

Juvenile Justice Converges on Principles Leading to the International Harmonization of the Juvenile Justice System

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Abstract: In November 1989, the General Assembly of the United Nations adopted the Convention on the Rights of the Child. This Convention expected member countries to harmonize their juvenile justice systems in the direction of making the best interest of the child the main focus of their justice administration, guaranteeing the respect of human rights and fundamental freedoms of children. South Africa and the United States are examples of how member countries abided by the Convention. On one hand, South Africa ratified the Convention and gave children a unique position in its juvenile justice system, whereas, on the other hand, the United States has signed the instrument but has not fully eradicated the typical punitive traits of its system; nonetheless, both countries still move in the direction of the shared international values. In particular, in the United States, individual States – such as Massachusetts – are showing how it is possible to successfully implement the international values shared in the Convention moving to a rehabilitation model.

Keywords: Juvenile Justice; Convention on the rights of the Child; South Africa; United States; Massachusetts.

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1. Introduction

Since juveniles under the age of 18¹ are typically considered psychologically immature persons², it is appropriate to support that they deserve a special treatment when they commit an offense, and this also demonstrated by the criminal justice system which sees fit to treat them differently than adults³. Another reason relies on the fact that children are subject to two different types of offenses: adult crimes, which are simply crimes regardless of the age of the offender, and status offenses, which are crimes not considered criminal had an adult committed them⁴. However, special safeguards for children in conflict with the law are limited in time and expire after the child reaches the age of majority⁵.

Children, as a significantly large population⁶, are inherently different from adults, therefore it is legitimate to enact a system of

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1. G A Res 44/25, *Convention on the Rights of the Child*, art. 1 (November 20, 1989).

2. See *Juvenile*, Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/juvenile> (last visited November 22, 2020).

3. See *IJJJO Glossary*, International Juvenile Justice Observatory, available at <https://www.oijj.org/en/docs/glossary?letter=J> (last visited November 22, 2020).

4. See United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (Sept. 2015), available at https://www.ojjdp.gov/mpg/litreviews/Status_Offenders.pdf (last visited November 22, 2020).

5. See Julia Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law*, 1, S Afr J on Hum Rts at 401, 411 (1995).

6. See Katharine Hall and Winnie Sambu, *Demography of South Africa's Children*, Children's Inst, University of Cape Town at 106 (2016), available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/2006/Child_Gauge_2016-children_count_demography_of_sa_children.pdf (last visited November 22, 2020) (South Africa's child population, in 2014, was approximately 18.5 million of the total 53.7 million citizens; this means roughly 34% of the population is under the age of 18. The United States' child population – those under the age of 17 – in 2018 was approximately 73.4 million). See also *Pop1 Child Population: Number of Children (in Millions) Ages 0-17 in the United States by Age, 1950-2018 and Projected 2019-2050*, Child stats.gov, available at <https://www.childstats.gov/americaschildren/tables/pop1.asp> (last visited November 22, 2020).

different standards for their treatment. The perspective that a child deserves different treatment in the criminal justice system generated the movement of most countries to enact a separate Juvenile Justice System of laws, policies, guidelines, and customary norms that are specifically applicable to children and reflect the countries' respective cultural values⁷.

Around 1945, 26 countries founded the United Nations to maintain international peace and to harmonize the actions of nations in the attainment of common goals⁸. United States and South Africa were two of the countries joining the United Nations⁹. In particular, as members, they proclaimed to stand by the principles of the United Nations Charter: United Nations sought to establish a "formal international legal recognition of the human rights of children"¹⁰, by calling for the international community to make a pledge to cooperate in the improvement of the living conditions of children through administrative systems¹¹. In November 1989, the Convention on the Rights of the Child was adopted to address the administration of juvenile justice¹². Specifically, it states:

7. See Hall and Sambu, *Demography of South Africa's Children* (cited in note 6). See also G A Res, art. 40 (cited in note 1) (in the Preamble of the Convention on the Rights of the Child, it is proclaimed that children are entitled to special care. The concept that a child deserves special treatment is well embraced in the international community having been cited in the Geneva Declaration of the Rights of the Child of 1924, the Declaration of the Rights of the Child adopted by the General Assembly in 1959, the Universal Declaration of Human Rights, among various others).

8. UN Charter, art. 1, §§1, 4.

9. See *Member States*, United Nations, available at <https://www.un.org/en/member-states/index.html> (last visited November 22, 2020).

10. See Cynthia Price Cohen, *Introductory Note* at 28, Int'l Legal Materials 1448 (1989).

11. See *id.*

12. See *id.* See also G A Res, art. 40(3) (cited in note 1) (four international instruments are generally thought of to have a direct bearing on the rights of children, including the United Nations Convention on the Rights of the Child 1989; the United Nations Guidelines for the Prevention of Juvenile Delinquency – Riyadh Guidelines; the United Nations Standard of Minimum Rules for the Administration of Juvenile Justice – Beijing Rules; and the United Nations Rules for Protection of Juveniles Deprived of their Liberty). Compare Ann Skelton and Boyan Tshelha, *International Instruments Pertaining to Child Justice, Child Justice in South Africa* 15 (Sept 2008), available at <https://www.files.ethz.ch/isn/103622/MONO150FULL.pdf> (last visited November 22, 2020).

State parties recognize the right of every child alleged as, accused of or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, which take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society¹³.

Member countries are free to create their own juvenile justice models¹⁴, but in order to abide by the Convention, these systems needed to focus on the best interests of the child while administering juvenile justice¹⁵. This concept can be found in the Declaration of the Rights of the Child: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"¹⁶. In addition, the Convention also emphasizes the importance of diverting children out of the mainstream criminal justice system, and away from adults¹⁷. This Convention is not self-executing; therefore, members need to ratify the Convention for it to be binding¹⁸. However, signing members are

13. G A Res, art. 40(1) (cited in note 1).

14. See G A Res, art. 40(3), (4) (cited in note 1) ("State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children [particularly] the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law [and] measures for dealing with such children without resorting to judicial proceedings. [C]are, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes [sic] 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").

15. See Cynthia Price Cohen, *Introductory Note* (cited in note 10). See also G.A. Res., Art. 3 (cited in note 1). Compare Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 405, 408 (cited in note 5).

16. G A Res, at Preamble (cited in note 1).

17. G A Res, art. 37 (cited in note 1).

18. See Skelton and Tshela, *International Instruments Pertaining to Child Justice, Child Justice in South Africa* at 16 (cited in note 12). See also Ann Skelton and R. Morgan Courtenay, *South Africa's New Child Justice System*, in *Juvenile Justice International Perspectives, Models and Trends* at 321, 325 (John A. Winterdyk ed., 2015).

expected to implement the Convention in good faith, including establishing laws, procedures, authorities, and institutions dealing exclusively with a child in conflict with the law, regardless of ratification¹⁹. On the one hand, South Africa ratified the Convention²⁰, whereas, on the other hand, as of 2015, the United States has only signed the instrument; nonetheless, both still move in the direction of the shared international values²¹.

This article will explore the similarities and the differences between two countries, South Africa and the United States, specifically Massachusetts, in relation to their integration of the international principles found in the Convention.

The next section lays out the development of the South African system and the United States' system, illustrating the various principles each values the most and how specific laws implement the principles of the Convention. In South Africa it is clear that the legislation is driven by a cultural emphasis on restorative justice rather than punishment, which gives children a unique position in the juvenile justice system, whereas the United States has signed the instrument but has not fully eradicated the typical punitive traits of its system. Nonetheless both countries are still move in the direction of the shared international values.

The final section of this article will look specifically at the international community's value of setting a minimum age of criminal responsibility, which both South Africa and the United States have embraced. The acknowledgment that a minimum age of criminal responsibility should exist forces countries to incorporate diversion programs into their juvenile justice systems, because it involves that the ordinary criminal justice system does not have the proper means

19. See Skelton and Tshela, *International Instruments Pertaining to Child Justice* at 15, 17 (cited in note 12). See also Skelton and Courtenay, *South Africa's New Child Justice System* (cited in note 18).

20. See Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 403 (cited in note 5).

21. See Gene Griffin and Paula Wolff, *The Convergence of U.S. Juvenile Justice Policies and the U.N. Convention on the Rights of the Child*, B.U. Int'L. J. 1 (Oct. 29, 2015), available at <http://www.bu.edu/ilj/2015/10/29/the-convergence-of-u-s-juvenile-justice-policies-and-the-u-n-convention-on-the-rights-of-the-child/> (last visited November 22, 2020) (South Sudan ratified the Convention on the Rights of the Child and left the United States as the only country to decide not to ratify the Convention).

to handle juvenile offenders. Further, this section will address the types of crimes children offenders can be charged with, and why addressing these crimes differently will ensure that minors are provided with the tools they need to break the cycle of crime in which they may find themselves later in life. The limitations on the sentencing portion of this article help to illustrate that, while both South Africa and the United States have enacted diversion programs or alternate courts to deal with child offenders, the death penalty and life imprisonment are two sentences that are prohibited from being assigned to children, in line with the direct embracement of the international community's emphasis on imprisonment as a last resort.

Finally, the article will discuss the handling of juveniles in and out of the courtroom with a specific focus on placing children in restraints and providing proper due process rights.

2. The Development of the Juvenile Justice System in South Africa and in the United States

In November 1989, the General Assembly of the United Nations adopted the Convention on the Rights of the Child. This Convention expected member countries to harmonize their juvenile justice systems in the direction of making the best interest of the child the main focus of their justice administration, guaranteeing the respect of human rights and fundamental freedoms of children. South Africa and the United States are examples of how member countries abided by the Convention, each following its own historical development and a unique harmonization pattern.

In particular, in South Africa the legislation focused on restorative justice rather than on punishment, which allowed for a seamless integration of the international values found in the Convention. Since the 1900s, South Africa began to emphasize children's individuality and their need of a different treatment when it comes about justice, especially when committing offenses. This country has made education of the juvenile offenders a priority, as it can promote self-discipline and reintegration of the minor, which is why most of the legislation enacted hinges on the best interest of the minor.

Otherwise, the United States has signed the Convention but has not fully eradicated the typical punitive traits of its system. The country has had a long history of intermingling children with adult offenders and made slow progress to adopting the view of the best interests of the minor. It was not until 1968 that diversion was seen as a viable option for child offenders. United States' case law clearly illustrates the slow implementation of the international values of protecting child offenders and guaranteeing a different treatment.

2.1. *South Africa and the Historical Influences on its Juvenile System*

South Africa's treatment of juveniles has evolved from a different cultural need from the United States' one, that is because many children in South Africa do not live in the traditional western home, following the nuclear model of parents and children living together²². Instead, African families embrace an extended family model in which children experience different caregivers through reciprocal relationships between parents, siblings, grandparents, aunts, uncles, cousins, and others, resulting in the possibility of living in households away from their biological family²³.

However, similarities can be found between South Africa and the United States for what concerns those children in the poorest of households, who are typically least likely to live with both biological parents and to experience a deprivation of parental care²⁴. Unfortunately, as of 2014, there were about 3 million orphans, children under the age of 18 without living biological parents²⁵. In addition, there are a significant number of child-only households in South Africa, in which all members are younger than 18 years old²⁶. This is significant

22. See Marcia Carteret, *Cultural Differences in Family Dynamics, Dimensions of Culture* (2010), available at <https://www.dimensionsofculture.com/2010/11/culture-and-family-dynamics/> (last visited November 22, 2020).

23. See Carteret, *Cultural Differences in Family Dynamics* (cited in note 12). See also Hall and Sambu, *Demography of South Africa's Children* at 106-07 (cited in note 6).

24. See Hall and Sambu, *Demography of South Africa's Children* at 106-07 (cited in note 6).

25. See *id.* at 108.

26. See *id.* at 109. See also *Situation Analysis of Children in South Africa* (The Presidency Republic of South Africa, April 2009), available at https://www.streetchildren.org/wp-content/uploads/2016/11/SAF_resources_sitan-UNICEF.pdf (last visited

because the juvenile justice system is tasked with providing for those children in need of care, which are children who have not necessarily committed a crime. Since 2003, the number of children detained and awaiting trial has decreased from 4,144 to 2,061 in 2007²⁷.

South Africa's legal system has evolved in large part due to the various influences on the country: the legal system is mixed with elements from Dutch, British, and Indigenous customary law²⁸. In particular, the latter focuses on reconciling the parties and restoring ruptured relationships rather than punishment, moreover the pre-colonization traditions emphasizes the important role of the community within the decision of punishment for all offenders²⁹.

Due to the long history of violence in South Africa, specifically in regard to children, juveniles have experienced a unique journey to the establishment of their rights. In the South African Act of 1909, the first Prime Minister introduced formal segregation which contributed to raise tension between the *white government* and the Native communities³⁰. The tension between the democratic movement and the apartheid³¹ state intensified the violence and directly contributed to the deterioration of the family, a contributor to child violence³². For instance, the Group Areas Act contributed to the dislocation of

November 22, 2020) (as of 2014, there were approximately 54,000 children living in a total of 45,000 child-only households. Ideally this situation is temporary, but in most cases it could be contributing to delinquent behavior in South Africa).

27. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 109 (cited in note 26).

28. See generally Julena Jumbe Gabagambi, *A Comparative Analysis of Restorative Justice Practices in Africa*, Hauser Global L. Sch. Program (2018), available at https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html#_3.2._South_Africa. (last visited November 22, 2020).

29. See *id.*

30. This was the beginning of the apartheid state in South Africa. See *South Africa in the 1900s (1900-1917)*, South African History Online (2017), available at <https://www.sahistory.org.za/article/south-africa-1900s-1900-1917#:~:targetText=Increased%20European%20encroachment%20ultimately%20led,South%20Africa%20by%20the%20Dutch.&targetText=The%20Cape%20Colony%20remained%20under,to%20British%20occupation%20in%201806> (last visited November 22, 2020).

31. This means a policy of segregation and political or economic discrimination. See generally *Apartheid*, MERRIAM-WEBSTER available at <https://www.merriam-webster.com/dictionary/apartheid> (last visited November 22, 2020).

32. See generally Admassu Tadesse, *Reforming Juvenile Justice Legislation and Administration in South Africa: A Case Study*, Unicef (1997), available at <https://www>.

children by separating them from mothers who were hostel residents or live-in domestics³³.

Through the 1970s³⁴ and the 1980s there was a rise of children in political detentions without trial or in violation of their due process rights. Only in 1994, the neo-elected President Nelson Mandela declared children prisons be emptied³⁵. It can be stated that, at this point, South Africa recognized the power of a governmental entity, like a magistrate, to place a juvenile under guardianship; a concept not different from the United States' use of the State as a surrogate parent (*parens patriae*)³⁶.

The recognition of children's rights in South Africa did not hit its peak until the 1980s, when the State became very active in several matters including the rights of children and women³⁷. Historically, South Africa would subject children who committed offenses to the same treatment as adults³⁸, but the ratification of the Convention and the newfound recognition of child rights spurred new legislation, promoting the international values of the treatment of children in conflict with the law.

unicef-irc.org/portfolios/documents/489_south-africa.htm (last visited November 22, 2020).

33. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 26 (cited in note 26).

34. After the 1976 Soweto Uprising children were in a traumatic state; the Truth and Reconciliation Commission concluded that many children lost their capacity to be children in a 1998 report (this uprising affected South African children in that they defied oppression, were arrested, imprisoned, kept in custody, maimed and killed).

35. See generally Tadesse, *Reforming Juvenile Justice Legislation and Administration in South Africa: A Case Study* (cited in note 32).

36. See Herman Conradie, *The Republic of South Africa*, International Handbook on Juvenile Justice 286, 287 (Donald J. Shoemaker ed. 1996). See also Clemens Bartollas, *United States*, International Handbook on Juvenile Justice 301, 303 (Donald J. Shoemaker ed. 1996). See also Nat'l. Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Report*, OJJDP Gov 84, 89 (2014), available at <https://www.ncjfcj.org/publications/juvenile-offenders-and-victims-2014-national-report/> (last visited November 22, 2020).

37. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 26 (cited in note 26) (many women and children were increasingly becoming victims to violence to a point where some believed they were "socialized into a cycle of violence"). See also Tadesse, *Reforming Juvenile Justice Legislation and Administration in South Africa: A Case Study* (cited in note 32).

38. See Conradie, *The Republic of South Africa* (cited in note 36).

2.1.1. *South Africa's Governing Law*

South African juvenile law is regulated by several instruments.

First, South Africa's Constitution specifically speaks about the rights of children³⁹. The Constitution contains a Bill of Rights section as does the United States' Constitution. However, the South African Bill of Rights and Section 28 of the general Constitutional provisions outline generic principles, pertaining to children, that the international community sought to implement⁴⁰. In fact, when South Africa established its Constitution in 1996, the instrument included provisions that seemed to be taken directly from the Convention. For example, The South African Constitution imbues children with rights ranging from personality, protection, well-being, having age accounted for, and being subject to detainment as a measure of last resort⁴¹. The best interest standard is also incorporated into general provisions⁴².

Second, South Africa recognizes and is governed by international law, such as the Convention. As a ratifying State, South Africa has an obligation to abide by the guidelines established in it⁴³. It makes sense that South Africa ratified the Convention⁴⁴ because its past has shown a preference toward restorative justice in which wrong doers are restored to a status which enables them to value others⁴⁵. In addition, the South African Courts recognize international law and use it to justify their rulings with an eye toward conformity⁴⁶.

39. S Afr Const 1996, § 28.

40. See *id.*

41. See *id.* See also The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 108 (cited in note 26).

42. See Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 417 (cited in note 5).

43. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 30 (cited in note 26).

44. See Skelton and Tshehla, *International Instruments Pertaining to Child Justice* at 17 (cited in note 12). See also Skelton and Courtenay, *South Africa's New Child Justice System* (cited in note 18). See also *Minimum Ages of Criminal Responsibility in Africa*, Child Rts Int'L Network (2019), available at <https://archive.crin.org/en/home/ages/Africa.html> (last visited November 22, 2020).

45. See generally Gabagambi, *A Comparative Analysis of Restorative Justice Practices in Africa* (cited in note 28).

46. See Skelton and Tshehla, *International Instruments Pertaining to Child Justice* at 15 (cited in note 12). See also Skelton and Courtenay, *South Africa's New Child Justice*

Third, Parliament, the legislative authority in South Africa, is tasked with ensuring conformity to the international instruments and the Constitution when making laws⁴⁷. South Africa's Parliament functions similar to the United States' Congress. Throughout its history, South Africa has enacted numerous pieces of legislation pertaining to children. Among these Acts are the Child Protection Act of 1911, the Children's Act of 1960, the Criminal Procedures Act of 1977, and the Child Care Act of 1983.

The early 1900s spurred a movement of reformation in which the Child Protection Act was enacted to provide guidance on implementing educational principles in the treatment of children who have committed offences⁴⁸. The Children's Act of 1960, one of the governing Acts, incorporates some of the Child Protection Act dispositions and it also establishes the Children's Court⁴⁹, which exist exclusively for the benefit of children in need of care and not for the adjudication of justice⁵⁰. Such children falling under the jurisdiction of this court are orphaned, cannot be controlled, are habitually truant, associated with immoral or vicious persons *et similia*⁵¹. The largest difference between these courts and the juvenile courts is that they are civil courts, not criminal ones⁵². Parliament again passed the Act in 2007 to conform with the Constitution and international law⁵³.

The Criminal Procedure Act, which regulates the age of juvenile offenders to under 18 and enacts penalties and procedures for juvenile hearings and trials⁵⁴, was amended to limit children under the

System (cited in note 18).

47. Ultimately, the Constitution of this country is the supreme law. See *National Legislature (Parliament)*, S Afr Gov't S (2019), available at <https://www.gov.za/about-government/government-system/national-legislature-parliament> (last visited November 22, 2020).

48. See Conradie, *The Republic of South Africa* (cited in note 36).

49. See *id.* at 292.

50. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 113, 114 (cited in note 26) (this court has extended powers over the family to ensure participation with the youthful offender's rehabilitation).

51. See Conradie, *The Republic of South Africa* at 292 (cited in note 36).

52. See Conradie, *The Republic of South Africa* at 293 (cited in note 36).

53. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 111 (cited in note 26).

54. See Conradie, *The Republic of South Africa* at 289-90 (cited in note 36).

age of 14 from being held longer than 24-hours, and those under 18 longer than 48-hours⁵⁵. Children who are required to stand trial are entitled to have legal representation, as well as assistance by a parent or a guardian, during proceedings⁵⁶. The criminal trials of juveniles are to be held in camera, a private hearing, which restricts who may attend; but when a child is found to be in need of care, rather than found to be committing criminal acts, the court may transfer the case to the Children's Court⁵⁷. The trials are intended to be wholistic, taking into account various factors of the child's circumstances⁵⁸, an effort to take into account the Convention's emphasis on the well-being of children as well as the proportionality of their crimes. South Africa also pulls from the Prisons Act of 1959 to reinforce that juveniles may not be detained in a prison cell, unless there is no other viable option for custody⁵⁹. Prisons are a common practice despite the fact that most of the South African instruments call for the separation of children and adults⁶⁰.

South African courts offer several sentences for juveniles, and this aspect seems to contradict the country's prior principles of social community, restoration and rehabilitation. Per the Criminal Procedures Act of 1977, South Africa allows juveniles to be given the death penalty, imprisonment (periodic or otherwise), a fine, and corporal punishment; however, some of these sentences are limited by law and multiple sections provide that instead of punishment, a juvenile can be ordered to attend probation and a treatment program or secure care facility before prison⁶¹. The Child Care Act provides for the protection of children who are uncared for by their biological parents, by

55. See Tadesse, *Reforming Juvenile Justice Legislation and Administration in South Africa: A Case Study* (cited in note 32).

56. See Conradie, *The Republic of South Africa* at 290 (cited in note 36).

57. See *id.*

58. See *id.* at 291.

59. See *id.* at 290.

60. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 110 (cited in note 26).

61. See Conradie, *The Republic of South Africa* at 291 (cited in note 36) (corporal punishment may not exceed "a maximum of seven strokes with a light cane ... [and] can be administered only under the supervision of a medical doctor and in the presence of the parent(s)"). See also Republic of South Africa, *Situation Analysis of Children in South Africa* at 110 (cited in note 26).

requiring the Department to register places of care or institutions that are used for the protection and temporary care of children separated from their families⁶². For those children living with biological parents, there is positive consideration of the fact that the parents appear or, at the very least, that they ensure the child appearance⁶³. Most of the principles embodied in South African law hinge on the very essence of the Convention, which not only made incorporating them into the country's law easier, but also made the enactment of the Child Justice Bill a success.

The new Child Justice Bill of 2008 takes the procedures outlined in the Criminal Procedures Act and aligns them with the Constitution and International Law⁶⁴. The Bill even explicitly mentions the Convention in the Preamble⁶⁵. The Bill "establishes a separate criminal justice process for those children accused of committing offences [sic] and includes a focus on procedures for individualized assessment and preliminary inquiry, diversion and restorative justice"⁶⁶. This legislation establishes a clear Juvenile Court⁶⁷.

Under South African law a juvenile is an individual between the ages of 7 and 20⁶⁸. This new Bill raises the age at which children have criminal capacity to 10 years old, meaning children under this age will automatically be referred for social services if they commit a crime, instead of being arrested or prosecuted⁶⁹. However, children

62. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 113 (cited in note 26).

63. See Conradie, *The Republic of South Africa* at 290 (cited in note 36).

64. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 114 (cited in note 26).

65. Child Justice Act 75 of 2008, § 3 (S Afr) (it is identified under Guiding Principles). See also Skelton and Tshehla, *International Instruments Pertaining to Child Justice* at 16 (cited in note 12).

66. The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 108 (cited in note 26).

67. See Conradie, *The Republic of South Africa* at 286 (cited in note 36).

68. See *id.*

69. See *id.* (this also means that children under the age of 10 have an irrefutable presumption that they are unable to possess criminal capacity, this group is rendered *doli incapax*). See also Child Justice Act 75 of 2008, § 7 (S Afr). See also The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 114 (cited in note 26).

as young as 14 can be arrested and prosecuted⁷⁰. Therefore, children under the age of 14, but over the age of 10, have a rebuttable presumption as to lacking criminal capacity: in these cases, it must be proved that the child knew the difference between right and wrong and had the requisite capacity before being prosecuted⁷¹ beyond a reasonable doubt⁷². The Bill also introduces preliminary inquiry in which a child is assessed, and a determination is made as to whether children can be diverted and still successfully amend for their crimes⁷³. The idea that children must be treated with special care is sprinkled throughout the new piece of legislation⁷⁴. The Bill even requires a Youth Court model in which a probation officer assesses the child when charged, after which the officer makes a referral for release or detention; these programs help get the child to take accountability, and amend the harm done to the child, victim, or community⁷⁵. Unfortunately, diversion and arrest statistics are at best conclusionary because they are based on limited factors, such as specific arrests, which makes sense considering the instruments of South Africa governing juvenile justice promote diversion out of the system⁷⁶.

The result of these governing Acts is that various different institutions have been established to deal with juveniles⁷⁷. As mentioned, some of the juvenile courts in South Africa are not *ordinary courts*, much like the United States, rather they create separate institutions to deal with children in need of care or with those committing *adult crimes*. However, when juveniles commit a crime, they are brought before a juvenile (criminal) court only upon an arrest, summons, written notice, final warning, or indictment⁷⁸. South African Juvenile Court is

70. See *id.*

71. See *id.* at 115.

72. Child Justice Act 75 of 2008, § 11 (S Afr). See also Conradie, *The Republic of South Africa* at 286 (cited in note 36).

73. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 114 (cited in note 26).

74. See *id.* at 108.

75. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 115 (cited in note 26).

76. See *id.* at 108-09 (estimates suggest that approximately 101,000 children were arrested annually during the period of 2001-2006).

77. Conradie, *The Republic of South Africa* at 287 (cited in note 36).

78. See *id.* at 289.

promoted as a last resort because juveniles can be ordered directly to prison, where they may be held with and treated similarly to adults⁷⁹. These institutions are governed by the United Nations Congress on Crime Prevention and Treatment of Offenders, which was adopted in 1955 and promotes discipline aimed at developing self-discipline, establishing adequate habit and a sense of moral responsibility⁸⁰. In addition, juvenile arrest has been limited to serious crimes such as murder, armed or dangerous robbery, arson, sexual assault, theft, and fraud⁸¹. Finally, the Bill specifically speaks to restraints, stating they should only be used on a child offender under exceptional circumstances⁸².

Alternative programs to the Children's Court and the Juvenile Court, include Child Care Schools as a means to rehabilitate and reintegrate the child back into society⁸³; Reform Schools, not to be confused with Child Care Schools, are institutions meant to *train* the children who have not been successful at rehabilitation and give them job skills, if possible⁸⁴; Clinic Schools, which are not subject to court intervention⁸⁵, were enacted in an effort to take care of children that would be detrimental to themselves or others in a traditional classroom⁸⁶. The model of South Africa focuses on the diminished individual responsibility of children by sanctioning behavior and providing provisions for treatment in which the children's social needs are accounted for in an environment where they can learn to respect others⁸⁷.

Like the United States, South Africa uses legislation to regulate the juvenile justice system, but the cultural implications of South African law place a larger emphasis on children in conflict with the law and attempt to remedy this behavior through restorative justice. Unlike the

79. See *id.* 296-97.

80. See *id.*

81. Child Justice Act 75 of 2008, §§ 20, 30 (S. Afr); see also Conradie, *The Republic of South Africa* at 297 (cited in note 36).

82. Child Justice Act 75 of 2008, § 33 (S Afr).

83. Conradie, *The Republic of South Africa* at 293-94 (cited in note 36).

84. See *id.* at 295.

85. See *id.* at 295-96.

86. See *id.* at 295-96.

87. See Skelton and Courtenay, *South Africa's New Child Justice System* at. 338-39 (cited in note 18).

United States, South Africa has enacted two separate systems to deal with children in conflict with the law including the Children's Court and the Juvenile Court. The Children's Court and other programs enacted by the new Child Justice Bill deal exclusively with children in need; only when the children have committed serious offenses will they be adjudicated before a Juvenile Court, while the United States, as a whole, relies on a Juvenile Court in a punitive way to seek retribution from children in conflict with the law.

2.1.2. *South Africa's Governing Law in Action*

Some relevant case law helps to illustrate how South Africa has put into use these various instruments.

In *S v. Williams*, whipping was abolished as a sentence because it was a "cruel, inhuman and degrading treatment"⁸⁸. The basis for the decision in *S v. Williams* came from language in the South African Bill of Rights but, as time went on, the courts began to analyze issues relating to children in the purview of the Convention and the subsequent Child Justice Act of 2008. With regard to sentencing, South Africa has embraced the best interest of the child standard, which originates from the Convention and is incorporated into the Child Justice Act.

In *Brandt v. S*, a 17-year-old committed a heinous murder of an elderly woman⁸⁹. The court acknowledged the Constitution and international instruments when making the declaration that child offenders deserve special attention and that the best interest of the child required different rules to be applied to sentencing child offenders⁹⁰.

In *DPP v. P*, a 12-year-old recruited two adults to murder her grandmother. She was convicted of murder but received a suspended sentence⁹¹. The court explains the light sentence as being based on the Convention's concept that detention is a matter of last resort and that that concept is linked to the best interest of the child analysis⁹². While South African courts look at the seriousness of the offense, the circumstances of the offender, and interest of the community, they

88. *S v. Williams and Others*, 1995 (3) SA 632 (CC).

89. *Brandt v. S*, 2004 JOL 1322 (SCA).

90. See *id.*

91. 2006 (1) SACR 243 (SCA).

92. See *id.*

also embrace the best interests of the child standard that is repeated throughout the Convention. Another case went so far as to call a police officer arrest that does not account for the best interest of the child unconstitutional.

In *MR v. Minister of Safety and Security*, the Constitutional Court held that a police officer, with discretion to arrest a child, must balance the conflicting interest and the constitutional requirements of the best interest standard or else the arrest was unlawful⁹³.

Whether the issue is detention or a minimum sentencing scheme, South Africa makes clear that the international law of the Convention and the South African Constitution are real restraints on Parliament which determine how judicial officers should treat children⁹⁴. For example, in *A v. S*, a 16-year-old was arrested, and the court noted that, since the accused was a child at the time of the crime, his trial had to be conducted in terms of the provisions of the Child Justice Act 75 of 2008⁹⁵. Further, the court noted that every Child Justice Court must ensure proceedings which are not hostile and appropriate for the age and the understanding of the child⁹⁶. The court even clarified that the requirement of a parent or guardian's presence at a trial must be a meaningful presence to help the child⁹⁷. In this case, the conviction and the sentence were set aside because the regional magistrate materially departed from the Child Justice Act which every Child Justice Court is obliged to adhere to⁹⁸.

These cases are just a few illustrations of how South Africa relies heavily on its international and domestic legislation in cases involving children.

93. *MR v. Minister of Safety and Security*, 2016 (2) SACR 540 (CC).

94. *Centre for Child Law v. Minister for Justice and Constitutional Development and Others*, 2009 (2) SACR 477 (CC).

95. *A v. S*, [2019] ZAECGHC 64.

96. See *id.*

97. See *id.*

98. See *id.*

2.2. *United States and the Historical Influences on its Juvenile System*

Unlike South Africa, the United States does not base its legislation on the international laws, but on the federal and state law instead. The United States has intruded on international affairs quite often but does not expressly participate when the international community seeks to ratify a new treaty in an effort to harmonize the principles around the world⁹⁹. A prime example is the United States' refusal to ratify the Convention because it focuses on economic, social, and cultural rights; "merely good social policy"¹⁰⁰ one might say, but not enough to alter an entire legal system. Whether the United States refused to ratify the Convention because it did not want the international community to infringe on its already established system or because it did not agree with specific provisions that could not be altered to the United States' liking is moot. The point is that the United States still embraces the goals of the Convention despite its failure to ratify one of the most influential pieces of International Human Rights Law¹⁰¹.

Traditionally, in the United States, there was no minimum age of criminal responsibility¹⁰². Therefore, juveniles who violated criminal laws were treated in the same way as adult offenders¹⁰³. The idea that juveniles were different from adults can be traced back to the origins

99. See *United States Ratification of International Human Rights Treaties*, Hum Rts Watch (July 24, 2009), available at <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties> (last visited November 22, 2020) (the United States has not ratified any human rights treaties since December 2002, including the Convention on the Elimination of All Forms of Discrimination against Women; the Convention for the Protection of all Persons from Enforced Disappearance; Mine Ban Treaty; the Convention on the Rights of Persons with Disabilities; the Optional Protocol to the Convention against Torture).

100. Cohen, *Introductory Note* (cited in note 10).

101. See *Convention on the Rights of the Child*, Unicef, available at <https://www.unicef.org/child-rights-convention> (last visited November 22, 2020).

102. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36). See also *Minimum Ages of Criminal Responsibility in the Americas*, Child Rts Int'l Network (2019), available at <https://archive.crin.org/en/home/ages/Americas.html> (last visited November 22, 2020).

103. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36).

of the Juvenile Court¹⁰⁴. By the 18th century, children *below the age of reason* were presumed to lack criminal capacity, which meant that 7-years-olds or younger children could not have criminal intent, but they could be sentenced to prison or death if found guilty¹⁰⁵. It has been found that children under the age of 12 and those who have offended are two to three times more likely to become violent offenders later in life¹⁰⁶.

Children started to be viewed as morally and cognitively immature, so the Society for the Prevention of Juvenile Delinquency established a facility to house and rehabilitate juvenile offenders¹⁰⁷. The Houses of Refuge were intended to separate children from the adult jails and penitentiaries they were being held in¹⁰⁸. Even children who committed status offenses were being held in adult prisons¹⁰⁹. A status offense is a noncriminal act committed by a child that happens to be considered a crime (solely) because the child commits it¹¹⁰. These crimes include "truancy, running away from home, violating curfew, underage use of alcohol, and general ungovernability"¹¹¹. Most of these crimes would fall under the jurisdiction of the Children's Court in South Africa. In 2011, there were approximately 116,200 status juvenile offenders

104. See Daniel P. Mears, et. al., *The "True" Juvenile Offender: Age Effects and Juvenile Court Sanctioning*, 52 *Criminology* 169, 169 (2014) (children were considered to "be malleable and capable of being reformed"). See also Peter J. Benekos and Alida V. Merlo, *Juvenile Justice in the United States*, in *Juvenile Justice: International Perspectives, Models and Trends* 396, 370 (John A. Winterdyk ed., 2015).

105. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36).

106. See Burns, et. al., *Treatment, Services, and Intervention Programs for Child Delinquents*, United States Office of Juvenile Justice and Delinquency Prevention (March 2003) 1, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/193410.pdf> (last visited November 22, 2020).

107. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36).

108. See *Juvenile Justice History*, Ctr on Juv and Crim Just, available at <http://www.cjcj.org/Education1/Juvenile-Justice-History.html> (last visited November 22, 2020).

109. See *id.*

110. See United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

111. *Id.*

and 8,800 of them were detained in secure facilities¹¹². Children who partake in this kind of behavior have been viewed to exhibit signs of personal, familial, and community issues, which are general factors underlying all offenders¹¹³. However, some of these behaviors should be tolerated to an extent as they allow children to learn from their mistakes which is an important part of being a child¹¹⁴. This concept is among those found throughout the Convention: break the cycle with education and diversion because children's inherent nature makes them most likely to be rehabilitated. These status offenders can cross lines within the system and be deemed *de facto* delinquent, in need, or follow under some other statutory category¹¹⁵.

While the United States was dealing with overpopulated prisons, it was also dealing with child poverty and neglect¹¹⁶. These struggles led to the creation of the Houses of Refuge in New York and Boston; the legislation creating these houses premised that an age-based differentiation between juveniles and adults should ensure institutional separation¹¹⁷. These institutions attempted to house "poor, destitute and vagrant youth who were deemed by authorities to be on the path towards delinquency"¹¹⁸. Similar to South Africa, the displaced children became the focus of criminal reform advocates. The system of

112. See *Status Offenses: A National Survey*, Coalition for Juvenile Justice 5, available at <http://www.juvjustice.org/sites/default/files/resource-files/Status%20Offenses%20-%20A%20National%20Survey%20-FINAL%20-%20WEB.pdf> (last visited November 22, 2020).

113. See United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

114. See Franklin E. Zimring, *American Juvenile Justice* 20 (2nd ed. 2018). See also *Literature Review: A Product of the Model Programs Guide* (cited in note 4) (however, this learning period should be concentrated, with privileges extended gradually over time for the opportunity of the child to have more experiences. Hopefully, this will combat poor decision making).

115. See United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

116. See *Juvenile Justice History* (cited in note 108).

117. See *id.* (as of 2017, 16-year-olds were still being held in adult prisons; this needs to change to prevent destroying lives). See also Teresa Wiltz, *Children Still Funneled through Adult Prisons, But States are Moving Again*, *Usa Today* (June 17, 2017), available at <https://www.usatoday.com/story/news/2017/06/17/how-raise-a-ge-laws-might-reduce-recidivism/400065001/> (last visited November 22, 2020).

118. *Juvenile Justice History* (cited in note 108).

the Houses of Refuge failed to reduce crime rates of children and established separate confinement for poor and delinquent children¹¹⁹. Alternative programs were introduced shortly after the Houses of Refuge including out-of-home placement and probation¹²⁰. Unlike South Africa, whose legislative body predominantly influenced the reform, the push for the United States to recognize that children need different treatment than adults when in conflict with the law was originally advocated by social reformers¹²¹.

However, these facilities were eventually taken over and incorporated into the Juvenile Court by the States, which used the doctrine of *parens patriae*¹²² (State as a surrogate parent) to make judgments that were in the best interest of the child, specifically in ways that the State would not have intervened with an adult¹²³. The first Juvenile Court was established in Illinois in 1899, and by 1910, 32 states have established either juvenile courts or probation services for juveniles; this trend continued until two states were left to enact an administrative system for juveniles in 1925¹²⁴. In 1968, the Juvenile Delinquency Prevention and Control Act recommended child offenders be dealt with based on their crimes, for instance, children with noncriminal or status offenses should be diverted outside the court¹²⁵. Traditionally, there was an idea that less violent or status offenders were *true*

119. See *id.*; see also Bartollas, *United States* at 302 (cited in note 36).

120. See *Juvenile Justice History* (cited in note 108).

121. See *id.*

122. See Zimring, *American Juvenile Justice* at 4 (cited in note 114) (this doctrine was present for most of the 20th century focusing on three values: children in need of supervision; family supervision of those who are dependent; the state should educate children and only intervene when the family fails; and the state should be able to decide what is in the best interest of the at-risk children).

123. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36). See also *Juvenile Justice History* (cited in note 108). See also Mears, *The "True" Juvenile Offender: Age Effects and Juvenile Court Sanctioning* (cited in note 104) ("A key element [of the doctrine] was the focus on the welfare of the child. Thus, the delinquent child was also seen as in need of the court's benevolent intervention").

124. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36). See also *Juvenile Justice History* (cited in note 108).

125. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 86 (cited in note 36).

offenders because the Juvenile Court's philosophy was that they were most culpable and most likely to reform their behavior¹²⁶. The way, in which the Juvenile Court attempted to deal with delinquents, was further affected by the Federal Juvenile Justice and Delinquency Prevention Act of 1974, which called for a push for diversion rather than detention¹²⁷. The Act sought to have children under the age of 15 diverted for status offenses¹²⁸. The courts focused on rehabilitation of offenders rather than punishment, which led to a distinction between juvenile and criminal courts¹²⁹. The jurisdiction of the Juvenile Court originally handled unruly children who needed reinforced parental authority, thus, justifying the legal doctrine of *parens patriae*¹³⁰. Like South Africa's Children's Court, the United States began to consider its Juvenile Court as an institution that could rehabilitate children in conflict with the law. State statutes set the age limits for original jurisdiction of the juvenile court, which is usually cut off at 18 years of age¹³¹. However, Juvenile Court judges were afforded a tremendous amount of discretion, because doing what was best for the child, pursuing their rights instead of merely honoring them, required a tremendous amount of power¹³². Jurisdiction may be extended beyond the age of 18 under special circumstances¹³³. However, the discretion of the judge and the likelihood of curing the juveniles in *treatment* soon called for a reform¹³⁴.

126. See Mears, *The "True" Juvenile Offender: Age Effects and Juvenile Court Sanctioning* at 170 (cited in note 104).

127. See Burns, *Treatment, Services, and Intervention Programs for Child Delinquents* at 8 (cited in note 106).

128. See Zimring, *American Juvenile Justice* at 3 (cited in note 114).

129. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36) (juvenile court would have to waive its jurisdiction for a juvenile to be tried as an adult; hearings were informal; and due process protections were deemed unnecessary).

130. See *Juvenile Justice History* (cited in note 108). See also Bartollas, *United States* at 303 (cited in note 36).

131. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 93 (cited in note 36).

132. See Zimring, *American Juvenile Justice* at 6 (cited in note 114).

133. In Massachusetts this may be extended to 20 years, but the oldest is 24 years. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 93 (cited in note 36).

134. See *id.* at 84.

While the international community was moving towards rehabilitation and diversion, the United States' juvenile justice system seemed to be moving away from these ideologies and began focusing on the seriousness of the crime committed. The Juvenile Justice and Delinquency Prevention Act called specifically for the deinstitutionalization of status offenders as well as a separation of juvenile offenders from adults¹³⁵. Then, a rise in juvenile crimes, especially violent crimes, led to a "Get Tough" era in spite of the 1974 Act¹³⁶. The 1980s and 1990s experienced spikes in violent juvenile crime and, as a result, states began to move towards a *law and order* approach; following which offenders charged under certain laws would be excluded from the juvenile court regardless of age or they would face mandatory sentencing¹³⁷. It was clear to the juvenile system that repeat offenders needed to be controlled even if that meant eliminating special protections¹³⁸.

During this period, South Africa began to incorporate the international policy of rehabilitation into its legislation and governance of its Children's Court and its Juvenile Court, while the United States started the transition of its ideology on how to deal with child offenders towards the punitive focus. Throughout the "Get Tough" era, most States enacted laws simplifying the process to transfer a child to an adult court or required the imposition of a mandatory sentence in an effort to combat serious juvenile offenders¹³⁹. This is one instance where the United States as a whole directly enacted laws conflicting with the Convention, specifically Article 37, which requires imprisonment of child offenders to be used as a measure of last resort. For example, the National Advisory Committee for Juvenile Justice and Delinquency Prevention sought to "Get Tough" on serious offenders

135. See *id.* at 86.

136. See Bartollas, *United States* at 304 (cited in note 36).

137. See Nat'l. Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 86 (cited in note 36).

138. See Zimring, *American Juvenile Justice* at 8-9 (cited in note 114).

139. See Barry Krisberg, et. al., *The Watershed of Juvenile Justice Reform*, 32 *Crime and Delinq.* 5, 9 (Jan. 1986) (starting around 1980, this "Get Tough" era spurred three different categories of statutory changes including making it easier to prosecute juveniles in adult courts (California and Florida) [,] lowering the age of judicial waiver (Tennessee, Kentucky, and South Carolina) [and] excluding certain offenses from juvenile court jurisdiction (Illinois, Indiana, Oklahoma, and Louisiana)). See also Bartollas, *United States* at 308 (cited in note 36).

in 1984 by encouraging development of preventative detention, transfer to adult courts, mandatory sentencing for violent crimes, and restoring the concept of accountability or just deserts¹⁴⁰. As a member of the United Nations, the United States has an obligation to implement the international principles found in the Convention in good faith; however, during the "Get Tough" era, the United States discredited the inherent difference between children and adults by subjecting them to punitive punishment rather than educational diversion. Despite this setback for juvenile justice, the United States began to transform again, mainly because of the United States Supreme Court, which has a similar function to South Africa's Constitutional Court.

2.2.1. *United States' Supreme Court Influences on its Juvenile System*

As the United States is a Common Law country, a series of Supreme Court cases also govern the juvenile justice system. The following part will be a brief description of the significant Supreme Court cases.

The rise of procedural safeguards for juveniles began with *Kent v. United States*. This case illustrates an instance, where a 16-year-old, with a prior record, was charged with rape and robbery¹⁴¹. The Juvenile Court judge, in his sole discretion, held no hearing on the case and waived jurisdiction without giving a reason¹⁴². The Supreme Court found the waiver invalid because the minor was entitled to a hearing with all the same procedural due process and fair treatment requirements of an offender in an adult court¹⁴³. The Court ruled that the child should have been afforded a hearing, his counsel should have been allowed to examine the investigation giving way to the waiver, and the court needed to give reason for the transfer¹⁴⁴. This marked the United States' turn from a model of informality in favor of a more formal system for juveniles.

140. See Krisberg, *The Watershed of Juvenile Justice Reform* at 8-9 (cited in note 139). See also Bartollas, *United States* at 304 (cited in note 36).

141. *Kent v. United States*, 383 US 541, 543 (1966).

142. See *id.* at 546.

143. See *id.* at 552. See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 89 (cited in note 36).

144. *Kent*, 383 US at 556.

A year later, in *In re Gault*, a 15-year-old, who was on probation, made a lewd call to his neighbor¹⁴⁵. No notice was given to his parents before he was taken into custody, nor after he was sent to the Children's Detention Home¹⁴⁶. The minor and his parents were not informed about a hearing, so they failed to attend; this resulted in a sentence to the State Industrial School for the remainder of his minority¹⁴⁷. If the minor were an adult, he would have received a maximum punishment of a \$50 fine or two months imprisonment¹⁴⁸. The Supreme Court decided that hearings, which may result in the institutionalization of a juvenile, require some of the basic due process rights such as notice, counsel, and protection against self-incrimination¹⁴⁹. The Court also explicitly rejected the doctrine of *parens patriae* as being a State's unlimited power for procedural arbitrariness¹⁵⁰. This decision marked the United States turn away from rehabilitative justice for juveniles to a more restrictive and punitive system¹⁵¹.

The adjudication stage in the United State juvenile system is similar to that of any trial where a plea is heard and evidence is presented¹⁵². *In re Winship* extended the requirement of proof beyond reasonable doubt to children charged with acts constituting adult crimes¹⁵³. However, *Mckeiver v. Pennsylvania* denied the right of a jury trial to juveniles¹⁵⁴. An argument made on behalf of jury trials for juveniles was that they needed protection from the state; this perception was rejected because the Court found that allowing jury trial could jeopardize the informality, flexibility, and confidentiality of juvenile

145. *In re Gault*, 387 US 1, 4 (1967).

146. See *id.* at 5.

147. See *id.* at 7.

148. See *id.* at 29.

149. See *id.* at 30-57.

150. See *id.* at 17-20, 30, See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 89 (cited in note 36). See also Bartollas, *United States* at 303 (cited in note 36).

151. See Krisberg, *The Watershed of Juvenile Justice Reform* at 28 (cited in note 139). See also Bartollas, *United States* at 303 (cited in note 36).

152. See Bartollas, *United States* at 308 (cited in note 36).

153. *In re Winship*, 397 US 358, 368 (1970). See also Bartollas, *United States* at 308 (cited in note 36). See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90 (cited in note 36).

154. *Mckeiver v. Pennsylvania*, 403 US 528, 550 (1971). See also Bartollas, *United States* at 308 (cited in note 36).

court proceedings¹⁵⁵. Further, the Court stated that jury trials are not constitutionally required in juvenile court hearings, because a trial by jury most likely "destroy[s] the traditional character of juvenile proceedings"¹⁵⁶. Therefore, while children had acquired a significant amount of procedural rights, they were not afforded the right to a jury trial in Juvenile Court for fear of blurring the line between the juvenile and adult courts even further. Despite the move towards a punitive system, most of these procedural decisions could be viewed as working towards the accepted international standards of child treatment in court proceedings, which, as Article 40 of the Convention suggests, should assure the respect of the individual dignity and worth.

In addition to *Kent*, *Breed v. Jones* also governs transfer proceedings¹⁵⁷. In *Breed v. Jones*, a petition was sent to the Superior Court of California asking to have a 17-year-old tried as he committed an act which, if committed by an adult, would constitute robbery¹⁵⁸. The next day he had a detention hearing which ordered him to be detained while the petition was pending¹⁵⁹. The Court found that the juvenile was subjected to two trials¹⁶⁰. Therefore, trying a "respondent in Superior Court, after an adjudicatory proceeding in Juvenile Court, violate[s] the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment"¹⁶¹.

In terms of privacy rights, two cases are illustrative. In *Oklahoma Publishing Co. v. District Court*, an order was issued to enjoin news members from publishing the name or picture of a minor child in connection with a juvenile proceeding¹⁶². However, as the name of the juvenile was being used in relation to the crime reporting it was held

155. *McKeiver*, 403 US at 545.

156. See *id.* at 540. See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Report* at 90 (cited in note 36).

157. See Bartollas, *United States* at 307 (cited in note 36). See generally *Kent v. United States*, 383 US 541 (1966). See also *Breed v. Jones*, 421 US 519 (1975).

158. *Breed*, 421 US at 521.

159. See *id.*

160. See *id.* at 533.

161. *Id.* at 541. See also Bartollas, *United States* at 307 (cited in note 36). See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

162. *Oklahoma Pub. Co. v. Dist. Court In and For Oklahoma Cty*, 430 US 308, 308 (1977).

that the order issued by the District Court violated the news members freedom of press¹⁶³. Another case dealing with the news and juvenile reporting is *Smith v. Daily Mail Publishing Co.*, where it was held that the State could not punish the truthful publication of a delinquent's name that was lawfully obtained¹⁶⁴.

The United States Supreme Court also took a stance on some sentencing for juveniles.

In *Eddings v. Oklahoma*, a 16-year-old shot and killed an officer after being pulled over on the Oklahoma Turnpike¹⁶⁵. The Court held that state courts must consider all relevant mitigating evidence including age for a juvenile charged with a crime and facing the death penalty¹⁶⁶. Taking into account the offender's age was a significant step towards conceptualizing principles embraced by the international community.

In *Schall v. Martin*, the Court was asked to decide whether preventive pretrial detention was valid¹⁶⁷. The Court found that preventive detention served legitimate state interests of protecting the juvenile and society¹⁶⁸. In addition to the regulatory purpose, the Court felt the procedural protections a that preceding detainment were sufficient¹⁶⁹.

In *Thompson v. Oklahoma*, a 15-year-old, at the time of his offense, was convicted of first-degree murder and sentenced to death¹⁷⁰. The Court expressed the opinion that "even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century"¹⁷¹. The Court held

163. See *id.* at 311-12. See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

164. *Smith v. Daily Mail Pub. Co.*, 443 US 97, 106 (1979). See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

165. *Eddings v. Oklahoma*, 455 US 104, 105-06 (1982).

166. See *id.* at 117. See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

167. *Schall v. Martin*, 467 US 253, 273-74 (1984).

168. See *id.* at 256-57.

169. See *id.* at 280. See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

170. *Thompson v. Oklahoma*, 487 US 815, 819 (1988).

171. See *id.* at 838.

that the Eighth and Fourteenth Amendments prohibit the death penalty for persons under the age of 16 at the time of their offense¹⁷².

Finally, *Roper v. Simmons* reconsidered the question of whether a person between the ages of 15 and 18 can be subjected to the death penalty¹⁷³. A 17-year-old plotted and executed a murder in which he duct taped a woman's entire face before throwing her into a river¹⁷⁴. Despite the atrocity of the crime, the Court held that the Eighth Amendment prohibited sentencing a child under the age of 18 to death because that sentence was reserved for "a narrow category of the most serious crimes"¹⁷⁵. This was just one of three cases that cited to research concluding children must be sentenced differently than adults and thus recognized the diminished criminal responsibility and greater capacity for rehabilitation¹⁷⁶. As a direct embodiment of the Convention, this was a step toward recognizing that typical sentencing was not appropriate for a minor and that child offenders should be sentenced in proportionality to their crime, but also by taking into account various mitigating factors about the child's inherent nature as a child.

In *Graham v. Florida*, a 16-year-old and three other friends attempted to rob a restaurant in Florida¹⁷⁷. The prosecutor chose to have the child tried as an adult, which meant that his charges carried a life sentence without the possibility of parole¹⁷⁸. The Court referred to a Global Law and Practice guide which declared that only 11 nations authorize the sentences of life without parole for juvenile offenders and only two of those, one being the United States, impose the

172. See *id.* See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-9 (cited in note 36).

173. *Roper v. Simmons*, 543 US 551, 555-56 (2005).

174. See *id.* at 556-58.

175. See *id.* at 568 sqq. (the opinion includes an appendix identifying the states permitting the imposition of the death penalty on juveniles. For those states that do permit the death penalty most have no minimum age requirement, for those that do have a minimum age requirement, the youngest is 16 years old. At the time of the opinion only 12 of the 50 states prohibited the death penalty entirely). See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

176. See generally *Roper v. Simmons*, 543 US 551 (2005); *Graham v. Florida*, 560 US 48 (2010); *Miller v. Alabama*, 567 US 460 (2012).

177. *Graham*, 560 US at 52.

178. See *id.* at 53.

sentence in practice¹⁷⁹. This case holds: "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide"¹⁸⁰.

In *Miller v. Alabama*, two 14-year-olds were convicted of murder and sentenced to life imprisonment without the possibility of parole in each of their respective cases¹⁸¹. Each case involved state mandatory sentencing schemes in which the juvenile's *lessened culpability* and *greater capacity for change* are ignored¹⁸². The Court held that mandatory sentences of life without parole for juveniles violate the Eighth Amendment¹⁸³.

A distinguished research professor of Criminal Justice, among others, believes that "the lack of political will – not public opinion – is the main barrier to developing a more balanced approach to sentencing and correctional policy"¹⁸⁴. They offer central themes to the public opinion including its increasing acceptance of policies that are punitive as citizens hear more and more disturbing stories about offenders and their crimes¹⁸⁵; seeking the punishment to fit the crime with a willingness to seek lesser punishments upon evidence of mitigating circumstances¹⁸⁶; taking a strong stance on violent crime based on the *common sense* that people who offend should not be left on the streets to reoffend¹⁸⁷; believing that rehabilitation should remain a goal of the correctional system¹⁸⁸; and believing violent youths forfeit their protections as children¹⁸⁹. These ideologies, taken together, prohibit

179. See *id.* at 80.

180. See *id.* at 82.

181. See *Miller*, 567 US at 465 sqq. (Jackson was charged with capital felony murder and aggravated robbery, while Miller was charged with murder in the course of arson).

182. See *id.*

183. See *id.* See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-92 (cited in note 36).

184. See Francis T. Cullen et. al., *Public Opinion About Punishment and Corrections*, 27 *Crime and Just.* 1, at 57 (2000).

185. See *id.* at 58.

186. See *id.* at 58-59, 60.

187. See *id.* at 59.

188. See *id.*

189. See *id.* at 60.

the United States from fully implement the international principles of the Convention.

2.2.2. *United States' Governing Law in Action*

In practice, the United State juvenile system differs from South Africa's as it embraces a crime control model, embedded into the juvenile justice system, which focuses on due process, discretion of enforcement authorities, punishment and retribution in order to protect society and hold children responsible for their crimes¹⁹⁰. Similarly to South Africa, in the United States the first contact a juvenile has with the criminal system are through police officers¹⁹¹. The latter, however, have broad discretion to divert children away from the court¹⁹². Indeed, police officers may make a determination based on the seriousness of the offense, the respect shown to him from the juvenile, the apparent social class, prior record and the effect on the community¹⁹³. If the police officer makes a determination that juvenile court is appropriate, then the latter will step into the role of controlling and correcting the behavior of the child¹⁹⁴.

First, a detention hearing where the situation is assessed in terms of protecting the child and ensuring public safety will firstly occur¹⁹⁵. This is followed by an intake hearing in which a preliminary screening determines the best resolution to the situation¹⁹⁶. In the intake hearing,

190. See Benekos and Merlo, *Juvenile Justice in the United States* at 388-90 (cited in note 104). See generally *Juvenile Court Procedures*, 81 Harv. L. Rev. 171 (1967). See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 89 (cited in note 36).

191. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 94 (cited in note 36).

192. See *ibid.* See also Bartollas, *United States* at 305 (cited in note 36).

193. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 94 (cited in note 36). See also Bartollas, *United States* at 305 (cited in note 36).

194. See Bartollas, *United States* at 306 (cited in note 36)

195. See Nat'l. Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 94 (cited in note 36) (during the process of a case it may be deemed to be in the child's *best interest* to be held in a secure detention facility). See also Bartollas, *United States* at 306 (cited in note 36).

196. See Nat'l. Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 94. See also Bartollas, *United States* at 307.

the intake unit will decide if the court has statutory jurisdiction and will either dismiss the case, divert it to a diversionary agency, place the juvenile on informal probation, or file the complaint with the court¹⁹⁷.

Ultimately, the goal of the juvenile justice system in the United States is the ability to control and correct the behavior of children violating the law. There are a variety of opinions on how to reform the juvenile justice system in order to effectively achieve the goals set out. These include, namely, *parens patriae*, advocating for *just desserts* over rehabilitation, or simply dealing with juveniles in the adult court system¹⁹⁸.

Essentially, overall, the United States implements only parts of the Convention while South Africa has effectively and expressly incorporated the Convention into their child justice legislation. In fact, despite legislative emphasis on diversion in the United States, the juvenile court still functions as a criminal tribunal and transfers a substantial amount of cases to adult courts. Differently, South Africa has managed to create a holistic juvenile system with a focus on dealing with child offenders in non-criminal ways and reserving the Juvenile Court for those serious offenses which, instead, the United States would transfer to an adult court.

2.2.3. Massachusetts as a Sample Study

When examining the juvenile justice system in the United States, it is more straightforward to look at one State, since each State has the authority to enact its own laws to govern within its borders and typically they all differ in certain aspects from one another. In this respect, Massachusetts represents a suitable case study, being a typical frontrunner in the Union: Massachusetts was, indeed, the first State to establish a higher education college and in 1636, Harvard University became the first college of its kind in the United States¹⁹⁹. In 1891, Massachusetts enacted the first juvenile probation system in which criminal courts were required to appoint probation officers to

197. See Bartollas, *United States* at 307 (cited in note 36).

198. See *id.* at 305.

199. See *Harvard at a Glance*, Harvard, available at <https://www.harvard.edu/about-harvard/harvard-glance> (last visited November 22, 2020).

juveniles²⁰⁰. In addition, Massachusetts was the first state to legalize same sex marriage²⁰¹.

Self-reported statistics suggest about half of children participate in illegal activity in Massachusetts²⁰². Nonetheless, only a small percentage are arrested. This small percentage is startling as the FBI reports 7,281 children under the age of 18 were arrested in Massachusetts in 2018²⁰³. An even smaller portion is committed to correctional facilities²⁰⁴. As a State within the United States, Massachusetts is subject to the Federal laws as well as the United States Supreme Court. However, as long as the State laws do not conflict with these higher authorities, Massachusetts may enact the juvenile system it sees fit. The Massachusetts Juvenile Court is governed by Massachusetts General Laws chapter 119 and 218 among others. The jurisdiction of the court is over children in need of services²⁰⁵; the care and protection of children²⁰⁶; offenders under the age of 18²⁰⁷; and neglected and delinquent children²⁰⁸. This encompasses the population of both the Children's Court and the Juvenile Court of South Africa. In addition, the Juvenile Court shares jurisdiction with the Supreme Judicial Court and the Superior Court in all proceedings. In Massachusetts there is a distinction between a delinquent offender and a youthful offender:

200. The Probation act of 1878 applied only to Massachusetts. See Skelton and Tshela, *International Instruments Pertaining to Child Justice* at 36 (cited in note 12).

201. See *Obergefell v. Hodges*, 135 S Ct 2584, 2597, 2604-05 (2015) (in 2003, the Massachusetts Supreme Judicial Court ruled that the State's ban on same sex marriage was unconstitutional. See *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003). In reaching this decision the Court references the State's Constitutional ban on second class citizen status. See *id.* at 312. This ruling sparked additional states to grant same sex couples the right to marry, but some states went the other way resulting in a great divide in the country. Then in 2015, the United States Supreme Court ruled that the right to marriage is a fundamental right that should be enjoyed by all persons).

202. See *An Internative Overview of the Massachusetts Juvenile Justice System*, Citizens for Juvenile Justice, available at <https://www.cfjj.org/jj-system-overview> (last visited November 22, 2020).

203. See *id.*

204. See *id.*

205. Mass Gen Laws ch 119, § 39E (2012).

206. Mass Gen Laws ch 119 § 24 (2008).

207. Mass Gen Laws ch 119, § 52 (2018); Mass Gen Laws ch 218, § 60 (1992).

208. Mass Gen Laws ch 218, § 60 (1992).

delinquent offender is a child between 12 and 18 who commits an offense against the law of the state²⁰⁹, while a youthful offender is a person who is subject to an adult sentence between the ages of 14 and 18 and has a prior juvenile history²¹⁰.

The procedures of the Juvenile Court are governed by the following: Massachusetts Rules of Civil Procedure in proceedings seeking equity relief, Juvenile Court Rules for the Care and Protection of Children, the Rules of the Supreme Judicial Court, Massachusetts Rules of Criminal Procedure in all delinquency and youthful offender proceedings, Juvenile Court Standing Orders and Applicable Trial Court Rules Uniform Magistrate Rule²¹¹. Ultimately, when a complaint is filed in Juvenile Court, it alleges the child is a delinquent child as defined in the law²¹². Moreover, it is expected that, when police officers refer a child to the Juvenile Court, they must attach an offense-based tracking number. The State, however, may only proceed if the person alleged to be delinquent has committed an offense while between the ages of 14 and 18 with a prior record and which would subject him to prison if he had been an adult²¹³. Once an adjudication has been made the delinquent child may be placed on probation as a form of sanction which may be imposed until the age of 18, although certain violations shall remain out of that child's file²¹⁴. In addition, the Juvenile Court judge may make a determination as to whether the child should be committed to the Department of Youth Services until he is 18 or whether to dismiss the case²¹⁵. This type of special care embraces the principles of proportionality, account of age and education. A youthful

209. Mass Gen Laws ch 119, § 52 (2018) (these offenses could not be civil infractions or first offense misdemeanors).

210. *Ibid.*, but see also Mass Gen Laws ch 119, § 21 (2018) (for definitions more closely related to those children in need or status offenders)

211. See *Juvenile Court*, Mass.gov, available at <https://www.mass.gov/orgs/juvenile-court> (last visited November 22, 2020)

212. Mass Gen Laws ch 119, § 54 (2019).

213. *Ibid.*, but see also Mass. Gen. Laws ch. 119, § 52 (2018) (this is the definition for a youthful offender).

214. Mass Gen Laws ch 119, § 58 (2013).

215. See *An Internative Overview of the Massachusetts Juvenile Justice System* (cited in note 202).

offender may be sentenced by the fixed statutory recommendation as provided in the law for an offense of the same kind²¹⁶.

In 2018, *An Act Relative to Criminal Justice Reform* was passed. This implemented numerous reforms including Juvenile Justice, CORI reform, DNA database creation, etc²¹⁷. For present purposes, the law made a significant change to Juvenile Justice²¹⁸. The new legislation in Massachusetts embraces many of the same international values that South Africa expressly put into its Child Justice Bill. In fact, the minimum age a juvenile can be charged with a delinquent complaint is raised from the age of 7 to 12²¹⁹. This effectively narrows the jurisdiction of the juvenile court to only those between the ages of 12-18²²⁰. In addition, the law decriminalized disturbance of a School Assembly, disturbing the Peace and all first-offense misdemeanors for which punishment is no more than 6 months incarceration or fine²²¹. As with regard to disturbance of School Assembly, decriminalizing it implies that the "police cannot arrest or file charges against a juvenile for disturbance of an assembly or for any such conduct within the school building or on the school grounds"²²². By decriminalizing disturbing the peace, instead, the "police cannot arrest or file charges against a juvenile for disturbing the peace within the school buildings"²²³. In Massachusetts, Child Requiring Assistance is the legislative title for persons within the Juvenile Court age jurisdiction and runs away from home, fails to obey parents and school regulations, is habitually truant

216. Mass Gen Laws ch 119, § 58 (2013).

217. Mass Gen Laws ch 119, §54, 86, 89 (2018); § 11:50 Jurisdiction of Juvenile Court-Original jurisdiction, 14C Mass Prac §11:50 (5th ed.) (2018).

218. See generally S Rep No. 189-2371 (2017-2018).

219. Mass Gen Laws ch 119, § 54 (2019); S Rep No. 189-2371, at § 73 (2017-2018) (before the amendment was made to the definition of a delinquent child in Mass Gen Laws ch 119, § 54, the minimum age a child could be charged with a crime was seven.). See also Mass Gen Laws ch 119, § 52 (2018). See also *Spring 2018 Criminal Justice Reform Bill*, Commonwealth of Massachusetts, available at https://www.mass.gov/files/documents/2018/05/15/FINAL%20CRIMINAL%20JUSTICE_0.pdf (last visited November 22, 2020).

220. S Rep No. 189-2371, at § 1 (2017-2018) (this means the age of criminal majority was amended to be 18 years of age).

221. See *Spring 2018 Criminal Justice Reform Bill* (cited in note 219). See also *Wallace W. v. Commonwealth*, 482 Mass. 789, 790 (2019).

222. *Spring 2018 Criminal Justice Reform Bill* (cited in note 219).

223. *Id.*

or is exploited²²⁴. As most of these reforms suggest, Massachusetts has embraced the international principles found in the Convention since it seeks indeed to bring certain offenses committed by children out of the criminal sphere. Upon the latter's request they may petition to be diverted to a local family resource center in which they will be subjected to an assessment to see whether this might prove beneficial for them²²⁵. Twenty-four-hour holds on juveniles are prohibited in this state and disposition options include in-home placement, subjections to medical and psychiatric treatment and placement with a relative or child agency²²⁶. The focus on decriminalizing status offenses mirrors the legislature's goal of diversion. In particular, the latter is of great relevance since it has been found that children exposed to the processing system of the Juvenile Court are more likely to experience negative effects in their development in comparison to diversion programs²²⁷. The focus on the best interests of the child is advocated as the primary consideration under the Convention and Massachusetts has implemented this principle by using it as the foundation for a significant portion of the recent reforms.

In fact, in Massachusetts a juvenile who has only been charged with a status offense, has no prior delinquent history, or deemed to be dependent, may not be placed in a secure detention facility²²⁸. Furthermore, once a person is sentenced to prison, except as a habitual criminal, the court shall set sentences based on the fixed maximum and minimum terms; specifically, in the case of a life sentence for murder committed by a person between the ages of 14 and 18, there is a minimum term of not less than 20 and no more than 30 years²²⁹. Murder is a legitimate State interest and a juvenile charged with murder must be transferred to the Superior Court²³⁰. Similarly, when a ju-

224. See *Status Offenses: A National Survey* at 29 (cited in note 112).

225. See *id.* See also Mass Gen Laws ch 119, § 54A (2018).

226. See *Status Offenses: A National Survey* at 29 (cited in note 112).

227. See Brianna Hill, *Massachusetts Raises Minimum Age of Criminal Responsibility*, 39 Child Legal Rts J 168, 168 (2019).

228. Mass Gen Laws ch 119, § 87 (2018).

229. Mass Gen Laws ch 279, § 24 (2014).

230. *Commonwealth v. Wayne W.*, 414 Mass. 218, 226 (1993).

venile is charged with a criminal offense, nonmurder offenses should be joined in Superior Court²³¹.

The new reforms to juvenile justice law in Massachusetts also state that restraints²³² can only be used on a child if the Juvenile Court judge finds that: "(1) the juvenile presents an immediate and credible risk of escape that cannot be curtailed by other means; (2) the juvenile poses a threat to his or her own safety or to the safety of others; or (3) restraints are reasonably necessary to maintain order in the courtroom"²³³. For the purposes of this addition, it has been determined that the Juvenile Court officers cannot use a blanket procedure requiring restraints for juveniles when they have been charged with committing certain serious offenses²³⁴.

In light of these considerations, it appears clear that the new juvenile justice reforms in Massachusetts (as well as in the United States generally) are in line with – or better, moving toward – the principles established in the Convention²³⁵. These reforms are oriented in the direction of a shared international understanding of how child offenders should be treated: break the child out of the cycle, which comes from the understanding that "if a child enters the system at a young age, they will be less likely to break free of the system as they approach adulthood"²³⁶. However, this will only overload diversion programs like South Coast Youth Courts²³⁷, which now has a larger populace it must try to help. The Youth Courts referenced for the United States or Massachusetts are similar to South Africa's Youth Court model, although they are often run by non-profit organizations instead of the state. The following sections of this article will hence illustrate the specific points in which South Africa and the United States, specifically

231. *Commonwealth v. Soto*, 476 Mass. 436, 436 (2017).

232. Mass Gen Laws ch 119, § 86 (2018) (restraints are described as any device limiting the children's voluntary movement including leg irons and shackles).

233. S Rep No. 189-2371, at § 86 (2017-2018). See also Mass Gen Laws ch 119, § 86(b) (2018). See *Spring 2018 Criminal Justice Reform Bill* (cited in note 119).

234. S Rep No. 189-2371, at § 86 (2017-2018).

235. See generally Griffin and Wolff, *The Convergence of U.S. Juvenile Justice Policies and the U.N. Convention on the Rights of the Child* (cited in note 11).

236. Hill, *Massachusetts Raises Minimum Age of Criminal Responsibility* at 168 (cited in note 127).

237. South Coast Youth Courts, available at <http://www.southcoastyouthcourts.org/> (last visited November 22, 2020).

focused on Massachusetts, are converging on the shared ideals of how to deal with child offenders in the criminal system.

3. *Prominent Principles Embraced by South Africa and Massachusetts*

With the Convention on the Rights of the Child the international community stressed the importance of setting a minimum age of criminal responsibility, this is an important aspect which both South Africa and the United States have embraced. Actually, the acknowledgment that a minimum age of criminal responsibility should exist indirectly forces countries to incorporate diversion programs into their juvenile justice systems, because it involves that the ordinary criminal justice system does not have the proper means to handle juvenile offenders. Moreover, the Convention was the starting point of a reconsideration of the types of crimes minors can be charged with, as well as the types of sentences assigned to juvenile offenders, and the handling methods of children in and out the courtrooms.

3.1. *"Am I too young to be arrested?"*

The Convention has become a significant part of South African law. This is due not only to its ratification, but also because the country has proved to be able to comprehensively embed the principles of the Convention into its national law. For instance, the Convention refers only to the minimum age of criminal capacity, in that it demands member countries to establish an age at which there is no capacity to commit crimes²³⁸. The rationale underlying the minimum age of criminal capacity acknowledges the special position children are in. In fact, it has been suggested that exposure to violence and crimes increases a child's likelihood of engaging in antisocial or criminal behavior²³⁹. Age thus acquires relevance in juvenile law and in fact the Convention sets the maximum age of a child at 18 years old²⁴⁰. This

238. G A Res, art. 40(3)(a) (cited in note 1).

239. See Hema Hargovan, *Child Justice in Practice: The Diversion of Young Offenders*, 44 S. Afr. Crime. Quarterly 25, 25 (June 2013).

240. G A Res, art. 1 (cited in note 1).

effectively narrows the jurisdiction of any member countries' juvenile system to those persons under the age of 18, but above the established minimum age. It also acknowledges the inherent immaturity of children which suggests they cannot comprehend the difference between right and wrong and, instead, leads to consider them more receptive to rehabilitation²⁴¹.

South Africa mirrors the Convention by setting the maximum age at 18, although the jurisdiction is extended to the age of 21 under certain circumstances²⁴². The minimum age of criminal capacity in South Africa is, instead, 14. However, children under the age of 14 and above the age of 10 are granted a rebuttable presumption to capacity if the State can prove beyond a reasonable doubt that such capacity in fact exists²⁴³. This means that children under the age of 10 are automatically referred to social services upon committing a crime or if they are deemed to be in need²⁴⁴. This is preferable compared to arrest as, assumedly with the Youth Court model South Africa has enacted, a probation officer will be able to determine the underlying cause of the delinquent behavior²⁴⁵. Hence, if the country can address the roots of this behavior before it becomes habit, it can lower the chances of a child's reoffending later in life²⁴⁶.

Establishing a minimum age is an obligation for those who have ratified the Convention. The United States, however, as a member of the United Nations and only a signee of the Convention, is expected to implement *soft law* in good faith when the foreign law is not in conflict with its sovereign law²⁴⁷. Traditionally, the Common Law of the

241. See generally *Roper*, 543 US 551 (2005); *Graham v. Florida*, 560 US 48 (2010); *Miller v. Alabama*, 567 US 460 (2012). See also S'Lee Arthur II Hinshaw, *Juvenile Diversion: An Alternative to the Juvenile Court*, 1993 J Disp Resol 305, 305 (1993).

242. Child Justice Act 75 of 2008, §1 (S Afr).

243. See *id.* at §§ 7, 11 (S Afr). See also Conradie, *The Republic of South Africa* at 286 (cited in note 36).

244. The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 114 (cited in note 26).

245. See *id.* at 115.

246. See Burns, *Treatment, Services, and Intervention Programs for Child Delinquents* at 1 (cited in note 106).

247. See Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 417 (cited in note 5) (States that sign the Convention regardless of ratification are at least expected to refrain from

United States presumed that a child younger than 7 lacked all criminal capacity²⁴⁸, thus setting the minimum age lower in comparison to the established age of 10 in South Africa. This could nevertheless be circumvented in practice as this class of children could still be sentenced to prison or death if found guilty of a crime²⁴⁹. In this respect, it is interesting to note that in the Supreme Court case *In re Winship*, the United States established the concept that the standard of proof should be beyond a reasonable doubt when children are charged with adult crimes²⁵⁰. Therefore, not only have South Africa and the United States sought to enact a minimum age of criminal capacity, but both States consider that the prosecution should adopt the same burden of proof required in an adult case when a child under the age of 18 is charged as an adult. In the case of the United States, moreover, it is clear that this concept of diminished criminal responsibility up to a certain age has been embraced well before the Convention.

The United States is difficult to infer from because State sovereignty insists that the Federal Government cannot reign over all decisions. Here, the Juvenile Court's jurisdiction is usually set at a maximum of 18, but the state may elect to change this age²⁵¹. Effectively, in both countries the jurisdiction of the Juvenile Court is extinguished when the offender turns 18²⁵². More specifically, in Massachusetts a delinquent child is an individual between the ages of 12 and 18²⁵³, but offenders between the ages of 14 and 18 may be subject to adult sanctions if they commit adult crimes²⁵⁴.

acting in such a way that would conflict with or defeat the object and purpose of the Convention).

248. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 93 (cited in note 36).

249. See *id.* at 84.

250. See *id.* at 90. See *In re Winship*, 397 US 358, 368 (1970). See also Bartollas, *United States* at 308 (cited in note 36).

251. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 93 (cited in note 36).

252. S Rep No. 189-2371, at § 1 (2017-2018) (the Age of criminal majority was amended to mean 18).

253. See *id.* at § 73.

254. Mass Gen Laws ch 119, § 54 (2019); Mass Gen Laws ch 119, § 52 (2018). See also *Spring 2018 Criminal Justice Reform Bill* (cited in note 219).

Both countries have recognized the inherent difference in children which is a warrant of a minimum age for criminal responsibility, regardless of ratification. Nevertheless, this international principle has significant repercussions that should be acknowledged. Since both countries will continue to experience crime rates for children under the respective minimum age, the focus should be on providing formal, well-funded resources for families that are experiencing trouble²⁵⁵. This implies that if a child under one of the respective countries' minimum age commits a crime and the police responds, the officer will be obliged to call social services as the child cannot legally be arrested²⁵⁶. This is acknowledged by South Africa in the hopes that the automatic diversion will be in the best interest of the child²⁵⁷, and this is a principle fully implemented by the Convention. In fact, this appears more reasonable for South Africa, since a larger population of its delinquent children require assistance.

3.2. *To Skip Class or Not to Skip Class, that is the Question*

The United Nations, as a coalition of countries, respects that each has its own identity. One of the main purposes of the organization was "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"²⁵⁸. Therefore, the Convention does not speak to specific offenses that children can be charged with, as these are matters which must be determined by the member States. This is reasonable in consideration of the fact that crimes are a changeable phenomenon across cultures and often even over time²⁵⁹. Criminologists will typically group crimes into categories, but the States through public policy, statutes, and other

255. See Hill, *Massachusetts Raises Minimum Age of Criminal Responsibility* at 168 (cited in note 227).

256. See *id.* at 169.

257. Child Justice Act 75 of 2008, § 7, (S Afr). See also Republic of South Africa, *Situation Analysis of Children in South Africa* at 114 (cited in note 26).

258. UN Charter art. 1, § 3.

259. See Scottish Centre for Crime and Justice Research, *Theories and Causes of Crime*, University of Glasgow 1, available at <http://www.sccjr.ac.uk/wp-content/uploads/2016/02/SCCJR-Causes-of-Crime.pdf> (last visited Nov. 22, 2020).

measures determine the specific crimes²⁶⁰ that will fall under their own classifications. For example, in regard to status offenses the Convention states: "State Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all and take measures to encourage regular attendance at schools and the reduction of drop-out rates"²⁶¹. This could be intended as the international community accepting truancy among the contributing factors leading to criminal behavior if not a civil crime in and of itself.

In South Africa, the Juvenile Court or the Criminal Court for children may hear cases involving crimes falling under government authority or good order, communal life, personal relations, property, economic affairs and social affairs²⁶². Realistically, the political strife that occurred throughout South Africa's history and still continues in some parts today, is a significant contributor to criminal behavior among the youth²⁶³. Among those that are reported, it appears that the Juvenile Court in South Africa deals with children who commit crimes against property, with crimes against personal relations running a close second²⁶⁴. In the new Bill enacted by South Africa, a child may only be placed in a prison if arrested for an offense such as murder, theft or fraud, among a few others²⁶⁵, and there are compelling reasons to do so²⁶⁶. As mentioned, the Children's Court deals with a different kind of child: those in need of care²⁶⁷. The crimes these children commit could be called status offenses²⁶⁸ in the United States,

260. The categories are often referred to as Violent Crimes, Property Crimes, White Collar Crimes, Organized Crimes, and Consensual or Victimless Crimes.

261. G A Res, Art. 28(1) (cited in note 1).

262. See Conradie, *The Republic of South Africa* at 288-89 (cited in note 36).

263. See Martin Schönteich et. al., *Crime in South Africa: A Country and Cities Profile*, Institute for Security Studies (2001)

264. See Conradie, *The Republic of South Africa* at 289 (cited in note 36).

265. See Child Justice Act 75 of 2008, §1 (S Afr).

266. See *id.* at §30(5).

267. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 114 (cited in note 16); see also Conradie, *The Republic of South Africa* at 293 (cited in note 36).

268. United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

but they are not deemed criminal under South African law²⁶⁹. Such children falling under the jurisdiction of this Court are orphaned, cannot be controlled, are habitually truant, associate with immoral or vicious persons, with beggars, etc²⁷⁰. On the basis of the Convention, courts which try to rehabilitate children's truant behavior should catch misbehavior early on and prevent it in the future.

In the United States, children can be charged with the same crimes as adults. As of 2017, most children under the age of 17 committed crimes of burglary, theft, arson, and vandalism²⁷¹. In terms of murder, children in the United States are transferred to the Superior Court to be judged as adults²⁷². In the United States, children can also be charged with status offenses which consist of skipping school or running away from home, consuming alcohol or tobacco, or breaking curfew (if enacted)²⁷³. However, these children can be deemed delinquent if their behavior is habitual and can contribute to criminal behavior later in life.

In Massachusetts, a juvenile may not be placed in a secure detention facility if has only been charged with a status offense, has no prior delinquent history, or is deemed to be dependent²⁷⁴. The State places an emphasis on the fact that children should be allowed to make mistakes (to some extent)²⁷⁵. Evidently, child crime within these countries has led to both seeking remedies to this behavior. Such remedies include diversion to a welfare agency or a diversion program such as Youth Court. In a way these are attempts to merge them into a hybrid system

269. See Conradie, *The Republic of South Africa* at 293 (cited in note 36).

270. See *id.* at 292.

271. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36).

272. *Commonwealth v. Wayne W.*, 414 Mass 218, 226 (1993).

273. See *Curfew by State, Nat'L Youth Rts. Assoc.* (2019) available at <https://www.youthrights.org/issues/curfew/curfew-laws/#info> (last visited November 22, 2020) (these curfews are often enacted by town). See also United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

274. Mass Gen Laws ch 119, § 87 (2018).

275. See Zimring, *American Juvenile Justice* at 20 (cited in note 114). See also United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

both the philosophy of the United States' "Get Tough" concept of accountability and the better interest of the child.

3.3. *Sentencing: Diversion instead of Death*

The Convention has the comprehensive purpose of establishing diversion approaches to children. The Convention expresses that State Parties should "recognize that every child has the inherent right to life [and the] State Parties shall ensure to the maximum extent possible the survival and development of the child"²⁷⁶. This is the Convention's attempt at focusing on the best interests of children as well as their well-being. Explicitly, it takes a stand against "torture or other cruel, inhuman or degrading treatment or punishment"²⁷⁷. The Convention enacts an outright prohibition on capital punishment and the sentence of life without the possibility of parole on persons under the age of 18²⁷⁸. The international community saw the detrimental effect the juvenile system can have on children, so it promotes legal safeguards for judicial proceedings in addition to "[a] variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes [sic] and other alternatives to institutional care"²⁷⁹.

In South Africa, instead of punishment a court may order the child to be placed under the supervision of a probation officer²⁸⁰. However, sentences like corporal punishment are allowed under strict requirements and it is reserved for immoral deeds with the intention to cause injury²⁸¹. Then, in 1990, the death penalty was suspended due to political changes²⁸². The new Bill in South Africa lists a variety of sentencing options ranging from community-based sentences and restorative justice sentencing to probation and detainment²⁸³. The vast

276. G A Res, art. 6. (cited in note 1).

277. GA Res, art. 37(a) (cited in note 1).

278. *Ibid.*

279. G A Res, art. 4 (cited in note 1).

280. See Conradie, *The Republic of South Africa* at 291 (cited in note 36).

281. See *ibid.*

282. See generally Anna Skelton, *Freedom in the Making: Juvenile Justice in South Africa*, in *Juvenile Justice in Global Perspective* (2015).

283. Child Justice Act 75 of 2008, § 72-79 (S Afr).

difference between the internal courts of South Africa is that the type of court generally determines the course that the court will take. For instance, the Juvenile Court typically diverts offenders to institutions such as reform schools and prisons, while the Children's Court will divert to child-care schools²⁸⁴. The ordering of the options represents the objectives of sentencing such as accountability, retribution, reintegration into the community, and the use of imprisonment as a last resort²⁸⁵; all of these are key features of the international community as established by the Convention. It is evident from the Criminal Procedures Act that South Africa would often qualify their sentences for juveniles or advocate for more personalized measures²⁸⁶. South Africa also focuses on the seriousness of the crime when sentencing or even bringing the juvenile into the system²⁸⁷. This is similar to the transition the United States experienced during its "Get Tough" era; South Africa nevertheless attempted to stay in the track of diversion.

As of 2012, a juvenile in the United States, cannot receive a mandatory sentence of life without parole, even in murder cases²⁸⁸. In *Graham v. Florida*, has been stated that a child who does not commit homicide may not be sentenced to life without the possibility of parole²⁸⁹. When children are tried for *adult crimes*, such as murder, a judge must be allowed to consider the child's age and any other relevant circumstances while determining punishment²⁹⁰. Most legislation deals with serious offenders thus the laws on sentencing revolve around

284. See Conradie, *The Republic of South Africa* at 293 (cited in note 36).

285. Child Justice Act 75 of 2008, § 69 (S Afr)

286. See Conradie, *The Republic of South Africa* at 291 (cited in note 36) (corporal punishment may not exceed "a maximum of seven strokes with a light cane ... [and] can be administered only under the supervision of a medical doctor and in the presence of the parent(s)"). See also Republic of South Africa, *Situation Analysis of Children in South Africa*, Unicef, 110, 115 (2009), available at https://www.westerncape.gov.za/text/2009/5/situation_analysis_of_children_in_south_africa.pdf (last visited November 22, 2020).

287. See Child Justice Act 75 of 2008, §§ 20, 30 (S Afr). See also Conradie, *The Republic of South Africa* at 297 (cited in note 36).

288. See *Miller v. Alabama*, 567 US 460 (2012).

289. See *Graham v. Florida*, 560 US 48 (2010).

290. See *End Juvenile Life Without Parole*, ACLU (2019) available at <https://www.aclu.org/end-juvenile-life-without-parole#targetText=In%20the%20United%20States%20each,JLWOP%22%20in%20the%20United%20States> (last visited November 22, 2020).

transferring a juvenile to adult court where they would be subject to adult determination²⁹¹. This contrasts the trend in the international community because it weighs the seriousness of the crime over the age of the offender instead of balancing them together. Less serious offenders often receive probation or are required to attend school. These models appear to be similar on their face, but further data will need to be collected to truly understand the impacts of these instruments on sentencing. Clearly, individual States are embracing the ideals behind diversion rather than actual criminal sentencing which aligns perfectly with the principles of the Convention.

Massachusetts takes things a step further by prohibiting a first offender alleged of a status offense from secure detention²⁹². Murder is the exception in that juveniles are almost always transferred to adult courts. In these cases, limits are set on the mandatory sentences²⁹³. The biggest convergence on the principle of diverging for sentences instead of detaining is the use of Youth Courts in both South Africa and Massachusetts²⁹⁴. Clearly diversion has been enacted as an international principle for the treatment of children in the juvenile justice system. It is a viable alternative to official programs²⁹⁵.

3.4. *Proper Treatment and Care of Juveniles*

The Convention suggests repeatedly that children should be "dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence [sic]"²⁹⁶. Another example is its reference to arrest and detention which is to be in conformity with the law and used as a last resort for a short period²⁹⁷. The Convention calls for children to be treated with a sense of dignity and worth,

291. See Scott Harshbarger and Carolyn Keshian, *The Attorney General of Massachusetts' Bill Relative to the Trial and Sentencing of Serious Juvenile Offenders*, 5 BU Pub Int LJ 135, 136 (1996).

292. Mass Gen Laws ch 119, § 87 (2018).

293. Mass Gen Laws ch 279, § 24 (2014).

294. See *South Coast Youth Courts*, available at <http://www.southcoastyouthcourts.org/> (last visited November 22, 2020).

295. See Hinshaw, *Juvenile Diversion: An Alternative to the Juvenile Court* at 312 (1993) (cited in note 141).

296. G A Res, art. 40(3)(b), (4) (cited in note 1).

297. G A Res, art. 37(a)(b) (cited in note 1).

which reinforces their respect for society²⁹⁸, and also recognizes the importance of separating children from adults²⁹⁹. The remaining provisions of the article discuss due process rights which all children should be afforded including prompt notification, fair and speedy hearing, and the right against self-incrimination³⁰⁰. Evidently, the inherent nature and likelihood of reform among children entitled them to special care. It is the old argument that it takes a village to raise a child but teaching children to reflect on their crimes in a productive way is exactly what programs like Youth Court across South Africa and the United States seek to do.

Besides due process rights and general treatment, the Convention does not speak specifically to restraints, but for purposes of illustrating how children should be subjected to different treatment, and this is a good example to illustrate the harmonizing ideologies. In South Africa, children are given rights of personality, protection, well-being, having age accounted for, and being subject to detainment as a measure of last resort³⁰¹. Also, the best interest of the child is a driving focus³⁰². Children in this country are entitled to legal representation and a wholistic approach which accounts for the offenders age and life circumstances³⁰³. The new Bill also installed a preliminary inquiry system that provides diversion and restorative assessment³⁰⁴. Interestingly, the new piece of legislation also speaks to restraints, stating they should only be used on a child offender under exceptional

298. G A Res, art. 40(1) (cited in note 1).

299. G A Res, art. 37 (cited in note 1). See also Mears, *The "True" Juvenile Offender: Age Effects and Juvenile Court Sanctioning* at 170 (cited in note 104).

300. G A Res, art. 40(2)(b)(ii)-(iv) (cited in note 1). See also Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 414 (cited in note 5).

301. Constitution of the Republic of South Africa Act, No. 108 of 1996, § 28. See also the Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 108 (cited in note 16).

302. Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 417 (cited in note 5).

303. G A Res, art. 37(c) (cited in note 1). Compare Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 410 (cited in note 5). But see also Conradie, *The Republic of South Africa* at 290-1 (cited in note 36).

304. The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 108 (cited in note 16).

circumstances³⁰⁵. The language is very similar to the recent Massachusetts legislation: "[n]o child may be subjected to the wearing of leg-irons when he or she appears at a preliminary inquiry or child justice court, and handcuffs may only be used if there are exceptional circumstances warranting their use"³⁰⁶. These guidelines embody the Convention principle that children, even those who commit crimes, should be afforded basic dignity and special care.

In the United States, as discussed, there was a "Get Tough" era and relevant case law that has shaped the recent juvenile justice system. This era was more punitive than in the past, but States, like Massachusetts, are slowly moving back to a rehabilitation model, which conforms with the Convention. Unfortunately, some states have been unable to internalize this international principle; those states still use solitary confinement in which a person is placed in an environment of extreme isolation and shackles for the punishment of juveniles³⁰⁷. This type of detention on juveniles can lead to "depression, anxiety and even psychosis"³⁰⁸. In court appearances, some states automatically authorize the use of shackles to physically restrain offenders, including "handcuffs, straitjackets, leg irons, belly chains, [etc.]" during their court appearances³⁰⁹. This can be seen as a stigmatizing and traumatizing experience for children³¹⁰. This is a direct by-product of the "Get Tough" era and detaining serious offenders with adults.

Taking a look at the cases as they progressed, it is clear the United States values a punitive justice system but also considers the best interest of the child as time progresses. The one place the United States falls short is in cases of murder where juveniles may be subject to up to 30 years in prison³¹¹. Due process rights such as the right to notice,

305. Child Justice Act 75 of 2008, § 33 (S Afr).

306. *Ibid.*

307. See Anne Teigen, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement*, National Conference of State Legislatures, available at <http://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx> (last visited November 22, 2020).

308. *Id.*

309. See *id.*

310. See *id.*

311. Mass Gen Laws ch 279, § 24 (2014).

counsel, confrontation, cross-examination, and the privilege against self-incrimination were established with the exception of jury trials³¹².

As a frontrunner state, Massachusetts is taking steps towards eradicating the method of using restraint, there

a juvenile shall not be placed in restraints during court proceedings and any restraints shall be removed prior to the appearance of a juvenile before the court at any stage of a proceeding unless the justice presiding in the courtroom issues an order and makes specific findings on the record that: (i) restraints are necessary because there is reason to believe that a juvenile presents an immediate and credible risk of escape that cannot be curtailed by other means; (ii) a juvenile poses a threat to the juvenile's own safety or to the safety of others; or (iii) restraints are reasonably necessary to maintain order in the courtroom³¹³.

Restraints are defined as any device limiting the voluntary movement of the child including leg irons and shackles, which have been approved by the trial court department³¹⁴. Massachusetts is one of the ten States which limit or prohibit the use of solitary confinement and shackles because of the detrimental effects on juveniles³¹⁵. Based on the understanding that children are inherently different from adults it makes sense to advocate for different procedures when they become involved with the court system. The due process rights ensure fairness and protect the juvenile, but the special protections of the juvenile court ensure that the cycle is not perpetuated.

312. See generally *Kent v. United States*, 383 US 541 (1966), *In re Gault*, 387 US 1 (1967), *McKeiver*, 403 US 528 (1971).

313. MGL ch. 119 §86(b).

314. MGL ch. 119 §86.

315. See Teigen, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement* (cited in note 308).

4. Conclusion

The perspective of this article is limited and is not meant to be a comprehensive illustration of the juvenile system in South Africa or in the United States. More broadly, this article attempts to illustrate the international principles embraced by South Africa and the United States, and advocate that they need to be further internalized by the United States, even though some of the individual States, like Massachusetts, have already begun to implement these international values.

This article has displayed a general theme of converging principles on the care and treatment of children within the juvenile system. In the case of South Africa, children have obtained a unique position in the law: partially it depends on South Africa's acknowledgement of international law, but this is also possible thanks to the various cultural implications of rehabilitation. Otherwise, the United States has failed to ratify the Convention, and enacts policy directly conflicting with it by adopting a punitive, crime model for its juvenile system. However, the unique structure of the United States allows individual States to choose to enact more protection for children, as long as their laws do not contradict the federal system, because federal law is a "*floor, not a ceiling*" to guarantees and protections. This allows individual States, such as Massachusetts, to freely embrace the international values emerging from the Convention.

Restorative juvenile justice is trending internationally. Massachusetts has jumped on board and it is time for the United States to do the same nationwide by implementing the principles of the Convention more effectively. Both countries have made large strides with juvenile justice reform. Due to the general informality, confidentiality, and inconsistent reporting of the juvenile system, it is difficult to confirm that diversion is the primary method of addressing child offenders in any system, but it is clear that both South Africa and Massachusetts share the same goals in this path towards diversion and treating children with self-worth.

First, both South Africa and the United States find a rationale behind limiting the age of criminal responsibility because children deserve special treatment when they enter the system. Their inherent nature makes them good candidates for rehabilitation and reintegration, which is why the Convention encourages members to set this

standard. As the Convention does not set the exact age, it is interesting to notice that South Africa sets its minimum age at 14 with a rebuttable presumption at 10 years old, while Massachusetts sets their minimum age at 12.

Second, educating child offenders is a significant principle held by the international community as it equips minors with tools to break out of the criminal cycle. Both South Africa and the United States have taken measures to ensure truancy is a crime which children can be punished for. Alternatively, they have enacted guidelines favoring diversion when a child goes before a criminal court.

Third, the Convention enacts a prohibition on death penalty and life imprisonment, but this is a principle which the United States as a whole has not lived up to.

However, many individual States, such as Massachusetts, are beginning to incorporate this type of language into their individual legislation. Finally, both South Africa and the United States embrace the importance of treating a child with dignity which includes giving the child proper due process rights and utilizing detention as a last resort. Although not specifically mentioned in the Convention, both South Africa and Massachusetts' prohibition or restriction on the use of restraints on children in the courtroom embodies the principle of treating children with dignity and worth. All of these specific measures further the harmonization of the international principles. Unfortunately, due to the evolution and history of the United States juvenile system, it may be very hard to break fully away from the punitive model it has established and embrace all of the international values established in the Convention as South Africa has already done.