

Who will remember the Children? The International Human Rights Movement and Juvenile Justice in Africa

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WHO WILL REMEMBER THE CHILDREN? THE INTERNATIONAL HUMAN RIGHTS MOVEMENT AND JUVENILE JUSTICE IN AFRICA

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Abstract

Our goal in this paper is two-fold: we seek to evaluate the development of juvenile justice in Africa by making use of a thorough and ethical method of analysis. We begin with a contextual explanation of the children's rights movement as it has developed on the continent. We then reframe David Kennedy's ten-item critique of the international human rights movement into three broad categories. Using these categories, we evaluate the development of juvenile justice in sub-Saharan Africa as it has arisen out of the children's rights movement.

I. NO INTERNATIONAL TREATY has been as universally lauded as the United Nations *Convention on the Rights of the Child*, 1989 (the "CRC").¹ It is the most quickly adopted and most widely ratified international human rights treaty in the history of the United Nations (every country in the world, except for the United States, has ratified it²). The CRC creates the impetus to require adults and the state to ensure the participation and protection of children in private and public life. It also provides for their special treatment when children come into conflict with the law.³ In many countries, the creation of separate juvenile justice laws and institutions was justified by drawing on the recommendations of the CRC. While the CRC has accomplished near universal agreement on the importance of children's rights, it has not been fully implemented in all countries. Among other things, ratification requires that a country draft and incorporate legislation that realizes the goals of the Convention. The push for this kind of law reform can contribute to accomplishing many goals, but more law does not necessarily mean more justice. In this article, we explore the ways in which the CRC has both driven and

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¹ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [CRC].

² Sarah Mehta, "There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US", (20 November 2015) *American Civil Liberties Union (ACLU)* (blog), online: <www.aclu.org/blog/speak-freely/theres-only-one-country-hasnt-ratified-convention-childrens-rights-us>.

³ CRC, *supra* note 1, arts 37, 40.

obstructed the development of juvenile justice in sub-Saharan Africa. We offer a critical assessment, which casts doubt on the definitions of success implicit in all law reform initiatives.

The growth of a children's rights movement in Africa in the 1990s provides a valuable case study to illuminate how juvenile justice has operated on the continent since the adoption of relevant international human rights standards. It can also provide a lens for evaluating the ways in which the international children's rights movement has helped or failed children engaged in the criminal justice systems of various African countries. The 1990s were a time of constitutional renewal and innovation in much of the African continent.⁴ In addition to the CRC, there was a united effort on the continent to adopt a legal instrument for children's rights that would better reflect the particular orientations, priorities, and systems of ordering that were present in Africa at the time.⁵ The outcome was the *African Charter on Rights and Welfare of the Child*, (the "ACRWC"), adopted in 1990 just one year after the CRC. Through the last decade of the last millennium, it became apparent that the voices of children's rights advocates would no longer be dismissed by the countries of Africa.⁶

The ACRWC and the CRC have not been equally embraced by African states. Somewhat surprisingly, the regional ACRWC has been more reluctantly ratified than the CRC. There are numerous potential explanations for this. Some observers claim that the ACRWC demands more of the ratifying states and is thus more costly politically.⁷ Others suggest that ratifying the CRC might just "look better" to the international community,⁸ while (regardless of the merits of its contents) there are few incentives for embracing the ACRWC.

⁴ Julia Sloth-Nielsen, ed, *Children's Rights in Africa: A Legal Perspective* (Cape Town: Ashgate Publishing, 2008) at i [Sloth-Nielsen, *Children's Rights in Africa*].

⁵ *Ibid* at iv.

⁶ *Ibid* at i.

⁷ See Robert Kwame Ame, "The Rights of Children in Conflict with the Law in Ghana" (2011) 19:2 Intl J Child Rts 271.

⁸ See Esmeranda Manful & Saka E Manful, "Child welfare in Ghana: The relevance of children's rights in practice" (2014) 14:3 J Soc Work. For further explanation of this phenomenon, see also Franklin E Zimring, Maximo Langer & David S Tanenhaus, eds, *Juvenile Justice in Global Perspective* (New York: New York University Press, 2015) at 3.

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At the ground level, within juvenile justice systems that more or less comply with the baseline requirements of the CRC, evidence suggests that children are still living in degrading and dangerous prison conditions.⁹ In 2008, the populations of imprisoned children in a number of African countries were reported as a percentage of the overall prison population: 1.3% in Ghana; 5.5% in Namibia; and 2.4% in Burkina Faso.¹⁰ In real numbers, this represents anywhere from just under 100 children to several hundred children, residing among adults in these prisons.¹¹ The full scope of the problem is not known, nor is the actual number of affected children.

Julia Sloth-Nielsen, an expert on child justice who sits on the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), describes the difficulty of accurately accounting for the number of children in African prisons.¹² She gives four reasons for this difficulty: (1) the absence of birth certificates; (2) police coercion of those under 18 to lie about their age in reports; (3) the lack of an organized system to account for prisoners in general; and (4) reliance on media reports and NGOs to physically account for imprisoned children. Some states have established youth detention centers within prisons.¹³ However, these centers tend to invest insufficient resources to ensure appropriate handling of youth inmates.¹⁴ The fact that in some countries there is a lack of specialized personnel dealing with at-risk children and youth means that, while child-centered in theory, these detention centers are often set up to fail as a result of ineffective and under-resourced implementation. Additionally, it is worth noting that while many, if not most, children in Africa who end up in prison arrive there

⁹ This claim is based on the personal experience of one of the authors who spent ten (10) weeks in Ghana in 2015, learning from local children's rights advocates who have observed prison conditions.

¹⁰ Julia Sloth-Nielsen, "Children in African Prisons" in Jeremy Sarkin, ed, *Human Rights in African Prisons*, 1st ed (Cape Town: HRSC Press, 2008) 117.

¹¹ *Ibid.*

¹² For an alternative but supportive account of the difficulty and importance of empirical verification in reformed countries, see Frieder Dünkel, "Juvenile Justice and Crime Policy in Europe" in Zimring et al, *supra* note 8 at 18.

¹³ Penal Reform International, *Global Prison Trends, 2016* (United Kingdom: Penal Reform International, 2016) at 5, online: <cdn.penalreform.org/wp-content/uploads/2016/05/Global_prison_trends_report_2016.pdf>.

¹⁴ *Ibid.*, "Prison Staff: Overworked and Underpaid?" Pull-Out Section at 1-7.

as a result of a legal process of some kind—usually criminal prosecution—there are also reports in some countries, for example, of street children being picked up off the street, intimidated, and beaten by police officers and sometimes put in jail cells among the adult population.¹⁵ Reports of such abuse, though underreported and difficult to track, are too egregious to ignore.¹⁶ Examples like this mean that the number of child prisoners is likely higher than reported, possibly considerably so, especially if incidences of unreported and misclassified detentions are widespread.

In this article, we outline a strand of literature that sheds skeptical light on legislative, statutory, and treaty-based efforts to promote the juvenile justice systems of sub-Saharan Africa based on international human rights norms. This argument implies a challenge to the human rights movement, which has hinged children's rights in Africa on implementation and enforcement of the CRC and other international instruments as a key driver. For a number of reasons to be articulated in the parts below, these claims deserve to be put to the test.¹⁷ In the next part, we review a critical perspective in the international human rights law literature, which provides the analytical frame to assess whether international legal instruments are worth pursuing and what their limitations might be. We argue that the international children's rights movement, like any well-intentioned movement for progress, can actually fail the goals that it seeks to achieve while purporting to do the opposite.

¹⁵ One of the authors was in attendance during a training provided by Defense for Children International (DCI) in Ghana in June 2015, that addressed this very concern. DCI was educating teachers and other community leaders about the importance of understanding children's initial mistrust of police officers in cities such as Kumasi.

¹⁶ See e.g. Human Rights Watch, *Where Do You Want Us to Go?: Abuses against Street Children in Uganda* (17 July 2014), online: < www.hrw.org/report/2014/07/17/where-do-you-want-us-to-go/abuses-against-street-children-uganda>; Nambile Cumber & Joyce Mahlako Tsoka-Gwegweni, "The Health Profile of Street Children in Africa: A Literature Review" (2015) 6:2 J Pub Health Africa 566.

¹⁷ This is especially true if the goal is, as we argue, to "remember the children."

II. AN ETHICAL FRAMEWORK FOR ANALYZING JUVENILE JUSTICE IN SUB-SAHARAN AFRICA

There is no shortage of good intentions in the international human rights movement. However, developing an ethical framework for analyzing children's rights as they pertain to juvenile justice requires a healthy amount of critical reflection. This is because, as Makau Mutua argues, "the globalization of human rights fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization in the rest of the world."¹⁸ Indeed, in the early 2000s, there was a proliferation of skeptical scholarship, including Third World Approaches to International Law (TWAIL), offering sobering critiques of globalization generally and the globalization of human rights through international law specifically.¹⁹

Amongst the sceptics is David Kennedy. In *The Dark Sides of Virtue: Reassessing International Humanitarianism*,²⁰ Kennedy examines the growth of international campaigns to protect refugees, promote economic development, regulate the conduct of war, and promote human rights (including children's rights). Writing as a believer in the goals of international humanitarianism, he gives voice to the disappointments of a faith betrayed. By casting global humanitarianism as an exercise in new forms of power, he demonstrates how, unavoidably, even the most well-intentioned projects can create as many problems as they solve.

Kennedy produces an inventory of the unforeseen consequences, blind spots, and biases of humanitarian work. He explores the mix of altruism, self-doubt, self-congratulation, and simple disorientation that accompany efforts to bring humanitarian commitments to foreign settings, and calls for international practice that is more self-critical than self-congratulatory,

¹⁸ Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 Harvard Intl LJ 201.

¹⁹ See Antony Anghie & BS Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 Chinese J Intl L 77; Makau Mutua, "What is TWAIL" (2000) 94 Am Soc Intl L 31; Opeoluwa Adetoro Badaru, "Examining the Utility of Third World Approaches to International Law for International Human Rights Law" (2008) 10:4 Intl Community L Rev 379; BS Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8:1 Intl Community L Rev 3.

²⁰ David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004) at 3-35.

more humane than humanitarian, more focused on truths than on rights, and more mindful of what is wrong with “us” rather than with “them”. Kennedy also reminds of the importance of always being aware that Western humanitarianism can do harm, even with good intentions, and sometimes, especially with good intentions.

We have summarized Kennedy’s checklist of critique into three broad categories: (1) The Implicit Political Nature of International Human Rights Law (“IHRL”); (2) The Exclusion of Distributional Justice in IHRL; and (3) The Problematic Discourse of IHRL. In what follows, we provide a brief explanation for grouping Kennedy’s checklist items together under these categories, and apply these critiques to the children’s rights movement, the development of domesticated juvenile justice reforms, and some of the legal instruments pertaining to the detainment of children within the African context. Before delving into these three sections and analyzing the way children’s rights, juvenile justice, and legislation regulating the imprisonment of children may (or may not) be implicated by the Kennedy critique, it is worth noting that these categories are not intended to each stand on their own. Rather, they should be read as integrated and interrelated. Each is a thread in the web of problems identified as stemming from the international human rights movement.

III. THE IMPLICIT POLITICAL NATURE OF IHRL

This category encompasses four of Kennedy’s critiques. These distil the argument that IHRL, despite its universal, supposedly objective, apolitical, and “colorless” application and implementation, is in fact political, not just on a professional level and on a personal level, but also at the state level. Entrenching international human rights acts have political consequences for countries that take on this Western philosophy. He argues that, because human rights originate and give voice to the expression of an ethics and political practice of Western eighteenth to twentieth century liberalism, there are certain assumptions that bias the practice

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of IHRL. He further argues that the human rights movement strengthens bad international governance and that it can lead to misguided politics in particular contexts.²¹ We will focus here on Kennedy's concern beyond the simple objection that human rights discourse is rooted in Western-dominated normativity and priorities. Instead, we focus on a more specific critique with practical implications – *i.e.* the accusation that human rights reflect cultural biases rooted in the anxieties and priorities to emerge from the West's own troubled history. By this account, the human rights movement is structured as primarily individualistic and secular, strangely detached from the way many people live their lives, in complex and pluralist conceptions of the good life. Thus, the human rights movement is viewed as inadequate because it fails to integrate normative concepts related to spirituality, community, ancestry and group identity, and creativity, all while pretending to be objective and universal.²²

One way in which this critique is relevant to the children's rights movement in Africa is evidenced by the divergent philosophies underpinning the CRC and the ACRWC. At a practical level, both treaties emphasize the importance of the "best interests of the child" (BIOC), a highly individualistic standard that no doubt means different things to different people and communities. Aside from the centrality of BIOC, the Conventions could not be more different in spirit, reflecting entirely different conceptions of the social contract. The Western approach to the social contract (as articulated in the writings of Hobbes, Locke, Rousseau, Kant, Rawls, and others) only refers to the moral obligations of "rational people"—

²¹ *CRC*, *supra* note 1, arts 30-35.

²² This critique of the Western-washed human rights movement is still alive and well. However, many African authors now argue that human rights are African, just as much as they are Western or white. See *e.g.* Basil Ugochukwu, "Unpacking the Universal: African Human Rights Philosophy in Chinua Achebe's *Things Fall Apart*" in Oche Onazi, ed, *African Legal Theory and Contemporary Problems: Critical Essays* (Dordrecht: Springer Netherlands, 2013) 199.

i.e. adults.²³ In intra-African cultures²⁴ and normative philosophies, the child has both rights and obligations towards parents and community, and is raised with an awareness of these obligations.²⁵ In this sense, international human rights present a challenge to pluralist African conceptions of the child. Afua Twum-Danso Imoh discusses the interconnection of children's rights and duties in the Ghanaian context: "Children have the right to be obedient. Children have the right to respect parents and all elderly people in the community. Children have the responsibility to respect elders and do what is right".²⁶ The difference, however, is that in the African context, there is a more explicit adoption of this balancing between rights and obligations, and a prioritization of communal and community interests in ways that western liberalism may not tolerate. These differences, when understood through social context and a frame of normative pluralism, are not necessarily accompanied by ranking. Rather, it reflects different global approaches to balancing collective and individual roles in society.

The two Conventions thus embody and reflect different approaches to the status of children and the scope and content of their rights due to the underlying philosophical and social differences discussed above. The ACRWC likely reflects a more accurate picture of the aggregate or consensus of intra-African beliefs and value systems. This raises the question, why is it that more African states have adopted the CRC than the African Charter? We think that at least part of the answer lies in the implicit political nature of IHRL. First, the ratification of an international treaty, such as the CRC, is a political act. In the case of developing countries dependent on foreign aid and investment, being seen to embrace the values of the dominant

²³ For a thorough and critical reflection of personhood as conceived by Nigerian philosopher Ifeyani Menkiti and Western philosopher Immanuel Kant, see Katrin Flikschuh, "The Arc of Personhood: Menkiti and Kant on Becoming and Being a person" (2016) 2:3 J Am Philosophical Assoc 437.

²⁴ The term intra-African culture is used here to be distinguished from a homogenous "African culture" that has been often referenced in the literature, and that we recognize as being problematic. The term "intra-African culture" reflects the varied cultures we recognize within the continent and within each African nation, akin to the way in which "Western culture" refers to the diverse cultural spectrum in Western countries, from European to North American nations.

²⁵ See Afua Twum-Danso Imoh, "Searching for a Middle Ground in Children's Rights in Ghana" (2011) 10:3 J Hum Rts at 388.

²⁶ *Ibid* at 384.

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West with respect to the treatment of children could improve a country's reputation globally. Indeed, the perception of modernizing or developing a country by aligning with the norms of international human rights may be viewed as a positive move that will garner respect in the international community and open the door to economic and political cooperation. This international perception matters to all leaders, but it may matter in particular ways to leaders of fractious or fragile African states in efforts to secure legitimacy, stability, and prosperity.

The suggestion that their global reputation, perception, and evaluation motivates ratification of international human rights treaties in Africa is no reason to reject ratification itself. However, it is good reason to begin an analysis of state behavior in this regard with skepticism, and to evaluate pragmatically the value of ratification, beyond the symbolic assurances it provides to Western donors and other actors. On the other hand, it may very well be that some positive, practical consequences flow from ratifying international instruments.

Another way of viewing the political dimension of the domestication of international treaties is to see whether there are political consequences stemming from the act of (non)ratification. For instance, in adopting the Juvenile Justice Act (2003), Ghana ratified and entrenched the relevant sections of the CRC.²⁷ The question that remains open is whether it has effectively implemented the law in a way that materially improves the conditions of children in the country. Top-down, legislative approaches are seldom successful at effecting meaningful social change when the values and practices of the population do not align with the new norms, or where knowledge about new norms is low. In a study of Ghana by Esmeranda Manful and Saka E. Manful, the authors found that there is a great disparity between the legislators' views and experiences of children's rights and the childcare providers' beliefs regarding the CRC.²⁸ The caregivers are tasked with the practical realization of the CRC's assurances through their

²⁷ Godfrey Odongo, "The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African context" in Sloth-Nielsen, *Children's Rights in Africa*, *supra* note 4 at 121.

²⁸ Manful & Manful, *supra* note 8 at 323-325.

daily dealings with children. The caregivers in the study were very skeptical and dismissive of the CRC, and were found to vastly misunderstand its purpose. They believed erroneously that it meant child participation and autonomy, with which they generally disagreed. One caregiver stated, “Children’s rights, allowing children to be involved in every issue is a ‘white man’s’ idea; it has nothing to do with us”.²⁹ Even the legislators expressed some skepticism towards the Convention, claiming, “. . . Ghana wants to be seen by the whole world that it is doing well so when it comes to signing Conventions we sign. You know so that we would be in the good books of the international community.”³⁰

One possible solution to this problem is to increase the transparency of government leaders about their motivations for signing international conventions, along with a detailed plan of implementation that they must be held accountable to see through.³¹ The CRC Committee is responsible for considering reports from all the signing countries. Jaap E. Doek claims that:

[t]his may seem to be an exercise in moving paperwork, but experiences have taught us that it is much more than that. The preparation of the report requires, given the broad content of the CRC, the involvement of many ministries and other governmental bodies....In addition, the NGOs in many countries submit their own reports...to the CRC Committee. These reports are often the work of close cooperation between the various specialized NGOs in the country via the establishment of a national forum or coalition of NGOs. Finally, a number of specialized UN agencies, in particular UNICEF, submit their reports on the country to the Committee.³²

There is thus some hope that international accountability mechanisms like the CRC Committee reports will have some effect, though it is impossible to infer with certainty the reasons for a failure to comply. In fact, it is known that many states fail to comply with implementation of

²⁹ *Ibid* at 323.

³⁰ *Ibid* at 322.

³¹ As an attendee pointed out during our discussion at the conference, the relationship between transparency and accountability is not always causal, as one might expect. For a discussion of the possible frameworks that transparency and accountability may operate within, and how this affects the relationship between the two mechanisms, whose common goal is to publicize state action and inaction, see Jonathan Fox, “The Uncertain Relationship between Transparency and Accountability” (2007) 17:4/5 *Development in Prac* 663.

³² Jaap E Doek, “Overview: The Protection of Children’s Rights and the United Nations Convention on the Rights of the Child: Achievements and Challenges” (2003) 22:2 *St Louis U Pub L Rev* 235 at 239.

international obligations due to significant lack of resources.³³ We address this issue in the next section.

IV. THE EXCLUSION OF DISTRIBUTIONAL JUSTICE IN IHRL

In this section, we have combined two of Kennedy's checklist items. The first is the notion that IHRL views both the problem and the solution too narrowly.³⁴ The second is the assertion that the system of international human rights law is more likely to produce and excuse violations than to prevent and remedy them.³⁵ Both critiques drive at the main practical pitfall of human rights law, which is that it does not properly engage institutions capable of distributional justice. In other words, international human rights are premised on the false notion that more law will produce greater access to justice, without an accompanying ability to change the underlying economic conditions. One cannot expect children's rights to be realized within a country that lacks the ability to provide basic needs, proper educational institutions, and fair economic distribution. The prohibition on child labor means little when child labor is the only way for a family to survive. Punishing those who employ children does nothing to improve the underlying conditions that produce the supply of child labor. Punishing employers and removing children from their families to prevent them from working may actually produce, on the whole, more harm than is caused by child labor.

Kennedy's critique remains relevant, as financial inequality has become one of the most pressing issues globally and locally. Scholars agree that, while political and civil rights have garnered considerable international attention, economic, social, and cultural rights have lagged

³³ *Ibid* at 251. "Poverty reduction and elimination should be given the highest priority. However, this does not mean that States should not try to make as much progress as possible in achieving the goals set in the WFFC, including improving protection of children against commercial sexual exploitation, abuse in the family, institutions, and on the streets. Many things that contribute to respect for the rights and dignity of the child can be achieved with little money. Poverty cannot be used as an excuse for doing nothing."

³⁴ *CRC*, *supra* note 1, art 10-13.

³⁵ *Ibid*, arts 24-26.

and floundered.³⁶ This has been a shortcoming of the international human rights movement to the extent that social and economic conditions largely determine the value and utility of political rights.

One of the present authors spent the summer of 2015 working with Defense for Children International (DCI) in Ghana. Engaging in local human rights outreach and education, DCI legal interns were instructed not to encourage local children to stop working. Indeed, notwithstanding the CRC consensus, the practical reality on the ground was that child labor is so important to local households that it would be wrong to disrupt this system of family income generation, however flawed it might be. It was plainly evident to the experts on the ground that a strong application of human rights legal principles would not improve the lives of those families who rely on child labor to survive and in fact could quite possibly make their lives considerably worse.

Consequently, instead of pushing for immediate and full implementation of the rights guaranteed by the CRC, DCI's advocates advised children on how to negotiate with their parents to gain a lighter workload, limit hours of work to only after school, and to set aside time for homework. This strategy involved tolerating CRC violations in the pragmatic interest of improving the material conditions for child laborers without disrupting the fragile social and economic framework for family and community survival. DCI had to be realistic and modest about what impact it could have on the ground. While the organization's mission statement adopts the CRC approach to children's rights (rather than that of the ACRWC) the practical reality is that the CRC's absence of integrated economic rights means that the lived enjoyment of political rights is wafer thin for those enduring social and economic disadvantage. Because DCI offers no economic incentives for compliance with CRC norms, it lacks the ability to

³⁶ See *e.g.* Scott Leckie & Anne Gallagher, eds, *Economic, Social and Cultural Rights: A Legal Resource Guide* (Philadelphia, PA: University of Pennsylvania Press, 2011).

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radically transform most of Ghanaian society. Instead, it offers children connections to human rights lawyers, family lawyers, the police, and other services, to help increase their bargaining power at home and at work. This has the effect of empowering children, but not necessarily in the manner envisioned by the CRC.

Considering the global situation as a whole, what human rights discourse seems to have ultimately accomplished for children is not economic justice, but rather some form of increased political and social recognition. Children are now universally accepted as rights-bearing individuals. They have achieved, as it were, an increased acknowledgement of their legal personhood. Additionally, even though economic rights are not yet positively enforced, cultural and social rights are being realized through the pragmatic efforts of NGOs like DCI, working within the inherent contradictions of the international human rights movement.³⁷ As Kennedy, emphasizes, pragmatism is the necessary approach to advancing human interests through human rights. In that sense, the CRC helped change the relationship between children and their elders, and between children and the state, opening the door to various forms of rights claiming, including via negotiations with their parents.

V. THE PROBLEMATIC DISCOURSE OF IHRL

Kennedy argues that human rights discourse is riddled with problems. We include three items from Kennedy's original checklist under the category of the discourse problem:³⁸ (1) that human rights discourse occupies the field of emancipatory possibility;³⁹ (2) that it both

³⁷ This was exemplified by the means of which social workers at DCI would teach young women about abstinence and sexuality. There was no attempt to tell them not to believe in their religion (whether Muslim or Christian), but the workers used their faith as motivation to withhold sex before marriage. They also incited fear in the young women, explaining how horribly painful an abortion would be. While not necessarily a feminist approach, it was an effective approach for driving home the point to young girls in a way that was culturally sensitive and age-appropriate.

³⁸ We will only address the first and third item in this short paper.

³⁹ *CRC*, *supra* note 1, arts 8-10.

generalizes and particularizes too much;⁴⁰ and (3) that it promises more than it can deliver.⁴¹ These critiques are concerned with dangers in the way we use human rights language — *i.e.* the jargon, assumptions, and underlying philosophy. The core philosophy of human rights discourse rests on notions of objectivity and universality that are but an abstract ideal. Pragmatic considerations tend to matter, as we have shown in the previous sections of this paper. They certainly matter for imprisoned children. When the gap between law on paper and enforcement is deep, public confidence in the legislation can be undermined. The risk is that adopting laws that are doomed to disappoint due to ineffective enforcement is precisely what gives rise to human rights skepticism and disillusionment in the first place, as law reform appears to be a form of public relations rather than an expression of deep enough political or legal commitment.⁴² This general disillusionment may also provide an additional explanation for the preference for the CRC over the African Charter in the children's rights context.

Responding to Kennedy's critique about human rights occupying the field of emancipatory possibility, Ann Skelton sketches the penal history of pre-colonial Africa and discusses the pluralist approaches to crime and punishment. Before colonialism, it turns out, there was no punishment of imprisonment.⁴³ The harshest punishments would result in physical lashings and beatings, and the community would collectively set the punishment, with input from the victim and their family, from the perpetrator and their family, and from any other interested party in the community.⁴⁴ However, with colonialism, imprisonment became a norm in many African countries. Colonial liberation did not bring an immediate return to indigenous

⁴⁰ *Ibid*, art 13-17.

⁴¹ *Ibid*, art 21-24.

⁴² See Frédéric Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes" in JM Beneyto & David Kennedy, eds, *New Approaches to International Law: the European and the American Experiences* (Hague, The Netherlands: TMC Asser Press, 2012) 3.

⁴³ Ann Skelton, "Freedom in the Making: Juvenile Justice in South Africa" in Zimring et al, *supra* note 8 at 328. Skelton claims that "[p]rior to colonization, there was no imprisonment or institutionalization. Crimes were treated as wrongs between individuals and families, to be solved in ways that promoted harmony and well-being in society. Harsher punishment such as corporal punishment or banishment was meted out for serious crimes."

⁴⁴ *Ibid*.

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legal traditions. On the contrary, post-colonial leaders tended to replicate the values, structures, policies and institutional practices of the former colonial authority. Questions of authenticity and authority are muddled. Domestic penal codes and international human rights both cast corporal punishment as torture, while condoning imprisoning convicted persons. Skelton notes that the “African customary approach to children’s wrongdoing was replaced by a far more punitive form of justice.”⁴⁵ Trends towards normative pluralism and rediscovery of indigenous legal tradition, however, have been converging with political interest in rehabilitation and diversion in criminal justice to have set the stage for a return to traditional African approaches to punishment. These traditions are increasingly gaining traction internationally as emancipatory, despite the fact that the discourse of “rights” takes a back seat to a discourse of discovery and borrowing from the local history in which these conflicts continue.⁴⁶

The idea that human rights discourse promises more than it can deliver can result in heightening the precariousness of imprisoned children. The nature of the discourse creates a reliance on legal professionals and enforcers who become the knowledge-holders of right and wrong, thus alienating communities from their own issues and from the vocabulary of their own governance. In the children’s rights context, it is often pointed out that the language of the CRC is inaccessible and improperly consulted by children themselves.⁴⁷ This makes children vulnerable, as they end up relying on adults in authority—often those with direct interests in maintaining the subordination of children. The rights discourse furthermore promises a supportive international community. Kennedy claims this is nothing more than a fantasy.⁴⁸ Interference of Western countries in African countries, for instance, is not neutral. Rather, it is

⁴⁵ *Ibid.*

⁴⁶ See e.g. George BN Ayittey, *Africa Unchained: The Blueprint for Africa’s Future* (New York, NY: Palgrave Macmillan, 2005).

⁴⁷ Said Mahmoudi et al, eds, *Child-Friendly Justice: A Quarter Century for the UN Convention on the Rights of the Child* (Sweden, Stockholm: Martinus Nijhoff, 2015) at 7.

⁴⁸ Kennedy, *supra* note 22 at 117.

encouraged, and nations who ratify human rights treaties such as the CRC often find there is little to no international support.⁴⁹ The human rights movement may itself appear to be redemptive —“as if doing something *for human rights* was, in and of itself, doing something *against evil*”⁵⁰, though, as we have argued in this paper, such is not necessarily the case.

VI. CONCLUSION

This paper has adopted the frame of Kennedy’s general critique of international humanitarianism and applied it to the issue of children’s rights in Sub-Saharan Africa. In so doing, we have canvassed the development of juvenile justice in the region and observe that the critique applies in several key respects. We found that the cracks in the notion of universality still exist upon examination of the practical implications of treaty rights in local contexts. We have drawn attention to a few examples—*anecdotal and statistical evidence*—that tend to support the Kennedy critique of international human rights mobilization. By contrasting the CRC both with practices on the ground and with a regional human rights instrument, we have demonstrated the inconsistent messaging with respect to the content of children’s rights in Africa. It is likely that Kennedy’s concern about over-promising and under-delivering is evident in this confusion over the status and rights of children in the African political and social context, notwithstanding the near universal consensus on the CRC. In the area of juvenile justice, the stakes are highest and the need for clarity about the rights of children is most pressing. Based on our admittedly cursory overview of the facts and literature, we conclude that children engaged in the criminal justice systems of a number of African states cannot, at present, expect the promises of international human rights to be fully and manifestly evident in their lives despite the apparent embrace of fundamental children’s rights by the state. This paradox deserves further study and sustained attention.

⁴⁹ Doek, *supra* note 36 at 242.

⁵⁰ Kennedy, *supra* note 22 at 118.