



Kelly-Anne Ramages

The Minimum Age of Criminal Responsibility in African Legal Systems

A Comparative Analysis



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'Trust in the Lord with all your heart; do not depend on your own understanding. Seek his will in all you do, and he will direct your paths. Don't be impressed with your own wisdom. Instead, fear the Lord and turn your back on evil. Then you will gain renewed health and vitality'. Proverbs 3: 5-8 (NLT).

I am grateful to my parents who have given me the opportunity to attain the highest levels of education and who have supported me throughout my studies. My dad deserves a special mention for his devotion, help and encouragement. He has never given up on me or doubted my ability to achieve my dreams. To my siblings for their constant love and support.

To Professor Julia Sloth-Nielsen thank you for your endless dedication and selfless efforts in improving Children's Rights globally and for taking a chance on me.

TABLE OF CONTENTS

CHAPTER 1: Introduction to the administration of juvenile justice and the minimum age of criminal responsibility (MACR)

| | |
|---|----|
| 1. Aims and rationale of the research | 7 |
| 2. The meaning and significance of the MACR | 8 |
| 3. Problem statement | 9 |
| 4. Delineation of chapters | 10 |
| 4.1 Chapter 1 | 10 |
| 4.2 Chapter 2 | 10 |
| 4.3 Chapter 3 | 10 |
| 4.4 Chapter 4 | 11 |
| 4.5 Chapter 5 | 11 |

CHAPTER 2: Overview of the International Frameworks: The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child

| | |
|---|----|
| 1. Introduction | 12 |
| 2. The United Nations Convention on the Rights of the Child | 16 |
| 2.1 The historical development of the United Nations Convention on the Rights of the Child | 16 |
| 2.2 The general aims and scope of application | 18 |
| 2.3 The key principles | 19 |
| 2.3.1 Non-discrimination | 19 |
| 2.3.2 Best interest of the child | 20 |
| 2.3.3 The right to life, survival and development | 21 |
| 2.3.4 Child participation | 22 |
| 2.3.5 The juvenile justice provisions: Article 37 and Article 40 | 24 |
| 3. The Committee on the Rights of the Child | 32 |
| 3.1 The day of general discussion | 34 |
| 3.2 General Comment No. 10 | 36 |
| 3.2.1 The prevention of juvenile delinquency | 38 |

| | |
|---|----|
| 3.2.2 Intervention in the context of judicial proceedings and interventions without resorting to judicial proceedings (diversion) | 39 |
| 3.2.3 The MACR | 39 |
| 3.2.4 The guarantees for a fair trial | 43 |
| 3.2.5 The deprivation of liberty including pre-trial detention and post-trial incarceration | 44 |
| 4. Evaluating the status of the UNCRC and the General Comment | 44 |
| 5. The African Charter on the Rights and Welfare of the Child | 46 |
| 5.1 Background and scope of application | 46 |
| 5.2 The substantive principles | 48 |
| 5.2.1 Non-discrimination | 49 |
| 5.2.2 Best interest of the child | 49 |
| 5.2.3 Right to life, survival and development | 50 |
| 5.2.4 Child participation | 50 |
| 5.2.5 The juvenile justice provision: Article 17 | 51 |
| 6. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) | 55 |
| 7. Evaluating the status of the ACRWC | 57 |
| 8. Conclusion | 57 |

CHAPTER 3: Assessing and comparing the minimum age provisions in the countries under study

| | |
|---|----|
| 1. Introduction | 59 |
| 2. The status of international law: dualist and monist approaches | 60 |
| 3. Child law reform and current developments on the MACR to date | 63 |
| 3.1 Uganda | 63 |
| 3.2 Ghana | 65 |
| 3.3 Kenya | 67 |
| 3.4 South Africa | 69 |
| 3.5 Namibia | 72 |
| 3.6 Lesotho | 75 |
| 3.7 The Gambia | 76 |
| 3.8 Ethiopia | 78 |

| | |
|---|----|
| 3.9 Malawi | 80 |
| 3.10 Mozambique | 82 |
| 3.11 Sierra Leone | 84 |
| 3.12 Zambia | 86 |
| 4. The CROC's jurisprudence on the MACR | 87 |
| 5. Assessing and comparing child law reform initiatives on the MACR of the countries under study | 88 |
| 6. Conclusion | 90 |

CHAPTER 4: A critical analysis of the SALRC and the recent position adopted by the CROC in General Comment No. 10 on the MACR

| | |
|---|-----|
| 1. Introduction | 91 |
| 2. The concept of criminal capacity | 91 |
| 3. Criminal capacity and the <i>doli incapax</i> presumptions | 92 |
| 4. Case law illustrations of the <i>doli incapax</i> presumption in practice | 94 |
| 5. Assessing the <i>doli incapax</i> presumption | 99 |
| 6. The need for separate legislation governing children in conflict with the law | 103 |
| 6.1 The emergence of the Child Justice Bill | 104 |
| 7. The issue of a the MACR and the draft proposals | 105 |
| 7.1 The Issue Paper | 105 |
| 7.2 The Discussion Paper | 106 |
| 7.3 The Report | 107 |
| 8. The Child Justice Bill (2002 version) | 109 |
| 9. The international perspective on South Africa's draft legislation | 112 |
| 10. The Child Justice Bill (2007 Cabinet version) | 112 |
| 11. The Child Justice Bill (2008 version approved by the National Assembly) | 116 |
| 12. Conclusion | 118 |

CHAPTER 5: Conclusion and Recommendations

APPENDICES:

| | |
|--|-----|
| Appendix 1 Child Justice Bill No. 49 of 2002 | 123 |
|--|-----|

| | | |
|---------------------|---|-----|
| Appendix 2 | Child Justice Bill (2007 Cabinet Version) | 125 |
| Appendix 3 | Child Justice Bill (2008 Version as approved by the National Assembly) | 130 |
| Appendix 3(A) | Chapter 14 General Provisions s96(4) and (5) | 136 |
| BIBLIOGRAPHY | | 137 |

CHAPTER 1

INTRODUCTION TO THE ADMINISTRATION OF JUVENILE JUSTICE AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY (MACR)

1. Aims and rationale of the research

This book seeks to investigate a specific aspect of juvenile justice, namely the MACR in the African legal systems that have been selected for the purpose of this study. The administration of juvenile justice has had many far reaching developments over the last decade, both internationally and nationally. There has been much debate and development in the area concerning children in conflict with the law and the MACR. In light of developing international law regarding the MACR, this investigation needs to be done within a children's rights framework incorporating a rights-based approach. The work started by Godfrey Odongo¹ and the recent approach adopted by the Committee on the Rights of the Child (CROC) in General Comment No. 10² forms the basis of this book.

The aims of this book are to assess, compare and analyse the MACR in accordance with the harmonisation of national and international laws, as reflected against the backdrop of recent international standards and African realities. The writer proposes to carry out the aims of the research by furthering the work started by Godfrey Odongo in 2005 in conjunction with the groundbreaking General Comment No.10 and its views on the MACR. In 2005 Godfrey Odongo submitted his LLD thesis on 'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context'. His research concentrated on the following six African countries, Ghana, Kenya, Lesotho, Namibia, South Africa and Uganda. Chapter 4 of his thesis was dedicated to the issue of age and criminal responsibility and legal reform in this regard. Two years later, the CROC produced General Comment No.10 which has provided signatories with a chronological minimum age. My book recaps on the work of Odongo, in so far as the MACR is concerned and reviews a further six African countries, to illustrate the international developments that have occurred since 2005 and how it impacts on national legal systems and children in conflict with the law. Finally, it will provide a critique of the position adopted by the CROC which conflicts with the position held by the South African Law Reform Commission (SALRC) and the many African countries who practice the *doli incapax* rule.

¹ GO Odongo (2005) 'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context' (Unpublished LLD Thesis).

² 'Children's rights in juvenile justice', CRC/C/GC/10, 2 February 2007.

The countries I selected to research are Gambia, Ethiopia, Malawi, Mozambique, Sierra Leone and Zambia. They were chosen on the following basis; firstly due to the availability of information and English texts³ at the time I started my research at the beginning of 2007, secondly because all six (as well as the six countries chosen by Odongo) are signatories of both the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) and finally as they are all developing countries that share similar problems culturally, economically, practically and socially. The legal reform taken by these countries and the implementation thereof will serve to illustrate the practical implications of the MACR pre and post General Comment No.10 and how the States Parties have attempted to implement suitable MACR's into their respective legal systems. It will become clear in chapter 3 that a suitable MACR may sometimes fall short of international standards and that the States Parties are urged to continue to review their existing legislation in an attempt to raise their MACR in accordance with international standards.

South Africa is used as a case study to detail some of the arguments for and against a MACR in accordance with international standards and the retention of the controversial *doli incapax* rule. The rationale behind focusing on South Africa is firstly due to the writer being a South African and is thus far better acquainted with its legal system and secondly, as some of these African countries have relied on South Africa's Child Justice Bill⁴ as a good practice model⁵ and thirdly on account of the MACR recently receiving much attention on the parliamentary agenda this year.

2. The meaning and significance of the MACR

The concept of an age of criminal responsibility relates to the age at which a child has the mental ability to distinguish between right and wrong and can understand or appreciate the consequences involved (cognitive mental function) and can act in accordance with such understanding or appreciation (conative mental function).⁶ It is the age at which children have the capacity to commit crimes and to accept responsibility for their actions, thus rendering them liable for

³ There were many other countries that I could have selected but their documents were not in English. Thus the language barrier prevented me from choosing possible other countries.

⁴ B 49 of 2002 (2008 Cabinet version as approved by the National Assembly).

⁵ L Ehlers 'Child Justice: Comparing the South African child justice reform process and experiences of juvenile justice reform in the United States of America' *Occasional Paper 1* July 2006 31, 39. The Bill has served as a good practice model for Gambia, Lesotho and Namibia.

⁶ Rumpff Report (1967) 'Report of the Commission of Inquiry into the responsibility of mentally deranged persons and related matters' 72; E Burchell & P Hunt (1997) *'South Africa Criminal Law and Procedure. Vol 1 General Principles of Criminal Law'* 153; C Snyman (2002) *'Criminal Law'* 177, 178; J Burchell & J Milton (2005) *'Principles of Criminal Law'* 358.

prosecution and formal sanctions.⁷ A MACR is indicative of the lowest age at which a State or international community is willing to hold children liable for their alleged criminal acts in a court of law.⁸ Children who commit criminal acts but are below the MACR should not be exempted from being held accountable. Their accountability should, however, be based on civil law measures of welfare, educational or non-punitive measures rather than criminal sanctions.⁹

The significance of a MACR is based on the universal trend that children are slow in developing mental capacity.¹⁰ Secondly, they often find themselves amongst the marginalised and vulnerable groups in society which leads to all kinds of abuse. Research has shown that the criminal justice system is not the most appropriate place to deal with such children and it is imperative that legal systems have protection measures in place to protect these children who find themselves in this unfortunate position.¹¹ Thus all children in conflict with law should be entitled to the MACR protections provided in the UNCRC, other UN standards and the ACRWC (discussed in chapter 2).

3. Problem statement

Investigating the MACR may tender difficulties in light of the fact that many African countries are developing countries structured upon deep rooted rural and cultural differences.¹² The actual determination of a child's true age is, and remains to be, a pressing issue in developing African legal systems. Poor infrastructure in many of these countries results in birth records being inaccessible or virtually non-existent which in turn leads to a lack of proof of age and reliable age estimates.¹³ To further complicate matters, lenient treatment afforded to child offenders by the child justice system is used by many adults as a forum to misrepresent their true age and slip

⁷ GO Odongo (2007) 'A case for raising minimum age of criminal responsibility'. Available at http://www.africanchildforum.org/Documents/age_of_cri_response.pdf [accessed 02 October 2008].

⁸ DJ Cipriani (2008) '*Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*'. Available at <http://www.worldcat.org/wcpa/oclc/213330715> [Accessed 11 September 2008].

⁹ DJ Cipriani (2005) 'South Asia and the minimum age of criminal responsibility: Raising the standard for children's rights'. Available at [http://www.unicef.org/rosa/Criminal_Responsibility_08July_05\(final_copy\).pdf](http://www.unicef.org/rosa/Criminal_Responsibility_08July_05(final_copy).pdf) [accessed 23 September 2008]; CRC/C/GC/10 para 31.

¹⁰ GO Odongo (2007) 'A case for raising minimum age of criminal responsibility'. Available at http://www.africanchildforum.org/Documents/age_of_cri_response.pdf [accessed 02 October 2008].

¹¹ DJ Cipriani (2005) 'South Asia and the minimum age of criminal responsibility: Raising the standard for children's rights'. Available at [http://www.unicef.org/rosa/Criminal_Responsibility_08July_05\(final_copy\).pdf](http://www.unicef.org/rosa/Criminal_Responsibility_08July_05(final_copy).pdf) [accessed 23 September 2008].

¹² L Ehlers 'Child Justice: Comparing the South African child justice reform process and experiences of juvenile justice reform in the United States of America' *Occasional Paper 1* July 2006 11.

¹³ DJ Cipriani (2005) 'South Asia and the minimum age of criminal responsibility: Raising the standard for children's rights'. Available at [http://www.unicef.org/rosa/Criminal_Responsibility_08July_05\(final_copy\).pdf](http://www.unicef.org/rosa/Criminal_Responsibility_08July_05(final_copy).pdf) [accessed 23 September 2008]; DJ Cipriani (2008) '*Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*'. Available at <http://www.worldcat.org/wcpa/oclc/213330715> [Accessed 11 September 2008].

through the system.¹⁴ Another pressing problem is the absence of appropriate responses to children below the age of the MACR and where there are responses they tend to be of a punitive nature.¹⁵ Despite the CROC fixing a minimum age at 12, some countries still have a lower age minimum which leads to disarray and non-uniformity amongst States Parties in the criminal justice sphere.

4. Delineation of chapters

4.1 Chapter 1

The introduction sets out the aims and rationale of the research, the meaning and significance of the MACR, identifying the problem and an overview of the chapters. It follows with a brief discussion on the work started by Odongo and developing international standards in light of the General Comment No. 10 and its views on the MACR. The writer then provides a rationale for the selection of the 12 countries under study and the focus on South Africa. It furthermore highlights some of the practical problems related to the MACR with regard to obtaining birth records, the consequences of deep rooted cultural differences and the African conception of age.

4.2 Chapter 2

An overview of the influences of international law: This chapter focuses on the influence of UNCRC and ACERWC in upgrading international norms on child justice in relation to the minimum age issue and reforming national law in accordance with those international standards. A large portion of this chapter is dedicated to General Comment No. 10 in general and specifically to the MACR and its findings. It highlights the roles of the CROC, the African Committee of Experts and Welfare of the Child (ACERWC) and looks at other relevant international instruments such as the European Convention on Human Rights, the International Convention on Civil and Political Rights and the United Nations non-binding instruments.

4.3 Chapter 3

This chapter outlines the method of incorporating international provisions into the States Parties' national legal systems. It then discusses the process of law reform that each country undertook in implementing a MACR. The African legal systems already dealt with by Odongo are discussed in brief while the Gambia, Ethiopia, Malawi, Mozambique, Sierra Leone and Zambia's law reform

¹⁴ Children's Rights Project (2007) *Children Used By Adults to Commit Crimes (CUBAC): Final Report on Pilot Programme Implementation*.

¹⁵ DJ Cipriani (2008) '*Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*'. Available at <http://www.worldcat.org/wcpa/oclc/213330715> [Accessed 11 September 2008].

processes are discussed more extensively. Finally these countries MACR's are assessed and compared to each other.

4.4 Chapter 4

CROC holds the view that a 'split age' is confusing and leads to discriminatory practices while the SALRC advocates the *doli incapax* rule because it serves as a 'protective mantle' for children in conflict with the law. This chapter critically analyses the two views and determines which view prevails in the context of South Africa. The chapter begins with an explanation of criminal capacity and the *doli incapax* presumption and whether the presumption really works in practice by looking at case law illustrations. It then provides an overview of the drafting history of South Africa's Child Justice Bill and an in depth discussion on the development of the relevant MACR provisions since 2002 and the cogent arguments in favour of raising the MACR and retaining the presumption.

4.5 Chapter 5

The final chapter briefly recaps the influence of and value attached to international law and the extent of harmonisation. Finally it discusses the conclusions drawn from the research and provides recommendations.

CHAPTER 2

OVERVIEW OF THE INTERNATIONAL LAW FRAMEWORKS: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD AND THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD.

1. Introduction

On an international level, the administration of juvenile justice has been described as 'revolutionary' since the adoption of the 1989 UNCRC.¹⁶ The UNCRC contains two fundamental articles concerning children in conflict with the law.¹⁷ Implementation of the UNCRC should not, however, be limited to these fundamental articles. The CROC has constantly advocated that the general principles enshrined in articles 2, 3, 6 and 12 form an integral part of the administration of juvenile justice.¹⁸ Thus, when implementing and interpreting its provisions, all the UNCRC articles affecting children in conflict with the law should be taken into account.¹⁹

In addition to the UNCRC, other applicable binding sources of international law in the sphere of juvenile justice are the Concluding Observations of the CROC, the 1966 ICCPR,²⁰ the 1950 ECHR²¹ and the 1990 ACRWC.²² These are further supplemented by three sets of non-binding rules or soft law known as the 1985 Beijing Rules for the Administration of Juvenile Justice,²³ the 1990 Standard Minimum Rules for Juveniles Deprived of their Liberty (the Havana Rules) and the

¹⁶ J Sloth-Nielsen (2000) 'Child Justice and Law Reform' in Davel, CJ (Ed) *Introduction to Child Law in South Africa* 385; G Van Bueren (2000) 'The United Nations Convention on the Rights of the Child: An Evolutionary Revolution' in Davel, CJ (Ed) *Introduction to Child Law in South Africa* 202.

¹⁷ Article 37 and Article 40. See 2.3.5 for full text and detailed discussion.

¹⁸ J Doek (2006) 'Child justice trends and concerns with a reflection on South Africa' in Gallinetti, J, Kassan, D & Ehlers, L (Eds) *Conference Report: Child Justice in South Africa: Children's Rights under Construction* 11.

¹⁹ G Lansdown (2000) 'The Reporting Process under the Convention on the Rights of the Child' in Alston, P and Crawford, J (Eds) *The Future of UN Human Rights Treaty Monitoring* 116; M Gose (2002) 'The African Charter on the Rights and Welfare of the Child' 17.

²⁰ The ICCPR was the first global treaty enshrining specific provisions in articles 6(5), 10(2)(b), 14(4) and 24 regulating the administration of juvenile justice. It is important to note that these articles were aimed at necessary improvements rather than a move towards a child-centred criminal justice system.

²¹ Neither articles 3 and 6 of the ECHR make any reference to children yet they find application in the sphere of juvenile justice. Article 3 prohibits torture, inhuman or degrading treatment or punishment while article 6 covers a range of due process rights relevant to juveniles within the jurisdiction of the Council of Europe.

²² The ACRWC has its juvenile justice provision enshrined in article 17. See 5.2.5 for full text and detailed discussion. J Sloth-Nielsen (2000) 'Child Justice and Law Reform' in Davel, CJ (Ed) *Introduction to Child Law in South Africa* 386, 387; G Van Bueren (2006) 'Article 40: Child Criminal Justice', in Alen, A et al *A Commentary on the United Nations Convention on the Rights of the Child* 4.

²³ The Beijing Rules (UN Standard Minimum Rules for the Administration of Juvenile Justice) were adopted by General Assembly Resolution 40/33 of 23 November 1985.

Riyadh Guidelines for the Prevention of Juvenile Delinquency.²⁴ Finally regard should also be had for the 1997 UN Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines) which recommend important criminal justice guidelines and penal policy aspects for children in conflict with the law.²⁵

The United Nations developed the non-binding Beijing Rules, Havana Rules and the Riyadh Guidelines to assist States in realising children's rights and in protecting those rights. Many of the basic principles reflected in the UNCRC are taken directly from the non-binding rules and guidelines. These rules and guidelines provided the backbone for many of the UNCRC's basic principles during its drafting and aid in the interpretation and understanding of its provisions.²⁶ It suffices to say that the non-binding principles incorporated into the UNCRC carry a much stronger weight than before, while the unincorporated principles remain interpretive tools. Together these binding and non-binding international standards are the subject of a comprehensive guidance for a rights-based juvenile justice which has no equal in the field of children's rights.²⁷ A more recent development that goes hand in hand with these Rules and Guidelines is the CROC's General Comments. There are 10 Comments to date which have proved to be immensely helpful for States Parties when interpreting thematic issues.²⁸ General Comment No.10 is of particular importance for States Parties' understanding of the MACR which is the focal point of this thesis.

²⁴ The United Nations Standard Minimum Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) were adopted by the General Assembly Resolution 45/113 and Resolution 45/112 on 14 December 1990.

²⁵ The UN Guidelines for Action on Children in the Criminal Justice System were recommended by Economic and Social Council (ECOSOC) Resolution 1997/30 of 21 July 1997. The Vienna Guidelines provide a framework for the implementation of international standards at national level. They do not add any new content to the already existing standards; rather they were designed to facilitate effective implementation of the UNCRC and other related instruments. The Guidelines emphasise the issues relating to age, for example, the importance around birth registrations and respect for all children's rights regardless of the legal age limits. Guideline 8 recommends that, in implementing the Guidelines, consideration should be given to the following:

'(a) Respect for human dignity, compatible with the four general principles underlying the Convention, namely: non-discrimination, including gender-sensitivity; upholding the best interests of the child; the right to life, survival and development; and respect for the views of the child; (b) A rights-based orientation; (c) A holistic approach to implementation through maximization of resources and efforts; (d) The integration of services on an interdisciplinary basis; (e) Participation of children and concerned sectors of society; (f) Empowerment of partners through a developmental process; (g) Sustainability without continuing dependency on external bodies; (h) Equitable application and accessibility to those in greatest need; (i) Accountability and transparency of operations; (j) Proactive responses based on effective preventive and remedial measures'.

²⁶ G Van Bueren (2006) 'Article 40: Child Criminal Justice', in Alen, A et al *A Commentary on the United Nations Convention on the Rights of the Child* 4, 5. At the same time the Beijing Rules were being adopted, the UNCRC was being drafted.

²⁷ UNICEF (1998) *Innocenti Digest: Juvenile Justice* 2.

²⁸ See later discussion at 3.2. General Comment No. 10.