The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe

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Abstract

This article explores the interaction between the best interests of the child and the child's right not to be detained except as a measure of last resort. It examines the normative framework governing the scope and functions of the best interests of the child under international law and the nexus between the concept of the best interests of the child and the right not to be detained except as a measure of last resort. Using legal developments in the juvenile justice systems in South Africa, Kenya and Zimbabwe, the article demonstrates that all these countries have protected both the best interests of the child and detention as a measure of last resort in their national constitutions and, in some instances, legislation. Judges in the three jurisdictions are generally sensitive to the child rights concerned, although South African judges appear to be a step ahead of those in the other two countries. Kenyan courts appear to be following the South African example and have outlawed certain practices. The approach of Zimbabwean judges is not uniform. It is argued that Zimbabwean courts should learn from South Africa and Kenya to ensure the promotion of the best interests of the child offender and protection from arbitrary detention.

Keywords: Best interests; child offender; detention; deprivation of liberty; measure of last resort

It has been 30 years since the adoption of the United Nations Convention on the Rights of the Child (UNCRC) in 1989,[1] yet children's rights and liberties are still grossly violated in different settings. The UNCRC with its near-universal ratification (the only exception is the United States of America) sets the normative standard for states parties, imposing on them the obligation to ensure the protection and promotion of children's rights in every sphere through policy formulation, legislation and other practical measures. In recent times, the subject of children deprived of liberty has become a global phenomenon. Children are deprived of their liberty in civil, judicial and quasi-judicial settings (such as migration holding camps) and criminal justice processes.[2]

Cognisant of the complexities of the deprivation of liberty for children, the UN Secretary-General commissioned an in-depth global study on children deprived of liberty.[3] Accordingly, a UN inter-agency task force was set up to carry out a global study on children deprived of liberty.[4] This study involved experts in the field of children's rights, international and regional organisations, academics and children themselves.[5] The final report was recently concluded and submitted to the UN General Assembly.[6] Against this background, this article aims to look at the best interests of children who are in conflict with the law (child offenders)[7] and to assess how the deprivation of liberty of children has been construed in selected criminal justice systems.

Child offenders are deprived of liberty through detention on arrest (police custody), pre-trial remand detention and prison sentences. According to the Global Study, there are approximately 410,000 children held in detention worldwide every year in either remand centres or prisons. This number excludes an extra one million children reportedly held in police custody at a rate of an estimated 160,000–250,000 children detained on any given day across the world.[8] For the purposes of this article, it is worth noting that these figures are alarming and indicate overreliance on detention as a method of curbing child or youth criminality. As noted in the study, part of the problem is that instead of seeking to prevent children from committing criminal activities, states parties often draft repressive and punitive laws and policies that lead to lengthy periods of incarceration.[9] Some of the causes of further imprisonment include laws stipulating a very low minimum age of criminal responsibility or legislating for long (usually mandatory minimum) sentences for specific offences or permitting imprisonment of children without the possibility of parole.[10]

International children's rights law provides legal requirements for the protection of children deprived of liberty, in particular that detention should be used as a measure of last resort in limited circumstances and for the shortest appropriate period of time.[11] However, the UNCRC does not provide guidance as to what is meant by detention as a measure of last resort and for the shortest appropriate period of time. States parties to the UNCRC can ensure a child-specific human-rights approach to the detention of children.

The way in which this provision of the UNCRC has been developed is explored in three jurisdictions: South Africa, Kenya and Zimbabwe. The countries were selected based on their shared Roman-Dutch and English legal history; their ratification of the UNCRC and the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter);[12] and their judicial interpretation to give effect to the right not to be detained except as a measure of last resort. Finally, all three states have included the protection of children's rights in their constitutions.

This article is divided into four parts. The first part discusses the normative framework governing the best interests of the child under international and regional children's rights law. The second part examines the nexus between the concept of the best interests of the child and the right not to be detained except as a measure of last resort. It is demonstrated that there has been a radical constitutional shift from the ordinary common law understanding of the best interests principle towards one that views the principle as a normative constitutional value intended to aid the protection of child offenders in the criminal justice system. The third part explores the implementation of the best interests of the child and the constitutional injunction of detention as a means of last resort in the context of the criminal justice systems. The province of the constitutional imperatives of detention as a measure of last resort and for the shortest appropriate period are analysed in two settings, namely (1) police custody, and (2)

post-trial detention. This part also engages with the question of whether the principle of the best interests of the child is construed and applied in a manner that ensures the protection of child offenders from detention except in unavoidable circumstances. Part 4 concludes and highlights the lessons learnt.

1. The best interests of the child in international law: scope and functions

The best interests of the child concept is not new under international children's rights law.[13] Its origins can be both implicitly derived from the preamble to the Declaration of the Rights of the Child, 1924[14] and expressly found in the Declaration of the Rights of the Child, 1959.[15] Of the binding international legal instruments pre-dating the UNCRC,[16] only the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) makes reference to the principle.[17] The International Bill of Rights makes no mention of the best interests of the child.[18] However, the principle is entrenched in the African Children's Charter.[19]

The best interests of the child takes centre stage in all 'actions' or matters concerning children,[20] including the protection of child offenders in the criminal justice system. Arguably, the best interests of the child principle progressively evolved and gradually expanded its application beyond the original scope in the UNCRC and African Children's Charter.[21] Historically, the best interest principle was conceptualised merely as one of the guiding principles of children's rights. Now, it is considered a distinct right and rule of procedure, which indicates its importance in all matters concerning children.[22] Some consider the principle of the best interests of the child to have fulfilled the requirements and achieved the status of customary international law.[23] It is an all-encompassing principle, setting the benchmarks against which states parties measure all aspects of their children's rights laws and policies, including child justice.[24] It has been suggested that the best interests of the child runs throughout the UNCRC, and perhaps the African Children's Charter, informing all other provisions and guiding the implementation of other rights.[25] Consequently, it is fair to observe that the best interests of the child is a 'fundamental interpretative legal principle' guiding the interpretation of the rights of every child, including the child offender's right not to be detained except as a measure of last resort and for the shortest appropriate period of time.[26]

In a number of its General Comments, the Committee on the Rights of the Child (CRC), gives the principle of the best interests of the child a progressive and expansive meaning.[27] It has recognised the principle as encompassing a substantive right, a fundamental interpretative legal principle, and a rule of procedure. To this end, the CRC has proclaimed that the best interests of the child should be envisaged as:

> a *substantive right* of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child […] a *fundamental interpretative legal principle* ensuring that the interpretation which most effectively serves the child's best interests should be chosen whenever a legal provision is open to more than one interpretation […] and a *rule of procedure* that the decision process in any matter concerning a child must include an evaluation of the possibility of any negative or positive impact of the decision on the child.[28]

The best interests principle performs different functions. The first, discussed by Stephen Parker, is that in all matters not regulated by positive rights in the CRC, the best interests standard 'will be the basis for evaluating the laws and practices of States Parties'.[29]

Second, the principle may be used to justify, support or clarify a certain approach to matters arising under other provisions of the CRC or national constitutions. This is what the CRC calls the interpretive function of the principle. Thus, the best interests principle is not just one of the factors to be considered when implementing the rights protected in the CRC but also an aid to meaningful construction and interpretation. In this way, art 3 of the CRC can be seen as an attempt to create specific obligations and a mechanism to prescribe a general principle that should inform decision-making in connection with all actions concerning children.

Third, the best interests principle is a mediatory concept that can 'assist in resolving conflicts where these arise within the overall framework of the Convention'.[30] In the context of the criminal justice system, the best interests principle justifies balancing the competing interests of the child and those of society in determining whether detention is necessary and, if so, whether the period thereof is the shortest possible under the circumstances.

2. Links between the best interests of the child and detention as a measure of last resort and for the shortest appropriate period

In the interpretation of the right not to be detained except as a measure of last resort and for the shortest period of time, the best interests of the child require the adjudicating authority to give substantive content to the right. The CRC proscribes the unlawful or arbitrary detention of children in the criminal justice system. In particular, art 37 of the CRC provides for, *inter alia*, the legal requirements in respect of the detention of children and the provisions concerning the treatment of detained children and their procedural and substantive legal status.[31] Further, it provides for additional requirements proclaiming that the detention of the child shall be a measure of last resort and for the shortest period of time. The phrase 'as a measure of last resort' can be taken to mean that the child offender should only be incarcerated if there are no other substitute options, and this option should only be considered in the absence of an alternative appropriate response to ensure the child's rehabilitation. The option has to be considered with utmost restraint, under exceptional and unavoidable circumstances. The phrase 'shortest appropriate period of time' is determined on a case by case basis. An individuated approach in assessing 'appropriateness' inevitably takes account of the best interests of the individual child offender. Ton Liefaard argues that the requirements in art 37 of the CRC have no precedent in international treaty law.[32] Undoubtedly, the requirements are considered to be among the most notable innovations set out in the CRC for the protection of child offenders.[33]

Article 37(c) of the CRC states that should a child be detained, such child 'shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of [the child's] age' and level of maturity. In addition, the same provision stipulates that children 'deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so'. Humanity and respect for human dignity are at the core of the treatment of detained child offenders. The safeguards set out minimum guarantees for the treatment of child offenders, including the need to separate them from detained adults.

The positive obligations imposed upon states parties are entrenched to ensure that the best interests of detained child offenders are upheld. The African Children's Charter similarly places an obligation on member states to ensure special conditions of detention for incarcerated children: for instance, separation from adults.[34] It is, however, not explicit on detention as a measure of last resort. It is clear that the ultimate objective of the provisions of art 37 of the CRC is to promote the best interests of the child offender not to be detained except as a last resort, and if detained, to have child-sensitive conditions of detention that are in line with international children's rights standards.

International children's rights law does permit the detention of child offenders only as a measure of last, not first or immediate resort and under limited and exceptional circumstances.[35] More importantly, however, international and regional children's rights instruments emphasise that if the detention of the child is necessary, then it must be for the 'shortest appropriate period'. To ensure detention for a 'shortest appropriate period', law enforcement authorities and the courts must consider the child's age, evolving capacities and level of maturity. A child's vulnerability to impulsive behaviour, susceptibility to make mistakes and immaturity decrease with age.[36] To this end, the CRC has reiterated that in the sentencing context, the best interests of the child mean that the traditional purposes of the criminal justice system 'such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders'.[37] Accordingly, the legislative reference to 'shortest appropriate period' requires not just the blanket enforcement of penal proportionality, but also the need to tilt the scales of the sentencing process in favour of the child offender.[38] Given the normative standard stipulated in international human rights instruments, it is important to examine how far courts in the selected countries have gone in the implementation and interpretation of laws regulating the detention of children in the criminal justice system.

3. Detention as a measure of last resort and the best interests of the child in practice

As a direct response to developments under international children's rights law, many African countries, including the selected countries, have constitutionalised children's rights. The constitutional recognition of children's rights in the selected countries offers children a powerful claim for justice that cannot easily be ignored.[39] The right of child offenders not to be detained except as a measure of last resort and for the shortest appropriate period of time is enshrined as a fundamental constitutional right in South Africa,[40] Kenya[41] and Zimbabwe.[42] The entrenched right strongly affirms the well-established recognition that children accused of committing offences deserve to be treated differently from adult offenders.[43]

On the other hand, the entrenchment of the principle of the best interests of the child principle in modern constitutions uplifts it from an ordinary common law precept to a constitutional norm and foundational principle of children's rights, thereby transforming the scope of its application.[44] Many modern constitutions of sovereign and democratic states are designed to occupy a supreme position, standing at the helm of the normative legal pyramid and binding every person (natural or juristic) as well as all organs of the state (executive, legislative and judicial institutions) at every level.[45] A constitution is a document of distinctive and supreme status in the hierarchy of laws in many legal systems.[46] Entrenching children's rights in the constitution is a reflection of a country's commitment to the protection and promotion of the human rights of children.

Given that detention often begins at police stations or remand prisons, this part examines whether legal developments in the countries under study give effect to the rights in question at that level. In addition, it also discusses whether post-conviction detention is being used as a measure of last resort by courts of law in South Africa, Kenya and Zimbabwe.

3.1 Pre-trial detention in police custody and remand institutions

The right of child offenders not to be detained except as a measure of last resort and for the shortest appropriate period becomes operative once a child is arrested. However, the detention of children in police cells is difficult to trace given the lack of coherent statistical data. The same problem applies in respect of the duration of any detention. Despite consensus that the detention of child offenders should be 'as short as possible', this phrase is open to varying interpretations by law enforcement officers.

The CRC prescribes that no child offender should be detained by the police for more than 24 h without a judicial order and if the child is detained in a remand institution, that the court should make a 'final decision on the charges not later than six months after they have been presented'.[47] Pre-trial detention should be used even more sparingly than post-trial detention (which should ordinarily be used in exceptional circumstances) because the child would not have been convicted of any offence yet.[48]

3.1.1 South Africa

The Constitutional Court dealt with the alleged wrongful arrest and unlawful detention of a fifteen-year-old girl by the police in the case of *Raduvha v Minister of Safety and Security*.[49] The girl had intervened and interposed herself between her mother and the police officers to stop the latter from effecting an arrest. This was the first case in which the Court had an opportunity to deal expressly with facts involving the pre-trial detention of a child offender in police custody against the backdrop of s 28(2) of the Constitution of South Africa.[50]

Noting the inherent vulnerability of children and the effects that arrest causes on children, the Court adopted a progressive interpretation of the constitutional obligation of the police service imposed by s 28(2) when arresting a child.[51] Raduvha contended that her arrest was unlawful, as the police officers acted irrationally and that it was unconstitutional as it violated her constitutional right enshrined in s 28(2), in that the police officers failed to act in her best interests.[52] The Court noted that the principle of the best interests of the child do not necessarily prevent children from being arrested or detained but sets normative standards for arresting functionaries.[53]

There was no indication the Court had considered the evidence through the lens of s 28(2), as per the constitutional requirement, to determine whether the police officers had taken account of the child's best interests, and if so, whether they accorded these interests paramount importance.[54] However, the Court was at pains to emphasise that the fact that the constitutional injunction demands that the best interests of the child be accorded paramount importance does not mean that the principle trumps all other rights.[55] The Court noted that all that is required by s 28(2) is for the state to have a child sensitive criminal justice system that treats children as children, cognisant of their inherent vulnerability and frailties, without permitting the hand of the law to fall disproportionately hard on them.

The Court, noting the importance of children's rights within the constitutional framework, proclaimed that the arrest and detention of a child in police custody should be resorted to when there is no other less intrusive way of securing the attendance of such a child before a court.[56] Detention should be a measure of last resort. Ruling in favour of the child, the Court proclaimed that when arresting a child, the arresting officer 'must' use the Bill of Rights to make a value judgement, thereby according special consideration to the paramountcy of the best interests of the child concerned.[57]

Despite this constitutional imperative of detention as a measure of last resort and for the shortest appropriate period, some children are still being unjustifiably detained in police cells. For example, in *S v N*,[58] a seventeen-year-old boy accused of shoplifting was detained due to the fact that the docket erroneously indicated that he was eighteen years old.[59] While the accused was in police custody, the proceedings were halted to pave way for an acknowledgement of guilt fine, but this never materialised. After the accused had been convicted on his own plea, his legal representative then raised the issue of age in mitigation, leading to numerous postponements while the accused's age was verified.

On discovering that the accused was seventeen years old, the magistrate stopped proceedings and sent the matter to the Northern Cape High Court for review with a request that the conviction be set aside since the accused would have been diverted had the Court been aware of his age.[60] The Court expressed concern about the attorney's failure to realise the implications of the accused's age, particularly in the context of the protection afforded child offenders in terms of the Child Justice Act 75 of 2008. Although the Court never referred to the constitutional principles, it did emphasise that had the accused been treated as a child from the onset, there was a real prospect that he would 'have been diverted away from the criminal justice environment' and not suffer the potential prejudice he had been exposed to.[61]

The Court emphasised that the charges to which the accused had pleaded should not have arisen in the first place, as the matter should have been diverted. The Court's point underlines the importance of avoiding detention and keeping children outside both prison and the criminal justice system.[62] Commenting on this case, Julia Sloth-Nielsen argues that the 'detention of the child offender was clearly unnecessary, not in the best interests of the child and resorted to not as a last option'.[63] It is worth noting that even though the accused was detained in a welfare facility, and not a correctional centre, following his conviction, there was no compliance with the principle of detention as a measure of last resort.

3.1.2 Kenya

The Constitutional and Human Rights Division of the High Court of Kenya has made a progressive interpretation of the role of the police in the arrest, search and detention of child offenders. In *MWK v Attorney General*,[64] a young girl was found guilty of possession of *cannabis sativa* (marijuana). Since the drugs were allegedly concealed under her clothes at the time of her arrest, the police took naked pictures of her and circulated these on social media, thereby violating her right to dignity and her best interests.[65]

The Court noted that s 53 of the Kenyan Constitution offers special protection to children in conflict with the law and accords them treatment that upholds human dignity and worth.[66] Highlighting the significant place that children's rights have secured in the Kenyan constitutional framework, the Court held that the entrenchment of the best interests of the

child in the Bill of Rights is indicative of the legislature's intention to make children's rights and interests a priority.[67]

Adopting a similar constitutional decree as that pronounced in the *Raduvha* case, Mativo J of the High Court of Kenya held that 'the police in arresting a child, are mandated to do it through the lens of the Bill of Rights and pay special attention to the paramount importance of the best interests of the child'.[68] The Court stated that the constitutionalisation of the best interests of the child injunction is a departure from the pre-2010 legal culture and represents the adoption of a new constitutional dispensation in which children are treated as children.[69] It ruled that the arrest, search and detention that violates the child's dignity and privacy is not compatible with the best interests of the child concerned, and therefore is unconstitutional.[70] The Court declared that for Kenyan children, the best interests principle extends beyond the rights enumerated in the Bill of Rights and creates an independent right.[71] Treating the best interests principle as a substantive right requires courts to reflect on laws and policies that intersect with all the rights of the child, including the right to be detained only as a measure of last resort and for the shortest appropriate time. The ruling seeks to reinforce the legal protection of child offenders in the criminal justice system.

In many instances, there is a significant disconnect between the rules governing the pre-trial detention of child offenders and reality. For instance, Rule 12 of the Child Offender Rules under Kenya's Children's Act 8 of 2001 provides as follows:

> Every case involving a child shall be handled expeditiously and without unnecessary delay.
>
> Where the case of a child appearing before a Children's Court is not completed within 3 months after his plea has been taken the case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.
>
> Where, owing to its seriousness, a case is heard by a court superior to the Children's Court the maximum period of remand for a child shall be 6 months, after which the child shall be released on bail.
>
> Where a case to which paragraph (3) of this rule applies is not completed within 12 months after the plea has been taken the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence.

These rules buttress the general prohibition of detention of child offenders except as a last resort and for the shortest appropriate time. First, they prescribe the expeditious handling of cases involving child offenders to ensure that children who are undergoing trial while in detention are released immediately, if acquitted. Second, where the child makes a plea and the matter is not completed within three months of the plea, that matter should be dismissed. This paves way for detained children on trial to be released immediately, if the trial is not concluded within the prescribed three months. Third, where the offence is serious enough to merit detention, the child offender is entitled to bail after serving six months. On the whole, the rules are premised on the principle that lengthy trials or placements on remand are not in the child's best interests.

Regardless of these specific guidelines, the Court of Appeal (Kenya's highest court at the time) has held that it is unconstitutional for the Minister to make rules that prescribe time

limits within which cases involving young offenders should be decided. Godfrey Odongo observes that a critical survey of 'court practices reveals that Kenyan courts have yet to fully embrace the time limits and the CRC's explanation of the desired pedagogic value of limiting pre-trial detention and delayed hearing of cases involving children'.[72] In *Mkunzo v Republic,*[73] the Court of Appeal held that the Children's Act and the Rules should not impose time limits within which to 'complete trials' *per se* but provide a basis for encouraging the expeditious handling of criminal cases involving children.

On appeal, the Court of Appeal declared that the imposition of time limits for cases involving children was unlawful. The Court held that Rules 10(4) and 12 were unconstitutional. The Court reasoned that the rules purported to set time limits within which to complete the criminal trial of alleged child offenders in a context where Kenya's now repealed Constitution and the Children's Act did not explicitly set time limits for the completion of trials involving children or adults. The Court of Appeal further examined the provision regarding bail under the provisions of the old Kenyan Constitution (s 72) and noted that any person, child or adult, charged with a capital offence was not entitled to a right to bail. The problem was also compounded by the fact that the Child Offender Rules are subsidiary legislation adopted by the Minister in charge and, to date, have no corresponding provisions in the Children's Act or the Kenyan Constitution.

Unfortunately, the Kenyan government has not moved to clarify the status of the rules in light of the Court of Appeal's decision. As such, courts have continued to apply the rules, with multiple variations with regards to whether the rules are legally binding or subject to interpretation. In *CJW Guardian ad litem for DW v Republic*,[74] the Kenyan High Court made no reference to s 53 of the Kenyan Constitution – the children's rights clause, which restricts the use of detention for children in keeping with the provisions of the CRC. In this case, a sixteen-year-old boy was charged with defilement. His case had been pending before the trial court for more than twelve months. He petitioned the High Court to consider whether the twelve-month lapse from the time of plea was in violation of Rule 12(2) of the Child Offender Rules.

The Court dismissed the child's request for a permanent stay of prosecution on the basis of the delay, asserting that the rule in question was instructive rather than mandatory.[75] In fact, the Court was at pains to emphasise that there are various reasons for delays, including court schedules and postponement requests. This paints a very different picture from the constitutional provisions governing detention as a measure of last resort. There is, therefore, need to harmonise the applicable rules and the prevailing reality.[76]

3.1.3 Zimbabwe

There are very few documented reports on pre-trial detention, and it is difficult to approximate, with some degree of certainty, the treatment of children in pre-trial detention facilities.[77] The detention of children has attracted little interest, since the adoption of the Constitution of Zimbabwe. This may be ascribed to various reasons, *inter alia*, (a) the lack of self-standing child-justice legislation setting standards on how child offenders should be treated in police custody;[78] (b) the absence of data on children detained upon arrest; (c) the fact that cases of children remanded in custody at the Magistrates Court are not reported;[79] (d) the lack of specialised children's rights lawyers strategically litigating on child justice matters; (e) and an absence of awareness (on the part of the child offenders as well as their parents or guardians) of children's rights. Arguably, without a statutory framework to give

substantive and procedural content to the constitutional right not to be detained except as a last resort, it is difficult to ensure effective implementation of this right.[80]

In 2018, the Zimbabwe Human Rights NGO Forum (NGO Forum) and the Zimbabwe Association for Crime Prevention and Rehabilitation of the Offender (ZACRO) investigated the extent to which conditions of pre-trial detention comply with international and domestic standards. One of the subsequent reports notes that:

> Considered holistically, these conditions cannot be said to be consistent with the child's age and it is clear that the state has mainly achieved mere separation between youth offenders and adult offenders. Yet, the conditions of detention should promote rehabilitation to ensure that the child is prepared for eventual re-integration into the community.[81]

A detailed reading of the report reveals that the conditions in pre-conviction custodial institutions for young offenders are not conducive to treating children in a manner that respects their vulnerability, lack of maturity and age. When it comes to the acceptable pre-trial treatment of children alleged to have committed crimes, Zimbabwe can learn from other jurisdictions.

3.2. Post-trial detention of child offenders

This section focuses on how the courts in the three jurisdictions have approached the child's right not to be detained except as a measure of last resort and for the shortest appropriate period of time. It explores whether or not the way in which the courts have approached this right gives effect to the best interests of child offenders. This includes an assessment of whether courts should be barred from imposing prison sentences on child offenders who commit serious offences.

3.2.1 South Africa

South Africa constitutionalised children's rights in 1996, the first of the countries under review to have done so.[82] Increasingly, it became imperative, on the basis of the constitutional injunction of detention as a measure of last resort, that if there is a legitimate option other than prison, courts must pursue that route.[83] In exceptional circumstances, where detention is sanctioned, the rules of proportionality come to the fore in assisting the sentencing court to assess what will constitute the shortest appropriate period of time, on a case-by-case basis. Individual circumstances will invariably determine the appropriateness of the sentence through the lens of the best interests of the child offender.

In *Director of Public Prosecutions (DPP), KwaZulu Natal v P*,[84] the state appealed the sentence imposed on P, a fourteen-year-old girl, for theft and the murder of her grandmother.[85] The Court emphasised the importance of the relevant constitutional rights in respect of the sentencing regime[86] and held as follows:

> Having regard to s 28 (1) (g) of the Constitution […], it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is 'not to be detained except, as a measure of last resort' and if detention of a child is unavoidable, this should be 'only for the shortest appropriate period of time' […] This follows from

> s 28 (2) of the Constitution which provides that a child's best interests are of paramount importance in every matter concerning the child.[87]
>
> As mitigating factors, the Supreme Court of Appeal considered the offender's age and that she had no previous conviction.[88] In aggravation, the Court emphasised that:
>
> The accused arranged for the brutal murder of her grandmother at the hands of two strangers; the deceased had her throat cut in her bedroom and was slaughtered like an animal […] The accused provided the killers with knives […] She stood watching while the killers carried out her evil command; and even callously allowed her six-year-old brother to enter the room when her sordid mission had been accomplished.[89]

In light of these and other aggravating factors, the Court replaced the sentence with seven years' imprisonment, the whole of which was suspended for five years on condition that the accused would not, during the period of suspension, again be convicted of an offence of which violence is an element.[90] Ultimately, the Court maintained the 36 months of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977, subject to a wide range of strict conditions.[91]

The Court's reasoning is vital in at least three respects. From the onset, the Court emphasised the link between the child's rights not to be detained except as a last resort and the child's best interests being paramount. Second, in light of the scope of these two rights, the Court was not hesitant to spare the child from imprisonment regardless of the seriousness of the offence. By setting its conditions, the Court sought to balance the child's right not to be detained except as a measure of last resort and the interests of society. More importantly, however, the Court emphasised that regard had to be given to the age of the child, who was only twelve years and five months old at the time of committing the offence. This played a pivotal mitigatory role in the sentencing process and required the Court to consider options (other than imprisonment) that would promote the child's reintegration into society.

There might be practical difficulties in thinking that child offenders should go unpunished for heinous crimes such as murder committed under aggravating circumstances. The Court battled with some of these difficulties but observed that it would be too late to impose a custodial sentence since the child had already been placed under correctional supervision for some period of time. Besides, children appear to have a better claim to rehabilitation, re-orientation and re-integration, especially given that their mental capacities are still developing and that childhood (particularly adolescence) is largely a period of perpetual experimentation and learning. The best interests of the child and detention as a measure of last resort impose on courts the duty to be sensitive to these considerations and to impose sentences that reflect such sensitivity.

In South Africa, courts have also held that the imposition of minimum sentences – whether mandatory or discretionary – on children in conflict with the law contravenes the constitutional injunction that post-conviction detention be used as a measure of last resort. In *Centre for Child Law*,[92] the Centre for Child Law challenged the constitutional validity of a law that subjected sixteen- and seventeen-year-olds to discretionary minimum sentences.[93] In confirming the declaration of unconstitutionality from the High Court, the majority judgement of the Constitutional Court held that 'last resort' literally means 'last resort', not first or intermediate resort, and that 'shortest appropriate period of time' means that imprisonment should be imposed only when it is the 'sole appropriate option'.[94] The

Constitutional Court underscored that the minimum sentencing statute was unconstitutional in respect of children because it (1) orientated courts, from the outset of the sentencing process, away from options other than imprisonment; (2) de-individuated sentencing by prescribing as a 'starting point' the period for which incarceration is appropriate; and (3) conduced to longer and heavier sentences by weighing on the discretion of judges.[95]

The Constitutional Court's ruling confirmed findings by the Supreme Court of Appeal in *Brandt v S*.[96] In that case, the Court held that a child's best interests are paramount and afford child offenders special protection, more so in the sentencing sphere. The Court considered the application of minimum sentence legislation in the sentencing of offenders under the age of eighteen years. The appellant, who was seventeen years and seven months at the time of committing the offence, was sentenced to life imprisonment for murder and to a minimum of fifteen years for robbery with aggravating circumstances, and attempted robbery.[97] The Court noted that 'the minimum sentencing legislation must be read in light of the values enshrined in the Constitution', and in line with the best interests of the child.[98] After taking into account the personal circumstances of the offender in light of s 28(2) of the Constitution, the Court altered the sentence of life imprisonment to a term of eighteen years imprisonment.[99] Against this background, it is patent that South African courts have adopted the constitutional injunction that detention be used as a measure of last resort as a significant principle underlying children's rights and the sentencing of child offenders.[100]

3.2.2 Kenya

The best interests of the child and post-conviction detention as a measure of last resort have been invoked in multiple contexts in Kenya. To begin with, s 190(2) of the Children's Act provides that children in conflict with the law cannot be subjected to the death penalty. The law prohibits the imposition of the death penalty upon offenders convicted of an offence punishable by death, but which was committed when the offender was below the age of eighteen years. Instead, such an offender is to be imprisoned at the 'President's pleasure' as provided for under s 25(2) of the Penal Code 81 of 1948.[101]

In *AOO v Attorney General*, the High Court was called upon to decide, among other issues, whether or not detaining persons below the age of eighteen at the President's pleasure contravened the provisions of art 53(1)(f)(i) and (ii), and 53(2) of the Constitution.[102] These provisions protect the child's rights not to be detained except as a measure of last resort and to have their best interests considered as a paramount consideration. Mativo J acknowledged that the constitutional provisions governing detention as a measure last resort do not distinguish between children convicted of serious offences and children convicted of lesser offences.[103] Originating from the United Kingdom, detention at the President's pleasure means the imposition of a sentence of imprisonment with no definite period of time set during sentencing. It was highlighted that the sentencing of juvenile offenders should be cognisant of the principle that imprisonment should be used as a last resort and for the shortest period possible.[104]

The Court expanded the principle that children's rights are of the utmost importance in our society.[105] Courts are required to distinguish between children and adult offenders in the penal context and children must enjoy preferential sentencing treatment.[106] The Court held that 'imprisonment at the President's pleasure, whose period is not defined or determined and which depends on the discretion of the Executive cannot […] be said to conform with both

the constitutional command of detention as a measure of last resort and the best interests of the child offender'.[107] Mativo J held that:

> the existence of a system providing for consideration of the possibility of a child being detained for the shortest time possible is a factor to be taken into account when assessing the constitutionality of the provisions under consideration […] Section 25 (2) of the Penal Code is inconsistent with the provisions of article 53 (1) (f) of the Constitution which provides that a child has the right not to be detained, except as a measure of last resort, and when held to be held for the shortest appropriate period of time and separate from adults and in conditions that take account of the child's sex and age.[108]

Further, the best interests of the child and detention as a measure of last resort were considered in a matter relating to the committal of child offenders to borstal institutions (youth detention centres) for the offence of manslaughter. In *Republic v TCP*,[109] the accused person, a minor below eighteen years of age, had been found guilty of manslaughter in terms of s 202 of the Penal Code, following the recording of a plea bargain agreement. The High Court observed that whilst the maximum sentence for the offence is life imprisonment, the person involved was a minor and the special constitutional provisions regulating the sentencing of child offenders were applicable.[110] After indicating that the issue had to be dealt with through the lens of the child's rights not to be detained except as a measure of last resort and to have his or her best interests protected, the Court made specific reference to the Children's Act, which, among other things, regulates the sentencing of child offenders.[111]

The Children's Act provides that 'no child shall be ordered to imprisonment or to be placed in a detention camp; no child shall be sentenced to death and no child under the age of ten years shall be ordered by a Children's Court to be sent to a rehabilitation school'.[112] Dulu J emphasised that while s 191(1)(g) of the Children's Act provided for the committal of a child who has attained the age of sixteen years to a borstal institution, there are various other less severe options available to the court in terms of the Children's Act.[113] A court therefore has the discretion to impose a sentence that is in keeping with the international standards of the best interests of the child.

In addition, the High Court partly relied on the Sentencing Policy Guidelines of the Judiciary. The relevant provisions of the guidelines provide that 'custodial orders should only be imposed as a matter of last resort when dealing with children. Committal of juveniles to rehabilitation schools or borstal institutions would be reserved for cases in which non-custodial measures have failed'.[114] The Court held that while the plea bargaining agreement envisaged committal of the child offender to a borstal institution; it had not been assured that there was available accommodation in any of the existing borstal institutions in Kenya.[115] In the end, the Court 'cautioned' the child offender and encouraged him 'to be of good and responsible behaviour from now on'.[116] The child was discharged in terms of s 35 (1) of the Penal Code, after spending about six months in custody.[117] There is no doubt the Court's holding pays homage to the child's right not to be detained except as a measure of last resort and to have their best interests protected in the sentencing context.

3.2.3 Zimbabwe

Despite the constitutional entrenchment of the best interests principle and detention as a measure of last resort, the Criminal Law (Codification and Reform) Act (Criminal Law Code)

23 of 2004[118] still provides for the imposition of mandatory minimum sentences for selected crimes, irrespective of the age of the offender. For instance, s 80 of the Criminal Law Code provides for mandatory minimum sentences in cases where the accused is convicted of rape, aggravated indecent assault or sexual intercourse with a young person. Further, it states that 'if it is proved that the accused, at the time of the commission of the crime, was infected with HIV, whether it was deliberate or not, a sentence of not less than ten years' imprisonment shall be imposed'.[119]

Recently, in the case of *LC v State,*[120] the High Court heard an appeal involving a young offender born HIV positive, who was convicted for having sexual intercourse with a minor.[121] On trial the Magistrates Court sentenced him to the mandatory minimum period of ten years' imprisonment in terms of s 80 of the Criminal Law Code. On appeal, he argued that s 80 of the Criminal Law Code was unconstitutional on the basis that it violates s 81(1)(i) of the Constitution, which deals with detention as a measure of last resort. In addition, he argued that the law is discriminatory in that it infringes the equality and non-discrimination clause in s 56 of the Constitution. However, while the High Court upheld the appeal against conviction, it did not engage the constitutional challenge. Subsequently, the constitutionality of minimum mandatory sentences against child offenders convicted under s 80 of the Criminal Law Code remains untested.

In addition, the Criminal Law Code provides that where an accused person is found guilty of theft of 'any bovine or equine animal' (stock-theft), the person must be sentenced 'to imprisonment for a period of not less than nine years or more than 25 years [if] there are no special circumstances' justifying a departure from the prescribed minimum sentence.[122] In sentencing offenders convicted of stock theft, judges are bound to consider nothing but the type of animal stolen. It does not matter whether, for example, the offender is an innocent fifteen-year-old hired to drive the livestock from point A to B or a self-professed 'kingpin' who has been in the business for a considerable period of time. In another example, s 128(1)(b) of the Parks and Wildlife Act[123] provides that, 'any person (including children) who is guilty of an offence involving the unlawful possession of, or trading in, ivory or any trophy of rhinoceros or of any other specially protected animal [should serve a] minimum mandatory sentence of imprisonment for a period of not less than nine years, unless there are special circumstances'.[124] It is important to note that the phrase 'special circumstance' is a proviso meant to promote judicial discretion on a case by case basis, without any specific guidelines.

The question of whether childhood is a 'special circumstance' warranting a departure from the minimum mandatory sentence if read with the constitutional injunction of detention as a measure of last resort and for the shortest appropriate period, remains unresolved. In South Africa, the Constitutional Court held that mandatory minimum sentences (1) orientate courts away from options other than imprisonment, (2) de-individuate sentencing by prescribing as a 'starting point' the period for which incarceration is appropriate, and (3) conduce to longer and heavier sentences by weighing on the discretion of judges.[125] In interpreting mandatory minimum sentencing legislation, Zimbabwean courts should adopt this line of reasoning, especially in line with their constitutional mandate to 'consider foreign law'.[126]

Like sentencing guidelines, mandatory minimum sentencing statutes usually tell the courts to consider the severity of the offence – as defined by the legislature – and the offender's criminal history. Mandatory minimum sentences turn judges into 'sentencing machines' that should simply impose the statutorily ordained minimum sentence once the child offender is

convicted of a particular crime. Where the statute denies courts even the slightest opportunity to depart from the prescribed sentence or its duration, the law establishes a conclusive presumption that the sentence is absolutely correct. This constraint on judges violates the constitutional prohibition of detention as a measure of last resort.[127]

Mandatory minimums also 'shift discretion from the sentencing judge to the prosecutor'.[128] Once the accused has been convicted, the hands of the judicial officer are tied and the prosecutor simply refers the presiding officer to the relevant section in the sentencing statute. This remains so regardless of the offender's susceptibility to treatment or the court's individualised assessment of risk; crime control purposes (some heavier sentences are inconsistent with the purposes for which they are imposed); the young offender's knowledge or ignorance of the minimum sentencing regime at the time s/he committed the offence; the unreasonable rank-ordering of offence severity; and whether the young convict is a first time offender or has expressed remorse over her or his conduct.[129]

The High Court adopted a commendable constitutional approach in *S v FM (juvenile)*,[130] where a seventeen-year-old had been sentenced to an effective nine-year prison term for eight counts of unlawful entry and eight counts of theft. On review, Tsanga J remarkably relied on international children's rights law and constitutional provisions, emphasising the best interests of the child and the right not to be detained except as a measure of last resort, and for the shortest period of time. The Court proclaimed that:

> Our Constitution adopts the principle that juveniles should be detained for the shortest possible time and only as a last resort – an obligation that is found in international law as exemplified by art 37 (b) of the [CRC] to which we are a party […] Section 81(1)(h)(i) of the Constitution […] provides that a person under eighteen has the right "not to be detained except as a measure of last resort". Also, if detained he or she has the right to be detained for the shortest appropriate period. Giving a seventeen year old an effective nine year sentence runs contrary to the letter and spirit of this constitutional imperative when it is considered that he had not committed any violent offences such as robbery, murder, or rape. From the point of view of children's rights custodial punishment is regarded as criminally damaging for children due to the criminogenic influences of prison. The Constitution also places emphasis on the best interests of the child being paramount at all times in matters involving children.[131]

The Court rightly interpreted the provisions of detention as a measure of last resort and for the shortest appropriate period of time and proceeded to reduce the sentence. After due consideration of the circumstances of the case and the sixteen counts involved, the Court altered the sentence from nine years to the shortest appropriate period of three years imprisonment for all counts, of which one year was suspended for five years on usual conditions of good behaviour.[132] The court *a quo*'s approach of sentencing the accused child offender for a long period of time was described as 'removing the child offender from the society by locking him up and throwing away the keys'.[133] It is without a doubt that the interpretation in *FM (juvenile)* is progressive and in-tandem with international normative standards with respect to the protection of child offenders in the criminal justice system. The decision, however, is silent on the conditions under which detained child offenders should be kept.

A different approach was adopted in *M (juvenile) v State*[134] wherein the High Court, on appeal, dismissed the appellant's arguments that the court *a quo* failed to take into account

the best interests of the child offender, and that imprisonment was resorted to as a first and not last recourse. Mawadze J stated that:

> Indeed, s 81 of [the Zimbabwean] Constitution, deals with the rights of children and emphasises in s 81(2) that a child's best interests are paramount in every matter concerning the child […] What escaped the mind of counsel for appellant is that *in casu* the sentencing court was grappling with the competing interests of the appellant (being the abuser) and the complainant (the abused ten year-old child). It is not the appellant's rights which are paramount. The rights of the victim are equally if not more important especially a ten year-old girl.[135]

The Court failed to grasp the fact that the best interests of the appellant (an illiterate and unrepresented child in the lower court) were not competing with those of the complainant. It should have been noted as argued orally by counsel for the appellant, that the interests of the child offender, who was sixteen at the time of the commission of the offence, were those in relation to his personal and individual circumstances. The constitutionalisation of the best interests principle in s 81(2) and 19 elevates it to a constitutional value and a constitutional principle.[136] Unfortunately, the Court failed to give constitutional value to the best interests of the child offender and confirmed the custodial sentence.

Clearly, the High Court adopted an easy option grounded on conservative legal reasoning that avoided a detailed constitutional analysis and interpretation of the best interests of the child. Further, the Court abandoned a progressive interpretation of the constitutional imperative of detention as a measure of last resort and for the shortest appropriate period of time. The Court relied on the guidelines by Bartlet J in *S v Zaranyika*[137] decided under the now defunct Lancaster House Constitution, 1980, which was an 'invisible child constitution' in terms of which children were neither seen nor heard, and not accorded special recognition.[138] Relying on guidelines formulated without a constitutional framework explicitly governing the implementation of children's rights in an era of constitutionally protected children's rights is indefensible. Arguably, there is great potential now more than ever, through transformative constitutionalism, to transform the way courts construe the best interests of the child to ensure that they accord it paramountcy as a constitutional norm, a constitutional right and a guiding principle in the penal context.

Clearly there have been mixed messages from the bench as some of the judges have made sound decisions while others have used imprisonment as a measure of first resort in clear contravention of s 81(1) and (2) of the Constitution. In *S v C (a juvenile)*,[139] the High Court correctly observed, in the context of rape trials, that generally speaking, juveniles should not be sent to prison, but in cases where there are aggravating features such as multiple counts, transmission of sexually transmitted diseases to the victim, serious psychological and or physical trauma, a high degree of violence or force used during the rape and the use of a weapon during the rape, effective imprisonment might be called for especially if the juvenile offender is between sixteen and eighteen years.[140] However, the Court was at pains to emphasise that the periods of imprisonment should vary according to the age and the moral blameworthiness of the offender.[141]

Reports from some civil society organisations have indicated that the Zimbabwean government has largely complied with its national and international obligation to ensure that young offenders are kept separately from detained persons over the age of eighteen years.[142] Unfortunately, even where children are kept separately from adults, the conditions of post-

trial detention do not appear to be consistent with the child's right to be treated in a manner and kept in conditions that take account of the child's age.[143] Zimbabwean courts should learn from South African and Kenyan jurisprudence, and align post-trial detention practices with international standards and the twin commands of detention as a last resort and for the shortest appropriate period of time; and the best interests of the child.

4. Conclusion

This article examined legal developments in South Africa, Kenya and Zimbabwe, with a view to assessing the implementation of the best interests of the child in the context of detention of child offenders as a measure of last resort. As shown from international children's rights law, the best interests of the child is an all-encompassing principle, setting the benchmarks upon which states parties measure all child justice laws and procedures. It is clear that the best interests principle is a self-standing right that strongly informs the interpretation and scope of other rights, including the right not to be detained except as a measure of last resort and for the shortest appropriate period of time. International norms and standards, and emerging child justice jurisprudence, significantly contribute to the manner in which the countries explored in this article implement and develop the best interests of child offenders, in the context of detention as a measure of last resort.

At a pragmatic level, in pre-trial proceedings, the police have a constitutional duty to operate through the lens of the best interests of child offenders and to avoid the detention of children except in unavoidable circumstances. This implies that law enforcement functionaries are constitutionally mandated to consider the best interests of the child when arresting a child. Accordingly, the detention of a child in police custody should be resorted to only when there is no other less invasive way of securing the attendance a young offender before a court of law.

Courts in South Africa and Kenya have construed the constitutional entrenchment of the best interests of the child as a special protection mechanism in the context of pre-trial detention, without necessarily outlawing the arrest and detention of children in exceptionally deserving circumstances. However, in Zimbabwe there is little evidence of how the constitutional injunction of the best interests of the child is translated to protect child offenders during pre-trial detention. Arguably, Zimbabwe can take some lessons from South African and Kenyan jurisprudence on how the police should execute their mandate while serving the best interests of the child.

The principle of the best interests of the child play a central role in the sentencing of child offenders, particularly in terms of imprisonment. In South Africa and Kenya, the sentences imposed on children for serious criminal offences are arguably consistent with both the best interests of the child and the child's right not to be detained except as a measure of last resort. As for Zimbabwe, there are disparities in the way courts approach or implement the principle of the best interests of the child and the child's right not to be detained except as a measure of last resort. The Zimbabwean judiciary could take guidance from Kenya and South Africa in terms of how to sentence child offenders. Examples from South Africa and Kenya as well as international children's rights law provide a strong foundation from which the Zimbabwean judiciary could work to improve its respect for, and promotion and protection of the principle of the best interests of the child offender and could ensure that detention is used as a measure of last resort.

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Notes

1 Adopted by the United Nations (UN) General Assembly on 20 November 1989 (A/RES/44/25).

2 For a definition of 'deprivation of liberty', see the Committee on the Rights of the Child (CRC) 'General Comment No 24 (2019) on children's rights in the child justice system' UN Doc CRC/C/GC/24 para 8. <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf> See also T Liefaard 'Deprivation of liberty of children' in U Kilkelly & T Liefaard (eds) *International Human Rights of Children* (2019) 322–324.

3 UN General Assembly Child Rights Resolution 69/157 (18 December 2014).

4 In October 2016, Manfred Nowak was appointed as the UN independent expert to lead the global study.

5 UN General Assembly 'Report of the independent expert leading the United Nations global study on children deprived of liberty' (A/74/136) (11 July 2019) paras 9–15. <https://undocs.org/A/74/136>. See also M Nowak 'United Nations global study on children deprived of liberty' (2019) <https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf>

6 The independent expert submitted the final report (main findings, conclusions and recommendations) at the 74th Session of the General Assembly (8 October 2019).

7 In some jurisdictions the term ‘juvenile’ is used to refer to a child offender.

8 Report of the independent expert (note 5 above) para 40.

9 Ibid para 43.

10 Ibid paras 43 and 44.

11 Article 37(b) of the UNCRC provides that, ‘No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time’. See also Rule 17.1(b) and (c) of the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).

12 Adopted by the Organisation of African Unity (OAU), now the African Union (AU) in 1990.

13 R Hodgkin & P Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 36 <https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf>. See also CRC ‘General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration’ UN Doc CRC/CGC/24 art 3 para 1 and 2. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2F5F0vEnG3QGKUxFivhToQfjGxYjV05tUAIgpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4>

14 Geneva Declaration of the Rights of the Child (1924).

15 UN Declaration of the Rights of the Child (1959) art 2 and 7.

16 Articles 3(1) and 37(c) of the CRC.

17 CEDAW art 5(b) and 16(1)(d) and (f).

18 Constituting the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, and International Covenant on Social Economic and Cultural Rights 1966.

19 See art 4(1) of the African Children’s Charter.

20 Article 3(1) of the UNCRC and art 4(1) of the African Children’s Charter. The term ‘action’ does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures. It also includes the failure to act or inaction as a form of action. See CRC ‘General Comment No 14’ (note 13 above) paras 17–18.

21 P Mahery ‘The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African child law’ in T Boezaart (ed) *Child Law in South Africa* (2009) 309, 318.

22 See CRC 'General Comment No 14' (note 13 above) para 6.

23 LI Schafer *Child Law in South Africa: Domestic and International Perspectives* (2011) 154.

24 F Viljoen 'African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 219.

25 A Moyo 'Reconceptualising the "paramountcy principle": Beyond the individualistic construction of the best interests of the child' (2012) 12 *African Human Rights Law Journal* 142, 146.

26 CRC 'General Comment No 14' (note 13 above) para 6.

27 For instance, see the CRC 'General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health' UN Doc CRC/C/GC/15 art 24 paras 12–15 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/PPRiCAqhKb7yhsqIkirKQZLK2M58RF/5F0vHCIs1B9k1r3x0aA7FYrehlNUfw4dHmlOxmFtmhaiMOkH80ywS3uq6Q3bqZ3A3yQ0%2B4u6214CSatnrBlZT8nZmj>; CRC 'General Comment No 16 (2013) on state obligations regarding the impact of the business sector on children's rights' UN Doc CRC/C/GC/16 paras 15–17 <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>; CRC 'General Comment No 20 (2016) on the implementation of the rights of the child during adolescence' UN Doc CRC/C/GC/20 para 22 <https://www.refworld.org/docid/589dad3d4.html>; 'General Comment No 24' (note 2 above) para 12.

28 CRC 'General Comment No 14' (note 13 above) para 6 (own emphasis).

29 S Parker 'The best interests of the child: Principles and problems' (1994) 8 *International Journal of Law and the Family* 26, 27. See also J Eekelaar 'Two dimensions of the best interests principle: Decisions about children and decision affecting children' in EE Sutherland & LB Macfarlane (eds) *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (2016) 99–111; U Kilkelly 'The best interests of the child: A gateway to children's rights' in EE Sutherland & LB Macfarlane (eds) *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (2016) 51–66. In South Africa, see J Sloth-Nielsen 'Chicken soup or chainsaws: Some implications of the constitutionalisation of children's rights in South Africa' (1996) *Acta Juridica* 6, 25; R Fambasayi & R Koraan 'Intermediaries and the international obligation to protect child witnesses in South Africa' (2018) 21 *Potchefstroom Electronic Law Journal* 1, 16–18; J Sloth-Nielsen 'The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa' (1996) 4 *International Journal of Children's Rights* 323, 341–342.

30 P Alston 'The best interests principle: Towards a reconciliation of culture and human rights' in P Alston (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (1993) 1, 16. See also N Peleg 'International children's rights law: General principles' in Kilkelly & Liefaard (note 2 above) 136–153; N Thomas & C O'Kane 'When children's wishes and feelings clash with their best interests' (1998) 6 *International Journal of Children's Rights* 137; CRC 'General Comment No 14' (note 13 above) para 33, stating that

the 'child's best interests shall be applied to all matters concerning the child or children, and taken into account to resolve any possible conflicts among the rights enshrined in the Convention or other human rights treaties. Attention must be placed on identifying possible solutions which are in the child's best interests'.

31 T Liefaard 'Juvenile justice from an international children's rights perspective' in W Vandenhole, E Desmet, D Reynaert & S Lembrechts (eds) *Routledge International Handbook of Children's Rights Studies* (2015) 234, 253. See also Liefaard (note 2 above) 327–332.

32 Liefaard (note 31 above) 253.

33 N Cantwell 'The origins, development and significance of the United Nations Convention on the Rights of the Child' in S Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Preparatoires*' (1992) 19, 28.

34 Article 17 of the African Children's Charter. See also Africa's Agenda for Children 2040 (November 2016), in particular aspiration 8, which states that African children should benefit from special treatment in the criminal justice system, consistent with their dignity.

35 For a general discussion, see Liefaard (note 2 above) 330–331. Within the South African context, see *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (6) SA 632 (CC) paras 87–90.

36 For a detailed discussion on this point, see A Moyo 'Youth, competence and punishment: Reflections on South Africa's minimum sentencing regime for youth offenders' (2011) 26 *South African Public Law* 229, 232–240.

37 CRC 'General Comment No 14' (note 13 above) para 28; CRC 'General Comment No 24' (note 2 above) para 76.

38 CRC 'General Comment No 24' (note 2 above) para 78.

39 B Woodhouse 'The constitutionalisation of children's rights: Incorporating emerging human rights into constitutional doctrine' (1999) 2 *University of Pennsylvania Journal of Constitutional Law* 25, 31.

40 Section 28(1)(g) of the Constitution of the Republic of South Africa, 1996.

41 Section 53(1)(f) of the Constitution of Kenya, 2010.

42 Section 81(1)(i) of the Constitution of Zimbabwe Amendment Act 20 of 2013.

43 Liefaard (note 2 above) 329. See also *Centre for Child Law* (note 35 above) para 61; J Sloth-Nielsen & H Kruuse 'A maturing manifesto: The constitutionalisation of children's rights in South African jurisprudence 2007–2012' (2013) *International Journal of Children's Rights* 646, 670; J Sloth-Nielsen 'The role of international human rights law in the development of South Africa's legislation on juvenile justice' (2001) 5 *Law, Democracy and Development* 59.

44 D Chirwa 'Children's rights' in D Chirwa (ed) *Human Rights Under the Malawian Constitution* (2011) 193, 201; B Rwezaura 'The concept of the child's best interests in the changing economic and social context of sub-Saharan Africa' (1994) 8 *International Journal of Law and the Family* 82, 100. For the countries under review, see s 28(2) of the South African Constitution, s 53(2) of the Kenyan Constitution, and s 81(2) of the Zimbabwean Constitution.

45 Selected democracies under review in this article are among them.

46 See *State v Acheson* 1991(2) SA 805, 813 (Nm).

47 CRC 'General Comment No 24' (note 2 above) para 102.

48 A Volz 'Stop the violence! The overuse of pre-trial detention, or the need to reform juvenile justice systems: Review of evidence' (2010) *Defence for Children International* 11. <https://defenceforchildren.org/wp-content/uploads/2010/04/PretrialDetentionReport-dci.pdf>

49 *Raduvha v Minister of Safety and Security* 2016 (2) SACR 540 (CC) 24.

50 Ibid para 32. Section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child.

51 Ibid para 57.

52 Ibid para 40.

53 Ibid paras 57–58.

54 Ibid para 53.

55 Ibid para 59. This point was first made by the Constitutional Court of South Africa in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) para 55, and later to be clearly pronounced in *S v M (Centre for Child Law* as amicus curiae) 2008 (3) SA 232 (CC) para 26. See also A Skelton 'Constitutional and international protection of children's rights' in T Boezaart (ed) *Child Law in South Africa* (2010) 280.

56 *Raduvha* (note 49 above) para 58.

57 Ibid para 65.

58 *S v N* High Court, Northern Cape Division, Kimberley (unreported case number 14/2016) [2016] ZANCHC 73 (28 October 2016).

59 Ibid para 2.

60 Ibid para 5.

61 Ibid paras 8 and 10.

62 Ibid para 12.

63 J Sloth-Nielsen 'Child Justice' (2018) 31 *South African Journal of Criminal Law* 174.

64 *MWK v Attorney General* [2017] eKLR, High Court of Kenya, Constitutional and Human Rights Division (Constitutional Petition No. 347 of 2015).

65 Ibid paras 2, 4, 11–13.

66 Ibid para 92.

67 Ibid para 92.

68 Ibid para 75. See also *Raduvha* (note 49 above) para 65.

69 Ibid para 68–69.

70 Ibid para 72–81

71 Ibid para 96. See also *Director of Public Prosecutions, Transvaal vs Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) paras 130 and 132; *S v M* (note 55 above) para 14-26.

72 G Odongo 'Kenya' in SH Decker & N Marteache (eds) *International Handbook of Juvenile Justice* (2017) 29, 39.

73 *Mkunzo v Republic* [2006] eKLR 1, Court of Appeal of Kenya (Criminal Appeal No. 239 of 2004).

74 *CJW Guardian ad litem for DW v Republic* [2011] eKLR, High Court of Kenya (Miscellaneous Application No. 41 of 2010).

75 Ibid 2.

76 In CRADLE, The Undugu Society of Kenya and Consortium for Street Children *Street Children and Juvenile Justice in Kenya* (2004) 24 it is argued that the 'period of detention, although supposedly 24 hours or less, can actually extend to weeks and even months'. <https://www.streetchildren.org/wp-content/uploads/2013/12/street_children_juvenile_justice_kenya.pdf>

77 As far as could be ascertained, there are no reported cases dealing with children's pre-trial detention rights.

78 It is acknowledged that part 3 and 4 of the proposed Child Justice Bill, 2019, contains extensive provisions on the detention of children in police custody. However, until the Bill becomes law, the status quo prevails.

79 It is unclear whether judicial officers at the Magistrates Court level have embraced a children's rights perspectives to the arrest and remand of child offenders.

80 See M Couzens '*Le Roux v Dey* and children's rights approaches to judging' (2018) 1 *Potchefstroom Electronic Law Journal* 1–27.

81 See Zimbabwe Human Rights NGO Forum 'Rights behind bars: A study of prison conditions in Zimbabwe' (2018) 35. <http://www.hrforumzim.org/wp-content/uploads/2018/10/Prison-Report-2018.pdf>

82 Detention as a measure of last resort was transferred almost verbatim from art 37(b) of the UNCRC.

83 *S v N* (note 58 above) para 39.

84 *Director of Public Prosecutions, KwaZulu-Natal v P* [2006] 1 SA 446 (SCA).

85 She was twelve years and five months old at the time of the offence, which is a relevant factor for the purpose of sentencing. The High Court had postponed the passing of sentence for a period of 36 months on condition that the accused complies with the conditions of a sentence of 36 months of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act.

86 Ibid para 14.

87 Ibid para 18.

88 Ibid para 20.

89 Ibid para 19–21.

90 Ibid para 28.

91 Ibid para 28.

92 *Centre for Child Law* (note 35 above).

93 The matter had started in the High Court. The High Court held that the impugned law 'left courts in applying the minimum sentencing regime with no discretion, but to start with the minimum sentence, clearly not a clean slate, but imprisonment as a first resort' and declared minimum sentencing unconstitutional in respect of juvenile offenders. See *Centre for Child Law* (ibid) para 9, 22–27.

94 Ibid paras 31–32.

95 Ibid para 45.

96 *Brandt v S* [2005] 2 All SA 1 (SCA) para 13. See also *Direkteur van Openbare Vervolgings v Makwatsja* (2004) 2 SACR 1 (T) para 22.

97 *Brandt* (ibid) para 2.

98 Ibid para 9.

99 Ibid para 26.

100 J Sloth-Nielsen 'Juvenile sentencing comes of age' (2005) 16 *Stellenbosch Law Review* 98, 100.

101 As amended by Act No 19 of 2014.

102 *AOO v Attorney General* [2017] eKLR, High Court of Kenya, Constitutional and Human Rights Division (Petition No. 570 of 2015).

103 Ibid 3–4.

104 Ibid 5.

105 Ibid 5.

106 Ibid 5.

107 Ibid 6–7.

108 Ibid 7–8.

109 *Republic v TCP* [2018] eKLR, High Court of Kenya (Criminal Case No 1 of 2018).

110 Ibid para 2.

111 Ibid para 2.

112 Section 190(1)–(3) of the Children's Act.

113 *TCP* (note 109 above) para 5.

114 See s 20.11 on of the Sentencing Policy Guidelines for the Judiciary. Section 20.16 of the guidelines also provides that 'before placing a child in a particular borstal institution, the court must enquire the availability of space in that institution. A child should only be placed in an institution if there is available accommodation'. <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf >

115 *TCP* (note 109 above) para 8.

116 Ibid para 9.

117 Ibid.

118 Chapter 9:23.

119 Section 80 of the Criminal Law Code.

120 *LC v State High Court, Masvingo* (Unreported case MUTR24/17 CA75/17) (27 February 2019).

121 The offender was sixteen years old at the time of committing the offence.

122 Section 114 of the Criminal Law Code.

123 Chapter 20:14.

124 See *S v Mweembe* (unreported Case No. HB 102-18, HCAR 345/18; Ref CRB 44-45/18) [2018] ZWBHC 102 (12 April 2018) (High Court Bulawayo).

125 *Centre for Child Law* (note 35 above) para 45.

126 Section 46(1)(e) of the Constitution provides that when interpreting the rights protected in the Declaration of Rights, every court, tribunal or forum may consider foreign law.

127 R Frase 'Sentencing policy development under the Minnesota sentencing guidelines' in A von Hirsch, AJ Ashworth & JV Roberts *Principled Sentencing: Readings on Theory and Policy* (2009) 270, 272–273.

128 C Spohn 'Criticisms of mandatory minimums' in Von Hirsch et al (ibid) 279, 279.

129 For an instructive discussion on this point, see Moyo (note 36 above) 241–244.

130 *S v FM (juvenile)* 2015 (1) ZLR 56 (H).

131 Ibid 60B–C.

132 Ibid 62A–B.

133 Ibid.

134 *M (juvenile) v State High Court, Masvingo* (unreported case HMA 07-18, CRB CA 59/17) [2018] ZWMSVH 07 (31 January 2018). The appeal was argued by the first author. The heads of argument were filed adding a fourth ground, to the effect that the court *a quo* failed to consider the best interests of the child offender. The best interests was argued extensively in oral submissions, particularly on the constitutional significance of the best interests of the child as paramount and how the court ought to construe its constitutional value.

135 Ibid 4.

136 See R Fambasayi 'The constitutional protection of child witnesses in Zimbabwe's criminal justice' (2019) 32 *South African Journal of Criminal Justice* 52, 65; A Moyo 'The legal status of children's rights in Zimbabwe' in A Moyo *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2019) 126, 156.

137 *S v Zaranyika* 1995 (1) ZLR158 (H). For other cases decided before the adoption of the current Constitution of Zimbabwe, see *S v Mavasa* 2010 (1) ZLR 28 (H); *S v Hunda* 2010 (1)

ZLR 387 (H); *S v Sithole* 1995 (1) ZLR 334 (S); *S v CM (A Juvenile)* High Court, Bulawayo (unreported Case No. (ENT 446/03) HC 1546/2003 and Case No. HC 1547/2003) [2003] ZWBHC 67 (18 June 2003).

138 J Tobin 'Increasingly seen and heard: The constitutional recognition of children's rights' (2005) 21 *South African Journal of Human Rights* 86, 94.

139 *S v C (a juvenile)* 2014 (2) ZLR 876 (H).

140 Ibid 879.

141 Ibid.

142 See for instance, Zimbabwe Human Rights NGO Forum (note 81 above).

143 ZACRO and NGO Forum 'Whahwa prison monitoring visit Report 2'. See also Zimbabwe Human Rights NGO Forum (note 81 above) 34–35.