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SDG 16 and the Impact of the CCR on Pre-trial Detention of Children in South Africa

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Abstract

The danger to children of "criminal contamination" while in detention pending trial cannot be underestimated.[1] Unfortunately, a large number of children are reported to be in pre-trial detention yearly. Sustainable Development Goal 16 (Goal 16), through indicator 16.3.2 seeks to reduce the number of unsentenced detained persons (including children). The essence of this indicator is that awaiting trial persons (for various reasons) should not be detained in custody unnecessarily. For children, such pre-trial detention can lead to devastating consequences such as loss of school time, mental and emotional breakdown and exposure to various forms of abuse. Having in mind the various negative consequences caused by detention, Article 37(b) of the Convention on the Rights of the Child (CRC) prohibits unlawful and arbitrary arrest, detention or imprisonment of children and if lawfully used, it is only to be a measure of last resort and for the shortest period. The requirement in Article 37(b) that any detention of children be only as a measure of last resort and for the very shortest period of time can be used as an instrument to achieve the objective of Goal 16, indicator 16.3.2. In light of indicator 16.3.2, this article will thus discuss the impact of this CRC provision in reducing the number of unsentenced detained children in South Africa, thus contributing towards the achievement of this goal. The article will give a statistical analysis of the progress made by South Africa in reducing the number of unsentenced children detained in secure care and correctional facilities as a result of applying the CRC provisions.

Keywords: Deprivation of Liberty; Pre-Trial Detention; SDG 16; Diversion; Due Process;

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1 Rule 13 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") 29 November 1985, A/RES/40/33.

Child Justice; Secure Care.

1 INTRODUCTION

Sustainable Development Goal 16 (Goal 16) aims to: "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."[2] The Goal 16 framework provides countries with a rights-based approach to tackling the drivers of suffering – that affords dignity and agency to those left behind.[3] It addresses patterns of exclusion, structural and institutional constraints and unequal power relations that produce and reproduce patterns of marginalisation, inequality and suffering over generations.[4] Target 16.3 expands the overall goal of Goal 16 to "promotion of the rule of law at the national and international levels and ensuring equal access to justice for all", notably through indicator 16.3.2 which aims to significantly reduce the number of unsentenced detainees as a proportion of overall prison population. Indicator 16.3.2 thus focuses on significantly reducing the number of persons (including children) held in detention who have not yet been sentenced.[5] The indicator signifies overall respect for the principle that persons awaiting trial should not be detained in custody unnecessarily.[6] This, in turn, is premised on aspects of the right to be presumed innocent until proven guilty.[7] From a development perspective, extensive use of pre-trial detention when not necessary for reasons such as the prevention of absconding, the protection of victims or witnesses or the prevention of the commission of further offences, can divert criminal justice system resources and exert financial and unemployment burdens on the accused and their families.[8]

In many parts of the world, children accused of crime languish in subpar detention facilities, waiting months or years for trials that often never occur.[9] This injustice is often traced back to minimal judicial resources, corruption, and a lack of safeguards such as legislation limiting pre-trial detention or availability of pre-sentencing alternatives.[10] Children detained before and after trial face a myriad of challenges, but those in pre-trial detention face unique issues while they are supposedly presumed innocent.[11] Theoretically, pre-trial detainees are a more temporary population than those imprisoned and as a result, authorities generally disregard their needs for education and healthcare, believing those resources to be better apportioned for sentenced detainees.[12]

A direct effect of taking time off from education is the diminished likelihood of detained

2 See United Nations "Sustainable Development Goals" https://www.un.org/sustainabledevelopment/sustainable-development-goals/ (accessed 20-03-2020).

3 UN Global Alliance "Report for Reporting Progress on Peaceful, Just and Inclusive Societies: Enabling the implementation of the 2030 Agenda through SDG 16+: Anchoring Peace, Justice and Inclusion" (2019) 22 https://www.sdg16hub.org/system/files/201907/Global%20Alliance%2C%20SDG%2016%2B%20Global%20Report.pdf (accessed 10-03-2020).

4 Global Alliance "SDG 16+ Report" (2019) 22.

5 These can also be referred to as awaiting trial/pre-trial detainee. Heard & Fair define a pre-trial detainee as someone who, in connection with an alleged offence, has been deprived of their liberty following a judicial or other legal process, but not yet definitively sentenced. The person could be at any of the following stages: the "pre-court" stage: the decision has been made to proceed with the case, and further investigations are in progress or a court hearing is awaited; the "court" stage: the court process (involving determination of guilt and/or sentence) is ongoing; the "convicted un-sentenced" stage: the person has been convicted at court but not yet sentenced; the "awaiting final sentence" stage: a provisional sentence has been passed, but the definitive sentence is subject to an appeal process. See Heard & Fair "Pre–trial Detention and its Overuse: Evidence from 10 Countries" (2019) 5 https://www.prisonstudies.org/news/pre-trial-detention-and-its-over-use-evidence-ten-countries (accessed 01-04-2020).

6 Global SDG Indicator Platform https://sdg.tracking-progress.org/indicator/16-3-2-unsentenced-detainees-as-a-proportion-of-overall-prison-population/ (accessed 02-04-2020).

7 *Ibid*. See also Article 40(2)(b)(i) of the CRC.

8 Global SDG Indicator Platform https://sdg.tracking-progress.org/indicator/16-3-2-unsentenced-detainees-as-a-proportion-of-overall-prison-population/ (accessed 02-04-2020).

9 Rosefelt "Children in Limbo: The Need for Maximum Limits for Juvenile Pre-trial Detention" 2019 *MJIL* 239.

10 Rosefelt 2019 *MJIL* 239.

11 Rosefelt 2019 *MJIL* 239. See also Méndez "UN Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (2015) https://www.refworld.org/pdfid/5501506a4.pdf (accessed 18-03-2020). The report focuses on children deprived of their liberty from the perspective of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

12 Open Society Foundation "The Socioeconomic Impact of Pre-trial Detention: A Global Campaign for Pre-trial Justice Report" (2011) 22–23 https://www.justiceinitiative.org/publications/socioeconomic-impact-pretrial-detention (accessed 08-03-2020).

children returning to school, which results in less stable employment and an increased chance of arrest.[13] In many countries, the lack of adequate facilities, food and sanitation, insufficient access to education and training, and compromised contact with family and friends makes even short periods in pre-trial detention traumatic for children.[14] Pre-trial detention impedes the exercise of children's due process rights, which negatively impacts their physical and mental health that can lead to social effects that last for their entire lives.[15] It is thus desirable for nations to avoid or limit detention of children (pre or post-trial) because of the enormous negative consequences it has on them, their families and society at large.

In line with the goal to limit detention of children, the important international treaty on the protection of children's rights, the Convention on the Rights of the Child (CRC), prohibits the unlawful and arbitrary arrest, detention and imprisonment of children.[16] The CRC requires such detention or imprisonment to be for the shortest period and only as a measure of last resort.[17] As such, the CRC can be used as an important tool in enforcing the reduction of unsentenced children in detention. Having ratified the CRC, many countries, including South Africa, have an obligation to comply with its provisions. In that light, this article will evaluate the impact of the CRC on the reduction of detention of unsentenced children in South Africa.

The article will begin with a discussion of Articles 37 and 40 of the CRC and General Comment 24 on children's rights in the child justice system published by the CRC Committee (responsible for enforcing the implementation of the CRC) in September 2019. The article will also discuss a recent global study led by Professor Manfred Nowak, on the deprivation of liberty of children in various settings including in the administration of justice.[18] The global study gives insight into the overall detention of children in criminal justice systems, the approximate number of children in detention worldwide and offers solutions that can help to reduce the incidence of detaining children.[19] Lastly, the article will give a statistical analysis of the progress made by South Africa in reducing the number of unsentenced children detained in secure care and correctional facilities as a result of applying the CRC provisions.

2 THE CRC AND DETENTION OF CHILDREN

International law on child justice promotes a comprehensive approach to the prevention of criminalisation and detention of children.[20] The binding legal prohibition of detention of children is found in Articles 37 and 40 of the CRC. Article 37(b) embodies one of the most significant principles of child justice. It provides that the arrest, detention or imprisonment of a child shall be non-arbitrary, in conformity with the law, a measure of last resort and for the shortest appropriate period.[21] The provision, in essence, has four elements, the first two of which are the prohibition of unlawfulness and of arbitrariness in the arrest, detention and imprisonment of children. Second, it demands that when the lawful and non-arbitrary requirements are met, the detention and imprisonment should be the only alternative and only for a short period. The "lawful" requirement addresses compliance with the grounds and procedures set out primarily under domestic law for arrest, detention and imprisonment, whereas "non-arbitrary" adds elements beyond the principle of legality, including reasonableness of the law itself and proportionality of measures.[22] The requirement of lawfulness and non-arbitrariness also means that cases of arrests, detention and imprisonment provided for by the law must not be

13 International Human Rights Law and Center "Children in Pre-trial Detention: Promoting Stronger International Time Limits" (2018) 7 https://ssrn.com/abstract=3273568 (accessed 01-04-2020).
14 *Ibid.*
15 *Ibid.*
16 See Article 37(b) discussed in the next section.
17 The next section of this article will expand on these requirements.
18 Nowak *United Nations Global Study on Children Deprived of Liberty* (2019).
19 Nowak 2019.
20 United Nations Special Representative of the Secretary-General on Violence against Children "Prevention of and Responses to Violence Against Children Within the Juvenile Justice System" (2015) 6 https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/publications/8._prevention_of_and_responses_to_violence_against_children_within_the_juvenile_justice_system.pdf (accessed 10-03-2020).
21 Article 37(b) of the CRC 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."
22 Schabas & Sax "Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty" in Alen *et al* (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2006) 77.

manifestly disproportionate, unjust or unpredictable.[23] It also means that the specific manner in which an arrest is made should not be discriminatory and must be deemed appropriate and proportional given the circumstances of each individual case.[24]

The principle that detention and imprisonment should only be used as a last resort and for the shortest period of time is based on scientific research exposing the negative impact of imprisonment not only to children but also to their families, their victims and society at large.[25] It imposes a duty on State Parties to the CRC to continuously explore the variety of dispositions operating as alternatives to institutionalisation and to establish facilities offering a less restrictive environment for children.[26] In addition, the principle implies that the whole child justice system should provide, by law, an indication of the competencies of authorities and time limits for the use of arrest, detention, and imprisonment of children.[27]

The CRC Committee has stated that arrest is often the starting point of pre-trial detention and State Parties are encouraged to ensure that the law places clear obligations on law enforcement officers to apply Article 37 in the context of arrest.[28] The CRC Committee further implores State Parties to use pre-trial detention only in the most serious cases, and even then only after community placement has been carefully considered.[29] In application of the principle that deprivation of liberty should be imposed for the shortest appropriate period, the CRC Committee encourages State Parties to provide regular opportunities to allow early release of children from custody, including police custody, into the care of parents or other appropriate adults.[30] The Committee also encourages State Parties not to use the payment of monetary bail as a requirement as most children cannot pay and because it discriminates against poor and marginalised families.[31] The Committee further states that the possibility of granting bail to a child is a recognition in principle, by the court, that the child should be released and other mechanisms can be used to secure attendance.[32]

The Committee urges all State Parties to bring every child arrested and deprived of his or her liberty before a competent authority within 24 hours to examine the legality of the deprivation of liberty or its continuation.[33] The Committee also recommends State Parties to ensure that pre-trial detention is reviewed regularly with a view to ending it.[34] In cases where conditional release of the child at or before the first appearance (within 24 hours) is not possible, the requirement is that the child should be formally charged with the alleged offences and be brought before a court for the case to be dealt with as soon as possible but not later than 30 days after pre-trial detention takes effect.[35] The Committee noted the practice of adjourning court hearings many times and/or for long periods, and urged State Parties to adopt maximum limits for the number and length of postponements and introduce legal or administrative provisions to ensure that the court makes a final decision on the charges not later than six months from the initial date of detention.[36] Failing to do so should mean the child be released.[37] The 24-hour period for having a child arrested or deprived of liberty to appear before a competent authority is a revolutionary provision provided by the CRC Committee as it was previously not included in General Comment 10 (on children's rights in juvenile justice). Neither was the 30-day or six months period recommended in General Comment 10 of the Committee's earlier General Comment on child justice.[38] It is submitted that the CRC Committee's provision can greatly enhance the reduction of children detained in

23 Nowak *UN Covenant on Civil and Political Rights - CCPR Commentary* 2 ed (2005) 10.
24 Nowak 10.
25 Manco "Detention of the Child in the Light of International Law: A Commentary on Article 37 of the United Nation Convention on the Rights of the Child" 2015 *ALF* 62.
26 Manco 62.
27 Manco 62. See also Schabas & Sax 81.
28 UN Committee on the Rights of the Child (CRC) "General Comment No. 24 (2019): Children's Rights in Juvenile Justice" CRC/C/GC/24, para 85.
29 General Comment 24, para 86.
30 General Comment 24, para 88.
31 *Ibid.*
32 *Ibid.*
33 General Comment 24, para 90.
34 *Ibid.*
35 *Ibid.*
36 General Comment 24, para 88.
37 *Ibid.*
38 General Comment No.10 of 2007.

pre-trial detention, if adhered to by State Parties.

In addition, the Committee implores State Parties in their laws to clearly state the criteria for the use of pre-trial detention, which should be primarily for ensuring appearance at the court proceedings and to determine whether the child poses an immediate danger to others.[39] If the child is considered a danger to himself or herself or others, then child protection measures can be applied.[40] According to the Committee, pre-trial detention should be subject to regular review and its duration limited by law.[41]

An important and highly effective way of reducing the number of children in the criminal justice system is through diversion mechanisms. Diversion involves the referral of matters away from the formal criminal justice system, usually to programmes or activities.[42] The diversion approach often yields good results for children, helps to avoid stigmatisation and criminal records, is cost-effective, and is congruent with public safety.[43] Diversion is presented to the child as a way of suspending the formal court process. The process will be terminated if the diversion programme is carried out in a satisfactory manner.[44] The CRC Committee encourages the use of a diversion mechanism at the pre-trial stage in order to reduce the use of detention and, even where the child is to be tried in the child justice system, the Committee encourages non-custodial measures to be carefully targeted to restrict the use of pre-trial detentions.[45] Alternative sentencing that prevents children from being deprived of their liberty is invaluable in the reduction of violence against children.[46] To ensure that deprivation of liberty is really used as a last resort, State Parties should establish and employ other alternatives to detention.[47] What is clear from the guidance of the CRC Committee is that the availability of other alternatives is key to ensure that deprivation of liberty of children, in all its forms, is used as a "last resort".[48] The Committee takes note that a variety of community-based programmes have been developed and should be used as diversionary options. These include: community service, supervision and guidance by designated officials, family conferencing and other restorative justice options, including reparation to victims.[49]

Article 40 of the CRC requires that specialised separate systems and institutions be developed for children in conflict with the law;[50] and that alternatives to formal criminal procedures be established. It also guarantees a child in conflict with the law the right to have his/her matter determined without delay.[51] A similar injunction to foster the development of non-custodial alternatives to sentencing is established through Article 40(4) of the CRC.[52] Although Article 37 is the key CRC provision in the context of detention of children, the implementation of Article 40 is also central both to reducing the use of detention and ensuring that when children are deprived of their liberty, their rights are adequately protected.[53] A discussion of the recent global study on children deprived of liberty ensues below.

39 General Comment 24, para 87.
40 *Ibid.*
41 *Ibid.*
42 General Comment 24, para 15.
43 *Ibid.*
44 General Comment 24, para 72.
45 General Comment 24, para 86.
46 United Nations "Prevention of and Responses to Violence Against Children".
47 Bochenek "The Global Overuse of Detention of Children" in The Center for Human Rights & Humanitarian Law's Anti-Torture Initiative *Protecting Children against Torture in Detention: Global Solutions for a Global Problem* (2017) 19.
48 Kilkelly "Translating International Children's Rights Standards into Practice: The Challenge of Youth Detention" in The Center for Human Rights & Humanitarian Law's Anti-Torture Initiative *Protecting Children against Torture in Detention: Global Solutions for a Global Problem* (2017) 49.
49 General Comment 24, para 16.
50 See General Comment 24, para 92 and 94: "A comprehensive juvenile justice system further requires the establishment of specialised units within the police, the judiciary, the court system, the prosecutor's office, as well as specialised defenders or other representatives who provide legal or other appropriate assistance to the child." "In addition, specialised services such as probation, counselling or supervision should be established together with specialised facilities including for example day treatment centres and, where necessary, facilities for residential care and treatment of child offenders."
51 Article 40(2)(b)(iii)
52 Article 40(4) provides that: A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.
53 Kilkelly 42.

3 THE UN GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY

3 1 Background to the Global Study

In October 2016, Professor Manfred Nowak was appointed as Independent Expert leading the United Nations (UN) Global Study on Children Deprived of Liberty, which was commissioned by the UN Secretary-General upon invitation by the General Assembly in its Resolution 69/157 of 18 December 2014. Nowak was primarily motivated to undertake the task of leading this global study by his own personal experiences from the time he was the Special Rapporteur on Torture from 2004 to 2010.[54] Since torture takes place behind closed doors, Nowak had to make unannounced visits to places of detention to which he witnessed unthinkable misery and true suffering of children.[55] From that experience, Nowak seeks to draw the attention of State Parties and the international community to a phenomenon that has widely been ignored in the past – that millions of children of all ages are suffering in many different types of detention facilities and as a result such children are being deprived of their childhood and future.[56] The UN human rights experts play a vital role in working towards the realisation of human rights. Through their reports, the experts highlight situations of human rights concern and provide invaluable analysis of the human rights situation in a specific country or on a specific theme.[57] The continuous examination of a particular situation by experts, signals to victims that their plight is not forgotten by the international community and provides them with the opportunity to voice their grievances.[58] The countries concerned also understand that the assessment of their human rights record will have an impact on their political, developmental and humanitarian considerations. This sometimes brings improved accountability and therefore change for the better.[59]

3 2 Findings from the Global Study

In 2019, the UN General Assembly published the report of the global study on children's deprivation of liberty. The study is the first scientific attempt on the basis of global data to comprehend the magnitude of the situation of children deprived of liberty, its possible justifications and root causes, as well as conditions of detention and their harmful impact on the health and development of children.[60] According to the study, deprivation of liberty may have detrimental effects on children's physical and mental health, their further development and their life because they are still in their formative years, hence State Parties are encouraged to apply non-custodial solutions when dealing with children in conflict with the law.[61] Detention of children has been described as inherently distressing, potentially traumatic and having adverse effects on children's mental health, often exacerbated by poor treatment and unsatisfactory conditions.[62] The study emphasised the use of a variety of dispositions such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care in line with Article 40(4) of the CRC.[63]

Data from the global study suggest that detention in the context of the administration of justice is still widely overused and there are several reasons for this phenomenon, starting before and going beyond the criminal justice system.[64] Some of these reasons include: a lack of effective child welfare systems; a lack of support for family environments; excessive criminalisation; low minimum ages of criminal responsibility; harsh sentencing; discrimination;

54 Nowak *United Nations Global Study on Children Deprived of Liberty* (2019) 5.
55 See Nowak 5–14. In these pages Nowak gives a detailed outline of the various sufferings of children in different places of detention which he visited.
56 Nowak 5.
57 United Nations Office of the High Commissioner for Human Rights (OHCHR) "Fact Sheet No. 27, Seventeen Frequently Asked Questions about United Nations Special Rapporteurs" (2001) 20 https://www.refworld.org/docid/479477450.html (accessed 05-03-2020).
58 *Ibid.*
59 *Ibid.*
60 United Nations General Assembly "Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty" 2019.
61 Paragraph 20.
62 Nowak 261.
63 Paragraph 20.
64 Paragraph 41.

socio-economic reasons and a lack of resources in the administration of justice.[65] The study further revealed that in the administration of justice, repressive and punitive policies have led to excessive criminalisation of children. Some States criminalise behaviours typical for children, which are sometimes referred to as "status offences" which include: truancy, running away from home, disobedience, underage drinking, "disruptive" behaviours and practices against traditions and morality.[66]

As evidence of the overuse of detention in the administration of justice, the study revealed that there are still at least 410,000 children held in detention every year in remand centres and prisons across the world.[67] Additionally, an estimated one million children are held every year in police custody.[68] The study, on the basis of State Party responses to questionnaires, was unable to provide a possible evidence-based figure for the number of children held in police custody on any given day.[69] Nevertheless, research for the study proves that detention remains the sad reality of an estimated 160,000 to 250,000 children in remand centres and prisons worldwide on any given day.[70] The study attributed the large number of children in detention to the lack of adequate support for families, caregivers and communities, to enable them to provide appropriate care to children, encourage their development and prevent them from coming into conflict with the law.[71] "Tough-on-crime" policies, as well as widespread discrimination and corruption also contribute to a large number of children being deprived of liberty.[72]

Despite the recorded numbers of detained children globally, the research established that there has been some progress achieved. The United Nations Children's Emergency Fund (UNICEF) in 2007 estimated that over one million children were detained in the context of the administration of justice, but data collected for this more recent study indicates that the number is currently less than half of a million.[73] The study attributed the decrease in the deprivation of liberty of children in the administration of justice to the comprehensive set of international human rights standards that have led to the establishment of specialised child justice systems and the adoption of non-custodial solutions.[74]

3 3 Recommendations from the Global Study

To minimise detention of children in the administration of justice, the study recommended that State Parties establish child justice systems with specialised structures and mechanisms offering free legal aid to all children regardless of age and family income, effective procedural safeguards, adequate, accessible and high-quality diversion and non-custodial solutions at all stages of the proceedings.[75] This includes establishing a minimum age of criminal responsibility, which should not be below 14 years of age.[76] Age thresholds for detention are also a good mechanism for keeping children out of detention, particularly prison, and this can be set higher than the minimum age of criminal responsibility.[77] The report urges State Parties to eliminate status offences and to decriminalise child-specific and "immoral" offences, including on grounds of sexual orientation and gender identity.[78]

The study recommended that police custody for children should not exceed 24 hours.[79] Pre-trial detention should be avoided as far as possible and should in no case last longer than 30 days until the child is formally charged, or six months until a judgment is rendered.[80] State Parties were also urged to set a maximum penalty for children accused of crimes, which reflects the principle of the "shortest appropriate period of time."[81] The report urged State Parties to

65 Nowak 274.
66 Nowak 275.
67 Paragraph 40.
68 Nowak 249.
69 Nowak 261.
70 Nowak 261.
71 Paragraph 94.
72 Paragraph 95.
73 Paragraph 80.
74 Paragraph 80.
75 Nowak 336.
76 Paragraph 109.
77 Liefaard *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (2008) 30.
78 Paragraph 108.
79 Nowak 337.
80 Paragraph 111.
81 Paragraph 112.

prioritise restorative justice, diversion from judicial proceedings and non-custodial solutions.[82] The study recommended a promising model from South Africa through the Child Justice Act 75 of 2008 (CJA) which provides for a wide range of diversionary measures such as an informal warning or reference to a probation officer of a child apprehended by the police. In addition, the probation officer can then prepare an assessment report, after which one of the diversion options can be chosen, or a combination of options if possible.[83]

The study encouraged various actors in the child justice system and the larger child protection system to cooperate closely in an effort to reduce the number of children in detention. A promising example of coordination and interagency work was noted from South Africa where cooperative work by an inter-sectoral government committee reduced the number of children in prison from 3757 in 2001 to 203 in 2018.[84] The study also noted that One Stop Justice centres have been established on the basis of the CJA of South Africa, which allows for streamlining of the entire justice process from arrest to formal court proceedings.[85]

4 DETENTION OF CHILDREN IN SOUTH AFRICA CONTEXTUALISED

A wealth of literature explaining the historical context of juvenile justice reform in South Africa has been written,[86] following the wholesale deprivation of children's liberty during the apartheid years in adult prisons, oftentimes for political offences.[87] After the release of Nelson Mandela in 1990, the focus of activists in the child rights domain was on the continued pre-trial detention of children charged with relatively minor common-law and statutory offences.[88] The focus of attention was the whole issue of the unwarranted and excessive use of detention especially in police cells and prisons pending the adjudication of charges.[89] There would appear to have been little concern for either the seriousness of the offence or the tender age of the accused, because children as young as 12 years were detained as readily as those of nearly 18 years.[90] This was because the definition of a "youth", at the time, was pegged at 21 years by the Prisons Act.[91]

The focus on pre-trial detention of children in prisons was to form a notable part of Mandela's opening speech in the new Parliament in 1994, which stated that:

> Government will, as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison… The basic principle from which we will proceed from now onwards is that we must rescue the children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders. I have therefore issued an instruction to the Departments concerned as a matter of urgency, to work out the necessary guidelines which will enable us to empty our prisons of children and to place them in suitable alternative care.[92]

The saga of amending legislation in a piecemeal fashion, followed by an about-turn when it became clear that the system was ill-equipped to house children (sometimes charged with serious and violent offences) in alternative accommodation has been well described elsewhere.[93] Ultimately, though, the crisis paved the way to the formation of an inter-ministerial cabinet committee comprising affected departments, which led to the development of the concept of "secure care".

Secure care was intended to constitute the alternative to pre-trial detention in prisons or police cells. It was intended to provide a safe yet therapeutic environment, and the

82 Paragraph 113.
83 Nowak 314.
84 Nowak 308.
85 Nowak 314. See diversion provisions in ss 51–62 of the CJA.
86 See an overview in Sloth-Nielsen "Child Justice" in Boezaart (ed) *Child Law in South Africa* 2 ed (2017) 172.
87 See Skelton & Tshehla "Child Justice in South Africa" 2008 *Institute for Security Studies Monograph* 150; Skelton "From Cook County to Pretoria: A Long Walk to Justice for Children" 2011 *Northwestern Journal of Law and Social Policy* 414-427; Sloth-Nielsen "Deprivation of Children's Liberty 'as a Last Resort' and 'for the Shortest Period of Time': How Far have we Come? And can we do Better?" 2013 *SACJ* 316.
88 *Ibid.*
89 *Ibid.*
90 *Ibid.*
91 8 of 1959.
92 State of the Nation Address by President of South Africa, Nelson Mandela, Cape Town http://www.mandela.gov.za/mandela_speeches/1994/940524_sona.htm (accessed 02-09-2019).
93 Sloth-Nielsen "Recent developments in Child Justice (2016-2018)" 2018 *SACJ* 173.

facilities were deliberately conceptualised as being small, so that a prison-like atmosphere characteristic of South Africa's larger urban prisons could be avoided, and also to ensure better and more personal care and oversight.[94] The task of securing premises, managing, and overall monitoring of secure-care facilities was accorded to the Department of Social Development[95], and although they did not get off the ground overnight, the situation is that each province now has at least two secure-care facilities, with a total of 31 centres spread throughout the country.[96] Some facilities are department-staffed and run, whilst others have since inception been outsourced to private sector players. Notably, 10 facilities throughout the country were managed by facilities management group Bosasa,[97] which was placed in liquidation following revelations of corruption at the state capture commission of inquiry. Thus far, no hints of impropriety have been raised in relation to the secure-care facilities contracts, as far as can be ascertained. The contracts with the departments terminated at the end of October 2019,[98] with the provincial departments taking over the management of the affected facilities. The development of secure care was specifically to provide an alternative to pre-trial detention in prisons, although the CJA does also permit the use of this facility as a sentence option.[99]

South Africa has given effect to its treaty obligations by enacting the CJA in 2008, which came into force from 1 April 2010. The Preamble to the CJA recognises that children are not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period.[100] In Chapter 4, the Act gives detailed provisions for the release or detention and placement of a child prior to sentencing. This includes: the approach to be followed when considering release or detention of a child after arrest; release on bail; and protection of children detained in police custody. Chapter 5 provides for an assessment by a probation officer. In Chapter 6, the Act covers diversion by a prosecutor and in Chapter 8 it gives a detailed outline of diversion and the various diversionary options. The next section will discuss how arrest and unlawful detention has been dealt with by the courts in South Africa; and thereafter statistical figures of the detention of children in secure care and correctional facilities will be given.

4 1 Arrest and Unlawful Detention of Children

As stated by the CRC Committee, pre-trial detention usually begins with arrest.[101] This section discusses the case of *MR v Minister of Safety and Security* in which the Minister of Safety and Security was sued for damages following the unlawful arrest and detention of a 15-year-old child (MR).[102] The facts of *MR v Minister of Safety and Security* gives an insight into the court's application of the CRC provisions. Since the matter commenced prior to the implementation of the CJA, MR was arrested pursuant to section 40(1)(*j*) of the Criminal Procedure Act 51 of 1977, which permits a warrantless arrest by a peace officer of any person who "wilfully obstructs him in the execution of his duty." MR was detained by the police for obstruction of justice after she had intervened and interposed herself between her mother and police officers who were trying to arrest her mother for violating a protection order; the incident took place at their house. MR and her mother were both arrested and detained by the police and released approximately 19 hours later.

MR's claim for wrongful arrest and detention against the Minister of Safety and Security failed in the High Court and, after a number of appeals it finally reached the Constitutional

94 Initially the norms and standards provided for 60 bed facilities, but this was later expanded to 120 beds to achieve economies of scale.
95 This task is carried out in line with s 197 of the Children's Act 38 of 2005.
96 Report of the Department of Social Development on the implementation of the Child Justice Act 2017-2018 www.justice.gov.za (accessed 10-03-2020). According to this report, the latest available, there were in the reporting period a total of 14,190 children in the centers, with 4064 admissions that year, and 3713 releases. That figure is somewhat lower (roughly 20%) than the equivalent data for the previous reporting cycle. Reportedly, that number may be fewer now as at least one facility in the Western Cape has been closed for renovations (personal communication, February 2020).
97 According to a press release by the National Department of Social Development on 31 August 2019.
98 https://www.news24.com/SouthAfrica/News/childrens-future-at-bosasa-youth-centres-in-the-balance-as-liquidator-sends-termination-notice-20190831 (accessed 5-04 2020).
99 See s 76 of the CJA.
100 CJA Preamble. See also ss 69(1)(e) and 77 of the Act.
101 General Comment 24, para 85.
102 2016 (2) SACR 54 (CC); See also discussion of the case in Skelton 2018 *IJCR* 416.

Court. On appeal to the Constitutional Court, the Court opined that:

> Section 28(2) of the Constitution demands, in peremptory terms, that in all matters affecting a child, her best interests are of paramount importance. In the context of an arrest of a child, this requires of the police officers, notwithstanding the fact that they are satisfied that the jurisdictional facts in section 40 of the CPA have been met, to go further and not merely consider but accord the best interests of such a child paramount importance.[103]

On consideration of the facts, the court established that MR was no threat to the arresting officers and had not attempted to run away. The court pointed out there was no reason to arrest MR as she could easily have been handed a summons to appear in court, or be placed in her father's care, had the previous court considered her best interests.[104] Hence, in the context of arrests of children, section 28(2) seeks to "insulate a child from the trauma of an arrest by demanding in peremptory terms that even when the child has to be arrested, his or her best interests must be accorded paramount importance,"[105] and the arrest should be resorted to when the facts are such that there is no other less invasive way of securing the attendance of such a child before a court.[106] However, this does not mean that children can never be arrested – rather it requires of the criminal justice system to be "child-sensitive." The Court held that the consideration of the child's best interests is part and parcel of the exercise of the discretion to arrest, however, and not an additional jurisdictional requirement.[107]

Regarding the subsequent detention of MR in police custody, the court affirmed that detention "constitutes a drastic curtailment of a person's freedom which the Constitution guards and should only be interfered with where there is a justifiable cause." Second, the court pointed out that "detention has traumatic, brutalising, dehumanising and degrading effects on people."[108] Furthermore, it was noted that detention facilities for children are not ideal places and they can have harmful effects on the detained child – as they did to MR.[109] Section 28(1)(*g*) of the Constitution stipulates that detention should be for "the shortest period of time."[110] It was agreed that the need to detain a child is necessarily a fact-based inquiry that requires a balancing of interests.[111] The court pointed out that, in this case, there was no evidence that police considered her individual circumstances to determine if her detention was a measure of last resort, and it followed that her detention was in flagrant violation of section 28(1)(*g*) and therefore unlawful.[112]

Research indicates a gradual but steady decrease in the numbers of children entering the system since the implementation of the CJA, as remarked on by the independent expert who led the global study.[113] Information on the total number of arrests has not been made available (if it was kept) until the most recent annual reporting cycle – instead, police previously collected information on the number of charges. The total number of charges fell from 80,106 in the 2010/2011 reporting year, to 42, 642 in the 2017/2018 reporting year, a drop of nearly 50%.[114] These latter charges involved slightly over 40,000 children. The 2017/2018 reporting year is the first one for which data on the number of children involved in criminal charges has been provided. Although it cannot be assumed that all children who are charged have been arrested, as no information on the use of alternative methods of securing the attendance of children in conflict with the law at court or other procedures that the CJA makes provision for, has been furnished in official reports. It can be speculated that a huge decline in recourse to detention in police custody has occurred. The reasons for this decline can be speculated upon

103 Paragraph 48.
104 Paragraph 52.
105 Paragraph 57.
106 Paragraph 58.
107 Paragraph 64.
108 Paragraph 68.
109 Paragraph 68.
110 It is not possible to determine whether part of the reasons for the decreased use of deprivation of liberty is in any way bolstered by an increase in the use of alternatives such as summons and notice to appear. However, this is unlikely given that the SAPS reflect the total number of charges brought annually against persons aged below 18 years, which should include charges under all circumstances, irrespective of the method used to bring the child accused to a preliminary inquiry or a court.
111 Paragraph 69, citing dicta from *Centre for Child Law v Minister for Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) para 29.
112 See the discussion of this case in 2016 *Juta's Criminal Law Review.*
113 See Global Study, para 80. See also Sloth-Nielsen "Recent Developments in Child Justice (2016-2018)"175.
114 South African Police Services Annual Report on the implementation of the Child Justice Act 2017/2018, 127.

as no definitive study has seen the light of day as yet. It is to be hoped that improved data collection and dissemination will shed further light on this in future.

4 2 Pre-Trial Detention of Children in Various Facilities

4 2 1 Detention in Secure Care Facilities

Data on secure care facilities is collected and presented by the Department of Social Development, the custodian of these institutions. With a total number of beds (capacity) in 28 institutions (in the previous reporting year, there were 31) dropping from 3272 to 2624 available beds, the data reported is that the total number of children in secure care facilities in 2017–2018 was 14,190 (the previous year this figure was 17,184 [2016/2017]). The overall number of admissions was given at 4064 children (countrywide).[115] The overall releases during the same reporting period were 3713 children. These figures are approximately 20% lower than the previous reporting year.[116]

It is also not possible to determine that all children held in secure care facilities were children in conflict with the law, since referral by a children's court to a secure care facility for behaviour management difficulties acting under the Children's Act 37 of 2005 is possibly a route into secure care.

Insofar as compulsory residence at a child and youth care centre is one possible sentence provided for by the CJA, information provided in the 2017/2018 Annual Report of the Department of Justice illustrates that in 2015/2016, this sentence was imposed on 17 children (out of a total of 154 children sentenced under the Act); in 2016/2017, 26 children were thus sentenced (out of a total of 280 children who were sentenced) and in 2017/2018 this rose to 39 children (out of a total of 407 sentences imposed).[117] These appear to be rather modest numbers.

It cannot necessarily be assumed that secure care facilities are, in practice, more benign alternatives to deprivation of liberty in correctional facilities, although they were developed with the intention of providing a more therapeutic, child rights-based, and reintegrative environment than prisons. Difficulties in providing the required level of care have been experienced,[118] and in one instance, police and correctional officials had to be called in to suppress riots, when facility staff could not manage to keep control.[119]

4 2 2 Detention in Correctional Facilities

Given that the origin of the impetus to develop a separate child justice system had its roots in the widespread pre-trial detention of children in prison, it is particularly gratifying that at the 30th anniversary of the CRC,[120] it was reported that the number of children awaiting trial in facilities managed by the Department of Correctional Services was below 100 in 2015/2016, (99), dropping even further to 78 in 2017/2018; of these, only three were female children in the entire country.[121] Between 2000 and 2017, the Department was able to report a 97% drop in the number of children detained annually, the figure as of the year 2000 being around 2250 remand detainees who were children.[122]

On 31 March 2018, of the children in detention, 81.82% were detained for a period ranging from a day to three months, 13.56% were detained for a period ranging from more than three

115 Of course the length of stay of a child is entirely unpredictable, depending as it does on whether bail is paid or the child otherwise released, the length of the time for preparation for trial, the actual conduct of the trial itself and so forth.

116 This data is not entirely satisfactory.

117 Department of Justice and Constitutional Development Report on the Implementation of the Child Justice Act 2017-2018, 37. Previous years record a much higher number; 2011: 353 sentences; 2012:355 sentences; 2013: 381 sentences; 2014: 245 sentences. A sharp decline in sentences of a child to compulsory residence at child and youth care centres is evident after this, as noted in the text above.

118 See for a discussion of interventions in relation to two facilities, http://apcof.org/wp-content/uploads/no-19-child-and-youth-care-center-by-zita-hansungule-.pdf (accessed 5-04-2020) and Sloth-Nielsen "Child Justice" 725.

119 In August 2015. See https://www.iol.co.za/news/riot-gear-used-to-punish-children-1592230 (accessed 6-04-2020).

120 In November 2019.

121 Department of Correctional Services 5th Annual Report on the Implementation of the Child Justice Act, 108.

122 Department of Correctional Services 5th Annual Report on the Implementation of the Child Justice Act, 109.

months to nine months and 3.41% were detained for a period longer than nine to fifteen months. Only one child was detained for more than one year but less than two years. The longest period spent in detention by a remand detainee child was less than four years.[123]

The use of imprisonment for sentencing children has also declined measurably. Note that the data suggests that this is not necessarily because of an increased recourse to secure care centres as a sentence option for a child.[124] The data on the number of children sentenced to imprisonment since 2011 indicates that the proportion is minute, given the large percentage of youth in South Africa, and the widespread acknowledgement of youth involvement in crime especially in the urban areas.[125]

As previously argued, the central issue that has emerged since the coming into operation of the CJA in 2010 is the dramatic drop in the numbers of children being processed through the criminal justice system.[126] The causes for this drop are speculative, but seem to emanate from the fact that fewer children are being arrested. The declining numbers permeate all aspects of the child justice system: there are fewer children in diversion programmes, fewer assessments and preliminary inquiries, and fewer children's trials being held.

At the same time, the diminishing number of children incarcerated in prisons (as awaiting trial remandees or as sentenced prisoners) is commendable. Whilst the development of the alternative of secure care facilities is partially accountable for the drop in numbers since the turn of the millennium, there can be no doubt, too, that enhanced vigilance to implementing the constitutional and international law principle of deprivation of liberty of children as a last resort and for the shortest appropriate period of time by the various stakeholders in the child justice system must be credited too.[127]

5 DIVERSION

Diversion has as one of its aims to avoid the necessity of pre-trial or post-conviction detention.[128] As such, diversion has been identified as one of the key priority areas for service delivery in the National Policy Framework for Child Justice, adopted in terms of section 93 of the CJA. Diversion is possible at multiple entry points in the child justice system, hence data on diversion is captured by different role players. The 2015–2016 Annual Report on the implementation of the CJA records that 8830 children were referred to diversion programmes according to data from the Department of Social Development (2383 fewer than the previous year) and 3497 were placed under home-based supervision (the number in 2014–2015 was 5529).[129] The National Prosecuting Authority Report on the Implementation of the CJA 2018– 2019 indicated that 4434 cases were diverted before enrolment in terms of the Child Justice Act.[130] The report indicated that diversions in terms of the CJA were reduced by 12.2% (615) from the previous reporting year (in 2017/2018 diversions totalled 5049).[131] In 2015–2016, the NPA reported that 8121 children were diverted, and in the following reporting year, 7673 children.[132] In the reporting period (2017–2018), 3490 cases were diverted at the preliminary inquiry.[133] The

123 Department of Correctional Services 5th Annual Report on the Implementation of the Child Justice Act, 113.
124 See the data presented in the preceding section on the figures relating to the use of child and youth care centres as sentencing options.
125 2011: 94 children; 2012: 98 children; 2013: 49 children; 2014: 39 children; 2015-2016: 15 children; 2016-2017: 51 children and 2017-2018: 62 children. These figures appear to fly in the face of recent press reports indicating that 750 murders had been committed by children in the last year. Murder is the offence most likely to attract a sentence of direct imprisonment.
126 Sloth-Nielsen "Recent Developments in Child Justice" (2016-2018) 175.
127 *Ibid.*
128 Other aims include teaching children useful skills, avoiding contamination through contact with the criminal justice system, and avoiding the child getting a criminal record at a tender age. See further Article 51 of the CJA.
129 Report of the Department of Social Development (2015-2016) 16.
130 Annual Report of the National Prosecuting Authority (2018-2019) 56.
131 Annual Report of the National Prosecuting Authority (2018-2019) 56.
132 Report of the National Prosecuting Authority (2015-2016) 4.
133 This is the pre-trial interim process established by Chapter 7 of the CJA. Report of the Department of Justice and Constitutional Development on the implementation of the CJA 24-25. This constitutes 26% of the outcomes of matters dealt with at the preliminary inquiry.

National Prosecuting Authority reported finalising 6769 prosecutorial diversions.[134] However, this figure appears to include diversions effected at the preliminary inquiry.[135] The data provided by the Department of Social Development refers to 10,515 children being accepted on to accredited diversion programmes and an increase of approximately 10% over the previous reporting period.[136] 3039 children were placed under home-based supervision, by comparison to 3620 from the previous year.[137] Although it is probably not possible to show this empirically, the ongoing development of diversion and home-based supervision is likely to be contributing to the diminishing deprivation of liberty statistics.

6 CONCLUSION

Whilst 2019 was the 30th anniversary of the CRC, it should be mentioned that 32 years have passed since the International Conference on Children, Repression and the Law in Apartheid South Africa, which was held at Harare from 24 to 27 September 1987.[138] A UN General Assembly Resolution on the plight of detained children in South Africa followed in February 1988.[139]

It is submitted that meaningful and measurable progress has been made in achieving a more child-friendly justice system for children in the intervening period, particularly regarding the adoption of dedicated legislation underpinning a child justice system, the development of institutions to support child justice, and by embracing diversion as a cornerstone of the system.

The article argues that the dwindling numbers of children deprived of their liberty can be attributed to a combination of factors and influences. First, the inclusion of the core principle of Article 37 of the CRC in the CJA – that detention be used only as a last resort and then only for the shortest period – in section 28(1)(*g*) of the Constitution has had profound impact. Striking down the newly introduced statutory minimum sentencing regime for 16 and 17-year-old convicted children in 2009,[140] the Constitutional Court clearly signalled that sentencing of children would henceforth be approached through the prism of the Constitution, not least insofar as deprivation of liberty was concerned. This position also motivated the Constitutional Court's decision in *MR v Minister of Safety and Security*[141] regarding the pre-trial detention of children, resulting in a consensus position as regards pre-trial and post-conviction detention.

Second, the pressure is not all from above – it is patent from various sources (ongoing judicial and prosecutorial training, increasing access to diversion, collaboration in implementation of the CJA) that the former indifference to the tender age of children when considering deprivation of liberty has faded, to be overtaken by a far more highly conscientised prosecution service and judiciary. Third, the Department of Social Development continues to operationalise the spirit and objective of the Act through the accreditation of diversion programmes and services, making alternatives to deprivation of liberty a real possibility.[142]

134 Chapter 6 of the CJA.
135 Report of the National Prosecuting Authority on the Implementation of the Child Justice Act 2017-2018, 63.
136 Report of the Department of Social Development on the Implementation of the Child Justice Act 2017-2018, 94.
137 Report of the Department of Social Development on the Implementation of the Child Justice Act 2017-2018, 94.
138 Abrahams "Promoting Children's Rights in South Africa – A Handbook for Parliamentarians" https://www.parliament.gov.za/storage/app/media/BusinessPubs/PromotingChildrensRights.pdf (accessed 11-04-2020)
139 Resolution 431134 of 7 February 1988.
140 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 ZACC 18, discussed amongst others in Skelton 2018 *IJCR* 401.
141 *MR v Minister of Safety and Security* 2016 (2) SACR 54 (CC).
142 The Department of Social Development Annual Report on the implementation of the CJA 2017-2018 records that there were then 76 accredited diversion programmes, nine more than the previous reporting cycle.

Finally, ongoing inter-sectoral monitoring efforts which commenced in the 1990s seem to continue playing a valuable role in reducing the numbers of children in correctional facilities, as well as ensuring that periods of detention remain short.[143] In conclusion, it appears that SDG indicator 16.3.2 looks well within sight for South Africa's children. Indicator 16.3.2 can further be advanced by employing the recommendations of the CRC Committee in General Comment 24 and recommendations from the global study discussed above. Some of these recommendations include the inclusion of the 24-hour timeline for a child to appear before a court after pre-trial detention. If the child cannot be brought before 24 hours, then the child should be formally charged and brought before court within 30 days after the pre-trial detention. Other recommendations include the continuous use of diversion in terms of the CJA and the inclusion of pre-trial detention criteria in legislation.

143 Legal Aid SA has a programme in place to track all children in detention, to ensure that no children are detained at correctional centres while they await their trial. "We have a working arrangement with the Department of Correctional Services to furnish us with the names of all children in their custody. Our Legal Aid SA Local Offices are thereafter tasked with the responsibility to consult with each individual child in custody to ensure that they are provided legal representation, with a view to facilitate the release of the child, and where this is not possible, to ensure that the child is kept in a place of safety, while in custody." Report of Legal Aid South Africa on the implementation of the Child Justice Act, 80.