UNIVERSITY OF CAPE TOWN

A CRITICAL ANALYSIS OF THE CHILD JUSTICE SYSTEM IN (MAINLAND) TANZANIA

PhD Thesis

by

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DECLARATION

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ABSTRACT

This study critically examines the child justice system in mainland Tanzania in the light of principles recommended by international child rights law. Thus far, international child rights law has developed a three-dimensional approach to child justice: an effective system to prevent child delinquency, the use of non-judicial procedures, and the development of special procedures aimed at protecting the rights of the child when judicial interventions are unavoidable. This approach is consistent with modern philosophical thinking about child justice.

The analysis of Tanzania's policies and laws on the prevention of child delinquency revealed glaring inadequacies. In particular, the laws fail to provide adequate legal protection to their socio-economic rights, such as those relating to health services and education. Since children subjected to violence and those lacking access to the basic necessities of life are the most prone to delinquency, the lack of policy attention to these areas mean that most of those children are likely to continue to engage in delinquency.

Tanzania's child justice system places undue reliance on judicial mechanisms. Although an attempt has been made of late to introduce some provisions allowing for the use of non-judicial interventions, these lack sufficient legal foundation and are not used consistently.

Despite its reliance on judicial mechanisms, Tanzania's child justice system is not as child friendly as one would expect. Granted, judicial mechanisms make provision for the child's rightsto information, to be heard, to privacy and to an expeditious process. However, they do not adequately protect the child's rights to legal representation and to protection against prosecution for status offences. Sentences such as repatriation, detention at the President's pleasure and corporal punishment, which are inconsistent with international law, are still legally allowed.

Substantial reforms are required in order to make Tanzania's child justice system compliant with international law and modern notions of justice. The reforms that have been made through the recently enacted Law of the Child Act 2009 are commendable but, as this thesis shows, much more remains to be done in order to guarantee in full the rights of the child in Tanzania's child justice system.

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I thank the Almighty God for giving me strength to complete this work.

DEDICATION

To Calvin, Caroline, Collins and Joyce.

ABBREVIATIONS AND ACRONYMS

CAT	Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 1984
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women 1979
COBET	Complementary Basic Education in Tanzania
CPA	Criminal Procedure Act (Cap 20 R.E. 2002)
CRC	Convention on the Rights of the Child 1989
DPP	Director of Public Prosecutions
ECOSOC	Economic and Social Council (of the United Nations)
GA	General Assembly
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
PMO-RALG	Prime Minister's Office, Regional Administration and Local Government
Res	Resolution
UDHR	Universal Declaration of Human Rights 1948
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
TASAF	Tanzania Social Action Fund

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CHAPTER 1: INTRODUCTION

1.1 Introduction

Child justice[1] was first introduced in Tanzania under British colonial rule in 1937 through the Children and Young Persons Ordinance 1937.[2] This Act was based on a concept of justice, one of the main features of which was punishment. This model of child justice has been discouraged by international law standards on the administration of justice. This is mainly because there is a common understanding that children are vulnerable and need care and protection.[3] Unlike that of adults, the rehabilitation of children is relatively more easily achievable and more relevant than punishment.[4] This understanding was one of the reasons for the adoption of the Convention on the Rights of the Child (CRC)[5] and, in the African region, the African Charter on the Rights and Welfare of the Child (the African Children's Charter).[6] These instruments recognise the need for a child justice system and for the protection of the rights of children in conflict with the law.[7]

In order to ensure that children's rights are protected, both the CRC and African Children's Charter require state parties to implement these treaties. They

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[1] In this thesis, 'child justice' refers to child criminal justice with particular focus on a child in conflict with the law. Where necessary, for instance with reference to some literature and in historical perspective, the term 'child' and 'juvenile' or 'child justice' and 'juvenile justice' are used interchangeably.

[2] The citation changed to Children and Young Persons Act (Cap 13 R.E 2002) in 2002. The changes in citation follow the revision of Tanzanian laws in 2002 in terms of the Laws Revision Act 7 of 1994 (currently Cap 4 R.E 2002); the Laws and Annual Revision Cap 356 Revised Laws 1965 and the Interpretation of Laws and General Clauses Act 30 of 1972, now cited as the Interpretation of Laws Act (Cap 1 R.E 2002). This resulted in changing 'Ordinances' into 'Acts' and it incorporates all amendments up to 1 July 2002. See Issa Shivji et al (eds) *Constitutional and Legal System of Tanzania* (2004) xvii. See also Chris Maina Peter 'The contribution of the Court of Appeal of Tanzania in the maintenance and safeguarding of the rule of law and human rights' in Chris Maina Peter and Helen Kijo-Bisimba (eds) *Law and Justice in Tanzania* (2007) 237–62, 254–5.

[3] Geraldine Van Bueren *The International Law on the Rights of the Child* (1995) 169.

[4] Wallace J Mlyniec 'The special issue for juvenile justice: An introduction' (2000) 15 (1) *Criminal Justice Magazine* 1.

[5] Convention on the Rights of the Child GA Res 44/25, Annex 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990.

[6] OAU Doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

[7] Articles 37, 39 and 40 of the CRC and art 17 of the African Children's Charter.

require states to establish child justice systems particularly for those children in conflict with the law. Tanzania, being a party to both the CRC[8] and the African Children's Charter,[9] is obliged to ensure that the rights of the child, including those of children in conflict with the law, are protected.

Tanzania enacted the Law of the Child Act[10] in 2009, thereby repealing its Children and Young Persons Act of 1937.[11] Among other things, the Law of the Child Act makes provision for the protection of children's rights in child justice. This study seeks to examine the extent to which this new Act protects the rights of the child in child justice.

It must be noted that reference to Tanzania in this thesis is to mainland Tanzania. The United Republic of Tanzania comprises Tanganyika (the mainland) and Zanzibar (the island). According to the First Schedule of the Constitution of the United Republic of Tanzania 1977,[12] the administration of justice does not fall within the competence of the Union, except for the functions of the Court of Appeal. Thus, mainland Tanzania and Zanzibar have separate laws governing child justice: the Law of the Child Act[13] and the Children's Act[14] respectively.

1.2 Problem statement

Before colonisation, Tanzania like other African countries, administered justice according to the customary rules applied in various communities and ethnic groups.[15] Traditional dispute mechanisms were not intended for children, probably because children's delinquencies were resolved within or between families. However, other issues concerning children, such as custody and inheritance, could be adjudicated by

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[8] Ratified on 10 June 1991.

[9] Ratified on 16 March 2003.

[10] The Law of the Child Act21 of 2009 (hereinafter also referred to interchangeably as the Child Act).

[11]The Children and Young Persons Act of 1937.

[12] The Constitution of the United Republic of Tanzania 1977 (Cap 2 R.E 2002).

[13] The Law of the Child Act (Mainland Tanzania).

[14] Act 6 of 2011 (Zanzibar).

[15] Shivji et al op cit note 2 at 258; Eliamani Laltaika 'Court assessors, received laws and informal justice in Tanzania' in Manfred O Hinz and Clever Mapaure (eds) *In Search of Justice and Peace: Traditional and Informal Justice System in Africa* (2010) 167–80,169.

the established traditional dispute settlement mechanisms in their respective community.[16]

In addition, because the view was that children belonged to the community, any of its members, particularly an adult, could discipline the child. A formal mechanism was invoked only where the offence committed was serious.[17] Such a mechanism could impose punishments intended to restore and promote social cohesion.[18] While the society perceived a crime as an anti-social act, the dispute settlement mechanism had no specialisation, especially in terms of a separate system for children.[19]

Tanganyika (the name given to what is nowTanzania's mainland before its union with Zanzibar in 1964) was colonised by Germany from 1884.[20] After the First World War, Germany surrendered its colonies to the allied powers.[21] The British took the country over from 1920 to 1961, when it became independent.[22]

Under British rule, the Native Courts Ordinance [23] was enacted with a view to regulating the administration of justice. This established separate courts for natives and foreigners. Native courts applied customary law, while civil courts dealt with foreigners and applied the received law. Customary law and received law, which included English common law, principles of equity and such statutes of general application as were in force in England on 22 July 1920,[24] were retained in the

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[16] Alyward Shorter 'Concepts of social justice in traditional Africa' (1977) 12 *Pro Dialogo Bulletin* 32.

[17] The author's knowledge and information derived from elders of the Wanyiramba tribe in Singida to which she belongs, and the Wagogo in Dodoma where she studied and worked.

[18] Shorter op cit note 14 at 33; T W Bennett 'Human rights and the African cultural tradition' (1993) 22 *Transformation* 30, 33.

[19] Existing literature on dispute settlement in pre-colonial Africa focuses on adults. See, for instance, Shorter op cit note 16; Shivji et al op cit note 2 at ch 20; Peter Rigby *Cattle and Kinship among the Gogo: A Semi-pastoral Society of Central Tanzania* (1938); Maxwell Gay Marwick *Sorcery in its Social Setting: A Study of Northern Rhodesian Cewa* (1965). The existing literature suggests that specialised child justice either did not exist or that it is not documented.

[20] Rainer Michael Bierwagen & Chris Maina Peter 'Administration of justice in Tanzania and Zanzibar: A comparison of two judicial systems in one country' (1989) 38 *International and Comparative Law Quarterly* 395, 397.

[21] Ibid.

[22] Ibid.

[23] Native Courts Ordinance 6 of 1920; see also Bierwagen and Peter op cit note 20.

[24] Judicature and Application of Laws Act s 2 (3).

country after independence. Unlike the traditional dispute mechanism, which did not have a separate child dispute system, British colonial rule established separate courts for children through the Children and Young Persons Act.[25] However, the juvenile courts thus established were not juvenile courts *per se,* as district and primary courts would sit as child courts when dealing with child matters.[26] In addition, special provisions on procedures [27] and substantive provisions contained in the Act were based on notions of criminal justice. Hence, the Act did not promote the wellbeing, social reintegration and rehabilitation of the child.

In addition, there were no procedures for dealing with children non-judicially and, therefore, as regards the judicial mechanisms, no provisions on legal representation were included and the relevant procedures were too adversarial. For instance, a child could be convicted on the grounds of his own guilty plea.[28]

Tanzania adopted its current Constitution in 1977[29] and its Bill of Rights in 1984.[30] Neither of these documents, however, included children's rights. It possibly may be presumed that children enjoyed the rights that were guaranteed to 'everyone'. The Constitution has undergone several amendments since 1984 when it included the Bill of Rights, yet none of these amendments has directly addressed children's rights.[31]

Tanzania's child law reform started formally in 1986 under the auspices of the Law Reform Commission. The Commission's Working Group presented its Report in

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[25] Section 2 defined the juvenile court as a district court sitting to decide juvenile cases, while the Children and Young Persons Act (Extension of Ordinance to Primary Courts) GN 640 of 1964 extended the court jurisdiction to primary courts.

[26]Section 3 Children and Young Persons Act. See also Shivji et al op cit note 2 at 190.

[27] Ibid part II.

[28] Section 10 Children and Young Persons Act.

[29]The Constitution of the United Republic of Tanzania.

[30] Constitutional Amendment Act, Act 15 of 1984.

[31] Apart from the 5th amendment (Act 15 of 1984) which introduced the Bill of Rights, subsequent amendments are the 6th Amendment 1990 (Act 14 of 1990); 7th Amendment 1990 (Act 16 of 1990) ; 8th amendment 1992 (Act 4 of 1992); 9th Amendment 1992 (Act 20 of 1992); 10th amendment 1993 (Act 7 of 1993); 11th Amendment 1994 (Act 34 of 1994); 12th Amendment 1995 (Act 12 of 1995); 13th Amendment 2000 (Act 3 of 2000); and 14th Amendment 2005 (Act 1 of 2005).

1994. [32] This concluded that the laws relating to children, including the Children and Young Persons Act of 1937, were outdated, and recommended their repeal and the enactment of new legislation. It also recommended the harmonisation of all laws dealing with children's rights, including the reform of child justice. [33] Other recommendations were the introduction of non-judicial measures for dealing with children in conflict with the law and the adoption of measures to deal with delinquency. Some of these proposals[34] were incorporated into the Sexual Offences Special Provisions Act enacted in 1998.[35]

Tanzania submitted its second Periodic Report to the CRC Committeein 2006.[36] It indicated that there were ongoing efforts to amend or repeal various outdated laws, including the Children and Young Person's Act, and to harmonise existing laws on children's rights. Importantly, Tanzania submitted that it had prepared a comprehensive bill that would incorporate constitutional and international standards, and that such a bill would soon to be tabled before Parliament. However, the Committee on the Rights of the Child in its Concluding Observations on the Periodic Report urged Tanzania to make progress on the implementation of international child justice standards. [37] It suggested extending juvenile courts countrywide, fixing the minimum age of criminal responsibility at 12 [38] and introducing alternative measures to the deprivation of liberty, such as diversion, community service and probation and counselling.[39] Additionally, recommendations

[32] The Law Reform Commission of Tanzania *Report of the Commission on the LawRelating to Children in Tanzania* 1994.

[33] Ibid paras 125–242. Further discussion in Chapter 4.

[34] These include increasing the age of criminal responsibility from seven to 10 years, thus replacing s 15 of the Penal Code (Cap 16 R.E 2002) and amending the Children and Young Persons Act s 3 so that child sexual offences proceedings should be heard incamera.

[35] Sexual Offences Special Provisions Act (Cap 101 R.E 2002).

[36] *The Country Second Periodic Report on the Implementation of the Convention on the Rights of the Child* (1998–2003) 23–4.

[37] CRC 'Consideration of reports submitted by the states parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child Tanzania', CRC/C/TZA/CO/2forty-second session, 21 June 2006 para 70.

[38] Ibid paras 69–70.

[39] Ibid.

for improving the child justice system were highlighted in a report of the Working Group on the Universal Periodic Review.[40]

Despite these recommendations, Tanzania did not enact new legislation until 2009 when the Parliament passed a Bill[41] that became the Law of the Child Act. Has the Act's substantive provisions addressed all these concerns? It is imperative that this question is addressed.

1.3 Objectives of the study

This thesis seeks to examine all the elements in the Tanzanian child justice system, including its laws, policies, institutions, procedures and court jurisprudence, to see how it complies with a child rights approach to childjustice. It focuses on three main pillars of child justice as recommended by international child rights law, namely, delinquency prevention, non-judicial interventions, and judicial interventions (these include pre-trial procedures, trial procedures and post-trial procedures). As regards delinquency prevention, the thesis examines the protection of children from violence. It further evaluates selected policies relating to the provision of socio-economic rights, in particular those relating to poverty alleviation and access to health services and education. Under non-judicial interventions, it addresses the question of the legal recognition of alternatives to criminal measures for dealing with child offenders, such as diversion. Under pre-trial procedures, the thesis considers the extent to which these procedures respect the child's liberty and dignity rights, especially at the time of arrest, detention and consideration of bail. Under trial procedures, the thesis investigates the extent to which these procedures respect the child's right to a fair trial. Lastly, the thesis will evaluate the sentencing options available for children and the procedures for appeal in the light of the child's international and constitutional rights.

The overriding question the thesis seeks to answer is to what extent does the Law of the Child Act domesticate and respect the international rights of the child pertaining to child justice? In order to answer this question, the thesis will:

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[40] United Nations General Assembly, Human Rights Council Nineteenth session 'Report of the Working Group on the Universal Periodic Review: United Republic of Tanzania' A/HRC/19/4 of 8 December 2011.See eg paras 37 and 41.

[41] Bill supplement published in the *Gazette* of the United Republic of Tanzania vol 90 no 20 of 10 July 2009.

(i) investigate the concept of children's rights as it had been understood and developed in international law and in the African regional system of human rights in the context of child justice;

(ii) investigate the extent to which current law reforms in Tanzania respect the rights of the child in child justice; and

(iii) investigate whether further reforms are necessary.

1.4 Literature review

The available literature on international law indicates that extensive studies have been done on children's rights[42] in general, and child justice in particular.[43] However, only a few studies have been conducted on the Tanzanian system.

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[42] See, for example Van Bueren op cit note 3; Julia Sloth-Nielsen 'Domestication of children's rights in national legal systems in an African context: Progress and prospects' in Julia Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 53–72; Danwood M Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 (2) *The International Journal of Children's Rights* 157; CJ Davel (ed) *Introduction to Child Law in South Africa* (2000); Danwood M Chirwa *Human Rights under the Malawian Constitution* (2011); Walter Bennet 'A critique of the emerging Convention on the Rights of the Child' (1987) 20 (2) *CornellInternational Law Journal* 1; Danwood M Chirwa 'Combating child poverty: The role of economic, social and cultural rights' in Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 91-108; Yo Kubota 'The protection of children's rights and the United Nations' (1989) 58 *Nordic Journal of International Law* 7.

[43] Diana Lewis 'The Rights of juvenile delinquents: An appraisal of juvenile courts procedures' (1957) 47 *Journal of Criminal Law, Criminology & Police Science* 561; Allison Morris & Mary McIsaac *Juvenile Justice*? (1978); Julian W Mack 'The juvenile court' (1909–1910) 23 *Harvard Law Review* 104; Roscoe Pound 'The juvenile court and the law' (1949–1950) 1 *Juvenile Court Judges Journal* 30; Gustav L Schramm 'Philosophy of the juvenile court' (1949) 261 *The Annals of the American Academy and Social Science* 101; MD Freeman 'The rights of children when they do 'wrong'' (1981) 21 *British Journal of Criminology* 210; Don Cipriani *Children's Rights and the Minimum Age of Criminal Responsibility* (2009); Robert Harris and David Webb *Welfare, Power, and Juvenile Justice* (1987); Note: 'Rights and rehabilitation in the juvenile court' (1967) 67 *Columbia Law Review* 281; Allison Morris et al *Justice for Children* (1980); Deborah Mills '*United States v Johnson*: Acknowledging the shift in the juvenile court system from rehabilitation to punishment' (1995-1996) 45 *De Paul Law Review* 93; Joel Goldfarb & Paul M Little 'California juvenile court :Effective uniform standards for juvenile court procedures' (1963) 51 *California LawReview* 421; Julia Sloth-Nielsen & Benyam Mezmur '2+2=5? Exploring the domestication of the CRC in South African jurisprudence (2002–2006)' (2008) 16 *The International Journal of Children's Rights* 1; Julia Sloth-Nielsen 'Children's rights in South African courts: An overview since the ratification of the UN

At the international level, Van Bueren[44] gives an account of the development of child justice in international law. She discusses various principles in the CRC and other international law instruments that relate to the administration of child justice such as rehabilitation, age of criminal responsibility, diversion and the right to a speedy trial. She observes that these principles are intended to achieve the best interests of the child in the administration of child justice. Her work discusses the rights of the child at the trial and post-trial stages and provides a useful guide to the administration of child justice at domestic levels.

It must be noted that the purpose of this thesis is not to discover gaps in the international law system. It is rather to take the international system as it presently exists and to examine the child justice system used in Tanzania against it, to see what gaps exist and to suggest how they might be filled. Thus, since it is the Tanzanian system that is being critically examined, the literature reviewed here is primarily focused on Tanzania.

As pointed out before, little research has been conducted on Tanzania's child justice system. The only study devoted to child justice is by Mashamba,[45] although other scholars have contributed. Mashamba examines the administration of child

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Convention on the Rights of the Child' (2002) 10 *International Journal of Children's Rights* 137; Robert Kwame Ame 'The rights of children in conflict with the law in Ghana' (2011) 19 *International Journal of Children's Rights* 271;Julia Sloth-Nielsen 'The international framework' in Julia Sloth-Nielsen (ed) *Child Justice in Africa*: *A Guide to Good Practice* (2004) 21–9; Julia Sloth-Nielsen 'Justice officials as role players' in Julia Sloth-Nielsen (ed) *Child Justice in Africa*: *A Guide to Good Practice* (2004) 137-41; John Tobin 'Judging the judges: Are they adopting a rights approach in matters involving children?'(2009) 33 *Melbourne University Law Review* 579; Jacqueline Gallinetti, Jean Redpath and Julia Sloth-Nielsen 'Race, class and restorative justice in South Africa: Achilles heel, glass ceiling or crowning glory?'(2004) 17 *South African Journal of Criminal Justice* 17; Andrew Beckroft 'Children and young people in conflict with the law: Asking the hard questions (2006) 57 *Juvenile& Family Court Journal* 1; Cogan Neil Howard 'Juvenile law, before and after the entrance of *'parens patriae'* (1970) 22 *South Carolina Law Review* 147; Elsje Bonthuys 'The best interests of children in the South African Constitution' (2006) 20 *International Journal of Law, Policy and Family* 32; M D A Freeman 'The rights of children when they do "wrong" ' (1981) 21 *British Journal of Criminology* 210.

[44] Van Bueren op cit note 3 at 169–215.

[45] Clement Mashamba *A Comparative Examination of the Administration of the Juvenile Justice Systems in Tanzania and South Africa*(unpublished PhD thesis, Faculty of Law, Open University of Tanzania2012).

justice systems in Tanzania and South Africa, and focuses on the extent to which Tanzania has embedded child justice in its criminal justice system. He observes that the government has not taken sufficient measures to establish a separate justice system for children. He argues that child justice seems to be seen as forming part of ordinary criminal justice and notes that there is lack of specialized institutions and trained personnel for the administration of child justice. His work is useful, as it considers some provisions of the Law of the Child Act and the extent to which they respect the rights of the child in child justice.

In another work, Mashamba[46] discusses child justice in Tanzania as defined and outlined in the Law of the Child Act. He points out persistent problems in the administration of the Act, such as children being detained together with adults. He is of the view that the system itself violates the rights of the child, although he does not elaborate on how children's rights are violated in juvenile justice. His work, however, does contribute to an understanding of Tanzanian child justice in general — and within the framework of the Law of the Child Act in particular.

The inadequacies in child justice, such as the lack of a separate child justice system, procedures and institutions are also discussed by Shivji et al.[47] This work also notes the weaknesses of the Children and Young Persons Act by pointing out that it did not establish juvenile courts and other institutions such as remand homes. It is thus relevant to an understanding of the reform introduced by the Law of the Child Act.

Provisions dealing with children are scattered throughout various laws. Anderson[48] discusses the problem of a lack of a comprehensive child justice legal framework in Tanzania and points out the likelihood of injustice where different laws define a child differently. However, while she notes the inadequacy of procedures and institutions in child justice, she does not go further, and fails to discuss which procedures are lacking, what the nature of their inadequacies are and what should be done to remedy the situation.

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[46] Mashamba 'A child in conflict with the law under the Tanzanian Child Act (2009): Accused or victim of circumstances' (2009) 8 (2) *The Justice Review* 156.

[47] Shivji et al op cit note 2. See particularly ch16, 187–213.

[48] Kirsten Anderson 'The juvenile justice in Tanzania: Desk review' (2011) Children's Legal Centre University of Essex (unpublished paper).

In 2011, the Ministry of Constitutional and Legal Affairs in collaboration with the United Nations Children's Fund (UNICEF) commissioned two studies on child justice. The studies were conducted by the Coram Children's Legal Centre (UK) and the National Organisation for Legal Assistance (NOLA-Tanzania).

One of these, entitled Analysis of the Situation of Children in Conflict with the Law in Tanzania (2012),[49] revealed, among others things, a number of weaknesses and failures of the Tanzanian child justice system. Specifically mentioned were the lack of specialised child justice institutions, including retention homes and approved schools; shortage of social welfare officers; insufficient knowledge on the rights of the child on the part of professionals in child justice, both at international and national levels; unnecessarily exposure of children to criminal justice; children were charged for status offences; detention was not used as a measure of last resort; long-term pre-trial detentions were imposed and children were detained in adults facilities; forced confessions at the police station and ill treatment; not being told the reasons for their arrest; lack of legal representation at any stage; the absence of formal diversion; and the imposition of corporal punishment as a sentence.

The second study, Assessment of Access to Justice for Under-18s in Tanzania (2012) [50] focuses, as its title suggests, on the access to civil, criminal and administrative and informal and informal justice. It was conducted in five regions in Tanzania and gathered qualitative and quantitative data from various stakeholders in justice administration, including from children. It revealed, inter alia, that legal services to children were inadequate, they were apprehended and interrogated without informing their parents and there was a lack of specialised courts and trained personnel. Although this study focuses mainly on legal representation in the broader context of justice (civil, criminal and administrative), it also largely affirms and supplements the findings of the first study, mentioned above. The findings of both these studies are relevant to this thesis, insofar as they provide evidence of what exists in practice or how some procedures and rules are being implemented. However, this thesis is concerned with the analysis of the Tanzanian child justice system against the backdrop of international standards; the key question being the extent to which it

[49] Ministry of Constitutional and Legal Affairs and UNICEF *Analysis of the Situation of Children in Conflict with the Law in Tanzania* Dar es Salaam (2012).

[50] Ministry of Constitutional and Legal Affairs and UNICEF *Assessment of the Access to Justice System for Under-18s in Tanzania* Dar es Salaam (2012).

incorporates a child-rights based approach to justice. This kind of analysis is absent in the literature, which justifies this present research.

1.5 Methodology and justification for the selected methodology

1.5.1 Methodology

In order to critique a particular system of child justice, one has to understand the development of the concept of child justice both in law and in philosophy. Hence, this thesis will start with an examination of the theories on children's rights and the development of the concept of child justice. The examination of these theories also helps to determine the nature of rights that need to be incorporated into, and protected in, a child justice system.

The corpus of the international law of the child is constituted by the United Nations system and regional systems of human rights. Since Tanzania is party to the African regional system, special attention is paid to this system and not to the European and Inter-American systems. This part of the thesis will draw on various sources of international law such as treaties, declarations, resolutions, guidelines, principles, general comments, concluding observations on reports submitted by states parties, reports on international and regional human rights treaties and other documents. Although some of these sources are not binding, they provide useful insights into the content and meaning of many children's rights that are binding on Tanzania. The ways in which Tanzania is bound by international child rights are dealt with in Chapter 3.

An analysis of international law will provide a basis for constructing a suitable system for child justice against which the Tanzanian system will be examined. In developing a picture of the existing system of child justice in Tanzania, the study will draw on the Constitution, legislation (particularly the Child Act) and the Children's Development Policy of 2008. Further, court decisions are reviewed in order to understand the court practice and procedures particularly on diversion, trial procedures and sentencing practices. Most of these cases were decided under the repealed Children and Young Persons Act 1937. Nevertheless, such cases are still relevant considering that the Law of the Child Act 2009, as will be shown, retains most of the 1937 Act's provisions.

The author of this thesis served as a magistrate in Tanzania from 2002 to 2006. This study was influenced and inspired by that personal experience and some of the factual assertions draw on it.

1.5.2 Justification

This thesis aims to examine the Tanzanian child justice system in the light of established international standards. A desktop approach was chosen, mainly for two reasons. The first is the nature of the study. The main objective of this thesis is to analyse laws and policies on the prevention of child delinquency and on interventions on their behalf through non-judicial and judicial measures. The desktop study method was considered appropriate, as the information needed to achieve the objective could be obtained largely from documents.

Another objective is to examine the relevant domestic legal system against the background of international law on child rights in the child justice system. It is for this reason that the views of children and other stakeholders cannot be ignored. It must be noted that a desktop study is often limited, because it is based on the existing data and on the documentary review method. Burton[51] argues that the reliability of such information may give rise to doubts about a desktop study's reliability, mainly because the information in it is collected and analysed by other researchers.[52] This may not provide comprehensive reports, thereby leading to an erroneous conclusion on the part of a person relying on them.[53] It is thus important for researchers to consider the use of secondary data in the context of their own studies.[54]

Considering the nature of the research, its objectives and the need to access the views of children and other people involved in the justice system, the question asked was whether the researcher could obtain sufficient data to enrich the findings without having to use empirical methods. Thus, in order to overcome the weaknesses inherent in the use of secondary data, three key characteristics suggested by Cothary[55] are taken into account.

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[51]Dawn Burton *Research Training for Social Scientists: A Handbook for Postgraduate Researchers* (2000) 351.

[52] Ibid.

[53] Ibid.

[54]Ibid at 350.

[55] C R Cothary *Research Methodology: Methods and Techniques*(2004) 111–2.

The first of these is the reliability of data. The main questions that need to be asked when determining reliability is who collected the data and what sources were used. In this regard, the information relied on in this research is drawn from studies commissioned or undertaken by international agencies such as the UNICEF, from international organisations such as the World Bank, and from reports by the states to the international treaty bodies such as the Committee on the Rights of the Child and the Human Rights Committee. In addition, some reliance was also placed on publications by Tanzanian government institutions, including the Ministry of Education, the Ministry of Health and Social Welfare, the Ministry of Justice and Constitutional Affairs and the Commission for Human Rights and Good Governance.

The second factor is the suitability of the data, considering the nature and scope of the study being relied on. As indicated above, this thesis examines laws and policies on the child justice system in Tanzania. Because data emanating from studies commissioned by the Government and other institutions mentioned above were used with a view inter alia, to improving social service delivery or the child justice system, such data were found to be suitable for this thesis.

The third factor is the adequacy of data in terms of accuracy. Because the information used was obtained from government publications, international organisations and studies commissioned by the Government or international organisations/agencies, it is presumed to be credible. In addition, some of these studies include first-hand information and empirical studies. By drawing from these studies, this thesis is also able to benefit from the voices of children and the views of other stakeholders.

The second reason for the selection of a particular methodology is the costs and time involved in empirical methods. Financial constraints were one of the reasons why empirical methods could not be used in this present research. Although such methods (such as interviews and questionnaires) have some advantages over documentary reviews, such as obtaining in-depth information and flexibility in restructuring questions,[56] they are time-consuming and costly.[57] Using such a method would have required the researcher to travel to Tanzania from Cape Town regularly

[56] Ibid at 98.

[57] Burton op cit note 51 at 349; Julius G Getman 'Contributions of empirical data to legal research' (1985) 35 *Journal of Legal Education* 489,493.

and spend much time in the field collecting data. This could not be done. However, financial constraints were not the sole reason for not employing the empirical methods. Consideration was also given to whether, because of the nature of this thesis, information that could have been acquired through other methods such as interviews and questionnaires could also have been obtained by a different method, such as documentary review. This question was answered in the affirmative.

1.6 Significance of this thesis

It is hoped that the findings and recommendations to be made will provide the impetus for Tanzania to reform its child justice system. As observed above, despite the enactment of the Law of the Child Act, problems regarding child justice remain. These are an impediment to the protection of children's rights in child justice. Therefore, the implementation of the recommendations to be articulated in, and drawn from, this thesis will enhance Tanzania's justice system and ensure that the rights of children in conflict with the law are protected.

In addition, it is important that those involved with policy formulation, legal reform, institutions and society in general (particularly at lower levels), have an understanding of the rights of children in the child justice process. A lack of such an understanding and any negative perceptions on the part of judicial and police officers and the wider community towards child offenders, is an impediment to the implementation of children's rights in child justice. It is thus imperative that the findings of this study are made available and accessible to members of the public at large so as to raise awareness of these impediments. In order to ensure that the findings are widely disseminated, they will be presented at different forums and in publications. The researcher will also translate the findings into Kiswahili, Tanzania's national language, thereby communicating them to a wider sector of Tanzanians, since the majority do not speak or understand English. This should make the study useful to the public at large as far as the rights of children in child justice are concerned.

Further, the findings drawn from this thesis may be used as a reference by judicial officers in the administration of child justice. This is particularly important, as the existing law was enacted after the adoption of the CRC and the African Children's Charter, both of which set the benchmark for child justice. In addition, the study will cover a broad area of child justice procedures that have not been researched yet.

Finally, this thesis's aim is to contribute towards improving child justice systems, not only in Tanzania but also in other countries.

1.7 Chapter outline

Tanzania's ratification of the CRC and the African Children's Charter resulted in the enactment of the Law of the Child Act of 2009. Despite this, the implementation of child rights in child justice remains a challenge and pressing problem. Although some research has been conducted on the subject of child justice, a detailed analysis of the Act in the light of the international rights of the child in this area remains to be done. This study seeks to investigate and comprehensively address this matter.

Chapter 2 examines the development of child rights theories as they apply to child justice and the evolution of the concept of child justice itself. In particular, it tracks the development of child justice from the notion of *parens patriae* to the rights approach of the CRC. It provides an important backdrop to the discussion of the relevant rights that should underpin a child rights-based approach to child justice.

Chapter 3 examines international rights of the child as they relate to child justice. It seeks to examine how the theories discussed in Chapter 2 have influenced the development of this body of law. The chapter pays particular attention to the CRC and the African Children's Charter because both have been ratified by Tanzania and are therefore binding on her in international law as well as domestically — to the extent that these treaties have been incorporated into domestic law. The chapter will also identify and discuss the hallmarks of a child rights friendly child justice system that states are bound to domesticate.

Chapter 4 provides an introduction to the Tanzanian child justice system. Apart from providing a brief historical account of the evolution of child justice in Tanzania, it seeks to analyse the extent to which Tanzania has sought to reform its child justice before and after its ratification of the CRC and the African Children's Charter. In particular, the chapter examines how the international rights of the child as they relate to child justice influenced the development of the Tanzanian child justice system.

Chapter 5 examines delinquency prevention. To prevent children from becoming offenders, it is necessary that measures be put in place to protect children from harm and destitution, both of which provide a gateway to child delinquency. This chapter has chosen selected themes of child protection, such as protection from

violence, sexual exploitation and child labour and the issue of child provision in order to provide an indication of the attention that Tanzania pays to the issue of delinquency prevention.

Chapter 6 examines the theme of non-judicial mechanisms for dealing with child offending. It seeks to examine whether non-judicial interventions in the forms of diversion and restorative justice form a central part of Tanzania's child justice system and the extent to which they do so.

Chapter 7 examines judicial mechanisms with particular focus on pre-trial and trial procedures. To what extent do these procedures respect children's rights? What is the minimum age of criminal responsibility? What safeguards are there at the time of arrest, detention and trial? Are children entitled to the right to be heard, to legal representation and to privacy? These are some of the questions addressed in this chapter.

Chapter 8 focuses on post-trial procedures. It deals with sentences under the Law of the Child Act and other penal legislation, the court practice and jurisprudence in sentencing, including types of sentences, and alternatives to custodial sentences. Here, available sentences and orders as well as court decisions are analysed with a view to identifying whether they are consistent with international standards on sentencing. In addition, this chapter examines provisions on appeal and their practicality and relevance in protecting children's rights.

Chapter 9 concludes the study and makes recommendations

CHAPTER 2: PHILOSOPHICAL FOUNDATIONS OF CHILDREN'S RIGHTS IN CHILD JUSTICE

2.1 Introduction

This chapter will discuss the philosophical foundations of children's rights as they apply to child justice and trace the development of the notion of 'juvenile justice'. As this notion is traceable to the legal systems of the United States of America and Europe, the historical discussion will draw on the literature pertaining to these systems. The theoretical discussion focuses on the old justice theory, which was dominant before the concept of juvenile justice was given legal recognition, the welfare theory and the new version of the justice theory. The aim of this discussion is to provide a theoretical foundation for the development of a child justice system that recognises the unique and special character of children as independent and autonomous human beings with rights. These rights may be shared with adults or be exclusive to them as children.

2.1.1 The concept of childhood in the rights discourse

The development of child rights encountered the prevalent opinion that rights relate to adulthood. The ability of a child to be a rights-holder was therefore questioned. While all theories of child rights accept that children need protection,[1] the idea of an autonomous child was highly contested. The paternalistic theory, a forerunner of the fiduciary theory of child rights, for instance held that children were not capable of holding rights as they lacked the rational capacity to make choices.[2] Further, it held that, except for protection, parents should have autonomy rights, as they know what is good for their children.[3] According to this view, rationality is associated with adulthood. This is, of course, only a generalisation.

Despite the fact that childhood has been used as a ground to deny children their rights, the concept of childhood lacks a precise definition. Nevertheless, attempts have been made to describe it. For example, Fionda has defined it as a

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[1] These include the fiduciary theory of John Locke (1632–1704) expressed in *Two Treatises of Government* (1924) (first published in 1689); the paternalism theory of John Kleinig in *Paternalism* (1983); and the interest theory of Joseph Raz in 'Legal rights' (1984) 4 (1) *Oxford Journal of Legal Studies* 1.

[2] John Stuart Mill (1806–1873) *On Liberty* (1989) 94–115 (first published in 1859).

[3] Kleinig op cit note 1 at 147.

'biological or psychological phase of life between infancy and adulthood'.[4] While the 'biological and psychological' development phase seems to be important in this definition, it falls short of describing where infancy ends and adulthood begins. Because both the beginning and end of childhood have no universally accepted definition, [5] the concept of childhood remains subjective, complex and ambiguous.[6] As Van Bueren has said, childhood is 'a complex phenomenon that any attempt to define it is inevitably artificial'.[7] Hence, it remains a 'complex social construct'.[8] Thus, who and what children are and what childhood is, are defined artificially by adults and by various ideologies.[9] Such definitions propose that children's needs are what adults believe them to be.[10] It is against this background that children's rights have been developed.

2.2 Developments in children's rights and rights in child justice

Developments in children's rights took place against a background of specific socio-economic conditions and philosophical ideologies in particular eras. In the past children were regarded as the property of their fathers — as articulated in the property theory.[11] This theory presupposed absolute parental rights over children rather than parental obligations to children.[12] The idea that children were property defeated any possible claim by them to rights in general and criminal justice in particular.

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[4] Julia Fionda 'Legal concepts of childhood: An introduction' in Julia Fionda (ed) *Legal Concepts of Childhood* (2001) 3–17, 3.

[5] Ibid.

[6] Thoko Kaime 'The African Children's Charter: Does it represent a relevant vision of childhood and children's rights?' (2009) 29 (3) *Children's Legal Rights Journal* 11.

[7] Geraldine Van Bueren *The International Law on the Rights of the Child* (1995) 32.

[8] Fionda op cit note 4 at 3; M D A Freeman 'The rights of children when they do "wrong" ' (1981) 21 (3) *British Journal of Criminology* 210,211.

[9] Ruby Takanishi 'Childhood as a social issue: Historical roots of contemporary child advocacy movements' (1978) 34 (2) *Journal of Social Issues* 8, 11; Kaime op cit note 6 at 14.

[10] The thesis will not elaborate extensively on child rights theory and the classification of these rights. It will rather show that there is some contention on childhood and child rights. Attitudes to these have changed over time, reflecting philosophical ideologies and socio-economic developments.

[11] Barbara Bennett Woodhouse 'From property to personhood: A child-centered perspective on parents' rights' (1997–1998) *Georgetown Journal on Fighting Poverty* 313,314.

[12] Ibid at 313.

The property theory was superseded by the emergence of other theories. In theeighteenth and the nineteenth centuries thinkers advanced new ideas on humanity and education.[13] John Locke[14] and John Stuart Mill[15] propounded the fiduciary theory and liberal paternalism respectively. While they denied children autonomous rights, they emphasised that children had a right to protection. Locke contended that parents have a duty to 'preserve, nourish and educate' the children they begot from God.[16] He recognised that children are begotten from God and are not a parent's property.[17] According to him, children need both protection and care because 'they are not born to the full state of equality'.[18] Locke argued that children have rights that are held by parents as trustees. Locke's theory can be contrasted with paternalism: [19] although it subscribes to protection, it denies that children have rights because they lack capacity to make choices. Unlike the property theory, both fiduciary and paternalistic theories underlined the need for child protection.

As examples of parental obligations under the trusteeship theory, Locke cited duties to nourish and educate children. In Sixteenth-century Europe, educationwas perceived as to create a duty for parents to educate their children.[20] Although parents had such an obligation, this did not necessarily mean that the purpose of education was the development of the child. On the contrary, it was intended to build children's capacity so that they would have 'more duties towards their parents and society than they had rights independent of them'.[21]

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[13] Kathleen Alaimo 'Historical roots of children's rights in Europe and the United States' in Kathleen Alaimo and Brian Klug (eds) *Children as Equals: Exploring the Rights of the Child* (2002) 1–23, 9.

[14] Locke op cit note 1 at 141–54.

[15] Mill op cit note 2 at 94–115.

[16] Locke op cit note 1 at 143.

[17] Ibid at148. The idea that a child is a father's property was associated with the idea that a child are born out of a father's seeds that are planted in a mother's womb. See Woodhouse op cit note 11 at 313.

[18] Locke op cit note 1 at 142.

[19] Mill op cit note 2 at 94–115. See also Kleinig op cit note 1; Michael D Freeman 'Taking Children's rights more seriously' in Phillip Alston et al (eds) *Children, Rights and the Law* (1992) 52–97.

[20] Alaimo op cit note 13 at 5–9. See also John Eekelaar 'The emergence of children's rights' (1986) 6 (2) *Oxford Journal of Legal Studies* 161,167.

[21] Alaimo op cit note 13 at 4–5 referring to Hugh Cunningham, *Children and Childhood in Western Society since 1500* (1995) 56. See also Paula S Fass *Children of a New World: Society, Culture and Globalization* (2007) 249.

Another significant development in child rights occurred in the Nineteenth Centurywith the emergence of reform movements in the United States...The reformers, commonly referred to as 'child savers', were concerned with the population growth of lower-class children, particularly immigrants, for whom they sought to provide training and discipline.[22] They were concerned with children's welfare in terms of social, economic and psychological developments.

Among the major changes brought about by child saving movements,[23] particularly before 1870, were those related to the elimination of child labour.[24] These movements were based on humanitarian concerns that viewed child industrial labour as unusual and unacceptable. Thus, they successfully launched campaigns that culminated in its legal abolition.[25] This was noted as the 'first important child-oriented reform movement in the Nineteenth Century'.[26]

In addition to protecting children from industrial labour, child savers were also concerned with a child's moral wellbeing.[27] They influenced the development of programmes whereby children were protected against alcohol, pornography and other delinquency related behaviour. In addition, they influenced reforms in prisons and reformatories.[28] These developments played a part in the progressive reform of

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[22] Anthony Platt *Child Savers* (1969) 3. Childsavers in Chicago included Louise Bowen, Ellen Henrotin, Mrs Perry Smith and Mrs Potter Palmer. They also included career women and philanthropists, members of elite women's clubs and professional and political women's groups concerned with child-saving, viewing it as women's rights. They worked together to address child care, education and juvenile delinquency.

[23]Ibid at 3 describes child savers as 'group of disinterested reformers who regarded their cause as a matter of conscience and morality, serving no particular class or political interests.' Generally, reform movement emerged in the Nineteenth Century in response to social problems caused by rapid industrialization and urbanisation. See generally. Barry Feld 'The Juvenile court meets the principle of the offense: Legislative changes in juvenile waiver statutes' (1987) 78 (3) *Journal of Criminal Law and Criminology* 471,474.

[24] Alaimo op cit note 13 at 13.

[25] Ibid.

[26] Ibid.

[27] Platt op cit note 22 at 3–4.

[28] Antony Platt 'The rise of the child-saving movement: A study in social policy and correctional reform' (1969) 381 *Annals of the American Academy on Political and Social Science* 21, 27.

penal law in general, which culminated in the establishment of a juvenile court (discussed in 2.3.2.2).[29]

2.3 Theories of child justice

2.3.1 Justice theory (the old version) as a dominant theory in criminal justice

The justice theory is a criminal law theory that was dominant before juvenile justice was established. It is relevant in discussion of juvenile justice because the adult criminal justice system applied to children. Under English common law, children below the age of seven were not held responsible for their actions,[30] and thus a child was unconditionally excluded from criminal responsibility. The law also set an age limit for a rebuttable presumption of mental immaturity. Evidence was required to prove that a child had sufficient knowledge to be held criminally responsible. The age of rebuttable presumption ranged between seven years and 12 or 14.[31]

With the exceptions of those excluded under the *doli incapax*rule,[32] the justice theory viewed a juvenile delinquent as a conscious lawbreaker.[33] The justice theory applied in criminal courts and did not establish a separate system for juvenile offenders.[34] State intervention was minimal, since at that time child labour played a vital role in the economy and parental autonomy dominated.[35] Thus, measures to protect and define children as a distinct class that needed protection in any sphere of life would have affected industrial labour. Hence, juveniles who were accused of

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[29] Ibid at 28.

[30] Lawrence C Wilson '*Parens patriae*: The unfulfilled promise (1976) 24 (10) *Chitty's Law Journal* 325; Julian W Mack 'The juvenile court' (1909-1910) 23 *Harvard Law Review* 104,106.

[31] Mack op cit note 30 mentions 12 years while Allison Morris et al *Justice for Children* (1980) 3; Allison Morris & Mary McIsaac *Juvenile Justice*? (1978) 1 mention 14 years.

[32] This is a rule of criminal law whereby children of a certain age are not held criminally responsible since they do not possess sufficient intelligence to distinguish right from wrong, or to form an intention to commit a crime. The age was under seven years at common law, and this was also applied in Commonwealth countries. However, the age has been increased in some countries and remained the same in others. See Don Cipriani *Children's Rights and the Minimum Age of Criminal Responsibility* (2009) 98–99.

[33] Morris & McIsaac op cit note 31 at x.

[34] Ibid.

[35] Ibid at 2.

committing serious crimes were tried according to ordinary criminal procedures[36] and were punished like adults. This included being sentenced to capital punishment.[37] In some instances, capital punishment could be imposed on children convictedfor just a minor offence.[38]

This theory, also referred to as classical criminology, is expressed in the works of Jeremy Bentham[39] and Cesare Beccaria.[40] It was premised on punishment and the accountability of the offender. The central aim of punishment was retribution and deterrence. The theorists maintained that an individual exercised free choice and will in committing a crime.[41]

When criminal law is based on this theory, it does not consider the individual circumstances of the offender because '[it] is more interested in particular acts than in people'. [42] Individual circumstances become relevant only in assessing sentence. The theory therefore discarded discretion in decision making, maintaining that punishment should only be prescribed by the legislature and not by judges.[43] It discarded discretion so as to create uniformity in sentencing. Although such uniformity was relevant, discretion was important. It would have been useful in dealing with children considering that the ordinary criminal justice system was being applied.

The justice theory was found to be weak in a number of aspects. The argument that punishment is a deterrent is weak. The offender is punished not because of what he has done but because other people might commit a crime.[44] In addition, punishment for people, such as children, with less culpability due to mental

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[36] Mack op cit note 30 at 106.

[37] Wilson op cit at note 30.

[38]Ibid citing D A Schmeiser *Cases and Comments on Criminal Law* (1966) 596. See also Freeman op cit note 8 at 213.

[39] Jeremy Bentham *An Introduction to the Principles of Morals and Legislation* (1907) (first published in 1789).

[40] Richard Bellamy (ed) *Cesare Beccaria Marchese (1738–1794):On Crimes and Punishment and Other Writings* (1995).

[41] Robert C Trojanowicz *Juvenile Delinquency: Concepts and Control* (1973) 25.

[42] Phillip Priestley, Denise Fears and Roger Fuller*Justice for Juveniles: The 1969 Children and Young Persons Act: A Case for Reform?* (1977) 7.

[43] Bellamy op cit note 40 at 12.

[44] Platt op cit note 22 at 17.

immaturity is improper, and will not serve as a deterrent. Given that children were subject to the same criminal justice as adults, the fact that they were children could have warranted different procedures and sentences for them.

The ability to make choices by wrongdoers, including children, as a factor in allocating criminal responsibility was also criticised. Children and adults have different abilities to make choices. Based on this difference, some theorists deny children their rights.[45] Such difference arguably should have been considered in allocating responsibility. The main idea is not that children lack ability to make choices but their rational capacity differs from that of adults and therefore they should be treated differently.

The theory remained dominant until the mid-Nineteenth Century when it was watered down with the emergence of positivist criminology.[46]

2.3.2 The welfare theory

2.3.2.1 The welfare theory and the position of positivist criminology

Positivist criminology is largely embodied in the writings of Lombroso. He persistently attempted to enquire into the personality of the offender.[47] He argued in favour of positivist criminology, his view being that it 'exhorted justice to study men' in contrast to classical criminology which 'exhorted men to study justice'.[48] To

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[45] See John Kleinig *Philosophical Issues in Education* (1982) 206–7, where it is argued that children do not need any legally prescribed rights since love, care and protection are enough.

[46] Morris & McIsaac op cit note 31 at 4.

[47] Cesare Lombroso *Crime, Its Causes and Remedies* (1911). It must be noted, however, that Lombroso's criminology is based on sociology. This differentiates it from legal positivism (on the nature of law) advanced by Jeremy Bentham and John Austin in the Nineteenth Century. The school of criminology advanced by Lombroso is referred to as positivism to emphasise its belief in deductive methods (reasoning from the general to the particular as opposed to inductivereasoning — from the particular to the general). Lombroso prefers this reasoning as used in the natural and social sciences. He maintains that physical science subjects, the nature of which keeps them closer to nature, started reasoning by deduction. Traditionally, legal reasoning preferred pure logic to observation. However it was realised that in studying the law of nature it was important to 'reason less' and 'observe more'. He, therefore, applied this reasoning to his theory, which was concerned with studying the personality of the offender. See 364.

[48] Leon Radzinowicz *Ideology and Crime: A Study of Crime in Its Social and Historical Context* (1966) 56.

them, therefore, the emphasis was on people and the justice system should consider their social circumstances.

The central argument of this theory is that criminality was associated with various social causes including 'biological, psychological, sociological and the environment'. [49] These factors were to be considered in allocating criminal responsibility. It rejected the idea that individuals 'will' crimes, and maintained that individual control in the commission of crimes was very little.[50] It was possible, therefore, for offenders to be reformed through various dispositions since factors contributing to the commission of a crime were subject to control by others, not by the individual.[51] In essence, positivist thinking sought to address criminality from a sociological perspective.[52] It sought to establish a connection between crimes and social circumstances and regarded punishment as inappropriate to reform offenders.[53]

Although positivism is not portrayed in the literature as one of the juvenile justice theories, its contribution to juvenile justice, particularly to the welfare theory, is well documented and acknowledged[54] to such an extent that it seems have been merged with the welfare theory. Despite this merger, positivism remains relevant in the history of juvenile justice.[55] This is mainly because its ideologies were combined with the welfare notions of justice. In contrast to the justice theory, positivist criminology maintained that a person who was incapable of making choices should receive treatment and not punishment.[56] Positivist criminology equated crimes with sickness and borrowed the methodologies of the medical profession, such as

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[49] Morris & McIsaac op cit note 31 at 5. See also Deborah Mills '*United States v Johnson*: Acknowledging the shift in the Juvenile Court system from rehabilitation to punishment' (1995–1996) 45 *DePaul Law Review* 903,908.

[50] Morris&McIsaac op cit note 31 at 4.

[51] Ibid at 5. See also Radzinowicz op cit note 48 at 42–59.

[52] Ibid at 49.

[53] Ibid at 49-50. See also Lombroso op cit note 47 at 365.

[54] See for instance Morris & McIsaac op cit note 31 at 5; Radzinowicz op cit at note 48; Platt op cit note 22 at 18–28; Marsha Lynn Merrill 'Designer, labels or exaggerated romance: Why juvenile law philosophy could never save all of its children?' (1996) 44 (2) *Chitty's Law Journal and Family Law Review*1, 3–5.

[55] Ibid at 5.

[56] Morris &McIsaac op cit note 31 at 5.

diagnosis and treatment, and imported them into criminal law.[57] It emphasised rehabilitation, discarded imprisonment and held that a sentence should fit the offender and not the offence.[58]

Positivist thinking influenced criminal law reforms and the reformers' movements in the latter part of Nineteenth Century.[59] Their approach, which embodies more features of welfare when compared with the justice theory, inspired reformers, who sought to promote the welfare of children to create separate institutions for the administration of justice.[60] As part of their reform movements, reformers sought to address children's living conditions and their moral behaviour, particularly that of dependent and destitute children, whose numbers had increased because of urbanisation — itself a result of an increase in populations had because of a growth in birth rates and immigration.[61] The reformers' social interventions extended to children in conflict with the law, for they established separate institutions for the placement of these, including adoption, foster care and houses of refuge.[62] The establishment of these institutions laid the foundation for the first juvenile court, noted as the most important achievement of the work of the reformers.[63]

Thus positivist criminology, the increase in medical analogies in criminal justice and in the number of social science professionals, such as welfare officers, gave rise to the 'rehabilitative ideal'.[64] This was the main feature of progressive criminal justice reform. The juvenile court therefore combined the ideology of positivism and welfare to administer justice.

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[57] Ibid at 4.

[58] Ibid at 5.

[59] Ibid.

[60] Ibid at 56.

[61] Takanishi op cit note 9 at 13.

[62] Platt op cit note 22 at 10; Fass op cit note 21 at 207; Sanford J Fox 'The early history of the court' (1996) 6 (3) *The Future of Children* 29,30. The first House of Refuge in the United States was the New York House of Refuge established in 1825, intended to rescue needy, neglected and delinquent children.

[63] Takanishi op cit note 9 at 15.

[64] Feld op cit note 23 at 475; Mills op cit note 49 at 909.

2.3.2.2 The evolution of juvenile justice and welfare as the dominant theory

The origins of juvenile justice can be traced to the late Nineteenth Century.[65] A separate system for the administration of juvenile justice was introduced with the establishment of the first Juvenile Court in Chicago, Illinois, in 1899.[66] Thereafter they were established in other parts of the United States, and by 1937, they were found in all states.[67] The countries of Western Europe followed the example of Chicago and established their own juvenile courts.[68] The United Kingdom passed legislation establishing juvenile courts in 1908: Belgium, France and Switzerland in 1912; Spain in 1918; the Netherlands in 1921; Germany in 1922 and Austria in 1923.[69]

Juvenile courts developed out of changes in two cultural ideas: childhood and social control.[70] Changes in the perception of childhood as a period of innocence and an important developmental stage (discussed in 2.2) advanced various reform agendas, including compulsory schooling, the abolition of child labour and the introduction of the concept of child welfare.[71] Social control through positivist criminology (discussed in 2.3.2.1) brought about a different perception of delinquency, one that adopted medical analogies in order to treat offenders instead of punishing them.[72] The juvenile courts combined the new concept of childhood with positivist criminology to administer juvenile justice through 'judicial-welfare'.[73] This was a departure from criminal justice and its dominant justice theory.

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[65] Anthony Platt, 'Triumph of benevolence: The origins of the juvenile justice system in the United States' in John Muncie et al (eds) *Youth Justice* (2002) 177–96,180.

[66] The Illinois Juvenile Court Act of 1899 s 1. The court had jurisdiction over dependent, neglected and delinquent children below 16 years of age. See also Platt op cit note 22 at 6.

[67] Platt op cit note 65 at 187.

[68] Wallace J Mlyniec 'The special issue for juvenile justice: An introduction' (2000) 15 (1) *Criminal Justice Magazine* 1; Josine Junger-Tas 'The juvenile justice system: The past and present in western society' in Ido Weijers & Antony Duff (eds) *Punishing Juveniles* (2002) 23–44, 29.

[69] UNICEF 'Juvenile Justice' (1998) 3 *Innocenti Digest* 1,10.

[70] Barry C Feld 'The inherent tension of social welfare and criminal social control: Policy lessons from the American Juvenile Court experience' in Eric Jensen & Jorgen Jepsen (eds) *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice Systems* (2006) 407–42, 410.

[71] Ibid.

[72] Ibid.

[73] Ibid.

In administering justice, the courts drew upon diverse experience and policies initiated previously by the reformers who established institutions such as houses of refuge.[74] It discarded the adjudication of delinquency and considered whether a child was 'a proper object' for intervention, an approach that had been applied in committing children to institutions before the juvenile court was established.[75] Those reformers were inspired by the need to remove children from the criminal law process and to establish 'special programs for delinquent, dependent and neglected' children.[76] They viewed children as a different class and appreciated that delinquents were amenable to reform. This required, among other things, that they should be kept away from adult offenders to avoid being contaminated.[77] This was one of the driving forces for creation of juvenile justice in the Nineteenth Century.

The early juvenile courts administered justice by implementing the welfare model. Their jurisdiction was founded on the doctrine of *parens patriae* (the country as parent).[78] This doctrine originated in the Chancery Court in England in the Fifteenth Century. The prerogative was exercised in the feudal era, in the Chancery Court representing the monarch.[79] The Court could intervene, inter alia, to assist those who were legally incapable of litigating, including minors, lunatics and idiots.[80] According to the laws and usages of England, the monarch had prerogatives, which included rights to revenues and the maintenance of society.[81] *Parens patriae* was one of such prerogatives in relation to the latter.

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[74] Charles M McGee 'Measured steps towards clarity and balance in juvenile justice system' (1989) 40 *Juvenile and Family Court Journal* 1, 4.

[75] Fox op cit note 62 at 37.

[76] Platt op cit note 22 at 10.

[77] Morris & McIsaac op cit note 31 at 3; Morris et al op cit note 31 at 7; Godfrey Odongo *Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context*(unpublished PhD Thesis,University of the Western Cape, 2005).

[78] Gustav L Schram 'Philosophy of the juvenile court' (1949) 261 *Annals of the American Academy of Political and Social Science* 101.

[79] Cipriani op cit note 32.

[80] Morris et al op cit note 31 at 2. See also Neil Howard Cogan 'Juvenile law, before and after the entrance of "parens patriae" ' (1970) 22 *South Carolina Law Review*147, 156.

[81] Ibid.

The juvenile court was therefore representing the state as a parent and exercised equity jurisdiction similar to that of the 'Chancellor in England representing the King as *parens patriae* with respect to infants'.[82] In addition, similar to the equity court, it was 'remedial not punitive', and it employed informal procedures.[83] In contrast to Chancery, however, the juvenile court extended its protective role as *parens patriae* to include not only neglected, destitute or abandoned children but also delinquents.[84] Further, the court had additional powers (compared to Chancery) to investigate the social circumstances of the child, for instance, through welfare officers, before reaching a decision.[85] It therefore had a broader protective role and jurisdiction as well as discretionary powers that enhanced its functioning by making decisions on a case-to-case basis.

The court distinguished itself substantially from criminal courts. It looked into, and considered, the child's needs, personality, and its social and moral environment as relevant factors in adjudicating delinquency.[86] In contrast to the justice theory, it was concerned not with the offences, but rather with theoffenders and how they could be helped. This watered down the main characteristics of a criminal court, which sought to investigate the offence and not the social circumstances of the offender. Here the court intervened in order to change the child's delinquent behaviour.[87] A child was not regarded as an offender, but as a victim of circumstances who needed protection and proper guidance.[88] In such a relationship, technical procedures were not considered relevant; what was important was to achieve rehabilitation.

In addition, the court respected a child before it by maintaining confidentiality. Confidentiality and the avoidance of labelling were meant to protect children from the stigma associated with court involvement.[89] The stigma was to be

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[82] Roscoe Pound 'Juvenile court and the law' (1949–1950) 1 *Juvenile Court Judges Journal* 30, 33.

[83] Wilson op cit note 30 at 326.

[84] Freeman op cit note 8 at 215.

[85] Wilson op cit note 30 at 325.

[86] Schramm op cit note78 at 103–4.

[87] William O Douglas 'Juvenile courts and due process of law' (1968–1969) 19 *Juvenile Court JudgesJournal* 9,11.

[88] Schramm op cit note 78 at 103.

[89] Merrill op cit note 54 at 2; Mack op cit note 30 at 109; Douglas op cit note 87 at 12; Platt op cit note 65 at 187.

avoided due to its lifelong effect, such as encouraging children to re-engage in criminal activities by classifying themselves as criminals after being so labelled.[90] The court, however, retained the term 'delinquent', which also stigmatises and ought to have been discarded with the development of juvenile courts.[91]

In addition to informal procedures, the court's main objective was to guide a child so that he or she can rejoin the society. It was not concerned with a guilty finding, but on guiding a child in a proper way.[92] The issue for determination before the court was not whether a child had committed a certain wrong but '"what is he" and "how has he become what he is" and what should be done to rescue him'.[93] Its main goal was to secure the welfare of children through rehabilitation rather than holding them accountable for their wrongs.[94] In comparison to criminal courts, where defendants were tried and, once found guilty, were sentenced to imprisonment, juvenile court presiding judges held 'adjudicatory' hearings.[95] Findings here were not of guilt but of 'delinquency,' punishable not by imprisonment, but in terms of available dispositions, including 'training school' supervision and committal to industrial and reformatory schools.[96]

The court was therefore different from a criminal court in so many ways. In its objective to achieve rehabilitation, it adopted informal procedures whereby procedural requirements such as standards of proof and legal representation were

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[90] Margaret May 'Innocence and experience: The evolution of the concept of juvenile delinquency in the mid-Nineteenth Century' in John Muncie *et al* (2002) *Youth Justice* 98–114, 101.

[91] Merrill op cit note 54.

[92] Joel Handler 'The Juvenile Court and the adversary system: Problems of function and form' (1965) *Wisconsin Law Review* 7,10.

[93] Mack op cit note 30 at 119.

[94] Gordon Martin 'The delinquent and the juvenile court: Is there still a place for rehabilitation?' (1992–1993) 25 *Connecticut Law Review* 57; Platt op cit note 65 at 189; Janet E Ainswoth 'The effectiveness of the juvenile courts in protecting the rights of juvenile delinquency cases' (1996) 6 (3) *The Future of Children* 64. This thesis takes note of the fact that rehabilitation has been replaced by reintegration, which is enshrined in the CRC art 40 (1). The term 'rehabilitation' is used only where the context so requires, particularly when referring to literature prior to the CRC.

[95] Platt op cit note 65 at 189.

[96] Janet Ainsworth 'Youth justice in a unified court: A response to critics of juvenile court abolition' (1995) 36 *Boston College Law Review* 927, 934; Morris & McIsaac op cit note 31 at 8.

disregarded.[97] In the context of this informality, the basic concepts of criminal liability and due process of the law were therefore overlooked.[98] The main idea was the same as that of the reformers who first established juvenile courts, which was that the court should not be punitive, but should act as *parens patriae*.[99] Since the procedures were informal (civil rather than criminal in nature),[100] and the court acted as a parent, the question of rights was not considered and children were regarded as having no rights in the justice process.[101] For instance, a child could appear before a court without the assistance of a lawyer or being given the opportunity to be heard.[102] The justification was that the court was *parens patriae*.[103]

The informality of procedures had its own merits and demerits. In the first place, it gave the court an opportunity to deal with children on an individual basis while considering their social life.[104] It also emphasised treatment rather than punishment, the main objective being rehabilitation.[105] In the second place, however, substituting procedural rights for protection, including due process, was arguably one of its weaknesses.[106] In addition, criticism was levelled at the court because of the irregularities involved in admitting hearsay evidence and statements from absent complainants and witnesses.[107]

In addition, being able to disregard theprocedures, the court as *parens patriae* had a broader discretion.[108] Judges could be flexible, and it was possible for them to

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[97] See Franklin E Zimring 'The common thread: Diversion in juvenile justice' (2000) 88 (6) *California Law Review* 2477; Platt op cit note 65 at 187; Ainswoth op cit note 96 at 934.

[98] Handler op cit note 92 at 8.

[99] Mills op cit note 49; Mack op cit note 30.

[100] Monrad G Paulsen 'Fairness to the juvenile offender' (1957) 41 *Minnesota Law Review* 547,563.

[101] Douglas op cit note 87 at 11.

[102] Platt op cit note 65 at 187.

[103] Handler op cit note 92 at 10.

[104] Platt op cit note 65 at 187. See also Douglas op cit note 87 at 10.

[105] See Handler op cit note 92 at 10. See also generally Paulsen op cit note 100; Platt op cit note 22; Platt op cit note 65.

[106] Ainsworth op cit note 94 at 70.

[107] Diana Lewis 'Rights of juvenile delinquents: An appraisal of juvenile court procedures' (1957) 47 (5) *Journal ofCriminal Law, Criminology and Police Science* 561,565.

[108] Note '*Parens patriae* and statutory vagueness in the juvenile court' (1972–1973) 82 *TheYale Law Journal* 745,748.

develop their own procedures.[109]Arguably, this was a broad discretionary power that could have its own disadvantages. As the Juvenile Court judges were equated to medical professionals and charged with a diagnosis and treatment of illness (a delinquent act), their solutions could be indeterminate and disproportionate.[110] A child could be sent to an institution until he or she attained a certain age or satisfied certain reform conditions.[111] Such an indeterminate sentence denied the child the opportunity to prove that he or she had changed, and therefore deserved to be accepted back into the community.

Despite its protective role, the welfare theory was challenged on various grounds. Between 1960 and 1980, the juvenile court with its welfare ideology was seriously attacked on the grounds that it had failed to achieve its rehabilitative goal.[112] Among the criticisms was the involvement of probation officers and prosecutors upon whom too much reliance was placed in administering justice.[113]A probation officer's findings and the absence of a formal charge or legal representation could provide the basis for a child's confinement. [114]

Furthermore, the court's disregard of procedural requirements was being challenged. For example, in *Kent v United States*, it was stated that the court 'being a *parens patriae* was not an invitation for procedural arbitrariness'.[115] The substitution of discretion for established procedures was similarly challenged. In *Re Gault*, the United States Supreme Court remarked that 'the absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment'.[116] The Court made a number of observations, which may be said to be a judicial response to welfare theory, before it went on to grant due process rights. It held that children were entitled to due process rights, including adequate notice of

[109] Lewis op cit note 107 at 565.

[110] Feld 'Just deserts for juveniles: Punishment vs. treatment and the difference it makes' *International Review of Criminal Policy* 81.

[111] Ibid.

[112] Feld op cit note 70 at 411.

[113] Handler op cit note 92 at 16.

[114] Ibid.

[115] 16 L Ed 2d 84, 94 (1966).

[116]*Re Gault* 18 L Ed 2d 527, 541 (1967).

charges, to be advised on legal representation, not to make self-incriminating statements and to cross-examine the other party.[117]

The criticisms to the welfare theory paved the way for a return to the justice theory.

2.3.3. Justice theory: A new version

A new version of the justice theory appeared in the 1970s as a reaction to the welfare theory.[118] This theory, also referred to as the 'back to justice' and 'revisionist' movement, is premised on just deserts.[119] Just deserts (proportional punishment), 'is punishment whose severity is proportional to the offender's culpability'.[120]

This theory eventually transformed the juvenile court from a social welfare agency into a 'second class criminal court that provided juveniles with neither therapy nor justice'.[121] The juvenile courts, in administering just deserts, paid little attention to the individual social circumstances of the child and were concerned only with determinations of guilt or innocence.[122] Providing delinquents with some procedural guarantees justified stiffer punitive sentences, which could be disproportionate for children.[123] The court was inclined to waive juvenile court jurisdiction and refer juveniles to adult courts.[124] This was a departure from the Juvenile Court philosophy of *parens patriae* and the rehabilitation goal.

As observed above, the court became punitive and severe sentences imposed on adults could also be imposed on children.[125] For instance in *Stanford v*

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[117] Ibid, opinion of the Court by Fortas J.

[118] Kevin Haines & Mark Drakeford *Young People and Youth Justice* (1998) Basingstoke: Macmillan 44.

[119] Odongo op cit note 77. See also Haines & Drakeford op cit note 118; John Clarke 'Whose justice?: The politics of juvenile control' in John Muncie et al (eds) *Youth Justice* (2002) 283–310 at 292; Handler op cit note 92.

[120] Stanley Z Fisher 'The disposition process under the juvenile justice standards project' (1977) 57 *Boston University Law Review* 732,745.

[121] Feld op cit note 70 408.

[122] Feld op cit note 110 at 82.

[123] Feld op cit note 70 at 412–3.

[124] Mills op cit note 49 at 935; Kristin K Zinsmaster '*In Re the Welfare of* Due Process' (2009–2010) 94 *Minnesota Law Review* 168,182.

[125] Feld op cit note 70 at 412.

Kentucky,[126] the United States Supreme Court affirmed the constitutionality of the death penalty imposed on a child for an offence committed at age 16 or 17. The court thus placed less weight on age and rehabilitation and more on just deserts in sentencing, focusing on what the children did and not who they are or may become.[127] The emphasis was not on the need or individual circumstances of the offender; it was on the deserved punishment, in that a person found guilty should receive the punishment which is proportional to the gravity of the offence — while considering also his previous criminal record.[128] This was in contrast to the welfare theory that emphasised the wellbeing of the child.

These changes inthe United Statesjuvenile justice system was followed in other countries. For instance, in Canada, Parliament repealed the Youth Offenders Act 1982 and replaced it with the 1999 Act placing more 'emphasis on offence than offender'.[129] It was thus clear that children's constitutional rights had compromised their protection. This was a radical departure from *parens patriae* upon which the juvenile court was founded.

Justice theory and just deserts ideology were criticised for their failure to reduce recidivism and serious crimes, one that was described as an unsuccessful attempt to balance justice and protection of rights in what could be said to be 'abandoning children to their rights'.[130] Just deserts were thus a shift from rehabilitation to punishment,[131] and that a flexibility in the waiver of juvenile court jurisdiction subjected more children to adult court adjudication.[132] Some commentators argued that if the primary objective of the juvenile justice was to

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[126] 106 L Ed 2d 306, 325 (1989).

[127] Feld op cit note 110 at 83.

[128]Junger-Tas op cit note 68 at 32.

[129] Ibid at 33.

[130] Bruce Hafen 'Children liberation and the new egalitarianism: Some reservation about abandoning youth to their "rights"' (1976) 3 *Brigham Young University Law Review* 605. Hafen discusses the autonomous rights of children in both criminal and civil justice and uses the term 'abandon children to their rights' to explain that protecting children is the most important right and they should not be abandoned to their other rights. The term is used here to show how child rights have been compromised by due process.

[131] Thomas Grisso 'Juveniles competency to stand trial: Questions in an era of punitive reform' (1997–1998) 12 *Criminal Justice* 4, 5.

[132] Ibid.

protect children through intervention, then the rule in *Gault* and *Winship* was a decisive rejection of juvenile court jurisprudence'.[133] The line between due process and just deserts was blurred, and the former was perceived as a failure.

The flaw in the new version of the justice theory had two major impacts on juvenile justice. The first is an incipient move to reject justice theory ideology on the purposes of punishment. For instance, the sentencing jurisprudence in the United States has been changing greatly with particular reference to capital punishment.[134] Not only have courts been rejecting punitive punishment, they also have been holding that punishment as retribution and deterrent for juvenile offenders is disproportional.[135] They have gone further in holding that sentencing a child without the possibility of release for an offence other than murder was unconstitutional.[136] In *Miller v Alabama*,[137] the Supreme Court recently declared mandatory terms without the possibility of parole in murder cases unconstitutional in the case of children. The influence of human rights in general and children's rights in particular in these developments is significant, not only in the United States, but also in other countries.[138] The United States Supreme Court, for instance, has taken note of a Convention on the Rights of the Child (CRC)[139] provision, despite the United Statesnot being a party.[140]

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[133] Zimring op cit note 97 at 2488. See also Ainsworth op cit note 94 at 70.

[134] Consider, for instance, the imposition of the death penalty on children confirmed by the United States Supreme Court in *Stanford v Kentucky* in 1989 supra note 126; court findings that the death penalty was unconstitutional for under 18s in *Roper v Simmons* 161 L Ed 2d 1 (2005) in 2005, and that life imprisonment without the possibility of release was unconstitutional in *Miller v Alabama* 183 L Ed 2d 407 in 2012.

[135] *Roper v Simmons* supra note 134 at 23.

[136] *Graham v Florida* 176 L Ed 2d 825 (2010) 835–6.

[137] *Miller v Alabama* supra note 134 at 430.

[138] For instance, after the inclusion of the Bill of Rights in 1984 and the ratification of the CRC in 1991, Tanzania abolished the death penalty for children in 1997. See s 26 of the Penal Code (Cap 16 R.E 2002).

[139] GA Res 44/25, Annex, 44 UN GAOR Supplement (No 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990.

[140] See for instance *Graham v Florida* supra note 136 at 849 where the court 'noted' that art 37 (a) of the CRC prohibits the death penalty for persons below 18, observing also that it is only the United States and Somalia that have not ratified the Convention.

The second impact of the flaw in the justice theory was the emergence of restorative justice, as will be seen below, as an alternative means of addressing juvenile delinquency.

2.3.4 Restorative justice and recent approaches to juvenile justice

From the 1980s, the new version of the justice theory and its just deserts philosophy was being replaced by the theory of restorative justice.[141] The justice theory and just deserts had not offered a viable solution to the protection of children's rights and a reduction of recidivism.[142] In addition, dealing with juvenile delinquents judicially proved to be costly. There was, therefore, a great interest in Western jurisdictions in restorative justice models, such as family conferencing and diversion as alternatives to judicial intervention in delinquency.[143]

The central theme of restorative justice is repairing the harm caused by criminal behaviour by facilitating negotiations that lead to the transformation of people, relationships and communities.[144] It is a theory of justice that takes into account the interests of the offender, the victim and the community. This theory contrasts sharply with both the welfare and justice theories. The former is mainly concerned with the offender and the latter with the harm caused to society. Restorative justice, therefore, represents a balanced approach to the interests of three groups: the offender, the victim and society. In addition, restorative justice had been proven through empirical studies to be more efficient than punishment models.[145]

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[141] 'Restorative justice refers to a theory of justice that responds to criminal behaviour by balancing the needs of the community, the victims and the offenders.' See United Nations Office on Drugs and Crime *Handbook on Restorative Justice Programmes* (2006) 6. See also Ann Skelton 'Restorative justice in child justice systems in Africa' in Julia Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 129–45 and further discussion in Chapter 6.

[142] Peter Murphy, Anthony McGinness & Tom McDermott *Review of Effective Practices in Juvenile Justice: Report for the Minister for Juvenile Justice — New South Wales* (2010) IV,12.

[143] John Muncie & Barry Goldson 'States of transition: Convergence and diversity in international youth justice 'in John Muncie & Barry Goldson (eds) *ComparativeYouth Justice* (2006) 196–224, 209.

[144] Prison Fellowship International Centre for Justice and Reconciliation *Restorative Justice Briefing Paper 1* (2008) 1–2.

[145] Studies conducted in Australia, Europe, United States and New Zealand. See Murphy et al op cit note 138 at iv.

As indicated above, implementation of diversion takes the form of conferencing, special child justice programmes and child justice teams.[146] Where it is implemented, court jurisdiction is reserved for serious offenders.[147] Diversion has been preferred, even in those countries that do not have separate justice systems for children.[148] In addition to diversion, prevention of delinquency has also been widely accepted as being efficient and cost-effective.[149]

While no uniform theory of justice has been adopted, states implement a hybrid justice system (with both welfare and justice theories elements), a welfare theory or a justice theory.[150] Importantly, where a hybrid justice system exists, the welfare approach takes precedence over the justice theory.[151] The hybrid justice system attracts even more support because countries that implement it also implement diversion and reserve court jurisdiction for serious offences.[152] Child offenders are therefore diverted from courts to community services when offences are not serious.[153]

Despite the fact that restorative justice is broadly accepted, the prevailing justice model will vary from one country to another. Variation depends on the extent of law reform in each individual state. It has been observed, however, that English common law countries implement the justice theory.[154] This, however, may be of too much of a generalisation, as it is too easy to assert that southern countries' justice systems reflect either the welfare or the justice theory.[155] Arguably, the prevailing

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[146] Murphy et al op cit note 142 at 13.

[147] Ibid, for instance in Victoria, Australia. However, the term 'serious offenders' is not elaborated on.

[148] These include Denmark, Finland, Iceland Norway and Sweden. Generally, these Scandinavian and Nordic counties do not have separate juvenile justice systems. They normally divert children from ordinary criminal courts into social welfare programmes. See Murphy et al op cit note 142 at 7.

[149] Ibid at iv.

[150] Ibid at3.

[151] Ibid at 10–13 with particular reference to Scandinavian counties with hybrid justice systems and their implementation of diversion to welfare programmes.

[152] Ibid at 3, with specific reference to Canada.

[153] Ibid at 3–7.

[154] Ibid at iv.

[155] See Jane Connors 'Juvenile justice in the Commonwealth' (1990) 39–40 *International Review of Criminal Policy* 55, 59. See also Odongo op cit note 77 at 42.

theory in the justice system will vary considerably from one state to another. It is however unlikely for either the welfare or the justice model to exist in isolation.[156]

2.3.5 The 'rights approach': An emerging child justice theory?

Juvenile justice trends from justice to welfare, welfare to justice and just deserts and, finally, restorative justice are indicative of the history of a struggle to find a workable theory on juvenile justice. While both the welfare and justice models have been subjected to critical scrutiny, there is currently a shift towards restorative justice from the two theories. In the same vein, the approaches of court jurisprudence from the countries that have been considered in this chapter have changed, and these now challenge the purpose served by punishment in the justice theory. These changes provide evidence that child justice practices and policies areso diverse that the two theories cannot adequately explain them.[157] The approach now is to combine these theories with restorative justice, and punishment with reintegration, so that the varied circumstances of children can be fully provided for and that the wellbeing of each individual child is secured. The recognition of children's rights, as will be shown in the next chapter, has also had an impact on our understanding of child justice.

2.4 The relevance of theories in the rights discourse in an African context

The relevance of juvenile justice theories in Africa in general and in Tanzania in particular should be understood in the context of the emergence and development of the notion of child justice.

Childhood in African societies had always been viewed as a 'time to learn, to build a character and to acquire the social and technical skills necessary to perform the future roles of adulthood'. [158] These include developing the skills and social roles of the child.[159] However, local conceptions of childhood have undergone some fundamental changes due to globalisation, urbanisation, migration and formal

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[156] Ibid at34.

[157] Julia Sloth-Nielsen 'Child justice and law reform' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 383–461, 385.

[158] Bart Rwezaura 'Competing "images" of childhood in the social and legal systems of contemporary Sub-Saharan Africa' (1998) 12 *International Journal of Law, Policy and the Family* 253,255.

[159] Ibid at 256.

education.[160] Hence, children's family ties and responsibilities to their families and society have been altered.[161]

Closely related to this is that the CRC has managed through the rights approach to create a common understanding of childhood. A child is defined as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'[162] and is entitled to develop his or her personality in an atmosphere of 'happiness, love and understanding', care and protection.[163] The need to join other countries in addressing delinquency in Africa is compelling. Currently, there are various factors responsible for the increase of crime and child delinquency that call for the reform of child justice systems in Africa. Some of these factors, such as urbanisation, that had led to an increase in crime in Western countries in the Nineteenth Century and early Twentieth Century and hence necessitated the reconstruction of childhood and juvenile justice, currently exist in Africa.[164] The rate of urban growth at five per cent per annum in Sub-Saharan Africa is the highest globally, twice as high as that for Asia and Latin America.[165] Other factors include HIV/Aids, poverty and family instability, which leave children orphaned, with many migrating to urban areas in search of a better life through employment.[166] The 2007 economic crisis in developed countries has also had a severe impact on developing countries' economies. This has resulted in problems such as unemployment, high prices of fuel and foodstuff, all of which exacerbate the problems.[167] The consequence is an escalation of the urban population with a concomitant increase in child criminality and delinquency.[168]

Thus, although children's rights and the notion of child justice could be seen as a foreign idea in Africa, the idea that children occupy a special place in society and deserve special treatment is not foreign to African thought and societies. The

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[160] Ibid at 259. See also Kaime op cit note 6 at 18.

[161] Rwezaura op cit note 158 at 259.

[162] Article 1.

[163] Thoko Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* (2009) 80, referring to the Preamble to the CRC para 6.

[164] Odongo op cit note 77 at 40.

[165] UNICEF *Cities and Children: The Challenge of Urbanisation in Tanzania* (2012) 4.

[166] UNICEF *The State of World's Children: Children in an Urban World* (2012) 33.

[167] Ibid at 40.

[168] Ibid at 42.

concept of child justice itself has been fundamentally transformed by the development of international law in which African states have participated.

2.5 Conclusion

The idea that children have rights has been debated for centuries. Primitive societies regarded children as their fathers' property and therefore they could not have rights. This perception changed over time, particularly with the emergence of education and the abolition of child labour. Subsequently, children were perceived as having the right to protection. The emergence of child savers spurred the development of the notion of juvenile justice. Initially framed in the context of the welfare ideology, this model of child justice discarded the classical criminal justice ideology of punishment that placed a greater emphasis on deterrence and retribution rather than on the relevance of the social circumstances of the offender and the need for rehabilitation.

The emergence of human rights and children's rights took these developments further, as children could be recognised as rights-holders and not just the objects of intervention. Children were granted due process rights that were previously accorded only to adults. However, these rights were accompanied by the ideology of just deserts, resulting in sentences that were more punitive.

There has since been a shift from the just deserts theory of punishment since *Re Gault* was decided. States are now more open to implementing restorative justice measures as part of a child justice framework that also incorporates aspects of the justice and welfare models. This development has occurred in recognition of the need to pay attention to the specific circumstances of the child in addition to the general principles of punishment. Indeed, such a mixed model of child justice is better able to cater for the varied circumstances of child offending and the limits of the free will theory.

The next chapter examines the international regime for the protection of children's rights and the extent to which it draws upon the theories discussed in this chapter. This chapter will provide an overarching framework against which the child justice system in Tanzania will be critiqued.

CHAPTER 3: CHILDREN'S RIGHTS IN CHILD JUSTICE IN THE INTERNATIONAL REGIME

3.1 Introduction

The previous chapter examined the theoretical underpinnings and evolution of child justice. It has shown that children's rights have evolved in line with changing concepts of childhood. In ancient times, children were regarded as the property of their fathers and as having no rights. This was a time when human rights were not recognised and thejustice theory was dominant, with no separate justice system for children. Developments in education and Christianity in the Sixteenth Century changed common perceptions of childhood, in that it was acknowledged that children needed protection. In addition, the emergence of the child savers (discussed in Chapter 2, section 2.2) in the United States in the Nineteenth Century introduced a welfare ideology that promoted the concept of children, not necessarily as autonomous beings but as vulnerable ones in need of protection, including that offered by a separate system of justice. The emergence of positivist criminology challenged deterrence and retribution as the main aims of punishment, and instead advocated for the treatment of the child offender based on the idea of treatment of a patient in medical profession and social reasons for criminality. The establishment of the first juvenile court gave effect to the welfare theory.

This chapter will discuss the evolution of the concept of child justice in international law. It will also examine the extent to which international law draws upon the child justice theories discussed in the previous chapter; and identify the key elements of a human rights-based approach to child justice and the principal obligations that states have with regard to creating a child friendly justice system. It will also form the backdrop against which the Tanzanian child justice system will be evaluated in subsequent chapters.

3.2 Historical background

The protection of children's rights in a child justice system is a recent development compared to the protection of children's rights generally. The protection of the children's rights in international law dates back to the 1920s.[1] The early international instruments included the Geneva Declaration of the Rights of the Child (Geneva

[1]Geraldine Van Bueren *The International Law on the Rights of the Child* (1995) 170.

Declaration) [2] and the United Nations Declaration of the Rights of the Child (UN Declaration).[3] Neither had provisions on the rights of children in conflict with the law.

The rights of children in conflict with the law were first articulated in the International Covenant on Civil and Political Rights (ICCPR).[4] This treaty provides for the separation of juveniles from adult offenders and requires juvenile trials to be expedited.[5] Furthermore, it requires that when criminal proceedings are brought against children, the procedures thereof should take into account their age and the need for rehabilitation.[6] The ICCPR also prohibits the imposition of the death penalty on a person below 18 years.[7] Although the ICCPR did not specifically provide for the establishment of a child justice system, the recognition of the need for children to be tried separately, the consideration of their age and the need for rehabilitation are important aspects in the development of child justice in international law. The ICCPR inspired states to establish separate child justice systems.[8] It, however, did not provide a comprehensive framework as to how such justice systems should be established and implemented. This gave individual states the discretion to determine the nature of their systems.[9] It was against this background that the United Nations General Assembly adopted the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) in 1985.[10] The Rules were adopted while the Convention on the Rights of the Child (CRC)[11] drafting process was underway, thus giving the drafters of the Convention an opportunity to incorporate some of its principles.[12] Van

[2]The Geneva Declaration of the Rights of the Child adopted 26 September 1924, League of Nations OJ SpecSupp 21 at 43.

[3]UN General Assembly Resolution 1386, 20 November 1959.

[4] International Covenant on Civil and Political Rights GA Res. 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.

[5]Article 10 (2) (b).

[6]Article 14 (4).

[7]Article 6 (5).

[8] Van Bueren op cit note 1.

[9] Roger J R Levesque 'Future visions of juvenile justice: Lessons from international and comparative law' (1996) 29 *Creighton Law Review* 1563,1566. This is mainly because it did not provide any guideline on the establishment of juvenile justice.

[10]GA Res 40/33, Annex, 40 UN GAOR Supp (No 53) at 207, UN Doc A/40/53 (1985).

[11]Convention on the Rights of the Child GA Res 44/25, Annex, 44 UN GAOR Supplement (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990.

[12] Van Bueren op cit note 1 at 171.

Bueren has argued that, by virtue of their incorporation in the CRC, these principles have become binding on states parties.[13]

3.2.1 The Convention on the Rights of the Child 1989

The CRC marked a turning point as far as children's rights in general, and child justice in particular, are concerned. This treaty has been hailed as an 'evolutionary revolution' that has radically, but peacefully, changed the image of childhood.[14] The CRC has transformed the notion of the child from an object of intervention into a legal person capable of holding rights.[15] This contrasts the ideologies of the property theory with those of the welfare model. A child is not property and is an autonomous individual and not merely an object of intervention. Scholars are strongly convinced that the CRC has superseded the welfare and justice debates, introducing in their place a child rights-centred approach to child justice.[16] The current number of 196 states parties[17] not only makes CRC the most ratified treaty, but also indicates a global commitment to the promotion and protection of children's rights.

The CRC, apart from being the most ratified treaty, has unique features that are properly designed for children. It is the first child rights-centered treaty that incorporates both civil and political rights *and* social, economic and cultural rights.[18]

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[13]Ibid at 170.

[14]Geraldine Van Bueren, 'The United Nations Convention on the Rights of the Child: An evolutionary revolution' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 202–312, 202.

[15] Julia Sloth-Nielsen 'Child justice and law reform' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 383–461, 387.

[16]Godfrey O 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* (2008) 147–63,147.

[17]United Nations Treaty Collection, available at *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en*, accessed on 27 December 2015.

[18] Van Bueren op cit note 14 at 202. See also Thomas Hammarberg 'The UN Convention on the Rights of the Child—and how to make it work' (1990) 12 *Human Rights Quarterly* 97 at 100. Civil and political rights will include the rights to name and nationality (art 7); preservation of identity (art 8); freedom of expression (art 13); freedom of thought, conscience and religion (art 14); freedom of association and peaceful assembly (art 15); protection of privacy (art 16); access to information (art 17); and the right not to be subjected to torture and other inhuman and degrading punishments and treatment (art 37 (a)). Social economic and cultural rights will include the right to health services (art 24); social security and child care services arts 26 and 18(3); standard of living (art 27); education (arts

All of these rights are relevant for all children, including those in conflict with the law. For the purposes of the administration of justice, arts 37 and 40 of the CRC articulate substantive and procedural rights. It is largely these two provisions and their equivalent in the African Children's Charter that will form the basis of discussion in this chapter.

The CRC is broadly premised on the four 'p's': *participation* in decision-making; *protection* against discrimination, cruel and degrading treatment; *prevention* of harm such as by developing policies in health care; and *provision* of basic needs.[19] These principles areal relevant and complement one another.[20] This suggests that the CRC embraces the ideology of welfare (protection) and the justice theory (autonomy) in its holistic approach to these rights. It seeks to strike an appropriate balance by employing four other key principles of the Convention.[21] These are the best interests of the child, non-discrimination, the right to life, survival and development and child participation.[22] Importantly, it recognises respect for dignity, which is core to the enjoyment of other rights.[23]

These four principles are relevant to all spheres of child rights, including child justice. For instance, the best interests principle, one of the underlying principles of the Convention, should be considered in all actions concerning children.[24] The principle is broad in its application, as it applies as a substantive right, interpretative principle and a rule of procedure.[25] Non-discrimination is also relevant so as to create

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28, 29). See Sharon Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 23–4.

[19] Van Bueren op cit note 14 at 203.

[20] Ibid.

[21] Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law' (1995) 11 *South African Journal on Human Rights* 401, 408.

[22] Articles 3, 2, 6 and 12 respectively; para 21 Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

[23]Article 40 (1).

[24]Julia Sloth-Nielsen 'The international framework' in Julia Sloth-Nielsen and Jacqui Gallinetti (eds) *Child Justice in Africa: A Guide to Good Practice* (2004) 20–9, 20; Sloth-Nielsen op cit note 21 at 409.

[25]CRC General Comment No 14 'The right of the child to have his or her best interests taken as a primary consideration (Art 3, para1)', CRC/C/GC/14, Sixty-second session, 29 May 2013. See Introduction para 6.

a sense of respect for others. Chirwa[26] correctly observes that it is most likely that children who contravene the law have experienced discrimination themselves in the past. Likewise, the right to life, survival and development are important and are relevant for a child to develop optimally and realise his or her full potential.

The CRC is supplemented by various soft-law instruments. Apart from the Beijing Rules mentioned above, other instruments include the Guidelines for the Prevention of Juvenile Delinquency 1990 (the Riyadh Guidelines). [27] These instruments serve as guides to states in the implementation of delinquency prevention consistent with the obligation of the state parties under the CRC to protect children.[28] Such protection is intended for all children and, in particular, for those who, though not in conflict with the law, are at social risk.[29] These include abandoned, neglected and abused children or those who for any reason are at social risk.[30]

In addition, the United Nations Rules for the Protection of Children Deprived of their Liberty 1990 (the Havana Rules)[31] seek to protect children deprived of their liberty in order to ensure that states comply with the principle articulated in the CRC that children should be detained or imprisoned as a matter of last resort.[32] The CRC provides that states parties shall ensure that arrest, detention or imprisonment shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.[33] Importantly, in addition to the last resort principle, the Rules recommend protection of other rights, such as the right to education, health and play and recreation consistent with the CRC.[34] Thus, the Rules recommend the protection of civil and political rights, as well as socio-economic

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[26]Danwood M Chirwa *Human Rights under the Malawian Constitution* (2011) 222.

[27] GA Res 45/112, Annex, 45 UN GAOR Supp (No 49A) at 201, UN Doc A/45/49 (1990).

[28] Articles 3 (2); 4.

[29]Para 7 Riyadh Guidelines.

[30] Ibid.

[31] GA Res 45/113, Annex, 45 UN GAOR Supp (No 49A) at 205, UN Doc A/45/49 (1990). The Havana Rules were intended to complement the existing United Nations Standard Minimum Rules for the Treatment of Prisoners 1955UN Doc A/CONF/611, Annex I, ESC Res 663C, 24 UNESCOR Supp (No 1) at 11 UN Doc E/3048 (1957), amended ESC Res 2076, 62 UNESCOR Supp (No 1) 35 UN Doc E/5988 (1977).

[32]Article 37 (b).

[33] Ibid.

[34] Rules 315; 49; 38 and 47 consistent with the CRC arts 28, 28, 24 and 31.

rights to ensure that all these rights continue to be protected when children are deprived of their liberty.

The rights of children in conflict with the law are also recommended in the United Nations Standards Minimum Rules for Non-custodial Measures 1990 (the Tokyo Rules).[35] These Rules apply without discrimination on the ground of age, among other grounds, and therefore they apply to children as well.[36] They seek to promote the use of non-custodial measures and the respect of human rights where measures other than imprisonment had been adopted.[37] They complement the idea of social reintegration in the CRC[38] by seeking to promote among offenders the sense of responsibility towards the community.[39] Thus, despite the fact that these Rules and Guidelines are soft law, they provide guidance to the states in respect of the implementation of their binding obligations on child justice under the CRC.

In addition, a number of resolutions to ensure the protection of children's rights in child justice have been adopted by United Nations bodies, such as the General Assembly[40] and the Economic and Social Council (ECOSOC).[41] Charter-based human rights organs, including the Human Rights Council, have also adopted

[35] GA Res 45/110, Annex, 45 UN GAOR Supp (No 49A) 197, UN Doc A/45/49 (1990).

[36] Item 2: scope of non-custodial measures: para 2.2.

[37] Item I: general principles:1 fundamental aims.

[38]Article 40 (1).

[39] Tokyo Rules item 1 fundamental aim para 10.1.

[40] UN General Assembly Resolution on Human Rights in the Administration of Justice GA A/Res/ 62/158 Sixty-second session 18 December 2007 and UN General Assembly Resolution 'Human Rights in the Administration of Justice' GA Res 65/213 adopted at the Sixty-fifth session 21 December 2010.

[41] The ECOSOC, exercising its powers under art 62 of the UN Charter within its broader mandate to promote observance of human rights has adopted the UN Guidelines for Action on Children in the Criminal Justice System 1997 ECOSOC Res 1997/30 21 July 1997; the UN Guidelines on Matters involving Child Victims and Witnesses of Crime 2005 ECOSOC Res 2005/20, 22 July 2005; Basic Principles on the use of Restorative Justice Programmes in Criminal Matters (2002) ECOSOC Res 2002/12, 24 July 2002.; Resolution Supporting National Efforts for Child Justice Reform, in Particular through Technical assistance and Improved United Nations System-wide Coordination ECOSOC Res 2007/23, 26 July 2007 and Resolution Supporting National Efforts for Child Justice Reform, in Particular through Technical Assistance and Improved United Nations System-wide Coordination ECOSOC Res 2009/26, 30 July 2009.

such resolutions.[42] Apart from these resolutions, treaty-based bodies such as the Committee on the Rights of the Child[43] and the Human Rights Committee, [44] adopt general comments and issue concluding observations that expand upon the treaty provisions. Though not binding, these documents are relevant as they interpret and clarify the CRC articles and provide guidance on the application and implementation of its provisions.[45] This is important for creating consistency and uniformity in different states and legal systems.[46]

3.2.2 The African Charter on the Rights and Welfare of the Child 1990

In the Africa region, the African Charter on the Rights and Welfare of the Child (the African Children's Charter)[47] supplements the CRC.[48] The CRC, like the African Children's Charter, recognises the rights of children in conflict with the law to have their right to dignity and other rights, including due process, respected.[49] It also embraces the four key principles and emphasises reintegration as the aim of child justice.[50] The CRC, in comparison with other instruments of the same nature, has

[42] Human Rights Council Resolutions: Human Rights in the Administration of Justice, in Particular Juvenile Justice Res A/HRC/Res/10/2, 25 March 2009 and Human Rights Council Resolutions on Human Rights in the Administration of Justice, in Particular Juvenile Justice, Res A/HRC/ 18/L.9, 29 September 2011.

[43] The Committee is the monitoring body for the Convention. It plays a significant role in child justice in line with its mandate under the CRC, inter alia, in examining the progress made by state parties in realising their obligations under the Convention. It makes General Comments based on specific articles and adopts provisions to assist state parties in fulfilling their obligations. See Office of the United Nations High Commissioner for Human Rights: Committee on the Rights of the Child, available at *http://www2.ohchr.org/english/bodies/crc/*,accessed on 2 October 2012.

[44] The Human Rights Committee is the monitoring body for the ICCPR. See *http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx,* accessed on 9 August 2014.

[45] UNICEF *A Guide to General Comment No 7: Implementing Child Rights in Early Childhood* (2006) 1–3.

[46]Ibid at 2.

[47] African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999.

[48]Sloth-Nielsen op cit note 24 at 29.

[49] Article 17.

[50]Article 17 (3).

more detailed provisions on child justice,[51] including those on non-judicial intervention.[52] In addition, unlike the African Children's Charter, the CRC provides a wide range of disposition options such as care, guidance, supervision orders, counselling, foster care, education and vocational programmes.[53] The African Children's Charter, however, emphasises that the aim of the treatment of a child in trial and post-trial procedures should be his or her reformation, reintegration into family and social rehabilitation.[54] This suggests that dispositions that enhance these objectives, such as those enumerated in the CRC, should be implemented. For this reason, the lack of provisions on dispositions in the African Children's Charter does not water down or dispense with the obligation to implement alternative sentences.

3.3 Elements of a rights-based child justice system

3.3.1 The obligation of states to establish a child justice system

By ratifying a human rights treaty a state assumes an obligation to reform its laws and policies in so far as they are not in line with the obligations in the treaty in question.[55] The CRC[56] and the African Children's Charter[57] provide two sets of obligations, both of which are relevant to child justice. The first is the obligation to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the two treaties. It is therefore obligatory for states parties to review their domestic legislation, not only on an article-by-article basis.[58] Compliance

[51]These include contact with family through correspondence and visits (art 37 (c)); deprivation of liberty as a measure of last resort, (art 37 (b)); prohibition of the death penalty and life imprisonment without possibility of release (art 37 (a)); non-retrospective application of penal laws and the rule against self-incrimination (art 40 (2) (iv)).

[52]Article 40 (3).

[53]Article 40 (4).

[54]Article 17 (3) African Children's Charter.

[55]FransViljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000)214–31, 215; Sloth-Nielsen 'Children's rights in South African courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *The International Journal of Children's Rights*137 at 138; CRC General Comment No 5 (2003) 'General measures of implementation of the Convention on the Rights of the Child' CRC/GC/2003/5, Thirty-fourth session 27 November 2003 para 1.

[56] Article 4.

[57]Article 1.

[58]CRC General Comment No 5 (2003) op cit note 55 para 18.

with such obligations will ensure that each child without discrimination enjoys the rights articulated in the Convention.[59] By defining the rights with reference to 'each child' and 'every child', both the CRC and the African Children's Charter demonstrate the value attached to each individual child. The second one is a specific obligation in relation to children in conflict with the law:

> States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law… .[60]

Thus, in addition to enjoying general rights, children who are accused of committing a criminal offence are entitled to special treatment or to treatment that is different from that accorded to adults. Such special treatment can be realised only by devising and implementing special procedures, mechanisms, institutions and practices compared to those applicable to adults.

The duty to establish a special system of justice for children arises from the recognition that children are vulnerable and less culpable due to their age.[61] This, in turn, underscores the need to consider alternatives to punishment and, where punishment is necessary, the need to consider the rehabilitation and reintegration of the child into society.

3.3.2 Delinquency prevention policy

The obligation to prevent child delinquency is not directly stated in the CRC. It has, however, been elaborated on by the Committee on the Rights of the Child[62] and in the Riyadh Guidelines.[63] The Committee has made reference to delinquency prevention relying on the CRC objectives 'to promote [the] child's personality, talents and mental and physical abilities to their fullest potential'.[64] It has recommended that delinquency

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[59] Article 2.

[60] Article 40 (3).

[61] Article 40 (3) (a) CRC.

[62] CRC General Comment No 10 'Children's rights in juvenile justice' CRC/C/GC/10, 25 April 2007, paras 16–21.

[63] The Guidelines are generally meant for delinquency prevention.

[64] Preamble, arts 6 and 29 CRC. See also CRC General Comment No 10 (2007) op cit note 62 para 16.

prevention should be part of child justice and that the absence of delinquency prevention in a child justice system is a serious shortcoming.[65]

The Committee has emphasised that it is not in the best interests of the child to grow up as a criminal. This means that measures must be taken to ensure the wellbeing of the child.[66] These may include the protection of children from mental and physical violence and abuse[67] and the provision of access to the basic services necessary for an adequate standard of living.[68] These should be reflected in state policies, particularly those on poverty reduction and social justice.

The CRC requires states parties to take legislative, administrative and other measures to protect children from the illicit use of narcotic drugs,[69] sexual exploitation, [70] traffic in children,[71] child labour[72] and all form of violence.[73] Violence against children includes physical, mental, negligent treatment abuse and maltreatment that occurs in various settings, including within the family.[74] Such violence has far-reaching effects on children's health and social behaviour.[75] Drug abuse, anxiety, aggressive behaviour and other social problems are among the effects of violence.[76] The Committee on the Rights of the Child has recommended that states have obligations to prevent violations of human rights; to investigate and punish the perpetrators; and to provide remedies to the victims.[77] In addition, while parents and other actors have responsibilities to protect children from violence, states have the

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[65]Ibid para 17.

[66]Ibid paras 16,17 and 18.

[67] Article 19 CRC.

[68] Article 27 CRC.

[69]Article 33.

[70]Article 34.

[71]Article 35.

[72]Article 32

[73]Article 19. The Committee on the Rights of the Child has also adopted a General Comment on violence: CRC General Comment No 13 'The rights of the child to freedom from all forms of violence', CRC/C/GC/13, Fifty-sixth session, 18 April 2011.

[74]Article 19.

[75]UN General Assembly *Report of the Independent Expert for the United Nations Study on Violence against Children* A/61/299, 29 August 2006 para 36.

[76]Ibid.

[77]CRC General Comment No 13 (2011) op cit note 73 para 5.

obligation to support parents in securing the living conditions necessary for the child's development.

The states' duty to support families entails adopting measures and programmes to support families, particularly those suffering from economic hardship.[78] For instance, programmes for empowering women could be relevant, for they remain comparatively poor despite the big role they play in their families.[79] The idea of supporting families makes sense because the family is an important unit for the upbringing of children and ensuring their wellbeing.[80]

The CRC also recognises the right of the child to the highest attainable standard of health.[81] The Committee on the Rights of the Child has recommended that states must provide adolescents access to education, information and child-friendly services on sexual and reproductive health.[82] Furthermore, children should be provided with information and life skills on sports, recreation and substance abuse.[83] In addition, the government should introduce and implement education policies, including vocational training.[84] This is consistent with the right to education under the CRC, which aims at ensuring that education addresses the developmental needs of the child, respect for human rights and cultural values.[85] Such education should seek to develop the child's 'personality, talents and mental and physical abilities to their fullest potential' and enable them to live in a satisfying life environment within

[78]Riyadh Guidelines paras11–19.

[79]United Nations Department of Economic and Social Affairs *The World's Women 2010: Statistics and Trends* (2010) vii.

[80] Committee on the Rights of the Child 'Day of general discussion: "Juvenile justice": Recommendations' 10th session, 13 November 1995 paras 230–231; Riyadh Guidelines 11, 12 and 14.

[81]Article 24.

[82]CRC General Comment No 15 (2013) 'Right of the child to the enjoyment of the highest attainable standard of health' CRC/C/GC/15 Sixty-second session 17 April 2013 paras 56, 58.

[83]Ibid para 59.

[84]Riyadh Guidelines paras 20–30.

[85]Article 29 The African Children's Charter art 31 refers to these values in the broader context of the 'responsibility of the child'.

society.[86] Education policies should include early childhood educationand address and provide solutions to school dropout.[87]

3.3.3 Codification of the minimum age of criminal responsibility

The age of criminal responsibility is relevant to child justice, regardless of whether the intervention adopted is judicial or non-judicial, in that it determines the type of intervention, jurisdiction of the court[88] and the appropriate dispositions that may be applied to a particular child offender.

The CRC defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.[89] This is a general definition that does not apply specifically to the age of criminal responsibility. The CRC, however, obligates states to legislate the minimum age below which a child shall be presumed not to have the capacity to commit an offence.[90] The Beijing Rules recommend that such an age should not be too low; rather, it should take full account of the mental, emotional and intellectual maturity of the child.[91] The Rules provide, further, that the guiding factor should be whether 'a child can live up to the moral and psychological components of criminal responsibility'.[92] The question is whether a child's mental immaturity and other factors associated with childhood could warrant criminal responsibility for what is essentially antisocial behaviour.[93] Newell[94] has criticised states that justify setting the age of criminal responsibility below 12 years, arguing that this practice is based on a

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[86]CRC General Comment No 1 (2001) 'The aims of education' CRC/C/GC/2001/1, Twenty-sixth session17 April 2001 para 2.

[87] Riyadh Guidelines 20.

[88] Barry Feld 'The inherent tension of social welfare and criminal social control: Policy lessons from the American juvenile court experience' in Eric L Jensen and Jorgen Jepsen (eds) *Juvenile Law Violators, Human Rights and the Development of New Juvenile Justice System*s (2006) 407–42, 431.

[89] Article 1 CRC; art 2 of the African Children's Charter.

[90] Article 40 (3) (a) CRC.

[91]Beijing Rules Rule 4.1; Human Rights Council Resolution on Administration of Justice (2011) op cit note 42para 12.

[92] Beijing Rules Rule 4.1, Commentary.

[93]Ibid.

[94] Peter Newell 'It is not child-friendly to make children criminals' A paper presented at a Child-Friendly Justice: What it Means and How it is Realised conference Stockholm 16–18 May 2014 at 2 referring to the CRC General Comment No 10 (2007) op cit note 62paras 30–9.

misunderstanding of some of the comments of the Committee on the Rights of the Child. The proper construction of the Committee's recommendation is that setting the age of criminal responsibility below 12 years is unacceptable.[95] Indeed, the Committee on the Rights of the Child has recommended 12 years as the absolute minimum age and 18 years as the upper age limit.[96] The upper age limit of childhood has also raised some problems in those jurisdictions that restrict the juvenile court to children aged 16 years, thus excluding those aged between 16 and 18.[97] The Committee has stressed that child justice principles should apply to all persons below 18 years at the time of the alleged commission of the offence.[98] The issue of age is again complicated by the fact that many of the children in question lack birth certificates that give proof of their age. Such children become 'extremely vulnerable' to abuse and injustice in the justice system.[99] To address this problem, states have been urged to ensure that children are registered immediately after birth.[100] This obligation is not limited to passing laws and establishing policies, but extends to eliminating all the *de facto* limitations to such registration. This was stated by the African Committee of Experts on the Rights and Welfare of the Child in *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya.*[101] Ensuring children are registered is particularly important in Sub-Saharan

[95] Ibid.

[96]CRC General Comment No 10 (2007) op cit note 62 paras 30, 32, 38 (the upper age limit refers to the age at which a child is subject to juvenile justice).

[97]Ibid para 38.

[98]Ibid para 37.

[99]Ibid para 39. It is likely that children without birth documentation may be vulnerable in certain cases. This will be most likely where the age of the child in question is close to the upper age limit. Thus the older the child, the more he or she is vulnerable. The Committee observed, however, that children without documentation indicating their age are 'extremely vulnerable'. The use of term 'extreme' here seems to be an exaggeration, as it seems to include all children without birth documentation.

[100] Article 7 CRC; See also Guidelines for Action on Children in the Criminal Justice System (1997) op cit note 41 para 12; UN General Assembly Resolution on the Rights of the Child General Assembly A/RES/63/241 24 December 2008 para 45; African Committee of Experts on the Rights and Welfare of the Child 'General Comment on article 6 of the African Charter on the Rights and Welfare of the Child', ACERWC/GC/02 (2014), Twenty-third ordinary session, 07–16 April 2014 paras 43–47.

[101]Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011 para 40, available

Africa, where the registration rate is low compared to other developing sub-regions.[102] To ensure an efficient justice system, birth registration should be encouraged, as it is required for various procedures, including the attainment of the age of criminal responsibility, particularly since this might be disputed.

3.3.4 Intervention through non-judicial measures

The CRC urges states parties to make efforts to deal through non-judicial means with children accused of having committed a crime.[103] Non-judicial interventions give effect to the restorative justice theory discussed in Chapter 2.[104] However, states have the discretion to decide on the specific non-judicial measures that may be taken. These may include community services, supervision and guidance, family conferencing, restitution and compensation for victims.[105]

The Committee on the Rights of the Child has recommended some guidelines for the implementation of non-judicial interventions.[106] For example, it has recommended that diversion should be invoked only where there is sufficient evidence that the child committed the offence in question.[107] In addition, the child must voluntarily agree to take responsibility for his actions and give his written consent to the diversion. Such consent may be obtained from parents in the case of a child aged below 16.[108] This is particularly relevant where diversion involves

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at*http://www.refworld.org/docid/4f5f04492.html* accessed on 11 December 2015. See alsoCCPR General Comment 17 (1989): 'Rights of the child (art 24)' Thirty-fifth session 1989, 7 April 1989 paras 7–8.

[102] UNICEF 'UNICEF Factsheet- Birth registration', available at *http://www.unicef.org/newsline/2003/03fsbirthregistration.htm*, accessed on 23 October 2012. In 2000, 70 per cent of births were not registered in Sub-Saharan Africa while 63 per cent were not registered in South Asia; 22 per cent were not registered in East Asia and the Pacific and in North Africa nearly one-third of children born in 2000 were not registered.

[103]Article 40 (3) (b). See also Rule 11 Beijing Rules. The Commentary on Rule 11 provides that diversion may be formal or informal and it may be with or without referral to alternative social work.

[104]Article 40 (3) (b) CRC. See also Van Bueren op cit note 1 at 169.

[105]CRC General Comment No 10 (2007) op cit note 62 para 27. See also Rule 11 Beijing Rules.

[106]CRC General Comment No 10 (2007) op cit note 62 para 27.

[107]Ibid.

[108]Ibid.

community service, since such service has to comply with international labour standards[109] and operates as a bar to subsequent criminal proceedings.

The Committee has also recommended that the offences in which non-judicial intervention may be invoked must be specified by the legislation.[110] Nevertheless, the Committee has said that diversion should not be limited to minor offences or first time offenders.[111] Rather, it should also be used for more serious offences and invoked even after court proceedings have been initiated.[112] The Committee has further recommended that the powers of those responsible for diversion must be regulated.[113]

3.3.5 Judicial mechanisms

The rights of the child accused of a criminal offence have to be protected in the whole judicial process, before, during and after trial. For instance, the presumption of innocence, the right to be heard, and the principle that detention must be used as a last resort relate to the whole justice process. The discussion below focuses on the rights that are particularly relevant to the key stages of the criminal process.

3.3.5.1 Pre-trial procedures: The child as a suspect

Pre-trial procedures refer to the justice process — from a child's arrest to his or her appearance in court. The CRC and the African Children's Charter recognise a number of rights that are relevant to a child suspected or accused of having committed a crime.[114] These include the right to be presumed innocent.[115] The Committee on the Rights of the Child has emphasised that this right must be observed consistently in the

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[109]Rule 11 Beijing Rules and the Commentary on it recommends that community service without the consent of the child would be contrary to the Convention concerning Forced or Compulsory Labour (ILO No. 29) 39 UNTS 55, entered into force 1 May 1932.Article 2 of the Convention defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.

[110]CRC General Comment No 10 (2007) op cit note 62 para 27.

[111]Ibid para 25.

[112] Beijing Rules, Rule 11.2 recommends that police should be empowered to dispose of cases without resort to judicial intervention; General Comment No 10 (2007) op cit note 62 paras 27, 68.

[113]Para 27.

[114]Articles 37 and 40 of the CRC; art 17 African Children's Charter.

[115] Article 40 (2) (b) (i) CRC; art 15 ICCPR; CRC General Comment No 10 (2007) op cit note 62 para 42.

justice process until the prosecution has proved guilt beyond reasonable doubt.[116] Consistent observance of the presumption of innocence is important to ensure that other rights in the justice system are respected.[117] These include the right to liberty, which prohibits arbitrary and unlawful arrest.[118] The law enforcement agencies must respect the legal status of children and promote the child's wellbeing.[119] For instance, it is important that when a child is arrested the charges and the reasons for arrest are communicated to the child 'promptly and directly'.[120] 'Promptly' suggests that the reason for arrest must be given at the time of arrest or soon thereafter.[121] In addition, parents and guardians should be notified of the child's arrest as soon as possible.[122] 'Directly' would imply personal communication, and an explanationthata child can understand. Communication may also be made through a parent or legal guardian.[123] The offence charged, the age of the child and the best interests of the child will possibly be relevantin the decision as to the proper channel of communication.[124]

The CRC and the Havana Rules have declared, further, that a child deprived of liberty is entitled to 'prompt access to legal and other assistance', [125] and to free legal aid.[126] The Guidelines for Action for Children in the Justice System in Africa have recommended that 'states must progressively ensure the availability of child-rights oriented legal representation for children in the justice system'.[127] Such right must be available from the moment a child is deprived of his liberty.[128]

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[116] Ibid.

[117] Ibid.

[118]Article 37 (b) CRC.

[119]Rule 20.3 Beijing Rules.

[120]Article 40 (2) (b) (ii); art 17 (2) (c) (ii) African Children's Charter; art 9 (2) ICCPR.

[121]Article 40 (2) (b) (iii).

[122]CRC General Comment No 10 (2007) op cit note 62 para 54. See also Beijing Rules Rule 10.1 that recommends that parents or guardian must be notified immediately.

[123] Article 40 (2) (b) (ii) CRC.

[124]Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 613–4.

[125]Article 37 (d) CRC.

[126] Rule 18 (a) Havana Rules.

[127] Para 38.

[128] Guidelines of Action for Children in the Justice System in Africa (2011) adopted at the Achieving Child-friendly Justice in Africa: Deprivation of Children's Liberty as the Last Resort conference, 7–8 November 2011 Kampala, para 38. The Guidelines were endorsed by the African Committee of

Various key instruments of international law emphasise the principle that detention at any stage of atrialmust be used only as a measure of last resort and for the shortest period of time (the last resort principle).[129] The rationale is to limit detention in terms of its necessity and time.[130] The Committee on the Rights of the Child, for instance, has expressed deep concern about pre-trial detention practices in Denmark.[131] The last resort principle aims to protect the child from physical abuse and psychological torture, and upholds the right to family and the presumption of innocence.[132]

It must be noted that, although international law is clear on permissibility and restrictions on the use of detention, neither the CRC nor the African Children's Charter provides a specific time frame within which a child should be brought to court. It is therefore up to individual states to prescribe such time frames, although the Human Rights Committee has recommended that 'delays must not exceed a few days'.[133] It could be argued that the time limit within which a child is brought to court must be shorter compared to that for adult offenders.[134] Chirwa,[135] for example, has argued that the requirement under the African Children's Charter that criminal matters against children shall be determined as 'speedy as possible' in article 17 (2) (c) (iv) 'entails [a] pace that is over and above that applicable to adults'.

Experts on the Rights and Welfare of the Child in 2012. See Julia Sloth-Nielsen 'Child- friendly justice in Africa',a paper presented at the Child Friendly Justice: What it Means and How it is Realised conference, Stockholm 16–18 May 2014 2.

[129] Article 37 (b) of the CRC; Rule 6 of the Tokyo Rules; GA Resolution 'Human Rights in the Administration of Justice' (2010) op cit note 40 para 14; Rule 17 Havana Rules.

[130]Commentary to Rule 91.1 Beijing Rules.

[131]Committee on the Rights of the Child 'Consideration of reports submitted by States parties under article 44 of the Convention: Concluding Observations: Denmark' CRC/C/DNK/CO/4, Fifty-sixth session, 7 April 2011 paras 65 (a) (i), 66 (b).

[132] Article 9 CRC; CRC General Comment No 10 (2007) op cit note 62 para 80.

[133]CCPR General Comment No 8 (1982) 'Article 9 Right to liberty and security of persons (art 9)' HRI/GEN/1/Rev.6, 30 June 1982 para 2.

[134] CRC 'Consideration of report submitted by States parties under article 44 of the Convention: Concluding Observation Liechtenstein,' CRC/C/LIE/CO/2, Forty-first session 16 March 2006, para 35.

[135]Danwood Mzikenge Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157, 166.

3.3.5.2 Trial procedures: The rights of the child as an accused

The CRC and African Children's Charter articulate a number of rights that must be protected as minimum legal guarantees during trial.[136] Both provide that a child has the rights to be treated in a manner that promotes his othersense of dignity and worth reinforces the child's respect for human rights, takes the child's age into account and also the need to promote reintegration.[137] Other rights that must be protected include the right to be heard;[138] the right not to be subjected to retroactive penal laws;[139] the right to be presumed innocent until proved guilty;[140] the right to be given notice of charges; [141] the right to examine or cross-examine witnesses;[142] the right to legal representation;[143] the right to a speedy trial before a competent tribunal;[144] and the right to privacy.[145]

3.3.5.2.1 Presumption of innocence, non-retrospective application of penal laws and status offences

The right to be presumed innocent until proved guilty provides a basis for protecting the rights of a child alleged to have committed an offence.[146] Until the presumption is rebutted, a person is regarded as not having committed the offence. During the trial, the presumption of innocence places the burden of proof on the prosecution to prove the accused's guilt.[147] The presumption of innocence in respect of children should be considered carefully, due to their mental immaturity.[148] It is to be noted that the child's conduct and any allegations — no matter how serious — are not conclusive evidence of guilt. The presumption of innocence can be rebutted only when the

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[136]Article 40 (2) (b).See also art 17 of the African Children's Charter.

[137] Article 40 (1) CRC.

[138]Articles 12 (2), 40 (2) (b) (ii) CRC; art 7 African Children's Charter.

[139]Article 40 (2) (a).

[140] Article 40 (2) (b) (i) CRC; art 17 (2) (c) (i) African Children's Charter.

[141] Article 40 (2) (b) (ii) CRC; art 17 (2) (c) (ii) African Children's Charter.

[142] Article 40 (2) (b) (iv) CRC.

[143] Article 40 (2) (b) (ii) CRC; art 17 (2) (c) (iii) African Children's Charter.

[144] Article 40 (2) (b) (iii) CRC; art 17 (2) (c) (iv) African Children's Charter

[145] Article 40 (2) (b) (vii) CRC; art 17 (2) (d) African Children's Charter.

[146]CRC General Comment No 10 (2007) op cit note 62 para 42.

[147] Ibid.

[148] Ibid.

accused has been given an opportunity to present his case, followed by the court finding him guilty.

The CRC also prohibits the institution of criminal proceedings against children for acts that were not prescribed as crimes by law at the time they were committed.[149] This prohibition also applies to the imposition of heavier sentences than those provided for when the offence was committed.[150] In addition to the non-retrospective application of penal laws, soft-law norms have increasingly urged states to outlaw status offences, defined under the Beijing Rules as 'any specific behaviour which would not be punishable if committed by an adult'.[151] These include truancy, being a rogue and a vagabond, and begging.[152] In particular, the Committee on the Rights of the Child has persistently urged states to abolish such offences.[153]

3.3.5.2.2 The right to be heard and other rights related to a fair trial

Both the CRC and the African Children's Charter provide that a child has a right to be heard in judicial and administrative proceedings.[154] In judicial proceedings, this right embraces and reinforces other rights. For instance, it includes the right to be informed of the reason for arrest and of the charges.[155] Further, the right to be heard gives effect to the presumption of innocence by allowing a child to defend his innocence and the prosecution to prove his guilt. It also gives effect to the right not to incriminate oneself, since a child is given an opportunity to retract or repudiate any statement previously made involuntarily, including confessions.[156]

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[149]Article 40 (2) (a) CRC. See also art 15 ICCPR; CRC General Comment No 10 (2007) op cit note 62 para 41.

[150]Article 15 ICCPR; CRC General Comment No 10 (2007) op cit note 62 para 41.

[151]Rule 3.1 Beijing Rules, Commentary.

[152]Commentary to Rule 3 Beijing Rules.

[153] Committee on the Rights of the Child, 'Consideration of reports submitted by States parties under article 44 of the Convention: Concluding Observations: Tunisia' CRC/C/TUN/CO/3, Fifty-fourth session 16 June 2010, para 66 (a); 'Consideration of reports submitted by States parties under article 44 of the Convention: Concluding Observations: Afghanistan' CRC/C/AFG/CO/1, Fifty-sixth session 8 April 2011, para 75 (c).The Committee recommended decriminalisation of status offences and the release of children held for such offences. See also Riyadh Guidelines, Guideline 56.

[154]Article 12 (2); art 4 (2) of the African Children's Charter.

[155]See s 3.3.5.1 above.

[156]Articles 40 (2) (b) (ii) and 40 (2) (b) (iv) CRC.

The CRC provides that children should be heard either directly or through a representative[157] and in a child-friendly environment.[158] Information on charges must also be supplied to the child's advocate or parent.[159] It may include documents as well as oral explanations of the content of such documents by police and judicial officers.[160] Such information must be communicated in the language that the child understands.[161] Further assistance on documents or court language may be sought from an interpreter.[162] In addition, a child must be given an opportunity to confront the evidence adduced against him/her and he/she should not be compelled to testify or plead guilty.[163] Further, the proceedings should be handled expeditiously[164] and there should be a right of appeal.[165] It is important that the trial of a child be handled expeditiously, so as to achieve reintegration and uphold the presumption of innocence.

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[157] Article 12 CRC; art 4 (2) African Children's Charter. See also CRC General Comment No 12, 'The rights of the child to be heard', UN Doc CRC/C/GC/12, Fifty-first session 1 July 2009 para 36 recommends that a representative could be a parent, a lawyer or a social worker. See also Chirwa op cit note 135 at 160.

[158] Article 12 (1); CRC General Comment No 10 (2007) op cit note 62 para 44; CRC General Comment No 12 (2009) 'The rights of the child to be heard' UN Doc CRC/C/GC/12 op cit note 157 para 34 recommends that in order for the right to be heard to be realised, the environment of the hearing must be child-friendly. The environment should not be hostile, intimidating, insensitive or inappropriate for the child's age. There should be a child-friendly delivery of information, trained staff, design of courtrooms, dressing of judges and advocates, sightscreens and separate waiting rooms.

[159] Article 40 (2) (b) (ii) CRC.

[160] General Comment No 10 (2007)op cit note 62 para 47.

[161] CCPR General Comment No 13 'article 14 (Administration of Justice) Equality before the courts and the right to a fair and public hearing before an independent court established by the law', Twenty-first session 13 April 1984, para 8.

[162] Article 17(2) (c) (ii) African Children's Charter.

[163] Article 40 (2) (b) (iv) CRC.

[164] Article 40 (2) (b) (iii) CRC; art 14 (3) (c) ICCPR provides for the right 'to be tried without undue delay'. Rule 20.1 of the Beijing Rules recommends that each case be handled 'expeditiously without unnecessary delay'.

[165] Article 40 (2) (5) CRC; art 17 (2) (c) (iv) of the African Children's Charter.

3.3.5.2.3 Legal representation

Legal representation is related to the right to be heard and to defend oneself.[166] The right to legal representation is recognised under the CRC, [167] the African Children's Charter[168] and other international instruments.[169] While both the CRC and the African Children's Charter provide for legal and other appropriate assistance, the presence of parents or legal guardian when a child is being heard is an additional requirement provided for only under the CRC.[170] The presence of parents or legal guardians may be waived if this is not in the best interest of the child and the child's age and situation is taken into consideration.[171] Further, a child must be informed of his right to legal representation[172] and, where the interests of justice require, free legal assistance must be provided.[173] Legal assistance for children is important as it goes beyond legal advice.[174] It also serves to assist children in understanding legal proceedings, which otherwise they might not be able to understand. This may be due to an intimidating court environment and technical legal language and their mental and physical immaturity. Legal representation also helps to comfort children psychologically, especially when they can trust someone to speak on their behalf.

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[166]Article 12 (2), 40 (2) (b) (iii) CRC. See also the African Children's Charter art 17 (2) (c) (iii).

[167] Article 40 (2) (b) (ii) (iii)CRC.

[168]Article 17 (2) (c) (iii).

[169]Ibid; art 14 (3) (d) ICCPR. See alsoPrinciple 1 of the Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc A/CONF.144/28/Rev1 at 118 (1990); Rule 15.1 Beijing Rules.

[170] Article 40 (2) (b) (iii) CRC.

[171] Ibid.

[172] See for instance, CRC 'Day of General Discussion on "Juvenile justice": Recommendations' (1995) op cit note 80 para 220. The Committee observed that state reports indicated that, in relation to the right to participate, children were not made fully aware of their rights, including the right to legal representation.

[173]Article 17 (2) (c) (iii) of the African Children's Charter; art 14 (3)(d) ICCPR.

[174]See art 37 (d) CRC; art 17 (2) (c) (iii) African Children's Charter which in addition to legal assistance refers to the right to 'other appropriate assistance'.

3.3.5.2.4 Privacy

The right of the child to privacy is guaranteed in both the CRC and the African Children's Charter.[175] It seeks to protect the honour and reputation of the child by limiting publicity in child justice. Both the Committee on the Rights of the Child and the Beijing Rules have recommended that privacy should be respected to avoid undue publicity or labeling.[176] The Guidelines in Matters Involving Child Victims and Witnesses of Crimes have recommended that respect for a child's dignity should be a 'matter of primary importance' for child victims and witnesses.[177] It is mainly for this reason that respect for dignity is emphasised, both in the deprivation of liberty and in other child justice procedure

In order to ensure respect for the right to privacy, it is recommended that children's cases should be heard in camera and anonymity maintained,[178] and that court documents, such as court orders and judgments, should not disclose children's names.[179] In addition, information that may lead to the identification of a child should also not be published.[180] The relevance of online publications should not be

[175]Article 40 (2) (b) (vii) CRC; art 17(2) (d) African Children's Charter. For discussion of the right to privacy, generally see Chirwa op cit note 26 at 158-70.

[176]CRC General Comment No 10 (2007) op cit note 62 para 64; Beijing Rules Rule 8.

[177]Guidelines 8 (a) 26. Guidelines on Matters involving Child Victims and Witnesses of Crime (2005) op cit note 41. Guideline 9 (a) defines child victims and witnesses as 'children and adolescents, under the age of 18, who are victims of crime or *witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or group of offenders'* (emphasis added). Since children who are alleged to have committed offences also appear as witnesses, this definition includes child offenders.

[178]Guidelines 27, 28 Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (2005) op cit note 41; CRC General Comment No 10 (2007) op cit note 62 para 64.

[179]Ibid.

[180] Ibid. See also International Federation of Journalists *Guidelines for Journalists and Media Professionals* (2002) Guideline 15; International Federation of Journalists *Guidelines and Principles for Reporting on Issues Involving Children* (1998) see Preamble paras 1 and 2 and Guideline 1. The Preamble para 2 provides that children have an absolute right to privacy except where it is stated in the Guidelines. This implies that children have rights, but such rights are not absolute, since they are subject to the freedom necessary and relevant for the media to disseminate information. In addition, principle 4 requires considering carefully the consequences of publishing any materials concerning

overlooked in view of the rapid expansion of such communications, particularly social networks.[181]

3.3.5.2.5 Deprivation of liberty: The child as a suspect accused or convict

Deprivation of liberty in child justice may occur following arrest or conviction. Children may be deprived of liberty in other situations, such as those related to immigration, asylum seeking or mental health[182] The Havana Rules define 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, by order of any judicial, administrative or other public authority.[183]

As noted earlier, the CRC and African Children's Charter provide that deprivation of liberty on any ground should be used as a measure of last resort, and where it is deemed necessary, it should be done in accordance with the law and for the shortest period of time.[184] In *Clifford McLawrence v Jamaica,*[185] the Human Rights Committee stated that 'the principle of legality is violated if an individual is arrested or detained on grounds not established by law'. The Committee on the Rights of the Child in its Concluding Observations to Latvia noted that deprivation of liberty for the

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children. See also para 49 of *the Guidelines on Action for Children in Justice System in Africa* op cit note 128.

[181] These will include Twitter, Facebook and other social networks.

[182] Hodgkin and Newell op cit note 124 at 560–6. See also CRC General Comment No 6 'Treatment of unaccompanied and separated children outside their country of origin', UN Doc CRC/GC/2005/6, Thirty-ninth session, 1 September 2005 para 61.

[183]Havana Rules (1990) rule 11 (b).

[184] Article 37 (b) CRC. Although this is not expressly stated in the African Children's Charter, it may be inferred from art17 (3), which provides that '[t]he essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation'. This is mainly because restrictions of deprivation of liberty are useful and efficient in achieving reformation and reintegration. See also rules 13, 19 Beijing Rules; Rule 6 of the Tokyo Rules; *Eligio Sedeno v Bolivarian Republic of Venezuela* Communication No 1949/2010, CCPR/C/106/D/1940/2010 (2012) para 7.10.

[185]Communication No 702/1996 (26 April 1996), CCPR/C/60/D/702/1996, para 5.5.

shortest period of time cannot be achieved without expeditious processes which guarantee a fair trial.[186]

3.3.5.3 Post-trial procedures: Legal guidelines and restrictions on sentencing

The rights of a child found guilty are well protected in international law. These rights relate to the forms of sentences that might be imposed on a child. As noted earlier, the last resort principle already restricts the use of imprisonment.[187] Courts are enjoined to consider alternatives to incarceration and, where such alternatives are not available, imprisonment must be used for the shortest period of time. In addition to the last resort principle, international law calls upon states to consider the child's age and the need for his reintegration in society when considering suitable punishment.[188] The Beijing Rules recommend that the reaction taken or an order passed must be in proportion to the circumstances and the need of the child, the gravity of the offence and the need of the society.[189] This principle embodies the just deserts theory of punishment, which could be counterproductive to children. However, when considered together with the principles discussed above, its role cannot be said to be predominant. It may be relevant when considering the relative gravity of offences committed by children and the use of indefinite sentences. Importantly, the best interests of the child principle, which applies in all actions concerning children, is equally applicable to sentencing.[190] This principle operates to curb the use of societal goals of punishment, such as retribution, deterrence and protection, and seeks to direct attention to the specific circumstances of the child.

In order to ensure respect for a child's dignity and other rights, the CRC and African Children's Charter prohibit various acts and the imposition of certain sentences. First, echoing various international and regional instruments, they both

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[186] Committee on the Rights of the Child 'Consideration of reports submitted by states parties under article 44 of the Convention: Concluding Observations: Latvia' CRC/C/LVA/CO/2, Forty-second session, 28 June 2006 para 62 (c).

[187] Article 37 (b).

[188] Article 40 (1).

[189] Rule 17.1 (a).

[190] Article 3 CRC.

prohibit torture and other cruel, inhuman or degrading treatment or punishment.[191] Torture is defined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed.[192]

According to this definition, an act will amount to torture if it: causes severe pain or suffering physically or mentally; is intentionally inflicted for the purpose of obtaining a confession; or is inflicted as punishment or intimidation based on discrimination on any ground.[193] The European Court of Human Rights in *Selmouni v France* held that torture will be committed, even in the case of acts that were previously considered only inhuman,[194] arguably lowering the threshold of torture.

The Committee on the Rights of the Child has suggested that all forms of violence against children will amount to torture, inhuman or degrading treatment or

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[191] Article 37 (a) CRC; arts 16 (1), 17 (2) (a) African Children's Charter. Other instruments include:UDHR (art 5); ICCPR (art 7); Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment GA Res 39/46, annex, 39 UN GAOR Supp (No 51) at 197 UN Doc A/39/51 (1984), entered into force 26 June 1987 (Convention Against Torture) (arts 1, 16); African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981 OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986 (African Charter) (art 5); American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123,entered into force18 July 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 doc 6 Rev.1 at 25 (1992) (American Convention on Human Rights) (art 5 (2))**;** European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5, 213 UNTS 222, entered into force 3 September 1953, as amended by Protocols No 3, 5, and 8, entered into force 21 September 1970, 20 December 1971 and 1 January 1990 respectively (European Convention on Human Rights) (art 3).

[192] Article 1.

[193] Ibid.

[194] See *Selmouni v France* Application No 25803/94, European Court of Human Rights 28 July 1999. The Court held that: '[H]aving regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" …the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future….'para 101.

punishment.[195] The Committee describes torture and inhuman or degrading treatment or punishment to include 'violence in all its forms against children in order to extract a confession, to extra judicially punish children for unlawful or unwanted behaviours'.[196] According to the Committee on the Rights of the Child, the important aspect is whether the purpose of such violence is to obtain a confession or impose extra-judicial punishment. This implies that those acts of violence used for this purpose that do not meet the torture threshold may still amount to cruel, inhuman or degrading treatment. For instance, corporal punishment has been cited as one such form of punishment that amounts to cruel, inhuman or degrading punishment.[197]

Apart from prohibiting torture, inhuman and degrading treatment, international law prohibits the imposition of the death penalty on persons under 18 years.[198] The prohibition of the death penalty is founded on the right to life and

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[195] CRC General Comment No 13 (2011) op cit note 73 para 26 outlines the following acts to be torture, cruel inhuman or degrading treatment or punishment: 'violence in all forms against children in order to extract confession, to extra judicially punish children for unlawful or unwanted behaviours, or to force children to engage in activities against their will, typically applied by police and law-enforcement officers, staff of the residential and other institutions and persons who have power over children… .'

[196]Ibid. See also para 4. This defines violence to include all forms of physical or mental violence neglect or maltreatment, exploitation including sexual abuse.

[197] See *George Osbourne v Jamaica* Communication No 759/1997, UN Doc CCPR/C/68/D/759/1997 (2000), para 9.1-Human Rights Committee; *Curtis Francis Doebbler v Sudan* African Commission on Human and Peoples' Rights Communication No 236/2000 (2003); *Caesar v Trinidad and Tobago*Inter-American Court of Human Rights (Ser. C) No 123 (2005) para 8. CRC General CommentNo 10(2007) paras 71, 89 (5), CRC General Comment No 8 (2006) 'The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts 19; 28, paragraph and 37, inter alia)' CRC/C/GC/8, Forty-second session, 2 March 2007 para 11; rule 17.1 Beijing Rules. Rule 67 Havana Rules; Guideline 21 (h) Riyadh Guidelines. See also various scholars' comments on corporal punishment, for example Michael DA Freeman 'Upholding dignity and the best interests of children: International law and the corporal punishment of children' 73 (2010) *Law and Contemporary Problems* 211; Benjamin Shmueli 'The influence of the United Nations Convention on the Rights of the Child on corporal punishment: A comparative study' (2008) 10 *Oregon Review of International Law* 189.

[198] Article 37 (a) CRC; art 5(3) African Children's Charter; art 6 (5) ICCPR; art 1 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of Death Penalty GA Res 44/128, annex, 44 UN GAOR Supp (No 49) at 207, UN Doc A/44/49 (1989), entered into force 11 July 1991; art 4(5) American Convention on Human Rights OAS Treaty Series No

dignity. The right to life is widely regarded as the most fundamental right that has gained the status of *jus cogens*in international law.[199] The Committee on the Rights of the Child has urged states that retain the death penalty for persons under 18 to abolish it.[200] In addition, the Beijing Rules have recommended that 'capital punishment shall not be imposed for any crime committed by juveniles'.[201] The limitation is therefore general and has no exceptions in terms of offences.

Also noteworthy is the fact that the CRC specifically prohibits life imprisonment without the possibility of release.[202] This prohibition is consistent with the principle that where deprivation of liberty is deemed necessary, it must be for the shortest period of time. It also dovetails with the intention to promote the reintegration of the child and ensure his or her best interests.

36,1144, UNTS 123,(1969), entered into force 18 July 1978; Art 1 Protocol No 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 114, entered into force 1 March 1985;art 1 Protocol No 13to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No 187), entered into force 7 January 2003 (prohibits the death penalty in all situations); art 68 Geneva Convention Relative to the Protection of Civilian Persons in Time of War75 UNTS 287, entered into force 21 October 1950; art 77 (5) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3, entered into force 7 December 1978; art 6 (4) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)1125 UNTS 609, entered into forceon 7 December 1978.

[199]Detrick op cit note 18 at 125; United Nations SubCommission on Human Rights 'The Death Penalty in relation to Juvenile Offenders' Res E/CN4/SUB 2/Res/2000/17, 17 August 2000 Preamble para 8.

[200]CRC General Comment No 10 op cit note 62 para 76. See also the Committee on the Rights of the Child 'Day of General discussion on "Juvenile justice" (1995) op cit note 80 para 221, the Committee noted with deep regret that the death penalty was still imposed for persons below 18 years. See also the United Nations Commission on Human Rights, 'The question of the death penalty' Res E/CN4/RES/2002/77, 25 April 2002; UN General Assembly 'Rights of the Child' (2008) Res A/RES/ 63/24124 December 2008. See para 27,43(a);Human Rights Council 'Human Rights in the Administration of Justice, in particular Juvenile Justice' (2009) op cit note 42 para 11; Human Rights Council 'Human Rights in the Administration of Justice, in particular Juvenile Justice' 2011 op cit note 42 para 13.

[201]Rule 17.2

[202]Article 37 (a).

3.4 Conclusion

This chapter has shown how the various theories of justice have been woven into the international and African regional systems for the protection of human rights. It is clear that the protective elements of the child are given as much prominence as the autonomy aspects of freedom. The protective elements are largely seen in the efforts to ensure the best interests of the child. This means that criminal proceedings must be avoided as much as possible and, when they are used, the child must be accorded treatment that is suited to his or her condition as a child. Not only does this require the establishment of special courts and procedures for children, it also requires specialised personnel to implement those procedures.

Critical to protecting the child is the need to ensure his/her general wellbeing. This means guaranteeing children access to basic necessities of life. In turn, this does not only mean ensuring that children enjoy their economic, social and cultural rights, but also taking deliberate measures aimed at identifying children in need of care and ensuring that such care is given to them. The significance of child delinquency was hence underscored. International law makes it an obligation of states to reduce child delinquency and hence reduce the need for the use of criminal procedures for children.

This chapter has also shown that where children commit offences, the best interests of the child would require that an effort be made to ensure the child's social reintegration and rehabilitation. It is for this reason that international law emphasises the role of non-judicial mechanisms in dealing with child offenders.

The autonomy aspects of the childhood are reflected in the procedural guarantees that the child has as well as the aims and forms of punishment that may be imposed. As has been shown, the CRC and the African Children's Charter require states to establish special laws, procedures and institutions for children who are accused of having committed crimes. Where judicial intervention is adopted, these treaties place limitations on the use of detention and guarantee the child a range of rights aimed at recognising and protecting the child as an autonomous being. The dignity of the child is also ensured by placing limitations on the forms of punishment that may be used, with a special emphasis on avoiding the use of punishments that promote the general goals of society and ignore the child's best interests.

In short, this chapter has shown that a human rights-based approach to child justice has to have the following elements. First, it must not be predominated by

criminal proceedings. Rather, child delinquency must form a central part of it, if only because it must be seen more as a societal problem than a particular child's problem. This starting point would make possible the development of a child justice system that is not just reactive. Instead, it would lead to the establishment of one that places at its centre prospective measures aimed at dealing with systematic issues that have a bearing on child delinquency. In short, a child-justice system that does not have at its core the prevention of child delinquency is incomplete. Secondly, the recognition that child delinquency reflects systematic injustice would lead to the creation of a system that is more sympathetic to child offenders and that aims at helping the children involved to regain their self-worth and ability to live a life worthy of dignity. Thus, the procedures that are developed to deal with child offenders have to prioritise non-judicial mechanisms. When judicial mechanisms are used, these have to be aimed at the child's best interests, rather than retribution, deterrence or the protection of society.

The chapters that follow will now assess the Tanzania's child justice system against this vision of child justice.

CHAPTER 4:THE EVOLUTION OF CHILD JUSTICE IN TANZANIA AND CONSTITUTIONAL AND LEGISLATIVE POLICY

4.1 Introduction

As the previous chapter has shown, international law does not embody a single theory of justice as far as child justice is concerned. Rather, it embraces the welfare, justice and restorative justice theories to create a child justice system that is truly child friendly and is aimed at protecting and fulfilling a child's best interests.

In this chapter, Tanzania's child justice system will be examined to see whether it meets the elements of a child rights-based justice system that places the welfare or best interests of the child at its core. To do this, it is necessary to examine the evolution and development of child justice in Tanzania from the pre-colonial and colonial eras to the independence era.

The chapter will pay particular attention to the constitutional and legal reforms that have taken place since independence and will examine their relevance to child justice. The relationship between Tanzanian law and international law will also be examined. This aspect of the inquiry is relevant in two ways. First, any deficiencies in Tanzanian law pertaining to child justice could be rectified by international law through domestic legal reforms, through the interpretation of domestic laws in the light of international law or the domestication of international treaties. Secondly, a victim of child rights violations related to criminal justice might explore remedial options offered by international law.

4.2 The administration of justice before and after independence

4.2.1 The administration of justice in pre-colonial Tanganyika

Tanganyika, like many other African countries, had its own ways of settling disputes before colonialism.[1] Colonialism and, later, the evolution of human rights altered criminal justice both in substance and in form. Most societies in pre-colonial Tanganyika did not have much in the way of centralised or institutionalised systems for the administration of justice.[2] Traditional leaders at various levels in society

[1] Issa G Shivji et al (eds*) Constitutional and Legal System of Tanzania* (2004) 258.

[2] Ibid.

administered justice, and clan elders, chiefs and tribal leaders were responsible for it at their respective levels.[3]

The procedures applied were informal, with an emphasis on reconciliation rather than on rules.[4] It was thought that the community rather than an individual was the victim of a wrong that had been committed. The adjudicators had the power to impose various sanctions, such as compensation, apology, fines and ostracism. Capital punishment was avoided but, where necessary, a person from the wrongdoer's community would be ordered to take the place of the victim in the victim's community.[5] The underlying principle of punishment was compensation, as opposed to retribution.[6] The main objectives were the restoration of peace, the prevention of harm, the protection of members of the society in question and the reformation of the offenders.[7]

Reconciliation was given prominence within the context of communal life. As mentioned before, a wrong was not perceived to be committed against an individual but against the whole community. Not all crimes (adultery, for example) were considered to have been committed against the community.[8] In most circumstances, however, because of the populace's communal lifestyle, the pre-colonial justice machinery sought to promote reconciliation for the wellbeing of acommunity and the need for peace and harmony.

The existence of separate adjudication machinery or justice system for children in pre-colonial times in what became known as Tanganyika is not referred to in the literature. This does not mean, however, that a child could not appear before an adjudicatory authority. The child could appear, for instance, when he/she had committed a serious crime or when his/her presence was important, such as in parenthood, divorce or inheritance disputes.[9] Minor misbehaviour by children could

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[3] Ibid.

[4] O Oko Elechi 'Human rights and the African indigenous justice systems' (paper presented at the 18thInternational Conference of the International Society for the Reform of Criminal Law, Montreal, Quebec 8-12 August 2004) 18.

[5] Shivji et al op cit note 1 at 259.

[6] Ibid at 258–9.

[7] Ibid at 258.

[8] Ibid.

[9] The existing literature seems to be consistent on the nature of disputes prevalent in the pre-colonial era. These were mainly related to theft, witchcraft, murder, inheritance, land, cattle, adultery,

be dealt with by any adult member of the community or between families. It is submitted that although in pre-colonial societies the language of child rights was not used, notions of protection and nurturance were recognised.

4.2.2 German rule 1884 to 1918

Tanganyika was colonised by Germany in 1884, when it concluded agreements for protection and understanding with local chiefs.[10] These agreements were apparently used by the Germans to assert claims to land.[11] Initially, *Deutsch Ostafrica* (German East Africa) consisted of Tanganyika only, but after 1886 its territory was extended to include Burundi and Rwanda.[12] Tanganyika came into being as a separate state only in 1920 when the United Kingdom was awarded part of the former German East Africa as a League of Nations mandate.[13]

The German colonial regime did not establish a juvenile justice system but introduced a court system. The applicable laws were based on race. The German Imperial Code (Imperial Code) established a two-tier court system.[14] On the one hand, there was a system for persons of Asian or European origin, to whom the Imperial Code was applicable. On the other hand, native courts adjudicated disputes between Africans in accordance with African customary law.[15] There was no special justice system established to deal with children.

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parenthood and divorce. This suggests that children could be involved when it comes to parenthood, inheritance and divorce disputes involving parents or guardians and, exceptionally, when they were charged for crimes such as theft. See Peter Rigby *Cattle and Kinship among the Gogo: A Semi-pastoralSociety of Central Tanzania* (1938); G Marwick *Sorceryin its Social Setting: A Study of the Northern Rhodesian Cewa* (1965); Martin Chanock *Law, Custom and Social Order* (1998); Elizabeth Colson *Social Organization of the Gwembe Tonga* (1960).

[10] Reiner Michael Bierwagen and Chris Maina Peter 'Administration of justice in Tanzania and Zanzibar: A comparison of two judicial systems in one country' (1989) 38 *International and Comparative Law Quarterly* 395,396.

[11] Ibid.

[12] Augustino L R Ramadhani 'Strengthening civil rights in Tanzania through legal reform process: an overview after fifty years of independence' in Angela K Ishengoma et al (eds) *Political Handbook and NGO Calendar 2012: Legal Reform Process for the Promotion of Civil Rights* (2011) 72–6 at 72.

[13] Bierwagen and Peter op cit note 10 at 396.

[14] Shivji et al op cit note 1 at 259.

[15] J P Moffett 'A history of the development of native courts' *Journal of African Administration* (1952) IV (1) 17.

4.2.3 British rule 1920 to 1961

When Tanganyika became a British mandate in 1920,the British Government, under the Foreign Jurisdiction Act enacted the Tanganyika Order-in-Council[16] as the Constitution.[17] The Tanganyika Order-in-Council established His Majesty's High Court of Tanganyika. It also made applicable in Tanganyika the English common law, the doctrines of equity and statutes of general application in force in England as of 22 July 1920.[18] The regime also enacted the Native Courts Ordinance 1920 (replaced in 1929) for the administration of justice. The Ordinance established first, second and third grade magistrates' courts that were subordinate to the High Court.[19] These courts were presided over by administrative officers who exercised both executive and judicial functions. Native courts were presided over by local chiefs and applied customary law.[20] The British colonial government did not establish a juvenile justice system in the first decade of its administration. This suggests that during that period children, depending on their race, continued to be tried in ordinary courts. It was only in 1937 that a child justice system was established.

4.2.3.1 The Children and Young Persons Act 1937: An overview

The British regime enacted the Children and Young Persons Act in 1937 to govern the administration of juvenile justice.[21] The Act, modelled on the British Children and Young Persons Act of 1933, incorporated both the justice and welfare theories. It empowered district and primary courts[22] to deal with both delinquent and needy children and young persons below 16 years of age. Children who were found begging,

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[16] Foreign Jurisdiction Act 1890; Order in Council 1920.

[17] Moffett op cit note 15 at 18.

[18] Tanganyika Order in Council 1920 art 17 (2).

[19] H F Morris 'Native courts: A cornerstone of indirect rule' in H F Morris and James S Read (eds) *Indirect Rule and Search for Justice* (1972) 131–66, 154. See also Ibrahim H Juma 'Role of law and politics in making a nation and integration' (2013) 4 (1) *Law Reformer Journal* 8, 21–4.

[20] The Native Courts Ordinance 1920 established Native Courts that applied customary law in criminal matters until such application was abolished by the Magistrates' Courts Ordinance 1963. For further discussion on Native Courts see Morris op cit note 19 at 134.

[21] The citation was 'Ordinance' before all Ordinance citations were changed to 'Acts' in 2002. See Shivji et al op cit note 1 at xvii.

[22] Section 3(1) vested jurisdiction in district courts. It was extended to primary courts in 1964 by the Children and Young Persons Act (Extension of Ordinance to Primary Courts) Order GN 640 of 1964.

who lacked the means of subsistence or had no guardian or parents had to be brought to court for special orders.[23] A child who was found to be a delinquent could be sent to an approved school. Other orders included committal of the child to the care of a fit person or institution until he/ she turned 18 or 21. Such an order, however, would be subject to renewal, variation or revocation.[24] Powers to arrest were vested in both administrative and police officers,[25] and were mainly enforced under the Township (Removal of Undesirable Persons) Ordinance 1944.[26] This Ordinance subjected street children to court adjudication.

The court procedures to which children were subjected were more or less the same as those applicable in the ordinary courts. Trial procedures were adversarial, in that after a preliminary hearing, and if a *prima facie* case was established, the court proceeded to hear evidence.[27] These are procedures used in the ordinary criminal courts.[28] The application of such procedures in juvenile courts suggested that, in line with the justice theory, the procedures were formal.[29] Legal representation and provisions on pre-trial procedures were not expressly provided for by the Act. In addition, non-judicial intervention and delinquency prevention were not included.

However, the Act had some relevant safeguards for child protection. These are today enshrined in the language of child rights. It required the privacy of the child to be protected by restricting attendance in court proceedings to parties, parents, advocates and other persons the court deemed proper to allow.[30] The requirement of a trial in camera was, however, limited and applied only to sexual offences.[31] The law further recognised that children were vulnerable and therefore had to be kept separate from adults while in custody.[32] Protection in detention, however, was, loosely defined. The law required that arrangements be made 'for preventing so far as

[23] Section 25.

[24] Section 25(h).

[25] Section 25 (1).

[26] Chapter 104 of the Laws of Tanganyika.

[27] Sections 8, 10.

[28] Sections 228–232 Criminal Procedure Act (Cap 20 R.E 2002).

[29] Sections 10,12–3.

[30]Section 11 Children and Young Persons Act.

[31] Section 3 (5).

[32] Section 5.

practicable' a child from being associated with an adult.[33] However, this did not apply when the adult was a 'relative', a term that was not defined.[34]

The Act further required that a child be heard. It required that a child be explained the charge in simple language and be given an opportunity to present a defence[35] that would indicate why the child should not be convicted.[36] In the course of a hearing, a child could be assisted by a guardian or parent in examination and cross-examination.[37] Thus, although legal representation was not provided for, assistance from parents or guardians in trial procedures was considered important. However, the Act did not provide for such assistance apart from the context of trial proceedings.

The Act prescribed various sentences as an addition or as an alternative to imprisonment. These included conditional discharge,[38] unconditional discharge,[39] fines [40] and repatriation to the child's home district [41] or placement in an institution. [42] Furthermore, it provided that no child could be sentenced to imprisonment unless other methods of dealing with such a child were considered unsuitable.[43] These were some of the notable safeguards in favour of the child. The Act however, was largely based on the justice theory.

4.3 Child justice after independence

4.3.1 Constitutional reforms

Tanganyika attained its independence from the United Kingdom in 1961. In the same year, it adopted its first constitution, the independence Constitution,[44] which created a sovereign independent state of Tanganyika. After independence, constitutional and legal reforms focused on how better to define and run the government. A new

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[33] Ibid .

[34] Ibid .

[35] Section 9.

[36] Ibid.

[37] Section 11 (3).

[38] Section 18.

[39] Section 23 (a).

[40] Section 21.

[41] Section 23 (b).

[42] Section 23 (c).

[43] Section 22 (2).

[44] The Tanganyika (Constitution) Order-in-Council 1961.

political philosophy was introduced, this being socialism or *ujamaa,* aimed at addressing poverty, improving health services, reducing illiteracy levels and the promotion of self-reliance.[45]

In order to reduce poverty, illiteracy, and to promote self-reliance under *ujamaa*, emphasis was placed on communal ownership of land and the exploitation of resources by a small group of people was discouraged.[46] This went hand in hand with the adoption of the Arusha Declaration in 1967 that advocated all people, under the trusteeship of the government, own the major means of production.[47] The Declaration resulted in the establishment of *ujamaa* villages (villagisation) in the 1970s. Thus, after independence the ruling party — the Tanganyika National Union (TANU) — and the government focused on the introduction and implementation of the *ujamaa* philosophy to fight poverty and to improve the wellbeing of people.

In 1962, Tanganyika adopted another Constitution, which created a republican government with an executive president. This replaced the Westminster model of government.[48]

Neither the 1961 nor the 1962 Constitution had a bill of rights. The reasons given were that such a bill of rights would constrain the state and promote disorder between the judiciary and the executive.[49]

In 1964, President Julius Nyerere of Tanganyika and President Abeid Karume of Zanzibar concluded an agreement to unite the two countries. This gave birth to

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[45]Julius K Nyerere *Ujamaa: Essays on Socialism* (1968) 1–12; Randal Sadleir *Tanzania Journey to Republic* (1999) 252–3.According to Julius Nyerere, the first president of an independent Tanganyika, the socialism (*ujamaa*) philosophy, as a political ideology,was founded on African traditional values that emphasised the family and communalism. See Bonny Ibhawoh & J I Dibua 'Deconstructing Ujamaa: The legacy of Julius Nyerere in the quest of social and economic development in Africa' (2003) 8 (1) *African Journal of Political Science* 59,62.

[46] Nyerere op cit note 45 at 16.

[47] Ibid at 13–6.

[48]Shivji et al op cit note 1 at 47–8.

[49] Robert Martin *Personal Freedom and the Law in Tanzania: A Study of Socialist State Administration* (1974) 40; Wilbert B L Kapinga 'The police force and human rights in Tanzania' (1990) 9 *Third World Legal Studies* 37,39; Ramadhani op cit note 12 at 73 referring to Parliamentary Debates (Hansard), the National Assembly 3rd Meeting 1088 28 June 1962. See footnote 5.

Tanzania[50] and called for a new constitution. The Interim Constitution of the United Republic of Tanganyika and Zanzibar was adopted in 1964. The following year, another Interim Constitution of Tanzania (the one-party state Constitution) was adopted. No bill of rights was included in the1965 Constitution.

The current Constitution, which has survived almost four decades with a number of amendments, was adopted in 1977.[51] Apart from establishing the organs of state, it retained the union and non-union competences and established the Court of Appeal of Tanzania as the highest appellate court in the country.[52] It also established the High Court of Tanzania.[53] However, like the previous constitutions, it did not have a bill of rights when it was adopted in 1977. The Bill of Rights was included via a constitutional amendment in 1984.[54]

4.3.2. The Bill of Rights

The Bill of Rights is contained in arts 12 to 30 of the Constitution and includes rights and duties. At the time of adoption, it did not have child-specific provisions. This position has not changed. In 1984, this omission could be understood, as the CRC had not yet been adopted. However, despite the adoption of the CRC in 1989 and its ratification by Tanzania in 1991, the Constitution has not been amended to rectify this gap, something that is difficult to understand. Fortunately, Tanzania is now in the process of reviewing its Constitution.[55] The current Draft has a specific provision on child rights. This contains both civil and political rights and economic, social and cultural rights as shown in 4.3.3 below.[56] In its current form, the Bill of Rights

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[50] This was achieved by signing Articles of Union. These were subsequently given legal force by Acts of Union:in Tanganyika by Act of Parliament, the Union of Tanganyika and Zanzibar Act 22 of 1964 and in Zanzibar by the Revolutionary Council of Zanzibar through the Union of Zanzibar and Tanganyika Law 1964. See generally.Shivji et al op cit note 1 at 50; Robert V Makaramba 'The state of constitutional development in Tanzania' (2001) (unpublished paper) 3.

[51] The Constitution of the United Republic of Tanzania 1977 (Cap 2 R.E 2002).

[52] Article 117 (1).

[53] Article 108 (1).

[54]The 5th Constitutional Amendment Act, 15 of 1984.

[55] Tanzania was expected to have a new constitution before October 2015 but this has not been realised and the date for a referendum is yet to be fixed.

[56]The United Republic of Tanzania, Draft Constitution 2014 (hereinafter the Draft Constitution). See art 53.

recognises the rights to life,[57] equality,[58] dignity[59] and freedom of expression.[60] It also recognises economic, social and cultural rights, such as the right to property,[61] the right to work, [62] and the right to fair remuneration.[63] Although the right to education is protected as a principle of state policy and is therefore not justiciable, it can inform policy and legal reform.[64]

4.3.2.1.Rights related to criminal justice

Article 13 (1) of the Constitution provides for the right to equality and requires the state to enact laws and procedures to ensure its realisation. Such procedures must include the right to a fair hearing, [65] recognise the presumption of innocence, [66] prohibit the retrospective application of penal law,[67] and respect the dignity of a person during criminal investigations and processes, restraint or execution of sentence.[68] In addition, torture, inhuman or degrading treatment or punishment is prohibited.[69] These rights apply to any person who is accused of having infringed penal law including children.

4.3.2.2Pre-trial rights

Article 13 of the Constitution provides that the dignity of a person must be respected in the criminal justice process, including during investigation. This means that an arrest can be made only if it is in accordance with the law, and arrested persons must not be subjected to torture or degrading treatment or punishment while in pre-trial

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[57] Article 14 of the Constitution of the United Republic of Tanzania.

[58]Article 12.

[59]Article 12 (2).

[60]Article 18.

[61]Article 24.

[62] Article 22.

[63] Article 23.

[64] Clement Mashamba 'Using directive principles of state policy to interpret socio-economic rights into the Tanzanian Bill of Rights' (2009) 2 (1) *Law Reformer Journal* 81, 99.

[65] Article 13 (6) (a).

[66] Article 13 (6) (b).

[67] Article13 (6) (c).

[68] Article13 (6) (d).

[69] Article 13 (6) (e).

detention.[70] Protection before trial under the Constitution also includes protection of the right to be presumed innocentand respect for the prohibition of the retrospective application of penal laws, as indicated above.

However, some pre-trial procedural rights are not included in the Bill of Rights. For instance, the right to be informed of the reason for arrest and the right to remain silent are not expressly recognised. Still, these rights could be implied from the rights expressly provided for, such as the right to be presumed innocent. The Draft Constitution does include these specific rights and it is hoped that they will be adopted as part of the new amendments.

4.3.2.3 Trial rights

The Constitution protects several trial rights under the umbrella of the right to a fair hearing. A fair hearing forms part of the right to a fair trial (discussed in Chapter 3). The right to a fair trial is not limited to the hearing but rather extends to the whole process of criminal justice from investigation to post-trial proceedings and treatment.[71] A fair hearing encompasses the right of the accused to hear the accusation, to cross-examine witnesses and to present his or her case. It also includes the right to be heard by a competent tribunal, either directly or through a legal representative. In addition, it includes the presumption of innocence until proved guilty.

The right to a fair trial and other rights apply equally to children who are accused of committing a crime. Thus, despite the lack of child-specific provisions, children also have the right to be heard, to cross-examine and present their own case.

4.3.2.4 Post-trial rights

The Bill of Rights does not expressly provide for the sentences to be imposed on persons convicted of criminal offences. Rather, it empowers the legislature to prescribe suitable forms of punishment following the principles and rights enunciated in the Bill of Rights. The requirement that imprisonment should be in accordance with

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[70] Article 15 of the Constitution.

[71] Lawyers Committee for Human Rights *What is a Fair Trial?A Basic Guide to Legal Standards and Practice* (2000) 4.

the law[72] and that the laws should derive their legitimacy from the Constitution,[73] suggests that sentences must conform to the Bill of Rights. The right to dignity and the prohibition of torture, cruel, inhuman and degrading treatment or punishment mean that the courts are bound to impose sentences that are proportional to the gravity and circumstances of the offender. The aim of punishment is the convicted person's reform as discussed in Chapter 3. The Constitution further provides for the right to appeal.[74]

4.4.3 The Draft Constitution 2014: Child rights provisions

As shown above, the Draft Constitution has specific provisions on children's rights, including civil, political, social and economic rights. Some of the civil and political rights it makes provision for include the rights of a child to a name and nationality[75] and to participate in various activities.[76] The Bill of Rights has elaborate provisions on the rights of suspects and prisoners (discussed in 4.3.2.1.4). These apply equally to children.

4.4.3.1 Civil and political rights (in criminal justice) in the Draft Constitution and their relevance in child justice

As shown above, Tanzania is in the process of enacting a new constitution. The Bill of Rights in the proposed Constitution has provisions relating to criminal justice more extensive than those found in the existing Constitution. As shown above, although these provisions are not child specific they apply to children as well.

The Draft Constitution includes the right to be informed of the reason for arrest[77] and the right to communicate with a lawyer or any other person.[78] This right is particularly relevant to children who are dependent on adults, such as their parents or other caregivers. Although this right is substantially recognised by the Criminal Procedure Act,[79] its inclusion in the Bill of Rights would give it constitutional status.

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[72] Article 15.

[73] Article 30 (5).

[74] Article 13 (6) (a).

[75] Article 53 (1) (a).

[76] Article 53 (1) (f).

[77] Article 48 (1) (a) (i).

[78] Article 48 (1) (b).

[79] Section 23 (1) Criminal Procedure Act.

Moreover, the Draft Constitution provides that an arrested person should be brought to court as soon as possible.[80] Although 'as soon as possible' does not specifically provide a time frame, it implies that a person be taken to court immediately or promptly.

The Criminal Procedure Act already provides that a person should be taken to court, where possible, within 24 hours.[81] Here again, the police could use many excuses based on impossibility for not doing this. It is important that this discretion on the part of the police should be restricted. A failure to take a person to court within 24 hours should oblige the police to seek an order from the court for an extension of such time. In addition, the power to release persons in terms of the Criminal Procedure Act in the case of non-serious offences when they are not taken to court within 24 hours [82] should be used widely. Hence the phrase 'as soon as possible' in the Constitution should be regarded as amplifying, the 24-hours requirement provision in the Criminal Procedure Act by it giving constitutional status.

The Draft Constitution also recognises the right of an accused to be notified of the charges against him and to get a copy of the judgment.[83] While the right to be notified of the charges amplifies the right to be heard and the presumption of innocence recognised under the present Constitution, the right to a copy of the judgment strengthens the right to appeal. A copy of the judgment is also important for the appellant to prepare his/her grounds of appeal. The recognition of this right to have an access to a judgment might seem somewhat trivial, given it is protected by the overarching right to a fair trial and of access to the court.[84] However, there have been complaints about difficulties faced by litigants in accessing judgments in the Tanzanian criminal justice system, which ultimately impinge on the right to appeal. The specific recognition of this right is thus justified by the existing context.

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[80] Article 48 (d).

[81] Section 32 Criminal Procedure Act.

[82] Section 32.

[83] Article 48 (3) (a) and (c).

[84] Article 13 of the Constitution.

4.4.3.2 Socio-economic rights in the Draft Constitution and their relevance in child justice

The Bill of Rights in the Draft Constitution recognise some socio-economic rights for children generally and children in conflict with the law in particular. It provides that children in conflict with the law should be protected and kept in a suitable environment.[85] This provision may be interpreted to refer to facilities in detention, including possibly separating children from adults in detention and providing them with sufficient food and health services.

With regard to children's general socio-economic rights, the Draft Constitution recognises the rights to education,[86] to health services[87] to food[88] and to shelter.[89] Although some of these rights are provided for in the Law of the Child Act,[90] their inclusion in the Bill of Rights in the Draft Constitution strengthens their legal status. Importantly, in contrast to the Law of the Child Act that provides only for parental responsibility with regard to the civil and political rights and socio-economic rights of children,[91] the Draft Constitution provides that it is the responsibility of communities and state authorities, in addition to parents, to ensure that children are brought up in a proper way and that they are protected.[92] This suggests that although parents have the primary responsibility to provide for their children, the state is also required to adopt policies and programmes to support parents in discharging their responsibilities. In addition, the right to education is included in the Draft Constitution.[93] In the current Constitution it is recognised as a non-justiciable principle of state policy.[94]

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[85] Article 53 (1) (d).

[86] Article 53 (1) (c).

[87] Article 53 (1) (e).

[88] Article 53(1) (e).

[89] Article 53 (1) (e).

[90] The Law of the Child Act 21 of 2009 (hereinafter the Law of the Child Act). For instance, the right to name and nationality (s 6); the right to life, dignity, respect, leisure, health and education from his parents (ss 8 and 9).

[91] Section 9.

[92] Article 53 (1) (g).

[93] Article 52.

[94] Articles 7 (2) and 9 (2) of the Constitution.

Socio-economic rights, such as the right to food, to shelter, to health and to education are relevant in child justice, mainly because children who lack such rights are prone to delinquency as discussed further in Chapter 5. The socio-economic rights provisions referred to above would be justiciable. The Draft Constitution provides that any person, whose rights have been violated by any authority, laws or policies, has a right to seek a remedy by petition to the High Court.[95] Such petitions may also be presented in a representative capacity by any institution,[96] any person on behalf of another person[97] or a group that has common interests.[98] As this discussion shows, the Draft Constitution promises to strengthen the constitutional framework for the protection of children's rights in general, and those applicable to child justice in particular.

4.5 Institutional and legal reforms

4.5.1 Institutional reforms

Tanganyika made major reforms to her court structure in 1963. All courts were integrated into the High Court, thus forming a one-tier court system.[99] The legislation also abolished the dual functions of the judicial officers by area and of Provincial Commissioners (District and Regional Commissioners).[100] The changes to the court structure, in turn, brought changes to child justice as well. The administration of justice in juvenile courts, then primarily vested in district courts, was extended to primary courts.[101] The institutional structure did not affect the main legislation dealing with children, the Children and Young Persons Act of 1937.

4.5.2 The process of legal reform

After the inclusion of the Bill of Rights in 1984 there was a clear indication that child justice legislation needed to bebrought into harmony with the Bill of Rights. Thus child law reform started in 1986 with the establishment of the Law Reform

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[95] Article 65 (2).

[96] Article 65 (4) (b).

[97] Article 65 (4) (c).

[98] Article 65 (4) (d).

[99] The Magistrates' Courts Act 55 of 1963 established primary courts (s 4), district courts (s 5) and resident magistrate courts (s 6) with their respective jurisdictions.

[100] Ramadhani op cit note 12 at 72.

[101] Children and Young Persons Act (Extension of Ordinance to Primary Courts).

Commission's Working Group. The Working Group released its report on child laws in 1994.[102] It identified various weaknesses. These were, inter alia, that the definition of a child varied in different legislation; children were being prosecuted for acts that did not constitute a crime when committed by adults (status offences); pre-trial and trial procedures did not contain sufficient human rights guarantees; and the system did not have alternatives to criminal proceedings such as diversion procedures.[103] Furthermore, the report found that the courts dealt with children in need of care in the same way as they dealt with those accused of having committed a crime.[104] In conclusion, the Working Group recommended the repeal of the Children and Young Persons Act and the Rules made under it.

These recommendations were not implemented, except for a few changes made in 1997 and 1998 abolishing the death penalty for children[105] and raising the age of criminal responsibility from seven to 10 years.[106]

The Committee on the Rights of the Child in 2006 reiterated the need to reform the child justice system.[107] Among other things, the Committee urged Tanzania to increase the age of criminal responsibility to 12, abolish corporal punishment, consider using non-judicial interventions such as diversion, make provision for legal aid, establish juvenile courts, improve court procedures and facilitate the social reintegration of child offenders.

Tanzania enacted its Law of the Child Act in 2009, three years after these recommendations were presented. Despite the adoption of the Act, there are still inadequacies in the child justice system. In 2010, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) urged Tanzania to comply with the Committee on the Rights of the Child's previous recommendations in 2006

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[102] The Law Reform Commission of Tanzania, *Report of the Commission on the Law Relating to Children in Tanzania* (1994)(hereinafter Report of the Law Reform Commission 1994).

[103] Ibidparas 125–200.

[104] Ibid paras 160–1.

[105] Written Laws (Miscellaneous Amendments) Act 31 of 1997.

[106] Amendments to the Penal Code (Cap 16 R.E 2002) made in the Sexual Offences Special Provisions Act (Cap 101 R.E 2002).

[107] Committee on the Rights of the Child 'Consideration of Reports submitted by the States parties under article 44 of the Convention: Concluding Observations: Tanzania', CRC/C/TZA/CO/2, Forty-second session, 21 June 2006 para 70. See Chapter 1 of this thesis.

> by particularly enacting comprehensive provisions in the juvenile justice standards; allocating sufficient human and physical resources; and conducting regular training to juvenile justice personnel to ensure that juvenile justice is administered in consonance with best practices and international standards, in accordance with Articles 17 [and] 30 of the [African Children's Charter].[108]

The Committee on the Rights of the Child in 2015 has expressed concerns that the Tanzanian child justice system is in many respects still inadequate.[109] These include the use of corporal punishment as a criminal sanction, lack of adequate legal aid services, an insufficient number of specialised personnel, long pre-trial detentions and physical and sexual abuse in pre-trial detention.[110] It has recommended that Tanzania should reform its child justice system, including promoting alternatives to judicial intervention, so that it will conform to international standards.[111]

It can be said that, while the Child Act (discussed further in 4.5.2.1 below) represents a major development towards child justice reform, yet a lot more needs to be done. These matters include increasing the age of criminal responsibility, promoting and strengthening non-judicial intervention and abolishing corporal punishment (as shown in Chapters 6, 7 and 8), so as to meet child justice international standards.

4.5.2.1 The Law of the Child Act 21 of 2009: An overview

The Law of the Child Act harmonises various pieces of legislation on child welfare, adoption, affiliation and child justice. It defines a child as a person below 18 years and incorporates key principles of the CRC, the best interests of the child, non-discrimination and participation.[112] As indicated in Chapter 3, these are all relevant to child justice. The Act provides that parents have a responsibility to ensure the child's survival and development.[113] The CRC provides that '[s]tates Parties shall ensure to

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[108]Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of Tanzania Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (2010) 10.

[109] CRC 'State report submitted under article 44 of the Convention: Concluding Observations: United Republic of Tanzania,' CRC/C/TZA/CO 3-5 Sixty-eighth session 3 March 2015.

[110] Ibid para 72.

[111] Ibid para 73.

[112] Sections 4,5, 6.

[113] Section 9 (3) (b).

the maximum extent possible the survival and development of the child'.[114]The Committee on the Rights of the Child has recommended that protective and risk factors that underlie the life, survival and development of the child 'need to be considered systematically in order to design and implement evidence-informed interventions that address a wide range of determinants during the life course'.[115] This suggests that the implementation of the right to life, survival and development requires a holistic approach and it is the responsibility of both parents and the government.

The Act provides for social, economic and cultural rights and civil and political rights. The protected socio-economic rights include the right to health, the right to food, the right to shelter, the right to education, and the right to play and leisure.[116] These rights are relevant to delinquency prevention. Quite often children engage in delinquency due to a lack of basic needs.

The Act provides that parents have a duty to provide for a child's leisure, food, shelter, clothing and education.[117] In the event of the death of the biological parents, parental responsibility shall vest in a relative of either parent or a custodian appointed by a court order or by a traditional arrangement.[118] Nevertheless, while parents and guardians have the primary responsibility to provide, the Act states that the local government also has a responsibility to support families.[119] Such responsibilities include keeping registers of the most vulnerable children and assisting children who need assistance[120] (discussed further in Chapter 5).

Several provisions in the Law of the Child Act relate to the theme of child protection. First, the Act prohibits harmful employment, torture and cruel, inhuman or degrading treatment.[121] Secondly, it provides that a violation of these rights

[114] Article 6 (2).

[115] CRC General Comment No 15 'The right of the child to the enjoyment of the highest attainable standard of health' CRC/C/GC/15, Sixty-second session, 17 April 2013 para 16.

[116] Section 8.

[117] Section 8 (1).

[118] Section 9(4).

[119] Section 94.

[120] Section 94 (4) and (5).

[121] Section 13.

constitutes an offence.[122] Further, it makes provision for children in need of care and protection particularly in relation to courts issuing care orders.[123]

According to the Act, a child has several civil and political rights. These include the right to a name and nationality[124] and the right to an opinion.[125]

The Act dedicates the whole of Part IX to child justice.[126] This part establishes juvenile courts and provides for the right of the child to be released on police bail,[127] to be heard, to legal representation and to privacy.[128]

The Act provides that if a child cannot be brought to court immediately, the officer in charge of the police station shall release such a child on bail.[129]Although the Act does not elaborate on pre-trial procedures, this provision is important in two main ways. First, it clearly requires that a child be brought to court immediately. Since the Act does not state the time frame, for instance 24 hours, which is provided in the Criminal Procedure Act,[130] this may imply that a child should be brought to court within a shorter time than that prescribed by the Criminal Procedure Act. Secondly, the Act contains a specific provision applicable to children, as opposed to the general provision in the Criminal Procedure Act. This is that a child, if not brought to court, shall be released on police bail subject to certain conditions.[131]

To ensure that the right to be heard is protected, the Law of the Child Act provides that the proceedings in Juvenile Court shall be informal, and adversarial procedures shall be avoided. [132] In addition, the charges as well as the particulars of the offence shall be explained to the child in simple language.[133] Further, a child shall be given an opportunity to defend himself or herself and, where a statement amounts

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[122] Section 14.

[123] Section 16.

[124] Section 6.

[125] Section 11.

[126] This part provides a brief description. Further discussion on pre-trial, trial and post-trial procedures under the Law of the Child Act and other legislation is provided in Chapters 7 and 8.

[127] Section 101.

[128] Sections 97, 99.

[129] Section 101.

[130] Section 32.

[131] Section 101.

[132] Section 99 (1) (c).

[133] Section 105.

to a guilty plea, may be convicted.[134] However, the law, including case law, provides guidelines and procedures to protect an accused against coerced confession and to ensure that conviction on a plea of guilty is based on a guilty plea that is unequivocal, as shown in Chapter 8. Furthermore, the right to appeal shall be explained when a decision is handed down by the court.[135]

The Act also makes provisions for representation by the next of kin and an advocate.[136] This representation provision implies that assistance during trial is not restricted to legal representation but may extend to assistance and support from parents or relatives. Despite the provision on legal representation in the Law of the Child Act, such representation remains a challenge in child justice. The extent to which the right may be realised by children in conflict with the law in either pre-trial or during trial is discussed in Chapters 7 and 8 respectively.

Parents, guardians and other persons are also permitted to attend the Juvenile Court proceedings.[137] In addition to its officers, the Juvenile Court may allow witnesses and other persons directly involved in the matter to attend court sessions.[138] Such discretion of the court is relevant in restricting attendance to persons, including parents, where appropriate. This is consistent with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) that provide that '[parents or guardian] may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile'.[139]

The right to privacy is protected, as the Act requires that proceedings shall be held in camera.[140]

During detention or imprisonment, children are guaranteed the right to be separated from adults.[141] They also have the right to more lenient forms of

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[134] Section 111.

[135] Section 99 (1) (g).

[136] Section 99 (1) (f).

[137] Sections 99 (1) (e) and 99 (2).

[138] Sections 99 (2) (a) and 99 (1) (d).

[139] Rule 15.2 United Nations Standard Minimum Rules for the Administration of Juvenile Justice GA Res40/33, 29 November 1985.

[140] Section 99 (1) (a).

[141] Sections 99 (2) and 102.

punishment, such as attendance at approved schools, fines, compensation, conditional discharge, supervision and repatriation orders.[142] The extent to which these and other orders are consistent with international standards is discussed in Chapter 8.

However, the Law of the Child Act makes no provision for alternatives to criminal proceedings, procedural protections before trial, legal representation before trial and the prevention of child delinquency. In addition, it retains sentences such as repatriation and corporal punishment (discussed in Chapter 8). Such sentences seem to hinder the promotion of reintegration. The CRC requires children in conflict with the law be treated in a manner 'which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in the society'. [143] Thus, the lack of pre-trial procedures, the lack of adequate provisions on non-judicial intervention[144] and delinquency prevention, as well as provision for sentences that are inconsistent with international child rights standards, are some of the weaknesses that cause the Law of the Child Act to fall short of international standards. Mashamba has observed that the process of enacting the Law of the Child Act was accelerated in such a way that it did not take into consideration international child rights standards.[145] This is the case, for example, with regard to lack of procedures on pre-trial, which ought to have been part of the Act. As shown above, it is also the case with the provisions for sentences, such as corporal punishment and repatriation orders, as these do not seem to promote reintegration as envisaged by international standards (discussed in Chapters 3 and 8). Some of the inadequacies, such as delinquency prevention, though not included in the Act, have been included in other legislation, policies and programmes (discussed fully in Chapter 5).

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[142] Sections116,118–9.

[143] Article 40 (1).

[144]Ministry of Constitutional and Legal Affairs *Child Justice:A Five Year Strategy for Progressive Reform 2013–2017* (2012) (currently Ministry of Justice and Constitutional Affairs) also identified the inadequacy in diversion that 'there is no formal system of diversion'. See at 11.

[145] Clement Mashamba *A Comparative Examination of the Administration of the Juvenile Justice Systems in Tanzania and South Africa* (unpublished PhD Thesis, Faculty of Law, Open University of Tanzania, 2012) 220.

4.6 The existing laws, policies, and institutions on child justice

4.6.1 Laws

In addition to the Law of the Child Act and the accompanying Juvenile Court Procedures, other laws relevant to child justice are contained in the Criminal Procedure Act[146] that governs criminal procedure in Tanzania; the Penal Code[147] that establishes offences and provides for applicable punishments; and the Evidence Act[148] that provides the rules governing evidence. In addition, the Magistrates' Courts Act[149] establishes the resident magistrates' district and primary courts and provides for their respective jurisdictions. It further provides for the procedures to be applied in primary courts under its Third Schedule, referred to as the Primary Court Criminal Procedure Code. The Corporal Punishment Act Cap 17 also applies to child justice.

4.6.2 Policies

The main policy on children in Tanzania is contained in the Child Development Policy 2008, although there are other policies in different ministries that touch upon child issues. This policy recognises that children have the rights to life, to protection, to participation, to development and to be treated equally.[150] It requires the government to address the problems of children at social risk, particularly street children who lack health services, care, food and shelter.[151] Although it does not address child justice, the policy requires the government to take measures to promote and protect the right to life, the right to equality and the principles of child participation and protection, all of which are relevant to child justice. Improving children's lives through the provision of basic services is important in realising their rights.

Improving life in terms of quality and eradicating poverty is also addressed at the national level in the National Strategy for Growth and Poverty Reduction (National Strategy for Poverty Reduction) which has two implementation phases:

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[146] Cap 20 R.E 2002.

[147] Cap 16 R.E 2002.

[148] Cap 6 R.E 2002.

[149] Cap 11 R.E 2002.

[150] United Republic of Tanzania, Child Development Policy 2008 (hereinafter Child Development Policy).

[151] Ibid at 25.

2005–2010 and 2010–2015 respectively.[152] The strategy is to be implemented in line with the Tanzania Development Vision 2025.[153] The strategy on poverty reduction further seeks to ensure the availability of quality educationand the development and implementation of childhood development programmes aimed at improving the wellbeing of children and other vulnerable groups.[154] The Youth Development Policy of 1996 and the Education and Training Policy of 1995 and of 2014 are relevant, in as far as education and employment are concerned. These should be understood to be part of child justice within the context of child protection.

The government also has adopted the National Human Rights Action Plan 2013–2017[155] alongside a Five Year Strategy for Child Justice Progressive Reform (2013–2017), discussed below. The National Human Rights Action Plan reflects the Government of Tanzania's commitment to promoting and protecting human rights in general and child rights in particular. It recognises that children are vulnerable due to their age, and seeks to protect child rights in general and children in conflict with the law in particular.[156] It identifies some challenges that children face, including poverty, trafficking, violence, early marriage, child labour, sexual abuse and school dropouts.[157] The Human Rights Action Plan seeks to increase an awareness of child rights, address violence against children and increase budget allocation to mitigate these challenges. With particular focus on child justice, it identifies some challenges, including limited juvenile courts, social welfare officers, inadequate rehabilitation programmes and legal representation. The Plan seeks to establish mandatory free legal representation, create prevention schemes, rehabilitation and reintegration programmes.[158]

In addition, as shown above, the government has adopted the recommendations contained in Child Justice: A Five Year Strategy for Progressive

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[152] National Strategy for Poverty Reduction1.

[153] Ibid.

[154]Ibid at 10.

[155] United Republic of Tanzania *National Human Rights Plan of Action2013–2017* Dar es Salaam (2013).

[156] Ibid at 38.

[157] Ibid at 39.

[158] Ibid at 42.

Reform 2013–2017.[159] The strategy aims at bringing Tanzanian child justice into conformity with international standards on child justice. It was informed by two studies commissioned by the Ministry of Justice and Constitutional Affairs in collaboration with UNICEF, Assessment of Access to Justice for Under-18s in Tanzania,[160] and Analysis of the Situation of Children in Conflict with the Law in Tanzania (Assessment of Juvenile Justice).[161] The studies confirm the ACERWC observations in 2010 that the Tanzanian child justice system does not meet international standards, and made recommendations for improvements as shown in 4.5.2 above. The Committee recommended that Tanzania should enact comprehensive provisions on juvenile justice standards. The need to improve child justice in order to meet international standards was also part of the recommendations of the Committee on the Rights of the Child in 2015, as shown in 4.5.2 above.

Generally, these studies revealed that, to a large extent, the child justice system does not meet international standards.[162] For instance, the Analysis of the Situation of Children in Conflict with the Law found that the child justice system lacked specialised child justice institutions and procedures. It established that there was limited coordination between child justice professionals. Further, the vast majority of children who appear in court were unrepresented and they lacked other appropriate assistance. Children were also at risk of human rights violations in police detention and prisons, they were detained with adult offenders in remand and in post-sentence institutions, and there were no community rehabilitation programmes.[163]

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[159] *Child Justice:A Five Year Strategy for Progressive Reform*op cit note 144.

[160] Ministry of Constitutional and Legal Affairs and UNICEF *Assessment of Access to Justice Systemfor Under-18s in Tanzania* Dar es Salaam (2012). Further information regarding these studies are also found in Carolyn Hamilton 'Working towards child friendly justice in Tanzania' *Justice* 4 February 2014 Brussels, available at *https://www.liverpool.ac.uk/media/livacuk/law/european-childrens-rights-unit/CFJ,-,Hamilton,final.pdf*, accessed on 24 June 2015.

[161] Ministry of Constitutional and Legal Affairs & UNICEF *Analysis of the Situation of Children in Conflict with the Law in Tanzania* Dar es Salaam (2012). This study and the *Assesment ofAccess to Justice* study op cit note 160 were carried out by the Coram Children's Legal Centre (UK) and the National Organisation for Legal Assistance (NOLA), a Tanzanian legal aid and human rights organisation. See United Republic of Tanzania *The Country Third to Fifth Periodic Reports on the Implementation of the Convention on the Rights of the Child 2012* Dar es Salaam (2013) para 26.

[162] *Analysis of the Situation of Children in Conflict with the Law* op cit note 161 at12.

[163] Ibid at 11–5. See also *Child Justice:*

Other weaknesses identified include lack of clear legal provisions on diversion; denial of bail for failure to meet conditions for it, long-term pre-trial detentions; and placement of children in adult detention facilities.[164]

As shown above, these studies led to the adoption of the recommendations contained in Child Justice: A Five Year Strategy for Progressive Reform andthe adoption of the Juvenile Court Rules.[165] The reforms mentioned in the Strategy are to be implemented and achieved progressively, while the gaps in the child justice system have been identified. These gaps include the lack of statutory amendments envisaged in the Strategy to establish the absolute age of criminal responsibility at 12, to exempt children from pre-trial detention for non-bailable offences, to make provisions for diversion, to prohibit corporal punishment in the justice system and to establish juvenile courts countrywide. The Temeke diversion and community rehabilitation scheme launched in 2012 in (discussed in detail in Chapter 6) is only a pilot study and currently rehabilitation programmes do not operate countrywide, [166] except for one in Mbeya. UNICEF committed itself to funding the programme in the Temeke pilot area until 2015, yet, despite the programme's success, such funding has not been extended.[167] This creates a dilemma, not only for the progress of the existing programme, but also for the expansion of such programmes to other parts of the country. The Temeke programme may be used to inform the government and other child justice stakeholders of the need to extend the scope and funding of diversion and rehabilitation programmes.

The government has also adopted the National Costed Plan for the Most Vulnerable Children 2013–2017.[168] The Plan seeks to guide the implementation of actions and policies with a view to enhancing the wellbeing of the most vulnerable

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A Five Year Strategyfor Progressive Reform op cit note 144 at 14,52.

[164]*Child Justice:A Five Year Strategyfor Progressive Reform* op cit note 144at 11.

[165] One of the actions to be taken in the Strategy was to ensure that Juvenile Court Rules are gazetted by 2014. See ibid at 20.

[166] Ibid at 36. See also footnote 21 at 36 of the Strategy. Information obtained from Temeke Social Welfare Officer Ms Subisya Kabuje on 22 July 2015 is that a rehabilitation programme has also been launched in Mbeya.

[167]Denis Mketo 'Mpango wa Marekebisho ya Tabia kwa watoto Wanaokinzana na Sheria na Watoto Walio Kwenye Hatari ya Kukinzana na Sheria Temeke' (2015) 3.

[168] Ministry of Health and Social Welfare *National Costed Plan for the Most Vulnerable Children 2013–2017* Dar es Salaam (2012).

children.[169] It defines the most vulnerable children as 'children under the age of 18 falling under the extreme condition characterized as severe deprivation so as to endanger their health, wellbeing and long-term development'.[170] The plan has four strategic objectives, these being: to strengthen the capacity of households and communities to support the most vulnerable children; to increase access to services to prevent and respond to cases of violence against children, their neglect and exploitation; to improve the access of the most vulnerable children to the utilisation of health care, education, early childhood care and development services; and to strengthen coordination, policy and service delivery.[171] These objectives are useful in child justice, particularly with regard to delinquency prevention. They seek to implement some socio-economic rights, such as education and health care — all useful in preventing child delinquency. Children may offend because they lack basic needs such as food, health care and education. In addition, the plan seeks to prevent, and respond to violence against children. Prevention and response to violence against children is also relevant in child justice, particularly in delinquency prevention. Children who experience violence may become delinquent.[172]

Another policy document that is relevant to child justice is the Multi Sector National Plan of Action to Prevent and Respond to Violence against Children 2013–2016.[173] This plan was adopted following the findings of the Study on Violence against Children[174]that had revealed the prevalence of sexual, physical and emotional violence against children.[175] The plan is informed by the National Strategy for Growth and Poverty Reduction (discussed above). In its cluster III, the Strategy seeks to promote human rights for all, particularly women, children and the vulnerable.[176] The Multi Sector Plan of Action, as its name suggests, works with professionals from

[169] Ibid at 1.

[170] Ibid.

[171] Ibid at 2–13.

[172] Ibid at 12.

[173] United Republic of Tanzania *Multi Sector National Plan of Action to Prevent and Respond to Violence against Children 2013–2016* Dar es Salaam (2012).

[174] UNICEF *Violence against Children in Tanzania: Findings from National Survey 2009* Dar es-Salaam (2011).

[175]*Multi Sector National Plan of Actionto Prevent and Respond to Violence against Children*op cit note 173 at 10, discussed further in Chapter 5.

[176] Ibid 14.

various sectors, including social welfare officers; community development officers; medical professionals; lawyers; police officers; and teachers. It involves both government and non-government entities that focus on the prevention of and response to violence against children.

The Multi Sector Plan of Action is relevant to child justice in three main ways. First, like the Costed Plan of Action, it deals with prevention of and response to violence against children. Secondly, it underscores the fact that violence against children needs to be addressed holistically, and thus the collaboration of different sectors and professionals is pivotal. Thirdly, its implementation is deeply rooted at grassroots level in local communities, civil societies and faith-based institutions. The active engagement of such communities in the prevention of and response to violence is important, as violence occurs within families and communities.

4.6.3. Institutions

Institutions that are responsible for child justice include the Ministry of Community Development, Gender and Children (Ministry of Gender and Children), responsible for initiating policies relating to children;[177] and the Ministry of Justice and Constitutional Affairs, is responsible for broad issues on law reform and the administration of justice.

The Chief Justice, who is head of the judiciary, is responsible for establishing juvenile courts and adopting relevant rules of procedure.[178] As head of the judiciary, the Chief Justice is also responsible for the appointment and management of magistrates who preside over most criminal cases.[179]

4.7 The status of international law in the Tanzanian domestic legal system

The only provision that refers to international law in the Tanzanian Constitution is found in art 63(3). It provides that:

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[177] Tanzania National Website *http://www.tanzania.go.tz/ministriesf.html*,accessed on 21 May 2013.The Ministry is currently known as the Ministry of Health, Social Welfare, Gender, Elderly and Children.

[178] Article 118 (1) of the Constitution; Law of the Child Act ss 97 (2), 99.

[179] Article 118 (1); art 116 excludes the power of the Chief Justice regarding the structure and administration of day-to-day activities of the courts established in accordance with the Constitution of Zanzibar and implying that such powers are limited to courts on the mainland and art 109 (4) provides for delegation of some administrative and supervisory powers to the Principal Judge.

> For the purpose of discharging its functions the National Assembly may:
> (d) enact laws where implementation requires legislation;
> (e) deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification.[180]

These provisions are not clear as to what the terms 'ratification' and 'party' mean. 'Ratification', as used in these provisions, could mean the act of becoming a state party to an international treaty. The Vienna Convention on the Law of Treaties defines ratification as an international act 'whereby a State establishes on the international plane its consent to be bound by a treaty'.[181] However, art 63 (3) (e) refers to treaties to which Tanzania is already a party. Hence, to avoid contradiction, 'ratification' as used in this article can be interpreted to mean the act of domestication. This interpretation would render Tanzania a dualist state, which is consistent with the practice in English-based common law systems. Hence, all the treaties ratified by Tanzania[182] have to be transformed into domestic law via a legislative process.

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[180] Section 63 (e) and (d).

[181] Article 2 (b) of the Vienna Convention on the Law of Treaties 1969, entered into force 27 January 1980. Also, art 2 (g) defines a party as 'a state which has consented to be bound by the treaty and for which a treaty is in force'.

[182]These include the International Covenant on Civil and Political Rights (ICCPR) GA Res 2200A (XXI), 21 UN GAOR Supplement (No 16) at 52, UN Doc A/6316 999 UNTS 171 (1966), entered into force 23 March 1976. Tanzania acceded to it on 11 June 1976. International Covenant on Social Economic and Cultural Rights (ICESCR) GA Res 2200A (XXI) 21 UN GAOR Supp. (No 16) at 49 UN Doc A/6316 993 UNTS 3 (1966) entered into force 3 January 1976. Tanzania acceded to it on 11 June 1976. Convention on the Rights of the Child GA Res 44/25, Annex, 44 UN GAOR Supplement (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990. Ratified by Tanzania on 10 June 1991. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; GA Res 54/263 Annex II, 54 UN GAOR Supp. (No 49) at 6, UN Doc. A/54/49 Vol. III (2000) entered into force January 18, 2002. Acceded to by Tanzania 24 April 2003. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts GA Res 54/263, Annex I, 54 UN GAOR Supp (No. 49) at 7, UN Doc. A/54/49, Vol. III (2000), entered into force 12 February 2002. Acceeded to by Tanzania on 11 November 2004. United Nations Convention on the Rights of Persons with Disabilities GA Res 61/106, Annex I, UN GAOR Supplement No 49 at 65 UN Doc A/61/49 (2006) entered into force 3 May 2008. Ratified by Tanzania on 10 November 2009. Convention on Elimination of All Forms of Discrimination against Women (CEDAW) GA Res. 34/180, 34 UN GAOR Supplement (No 46) at 193,

The Constitution is silent on the status of international customary law in Tanzania. It is argued that, since Tanzania inherited English common law, the position that obtained in the English legal system on 22 July 1920 has to apply.[183] The common law position at the time — and currently in effect — is that customary international law is considered part of domestic law, unless it conflicts with an Act of Parliament or abrogated by the decision of a court of superior ranking.[184] Hence, customary international law will form part of the Tanzanian domestic law when it is not in conflict with the Constitution, legislation and decisions of the Court of Appeal of Tanzania.

While international treaties have to be domesticated before they can be enforced by the courts in Tanzania, the courts still use international treaties and other sources of international law while interpreting the provisions of domestic law. For example, in *Attorney General v Reverend Christopher Mtikila*,[185] the Court of Appeal held that 'reference to international human rights instruments has been ordained by this court'.[186] Various other decisions have made reference to international law.[187]

UN Doc A/34/46 (1979), entered into force3 September 1981. Ratified by Tanzania on 20 August 1985. Status of ratification of the above instruments, available at the United Nations treaty collection at*https://treaties.un.org/Pages/ParticipationStatus.aspx*, accessed on 24 July 2014. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 ILO No 182 2133 UNTS161, entered into force 19 November 2000. Ratified by Tanzania on 12 September 2001 ratification status, available at *http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:0::NO:::*, accessed on 28 December 2015. Some of the conventions at the regional level include the African Charter on Human and Peoples Rights, OAU Doc CAB/LEG/67/3 Rev. 5, (1982) 21 ILM 58 entered into force 21 October 1986. Ratified by Tanzania on 18 February 1984 ratification status, available at *http://www.achpr.org/instruments/achpr/ratification/*, accessed on 16 June 2014. African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999 ratified by Tanzania on 16 March 2003. Ratification status available at *http://www.achpr.org/instruments/child/ratification/*, accessed on 16 June 2014.

[183]Section 3 (3) of the Judicature and Application of Laws Act (Cap 358 R.E 2002).

[184] Ian Brownlie *Principles of Public International Law* 7 ed (2008) 41–4.

[185] Civil Appeal No 45 of 2009 (unreported) Dar es Salaam (CA).

[186]*Mtikila's* case ibid at 14.

[187] See for instance in *Republic v Mbushuu Alias Dominic Mnyaroje and Kalai Sangula* [1994] TLR 146 (HC) 156-8 the court when deciding on the death penalty as being inhuman and degrading punishment made reference to inter alia the ICCPR 1966 and the Second Optional Protocol to the ICCPR 1989. In *Bernardo Ephraim v Holaria Pastory and Gervasi Kaizilege* High Court Mwanza

4.8 Conclusion

The administration of justice both in pre-colonial Tanganyika and during the period of German colonisation did not have a separate justice system for children. Thus, children were tried in ordinary courts during the German colonial period and in the first decade of British rule. Since race formed the basis of jurisdiction, children were also tried according to their respective races.

The rudiments of a child justice system in Tanzania were introduced during the British colonial period. In 1937 the British colonial government enacted the Children and Young Persons Act that had the attributes of both welfare and justice theories. For instance, it required children to be separated from adults, it provided for proceedings involving children to be held in camera, it protected several rights, such as the right to be heard, and it restricted the use of imprisonment for children.

Despite these noble features, the Act did not have procedural guarantees aimed at protecting children before trial. This meant that the procedures applicable to adults applied to children. A child, for instance, could be convicted on his plea of guilty, just like an adult. The Act also did not have provision for legal representation, non-judicial interventions or the prevention of child delinquency. This legislation continued to apply in Tanzania after independence with few amendments.

The inclusion of the Bill of Rights in the Constitution of 1984 heralded fundamental changes to child justice that have taken place and, no doubt, will continue to take place. Although the new Bill of Rights did not have child-specific provisions, it recognised a wide range of rights that are relevant to child justice. These included socio-economic rights, most of which are relevant to the child'swell-being and therefore to delinquency prevention. The Bill of Rights also introduced several civil and political rights relevant to the administration of criminal justice and to child offenders.

The adoption of the Law of the Child Act has further augmented the protection of the rights of children as far as child justice is concerned. The specific ways in which this Act has done so — or failed to do so — are the subject of further

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Civil Appeal No 70 of 1989; (2001) AHRLR 236 (TzHC 1990), when dealing with the right of a woman to dispose of clan land, the court made reference to CEDAW, the African Charter on Human and Peoples Rights and ICCPR. In *Director of Public Prosecutions v Daudi Pete* [1993] TLR 22 (CA) 34 the court stated that the African Charter on Human and Peoples Rights must be taken into account in interpreting the Bill of Rights.

investigation in the chapters that follow. It is sufficient to note for the moment that the Act codifies a large proportion of the CRC and the African Children's Charter. To the extent that the Act falls short, international law could be used as an interpretative tool to realise further reforms in that courts may draw on the rich jurisprudence on child justice that international law has developed.

This chapter has also discussed the relevance of the Draft Constitution in the child justice system. It has shown that this has many provisions that seek to protect the rights of offenders. In addition, the chapter has provided an overview of the legal, policy and institutional framework within which child protection is administered in Tanzania. The specific details of these policies, programmes and legislation form a basis for analysis in the following chapters, starting with the next chapter, which focuses on Tanzania's legal and policy measures on child delinquency.

CHAPTER 5: CHILD DELINQUENCY PREVENTION IN TANZANIA

5.1 Introduction

As argued earlier, a human rights-based approach to child justice has to place delinquency prevention at its centre. This approach is informed by a recognition that there is a close link between child delinquency and the lack of access to economic, social and cultural rights. By ensuring the realisation of these rights, and thus improving their lives, children will most likely grow up well and escape from being involved in criminal behaviour.

Thus, the questions that this chapter will address are as follows: To what extent are economic, social and cultural rights recognised in the Tanzanian legal landscape? How are the legal provisions on these rights integrated into the child justice system and policies? Because of the breadth of the questions raised, this chapter will focus on a select few economic, social and cultural rights, on legal and policy measures for implementing rights, and on the related themes of poverty and child protection from violence, exploitation and child labour.

5.2 Child delinquency in Tanzania

Child delinquency is attributable to many socio-economic factors: poverty, family instability, parentlessness and a general lack of family care in Tanzania are among such factors.[1] Many children facing these hardships find themselves on the streets as sellers of petty goods and beggars or, in the case of girls in particular, employed as domestic servants.[2] In most cases those children who are in domestic employment are underpaid, overworked, discriminated against and subjected to violence, including sexual violence, within the families for whom they work.[3]

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[1] Joel L P Lugalla & Jessie Kazeni Mbwambo 'Street children and street life in Tanzania: The culture of surviving and its implication for children's health' (2002) 23 (2) *International Journal of Urban and RegionalResearch* 329,340. Although the authors identify these as reasons for leaving their families, both those who leave their family for such a reason and those who encounter such situations without leaving their family are prone to delinquency.

[2] Sosthenes Mwita 'Tanzania: Human trafficking getting worrisome' *Tanzania Daily News* 12 June 2013, available at *http://archive.dailynews.co.tz/index.php/features/18550-human-trafficking-getting-worrisome*, accessed on 20 September 2013.

[3] Ibid.

Although there is no nation-wide consolidated statistical data on children in conflict with the law or lacking parental care, the number of these children is believed to be huge.[4] The Human Rights Commission and Good Governance Report on Children in Detention Facilities 2011 has claimed that about 591 children were held in 65 detention facilities in 2011.[5] While the number of detained children may well reflect the extent of the use of custodial orders and the implementation of the principle of last resort, it may not accurately reflect the number of children in conflict with the law in Tanzania. This is particularly so because not every child in conflict with the law is detained. Mashamba[6] argues that this lack of statistical data is the result of poor record keeping and the absence of a proper data management system in child justice institutions, including police stations, the judiciary, prisons and the social welfare department. This means that countrywide the number for child offenders has never been ascertained.

Although it is acknowledged that street children are a major problem, establishing what their actual number is has been difficult as the population is fluid, because children move between their homes and the streets, and insufficient research has been done on the subject.[7] A 2005 study conducted by the Mkombozi Centre shows that 959 and 1441 children were living on the streets of Moshi and Arusha respectively.[8] Another report revealed that about 1489 children aged between 6 and 18 were living on the streets of Mwanza in 2012.[9] These numbers represent only children in three regions. It is clear that the problem of child destitution is serious.

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[4] Clement Mashamba *A Comparative Examination of the Administration of the Juvenile Justice Systems in Tanzania and South Africa* (unpublished PhD Thesis Faculty of Law, Open University of Tanzania) (2012) 332 referring to Commission of Human Rights and Good Governance *Inspection Report for Children in Detention Facilities in Tanzania* (2011), viii. The Report showed that there were *approximately* 1400 adult detention facilities in Tanzania.

[5] *Inspection Report for Children in Detention Facilities in Tanzania* op cit note 4 at vi-viii.

[6] Mashamba op cit note 4.

[7] Sheryl L Buske 'A case study in Tanzania: Police round-ups and detention of street children as a substitute for care and protection' (2011–2012) 8 (1) *South Carolina Journal of International Law and Business* 87,89.

[8] Mkombozi Centre for Street Children *Mkombozi Census 2005: A Comparative Analysis of Tanzania's Most Vulnerable Children* (2005) 16.

[9] Railway Children Organisation *Children and Young People Living on the Streets in Mwanza Tanzania: Headcount Report* (2012) 10.

Such children not only are at great personal risk, but also are vulnerable to becoming involved in criminal activities. There is, therefore, no doubt that an intervention in the form of delinquency prevention is necessary.

Measures to prevent child delinquency are relevant to all children and have to be aimed at ensuring that they enjoy their rights to life, survival and development, to education, to health, to food, to water, to shelter, to family and to play and recreation. More specific measures must be directed at children who encounter social challenges or social exclusion, as these increase the likelihood of their engaging in delinquency. These children are regarded as being at 'social risk'. Thus, the state should direct its policies and programmes towards an early intervention in order to minimise the risk of these children becoming delinquents.

It was shown in Chapter 3 that the Convention on the Rights of the Child (CRC) recognises the interdependence and indivisibility of all rights and, more specifically, that economic, social and cultural rights are also relevant to child justice. While civil and political rights are applicable to criminal investigations and court-related proceedings, economic, social and cultural rights are relevant to delinquency prevention. However, most child justice systems rarely recognise the indivisibility of all rights. It is not uncommon, for example, for child justice legislation to incorporate most of the civil and political rights and to ignore economic, social and cultural rights. Those systems that recognise this principle tend to codify child delinquency prevention measures in welfare legislation—in the form of protection and social service programmes for children at social risk.[10]

[10] For instance, Guyana adopted the Protection of Children's Act 17 of 2009, the Children and Protection Agency Act 2 of 2009 that creates an Agency to deal with children particularly those at risk including street children and those in hazardous labour, the Child Care and Development Services Act 12 of 2011 in addition to the Juvenile Offenders Act (Amendment Act) 13 of 2010. South Africa has in place the Child Welfare Act (Children's Act 38 of 2005) as amended by the Children's Amendment Act 41 of 2007 that introduces Part 8 on prevention and early intervention. Seychelles has enacted the Welfare Agency Act 22 of 2008 that guides assistance to needy families. Other states have legislation on juvenile justice and the prevention of delinquency such as the Belarus Act 200-Z of 2003 the Child Neglect and Juvenile Prevention System. The United States is an exception, being a non-party to the CRC, it has federal legislation to address delinquency since 1974, following an increase in crimes committed by children in the 1970s. It enacted the Juvenile Justice and Delinquency Prevention Act 1974 that, inter alia, decriminalises status offences.

This chapter will show that in Tanzania the Law of the Child Act attempts to incorporate both civil and political rights and aspects of economic, social and cultural rights. Ideally, this gives Tanzania a better opportunity to address child delinquency comprehensively and holistically.

5.3 Measures for delinquency prevention

The Committee on the Rights of the Child has recommended that domestic legislation should reflect the general principles identified in the CRC.[11] Reflecting these rights and principles in policies and legal provisions is a step towards their fulfillment. In addition, with regard to delinquency prevention, measures to be taken should broadly be those relating to the implementation of economic, social and cultural rights.[12] Among other things, such measures should aim at implementing the right to protection from violence, including sexual exploitation,[13] 'the right to the enjoyment of the highest attainable standard of health care',[14] the right to an adequate standard of living,[15] and the right to education.[16]

5.3.1 Protection and provision rights in Tanzania's Constitution, policies and legislation

As shown in Chapter 4, the Constitution[17] enshrines limited socio-economic rights, such as the right to work, to a fair remuneration and to property. While the right to education is also recognised, it is included in state policy that is not justiciable. As was also seen in Chapter 4, the Draft Constitution of 2014[18] provides specifically for the rights of the child to education, to health, to food and to shelter. It also provides

[11] CRC General Comments No 5, 'General Measures for Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44 (6))' CRC/C/GC/2003/5, Thirty-fourth session 27 November 2003 para 22.These principles are non-discrimination (art 2); life, survival and development (art 6); the best interests of the child (art 3) and participation (art 12).

[12] CRC General Comment No 10, 'Children's Rights in Juvenile Justice' CRC/C/GC/10, Forty-fourth session, 25 April 2007 para 16.

[13] Articles 19, 32, 34 of the CRC.

[14] Article 24 of the CRC.

[15] Article 27 of the CRC.

[16] Articles 28, 29 of the CRC.

[17] The Constitution of the United Republic of Tanzania 1977 (Cap 2 R.E 2002) (hereinafter the Constitution).

[18] The Draft Constitution of the United Republic of Tanzania 2014 (hereinafter the Draft Constitution).

that children have the right to protection from parents and guardians, communities and state authority.[19] This provision seems to be broader than the one in the current Constitution, which provides that all people are entitled to equality and protection before the law.[20]

The Draft Constitution also provides that it is the responsibility of every parent, guardian, community and state authority to ensure that children are brought up in a proper way.[21] Thus, if the Draft Constitution were adopted in its current form, it may provide more protection in two main ways. First, it would strengthen child protection by including it in the Bill of Rights. Secondly, it would categorically extend the responsibility to protect to communities and state agencies.[22]

Chapter 3 discussed the key principles embodied in the CRC and demonstrated their relevance to child justice. As shown in Chapter 4, the Law of the Child Act codifies the right to participation, the right not to be discriminated against and the best interests principle. The relevance of these principles to child justice was also explained.

With regard to the principle of survival and development, the Law of the Child Act provides that parents have a duty to assure a child's survival and development.[23] The Tanzania's Child Development Policy provides that child development is the responsibility of parents, the community and the government.[24]

Although parents have a primary responsibility towards their children,[25] the government should support them, for instance, by formulating policies. According to the Law of the Child Act, children must be taken care of by their biological parents — or extended family if the parents are deceased.[26] This is consistent with the recommendations of the Committee on the Rights of the Child that declared that

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[19] Article 53 (1) (g).

[20] Article 13 (1).

[21] Article 53 (2). (Translation from Kiswahili to English is the author's.)

[22] Article 53 (1) (g) and (2). See also Chapter 4.

[23] Section 9 (3) (c).

[24] The United Republic of Tanzania, Child Development Policy (2008) 9 (hereinafterChild Development Policy).

[25] Articles 3 (2), 5, 9, 18, 27 of the CRC;arts 19 and 20 of the African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999 (African Children's Charter).

[26] Sections 8, 9 (3) (c) and (4).

Tanzania should strengthen support provided to biological families and encourage home-based as opposed to institutional care.[27] Children who cannot be cared for within the family may be placed in an institution. Thus, in exceptional circumstances, the government may provide direct services, such as through institutional arrangements in the case of orphaned children who lack alternative care. The government is also generally involved in formulating policies and enacting laws to facilitate alternative care and introducing programmes to support communities and families.[28]

The state also has a

> positive and active obligation to support and assist parents and other caregivers to secure, within their abilities and financial capabilities and with respect for the evolving capacities of the child, the living conditions necessary for the child's optimal development.[29]

Chirwa argues, correctly, that the primary responsibility of parents in the upbringing of children 'must not be interpreted as a claw-back clause on the responsibilities of states towards children'.[30] The Independent Expert for the United Nations Secretary-General Study on Violence against Children[31] correctly observed that 'children's right to life, survival and development, dignity and physical integrity does not stop at the door of the family home nor do states' obligations to ensure these rights for children'.[32]

The Law of the Child Act also contains provisions for care and supervision orders for children in need of care and protection.[33] The court may issue a care order or an interim care order in the case of children who are abandoned, who have parents

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[27] CRC 'Consideration of reports submitted by states parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania' CRC/GC/C/TZA/Co/3-5 Sixty-eighth session 3 March 2015 para 48 (d).

[28] United Republic of Tanzania *The Country Third to Fifth Periodic Reports on the Implementation of the Convention on the Rights of the Child 2012* Dar es Salaam (2013) para 96.

[29] CRC General Comment No 13 'The rights of the child to freedom from all forms of violence', CRC/GC/C/13, Fifth-sixth session 18 April 2011 para 5.

[30]Danwood Chirwa 'Combating child poverty: The role of economic, social and cultural rights' in Julia Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 91–108, 93.

[31] United Nations *Report of the Independent Expert for the United Nations Study on Violence against Children* Sixty-first session Resolution A/61/299 29 August 2006.

[32] Ibid para 38.

[33] Sections 16,27–33 of the Law of the Child Act.

or guardians who do not exercise proper guardianship, or who are in any other environment that the Commissioner for Social Welfare may determine[34] children on behalf of whom a care or supervision order is issued may be placed in an approved residential home, with approved foster parents, or at the home of a parent, guardian or relative.[35]

Children in 'any other environment' may include those who are at risk for various reasons. In addition, there are provisions regarding foster care, where married couples or individuals may apply to court to be foster parents.[36] These are also elaborated on in the regulations made in terms of the Act.[37]

The scope of alternative careorders may be widened by including in it children 'in other environment', other than those spelled out in s 16 of the Law of the Child Act.[38] This is likely to protect children who are not specifically mentioned in s 16. However, these orders may be made only upon the application of a social welfare officer.[39] This cannot guarantee that a care order is made in respect of every child in need of care and protection because of the shortage of social welfare officers and places to accommodate children after the order has been made.

To ensure a child's wellbeing, the government has adopted policies and programmes to support communities and households. In its combined reports submitted to the Committee on the Rights of the Child, Tanzania noted that it has various programmes and services in place that aim to implement the principles of right to life, development and survival.[40] Although no specific programme or service was mentioned in the case of mainland Tanzania, it was shown in Chapter 4, for instance, that some of the key policy documents that address the needs of poor communities and the most vulnerable children include the National Costed Plan of

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[34] Sections 16, 18 of the Law of the Child Act; Rule 94 The Law of the Child (Juvenile Court Procedure) Rules GN 252 of 2014 (hereinafter Juvenile Court Rules). An interim order may be made pending the final determination of the application.

[35] Section 18 (3) of the Law of the Child Act.

[36] Rule 5 Foster Placement Regulations GN 153 of 2012.

[37] Juvenile Court Rules part X; Foster Placement Regulations GN 153 of 2012.

[38] Section 16 provides for grounds under which a care order may be made, including where a child is orphan, abandoned, has been neglected or ill treated or is under a care of a destitute person, inter alia.

[39] Section 19 Law of the Child Act.

[40] *The Country Third to Fifth Periodic Reports on the Implementation of the Convention on the Rights of the Child* op cit note 28 para 52.

Action for the Most Vulnerable Children[41] and the National Action Plan to Prevent and Respond to Violence against Children.[42] The National Costed Plan of Action, for example, seeks to guide the implementation of actions and policies that aim to enhance the wellbeing of the most vulnerable children. It defines the most vulnerable children as those 'falling under the extreme condition characterized by severe deprivations to endanger their health, wellbeing and long-term development'.[43] Its first strategic objective is to strengthen the capacity of households and communities to care for and support the most vulnerable children, while the Plan of Action seeks to reduce the economic vulnerability of families and to engage with them to improve their standard of living.[44] It also seeks to improve family care, to improve community awareness to support the most vulnerable children within their communities, and to establish and strengthen community initiatives and institutions with a view to protecting the most vulnerable children.[45]

The National Costed Plan of Action has been rolled out to at least one ward in 62 out of 169 districts. The number of children receiving support is small, just 160 000 out of the 1 000 000 most vulnerable children estimated in mainland Tanzania.[46] This shows that only few of the children classified as 'the most vulnerable' are being supported.

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[41]Ministry of Health and Social Welfare *National Costed Plan for the Most Vulnerable Children 2013–2017* (II) Dar es Salaam (2012). See Chapter 4, section 4.6.2.

[42] United Republic of Tanzania *Multi Sector National Plan of Action to Prevent and Respond to Violence against Children 2013–2016* Dar es Salaam (2012).

[43]*National Costed Plan of Action for the Most Vulnerable Children* op cit note 41 at 1. The attributes that fall within the definition include:Children living in extremely poor households with significant unmet needs in terms of adequate education, health care, food/nutrition, shelter, HIV/ AIDS services,and emotional and physical protection; children whose sole caregiver has a disability that severely hinders the provision of care, protection; children living in households with only an elderly caregiver (60 years and above and with significant unmet needs in terms of adequate education, health care, food/nutrition, shelter); children who are orphans with significant unmet needs in terms of adequate education, health care, food/nutrition, shelter, HIV/AIDS services; street children; children involved in worst form of child labour; children assessed to be at risk of, or suffering from violence, abuse and/orneglect, inter alia.

[44]*National Costed Plan of Action for the Most Vulnerable Children* op cit note 41 at 3.

[45] Ibid at 3–4.

[46]*Third to Fifth Reportson the Implementation of the Convention on the Rights of the Child*op cit note 28 para 98.

The support to the most vulnerable children is also a requirement under the Child Act. This provides that '[t]he local government authority shall have the duty to keep a register of most vulnerable children within its area of jurisdiction and give assistance to them…'.[47] In line with this responsibility, the most vulnerable committees/teams have been established in various districts at the district and lower levels.[48] Although these teams were intended to protect the most vulnerable, in practice they are working as child protection teams and they currently exist in about 23 districts at the hamlet (*mtaa*), ward and districts levels.[49]

5.3.1.1 Protection against violence, sexual exploitation, drugs and child labour

The National Strategy for Growth and Reduction of Poverty (National Strategy for Poverty Reduction)[50] recognises that protection of children contributes to their understanding and respect for a human rights culture.[51] Hence, it recognises that children must be vested with legal rights and protected from sexual exploitation, abuse and child labour.[52] Although the Strategy does not specifically mention violence, its reference to 'child abuse' could be interpreted to include violence.[53]

Also relevant to protection from violence, as was shown in Chapter 4, is the Multi Sector National Plan of Action to Prevent and Respond to Violence against Children 2013–2016. As shown in Chapter 4, the Plan focuses on both prevention and response to violence against children. Some of the key commitments here include promoting awareness and addressing social norms for prevention of violence; coordinating the child protection system, medical response to gender-based violence; strengthening access to justice for child victims of violence; and working with local

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[47] Section 94 (4).

[48] *National Costed Plan of Action for the Most Vulnerable Children* op cit note 41 at 12.

[49] Information obtained from Ms Subisya Kabuje, Temeke, a social welfare officer. According to her, in some areas these teams are called Most Vulnerable Committees, but in others they are called Child Protection Teams.

[50] The United Republic of Tanzania, National Strategy for Growth and Reduction of Poverty (2010–2015). This is phase II which was preceded by phase I (2005–2010) (hereinafter National Strategy for Poverty Reduction).

[51] Ibid at 78.

[52] Ibid.

[53] CRC General Comment No 13 (2011) op cit note 29para 4 includes abuse in the definition of violence.

government, civil societies and faith-based organisations to address violence against children.[54]

Some of the achievements of child protection system have been the establishment of Child Protection Teams (CPT) in a number of district councils such as Temeke, Hai, Kasulu, Magu, Musoma and Bukoba.[55] The teams consist of different professionals from social welfare, education, health and the justice system. However, the system has not been spread countrywide. In addition, despite the fact that social welfare officers have a crucial role to play in these teams, there are too few of them, and, as shown in Chapter 4, more than half of the districts do not have them.

Child protection is also referred to in the Child Justice: A Five Year Strategy for Progressive Reform 2013–2017.[56] Objective five of this Strategy aims at protecting children from violence and putting in place an effective justice system to ensure the protection of children's rights in the case of violence.[57] The role of police to investigate and prosecute and the role of courts to hear and make orders such as supervision and care orders are outlined in the Strategy.[58]

However, the small number of social welfare officers and the lack of a clear system for reporting and investigating violence against children are some of the challenges to the effective implementation of these measures.[59] In addition, services to support children and their families have not been adequately developed and child protection teams are yet to be established in a large part of the country.[60] Nevertheless, progress is being made as currently there are about 30 districts working with the support of UNICEF, Save the Children and Pact-Tanzania to establish child protection teams.[61]

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[54] *Multi Sector National Plan of Actionto Prevent and Respond to Violence against Children*, op cit note 42 at 15–27.

[55] Ibid at 17.

[56] Ministry of Constitutional and Legal Affairs *Child Justice:A Five Year Strategy for Progressive Reform 2013–2017* Dar es Salaam (2012).

[57] Ibid at 77.

[58] Ibid at 78.

[59] Ibid at 79.

[60] Ibid.

[61] Information from email communication with UNICEF Communication for Development Specialist-Child Protection, UNICEF Tanzania Country Office, Ms Georgina Mtenga on 18 July 2015.

As was shown in Chapter 4, the government adopted the Child Development Policy in 2008. Unlike the National Strategy for Poverty Reduction discussed above, the Child Development Policy provides that a child must be protected from all forms of violence.[62] In addition, violence is also prohibited by the Law of the Child Act, although as shown above, the Act sees the responsibility for child protection through the narrow lens of parental responsibility.[63] According to the Law of the Child Act, parents suspected of committing violence must be reported to the local government authority in their area.[64] The social welfare officer may investigate the matter further.[65]

The Law of the Child Act also codifies the prohibition of torture, cruel, inhuman and degrading treatment or punishment.[66] Effectively, this may be interpreted as prohibiting violence against children in general. The Ministry of Home Affairs has also adopted several measures that aim at strengthening police capacity to prevent and handle child violence and abuse cases.[67] These include the establishment of a police gender and children's desk in each police station.[68]

However, despite the prohibition of torture, cruel and degrading treatment and punishment by international law and the Law of the Child Act, corporal punishment is not expressly prohibited by the latter. On the contrary, it is considered legal in homes, schools and in the administration of justice.[69] The Penal Code[70] and the Corporal

[62]See10–11 para 24.

[63] Section 9 (3).

[64] Section 95.

[65] Sections 95, 96.

[66] Section 13.

[67]There have also been other measures to address violence, such as the establishment of the Tanzania Police Female Network on Violence against Women and Children (see Save the Children, available at *http://resourcecentre.savethechildren.se/start/countries/tanzania/legal-framework*, accessed on 27 August 2014); the Plan of Action for the Prevention of Violence against Women and Children 2001–2015; The Tanzania Police Force *Standard Operating Procedures for Prevention and Response to Gender-Based Violence and Child Abuse* Dar es Salaam (2012). See also Ministry of Home Affairs: Tanzania Police Force *Guidelines for Establishment of Police Gender and Children's Desk* Dar es Salaam (2012).

[68]*Guidelines for Establishment of Police Gender and Children's Desk* op cit note 67.

[69] Corporal Punishment Regulations GN 294 of 2002 (made under s 60 of the National Education Act 1978); Corporal Punishment Act (Cap 17 R.E 2002) and Penal Code (Cap 16 R.E 2002) as amended by the Sexual Offences Special Provisions Act (Cap 101 R.E 2002) (hereinafter Sexual Offences Special

Punishment Act[71] provide for judicial corporal punishment. In addition, regulations made under the Education Act[72] allow corporal punishment as a disciplinary measure in school.[73] In its report to the Committee on the Rights of the Child 2013, Tanzania submitted that according to reg 3 (1) 'corporal punishment may be administered for serious breaches of school discipline or for grave offences committed whether inside or outside the school'.[74] Despite being urged to abolish corporal punishment by the Committee on the Rights of the Child in 2006,[75] in its Combined Reports to the Committee in 2013 Tanzania submitted that

> the State Party deems justifiable the application of caning of unruly students in schools as falling outside the scope of corporal punishment; and it has regulated the application of the punishment in schools in order for it not to amount to degrading or inhuman treatment of misbehaving pupils in schools. Corporal punishment remains lawful in schools in Tanzania Mainland by virtue of provisions of the Education (Corporal Punishment) Regulations (1979).[76]

In its Concluding Observation the Committee noted with serious concern

> that provisions in the legislation condone corporal punishment for "justifiable correction" in schools, provided that it is carried out by the head teacher, and for parents to discipline their children "provided it does not lead to injury"….[77]

The Committee urged Tanzania to either amend or repeal its legislations including the Child Act, Penal Code, Corporal Punishment Ordinance and Sexual

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Provisions Act). For further discussion on corporal punishment in schools, see Sheryl Feinstein and Lucas Mwahombela 'Corporal punishment in Tanzania's schools' (2010) 56 (4) *International Review of Education* 399, 407.

[70] See section 131 as amended by s 177 (a) of the Law of the Child Act that provides for imprisonment for five years with corporal punishment for the offence of rape.

[71] Chapter 17 R.E 2002).

[72] Section 60 of the Education Act (Cap 353 R.E 2002).

[73] Education (Corporal Punishment) Regulations GN 294 of 2002 Made under Education Act (Cap 353 R.E 2002).

[74] *Third to Fifth Reportson the Implementation of the Convention on the Rights of the Child* op cit note 28para 88.

[75] CRC 'Consideration of reports submitted by the states parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania', CRC/ C/TZA/CO/2, Forty-second session 21 June 2006 para 34 (a)

[76] *Third to Fifth Reports on the Implementation of the Convention on the Rights of the Child* op cit note 28 para 87.

[77] CRC 'Consideration of reports submitted by states parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania 2015 op cit note 27 paras 36; 72 (e).

Offences Special Provisions Act so as to expressly prohibit corporal/physical punishment in all settings.

The CRC requires that school discipline should be administered in a manner that respects dignity and other rights.[78] Chapter 3 established that the Committee on the Rights of the Child recognises that reasonable restraint may be used in exceptional circumstances.[79] Such circumstances include the correction of dangerous behaviour by students or children in conflict with the law.[80] However, this should not be a 'deliberate and punitive use of force to cause some degree of pain, discomfort or humiliation'.[81] Importantly, the Committee has urged states to eliminate corporal punishment at the very least in all formal and private settings.[82] Further, international law generally regards corporal punishment as a violent, inhuman and degrading punishment.[83] At the domestic level, the Namibian Supreme Court in *Ex-Parte Attorney General* held that corporal punishment violates dignity and is inhuman and degrading regardless of how limited and restricted it is. Even if there are controls and restrictions 'the fact remains that *any* type of corporal punishment results in some impairment of dignity and degrading treatment'.[84] Thus in Tanzania, where corporal punishment is legal in justice institutions and as a disciplinary measure in schools and homes, as shown above,[85] could follow this approach and prohibit it.[86] The

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[78] Article 28 (2). See also CRC General Comment No 1 'Article 29 (1): The aims of education' (art 29 (1))', CRC/GC/ 2001/1, 17 April 2001 para 8. See also United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) GA Res 45/112, Annex 45 UN GAOR Supplement (No 49A) at 201, UN Doc A/45/49 14 December 1990, Guideline 21 (h).

[79] CRC General Comment No 8 'The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts 19; 28 (2) and 37, *inter alia*)', CRC/C/GC/8, Forty-second session, 2 March 2007 para 15.

[80] Ibid.

[81] Ibid para 14.

[82] Ibid para 22.

[83] See Chapter 3.

[84] *Ex-Parte Attorney General: in Re Corporal Punishment by Organs of State* (1991) (3) SA 76 (NmS) 97.

[85] See Education Act op cit note 72 and Education (Corporal Punishment) Regulations op cit note 73. For instance corporal punishment may be imposed as a sentence under the Corporal Punishment Act (Cap 17 R.E 2002), s 131 of the Penal Code (Cap 16 R.E 2002) and as a disciplinary measure in schools under the Education (Corporal Punishment) Regulations GN 294 of 2002.

Democratic Republic of Congo,[87] Kenya,[88] Albania,[89] Togo,[90] and South Sudan[91] are among the countries that prohibit corporal punishment.

It must also be noted that the Law of the Child Act prohibits sexual exploitation, prostitution and pornographic performances.[92] It prohibits owners of bars, pubs and nightclubs from allowing children to enter such places or from selling cigarettes, alcohol, drugs and spirits or any intoxicating substance to a child.[93] It prescribes various terms of imprisonment and fines, including a fine of one million Tanzanian shillings or 12 months imprisonment or both for a violation of these provisions.[94] Furthermore, the use, cultivation, possession or sale of narcotic drugs is prohibited.[95] Heavy penalties are prescribed for contravention of these provisions, including life imprisonment.[96]

The Penal Code creates the offence of sexual exploitation of children.[97] It is an offence for any person to permit or procure a child for sexual abuse or for an indecent exhibition or show.[98] Sexual exploitation, including child pornography, is also prohibited by the Anti-Trafficking in Persons Act (Anti-Trafficking Act).[99] This Act describes trafficking relating to children and disabled persons as 'severe trafficking', for which it imposes a stiff punishment of a fine between five and 150 million Tanzanian shillings (around US $3 000 and US$ 92 000) or between 10 and 20 years

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[86] See, for instance,the South Africa Education Policy Act 27 of 1996 s 3 (4) (n) which prohibits corporal punishment in educational institutions.

[87] Article 53 of the Law on Protection of the Child, Law 4–2010 of 2010.

[88] Article 29 of the Constitution of Kenya 2010.

[89] Article 21 (b) of the Law on Protection of the Rights of the Child 10347 of 2010.

[90] Article 357 of the Children's Code 2007–017 of 2007.

[91] Article 17 (1) (f) of the Transitional Constitution of the Republic of South Sudan.

[92] Section 83.

[93] Sections 83, 158, 17 (2) of the Law of the Child Act. Section 4 defines a child as a person below the age of 18 years.

[94] Sections 17, 83 (3).

[95]Sections 12,16 of the Drug and Prevention of Illicit Traffic in Drugs Act (Cap 95 R.E 2002). (Hereinafter Prevention of Drugs Act).

[96]Prevention of Drugs Act ss 12, 16, 16 (1) (i).

[97] Sections 138 B, 139, 140, 141, 142, 143 as amended by the Sexual Offences Special Provisions Act.

[98] Section 138 B.

[99] Section 4 of the Anti-Trafficking in Persons Act 6 of 2008.

imprisonment or both.[100] Human trafficking may be addressed within the context of prevention and response to violence against children. Children are trafficked for, among other reasons, sexual exploitation.[101]

The prohibition of sexual exploitation and pornography is relevant in the context of child violence in particular and delinquency prevention in general. Violence against children may be physical, sexual or emotional.[102] Further, the prohibition on owners of bars allowing children to enter their premises, or selling alcohol to them and other forms of control on the use cigarettes and alcohol is justifiable, for although these are not forms of violence, they can be the drivers of violence. Thus exposing children to pubs and bars or selling alcohol to them may expose them to various forms of violence. The Committee on the Rights of the Child has urged Tanzania

> to research the root causes and extent of the commercial sexual exploitation of children, child sex tourism, the sale of children, child prostitution and child pornography, to identify children at risk, assess the extent of the problem and develop targeted policies and programmes.[103]

The prohibition of sexual exploitation and pornography as forms of violence is thus relevant in the context of delinquency prevention.

Child labour may also be addressed in the context of violence against children in particular, and delinquency prevention in general. Child labour in the context of delinquency prevention is relevant in two main ways. First, child labour may be regarded as a driver of violence as cause and effect. Children may be involved in child labour because they do not have basic needs fulfilled or they may lack basic needs, including education, because they are employed as child labourers. Secondly, children who are involved in child labour are likely to fall within the category of children at social risk. For instance, the Commission on Human Rights and Good Governance's Report on Children in Detention Facilities in Tanzania (2011) found that many children in conflict with the law are also involved in child labour.[104]

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[100] Section 6.

[101] United States Department of State *Trafficking in Persons Report* Washington D.C (2014)

[102] UNICEF *Violence against Children in Tanzania: Findings from a National Survey 2009* Dar es Salaam (2011). See also art 19 CRC.

[103] CRC 'Consideration of report submitted by states parties under article 44 of the Convention' Concluding Observations: United Republic of Tanzania 2015 op cit note 27 para 75.

[104] *Inspection Report for Children in Detention Facilities in Tanzania* op cit note 4 at ix.

Child labour is prohibited by the Employment and Labour Relations Act.[105] The employment of children under the age of 14 is generally prohibited by the Act. The Act also prohibits the employment of children below 18 years of age in certain hazardous jobs.[106] It categorically provides that a child should not be involved in employment harmful to his or her health, education and physical and moral development.[107] This is consistent with the Child Development Policy that also prohibits child labour.[108] Tanzania has also adopted the National Strategy for the Elimination of Child Labour 2005–2010.[109]

Legal and policy measures adopted with respect to sexual exploitation, drug use and child labour are consistent with the international obligations discussed in Chapter 3.[110] However, despite these measures, human trafficking, child labour and drug abuses are major problems that still affect children. Tanzania is a source of both transit for and destination of humans trafficked for purposes of forced labour and sexual exploitation.[111] Girls are trafficked from rural to urban areas for domestic work and sexual exploitation.[112] Statistics indicate that together with other activities, 76.9 per cent of trafficking victims engage in housework, 50 per cent in bar work and 34 per cent in sex work.[113] Some of these children have the consent of their parents to move to urban areas to improve their living standards. In many cases, these will be children who dropped out of school for various reasons or failed in their standard seven and form two examinations.[114]

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[105] Act 6 of 2004 s 6 (hereinafter Employment Act).

[106] Sections 4 and 5 Employment Act. These jobs include working in mines, factories or as ship's crew or any work that may be considered hazardous by the Minister. See s 5 (3). See also the Child Development Policy 10–11.

[107] Section 12.

[108] See 11 para 24.

[109] Save the Children op cit note 67.

[110] See 3.3.1.

[111] United States Department of State *Trafficking in Persons Report* (2010) 318.

[112] Ibid.

[113] S R Kamazima *A Report on Human Trafficking Baseline Assessment in Tanzania: Findings from Selected Regions* (2009) 31.

[114] Human Rights Watch *Toxic Toil: Child Labor and Mercury Exposure in Tanzania's Small Scale-Gold Mines* (2013) 61–2. See also Honorina Munubi 'Assessment of the causes and effects of domestic child labor and its impacts on society: A case study of Dar es Salaam – Tanzania' (2013) 1 (1) *The Journal of Global Gender Studies* 1, 16–7.

Further, 27 per cent of children aged between five and14 years (equivalent to 2 691 262) are working and not studying, and 22.3 per cent aged between seven and 14 are attending school while working.[115] Most children who work are engaged in hazardous labour.[116] They work on coffee, sisal and timber plantations where they are exposed to pesticides and chemical fertilizers; in the fishing industry, in mining and in grazing livestock.[117] Those who work in mining use dangerous tools to crush stones, and boys, in particular, are exposed to drug and alcohol abuse in mining camps, while girls are sexually exploited.[118] In addition, the rate of child drug abuse is escalating.[119] While 200 000 drug addicts were receiving treatment in rehabilitation centres in 2011, the total number of drug addicts countrywide is estimated to be 500 000, the majority being youths.[120] Thus, while the legal and policy measures address these issues, these facts suggest that they are not being implemented as efficiently as they should.

5.3.1.2 Special protection of children at social risk

Children at social risk are also protected under the National Costed Plan of Action for the Most Vulnerable Children.[121] The Plan of Action defines the most vulnerable children to include children living or working on the streets; children involved in the worst form of child labour and 'children assessed to be at risk of, or in conflict and in contact with the law'.[122] One of the objectives of the Action Plan is to strengthen the capacity of households with most vulnerable children by improving food security and

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[115] United States Department of Labor *Findings on Worst Forms of Child Labor* (2011) 593. However the source does not provide the equivalent number in respect of those aged between seven and 14 years.

[116] Ibid.

[117] Ibid.

[118] Ibid.

[119] Kevin J Kelley 'Tanzania: Narcotic readily available as abuse rises in Tanzania' *East African* 14 March 2005, available at *http://allafrica.com/stories/200503150798.html*,accessed on 29 May 2013.

[120] Daniel Semberya 'Why drug abuse remains a major challenge to youth?' *The Guardian* 19 November 2014, available at *http://www.ippmedia.com/frontend/index.php/javascript/page_home.js?l=74342*,accessedon 26 August 2015.

[121] *National Costed Plan for the Most Vulnerable Children* op cit note 41 at 1.

[122] Ibid.

income.[123] These initiatives may mitigate the conditions that children at social risk are facing. Hence, they are relevant in delinquency prevention for children at social risk.

The Child Act provides the grounds upon which a child may be regarded as in need of care and protection and the measures to be taken to deal with them.[124] These grounds include being abandoned, orphaned and destitute, involvement in begging or receiving alms, being under the care of a destitute parent or parents who do not exercise proper care, being found acting in a manner that can reasonably lead to an inference that one is soliciting for an immoral purpose, and not being under proper guardianship.[125] It should be noted that children in this section would include those referred to as street children. These may not necessarily be homeless. Some street children work and sleep on the streets while others roam the streets to beg and then return home.[126] While the former are homeless and, in most cases, are not in contact with their families, the latter have contact with their families and, in some cases, they are sent by their parents to beg on the streets.[127] Such children may, nevertheless, still be lacking care because their parents are poor, unwilling or ill-equipped to look after them.

The Law of the Child Act requires children in need of care and protection to be taken to court for orders of care and supervision.[128] It also provides for child support services by the local government authority.[129] It provides that it is the role of a social welfare officer to promote the welfare of a child within his or her jurisdiction.[130] This includes working with the local government authority to ensure that most vulnerable children are identified and provided with assistance.[131] The social welfare officer has a duty to investigate child rights violations[132] and can search

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[123] Ibid.

[124] Sections 16–8.

[125] Section 16 of the Law of the Child Act.

[126] UNICEF 'The State of the World's children: Excluded and invisible' (2006) at 41, available at *http://www.unicef.org/sowc06/profiles/street.php*, accessed on 20 June 2013.

[127] Ibid 40–1.

[128] Sections18–9.

[129] See part VIII of the Law of the Child Act. Section 3 of the Local Government (Urban Authorities) Act (Cap 288 R.E 2002) defines local government as district and urban authorities respectively.

[130] Section 94 (1).

[131] Section 94 (4)–7).

[132] Section 94 (7).

premises for that purpose.[133] The social welfare officer receives information or complaints from the local government authority to which members of the community have a duty to report violations relating to a child.[134] These include violations by parents, such as neglect or refusal to provide food, shelter, medical care and education.[135] The welfare officer has the power to deal with such complaints in a reconciliatory manner or by instituting legal proceedings where the agreement reached in reconciliation is not complied with or where the reconciliation efforts fail.[136] The officer also has a duty to provide counselling[137] and to institute legal proceedings where necessary.[138] In their investigations and searches, welfare officers must work with police officers.[139]

While these legal provisions are useful, their implementation may be limited due to the small number of social welfare officers, as argued in Chapter 4. In addition, the legal protection under the Law of the Child Act seems to focus on children who experience violence within the family and not on those who do not have families.

5.3.2 Provision of socio-economic rights: The attainment of the highest standard of living

It was shown in Chapter 3 that the provision of socio-economic rights is an important means of preventing delinquency. It was also pointed out in Chapter 4 that the Tanzanian Constitution does not protect most of these rights, except for the right to work, the right to property and the right to education. In fact, the right to education is recognised as a non-justiciable right. Nevertheless, this section will examine policy and legal measures aimed at enhancing the standard of living, reducing poverty and providing access to health and education in Tanzania.

The attainment of an adequate standard of living must be discussed in the context of poverty, a major obstacle to the enjoyment of rights in general and the prevention of delinquency in particular. There are varying opinions on poverty as a violation of human rights. One view holds that poverty is a violation of human rights.

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[133] Section 96.

[134] Section 95 (1).

[135] Section 95.

[136] Section 95 (1)–(2).

[137] Section 94 (3).

[138] Section 95 (2).

[139] Section 96.

In 2012, the Human Rights Council adopted Guiding Principles on Extreme Poverty and Human Rights in which it underscored the fact that 'persons living in poverty face daily violations of their civil, cultural, economic, political and social rights, which interact and mutually reinforce one another with devastating effects'.[140] In addition, the Special Rapporteur on poverty and human rights has observed that

> [t]he elimination of extreme poverty should thus not be seen as a question of charity, but as a pressing human rights issue. Its persistence in countries that can afford to eliminate it amounts to a clear violation of fundamental human rights.[141]

Doz Costa[142] has argued that poverty is not only a deprivation of economic or material resources, but also a violation of human dignity. Hence, there is a connection between poverty and the violation of human rights.[143]

A different view is taken by Easterly,[144] who argues that in order to amount to human rights violation, there must be a person who has the right and a violator of such right.[145] Such relationship does not exist in the context of poverty, he argues, particularly because it is not clear as to who is a violator of the right. Thus, 'calling poverty a "human rights violation" does not point to any concrete actions that the "violator" must stop in order to restore rights to the "violated"'.[146] Further, who is considered 'poor' and 'not poor' is different in different countries and on a global scale.[147]

Although there is no consensus that poverty is a violation of human rights, poverty hinders the enjoyment of human rights.[148] Despite the global achievement of

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[140] Human Rights Council Guiding Principles on Extreme Poverty and Human Rights 2012 Resolution 11/21 of 27 September 2012.

[141] Information available at the Office of the High Commissioner for Human Rights, available at *http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx*, accessed on 24 August 2015.

[142] Fernanda Doz Costa 'Poverty and human rights: From rhetoric to legal obligations' (2008) 81 (9) *SUR International Journal on Human Rights.*

[143] Ibid.

[144] William Easterly 'Poverty is not a human rights violation' 5 June 2009, available at *http://aidwatchers.com/2009/06/poverty-is-not-a-human-rights-violation/*,accessed on 24 August 2015.

[145] Ibid.

[146] Ibid.

[147] Ibid.

[148] For a discussion on poverty and human rights, see generally, Doz Costa op cit note 142 ; Thomas W Pogge 'Severe poverty as a human rights violation' available at

the Millennium Development Goal I of eradicating extreme poverty by a decline of 1.9 billion population living in extreme poverty in 1990 to 836 million in 2015, about 800 million people still live in extreme poverty.[149] Children from poor families lack basic needs, including access to education, food, health and shelter.[150] Such lack of access renders them prone to exploitation, abuse and juvenile delinquency. In addition, quite often parents turn out to be violent, aggressive and mistreat children due to economic hardship.[151] Studies indicate that economic hardship, for instance, due to unemployment and the resulting lack of income, causes depression in parents and affects the way they interact with their children.[152] In addition, poverty inhibits the ability of the family to exercise social control over children and, as a result, increases juvenile delinquency.[153] It is important, therefore, that delinquency prevention legislative measures aim at poverty reduction.

5.3.2.1. Poverty in Tanzania

The United Nations categorises poverty as 'absolute' and 'overall'. Absolute poverty is 'a condition characterised by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to services.'[154] On the other hand, overall poverty is

> [L]ack of income and productive resources to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments and social discrimination and exclusion. It

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http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf, accessed on 24 August 2015; UNESCO Poverty Project *Ethical and Human Rights Dimensions of Poverty: Towards a New Paradigm in the Fights against Poverty* Philosophy Seminar, All Souls College, Oxford (March 2003).

[149] United Nations *The Millennium Development Goals Report 2015* New York (2015) 8.

[150] Ibid at 7–8.

[151] Ibid.

[152] Ibid. See also Vonnie C McLoyd 'The impact of economic hardship on black families and children: Psychological distress, parenting and socioeconomic development' (1990) 61 *Child Development* 311,320.

[153] Robert J Sampson and John H Laub 'Urban poverty and the family context of delinquency: A new look at structure and process in classic study' (1994) 65 (2) *Child Development* 523,538.

[154] United Nations, World Summit for Social Development *Report of the World Summit for Social Development* A/CONF.166/9 Copenhagen, Denmark (6–12 March 1995) para 19.

> is also characterised by lack of participation in decision-making and in civil, social and cultural life.[155]

According to these definitions, Tanzania encounters absolute poverty. Only 47 per cent of Tanzanians have access to safe drinking water, while 88 per cent are without proper sanitation.[156] Life expectancy is 59 years, the under-five child mortality rate is 68 per 1000 live births,[157] while only two per cent of rural and 39 per cent of urban populations have access to electricity.[158] Further, 94 per cent of the rural population use animal and plant-based materials (biomass) for heating and lighting.[159] Individual income is low, as is evidenced by the fact that 67.9 per cent of the population live below 1.25 US dollars per day.[160] Poverty in Tanzania disproportionally affects the rural population, which consists of 75 per cent of the total population, while 80 per cent of the poor reside in rural areas.[161] Most of the poor are children, who lack access to adequate health services, nutrition and education, all of which are necessary for them to develop mentally, physically and psychologically.

Tanzania is among the least developed countries with high poverty levels.[162] Poverty is caused by both internal and external factors. Internal factors include poor economic policies that do not adequately promote economic growth or sufficient agricultural support, which is a source of employment for more than 75 per cent of the people in rural areas, particularly small-scale farmers.[163] Other internal factors include

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[155] Ibid.

[156] World Health Organization (WHO) *World Health Statistics* (2013) 33–4.

[157] Ibid at 22, 56.

[158] UNDP '[Clean Development Mechanism] CDM Opportunities and Challenges in Tanzania', available at *http://www.undp.org/content/undp/en/home/ourwork/environmentandenergy*, accessed on 9 July 2013.

[159] Ibid.

[160] See, UNDP 'Human Development Report'New York (2013) 160, Table 5. It also indicates that the intensity of deprivation is 50.7 per cent and 33.4 per cent of the population is in severe multidimensional poverty. Severe poverty is defined as the percentage of the population with a deprivation score of 50 per cent or more. See 161.

[161] World Bank 'Tanzania Economic Update: Spreading the Wings from Growth to Shared Prosperity' (2012) x, available at *http://www.worldbank.org/en/news/feature/2012/11/01/tanzania-economic-update-from-growth-to-shared-prosperity,* accessed on 3 June 2013.

[162] Ibid 27; UNDP 'Human Development Report' (2013) op cit note 160 at 160–1 Table 5.

[163] World Bank *Tanzania Economic Update* op cit note 103 at x.

corruption and diseases such as malaria and HIV/Aids. External factors include the national debt burden,[164] unfavourable international trade policies and the world economic crisis of 2008, from which most countries are still recovering.[165] A combination of these factors has resulted in higher unemployment rates, poor delivery of services and rising petrol prices with subsequent increases in foodstuff prices.[166] These effects have worsened living conditions for people in both rural and urban areas. To mitigate these conditions, people in rural areas tend to migrate to urban areas for employment and other opportunities. These include children, most of whom are trafficked for employment as street vendors, domestic workers, sex workers, and for activities pointed out in section 5.3.1.2.

5.3.2.2 Child poverty in Tanzania

Poverty affects nearly half of the child population.[167] Child poverty and deprivation is escalating, and mostly affects children in rural areas who have less access to health services, clean water and quality education.[168] It is estimated that six million children aged between 0 to 14 years live below the basic needs poverty line, while approximately three million are below the food intake poverty line. Basic needs and food intake poverty lines are used to describe absolute as opposed to relative poverty. The basic needs poverty line refers the ability to access basic needs such as food, shelter and clothing.[169] Thus basic needs poverty lines 'are anchored in some absolute

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[164] World Bank 'International Debt Statistics' (2015) 136, available at *http://data.worldbank.org/news/International-Debt-Statistics-2015*, accessed on 6 February 2015.

[165] World Bank *Global Financial Crisis and its Implications for the Developing Countries* G-20 Finance Ministers' Meeting, Sao Paulo Brazil 8 November 2008 1–5. On international trade policies see generally Martin Khor and Jose Antonio Ocampo 'The Unsettled Global Trade Architecture',paper presented at the Conference on Global Economic Governance, Washington D.C 7–8 October 2010.

[166] *Global Financial Crisis and its Implications for the Developing Countries*op cit note 165 at 1–5.

[167] UNICEF *Childhood Poverty in Tanzania: Deprivation and Disparities in Child Well-being* Dar es Salaam (2009) viii.

[168] UNICEF *Annual Report for Tanzania* (2010) 2. (UNICEF has published reports for 2012, 2013 and 2014. However, the information provided in this footnote is not included in the 2012,2013 and 2014 reports.)

[169] United Nations Educational, Scientific and Cultural Organisation (UNESCO) 'Poverty', available at *http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/poverty/*, accessed on 25 August 2015.

standard of what households should be able to count on in order to meet their basic needs'.[170] With regard to the food intake poverty line, it 'defines the poverty line by finding the consumption expenditures or income level at which a person's typical food energy intake is just sufficient to meet a predetermined food energy requirement'.[171]

Poverty has had an impact for children on the access to, and the quality of, education they receive.[172] For instance, only 58 per cent of children from the poorest families attend primary school compared to 88 per cent in wealthier families, most of the latter being in urban areas.[173] Although the government had abolished primary school fees since 2001, parents were required to buy school uniforms, learning materials, and to contribute to school water and electricity bills and salaries for watchmen until recently when the government abolished various contributions. The Committee on the Rights of the Child has expressed concern that such contributions are still paid by the parents of primary and secondary school students.[174] Despite the adoption of policies and programmes to eradicate poverty, such as the National Strategy for Poverty Reduction and the Tanzania Social Action Fund, the pace of poverty reduction is slow, and falls short of the United Nations Millennium Development Goal one, which aims at eradicating extreme poverty and hunger by half in 2015.[175]

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[170] World Bank 'Choosing and Estimating a Poverty Line', available at *http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20242879~menuPK:492130~pagePK:148956~piPK:216618~theSitePK:430367,00.html*, accessed on 25 August 2015.

[171] Ibid.

[172] UNICEF *Annual Report for Tanzania* (2010) op cit note 168 at 2.

[173] Ibid.

[174] CRC 'Consideration of reports submitted by states parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania', 2015 op cit note 27 para 60 (a). Note that contibutions in pre-primary, primary and secondary schools were abolished later in 2015, see Abolition of fees in pre-primary, primary and secondary schools Government Circular 5 of 2015. However parents are required to buy school uniforms and learning materials.

[175]UNICEF *Annual Report for Tanzania* Dar es Salaam (2013) 2; See also United Nations website at *http://www.un.org/millenniumgoals/*, accessed 24 July 2015. It remain to be seen whether Tanzania may be able to meet the sustainable development goal 1, 'end poverty in all its forms everywhere', by 2030 adopted at the United Nations Sustainable Development Summit on 25 September 2015, available

5.3.2.3 Poverty reduction policies

The Tanzanian government has shown some commitment to reducing poverty and enhancing the wellbeing of its people. It has taken various measures, including adopting of the policy adopted in the National Strategy for Poverty Reduction.[176] The Strategy is guided by the National Development Vision 2025, adopted in 1999. It seeks to achieve high quality standards of peaceful, stability, unity and good governance, a well, educated and learning society and a competitive economy capable of producing sustainable growth and shared benefits.[177] The objectives, both in the Strategy and in the Development Vision, are consistent with the United Nations Millennium Development Goals.[178] Tanzania has shown a commitment to achieve these goals, which include the eradication of extreme poverty and hunger, universal primary education, reduction of child mortality and combating malaria and HIV/Aids.

The Strategy has three clusters, namely, growth for reduction of income poverty; quality of life and social wellbeing; and good governance and accountability. In order to eradicate extreme poverty and hunger, it provides that the government is committed to improving social wellbeing and enhancing economic capabilities, particularly for the poor and for vulnerable groups.[179] Its aims are enhancing service delivery in health, education, water, survival and wellbeing for women and children and developing decent human settlement and social protection of vulnerable groups.[180] It further seeks to enhance democracy and good governance by improving service delivery for all, particularly the poor and children.[181]

According to the strategy, the government is committed at all levels to providing an environment in which children's rights, including the rights to food,

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at *http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html*, accessed on 8 January 2016.

[176]National Strategy for Poverty Reduction op cit note 50.

[177] Tanzania Development Vision 2–3.

[178] United Nations General Assembly 'United Nations Millennium Declaration' A/Res/55/2 18 September 2000, III paras 11–20.

[179] National Strategy for Poverty Reduction op cit note 50 at 54.

[180] Ibid at 63.

[181] Ibid at 83.

health services, shelter, water and education are realised.[182] It seeks to ensure that children are protected from the worst forms of forced labour and sexual exploitation.[183] It also seeks to improve juvenile justice and to support children in difficult situations.[184] It is committed to providing social protection to vulnerable groups, including women, children and orphans, by reducing household insecurity and encouraging investment in poverty reducing assets (physical, human and social).[185] The Strategy and the Development Vision to a large extent provide a comprehensive framework regarding poverty reduction in Tanzania.

Tanzania has also adopted other measures, which aim at reducing poverty consistent with the Strategy on Poverty Reduction. It is implementing the Tanzania Social Action Fund (TASAF) using national funds and support from the World Bank.[186] The Fund is the government strategy aiming at reducing poverty and improving livelihood in vulnerable districts and the poorest households.[187] At the household level, the poorest families are selected using clearly defined criteria. [188] In addition, the programme aims at overseeing community-based projects such as the construction of schools and health centers and managing sub-projects so as to empower communities to manage funds.[189] The Fund has been implemented in three phases.

As part of its broad objectives to reduce poverty and improve the quality of life. The TASAF phase one implements a conditional cash transfer programme.[190] This entails cash payments to citizens after they satisfy conditions such as health clinic visits for the elderly and for enrolment of and school attendance for children.[191] The Fund (TASAF) seeks to empower communities to access resources that can

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[182] Ibid at 77.

[183] Ibid.

[184] Ibid.

[185] Ibid at 54.

[186] David Evans et al *Community based conditional cash transfersin Tanzania* Dar es Salaam (2012), 8.

[187] Phase I was implemented in Bagamoyo, Chamwino and Kibaha districts.

[188] Evans et al op cit note186 at 8.

[189] Ibid at 9; United Republic of Tanzania *TASAF II Resettlement Policy Framework* Dar es Salaam (2004) ix–x.

[190] Evans et al op cit note 186 at 6.

[191] Ibid at 8–9.

stimulate activities to increase income and improve the use of social services.[192] Phase two focuses on a national village fund and capacity enhancement. It seeks to empower communities to meet the objectives of the National Strategy on Poverty Reduction.[193] Such social services include access to water and sanitation, education and health.[194] In phase three TASAF focuses on a productive social safety net.[195] This involves community participation in temporary paid employment, conditional cash transfers and business development skills to improve quality of life and increase income, improve infrastructure such as health centres, schools, sanitation and water and building communities' capacity.[196] These aim at realising the objectives of the programmes.[197]

Another policy relevant in poverty reduction is the National Costed Plan of Action for the Most Vulnerable Children, mentioned earlier. This targets the most vulnerable children, provides a policy framework to support the poor in the communities. Some characteristics of those included in the most vulnerable definition refer to children living in extremely poor households with significant unmet needs in terms of education, shelter and adequate food and nutrition; children living in a household with an elderly caregiver (60 years and above) and with significant unmet needs, such as adequate food and health services; children who are orphaned and with significant unmet needs, such as shelter, education and adequate food and nutrition; children living in a child-headed household; children assessed to be at risk of being in conflict with the law; children involved in the worst forms of child labour, such as sexual exploitation, paid domestic work, human trafficking; and children assessed to be in immediate risk, such as of drug abuse.[198]

The National Costed Plan of Action for the Most Vulnerable Children seeks to improve the economic capacity of the most vulnerable children households by

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[192] Ibid.

[193] The United Republic of Tanzania *TASAF II Operational Manual* Dar es Salaam (2009) 2.

[194] Ibid.

[195] United Republic of Tanzania *Tanzania Third Social Action Fund: Productive Social Safety Net Operational Manual* Dar es Salaam (2013) 2.

[196] Ibid.

[197] Ibid at 2–3.

[198] *National Costed Plan of Actionfor the Most Vulnerable Children* op cit note 41 at 2.

improving food security, income and savings.[199] Importantly, it seeks to engage families in the process of enhancing capacity to improve their own quality of life instead of depending on external assistance from the government and non-governmental entities. [200] Thus, the Plan seeks to address socio-economic rights for the most vulnerable children. Addressing socio-economic rights is relevant in the context of delinquency prevention because, as indicated before, children living in poverty because of a lack of socio-economic rights are prone to delinquency.

In addition to the TASAF and National Costed Plan of Action, discussed above, social protection legislation, including the National Food Security Act[201] and the National Disaster Management Act, has been put in place.[202] The government may distribute food at a subsidised price in the event of shortages through the Strategic Grain Reserve.[203] However, these policies seek to respond to specific events affecting a particular population in cases of natural or man-made disasters.[204] They thus have little, if any, effect on poverty reduction. Nevertheless, the government has policies that seek to support small-scale farmers so as to increase their productivity, such as the Food and Nutrition Policy 1992, the Agricultural Policy and the Rural Development Policy 2001.[205]

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[199] Ibid at 3.

[200] Ibid at 3–4.

[201] Section 7 of the National Food Security Act 4 of 1991 establishes a Food Security Department, which among its functions outlined in s 8 is to advise the government on food security policies and monitor the state of the country food situation at all stages.

[202]Act 5 of 2014. Section 3 defines disaster as 'an occurrence or series of occurrences, whether natural or man-made, man-made calamity that causes or poses a significant disruption or threat to the functioning of a community, causing widespread human, natural, economic or environmental losses which exceed the capacity of that community to cope with the disaster using its own resources'; s 4 establishes an Agency whose functions, as outlined in s 5, includes to 'act as the central planning, coordinating and monitoring institution for the prevention, mitigation, preparedness, response and postdisaster recovery, taking into account all potential disaster risks'.

[203] Section 8 (2) (k) Food Security Act.

[204]United Republic of Tanzania *Social Protection Framework* (draft) Dar es Salaam (2008) 8. (Note that UNICEF Annual Report for Tanzania (2014) 45 indicates that the Framework was to be finalised in 2014. However, it is unclear whether the Framework has been adopted.)

[205]*Social Protection Framework* op cit note 204 at 8.

Further, there are various social security schemes such as the National Social Security Fund (NSSF), the Public Service Pension Fund (PSPF), the Parastatal Pension Fund (PPF), the Local Authorities Pension Fund (LAPF) and the Government Employees Pension Fund (GEPF).[206] In the case of health insurance, while most of government and private sectors workers are covered by various schemes such as the National Health Insurance Fund (HNIF),[207] the government introduced a voluntary community health insurance scheme in 2001.[208] This is a pre-payment council scheme that enables a community to access health services at an affordable premium.[209] However, apart from health insurance, the above schemes are mainly for employees either in the public sector, or in both the public and private sectors (formal and informal), and thus they have little impact on the lives of the vulnerable.

5.3.2.4 Family support

Among the measures that would ensure child protection is supporting families in carrying out their responsibilities towards children. This would ensure that children's social and economic rights as key components of the rights to life, survival and development are realised. Chirwa argues that:

> [T]he aspects of prevention, protection and provision are all embedded in the right to survival and development, which is regarded as the umbrella right from which a range of key children's socio-economic rights can be derived.[210]

As shown in Chapter 3 and in 5.3.2.1, child neglect, child violence within the family and child delinquency are often due to economic hardship and a lack of relevant skills, all of which hinder access to socio-economic rights. Supporting families, particularly those suffering from economic hardship, is therefore important.

The Law of the Child Act recognises the role of local government in promoting the welfare of the child.[211] The Local Government (District Authorities) Act[212] and the Local Government (Urban Authorities) Act[213] provide that it is the

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[206] Ibid at 9.

[207] National Health Insurance Fund Act 8 of 2009.

[208] Community Health Fund established under s 4 of the Community Health Fund Act 1 of 2001.

[209] See the National Health Insurance Fund website *http://www.nhif.or.tz/index.php/chf* , accessed on 24 July 2015.

[210] Chirwa op cit note 30 at 93.

[211] Section 94 (1) of the Law of the Child Act.

[212] (Cap 287 R.E 2002) s 111.

function of local government authorities to promote social welfare and the economic wellbeing of all persons in their respective areas. As shown in 5.3.1, the Law of the Child Act requires local government to assist the most vulnerable children to enable them to grow up with dignity and to develop their potential.[214] In addition, the National Strategy for Poverty Reduction provides that government will ensure the rights of various groups, including children, by supporting them— particularly those in difficult situations.[215] Further, the National Costed Plan of Action for the Most Vulnerable Children 2007–2010[216] seeks to serve as a reference tool for government and civil society to improve the wellbeing of the most vulnerable children. As indicated before, the Most Vulnerable Committees (MVCs) have been established to address the problem of the most vulnerable children in local communities.[217] These Committees play an important role in various respects, including parenting skills, and closely observe child abuse.[218] As shown in Chapter 4, the government in collaboration with UNICEF commissioned a study in 2011 on the Assessment of Access to Justice in Tanzania.[219] The study, conducted by the Coram Children's Legal Centre UK and National Legal Aid (NOLA), describes some functions of the most vulnerable committees.[220] These include supporting children who are least likely to be able to access basic rights and needs at community level, such as care, support and

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[213] (Cap 288 R.E 2002) s 54 (1).

[214] Section 94 (4).

[215] National Strategy for Poverty Reduction op cit note 50.

[216] United Republic of Tanzania *The National Costed Plan of Action for Most Vulnerable Children 2007 -2010* (2008) 9 (NCPA I) defines most vulnerable children as those who experience conditions such as, inter alia, life in extreme poverty, disability lacking adequate support, affected by chronic illness without support or without adequate adult support such as living in houses headed by grandparents due to parents' deaths. See also *National Costed Plan of Action 2013–2017* (NCPA II) op cit note 41.

[217] *National Costed Plan of Action I 2007–2010* op cit note 216 at 7. Note that the National Costed Plan of Action for the Most Vulnerable Children is implemented in two phases, phase I –2007–2010 and phase II 2013-2017. Phase I is responsible for, among other things, establishing structures and functions of the Most Vulnerable Committees at the lower (village/ward), district and national levels; Ministry of Constitutional and Legal Affairs and UNICEF *Assessment of the Access to Justice System for under-18s in Tanzania* (2012) 40–3. (Currently Ministry of Justice and Constitutional Affairs.)

[218] Ibid at 43.

[219] Ibid at 5.

[220] Ibid at 40.

protection.[221] They were established in consideration of the fact that child protection within the extended families, which existed in the past, is declining mainly due to socio-economic factors and HIV/ Aids. Thus, the Most Vulnerable Committees, which are headed by social welfare officers at the lower level, are responsible for the implementation of the functions outlined above. Such functions are primarily vested to the local government authorities as provided in the Child Act and its regulations.[222] Thus, the Most Vulnerable Committees derive their mandate from the Child Act and its regulations.

In addition, the Child Development Policy 2008 provides that government in collaboration with other stakeholders should facilitate access to financial loans to families with low incomes.[223] It further provides that government should assist families with reintegration programmes for street children and their parents.[224] It should be noted here that there are also parents who earn their living through begging on the streets and they sometimes use children to beg. In its Initial Report to the Committee of Experts to the African Children's Charter, Tanzania submitted that it had made progress in the reintegration of child issues and vulnerabilities in its broader development framework that informs policies and programmes.[225] This may be reflected in the existing policies discussed above, which address the need to support families. The target of these policies is the community in general and households in particular, and attention is paid to the poor and vulnerable. These policies and programmes are important considering the fact that the number of children living without parental care (most vulnerable children) is reportedly increasing whereas most children are living in elderly headed households, child-headed households, in institutional care and on the streets.[226]

Further, the National Costed Plan of Action seeks to address other family issues, including providing parenting education and implementing mechanisms for the

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[221] Ibid.

[222] Section 95 the Law of the Child Act; Law of the Child (Juvenile Court) Rules 2014 part X.

[223]Child Development Policy, 35.

[224]Ibid at 25.

[225] United Republic of Tanzania *Initial Report Submitted to the African Committee of Experts on the African Charter on Rights and Welfare of the Child* (2009).

[226] CRC 'Consideration of reports submitted by state parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania', 2015 op cit note 27 para 48 (a).

prevention of family separation and reintegration for separated children to ensure reintegration and reunification. [227] Thus, despite the fact that the Child Development Policy does not address some important issues relevant to supporting families, such matters are addressed in these other policies and programmes.

5.3.3 Access to health services

The right to health services should be considered in the light of the child's physical, mental and social wellbeing. As shown in Chapter 3, lack of or poor health care, particularly primary health care, has an impact on both children's health and juvenile delinquency.[228] The World Health Organization defines primary health care as

> essential health care based on practical, scientifically sound and socially acceptable methods and technology made universally accessible to individuals and families through their full participation and at a cost that the community and the country can afford to maintain.[229]

It includes, at least, education on prevailing health problems and how to prevent and control them.[230] It may, therefore, be argued that, in the context of Tanzanian communities, and with particular focus on delinquency prevention, primary health care would include aspects of education and information on the use and abuse of alcohol, drugs and other substances, the prevention of HIV/Aids and reproductive health.

It was shown in Chapter 4 that the right to health is not included in the Tanzanian Bill of Rights. The Draft Constitution, though it has no general provision on right to health, has a specific provision that recognises the right of the child to health services. [231] The adoption of this Draft Constitution in its current state would be useful, as it recognises that a child has a constitutional right to health services.

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[227] *National Costed Plan of Action for the Most Vulnerable Children* (I) op cit note 216 at 9.

[228] CRC General Comment No 15 (2013) 'Right of the child to the enjoyment of the highest attainable standard of health' CRC/C/GC/15, 17 April 2013; CRC General Comment No 14 (2013) 'The right of the child to have his or her best interests taken as a primary consideration (art 3 para1)'.CRC/C/GC/14 29 May 2013 para 78.

[229] World Health Organization *Report of the International Conference on Primary Health Care Alma-Ata*, USSR 6-12 September 1978 at 3.

[230] Ibid at 4.

[231] Article 53 (e) of the Draft Constitution 2014.

Such recognition would strengthen the provisions of the Law of the Child Act with regard to children's right to health.

It was pointed out in 5.3.1 that, while the Law of the Child Act provides that the right to health is the responsibility of parents alone, the Child Development Policy provides the right to health only for prenatal care.[232] However, the National Strategy for Poverty Reduction also draws on the Tanzania Development Vision 2025. In essence, it recognises that social wellbeing, including health, is a key to the reduction of poverty. In addition, the National Health Policy 2003 that is informed by the Development Vision 2025,[233] seeks to improve the health of all people — with particular focus on those most at risk.[234] Although 'most at risk' is not defined, this would probably include children, particularly those under five, upon whom the Policy places special emphasis.[235]

With specific reference to children, the Policy provides that the essential health package shall include reproductive and child health.[236] It provides that education and advocacy shall be used as means to address such health problems.[237] In addition, guidelines and procedures on delivery of health education shall be developed by the Ministry of Health from time to time.[238] Further, the Policy seeks to promote an environment that is friendly for youth to access reproductive health information.[239]

Although it does not adequately address problems such as drug abuse, which is escalating among children in Tanzania, it enshrines strong policy provisions that must inform legislation. The Public Health Act[240] generally addresses public health issues, including regulating and handling food and food hygiene; the environment, including waste management; and the control and prevention of malaria. There is no specific provision on primary health care within the meaning given to it in this

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[232] Child Development Policy 20.

[233] See 3.1.

[234] The United Republic of Tanzania, National Health Policy (2003) 4.

[235] Ibid at 11.

[236] Ibid at 10.

[237] Ibid at 9–10.

[238] Ibid at 9.

[239] Ibid at 11.

[240] Act 1 of 2009.

section. Nevertheless, the National Adolescent Reproductive Health Strategy 2010–2015 has been developed and reinforces the health policy on reproductive health.[241] Importantly, reproduction health, pregnancy, HIV/Aids and sexually transmitted diseases have been included in education curricula in both primary and secondary schools. [242] However, there are some challenges that hinder the adequate implementation of health programmes. For instance, only a few teachers are trained to teach adolescent health and only a few children can access child friendly services.[243] Due to these and other reasons most children lack knowledge on the effect of sexual activities, knowledge about transmission and prevention of HIV/Aids, particularly those in primary schools.[244] Lack of such knowledge is further exacerbated by the fact that life skills education[245] is taught as an extra-curricular subject in less than 10 per cent of primary and secondary schools.[246] Life skills are important to promote responsible behaviour, self-confidence, assertiveness in resisting pressure on the use of drugs or to have sex, assertive communication skills, equality and the prevention of prejudice and abuse.[247] The Committee on the Rights of the Child urged Tanzania to adopt a comprehensive reproductive health education policy and make health education part of the school curriculum. [248] It has further urged Tanzania to introduce child friendly and age appropriate reproductive health information and services.[249] It can be said that, despite inadequacies in education on drug abuse, life skills and

[241] UNICEF Tanzania *Adolescence in Tanzania* Dar es Salaam (2011) 18.

[242] Ibid at 30.

[243] Ibid.

[244] E Matasha et al 'Sexual and reproductive health among primary and secondary school pupils in Mwanza, Tanzania: Need for intervention' (1998) 10 (5) *Aids Care* 571,579.

[245] Defined as 'abilities for adaptive and positive behaviour that enable individuals to deal effectively with the demand and challenges of everyday life'. See UNICEF *Life Skill-based Education for Drug Use Prevention Training Manual* (2001) 10, available at *http://www.unicef.org/lifeskills/files/DrugUsePreventionTrainingManual.pdf*, accessed on 28/02/2014.

[246] *Adolescence in Tanzania* (2011) op cit note 241 at 30.

[247] World Health Organization and United Nations Education, Scientific and Cultural Organization *Handbook for Curriculum Planners* (1994) 4-5.

[248] CRC 'Consideration of reports submitted by states parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania', 2015 op cit note 27 para 58.

[249] Ibid.

reproductive health, the policy on health addresses the issue of primary health care, which is also relevant for delinquency prevention.

In addition to health policies, the government is implementing the Community Health Fund (CHF).[250] This is intended to enable those not covered under the National Health Insurance Fund (NHIF) intended for employees in formal and private sectors.[251] In addition, issues relating to health generally are addressed in the Tanzania Social Action Fund programmes and the National Costed Plan of Action. Although the documents focus more on the most vulnerable children, they complement the existing Health Policy by reaching the poor and the most vulnerable communities. For instance, strategic objective three of the Plan is to improve utilisation of health care, including antiretroviral therapy, to the most vulnerable children and their caregivers.[252] However, as indicated above, the Plan, the CHF and the NHIF seem to focus on health services generally. While these are relevant to vulnerable children and poor communities, they do not focus on life skills education and reproductive health programmes that may be relevant in delinquency prevention.

5.3.4 Access to education

Education could be used to improve children's lives. As a body of knowledge, it represents power that gives a person confidence and the ability to overcome challenges in life. It was shown in Chapter 3 that children have the right to access education for their physical and mental development to their fullest potential.[253] The Committee on Economic Social and Cultural Rights, the monitoring body of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 explains the relevance of education in a wider context. '[It] is the primary vehicle by which economically marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.'[254] Education, therefore, is a tool towards individual and societal development, poverty eradication, and health improvement and in this context, delinquency prevention.

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[250] Community Health Fund Act 1 of 2001.

[251] Section 5 of the Community Health Fund Act.

[252] *National Costed Plan of Actionfor the Most Vulnerable Children* op cit note 41 at 10.

[253] Articles 28, 29 CRC; art 11 African Children's Charter.

[254] CESCR 'General Comment 13: The right to education (art 13)' E/C.12/ 1999/10, Twenty-first session 8 December 1999 para 13.

The Tanzanian education system consists of two years of pre-primary school; seven years of primary education; four years of ordinary level secondary education (forms one-four); two years of advanced level education (forms five-six) and three years and above of university level.[255] The enrolment age in primary school is seven years[256] but in practice five or six years. Form four leavers are children aged between 16 and 17. Children completing standard seven may be enrolled in vocational training.[257] Evaluation of education in this chapter refers to pre-primary, primary, ordinary level secondary education and vocational training. Advanced secondary and higher education are not included. This is because children, defined as persons below 18 years, will be expected to be in pre-primary, primary and ordinary level secondary grades, particularly primary and ordinary levels.

As shown in Chapter 4, the right to education is provided for by the Constitution.[258] In addition, although not included in the current 2014 Education Policy,[259] the1995 Education and Training Policy provides that the government should guarantee pre-primary and primary education as a basic right.[260] The Education and Training Policy of 2014 recognises that education is a tool to achieving

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[255]This is according to the United Republic of Tanzania Education and Training Policy (1995) 12 that existed until 2015. Tanzania adopted the Education and Training Policy of 2014. This policy was launched on 13 February 2015. According to this policy the system is likely to change in the future as it proposes: one year pre-primary school; six years primary school; four years ordinary level secondary school; two years advanced secondary education; and three years university level. See Education Policy of 2014 at 9. See also Bernard Lugongo 'Bye Std VII Exams, English; Karibu Kiswahili in studies' *The Citizen* 14 February 2015, available at *http://www.thecitizen.co.tz/News/national/Bye-Std-VII-exams--English--Karibu-Kiswahili-in-studies/-/1840392/2623428/-/2krj4x/-/index.html,* accessedon 14 February 2015. There is no information online that the 2014 policy is in force. However, Professor Kitila Mkumbo, Head of the Department of Educational Psychology and Curriculum Studies, School of Education, University of Dar es Salaam through email communication on 28 January 2016 confirmed that the 2014 policy is in force.

[256]*Education and Training Policy* of 1995 at 13. Although the 2014 policy has proposed that children should be enrolled in primary school between the ages of four and six, this is yet to be implemented.

[257] Ibid at 14.

[258] Article 11. However the right is not justiciable.

[259] Education and Training Policy 2014 launched in 2015. See at 1 that it replaces the 1995 Education and Training Policy as well as other policies.

[260]*Education and Training Policy* 1995 at 18. See op cit note 255.

development.[261] The policy requires primary education to be compulsory and free.[262] This is consistent with art 28 (a) of the CRC which requires states to make primary education compulsory and be available for free.[263] Further, the National Strategy for Poverty Reduction recognises that an improvement in the life and wellbeing of people depends, among other things, on affordable, accessible and quality education.[264] The strategy seeks to improve childhood access to pre-primary, primary and secondary education.[265] In order to achieve this, the government is committed to rehabilitating and expanding school infrastructure, providing learning materials, reviewing curricula to accommodate emerging issues and facilitating HIV/Aids education and life skills training.[266] In addition, the government launched the Primary Education Development Plan (PEDP) in 2001 and the Secondary Education Development Plan (SEDP) in 2004 to ensure that all children have access to primary and secondary education. The Law of the Child Act, as indicated in Chapter 4, recognises the right to education. It provides that education for children is the responsibility of parents.[267] It also recognises the relevance of acquiring vocational skills and training in the form of apprenticeship.[268]

Since the right to education is recognised as a non-justiciable principle of state policy in the Constitution, it is supposed to inform the development of relevant policies on education. This has been done largely though the National Strategy for Poverty Reduction and Education Policy that addresses education to a certain extent satisfactorily, particularly in relation to compulsory and free primary education.

Education is also reflected in other policy documents and programmes, such as the Tanzania Social Action Fund and the National Costed Plan of Action 2013–2017. As shown above, the Fund seeks to reach the poorest communities and provide support in terms of social cash transfers that focus on, among other areas, supporting

[261] *Education and Training Policy* 2014 vii.

[262] Ibid at 24; Primary Education Development Programme (PEDP) (2001). The latter abolished school fees in primary schools.

[263] Ibid. Compulsory education is provided in the Policy while free education was introduced in 2001 under the Primary Education Development Programme.

[264] See 63-7.

[265] See 56.

[266] See 57.

[267] Section 8 (1) (e).

[268] Section 87 of the Law of the Child Act.

education.[269] In addition, it supports educational infrastructure including rehabilitation of classrooms and laboratories.[270] However, the Tanzania Social Network Fund does not support education beyond primary school.[271] This has been regarded as a major weakness of the programmme because children completing primary school without opportunities for further education may engage in child labour.[272] Further, the National Costed Plan of Action, within its broad objectives to improve livelihood and the economic capacities of families and communities, implies building capacities of the communities and families to meet their needs including education.[273] In particular, it seeks to ensure that the most vulnerable children have access to pre-primary, primary, secondary and vocational education.[274] This is to be achieved through campaigns to promote enrolment, advocating the provision of study materials and byelaws to prevent students from being expelled from schools because they cannot afford to pay contributions.[275] These are to involve child protection teams and the Most Vulnerable Committees.[276] Despite these ambitions enumerated in the Policy it may take some time to reach a substantial number of children since establishment of the teams and committees is progressive. However, the government has recently issued a notice that education for children in Tanzania from pre-primary school to secondary school should be free, in that the government is going to subsidise education, and that parents should not pay either school fees or contributions.[277] This may enable those children who were expelled for failure to pay school fees and other contributions to access education.

However, despite the above policy measures, in order to achieve delinquency prevention through education both the quantity (access) and quality (acceptable

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[269] United Republic of Tanzania 'TASAF II Resettlement Policy Framework' Dar es Salaam (2004) 11.

[270] Ibid.

[271] Esther Ndungumaroet al'Report on the Evaluation of TASAF's CB-CCT Program on Child Labour' Dar es Salaam (2014) 13.

[272] Ibid.

[273] *TheNational Costed Plan of Action for Most Vulnerable Children* op cit note 216 at 10.

[274] Ibidat 11.

[275] Ibid at 13.

[276] Ibid.

[277] Ministry of Education and Vocational Training 'Abolition of fees in pre-primary, primary and secondary schools' Circular No 5 of 21 November 2015.

standard) of education are relevant.[278] While quantity may be easily ascertained through legal and policy frameworks, quality may be ascertained through the level of literacy and performance in examinations among other factors. It is against this backdrop that the quantity and quality of education in Tanzania is examined.

5.3.4.1 The quantity and quality of education and its impact on delinquency

It was shown in Chapter 3 that for education to be a useful tool in delinquency prevention, it must be available and of an acceptable quality. Tanzania is performing well in terms of enrolment in primary schools. In 2010 enrolment represented a 101.7 percent gross enrolment ratio[279] of the population of official primary education age, which is between seven and 14 years. This included over-age and under-age children as well. Comparatively, in 2003 enrolment represented only 95.8 percent of the same population.[280] These figures also include the enrolment of children who were not enrolled in primary school at the appropriate age of seven years.[281] These achievements are further fortified by the implementation of the Education Policy and the National Strategy for Reduction of Poverty, identified above. While these achievements are commendable, enrolment in secondary schools in 2012 was as low as 35 percent.[282] The reason for a decline in enrolment in secondary school may be attributed to the fact that only a few students passed their standard seven examinations, a qualification for enrolment in secondary school. For instance, in 2011, of all students who sat the Primary School Leaving Examinations, only 58.3 per cent passed while in 2012 only 30.7 per cent passed.[283]

Although it may be relatively difficult to describe 'quality education', poor performance and higher rates of illiteracy may suggest that education quality is poor.

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[278] Article 29 CRC; CRC General Comment No 1 (2001) op cit note 78 para 9.

[279] The 101.7 percent that is above 100 per cent includes over-aged (above seven years) and under-aged (below seven years) children and class repeaters. See World Bank 'School enrolment', available at *http://data.worldbank.org/indicator/SE.PRM.ENRR/countries/TZ-ZF*, accessed on 28 June 2013.

[280] The World Bank *World Development Indicators* 2013, available at *http://data.worldbank.org/country/tanzania,* accessed on 28 June 2013; UNICEF *Annual Report for Tanzania* 2013 at 2.

[281] See s 35 Education Act (Cap 353 R.E 2002) for enrolment age.

[282] World Bank 'School enrolment' available at *http://data.worldbank.org/indicator/SE.PRM.ENRR/countries/TZ-ZF*, accessed on 28 June 2013.

[283] Ibid.

Hence, this section will determine the quality of education in both primary and secondary schools by reference to these two indicators. These are competence in basic skills, that is, reading, writing and arithmetic; and performance in public examinations.[284] More than 50 per cent of students complete primary education without a lower level of literacy as they are unable to read and write in English or Kiswahili; 70 per cent could not do simple arithmetic according to the research released in 2011;[285] and a total of 5000 students selected to join form one in 2012 were unable to read and write.[286] In addition, the 2013 examination results for form four were unsatisfactory as 65 per cent of students who sat for the national examinations failed.[287] This has been described as the worst result in the history of education in Tanzania.[288] Although the results were subsequently nullified on technical grounds,[289] the fact remains that the quality of education in primary and secondary schools is poor.[290]

The impact of poor performance on child development and, consequently, on juvenile delinquency, is that children complete their education in terms of school

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[284] Kitila AK Mkumbo 'Teachers' commitment to, and experiences of, the teaching profession in Tanzania: Findings of focus group research' (2012) 5 (3) *International Education Studies* 222.

[285] Sibongile Nkosi 'Tanzania schools go backwards' *Mail and Guardian* 17 August 2012, available at *http://m.mg.co.za/article/2012-08-17-00-tanzanias-schools-go-backwards*, accessed 17 April 2013. See also Hans Hoogeveen and Dorica Andrew *Are Our Children Learning? Literacy and Numeracy across East Africa* (2012) 11.

[286] Edwin Mashasi '*Kutojua Kusoma na Kuandika Chanzo ni Nini*?' (2012) (i), citing Mwananchi Newspaper 12 April 2012.

[287] Deodatus Balile 'Form 4 exam results in Tanzania trigger education debate' *SABAHI* 6 March 2013, available at *http://sabahionline.com/en_GB/articles/hoa/articles/features/2013/03/06/feature-02?change_locale=true*,accessed on 23 April 2013.

[288] Ibid.

[289] The government nullified the results and re-announced them after applying a different grading system. See Deodatus Balile 'Lowering of school exam grading sparks outcry in Tanzania' *SABAHI* 7 November 2013, available at *http://sabahionline.com/en_GB/articles/hoa/articles/features/2013/11/07/feature-02*, accessed on 13 November 2013.

[290] Factors responsible for poor performance include lack of laboratories, books, classrooms and few teachers. The establishment of ward secondary schools in 2005 led to having only one teacher for all subjects in some schools. See Suleman Sumra and Rakesh Rajani *Secondary Education in Tanzania: Key Policy Challenges* (2006) 1–3.

years without developing their intellectual and physical personalities and mental abilities to their full potential, as intended.[291] They generally do not acquire the academic and life skills expected at their level of education. These include skills in making decisions, resolving conflict in a peaceful manner, developing a healthy lifestyle, good social relationships, responsibility and other tools that they ought to acquire from their studies.[292]

In addition, school dropouts for reasons such as pregnancy,[293] poverty, early marriage[294] and child labour affect enrolment and performance, or result in failure to complete a certain grade. For instance, in 2007, 30 per cent of children enrolled in primary school and 20 per cent in secondary school dropped out.[295] Children who drop out from school for various reasons are likely to engage in drug abuse, frustrated that their expectations are not met.[296]

Corporal punishment is also a reason for school dropouts.[297] Corporal punishment, which is used to discipline and improve academic performance,[298] affects the learning capabilities of children including developing strong fears and anxiety,

[291] Riyadh Guidelines op cit note 78, Guideline 21 (a).

[292] CRC General Comment No 1 (2001) para 9.

[293] Out of a total of 99 678 students who dropped out of primary and secondary schools, 8113 dropped out because of pregnancy. See Ministry of Education and Vocational Training, Basic Education Statistics in Tanzania (BEST) (2010) 23 Table 2.9, 60 Table 4.11.

[294] According to the Law of Marriage Act 1971 (Cap 29 R.E 2002) s 13 a girl may get married at age 14.

[295] Integrated Region Information Networks (IRIN) Africa 'Tanzania concern over school dropout rates', available at *http://www.irinnews.org/report/72628/tanzania-concern-over-school-drop-out-rate*,accessed on 20 March 2013.

[296] Jeremy D Finn 'Withdrawing from school' (1989) 59 (2) *Review of Educational Research* 117,119.

[297] See Nelly Mtema 'Tanzania: Corporal punishment humiliating experience to teachers, students' *Tanzania Daily News* 29 January 2014, available at *http://allafrica.com/stories/201401290167.html?mstac=0*, accessed on 17 March 2014. Corporal punishment as a sentence is discussed in Chapter 8.

[298] Sheryl Feinstein and Lucas Mwahombela 'Corporal punishment in Tanzania's schools' (2010) 56 (4) *International Review of Education*399, 407–410.

depression, inhibition, aggression, shame, feelings of inferiority, lowered self-esteem, delinquency and substance abuse.[299]

5.3.4.2 Education for children 'at social risk'

The education system as a mechanism for preventing delinquency should pay particular attention to children at social risk.[300] The term 'children at social risk' is used in the Riyadh Guidelines to include those who are abandoned, neglected, abused, or exposed to drug abuse or are in marginal circumstances.[301] The Law of the Child Act has no provision on education for children at social risk, but it defines children at social risk as those in need of care and protection who should be taken to court for orders.[302]

However, the Child Development Policy requires central and local governments and civil society to establish funds to assist orphaned and other vulnerable children.[303] Vulnerable children would probably include street children.

The Primary Education Development Programme introduced Complementary Basic Education in Tanzania (COBET) to provide basic education for those who were not enrolled at the appropriate age, that being seven. This is particularly useful for street children.[304] Under the Programme, classes were introduced at least in every ward from standards one to four to accommodate children aged above seven. After completing standard four, the childrencould then be integrated into a mainstream school or, depending on their age, for only two years before they sit for standard seven examinations.[305] The local government authorities that are responsible for

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[299] Arab Naz et al 'The impact of corporal punishment on students' academic performance/career and personality development upto secondary level education in Khyber Pakhtunkhwa Pakistan' (2011) 12 *International Journal of Business and Social Science* 130,131.

[300]Riyadh Guidelines, Guideline 24.

[301] Ibid. Preamble para 8.

[302] Section 16.

[303] Child Development Policy at 25 and 27. See also National Strategy for Poverty Reduction op cit note 50 at 81.

[304] UNICEF *Promoting Quality Education for Orphans and Vulnerable Children: A Source Book of Programme Experiences in Eastern and Southern Africa* (2009) 71–85.

[305]Ibid. On complementary basic education, see also Purna Shrestha 'Background paper: Street children' A paper presented at the international conference: Reaching the marginalised — how to approach inclusive education' Düsseldorf, Germany 10–11 September 2009 at 2.

supervision of primary and secondary education[306] through the Prime Minister's Office, Regional Administration and Local Government (PMO-RALG) are the proper authorities to implement Complementary Basic Education.

As shown in Chapter 4 and in this chapter, the National Costed Plan of Action targets the need of the poor and the most vulnerable children, including supporting education for vulnerable children. The most vulnerable children include those who are assessed to be at risk or are in conflict with the law.[307] In addition, the government has established programmes to empower children from poor communities economically, providing education and supporting rehabilitation of education infrastructures under the Tanzania Social Action Fund. Although, as indicated before, education supported under the Fund does not extend beyond primary school, policy measures and programmes have been directed towards the most vulnerable children, in this case children at risk.

5.4 Conclusion

The obligation to prevent delinquency is founded on the need to promote the wellbeing of the child, to protect the child's best interests and to ensure the children's development. This is achieved by implementing all the rights and principles in the CRC and, in particular, protecting children against all forms of violence and their rights to the highest attainable standard of living, to attainable standards of health and to education.

This chapter paid attention to the four above-mentioned rights due to their direct impact on child delinquency and for purposes of feasibility. If there are strong policies on protection against violence, poverty reduction, provision of health services and education there is a better chance that a large number of children will be rescued from delinquency. The chapter has proved that the provisions dealing with the protection of children from violence under the Law of the Child Act are inadequate. For instance, despite the fact that the Act prohibits torture and other inhuman or degrading treatment or punishment, it does not expressly prohibit corporal punishment. Hence, this form of punishment is regarded as acceptable and legal in homes, schools and in the justice institutions. Nevertheless, although protection from

[306] Ministry of Education and Vocational Training *Basic Standards for Pre-primary and Primary Education* (2010) 6.

[307] *National Costed Plan of Action for the Most Vulnerable Children* (I) op cit note 216 at 2.

violence is not adequately addressed in the Law of the Child Act, it has been included in the National Plan of Action to Respond to Violence against Children and legislation that seeks to protect children against violence.

With regard to socio-economic rights, the Law of the Child Act provides that the provision of such rights is the responsibility of parents as well as the local government, in particular the responsibility of local government to support children who are in need. In addition, various policies and programmes on poverty reduction have been adopted to support children, particularly the most vulnerable and poor households. These include the National Strategy on Poverty Reduction and the programmes to support poor households, for example, through cash transfer under the Tanzania Social Action Fund (TASAF) and other programmes that seek to support poor and vulnerable communities and households.

The policy on poverty reduction, particularly the National Strategy for Poverty Reduction, broadly addresses socio-economic issues relating to poverty, ranging from economics, health and education to issues of good governance, and also pays attention to special groups such as children. With regard to the right to the highest attainable standard of health, there is no such right in the Constitution though the Draft Constitution has a provision on children's right to health. Further, despite the fact that there are inadequacies in education on reproductive health and life skills generally, the policy on the provision of health services is generally sound. Importantly, the National Costed Plan of Action for the Most Vulnerable Children and the Community Health Fund also complement health policy. Likewise, the programmes to empower communities and households, including supporting sub-projects, such as the rehabilitation of health centres established by the government under the Tanzania Social Action Fund, are relevant to improve livelihood, including health services. One of the weaknesses of social protection schemes lies in the exclusive focus on those in formal employment. Nevertheless, the Community Health Fund does pay particular attention to the informal sector.

The policies on education are inadequate in two respects. First, apart from the fact that education is recognised as a non-justiciable right in the Bill of Rights, the Law of the Child Act provides that is the responsibility of parents. It has been shown in this chapter that this may change if the Draft Constitution were adopted, for it recognises education as a justiciable right. Secondly, despite the existence of a policy and legal framework as well as programmes to support education in general and for

the most vulnerable children in particular, education is seen mainly largely in terms of quantity but not in terms of quality. Since international standards on the right to education include both quality and quantity, such an approach to education is inadequate.

On the whole, although Tanzania has taken various positive policy and legal measures as well as introducing programmes to improve the livelihood of poor communities and households that are relevant in preventing child delinquency, these measures are fragmented and inconsistent. The need for a more comprehensive and coherent policy on the prevention of child delinquency is thus as imperative as the need to enforce the existing policies.

The next chapter examines the question of the place of non-judicial intervention in Tanzania's child justice system.

CHAPTER 6: NON-JUDICIAL INTERVENTIONS

6.1 Introduction

A human rights-based approach to child justice does not only require a child justice system to incorporate measures to prevent child delinquency, it also requires states to make full use of alternatives to judicial measures for children accused of committing crimes. Thus, this chapter examines the Tanzanian child justice system with the specific purpose of finding out whether it makes use of such alternatives. As shown in Chapter 3, alternatives to judicial measures include diversion, with further options such as community service, supervision and guidance. They also include family conferencing, mediation, restitution and compensation.[1]

It must be noted that non-judicial interventions are usually used after the machinery of justice has been set in motion, for instance, after arrest or during trial. In effect then, these measures are meant to avoid subjecting the child to the full force of legal proceedings. It must also be noted that the Tanzanian child justice system has not formally adopted diversion. Thus, this chapter examines various legal provisions relied upon by some courts to divert children from criminal proceedings.

6.2 Understanding non-judicial intervention, diversion and restorative justice

Non-judicial intervention refers to measures for dealing with a child in conflict with the law without resorting to court proceedings.[2] It is also used interchangeably with diversion. For instance, the Guidelines on Child Justice in Africa define diversion as 'channeling children alleged to be in conflict with the law away from formal court procedures into alternative processes or programmes including restorative justice processes'.[3] The Committee on the Rights of the Child has defined diversion as a

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[1] Discussed in 6.2 below.

[2] Article 40 (3) (b); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) GA Res 40/33 Annex, 40 UN GAOR Supplement (No 53) at 207, UN Doc A/40/53, 29 November 1985, rule 11; CRC General Comment No 10 'Children's rights in juvenile justice', CRC/C/GC/10, Forty-fourth session 25 April 2007, paras 22–7.

[3] African Child Policy Forum and Defence for Children International, *Guidelines on Action for Children in the Justice System in Africa* (2011) para 9 adopted at the Conference ─Achieving Child Friendly Justice in Kampala in 2011. The Guidelines were endorsed by the African Committee of Experts on the Rights and Welfare of the Child in 2012. See Julia Sloth Nielsen 'Child friendly' justice in Africa' Conference on Child Friendly Justice: What it Means and How it is Realised, Stockholm 16–18 May 2014 at 2.

measure 'involving removal from criminal/juvenile justice processing and referral to alternative (social) services'.[4] Thus, in terms of these definitions, non-judicial interventions may include various diversion programmes and services ranging from community service and supervision to guidance.[5] It may also include measures or programmes that give effect to the restorative justice theory, including reconciliation, victim compensation and restitution.[6] The Committee on the Rights of the Child has stated, further, that such measures for both diversion and restorative justice are not limited to those outlined above, and states are encouraged to draw lessons from the experience of other states that have already introduced diversion programmes.[7]

It was shown in Chapter 3 that restorative justice existed in ancient communities and then developed internationally in the Twentieth Century as a modern theory of justice to redress the justice theory. Historically, restorative justice is a form of dispute resolution used in some communities in various parts of the world, including Africa.[8] It is from these ancient practices of restorative justice that the modern restorative theory draws its inspiration.[9] Eventually, it found recognition in international law in 2002.[10] It is therefore both a new and an ancient theory of justice.[11]

Restorative justice is defined as 'a theory of justice that emphasises repairing the harm caused or revealed by criminal behaviour. It is best accomplished through

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[4] CRC General Comment No 10 (2007) op cit note 2 para 24.

[5] Ibid para 27.

[6] Ibid.

[7] Ibid.

[8] Jaap Doek 'Understanding diversion and restorative justice: Setting the context' International Colloquium on Juvenile Justice, New Delhi 16–18 March 2013 at 8.

[9] Ann Skelton 'Restorative justice in child justice systems in Africa' in Julia Sloth Nielsen (ed) *Children's Rights inAfrica: A Legal Perspective* (2008) 129–146, 129. See also Doek op cit note 8 at 8. For further discussion on restorative justice, see also Boyane Tshehla 'The restorative justice bug bites the South African justice system' (2004) 17 *South African Journal of Criminal Justice* 1.

[10] Incorporated in the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Resolution E/RES/2002/12 37th Meeting 24 July 2002, thereby signifying such entrance.

[11] Skelton op cit note 9 at 129.

cooperative processes that include all stakeholders.'[12] The theory is implemented by a restorative process.[13] 'Restorative process' is defined as

> [A]ny process in which the victim and the offender and, where appropriate any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of the facilitator.[14]

Such process may include mediation, conferencing and sentencing circles, while the outcome may include responses and programmes such as reparation, restitution and community services.[15] These processes and programmes are being implemented in various countries, including Uganda and Ghana.[16] Skelton identifies practical examples such as compensation, restitution, apology and caution in local council courts in Uganda and supervision, apology and restitution in child panels at district and community levels in Ghana.[17] The distinctive features of restorative justice are victim participation and restoring harmony.[18]

Diversion, unlike restorative justice, does not necessarily involve a third party[19] In addition, as shown above, while diversion implies non-judicial intervention, this may not necessarily be the case with restorative justice. Restorative justice may be administered as part of judicial proceedings.[20] According to Doek, '[i]t can be part of the sentence by a court or it can lead to an agreement between the offender and the victim as an alternative to sentencing by the court'.[21] Doek argues that diversion is, and should be, implemented by police, prosecutors and other bodies but not by courts.[22] By contrast, restorative justice can be used in the entire child justice

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[12] Prison Fellowship International, Centre for Justice and Reconciliation 'Restorative Justice', available *at http://www.restorativejustice.org/*, accessed on 19 July 2014.

[13] Basic Principles on the Use of Restorative Justice (2002) op cit note 10 para 1.2.

[14] Ibid.

[15] Ibid paras 1.2, 1.3.

[16] Skelton op cit note 9 at 131–2; The African Child Policy Forum and Defence for Children International *Achieving Child-friendly Justice in Africa* (2012) 61.

[17] Skelton op cit note 9 at 131–2.

[18] Doek op cit note 8 at 8.

[19] Ibid.

[20] Ibid at 9.

[21] Ibid.

[22] Ibid at 5.

process.[23] This suggests, according to him, that while diversion orders should be made by police and prosecutors only, restorative justice may be implemented by police officers, prosecutors, magistrates and other agencies.

6.3 Implementing non-judicial interventions

As shown in Chapter 3, the Convention on the Rights of the Child (CRC) provides that non-judicial intervention should be used whenever appropriate and desirable.[24] Although the language used suggests that states have the discretion to determine when it is desirable and appropriate to use such measures, international law has increasingly defined the circumstances in which it would be appropriate to use such non-judicial interventions. For example, it was shown in Chapter 3 that the Committee on the Rights of the Child has recommended that these interventions should not be restricted to minor offences.[25] The Beijing Rules specifically recommend that courts should use diversion, which may involve referral to community or other services.[26] Restitution and/or compensation for victims could also be ordered.[27]

While the specific programmes for non-judicial intervention fall within the discretion of individual states, the Committee as well as the Beijing Rules have offered some guidelines that may assist states in the exercise of their discretion.[28] These guidelines state that non-judicial interventions should be established as an integral part of the child justice system.[29] In addition, the powers of the police, prosecutors and other agencies to divert must be clearly provided for in the law.[30] Furthermore, where a diversion order involves community work, the consent of the child should be obtained.[31] The Committee has also recommended that promoting

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[23] Ibid.

[24] Article 3 (b) of the Convention on the Rights of the Child GA Res 44/25, Annex, 44 UN GAOR Supplement (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990. See also the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) GA Res 45/110 UN Doc A/45/49 (1990) para 5 on pre-trial dispositions.

[25] CRC General Comment No 10 (2007) op cit note 2 para 25.

[26] Rule11,11.3

[27] CRC General Comment No 10 (2007) op cit note 2 para 27; rule 11.4 Beijing Rules.

[28] Chapter 3 s3.3.4.

[29] CRC General Comment No 10 (2007) op cit note 2 para 26.

[30] Ibid para 27.

[31] Ibid.

non-judicial interventions is an obligation for the state parties flowing from art 40 (3) of the CRC.[32]

6.3.1 Diversion and restorative justice in Tanzania prior to the policy and legal reforms

6.3.1.1 Constitutional legitimacy

The Constitution requires courts to promote and enhance reconciliation and to avoid paying undue regard to procedural technicalities when settling disputes in both civil and criminal matters.[33] This provision, which is also reiterated in the Draft Constitution,[34] provides a basis for establishing laws and procedures for non-judicial interventions in child justice.

6.3.1.2 The Law of the Child Act and other legislation

The Law of the Child Act of 2009 makes no provision for non-judicial interventions. The Act merely requires that proceedings in the juvenile court shall be as informal as is possible.[35] This could be interpreted generously to suggest that juvenile courts must try to use non-adversarial procedures as much as is possible. However, the practice in Tanzania shows the procedures used in these courts are mostly adversarial. These include plea taking, conviction on a plea of guilty,[36] preliminary hearing,[37] proof by evidence by parties,[38] conviction and sentence.[39]

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[32] Ibid para 25.

[33] Article 107 (A) (2) (d)–(e) of the Consitution of the United Republic of Tanzania 1977 (Cap 2 R.E 2002). Although art 107 (A) (2) (d) (English version) does not specifically provide for reconciliation, the Kiswahili version of the Constitution, which according to the Court of Appeal in *DPP v Daudi Pete* [1993] TLR 22 (CA) 39 is the controlling version, states that courts should promote reconciliation (*usuluhishi*).

[34] Article 168 (1) (d) – (e).

[35] Section 99 (1) (c).

[36] Sections 105–7, 111 of the Child Act; Rule 32 of the Law of the Child (Juvenile Court Procedure) Rules GN 252 of 2014 (Juvenile Court Rules).

[37] Rule 37 Juvenile Court Rules.

[38] Sections 109, 110 of the Law of the Child Act. See also Rules 33–6, 39–45 Juvenile Court Rules.

[39] Sections 111, 121–31 Law of the Child Act; Rules 46-54 Juvenile Court Rules.

Prior to the adoption of the policy on child justice reform, Child Justice: A Five Year Strategy for Progressive Reform[40] and the promulgation of Juvenile Court Rules[41] (discussed in 6.3.2), some relevant provision that may be translated to empower courts to use non-judicial intervention include the Constitutional provision above and statutory provisions. In practice, extra-legal procedures and informal community diversion have been used.

With regard to legal provisions, courts[42] may invoke general provisions to ensure that children are dealt with outside formal judicial procedures. One of such provisions is s 4(2) of the Primary Court Criminal Procedure Code, which provides:

> In the case of proceedings for common assault or for any other offence of a personal or private nature, the court may, if it is of the opinion that the public interest does not demand the infliction of a penalty, promote reconciliation and encourage and facilitate the settlement, in an amicable way of the proceedings or terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed.

This provision may be regarded and interpreted as giving legal authority for the courts to use diversion and restorative justice measures of offences of personal nature, for example, assault. It encourages reconciliation or other amicable ways of settlement, such as compensation, which form part of restorative justice.

However, section 4 (2) is narrow in its scope in that it applies only in criminal proceedings before primary courts and is not specifically intended for children. As a result, children may not enjoy more protection than may adults. Nevertheless,

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[40]The Ministry of Constitutional and Legal Affairs *Child Justice*: *A Five Year Strategy for Progressive Reform 2013–2017* (2012).

[41] Juvenile Court Rules promulgated in 2014.

[42]'Courts' here refers to the Juvenile Court, primary and districts courts. Generally primary courts, district courts and the Juvenile Court exercise concurrent jurisdiction in child justice. Despite the fact that s 97 (1) of the Child Act provides that there shall be established courts to be known as 'the Juvenile Court' the above-mentioned courts are likely to continue exercising concurrent jurisdiction until specific juvenile courts are designated. This is mainly because according to Rule 5 of the Juvenile Court Rules the juvenile court shall be identified by a specific name and location. Currently the only juvenile court is Kisutu in Dar es Salaam that existed before the Child Act 2009. However, s 4 (2) may be limited to primary courts because the Primary Court Criminal Procedure Code applies only to primary courts.

magistrates have been inclined to order settlement out of court, particularly in less serious offences, such as the use of abusive language.[43]

Apart from the courts, the Director of Public Prosecutions (DPP) may also divert children from the criminal process. The DPP has the power to decide whether to prosecute[44] or to discontinue criminal proceedings. This power may be used to remove children from the formal justice system.[45] However, these powers are general and not specific to children, and the DPP has not produced clear procedural guidelines that may help all prosecutors in decisions concerning the diversion or prosecution of children.[46]

As is clear from this discussion, the lack of a clear legal basis for alternatives to judicial proceedings in criminal cases involving children posed a challenge to the effective implementation of such procedures. Such challenges relate to when such procedures can be used; what specific alternatives may be used; how consistently they should be used; who has the power to order their use; under what conditions they should be used; and who is responsible for the supervision of their implementation. These problems arise in practice, as the discussion that follows will show.

6.3.1.3 The practice of extra-legal procedures on diversion

Police officers have in some cases settled or allowed criminal cases to be settled using family mediation or restitution.[47] It has been reported, for example, in the findings published in the Analysis of the Situation of Children in Conflict with the Law in Tanzania that in the Dodoma, Dar es Salaam, Lindi and Arusha regions a number of

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[43] From my own experience as a magistrate and information obtained from magistrates in district and primary courts in Temeke- Dar es Salaam, Morogoro and Dodoma.

[44] Section 9 of the National Prosecution Services Act 27 of 2008.

[45] Section 91 of the Criminal Procedure Act (Cap 20 R.E 2002).

[46] *Child Justice*: *A Five Year Strategy for Progressive Reform 2013–2017* op cit note 40 at 32 states that by the end of 2014 the DPP must develop standard procedures/guidelines for investigation and prosecution of child suspects and victims. However, these are basically in relation to prosecution and investigation. In addition, it is not clear at the time of this study whether such procedures and guidelines have been developed.

[47] Department of Social Welfare and UNICEF *Community Rehabilitation Programme: Evaluation of the First Year 2012–2013* (2013) 16.

minor offences are handled in police stations without legal proceedings.[48] Typically, police let children accused of having committed minor offences go while in others they involve parents or refer them to a local leader for reconciliation.[49] In Lindi, for example, it was reported that only about 20 per cent of child cases go for formal adjudication because most of them are dealt with via mediation by the police.[50] Similarly, in Dar es Salaam, 20 to 30 per cent of cases are resolved by mediation at the police stations.[51]

This seems to be an extra-legal practice that has no express legal basis. Furthermore, there are no clear guidelines that the police use. As a result, the diversion processes are sometimes abused and tainted by corruption.[52] For instance, in some police stations parents are asked to pay 'fees' in order for their children to be diverted.[53] This practice is clearly an abuse of power, as there is no legal requirement for the payment of fees for diversion. It has also been reported that children are sometimes subjected to violence, including corporal punishment, as an alternative to court proceedings.[54]

Although a specific provision on diversion would not completely eradicate corruption and abuse of power, it would reduce the extent of such malpractices, particularly when information about the diversion procedure and its existence is disseminated to the public.

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[48] Ministry of Constitutional and Legal Affair and UNICEF *Analysis of the Situation of Children in Conflict With the Law in Tanzania* (2012) 82–3. Note that the same document is also published by Kirsten Anderson, Coram Children's Legal Centre, UK in collaboration with UNICEF and National Organisation for Legal Assistance as *Tanzania Analysis of the Situation of Children in Conflict with the Law in Tanzania*(2012). This thesis has consulted the former title.

[49] Ibid at 82.

[50] Ibid.

[51] Ibid.

[52] Cecilia Anderson and Aki Stavrou *Youth Delinquency and the Criminal Justice System in Dar es Salaam Tanzania* (2000) 74. See also Kizito Makoye 'How bribery cripples Tanzania courts' *Thomson Reuters Foundation* 27 November 2012, available at *http://www.trust.org/item/?map=how-bribery-cripples-justice-in-tanzania-courts/*,accessed on 21 May 2013.

[53] *Analysis of the Situation of Children in Conflict with the Law in Tanzania*(2012) op cit note 48 at 83.

[54] Ibid at 82.

6.3.1.4 Informal community diversion

The Working Group of the Law Reform Commission Report in 1994 found that diversion exists as a practice in various tribal communities.[55] Communities in Kilimanjaro, Mbeya, Arusha and other regions still settle matters relating to children outside court, and this may be considered a form of diversion.[56] This kind of non-judicial intervention is also referred to as informal diversion[57] and is recognised by international law.[58]

However, this thesis has argued that it should form an integral part of the child justice system. Due to the lack of legal recognition, this practice it is also used inconsistently. Its scope is limited, as it is used only in some areas[59] and in respect of certain kind of misbehaviour, such as fighting.[60] It has also been reported that some

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[55] The Law Reform Commission of Tanzania *Report of the Commission on the Law Relating to Children in Tanzania* (1994) para 207. See also Ministry of Constitutional and Legal Affairs and UNICEF *Assessment of the Access to JusticeSystem for Under-18s in Tanzania* (2012) 47. Note that in the case of the latter Report there are two sets of reports on this with the same content and title. The study was commissioned by the Tanzanian government in collaboration with UNICEF and undertaken by Coram Children's Legal Centre, UK in collaboration with National Organisation for Legal Assistance (NOLA) in 2011. The same report has been published by the government, Ministry of Constitutional and Legal Affairs and cited as: Ministry of Constitutional and Legal Affairs *Assessment of Access to Justice for Under-18s in Tanzania* (2012) while the other is cited as: Carolyn Hamilton and Ruth Barnes Coram Children's Legal Centre, UK in collaboration with UNICEF and the National Organisation for Legal Assistance *Assessment of Access to justice for under-18s in Tanzania* (2012). In this thesis the former report and citation is being used.

[56] *Law Reform Commission Report* (1994) op cit note 55 para 207.

[57] *Assessment of the Access to Justice System* op cit note 55 at 39.

[58] Beijing Rules, Commentary to rule 11 provides that diversion is practised on both formal and informal bases.

[59] The extent of use is uncertain considering that the study on access to justice included only ten regions and the use of informal diversion was inconsistent. See for instance *Assesment of the Access to Justice System* op cit note 55 at 47 where elders respond to the interviewer that they prefer not to deal with cases relating to children in conflict with the law. In addition, the Law Reform Commission's Report op cit note 55 para 207 mentions some regions (Mbeya, Arusha and Kilimanjaro) where diversion exists in practice but seemingly by way of illustration. Hence the extent of practice could not be ascertained.

[60] *Assessment of the Access to Justice System* op cit note 55 at 50.

local leaders (clan or elders council) do not respect the right of the child to be heard in these forums.[61] Apparently, they prefer dealing with adults rather than with children.[62]

The fact that currently Tanzanian law does not recognise informal systems of criminal justice involving children means that community diversion and other informal means of dealing with child offenders will continue to operate outside the confines of child rights and in a context where there is no clear accountability structures.

6.3.2 Current trends in diversion: The policy and legal reforms

Intervention through non-judicial measures is currently taking a new direction that promises a significant improvement in diversion. This is mainly because of policy measures adopted in 2013 for progressive reform of child justice system in Tanzania including diversion. In 2011, the Ministry of Constitutional and Legal Affairs in collaboration with UNICEF-Tanzania in 2012 commissioned two studies: the Analysis of the Situation of Children in Conflict with the Law in Tanzania[63] and Access to Justice for Under-18s in Tanzania,[64] as indicated earlier in this chapter and in Chapter 4.The studies informed the key policy document on child justice reform: Child Justice: A Five Year Strategy for Progressive Reform adopted in 2013 on among other areas, the development of diversion.

The Strategy sets out various objectives and targets to be achieved to reform child justice including laws, policies and practice within five years. One of its objectives is to develop prevention, diversion, rehabilitation and reintegration programmes for children who are at risk or are in conflict with the law.[65] It also seeks to ensure that detention is used only as a measure of last resort.[66] These objectives are intended to mitigate the existing challenges, which include lack of clear legal provision on diversion and rehabilitation programmes.[67] Hence, it identifies the need

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[61] Ibid at 47.

[62] Ibid at 50.

[63] Op cit note 48.

[64] Op cit note 55.

[65] *Child Justice: A Five Year Strategy for Progressive Reform* op cit note 40 at 49.

[66] Ibid.

[67] Ibid at 52.

to have rehabilitation programmes within the communities and explicit powers for police officers, magistrates and prosecutors to divert.[68]

Under the Strategy, the Ministry of Constitutional and Legal Affairs and other ministries, subject to the approval of the Chief Justice, were tasked by the Child Justice Forum, formed under the Strategy on Child Justice Reform in 2013,[69] with drafting amendments to the Police Act, the Criminal Procedure Act and the Child Act for specific provisions on diversion by 2015. However, the amendments to these pieces of legislation have not been put into effect yet.[70] The Committee on the Rights of the Child in its 2015 Concluding Observations has also urged Tanzania to promote alternatives to detention such as diversion and community services.[71] Nevertheless, the Strategy gives a direction on child justice reform in general, and diversion in particular.

The Strategy identified the lack of rehabilitation programmes to which children may be referred as an alternative sentence.[72] During the adoption of the Strategy in 2013, the Ministry of Social Welfare was tasked with piloting a diversion and community rehabilitation and reintegration scheme in Temeke district by 2015.[73] It was intended that various stakeholders, including the Temeke Municipal Council, the Child Protection Team, the judiciary and ward executive officers, would be involved in the implementation of the diversion scheme.[74] Although the task was to pilot a diversion area, an ongoing diversion and community rehabilitation programme had been in place since 2012.[75] The Ministry of Health and Social Welfare in

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[68] Ibid at 51–2.

[69] Ibid at 9. Under the Strategy, an interagency forum — the Child Justice Forum — was formed comprising of officials from ministries, government departments and non-governmental organisations. Thus tasks were assigned to either a specific ministry or for collaboration with other ministries/departments or entities.

[70] Ibid 50.

[71] CRC 'Consideration of state report submitted under article 44 of the Convention: Concluding Observations: United Republic of Tanzania' CRC/C/TZA/CO 3-5 Sixty-eighth session 3 March 2015 para 73 (e).

[72] *Child Justice*: *A Five Year Strategy for Progressive Reform* op cit note 40 at 38-40.

[73] Ibid at 40.

[74] Ibid.

[75] Ibid. For the establishment of Temeke rehabilitation programme, see also the *Strategy* op cit note 40 at 36 footnote 21.

collaboration with UNICEF in 2012 established a pilot rehabilitation programme in Temeke, Dar es Salaam.[76] The programme was designed for children aged between 10 and 17.[77] It allowed children to attend a four-to-six month's programme. This included activities and interventions such as counselling.[78] The children can be referred to the programme by a police officer as a diversionary measure, by the court as an alternative to pre-trial detention, or by a probation officer as part of a probation order. [79] The programme is useful for the whole process of criminal justice, from pre-trial to post trial. The programme was evaluated after one year of its existence. This showed that there were some achievements, which may be used to establish such programmes in other parts of the country. For instance, by 2013, 67 children had been diverted from formal criminal justice or given non-custodial sentences in the Temeke programme.[80] In addition, another rehabilitation programme has been established in Mbeya.[81]

Some challenges that may provide a lesson to improve both the existing and future programmes were identified. For instance, the Evaluation Report identified some weaknesses in the implementation of the programme.[82] For example, it was found that police officers did not refer children who had committed theft if the item stolen was valued at more than 1.5 million Tanzanian shillings (equivalent to US $ 910).[83] Such decisions were possibly based on the guidelines issued by the Ministry of Community Development — that a child be admitted into the programme if he or she had not committed 'any non-serious offence, for example, robbery or theft'.[84]

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[76] *Community Rehabilitation Programme*: *Evaluation Report (2012–2013*) op cit note 47 at 3.

[77] Ibid at 9.

[78] Ibid at 6, 10.

[79] Ibid at 3.

[80] UNICEF *Annual Report for Tanzania* (2013) 6.

[81] Information obtained from Temeke social welfare officer and the Most Vulnerable Children District Coordinator, Ms Subisya Kabuje. Email communication dated 22 July 2015.

[82] *Community Rehabilitation Programme*: *Evaluation Report (2012–2013)* op cit note 47 at 21–40.

[83] Ibid at 27.

[84] Ministry of Health and Social Welfare, Department of Social Welfare, *Guide to the Establishment and Implementation of the Community Rehabilitation Programme*, July 2013 referred to in *Community Rehabilitation Programme: Evaluation Report (2012 –2013)* op cit note 47, see footnote 11 of the Report at 9.

Nevertheless, some measures have been taken to broaden the scope of the children referred to the programmes by including those who commit theft and other offences not included in the guidelines.[85] Such measures are consistent with the recommendation of the Committee on the Rights of the Child that diversion should not be restricted to minor offences.[86] The Committee on the Rights of the Child has recommended that states should provide for offences for which children should be diverted.[87]

With regard to legal measures, in 2014 the Chief Justice promulgated the Juvenile Court Rules in terms of s 99 (1) of the Child Act.[88] The Juvenile Court Rules now provide for alternative dispute settlement, in that

> [t]he magistrate shall have the power in both criminal and civil cases to encourage the parties to use an alternative dispute resolution procedure if appropriate and facilitate the use of such procedure.[89]

According to this provision, a magistrate has a duty to encourage the parties to use alternatives to legal dispute resolution. This must be taken to mean that the magistrate while taking into account the best interests of the child, must provide information to the parties on the available alternatives, and their advantages and disadvantages over judicial intervention. Although not defined, alternative dispute resolution mechanisms would include various forms of non-adversarial settlement, such as reconciliation and mediation. Rule 16 (1)(m) expressly states that the magistrate should not only encourage but also facilitate the alternative dispute resolution process. Thus, the role of the magistrate in such a process is both passive and active.

Another provision that provides a basis for non-judicial interventions relates to remanded children. Rule 30 (1) provides that '[a]ny child who has been remanded in custody shall be assessed by a social welfare officer within three days of the start of

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[85] Communication with Social Welfare Officer and Most Vulnerable Children District Coordinator in Temeke, Ms Subisya Kabuje and the co-ordinator of Kigamboni Rehabilitation Centre,Temeke Municipal, Mr Nassoro Mkwesso when the author paid a visit to the Centre on 14 August 2015.

[86] CRC General Comment No 10 (2007) op cit note 2 para 25.

[87] Ibid para 27.

[88] The Juvenile Court Procedure Rules.

[89] Rule 16 (1) (m).

the remand'.[90] The officer shall submit an assessment and may recommend the case for diversion.[91] The court may then refer the case to the prosecution to consider diversion.[92]

Thus, although the Law of the Child Act is silent on diversion, the Rules make reference to it. However, the fact that diversion is expressly provided for in the Rules and not in the Act diminishes the significance of alternatives to judicial mechanisms in Tanzania's child justice system. Non-judicial mechanisms require a more solid legal foundation than what is found in the Rules. It is mainly for this reason that the Strategy on Child Justice Reform seeks to amend the Child Act and other legislation to provide for diversion.[93] Seemingly, legislation amendments should also go hand in hand with some amendments to the rules that need to be more elaborate.

Indeed, in their current form, the Rules have several shortcomings. First, it is unclear who has the ultimate authority to make a diversionary order. For instance, the power of the court to divert seems to be passive. A court can only recommend, while the ultimate authority to divert seems to lie with the prosecution. Secondly, the powers of police officers or other authorities to divert are not defined. The Children's Act of Zanzibar, for instance, provides that when a child is charged with offences listed in the first schedule, the police officer may, instead of instituting legal proceedings, divert a child by cautioning such child.[94] The Public Prosecutor also has powers to divert where a child acknowledges responsibility and after such a child has been assessed by a probation officer or a social welfare officer.[95] Thirdly, the Rules are silent on the procedures that must be followed in making diversion orders and on the specific types of diversion orders that could be made in specific cases. Fourthly, 'diversion' in the Rules seems to be limited in scope, since it is intended to benefit only children who are remanded. As shown earlier, diversion may be considered

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[90] Rule 30 (1).

[91] Rule 31 (6). Note that this is the only provision that makes reference to diversion, as the term is not used elsewhere in the Act or the Rules.

[92]Rule 31 (6).

[93]*Child Justice: A Five Year Strategy for Progressive Reform* op cit note 40 at 37.

[94] Section 39 of the Children's Act 6 of 2011 of Zanzibar. The offences in the First Schedule include malicious injury to property; robbery (in the absence of aggravating circumtances or under the use of firearm); common asault; theft; perjury; tresspass and contempt of court.

[95] Section 42 (1) of the Children's Act.

where an assessment report 'regarding a child remanded in custody' has recommended it. Children released on bail, particularly police bail (discussed in Chapter 7), and those who are the subject of extra-legal diversion (discussed above) seem not to be included in this provision.

6.4 Conclusion

This chapter has shown that Tanzania's child justice system has some flaws in its use of alternatives to criminal proceedings in cases of child offenders. The Law of the Child Act, the main legislation dealing with child justice, does not expressly provide for diversion.

To their credit, the courts, the police and communities have tried to use alternatives to judicial proceeding. These efforts have relied on a number of existing legal provisions or community practices and traditions. The more plausible sources of law relied upon have included the general provisions of the Constitution and the Primary Court Criminal Procedure Code. These place a responsibility on the courts to promote reconciliation and the amicable settlement of disputes.

This chapter has shown that, despite these provisions, alternatives to criminal proceedings need to be adequately developed. The relevant procedures, powers and functions for implementation of diversion procedures are not clearly defined and distributed among the relevant authorities. Neither has the responsibility to monitor the implementation of these procedures, particularly court orders, been defined and vested in any particular body or institution.[96]

Some progress on establishing diversion procedures and programmes have been made, as shown in this chapter. The adoption of the Juvenile Court Rules in 2014 has expanded the procedures for diversion. These newly adopted Rules provide a clear legal basis for alternative dispute resolution. In terms of these, children remanded may be considered for diversion where the social welfare officer recommends this in the first assessment report.

To a limited extent, the Juvenile Court Rules suggest that magistrates and prosecutors have authority to divert. However, it has been shown that their powers and responsibilities are not clearly stated. Chapter 3 demonstrated that in order for diversion to function effectively, the powers of police officers, prosecutors and

[96] See, generally, the requirements of Principles on Restorative Justice op cit note 10; Beijing Rules and CRC General Comment No 10 (2007) op cit note 2.

magistrates should be clearly defined. There should be services and programmes to which diverted children could be referred. The rights of the child must be guaranteed in the process. It is not enough that a child is discharged or a matter settled out of court. Diversion must aim to redress the situation, make the child accountable for his or her wrong, and reintegrate him or her into the community. These aspects are missing in the Tanzanian law, in that guidelines, programmes and services that have been established to support the practice of diversion are limited.

Despite the inadequacies identified in the Rules, they do provide a better direction on the implementation of diversion in Tanzania. Importantly, the adoption of a Five Year Strategy on Child Justice Progressive Reform is a relevant policy measure that gives proper direction on developing diversion.

The next chapter examines the extent to which the criminal procedures used in criminal cases involving children respect the rights of the child.

CHAPTER 7: PRE-TRIAL AND TRIAL PROCEDURES

7.1 Introduction

Ideally, an effective child delinquency prevention programme should result in fewer cases of child offending. Moreover, children who are involved in crime should be dealt with primarily through alternatives to criminal proceedings. The reality on the ground, however, often prevents the realisation of this ideal. Thus, while this thesis argues that Tanzania must place child delinquency prevention and alternatives to criminal proceeding at the centre of its child justice system, it recognises that the criminal law means of addressing child offending will continue to form part of that system and will in some cases indeed be appropriate.

This thesis has shown that the Committee on the Rights of the Child has emphasised that alternatives to criminal procedures must be used, even in serious offences. Despite this emphasis, the Committee has not offered detailed criteria that may help states to determine which types of child offences should be resolved through criminal proceedings. Clearly, states have the discretion to determine the offences and circumstances that should warrant the use of such procedures. Nevertheless, based on the totality of the rights of the child, it can be argued that such discretion should be exercised in the light of a number of factors. These are the seriousness of the offence; the extent of the harm caused by the offence; the presence of aggravating and mitigating circumstances; the age and maturity of the child; whether the intention to commit the crime was clear; the possibility that the harm caused could be repaired; the criminal record of the accused; whether the accused has been dealt with according to law before alternatives to criminal proceedings were used; and whether the accused has shown remorse.

As with all other aspects of the child justice system, criminal procedures must reflect and be informed by human rights. This chapter will examine the criminal procedures used in Tanzania to address child offending. Given that there is no clear child delinquency prevention policy and no comprehensive legal framework for the use of alternatives to criminal procedures, the Tanzanian child justice system relies predominantly on criminal mechanisms for resolving problems of child offending. The chapter commences with a consideration of the issue of a child's age of criminal responsibility. Following this, the issue of the pre-trial procedures relating to arrest and detention before the child is taken to court will be addressed. Thereafter trial

procedures will be examined. The main laws that make up the child justice system, as far as pre-trial and trial procedures are concerned, are contained in the Constitution,[1] the Criminal Procedure Act,[2] the Primary Court Criminal Procedure Code,[3] the Law of the Child Act (hereinafter also referred to as the Child Act),[4] the Law of the Child Act (Juvenile Court Procedure) Rules[5] and case law.

7.2 The minimum age for criminal responsibility

The definition of a child and the minimum and upper ages for criminal responsibility of children at the international level were discussed in Chapter 3. The Law of the Child Act defines a child as a person below 18 years of age.[6] This is a general definition of childhood, which means that ideally all children aged below18 must be afforded the guarantees discussed in Chapter 3 when accused of, or tried for, criminal offences.

The Penal Code establishes the age of 10 years as the minimum age for criminal responsibility.[7] Hence, children under 10 are absolutely exempt from criminal liability. Furthermore, the Penal Code provides that a child below 12 years will be responsible only if the prosecution proves that he or she had the ability to know the consequences of his or her act or omission.[8] This means that the rebuttable presumption of innocence applies to children aged between 10 and 12. In addition, a

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[1]Constitution of the United Republic of Tanzania 1977 (Cap 2 R.E 2002).

[2] (Cap 20 R.E 2002) (hereinafter Criminal Procedure Act). This governs procedures in High Court, resident magistrates' courts and district courts, see ss 3 and 4. The Act applies in Juvenile Court (the one designated Juvenile Court in Kisutu Dar es Salaam that exercises concurrent jurisdiction with districts courts and primary courts). This is particularly because the Law of the Child (Juvenile Court Procedure) Rules GN 252 of 2014 (hereinafter Juvenile Court Rules) were gazetted only in 2014.

[3] The Primary Court Criminal Procedure Code is included in the Third Schedule to the Magistrates' Courts Act (Cap 11 R.E 2002). According to s 1 of the Primary Court Criminal Procedure Code, it applies to primary courts only. See also s 3 of the Criminal Procedure Act.

[4] Act 21 of 2009.

[5] GN 252 of 2014.

[6] Section 4 (1).

[7]Section 15 (1) (3) of the Penal Code (Cap 16 R.E 2002) (hereinafter the Penal Code) as amended by the Sexual Offences Special Provisions Act (Cap 101 R.E 2002) (hereinafter the Sexual Offences Special Provisons Act).

[8] Section 15 (2) of the Penal Code as amended by the Sexual Offences Special Provisions Act.

male person below 12 years is irrebutably presumed to be incapable of having sexual intercourse.[9] Hence, a boy under 12 years is exempt from criminal liability for rape.[10]

While the definition of a child is consistent with the CRC and the African Children's Charter, the minimum age of criminal responsibility is inconsistent with the international law standards discussed in Chapter 3, in that the Committee on the Rights of the Child has recommended that the absolute minimum age for criminal responsibility should not be below 12. In its 2006 Concluding Observations on Tanzania's report, the Committee urged Tanzania to establish the age of criminal responsibility at 12 or older, which is the internationally accepted standard.[11] However, this recommendation has not been put into effect. Furthermore, the Committee has recommended that states should not create exceptions by way of rebuttable presumptions that give courts a discretion to decide on the criminal responsibility of a child under 12.[12]

Due to the low rate of birth registration in Tanzania, some children do not have birth documentation.[13] Birth documentation is relevant in deciding whether an offender has capacity and, if so, whether he or she should be treated as a juvenile. Statistics reveal that in 2010 only 56 percent of children under five years were registered.[14] Following the recommendations of the Committee on the Rights of the Child in 2006 that the country should strengthen its birth registration system by ensuring free registration,[15] Tanzania took legislative and administrative measures to comply with these recommendations. First, it enacted a specific provision in the Child

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[9] Section 15 (3) Penal Code.

[10]According to s 4 of the Sexual Offences Special Provisions Act, the offence of rape is committed when a man has sexual intercourse with a woman without her consent.

[11]CRC 'Consideration of the report submitted by states parties under Article 44 of the Convention: Concluding Observations: United Republic of Tanzania', CRC/C/TZA/CO/2, Forty-second session, 21 June 2006para 70 (b). See also Clement Mashamba *A Comparative Examination of the Administration of the Juvenile Justice Systems in Tanzania and South Africa* (unpublished PhD Thesis, Faculty of Law, Open University of Tanzania (2012)) 346.

[12] CRC General Comment No 10 'Children's rights in juvenile justice', CRC/C/GC/10, Forty-fourth session 25 April 2007. See para 30.

[13]Commission for Human Rights and Good Governance *Inspection Report for Children in Detention Facilities in Tanzania* (2011) 13.

[14] UNICEF *State of the World's Children* (2012) 141.

[15] CRC 'Concluding Observations: United Republic of Tanzania 2006' op cit note 11 para 32.

Act that a child has a right to a name and nationality.[16] Such rights create obligations for parents to ensure that children are registered at birth. In addition, the Draft Constitution of 2014 provides that a child has a right to a name and nationality.[17] Secondly, the government, in collaboration with UNICEF and with support from the government of Canada, has taken measures to improve birth registration in the country by using mobile and scanning technology.[18] Initiatives were taken for free birth registration for children aged nought to five years in Temeke (2012) and Mbeya (2014), and also in Mwanza (2015).[19] These initiatives are also consistent with the recommendations of the Committee of Experts on the African Children's Charter in 2010. These urged Tanzania to take urgent measures to ensure compulsory birth registration consistent with art 6 of the Charter.[20]

As shown above, the Child Act provides for the right of the child to be registered at birth.[21] It also requires a court to take evidence, including medical evidence, to ascertain age when a person appears to be a child.[22] However, where a person before the court appears to be aged 18 or above, and where the court has failed to establish age, the age stated by the person in question or by a parent, guardian or social welfare officer shall be deemed to be the correct age.[23] In the case of uncertainty as to age, and in the absence of a statement of age as previously mentioned, the accused is entitled to the benefit of the doubt.[24] An inquiry to

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[16] Section 6 Law of the Child Act. See also United Republic of Tanzania *The Country Third to Fifth Periodic Reports on the Implementation of the Convention on the Rights of the Child 2012* Dar es Salaam (2013) para 63.

[17] Article 53 (1).

[18] UNICEF *Annual Report for Tanzania* (2014) 34–38.

[19] UNICEF 'The government expands its new birth registration system to Mwanza' 11 May 2015, available at *http://www.unicef.org/tanzania/media_16488.html*, accessed on 26 July 2015).

[20] ACERWC 'Concluding recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Report of the United Republic of Tanzania on the status of the implementation of the African Charter on the Rights and Welfare of the Child (under article 43 of the Charter)' Fourteenth session 16–19 November 2010 at 9.

[21] Section 6 (3).

[22] Section 113. However, the courts in *Republic v James Yohana* (1968) HCD No 145 (HC) 50, *Yusuph Kabong v Republic* (1968) HCD 188 (HC) 66 and *Emmanuel Kibona and Others v Republic* (1995) TLR 241 (HC) 243–244 held that medical evidence is not conclusive proof of age.

[23] Section 114 (2); Rule 12 (4) (c) ; (5) Juvenile Court Rules.

[24] *Emanuel Kibona's* case supra note 22 at 245. See also rule 12 (7) Juvenile Court Rules.

determine age is not to be carried out during pre-trial procedures, but rather when a person has been brought to court.[25] Thus, a child without documentation may be prejudiced in such procedures.

7.3 Protection of pre-trial rights

7.3.1 Lawful arrest and reasons for arrest

The Child Act and the Juvenile Court Rules have no provisions on pre-trial procedures.[26] The power of the Chief Justice to make rules under s 99 (1) of the Act refers to the powers to make rules for conducting proceedings. The Juvenile Court Rules, according to rule 2, apply in all cases before the Juvenile Court.[27]

The Criminal Procedure Act may be used to provide procedures for pre-trial in the case of children. The Criminal Procedure Act provides that:

> All offences under any other law shall be inquired into, tried and otherwise dealt with according to the provisions of this Act, except where that other law provide differently for the regulation of the manner or place of investigation into, trial or dealing in any other way with those offences.[28]

Since there are no procedures that provide differently for investigation (which, according to the Chapter II of the Act, include arrest, escape, and search warrant) the provisions of the Criminal Procedure Act on investigation apply in pre-trial in the case of children offenders.

The Constitution provides for respect for dignity in criminal investigations and prohibits torture, inhuman or degrading treatment or punishment.[29] Under the Criminal Procedure Act, an arrest may be made by a police officer with or without a warrant.[30] Magistrates may arrest or issue warrants of arrest for persons reasonably believed to have committed an offence within the local limits of their jurisdiction or

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[25]Section 113 Child Act; Rule 12 Juvenile Court Rules. See also *Inspection Report for Children in Detention Facilities in Tanzania*op cit note 13 at 13.

[26] The only provision in the Law of the Child Act that may be relevant before trial is s 101, which relates to police bail. It provides that where a child is arrested and is not brought immediately before a Juvenile Court, he or she may be released on police bail subject to the fulfillment of the bail conditions set out in s 101.

[27] Rule 20.

[28] Section 3 (4) (2) of the Criminal Procedure Act (Cap 20 R.E 2002).

[29] Article 13 (6) (d)–(e).

[30] Sections 13, 14, 16 and 18.

who commit an offence in their presence.[31] Private persons may arrest only when offences, such as a breach of the peace, being in possession of property reasonably suspected to have been stolen, are committed in their presence.[32]

The Constitution provides that 'human dignity shall be protected in all activities pertaining to criminal investigation and process'.[33] Further, the Criminal Procedure Act provides that a person arrested, whether with or without a warrant, must be informed of the reasons for the arrest, [34] and that no force should be used in arrest other than that which is necessary to effect it.[35] The Human Rights Committee also emphasises the need for, and relevance of, reasons for an arrest. An arrested person needs to be notified of the reasons for his arrest so that, if he thinks these reasons are invalid, he can seek his release. [36] In addition, the arrested person shall not be subject to restraint other than that which is necessary to prevent escape.[37] The use of restraint as an exceptional measure promotes respect for dignity in the arrest process.

It is clear that the Constitution and legislation generally enshrine the protection of the rights of accused persons and suspects on arrest and the right to be informed of the charges. What they do not do is to prescribe specific procedures for dealing with child suspects. Given that some of the offences children may be arrested for need not be resolved via criminal intervention, the use of handcuffs and force, which may be appropriate for adults, may be inappropriate for children.

As shown in Chapter 4, the Draft Constitution has more elaborate provisions on criminal justice. Some of the rights available before trial include the right to be informed of the reasons for arrest, the right to remain silent, the right to seek legal assistance or communicate with a relative and the right not to be forced to confess.[38]

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[31] Sections 17, 18 Criminal Procedure Act.

[32] Sections 13, 14 and 16 Criminal Procedure Act.

[33] Article 13 (6) (d).

[34] Section 23 Criminal Procedure Act. Police officers, private persons and magistrates have the power to arrest. See ss11, 14, 16, 17.

[35]Section 11 Criminal Procedure Act.

[36] CCRP General Comment No 35 CCPR/C/GC/35'Right to liberty and security of persons (Art 9)', 112th session 7–31 October 2014, 16 December 2014 para 25, replacing CCPR General Comment No 8 'Right to liberty and security of persons (Art 9)' Sixteenth session, 30 June 1982.

[37] Section 12 Criminal Procedure Act.

[38] Article 48 (1) (a) (i), 48 (1) (a) (ii), 48 (1) (b) and 48 (1) (c) respectively.

Chapters 4 and 5 also revealed that the Juvenile Court Rules were adopted in 2014. However, because these relate mainly to court procedures, matters relating to procedures before trial remain to be regulated by other legislation, including the Criminal Procedure Act discussed above.

The Rules contains safeguards in relation to arrest for non-appearance before the court.[39] For example, they provide that it is only by means of a court order that a child may be arrested when an application has been made by the police officer on oath, either to answer a charge against him/her or to remand him/her.[40] In addition, the warrant may be issued only where other attempts to bring the child to court, such as a summons, have failed.[41] Importantly, the arrest and the reasons for it shall be communicated to the parent or guardian and the social welfare officer. Although the requirement to notify the parents is provided for in the Criminal Procedure Act, the Rules expand the scope of those who need to be informed by including social welfare officers.

More safeguards are also provided by the Rules when a child is not taken to court within 24 hours. In such a situation, the police officer and social welfare officer has an obligation to cooperate with the police so that a child is kept in an approved residential home or with a fit and proper person.[42] Implementation, however, remains the challenge, as some districts, as shown in Chapters 4 and 5, do not have social welfare officers.[43] Similarly, the study on the situation of children in conflict with the law found that there are shortages of social welfare officers in retention homes.[44] In some facilities, although social welfare officers were available, they were not adequately trained in child justice.[45]

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[39] Rule 22.

[40] Rules 22 (1) (a) (b) and 23.

[41] Rule 23 (2).

[42] Rule 23 (5).

[43] See also Ministry of Constitutional and Legal Affairs *Child Justice: A Five Year Strategy for Progressive Reform 2013–2017* Dar es Salaam (2012) 38.

[44] Ministry of Constitutional and Legal Affairs and UNICEF *Analysis of the Situation of Children in Conflict with the Law in Tanzania* (2012)18.

[45] Ibid.

7.3.2 Communicating information on arrest to parents

Chapter 3 established that international law requires that information on child arrests be communicated to parents or guardians. This requirement is also provided for in the Criminal Procedure Act.[46] The Act requires that the parent or guardian should be informed immediately of the arrest and the offence for which the child is arrested.[47] This requirement serves to ensure that parents are present during interrogation, arrange for legal representation or facilitate the child's release on bail.

The Act also provides that where a child is arrested following an arrest warrant issued by the court,[48] the person arresting the child must immediately notify the parents, guardian or a social welfare officer in the respective area of the arrest and the reason for the arrest.[49] Rule 23 provides

> Where a child is arrested under a warrant of arrest, the person arresting the child shall immediately inform and notify the parent, guardian, carer and the head of the social welfare department of the district where the child is arrested, of-
>
> (a) the arrest of the child
> (b) the reasons for the arrest;and
> (c) the child's whereabout.[50]

The Rules also provide thatwhen the matter is brought to court, the child, parents and, where a child is represented, an advocate must be served with documents relating to the charge sheet, facts and particulars of the offence in sufficient time to prepare his or her defence.[51] Where a child understands neither Kiswahili nor English, the documents must be translated into a language the child understands.[52] Thus, the rights of both children and parents to be informed of the charges are adequately provided for.

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[46] Section 56 (1).

[47] Ibid.

[48] The court may issue an arrest warrant where a child is required to answer a charge or complaint against him, where there is an application to remand him or where a child fails to appear in response to a summons. See rules 22, 23 Juvenile Court Rules.

[49]Rule 23 (3) Juvenile Court Rules.

[50] Rule 23 (3) (a) – (c) Juvenile Court Rules.

[51]Rule 24 (2) Juvenile Court Rules.

[52]Rule 24 (3) Juvenile Court Rules.

Despite these provisions information on the arrest of children is often not communicated to parents.[53] For instance, of the 179 children interviewed by the Human Rights Commission and Good Governance in 2011,[54] 42 per cent were not given an opportunity to contact their relatives.[55] Only 45 per cent of the 179 said that they were given such an opportunity[56] and, none of the 56 children who participated in a focus group at the Ilambo (Mbeya) approved school said that a parent participated in their interrogation at the police station.[57] The findings from the Assessment of Access to Justice for Under-18s shows that only 13 (equivalent of eight per cent) of the 154 children interviewed said that an adult or parent was present after their arrest.[58] This shows that, in practice, police officers do not often communicate information on arrest to parents. The reasons that parents are not contacted include children not having their contact details or hiding their identities from police officers[59] and police officers demanding bribes in order to communicate with parents.[60]

7.3.3 Access to legal and other assistance before trial

Chapter 3 demonstrated that the CRC and the African Children's Charter recognise the right of the child to legal and other assistance. The Committee on the Rights of the Child has said that a child who is questioned requires legal assistance and must be able to request the presence of his parents or guardian.[61] Further, the Committee, in its Concluding Observations, encouraged Tanzania to 'ensure the provision of qualified and independent legal aid to children in conflict with the law at all stages of legal proceedings'.[62]

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[53] *Inspection Reportfor Children in Detention Facilities in Tanzania* op cit note 13 at x.

[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Ibid at 17.

[58] Ministry of Constitutional and Legal Affairs *Assessment of Access to Justice for Under-18s in Tanzania* (2012)24.

[59] Ibid at 25.

[60] *Inspection Reportfor Children in Detention Facilities in Tanzania* op cit note 13 at 16.

[61] CRC General Comment No 10 (2007) op cit note 12 para 58.

[62] CRC 'Consideration of reports submitted by the sate parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania,' CRC/C/TZA/CO/3-5 Sixty-eighth session 3 March 2015 para 73 (a).

Legal representation is provided for in the Child Act and the Juvenile Court Rules. The Child Act provides that a child has a right to legal representation in court proceedings.[63] The Juvenile Court Rules provide that 'a child who is a party to proceedings in a criminal or civil case shall have a right to legal and other appropriate assistance'.[64] Thus, legal representation under both the Act and the Rules is meant for court proceedings. Hence, the law does not adequately address legal representation before trial, for instance, at the police station.

However, some provisions of the Criminal Procedure Act may be broadly interpreted to infer representation before trial. The Criminal Procedure Act provides that police officers should facilitate communication between the arrested person and a lawyer, relative or friend upon request by the person arrested.[65] This provision may be used to inform the parents or relatives of the arrested children, who may arrange for a lawyer before trial, for example, during police interrogations.

In respect of a child, communication with a parent or guardian, as argued in 7.3.2 above, may be more appropriate than communicating with a lawyer, as a child may not have details of, and knowledge about, lawyers. Such communication, which may be regarded as 'other assistance', is provided for by the Act, as shown above.[66] Communication with parents is relevant in two main ways. The first is to provide other assistance. Although the Act does not categorically provide for the presence of parents during questioning, the need to notify and inform them of the offence implies that they should also be present during questioning. The second is that parents may be able to contact and retain the services of a lawyer for the child.

In *Ramadhani Salum v Republic*,[67] the Court of Appeal held that a police officer taking a cautioned statement is not allowed to bring someone else in during the process. The court further held that such a police officer is required to inform a person under restraint only so that he may communicate with a lawyer or relative.

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[63] Section 99 (1) (f).

[64] Rule 14 (1) (a).

[65] Section 54 (1).

[66] See s 56 (1) of the Criminal Procedure Act.

[67] Criminal Appeal No 5 of 2004 (unreported) Mwanza (CA) 5. Note, however, that there was uncertainty concerning the age of the accused in this case. However, in the whole process the accused was treated seemingly as an adult.

This decision is detrimental to child rights as it means that children may be easily induced into making confessions when they are subjected to one-on-one interrogations by police officers. It is also difficult to ensure that the rights to be presumed innocent and not to incriminate oneself are respected.

The fact that the vast majority of children do not have legal representation in various stages of criminal justice is shown in the findings of the study on the situation of children in conflict with the law, as discussed in Chapter 4.[68] As a response to this and other challenges identified in this study, a five-year strategy on child justice reform that seeks to improve access to legal assistance was drawn up.[69] This reiterates the fact that legal service is extremely limited, as only a few organisations provide legal assistance and children are unaware of the existence of such legal aid providers.[70] Its aim is to improve legal aid by involving Child Justice Forum members[71] in enacting legislation to facilitate it.

Currently, there are organisations that provide legal assistance. These include the Tanganyika Law Society.[72] The Society is able to provide legal aid through funds raised by members' annual subscriptions.[73] However, children hardly access legal services because either they are not aware of the existence of legal aid by the Society or because of the complexity of the application procedures involved.[74] Applicants are required to submit a written application and appear for an oral interview in one of the Society's eight chapters established in the country.[75] Apart from the interview requirement, the need for their appearance at the interview also suggests that there

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[68] *Assessment of Access to Justice for Under-18s in Tanzania* op cit note 58 at 56; *The Country Third to Fifth Periodic Reports on the Implementation of the Convention on the Rights of the Child* op cit note 16 para 303.

[69] *Child Justice: A Five Year Strategy for Progressive Reform 2013–2017* op cit note 43 objective no 7 63–8.

[70] Ibid at 93–4.

[71] As shown in Chapter 4, the Child Justice Forum is comprised of various members from ministries, government departments and civil societies.

[72] Established under the Tanganyika Law Society Act (Cap 307 R.E 2002).

[73] *Assessment of Access to Justicefor Under-18s In Tanzania* op cit note 58 at 58.

[74] Ibid.

[75] Ibid. These chapters are: Tanga, Arusha, Mbeya, Mwanza, Tabora, Dodoma, Kilimanjaro and Dar es Salaam.

may be travel costs involved from one region to another, as the chapters of the Tanganyika Law Society have not been established in every region or district.

Legal aid may also be obtained from the Tanzania Women Lawyers (TAWLA), the Faculty of Law of the University of Dar es Salaam, the Open University of Tanzania, the Legal and Human Rights Centre and the National Organisation for Legal Assistance.[76] This last has a wide geographical coverage, as it has offices in various regions across the country.[77] Statistics show that it is mostly civil cases that are supported by these organisations. Criminal cases, including those of children, are to a large extent excluded, as is shown in a table at 7.4.3 below.[78] The study on access to justice has indicated that Tanzania's approach is unusual because in many countries legal aid mainly supports criminal cases.[79]

7.3.4 Pre-trial detention as a measure of last resort

Chapter 3 established that the last resort principle applies to all forms of detention, including pre-trial detention. Release on bail after arrest may be relevant to upholding this principle. Such release may be affected either at a police station or when a child is brought to court.[80] Police officers have the power to release a suspect on bail for an offence not punishable by death and not serious in nature.[81] The Child Act provides that a child arrested with or without warrant shall be released on bail unless the offence charged is homicide or is punishable with imprisonment for a term exceeding seven years. Release on bail also applies where it is necessary to remove a child from associating with undesirable persons, or if the release would defeat the interests of justice. A person not released on bail is entitled to be taken to court within 24

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[76] *Assessment of Access to Justic for Under-18s In Tanzania* op cit note 58 at 60–62.

[77] Ibid. These are located in Dar es Salaam, Dodoma, Iringa, Kigoma, Mtwara, Mwanza, Mbeya. Tabora, Songea and Kasulu. Information obtained from the Dodoma region office, which has been rented by a different institution, is that the offices in Dodoma and other regions have been closed except for the one in Dar es Salaam. Efforts to reach the Dar es Salaam office through the email address and telephone number provided on their website were unsuccessful.

[78] Ibid at 10 (note that the numbering of the access to justice (2012) document is not consecutive, after p 62, numbers begins at 1).

[79] Ibid.

[80] Section 101 of the Law of the Child Act.

[81] Section 32 (1) Criminal Procedure Act.

hours.[82] However, the Human Rights Commission Report indicates that police detention of children is often longer than 24 hours and may be as much as four days or more.[83]

With regard to court bail, the Juvenile Court Rules provide that, except for non-bailable offences, the court may grant bail to a child.[84] The court must take into account factors such as whether the child is unlikely to receive a custodial sentence if convicted.[85] In addition, it must take into account the principle that deprivation of liberty pending trial should be used as a measure of last resort and for the shortest period possible.[86] A magistrate is also enjoined to consider whether the child and the public can be adequately safeguarded by alternative measures such, as placing a child under the supervision of a parent, relative or institution before remand.[87] If remand is necessary, a child must be separated from adults.[88] As an additional measure to guard against abuse of detention orders, the Rules provide that such orders must be reviewed every 14 days.[89]

On reflection, the laws seem to impose restrictive conditions for bail by the police. With police bail, a child may not be released where the offence is punishable by a term exceeding seven years.[90] Such offences would include those for which adults may be admitted to bail.[91] For instance, adults charged with offences such as theft[92] or concealing wills[93] (punishable with seven to 15 years in the former and 10 years in the latter) are not subject to such restrictions. They may be released subject only to conditions that are intended to procure their attendance in court and to restrictions where the offence charged is not 'non-bailable', such as murder, treason,

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[82] Ibid.

[83] *Inspection Report for Children in Detention Facilities in Tanzania* op cit note 13 at 12.

[84] Rule 28 Juvenile Court Rules.

[85] Rule 29 (1) (a).

[86] Rule 29 (1) (b).

[87] Rule 29 (3).

[88] Rule 29 (8) (9).

[89] Rule 31.

[90] Section 101 (a) of the Law of the Child Act.

[91] For instance stealing from a person (s 269); stealing by agent (s 273); and receiving stolen property (s 311) are all punishable by ten years imprisonment and an accused may be admitted to bail.

[92] Sections 265, 266 , 268 Penal Code.

[93] Section 277 of the Penal Code.

armed robbery, defilement or illicit trafficking in drugs.[94] Further, a child may not be released if it is considered that it is necessary in his or her interest to remove him or her from association with undesirable persons.[95] Although the term 'undesirable' is not defined, it would include people who might contribute to his criminal behaviour. However, where he is to be so protected, the proper order should be release on bail subject to being under the care of a person who 'is not undesirable', as opposed to detention.

In *Republic v Njama Zuberi*,[96] the High Court held that a child was likely to be contaminated by undesirable persons when in detention and it therefore ordered release on bail pending trial. Further, a child may not be released if the police officer is of the opinion that such release would defeat the interests of justice. The 'interests of justice' need to be defined as in the case of 'pulic interest.' The 'public interest' clause was considered in *Director of Public Prosecutions v Daudi Pete*.[97] The Court of Appeal held that for 'the public interest' clause to be saved by the derogation clause in Article 30 (1) and (2) of the Constitution, it must meet two conditions. First, the relevant clause must adequately safeguard against arbitrary interference with human rights by public authorities. Secondly, it must be consistent with the principle of proportionality or reasonableness in that the restrictions should not be more than is necessary to achieve a legitimate objective.[98] The same view on proportionality was expressed by the High Court in *Peter Ng'omango v Gerson Mwangwa and the Attorney General*[99] that 'the means employed by the Government to implement matters on public interest should be no more than is reasonably necessary to achieve the legitimate aim'.[100] The High Court held that the Government Proceedings Act that required ministerial consent before suing the government was not saved by the derogation clause in art 30 of the Constitution since it was not in the public interest and was too broad, as it could deny access to justice even to those with genuine and

[94] Section 148 of the Criminal Procedure Act.

[95] Section 101 (b) of the Law of the Child Act.

[96] [1985] TLR 241 (HC) 244.

[97] [1993] TLR 22 (CA).

[98] *Daudi Pete's* case ibid at 42–43.

[99] [1993] TLR 77 (HC).

[100] Ibid 86.

clear grievances.[101] Thus, if bail is to be denied on the basis of interest of justice under the Child Act, the relevant provisions must meet the conditions in *Daudi Pete.*[102] However, the interest of justice requirement and other conditions for bail may limit the release of a child by delaying it or by limiting the use of the last resort principle. This is mainly because obtaining a release may require an administrative complaint against the police force, a complaint to the Commission for Human Rights and Good Governance or an application for judicial review.

With regard to court bail, there are bailable and non-bailable offences.[103] In the case of non-bailable offences, a child cannot be released.[104] A 'non-bailable offence' is not defined by the Rules, the Child Act or the Criminal Procedure Act. Such offences may possibly include those for which the Criminal Procedure Act provides that the court shall not admit an accused to bail. These include murder, treason, defilement, armed robbery and illicit trafficking in drugs.[105] Categorising these offences as 'non-bailable' may be too broad and unconstitutional. The Court of Appeal considered an appeal from the High Court in *Daudi Pete.*[106] This had granted bail for an offence of robbery with violence and declared s 148(4)(5) unconstitutional. These provisions prohibited bail in certain circumstances. The Court of Appeal affirmed the decision and held that s 148(5)(e) was too broad since it denied bail even to persons who are not a danger to public safety in terms of Article 30(2)(b) of the Constitution.[107]

In considering whether to release a child on bail or not, a court must decide whether the accused is unlikely to receive a custodial sentence.[108] The offences for which a child may receive a custodial sentence include serious offences of violence,

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[101] Ibid. See also *Kukutia Ole Pumbuni v Attorney General and Another* [1993] TLR 159 (CA) 167 where the court held that the provision requiring ministerial fiat before suing the government was arbitrary as it did not set any safeguards against abuse of power by the Minister who had discretion to give consent. For instance, it did not provide a time limit for the Minister to decide.

[102] *Daudi Pete's* case supra note 97.

[103] Rule 28 (1).

[104] This may be possible by the way of judicial review.

[105] Section 148 (5) (a). See also *Republic v Dodoli Kapufi and Another* Criminal Revision Nos 1 and 2 of 2008 (unreported) Mbeya (HC).

[106] *Daudi Pete's* case supra note 97.

[107] The Constitution of the United Republic of Tanzania.

[108] Rule 29 (1) (a).

where the child is a persistent offender or where the offence would be punishable by a custodial sentence if committed by an adult.[109] These conditions fail to mention explicitly child rights principles such as last resort, the need to protect the child, consideration of alternatives to criminal proceedings, the age and vulnerability of the child and the need to reintegrate the child. The regular use of pre-trial detention suggests that it is not being used as a measure of last resort, as has been shown in the report on children in detention conducted by the Commission for Human Rights and Good Governance,[110] and in the two studies commissioned by the Ministry of Constitutional and Legal Affairs in collaboration with UNICEF that lead to the adoption of a five-year strategy on child justice reform.[111] These studies, discussed in Chapters 4, 5 and 6, were undertaken by the Coram Children's Legal Centre and the National Organisation for Legal Assistance. They are Access to Justice [112] and Analysis of the Situation of Children in Conflict with the Law.[113] Their reports indicate that pre-trial detention is often long and is not used as a measure of last resort.[114] The strategic report seeks to address the problem by ensuring that diversion programmes are established. The provisions on bail conditions for children were to be amended by 2013.[115] Although some progress has been made to establish diversion programmes, as shown in Chapter 6, this was only in two districts, Temeke and Mbeya. Hence, long-time detentions, either because of a lack of diversion programmes or stiff bail conditions, continue to be a problem. For instance, in *Republic v Ally Yahaya Masudi*,[116] the accused, when 15 years old, committed a murder contrary to s 196 of the Penal Code in 2004. The court judgment revealed that he remained in remand custody (pre-trial detention) for nine years until sentenced in 2013, then aged 25 years old.[117] The Committee on the Rights of the Child Concluding Observations for Tanzania in 2015 was concerned about long-term pre-

[109] Rule 54 Juvenile Court Rules.

[110] *Inspection Reportfor Children in Detention Facilities in Tanzania* op cit note 13.

[111] *Child Justice*: *A Five Year Strategy for Progressive Reform* op cit note 43.

[112] *Analysis of the Situation of Children in Conflict with the Law in Tanzania* (2012)op cit note 44.

[113] *Assessment of Access to Justice for Under-18s in Tanzania* op cit note 58.

[114] See *Analysis of the Situation of Children in Conflict with the Lawin Tanzania* (2012) op cit note 44 at 9; ibid at 42–3.

[115] *Child Justice: A Five Year Strategy for Progressive Reform*op cit note 43 at 53.

[116] Criminal Session case No 45 of 2010 (HC) Dar es Salaam (unreported) 14.

[117] Ibid.

trial detention, in most cases in adult prisons.[118] It recommended that Tanzania should expedite investigation and trial processes so as to reduce the number of children in pre-trial detention and shorten their time in detention. [119]

7.3.5 Expeditious process

It was shown in Chapter 3 that release from pre-trial detention in general, and in juvenile cases in particular, must be facilitated expeditiously. As shown above, release on bail at a police station ensures immediate release after arrest consistent with the last resort principle.[120] Despite some restrictions on bail in the Child Act and the Juvenile Court Rules (discussed in 7.3.4), it is possible for a child to be released particularly in the case of minor offences, with which in practice most children are charged.[121] The Analysis of the Situation of Children in Conflict with the Law in Tanzania study, discussed earlier, presents some findings on the nature of offences committed by children.[122] The study found that a significant number of children are arrested and prosecuted for public disorder offences, such as loitering, disrupting passengers, truancy or the use of abusive language.[123] Although children committing theft outnumber those charged with disorderly conduct, the former are charged mainly with minor theft offences such as pick pocketing.[124] Serious property related offences such as house breaking and robbery are committed mainly together with adults.[125] The percentage of children offenders and the offences they were charged with over a period of 12 months, when data was collected from sample regions,[126] are as follows:

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[118] CRC 'Consideration of report submitted by state parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania' (2015) op cit note 62 para 72 (d).

[119] Ibid para 73 (d).

[120] Sections 101 of the Law of the Child Act and 64 (2) (c) Criminal Procedure Act.

[121] *Analysis of the Situation of Children in Conflict with the Law in Tanzania* (2012)op cit note 44 at 31.

[122] Ibid.

[123] Ibid at 62.

[124] Ibid at 31–2

[125] Ibid.

[126] These are: Arusha, Dar es Salam, Dodoma, Kilimanjaro (Moshi Urban and Hai), Lindi (Lindi Urban and Nachingwea Districts), Mbeya, Morogogo (Wami Youth Prison), Mtwara (Mtwara Urban and Masasi Districts), Mwanza and Tanga. See ibid 4.

Percentage of children	Offences arrested for
2%	Serious property offences
50%	Theft and other minor property offences
21%	Sexual offences
2%	Murder or manslaughter
2%	Other offences against persons
2%	Other
18 %	Disorderly conduct

Source: Ministry of Constitutional and Legal Affairs and UNICEF, Analysis of the Situation of Children in Conflict with the Law in Tanzania (2011), 31 Table E-5.

In order to accelerate the process, it is required that a child, if not released, must be taken to court within 24 hours[127] or be brought to court when an investigation has been completed[128] and be tried on the same day for offences other than homicide.[129]. Importantly, where a child is not tried on the same day, the law requires that a case before the Juvenile Court be completed no later than six months from the first day the child appeared in court.[130] Thus, anexpeditious process may be achieved in terms of release from detention in respect of certain offences or, with respect to other offences, by respecting the time frame within which a child is to be taken to court or tried.

In addition to the provisions of the Child Act and the Juvenile Court Rules on release on bail and the timeline to be taken to court, the government has adopted a Five Year Strategy on Juvenile Justice Reform 2013–2017 (discussed in Chapters 4, 5 and 6). This seeks to address the problem by ensuring that children's cases are handled expeditiously.[131] However, decisions on child matters are often subject to lengthy delays. For instance, in *Republic v Yahaya Masudi,* a case involving a child of 15 years charged with murder took nine years to be decided.[132] This is but one

[127] Sections 148 of the Criminal Procedure Act; s16 of the Primary Court Criminal Procedure Code; rule 23 (5) Juvenile Court Rules.

[128] Section 103 (1) Child Act.

[129] Section 103 (2) Child Act.

[130] Rule 34 Juvenile Court Rules.

[131] *Child Justice: A Five Year Strategy for Progressive Reform* op cit note 43 at 40.

[132] *Yahaya Masudi's* case supra note 116 at 14.

example, but long-term detention is the reason that the Committee on the Rights of the Child in its Concluding Observations to Tanzania has recently encouraged Tanzania to handle child matters expeditiously.[133]

7.4 Trial rights: The Juvenile Court

Chapter 3 established that international law recommends the establishment of laws, procedures and institutions specifically applicable to children who offend against the criminal law.[134] One of the institutions required is child justice courts, also called juvenile courts. International law recommends that such courts must be as 'child friendly' as possible.

The Child Act provides that 'there shall be established a court to be known as the Juvenile Court, for purposes of hearing and determining child matters relating to children'.[135] It further provides that the Chief Justice may designate any premises used by the primary court to be used as a juvenile court.[136] The Juvenile Court Rules provide that 'each juvenile court under the Act shall be identified by its specific name and location'.[137] To date only one juvenile court — Kisutu, Dar es Salaam— has been designated. This court, in fact, existed before the enactment of the Child Act. Mashamba has correctly observed that the establishment of a juvenile court by the Child Act remains only a legal provision, as there is only one existing juvenile court in Kisutu, Dar es Salaam. [138] The Kisutu Juvenile Court, district courts and primary courts exercise concurrent jurisdiction in child justice matters.[139]

It is argued that designating primary courts as juvenile courts does not serve the aims of a human rights-based approach to child justice. Not only are such courts unable to dedicate their attention exclusively to child justice cases, they are not suited

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[133] CRC 'Consideration of report submitted by state parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania' 2015 op cit note 62 para 73 (d).

[134] Article 40 (3).

[135] Section 97 (1).

[136] Section 97 (2).

[137] Rule 5.

[138] Mashamba op cit note 11 at 353.

[139] The district courts had jurisdiction in terms of s 3 of the Children and Young Persons (repealed); and primary courts had jurisdiction by virtue of the Children and Young Persons (Extension of Ordinance to Primary Courts) Order GN 640 of 1964) in terms of s 160 (2) (c) of the Child Act. The Kisutu Juvenile Court exercises jurisdiction concurrently with primary and district courts.

to children because they were designed for adults. It is also difficult for them to develop specialised personnel as magistrates are compelled to dispense justice in all other aspects of the law.

7.4.1 The presumption of innocence, non-retrospective application of penal laws and status offences

Chapter 3 demonstrated that the presumption of innocence is protected by the Bill of Rights.[140] The Criminal Procedure Act and the Child Act establish procedures, which, to varying degrees of success, attempt to fortify this presumption. These procedures include those related to arrest and bail, access to legal services and information on the charges discussed above.[141] In addition, as is the case in other common law-based jurisdictions, the burden of proof in Tanzania in a criminal case falls on the prosecution.[142] The prosecution must prove the accused's guilt beyond reasonable doubt.[143] In *Alhaji Shabani Mintanga Kondo v Republic*,[144] the High Court held that the presumption could not be taken away simply because the accused is arrested, charged and remanded. Thus, where arrest and detention is in accordance with the law,[145] including the Constitution, the presumption of innocence and other rights must not be violated.

The retrospective application of penal law is prohibited by the Constitution.[146] The Constitution provides that no person shall be punished for an act that at the time of its commission was not an offence under the law.[147] It also prohibits the imposition of heavier sentences or sentences other than those prescribed for the offence at the time when it was committed.[148] Thus, it prohibits retrospective penal offences as well as retrospective sentences. This is consistent with the ICCPR,[149] the CRC[150] and the

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[140] Article 13 (6) (b).

[141] Discussed in the following sections.

[142] Sections 110, 114 of the Evidence Act.

[143] *Selemani Makumba v Republic* [2006] TLR 379 (CA) 384.

[144] Criminal Application No 38 of 2008 (unreported) Dar es Salaam (HC) 11.

[145] See art 15 (2) which provides that arrest, detention or deprivation of liberty must be in accordance with the law.

[146] Article 13 (6) (c).

[147] Ibid.

[148] Ibid.

[149] Article 15.

African Children's Charter,[151] as demonstrated in Chapter 3. In *Selemani Makumba v Republic*, [152] the Court of Appeal held that although the High Court had power to increase sentence in terms of s 366(1)(a)(ii) and (b) of the Criminal Procedure Act, the final sentence imposed by the lower court in this particular case was inappropriate, as it had applied the Sexual Offences Special Provisions Act 1998 retrospectively.

This thesis has also shown that international law urges states to decriminalise status offences. [153] However, the Primary School (Compulsory Enrolment and Attendance) Rules[154] create the offence of 'failure to attend regularly at school'.[155] A child convicted of such an offence may be confined to an approved school.[156] Although an approved school order is the only order for truancy under the Primary School Rules, alternative orders, including conditional discharge under the Child Act, may be appropriate.[157] Provisions of the Penal Code[158] and other legislation[159] create offences against public order such as prostitution, wandering, receiving alms and begging,[160] vagrancy, loitering,[161] touting or disrupting passengers.[162] Some of these offences are grounds for a child being identified as in need of care and protection,[163] and hence being taken to court for such an order.[164] Since the court has jurisdiction

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[150] Article 40 (2) (a).

[151] Article 17 (2) (c) (i).

[152]*Selemani Makumba's* case supra note 144 at 385.

[153]It was shown in Chapter 3 (3.3.5.2.1) that these are offences in which children are held responsible but adults are not, for instance, truancy.

[154] GN 280 of 2002.

[155] Rule 5 of the Primary School Rules (2002).

[156]Rule 5 of the Primary School Rules (2002).

[157] Section 116 (1). Conditional discharge may be ordered upon conviction for any offence other than homicide.

[158] Sections 176–177 of the Penal Code. Such offences include collecting alms, having no means of subsistence or unable to give a good account of self, begging or encouraging children to do so.

[159] These include the Township (Removal of Undesirable Persons) Act Cap 104 of the Laws of Tanganyika.

[160] Sections 176,177 Penal Code.

[161] Section 177 Penal Code.

[162]*Analysis of the Situation for Children in Conflict with theLawin Tanzaia* (2012) op cit note 44 at 6.

[163]Section 16 the Law of the Child Act.

[164] Section 18 the Law of the Child Act.

over children in conflict with the law and those in need of care and protection,[165] it may be difficult to draw a line between the two.

Many poor children are charged with these offences.[166] This amounts to indirect discrimination, as it targets mainly poor children even though these offences are defined in seemingly neutral terms.

In *Mkombozi Centre for Street Children, East African Law Society and Legaland Human Rights Centre v Attorney General*,[167] the applicants filed an application tithe High Court challenging the constitutionality of the Removal of Undesirable Persons Act[168] and other legal provisions, which had been used as a legal basis by police officers to round up street children. The High Court rejected the application and held that

> The solution to the street children lies in trying to address the root causes and not in the laws which are there to afford a balance between the interests of these groups and the rest of the members of the public. In the circumstances we hold that it will not be done away because to do so will definitely remove the balancing mechanism between individual rights on the one hand as against those of the other members of the society….[169]

The appeal to the Court of Appeal[170] was recently dismissed on the grounds that it was time barred.[171] While the rules of procedure must be adhered to, the Constitution[172] and the jurisprudence of the Court of Appeal take the view that procedural technicalities should not be used to defeat the ends of justice.[173]

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[165]Section 98 the Law of the Child Act.

[166]*Analysis of the Situation of Children in Conflict with the Law in Tanzania* (2012*)* op cit note 44 at 32.

[167] Miscellaneous Civil Case No 24 of 2007 (unreported) Arusha (HC). See brief summary of the case in Legal and Human Rights Centre *Tanzania Human Rights Report* (2009) 87–9.

[168] Township (Removal of Undesirable Persons) Act (Cap 104 of the Laws of Tanganyika).

[169]*Tanzania Human Rights Report* (2009) op cit note 167 at 88.

[170]*Mkombozi Centre for Street Children, East African Law Society andLegal andHuman Rights Centre v Attorney General* Civil Appeal No 30 of 2014 (unreported) Dar es Salaam (CA).

[171] Ibid 6.

[172] Article 107 (2) (e).

[173] See for instance *China Hennan International Co-operation Group v Salvand A K Rwegasira* Civil Reference No 22 of 2005 (unreported) Mwanza (CA). However, while acknowledging that procedural technicalities should not be used to defeat substantial justice, what constitutes 'mere technicalities' may

In this case the Court of Appeal decision on the merits, regardless of the outcome, could have been important, not only in developing child rights jurisprudence but also in possibly providing guidance on the aspects of child delinquency and poverty examined in Chapter 5.

7.4.2 The right to be heard

The right to be heard signifies that a child is respected as an individual with autonomy and that his or her rights are protected like those of other persons. It is a rule of natural justice, a statutory and constitutional right that no one should be condemned unheard.[174] The right to be heard is enshrined in the Bill of Rights as the right to a fair hearing.[175] The Constitution requires that legislation should be enacted to ensure a fair hearing.[176] The Criminal Procedure Act is the main procedural legislation that has been enacted to ensure a fair hearing in criminal justice. The key elements of this right include the right to be tried by an impartial and competent tribunal,[177] In *Kimbute Otiniel v the Republic*,[178] the appellant was convicted and sentenced to life imprisonment by the Resident Magistrate's Court in Arusha for the offence of rape contrary to section 130 (2) (e) and 131 of the Penal Code. He appealed to the High Court on the grounds, among others, that the court erred in basing the conviction on the evidence of the victim, a child of tender years, as an examination to ascertain the child's competence to testify (*voire dire* examination) was not properly conducted. His appeal to the High Court was unsuccessful. He appealed further to the Court of Appeal. The latter resolved that there were conflicting decisions regarding a *voire dire* examination and this was an issue that needed to be resolved by a full bench before the appeal was decided on the merits. The matter then went before the full bench for such consideration. The full bench of the Court of Appeal held that the right to be heard is pivotal to the protection of the best interests of the child in the administration of justice. It further held that

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be subjective. In *China Hennan* (supra) the Court of Appeal held that wrong citation of the legal provisions was fatal and could not be protected by article 107 A (2) (e) of the Constitution.

[174] *Dishon John Mtaita v Director of Public Prosecutions* Criminal Appeal No 32 of 2004 (Arusha) Unreported (CA) 9.

[175] Article 13 (6) (a).

[176] Article 13 (6) (a) of the Constitution.

[177] Article 13 (3) of the Constitution.

[178] Criminal Appeal No 300 of 2011 (unreported) Dar es Salaam (CA) 74.

> [t]he right of the child to freely express an opinion and to give an account in court is recognized therein (sections 11, 99(1)). The best interest principle set out in section 4(2) of the Law of the Child Act requires the paramount interests of the child to be the primary consideration in all actions concerning a child by courts or other administrative bodies. The child's right to be heard in judicial proceedings and in the particular circumstances of this case, one involving a child victim of sexual violence and the right of the accused to a fair trial are all entrenched in our law. To summarily reject the child's evidence at the threshold level, on a slip for which he or she bears no responsibility under section 127(2), would deny the court a source of crucial evidence, and at times the only spring, in cases in which the child victim is perhaps in a position to offer a coherent, intelligible and reliable account of victimization. It would work serious injustice to a child who has absolutely no control over the matter.[179]

The first step in fair hearing is taken when the content of the allegation is made available in a document or oral explanation or both. The Child Act requires that particulars of the charge must be explained to a child in simple language.[180] The language of the juvenile court is either Kiswahili or English.[181] Where a child does not understand either of them an interpreter must be provided.[182]

The Juvenile Court Rules provide that a child who does not understand the language of the court shall be given an interpreter.[183] The requirement for an interpreter extends to sign language for a child who may not understand the language because of a disability such as deafness or speech impairment.[184] Interpretation is also required in the case of documents, including the charge sheet. [185] The emphasis here is on understanding, either directly or through an interpreter.

The need to understand is emphasised by the Rules as part of a fair trial. A fair trial requires that an accused understands, and is able to follow the course of, the nature of the proceedings.[186] In *Kigundu Francis and Jackson Mussa v Republic*,[187] the Court of Appeal held that although the accused were provided with an interpreter,

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[179] Ibid.

[180] Section 105.

[181] Rule 9.

[182] Section 26 Primary Court Criminal Procedure Code; Rules 9 and 10 Juvenile Court Rules.

[183] Rule 10 (1).

[184] Ibid.

[185] Rule 24 (3).

[186] *Mussa Mwaikunda v Republic* [2006] TLR 387 (CA).

[187] Criminal Appeal No 314 of 2010 (Unreported) Mwanza (CA) 7.

the interpreter's failure to take a judicial oath in terms of s 4 (b) of the Oaths (Judicial Proceedings) and Statutory Declarations Act[188] violated their right to a fair trial. This decision is perhaps understandable, because persons who require the services of an interpreter cannot tell whether the interpretation is accurate or not, hence the need to ensure that interpreters are held accountable. The Court of Appeal reiterated that fair trial requires that accused person sunderstand the nature of the charges and the proceedings, the substantial effect of any evidence adduced by the prosecution, plead to the charges and are able to defend themselves.[189]

After a child has understood the nature of the charge, he or she should be heard either directly or through a representative.[190] The Child Act provides that a child 'shall have a right to give an account and express an opinion', to challenge the evidence of prosecution witnesses and to defend himself or herself.[191] In addition, the Juvenile Court Rules provide that before commencement of a trial the court shall provide a child, his parents, guardian or advocate with a copy of the charge sheet to enable them prepare a defence.[192] The Act uses the general term 'express an opinion' as opposed to the specific term, 'to be heard in judicial and administrative proceedings', used in the CRC.[193] Nevertheless, the right to examine witnesses, to defend oneself,[194] to have an opportunity to prepare a defence and the general provision on the right to express an opinion,[195] all lead to the conclusion that the right be heard is included in the Child Act.

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[188] (Cap 34 R.E 2002).

[189] *Kigundu Francis's* case *supra* note 187 at 5. The Court made reference to the decision in *Mussa Mwaikunda's* case op cit note 186 at393.

[190] The right to be heard through a representative is discussed in 7.4.3 below.

[191] Sections 99 (1) (h), 108,109,110.

[192] Rule 24 (2).

[193] The right to give an opinion in s 99 (h) of the Child Act is equivalent to and part of the freedom of expression articulated in the ICCPR. The ICCPR, like the CRC, regards both freedom of expression and the right to be heard as part of a fair trial. The CRC provides for both of these rights in art 12 (1) and (2) respectively while the ICCPR provides them in arts 19 and 14 respectively.

[194] Sections 108–111 of the Child Act.

[195] Section 11.

7.4.2.1 The right to be heard and the right to remain silent

The right to be heard includes the right to remain silent. The latter is intended to protect an accused from self-incrimination. The relevance of the right to remain silent was explained by the South African Constitutional Court in *Thebus and Another v the State*:[196] 'The right to remain silent before and during trial and to be presumed innocent are important and interrelated rights aimed ultimately at protecting the fundamental freedoms and dignity of an accused person.' This right is even more relevant to a child who is vulnerable due to age, particularly when he/ she is without legal or other assistance, either at the police station or in a court.

The right to remain silent is provided for in the Criminal Procedure Act, both for pre-trial investigations and during trial.[197] At the investigation stage, a police officer is required to caution the suspect that he/she is not obliged to answer any questions connected to the investigation.[198] During trial and after the closure of the prosecution's case, the court is enjoined to explain to the accused that they have the right to give evidence, including calling witnesses in their defence.[199] The accused has a right to decide not to call witnesses and to remain silent.[200] However, if an accused decides to remain silent after having been informed about such rights, the court is entitled to draw an adverse inference.[201]

As can be seen from the foregoing discussion, an adverse inference from the silence of the accused only applies during trial and not before it.[202] The legal implications of this right differ before trial and during trial. In the case of the latter, an adverse inference may be drawn, mainly because, on the face of it, the evidence adduced by the prosecution is sufficient for a conviction in the absence of a defence by the accused.[203]

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[196] (CCT 36/02) [2003] ZACC 12 para 54.

[197] Sections 53 (c) (i); 231 Criminal Procedure Act.

[198] Section 53 (a) (i) Criminal Procedure Act.

[199] Section 231 (1) Criminal Procedure Act.

[200] Section 231(1) (a) (b).

[201] Section 231 (3) Criminal Procedure Act.

[202] See sections 53 and 231 of the Criminal Procedure Act.

[203] The decision of the South African Constitutional Court in *Osman and Another v Attorney General Transvaal* (CCT 37/97) [1998] ZACC 14 para 22 may also offer the same explanation in the case of the Tanzanian Criminal Procedure Act ss 53 and 231.

An adverse inference may result in injustice in the case of a child. A child may fear to speak because of the intimidating court environment or for other reasons, not only because he or she has committed an offence or does not want to testify.[204] Moreover, the fact that in some traditions in African countries, including Tanzania, children are not allowed to speak in the presence of adults without permission may affect their readiness to speak, even where they have been allowed to speak.[205] Sloth-Nielsen correctly argues that, in an African context, the compatibility of children's rights and customary law poses an acute problem whenever law reform, harmonisation and domestication are considered.[206]

7.4.2.2 Procedures in the Juvenile Court and conviction on a plea of guilty

Conviction on a plea of guilty is a matter in which courts exercise caution. Criminal offences carry punitive sentences, including the death penalty,[207] life imprisonment[208] or a number of years in jail.[209] In the case of children, punishment may warrant imprisonment or detention at the President's pleasure.[210] The court thus must always be satisfied that the admission by the accused is not ambiguous.[211] In addition, a plea of guilty has legal consequences for only the legality of the sentence imposed is appealable, not the conviction.[212] Exceptionally, the court may admit an appeal where such plea of guilty was imperfect, ambiguous, the result of a mistake or

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[204] It is for this reason that the Committee on the Rights of the Child in General Comment No 12 has recommended that in order for the child to be heard the environment must be child friendly. See CRC General Comment No 12 'The rights of the child to be heard', CRC/C/GC/12, Fifty-first session 1 July 2009 para 60.

[205] Priscilla Yachat Ankut 'The African Charter on the Rights and Welfare of the Child: Linking principles with practice' (2006) (unpublished paper) 9.

[206] Julia Sloth-Nielsen 'Domestication of children's rights in national legal systems in an African context: Progress and prospects' in Julia Sloth-Nielsen (ed) *Children's Rights in Africa* (2008) 53–72, 55.

[207] Section 197 Penal Code.

[208] Sections 131 (1) and 198 Penal Code.

[209] Section 131 Penal Code. An accused may be sentenced to imprisonment for up to 30 years.

[210] See ss 26, 131 (2) Penal Code.

[211] Section 228 (2).

[212] Section 360.

misapprehension, the charge did not disclose any offence or 'that upon the admitted facts he/she could not in law have been convicted of the offence charged'.[213]

The Child Act provides that, 'where the statement made by the child amounts to a plea of guilty the court may convict him'.[214] However, before entering a plea a child shall be given an opportunity to communicate with his/her representative.[215] This is to ensure that a child is advised of the implications of a plea of guilty. Further, the court has a duty to ascertain that a plea is unequivocal.[216] Here the procedures outlined by the East African Court of Appeal in *Adan v Republic*[217] are relevant:

> When a person is charged, the charge and the particulars of the charge should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused inopportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea of not guilty and proceed to hold a trial. If the accused does not deny the alleged facts in any material respects, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence.

The court applied this procedure in *Ngasa Madina v Republic*,[218] where the accused pleaded guilty to rape and admitted the fact that he was found naked on a bed with the victim. The court observed that these facts did not constitute the offence of rape, the essential ingredient of which is sexual intercourse. In *Kalos Punda v Republic*,[219] the Court of Appeal upheld the conviction and sentence of the court *a quo* where the accused had pleaded 'it is true' to both the charge and the facts of the case in a prosecution for attempted rape contrary to s 132 (1) of the Penal Code. The Court held that the appellant was convicted on an unequivocal plea of guilty.

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[213] See *Laurence Mpinga v Republic* [1983] 166 (HC) 168. See also *Khalid Athuman v Republic* [2006] TLR 79 (CA) 80.

[214] Section 107.

[215] Rule 32 (2).

[216] Rule 32 (3) Juvenile Court Rules.

[217] (1973) EACA 445 at 446 quoted in *Khalid Athuman's case* supra note 213 at 83.

[218] Criminal Appeal No 151 of 2005 Mwanza (unreported) (CA) 5–8.

[219] Criminal Appeal No 153 of 2005 Mtwara (unreported) CA.

Likewise, the Court of Appeal in *Said Athumani Mande v Republic*[220] considered that the words 'it is true' when the charge was read to the accused and 'the facts are quite correct', when the facts were explained, amounted to an unequivocal plea of guilty to the offence of armed robbery contrary tos 286 of the Penal Code.

As indicated above, the procedure elucidated in *Adan v Republic*[221] seeks to ensure that a plea entered by an accused is unequivocal.[222]

The ability of a child to understand the nature of the proceedings and their consequences is key to a fair trial.[223] In *S v M*,[224] the Court warned of the danger of convicting an innocent person, if great care is not taken in the case of a child:

> Accused persons sometimes plead guilty to charges, experience shows, without understanding fully what these (sic) encompass. The danger of doing so is obvious in a society like ours, which sees many who are illiterate and unsophisticated coming before the court with no legal assistance. The danger is greater still it goes without saying, when such a one is a young child with a limited grasp of the proceedings.[225]

Such care should be particularly exercised when the accused is a child and is unrepresented.

7.4.3 Legal representation during trial

Chapter 3 established that the right to be heard includes the right to be heard through a legal representative. The right to legal representation is both a constitutional and a statutory right in Tanzania.[226] Although it is not expressly protected as a separate right, the High Court in *Haruna Said v Republic* [227] held that 'the right to a fair hearing under article 13(b)(a) of the Constitutional carries with it the right to legal representation'.[228] Further, the High Court stated that 'the quality of justice surely improves where there is legal representation'. The Court continued: 'It is not every man who has the ability to defend himself on his own. He cannot bring out the points

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[220] Criminal Appeal No 59 of 2012 Dodoma (unreported) (CA) 2-3.

[221] *Adan's* case supra note 217.

[222] Rule 32 (3) Juvenile Court Rules.

[223] *Mussa Mwaikunda's* case op cit note 186 elaborates on the conditions for a fair trial.

[224] 1982 (1) SA 240 (N). This judgement was referred to in *Mshengu v The State* (446/08) [2009] ZASCA 65 para 10.

[225] *Mshengu's* case ibid.

[226] Sections 310 of the Criminal Procedure Act and 97 of the Child Act.

[227] [1991] TLR 124 (HC).

[228] Ibid at 126.

in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence.'[229] As shown in Chapter 3, international law has interpreted the right to representation more broadly to mean that such representation or assistance can be provided by parents, relatives and social workers.[230] This interpretation is useful, as children need protection, counselling and guidance, not just legal representation or advice.

The Child Act provides thata child has a right to be represented by his or her next of kin or an advocate.[231] Although the next of kin may not necessarily be a legal representative, he or she falls within the category of those who may assist a child other than in a legal capacity. These include parents, guardians and social welfare officers who may assist in examination of witnesses.[232] Furthermore, the Juvenile Court Rules provide that a child shall have a right to 'legal and other appropriate assistance'. [233] Appropriate assistance may be given by parents, relatives or guardians.[234] Where a child cannot afford to pay for legal representation, and where legal assistance is not available or where parents may not assist a child, the presiding magistrate shall appoint a guardian ad litem or ask a child to suggest one.[235]

For the most part, these provisions domesticate the requirements of international law. However, a number of minor points of clarification must be made. First, the assistance by parents, guardians and social welfare officers as provided in the Rules seems to be applicable at the time of trial. In addition, the Child Act does not specify who it is that covers the costs of such representation. The Committee on the Rights of the Child has recommended that legal assistance should be free of charge.[236] In addition, the International Covenant on Civil and Political Rights also provides that everyone charged with an offence shall have a right to free legal representation if he does not have sufficient means to pay for it.[237]

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[230] Ibid.

[230] CRC General Comment No 12 (2009) op cit note 204 para 35.

[231] Section 99 (1) (f).

[232] Section 99 (10 (e); 108 (2).

[233] Rule 14.

[234] Rule 15.

[235] Rules 14 (1);15 (1) (2) Juvenile Court Rules.

[236] CRC General Comment No 10 (2007) op cit note 12 para 49.

[237] Article 14 (3) (d) ICCPR.

Somehow, the question of who bears the costs for legal representation has been resolved in part by the Juvenile Court Rules. These state that legal representation 'shall be provided to a child free of charge wherever practicable'.[238] It is not clear when or under what circumstances this may be practicable. Perhaps guidance may be sought from the Legal Aid (Criminal Proceedings) Act.[239] Under this Act, legal assistance is subject to at least two conditions. First, the Chief Justice, the Principal Judge or a judge in charge of the relevant competent High Court should certify that the interests of justice require that a person be represented. Secondly, the person must have insufficient means to obtain legal aid.[240] The practice has been that accused persons charged with capital offences who have no financial means are represented.[241]

As is clear from the above, the provisions of the Legal Aid (Criminal Proceedings) Act prescribe as a requirement 'punishment' and the 'means' test, both of which must seemingly be satisfied. These conditions are difficult to satisfy in the case of children. The punishment threshold would not apply to children because capital punishment may not be imposed on them.[242] If the punishment test fails then the means test should not take place.

The Juvenile Court Rules provide that the court shall ensure that a child is represented in all hearings.[243] In case a child is not represented, the court may adjourn the case for 14 days to allow a representative to be appointed.[244] Although the court makes reference to representation this is most likely intended to secure either legal representation or other appropriate assistance. This is line with Rule 15 that provides that

> Where a child cannot afford to pay for legal representation, and it is not practicable to provide free legal assistance to a child, and a parent or guardian is not able to provide effective representation for the child, the magistrate presiding at the hearing shall

[238] Rule 14 (2).

[239] (Cap 21 R.E 2002).

[240] Section 3.

[241] Mohamed Othman Chande, Chief Justice of Tanzania 'Keynote Address on the occasion of the Annual Conference of the Tanganyika Law Society' (2012)11.

[242] Section 26 (2) Penal Code as amended by Written Laws (Miscellaneous Amendment) Act 31 of 1997.

[243] Rule 27 (1).

[244] Rule 27 (2).

> ensure that a child who is charged with a criminal offence is provided with appropriate assistance in the form of a guardian ad litem.[245]

Some case law suggests that the courts are willing to relax the punishment requirement for purposes of granting legal aid. For example, in *Haruna Said,*[246] where the accused was charged with 59 counts of stealing by a person in public service contrary to ss 271 and 265 of the Penal Code, the High Court held that legal aid paid by the state was necessary in this case in the light of two factors. First, the length of sentence for the offence charged and, secondly, the presence of complicated legal issues such as alibi, hearsay evidence and a confession. The court held that in such situations the trial court is enjoined to inquire into only the accused's means to engage an advocate. The court underlined the point that legal aid should not be unreasonably refused.

This decision could be used to establish a more inclusive regime for the administration of legal aid in child justice. Children are unlikely to commit the offences for which legal aid is granted under the Legal Aid (Criminal Proceedings) Act. It could be argued that legal aid should be available to every child who satisfies the means test if there is a possibility that a custodial sentence could be imposed on the child.

Efforts are now being made to ensure that children are legally represented. For instance, as shown in 7.3.3, legal aid is provided in part by the National Organisation for Legal Assistance that does take some children's criminal cases. In addition, legal aid services are offered by non-governmental organisations, paralegals and the University of Dar es Salaam as well as the Open University of Tanzania, the Tanganyika Law Society, the Bar Association of mainland Tanzania, as shown in 7.3.3 above. However, as shown below, legal aid providers largely take civil cases. The study on Access to Justice findings shows that most of the legal aid providers do not take criminal cases because of their nature and the objective of their organisations when they were established, or because they have a limited number of advocates who may legally represent clients in court.[247] The cases that some of these organisation take is shown in the table below:

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[245] Rule 15 (1).

[246] See *Haruna Said's* case supra note 227 at 129–130.

[247] *Assesment ofAccess to Justice* op cit note 58 at 59–60. Legal requirements for practicing advocates are provided in sections 8, 34, and 35 of the Advocates Act (Cap R.E 2002).

Legal aid provider	Nature of cases
NOLA	Almost exclusively civil
Legal and Human Rights Centre	Civil, but may take criminal case of a child in conflict with the law if there is a clear abuse of process
Tanzania Women Lawyers Association	Civil cases
Kilimanjaro Women Information Exchange and Consultancy Organization (KWIECO)	Civil and criminal
Babati Legal Aid Centre	Civil, but may take the criminal cases for a child victim of crime
University of Dar es Salaam	Civil and only 'hardship' cases and strategic litigation.

Source: Ministry of Constitutional and Legal Affairs and UNICEF: Access to Justice for Under-18s in Tanzania 62–63.

The United Nations Children's Fund (UNICEF) –Tanzania is also supporting legal aid through the legal programme it introduced in 2013. The programme offered legal representation to all children appearing in Kisutu Juvenile Court, Dar es Salaam in 2013.[248] In addition, children in two prisons and in a detention home in Dar es Salaam received legal assistance, which resulted in the release of over 350 children from detention.[249] By 2014, a total number of 630 children had been released through legal aid support under the UNICEF legal assistance programme.[250] Although the programme is limited in terms of geographical coverage, as it has mainly offered legal assistance to children in Dar es Salaam, such programmes are useful to supplement legal aid provided by non-governmental organisations. Legal aid is still inadequate and, due to this, the Committee on the Rights of the Child has recently expressed its concern about the lack of adequate legal aid services for children in conflict with the law.[251]

[248] UNICEF *Annual Report for Tanzania* (2013) 6.

[249] Ibid.

[250] UNICEF *Annual Report for Tanzania* (2014) op cit note 18 at35.

[251] CRC 'Consideration of reports submitted by the sate parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania' (2015) op cit note 62 para 72 (a).

7.4.4 The right to privacy

The right to privacy is a hallmark of child justice as conceived by international law.[252] The CRC provides that a child has a right 'to have his or her privacy fully respected at all stages of proceedings'.[253]

The Child Act seeks to protect the right to privacy by providing that the juvenile court shall sit in a different building from that in which ordinary sessions are conducted, except where a child is jointly charged with an adult.[254] It also provides that proceedings should be held in camera.[255] The Act restricts the persons who may attend such proceedings to the parties to the case, namely, witnesses, advocates or persons directly involved,[256] social welfare officers,[257] parents or guardian,[258] or any other person by leave of the court.[259] The Juvenile Court Rules provide that proceedings relating to children shall be held in camera or in closed courtrooms.[260] The rules further restrict attendance to parties, advocates, parents or guardians and other people who may be allowed by the presiding magistrate. Importantly, the consent of the child shall be sought before other people are allowed to attend.[261] The opportunity of a child to approve attendance is important, so as to ensure that the attendance of some persons does not impinge on the child's rights in general and the right to be heard in particular. The identities and names of children shall be protected.[262] These protective measures are consistent with international standards.

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[252] See s 3.3.5.2.4 of Chapter 3.

[253] Article 40 (2) (b) (vii).

[254]Sections 98 (3), 100(1).

[255] Section 99 (1) (b); rule 11 Juvenile Court Rules.

[256] Section 99 (2) (e).

[257] Section 99 (d).

[258] Section 108 (2).

[259] Section 99 (2) (b); rule 11 Juvenile Court Rules.

[260] Rule 11.

[261] Rule 11 (4).

[262] Section 188 Criminal Procedure Act as amended by the Law of the Child Act s 194; rule 11 (5) Juvenile Court Rules.

7.5 Conclusion

An examination of the pre-trial and trial procedures in Tanzania has revealed that by and large they take into account human rights in general, but child specific procedures are yet to be fully and comprehensively developed. Some of the pre-trial and trial rights that are sufficiently incorporated into these procedures include the right to be informed of the reasons for arrest and the right of parents to be notified of the arrest of their child and of the offence with which he or she has been charged. The child's right to liberty and to a speedy trial is also guaranteed to some extent through the provisions relating to bail, being taken to court within 24 hours if not released on bail, being taken to court when investigations are completed, and the requirement that cases in juvenile courts must be disposed of within six months. The right to be heard, including the right to legal and other assistance, the presumption of innocence and the right to privacy are also recognised in varying degrees of detail.

Despite these notable achievements, this chapter has exposed some of the inadequacies in these procedures. These include problems arising from definition of 'child'. The minimum age of criminal responsibility is too low (at 10 years) and is inconsistent with the recommendations of the Committee on the Rights of the Child that has recommended at least 12 years. The law also still criminalises child conduct associated with the social status of certain children — the poor. The provisions governing the granting of bail exclude bail for certain offences and impose strict conditions for bail for other offences. Although legal representation is provided for in the Child Act, it applies only at the time of trial and not before it. The manner in which the right is protected does not impose an obligation on the state to provide such legal assistance at its expense, while the Law of the Child Act fails to provide guidelines on the circumstances in which legal aid should be deemed mandatory for children. As a result, one is compelled to fall back on the general scheme for legal aid under the Legal Aid (Criminal Proceedings) Act. However, this Act was never intended to apply to children, and its provisions have been shown to be unsuited to them.

Despite the fact that legal aid may be available from the Tanganyika Law Society, university legal clinics and non-governmental organisations such as the National Organisation for Legal Assistance and the Tanzania Women Lawyers Association, such aid is limited in two main ways. First, the legal aid provided by the legal aid schemes is mainly for civil rather than criminal cases. Secondly, there is no

legal requirement that children should be advised on legal aid schemes, either at police stations or in court.

The next chapter examines at the last major pillar of child justice, post-trial procedures.

CHAPTER 8: POST-TRIAL PROCEDURES

8.1 Introduction

The final aspect of child justice examined in this thesis is post-trial procedures. Some of the issues of critical importance from a child rights'perspectives regards these procedures include the principle of the deprivation of liberty as a last resort and for the shortest period of time; the human dignity of the child and its implications for the severity of punishment that may be meted out; the proportionality of punishment; and the need to reform the child and re-integrate him or her in his or her community.

To what extent does the Tanzanian child justice system domesticate these principles? This question will be answered by assessing and investigating the factors and principles that the courts in Tanzania consider when deciding on an appropriate punishment for child offenders. It will also investigate the forms of punishment that are available for children. The question is whether sufficient consideration is given to alternatives to custodial sentences. The chapter will then consider the post-sentencing procedures to determine whether the child's right to appeal is protected.

It must be noted that most provisions in the Law of the Child Act and the Juvenile Court Rules have not been tested by the courts.[1] An analysis of the provisions relating to sentencing therefore depends largely on an interpretation of the Child Act itself. Relevant decisions made in terms of contemporary case law, as well as those decided under the repealed Children and Young Persons Act of 1937, will be identified and analysed.

8.2 The post-trial procedures

In this thesis,'post-trial procedure' refers to procedures that apply after conviction, including those that govern or are applicable to sentencing and appeals. The Criminal Procedure Act provides that parties should be heard on sentence before a decision is

[1] In this context, 'court' refers to the High Court and the Court of Appeal of Tanzania that are courts of record. As shown in the main text, most of the provisions of the Child Act and the Juvenile Court Rules have not been tested by the courts. For instance, on 19 June 2012 Dr Clement Mashamba, a Director of the National Organisation for Legal Assistance (NOLA) in Tanzania, sent a copy of a judgment (*Elizabeth Michael Lulu v Republic* Miscellaneous Criminal Application No 46 of 2012 (unreported) Dar es Salaam (HC)) to a group, including the author of this thesis. This indicated that it was the first judgment of the High Court following the enactment of the Child Act in 2009. This is evidence that few cases reach the High Court and the Court of Appeal.

made.[2] The prosecution presents aggravating circumstances to the court and calls for a suitable sentence as prescribed by law. Factors that the courts may consider in aggravation include the criminal record of the accused,[3] the prevalence[4] and seriousness of the offence, the harm caused, and whether the accused has expressed remorse. The convict may also plead mitigating factors, such as age, the time spent on remand, remorse, being a first offender, and a record of good behaviour.[5] In cases concerning children, factors that may be considered in mitigation or aggravation of a sentence are presented to the court in the form of a social inquiry report.

8.2.1 Social inquiry report

A social inquiry report is an account presented to the court, normally by a social welfare officer, to inform it of a child's situation. It is intended to assist the court in sentencing by providing it with 'information, advice and assistance relating to personal, social and offending circumstances of the convicted person and the suitability of different sentence options'.[6] The Child Act provides that information relating to character, antecedents, home life, occupation and health must be obtained 'as may enable the court to deal with the case in the best interests of the child'.[7] The Juvenile Court Rules provide that a social inquiry report should be submitted before a sentence or order is passed.[8] Such report should include, among other things, child's background, family circumstances, information on whether the child attends school and recommendations on the appropriate sentence.[9]

Consideration of the report is mandatory before sentencing, except in the case of minor offences.[10] However, in most cases sentences are imposed on children in the

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[2] Section 236 Criminal Procedure Act (Cap 20 R.E 2002) (hereinafter the Criminal Procedure Act).

[3] Section 237 Criminal Procedure Act.

[4] *Hattan v Republic* (1969) HCD No 234 (HC) 211.

[5] See *Republic v William s/o Gabagumbi* (1967) HCD 82 (HC).

[6] Cyrus Tata et al 'Assisting and advising the sentencing decision process: The pursuit of 'quality' in pre-sentence reports' (2008) 45 *British Journal of Criminology* 835,836.

[7] Section 111.

[8] The Law of the Child (Juvenile Court Procedure) Rules GN No 252 of 2014 (hereinafter Juvenile Court Rules) rule 47 (1).

[9] Rule 47 (1) (a)–(g).

[10] Section 111of the Law of the Child Act.

absence of a social inquiry report.[11] The findings from the study on the Situation of Children in Conflict with the Law (reviewed in Chapter 1) have also shown that in many areas children are sentenced without a social inquiry report.[12] The severe shortage of social welfare officers is one of the reasons for this. Fewer than 50 per cent of Tanzania's districts employ social welfare officers, but even in these districts, their number is insufficient.[13] In some cases, a report is presented, but the presiding magistrates rarely have the benefit of social welfares' recommendations to inform their sentencing decisions.[14]

8.2.2 Guiding principles on sentencing

International law requires states to establish laws, procedures and institutions applicable to children in conflict with the law.[15] Such laws and procedures should include guiding principles on sentencing.[16] These include the wellbeing of the child, the proportionality of the sentence to the offence and the offender's age and individual circumstances. They further include reintegration, the intention of sentence imposed to be the one most likely to redress the offending behaviour and be as less restrictive as possible, and that detention should be a measure of last resort.

The Juvenile Court Rules provide that before reaching a decision on an appropriate sentence, the court should take into account the following principles: the proportionality; the need for rehabilitation and reintegration; the need to maintain family relationship; the importance of imposing less restrictive sentence; the need to take into account the factors that have contributed to the child offending; and special circumstances of a certain group such as those living in difficult circumstances.[17] In addition, the court is required to take into account the social inquiry report, any plea

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[11]Commission for Human Rights and Good Governance, *Inspection Report for Children in Detention Facilities in Tanzania* (2011) xiii.

[12] Ministry of Constitutional and Legal Affair and UNICEF *Analysis of the Situation of Children in Conflict with the Law in Tanzania (*2012) 104 (the name of the Ministry was changed in 2012 to the Ministry of Justice and Constitutional Affairs).

[13] Ibid at 52;105.

[14]Ibid at 104. See also *Inspection Report for Children in Detention Facilities in Tanzania* op cit note 11 at xiii.

[15] See Chapter 3, part 3.3.1.

[16] See Chapter 3, part 3.3.5.3.

[17] Rule 49 (1) (a)–(g).

of mitigation, culpability of the child and any harm caused; that placement in an approved school should be a matter of last resort; and consider whether non-custodial sentence would serve the best interests of the child and the interests of justice.[18]

In this thesis, the wellbeing of the child, the need for reintegration, the need to maintain family relationship, factors for offending, special circumstances including difficult living conditions, and the relevance of the sentence to the offender are discussed as part of the best interests principle, the age of the child and culpability are discussed as part of the age of the child, while the principle of proportionality and the last resort principle are evaluated separately.

8.2.2.1 The best interests of the child

As shown in Chapter 3, the best interests of the child is one of the core principles in the CRC and the African Children's Charter. The CRC provides that in all actions, whether undertaken by public or private institutions, legislative bodies, administrative authorities or courts of law, the best interests of the child shall be a primary consideration.[19] This is reiterated in the African Children's Charter that provides that 'in all actions undertaken by any person or authority, the best interests of the child shall be the primary consideration'.[20] Thus, this principle applies in all actions concerning children.

The best interests principle is one of the key principles in the Law of the Child Act.[21] The Juvenile Court Rules provide that, before passing a sentence, a court shall take into account whether a discharge or a non-custodial sentence would serve both the best interests of the child and the interests of justice.[22] It is clear that courts are enjoined to consider the child's best interests.

In considering the child's best interests, the court is also required to take into account the need to maintain and strengthen family relationships and the child's need to develop responsible, beneficial and socially acceptable ways, the need for reintegration, and the social circumstances that led to the offence, including poverty.[23]

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[18] Rule 49 (2) (a)–(e).

[19] Article 3 (1).

[20] Article 4 (1).

[21] Section 4 (2).

[22] Rule 49 (2) (e).

[23] Rule 49 (1) (c) (e) (f) and (g).

Hence, the application of the child's best interests principle in sentencing may not be excluded. As shown in Chapter 3, the best interests principle is wide in scope and applied in all actions concerning children. Its threefold application as a substantive right, a rule of interpretation and a procedural rule means that it also applies to sentencing.

In *Elizabeth Michael Lulu v Republic*,[24] the High Court considered and applied this principle in determining the age of the accused pending committal proceedings. It observed that when the age of the accused is not known, the High Court has three options. The first of these was to return the records to the trial court for it to exercise its powers; secondly, to order the applicant to file a fresh application to the High Court and, thirdly, to exercise its supervisory powers under s 44 of the Magistrates' Courts Act and determine the accused's age. However, in the likelihood that the accused was a child, the High Court is compelled to take the third option, as this was the one that was most likely to guarantee the best interests principle. As a result, the Court assumed jurisdiction to determine the age of the accused as a matter of urgency, so that it could decide whether the accused was entitled to be released on bail.

However, a different approach was taken by the High Court in *Republic v Judith Chomile.*[25] The accused was charged with manslaughter contrary to section 195 of the Penal Code. Although the facts of the case are not stated in the judgment but only that such facts were read, it was shown when sentencing that the accused when aged 15 had strangled the deceased, who was aged nine.[26] This act was perpetrated after the deceased provoked the accused by calling her a fool and saying that she was poor. The accused was convicted on her own plea of guilty. Although the social welfare officer recommended in a social inquiry report that the accused was a child and, because of her age, needed special care and supervision, the court sentenced her to eight years imprisonment.[27] In its judgment, the Court made no reference to the Child Act and those Rules under it that make particular mention of the sentencing guiding principles. This may mean that the child was tried and sentenced based on the Penal Code and the Criminal Procedure Act, both of which

[24] *Elizabeth Michael Lulu's* case supra note 1 at 9–13.

[25] Criminal Sessions case No 76 of 2015 (unreported) Morogoro (HC).

[26] Ibid at 6.

[27] Ibid at 10–11.

apply to adults. As the Juvenile Court Rules were adopted only recently, it remains to be seen how the best interests principle will feature in sentencing decisions. On the face of it, the Rules manifest an intention that they should play a central role.

8.2.2.2 The last resort principle and alternatives to imprisonment

Consistent with the last resort principle in sentencing, the Law of the Child Act prohibits the imprisonment of children in regular prisons.[28] This does not necessarily mean that children may not be deprived of their liberty, for there are circumstances in which this may happen. The Juvenile Court Rules suggest that children may be subjected to an approved school order, although such orders should be exceptional measures as a last resort and of the shortest appropriate duration.[29] Before such orders are made, the court is enjoined to consider 'whether a discharge or a non-custodial sentence would be in the best interests of the child and serve the interests of justice'.[30] In principle, then, the Juvenile Court Rules make a notable attempt to domesticate these fundamental principles of child justice that should ensure that children convicted of criminal offences are treated humanely and in a way that guarantees and promotes their rights.

8.2.2.3 The age of the child

As this thesis has shown, international law requires that children in conflict with the law should be treated in a manner that takes their age into account.[31] Age as a factor in sentencing is recognised in Tanzania by both statutory provisions[32] and court decisions.[33] In *Yassin Maulid Kipanta*,[34] the three accused were convicted of being in possession of instruments that could be used in the commission of a felony contrary to s 298 (c) of the Penal Code. Both were sentenced to two years imprisonment. The court considered the age of the three children and held that they acted foolishly rather

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[28] Section 119.

[29] Rule 49 (2) (d).

[30] Rule 49 (2) (e) Juvenile Court Rules.

[31] Article 40 (1); 40 (2) (b) (iii); 37 (c) CRC.

[32] Sections 326, 337 and 339 of the Criminal Procedure Act.

[33] See *Yassin Maulid Kipanta and Two Others v Republic* [1987] TLR 183 (HC) 165; *Republic v Asia Salum andAnother* [1996] TLR 12 (HC); *Republic v Fidelis John* [1988] TLR 165 (HC).

[34] *Yassin Maulid Kipanta's case* ibid at 187.

than criminally because of their relatively young age. It was for this reason that they could not be held responsible in the same way, as could adults. The court substituted the sentence of two years imprisonment with one of nine months. This decision was handed down before the Child Act was enacted and the Juvenile Court Rules were adopted. The approach adopted by the court in this decision is relevant to the protection of child rights in sentencing. Thus, the court considered the appellants' age as a relevant factor in sentencing.

8. 2.2.4 The principle of proportionality

As pointed out earlier in this chapter, the principle of proportionality is centraltosentencing as it serves to avoid using accused persons as a means of achieving social goals without any regard to their rights.[35] The Juvenile Court Rules provide that the courts should consider this principle in the light of the circumstances of the offence and offender.[36] They further provide that the courts must consider 'imposing the least restrictive sentence consistent with the legitimate aim of protecting victims and the community'.[37]

Because of its association with retribution, the principle of proportionality has to be balanced against the best interests of the child and the principles of rehabilitation, reformation and social reintegration discussed earlier in this thesis. Indeed, the fact that the Rules include this principle, among many other child rights principles, means that the principle of proportionality is not intended to play a predominant role, but serves to limit generalised sentences that have historically been imposed on children, often innocently, but which fail to distinguish levels of blameworthiness in the case of child offenders. This principle is particularly relevant to sentences such as imprisonment at the President's pleasure, which will be analysed later in this chapter.

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[35] Rule 16 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) GA Res 40/33 Annex, 40 UN GAOR Supplement (No 53) at 207, UN Doc A/40/53 (1985), 29 November 1985.

[36] Rule 49 (1) (a).

[37] Rule 49 (1) (d).

8.3 Sentence options under the Law of the Child Act and other legislation

8.3.1 Non-custodial sentences

A non-custodial sentence is any sentence or order under the Law of the Child Act other than an approved school order. As defined by the Law of the Child Act, such a sentence includes unconditional discharge, a conditional discharge (probation order), supervision orders,[38] fines, compensation, restitution or costs that may be ordered against a parent, guardian or relative.[39] The court may also order the repatriation of a child to his home district,[40] order a child to apologise, or refer the child for community rehabilitation, counselling or therapy.[41]

8.3.1.1 Probation, absolute discharge and care orders

A child may be discharged either conditionally (probation order) or absolutely for any offence except homicide.[42] He or she may enter into his or her own recognisances, with or without sureties on condition that he or she remains of good behaviour for a period of at least three years.[43] The court may direct that the child be placed under the supervision of a parent, guardian and a relative, or a social welfare officer during the probation period.[44] A child under probation may be subject to conditions such as reporting to a social welfare officer, refraining from entering specific premises, or refraining from contacting or communicating with a specified person.[45] In addition, the Probation of Offenders Act provides that the court may impose a probation order for a period of between one and three years.[46]

The Law of the Child Act does not provide for a minimum probation period. This implies that it allows for the court's discretion to impose a term shorter than a year rather than the terms specified by the Probation of Offenders Act. A child may

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[38] Section 116.

[39] Sections 116,118.

[40] Section 119 (2) (b).

[41] Rule 50 (3) Juvenile Court Rules.

[42] Sections 116, 119 (2) (a) Law of the Child Act. Conditional discharge is also provided for by s 4 of the Primary Court Criminal Procedure Code.

[43] Section 116 (1).

[44] Section 116 (2). See also rule 52 Juvenile Court Rules.

[45] Rule 52 (2) Juvenile Court Rules.

[46] Section 4 (1) of the Probation of Offenders Act (Cap 247 R.E 2002).

also be released if he or she has demonstrated good behaviour, and thus may be presumed to have served the sentence.[47] However, the Act does not specify the period within which an assessment of good behaviour may be made in order to justify discharge. In imposing a probation order, the court may include conditions such as requiring a child to attend school, refrain from associating with certain people or entering certain places or obeying instructions from a social welfare officer.[48] Findings from the 2012 study on the Analysis of the Situation of Children in Conflict with the Law have shown that, in most cases, magistrates do not impose probation orders, particularly when parents are deceased or, for any reason, are not available to supervise such orders.[49] In some cases, children are detained after conviction because there is no probation officer in a particular district to supervise such orders.[50] The Juvenile Court Rules provide that after the court has imposed a probation order, and where a parent, guardian or relative is unwilling to supervise the child, a social welfare officer may assume the supervisory role.[51] This provision may also be used to impose probation orders where parents are deceased.

However, the imposition of probation orders may be limited because of the very low number of social welfare and probation officers available to supervise their implementation. For instance, there are 120 probation officers in Tanzania working in 12 out of its 35 regions.[52] Nevertheless, the challenges regarding the shortage of social welfare officers and the number of districts that do not have them are addressed to some degree, as the local government authority may take responsibility for the child.[53] It is important, therefore, that child justice administrators have access to these rules and know their content, so that probation orders are widely used. Currently children who receive non-custodial orders may be referred to the Temeke rehabilitation centre in Dar as Salaam as part of probation orders.[54] It is largely

[47] Section 116.

[48] Rule 52 Juvenile Court Rules.

[49] *Analysis of the Situation of Children in Conflict with the Law* op cit note 12 at 15.

[50] Ibid.

[51] Rule 52 (2).

[52] *Analysis of the Situation of Children in Conflict with the Law* op cit note 12 at 105.

[53] Rule 52 (5).

[54] United Republic of Tanzania *Child Justice: A Five Year Strategy for Progressive Reform 2013-2015,* 52.

children in Dar es Salaam who benefit from their proximity to the rehabilitation centre, thus it is important that rehabilitation programmes are established countrywide.

A probation order may be cancelled if a child fails to abide by the conditions set. The original offence will determine how the court deals with the child.[55] In *Republic v Faraja Emmanuel,* [56] the 16-year-old accused was charged with manslaughter contrary to ss 195 and 198 of the Penal Code. He was convicted and discharged on the condition that he commits no offence within a period of 12 months from the date of the judgment. The High Court further held that should he commit an offence within such period he would be liable to be sentenced as for the original offence.[57]

The procedure for the cancellation of orders is not taken lightly by the court and it encompasses the right to be heard. The court is enjoined to obtain information under oath on non-compliance with the order.[58] In addition, it is required to summon the child and the sureties and hear from them before it makes a decision.[59] These requirements mean that the court applies strict conditions before a probation order is cancelled.

Further, the court may also discharge a child without making any order (absolute discharge). The Child Act provides that 'where a child is convicted of any offence punishable with imprisonment, the court may, in addition or alternative to any other order which may be made under this Act, discharge a child without making any order'.[60] A court may order a child to be handed over to the care of a fit person or institution or to supervision as an alternative where the child is convicted of an offence punishable by imprisonment.[61] The Juvenile Court Rules provide that other conditions that may be attached include an oral or written apology to a specified person, referral to a community rehabilitation or reintegration programme, referral to counselling therapy, restitution to a victim, family conferencing or victim/offender

[55] Section 117 (2).

[56] Criminal Sessions case No 112 of 2014 (unreported) Dodoma (HC) at 6.

[57] *Faraja Emmanuel's* case ibid.

[58] Section 117 (1) of the Law of the Child Act.

[59] Section 117 (1) (2) of the Law of the Child Act.

[60] Section 119 (2) (a) Law of the Child Act.

[61] Section 119 (2) (c) Law of the Child Act.

mediation or attending some community work.[62] Some of these conditions, such as apology and restitution, are relevant to non-judicial intervention (discussed in Chapter 6). The conditions are also relevant in upholding the principle of last resort.

However, other conditions, such as referral to family conferencing or victim/offender mediation,[63] though useful, need more elaborate procedures and powers. For instance, not only should the order be relevant from the initial stage especially before trial but also the composition of groups involved in the process, their mandate and procedures to be followed should be established. The Act or the Rules neither define nor describe these groups. On the whole, the implementation of some of these orders could be closely linked to the Department of Juvenile Justice established under the Ministry of Health and Community Welfare.[64] According to the Report submitted by Tanzania to the Committee on the Rights of the Child in 2013, Tanzania has established a Juvenile Justice Service section within the Ministry of Health and Social Welfare.[65] The section deals with, among other things:

> [C]oordinating provision of guidance, rehabilitations and counselling of alcohol addicts and drug abusers. It also conducts behavioural rehabilitation of children and carries out impact studies and researches on various interventions on Juvenile Justice.[66]

Community services may also be ordered under the Community Service Act.[67] Such an order may be made in respect of any offence punishable by a period of less than three years imprisonment.[68] The use of non-custodial orders is useful for reintegration purposes. Imprisonment tends to bring children into contact with criminals hence it does not promote rehabilitation.[69] Thus, conditional discharge or a probation order is more appropriate for children.[70]

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[62] Rule 50.

[63] Rule 50 (3) (b) (vii).

[64] United Republic of Tanzania *The Country Third to Fifth Periodic Reports on the Implementation of the Convention on the Rights of the Child 2012* Dar es Salaam (2013) para 300.

[65] Ibid.

[66] Ibid.

[67] Cap 291 R.E 2002.

[68] Section 3 Community Service Act.

[69] *Republic v Teodosia s/o Alifa* (1967) HCD No 216 (HC) 58.

[70] Ibid.

These provisions are consistent with the principles of international law on non-custodial sentences,[71] whose main goal is to avoid the imprisonment of children as much as possible. However, the protection of children's rights also depends on the extent to which courts utilise these non-custodial orders and the existence of clear guidelines on how to implement some of such orders, such as family conferencing or mediation. For instance, it seems to be a common practice, particularly before the adoption of the Juvenile Court Rules, that cases are dismissed under either s 225 (5)[72] or s 91[73] of the Criminal Procedure Act without further orders.[74] Unfortunately, a dismissal of cases under these sections does not bar the institution of proceedings based on the same facts. Thus, courts may be able to utilise non-custodial orders where there are established programmes to refer children or where there are other established and functioning institutions such as for family conferencing and mediation.

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[71] See generally Standards Minimum Rules for Non-custodial Measures 1990 (the Tokyo Rules) GA Res 45/110, Annex, 45 UN GAOR Supplement (No 49A) at 197, UN Doc A/45/49, 14 December 1990on non-custodial sentences.

[72] Section 225 (5) provides that where the court is unable to proceed with the hearing the court may discharge the accused. However, discharge under this section does not bar subsequent charge to be filed against the accused for the same offence.

[73] Section 91 (1) provides for the powers of the public prosecutions to discontinue criminal proceedings and discharge the accused person at any stage before verdict or judgment. Discharge under this section does not bar subsequent criminal charges against the accused on the same facts.

[74]The author's observation when visiting Kisutu Juvenile Court and randomly picking up some cases in 2013: *Republic v Rashid Juma* Criminal case No 52/2011, 14 years, charged with rape contrary to s 130 (1) (e) of the Penal Code charge withdrawn under s 225 (5) Criminal Procedure Act; *Republic v Lukman Omari Abdallah,* 11 years Criminal case No 24/2012, charged with stealing contrary to ss 265 and 258 of the Penal Code; withdrawn under s 225 (5) Criminal Procedure Act; *Republic v Asubia Mansuri*, 12 years criminal case 42/2011, malicious damage to property contrary to s 265 Penal Code, charge withdrawn under s 225 (5) Criminal Procedure Act; *Republic v Ally Sultan* 18 years, criminal case 21/2009, charged with unnatural offence contrary to s 154 (1) (a) Penal Code convicted, sentenced to conditional discharge for two years and compensation of 100,000; *Republic v Kitoi Rashid China*, criminal case 25 of 2011, 13 years, charged with gang rape contrary to s 131 (a) (1) of the Penal Code charge withdrawn under ss 103 (1) and 225 of the Criminal Procedure Act; *Republic v Yohana Selestine* 16 years and *Simon Laurent* 10 years, criminal case No 17 of 2012 criminal trespass contrary to s 299 of the Penal Code (the second accused pleaded guilty and was convicted, and ordered to be handed over to his mother, and in the case of the second accused the charge withdrawn under s 225(5)).

8.3.1.2 Repatriation orders

Repatriation may be ordered where a child is convicted of any offence punishable by imprisonment.[75] The Law of the Child Act provides that, in addition or as an alternative to any other order to be made under the Act, the court may order repatriation of a child to his home district.[76] Such district must be within Tanzania and repatriation should be at governmental expense.[77] However, the Act does not specify conditions or factors to be considered before the order is made. It can be argued that the findings of an inquiry as to why a child left home, what are or were the living conditions at home, whether or not he or she was subjected to violence and whether the parents are alive, would be relevant. Information concerning these factors could be presented in a social inquiry report.

The provisions on repatriation under the Law of the Child Act were borrowed from the repealed Children and Young Persons Act.[78] These provisions need to be reconsidered in the light of the Law of the Child Act that seeks to implement child rights.[79] It is most likely that the 1937 Act was meant to remove children from urban areas. The court dealt with both needy and delinquent children. These orders were meant to authorise administrators to deal with child delinquency and destitution in a way that was problematic for the child and paid less attention to the duty to provide alternative care to children who lacked care. The Children and Young Persons Act was enforced alongside the Township (Removal of Undesirable Persons) Ordinance.[80] This, as its name suggests, made provision for the removal of persons considered to be undesirable. Both these Acts embody outdated notions of childhood and parental care and are not in keeping with a child rights-based approach to child justice.

8.3.1.3 Fines, compensation and costs

For a court in Tanzania to impose a fine, compensation or costs, the law must have these forms of punishment for the offence at hand, and the court must be satisfied that

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[75] Section 119 (2) of the Law of the Child Act.

[76] Section 119 (2). The order should be in the alternative to other orders under the Law of the Child Act but not to those under other legislation. See *Republic v Geofrey Malamia* (1968) HCD No 306 (HC) 112.

[77] Section 119 (2) of the Law of the Child Act.

[78] Section 23 (b).

[79] See the Law of the Child Act, objectives of the Act.

[80] Chapter 104 of the Laws of Tanganyika.

two conditions exist. One is that the order must be a prescribed punishment for a particular offence.[81] The second condition is that the court must be satisfied that such an order will be in the best interests of the child.[82] The order may be made in addition to other orders or independently.[83] It can be made against a parent, guardian or relative instead of the child.[84] However, no such order may be made where the court is satisfied that parents, guardians or relatives cannot be found.[85] The presence of parents or guardian is important, as it would ensure that the order is executed and gives parents the opportunity to be heard in line with the general right to be heard. An order to pay fine or compensation may be made against parents where they have contributed to the commission of the offence, such as by neglecting to exercise due care of the child.[86]

It is clear that children may not be in a position to meet fines, compensation or cost orders using their own means. Making it possible to direct such orders against parents may help in situations where the parents can afford to meet those orders and are willing to be reunited with the child. This explains the requirement under the Juvenile Court Rules that compensation, a fine or cost orders shall not be made against a child who has no means to pay is inconsistent with the Act that requires such orders to be made against parents or guardians.[87]

However, the condition that there should be neglect on the part of parents in order for fines, compensation or cost orders to be imposed on the latter is counterproductive to child rights. It means that the children of good parents cannot benefit from these orders while those with problematic parents can. By placing the children of problematic parents under the care of those very same parents does not help the children, because they may be subjected to the same neglect that led to their offending and to the making of the orders in the first place. Conversely, children of good parents who stand to benefit from being reunited with their parents may not benefit from these alternatives to custodial sentences. These reasons militate in favour

[81] Section 118 (1) Law of the Child Act.

[82] Ibid.

[83] Section 118 (2) Law of the Child Act.

[84] Section 118 (1) Law of the Child Act; Rule 51 Juvenile Court Rules.

[85] Section 118 (1) Law of the Child Act.

[86] Ibid.

[87] Section 118 the Law of the Child Act; Rule 51 (2) Juvenile Court Rules.

of a dissociation of parental fault from these orders. The issue of fault must be considered as part of efforts aimed at finding suitable care for the child.

8.3.1.4 Corporal punishment

Judicial corporal punishment is regulated by the Corporal Punishment Act[88] and other legislation.[89] In the case of children, the Act defines it as caning.[90] According to the Corporal Punishment Act, children aged 16 to 18 years may be subjected to 24 strokes, while children aged below 16 may be subjected to 12 strokes.[91] Corporal punishment is expressly provided for as a possible sentence for several offences, including rape and attempted rape.[92] It may be imposed as the only sentence for a first offender on a rape[93] or attempted rape charge.[94] It may also be imposed on a second or third rape offender, in addition to a term of imprisonment.[95] According to the Corporal Punishment Act, [96] in the case of children corporal punishment may be ordered and administered as an alternative sentence for all offences under the Penal Code, except those punishable with death or imprisonment. The relevant provision reads:

> A juvenile convicted of an offence under the Penal Code, other than an offence punishable with death, or of any offence punishable under any other law with imprisonment shall be liable to corporal punishment in lieu of any other punishment to which he may be liable for the offence.[97]

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[88] Corporal Punishment Act (Cap 17 R.E 2002) (hereinafter Corporal Punishment Act).

[89] See, for instance, s 131 of the Penal Code and s 2 (1) (c) of the Primary Court Criminal Procedure Code (Third Schedule) Magistrates' Courts Act (Cap 11 R.E 2002).

[90] Section 2.

[91] Section 8 (2).

[92] Section 132 of the Penal Code (Cap 16 R.E 2002) as amended by s 177 of the Law of the Child Act provides for corporal punishment for rape first offenders and corporal punishment in addition to imprisonment for second time and habitual offenders. See also s 132 (4) of the Penal Code as amended by Written Laws (Miscellaneous Amendment) Act 3 of 2011 which introduces subsec4. Section 4 (a) provides for corporal punishment for attempted rape first offender.

[93] Section 131 (2) (a) as amended by s 177 of the Law of the Child Act.

[94] Section 123 (4) (a) as amended by Written Laws (Miscellaneous Amendment) Act 3 of 2011.

[95] Section 131 (2) (b) (c).

[96] Cap 17 (R.E 2002).

[97] Section 6 of the Corporal Punishment Act. Note that section 2 of the Act defines a juvenile as a person under the age of 16.

The reason for using corporal punishment as the only sentence in the case of certain offences may be linked to the status of offenders being children. For instance, courts in Tanzania as well as in other countries have been using it as a substitute for imprisonment, as they regard it as a lesser punishment. The Namibian Supreme Court in *Ex-Parte Attorney General in Re: Corporal Punishment by Organs of State*[98] observed that one of the reasons that it is perceived as being constitutional in respect of juvenile offenders as opposed to adults, is that magistrates regard it as proper for children in place of other sentences, such as fines and imprisonment. For example, in *Matonya Chima v Republic*,[99] the accused was charged and convicted for a rape contrary to section 130 of the Penal Code. He was sentenced by the trial court to twelve months imprisonment. On appeal to the High Court, it was held that imprisonment for juvenile offenders was inappropriate and that the more appropriate sentence would have been corporal punishment.[100] The Court reversed the sentence imposed by the trial court and substituted so as to result in the offender's immediate release. Similarly, in *Republic v Aleni Mwamengo*,[101] the High Court set aside a sentence of 12 months suspended imprisonment for defilement of a girl aged less than 12 years. It held that the sentence imposed was so manifest in its severity that it should not be allowed to stand and it substituted 10 strokes. The same view was also expressed in *Republic v Taimu Nzunda.*[102] The accused, aged 17 years, was convicted for an offence of attempted rape contrary to section 132 of the Penal Code. He was sentenced to 12 months imprisonment suspended for eight months in terms of section 294A of the Criminal Procedure Act. The Court held that the suspended sentence could not be ordered for the offence of rape or attempted rape. It further held that a suspended sentence was intended to be an alternative to imprisonment. The court cited *O'Keefe* [1969] All E.R 426, in which it was said that 'the magistrate having already ruled out the propriety of a prison sentence had the option of one or more of the following sentences: absolute discharge, conditional discharges, probation order, a

[98] SA (14/90) [1991] NASC 2; 1991 (3) SA 76 (NmSc) (5 April 1991) 30.

[99] (1967) HCD No 98 (HC) 24.

[100] Ibid. See also *Republic v Aleni Mwamengo* (1972) HCD No 226 (HC) 293, *Republic v Taimu Nzunda* (1972) HCD No 25 (HC) 27–8.

[101] *Alen Mwamengo's* case ibid at 293.

[102] *Taimu Nzunda's* case supra note 100 at 27–8.

fine or corporal punishment', and set aside a 12-month imprisonment sentence that was suspended for eight months, and substituted 10 strokes of corporal punishment.

Further, corporal punishment is viewed as legitimate in the case of children, as traditionally it was used to correct children who did not comply with community norms.[103] The findings from the study on the Analysis of the Situation of Children in Conflict with the Law in Tanzania[104] has shown that probation and social welfare department officials agreed that corporal punishment is used against children because it is quick and easy to administer.[105] On the other hand, sometimes magistrates do not impose it because they do not believe in its effectiveness.[106]

Despite the reasons given for it being imposed or otherwise, legal provisions regarding corporal punishment relate more to children than to adults. For instance, in addition to being a punishment for rape under the Penal Code, the Corporal Punishment Act provides that caning may be used in the case of children as an alternative in all offences except murder and those punishable with imprisonment.[107] In the case of adults, corporal punishment should not be used except in offences specified in the schedule.[108] Some of such offences include rape (ss 130 and 131 of the Penal Code); burglary (s 294 of the Penal Code); armed robbery (s 287 A of the Penal Code); attempted armed robbery(s 287 B of the Penal Code); robbery; (s 286 of the Penal Code) and attempted robbery (s 287 (1) of the Penal Code).

In an African context, corporal punishment is widely used in the homes by parents.[109] However, its use in formal settings has increasingly been outlawed in many countries.[110] The Namibian Supreme Court in *Ex-Parte Attorney General in Re:*

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[103] The Law Reform Commission *Final Report on Designated Legislation in the Nyalali Commission Report* 1994, 43.

[104] *Analysis of the Situation of Children in Conflict with the Law* op cit note 12.

[105] Ibid at 107.

[106] Ibid.

[107] Section 6.

[108] Section 3 Corporal Punishment Act.

[109] Ibid.

[110] There are 46 states that have abolished corporal punishment in all settings. These and the year of prohibition in brackets are: Sweden (1979); Norway (1987); (1983); Austria (1989); Cyprus (1994); Denmark (1997); Latvia (1998); Croatia (1999); Germany (2000); Israel (2000); Bulgaria (2000) Turkmenistan (2002); Iceland (2003); Romania (2004); Ukraine (2004); Hungary (2005); Greece (2006); Togo (2007) Spain (2007); Venezuela (2007); Uruguay (2007); Portugal (2007); New Zealand

Corporal Punishment by Organs of State[111] held that this form of punishment was unconstitutional. The courts in both Zimbabwe and Namibia hold the view that it makes no difference whether corporal punishment is administered to adults or juvenile offenders. In both cases it is degrading and inhuman.[112]

The Law of the Child Act provides that 'a person shall not subject a child to torture or other cruel, inhuman punishment or degrading treatment'.[113] This is consistent with article 13 (6) (e) of the Constitution that prohibits torture or inhuman or degrading punishment or treatment. Although these provisions could be interpreted generously as prohibiting corporal punishment, it is important that corporal punishment is expressly prohibited. For example, the amendments to the Penal Code through the Law of the Child Act that introduced corporal punishment in addition to a five-year imprisonment term for the offence of rape waters down the inference that prohibition of torture under the Act includes also prohibition of corporal punishment.

The Global Initiatives to End All Corporal Punishment of Children Report of 2015 has recommended that prohibition of corporal punishment must meet two conditions. One, the legislation prohibiting corporal punishment should send a clear message that all corporal punishment is prohibited and that there should be no exception of justifying it, for example, that it is not harmful.[114] Two, there should be

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(2007); Netherlands (2007); Liechtenstein (2008); Luxembourg (2008); Republic of Moldova (2008); Costa Rica (2008); Albania (2010); Democratic Republic of Congo (2010); Kenya (2010); Tunisia (2010); Poland (2010); South Sudan (2011); Cape Verde (2013); Honduras (2013); FTYR Macedonia (2013); Andorra (2014); Estonia (2014); Nicaragua (2014); San Marino (2014); Argentina (2014); Bolivia (2014); Brazil (2014); Malta (2014); Benin (2015); Ireland (2015); Peru (2015). See Global Initiatives to End All Corporal Punishment of Children 'States which have prohibited all corporal punishment', available at *http://www.endcorporalpunishment.org/progress/prohibiting-states/*,accessed on 2 January 2016.

[111] 1991 (3) SA 76 (NmSc) 30.

[112] *S v Juvenile* (1989) (2) ZLR 61 (SC); 1990 (4) (SA) 151(ZS). See also *Corporal Punishment by Organs of State* case supra note 98.

[113] Section 13 (1). See also s 55 (2) of the Criminal Procedure Act that prohibits cruel, inhuman or degrading treatment to a person under restraint.

[114] Global Initiatives to End all Corporal Punishment of Children 'Ending legalized violence against children: Global progress to December 2015' at 5, available at *http://www.endcorporalpunishment.org/assets/pdfs/reports-global/Global-report-2015.pdf* accessed on 2 January 2016.

no legal loopholes, in that all legal provisions on corporal punishment in all settings should be repealed.[115]

An attempt of abolishing corporal punishment in Tanzania for adults was made primarily in 1972[116] but was reinstated in 1989.[117] The abolition was only for adults and not for children. The High Court of Tanzania in *Thomas Menig v Republic*[118] held that 'retribution as a sentencing policy is old fashioned and uncivilised as it espouses sadism'. It further held that corporal punishment is not only inherently inhuman and degrading and therefore unconstitutional in terms of art 13 (6) (c) of the Constitution, but also according to international human rights law it has become unacceptable in a civilised and democratic society.[119] Despite this decision, corporal punishment provisions still exist in some legislation, including the Penal Code and the Corporal Punishment Act.

When Tanzania appeared before the Human Rights Council for Universal Periodic Review in 2011, several recommendations in respect of it were put forward, including that it should prohibit corporal punishment.[120] In its effort to protect children against violence Tanzania has adopted a policy: The Multi-Sector Plan of Action to Prevent and Respond to Violence against Children (discussed in Chapters 4 and 5).[121] This policy indicates that it supports the twelve recommendations of the Independent Expert for the United Nations Secretary-General Study on Violence against Children.[122] One of these recommendations is that states should 'prohibit all forms of violence against children, in all settings, including all corporal punishment'.[123] However, Tanzania has not implemented such recommendation. The Committee on the Rights of the Child has repeatedly urged Tanzania to abolish

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[115] Ibid.

[116] Minimum Sentence Act (Cap 90 R.E 2002). Note that this statute does not apply to children.

[117] Written Laws (Miscellaneous Amendments) Act 10 of 1989.

[118] [1992] TLR 151 (HC) 167.

[119] *Thomas Mjengi's* case ibid at 174.

[120] Human Rights Council 'Report of the Working Group on the Universal Periodic Review: United Republic of Tanzania' Nineteenth session, 8 December 2011, paras 86:37 and 86:38.

[121] United Republic of Tanzania *Multi Sector National Plan of Action to Prevent and Respond to Violence against Children 2013-2016* Dar es Salaam (2013).

[122] United Nations General Assembly 'Rights of the Child' Note by the Secretary General A/61/299, Sixty-first session 29 August 2006.

[123] Ibid at 8,14.

corporal punishment in all settings.[124] As shown in Chapter 5, in its 2015 recommendations to Tanzania the Committee on the Rights of the Child urged Tanzania to:

> repeal or amend, as needed, all legislation in order to explicitly prohibit corporal/physical punishment in all settings as "justifiable" correction or discipline, including provisions contained in the Law of the Child Act (2009)… the Corporal Punishment Ordinance (1930), the Minimum Sentences Act (1963), the Sexual Offences (Special Provisions) Act (1998), the Penal Code (1981) and the Criminal Procedure Code (1985).[125]

The Committee therefore recommended that Tanzania should abolish corporal punishment as a judicial sanction.[126]

Chapter 3 establishes that international law regards corporal punishment as a violation of rights. In addition to being a violation of human rights, including respect for dignity and being a cruel, inhuman and degrading punishment, the effects of corporal punishment, both physical and psychological, were also indicated in Chapter 3. Psychological effects, for instance, include strong fears and anxiety, depression, inhibition, aggression, shame, feelings of inferiority, lowered self-esteem, delinquency and substance abuse.[127] Moreover, corporal punishment is based on deterrence and retribution, which have been criticised (discussed in Chapter 2). Retribution as an objective of punishment in the case of children is no longer supported in international and domestic jurisprudence.[128] It has been observed that the efficiency of corporal punishment is not significant, as any other punishment could

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[124] CRC 'Consideration of the reports submitted by states parties under Article 44 of the Convention: Concluding Observations: United Republic of Tanzania', CRC/C/TZA/CO/2 Forty-second session, 21 June 2006, para 70 (c); CRC 'Consideration of reports submitted by states parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania', CRC/C/CO/TZA/3-5 Sixty-eighth session 3 March 2015 paras 36, 37 (a) respectively.

[125] Ibid.

[126] Ibid para 73 (f).

[127] Arab Naz et al 'The impact of corporal punishment on students' academic performance/career and personality development up-to secondary level education in Khyber Pakhtunkhwa Pakistan' (2011) 12 (2) *International Journal of Business and Social Science* 130,131.

[128] See Chapters 2 and 3. See also Danwood Mzikenge Chirwa 'The implications of the emerging jurisprudence in international criminal law for penal regimes in post-independent Africa' (2004) 17 (2) *South African Journal of Criminal Justice* 193,198.

do.[129] Further, Chapter 3 has shown that international law, including human rights jurisprudence, regards judicial corporal punishment as being inhuman and degrading. This view has also been vented in domestic jurisprudence. The High Court of Tanzania in *Thomas Mjengi* held that corporal punishment was inhuman and degrading.[130] The Namibian Supreme Court held in *Corporal Punishment by Organs of State* that '[j]uveniles also have an inherent dignity by virtue of their status as human beings and that dignity is also violated by corporal punishment inflicted in consequence of judicial or quasi-judicial authority.'[131] The Supreme Court of Zimbabwe in *State v Ncube and Others*[132] held that whipping was inhuman and degrading and therefore in contravention of s 15 (1) of the Zimbabwean Constitution. It held that there are adverse effects inherent in whipping.

> It is a punishment, not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency.

Thus, in as much as it violates dignity, corporal punishment impinges on the Tanzanian Bill of Rights that provides for dignity and the prohibition of cruel and degrading punishment.[133] The fact that 48 states have prohibited corporal punishment[134] may be regarded as state practice leading to prohibition being regarded as customary international law.

8.3.2 Custodial sentences

8.3.2.1 Approved school

An approved school may be ordered under the Child Act when a child is convicted of an offence that, if committed by an adult, would have been punishable by a custodial

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[129] *The State v Henry Williams and Others* Case CCT/20/94 paras 84–6.

[130] *Thomas Mjengi 's* case supra note 118 at 171–3.

[131] *Corporal Punishment by Organs of State* case supra note 98 para 29.

[132] 1987 (2) ZLR 246 (SC) 274. This case was decided under the Constitution of the Republic of Zimbabwe 1980 as amended by Act 5 of 1985, Zimbabwe has a new Constitution, The Constitution of Zimbabwe 2013.

[133] Article 13 (6) (e).

[134] Global Initiative to end all corporal punishment of children, available at *https://www.crin.org/en/library/organisations/global-initiative-end-all-corporal-punishment-children*, accessed on 2 January 2016.

sentence.[135] It may also be ordered where a child 'is a persistent offender, if the court believes that there is significant risk to members of the public'[136] or where a child is convicted of a serious offence of violence.[137]

The offences punishable by custodial sentence in the Penal Code in the case of adults are numerous.[138] Thus for instance, children found begging, an offence punishable by three months imprisonment if committed by an adult, may be sent to an approved school.[139] This suggests that committal to an approved school is used as a substitute for imprisonment. However, as has been pointed out earlier, the courts are required to impose an approved school order only as a sentence of last resort.[140] This means that, despite the offences being punishable by custodial order when committed by adults, the court must consider all other alternatives before custody in approved school is ordered. The term of custody at approved school is three years or until when a child attains 18 years.[141]

The manager of an approved school may either apply to the court for an extension or, with the approval of the Board, order a child to be released after six or 12 months.[142] An extension may be sought where a child needs further training.[143] However, such extension may not go beyond a date upon which a child has attained 18 years.[144]

In practice, approved school orders are rarely made, and then especially in cases those involving recidivist offenders, known in Kiswahili as *watoto watukutu*.[145] However, this may mean that either alternative sentences are regularly used, or that children, who would have been sentenced to take up residence at an approved school,

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[135] Section 120.

[136] Rule 54 (1) (b)–(c) Juvenile Court Rules.

[137] Rule 54 (1) (a) Juvenile Court Rules.

[138] These include theft, ss 265, 268; being an idle and disorderly person which includes wandering or gathering alms s 176 (2); being a rogue or vagabond s 177.

[139] Section 176 of the Penal Code. See also *Analysis of the Situation of Children in Conflict with the Law* op cit note 12 at 62.

[140] See section 8.2.2.2.

[141] Section 127 of the Law of the Child Act.

[142] Section 129 (a) (b) of the Law of the Child Act.

[143] Section 127.

[144] Ibid.

[145] From the author's own experience as a magistrate.

are detained with adults, as the Commission for Human Rights and Good Governance comprehensive study leading to an Inspection Report for Children in Detention Facilities of 2011 has indicated.[146] Children in adults' detention facilities have limited access to relevant resources for rehabilitation such as education, vocation training, psychological support and recreation.[147] The findings from the Report show that in 65 detention facilities visited in 14 regions there were 441 children in adult detention facilities. Out of these, 377 were in pre-trial detention and 64 were in post-trial detention.[148] Detention with adult offenders is also revealed in the study on Analysis of Access to Justice for Under-18s in Tanzania. Children detained in adult detention facilities are subjected to the violation of a number of their rights. For instance, the study shows that they are subjected to physical or sexual abuse.[149] In addition, such facilities are overcrowded, so that due to their age their health is more likely to be affected. The Arusha Urban Prison was visited as part of the study on the analysis of the situation of children in conflict with the law. The prison had the capacity for only 530 inmates, yet it held 1381 detainees, 15 of whom were children.[150]

The other reason that so few children are being committed to an approved school could lie in the fact that Tanzania has only one of these, in Mbeya in the south. The school is underutilised, possibly because of its geographical location. For instance, the Inspection Report by the Commission for Human Rights and Good Governance revealed that there were only 56 children in the approved school while its capacity is 300.[151] The same report revealed that many children were detained with adults in detention centres and prison facilities in other parts of the country, as shown above.[152] Despite Tanzania's submission to the Committee on the Rights of the Child that it intends to construct retention homes in every zone (around seven),[153] the Committee encouraged Tanzania to '[i]mmediately remove children from adult

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[146] *Inspection Report for Children in Detention Facilities in Tanzania* op cit note 11 at xiii.

[147] Ibid.

[148] Ibid at xiii.

[149] *Analysis of the Situation of Children in Conflict with the Law* op cit note 12 at 16.

[150] Ibid.

[151] *Inspection Report for Children in Detention Facilities in Tanzania* op cit note 11 at xiii.

[152] Ibid.

[153] *Combined Third to Fifth Periodic Reports to the Committee on the Rights of the Child* op cit note 64 para 301.

detention facilities and ensure that their detention conditions are compliant with international standards, including with regard to access to education and health services.' [154] Despite the fact that the law states that imprisonment is prohibited and that an approved school should be a measure of last resort, the number of children mentioned in the two studies suggests that detention is used regularly. This suggests, further, that in practice detention, as a measure of last resort, is not implemented adequately. In addition, the fact that some of the children are detained in adult prisons suggests not only that the real purpose of the prohibition of imprisonment is yet to be achieved, but also that children are subject to multiple violations of their rights, including sexual abuse.[155]

8.3.2.2 Detention at the President's pleasure

The death penalty is prohibited in the case of children who are convicted of homicide,[156] and detention at the President's pleasure is a substitute for it.[157] Such detention may be imposed under the Penal Code by the High Court that has jurisdiction over homicide.[158] The relevant provision reads:

> The sentence of death shall not be pronounced on or recorded against any person who at the time of the commission of the offence was under eighteen years of age, but in lieu of the sentence of death, the court shall sentence that person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Minister for the time being responsible for legal affair may direct, and whilst so detained shall be deemed to be in legal custody.[159]

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[154] CRC 'Consideration of reports submitted by states parties under article 44 of the Convention: Concluding Observations: United Republic of Tanzania' 2015 op cit note 124 para 73 (c).

[155] *Inspection Report for Children in Detention Facilities in Tanzania* op cit note 11 at xiii.

[156] There is no offence of homicide in the Penal Code. According to the definition in David Ormerod *Smith and Hogan's Criminal Law* 13 ed (2011) 489–562 homicide includes both murder and manslaughter. According to the Penal Code murder is killing with intent (*mens rea*) and is punishable by the death penalty (ss 196,197 of the Penal Code). Manslaughter is a lesser offence, where the act is unintentional and is punishable by life imprisonment (ss 195 and 198 of the Penal Code). It is unclear whether the sentence applies to both.

[157] Section 26 of the Penal Code.

[158] See the first schedule to the Criminal Procedure Act on offences and courts' jurisdiction.

[159] Section 26 (2) Penal Code. Although a child is detained at the President's pleasure, it provides that the discretion to discharge a child when recommended is vested to the Minister in terms of s 26 (5) of the Penal Code.

A recent example showing that this form of punishment is still used is *Republic v Ally Yahaya Masudi*.[160] In this case, a child aged 15 was sentenced to detention at the President's pleasure following a conviction for murder. The court held that

> [The accused] was 15 years old when he committed the offence. Although the sentence for murder offenders is death by hanging, the accused cannot be sentenced to death because he was a young person when he committed the offence. Under section 26 (2) of the Penal Code the law requires that the offender be detained during the President's pleasure[161]

The Superintendent of Prisons or other places where a child is detained is required, after the expiration of 10 years, to submit to the Minister responsible for legal affairs a report on the history and character of a detained person.[162] The Minister has a discretion to discharge a child detained or direct a child to remain under supervision.[163]

Detention at the President's pleasure raises the question of constitutional legitimacy, consistency with child rights in general, and the last resort principle in particular. Historically, this provision was inherited from English common law. In medieval times, the King could not be sued in his own courts.[164] He also had discretionary powers in certain matters considered to be in the public interest. These matters extended to judicial functions, including the administration of justice and the prerogative to pardon.[165] The power of the King to administer justice was abolished in England in 1607.[166] The prerogative powers, in particular the arbitrary powers of committal, were declared unlawful by the Petition of Rights of 1628. Further limitations on the use and abuse of prerogatives were included in the Bill of Rights of 1689 and by the establishment of a constitutional monarchy.[167]

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[160] Criminal Sessions case No 45 of 2010 (unreported) Dar es Salaam (HC) 15.

[161] Ibid.

[162] Section 26 (4) Penal Code.

[163] Section 26 (5) Penal Code.

[164] AW Bradley and K D Ewing *Constitutional and Administrative Law* 15 ed (2011) 246. See also Lucinda Maer and Oonagh Gay (2009) 'The Royal Prerogative' Standard Note House of Commons Library at 3 available at *http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-03861.pdf*, accessed on 12 December 2013.

[165] Bradley and Ewing op cit note 164 at 247.

[166] In *Prohibition del Roy* (1607) 12 Co Rep 63 cited in ibid.

[167] Bradley and Ewing op cit note 164 at 247.

In other commonwealth countries, including Tanzania, such powers changed following the introduction of independence constitutions and, particularly, by the inclusion of bills of rights. In Tanzania, courts on a number of occasions have quashed the President's decisions that relied on prerogative powers, on the grounds that they were unconstitutional. For instance, in *James Gwagilo v Attorney General*,[168] the President ordered the removal of the plaintiff, a civil servant, from office on grounds related to the 'public interest'. The plaintiff filed a case to challenge his removal. The High Court held that '[w]hen Tanganyika became a Republic in 1962 the prerogative power of the Crown to dismiss a civil servant at will ended, and did not devolve to the President'.[169] The Court held further that the President should give a reason for removing a civil servant in office. 'The President cannot and should not just out of the blue, state that he was removing someone in the public interest without disclosing the interest of the public to be served. Otherwise he will be accused of acting arbitrarily and in a high-handed manner.'[170]

The same approach was also taken in *Said Juma Muslim Shekimweri v Attorney General.*[171] The applicant filed an application to the High Court for an order to quash the decision of the President that had directed that he should retire from employment in the public interest. The High Court held that 'the common law principle that a civil servant is dismissible at the President's pleasure is not part of the law of this country'. [172]

Thus, the source of power has shifted from the Crown to constitutions under the principle of constitutional supremacy. Constitutional supremacy requires that the laws of Tanzania and the conduct of public authorities, including the President, must be consistent with the Constitution. Hence, the President is no longer above the law, but subject to it.[173]

In addition to being unconstitutional, detention at the President's pleasure is also inconsistent with the last resort principle and the principle of proportionality. The length of such a sentence is indeterminate, reviewable only after 10 years.

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[168][1994] TLR 73 (HC).

[169] *Gwagilo's* case ibid at 76.

[170] Ibid at 78.

[171] [1997] TLR 3 (HC).

[172]*Said Juma Muslim Shekimweri's* case ibid at 10.

[173]*Gwagilo's* casesupra note 168 at 87.

8.3.2.3 Imprisonment

As indicated early in this chapter, the Child Act prohibits imprisonment of children.[174] It provides for various alternative orders including absolute discharge, repatriation and care orders as discussed above.[175] In addition, where the offence would have been punishable with imprisonment if committed by an adult, a child may be sentenced to an approved school. However, the prohibition of imprisonment is not consistent. For instance, imprisonment up to five years may be imposed under the Penal Code for rape and attempted rape.[176] A child convicted of rape for the third time or a child recidivist may be sentenced to five years imprisonment and to corporal punishment.[177] In addition, a sentence of six months may be imposed for attempted rape by a second-time offender and of 12 months for a third-time offender.[178] The amendments that introduced this provision were effected under the Child Act, but there is no clear relationship between the application of the Child Act and the Penal Code. This may lead to the imposition of different sentences for the same offence as provided for in the two pieces of legislation. This means that the child could be sentenced to a term of imprisonment under the Penal Code or to other punishments specified in the Child Act, as the latter prohibits imprisonment. There is a possibility that some courts may disregard the prohibition of imprisonment in the Child Act and impose sentences provided for by the Penal Code. The High Court decision in *Republic v Judith*

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[174] Section 119 (1).

[175] See s 119 (2) (a) – (c).

[176] Section 131 (2) 'Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall– (a) if a first offender, be sentenced to corporal punishment only; (b) if a second time offender, be sentenced to imprisonment for a term of twelve months with corporal punishment; (c) if a third time and a recidivist offender, he shall be sentenced to five years with corporal punishment.' (s 131 (2) (c) as amended by the Law of the Child Act. See also s 132 (4) as amended by Act 3 of 2011, 'where the offence of attempted rape is committed by a person who is below the age of eighteen years, he shall (a) If a first offender, be sentenced to corporal punishment of five strokes; (b) If a second time offender, be sentenced to a term of six months; (c) If a third time offender or habitual offender be sentenced to a term of twelve months.' See also *Tabu Fikwa* v *Republic* [1988] TLR 46 (HC) 53 that held that one of the reasons that the court is bound to impose imprisonment is where imprisonment is a mandatory sentence for an offence in certain legislation.

[177] Section 131 (2) (c) of the Penal Code as amended by s 177 of the Law of the Child Act.

[178] Section 132 (4) (b) (c) as amended by Written Laws (Miscellaneous Amendments) Act 3 of 2011.

Chomile [179] is one of such cases. It has been shown in 8.2.2.1 above that the accused aged 15 was sentenced to eight years imprisonment for the offence of manslaughter contrary to section 195 of the Penal Code. Seemingly, the Court imposed a sentenced provided for in the Penal Code as neither the Law of the Child Act nor the Juvenile Court Rules were referred to in the judgment.

The Juvenile Court Rules provide that detention at an approved school may be ordered as a measure of last resort.[180] The use of the last resort principle is the key to regulating imprisonment or detention. In interpreting s 22 (1) (2) of the repealed 1937 Act (retained in ss 119 (1) and 120 of the Law of Child Act and rule 54 (1) (d) and (3) of the Juvenile Court Rules), that imprisonment should be used as a measure of last resort, the High Court in *Musa and Ngozi v Republic*[181] held that the aim of this section was to make imprisonment an inappropriate and unsuitable punishment for children. In *Republic v John Gilied* [182] and *Republic v Fidelis John*,[183] the Courts held that fines, discharges and probation orders were appropriate alternatives to imprisonment. As shown in 8.3.2.2, despite the prohibition of imprisonment and the provision on the use of approved school orders, the principle of last resort has not been adequately translated into reality. Children are sentenced to imprisonment, although the extent to which imprisonment is used could not be ascertained.[184] The findings from the Commission for Human Rights and Good Governance report on the inspection of children in detention have shown that courts do sentence children to custody because many of them have no proper addresses and or have no parents, guardian or family to entrust them to.[185] Thus, 'children are given custodial sentences because of their family background, rather than due to the seriousness of their offence or the need for them to be detained'.[186]

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[179] *Judith Chomile's* case supra note 25.

[180] Rule 54 (1) (d).

[181] (1970) HCD No 278 (HC) 269.

[182] [1984] TLR 273 (HC).

[183] [1988] TLR 165 (HC).

[184] *Analysis of the Situation of Children in Conflict with the Law* op cit note 12 at 106.

[185] *Inspection Report for Children in Detention Facilities in Tanzania* op cit note 11 at 24.

[186] Ibid.

8.4 Post-trial detention in Tanzania child justice system: A measure of last resort?

As shown in Chapter 3, international law requires deprivation of liberty to be used only as a measure of last resort. It was shown in 8.2.2 that the last resort is one of the sentencing guiding principles that are intended to promote the reintegration of a child into the community. The last resort is also intertwined with the best interests of the child, whereas the latter should be considered in all actions concerning children as shown in Chapter 3. The Committee on the Rights of the Child 'underlines that protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders'.[187]

The present section highlights post-trial detention, particularly the imposition of custodial sentences that the Child Act and other laws provide, as well as the extent to which they are consistent with international standards, in particular, the last resort principle.

As shown in 8.3.2.3 above, the Child Act provides that children shall not be sentenced to imprisonment. However, imprisonment may be ordered for rape under the Penal Code. Further, a child may be detained at the President's pleasure for a homicide offence. While the court may order attendance at an approved school instead of imprisonment, detention at the President's pleasure for homicide is simply a punishment that is reviewable after 10 years.[188] In such situations, the discretionary power of the court in sentencing may be limited. In *Tabu Fikwa v Republic*[189] it was held that courts should seriously consider an alternative sentence before imposing imprisonment, except where the offence attracts a mandatory sentence of imprisonment under legislation. Detention at the President's pleasure, being a mandatory sentence for homicide, excludes any consideration of alternatives. In *Thomas Mjengi v Republic*[190] the High Court held that the mandatory sentence under

[187] CRC General Comment No 14 'The right of the child to have his or her best interests taken as a primary consideration (art 3, para1)', CRC/C/GC/14 Sixty-second session, 29 May 2013 para 28.

[188] Section 26 (2) of the Penal Code.

[189] *Tabu Fikwa's* case supra note 176 at 53.

[190] *Thomas Mjengi's* case supra note 118 at 165–6.

the Minimum Sentences Act[191] denies a convicted person the benefit of any consideration of factors, such as age, remorse, degree of participation and the prevalence of the offence. Thus, because it is the only sentence for homicide, detention at the President's pleasure is not a measure of last resort.

In relation to 'the shortest period of time', the Child Act provides that the length of approved school detention is either three years or when a child attains 18, whichever comes first.[192] Such period may be extended upon application by the manager of an approved school.[193] In addition, the execution of an order may be suspended pending arrangements for the placement of a child in an approved school.[194] During such a period, a child may be admitted to a retention home, entrusted to the care of a fit and proper person, or released on bail. It must be noted that there are no age categories for sentences including custodial sentences. Thus, whether three years detention is a long period is subjective and depends on the age of the child.

Where, for instance, an order is made against a child aged 12 it is most likely to have far greater negative consequences for that child than for a child aged 17. Not only is the former most likely to spend a long time in detention in an approved school, possibly for all of three years, but he is also at a disadvantage in missing parental guidance and care when it is most needed for a child of his age. For instance, in *Republic v Simon Daud and Yusuph Ramadhani*, [195] two children aged 12 and 14 were remanded waiting arrangements for approved school placement. In reviewing the order, the High Court observed that '[a]ccording to the Probation Officer's report the two juveniles got into trouble on account of lack of proper parental control'. In addition, suspension of sentence may be a punishment in itself as it may prolong the period of detention. In *Republic v Simon Daud and Yusuph Ramadhani*,[196] the court set aside an approved school order in respect of two children as they had been in remand for almost a year, waiting to be placed in an approved school.

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[191] (Cap 90 R.E 2002) as amended by Act 10 of 1989. Note, however, that the Act does not apply to children.

[192] Section 124 (4) Law of the Child Act. See also rule 54 Juvenile Court Rules.

[193] Sections 127, 128 and 129 Law of the Child Act.

[194] Section 125 Law of the Child Act.

[195] (1972) HCD No 28 (HC) 29.

[196] Ibid.

The period of detention for a homicide at the President's pleasure is indeterminate. The order may be reviewed after 10 years, as shown in 8.3.2.2. The possibility of release is also unrealistic, as it is not guaranteed. Even if it were, the period of 10 years is too long and is likely to affect a child's moral, physical and psychological development. Overall, the use of post-trial detention as a measure of last resort is inadequate.

Chapters 4, 5 and 6, however, have shown that there are policies and legal reforms taking place that are likely to improve the child justice system. Child Justice: A Five Year Strategy for Progressive Reforms (discussed in Chapter 4), is the relevant policy document that aims at ensuring that Tanzania's child justice system conforms to international standards. Thus, the policy is useful for improving the use of detention as a measure of last resort.

8. 5 Appeals

It was shown in Chapter 3 that a fair trial includes the right to appeal. This is provided by both the Constitution[197] and the Law of the Child Act.[198] The Constitution provides that when rights and duties are being determined by a court or other agency the person concerned shall be entitled to appeal or have another legal remedy.[199] This means an appeal from decisions of judicial and quasi-judicial bodies is a right. An appeal against an order or sentence under the Law of the Child Act shall be filed within 14 days from the date of order or judgment.[200] However, a person may apply to the High Court for an appeal out of time. The Juvenile Court Rules provide that the appeal should be filed in the High Court in the form of a memorandum, stating briefly the grounds of objection of the decision, sentence or order.[201] Such a memorandum should be in either Kiswahili or English. The Criminal Procedure Act provides that any person aggrieved by a decision of a lower court may appeal against findings, judgment or order.[202] Such an appeal may be both on matters of fact and of law.[203]

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[197] Article 13 (6) (a).

[198] Sections 99 (1) (g) and 130. See also rule 123 Juvenile Court Rules.

[199] Article 13 (6) (a).

[200] Section 130. See also rule 123 (1) Juvenile Court Rules.

[201] Rule 123 (2).

[202] Section 359.

[203] Section 359 (2).

Further, 'another legal remedy' in art 13 (6) (a) of the Constitution may be interpreted as a right to review or revision. The decision of a juvenile court may be revised by the High Court under its general supervision powers in terms of the Magistrates' Courts Act[204] and the Criminal Procedure Act.[205] The Criminal Procedure Act provides that the High Court may call and examine the records of subordinate court in order to satisfy itself on the correctness, legality or propriety of any finding, sentence, or order made.[206] In addition, it may examine the regularity of the proceedings.[207] In most cases, the powers of the High Court on revision are exercised after the aggrieved party has lodged a complaint on legality of sentence or jurisdiction of the trial court. It may also act on its own motion and call for trial court's record based on information obtained from other sources including media.[208]

In both appeal and revision procedures the High Court has the power to reverse the findings or order of the trial court and acquit the accused and it may alter the findings and maintain, reduce or increase the sentence.[209] Thus, in addition to appeal, revision is among the remedies listed in article 13 (6) (a) of the Constitution that an aggrieved person may pursue.

Despite the fact that legal provisions on appeal and revision are in existence, the practice in utilising them is different. The findings from the study on the analysis of the situation of children in conflict with the law show that children rarely ever appeal, partly because they do not have legal assistance.[210] Those few cases in which they do appeal are murder cases where they have legal representation paid by the

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[204] Sections 30, 31, 32 and 44 of the Magistrates' Courts Act Cap 11 (R.E 2002); s 130 (3) of the Law of the Child Act.

[205] Section 372.

[206] Section 372.

[207] Section 372 Criminal Procedure Act.

[208] Section 373 (1) (a) of the Criminal Procedure Act provides the High Court may exercise revision powers on records call for, reported for or which otherwise comes to its knowledge. From the author's own experience when working as a magistrate information may reach the high court through formal complaints by a party to the proceedings, for example writing a letter, or through media.

[209] Sections 166 and 373 Criminal Procedure Act.

[210] *Analysis of the Situation of Children in Conflict with the Law* op cit note 12 at 107.

state.[211] The findings also revealed that children are not always aware of their rights, partly because trial magistrates do not always explain the right to appeal to them.[212]

8.6 Conclusion

There is evidence that, at least on paper, Tanzanian law recognises the principle of proportionality, the last resort principle, the age of the child and the best interests of the child as important factors to be considered in sentencing children. How well these are integrated into the whole sentencing regime and practice is a more complex problem.

The Law of the Child Act and the Juvenile Court Rules provide various alternatives to imprisonment, which are keeping with the expectations of international law. These include conditional or absolute discharge, supervision orders, compensation, costs, fines and counselling. However, some of these alternatives are limited in scope. For instance, fines, costs and compensation are only available if a parent has contributed to the offence by parental neglect. Some of the non-custodial orders, such as repatriation and corporal punishment, do not promote reintegration or the best interests of the child. Despite the fact that the Law of the Child Act prohibits cruel, inhuman and degrading treatment or punishment, it does not expressly prohibit corporal punishment.

There remains confusion as to the use of custodial sentences as the Law of the Child Act and Penal Code contradict each other here. The former purports to outlaw imprisonment while the latter allows it. The provisions also do not make it clear when custodial sentences must be considered appropriate. This chapter has also argued that imprisonment at the President's pleasure is unconstitutional and should be outlawed.

To its credit, the Tanzanian child justice system makes adequate provision for the appeal and revision of the decisions of juvenile courts. The practice, however, has been that appeals are seldom lodged, mainly because children lack legal representation or because magistrates do not always explain such right to them.

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[211] Ibid. See generally ss 2 and 3 of the Legal Aid (Criminal Proceedings) Act (Cap 21 R.E 2002). It was shown in Chapter 7 that the state may pay for legal representation where an accused is unable to pay and if the Chief Justice, Principal Judge or a Judge in charge certifies that such legal aid is required for the interests of justice. The practice, however, is that legal aid is limited to offences that are punishable by capital punishment such as murder.

[212] Ibid.

The next chapter concludes this thesis and makes some recommendations.

CHAPTER 9: CONCLUSIONS AND RECOMMENDATIONS

9.1 Introduction

This thesis has investigated the extent to which Tanzania's child justice system embodies a child rights-based approach. Much of the investigation focused on the laws, procedures, practices and policies that have a direct or indirect relevance to child justice. It also took place in the context of recent reforms to child law in Tanzania, as reflected in the Law of the Child Act 2009; the Juvenile Court Rules; the National Strategy on Poverty Reduction; Child Justice: A Five Year Strategy for Progressive Reform (2013–2017); the National Costed Plan of Action for the Most Vulnerable Children (2013–2017); and the Multi Sector Plan of Action to Prevent and Respond to Violence against Children (2013–2016). The thesis also considered other policies the aims of which are to protect children from violence, to combat poverty and provide access to food, health and education.

It is too early to consider the impact that these reforms have had on child justice in Tanzania. It is possible, however, as this thesis has demonstrated, to predict what their impact might be by analysing the nature of these reforms and measures. At the core of this thesis is the assumption that a child justice system that respects the rights of the child has a better chance of bringing about justice to society and for the children involved. This assumption underpins the commitment to the protection of children's rights made by states at a global level.

In its opening chapter the thesis examined the development and theoretical underpinnings of child justice in order to lay the foundation for evaluating its hallmarks, as conceived by international law and Tanzanian domestic law. It tracked the history of the concept of child justice from its hazy beginnings, its preoccupation with removing problematic children from society and a concern for the protection and welfare of the child, to placing the child and his or her rights at its centre. The justice theory was seemingly emancipative, to the extent that it regarded very young children as being capable of intentional action. However, it was largely concerned with visiting retribution upon children, instead of viewing the offending child as being representative of society's ills rather than as individual who was considered a problem. Criminal justice, according to this theory, made no distinction between adults and children in terms of criminal procedures and sentencing. The child savers movement emerged in the United States in the Nineteenth Century to protect children,

including the needy, neglected, destitute and delinquent. Concerned with the welfare of the child, this movement led in practice to the development of a more child-centred justice system, underpinned by the emergence of 'juvenile courts'. Child savers also borrowed from sociological criminology to identify the social factors responsible for the commission of crimes. They proved that children in need of care were prone to delinquency because of the harsh socio-economic conditions in which they lived.

However, by the 1960s the welfare theory began to lose its appeal. Although it had the best interests of the child at heart, it was criticised for, among other things, treating children as objects of charity and not as rights-holders. Under it, children were sentenced to detention in reformatory schools without being accorded due process.[1]In addition, they were largely subjected to discretionary sentences without much guidance from statutory laws. Consequently, the 1967 landmark United States Supreme Court's decision in *Re Gault* [2] heralded the beginnings of a child rights-centred approach to child justice. It held that children have the right to be given notice of the charges proffered against them, the right to cross-examine adverse witnesses, the right to legal representation and the right not to be compelled to make self-incriminatory statements.[3]

Although these rights were recognised, the period that followed witnessed a return to the justice theory of punishment with its emphasis on criminal punishment and just deserts.[4] The backlash against the revised justice theory led to the development of the restorative theory of justice, which in child justice sought to emphasise the use of alternatives to imprisonment, such as reconciliation, restoration of relations, reintegration and rehabilitation.

The development of international and regional systems of human rights heightened the significance of human rights. No field of law has been left untouched by international law, and child law is no exception. The CRC and the African Children's Charter heralded far-reaching changes to perceptions and conceptions of the child and childhood. As far as the area of child justice is concerned, both of these treaties try to incorporate aspects of the three theories of justice referred to above. A child rights-based approach to child justice is essentially an amalgam of these

[1] See Chapter 2.

[2]See Chapter 2.

[3]Ibid.

[4]Ibid.

theories, perhaps with the welfare and restorative justice elements dominating the justice theory overall.

The welfare theory may be seen in provisions that emphasise the importance of delinquency prevention. Justice theories are reflected in criminal procedures, while the welfare theory serves as a counterweight to the justice theory in the application of those procedures. Thus, for example, while the justice theory may demand that a child be tried for a criminal offence, the welfare theory will insist that the best interests of the child are taken as a primary consideration in all actions concerning children.

The rights-based approach accentuates autonomy and thus broadens the rights that should be respected when dealing with a child offender through criminal or other mechanisms. As this thesis has shown, a rights-based approach to child justice has three main elements. There must be a clear and comprehensive child delinquency prevention strategy, policy or programmes, all of which must also be implemented effectively. The child justice system must try as much as possible to use alternatives to criminal proceedings. Lastly, criminal procedures must respect all rights of the child, not just during trial, but also before and after it.

It is this model of child justice that forms the basis upon which the Tanzanian child justice system was evaluated.

9.2 Implementing delinquency prevention

This thesis has argued that the best way to protect children is not just by protecting their rights when they are brought before the courts but also, and more importantly, by improving the conditions under which they grow up so that they are not made vulnerable to delinquency. The history of child justice supports the view that violence against children, neglect and, generally, their lack of basic needs are major causes of delinquency.[5] Issues of child poverty, parentlessness, lack of care or general destitution can be dealt with by guaranteeing and respecting the economic, social and cultural rights of children and ensuring that those in need of care and protection are granted alternative care and protection.

Although the prevention of child delinquency has not figured in legislation or in its Child Development Policy, there are policies and programmes established in Tanzania to address socio-economic needs, particularly those of the most vulnerable. These include policy measures under the National Strategy for Poverty Reduction and

[5]Ibid.

the National Costed Plan of Action for the Most Vulnerable. These policies inform some programmes under the Tanzania Social Action Fund (TASAF). They include social cash transfers that aim at supporting and enhancing the living standards of the most vulnerable households and families.

However, that these programmes are limited because they are reactive. They aim at supporting families that have been identified as most vulnerable, rather than being proactive by establishing programmes that may prevent households from becoming vulnerable. Hence, it is likely that the number of the most vulnerable children may increase if the programmes adopted do not result in poverty reduction.

The government has also introduced a Multi Sector Plan of Action to Prevent and Respond to Violence against Children and has established Committees for the Most Vulnerable Children. Although the Committees have not been established in most parts of the country, the work the existing ones have done provides an impetus for others to be established in other parts.

It is clear, as was shown in Chapter 5, that Tanzania is committed to protecting children from violence and to improving health services, the standard of living and access to education. It has adopted various policies with that aim in mind. The National Strategy for Growth and Poverty Reduction 2010–2015 and the Tanzania Development Vision 2025 are key policies examples. With specific reference to children, the Ministry of Community Development, Gender and Children adopted the Child Policy in 2008; the Ministry of Health the Health Policy in 2003;[6] and the Ministry of Education and Vocational Training the Education and Training Policy in 1995, followed by another in 2014. This thesis has argued that, while these policies have commendable provisions for children, they do not deal directly with the issue of child delinquency.

It has also been shown that Tanzania has made an effort to put in place legal measures to prevent violence against children and to protect them from other types of harm. For example, the Child Act provides for the protection of children from violence from parents and prohibits the use of cruel, inhuman and degrading treatment and punishment on children. Other laws seek to protect children from child labour,

[6] Note that at present a single ministry attends to issues concerning health and community development, this being the Ministry of Health, Community Development, Gender, Elderly and Children.

trafficking, alcohol and drug abuse, sexual violence, child pornography and other forms of child abuse. The Anti-Trafficking in Persons Act also makes it an offence to transport a person under the pretext of domestic or overseas employment for the purposes of prostitution, pornography, forced labour or sexual exploitation.[7] In addition, child labour is prohibited under both the Labour Relations Act and the Law of the Child Act.

Further, although the Act places some obligations on local government, such as reporting child rights violations, and on social welfare officers to investigate child violence, such obligations are limited. First, 'reporting' relates to violations by parents, guardians and relatives who have to provide basic needs, including food, education, medical care and who must protect children from violence and abuse.[8] Secondly, although social welfare officers and the police officers have the power to investigate child abuse, this power only relates to children who experience violence within families.[9] Thus, the Act neglects homeless or parentless children. Further, although the Act prohibits cruel, inhuman or degrading treatment or punishment, it does not expressly prohibit corporal punishment. As a result, corporal punishment continues to be administered in homes and is legal in schools and justice institutions.

The thesis also provides a brief overview of the protection of economic, social and cultural rights in Tanzania to show how seriously Tanzania considers its duty to provide its citizens, and children in particular, with access the basic means of survival and development in general. Chapter 4 established that the Constitution provides for a limited number of socio-economic rights. These are the right to work, to remuneration, to property and to education. The last-named right is not justiciable. The Law of the Child Act that recognises the rights of children to education, health, food and shelter supplements these rights. Importantly, the Draft Constitution, soon to be referred to a referendum, has in it a specific provision (art 53) that provides for child rights, including the right to health, to food and nutrition, to education and to protection from harm.

In addition, a number of policies, most of which are relevant to children, have been adopted in the areas of poverty reduction, health care and education. However,

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[7]Section 4 of the Anti-Trafficking in Persons Act 6 of 2008.

[8]See ss 94 (7), 95 (1); ss 8, 9 of the Law of the Child Act.

[9]Sections 95 and 96 (1), of Law of the Child Act.

as has been previously mentioned, what remains of concern is the lack of a clear and comprehensive policy that links general access to socio-economic rights, child poverty, parental care, child destitution and child justice.

9.3 Non-judicial interventions

Tanzania has some legal provisions that have led to the development of the practice of diversion, but these provisions are very insubstantial. Despite the fact that there is some progress in laws and policies reforming child justice in general, and diversion in particular, a consistent and comprehensive system of alternatives to criminal proceedings is yet to be finalised. As a result, Tanzania still relies on criminal proceedings as the backbone of its child justice system.

The Child Justice: A Five Year Strategy for Progressive Reform document adopted by the Child Justice Forum, an inter-agency comprising various government agencies and non-governmental organisation officials, seeks to regulate and provide for diversion and rehabilitation programmes. Community rehabilitation programmes have been established in Temeke district as a pilot area in 2012 and, more recently in 2015 in Mbeya. One hopes that these programmes will be rolled out to the country's 29 regions.

9.4 Pre-trial and trial procedures

The pre-trial and trial procedures for dealing with child offending were scrutinised at length. Unlike other aspects of its child justice system, pre-trial and trial procedures are arguably more consistent with the international rights of the child. Nevertheless, a number of key deficiencies have been identified. For example, the minimum age of criminal responsibility remains too low (10 years as the absolute minimum and between 10 and 12 years as the age of presumed criminal responsibility). The principle of using pre-trial detention as a measure of last resort is not fully respected, as the Law of the Child Act imposes strict conditions for granting bail before a trial. Furthermore, although the right to be heard is recognised by the Constitution and the Law of the Child Act, the manner in which the right to legal representation is protected does not make it clear that the state has a duty to provide free legal assistance to children facing criminal proceedings. Perhaps more importantly, the law still allows the prosecution of children for status offences.

9.5 Sentencing and appeals

The thesis considered sentencing procedures against four principles, namely: that children must be dealt with in the light of their age and maturity; the proportionality principle; best interests of the child; and the last resort principle. It was shown that, on paper, all of these principles are included in the Law of the Child Act and the Juvenile Court Rules. Furthermore, case law would seem to suggest that courts take these principles into account, albeit not always consistently.

In general, Tanzanian laws make provision for the use of non-custodial orders as is required by international law.[10] These include conditional discharge, absolute discharge, fines, costs and compensation, compulsory school attendance and counselling. However, fines, cost and compensation orders can only be made in the case of a child whose parent has not contributed to the commission of the offence with which the child is charged. Furthermore, some controversial orders, such as the repatriation of a child to his/her home district, are also allowed. Curiously, the Law of the Child Act does not link some of these orders to the pre-trial alternatives for dealing with the child according to the criminal law.

More serious concerns relate to some of the forms of criminal punishment to which children may be subjected. Corporal punishment is still imposed, as is imprisonment at the President's pleasure. Both these sentences are contrary to human rights as they violate the prohibition of cruel, degrading or inhuman punishment, the principle that punishment must be definite and proportionate and be consistent with other rights of the child. Given that the law has domesticated the principle that imprisonment should not be imposed and an approved school order should be used as a last resort, one expects that the Child Act and its Rules would harmonise the provisions on detention or imprisonment in other legislation, particularly the Penal Code. Regrettably, neither the Child Act nor the Rules do this, despite the fact that the latter were promulgated to give effect to the former. This gap is particularly glaring, considering that the status of imprisonment vis-á-vis approved school orders has not been clarified. There seems to be some confusion as regards children who lack parental care and who thus must be provided with alternative care rather than being sent to approved schools, and children who have been convicted of a criminal offence.

[10]Chapters 3 and 8.

On a positive note, the provisions on appeal and revision try to give effect to the child's right of access to justice and to be heard by more than one court or forum.

9.6 Recommendations

In view of these conclusions, the study makes the following broad recommendations:

9.6.1 Protection against violence

Protection of children from violence is the key to a child's life and development in general, and the prevention of child delinquency in particular. Chapter 5 has shown that children who experience violence are likely to become violent. It is clear that the government has adopted policies and programmes that aim at protecting children from violence. Due in part to the results of the UNICEF study of 2009, which revealed high levels of various forms of violence against children,[11] the government adopted the Multi Sector Programme of Action to Prevent and Respond to Violence against Children 2013–217 and the National Costed Plan of Action for the Most Vulnerable 2013–2017. These are important policies that need to be translated into actions. In addition, the local government authorities, together with the Most Vulnerable Committees established at the ward and district levels, are important structures for child protection. It is important that these committees be established countrywide, as currently they exist in only a few districts.

Legislation is also in place to ensure that children are protected from all forms of violence. Section 9 of the Law of the Child Act prohibits violence against children. In addition, the Law of the Child Act prohibits torture or other cruel, inhuman or degrading treatment or punishment. It is evident, however, that corporal punishment is still used in various settings, including in homes and schools and as a judicial sentence (the last is dealt with in 9.6.9 below). Although the administration of corporal punishment in schools is governed by regulations, it is important that programmes are put in place to promote parenting skills and alternative punishment to corporal punishment both at home and in schools.

As shown in Chapter 5, various laws that criminalise acts that, although not forms of violence, are drivers of violence. Such acts include sexual exploitation, drugs

[11]Note that after this study, the UNICEF and the Tanzanian government commissioned another follow-up study in 2014 to identify knowledge, attitudes and practices on violence against children. The report from this study is yet to be released.

and child labour. Generally, Tanzania has taken sufficient policy and legal measures to address violence against children. It remains to be seen whether these policies will be translated into actions. As shown in 9.1 above, a clear and comprehensive prevention strategy, policy or programme to combat child delinquency should be designed to address the problem, particularly if implemented effectively.

9.6.2 Comprehensive policy on child delinquency

The state should adopt a comprehensive policy on the prevention of child delinquency. This should place at its centre access by children to the basic necessities of life and alternative care and protection services. Chapter 5 has shown that children who lack basic needs are prone to delinquency. Despite the fact that some progress is being made in implementing programmes such as a social cash transfer under the Tanzania Social Action Fund (TASAF), these programmes are limited.

The need to address the most vulnerable households and communities is consistent with the Committee on the Rights of the Child's recommendations. In 2006, in its Concluding Observations the Committee stated that 'based on its commitment expressed in [the National Strategy for Poverty Reduction] Tanzania [needs] urgently [to] develop a comprehensive social protection framework with the highest priority given to the most vulnerable children'.[12] Furthermore, Tanzania needs to enhance the living standard of households in general, and children in particular, by implementing the National Strategy for Poverty Reduction.

With regard to health services, important policies on health are in place. The National Health Insurance Fund and the Community Health Fund are relevant to ensuring that employees and communities access health services. Tanzania has included reproductive health, pregnancy, HIV/Aids and sexually transmitted diseases in its education curricula for both primary and secondary schools. These are relevant to delinquency prevention. However, three challenges emerge in the implementation of these programmes. These are, one, that only a few teachers are trained to teach adolescent health; two, that only a few children can access child friendly services; and three, that life skills are taught as an extra-curricular subject.

In order to achieve delinquency prevention through the provision of health services, it is recommended that more teachers are trained to teach adolescent health,

[12]CRC Concluding Observations 2006 para 54.

that access to reproductive health services is provided to children and that life skills training is included in education curricular.

With regard to education, Tanzania has made progress in increasing enrolment in schools, as shown in Chapter 5. Despite this progress, academic performance is still unsatisfactory. While an increase in school enrolment is commendable, there is a need to improve the quality of education, as enrolment (quantity) should also go hand in hand with quality education. Academic performance could be improved by employing trained teachers and constructing and equipping laboratories and other infrastructure with basics such as learning materials, chairs and desks. To its credit, the government, through Circular 5 of 2015, has abolished all contributions to schools from pre-primary to secondary level from parents for extra classes, water and electricity bills and desks. This is likely to improve enrolment and attendance, particularly if the government subsidy is paid adequately and in time, as envisaged in the Circular. In the past, some of the children drop out from school or could not attend school because parents were unable to pay contributions to their school.

Education for the most vulnerable children (also referred as children at social risk in Chapter 5) is also addressed in policies such as the National Costed Plan of Action for the Most Vulnerable Children 2013–2017. However, despite the fact that the educational infrastructure is available to the most vulnerable children, education programmes established under the Tanzania Social Action Fund do not support the most vulnerable beyond primary school level. Primary education is the lowest education level. Those completing it do not have the necessary skills for self-employment or employment in either the public or private sector. Hence, free education for the most vulnerable children should be offered beyond primary education.

9.6.3 Alternatives to criminal justice system

The use of non-judicial alternatives to punishment has a constitutional legitimacy in Tanzania. Article 107A (d) of the Constitution requires courts to promote reconciliation. Prior to the enactment of the Law of the Child Act in 2009 and the Juvenile Court Rules in 2014, non-judicial intervention could be exercised by relying on the provisions in the Constitution and other laws, such as the Primary Court Criminal Procedure Code and the Criminal Procedure Act. Informal community diversion and extra-legal diversion procedures could also be used. As was shown in

Chapter 6, despite being useful, legal provisions on diversion are limited in scope, diversion practice are inadequate and some of such practices, for instance extra-legal diversion, fall short of international child rights standards.

There is some evidence that the implementation of non-judicial measures is taking shape. The adoption of Child Justice: A Five Year Strategy for Progressive Reform in 2013 (discussed in Chapter 6) is an important policy document recognising diversion. For instance, one of the objectives of the Strategy is to develop prevention, diversion, rehabilitation and reintegration programmes for children who are at risk or are in conflict with the law. As mentioned earlier in this chapter and discussed further in Chapter 6, rehabilitation programmes were established in Temeke and have since been extended to Mbeya.

The Juvenile Court Rules promulgated in 2014 offer a proper legal mechanism for implementing diversion. According to the Rules, children remanded may be considered for diversion where the social welfare officer recommends this in the first assessment report.

To a limited extent, the Juvenile Court Rules suggest that magistrates and prosecutors have the authority to divert. However, it has been shown that their powers and responsibilities are not clearly stated. In order for diversion to function effectively, the powers of police officers, prosecutors and magistrates should be clearly defined. For instance, under the Juvenile Court Rules a child is considered for diversion after legal proceedings have been instituted. It is somehow unclear whether police officers have power to divert or not, or to recommend diversion before a case has been filed in court.

It is also important that more elaborate legal provisions and procedures on diversion as well as non-custodial sentences be introduced. The significance of these alternatives must be emphasised and principles clarified as to when and how they should be used. For instance, it is not sufficient that the Juvenile Court Rules provide for family conferencing and victim offender mediation without establishing who is required to carry out these processes and what the powers conferred upon such a person or institution are.

It is recommended that a pre-trial session should be conducted and, where possible, family conferencing and victim offender mediation take place so that a child is dealt with through non-judicial intervention. It is also important that police officers,

magistrates, prosecutors and other agencies be provided with powers to divert. Here, amendments to the Law of the Child Act and the Juvenile Court Rules are necessary.

There is a need to expedite the establishment of rehabilitation programmes elsewhere than in Temeke and Mbeya, so that courts are able to refer children to such programmes. It is impossible to make such orders if the rehabilitation programmes are not in place and those that are, are inadequate, as this automatically limits the efficacy of non-custodial orders.

9.6.4 Minimum age of criminal responsibility

The minimum age of criminal responsibility should be raised to 12 years or above, while the upper-age limit for children who should benefit from child justice principles and rights should be increased to 18 years. Increasing the age of criminal responsibility would reduce the number of children who come before the justice system and therefore protect more young children.

It is recommended that some provisions of the Criminal Procedure Act and other legislation should be amended so as to conform to the international standards and other domestic legislation regarding the definition of a child as a person below the age of 18. Further, in line with the recommendation of the Committee on the Rights of the Child, the age of criminal responsibility of 10 years is set too low. Therefore, as indicated before, the minimum age should be increased to 12 years or above. It must be noted, however, that 12 years is only the lowest recommendation of the Committee and a state may go beyond this threshold. As shown in Chapter 7, the Committee's Concluding Observations to Tanzania recommended that Tanzania should increase the age of criminal responsibility to 12 or over.

Increasing the age of criminal responsibility beyond 12 should also go hand in hand with adequate provisions on how to deal with children excluded from criminal responsibility. For instance, adequate non-judicial intervention would be appropriate to deal with them as well as others, whom, although they are not excluded by age, the proper diverting authorities determine that they should be dealt with through non-judicial intervention. Although non-judicial intervention is being developed, as seen in the rehabilitation programmes introduced in Temeke and Mbeya, such programmes should be spread countrywide.

9.6.5 Access to legal representation

The law should make provision for children to have access to legal representation at the state's expense and clarify the principles governing such access. This should also include the requirement that children and their parents should be advised at the police station and in court of the child's right to legal representation and legal aid. In addition, legal aid schemes should widen their scope to criminal cases, particularly for children in conflict with the law. Currently most legal aid schemes provide services in civil cases and a few criminal cases — mainly those where children are victims.

9.6.6 Bail

The powers and conditions governing the granting of bail to children need to be clarified, as should when detention before trial can be used. It is important that the Criminal Procedure Act, the Law of the Child Act and the Juvenile Court Rules are amended to make specific provision for bail in the case of children. Such amendments should be child friendly in the way that bail for children should not be unnecessarily restricted. In other words, bail conditions for children should be more lenient compared to those for adult offenders. This could be relevant in the implementation of the last resort principle.

9.6.7 Detention as a measure of last resort

The principle of last resort should be implemented by the adoption of various measures, including setting a time frame within which child matters are disposed of. For instance, the strategy on child justice reform seeks to ensure that there is a time limit within which child matters are to be determined. This requirement is consistent with the Recommendations of the Committee on the Rights of the Child as expressed in General Comment No 10 of 2007. The Committee recommended that

> States parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body.[13]

As shown in Chapter 7, a pre-trial detention for a period of nine years (2004 to 2013), as described in *Republic v Ally Yahaya Masudi*,[14] was very long. Such long-term detention is likely to damage the child's development.

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[13]CRC General Comment No 10 (2007) para 52.

[14]See Chapter 8.

The implementation of the last resort principle should also go hand in hand with capacity building for justice administrators, as recommended in 9.6.10 below. Seemingly, judicial personnel and others involved in child justice are not aware of the existence of the Law of the Child Act and its Rules. Instead, they deal with matters involving children, including sentences and other issues, in terms of what are provided in the Penal Code or other legislation. The recent decision (2015) in *Republic v Judith Chomile*, in which a child aged 15 was sentenced to eight years imprisonment for manslaughter contrary to section 195 of the Penal Code, is a clear indication of what it is that the Law of the Child Act illustrates. Although the Law of the Child Act prohibits imprisonment for children, neither it nor the Juvenile Court Rules were referred to in the judgment.

9.6.8 Decriminalising status offences

Status offences should be decriminalised. The decriminalisation of status offences has also been recommended by the Committee on the Rights of Child in its General Comment No 10 of 2007. Despite these recommendations, children are prosecuted for status offences, as shown in Chapter 7.

9.6.9 Review and abolition of certain sentences

There is a need to review or abolish some of the sentences imposed on children. Sentences, such as detention at the President's pleasure, repatriation of the child and corporal punishment need to be abolished as they do not promote reintegration and they are in conflict with international child rights standards. Detention at the President's pleasure is too long a period and may be reviewed only after 10 years. The review does not necessarily result in a release. A repatriation order does not seem to be compatible with reintegration and the best interests of the child. An order is meant to remove a child from a certain place to his/her home district without an inquiry indicating that the place is suitable and that there is a person (a parent or relative) to take care of the child.

With regard to corporal punishment, despite the recommendations of the Committee on the Rights on the Child in 2006 and 2015 in its Concluding Observations to Tanzania, Tanzania has not repealed provisions on corporal punishment, including judicial corporal punishment. In its Report to the Committee in 2013, it was submitted that corporal punishment is regarded as justifiable and is regulated in schools. However, it made no submission with regard to judicial corporal

punishment. Further, s 177 of the Law of the Child Act repeals life sentences for children for the offence of rape and amends the Penal Code by stipulating that the offence of rape is punishable by imprisonment for five years and corporal punishment. These provisions do not indicate a clear intention to repeal provisions on corporal punishment.

There are various factors that Tanzania needs to consider in relation to abolishing corporal punishment. First, corporal punishment is regarded as cruel and inhuman treatment in international law, as shown in Chapter 6. Secondly, as shown in Chapter 8, 48 states prohibit corporal punishment in all settings. This may be regarded as state practice leading to the development of international customary law. Thirdly, the Concluding Observations to Tanzania in 2006 and 2015 recommended that Tanzania should abolish corporal punishment. Although the Concluding Observations are soft law, they may interpret binding treaty provisions and elaborate on states' obligations in a particular treaty. In this respect, the prohibition of corporal punishment is in line with arts 19 and 37 of the CRC. While art 19 requires states to protect children from physical and mental abuse, art 37 prohibits torture, cruel and other forms of degrading treatment or punishment. Fourthly, art 13 (6) (e) of the Constitution prohibits torture, inhuman or degrading treatment or punishment. Fifthly, Tanzania has enacted the Law of the Child Act to promote and protect child rights. In its s 13, the Act prohibits torture or other cruel, inhuman punishment or degrading treatment. In addition, the High Court in *Thomas Mjengi* declared corporal punishment unconstitutional.

Thus, there is a need for Tanzania to prohibit corporal punishment by repealing the relevant provisions of the Penal Code, the Corporal Punishment Act and other legal provisions. Instead, alternative sentences including conditional discharge, absolute discharge, fines, compensation and costs should be used more regularly.

9.6.10 Transformation of child justice courts

A clear distinction between child justice courts and ordinary courts remains to be made. Child courts need to be transformed physically and conceptually so that they are truly child friendly. These courts must be presided over by qualified personnel who have specialised skills in child rights. Thus, it is important that judges, magistrates, police officers, social welfare officers, probation officers, prosecutors, advocates and others involved in the administration of child justice are educated in

child rights in general and child justice in particular. Although the Juvenile Court Rules have been promulgated, child rights in child justice may not be realised where those responsible for justice administration do not have the sufficient knowledge of child rights and child justice. For instance, as shown in Chapter 8 in respect of *Republic v Judith Chomile*, a child aged 15 was sentenced to eight years imprisonment for manslaughter contrary to section 195 of the Penal Code. Section 119 (1) of the Law of the Child Act provides that children should not be sentenced to imprisonment. In the judgment given in *Chomile's* case, the court did not refer to either the Law of the Child Act or the Juvenile Court Rules.

In *Republic v Faraja Emmanuel*, a child aged 16 was charged with manslaughter contrary to s 195 and 198 of the Penal Code. There, the court ordered a conditional discharge in terms of s 38 (1) (3) of the Penal Code. The Court did not refer to child-specific legislation, such as the Law of the Child Act and the Juvenile Court Rules either in the proceedings or in sentencing, despite the fact that conditional discharge is also provided for in both.[15] Reference to child-specific legislation would have shown that not only was the sentence imposed the least restrictive, but also that principles and factors to be taken into account when sentencing a child, such as the best interests of the child, the need for rehabilitation and reintegration, were also considered.

9.6.11 Capacity building and training of social welfare officers

There is a need to train and employ more social welfare officers. This is important in so many respects. First, social welfare officers play a major role in child protection systems at the level of local government and its authorities, including taking a lead in Most Vulnerable Committees as shown in Chapter 5 and provided for in s 95 of the Child Act. Secondly, the availability of a social inquiry report, which is relevant before a child is sentenced, depends on the availability of a social welfare officer. Chapter 8 has shown that children are sentenced without a social inquiry report because sometimes there is no social welfare officer to prepare it. Thirdly, some orders, such as supervision and conditional discharge, depend much on the availability of social welfare officers as indicated in Chapter 8 and as provided by the Juvenile Court Rules. When, for instance, parents are unwilling to supervise a child

[15]Section 119 Law of the Child Act; Rule 52 Juvenile Court Rules.

and no social welfare officer is available, the court may impose a custodial sentence. It is important, therefore, that more social welfare officers are trained and employed.

9.6.12 Improved law reporting on children

The reporting of legal matters in general and those concerning children in particular, should be improved.

9.7 Conclusion

The whole gamut of child rights is relevant to child justice. If fully implemented, there would be fewer children involved in criminal offences and those that are dealt with in a manner that ensures that they are reclaimed from delinquency and reintegrated in society. The Tanzanian child justice system has clearly evolved, especially with the adoption of a new Bill of Rights in the 1980s, the Law of the Child Act in 2009 and the Juvenile Court Rules in 2014. In addition, policies are being adopted that address child justice reforms in various aspects, including violence against children, socio-economic rights and the administration of child justice. The Draft Constitution of 2014 that is to be referred to a referendum is likely to enhance child rights, with civil and political rights and socio-economic rights to be included in art 53 if the Draft Constitution is adopted in its current form. However, a great deal more needs to be done to ensure that the child justice system in Tanzania fully embodies a human rights-based approach. The aim of this thesis, in general, and the recommendations in 9.6 above, in particular, is to make a notable contribution to achieving that goal.

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