

# Article

# 40

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THE DYNAMICS OF YOUTH JUSTICE & THE CONVENTION  
ON THE RIGHTS OF THE CHILD IN SOUTH AFRICA



*State reporting is an integral part of the obligation to respect, protect, promote and fulfil children's rights as set out in global and African human rights instruments. Thus, South Africa is under obligation to report on the measures it has taken towards realising these rights. As a member of the United Nations (UN) and the African Union (AU), South is required to report on its progress (and challenges) to the Committee on the Rights of the Child (CRC Committee) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC/Committee) respectively.*

## ***South Africa reports to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC): Focus on the Child Justice System***

*Usang Maria Assim, Community Law Centre, University of the Western Cape*

*Under article 44 of the UN Convention on the Rights of the Child (CRC), State Parties are required to submit an Initial Report within two years of ratification of the Convention and thereafter submit periodic reports every five years. South Africa ratified the CRC on 16th June 1995. Consequently in line with article 44, it submitted its Initial Report to the CRC Committee on 4th December 1997. The Report is available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/162/94/PDF/G9816294.pdf?OpenElement>. The second, third and fourth periodic reports were therefore due in 2000, 2005 and 2010 respectively. Although these long overdue reports are yet to be submitted, the Government has taken steps towards the preparation of these reports (as a combined second, third, and fourth periodic report spanning 1998 to 2014) and it is hoped that they will be submitted to the CRC Committee in 2015.*

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### Welcome to the second edition of Article 40 for 2014.

*In this edition, we begin with a feature on South Africa's reporting obligations in terms of the African Charter on the Rights and Welfare of the Child (ACRWC) before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) – with a focus on the Child Justice System. At the end of October 2013, the Government of South Africa submitted its initial report before the ACERWC while a delegation of civil society representatives submitted a 'complementary' or 'shadow' report. In April 2014, the civil society delegation attended a pre-session of the Committee where oral presentations were made while engaging with the Committee. In October 2014, the Government of South Africa sent a high-powered delegation to present the State Party report. While the Committee is busy putting together its Concluding Observations, this feature presents some highlights from the engagement between the ACERWC and the Government delegation, as it applies to the situation of child justice in South Africa.*

*In the second feature, Christina Nomdo, Blanche Rezant, Loraine Townsend, and Samantha Waterhouse provide an overview of RAPCAN's Child Witness Project which advocates for a child rights based approach in the criminal justice system for child victims of sexual abuse. The feature provides, among others, a justification for the project and the aims of the project.*

*The third feature, which concludes this edition, is by Anna D. Tomasi, Advocacy Officer for the Defence for Children International (DCI), elaborating on the call for a global study of children deprived of liberty. The feature expounds on the fact that the issue of children in detention is not merely a legal issue but a social one as well; however, it is currently not high on the (global) social agenda. She concludes that through the study, 'governments will be able to realize and improve their national policies and practices, while serving the best interests of both the child and society at large.'*

*We thank you for your continued support and wish you happy holidays and a wonderful year in 2015.*

*Enjoy!*

**Dr. Usang Maria Assim**  
For the Editorial Team

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Similarly, under the African Charter on the Rights and Welfare of the Child (ACRWC), article 43 requires a State Party to submit its initial report within two years of ratification and thereafter every three years. South Africa ratified the ACRWC on 1st July 2000, but had never submitted any report to the ACERWC until 2013. An initial Country Report covering the period January 2000 to April 2013 was prepared by the now disbanded Department of Women, Children and Persons with Disabilities (DWCPD) and submitted to the ACERWC by November 2013. On 9 October 2014, the Government of South Africa formally presented this report on the implementation of the ACRWC to the ACERWC in Addis Ababa, Ethiopia.

The state reporting process is a participatory process which refers to a mutual exchange encompassing discussion, cooperation and collaboration in good faith. Thus, it is not intended to be an adversarial or accusatory process; rather, it is a process of 'constructive dialogue'. Constructive dialogue presents an opportunity for States Parties receive expert advice and opinions on their compliance with their child rights commitments to further assist them in the implementation of the African Charter at the national level.

#### **The role of civil society in the state reporting process**

Civil society plays a key role in the state reporting process by providing an alternative medium for assessing the State's progress; this is done chiefly through the preparation of alternative, complementary or 'shadow' reports. Shadow reports provide the relevant treaty bodies with additional information or alternative perspectives on the issues covered in state party reports. The importance of this is that the State can be held accountable for its obligations in a wide-ranging and holistic manner because the shadow reports enable the monitoring bodies to better assess the State's performance.

Thus, early in 2013, the Children's Institute at the University of Cape Town and the Parliamentary Programme of the Community Law Centre began a process of drawing together a wide range of activists and researchers from the

*Continued on page 3*

children's rights sector to draft an alternative report to the Government's reports for both the CRC Committee and the ACERWC. The shadow report for the CRC Committee is yet to be prepared since the State report to that body is yet to be finalised and submitted. However, as soon as the Government report to the ACERWC was submitted late in 2013, civil society swung into action to prepare a shadow report; it was finalised and submitted by the end of February 2014. The report was prepared by about 35 different authors representing 27 different organisations and was endorsed by a further 18 organisations. A civil society delegation comprising seven experts on different aspects of children's rights and two children thereafter met with the ACERWC in April 2014 for a constructive dialogue based on the shadow report. Civil society shadow reports, which are prepared in relation to the content of the government report, are usually considered prior to the session where the state party report is considered. Based on the additional information obtained from engaging with civil society, the treaty monitoring body prepares a list of questions or issues which is sent to the state party for responses ahead of the meeting with the state party delegation.

The complementary report prepared by the South African civil society delegation covered a wide range of issues, including matters to do with the Child Justice System. Some of the informed responses provided by the civil society representatives aided the Committee in the formulation of questions for engaging with the government in October 2014.

### **Key issues emerging from the South African Child Justice System during the constructive dialogue between the Government of South Africa and the ACERWC**

A delegation from the Government of South Africa met with the ACERWC on 9th October 2014. It was an impressive delegation led by Deputy Minister of Social Development Hendrietta Bogopane-Zulu and Deputy Minister of Police, Makhotso Maggie Soty, together with the Deputy Head of Mission of the South African Embassy in Ethiopia, NolufefeDwabayo. Also forming part of the delegation were senior officials from the Departments of Social Development, Health, Basic Education, Justice and Constitutional Developments, and the South African Police Services (SAPS). It was indeed a high-powered delegation signifying the seriousness with which the Government of South Africa views the members and work of the ACERWC. Moreover, child representation on the team was worthy of praise, as the delegation included three children, one in Grade 7, and two in Grade 11. The participation of the children is particularly commendable because it was not tokenistic and their contribution and response to questions was articulate. Altogether, there were about 20 people in the delegation. A smaller delegation of four attended the session on behalf of South African civil society, with two being members of the Child Justice Alliance.

After the presentation of the country report by the head of the delegation, the ACERWC asked trenchant questions on a wide range of issues, to kick-start a process of constructive dialogue with the government. Some of the key issues raised around the South African Child Justice System, including responses from the Government delegation, are highlighted below.

#### **Age of criminal capacity**

Of concern to the Committee is the age of criminal capacity which remains at 10 years in South Africa. The Committee sought an update on progress



made towards the review planned for April 2015, and whether it would include a review of the *doli incapax* presumption and whether there will be an improvement in the situation. The Committee also expressed concerns about whether the Government has the necessary data to conduct the review, especially in light of the limited time available before April 2015.

The government delegation assured the Committee that the minimum age of criminal capacity will be looked at in the April 2015 review. The Department of Justice and Constitutional Development is working on gathering data on this; a report will be submitted to the government in time for the April 2015 review. The delegation added that issues related to *doli incapax* will definitely form part of the review.

#### **Sexual offences**

In relation to sexual offences, the concerns of the ACERWC included whether or not assistance and support is available to child witnesses, and what actions have been taken by the government as a consequence of the Teddy Bear Clinic judgement. (See the last edition of Article 40 where the case and decision were discussed: <http://communitylawcentre.org.za/projects/childrens-rights-project/Publications/Article%2040/Article%2040%20-2014-1.pdf/view?searchterm=Teddy%20Bear%20Clinic>). The Committee also expressed concern about the low conviction rate in cases of rape.

The Government delegation stated that the Department of Social Development (DSD) is responsible for the victim empowerment programme, which focuses on reunification and reintegration. In addition, Sexual Offences Courts (SOCs) are designed to deal with crimes against children and have special facilities such as anatomical dolls to assist children when giving their testimonies. The National Prosecuting Authority (NPA) also provides children with witness preparation services.

According to the delegation, the re-establishment of SOCs has seen a drastic improvement in conviction rates. Recent figures show that 63% of finalised cases resulted in a conviction. In specialised investigation of crimes against children, performance is measured; a detection rate of over 70% of cases that have been properly investigated and prosecuted has been found. Over 80% of police stations have victim-friendly facilities, and the South African Police Services (SAPS) is also investigating child pornography.

Regarding the Teddy Bear Clinic case, government has complied as the issue has been dealt with, and an amendment has been drafted.

### **The involvement of children in crime**

The Committee raised concerns about the apparent high numbers of children involved in crime, particularly those used by adults in the commission of crime. The Committee sought to know the prevalence of children used by adults in the commission of crime (CUBAC) and what is being done to address the problem. Concerns were also raised about the protection of children who testify against adults who involve them in the commission of crime.

In response, regarding CUBAC, the delegation noted that the 2012/2013 statistics showed that there were 735 cases in that year. It was pointed out that the Child Justice Act obliges court officials to report cases of CUBAC and that the sentences for adult perpetrators are heavy in order to deal with the culprits and provide some deterrence.

The delegation also informed the Committee that in a number of cases, criminals recruit children in schools for their criminal activities. In response to this, the SAPS and the Department of Basic Education (DBE) have, since April 2011, been working together to tackle the trend. There are also provincial structures in place that are responsible for rolling out school safety programmes.

### **Diversion and capacity challenges in the Child Justice System**

The Committee was concerned that the number of children in diversion programmes was declining. It was noted that, with regard to the diversion of children in trouble with the law, it seems the police officials are not implementing the diversion programme properly causing real problems in the system. Related to this was a concern raised about the capacity of child justice official; the Committee expressed concerns about the numbers of service providers generally and the level of training they had received. The attention of the delegation was drawn to a report indicating that only 23% of police officials have received training on the Child Justice Act.

The delegation responded that while there appears to be a decline in the rates of diversion, the figures indicate that the percentage of children charged with crime, and who are diverted has increased from 19% in 2011/12 to 22% in 2012/13. The number of officials trained on the Child Justice Act is also increasing; the delegation stated that the current figure stands at about 30%, representing a total of 1,800 officials. Police training and the period of training has also been extended to 24 months. Training starts with new recruits and a lot has been added to the basic training programme.

### **Concluding remarks**

The final stage of a state reporting cycle is the preparation of Concluding Observations by the Committee in closed session. This will bring together the Committee's general overview of the situation of children's rights in South Africa, based on the contents of the reports received and the constructive dialogue between the Committee and the South African Government delegation (as well as between the Committee and civil society). Concluding observations are also expected to highlight major areas of concern and provide suggestions and recommendations to the Government on how to improve the overall implementation of the Charter in South Africa.

At the end of the presentation of South Africa's report, the head of the delegation expressed the commitment of the Government of South Africa to engage with the Concluding Observations when they are finalised and sent. It is hoped that the contents will spur the Government to further action towards securing a more efficient and effective Child Justice System in South Africa.

# **RAPCAN's Child Witness Project:**

## **Advocating for a child rights based approach in the criminal justice system for child victims of sexual abuse**

*Christina Nomdo and Blanche Rezant, Resources Aimed at Prevention of Child Abuse and Neglect (RAPCAN), Cape Town, Loraine Townsend, Health Systems Research Unit, South African Medical Research Council, Cape Town and Samantha Waterhouse, Community Law Centre, University of the Western Cape, Cape Town*



“ I just actually remember that actual incident, the part where I was lying on my back and I was looking straight into his eyes. But it was like I was looking right through him. It always flashes back and I just see in his eyes, you know it's like empty. I was asking him calmly to stop. I just remember it like that. I was looking up at the stars and the tears were running down my eyes... I didn't want to end up dead or something like that, so I just kept calm. ”

*(Child 1, sexually assaulted at 13 years old)*

*Continued on page 6*

### **Why the need for a Child Witness Project (CWP)?**

Sexual abuse of children results in short- and long-term psychological and behavioural problems as well as the risk of, for example, later sexual and physical abuse and domestic violence. Few child victims of sexual abuse are resilient and able to lead relatively normal lives following the traumatic event/s.

According to the South African Police Service (SAPS) Annual report, 63 067 sexual offences were recorded in 2012/13; 25 446 of these against children (40.3%). Unreported offences are thought to be much higher. The conviction rate of reported offences is very low: 9%. In order for the perpetrator to be successfully prosecuted, the South African Criminal Justice System requires child victims to be witnesses in court. The children are forced to deal with the trauma of having to repeatedly relive the ordeal by retelling their stories of abuse at several stages of the investigation, including during in-court testimony

### **What is the aim of RAPCAN's CWP project?**

Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) provided court preparation and support services to child victims of sexual offences in the Child Witness Project (CWP) in up to six regional magistrate's courts in the Western Cape between 2002 and 2013. In an effort heralded as best practice, RAPCAN was able to transfer this project to another Western Cape Department of Social Development service agent – Western Cape Lifeline/Childline in 2013. The Department of Justice and the National Prosecuting Authority in the Province are also key stakeholders in the CWP; all convinced of the value of the project in the courts.

The CWP provides support to child victims in a child-friendly environment by familiarising them with the court process; enabling them to develop techniques to cope with the stress of testifying; and providing meals for children whenever they come to court. The children's caregivers are also supported to understand and manage signs and symptoms of trauma. Court support workers connect the child with

counselling services and help to track the progress of the case through the Criminal Justice System. Through this work, RAPCAN has developed a deep understanding of the significant implementation challenges faced by stakeholders in the system, by children and their families.

### **What are the laws and policies providing for guidance for protection in courts of child victims of sexual offences?**

The Criminal Law [Sexual Offences and Related Matters] Amendment Act of 2007 (SOA) and the National Policy Framework for the Management of Sexual Offences (NPF) are key legislative and policy guidelines for the management of sexual offences. However, this legislation and policy has not improved the protective measures for children in practice.

The matter was taken to the Constitutional Court in *Director of Public Prosecutions v Minister for Justice and Constitutional Development and Others 9[2009] ZACC 8*). The Constitutional Court found that the practice reform was hampered by the interpretation of the legislative and policy frameworks.

A recent law, signed in January 2014, has provided the legal framework for the establishment of Sexual Offences Courts (SOCs). Prior to this, the Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (MATTSO) report, issued in August 2013, made key recommendations for the protection of child victims in sexual offences courts.

### **What are the special protections afforded to children?**

The MATTSO report recommends the following special protections for children testifying in sexual offences courts:

- A separate room for testimony;
- Closed Circuit TV equipment;
- An intermediary system;
- Separate waiting rooms for children;
- Anatomically detailed dolls to help with testimony;
- Specialised and sufficient court personnel;
- Victim support officers; and
- A feeding scheme for child witnesses.

### **Why did RAPCAN investigate the experiences of children, caregivers and court support workers?**

In practice, children's interests are often considered secondary to the interests of the Criminal Justice System and of the adults who work in that system. Further, children's views on and experiences of the system receive little attention

From 2011 to 2013, children and caregivers as well as court support workers from 5 court sites – Atlantis, Khayelitsha, Paarl, Cape Town and Wynberg - were interviewed. Children and caregivers were interviewed by clinical psychology interns. Court support workers were interviewed by an experienced qualitative researcher and involved in internal organisational processes documenting and analysing their experiences.



### **What were the key findings from this research?**

The findings from the research were compiled into an Implementation brief entitled: Implementation brief on the management of child sexual offences courts: Failing systems, broken promises<sup>1</sup>. This brief was later used as a key part of a Shukumisa Policy Brief presented in parliament to the Justice Portfolio Committee on 16 October 2014. In addition, the views of the court support workers were documented in an article in the South African Crime Quarterly entitled: Court workers speak out: Upholding children's rights in the criminal justice system<sup>2</sup>.

The objectives of the research were to examine whether:

- Children are afforded special protection, assistance and support during their participation in the criminal justice process;
- The Criminal Justice System respects children's inherent right to dignity and to privacy, to be treated fairly and equitably, and to be protected from unfair discrimination on any grounds;
- Children are protected from further psychological stress and harm resulting from testifying in open court ;
- Children are protected from possible degradation or exploitation resulting from testifying in open court;
- Legal and administrative proceedings involving children kept to a minimum or avoided where possible;
- Children are given the opportunity to be heard, either directly or through an impartial representative, and their opinions are given due consideration in judicial and administrative proceedings; and
- Children are treated as capable witnesses, whose testimony is valid and trustworthy in judicial proceedings.

### **What were the main findings in relation to the personnel children encountered in the courts?**

The court personnel most often involved in the process that the children engage with are the prosecutors, defence lawyers, and magistrates. Other criminal justice sector role-players such as the South African Police Service Investigating Officer are also a key point of engagement for the children. In some cases, children are supported by victim support services.

The investigating officer is the first point of contact for the children. The empathy of these officers is critical when considering whether the best interest of the child is paramount. In cases where empathy is not apparent, this is deeply traumatic for the child. Compare the treatment of two children from reports about investigating officers and their role:

*"...detective X was also supportive. He gave me the same advice as the aunty gave me, not to look at the accused, but only to concentrate on the prosecutor and the magistrate. ...I had no money to go to court, he would go and fetch me from home"*

*(Child 3)*

*Say they come from the farms, that long distance from [place name] or wherever they come from, sitting with the perpetrator in the car. I can imagine myself, sitting with somebody in a car that wanted to murder me, or did rape me or whatever. So when the child comes here, you don't know what to say. You don't know where to start, what to talk or where to begin with the child, because the child is so traumatised sitting with that person for an hour or hour-and-a-half in the car.*

*(Interview: CSW 4)*

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1 Published online [www.rapcan.org.za](http://www.rapcan.org.za)

2 Published in the South African Crime Quarterly 48, June 2014



Investigating officers set the stage for other role-players within the Criminal Justice System. When a child is treated with dignity and respect and their best interests are taken into account, this makes an indelible impression upon them. When the converse is the case, children are even more deeply traumatised.

The court support worker is the first point of contact with children at the court building. She/he has the opportunity to restore trust in the system and convince the children that there are adults within the system that care about them. Due to their caring nature and their sensitivity to the secondary trauma that children might experience from the retelling and reliving of the abuse, court support workers struggle when reflecting on the pain that children have experienced from the abuse.

*"I will protect any child...Your child is my child, irrespective of colour and race."*

(CSW 2)

*"They introduced themselves...and told her (the child) they are there to help her if she's got questions...They made her feel comfortable...They were like real mothers...they didn't keep themselves up there...they were always cheerful and (supportive)."*

(Caregiver 1)

Court support workers are supported and debriefed regularly to prevent internalisation of the trauma experienced by the children. They are defenders of children's rights – demonstrating a respect for their dignity. They also engage court role-players when necessary, reminding them to respect the humanity of the children and not unduly traumatise the children in the course of the role they need to play.

Within the courtroom the Criminal Justice System protagonists – magistrate, prosecutor and defence lawyer - can be supportive of the children without compromising their roles. When they take their roles too seriously and forget that they are engaging a traumatised children, children often leave their experience of the court more mistrustful of adults and less convinced that they have rights. The experiences when engaging the prosecutors were indicative of their approach to children's rights:

*"The court is a very cold place...it depends on the prosecutor, the one defending that child, ...that prosecutor will tell the child, okay, you don't need to worry. Don't worry, everything is going to be fine. You don't have to fear. Don't even look at the perpetrator... you look at me."*

(CSW 2)

*"I felt that she [the prosecutor] was rude...she would complain to my mommy that I'm getting an attitude, but it's because I got upset about it. It was almost like they were shouting, man, and convincing me that I'm lying, and I know I am not lying. ...it feels like she's not even on my side here...I think that they can be more polite"*

(Child 2)

The prosecutor was either the best defender of children's rights by playing the role of protector, or she/he represented another challenge for the children to contend with. Instead of being the children's champion, these actors have the ability to create deep mistrust of the Criminal Justice System.

The defence lawyer is on the side of the perpetrator and therefore a feared protagonist in the court room. Not surprisingly, given their role in the case, defence lawyers seemed to be the ones who were most objected to by the children:

*"...his lawyer, she was very abrupt and rude that day... so that made me very emotional because I don't like people who are rude."*

(Child 2)

The way in which the defence lawyer interrogated and created the impression that children were lying, was the most humiliating experience for children during the court proceeding.

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The manner in which magistrates exercise their role in the court could lead children to believe that they are only interested in the process of administering justice and not interested in children's well-being. Alternatively, when the magistrate takes an interest in the children's well-being, children feel as if the most superior power in the court is working with their best interests at heart:

*"They didn't actually ask me if I was okay actually speaking in the court, but they just asked me if I was okay to speak today."  
(Child 2)*

The magistrate is seen as the ultimate authority in the court, and children look to her/him to set the tone for the manner in which they will be treated.

The adults whom the children encounter in the court system have the ability to restore children's trust in adults by respecting their dignity, being mindful and concerned about their well-being throughout the process, and fully informing them about how they will be treated during the court proceedings.

### **What were children's experiences of the court building, court proceedings and meeting the perpetrator in that setting?**

The children are understandably most afraid of meeting the perpetrator and his family in the court setting. Sometimes the court buildings do not allow for separate entrances for victims. However, a child-friendly waiting room, which is core to the court support model, can go a long way to relieving the anxieties the children face.

*"...when you see the person that did something to you, you change your mind and then don't want to go further with what you did. Not that you are lying, but just because you are scared of what can happen outside. ...my granny always tried to calm me, but I would always get myself worked up because I know I had to go there and I was going to see the man."  
(Child 2)*

*"...when it's lunchtime and we had to go outside, then (she) will always hide behind me and say: 'Mommy, there is his mommy sitting. Then she will now stand so they can't see her. So I don't think that is very good, because she was very nervous whenever she saw him or his parents, and even his witness.'  
(Caregiver 1)*

Not fully understanding the court process, children are often fearful of the consequences of having to tell their stories in court. For some, the fear of retribution from the perpetrator or his family/acquaintances is very real, and their greatest concern is that the perpetrator will not be detained. This often leads to children not wanting to go through with the court processes.

The court building also intimidates children, but the child-friendly waiting room created some comfort and an experience of safety:

*"I heard many bad stories about the court and it was my first experience there...It's a neat place, but the gates...it sommer shows it's for prisoners...It looks a bit scary inside...I think when they built the court they could have made another pathway so that the victim doesn't see...I didn't know there would be a camera room, because I didn't want to see the man that did it...I actually felt safe (in the waiting room)...I was watching the TV and I was keeping myself busy"  
(Child 2)*

The main concerns in court are the protection of the child victims from proximity to the perpetrators; other accused; and hearing other experiences of crime and violence. These experiences are anxiety-provoking for children who need to be calm and brave if they are to testify against their perpetrator.

### **What were the main conclusions the studies arrived at in relation to whether children were protected from secondary trauma at courts?**

Despite policy and law reform, the gains in reducing further traumatising of children who go through the system are difficult to ascertain. The following are some current concerns emanating from children's experience of the criminal justice system:

- The conviction rates remain very low;
- There are still infrastructural concerns and lack of protective measures for children within courts; and
- The court personnel are overstretched and sometimes poorly trained and have limited aptitude for working with child sexual offences.

The important values, objectives and principles contained in the policy and legislative frameworks must be reflected at the level of services to children in courts, to make children's rights a reality.



# Calling for a Global Study on Children Deprived of Liberty

Anna D. Tomasi, Advocacy Officer, Defence for Children International (DCI), Geneva

## Law & practice

International human rights law and in particular the United Nations Convention on the Rights of the Child (UNCRC), establish the clear obligation for states to use detention as a last resort, for the shortest period of time and to apply measures that are in the best interests of the child that aim at rehabilitation<sup>1</sup>. These obligations, however, are continuously violated. It is estimated – although this number is out-trotted - that over 1,000,000 children are in criminal detention worldwide<sup>2</sup>; this number does not include the many cases that remain unreported or the various other forms of deprivation of liberty. Deprivation of liberty is indeed quite a broad concept and would entail “any form of detention or imprisonment or the placement of a person under the age of 18 in a public or private custodial setting, from

which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority”<sup>3</sup>. Children are, for instance, also detained in the context of immigration, based on their or their parents’ migration status. Immigration detention of children always constitutes a child rights violation<sup>4</sup>. Children may also be confined for physical and mental health, among other, reasons.

The majority of children detained in criminal justice systems are in pre-trial detention<sup>5</sup>, which contravenes the right to due process<sup>6</sup>. And in cases where children have been sentenced by judicial decision, it is generally for petty offences<sup>7</sup>.

In all cases, children deprived of liberty are exposed to increased risks of violence and abuse by police, adult prisoners, prison officials and other detained children while in detention. Their civil, political, economic, social and cultural rights are denied. Deprivation of liberty should not mean deprivation of liberties<sup>8</sup>; detainees should continue to enjoy their human rights<sup>9</sup> with the ultimate aim of reinsertion into society.

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1 Riyadh Guidelines, 1990 ; Beijing Rules, 1985 ; Tokyo Rules, 1990; United Nations Convention on the Rights of the Child, Article 40

2 UNICEF, Progress for Children, A report Card on Child Protection, Number 8, 2009

3 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), 1990

4 Day of General Discussion of the Committee on the Rights of the Child, 2012: “The rights of all children in the context of international migration”; CRC’s General Comment No. 6

5 Ibid (n 2)

6 United Nations Convention on the Rights of the Child, Article 40.3.b

7 Office of the SRSG on Violence Against Children, Prevention of and responses to violence against children within the juvenile justice system, 2012

8 Professor Manfred Nowak, 2012

9 UN Basic Principles for the Treatment of Prisoners (Principle 05), 1990,

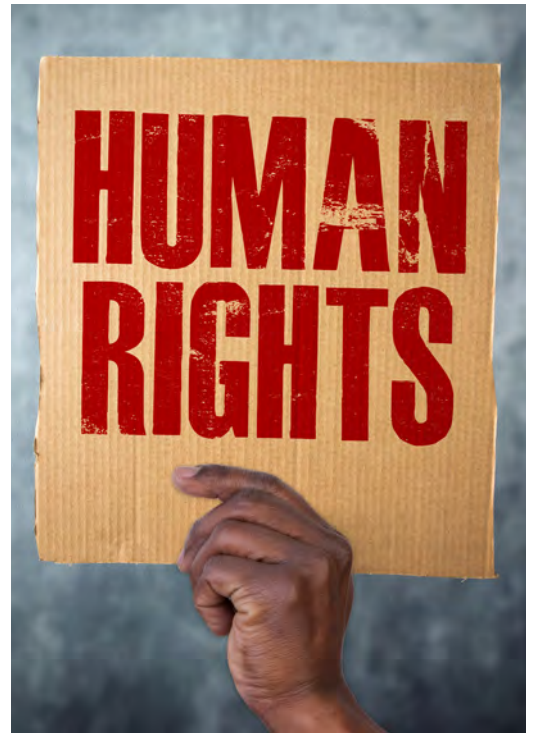
### **A challenge yet to overcome**

In the 25 years since the adoption of the UNCRC the issue of child detention has never been adequately addressed and even continues to lag behind compared to the other areas. Deprivation of liberty of children is an extremely serious issue, not only violating basic international obligations (*sensu lato*), but exposing each and every child who is detained, for whatever reason, to further rights violations (*sensu stricto*). And with immigration detention on the rise, apparently there is more regression than improvement in the situation. The fundamental obligations of the UNCRC have clearly not been understood, accepted or acted upon by governments. Another indicator is the number of times states have been urged by human rights treaty bodies to end inhumane practices that constitute *per se* violations of international human rights law, for use of the death penalty, torture, etc. The underlying concern, compared to other situations (of child labour, trafficking, etc.), is that children in detention are in the “care” of the state so whatever happens behind bars is actually a conscious choice<sup>10</sup> - “out of sight, out of mind”?!

The issue of children in detention is not high on the social agenda either. What is failed to be understood is that this is not “merely” a legal issue of international obligations not being fulfilled by states, but a social one: there is strong evidence that detention may actually worsen recidivism rates<sup>11</sup>; and while detained, children are all too often exposed to increased violence and deprived education making their future lives outside bars even harder; furthermore, it also detention of children increase public expenditure. Deprivation of liberty of children has short- and long-term impact on society at large.

### **The way forward**

What are the solutions? Put law into practice, by concretely and effectively implementing the rights and measures codified by international human rights instruments, primarily the UNCRC and other international standards. States are required to only use deprivation of liberty in conformity with the law, as a measure of last resort and for the shortest appropriate period of time<sup>12</sup>. Furthermore, measures such as diversion, which do not involve judicial proceedings, must be promoted. Diversion avoids stigmatization and has good outcomes for children and public safety, as well as being cost-effective<sup>13</sup>. In cases where judicial proceedings are necessary, social and educational measures are to be the primary option, as the “need to safeguard the well-being and best-interests of the child and promote reintegration must outweigh other considerations”<sup>14</sup>.



To turn rights into reality we first need to analyze and understand the depth the situation on the ground. It has in fact been officially recognized that there is a severe lack of data relating to the situation of children in detention<sup>15</sup>; and as aforementioned, the number of reference is not comprehensive or certain. On such basis Defence for Children International (DCI)<sup>16</sup> decided to launch a campaign to call upon the members of the United Nations General Assembly (UNGA) to request that the United Nations Secretary-General (UNSG) undertake a Global Study on Children Deprived of Liberty.

The Study intends to take into account deprivation of liberty in all its forms, including: children in conflict with the law; children confined due to physical or mental health or drug use; children living in detention with their parents; immigration detention; children detained for their protection; national security;

Continued on page 12

10 Juvenile Justice: the unwanted child – why the potential of the Convention on the Rights of the Child is not being realized, and what we can do about it, Bruce Abramson, 2005

11 UNICEF Toolkit on Diversion and Alternatives to Detention, Compilation of evidence in relation to recidivism, 2009

12 United Nations Convention on the Rights of the Child, Article 40

13 United Nations Committee on the Rights of the Child, General Comment No.10 'Juvenile Justice', 2007

14 Ibid (n 11)

15 United Nations Secretary-General's Study on Violence against Children 2005, pg.191; joint report of the Secretary General on violence against children, the Office of the High Commissioner for Human Rights (OHCHR) and United Nations Office for Drugs and Crime (UNODC) on prevention of and responses to violence against children within the juvenile justice system, 2012

16 Defence for Children International (DCI) is an international non-governmental organization Defence for Children International is an independent non-governmental organisation that has been promoting and protecting children's rights on a global, regional, national and local level for 35 years. DCI is represented through its national sections and associated members in 46 countries worldwide, and an International Secretariat based in Geneva, Switzerland. - See more at: <http://www.defenceforchildren.org/#sthash.sj7e5Df4.dpuf>

*The issue of children being deprived of liberty goes beyond a human rights discourse and includes that of the development of humanity as a whole: “The degree of civilization in a society can be judged by entering its prisons.”*



etc. In order to ensure that deprivation of liberty is clearly understood and thus used as a measure of last resort, there is also critical need to improve the clarity around key concepts which are related to children's rights and deprivation of liberty (such as last resort, shortest possible time, best interests of the child; access to justice; pre-trial detention; diversion; restorative justice; formal and informal justice systems; alternative measures; protective measures; age of criminal responsibility; rehabilitation and reintegration; administration detention; inter alia).

In March 2013, after various meetings with the CRC Committee, numerous non-governmental organizations, academics and other UN entities, the campaign – having obtained eager and strong support – was officially launched at the UN office in Geneva. In June 2013, an expert consultation was held in Geneva to discuss the Study, the strategy to have it formally requested by the UNGA, and the potential methodology to be followed when conducting the Study. Many experts took part and provided their insight on how to proceed. A mission to New York was then carried out to lobby state representatives at the UNGA in light of the drafting of the UNGA child rights resolution to hopefully formally request the Study. The momentum continues to grow and hopefully the Study will be put into action. So far, over fifty civil society organizations have signed on to support the call for such Study and the CRC Committee has recommended the UNGA<sup>17</sup> to request the realization of such in-depth Study. States are also supporting this initiative.

To undertake a Study of such caliber, which would comprehensively and scientifically analyze the status of the situation of children in detention worldwide and consider the good practices worth following, will take time, close coordination with states and other actors, and of course financial and human resources. The Study does not intend to be an end in itself, but rather a starting point: to get the ball rolling on this stagnant and even regressive issue, by getting all actors involved and thus placing it on the political agenda of countries worldwide, in the hope to see an advance in the overall situation. Through the Study, governments will be able to realize and improve their national policies and practices, while serving the best interests of both the child and society at large.

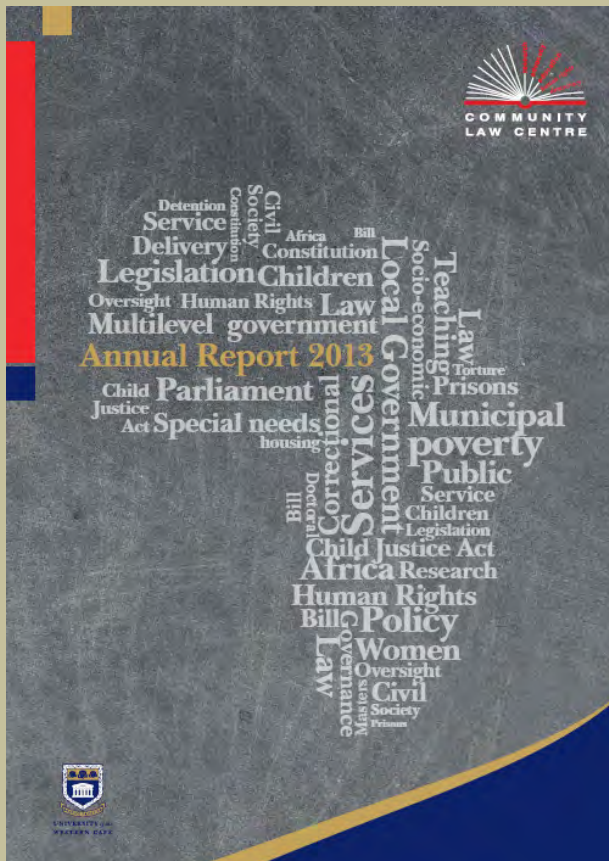
The issue of children being deprived of liberty goes beyond a human rights discourse and includes that of the development of humanity as a whole: “The degree of civilization in a society can be judged by entering its prisons.”<sup>18</sup>

<sup>17</sup> Based on article 45 ( c ) of the United Nations Convention on the Rights of the Child

<sup>18</sup> Fyodor Dostoevsky, Russian novelist (1821 – 1881)



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#### EDITORS

Usang Maria Assim  
Benyam Dawit Mezmur

#### TO CONTACT THE CHILDREN'S RIGHTS PROJECT:

Crystal Erskine  
Tel: 021 959 2950  
Fax: 021 959 2411  
E-mail: cerskine@uwc.ac.za

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#### LAYOUT AND DESIGN

Out of the Blue Creative  
Communication Solutions  
Tel: 082 858 3802  
E-mail: [annalene@outoftheblue.co.za](mailto:annalene@outoftheblue.co.za)