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**UNIVERSITY OF CAPETOWN**  
**SCHOOL FOR ADVANCED LEGAL STUDIES**

**JUSTICE FOR THE CHILD OFFENDER: TO WHAT EXTENT DOES ZAMBIA  
COMPLY WITH INTERNATIONAL LAW STANDARDS?**

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LLM in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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## **DECLARATION**

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

.....  
**CHITI YVONNE KABWE**

## **DEDICATION**

This thesis is dedicated to my late husband Kenneth Ron Kabende. I am forever grateful to him for urging me to carry on despite the circumstances.

University of Cape Town

## **ABSTRACT**

The concept of child justice has existed for quite some time. The concept involves among other things, a separate judicial system for children who come into conflict with the law. The international community has embraced the concept in a number of international instruments to which States such as Zambia are a party. The effect of such ratification is that States Parties are administer child justice in the manner laid out by international standards and norms.

This thesis therefore sets out to consider to what extent Zambia has complied with international law standards on child justice particularly for the juvenile offender. The international legal framework as it currently operates will therefore be considered in this study. An examination of Zambia's current laws will also be taken into account and an analysis of whether or not such laws live up to international standards will be made. Recommendations will then be made on any shortcomings that may be observed.

## ACKNOWLEDGEMENTS

I would like to begin by giving my gratitude to my Father God. None of this would be possible without Him.

I also wish to give thanks to my supervisor Professor Danwood Chirwa for his guidance in writing this thesis.

To my mother, Mrs Beatrice Kabwe, I give thanks for being a pillar of strength and looking after my son during my year of study. I love you mum.

Even if he may not understand it now, I would like to thank my son Lutanda for being the sweetest boy ever and being a part of the motivation to carry on.

Last but not the least, I would like to give my sincere gratitude to my late husband Kenneth Ron Kabende who encouraged me to push on despite the circumstances. I will always love you my sweet.

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## ACRONYMS

### 1. Abbreviations

CRC United Nations Convention on the Rights of the Child  
ACRWC African Charter on the Rights and Welfare of the Child  
ICCPR International Covenant on Civil and Political Rights

### 2. Short names

Beijing Rules Standard Minimum Rules for the Administration of Juvenile Justice  
CRC Committee Committee on the Rights of the Child  
JDLs UN Rules for Juveniles Deprived of their Liberty  
Riyadh Guidelines UN Guidelines for the Prevention of Juvenile Delinquency

## **CHAPTER ONE**

### **INTRODUCTION AND OVERVIEW OF THE STUDY**

#### **1. INTRODUCTION**

Zambia has ratified a number of international instruments such as the United Nations Convention on the Rights of the Child (CRC)<sup>1</sup> and the African Charter on the Rights and Welfare of the Child (ACRWC).<sup>2</sup> Considering that over two decades have gone by since the ratification of these instruments, one would expect that a lot of stride has been made in terms of domestic implementation, and in this particular context, as it relates to the issue of child justice.

The Juvenile's Act<sup>3</sup> is the principal Act meant to address the issue of children who are in conflict with the law. Sadly, this Act came into force in 1956 when Zambia had not even attained independence from British colonial rule. Since 1956, only a few amendments have been made. This Act has features which bear a period when children were not considered as individual rights holders. This may act as a constraint to the transformation of the entire child justice system as it currently operates in Zambia.

In its preamble, the Act provides that its object is "to make provision for the custody and protection of juveniles in need of care; to provide for the correction of juvenile delinquents; and to provide for matters incidental to or connected with the foregoing."

The CRC in Article 1 has defined a child to mean one who is below the age of 18. On the other hand, the Juvenile's Act, defines a juvenile as "a person who has not attained the age of nineteen years; and includes a child and a young person."<sup>4</sup> However, the Constitution,<sup>5</sup> which is the

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<sup>1</sup>United Nations Convention on the Rights of the Child GA Res 44/25, annex, 44 UN GAOR Supp (NO 49) at 44/49 (1989), entered into force 2 September 1990.

<sup>2</sup>The African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.4/49 (1990), entry into force 29 November 1999.

<sup>3</sup>Chapter 53 of the Laws of Zambia.

<sup>4</sup>Section 2. In addition, there is the definition of a "juvenile adult" which means-

"(a) a person who has attained the age of nineteen years but has not attained the age of twenty-one years; and  
(b) a person who has attained the age of twenty-one years but has not attained the age of twenty-five years and whose classification as a juvenile adult has been expressly sanctioned by the Minister."

<sup>5</sup>Act No. 1 of 1991 (amended by Constitution (Amendment) Act, No. 18 of 1996).

highest law of the land, defines a young person as, any person under the age of 15 years.<sup>6</sup> This is in sharp contrast to the CRC.

Because Zambia has a dual legal system that permits the application of Customary and Statutory laws, the Constitution allows the application of customary law in social practice. The Local Courts are primarily courts of customs and have substantial power to invoke customary law and rule on minor criminal matters which may not fully be in accordance with statutory law, including the Juvenile's Act. For instance, customary law defines a child as a person who has not attained puberty while other statutory law contains multiple definitions of a child as seen above. These various legal minimum ages are inconsistent, discriminatory and/or too low and require total review in order to avoid disparities in social practice and to bring Zambian law in conformity with international treaties guaranteeing the rights of the child.

Other pieces of legislation such as the Criminal Procedure Code,<sup>7</sup> the Penal code,<sup>8</sup> Probation of Offenders Act,<sup>9</sup> also touch on the issue of juvenile offenders, but these are not sufficient. Moreover, just like the Juvenile's Act, some of these laws appear to be outdated. In light of this, steps are being taken to reform the entire law as it relates to child offenders and, at the time this research was being conducted, a Child Justice Administration Bill was being drafted by the appropriate bodies. It is hoped that once the Bill is enacted into actual law, a number of important issues such as the definition of a child, the minimum age of criminal responsibility, diversion, pre-trial safeguards as well as trial safe guards among others, will be adequately addressed.

Considering that Zambia has legislation which came in before the CRC in terms of child justice, this work will concern itself with demonstrating how that law operates in comparison to the standards that have been set out under international law. Consideration will also be made as to what can be done to ensure compliance if it is found that the country is actually not complying with the international standards.

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<sup>6</sup> Article 24(4) of Chapter 1 of the Laws of Zambia.

<sup>7</sup> Chapter 88 of the Laws of Zambia.

<sup>8</sup> Chapter 87 of the Laws of Zambia.

<sup>9</sup> Chapter 93 of the Laws of Zambia.

The Juvenile's Act provides for the establishment of a juvenile court under Part III. Further, Muntingh<sup>10</sup> reports that the Child Friendly Court (CFC) program was introduced in the face of outdated legislation, a generally punitive approach and non-child- friendly court system to deal with the challenges children face in the Zambian court system. The question to be considered is whether the CFC program combined with the pieces of legislation referred to above, and case law have been sufficient for Zambia, such that one can say the country has fully complied with international standards.

Going back to the international legal framework, other than the CRC and the ACRWC, there are three sets of other international rules governing child justice. These include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)<sup>11</sup> which was the first international legal instrument to comprehensively detail norms for the administration of juvenile justice with a child rights focus and development oriented approach. It provides guidance on social policies to be applied to prevent and protect young people and most of its provisions have been incorporated into the CRC. There is also the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDL Rules),<sup>12</sup> which provides safeguards on fundamental rights and establishes measures for young persons deprived of their liberty. The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)<sup>13</sup> establishes a progressive justice system for the child who comes into conflict with the law.

Both the provisions of the CRC and ACRWC and the international instruments referred to above make it clear that in all matters concerning the child, the best interests of the child<sup>14</sup> is of great importance and it is anticipated that this should also be a consideration by the Zambian judicial system when dealing with a child. Other than the child's best interests, the other key principles that should govern a child justice system include the child's right to participate, the principle of

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<sup>10</sup> Lukas Muntingh "Evaluation Report on Child Justice in Zambia" (UNICEF: 2007) at 9.

<sup>11</sup> UN Standard Minimum Rules for the Administration of Child Justice (Beijing Rules) General Assembly Resolution 40/33 of 29 November 1985.

<sup>12</sup> UN Rules for the Protection of Juveniles Deprived of their Liberty General Assembly Resolution 45/113 of 13 December 1990.

<sup>13</sup> UN General Assembly Guidelines for the Prevention of Child Delinquency (Riyadh Guidelines) General Assembly Resolution/45/112 of 14 December, 1990.

<sup>14</sup> Article 3 of the CRC and Article 4 (1) of the ACRWC respectively.

non-discrimination and that of the right to survival and maximum development. All these will be discussed in greater detail in the next chapter.

## **2. SCOPE AND OBJECTIVES OF THE STUDY**

This work will concern itself with examining the international legal framework in terms of child justice. Particular attention will be paid to the provisions of the CRC and ACRWC and other international instruments. A critical analysis will then be made of Zambia's laws and policies on child justice and the extent to which they comply with international standards. Recommendations will then be made as to how best the gaps on child justice can be filled up if any at all.

## **3. METHODOLOGY**

This research will be mainly desk research and data in the form of books, scholarly articles as well as the internet. All these will be consulted with a view of disseminating information in terms of the law on child justice from the international perspective as well as the Zambian system.

## **4. CHAPTER SYNOPSIS**

Chapter one, which is the introduction to this work, will concern itself with the whole purpose of this research. The scope and methodology will also be set out therein. Chapter two will focus on the international legal frame work within which the child justice system operates. The chapter will actually begin by looking into the developments of child justice and subsequently, an outline of the international legal standards and norms particularly the CRC and the ACRWC will be considered. Chapter three will focus on the Zambian legislative system and court practice when it comes to dealing with a child offender. The Juvenile's Act and other relevant legislation will be considered as well as the case law and other materials on the subject. An assessment as to the extent of Zambia's compliance to international standards will then be made. A summary of the

research conducted and its findings and will be made in the conclusion and recommendations chapter which will be chapter four.

## CHAPTER TWO

### THE INTERNATIONAL LEGAL FRAMEWORK ON CHILD JUSTICE

#### 1. INTRODUCTION

On a daily basis, society faces cases where young children are involved in criminal conduct, some more serious and shocking than others. Some of these cases prompt widespread debate on how to handle young offenders within the justice system. This chapter will focus on the concept of child justice as it prevails under international law and in doing so, it is important that reference be made to how the concept has developed. The general principles that underlie children's rights and equally apply in a child justice system will also be considered. In addition, the chapter will look at how those principles translate into more specific rules governing child justice. All this will be done with considerations being given to the provisions of various international instruments such as the CRC, ACRWC and ICCPR; all of which touch on the subject of child justice. Reference to the Beijing Rules and other nonbinding international instruments will also be made. It is to be borne in mind that the terms child justice and juvenile justice will be used interchangeably as they bear one and the same meaning.

#### 2. DEVELOPMENTS IN CHILD JUSTICE UNDER INTERNATIONAL LAW

Before the late 1890's, youths were subjected to the same criminal justice process as adults meaning, that children apprehended for criminal behavior, were tried and given similar punishment as adults.<sup>15</sup> Today, most societies essentially have a judicial process in which children who come into conflict with the law are dealt with separately from adult offenders.<sup>16</sup> The concept of a separate child justice has its roots in the USA with the passage of the Juvenile Court Act in 1899<sup>17</sup> in the state of Illinois. This concept of a separate justice system for children

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<sup>15</sup> "The context of juvenile justice: defining basic concepts & examining public perceptions of juvenile crime," available at [http://samples.jbpub.com/9780763762513/62513\\_CH01\\_Elrod3E.pdf](http://samples.jbpub.com/9780763762513/62513_CH01_Elrod3E.pdf) [accessed on 25<sup>th</sup> September, 2012].

<sup>16</sup> UNICEF (1998) "Innocenti digest: Juvenile Justice," available at <http://www.unicef-irc.org/publications/pdf/digest3e.pdf> [accessed on 25th September, 2012].

<sup>17</sup> Illinois Juvenile Court Act (1899) Ill Laws 133.

notion then spread to Britain, Australia, and the Scandinavian countries<sup>18</sup> and eventually to Africa through colonialism.

The original separate system of justice for children was based on a social welfare model (also known as a child welfare model).<sup>19</sup> Under this model, courts assumed an important role in protecting, assisting and guiding children, not punishing them, with a view of transforming them into responsible, law-abiding citizens.<sup>20</sup> What influenced this notion is the basic fact that children are immature and lack the mental capacities necessary for them to act willfully and bear responsibility for their actions. In addition it was discovered that sending young offenders to prison would have the negative impact of their being contaminated even further by adult offenders which would subsequently result in them being involved in much more heinous offences than they would have engaged in before.<sup>21</sup> The early developments of the juvenile justice system in the USA subsequently led to the development of international norms and standards on juvenile justice standards which are enshrined in a number of international instruments both binding and non-binding.

## **2.1 The ICCPR**

The first binding treaty to include basic standards on child justice is the International Covenant on Civil and Political Rights (ICCPR).<sup>22</sup> The Convention sets the foundation in terms of treaty law as regards the right of due process for every individual accused of a crime.<sup>23</sup> Since the treaty generally concerns itself with basic civil and political rights, its provisions in terms of the administration of child justice are narrow and specific.<sup>24</sup> Article 10(2) (b) of the ICCPR demands for the separation of accused juveniles from adults and the speedy adjudication of their cases. The ICCPR also impresses upon states to establish trial procedures for juveniles that

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<sup>18</sup> Eric L. Jensen "An historical overview of the American juvenile justice system" in Eric. L. Jensen & Jorgen Jepsen (eds) *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice systems* (Oxford: Hart Publishing, 2006) at 8.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Margaret May "Innocence and experience: the evolution of the concept of juvenile delinquency in the mid-nineteenth century" in John Munice et al (eds) *Youth Justice: Critical Readings* (London: Sage Publications, 2002) at 101.

<sup>22</sup> General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

<sup>23</sup> Article 14 of the ICCPR.

<sup>24</sup> Geraldine van Bueren "The administration of juvenile justice and the prevention of juvenile delinquency" in *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff, 1995) at 170.

would take account of the offender's ages and the desirability of promoting their rehabilitation.<sup>25</sup> Another important provision in the ICCPR is the prohibition of the death penalty as a sentence on offenders below the age of 18 years.<sup>26</sup>

Although the ICCPR covers some aspects of child justice, there was still a felt need to have a comprehensive framework on child justice at an international level which states could utilize for guidance in establishing and operating their own national juvenile justice systems.<sup>27</sup> The need for such an instrument manifested itself in the CRC and at a regional level, the ACRWC. The underlying principles of these two instruments will be discussed shortly. Before going into that discussion, other international instruments that have played a significant contribution to the development of child justice, include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice<sup>28</sup> also known as the Beijing Rules; the United Nations Guidelines for the Prevention of Juvenile Delinquency<sup>29</sup> (the Riyadh Guidelines); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty<sup>30</sup> (the JDL Guidelines).

## **2.2 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)**

The Beijing Rules were adopted in 1985 by the Seventh Congress on the Prevention of Crime and the Treatment of Offenders, marking a significant milestone in the development of juvenile justice.<sup>31</sup> The Rules take into account diverse national setting and legal structures, and reflect the aims and the spirit of juvenile justice and essentially set out desirable principles and practices within which a national juvenile justice system should operate.<sup>32</sup> They represent the minimum conditions internationally accepted for the treatment of juveniles who come into conflict with the law.<sup>33</sup> The Beijing Rules state that the aims of juvenile justice are to enhance the well-being of

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<sup>25</sup> Article 14(4) of the ICCPR.

<sup>26</sup> Article 6(5) of the ICCPR.

<sup>27</sup> Van Bueren, *supra* note 24 at 169.

<sup>28</sup> Adopted by the UN General Assembly 29 November 1985, Resolution 40/33.

<sup>29</sup> Adopted by the UN General Assembly 14 December 1990, Resolution 45/112. Also known as the "Riyadh Guidelines."

<sup>30</sup> Adopted by the UN General Assembly 14 December 1990, Resolution 45/113. Also known as "the UN JDL Rules."

<sup>31</sup> UNICEF Innocenti Digest, *supra* note 16.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

the juvenile and to ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of the offender and the offence.<sup>34</sup>

They stress that placement of a juvenile in an institution shall always be a measure of last resort and call for the promotion of detention and the classification of juveniles research, planning, policy formulation and evaluation.<sup>35</sup>

### **2.3 The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)**

The prevention of juvenile delinquency in our societies is a primary concern. Internationally, the issue was addressed in the Riyadh Guidelines which were first elaborated at a meeting held by the Arab Security Studies and Training Center (ASSTC) in Riyadh and thus designated as the Riyadh Guidelines.<sup>36</sup> They were adopted by the U.N General Assembly in 1990 as a response to the question of what to do about children committing criminal offences within the context of development.<sup>37</sup> They are aimed at, inter alia, emphasizing the need for and importance of progressive delinquency prevention policies as well as the systematic study and elaboration of measures towards such prevention policies.<sup>38</sup> In short, they give guidance to States for strategies to prevent children from becoming involved in the commission of crimes<sup>39</sup> and also for the social reintegration of children at risk of being abandoned, neglected and abused.<sup>40</sup> The Guidelines therefore cover the pre-conflict stage, i.e. before juveniles come into conflict with the law and have a “child-centred” approach.<sup>41</sup> They are based on the premise that it is necessary to offset those conditions that adversely had contributed to influence and impinge on the healthy development of the child.<sup>42</sup> It is therefore apparent that the Guidelines are premised on the

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Jacqui Gallinetti “Child justice in South Africa: The realization of the rights of children accused of crime” in Trynie Boezaart (ed) *Child law in South Africa* (Lansdowne: Juta & Co Ltd, 2009) 635-664.

<sup>39</sup> Ann Skelton & Boyane Tshehla “Child justice in South Africa’ Monograph 150(Pretoria: Institute for Security Studies, 2008) available at <http://www.issafrica.org/pgcontent.php?UID=2341%2632> [accessed on 25<sup>th</sup> September, 2012].

<sup>40</sup> Ibid.

<sup>41</sup> UNICEF Innocenti Digest, supra note 16.

<sup>42</sup> Ibid.

principle of the child's right to life and maximum survival and development which principle will be discussed in greater detail shortly.

#### **2.4 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDL Guidelines).**

The JDL Guidelines were elaborated by the Committee on Crime Prevention and Control in close cooperation with several intergovernmental and non-governmental organizations, such as Defence for Children International and were adopted by the U.N General Assembly on 14 December 1990.<sup>43</sup>

A brief summary of the JDL's is that they deal with a range of children who have been deprived of their liberty.<sup>44</sup> This includes those held in custody during the pre-trial and trial stage as well as those sentenced to imprisonment.<sup>45</sup> Deprivation of liberty is defined under the guidelines<sup>46</sup> and the overriding message of the JDLs is that young people under the age of 18 years should not be deprived of their liberty except as a measure of last resort, and that where this does occur, each young person must be dealt with as an individual, having his or her needs met as far as possible.<sup>47</sup> There is an emphasis on preparing the young person for his or her return to society from the moment of entry into the detention facility.<sup>48</sup>

Read together, the Beijing Rules, Riyadh Guidelines and JDLs embody the four principles of the best interests of the child, the child's right to participate, the right to equality and non-discrimination, and the child's right to life and maximum survival and development which are principles underlying the binding CRC and ACWRC. The Guidelines constitute a comprehensive framework for the care, protection and treatment of children who come into conflict with the law. However, unlike the CRC and ACRWC, the limitation of these instruments is that they are mere recommendations, which, though persuasive, are non-binding.

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<sup>43</sup> Ibid.

<sup>44</sup> Skelton, supra note 39.

<sup>45</sup> Ibid.

<sup>46</sup> Rule 11(b) of JDL's defines deprivation of liberty as any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at will.

<sup>47</sup> Skelton, supra note 39.

<sup>48</sup> Ibid.

## **2.5 The UN Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC)**

The CRC was the first binding treaty to deal exclusively with the rights of the child and contains comprehensive provisions relating to child justice under Article 40. The ACRWC is another binding instrument which deals with child justice at a more detailed level under Article 17. Both these instruments have four underlying principles which serve as guides when it comes to the rights of the child, including the administration of child justice. These principles include the best interests of the child;<sup>49</sup> the child's right to participate;<sup>50</sup> the right to equality and non-discrimination<sup>51</sup> and the child's right to life and maximum survival and development.<sup>52</sup> These principles translate into specific rules that govern child justice from the time the offence is allegedly committed by a child to sentencing and post-sentencing procedures which will be discussed at length at a later stage.

### **2.5.1 The Best Interests of the Child**

Article 3(1) of the CRC expressly provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Other than the CRC, the term “the best interests of the child” features in a number of international and domestic instruments. The meaning of the child's best interests is not precisely defined in the CRC and can be considered in a broad range of situations.<sup>53</sup> It is submitted that the term should be taken as it appears. In all circumstances, whether in the private or public sphere, the question should always be what is best for the child? It should not be what the caregivers or adults involved think might be best for the child. If the child is able to express him or herself, he or she should be able to freely give an opinion of what he or she thinks is best for him in any given situation. Of course, the child's maturity has to be borne in mind. Specifically within the

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<sup>49</sup>Article 3 of the CRC; Article 4 (1) of the ACRWC.

<sup>50</sup> Article 12 of the CRC.

<sup>51</sup>Article 2 of the CRC; Article 3 of the ACRWC.

<sup>52</sup> Article 6 of the CRC.

<sup>53</sup> “UNHCR Guidelines on Formal Determination of the Best Interests of the Child” available at <http://www.unicef.org/violencestudy/pdf/BID%20Guidelines%20-%20provisional%20release%20May%202006.pdf> [accessed 31<sup>st</sup> January, 2013].

CRC, examples of where the principle finds its place include situations such as separation from parents,<sup>54</sup> court hearings<sup>55</sup> and adoption procedures.<sup>56</sup> The Committee on the Convention on the Rights of Child which is the treaty body vested with the powers of ensuring implementation of the Convention, has alluded to the principle in its General comments. There is emphasis that the best interests' principle should not be considered in isolation but in relation to the other principles alluded to above.<sup>57</sup> In line with this is the need that the principle should be interpreted in the spirit of the whole CRC.<sup>58</sup> State parties are therefore discouraged from interpreting the best interests principle in an overly cultural relativist manner which would deny the rights guaranteed to children under the CRC.<sup>59</sup>

Taken in the context of the administration of juvenile justice, the CRC Committee elaborates on the meaning of the child's best interests in General Comment 10.<sup>60</sup> The Committee points out that children differ from adults in their physical and psychological development, and their emotional and educational needs.<sup>61</sup> Such differences constitute the basis for the lesser culpability of children in conflict with the law.<sup>62</sup> These differences and several others justify a separate juvenile justice system and different treatment for children.<sup>63</sup> The protection of the best interests of the child means, for instance, the traditional objectives of criminal justice, such as retribution

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<sup>54</sup> Article 9(1) provides that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child..." and 9(3) also provides that "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

<sup>55</sup> Article 40(2)(b)(iii) provides that "b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: ... (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians."

<sup>56</sup> Article 21 stipulates that "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration..."

<sup>57</sup> Rachel Hodgkin and Peter Newell, "Implementation Handbook for the Convention on the Rights of the Child" (New York: UNICEF, 2002) at 37.

<sup>58</sup> Ibid at 38.

<sup>59</sup> Ibid.

<sup>60</sup> CRC General Comment No. 10 "Children's rights in juvenile justice" CRC/C/GC/10 25 April 2007.

<sup>61</sup> Ibid at para 10.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

and repression must give way to rehabilitation and restorative justice objectives.<sup>64</sup> Of course, this has to be done with attention to public safety.<sup>65</sup>

It is important to note that the CRC demands that the best interests of the child will be *the determining factor*, for certain specific actions, including adoption and separation from parents against their will whereas for other actions, it has to be *a* primary consideration. This means for other actions, other considerations are not excluded from being taken into account. This situation is unlike that found in the ACRWC under Article 4(1) which states that “in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.” So the ACRWC demands that the best interests of the child should always be *the* determining factor.

The best interest principle goes hand in hand with the concept that the well-being of the juvenile should be emphasized and to this end, Article 40(1) of the CRC stipulates that:

a child alleged as, or accused of, or recognized as having infringed the penal law should be treated in a manner consistent with the promotion of their sense of dignity and worth and which reinforces their respect for human rights.<sup>66</sup>

The CRC Committee elaborates on the meaning of Article 40(1) by stating that the principle of dignity reflects the fundamental human right enshrined in international human rights law that all human beings are born free and equal in dignity and rights. The Committee further stresses that this is a right to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement officers and all the way to the implementation of all measures for dealing with the child.<sup>67</sup>

It is suggested that one aspect of maintaining the child’s wellbeing and best interests could be through regular personal relations and direct contact with his or her parents.<sup>68</sup> Therefore,

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<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Article 17(3) of the ACRWC has a similar provision; Beijing Rule 5.1 provides “The Juvenile Justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence;” the JDL’s also states that the juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles under Rule 1 the fundamental perspectives.

<sup>67</sup> Ibid.

<sup>68</sup> Van Bueren, *supra* note 24, at 172.

international standards demand that deprivation of liberty, especially when it comes to children, should be used as a measure of last resort and when resorted to, it should only be for the minimum possible period.<sup>69</sup>

### **2.5.2 Right to Participate**

The principle of child participation finds its place mainly in Article 12 of the CRC which provides as follows:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 7 of the ACRWC also contains a similar provision albeit in a summarized manner. Participation generally is about influencing decision making and achieving change. When talking about child participation, we are talking of an informed and willing involvement of all children, including those who are differently abled and those at risk, in any matter concerning them either directly, or indirectly.<sup>70</sup>

Since Article 12 states that participation has to be conducted freely, it means the child has to express his or her views without any pressure or undue influence.<sup>71</sup> This principle which applies to all matters affecting the child can also be taken within the child justice context and entails that the environment in which the child is expressing his or her views needs to be “child friendly” or have a sense of security for the child’s benefit. It follows therefore that the child should not be forced to exercise this right and can choose not to be heard. It also means the child can choose to be heard through a representative. This right must be fully respected and implemented through

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<sup>69</sup> Article 37(b) of the CRC provides that: “The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest period of time;” Rule 17(1) (b) of the Beijing Rules provides that: “Restrictions on the personal liberty of the juvenile shall be imposed only after a careful consideration and shall be limited to the possible minimum.”

<sup>70</sup> Susan Moses “Children and participation in South Africa: An Overview” (2008) 16 (3) *International Journal of Children’s Rights* 327, 328.

<sup>71</sup> CRC General Comment No. 12, “The Right of the Child to be Heard” (2009) CRC/C/GC/12 para 21.

every stage of the process.<sup>72</sup> It is submitted that when the child is participating in the proceedings, it is important that safeguards be put in place to ensure that the child avoids self-incrimination. These rules of participation within the juvenile justice system will be discussed in greater detail at a later stage.

### **2.5.3 Equality and Non-Discrimination**

The principle of non-discrimination as enshrined in Article 2 of the CRC and Article 3 of the ACRWC prohibits discrimination on the basis of gender, ethnic or social origin, race, disability or any other status, and calls for the equal treatment of children. The term “discrimination” is not defined in the CRC and the Committee on the Rights of the Child has not yet issued any interpretative specific General Comment on Article 2. However, the Committee has asserted the fundamental importance of Article 2 and raises the issue of non-discrimination in its consideration of each State Party report. In a relevant General Comment, the Human Rights Committee proposes that the term “discrimination” should be understood to imply “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>73</sup>

Specific to child offenders, the CRC Committee has advised that this principle demands that State parties are obliged to take all the necessary steps to ensure that all children in conflict with the law are treated equally through the establishment of rules, regulations or protocols, which enhance the equal treatment of child offenders and provide redress, remedies and compensation.<sup>74</sup> The CRC Committee denounces disparities in terms of policy and the law when it comes to certain groups of children in conflict with the law such as street children, those belonging to racial, ethnic, religious or linguistic minorities.<sup>75</sup> Children with disabilities and recidivists should also not be discriminated against. This recommendation is especially true when it comes to former child offenders who wish to assume a positive role in society and are denied access to employment or education based on their past. As the Committee suggests, it is

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<sup>72</sup> Hodgkin and Newell, *supra* note 57, at 609.

<sup>73</sup> HRC, General Comment No. 18 “Non-discrimination” U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) para 6.

<sup>74</sup> CRC General Comment No. 10, *supra* note 60, at para 6.

<sup>75</sup> *Ibid.*

important that there be rules, regulations or protocols which enhance equal treatment of child offenders.<sup>76</sup> The creation of status offences such as vagrancy, truancy and runaways for juveniles only is also condemned as being discriminatory as most of these are usually the result of psychological or socio-economic problems.<sup>77</sup> There is a call on State parties to abolish provisions relating to the same.<sup>78</sup>

#### **2.5.4 Right to Life and Maximum Survival and Development**

The inherent right to life is a universal human rights principle. The CRC and ACRWC under Article 6 and 5 respectively, call on States parties to ensure that in relation to the child, this right is upheld as well as that of the survival and development to the maximum extent possible. The ICCPR upholds the right to life and adds that no one shall be arbitrarily deprived of his life.<sup>79</sup> States parties to the international instruments referred to above are urged to take up measures to ensure that their domestic legislation reflect this principle. To this end, the death penalty is discouraged as are enforced disappearances and any actions that intentionally take life away.<sup>80</sup> In relation to the latter aspect, consideration has been made by the Committee on issues of abortion and to this end, the issue of clandestine abortions has arisen and State Parties who criminalize abortion even in instances of rape and incest have been criticized.<sup>81</sup> However, one could argue that life begins at conception and the child should be protected from that time. That is a topic which is obviously controversial and beyond the scope of this work. When talking of ensuring maximum survival and development in the CRC and ACRWC, the provision should be read in conjunction with others and so, for instance, Article 24 of the CRC demands inter alia, that States Parties take up appropriate measures to reduce infant and child mortality. State Parties are also encouraged under Article 32 to protect children from exploitation and this is of course to ensure maximum survival and development.

In relation to the concept of child justice, this demands for States parties to develop effective national policies and programmes to prevent juvenile delinquency as this tends to have a

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<sup>76</sup> Ibid.

<sup>77</sup> Ibid para 7.

<sup>78</sup> Ibid para 8.

<sup>79</sup> Article 6 (1).

<sup>80</sup> Hodgkin and Newell, supra note 57, at 84.

<sup>81</sup> Palau CRC/C/15/Add.149, paras 46 and 47.

negative impact on the development of a child.<sup>82</sup> It also means States are to put in measures to respond to juvenile delinquency. The prohibition of the death penalty by both treaties<sup>83</sup> is also another way of ensuring this right as is that of using imprisonment as a measure of last resort in relation child offenders.<sup>84</sup> This is consistent with the stated purpose of treatment, rather than punishment, being paramount in juvenile justice.

All these principles translate into specific rules that govern child justice from the time the offence is allegedly committed by a child to sentencing and post-sentencing procedures. The next section will go straight into considering the specific rules that are ideally supposed to exist when dealing with a child offender both from the CRC and ACRWC perspective. Provisions of the Beijing rules, JDL's and the Riyadh Guidelines will also be considered.

### **3. THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY**

The first important step in an ideal child justice system is to determine whether or not a child is capable of committing a particular crime. This is because the concept of criminal responsibility should be related to the age at which children are able to understand the consequences of their actions.<sup>85</sup> Because of their emotional, mental and intellectual immaturity, international law leans towards a protective attitude when it comes to the criminal liability of children and lower ages ascribing criminal liability are frowned upon. In addition, a higher age limit promotes the principle of the child's right to life and maximum development and survival.

Article 40 (3) (a) of the CRC requires state parties to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law." The ACRWC is couched in similar terms under Article 17(4). There is no clear cut minimum age that has been set by the two treaties for a child's criminal responsibility. The CRC Committee notes that from the reports of States parties, a wide range of minimum ages of criminal responsibility have been set which can be as low as 7 or 8 years to a commendable high level of age of 14 or 16.<sup>86</sup> In

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<sup>82</sup>CRC General Comment No. 10, supra note 60, at para 11.

<sup>83</sup> The CRC under Article 37 (a) urges States Parties to ensure that: "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;" Article 5(3) of the ACRWC stipulates that "Death sentence shall not be pronounced for crimes committed by children."

<sup>84</sup> Article 37 (b) of the CRC.

<sup>85</sup> Van Bueren, supra note 24 at 173.

<sup>86</sup>CRC General Comment No. 10, supra note 60, at para 30.

addition, it is noted that some jurisdictions have the common law rebuttable presumption of *doli incapax* (which is the rebuttable presumption of non-responsibility pertaining to criminal capacity).<sup>87</sup> The CRC Committee has condemned the use of two minimum ages of criminal responsibility as this often not only confusing, but may result in discriminatory practices.<sup>88</sup> Due to this confusion, the Committee has made recommendations on what should be acceptable minimum ages of criminal responsibility. The Committee refers to the Beijing Rules and States Parties are advised to link the minimum age for criminal responsibility to the child's development and maturity.<sup>89</sup> Rule 4 of the Beijing Rules requires that when States establish an age of criminal responsibility, the same should not be fixed too low, bearing in mind the emotional, mental and intellectual maturity of the child. It is noted that although the question of establishing a minimum age for criminal responsibility may differ widely due to history and culture, if the age of criminal responsibility were too low or nonexistent, then the concept of responsibility would become meaningless.<sup>90</sup>

In conclusion, a fixed minimum age of criminal responsibility of not lower than 12 years appears to have been established and any age below 12 years is unacceptably low<sup>91</sup> and would be in contravention of the CRC.<sup>92</sup> It is further recommended that States Parties should progressively raise the minimum age where possible.<sup>93</sup> Various countries have reviewed their minimum ages of criminal capacity since the adoption of the CRC in 1989.<sup>94</sup> These reviews have resulted in higher minimum ages of criminal liability. For instance, under the Ugandan Children Act, 1997, the minimum age of criminal responsibility has been raised from 7 years to 12 years and the presumption of *doli incapax*<sup>95</sup> has been abolished. The same applies to Ghana.<sup>96</sup> South

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid at 32.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid at 32.

<sup>93</sup> Ibid.

<sup>94</sup> Ann Skelton & Charmain Badenhorst "The criminal capacity of children in South Africa: international developments & considerations for a review," available at <http://www.communitylawcentre.org.za/projects/childrensrightsproject/Publications/Other%20publications/The%20criminal%20capacity%20of%20children%20in%20South%20Africa%20-%20International%20developments%20and%20considerations%20for%20a%20review.pdf> [accessed 1<sup>st</sup> October, 2012] at 11.

<sup>95</sup> Ibid.

<sup>96</sup> Section 4 of the Criminal Code (Amendment) Act 1998 (554).

Africa has amended its laws on criminal capacity by raising the minimum age from 7 to 10 years in its Child Justice Act.<sup>97</sup> Nonetheless, a child who is 10 years or older but under the age of 14 years at the time of the alleged commission of the offence is presumed not to have criminal capacity unless it is subsequently proved beyond a reasonable doubt that the child had such capacity at the time of the alleged commission of the offence.<sup>98</sup>

#### **4. DIVERSION**

According to article 40 (3) of CRC, States parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable. The Beijing Rules under Rule 11.1 provides that consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority. It is clear from these instruments that in an ideal child justice system, it is important that children who come into conflict with the law be protected from the stigmatization that comes with a criminal record. This can be achieved by the avoidance of a criminal trial where appropriate. In addition, there is the need to protect such children from human rights violations that are so common in the criminal justice system.<sup>99</sup> It is for such reasons that international standards have developed alternatives to criminal trials such as diversion for certain offences involving juveniles. The child's best interests and sense of wellbeing are promoted in this manner as is his or her right to life, maximum survival and development.

Mechanisms for diverting children away from the criminal justice system therefore, lie at the heart of any good juvenile justice system. The Committee on the Rights of the Child has interpreted Article 40(3) to mean diversionary measures should be one way of avoiding the child coming into contact with formal judicial proceedings.<sup>100</sup> The Beijing Rules centralize the principle of diversion under Rule 11.1 and the commentary to that rule elucidates that diversion involves the removal from the criminal justice processing and, frequently, redirection to community support services. The commentary also suggests that diversionary measures are appropriate in minor offences where the family, the school and other informal social control

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<sup>97</sup> Section 7(1) of the Act.

<sup>98</sup> Section 7(2) of the Child Justice Act.

<sup>99</sup> Van Bueren, *supra* note 24, at 176.

<sup>100</sup> CRC General Comment No. 10, *supra* note 60, at para 27.

<sup>100</sup> *Ibid.*

institutions have already reacted or are likely to react in an appropriate and constructive manner. This goes hand in hand to the observations of the CRC Committee in General Comment 10 which has gone a step by recommending that measures such as diversions are not to be limited to minor offences such as shoplifting.<sup>101</sup> The added advantage of the practice is that, not only is stigmatization of the child avoided, but it is also in the public's interests since the process is cost-effective.<sup>102</sup> Diversion has also been justified on the basis that it aims to avoid the contamination of child offenders by more serious or recidivist offenders.

However, much as diversion is encouraged, the Committee stresses that it should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding.<sup>103</sup> It is also very important that the child offender or his parents or guardians consent to the process of diversion<sup>104</sup> as community service being enforced without this consent would be in breach of Article 1 (a) of the International Labour Organisation Convention No.105 Concerning the Abolition of Forced Labour, 1957.<sup>105</sup>

## **5. PRE-TRIAL SAFE-GUARDS**

Generally the deprivation of liberty, should be used as a measure of last resort and particularly to children, when such deprivation is resorted to, it should only be for the minimum possible period.<sup>106</sup> There are many forms of deprivation of liberty within the juvenile justice system and they include being in police custody, house arrest, placement in reform or training schools, boot or work camps, detention centres and prisons.

A number of pre-trial and trial safeguards have therefore been developed to ensure that children accused of having committed offences are protected from the moment of apprehension and that

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<sup>101</sup> Ibid para 25.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid para 27.

<sup>104</sup> Ibid. Similarly, Rule 11.3 of the Beijing Rules states that diversion involving community service or other services should only be done with the consent of the juvenile or his or her parents or guardians.

<sup>105</sup> Van Bueren, *supra* note 24 at 174.

<sup>106</sup> Article 37(b) of the CRC provides that: "The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest period of time;" Rule 17(1) (b) of the Beijing Rules states: "Restrictions on the personal liberty of the juvenile shall be imposed only after a careful consideration and shall be limited to the possible minimum."

they are not arbitrarily deprived of their liberty. These safeguards are essentially the right to the due process of the law which entails fair treatment and trial.<sup>107</sup> Due process demands that children in trouble with the law have a right to be notified promptly of why they are being apprehended or charged;<sup>108</sup> a right to legal representation;<sup>109</sup> the determination without delay by a competent and independent and impartial authority or judicial body;<sup>110</sup> a fair hearing;<sup>111</sup> the right not to confess to guilt;<sup>112</sup> and the right to privacy.<sup>113</sup> Some of these rights will be discussed in a little more detail shortly.

### 5.1 Right to Be Informed

From the moment of apprehension, there is need for a child to be informed as to the reasons he or she is being apprehended. The right to be given such information is in line with the principle of participation. The CRC explicitly provides for the minimum requirements of due process under Article 40. However, it does not expressly provide for the right to be informed in terms of reasons of apprehension<sup>114</sup> unlike the Beijing Rules under Rule 10.1 which states that once juveniles are apprehended, their parents or guardians should be notified immediately or if this is not possible, within the shortest possible time. The CRC Committee has however advised that the words “prompt and direct” in relation to notification of charges mean as soon as possible, and that is when the prosecutor or the judge initially takes procedural steps against the child. This should be taken to mean from the moment of apprehension. In order to effectively participate in the proceedings, every child must be informed promptly and directly about the charges against her or him in a language she or he understands.<sup>115</sup> It is also necessary that information about the juvenile justice process and possible measures to be taken by the court be given to the child. The proceedings should be conducted in an atmosphere enabling the child to participate and to express her/himself freely.<sup>116</sup> If appropriate, this can be done through the child’s parents or legal

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<sup>107</sup> UNICEF Innocenti Digest, supra note 16, at 5.

<sup>108</sup> Article 40(2) (b) (ii) of the CRC and Article 17(2) (b) (ii) of the ACRWC.

<sup>109</sup> Article 40(2) (b) (ii) of the CRC and Article 17(2) (b) (iii) of the ACRWC.

<sup>110</sup> Article 40(2) (b) (iii) of the CRC and Article 17(2) (b) (iv) of the ACRWC.

<sup>111</sup> Ibid.

<sup>112</sup> Article 40(2) (b) (iv) of the CRC.

<sup>113</sup> Article 40(2) (b) (vii) of the CRC and Article 17(2)(d) of the ACRWC.

<sup>114</sup> Godfrey Odongo, “The Impact of International Law on Children’s Rights on Juvenile Justice Law Reform in the African Context” in Julia Sloth-Nielsen(ed) *Children’s Rights in Africa: A Legal Perspective* (Aldershot: Ashgate, 2008) 147-163 at 177.

<sup>115</sup> Article 40 2(b)(ii) of the CRC.

<sup>116</sup> CRC General Comment No. 12, “The Right of the Child to be Heard”(2009) CRC/C/GC/12 para 60.

guardians, and it is also important that they be advised that they have the right to legal or other appropriate assistance in the preparation and presentation of juvenile's defence.<sup>117</sup>

It is important to note at this point that throughout the entire process, every child alleged as or accused of having infringed the penal law is to be presumed innocent until proven guilty according to law.<sup>118</sup>

The right of a child to have his or her parents or legal guardians informed of the charges is said to be qualified by the words "where appropriate" in order to protect the child's best interests.<sup>119</sup> Therefore, if a child wishes for such information to be withheld and it is in the child's best interests that the parents should not be informed, the State Party is under a duty to take those wishes into account and entitled to exercise its discretion in withholding such information.<sup>120</sup>

In informing the child of the charges being brought against him or her, the CRC has been criticized as not including the additional safeguard of having the same read "in detail" in a language which enables the child to understand the "nature and the cause" of the charge as is the case with the ICCPR under Article 14(3).<sup>121</sup> Article 17 (2) (c) of the ACRWC has this provision.<sup>122</sup> It is advised that the CRC should not be read in isolation but can be read together with other international instruments such as the ICCPR and ACRWC which demand that when children are being informed of the charges against them, it should not only be done in detail in a language in which they understand the charges but further that the information is communicated in a manner which a child is capable of understanding.<sup>123</sup>

The child is further guaranteed the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used under Article 40(2) (b)(vi) of the CRC and Article 17(2)(c)(ii) of the ACWRC.

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<sup>117</sup> Article 40 2 (b) (ii) of the CRC.

<sup>118</sup> Article 40 2(b) (i) of the CRC and Article 17(2)(c)(i) of the ACWRC.

<sup>119</sup> Van Bueren, *supra* note 24, at 177.

<sup>120</sup> *Ibid* at 178.

<sup>121</sup> *Ibid*.

<sup>122</sup> Article 17(2)(c)(ii) provides that " ... every child accused of having infringed the penal law shall be informed promptly in a language that he understands and in detail of the charge against him..."

<sup>123</sup> Van Bueren, *supra* note 24 at 178.

## 5.2 Right Not To Confess To Guilt

The CRC provides that a child should not be compelled to give testimony or to confess to guilt.<sup>124</sup> This is in line with Article 14 (3) (g) of the ICCPR. These provisions should be taken to mean the child can exercise the right to remain silent. The Beijing Rules under Rule 7 comprehensively sets out the basic procedural safeguards which include inter alia, the right to remain silent.

In terms of what amounts to confession, the CRC Committee has explained that the term “compelled” should be interpreted broadly and not limited to physical force or other clear violations of human rights but taken to include statements and actions meant to suggest the possibility of imprisonment for the child or the promise of an early release or reward once the child gives the “true story.”<sup>125</sup> Throughout the entire process, it is important that the child being questioned must have access to a legal or other appropriate representative, and must be able to request the presence of his/her parent(s) during questioning.<sup>126</sup> There is also need for the independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable.<sup>127</sup>

## 6. TRIAL SAFEGUARDS

As it has been established earlier, if a child accused of having infringed the penal law does not undergo the process of diversion, he or she is guaranteed the right to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law.<sup>128</sup> This means that the body determining the matter need not necessarily be judicial, provided that its procedures comply with the safeguards enshrined in the CRC.<sup>129</sup>

### 6.1 Special Courts Procedure

There are different approaches for the determination of children’s criminal responsibility, including the use of specialized (juvenile courts) on the one hand, or adult courts and or non-

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<sup>124</sup> Article 40 (2) (b) (iv) of the CRC.

<sup>125</sup> CRC General Comment No. 10, supra note 60, para 57.

<sup>126</sup> Ibid at 58.

<sup>127</sup> Ibid.

<sup>128</sup> Article 40(2) (b)(iii) of the CRC. Article 17(2) (c)(iv) of the ACWRC has a similar provision.

<sup>129</sup> Odongo, supra note 114, at 179.

judicial bodies on the other. What the CRC and Beijing Rules stress is that the body or authority concerned be competent and adheres to the aims of a juvenile justice system in international human rights law.<sup>130</sup> Some critics of such systems have observed that in the absence of a trained judge or magistrate, the likelihood of these systems going against established principles of child justice system are quite high.<sup>131</sup>

Whether formal or informal, a competent tribunal should ensure that the proceedings should be conducive to the child's best interests.<sup>132</sup> It is also important that the child exercises his or her right to participate in the judicial proceedings, a principle which has already been alluded to earlier. In addition to what has already been stated about participation, the Beijing Rules add that juvenile proceedings should be held "in an atmosphere of understanding" which allows the child to "participate...and express herself or himself freely."<sup>133</sup> The parents or guardians should normally be present and can participate in the proceedings. Their presence is important as it can provide psychological and emotional assistance to the child.<sup>134</sup>

The CRC and ACRWC also demand that the child should have access to legal representation or such other assistance unless this is not considered in the best interest of the child.<sup>135</sup> It is important in all this that the privacy of the child is respected.<sup>136</sup> The expeditious handling of cases is another aim of the child justice system.<sup>137</sup> This is an unconditional duty placed on States Parties which should never be dependent upon resources or lack thereof.<sup>138</sup>

### **6.1.1 Legal Representation**

The child accused of having infringed the penal law has a right to the presence of legal or other appropriate assistance under Article 40 (2)(b)(ii) of the CRC and Article 17 (2) (c) (iii) of the ACRWC. The ICCPR has a similar provision under Article 14 (2) (d). The CRC Committee has

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Beijing Rule 14.2.

<sup>133</sup> Rule 14.2.

<sup>134</sup> Van Bueren, supra note 24 at 180.

<sup>135</sup> Article 40(2) (b) (iii) of the CRC and Article 17(2) (c)(iv) of the ACWRC.

<sup>136</sup> Article 40 (2) (b) (vii) of the CRC and Article 17(2) (d) of the ACWRC.

<sup>137</sup> Article 2(b)(iii) of the CRC and Article 2(b)(iv) of the ACRWC. The ICCPR also emphasizes on the speedy adjudication of cases involving juveniles under Article 10(2)(b).

<sup>138</sup> Odongo, supra note 114, at 179.

left it to States parties to determine how this assistance is to be provided.<sup>139</sup> The emphasis however, is that it should be free of charge. The ICCPR has a better provision in that it expressly calls on States Parties to inform an accused person of this right to legal assistance and assign such assistance to him without payment by him if he does not have sufficient means to pay for it.<sup>140</sup>

When speaking of legal representation, it means the person involved can be someone with legal qualifications or not.<sup>141</sup> What is important is the quality of representation meaning the person must have adequate knowledge in legal matters especially those pertaining to juveniles.<sup>142</sup> As earlier alluded to, the presence of the parents or guardians and the legal assistance should be with the consent and in the best interest of the child and can, at times, be withheld.<sup>143</sup>

The child has the right to confront and cross-examine witnesses on his or her behalf under conditions of equality<sup>144</sup> at all stages of the proceedings. The child has also a right to appeal or have the judicial review of decisions<sup>145</sup> made by judicial or other competent authorities.

### **6.1.2 Right to Privacy**

The CRC under Article 16 prohibits the unlawful interference to a child's right to privacy. The ACRWC similarly protects the child's right to privacy. This right has been translated to include proceedings involving juveniles. Therefore, at all stages of the proceedings, the child's privacy is to be respected.<sup>146</sup> This implies that from the moment of apprehension until the proceedings are concluded, no information leading to the identification of the child offender are to be released to the public especially through the press.<sup>147</sup> The reason behind this rule is simply to avoid stigmatization of the child offender as this can have negative psychological and sometimes physical consequences to the child. The CRC Committee has taken note of the fact that in an effort to protect the child's privacy, some States choose to have the proceedings held in

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<sup>139</sup> CRC General Comment No. 10, supra note 60, para 49.

<sup>140</sup> CRC General Comment No. 10, supra note 60 para 49.

<sup>141</sup> CRC General Comment No. 10, supra note 60 para 49.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid at 181

<sup>144</sup> Article 40 2(b) (iv) of the CRC and Article 14 (2) (e) of the ICCPR.

<sup>145</sup> Article 40 2(b) (v) of the CRC; Article 2(c) (iv) of the ACRWC; Article 14(5) of the ICCPR.

<sup>146</sup> Article 40 (2)(b)(vii) of the CRC and Article 17(2)(d) of the ACWRC.

<sup>147</sup> CRC General Comment No. 10, supra note 60, para 64. Rule 8(2) of the Beijing Rules also has such a provision.

camera.<sup>148</sup> This practice is recommended by the Committee. Some scholars observe that in as much as such restrictions on juvenile proceedings decrease the chances of stigmatization, it is somehow better to have the same open to the public so as to avoid human rights cases violations go unnoticed.<sup>149</sup> However, it is submitted that this may impede the child's rehabilitation and reintegration back into society due to the stigmatization. Instead, better safeguards which oversee the proceedings by experts in the field could be put up to ensure the non-violation of the child's rights within the system.

The duty to maintain the child's privacy is extended to his or her criminal records.<sup>150</sup> The Beijing Rules are more elaborate on the matter and demand that only authorized persons such as researchers should have access to the same.<sup>151</sup> An additional safeguard on the issue of privacy found under the Beijing Rules demands that where a juvenile is subsequently involved in adult proceedings, the records of any juvenile proceedings should be inadmissible.<sup>152</sup>

## **7. SENTENCING JUVENILE OFFENDERS**

When a child is found to have committed an offence, the court or other authority handling such a child's offence has to be guided by certain principles laid down in international law when it comes to sentencing. A number of fundamental guiding principles are found in the CRC, ACRWC, ICCPR and Beijing Rules in relation to the sentencing of children. These principles aim at ensuring that children are treated in a manner consistent with their "age and the desirability of promoting the child's reintegration and his or her assuming of a constructive role in society."<sup>153</sup> Therefore, a sentencing policy for children which is punitive and primarily aimed at general deterrence runs counter to this principle.<sup>154</sup> The first comprehensive expression of this approach appears in Rule 17 of the Beijing Rules which provides that the reaction taken in the adjudication and disposition of a case involving a child should be to ensure that the child is dealt with in a manner appropriate to his or her well-being and proportionate to the offence and with due regard to his or her circumstances and the needs of society. This "principle of

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<sup>148</sup> Ibid at 65.

<sup>149</sup> Odongo, supra note 114, at 182.

<sup>150</sup> Ibid.

<sup>151</sup> Rule 21.1.

<sup>152</sup> Rule 21.2. The CRC Committee under General Comment No. 10, supra note 60, para 67 make a similar recommendation.

<sup>153</sup> Article 40 of the CRC. Article 17(3) of the ACRWC is phrased in a similar fashion as is Article 14 (4) of the ICCPR.

<sup>154</sup> Van Bueren, supra note 24, at 183.

proportionality” has been included in the CRC which provides that the adjudication and dispositions in the administration of juvenile justice must aim to “to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”<sup>155</sup> Further, Article 40(1) of the CRC stipulates that, a child alleged as, or accused of, or recognized as having infringed the penal law should be treated in a manner consistent with the promotion of their sense of dignity and worth and which reinforces their respect for human rights.<sup>156</sup> This means States Parties should promote non-custodial measures, and certain punishments should be done away with altogether.

### **7.1 Non-custodial Measures**

Since it has been observed that that deprivation of liberty should be used as a measure of last resort and, when resorted to, be for the minimum possible period, international instruments have recommended some methods of dealing with a child found to have infringed the penal law. These non-custodial measures should be made available to ensure that the child is dealt with in a manner appropriate to his or her well-being and proportionate to the offence and with due regard to his or her circumstances as discussed above. Article 40(4) of the CRC and Rule 18.1 of the Beijing Rules provide the following alternative sentencing options:

- care, guidance and supervision orders
- probation
- community service orders
- financial penalties, compensation and restitution
- intermediate treatment and other treatment orders
- orders to participate in group counseling and other similar activities
- orders concerning foster care, living communities or other educational settings

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<sup>155</sup> Article 40(4) of the CRC.

<sup>156</sup> Article 17(3) of the ACRWC has a similar provision. The JDL also provide that the juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles under Rule 1 the fundamental perspectives.

## 7.2 The Prohibition of Certain Sentences

Other than placing limitations on the deprivation of liberty of children, International human rights law also prohibits specific types of punishment from being imposed on children. Such punishment includes the use of corporal punishment, imposition of life imprisonment without the possibility of parole and the imposition of the death penalty.

The use of corporal punishment as a form of punishment for child offenders is prohibited as it constitutes cruel, inhuman or degrading treatment or punishment under Article 37(a) of the CRC and Article 17 (2)(a) of the ACRWC.<sup>157</sup> The Beijing Rules and the JDLs expressly provide that “juveniles shall not be subject to corporal punishment.”<sup>158</sup> Corporal punishment directly conflicts with children’s rights to dignity and physical integrity.

Life imprisonment without the possibility of parole on child offenders is equally condemned under the CRC and ACRWC.<sup>159</sup> This prohibition accords with the principle of limiting detention to the shortest period of time. The principle of detention as a last resort and for the shortest period of time would be violated if a prison sentence does not allow for the possibility of release or parole as it would be indefinite. Countries where children are handed down sentences of a minimum and mandatory sentencing<sup>160</sup> nature are also criticized as violating States’ obligation under the CRC.

The imposition of the death penalty for children who commit offences whilst under the age of 18 years is prohibited under Article 37(a) of CRC. A similar provision is found under Article 5(3) of the ACRWC. The ICCPR under Article 6(5) also prohibits not only the imposition of the death penalty on persons below the age of 18 years but also on pregnant women. The prohibition of

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<sup>157</sup> The CRC Committee has discussed this further under General Comment No. 8 “The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment” CRC/C/GC/8 (2007) para 11.

<sup>158</sup> Rule 17(3) and Rule 67 of the Beijing Rules and JDL Rules respectively.

<sup>159</sup> Article 37 (a) of the CRC provides that: “Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age.” The phrase “without possibility of release” in Article 37 of the CRC was added to accommodate States such as Japan who did not want to see an absolute prohibition on life imprisonment. This therefore means that State parties may sentence an individual who committed an offence when under the age of 18 years of age to life imprisonment, provided that such sentence is commensurate to the offence and the offender and there is an effective procedure in place for reviewing the sentence. The trend in many countries however has been that life imprisonment is used sparingly on children so as to comply with the “shortest appropriate period of time” provision under the CRC and other international instruments.

<sup>160</sup> CRC, Concluding Observations: Australia CRC/C/15/Add.79, 21 October 1997 para 22.

this type of punishment is reaffirmed in the Beijing Rules <sup>161</sup>and the Safeguards Guaranteeing Protection of the Rights of those facing the Death Penalty which provide that juveniles must not be sentenced to capital punishment for any offence.<sup>162</sup> The prohibition of the death penalty is in line with the underlying principle of the child's right to life survival and development and disregards the fact that children have the potential for change, growth and rehabilitation. This proscription is so universally practiced and accepted, it has reached the level of a norm of *jus cogens*.<sup>163</sup> Despite this, and "a conspicuous global evolution" towards the general abolition of the death penalty (even for adult offenders), the United States was the only nation as of October 2003, to have reportedly executed juvenile offenders. However, with cases such as *Roper v. Simmons*,<sup>164</sup> it appears even that nation is moving towards the abolition of the death penalty for juveniles. In that case, the Supreme Court held that it was unconstitutional to impose capital punishment for crimes committed while under the age of 18.

## 8. POST-SENTENCING MEASURES

It is important that considerations be made by States as to how deal with juveniles after sentencing especially where a custodial sentence has been served. This is because international law demands that judicial systems should ensure that measures that promote the child offenders' reintegration into society are in place.<sup>165</sup> The JDL's under Guideline 79 provide that:

all juveniles should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release. Procedures, including early release, and special courses should be devised to this end...

To this end, procedures, including early release, and special courses should be devised.<sup>166</sup> This means competent authorities should provide or ensure services to assist juveniles in re-

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<sup>161</sup> Rule 17.2 provides that "capital punishment shall not be imposed for any crime committed by juveniles."

<sup>162</sup> UN Doc ECOSOC Res 1984/50 adopted 25 May 1984.

<sup>163</sup> Van Bueren, *supra* note 24 at 189. Further the Vienna Convention on the Law of Treaties, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 under Article 53 provides that such a norm constitutes a general international law accepted by a large majority of States as a whole and is immune from derogation by states and is modifiable only by a norm of the same status.

<sup>164</sup> 543 U.S.551 (2005).

<sup>165</sup> For instance Article 40 (1) of the CRC provides that "States Parties recognize...the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." The ACRWC also states that "the essential aim of treatment of every child... if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation."

<sup>166</sup> Guideline 80 of the JDL's.

establishing themselves in society and to lessen prejudice against such juveniles.<sup>167</sup> These services should ensure, to the extent possible, that the juvenile is provided with suitable residence, employment, clothing, and sufficient means to maintain himself or herself upon release in order to facilitate successful reintegration.<sup>168</sup> Further, the Beijing Rules, under Rule 29(1) advise that efforts be made to provide semi-institutional arrangements, such as half-way houses, educational homes, day-time training centres and other such appropriate arrangements that may assist juveniles in their proper reintegration into society. The implications of this homogenous approach are clearly that community-based and family-focused initiatives are to be developed to a maximum. This cannot be a task that falls to juvenile justice professionals, but to a wide range of governmental and non-governmental bodies with mandates in these spheres.<sup>169</sup>

Unfortunately, the provisions found in the Beijing Rules and JDL's are not binding and mere recommendations to States. This coupled with the fact that some States parties to the CRC such as Zambia are developing countries with limited resources make it difficult to implement some of these measures.

## **9. CONCLUSION**

This chapter has focused on the normative framework of international law on child justice. The international community has established norms and standards pertaining to child justice under treaties such as the CRC and ACRWC. Further, non-binding instruments such as the Beijing Rules, the JDL's and the Riyadh Guidelines offer more guidance on an ideal child justice system. It has been observed that a separate judicial system for child offenders is paramount. What is common in all these instruments is that the child offender is seen as an individual capable of reforming and making a positive contribution to society. Such a system other than upholding fundamental human rights should always have the four principles of the best interests, participation, non-discrimination and the right to life, maximum development and survival underlying it. The specific rules and international norms discussed can be used as a guide to test the compatibility of the treatment and protection of children in conflict with the law. Countries such as Zambia which have ratified treaties such as the CRC and the ACRWC are duty-bound to implement the obligations contained therein. The next chapter therefore examines

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<sup>167</sup> Guideline 79 of the JDL's.

<sup>168</sup> Guideline 78 of the JDL's.

<sup>169</sup> UNICEF Innocenti Digest, supra note 16 at 15.

child justice in Zambia and whether there has been compliance with the international standards outlined above.

## CHAPTER THREE

### CHILD JUSTICE IN ZAMBIA

#### 1. INTRODUCTION

Chapter two concerned itself with the normative legal framework regarding child justice. It was observed that a number of principles have been established under international law to serve as guidelines on how a national child justice system should operate. With these principles in mind, this chapter will now focus on the administration of child justice in Zambia. From the outset and without necessarily preempting the matter, it is important to note that Zambia does not have one comprehensive piece of legislation dealing with children. Although the Juveniles Act deals with the issue of child offenders to a certain degree, other pertinent issues relating to the subject matter are scattered in a number of different pieces of legislation, most of which were enacted decades before the CRC and ACRWC. Such legislation include the Zambian Constitution, the Criminal Procedure Code, the Penal code, and the Probation of Offenders Act. Thus, what constitutes Zambia's child justice system is to be found in various statutes, and it is the totality of the Zambian law that will be the subject of examination and evaluation in the light of the internationally accepted principles and rules on child justice.

#### 2. CONSTITUTIONAL FRAMEWORK

As stated above, in Zambia, the laws related to children are disseminated among different statutes. One such piece of legislation is the Zambian Constitution, which is the supreme law of the land. Constitutional supremacy is provided for under Article 1(3). The provision goes on to state that "if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void." The effect of this legal supremacy is that the Constitution takes precedence over all other law in the country, for example, legislation or case law. The court in the case of *John Banda v The People*<sup>170</sup> observed that since the Constitution is "the supreme law of the land, its provisions cannot be subordinated to any other statute." This was a case where the imposition of corporal punishment as a sentence was being challenged as being cruel,

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<sup>170</sup>HPA/6/1998 or (2002) AHRLR 260 (ZaHC 1999)

inhuman and degrading, and therefore in contravention of the Constitution. The decision had important implications in terms of the imposition of the punishment as will be discussed later.

The Constitution generally guarantees a number of fundamental rights and freedoms which are “subject to such limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”<sup>171</sup> Although the Bill of Rights contains provisions of international law which have been domesticated over the years, the point still remains that some of the provisions do not give the same protection as international human rights law. For instance, the non-discrimination clause in Article 23 of the Constitution contains extensive limitations clauses and does not include status, age, birth and disability as factors against which a person can be discriminated. This has negative implications on children’s rights in terms of the non-discrimination principle enshrined in the CRC and the ACRWC.

In relation to the administration of justice, the general protection of such rights is found under Article 18 which should be taken to equally apply to juveniles. The due process rights found under this provision appear to satisfy those provided under international instruments like the ACRWC, the CRC, and the ICCPR observed in chapter two. To this end, every person in Zambia, accused of committing a crime, is presumed innocent unless the contrary is proved.<sup>172</sup> Such a person has the right to be informed, as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged.<sup>173</sup> The Constitution also provides that an accused person should be given adequate time and facilities for the preparation of his defence<sup>174</sup> and that the State is obliged to provide him with legal aid in accordance with the relevant Act if he or she cannot afford hiring a private legal practitioner. Unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.<sup>175</sup> Once the matter goes to trial, the accused has a right to cross-examine the prosecution witnesses and examine his own witnesses either through his legal representative or on his own.<sup>176</sup> If he or she cannot understand the

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<sup>171</sup> Article 11.

<sup>172</sup> Article 18(2) (a).

<sup>173</sup> Article 18(2) (b).

<sup>174</sup> Article 18(2) (c)

<sup>175</sup> Article 18 (1).

<sup>176</sup> Article 18 (2) (e).

language used at the trial, he or she has the right to have the assistance of an interpreter.<sup>177</sup>No person tried for a criminal offence shall be compelled to give evidence at the trial.<sup>178</sup>These provisions enhance participation rights recognized in international law.

Specific to children, the Constitution provides for the protection of the child's right to privacy under Article 11 (b). Under that provision, the trial of any person below the age of 18 is not open to members of the public as is the case with adults accused of committing crime. Other than this provision, no other provision exists specifically in relation to juvenile offenders. Nonetheless, since the due process rights apply with equal force to juveniles, it means the Constitution recognizes some of the principles underpinning children's rights. For instance, by recognizing the right to be informed of the charge and also the right to cross-examine witnesses either through a lawyer or own his own behalf, the child's right to participation is being recognized. The protection of the child's privacy during court proceedings is another important feature which enhances the best interests of the child and that of maximum survival and development.

Other provisions which are outside the realm of the administration of justice and appear to secure the child's right to maximum survival and development include the right to life of an unborn child<sup>179</sup> and the right of young persons not to be exploited.<sup>180</sup>The arbitrary deprivation of liberty for a person below the age of 18 is also proscribed except where there is an order of a court or the consent of his parent or guardian.<sup>181</sup>The best interest principle can also be seen to be embedded in these provisions even if it is not expressly referred to.

It is rather unfortunate that although Zambia attained its independence from Britain in 1964, most of the country's legal system remains under the straight-jacket of the British legal system of which common law is the defining characteristic.<sup>182</sup>As a result, international law faces stiff challenges infiltrating the defiant Zambian legal terrain as courts have been reluctant to make use of international law with some notable exceptions.<sup>183</sup>This is attributed to colonial heritage rather

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<sup>177</sup>Article 18 (2) (f).

<sup>178</sup>Article 18 (7).

<sup>179</sup>Article 12.

<sup>180</sup>Article 24.

<sup>181</sup>Article 13 (f).

<sup>182</sup> Michelo Hansungule "Domestication of international human rights law in Zambia" available at [www.pulp.up.ac.za/pdf/2010\\_17/2010\\_17.pdf](http://www.pulp.up.ac.za/pdf/2010_17/2010_17.pdf) [accessed 10th February, 2013].

<sup>183</sup>Ibid.

than Zambia's deliberate choice.<sup>184</sup> An exceptional case where the courts of law used their discretion to use undomesticated international law is that of *Longwe v Intercontinental Hotels Limited*.<sup>185</sup> The petitioner, a human rights and gender activist in Zambia, had gone to Lusaka's Intercontinental hotel with her partner. At the hotel, Sara's partner remained in the car in the garage while she went to the hotel to look for a friend. She was refused access by hotel security on the grounds that she was not accompanied by a male partner. Hotel policy dictated that it would disallow access to certain parts of the hotel to unaccompanied women. The restriction did not apply to unaccompanied men. In a bid to fight what she saw as discrimination based on gender and sex contrary to the non-discrimination clause in Article 23 of the Zambian Constitution, the petitioner decided to take the matter to the High Court. She argued that besides Article 23 of the Constitution, the conduct of the hotel constituted discrimination from which she is protected under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the African Charter on Human and Peoples' Rights. The respondent (Intercontinental Hotels Limited) averred that the petitioner had no right to cite conventions which Zambia had not yet domesticated in local law and which the Court, therefore, had no jurisdiction to apply. However, the Court was alive to its discretion to apply the undomesticated conventions which the country had ratified. In his seminal ruling,

Musumali J held:

It is my considered view that ratification of such documents by a nation state without reservations is a clear testimony of the willingness of the State to be bound by the provisions of such a document. Since there is willingness, if an issue comes before court by which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of that treaty or Convention in my resolution of the dispute.

The case was decided in favour of the petitioner. In his seminal decision, the judge held that:

In deciding an issue not covered by domestic legislation, a court could take judicial notice of international treaties and conventions, like the African Charter on Human and Peoples' Rights and the Convention on the Elimination of All Forms of Discrimination against Women, when they had been ratified without reservation by a state, indicating its willingness to be bound by their provisions ...

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<sup>184</sup> Ibid.

<sup>185</sup> 1992/HP/765; [1993] 4 LRC 221.

In other words, the judge used the case to point to the important concept of “judicial notice” which he said could be invoked as a tool in instances where the issue to be decided is not already covered by domestic legislation. In the particular case, however, discrimination that the judge was called upon to rule on was already covered specifically under article 23 of the Constitution. However, it cannot be denied that international instruments had persuasive value and helped in the ultimate decision of the Court.<sup>186</sup>

The first time international law was discussed at the Supreme Court, which is the highest of the land, was in 1995 in the case of *Sata v Post Newspapers Ltd and Another*.<sup>187</sup> The brief facts of the case are that, the applicant, a long-serving senior politician who held various positions indifferent governments since the country’s independence, petitioned the High Court alleging that he had been defamed by the *Post* newspaper. An editorial had stated that the plaintiff’s “political prostitution” prompted the former president to fire him. The defendants pleaded that the editorial had constituted fair comment on matters of public interest. Based on this, the defendants argued that article 20 of the Constitution which guaranteed freedom of expression and the right to information provided that no law shall make provision which derogated from the freedom of the press. In his judgment, Chief Justice Ngulube, made several references to international instruments as sources of law. Being the first time a member of the Supreme Court and, therefore, with power to bind inferior courts and create precedent, this case signified a major turning point in the use of international law by judges’ discretion in Zambia. After referring to the First and Fourteenth Amendments to the US Constitution, Chief Justice Ngulube opened his references to international law with this line:

It should be noted that there are international human rights instruments with similar provisions. For instance, an English court would take heed of art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms ...

The Chief Justice then quoted relevant parts of article 10 of the European Convention which guarantees freedom of expression. After that, he cited article 19 of the ICCPR. He then went on to cite the African Charter in the following terms:

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<sup>186</sup>Hansungule, supra note 182.

<sup>187</sup>[1995] ZMHC 1 (13 February 1995), available at <http://www.saflii.org/zm/cases/ZMHC/1995> [accessed 12th February, 2013].

In the case of Zambia and other African countries, there are also the more modest provisions of article 9 of the African Charter on Human and Peoples' Rights which declare the right of every individual to receive information and to express and disseminate his opinions "**within the law.**"

So, besides making copious references to United States jurisprudence, the country's most senior jurist easily sought the help of international law in the resolution of the dispute between a powerful politician and an equally powerful newspaper. However, his observation of the African Charter as providing for what he described as "more modest provisions of article 9," suggests that the Judge only had access to the Charter and may not have taken into account the decisions of the African Commission on claw back clauses ironically including those on Zambia in which the Commission decided that claw back clauses should not be interpreted in a manner that narrowed the scope of the Charter to protect rights.<sup>188</sup>

In terms of children's rights, there has been some recognition of the same by the judiciary as seen in cases such as that of *John Banda v The People* cited above.<sup>189</sup> In as much as there was no specific reference to international instruments such as the CRC and ACRWC in that particular case, the government revised the Penal Code and other relevant legislation as will be seen later. By doing this, the State has followed the principles found in international law discussed in the previous chapter, where it was noted that the application of corporal punishment is outlawed and the sentence considered a violation of human rights.

Overall, the Constitution does not adequately deal with children's rights thereby falling short of the standards set in the CRC and ACRWC. Moreover, the principles enshrined in these instruments namely the best interests of the child, non-discrimination, right to life, survival and maximum development and participatory rights are not expressly provided for in the Constitution.

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<sup>188</sup>*Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* (2000) AHRLR 321(ACHPR 1996); *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999). In both the two communications, Zambia unsuccessfully tried to invoke both the limitations in the Charter and its own law as escape clauses. In the latter case, the Commission stated (at para 42) that it "is of the view that the claw-back clauses must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of credence to violations of the express provisions of the Charter ..."

<sup>189</sup>HPA/6/1998 or (2002) AHRLR 260 (ZaHC 1999)

### 3. THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

It has already been established that the first important step in an ideal child justice system is to determine whether a child is capable of committing a particular crime and that the minimum age of criminal responsibility differs widely owing to history and culture. It was shown in chapter two that, the CRC Committee has made it clear that any age below 12 years is unacceptably low.

Section 14 of the Penal Code, states:

- (1) A person under the age of 8 years is not criminally responsible for any act or omission.
- (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission, he had capacity to know that he ought not to do the act or make the omission.
- (3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge

Section 14 (1) above should be taken to mean that a child aged below eight is not criminally responsible for any act or omission. The rebuttable presumption of criminal capacity for a child of 12 years old found under section 14 (2) makes it possible for a child under the age of eight to be found criminally liable. Zambia therefore has two minimum ages of criminal responsibility and this goes against international law standards which require a minimum age of 12 years in terms of criminal capacity. Section 14 (3) also has the potential of perpetuating discrimination between boy and girl child offenders.<sup>190</sup> This is particularly true for sexual offences where the boy child offender maybe discriminated against.<sup>191</sup> The effect of these provisions is that the child's right to survival and maximum development is undermined and discrimination arises in the treatment of child offenders. This goes against the well-established principles that have been enshrined in the CRC and other international instruments observed in chapter two.

The Penal Code (Amendment) Act No. 15 of 2005 introduced the definition of a child as “a person below the age of 16 years.” This amendment introduces a general definition of the child.<sup>192</sup> It is unclear whether it aims to amend the minimum age of criminal responsibility referred to earlier. If it does not, there is need for Zambia to harmonize its laws with international

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<sup>190</sup>Children In Need Network “UNCRC Monitoring Report” 2007, available at [www.crin.org/docs/UNCRCZambiat.doc](http://www.crin.org/docs/UNCRCZambiat.doc) [accessed 3<sup>rd</sup> January, 2013].

<sup>191</sup> Ibid.

<sup>192</sup> Section 131A of the Act.

law and raise criminal responsibility to at least the age of 16 years so as to be consistent with Act No. 15 and thereby satisfying the recommendations of the CRC Committee which call for a higher minimum age of criminal responsibility. The common law rebuttable presumption of *doli incapax* should also be abolished as was the case in Uganda.

#### 4. DIVERSION

As was observed in the preceding chapter, diversion programs are a means of ensuring a child's right to life, survival and development. They provide the means of protecting children from the general negative effects of criminal proceedings, including the stigma of conviction and sentence and retributive punishment. Diversion is recommended by a number of international instruments such as the CRC and the ACRWC.<sup>193</sup>

Within the Zambian context, there is insufficient reference to diversion. The closest the Juvenile's Act comes to doing this is in Section 9, under which a juvenile in need of care is taken to mean a person who-

- (a) is a juvenile who, having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either falling into bad associations or is exposed to moral or physical danger or beyond control; or
- (b) is a juvenile who-
  - (i) being a person in respect of whom any scheduled offence has been committed; or
  - (ii) being a member of the same household as a juvenile in respect of whom such an offence has been committed; or
  - (iii) being a member of the same household as a person who has been convicted of such an offence against a juvenile; or
  - (iv) being a female member of a household whereof a member has committed an offence under section one hundred and fifty-nine of the Penal Code in respect of another female member of that household; or
  - (v) frequenting the company of any reputed thief or prostitute; or

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<sup>193</sup> Article 40 (3) as interpreted by the CRC Committee in General Comment 10, supra note 60, at para 27.

(vi)lodging or residing in a house or the part of a house used by any prostitute for the purposes of prostitution, or is otherwise living in circumstances calculated to cause, encourage, or favour the seduction of the juvenile; requires care, control or protection.

The Act empowers any police officer or juveniles inspector having reasonable grounds for believing that a juvenile is in need of care to bring him before a juvenile court, unless he is satisfied that the taking of proceedings is undesirable in the interests of such juvenile, or that proceedings are about to be taken by some other person.<sup>194</sup> From the above, it appears that the best interests of the child are required to be taken into consideration.

Once a juvenile court is satisfied that any person brought before it is a juvenile in need of care, the court may make the following orders-

- (a) order his parents or guardian to enter into recognizances to exercise proper care and guardianship; or
- (b) commit him to the care of any fit person, whether a relative or not, who is willing to undertake the care of him; or
- (c) without making any other order, or in addition to making an order under either of the last two foregoing paragraphs, make an order placing him for a specified period, not exceeding three years, under the supervision of a probation officer or some other person appointed for the purpose by the court; or
- (d) order him to be sent to an approved school.<sup>195</sup>

This is one diversionary measure under the Act which diverts a child (who would otherwise be an offender) away from the formal criminal justice system and brings him or her under the care of the court. Another provision under the Act where diversion can be utilized is Section 73 (j) which empowers the Court to deal with a juvenile in any manner it deems fit. The problem is that this provision comes in when the child has already undergone formal court proceedings There is therefore need for the practice to be well-defined in accordance with international instruments.

As observed earlier, diversion helps the child avoid the stigma attached to conviction and sentence. Another advantage of this measure is that it prevents the potential child offender from

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<sup>194</sup> Section 10(1).

<sup>195</sup> Section 10(2).

engaging in criminal conduct as the social, economic, family and health problems contributing to the criminal conduct of the child are addressed and therefore preventing juvenile delinquency in line with the Riyadh guidelines. The orders referred to above are aimed at helping the child offender to understand and assume responsibility for his or her unlawful conduct, as well as to change and improve his future behavior. In this regard, the Juvenile's Act appears to be sensitive and responsive to the needs of children who find themselves on the wrong side of the law due to lack of parental care, which is in line with the spirit of the CRC.

The other issue not addressed in the Act, is the child's right to be heard regarding his or her consent to the decision to be diverted from the criminal justice system under the provisions above. The decision appears to lie entirely in the hands of the court. Under international law, the informed consent of the child is of paramount importance in order to respect the child's autonomy. By getting his or her consent, the courts would be helping him or her assume responsibility for his or her conduct. In addition, there is a likelihood that a child who consents to diversion, is most likely to be more cooperative with the authorities involved and abide by the orders of the court, than one who was never given an opportunity to voice his or her opinion on the matter.

## **5. PRE -TRIAL SAFEGUARDS FOR JUVENILES ACCUSED OF CRIME**

The purpose of pre-trial safeguards is to ensure that children accused of having committed offences are protected from the moment of apprehension and that arbitrary deprivation of their liberty is avoided. As discussed earlier, the Zambian Constitution is one piece of legislation that offers such protection.

The Constitution generally prohibits the deprivation of liberty save under certain circumstances.<sup>196</sup> As noted earlier, the due process rights such as the right to be notified promptly of why one is being apprehended or charged;<sup>197</sup> the right to legal representation;<sup>198</sup> the right to

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<sup>196</sup> Article 13(1) provides that "a person shall not be deprived of his personal liberty except as may be authorized by law in any of the following cases:(a) in execution of a sentence or order of a court, whether established for Zambia or some other country, in respect of a criminal offence of which he has been convicted; (b) in execution of an order of a court of record punishing him for contempt of that court or of a court inferior to it..."

<sup>197</sup> Article 18(2) (b).

<sup>198</sup> Article 18(2) (c).

remain silent,<sup>199</sup> are covered in the Constitution and other pieces of legislation such as the Juvenile's Act. Although some of these constitutional provisions are not specific to juveniles, they apply to all Zambian citizens, and it shall therefore be taken that they equally apply to children.

### **5.1 Arrest and Detention of Child Offenders**

Section 58 to 60 of the Juveniles Act sets the following basic requirements for juveniles alleged to have infringed the law:

- detention of alleged child offenders should be avoided;<sup>200</sup>
- if detention cannot be avoided, children must be kept separately from adults, and girls must be placed under the care of a female officer;<sup>201</sup>
- the child should as far as possible be kept in a place of safety;<sup>202</sup>
- the officer in charge of the police station must show to the court why detention is required and why the child could not have been released on own recognizance or police bond.<sup>203</sup>

The above appear to satisfy the standards and norms set out in the CRC under Article 37(b) and Rule 17(1) (b) of the Beijing Rules which generally proscribe the detention of children and only allow the same be used as a measure of last resort and for the shortest period of time. The detention of any person, especially a child, is likely to have negative physical and psychological effects. In discouraging the detention of children and appealing for safety measures to be put in place in the event that detention cannot be avoided, Sections 58-60 appear to adequately protect the child's right to life, survival and maximum development. The best interests of the child are also considered.

When it comes to the remand of arrested juveniles, Sections 60, 61 and 62 of the Juvenile's Act demands:

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<sup>199</sup> Article 18 (7).

<sup>200</sup> Section 58.

<sup>201</sup> Ibid.

<sup>202</sup> Section 60.

<sup>203</sup> Ibid.

- that they may be remanded to a place of safety but may under certain conditions (unruliness or impracticability) be remanded to a remand prison;
- they may also be remanded to any other type of dwelling identified by the Commissioner; and
- juveniles must appear before the court that gave the order for remand every 21 days.

## **5.2 Right to Be Informed**

It has been shown that under Article 18(2) of the Constitution, every person accused of infringing the law has to be informed of the charge. Article 13 also demands that “any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.”

These Constitutional guarantees are quite important and it should be taken that the inclusive word “detention” under Article 13 (2) means that from the moment of apprehension, the juvenile needs to be given reasons as to why he or she is being detained. Article 18 applies to the right to be informed as regards the charges and not mere apprehension. This is in line with international instruments such as the CRC and the Beijing Rules which impose a further obligation on the parents or guardians of the child to also be informed. Once charges have been brought against the juvenile, there is no provision in either the Constitution or the Juvenile’s Act to have the child’s parents or legal guardians informed of the charges being brought against the child. However, it will be shown shortly that a practice has developed in which the presence of the juvenile’s parents or guardians during questioning (which can include information on the charges) at the police station is considered desirable.

The Constitution provides for the free assistance of an interpreter if the child cannot understand or speak the language used<sup>204</sup> as is the case under Article 40(2) (b)(vi) of the CRC and Article 17(2)(c)(ii) of the ACWRC. The above provisions under Zambian law all enhance the child’s participation rights recognized in international law.

## **5.3 Right Not to Confess To Guilt**

It was seen in chapter two that the CRC provides that a child should not be compelled to give testimony or to confess to guilt and that the Beijing Rules go a step further by expressly

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<sup>204</sup> Article 18 (2) (f).

stipulating that a child has the right to remain silent under Rule 7.<sup>205</sup> It was also noted that throughout the entire process, it is important that the child being questioned must have access to a legal or other appropriate representative, and must be able to request the presence of his/her parent(s) during questioning.<sup>206</sup>

Under Zambian law, it has been seen that the Constitution does not allow for one to be forced into giving evidence during trial<sup>207</sup> and the presumption of innocence is also enshrined.<sup>208</sup> The Juvenile's Act is silent on the right not to confess either during investigation or at trial. The presence of parents is only referred to during court proceedings as will be seen shortly. Judicial decisions reveal that the court will not allow for confessions obtained under duress and the presence of parents or guardians whenever statements are being recorded from a juvenile is favoured. This is in line with international standards and norms. Thus, in *Mbewe v The People*,<sup>209</sup> the appellant, a juvenile, had been convicted for aggravated robbery in the lower court. On appeal to the Supreme Court, he challenged the conviction and sentence and particularly claimed he did not make the confession statement at the police station voluntarily. The confession was successfully expunged as it was found to have been obtained involuntarily. Attention was also drawn to the absence of a parent or guardian of the appellant at the police station when the statement of the appellant was recorded and a request was being made for the court to lay down a general rule for the guidance of the police in the taking of statements from juveniles. However, the court was reluctant to lay down any judges' rule in this regard as it pointed out that although the Juveniles Act stressed the importance on the attendance whenever possible, during all stages of the proceedings in court, of a parent or guardian of a juvenile there is no such provision in the Act for the attendance of a parent or guardian at a police station during the taking down of statement of a juvenile. Nonetheless, the court pointed out that it is desirable in the interests of both the police and the juvenile to have a parent or guardian whenever possible to be present at the police station when a statement is being taken from a juvenile.

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<sup>205</sup> See supra note 110.

<sup>206</sup> See supra note 112.

<sup>207</sup> Article 18 (7).

<sup>208</sup> Article 18 (2) (a).

<sup>209</sup> (1976) Z.R 317 (S.C).

In another case of *The People v. Nephath Dimeni*,<sup>210</sup> the Court in excluding the confession statement allegedly made by the juvenile appellant observed that:

Although the Supreme Court has accepted the desirability to have a parent or guardian at the police station when a statement is being taken from a juvenile it is perhaps unfortunate that Zambia still operates under the pre-1964 English Judges Rules... The pre- 1964 Judges Rules have no provisions for the presence of a parent or guardian at the Police station during the interrogation of children and young persons which is specifically provided for in the revised English Judges Rules...

The Judges' Rules referred to above are part of Zambia's common law system inherited from British colonial rule. A number of rules are established thereunder including an accused's right to remain silent and not to confess to guilt. They are not rules of law but rather rules of practice drawn up for the guidance of police officers. Faced with an objection to a confession, the Court in the case of *Shamwana and 7 others v The People*<sup>211</sup> observed that:

Judges' Rules ...were designed to serve as a strong reminder to the police to ensure ...the giving of the usual warn and caution to a defendant or a suspect so as to inform or remind him of his right to exercise a free choice to speak or to be silent...

Therefore police officers have a duty to inform all suspects, including juvenile suspects, that they have the right to remain silent when being questioned. However, once the matter goes to trial, the Court has the discretion whether or not to exclude a confession obtained in circumstances where the accused is not informed of his or her right to remain silent or obtained in breach of the Judge's Rules generally.<sup>212</sup>

From the above, it appears that the Courts are complying with international law standards when it comes to matters of confessions and the required presence of parents or guardians for alleged child offenders. This is all in the best interests of the child. The better position however, would have been to have an express provision in the Juvenile's Act allowing for the matters alluded to above so as to bring it into conformity with the CRC and Beijing Rules. As things stand, it is very easy for law enforcement officers not to abide with judicial decisions as there is no statutory provision to rely on.

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<sup>210</sup>(1980) Z.R 234 (H.C).

<sup>211</sup>(1985) Z.R. 41 (S.C.).

<sup>212</sup> Thus in the Shamwana case referred to above, the Court observed that "the exercise of a trial court's discretion whether to exclude or admit confessionary evidence will always depend on the facts of each particular case."

## 6. TRIAL SAFEGUARDS

As it has been established earlier, if a child accused of having infringed the penal law does not undergo the process of diversion, he or she is guaranteed the right to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law.<sup>213</sup> It has been observed that under article 18 (1) of the Zambian Constitution, if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. It is now time consideration was made to court proceedings as they relate to juveniles.

### 6.1 Juvenile Courts

Chapter two revealed that international law has evolved in a manner which demands that States establish a distinct system of criminal justice that treats children in a manner appropriate to their ages and levels of maturity.<sup>214</sup>

Particular to Zambia, the Committee on the Rights of the Child in its response<sup>215</sup> to the Zambia State Party Report<sup>216</sup> on the implementation of the Convention on the Rights of the Child was quite direct in its recommendations on improving child justice. The Committee stated inter alia, the following:

... the State party takes all appropriate measures to implement a juvenile justice system in conformity with the Convention, in particular Articles 37, 39 and 40 (and other international instruments) and that the State party establish an adequate number of juvenile courts across the country and appoint trained juvenile judges.

Although enacted way before the CRC came into effect and an import of the colonial era, the Juveniles Act provides for the establishment of a Juvenile Court under Section 63.<sup>217</sup> Therefore,

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<sup>213</sup> Article 40(2)(b)(iii) of the CRC. Article 17(2)(c)(iv) of the ACWRC has a similar provision.

<sup>214</sup> See supra note 116.

<sup>215</sup> Committee on the Rights of the Child (2003) Consideration of reports submitted under Article 44 of the Convention, 33rd Session, 19 May – 6 June 2003, CRC/C/15/Add.206.

<sup>216</sup> Government of the Republic of Zambia (2002) Initial and first periodic Report on the Implementation of the UN Convention on the Rights of the Child, Lusaka.

<sup>217</sup> The said section provides “A subordinate court sitting for the purposes of-

(a) hearing any charge against a juvenile; or

(b) exercising any other jurisdiction conferred on juvenile courts by or under this or any other Act is, in this Act, referred to as a juvenile court.”

all magistrate courts are able to sit as juvenile courts whenever a juvenile is alleged to have committed an offence. Section 11 of the Criminal Procedure Code empowers the High Court to sit as a juvenile court in cases where certain offences are alleged to have been committed by children. Whether in the magistrate's courts or the High Court, special procedures are to be followed and in chapter two, it was seen that Article 12 (2) of the CRC grants a child participatory rights in any judicial or administrative proceeding affecting him or her.<sup>218</sup> In addition, there is need that juvenile proceedings be conducted "in an atmosphere of understanding" which allows the child to "participate...and express herself or himself freely."<sup>219</sup> It appears to create such an environment includes having a minimal number of people in the courtroom and to this end, under Section 119 of the Juveniles Act, only the following persons may be present during the proceedings:

- (a) Members and officers of the court i.e. ushers, clerks, interpreters, lawyers etc.
- (b) Parties to the cause, their lawyers, witnesses and other persons directly concerned with the case.
- (c) Bona fide representatives of newspapers and news agencies.
- (d) Such other persons as the court may specifically authorise to be present.

During proceedings, the plea will be taken in the normal way as would be with an adult and the court will ask the juvenile if he admits the charge.<sup>220</sup> If he does then the court will record a plea of "charge admitted". If not, a plea of "charge not admitted" will be recorded. Where the magistrate presiding is a magistrate class of not long standing or any other magistrate and the juvenile isn't legally represented, a trial should be conducted notwithstanding that the juvenile admitted the charge.<sup>221</sup>

If the presiding magistrate is not a magistrate Class III of not long standing or the juvenile has not admitted the charge, the juvenile must be given the opportunity to cross examine the prosecution witnesses and the opportunity to have his parents or guardians present and to cross

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<sup>218</sup> Article 4(2) of the ACRWC has a similar provision.

<sup>219</sup> Rule 14.2. of the Beijing Rules.

<sup>220</sup> Section 64(2).

<sup>221</sup> Section 64(3).

examine the prosecution witnesses also.<sup>222</sup> This appears to satisfy the requirement under international standards that the right to participate can be either directly, or through a representative or an appropriate body. However it appears there are no safe guards to ensure that the child avoids self-incrimination.

If the juvenile makes statements to the prosecution witnesses instead of asking questions, the court is duty bound to question the prosecution witnesses on behalf of the juvenile along the lines the juvenile suggests.<sup>223</sup>

In addition to the above special courts, and as a response to the lack of modern legislation regarding child justice, Child Friendly Courts (CFCs) were recommended as part of the 2000 Situational Analysis.<sup>224</sup> Just like the juvenile courts discussed in chapter two, a child friendly court is a specialized court which aims to conduct trials of children in a manner that reinforces their respect for human rights and fundamental freedoms of others.<sup>225</sup> In Zambia, the CFC was centralized at one court in Lusaka as a pilot project sponsored by UNICEF and other stake holders.<sup>226</sup> It was in practice until 2004, but mostly due to problems of magistrates' turnover, the centralization of cases was then suspended.<sup>227</sup> The situation as it currently stands is therefore that stipulated under the Juvenile's Act where magistrates courts sit as such whenever there is a case involving juveniles.

An observation has been made that the court environment is not as friendly as it should be. For instance, one social worker described the treatment of children by prosecutors as "harsh and not child friendly".<sup>228</sup> This inevitably bears negatively on the child's right to participate in the proceedings. It is submitted that this harsh environment is probably due to the fact that the principle of participation has not been expressly incorporated in the Juvenile's Act and so a child offender's rights and needs are sidelined. It would have been better to have an additional provision that all proceedings involving children be conducted in a friendly atmosphere so as to

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<sup>222</sup> Section 64(4).

<sup>223</sup> Section 64(5).

<sup>224</sup> Muntingh, supra note 10, at 34.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Human Rights Violations in Zambia Part III: Child rights' situation "Shadow Report UN Human Rights Committee," available at [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/omct\\_zambia2.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/omct_zambia2.pdf) [accessed 10<sup>th</sup> February, 2013].

<sup>228</sup> Ibid.

meet the needs of the child according to the level of maturity. The fact that most of the prosecutors have not received specialized training in how to deal with child offenders does not help matters.<sup>229</sup>

The overall picture appears to be that the law and juvenile proceedings in Zambia meet the expectations of international standards and norms. Nonetheless, considering what has been noted regarding the harsh environment of the proceedings, there is still need for Zambia to firstly amend its laws by expressly providing for the principle of child participation in the Act and then actually have the same implemented on the ground so as to satisfy its obligations to the CRC and the ACWRC as well as other international instruments.

### **6.1.1 Legal Representation**

It was observed in chapter two that when it comes to the issue of legal representation for child offenders, international law standards demand that the child has the right to have adequate time and facilities for the preparation of their defence<sup>230</sup> and further communicate with counsel of their choice.<sup>231</sup>

In Zambia, the Constitution guarantees the right to legal aid representation in accordance with the relevant Act where an accused cannot afford the services of a private practitioner.<sup>232</sup> Adequate preparation of an accused's defence is also guaranteed in the Constitution.<sup>233</sup> Sections 8 and 9 of the Legal Aid Act<sup>234</sup> empower the subordinate court and High Court respectively, to order that a legal aid certificate be granted to any person accused of committing an offence in the event that he or she does not have the means to hire a private practitioner. The grant of a legal aid certificate will also apply when the court deems it fit in the interests of justice to do so.<sup>235</sup> Upon receipt of a legal aid certificate issued by the Court, the Director of the Legal Aid Board shall, in consultation with the secretary of the Law Association of Zambia, and subject to section 20A, assign a practitioner to the person named in the certificate for purposes of the criminal

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<sup>229</sup> Muntingh supra note 10 at 35.

<sup>230</sup> Article 40(2) (b) (ii) of the CRC and Article 17(2)(c)(iii) of the ACWRC.

<sup>231</sup> Article 14 (3) (b) of the ICCPR.

<sup>232</sup> Article 18 (2)(d).

<sup>233</sup> Article 18 ((2)(c).

<sup>234</sup> Chapter 34 of the Laws of Zambia.

<sup>235</sup> Section 8(1) (b).

proceedings to which the certificate relates.<sup>236</sup>In practice, very few children appear with legal representation in the subordinate courts. The under-funding of the Legal Aid Board makes it virtually impossible for children to appear in court with legal representation.<sup>237</sup> It is only in the High Court where offences such as murder and aggravated robbery are dealt with that legal aid representation is granted.

During trial, the child has the right to cross-examine prosecution witnesses through a lawyer or on his or her own or the parents as has been established earlier.<sup>238</sup>In order to uphold the best interests of the child,<sup>239</sup>the use of a social welfare officer appears to play a pivotal role especially when it comes to the sentencing of a child offender as shall be seen in the section relating to sentencing of juveniles. This is important and within the spirit of the CRC and ACRWC which demand that other appropriate assistance maybe rendered to the child offender during the trial and the use of a social welfare officer falls into the category of such assistance.

As alluded to in chapter two, the presence of the parents or guardians and the legal assistance should be with the consent and in the best interest of the child and can, at times, be withheld. Zambian legal provisions do not cover this aspect. Instead of viewing the child as an independent rights holder, the child appears to still be considered as someone who is vulnerable and on whose behalf decisions have to be made without giving ear to his or her views on any subject, and in this particular regard, in relation to criminal proceedings.

In light of the above, the government of Zambia has to amend its laws in such a way that the child is guaranteed legal representation or other such qualified personnel and is able to fully participate in the proceedings. By doing that, the need for an effective and fair trial as demanded by international standards will be met.

### **6.1.2 The Right to Privacy**

The child's right to privacy which implies inter alia, that the proceedings are to be held in camera and the child's identity is not to be divulged by the authorities or the press at all stages of the

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<sup>236</sup>Section 8(7) and 9(7). Section 20A provides for the registration and de-registration of practitioners who desire to be registered for purposes of providing legal representation under the Act.

<sup>237</sup> Muntingh supra note 10, at 34.

<sup>238</sup> Section 64(4) of the Juveniles Act and Article 18 (2) (e) of the Zambian Constitution.

<sup>239</sup> Section 64 (7).

proceedings<sup>240</sup> appears to be satisfied under Zambian law. The Juvenile's Act provides that newspaper reports, radio broadcasts, TV programmes should not reveal the name, address or school or any other particulars calculated to lead to the identity of the juvenile involved in the proceedings either as a defendant or a witness.<sup>241</sup> The fact that the law is restrictive of which persons may be present during such proceedings<sup>242</sup> adds to the privacy that a child is entitled to. Therefore, in this regard, the country has somewhat satisfied the international law requirement of the right to privacy. The only concern is that there is no additional safeguard in the law providing that where a juvenile is subsequently involved in adult proceedings, the records of any juvenile proceedings should be inadmissible.<sup>243</sup> In addition, the full names of child offenders are used in the record of proceedings and in the law reports and the anonymity of the children is therefore not maintained. As such, the whole purpose of protecting the privacy of the child tends to be defeated. This means that a child convicted of a crime carries the stigma of a criminal record for life.

## **7. SENTENCING PROCEDURES FOR JUVENILE OFFENDERS**

A number of fundamental guiding principles are found in both the CRC and Beijing Rules in relation to the sentencing of children and there is a preference for the use of alternative non-custodial measures over traditional punitive measures for child offenders especially those who do not present a serious threat to society. Therefore the sentencing of child offenders should be the kind that promotes the child's reintegration and his or her assuming of a constructive role in society,<sup>244</sup> not a punitive and deterrent one.

### **7.1 Non-custodial Measures**

Chapter two revealed that international law demands that the deprivation of liberty should be used as a measure of last resort and when resorted to, it should only be for the minimum possible period.<sup>245</sup> In this regard state parties to the CRC are obliged to develop alternative sentencing

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<sup>240</sup> Article 40 (2)(b)(vii) of the CRC and Article 17(2)(d) of the ACWRC.

<sup>241</sup> Section 123.

<sup>242</sup> Section 119.

<sup>243</sup> Rule 21.2 of the Beijing Rules.

<sup>244</sup> Article 40 of the CRC.

<sup>245</sup> Article 37(b) of the CRC and Rule 17(1) (b) of the Beijing Rules.

measures to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence.

Within the *Zambian* context, when a charge is proved against a juvenile offender, he or she should be asked if he/she has anything to say in mitigation. His parent/guardian can also mitigate.<sup>246</sup> Section 64(7) of the *Juvenile's Act* demands that once a charge is proved and:

... Before deciding how to deal with him, the court shall, if practicable, obtain such information as to his general conduct, home surroundings, school record, and medical history as may enable it to deal with the case in the best interests of the juvenile, and may put to him any question arising out of such information...

Therefore before making any sentencing order, the court is required to obtain a social welfare report on the juvenile in order to secure the best interests of the child. This satisfies the best interests principle discussed in chapter two. Where there is no social welfare officer, the information can be sought from the juvenile's parent/ guardian (not the police). The parent/guardian is duty bound to attend the proceedings if he resides within a reasonable distance of the court unless the court is satisfied that it would be unreasonable to require his attendance (e.g. he is wheelchair bound). For the purpose of obtaining such information or for special medical examination or observation, the court may from time to time remand the juvenile on bail or to a place of detention so, however, that he appears before a court at least once in every twenty-one days.<sup>247</sup>

The *Juvenile's Act* demands that imprisonment for juvenile offenders be used sparingly and to this end, Section 72 demands that:

- (1) No child shall be sentenced to imprisonment or to detention in a detention camp.
- (2) No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other manner.
- (3) A court shall not order a child to be sent to a reformatory unless the court is satisfied that having regard to his character and previous conduct, and to the circumstances of the offence, it is expedient for his reformation and the prevention of crime that he should undergo a period of training in a reformatory.

Section 73 provides that in the event that a charge has been proved against a juvenile the court shall take into consideration the manner in which the case should be dealt with, namely:

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<sup>246</sup> Section 64(7) of the *Juvenile's Act*.

<sup>247</sup> *Ibid.*

- (a) by dismissing the charge;
- (b) by making a probation order in respect of the offender;
- (c) by sending the offender to an approved school;
- (d) by sending the offender to a reformatory;
- (e) by ordering the offender to be caned;
- (f) by ordering the offender to pay a fine, damages or costs;
- (g) by ordering the parent or guardian of the offender to pay a fine, damages or costs;
- (h) by ordering the parent or guardian of the offender to give security for the good behaviour of the offender;
- (i) where the offender is a young person, by sentencing him to imprisonment;
- (j) by dealing with the case in any other manner in which it may legally be dealt with.

Other than section 73 (1)(e) and (i) which allow for caning and imprisonment, the above sentencing options appear to be in line with what is recommended under international law.<sup>248</sup> Moreover, Section 73 (2) provides that whenever a juvenile is found guilty of an offence, a reformatory order can be substituted for imprisonment. However, reformatory orders are considered to be quite harsh probably because this is a form of institutionalization or imprisonment. However, the same seem to be highly favored by lower courts unlike the superior courts. An illustration of this is seen in the case of *Gedion Musonda and Chisha Chimimba v The People*.<sup>249</sup> Three juvenile offenders aged 16, 15 and 13 were found guilty of burglary and theft. The trial magistrate on the recommendation of a probation officer ordered that they be sent to a reformatory. They were first offenders, had pleaded guilty and the amount involved was recovered. It was held on appeal, that a reformatory order is a very severe punishment and should only be made when other methods of reformation are in the circumstances, entirely inappropriate

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<sup>248</sup>Article 40(4) of the CRC and Rule 18.1 of the Beijing Rules.

<sup>249</sup>(1979) Z.R. 53 (S.C.).

or have proved to be in vain in the past. The learned trial magistrate was condemned for not considering the provisions of s. 72 (3) of the Juveniles Act.<sup>250</sup> As a result, the Supreme Court set the reformatory order aside and instead substituted it with a probation order.

Further, in the case of *Francis Mayaba and Others v The People*,<sup>251</sup> a juvenile was convicted with 2 others for murder. A reformatory order was passed by the High Court in respect of the juvenile. On appeal, the Supreme Court set aside the murder conviction with that of manslaughter and further the reformatory order was set aside. Instead the court committed the offender to a probation officer for supervision for 1 year but since he had been in a reformatory for over a year, the Court decided that this was not necessary and he should therefore be released immediately.

From what has been alluded to above, it would appear that the country is complying with international law standards of not imprisoning child offenders or sending them to institutions and the practice is especially condemned by the Supreme Court. The downside is that sometimes, in cases such as the ones referred to above, even if the child decides to appeal the sentence, by the time his or her appeal is heard, he or she would have served their sentence. While awaiting the determination of the appeal, the juvenile would be remanded in prison and exposed to adult convicts thereby risking exposure to hard core crime.

To satisfy international standards even more, it would be better if the Juvenile's Act covered community service orders, or orders to participate in group counseling and other similar activities as sentencing options. Orders concerning foster care, living communities or other educational settings could also be included to ensure compliance with international law standards.

## **7.2 The Prohibition of Certain Sentences**

In chapter two, it was seen that other than placing limitations on the deprivation of liberty of children, international human rights law also prohibits specific types of punishment from being imposed on children. This kind of prohibited punishment can be in the form of corporal

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<sup>250</sup> The said section provides that: "A court shall not order a child to be sent to a reformatory unless the court is satisfied that having regard to his character and previous conduct and the circumstances of the offence, it is expedient for his reformation and the prevention of crime that he should undergo a period of training in a reformatory."

<sup>251</sup>(S.C.Z. Judgment No. 5 of 1999).

punishment, life imprisonment without the possibility of parole and the imposition of the death penalty.

Under the Constitution of Zambia, a person shall not be subjected to torture or to inhuman or degrading punishment or other like treatment.<sup>252</sup> Moreover, it is provided that all young persons shall be protected against physical or mental ill treatment, all forms of neglect, cruelty or exploitation.<sup>253</sup> Following a 1999 Supreme Court ruling in *John Banda v The People*,<sup>254</sup> corporal punishment is unlawful. The case involved an appeal challenging a sentence whereby a magistrate ordered that a 19 year-old be given ten strokes with a cane after being convicted for damage to property. The Supreme Court of Zambia ruled that corporal punishment, was in direct conflict with Article 15 of the Zambian Constitution and therefore unconstitutional. The court specifically declared null and void Sections 24 (c) and 27 of the Penal Code Act which allowed for corporal punishment.

As a consequence of the Banda Decision, several provisions on corporal punishment were repealed through a series of amendments to the relevant penal legislation such as the Criminal Procedure Code (Amendment) Act 9 of 2003, Penal Code (Amendment) Act 10 of 2003, Education (Amendment) Act 11 of 2003, Prisons (Amendment) Act 16 of 2004. All these amendments were meant to expunge the penalty of corporal punishment in line with the judgment. However, it would appear the legislature ignored corporal punishment in section 73(1) (e) of the Juveniles Act referred to above as well as the Local Courts Act.<sup>255</sup> Sections 15 to 18 of this Act provide for the penalty of corporal punishment for anyone found to have acted or omitted to act contrary to African customary law as determined by a local court within its jurisdiction. Despite this, an appropriate interpretation of the law should be as follows: the Banda case law should apply and prevail over those provisions. Although a clear overall prohibition (accompanied with penalties) of corporal punishment in the legislation is also necessary in order for Zambia to fully bring its laws in conformity with international law standards.

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<sup>252</sup> Article 15 under Act No. 1 of 1991 (amended by Constitution (Amendment) Act, No. 18 of 1996.

<sup>253</sup> Article 24(2) of the Constitution.

<sup>254</sup> HPA/6/1998.

<sup>255</sup> Chapter 29 of the Laws of Zambia.

It has been observed that life sentences without the possibility of release for offences committed by juveniles are proscribed by international law as observed in chapter two.<sup>256</sup> In Zambia, in as much as the Juvenile's Act generally prohibits the imprisonment of juveniles as seen above, ambiguous statutory language exists in some statutory laws which suggests that life imprisonment without the possibility of release for juvenile offenders can be imposed.<sup>257</sup> The law in question provides that the court may sentence the juvenile to be detained at the "President's pleasure;" and when so sentenced, the convict could be detained in such place and under such conditions as the President may direct. No limitation in terms of place and time period of detention is précised and as such, a child offender could end up spending his or her life in detention. At the time of this research, there were no cases recorded of juveniles that had been handed down such a sentence. Nonetheless, there is need for Zambia to have legislation prohibiting the use of penalty at the President's pleasure as recommended by the CRC Committee.

The previous chapter also revealed that the imposition of the death penalty for children who commit offences whilst under the age of 18 years is prohibited under international law<sup>258</sup> which is in line with the underlying principle of the child's right to life survival and development.

According to section 25(2) of the Zambian Penal Code, a person below 18 cannot be condemned to the death penalty. The said section provides that "in lieu thereof the court shall sentence him to be detained during [sic] the President's pleasure and when so sentenced he shall be liable to be detained in such a place and under such conditions as the President may direct."

Since there is no limitation in terms of the place and time period of detention it means that such a sentence is indeterminate and a child offender who receives such a sentence is basically in the same situation as one who receives a life sentence. As stated earlier, there is need for this statutory provision to be done away with.

## **8. POST SENTENCING MEASURES**

Although there is not much information regarding post sentencing measures for juveniles under international law save for what is contained in the JDLs and was referred to briefly in the

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<sup>256</sup> See supra note 144.

<sup>257</sup> Section 25(2) of the Penal Code.

<sup>258</sup> Article 37(a) of CRC. A similar provision is found under Article 5(3) of the ACRWC.

previous chapter, it is still rather unfortunate to note that Zambian law does not in any way refer to post sentencing measures for juvenile offenders. There is therefore need for the country to make provision for such measures in its laws by using the little that exists in the JDLs.

## **9. CONCLUSION**

This chapter has focused on Zambia's child justice system as it currently operates. It has been observed that a number of legislative provisions providing for the protection of children in conflict with the law exist. Of these, the Constitution is most important owing to its supremacy of the country. In as much as the Constitution does not refer to the administration of child justice, a number of due process rights generally exist therein and are taken to apply to juvenile offenders. The Juvenile's Act which establishes juvenile courts and the manner in which proceedings are supposed to flow is helpful to some extent as it appears to embody some of the core principles, albeit implicitly. Unfortunately, in as much as the Act may impliedly have principles such as the best interests of the child and the right to life and maximum survival and development, the Act is one enacted long before children were recognized as individual rights' holders. It therefore does not comprehensively cover other child rights principles such as those of non-discrimination and participation. Diversionary measures are particularly an area of concern which need to be included in the Act. The dualistic system that exists in Zambia where customary law and English law are implemented side by side means customary law and the old English ideas on law, rights and justice introduced by colonialism tend to deny child offenders of the rights due to them under in international law. However, as shown above, the courts have to some extent, used their discretion to make reference to international law and the constitution when adjudicating cases. The government, by repealing most laws allowing for corporal punishment, reveals some form of commitment of giving effect to children's rights. Another problem noted is the non-implementation of the law that does actually exist to protect child offenders. This can be attributed to a lack of training on children's human rights by those charged with the administration of child justice such as the police, social welfare officers and magistrates. It is hoped that with the drafting and enactment of the Child Justice Administration Bill, Zambia will fully comply with the child justice standards that have been set out under international law.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

This study has concerned itself with critically analyzing the extent to which Zambia's laws comply with international standards and norms on child justice. In order to do this, it was necessary to consider the history of child justice as it began in the United States of America where the first juvenile court was established by the state of Illinois in 1899. It was in the USA that a separate juvenile justice system was first introduced. This new system influenced a number of countries world over, on how to deal with child offenders and with time, international standards and norms regulating juvenile justice were established in conventions such as the CRC and ACRWC.

Since Zambia is a state party to the CRC and the ACRWC, it has obligations to fully implement the provisions of these instruments including those relating to child justice. Although some positive features exist in the country's juvenile justice system, much still needs to be done in view of the legislation which is currently being used. The fact that matters relating to children are scattered in a number different instruments does not help. There is need to have one comprehensive piece of legislation relating to children's rights.

It has been seen in chapter one and two that the different pieces of legislation have varying definitions of a child. Not even the Zambian Constitution, the highest law of the land defines who a child is so as to set a basic standard on which other legislation may follow. Although some would argue that this cannot be avoided given that children will be regarded as competent to do certain things depending on what that thing is, this may still have negative implications on the rights of the child, especially when the core principles are thought of. For instance, a person below the age of 18 is considered as having the capacity to marry under local customary law which law is recognized under the Local Courts Act and the Constitution. This may result in child marriages leading to negative physical and psychological effects on the part of the child especially in relation to girls. Such practices go against the best interests of the child as well as his or her right to life, survival and maximum development. Another example could be drawn from the Employment (Amendment) Act 1997, which defines a young person as one who has not attained the age of 15 years and is capable of being employed. This may lead to child labour and

consequently, lead to adverse effects on the child's health and his or her right to life and development. Owing to such factors, there is need for the law to have a standard definition of the child as provided under the CRC, namely that of one being below the age of 18.

Despite guaranteeing a number of rights to all citizens, children inclusive, a weakness in the Constitution is that it does not adequately protect and guarantee children's rights as envisaged by the CRC. The due process rights guaranteed in the Constitution are helpful in terms of the administration of child justice as they reflect some of the four core principles found in the CRC and ACRWC. However, it would be better if the best interests of the child, non-discrimination, participatory rights and the right to life, survival, and maximum development were expressly provided for in the Constitution and other legislation.

It has been seen in the previous chapter that the Juvenile's Act and Criminal Procedure Code establish a juvenile court. A number of positive features can be seen in terms of how juvenile proceedings are to be conducted under the Juvenile's Act. The manner in which proceedings are specially conducted when dealing with children is one such positive feature which appears to satisfy international law standards. The best interests of the child appear to lie at the heart of such proceedings. The same can be said about the general reluctance in the detention and imprisonment of children alleged to have infringed the penal law. However, a number of issues still need to be addressed in the administration of child justice. These include the fact that like the Constitution, the Juvenile's Act and other legislation referred to do not expressly provide for the best interests of the child, non-discrimination, child participation and the right to life, maximum survival and development. The implications of not recognizing these principles in concrete terms are seen in the examples referred to above in terms of early child marriages and child labour. In addition, Zambia has two ages of criminal responsibility which go against the international law standards of non-discrimination and the right to life, survival and development. Ambiguity still prevails in terms of the definition of a child under the legislation dealing with the age of criminal responsibility and it is recommended that the age be raised to 16 so as to have uniformity with the Penal Code (Amendment) Act No. 15 of 2005 which introduced the definition of a child as "a person below the age of 16 years." The CRC Committee as seen in chapter two appreciates States with such an age of criminal capacity. Although merely

persuasive, Zambia would be satisfying the recommendations of the Committee and hence living up to the expectations of international law standards.

Child participation is a principle which has not been fully embraced in the Zambian child justice system and this is attributed to the dualistic nature of the country's legal system where custom and old English law resist the change to this internationally recognized principle. There is need to have the same incorporated into national law and the courts of law could use their power of incorporating the same through judgments such as the ones referred to in the previous chapter.

Another area of concern in the child justice system is that the country has no law that specifically provides for diversion. It is only by reading into the law that it appears diversion is offered for juveniles in need care and not necessarily children alleged to have infringed the penal law. It was also seen in chapter two that the courts invoke the provisions of section 73(1)(j) of the Juveniles Act which provides that the court may deal with the case in any other manner in which it may deem fit during sentencing. This means that the diversion options are only ordered after a child has gone through the criminal justice system and is found to have committed an offence. This defeats the whole purpose of diversion which is meant to shield the child offender from the criminal proceedings altogether. It is recommended that diversion should form part of the administration of child justice in Zambian law but definitely not at such a late point.

In terms of sentencing, the provisions under the Juvenile's Act appear to promote rehabilitation and the reintegration of the child into society in accordance with international standards. However, the same should be extended to include guidance orders, community service orders, restitution orders and treatment or counseling orders, as provided by the CRC and other international standards on juvenile justice. There is need to do away with the imposition of a fine on a child seeing that most children in Zambia who run in conflict with the law are street children and not in formal employment. It is therefore unrealistic to expect them to pay a fine as this may just encourage them to commit more crime such as theft in order to satisfy the sentence.

Despite the fact that Zambia proscribes the death penalty for child offender, it is recommended that government repeals the legislation that allows for the detention of children who are to be released at the presidents' pleasure. This is inconsistent with the principle that children should only be detained as a measure of last resort and for the shortest time possible.

It is recommended that prosecutors, social workers and magistrates need to receive specialized training on international juvenile justice instruments and dealing with children in court in order to satisfy international standards and norms as suggested by Muntingh. This should include the conducting of refresher courses for the purposes of updating the role players of the emerging issues in juvenile justice administration. It is also important that legal representation be afforded to children from the initial contact with the police, all the way to trial and post-trial if necessary.

It is also important that members of the public including children be informed about the law, their rights and legal responsibilities. There is therefore need for public awareness on the Juvenile's Act, and the Constitution as well as the CRC and ACRWC provisions which touch on child justice. This may be done through educational outreach programs in schools and in society at large.

In summary, it has been observed that since the Zambian Constitution does not expressly allow judges to have recourse to international law, the courts have been rather reluctant on using international law in interpreting the provisions of the Constitution, except in a few cases. However, as long as the country has ratified the international instruments considered in this study, it is duty bound to fully implement the provisions of these instruments through the various rules of incorporation. As such, it is recommended that all appropriate measures be taken to implement a child justice system which is in conformity with the CRC, particularly articles 37, 39 and 40. With the Child Justice Administration Bill underway, it is hoped that all the issues addressed in this study and elsewhere will be addressed.

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