

How South Africa, Kenya and Zimbabwe measure up on child offenders

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Around the world, hundreds of thousands of children are not free. They are deprived of their liberty in settings such as migration holding camps and criminal justice processes.



The best interests of the child require detention to be used as a last resort. Shutterstock

According to the United Nations (UN) [Global Study on Children Deprived of Liberty](#), there are about **410,000 children** detained in the criminal justice system every year, globally. This number excludes those in police custody. In some countries, such as Zimbabwe, information about the number of children in police custody is not easily available.

Children end up in detention when they are accused of committing criminal offences. Legally, children (defined as aged under 18) should not be detained except as a measure of last resort. But in practice children are often detained before and after trial.

We argue that the best interests of the child is a powerful legal principle to ensure that children are only detained as a measure of last resort.

In child justice, the meaning and scope of the best interests of the child are multifaceted. The principle is provided for in terms of the UN [Convention on the Rights of the Child](#), ratified by all UN member states except the United States.

It is generally accepted under international children's rights law that the best interests principle performs multiple functions. It can shape the content of other rights of children in the criminal justice system. It can be directly applied to a specific factual situation. And it can be an interpretative legal principle or a rule of procedure. The flexibility of the principle allows any person, authority or court to tailor its application to the context.

Best interests of the child principle

The best interests of the child principle is enshrined in the constitutions of [South Africa](#), [Kenya](#) and [Zimbabwe](#). It requires that in all matters concerning the child, the best interests of that child are of paramount importance.

In practice, courts use the principle to evaluate whether laws and court processes protect the rights of children involved in the justice system. Further, the principle can be used to justify, support or clarify a specific approach to dealing with a matter concerning a child offender.

The right not to be detained, except as a measure of last resort and for the shortest appropriate period, aims to protect children from the harmful effects of incarceration. It is based on the understanding that childhood (particularly adolescence) is mostly a period of experimentation and learning.

At that stage of life, children are striving to understand many issues, and their mental capacities are still developing. Given their ability to accept correction, children have a better claim to rehabilitation, reorientation and reintegration. That's why child offenders should only be sent to prison if there is no other suitable alternative response to the crimes they commit.

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The research

In [our research](#) we examined legal developments in South Africa, Kenya and Zimbabwe. We wanted to determine how these countries' courts interpret the best interests of the child offender to give effect to the right not to be detained – except as a measure of last resort, and for the shortest appropriate period. The choice of countries was informed by a shared legal heritage and the protection of children's rights in their constitutions.

The study reviewed literature on international children's rights law, domestic legal instruments and case law. It specifically looked at the legal and policy position on pre-trial and post-conviction detention in each of the selected countries.

We observed that the constitutions of the three countries protect the best interests of the child – and the right not to be detained except as last resort. All criminal justice processes in the three countries should thus comply with constitutional standards on the detention of children.

There is evidence that child justice processes in South Africa comply with the constitutional standards on detention as a measure of last resort. Kenya is following the steps of South Africa, although there is room for improvement.

In Zimbabwe, there is a need for law reform to ensure that criminal justice processes comply with constitutional dictates. But it is worth noting that in some instances courts have been trying to enforce compliance, albeit using different interpretations of the best interests principle, and the right not to be detained except as a measure of last resort.

Findings

Firstly, the best interests of the child principle obligates the police to ensure child offenders are not detained in police cells, except as a last resort. During arrests, the police are required to respect the dignity and best interests of the child.

Courts in South Africa and Kenya have made it clear that the police must use child-friendly justice approaches. Some of the measures required by law include allowing the child offender to sleep at home and instructing a parent or guardian to bring her or him to court. But in practice child offenders are always detained in police cells before appearing in court. This is the case in all three countries.

It may be that police lack knowledge of child justice laws. Detaining children may also reflect police attitudes and the belief that children must be punished in order to learn. In Zimbabwe, the treatment of child offenders during arrest or detention in police cells is not documented.

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Secondly, the best interests of the child play a central role in sentencing. South African courts have consistently applied the best interests principle and used detention as a measure of last resort. In many instances, courts choose sentencing options that ensure the rehabilitation and reintegration of the child into society.

The appropriateness of an alternative sentence is determined by the seriousness of the offence. A sentence may be, for example, a wholly suspended prison term or community service (provided it does not interfere with the child's education).

Kenyan courts appear to be following the South African example. They are progressively interpreting the best interests of the child as a special protection mechanism in the context of detention as a measure of last resort. This approach is commendable and ensures that child offenders are given a second chance.

We observed that in Zimbabwe there are differences in the way courts approach cases concerning child offenders. In some instances, judges adhere to the right not to be detained unless there is no other option under the circumstances. But sometimes judges use detention as a [punitive measure against child offenders](#) and as a measure of first resort, without considering the best interests and other less restrictive alternatives.

There is abundant evidence that South Africa and Kenya are doing fairly well in protecting the rights of child offenders. We recommend that Zimbabwean courts, too, should promote the best interests of the child offender through avoiding arbitrary detention in clear violation of constitutional imperatives.

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