctional Services Amendment Act.

The children involved in the criminal action of breaking a window should, according to law, have been placed back to school while awaiting trial. If the case would proceed, and not have been withdrawn, it should appear in court as speedily as possible.

Forcing the girls to wear leg-irons at the police station is a very serious matter and out of proportion by all means. Placing leg-irons on children may be considered to be cruel, inhumane and degrading treatment and contradictory to fundamental human rights legally stated.¹¹⁷ Making them sleep on benches in a room without blankets or pillows in this condition further strengthens the violation of law and amounts to inhumane treatment with reference to detention conditions.¹¹⁸

5.6.9.2 The Detention Procedure

The detention procedure as such also needs clarification. How could the children end up spending five days in a police cell and then for some unfortunate chosen, another ten days in a prison? Who made it possible to decide to divide them in to three different groups for further detention?

At their first appearance in court, they were all charged with “malicious injury to property” and told by the prosecutor that they would be taken to place of safety until their next court appearance. This is confirmed by the girls and by the prosecutor in their records. The question remains why the girls were not sent to the place of safety but rather taken back to the police cell in Buffelshoek despite the order from the Magistrate. The possible reasons could have been lack of space at the place of safety or transport arrangements. No matter the reason this decision was wrong and illegal by all means.

The decision to move them from the police cell to a further placement seems rather vague and thus difficult to grasp the question of responsible authorities. The girls themselves said that a policeman from Wolmaransstad came to the police cell in Buffelshoek and told them of the move. If this was a decision issued from court or from the social worker is not revealed. The court does however not have any registers of this decision.

Three girls were ordered a placement in prison. This decision can by no means be justified. Placing a child in a prison awaiting trial can only be legally justified if it is:

...in the interests of the administration of justice and the safety and protection of the public and no secure place of safety, within a reasonable distance from the court, mentioned in section 28 of the Child Care Act, 1983 (Act No. 74 of 1983), is available for his or her detention: Provided that such a person may

¹¹⁷ Section 12.1 (e), 1996 Constitution of South Africa. With particular reference to leg-irons see De Vaal, (2000), p 615.

¹¹⁸ Section 35.2 (e), 1996 Constitution of South Africa.

*only be detained in a prison (but not a police cell or lock-up) if he or she is accused of having committed an offence or category of offences mentioned in Schedule II, or any other offence, in circumstances of such a serious nature as to warrant such detention: Provided further that such a person shall be brought before the court that made the order of such detention every 14 days to enable such court to reconsider the said order.*¹¹⁹

This was not an offence according to Schedule II and there was apparently place available at a place of safety within reasonable distance. The girls could furthermore not be considered a general threat to the public based on their deeds.

Two of the girls were taken to a place of safety, which was the correct legal procedure, although it was delayed for five days. Placing the remaining three girls back at school is also an acceptable legal placement for awaiting trial.

The question remains however why they were divided and on what official grounds. Why were not all the girls placed back at school or as a second alternative at a place of safety? According to the girls they all saw racial separation as the only explanation to the division. They were not separated according to age or to the groups who absconded together. The only factor they had in common was their race. The black girls were accordingly sent to prison, the so-called “coloured” girls were sent back to school, while the two white girls were taken to a place of safety. When they asked the policeman about the reason for the separation, he said they could not find place for all of them at a place of safety. According to the girls placed in the place of safety they were beds available and they even saw new girls coming in during their time there. The policeman also explained that they were to be separated according to age with the youngest going to a place of safety and the oldest to prison. This was not valid since one of the youngest girls went to prison and one of the oldest to the place of safety. Treating the girls in this manner amounts to discrimination on racial grounds. This is a very serious matter and can thus not be ignored in this case.

5.6.9.3 The Question of Legal Responsibility of the School

The legal actions of the school must also be questioned. It can under no circumstances be possible to reject children, as the school is their legal guardian and thereby obliged to take responsibility for them. Although the school might not have known what to do with the misbehaving children, they surely didn't act in a correct manner. Talking to the principle of the school he stressed that these children are very difficult children and can therefore not be dealt with in an ordinary manner. They have all misbehaved several times and one finally gets desperate about the situation and needs to do something about it. The staff members are all teachers by profession and not social workers, nor specifically trained working with troubled children.

¹¹⁹ Section 29, 1996 Correctional Services Amendment Act.

They are thus not properly trained to handle children of this kind. The teachers at school are also responsible for supervising the hostels, leaving the children in a very strict school environment 24 hours a day.

He explained the problem of absconding from school. If the children run away he claims that the school cannot be responsible for chasing after them. If that were the case, they would be continuously on the move after finding children. When the police department takes over, the children are in the hands of the police and thereby not the responsibility of the school. The school fully respects the work of the police and does not have the need or mandate to monitor their work. If there is maltreatment by the police it is up to the justice department to correct their mistakes and not the duty of the school. He finally explains that he cannot overrule the decision made by the police or the justice department.

After talking to the principle one senses a situation of not wanting to deal with these children, as well as a desperate need to make someone else responsible for them. It is however the duty of the school to care for these children under law, since they are placed there due to specific reason of special care, education and learning.

The principle further stressed the important concept of corresponding duties with rights. Children cannot only claim their rights in different situations but they also have responsibilities to care for. I think everyone agrees on this concept but it still does not legitimise the irresponsible action of the school in reference to the girls held in police cells.

The school did intentionally leave the children, whom they are legally responsible for, with the police. They did not take any action against this despite knowing they were held in detention in police cells. The school is hereby to be held responsible for knowing about the fate of the girls and the passive action of not doing anything about it.

In addition, the children missed out of school resulting in a significant backlog in their studies upon return to the school. This was in the period of exam preparations, which could affect their results and intentions to do well. The school may be held responsible for letting this occur and perhaps also the correctional and social services for not providing any books during the detention period.

To conclude, the main reason this could happen is due to the lack of knowledge and experience of how to deal with these vulnerable and troubled children. The staff members and other authorities involved are not trained within this field and as a result they desperately try to handle the children like ordinary children but constantly fail. This inexperience will unfortunately have severe ramifications for the girls and their life in school.

Upon our second visit to the school, we were told that the principle of the school had decided that the girls should receive further punishment for

absconding. There were to be held in detention at school for a time period up to ten days, while the rest of the children were to go home for holidays. Not only were they held up at school during their holidays, but they also needed to organise and pay for their own transport, since they could not go with the school bus leaving the day the holiday began. The principle explained that this was a proper procedure stated in the rules of the school and should thus not be questioned. Although the school may have certain liberties when drafting the rules of the school they may never violate any general laws within the field. The decision of double punishment is by no means allowed under the provisions of the Child Care Act or under the Bill of Rights of the South African Constitution.

6 Conclusion and Future Prospects

6.1 Introduction

Besides possible ambiguous provisions, the theoretical presentation of the child justice system looks rather well planned, having possibilities to protect the welfare and well-being of children. According to the law presented, alternative measures shall always be promoted and children should only be deprived of their liberty as a measure of last resort and for the shortest period of time. If yet detained they shall be treated in a fair and humane manner according to their age and maturity. Theory and practice do however seldom coincide. The situation of children within the awaiting trial procedure is no exception. In practice, children are slipping through the cracks with a result of drifting in the system for no particular reason. By falling deeper into the criminal system the risk of becoming become disillusioned and identified as serious criminals for initial petty crimes is greater. The conditions when in detention are appalling with serious frightening consequences, such as rape and other cruel and degrading treatment. Although lawyers are initiating a process of claiming damages from the state, the price is impossible to value and the monetary compensation becomes a symbolic value for the victim.

In this conclusion I wish to bring all the cases together and analyse the different situations in order to see if there is a constant pattern of identical breaches and which institutions and departments are to be blamed for breaching the law. The law itself also needs to be further analysed to identify possible loopholes where the law is silent causing serious consequences for the victims. What can be done and what is done by the country today to improve the situation of children held in detention under appalling and unlawful conditions and for long periods of time?

6.2 Concluding Analysis of Cases

The cases presented show that the criminal system in South Africa is evidently not functioning in a satisfactory manner. There are many different authorities involved that do not do their jobs properly and fail to follow the law. The cases in general show acts of ignorance, lack of knowledge of proper legal procedures, as well as questioning the actual professional skills by responsible authorities. There seems to be an unwillingness to take responsibility whereby no one wants to take the blame due to lack of knowledge of how to handle the particular situation. As a result, the

children's cases are sent between departments and institutions and are passed on due to lack of knowledge of the correct procedure.

When analysing the cases it seems to be the same departments who are making mistakes. Is this due to lack of knowledge, lack of resources or simple ignorance? One may further question if these situations arise out of social or legal ambiguities. The law as such does not seem to be the main area that causes the problems. The possible dilemma may rather be legal enforcement and cooperation and communication between responsible authorities. The staff of responsible authorities, such as police and probation officers and social workers, needs to be trained and engaged in the actual situation of the children. Not only do they need further education of the law, but there is also a need to clarify which institution is responsible for the different procedures to prevent possible misunderstanding and miscommunication.

Although the law as such does not seem to be the main reason for the malfunctioning child justice system, one still needs to investigate its efficiency and means of implementation. There seems to be a lack of efficient administration of juvenile justice. The law within this area needs to be reformed and changed to a manner that makes it easier to apply to further strengthen the rights of children. It should also be made more difficult to place children in the criminal system when accused of crimes and rather advocate for diversion and proper social care.

Another similarity of the cases is their geographical location. They have all occurred in fairly remote areas of South Africa, in small towns, illustrating a countryside problem. This can perhaps explain why the children are held at the police station rather than transported long distances between the different institutions. The necessary transport to move them to the correct placements are scarce and the children are hereby forgotten and left in the police cells for lengthy periods of time.

These are certainly enough cases to show that these are not isolated cases but rather a dilemma that is happening all the time all over the country. One fears to imagine what the situation is like in the provinces not visited and in other rural areas where distances to courts and police stations are even further. As a result, children are left drifting in the system for no particular reason and instead of being treated with special care they are falling victims of serious human rights violations.

6.2.1 Fundamental Legal Breaches

The main fundamental legal breach that brings all these cases together is the concept of unlawful detention in police cells used as an easy way out rather than as a measure of last resort only for the shortest period of time. Not only were the children detained for unreasonable long periods of time in illegal institutions, but they were also victims of serious maltreatment. Many of the

children were mixed with adults in the police cell, which is by all means illegal and in breach of international human rights law. The conditions of detention were further illegal with denied access to education, exercise and proper nutrition. The welfare and well-being of the child can by no means have been properly considered, neither promoted. By simply ignoring the acts of the law and leaving the children in these appalling conditions further neglects the right to dignity. There have been serious breaches of section 28 of the Constitution that specifically states the rights of children. Not only does it forbid detention as a common procedure, but it also prohibits maltreatment, neglect, abuse and degradation. Section 12 of the Constitution further protects all people for liberty and security of person including deprivation of liberty, detained without trial and punished in a cruel and inhumane manner. Section 10 of the Constitution may also be considered ignored in these cases. This section promotes the respect and protection of inherent dignity. The dignity of these children have by no means be promoted or respected considering their experiences while in detention.

One of the main problems observed is the lack of communications between the courts and the responsible authorities who are ordered to carry out the court's decisions. Section 165.5 of the Constitution states that:

An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

The responsible authorities thereby have a constitutional obligation to implement the orders from the court. In these cases there have been many failures and constitutional breaches also within this context. Once the judge has issued the sentence his responsibility is lifted and the case proceeds to the probation officer or the department of social development or the department of education. This results in a complicated procedure with many authorities involved and a great risk of an inefficient administration of justice.

6.2.1.1 The Best Interest of the Child

The best interests of the child shall in all situations be considered and promoted for the welfare and well-being of the child. Article 3 of the Convention on the Rights of the Child states:

- 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
- 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
- 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of*

safety, health, in the number and suitability of their staff, as well as competent supervision.

This is the main provision stating the general standards of the Convention as such. The article is to be read in conjunction with every specific article of the Convention and should also include actions not covered expressly by the Convention. The child's own views shall be promoted as well as certain objective criteria considered. It is primarily concerned with acts of public officials and institutions. Subsection 3 further strengthens the role of the authorities that are responsible for the care and protection of children.¹²⁰

These cases clearly lack consideration of the best interests of the child when treating them in this manner. The best interest of the child shall be a primary consideration according to the CRC. According to the South African Constitution the best interests of the child shall be of paramount importance. Despite the strengthened legal right, this is by no means reflected in the South African juvenile criminal justice system.¹²¹

6.2.1.2 Claim for damages

The children presented in the cases have different experiences, some more serious than others. They do however all have a legitimate reason to claim damages from responsible authorities and the state. Their rights have been neglected and resulted in many serious consequences.

International law, ICCPR, article 9.5, allows the right to claim for compensation if detained unlawfully or victim of illegal arrest. The Constitution of South Africa further allows for the right to claim compensation through sections 38 and 172.1. This applies to breaches of fundamental human rights in the constitution or any other law inconsistent with its provisions.

What will be done in these cases is a civil claim for damages. The quantum as such is difficult to calculate due to the relatively lack of previous cases within this field. When determining compensation of this kind one may refer to non-patrimonial loss. Non-patrimonial loss does not have economic value and relates to the infringement of highly personal interests. The reparation of non-patrimonial loss may take form of compensation, satisfaction and damages.¹²²

¹²⁰ Detrick, (1999), p 90-93.

¹²¹ Compare article 3.1, CRC and article 28.2, 1996 Constitution of South Africa.

¹²² Neethling, J, *Law of Delict*, (1999)

6.3 Future Prospects

6.3.1 The Child Justice Bill

One of the most strategic actions to improve the situation of children in trouble with law may be the South African Law Commission's initiative to draft a Child Justice Bill. In relation to the new democratic South Africa and the introduction to the Constitution, the need to establish a new set of rules that would work in alliance with the Constitution to protect children within the criminal justice system is evident. South Africa has furthermore within this period ratified international legal instruments with the obligation of implementing measures into the domestic system. In 1997 the Minister of Justice and Constitutional Development requested the South African Law Commission, under its obligations of article 40 CRC, to perform an investigation on the juvenile justice system and the need for reform. The Commission presented the Child Justice Bill in 2000 (SALC draft bill) and was sent to parliament in 2001. It was then further introduced in the National Assembly in 2002 as Bill B49 of 2002, and is currently in its final stages for promulgation in parliament. The Bill has unfortunately become a political strategy and is currently not moving in any direction for possible implementation. It passed its second rewording in September 2003 to allow for additional changes by the Department. The Bill has been criticised for being too long and complicated and unrealistic to implement economically. The future will tell whether or not it will be implemented and most importantly on which conditions.¹²³ In the meantime the Interim protocol concerning children awaiting trial is still of importance, supporting the Child Justice Bill while legally relying on the Constitution and the old national legislation.¹²⁴

6.3.1.1 Contents of the Child Justice Bill

Based on the Constitution and international instruments related to child justice for the protection and welfare of children, the Bill presents various means to improve and protect the situation for children within the justice system. It advocates for means of restorative justice and reconciliation rather than punishment and imprisonment. It is considered a progressive bill, replacing many provisions of the Criminal Procedure Act of 1977 and creating new processes involving namely professional workers and families to solve problems with children, and giving the probation officer a key role in the procedure. It does not include specific measures of care and

¹²³ For a current update on the Child Justice Bill in parliament as well as detailed information on the Bill visit the Child Justice Alliance Project, <http://www.childjustice.gov.za>.

¹²⁴ Interim National Protocol on Management of Children Awaiting Trial signed on 1 June 2001. Until the Child Justice Bill has been enacted and implemented the protocol shall ensure proper legal procedures for children accused of crimes and awaiting trial. For more detailed information see <http://www.children.gov.za/Publications/INP.htm>

protection of children in prisons, but rather refers to the Correctional Services Act in that matter. It also suggests the importance of an effective monitoring structure to observe the implementation of the Bill.¹²⁵

The main point considered is to enhance all possibilities of diverting children away from the criminal justice system by introducing diversion options in the majority of cases where children are accused of committing crimes. Alternatives to arrest, the age of criminal capacity, preliminary inquiry, juvenile courts and effective legal representation are also issues presented. The highlights from the Bill will be presented below in order to illustrate how the possible future justice system will be structured stressing the significant issues in need of reform.

6.3.1.2 Age and Criminal Capacity

According to the common law of South Africa today, children under the age of seven lack criminal capacity. Children between seven and 14 are presumed to lack criminal capacity if it cannot be proved beyond reasonable doubt that the child was aware of its actions and able to understand the consequences. Children above the age of 14 are considered developed to such an extent as to be responsible for its actions and are thus entailed with complete criminal capacity.¹²⁶

The Child Justice Bill suggests an amendment to the common law, raising the age of minimum criminal responsibility from seven to ten years. Children below the age of ten shall not be prosecuted at all, while children between the age of ten and 14 are presumed not to have a certain capacity to act responsively. If it can be proved beyond reasonable doubt that the juvenile had capacity of that time the children may be held responsible for his or her deeds.¹²⁷

6.3.1.3 Arrest and Detention

According to the Bill, detention shall be considered as a measure of last resort only. It may only be used after exhausting the possibilities of releasing the child to their parents or other appropriate adult. The release of the child into the care of parent or appropriate adult should always be the first option considered. If that is not possible, the possibility of bail should be considered and lastly the possible referral of a child to a welfare facility. Alternatives to the arrest of children shall thereby by all means be promoted. If a child is still arrested it must be done with regard to dignity and the well being of the child.¹²⁸

¹²⁵ South African Law Commission, *Report on Juvenile Justice*, Project 106, July 2000, pp x-xi; Clause 2 of Child Justice Bill 2002.

¹²⁶ Sloth-Nielsen, J: *Child Justice and Law Reform* in Davel, CJ, (2000), *Introduction to Child Law in South Africa*, p 393.

¹²⁷ Clause 5, 2002 Child Justice Bill.

¹²⁸ Clause 3.2-3, 2002 Child Justice Bill.

When a child is arrested, the police must within 24 hours notify a probation officer of the arrest of the child, and must furthermore take the child to a probation officer no later than 48 hours from the arrest. The child's parent or other appropriate adult must also be notified and be given warning to attend the preliminary inquiry concerning the child concerned. The child shall be informed why he or she is arrested, what his or her prescribed rights are and explain the procedure that will follow.¹²⁹ The police may not arrest a child below the age of ten but must rather inform probation officer of the situation and may remove the child to a place of safety.¹³⁰

If the child is charged with a minor offence, the police are obliged to release the child in custody into the care of his parents or appropriate adult. If charged with a more serious offence the child may be released on certain conditions and in consultation with a probation officer. If there is no parent or appropriate adult to care for the child, the child shall be taken to a place of safety if available and within reasonable distance from the place where the preliminary inquiry shall be held. If child charged with committing a very serious offence he shall be detained in a place of safety awaiting trial. There is no possible release of the child in these serious cases.¹³¹

There are a number of principles to be considered when deciding upon the release or detention of a child. Releasing the child unconditionally to a parent or appropriate adult is the most desired procedure, and detention should only be considered as a measure of last resort in the least restrictive form.¹³² A child may only be remanded to prison to await trial if he or she is above the age of 14 and has committed a serious offence and a place of safety is not possible to arrange. If held in prison the child must appear in court every 30 days (every 60 days if placed in a place of safety or secure care facility).¹³³

6.3.1.4 Diversion

The Child Justice Bill stresses the importance of diversion in order to remove children from the court to the maximum extent possible. New diversion systems are suggested and aim to cover the majority of children who have committed crimes. The diversion options are numerous aimed at catering for the majority of children who have committed crimes. Diversion should be appointed on a proportional basis to the harm caused and should be positive in their outcome and facilitate in the understanding of the impact

¹²⁹ Clause 7.3, 2002 Child Justice Bill.

¹³⁰ Clause 7.7, 2002 Child Justice Bill.

¹³¹ Clauses 11-16, 2002 Child Justice Bill. In order to determine the degree of serious offences, acts are listed in Schedules I-III, 2002 Child Justice Bill. For a more detailed explanation see South African Law Commission, *Report on Juvenile Justice*, Project 106, July 2000, pp xxxi-xxxii.

¹³² Clauses 11-16, 2002 Child Justice Bill.

¹³³ Clause 36.4-5, 2002 Child Justice Bill.

of the child's behaviour. The diversion options are categorised in three levels depending upon the offence committed. They all promote apology, payment of compensation and other restorative justice measures.¹³⁴

Diversion can be considered if the child voluntarily acknowledges responsibility for the alleged offence and understands his rights. There should also be sufficient evidence to prosecute and the child and consent from the parent or appropriate adult to diversion as such and the option decided upon.¹³⁵

6.3.1.5 Child Justice Court

Children who are not diverted will instead proceed to a child justice court. It is not a special or separate court but staffed with specially trained and selected personnel. Children convicted of murder and rape and other serious matters of similar degree will not be tried at the child justice court but will be converted to a regional court or high court.

If placed in detention during the proceedings children are to be held in conditions on account of their age and held separated from adults. Girls shall furthermore be separated from boys.¹³⁶

The trial shall be held as speedily as possible. If a child is held in detention pending trial and the trial is not concluded within six months, the child must be released from custody unless he is charged with very serious crimes such as rape, murder or aggravated robbery.¹³⁷

6.3.1.6 Provisions Regarding the Legal Procedure

6.3.1.6.1 Preliminary Inquiry

The preliminary inquiry procedure aims at being an informal procedure and shall be held in any place but the court, unless no other suitable place is available. Before the preliminary inquiry the probation officer shall assess the child individually in order to establish the prospects of diversion and possible release of the child to his or her family or an appropriate care facility.¹³⁸ At the preliminary inquiry procedure a proper individual assessment of the child is to be done based on the former assessment in order to decide on diversion or prosecution. This will be done with maximum emphasis on diversion. The placement of the child shall also be considered in this process. If the child is to be diverted, an appropriate

¹³⁴ Clause 47, 2002 Child Justice Bill describes the options in more detailed.

¹³⁵ Clause 44, 2002 Child Justice Bill.

¹³⁶ Clause 55, 2002 Child Justice Bill.

¹³⁷ Clause 58, 2002 Child Justice Bill.

¹³⁸ Clause 19, 2002 Child Justice Bill.

option is to be decided upon. If not, the child is to be transferred to the Children's Court for further prosecution.¹³⁹

6.3.1.6.2 Legal Representation

Every child has the right to legal representation. In certain situations it is to be provided at state expense. The legal representation must be professional involving an admitted attorney or advocate. A child may not always have the right to waive his right to legal representation since it is to be considered as a negative consequence for the child. If a child is not satisfied with the appointed legal representative, he or she shall be helped to apply to the legal aid board for another representative. The parent or appropriate adult must attend the proceedings unless they are excused by the court or exhausted efforts to locate the parent has been made and further delay would harm the child. They do not however serve as the legal representative to their child but rather as moral support.¹⁴⁰

6.3.1.6.3 Privacy

There is an absolute prohibition to publish any material that would possibly reveal the identity and character of the accused minor. Records of conviction and sentence may in addition be expunged in certain situations.¹⁴¹

6.3.1.6.4 Sentencing Options

Regarding sentencing options the Bill promotes restorative justice with community based systems and correctional supervision. The suggested diversion options can also serve as means of sentencing. Residential sentences including prisons and institutions run by the department of social development are also possible, but shall be used as the last resort only and for the shortest period of time. A pre-sentence report prepared by a probation officer including an individual assessment of the child is compulsory before imposing custody sentence.¹⁴² Imprisonment is furthermore limited to serious offences only and can only apply to children over the age of 14.¹⁴³

¹³⁹ Clauses 25, 28, 36, 41, 2002 Child Justice Bill.

¹⁴⁰ Chapter 9; clauses 73-76, 2002 Child Justice Bill.

¹⁴¹ Clause 60, 2002 Child Justice Bill.

¹⁴² Clause 62, 2002 Child Justice Bill.

¹⁴³ Chapter 8; clause 69, 2002 Child Justice Bill.

6.3.2 Other Postive Actions Improving the Juvenile Justice System

6.3.2.1 S v Zuba¹⁴⁴

Another recent action that has been significant for the development for improving the situation for children within the juvenile justice system is the so-called Zuba case. It has proved importance of litigation and its possible effects on society and legal reform by forcing the Government to act of its legal duties to improve the situation for children awaiting trial. One may also observe South Africa's action to follow its legal implications

The case arose due to the absence of reform schools in the Eastern Cape Province¹⁴⁵. Children who were sentenced to reform schools were, instead of being placed at reform schools, placed in prisons or police cells to await trial. Conditions were appalling including long periods of waiting times. Reform schools in other parts of South Africa denied access to children not residing in their province, due to lack of inter-provincial arrangements. As a result, the Department of Education and Department of Social Development were ordered to file reports on the progress made to finalise and transfer children to reform schools. The court structured detailed orders of how the responsible authorities planed to improve the situation on the province on both short term and long term basis. Transfers were made possible to other provinces but also a more long-term plan was initialised to present a reform school in the province itself.

This structural interdict shows the court's willingness to enforce the state to implement the provisions of the Constitution and the discussed Child Justice Bill. There have been many previous cases where nothing has happened despite the acute problems. What seems very promising is the presence of effective mechanisms if the Government fails to implement the law. This case also highlighted the problem concerning the administrative problems seen in the cases studied above. The situation today involves too many authorities and complicated procedures, resulting in a very fragile situation with weak links in the overall chain of responsibility.

6.3.2.2 S v Kwalase¹⁴⁶

A more previous case from year 2000 shows the courts willingness to work in accordance with the provisions of the Constitution and international law. It stressed the constitutional obligation of statuary law being consistent with international law promoting dignity, freedom and equality. The case concerned a review of a sentence of imprisonment that was imposed on a

¹⁴⁴ *S v Zuba and 23 similar cases*, cases no CA40/2003 and 207/2003, Eastern Cape Division, judgment handed down on 2 October 2003.

¹⁴⁵ See Supplement A of map of South Africa and the Eastern Cape Province.

¹⁴⁶ *S v Kwalase* 2002 (2) SACR 135 (CPD)

minor at the age of 15. The judges cited the provisions of the Constitution and the principle of detention as a measure of last resort only, for the shortest period of time. The constitution as well as international standards clearly rejected imprisonment. The sentence was thereby reviewed and replaced with a shorter term based on correctional supervision and community based sentence.

Although the Child Justice Bill was only at a drafting stage at this time, the views and minds of the justice system seem to have highlighted a problem within the system and a method to deal with it.

6.3.3 Diversion Programmes

Diversion has increased the court's options of dealing with first offenders and setting them straight before they get involved in more serious crime¹⁴⁷

South Africa has lately been encouraged to initiate various diversion programmes in the community. Diversion is offered as an alternative way of dealing with young offenders. Instead of being introduced to the criminal justice system, children are diverted into community programmes where they are held accountable for their deeds. Formal diversion programmes started by NICRO¹⁴⁸ in the early 1990s and has ever since expanded within that organisation and others. There has been a great positive outcome of the programmes. According to a study made by NICRO only 6.3% of the young offenders re-offended the first year after completing their programme.¹⁴⁹ This may illustrate the importance of further developing the concept of diversion programmes and actively using them as sentences for juveniles.

6.3.4 Recommendations from Uganda

Uganda may be used as an example of a country that has used a different approach to try to reduce the number of cases of long periods of time in detention. The Constitution of Uganda mandates the Human Rights Commission to review cases where persons are detained under state of emergency. On review they may order release of the person or uphold grounds of detention.¹⁵⁰ In order to improve the situation of children awaiting trial for long periods of time, South Africa may be inspired by Uganda. A similar mandate may be suggested for the South African Human Rights Commission to improve the severe situation of persons awaiting trial for inhumane periods of time. This may in particular regard children who, according to international and domestic law, are to be removed from

¹⁴⁷ Quote by Magistrate on NICRO's presentation on diversion programmes.

http://www.nicro.org.za/programmes/programmes_youth.asp

¹⁴⁸ National Institute for Crime Prevention and the Reintegration of Offenders. NICRO is a national NGO that involves in crime related issues in relation to democracy and human rights. Its aim is to strengthen the human rights culture and promote a safer South Africa.

¹⁴⁹ http://www.nicro.org.za/programmes/programmes_youth.asp

¹⁵⁰ See articles 47-48, 1995 Constitution of Uganda.

the criminal justice system and diverted into society rather than detained for long periods of time. A procedure of this kind would be a significant protection of the fundamental human rights promoting the welfare and well-being of the child. Although it may be a strict legal and administrative procedure, I believe that its actual existence in South African law would illustrate the importance of battling children in trouble with the law in a respected manner.

6.4 Final Comments

6.4.1 South Africa's Implementation of International Law According to the Committee on the Rights of the Child

When the Committee on the Rights of the Child wrote its report on South Africa in year 2000¹⁵¹, it was not without criticism. In reference to juvenile justice, they were mainly concerned about the ineffective administration and compatibility with international legal standards, lengthy time of cases to be completed, and the use of detention other than a measure of last resort only. The Committee further highlighted the problems of overcrowded detention facilities and the matter of mixing children with adults while in detention. The staff was considered in some instances unprofessional and not specifically trained to care for children and promote their right to special needs.

The Committee's recommendations can be well reflected in the field study done in this paper. They stressed the need to take further steps to implement a juvenile justice system in conformity with the Convention on the Rights of the Child (CRC) and other international instruments such as the so called "Beijing rules", the "Riyadh Guidelines" and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL). They furthermore stressed the importance of respecting the children's right to be detained as a measure of last resort only, for the shortest period of time, for the best interests of the child. The staff needs further education to handle the children in a respected manner in conformity with the law.

6.4.2 Personal Reflections

My conclusions and reflections reached after my field study are perhaps not surprisingly fairly similar to the recommendations of the Committee. Although the Report was written almost five years ago, the problems seem to be remaining. In my opinion South Africa is in need of a well functioning juvenile justice system with a well functioning administration and cooperation between authorities, a dedication by the staff to implement and follow the legal standards. Not only do the staff of the police need

¹⁵¹ Concluding Observations of the Committee on the Rights of the Child, 23 February 2000.

additional education, but also social workers, probations officers and other possible staff involved. South Africa has in the past decade moved a great step forward towards implementing democratic principles and strengthening the rights of children. There are however still many shady areas that are under critique where children are deprived of their fundamental human rights. The problem is not new and it is time that it receives all possible attention and advocacy to improve the situation for children in trouble with the law. Children involved with crime are not less children than others. Despite the distinct difference between children and adult offenders, the treatments do seldom differ and children are introduced to the adult world with little consideration to their age and development. The laws that are specifically designed to protect children from criminal system must be promoted for the best interests of the child and their future.

Another problem that has to be tackled is the concept of rape in detention. Not only did I personally meet with a child who is a victim of this, but it also seems to be a great problem throughout prisons and police cells in South Africa. One of my first days in South Africa I read an article in the newspaper stating that rape among young offenders a huge problem in South Africa. While awaiting trial, they have experienced being raped in court cells, in the back of police vans and in prison cells. The rapists are mainly adult fellow offenders. The main reasons seems to be overcrowding of police cells, the lengthy period of awaiting trial, and insufficient staff to handle the problems. The extent of the problem is unknown, but all prisons in South Africa witness the same problems and something has to be done urgently.¹⁵²

Criticising a relatively newborn democracy like South Africa is often done restrictively, if done at all. One may be fair and claim that South Africa needs time to get on its feet and implement all new legislation and procedures. In relation to juvenile justice many of the procedures are old and actually written during the apartheid era. The new reforms are of such fundamental character that one has to force South Africa to follow its implications. Being a newborn democracy and advocate of human rights they should by all means live up to their reputation as the country with the most detailed and well-written constitution stating fundamental freedoms and liberties of their people.

¹⁵² Adams, Sheena, "Young prisoners' rape ordeal", Pretoria News, 17 September 2004.

Supplement A

Map of South Africa, indicating different places referred to in field study.



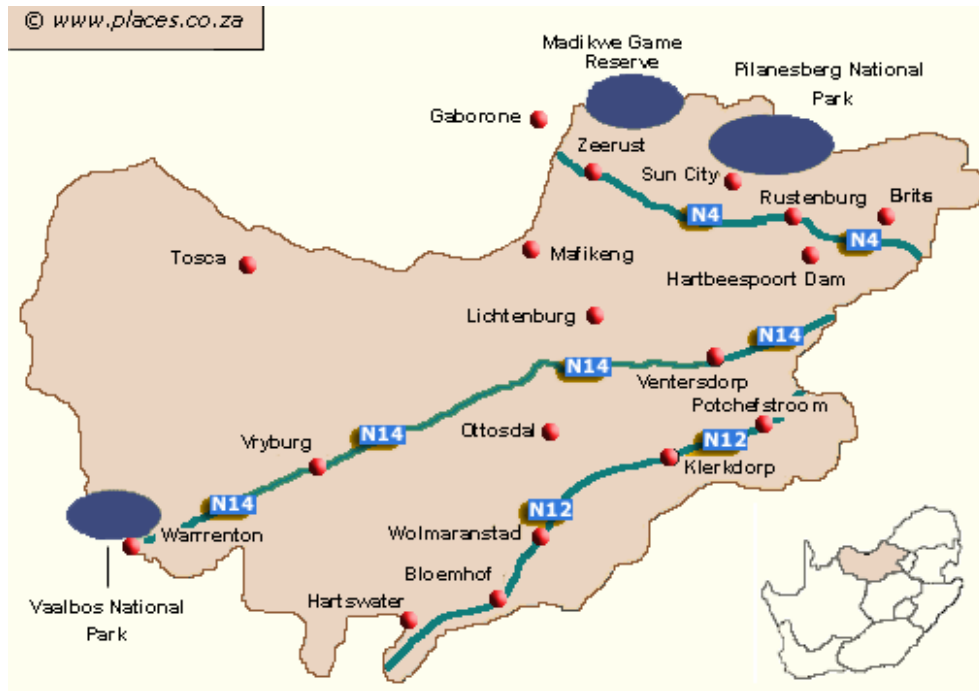
Supplement B

Map of Mpumalanga province



Supplement C

Map of North West province.



Supplement D

Map of Gauteng province.



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