

**STRENGTHENING ACCESS TO JUSTICE FOR A CHILD IN CONFLICT
WITH THE LAW: A CASE FOR LAW REFORM**

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DECLARATION

I KING'ORI ESTHER WAITHERERO do declare that this thesis is my original work and has not been submitted for a degree in any other university.

Date -----

This thesis has been submitted with my knowledge and approval as the University Supervisor.

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DEDICATION

This thesis is dedicated to my husband Charles Njuguna and to my children Angela, Peter, Claire , King'ori and Megan without their love, nurturing and constant support and encouragement I would not have made it this far.

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ABSTRACT

Access to justice is a core human right embodied in the Constitution of Kenya, 2010, and operationalized by Kenya's domestic legal framework. Access to justice is guaranteed to every person in Kenya. The constitutional and legal framework, however, fails in ensuring children in Kenya, who are in conflict with the law, access justice. This is despite ratification of some of the international and regional legal instruments touching on the rights of children. The challenge of children in conflict with the law, being unable to access justice, is attributable to the lack of procedural rules ensuring the proper realization of the rights of children, glaring gaps in the implementation of the existing law and the failure to actualize some of the core concepts enshrined in the international and regional framework in the Children Act.

This Study explores the problem of access to justice for children in conflict with the law. The focus of the analysis being both the international and the domestic legal framework, it critiques Kenya's existing domestic legal framework against the Convention on the Rights of the Child (CRC) and the African Convention on the Rights and Welfare of the Child (ACRWC). The Study further examines the administration of juvenile justice and all the encompassing rights including the right to survival and development for the child, the right to be heard and the presumption of innocence for children in conflict with the law. Juvenile justice is very broad. It includes child offenders and children in need of care and protection of the law who are collectively referred to as children in conflict with the law within this Study.

The Study finds Kenya's Children Act inadequate in ensuring access to justice for children in conflict with the law and recommends the review of the Act to ensure its full compliance with the international and regional framework. The recommendations on review of the Children Act include the full operationalization of Article 37 and 40 of the CRC and Article 17 of the ACRWC, and the implementation of a proper institutional framework to ensure the challenge of accessing justice by children in conflict with the law is effectively dealt with.

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ACRONYMS

Abbreviations

CRC- United Nations Convention on the Rights of the Child

ACRWC -African Charter on the Rights and Welfare of the Child

ICCPR International Covenant on Civil and Political Rights

UDHR-Universal Declaration of Human Rights.

ICESCR- International Covenant on Economic, Social and Cultural rights

Short names

Beijing Rules - Standard Minimum Rules for the Administration of Juvenile Justice

CRC Committee -Committee on the Rights of the Child

JDLs -UN Rules for Juveniles Deprived of their Liberty

Riyadh Guidelines -UN Guidelines for the Prevention of Juvenile Delinquency

LAWS CITED

International instruments

(In the order of year of adoption)

The 1955 Standard Minimum Rules for the Treatment of Prisoners, Economic and Social Council Resolutions Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

Declaration of the Rights of the Child 1959. General Assembly Resolution 1386 (XIV) 14 UN GAOR Supp (No. 16) at 19, U.N. Doc. A/4354 (1959).

International Covenant on Civil and Political Rights-Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1)

UN Standard Minimum Rules for the Administration of Child Justice, Adopted by General Assembly Resolution 40/33 of 29th November 1985.

United Nations Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20th November 1989 Entry into force 2 September 1990, in accordance with article 49.

The UN standard minimum rules for non-custodial measures (Tokyo rules) Adopted by General Assembly resolution 45/110 of 14 December 1990.

UN General Assembly Guidelines for the Prevention of Child Delinquency, Adopted and Proclaimed by the United Nations General Assembly Resolution 45/112 of December 14, 1990)

UN Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990

Committee on the Rights of the Child's General Comments

CROC (2002) *General Comment No. 2* “The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child.”
CRC/GC/2002/2 (Adopted at the 32nd session on 15 November 2002).

CROC (2003) *General Comment No. 5*: “General Measures of Implementation for the

CROC (2005), *General Comment No. 6* “Treatment of Unaccompanied and Separated Children Outside their Country of Origin” CRC/GC/2005/6 (Unedited Final Version)
(Adopted at the 39th Session on 3 June 2005) Para 61

“General Discussion on ‘The Child and the Media’” 13th Session, 7 October 1996
CRC/C/50 Annex IX; CRC/C/DOD/1

“Guidelines Regarding the Form and Content of Initial Reports to be submitted by States Parties under Article 44 (1)”, CRC/C/5, 15 Oct 1991 and the revised version, CRC/C/58, 20 Nov 1996

Recommendations from the Day of General of Discussion on Juvenile Justice” (Excerpted from CROC “Report on Tenth Session, CRC/C/43, Annex VIII, 10th Session, 13 November 1995)

Recommendations adopted during the Day of General Discussion on ‘Violence against Children”, in “Report on the twenty-fifth Session, September/October 2000, CRC/C/100”

African Union

African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24.9/49 (1990).

Domestic laws

Young Person Act Chapter 141 Laws of Kenya (now repealed)

Children’s Act Chapter 586 Laws of Kenya

Constitution of the Republic of Kenya 2010

Borstal Institution Act Chapter 92 Laws of Kenya.

Evidence Act Chapter 80 Laws of Kenya

The Penal Code Chapter 63 laws of Kenya

The Probation of Offenders Act Chapter 64 laws of Kenya

The Criminal Procedure Code Chapter 75 laws of Kenya

The Police Act Chapter 84 laws of Kenya

South Africa

Child Justice Act No. 75 of 2008.

Case law

In Re Gault 387 U.S. 1 (1967).

In re Winship 397 U.S.358, 90 S.Ct.1068, 25 L.Ed.2d 368 (1970).

Kent v. United States 383 U.S. 541, 86 S.Ct. 1045 [1966].

Mckiever v Pennsylvania, 403 U.S.528 (1971)

Kazungu Mkunzo and Another v Republic (2006) e KLR

CHAPTER ONE

INTRODUCTION

1.0 Background

Children come into contact with the justice system as offenders, victims, witnesses or children in need of care and protection. The child offenders and children in need of care and protection are the main subject of this study. In this study these two categories will be referred to as children in conflict with the law. These children face various challenges in the justice system due to lack of a proper legal, institutional and procedural framework. Kenyan law needs to provide for access to justice to ensure such children access justice before they enter into the justice system and once they find themselves in the criminal justice system.

For purposes of this study, justice is conceptualised broad. It encompasses the recognition of the rights of the children in the law; the provision of equal protection of the rights; the equal access to judicial mechanisms for such protection; the respectful, fair, impartial and expeditious adjudication of claims within the judicial mechanism; and the equal and humane treatment of the children incarcerated for purposes of enforcement of the law.

Access to justice for the purposes of this study is conceptualised broadly. It begins from inclusion within embodiment of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to ones rights; equal right to the protection of one's rights by the legal enforcement agencies; easy entry into the judicial justice system; easy availability of physical legal infrastructure; affordability of the adjudication engagement; cultural appropriateness and conducive

environment within the judicial system; timely processing of claims; and timely enforcement of judicial decisions.¹

Internationally, the Convention on the Rights of the Child (CRC) is the main instrument that deals with child rights.² Regionally, the Africa Charter on the Rights and Welfare of the Child (ACRWC) is the instrument that deals with child rights.³ These two instruments set standards that take into account the vulnerability of the child.

Prior to the CRC's adoption, a set of non-binding rules in the juvenile justice sphere had been adopted. These include the United Nations Guidelines for the Prevention of Juvenile Delinquency,⁴ the United Nations Standard Minimum Rules for the Administration of Juvenile Justice,⁵ and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.⁶ Some of the provisions in these rules have now attained binding status by their inclusion in the CRC.

The CRC and the ACRWC have revolutionized the area of child law in all its facets with a clear move from the doctrine of *parens patriae* which entrusted parents with rights over their children and with the State as the ultimate guardian of children. Juvenile justice referring to the set of laws, policies, procedures and institutions put in

¹ These are some of the principles embodied in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice commonly referred to as "The Beijing Rules," See UN General Assembly (1985) *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, Adopted by General Assembly resolution 40/33 of 29 November 1985, at <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf> (accessed 20/03/2016), Articles, 2.3, 7, 12, 20.

² Adopted by the United Nations Assembly on the 20th November, 1989 and entered into force on 2nd September, 1990. Available online on <http://www2.ohchr.org/english/law/crc.htm> Accessed on 30th April 2015.

³ Adopted by the 26th ordinary session of the assembly of Heads of states and Government of the OAU Addis Ababa, Ethiopia in July, 1990. Entered into force 29th November 1999. Available at <http://www.africa-union.org/official-documents/treaties-con>. Accessed on 30th April 2015.

⁴ Adopted by the UN General Assembly 14 December 1990, Resolution 45/112. Also known as the 'Riyadh Guidelines'. Available at <http://www.un.org/documents/ga/res/45/a45r112.htm> Accessed on 30th April; 2015.

⁵ Adopted by the UN General Assembly 29 November 1985, Resolution 40/33. Also known as the 'Beijing Rules'. Available at <http://www2.ohchr.org/english/law/beinjinrules.htm> Accessed 30th April 2015.

⁶ Adopted by the UN General Assembly 14 December 1990, Resolution 45/113. Also known as 'the UN JDL Rules'. Available at <http://www.un.org/documents/ga/res/45/a45r113.htm> Accessed on 30th April 2015

place to deal with children alleged or accused of committing crimes is part of this revolution.⁷ Children are now a subject of human rights and law rather than an object of it.⁸

Kenya has made great strides on the development of law regarding child justice by the enactment of the Children Act in 2001 and the promulgation of the 2010 Constitution on 27th August, 2010.⁹ Article 2 (6) of the Constitution provides that all treaties ratified by Kenya automatically become law of the land. Accordingly Kenya is bound both by procedural reporting requirement as well as the obligation to take legislative steps among others to ensure that the children rights as contained in the treaties are realized and implemented in domestic legal system.¹⁰

The Children Act domesticates the CRC and ACRWC. Despite this domestication, Kenya still needs to relook at its legislative framework on the children in the justice system to fill in the glaring gaps in the implementation of the existing law. There is also need to amend or include other provisions that have been left out to meet the standards set by the CRC and the ACRWC.

1.1 Statement of Problem

Articles 37 and 40 of the CRC are the ones that deal specifically with the administration of juvenile justice. The provisions in the Constitution 2010 and in the

⁷ See Bala, N and Bromwich, R “Introduction: An International Perspective on Youth Justice” in Bala, N *et al* (eds) (2002) *Juvenile Justice Systems: An International Comparison of Problems and Solutions*, Toronto: Thompson. 3.

⁸ UNICEF (2004) *Justice for Children: Detention As a Last Resort: Innovative Initiatives in the East Asia and Pacific Region* UNICEF: New York 4. See also Wernham, M (2004) *An Outside Chance: Street Children and Juvenile Justice - An International Perspective* Consortium for Street Children: London 13-14.

⁹ Kenya gazette supplement No.55 (The constitution of Kenya printed by the Government Printer Nairobi on 27th August, 2010)

¹⁰ Odongo Godfrey Odhiambo- The domestication of International law standards on the rights of child with specific reference to juvenile in African context. Available at <http://heinonlinebackup.com/hol-cgi-bin/get-pdf> Accessed on 30th April 2015

Children Act domesticate most of the provisions as set out by Articles 37 and 40 of the CRC and Article 17 of the ACRWC.

The Children Act, however, fails to comply with the CRC and the ACRWC in several ways:

- a. First, the Children Act does not provide for concepts such as minimum age of criminal responsibility, diversion, restorative justice system, and crime prevention mechanisms.
- b. Second, there are no procedural rules put in place to ensure enjoyment of the various guarantees in the Act like legal aid, privacy, and expeditious trial among others.
- c. Third, there are insufficient institutional safeguards like separate child friendly facilities like the courts, remand and rehabilitation homes and trained personnel which hinder enjoyment of these guarantees.

All these factors have violated or, at the very least, threatened the rights of children who are in conflict with the law. The result is a miscarriage of justice since the rights of children embodied in both international and regional legal instruments, as being the bare minimum requirements, are not reflected in Kenya's domestic legal regime. For instance, the minimum age of criminal responsibility for child offenders in Kenya, as captured in the Penal Code, Cap 63, Laws of Kenya, allows for children as young as eight years to appear in court. This deviates from best practices as such child offenders are too young to appreciate the impact of their choices or follow in the court process during their trial.¹¹

Such failure to comply with international legal instruments on access to justice for children defeats the essence of the law and puts Kenya at a precarious situation where

¹¹ Madalyn K. Wasilczuk (2012) "Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense," 45:291 *International Law and Politics* 291-333, Pg 14.

it is unable to protect the rights of its children, despite agreeing to be bound by the obligations arising from international law.

1.2 Research Questions

The questions that will guide this study are:-

- 1) Does the Kenyan Children Act provide for all the legal, procedural and institutional safeguards in juvenile justice as provided under Articles 37 and 40 of the CRC and Article 17 of the ACRWC?
- 2) Is there anything that can be done to ensure compliance and improve access to justice for a child in Kenya?

1.3 Research Objectives

This project paper seeks to fulfill the following research objectives:-

- a) Evaluate the existing Kenyan law on child justice vis a vis the Articles 37 and 40 of the CRC and Article 17 of the ACRWC, and to critically analyze the shortcomings in the Children Act.
- b) Examine ways to improve access to justice for children in Kenya and give recommendations on how to deal with the shortcomings.

1.4 Hypothesis

This study shall proceed on the hypothesis laid out hereunder:

- 1) First, the Kenyan Children Act does not provide for all the legal, procedural and institutional safeguards in juvenile justice as provided under Articles 37 and 40 of the CRC and Article 17 of the ACRWC.
- 2) Second, such gaps, and shortcomings can be dealt with by coming up with a comprehensive legal, procedural and institutional framework.

1.5 Justification of the study

There is no comprehensive law that has been enacted to deal with a child in conflict with the law which conforms to the international standards in the areas earlier highlighted.

The child offenders are provided for under sections 184 to 194 of the Act whereas the children in need of care and protection are provided for under section 119. These sections are not comprehensive in themselves and there are no rules made to guide their application.

This study evaluates the lacunas in the Children Act vis a vis Articles 37 and 40 of the CRC and Article 17 of the ACRWC. Further, this Study will highlight the problems facing children in the justice system in Kenya due to lack of comprehensive legal, procedural framework and institutional safeguards and why there is need for legal reform. This study will contribute towards coming up with the necessary comprehensive legal, procedural and institutional framework for the children in conflict with the law.

1.6 Theoretical Framework

The early development of juvenile justice law and practice was underpinned by a number of philosophical theories, predominant of which were the welfarist and justice theories. These theories were developed in the absence of a child rights' orientation that was at the time, nominally developing, if not absent altogether.¹²

¹² These theories have been extensively canvassed in early leading works on juvenile justice and the intention here would be limited to setting out in brief the main thrust of these theories with a view to providing the basis for this study. Some of the early works in this regard include Morris, A. and Giller, H (1987) *Understanding Juvenile Justice* London: Croom Helm; Naffine, N "Philosophies of Juvenile Justice" in Gale, F, Naffine, N and Wundersitz, J (eds) (1993) *Juvenile Justice: Debating the Issues* Australia: Allen and Unwin; Cuneen, C and White, R (1995) *Juvenile Justice: An Australian Perspective* Melbourne: Oxford University Press; Muncie, J (1999) *Youth and Crime* London: Sage Publications. For a recent discussion of these theories, see Zimring, F.E "The Common

1.6.1. Welfarism theory

Welfarism theory informed the juvenile justice in the United States in the late 19th century and early 20th century. It is also referred to in some writings as the protection model. It is the theory upon which the early juvenile justice courts in the United States and Western Europe were founded.¹³

The focus of this theory was on the welfare of the child rather than on the rights of the child or of the parents. Rehabilitation and treatment were considered the goals of the system. Courts assumed an important role in protecting a child. It advocated for a separate justice system for juveniles.¹⁴

Children were perceived as immature, mentally and socially. The original idea of a juvenile court was, children were to be nurtured and given guidance with a view to making them responsible adults rather than use criminal punishment to address children's violations of the law. Welfarism was informed by a desire to be kind as manifested in the general role of the state as *parens patriae*.¹⁵

Thread: Diversion in the Jurisprudence of Juvenile Courts” in Rosenheim, M.K, et al (eds) (2002) A Century of Juvenile Justice Chicago/London: University of Chicago Press. 17.

¹³Richard.A.Lawrence (2008) *History and development of the juvenile court and justice process*, Available at http://www.sagepub.com/upm-data/19434_Section_1.pdf Accessed on 29th April 2015

¹⁴ Ibid

¹⁵ An English law doctrine symbolizing the role of the Monarchy in protecting vulnerable parties in courts of equity. The advent of welfarism saw the extension of this doctrine in English law to children's issues, in which judges assumed wide discretionary powers to forcibly order the removal of children from destitute families. In the realm of juvenile justice, the philosophy of the doctrine meant securing the welfare of the child in the belief that the state must act as a child's parents securing needs rather than rights of the offender. See Schissel, B (1993) *Social Dimensions of Canadian Youth Justice* Toronto: Oxford University Press vi. Elizabeth Scott explains that under this doctrine, interpreted as 'parenthood of the State', the State 'has the responsibility to look out for the welfare of children and other helpless members of society. Thus, parental authority is subject to government supervision; if parents fail to provide adequate care, the State will intervene to protect children's welfare.' See Scott, E (2002) "The Legal Construction of Childhood" in Rosenheim, M.K et al (eds) *A Century of Juvenile Justice* Chicago: University of Chicago Press 116. In the early 20th century one consequence of this approach was that 'children's courts should not be an instrument to punish the child but one that protects and educates', see Bottoms, A and Dignan, J "Youth Justice in Great Britain" in Tonry, M and Doob, A.N (2004) *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* (Volume 31) Chicago & London: The University of Chicago Press 22.

The juvenile court judge was used by the state for the application of intervention measures including prevailing social inadequacies.¹⁶ Children in conflict with the law had their cases attended to by an administrative judge who reached the verdicts like probation or supervision, authorizing institutionalization in an orphanage or foster home, or sentencing the child to one of the penal institutions that existed then.¹⁷ The juvenile justice judge would be assisted by social service personnel, clinicians and probation officers. All these played a role in the juvenile court's search for a treatment plan best suited for a particular child's needs.¹⁸

The evolution of juvenile justice was directly related to the emergence of a group of philanthropists known as the progressives and child savers.¹⁹ They were acting from the fear that such social problems would overwhelm the traditional stability of the society hence creating new problems of social control.²⁰ The juvenile court's verdict was the treatment of needs and not deeds and the eventual rehabilitation of the child.²¹ This was because any criminal action on the part of children was seen as attributable to dysfunctional elements in their environment.

¹⁶ Robert E. Shepherd, jr; The juvenile court at 100 years: A look back. Available at <https://www.ncjrs.gov/html/ojdp/jjjournal1299/2.html> Accessed on 30th April 2015.

¹⁷ Clement, M (1997) *The Juvenile Justice System: Law and Process* London: Butterworth-Heinemann 18.

¹⁸ *ibid*

¹⁹See Dr Ann Skelton: Restorative Justice as a Unifying Force for Child Justice Theory and Practice: *A paper prepared for the 1st world congress on restorative justice Lima, Peru November 3-7, 2009*. Available at <http://www.unicef.org/tdad/4annskelton.pdf> Accessed on 29th April 2015. In this paper Ann says that as the century drew to a close, two of the "child savers" worked tirelessly to introduce the first juvenile court in the world. Interestingly, they were two women: Lucy Flower and Julia Lathrop. The first juvenile court was inspired by these two women, and the driving force behind it in its early years was two other women, Jane Addams and Florence Kelley. One of the first probation officers at the court was also a woman: Ida Barnett Wells. Its first woman judge, Mary Bartelme, adjudicated girl's cases from 1913, and was appointed as the presiding judge for the Chicago Juvenile Court in the 1920s. see also Platt, A (1977) *The Child Savers: The Invention of Delinquency*(2nd ed) Chicago: University of Chicago Press. It is of interest that Platt explains the emergence of the juvenile justice system as coinciding with a time of transition from an agricultural economy to an industrial economy and from a rural to an increasingly urban society (in the United States) with the effect of population explosion, urban-rural migration, social disruptions to family networks and the surge in criminal offending,

²⁰ This emerged in response to the social problems arising from rapid industrialization, urbanization and modernization in the mid to late 19th century and early 20th century in the American society.

²¹ Breen, C (2002) *The Standard of the Best Interests of the Child* the Hague: Martinus Nijhoff 196.

In dealing with child offender the juvenile court was required to look at the social and economic background of each juvenile.²² It presupposed that the court would look into the individual needs of the juvenile and determine their best treatment.²³ The juvenile court, placed emphasis on treatment, supervision and control and allowed the state to intervene in the lives of young offenders.²⁴

The main argument of welfare theorists is that due to their immaturity, children could not be regarded as rational beings. Welfarism as advanced incorporated the then emerging idea that children should be treated differently due to their immaturity.²⁵

In defining childhood at the time, pure welfarism drew heavily on criminology and sociology and in particular the moral intellectual development theory in criminology, which suggests that the younger the actor, the less probable it is that the sense of right and wrong always informs the actor's behaviour. The social construct of the innocent child was expanded in law and social theory and rational and scientific solutions designed by experts and administered by the State through the juvenile court prescribed.²⁶

²² Ibid page195

²³ Mack, J.W "The Juvenile Court" (1909) 23 *Harvard Law Review* 104-122

²⁴ According to Mack, an early proponent of the early juvenile court, the juvenile justice system at the time "required judges who were willing and patient enough to search for the underlying causes of trouble and to formulate a plan through which co-operation, oft times, of many agencies the cure (of offending) may be effected.' See Mack 119.

²⁵Mills, D.L "United States v Johnson: Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment"(1996)*De Paul Law Review* 903-941,904-905.

Available at <http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1795&context=law-review>. Accessed on 11th May 2015.

²⁶ See generally, Kohlberg, L (1969) *Stages in the Development of Moral Thought and Action* New York: Holt, Rinehart & Winston.

The trademarks of welfarism included the exercise of judicial powers over delinquent, uncontrollable and neglected children and this was used to justify the replacement of State control for parental control under the reasoning that the state would act in the child's best interests and thereby improve the child's welfare - the very essence of *parens patriae*.²⁷

In a children's court, a largely informal atmosphere would be the desired setting while giving greater importance to the role of social workers. The rehabilitative ideal of the court *vis a vis* the child offender was marked by disproportional and indeterminate individualized treatment.²⁸

Behind philanthropic vision and rehabilitative rhetoric of the juvenile justice system lay the ugly face of pure welfarism. The children were not allowed due process safeguards of the law like legal representation or other procedural safeguards like rules of evidence.²⁹ There was also extensive dependence on the use of institutionalization, often, for indeterminate periods of time.³⁰

Welfarism was only halted by the now widely acclaimed decision of the U.S Supreme Court in *Re Gault*.³¹ The court acknowledged the juvenile's right to counsel and other

²⁷ Breen, C (2002) *The Standard of the Best Interests of the Child op. cit.* page 199.

²⁸The decision made by the court would continue for the rest of the child's minority and would not be proportional to the offence since there exclusive focus on the offender only, and not the gravity or petty nature of the offence as well

²⁹ See case of *Re Crouse* where the father of Mary Ann Crouse argued that his daughter was illegally incarcerated without a trial. The Court denied his claim, stating that the Bill of Rights did not apply to juveniles. The Court stated that when parents are found to be "incompetent" in their parental duties, the state has the right to intervene and provide their child with guidance and supervision. The *Crouse* ruling was based on what the Court believed was the best interests of the child and the entire community, with the assumed intentions that the state could provide the proper education and training for the child. See also History and development of the juvenile court and justice process. Available at http://www.sagepub.com/upm-data/19434_Section_I.pdf Accessed on 29th April 2015.

³⁰Odongo Godfrey Odhiambo- The domestication of International law standards on the rights of child with specific reference to juvenile in African context. Available at <http://heinonlinebackup.com/hol-cgi-bin/get-pdf> Accessed on 30th April 2015

³¹ *Re Gault*, 387 U.S.1 (1967). Available at <http://www.uscourts.gov/educational-resources/get-involved/constitution-activities/sixth-amendment/right-counsel/facts-case-summary-gault.aspx>. Accessed on 29th

due process rights.³² The court rejected the rationale for denying procedural safeguards to juveniles stating thus:

The juvenile court has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individual treatment...Departures from established principles of due process have frequently resulted not in enlightened procedure, but arbitrariness...³³

On the discretion that juvenile court judges had, the Supreme Court in the case of *Kent*,³⁴ a case decided at the same time as *Gault*, was explicit that such discretion was not a carte-blanche for arbitrary procedure. It was stated there was need for procedural fairness, assistance of counsel, access to records and a statement of reasons for the juvenile court's decision to transfer a case to the adult court.³⁵ The essence of

April 2015. In this case the police arrest of a boy (Gerard Gault) aged 15 for allegedly using lewd and obscene language in a telephone call to a woman. The boy was subsequently detained in police custody for four days then taken before a juvenile court where the court conducted informal hearings with no records or transcript of the proceedings. The primary witness in the case was not called to confirm that Gault was the one who had made the telephone calls. In addition, no counsel was provided by the court. Gault was subsequently sentenced by the trial court to 5 years at the State Industrial School, hence the case was referred to the Supreme Court.

³² The Court determined that children appearing in the juvenile court required constitutional safeguards. It mandated that juvenile court hearings must include the basic procedural rights including the right to advance notice of charges, the right to a fair and impartial hearing, the right to counsel which included the right to confront and examine witnesses and the privilege against self incrimination. See *Re Gault*(as above) 31-57

³³*Gault case*, page 18-19.

³⁴383 U.S. 541, 86 S.Ct. 1045 [1966].

Available at <http://www.law.cornell.edu/supremecourt/text/383/541>. Accessed on 29th April 2015.

³⁵Morris Kent, age 16, was on probation when, in 1961, he was charged with rape and robbery. He confessed to the offense, and his attorney filed a motion requesting a hearing on the issue of jurisdiction because he assumed that the District of Columbia juvenile court would consider waiving jurisdiction to criminal court. The judge did not rule on the motion for a hearing, but waived jurisdiction after making a "full investigation," without describing the investigation or the grounds for the waiver. Kent was found guilty in criminal court and sentenced to 30 to 90 years in prison. Appeals by Kent's attorney were rejected by the Appellate courts. The U.S. Supreme Court ruled that the waiver without a hearing was invalid, and that Kent's attorney should have had access to all records involved in the waiver, along with a written statement of the reasons for the waiver. *Kent* is significant because it was the first Supreme Court case to modify the long-standing belief that juveniles did not require the same due process protections as adults, because the intent of the juvenile court was treatment, not punishment. The majority statement of the justices noted that juveniles may receive the "worst of both worlds"—"neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children". See also History and

Gault and *Kent* was that, despite the rehabilitative rhetoric, children often received punitive consequences.³⁶

As a rights culture developed in various countries in the 1970s, the welfare model was condemned for its paternalism, violation of rights and potential for discriminatory treatment and overreliance on institutionalisation.³⁷ This resulted in a two-branched criticism. On one hand, there were denunciations about the lack of due process safe guards and the conditions then obtaining in institutions. On the other hand, a perception developed of an over-lenient attitude on the part of the juvenile court. Despite the above, Welfarism theory remained dominant for almost a whole century. Its dominance as earlier said was halted with the decision in *Gault*.³⁸ In light of the criticisms on the welfare theory, there was a shift on the philosophical basis for juvenile justice ensued. This climaxed in the development of the 'back to justice' theory or the justice model as an alternative discourse.

1.6.2 The back to justice theory

With a clear aim of stripping the juvenile justice discourse of the protectionist policies inherent in the welfare theory, the alternative prominent model became the justice model taking root in the late 1970s and early 1980s onwards. The justice model came to be recognized, with punishment as the prime ideal.³⁹ It is also called attack on the juvenile justice.

development of the juvenile court and justice process page 26 available at http://www.sagepub.com/upm-data/19434_Section_I.pdf. Accessed on 29th April 2015 .

³⁶ ³⁶ Breen, C (2002) *The Standard of the Best Interests of the Child op. cit.* page 199.

³⁷It can therefore be said that the very special features of the first juvenile courts, namely their informality and wide discretion, also proved to be the Achilles heel of their welfarists philosophy.

³⁸Wadlington W, (1883)Reshaping juvenile justice system before and after in *Re Gault*, London: Butterworths page 197.

³⁹ Odongo Godfrey Odhiambo- The domestication of International law standards on the rights of child with specific reference to juvenile in African context. Available at <http://heinonlinebackup.com/hol-cgi-bin/get-pdf> Accessed on 30th April 2015

In this theory, children were no longer to be regarded as immature but rational and self-determining. Child delinquents were not regarded as victims of the environment within which they lived. Back to justice philosophy dictated that non-criminal behaviour, including the so-called status offences like truancy, vagrancy and being uncontrollable should not be dealt with within the remit of the criminal justice system. It gave priority to the liberty and freedom of its citizens of which children were part and parcel.⁴⁰

According to the theory all individuals including children were regarded as reasoning agents and therefore fully responsible for their actions. They were to be accountable before the law and appropriate punishment administered. They argued that the proper function of juvenile justice was to assess the degree of guilt of the child and apportion punishment in accordance with the degree of seriousness of the offending behaviour.

The individual child was to be accorded the full rights to due process within the *Gault* spirit. Rather than leave the discretion wide open as in the welfarist ,the justice model placed heavy emphasis on predictability and determinateness.

The state's powers had to be constrained. The justice model was therefore said to be concerned with dispensing 'just desserts.' The child is perceived as an independent author of their actions, endowed with a degree of free will. If such an independent deviant actor has contravened a rule, the balance of the scales of justice had been disturbed and can be restored only if the offender is punished. In pursuance of the ideal of determinateness, the extent of the punishment must be proportionate to the extent of the harm done.⁴¹

⁴⁰ ibid

⁴¹Snyman, C.R (1995) *Criminal Law (3rd edition)* Durban: Butterworths 20.

While juvenile justice entails the balancing of the need to protect society against criminal behaviour and the need to pay special attention to the personal circumstances of the child offender, this theory leaned heavily in favour of protecting society and thus emphasizing retribution as the primary goal. As a result, a juvenile justice system modeled on justice philosophy does not primarily focus on the issue of how to protect the best interests of the child.⁴²

Unlike Welfarism, the justice model placed children and adults on the same plane. Whereas the welfare model sought to give protection to the child, the justice model instead asserted that the purpose of the system was to cause pain and discomfort to the offender. This led to the call for more severe punishment as there was call against the use of less expensive form of sanctioning.

The justice model demanded like-treatment for child offenders as for adults on the premise that there was no differentiation between the two. In place of the juvenile court's previous informal conferences, the application of adult criminal justice procedures led to adversarial hearings similar to criminal trials.⁴³ This also led to the introduction of sentences like corporal punishment, hard labour, death penalty and long sentences.

The juvenile court did not totally mirror its adult counterpart court but there was an increase of due process rights. The juvenile court retained certain of its distinct aspects,⁴⁴ and the *parens patriae* doctrine survived the onslaught of due process. The irony is that the failure to fully extend the applicable due process rights to criminal

⁴²Breen, C (2002) *The Standard of the Best Interests of the Child*, *op. cit.* pg 199.

⁴³ Muncie, J "Children's Rights and Youth Justice" in Franklin, B (ed) (2002) *The New Handbook of Children's Rights - Comparative Policy and Practice* London and New York

⁴⁴ The case of *Mckeiver v Pennsylvania*, 403 U.S.528 (1971) decided by the U.S Supreme Court firmly refused to accept the right to a jury trial for children appearing in juvenile courts. On the other hand, a number of other cases ruled in favour of juvenile court-ordered preventive detention for children.

trials of juveniles meant that the range of procedural rights to which children were entitled were limited.

Indeed, it has been stated that the negative effect of *Gault* and the long line of cases thereafter was that they abolished the distinctions between the juvenile court, with its focus on the needs of the juvenile, and the adult court with its emphasis on legal guilt.⁴⁵

1.6.3 Practical convergence in the two models and its applicability in Kenya

Theoretically, welfarism thrived for much of the 20th century and its centrality was only halted in the period toward the end of the 1960s when the justice model firmly took root. In practical terms however, a world-wide struggle with the welfare-justice theories balance has ensued.

The dichotomous analysis based on welfare or justice models can be a helpful theoretical construct that captures the salient ideological shifts in the perceptions of the needs, rights and capacities of child offenders at different times in the history of juvenile justice.

However, the welfare-justice continuum cannot, exist in pure forms. As summed up by two scholars, “the welfare model can be understood as one polarity on a theoretical continuum of possible models of regimes of juvenile justice, though in the real world, no justice system exists in one of the pure forms described by analytical models.”⁴⁶

⁴⁵ Breen, C (2002) *The Standard of the Best Interests of the Child, op. cit.* pg203.

⁴⁶ Krisberg, B (2005) *Juvenile Justice: Redeeming our Children* London: Sage Publications 57 , *ibid*, Breen (above) 203.

Aspects of both models can be found operating in one juvenile justice system. A handy example is that it remains widely assumed that under a certain age young people are *doli incapax*.⁴⁷

In all countries there are special systems to deal with juveniles who commit offences. All are to some extent inspired by a welfare approach with attempts at excluding punishment or adapting punishment to the special needs of young people. In Kenya, however, we have a hybrid of both but the justice theory seems more dominant which allows children to be tried in the adult justice system and courts to mete out punishment for children.

1.6.4 Relevance of the justice-welfare theoretical debate to Kenya

In many cases juvenile justice laws in Africa Kenya included formed part of colonially inherited laws with the resultant effect that the philosophy of how to manage child offenders reflected the social construction of childhood as conceptualised by the colonizing countries.⁴⁸ The ideals of welfarism and justice models that were reflected in African juvenile justice systems, both in policy and practice, mirrored what was found in the colonizing countries' legal systems.

In Kenya, inherited juvenile justice laws mirrored the Britain's, now repealed 1933 Children and Young Persons Act, with emphasis on welfarist-oriented provisions.⁴⁹ Until the enactment of the Children Act in 2001 Kenya's juvenile justice system

⁴⁷That is incapable of forming an intention to commit a crime and should not be held fully responsible for their actions which is by and large a welfarist orientation, even though the age at which criminal responsibility is set differs remarkably

⁴⁸ See for example Alemika, E O and Chukwuma, I.C (2001) *Juvenile Justice Administration in Nigeria : Philosophy and Practice Lagos*: Centre for Law Enforcement Education 10 (tracing the evolution of the Nigerian juvenile justice system between Independence in 1960 and the year 2000 to the British Colonial rule in pre-independent Nigeria, and making the point that the defects in this system reflect the fact that it was part of the colonial legal system that had as its purpose the preservation of the colonial order).

⁴⁹ South Consulting (1999) "Juvenile Justice in Kenya: Project Identification Mission" (An Unpublished Report Commissioned by the Royal Netherlands Embassy). (Discussing the juvenile justice system put in place by the now repealed 1969 Children and Young Persons Act.

reflected the image of the Britain's child as found in the Children and Young Persons Act.

Kenya did not change her laws in line with the changing social construction of childhood and a host of other factors.⁵⁰ Whereas Kenya applied the ideology reflected the position in England, ironically even though there was a semblance of the welfare model, the expected perceived caring and rehabilitative notions of the system were illusory.⁵¹ Adequate protection of children from the adult system (an ideal of welfarism) was not automatic. One study records that:

It was found that the Kenyan conceptualization of the criminal justice process for children is generally a benign one, focusing on 'rehabilitation' and 'education' rather than on punishment. This is seen in the fact that even the current law does not use the terms 'conviction' and 'sentence'. Imprisonment is rarely used and children do not get criminal records. These features indicate a leaning towards welfarism in the criminal justice system for children. The danger in this is that in reality the system may be far less benign than it seems on paper. Children are not sent to prisons-but alternatives to imprisonment may also be damaging...⁵²

The fact that these laws were inherited from British laws enacted before the recognition of children's rights (with the adoption of the CRC in 1990) meant that children's rights ideology was not part of the juvenile justice theoretical debate in Kenya. Hence it can be said that the justice-welfare theories which were primary to

⁵⁰ Taking the example of Britain, juvenile justice legislation has changed quite remarkably with an increasing emphasis on punitiveness. Since the 1933 Children and Young Persons Act, this field has witnessed a number of law reforms including the 1969 legislation going by a similar name and eventually the 1989 Children's Act now in force (although not applying to juvenile justice issues). The juvenile justice sphere has been affected considerably by the developments in criminal justice legislation as well, including the 1998 Crime and Disorder Act.

⁵¹ See the discussion on welfarism, section 2.3 above.

⁵² See southern consulting (above)12

juvenile justice philosophy in Britain defined Kenyan juvenile justice discourse until the adoption of the CRC.⁵³

1.6.5 The entry of children's rights

Children's rights have evolved and developed significantly moving from when children were perceived not to have any rights and at the peak of welfarism theory when they were treated as objects of intervention.⁵⁴ In the late twentieth century children started being perceived as legal subjects and holding their own rights.⁵⁵ With the adoption of the CRC, and the ACRWC in 1990 the concept of children's rights transformed all issues concerning children and the area of juvenile justice was reformed as well.⁵⁶

Juvenile justice is now perceived through the lens of a children's rights-based philosophy as opposed to the earlier juvenile justice theories. This is because the CRC, the ACRWC and the trio of instruments as discussed in the introduction, document or incorporate some of the welfare and justice precepts.⁵⁷ They have strengthened the principle of the best interests of the child. They have reinforced the principle that children have a right to express their views and have their wishes taken into account in legal decisions which concern them. The CRC and the ACRWC make an attempt to close in the divide between paternalist and participatory rights.⁵⁸ Some of the

⁵³ *ibid*

⁵⁴ Nigel Lowe and Gillian Douglas, (2007) *Bromleys Family Law* 10th edition ,Oxford University Press, 6 and generally chapter 11 ;see also Robert Adams, *Juvenile justice and children and young peoples rights* in Bob frankline *the rights of the child*, (1986) Basil Blackwell Ltd ,97.

⁵⁵ LeBlanc, L (1995) *The Convention on the Rights of the Child-United Nations Lawmaking on Human Rights* Nebraska: University of Nebraska Press 3-62.

⁵⁶ Van Bueren, G (1995) *The International Law on the Rights of the Child* Boston/Dordrecht: Martinus Nijhoff at 169 (asserting that children's rights has revolutionized the whole doctrine of "parens patriae" including its operation in juvenile justice).

⁵⁷ See Sebba, L "Juvenile Justice: Mapping the Criteria" in Freeman, M and Veerman, P (eds) (1992) *The Ideologies of Children's Rights* Dordrecht: Martinus Nijhoff Publishers 237-254, 240-241.

⁵⁸ This is the essence of the relationship between the CRC's and ACRWC'S provisions on the best interests of the child as a primary criterion on all issues concerning children (Article 3 CRC and article 4 ACRWC) and the bulk of the CRC and ACRWC documenting protection, provision and prevention rights and the rights to participation

juvenile justice provisions of the CRC and the trio of non-binding international juvenile justice instruments (Beijing Rules, UN JDL Rules and Riyadh Guidelines) do represent a blend of both justice and welfare theories.⁵⁹

In light of the above as Sloth-Nielsen has contended the rights and the principles as established by the CRC provide a fresh yardstick against which [juvenile justice] legislation and policies can be measured.⁶⁰ She argues in addition to the above the CRC has established six entirely new features which usher in a new normative standard for juvenile justice which was hitherto absent in the earlier theories.⁶¹ These are the provisions in Articles 37 and 40 which include, amongst others the establishment of separate laws, institutions and procedures applicable to children accused or alleged of committing crimes; and the setting of a minimum age of criminal capacity. These are the principles that form the basis of this study and are discussed seriatim in the next chapter.

1.7. Literature Review

The literature review for this Study shall entail an analysis of books, journal articles, theses, reports, monographs and newspaper articles on the right of children to access justice. This study shall examine the existing literature and identify the gaps which this study addresses. Some of the literature available on the subject is examined below while the rest of the literature is examined during the course of the Study.

(Article 12 and Article 4(1) ACRWC). See generally, Alston, P (ed) (1994) *The Best Interests of the Child: Reconciling Culture and Human Rights* Oxford: Clarendon Press.

⁵⁹ Provisions entrenching diversion in Article 40(3), for example, represent recognition of what may be termed as 'welfarist ideals'. On the other hand, the procedural rights that underlie Article 40 of the CRC and Article 17(2) ACRWC are reminiscent of the demand for due process in the informality of the early juvenile court procedures, a key ingredient of what may be termed as a justice model.

⁶⁰ Sloth Nielsen, J "The Role of International Law in the Development of South Africa's Legislation on Juvenile Justice (2001) *Law, Democracy and Development* .67

⁶¹ *Ibid* 68

Violet Odala in her journal article “The Spectrum for Child Justice in the International Human Rights Framework: From ‘Reclaiming the Delinquent Child’ to Restorative Justice,”⁶² first examines the historical development of child justice globally before investigating the international legal framework regulating child justice. She compares the welfare model theory against the justice model theory. She notes that the welfare model theory did not regard children as rational or self-determining agents who are responsible for their actions.

The welfare model theory, however, did not allow children the due process safeguard of the law. For instance, there was no legal representation for children nor were the rules of evidence adhered to. This violated the rights of the children who were in conflict with the law. She leans towards the justice model theory which regarded children as reasoning agents responsible for their actions but then accorded the child offenders their full human rights and followed the due process of law to determine the culpability of the child to offenses they committed.

Violet Odala acknowledges the importance of the CRC as a “Landmark” in the protection of the rights of children. She holds that the CRC changed the status of children from “victims and recipients of welfare to individual rights holders.” Further to this, she examines the regional framework promoting the rights of children in Africa which includes the ACRWC. The ACRWC, she argues, was in consequence to the member states of the OAU agreement to protect the rights of the African child. Further still, she holds that the ACRWC offers better protection for the rights of the children than the CRC.

Violet Odala addresses aspects of restorative justice including redress and vindication of the victim through fair treatment and rehabilitation of the offender. She concludes

⁶² Violet Odala (2012) “Spectrum for Child Justice in the International Human Rights Framework: From Reclaiming the Delinquent Child to Restorative Justice,” 27:3 *American University International Law Review*, 543-580.

by emphasizing the importance of restorative justice as the best means to deal with children in conflict with the law. The journal article, however, does not address the impact that the international and regional legal instruments have had on the domestic legal instruments. This study will address the impact that the international and regional legal instruments have had on access to justice for children in Kenya.

Sharon Detrick in her book, *A Commentary on the United Nations Convention on the Rights of the Child*,⁶³ examines the CRC, including its history and its application. She defines a child as per the CRC to be, “any human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.” She reasons that by the Convention providing for the definition of the child, it sets out the scope of the application of the rights set forth under it. She also examines the definition of the term child as per the ICCPR and the ICESCR stating that the international legal instruments have specific provisions applicable to children, however, none of them specifically define who a child is leaving it open to the States to set legislation when a child attains the age of majority. She problematizes the concept of the beginning of childhood noting the debate on the significance of prenatal life. She states that Article 6 of the CRC promotes and upholds the right to life without specifically stating when life precisely commences. She explores the various rights of children as provided for under the international legal instruments. For instance, the right to name and nationality, right to be heard, freedom of expression, freedom of thought, conscience and religion, freedom of association and peaceful assembly, freedom from abuse and neglect, among others. Her analysis of the rights of children are done on a per article basis, commenting on the interpretation of the article while abiding to and the state obligations.

⁶³ Sharon Detrick (1999) *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, Leiden, Boston.

She also examines the implementation mechanism of the CRC, i.e. the Committee on the Rights of the Child to which states regularly report to on the implementation of the CRC domestically. She notes that the Committee is established by the CRC but operationalised by Article 45 which provides for the working of the Committee. Her analysis of the CRC involves guidance on the Articles of the Convention and how state parties have implemented the CRC. She, however, analyses the CRC only. Her examination does not dwell particularly with any one article or state party but with the articles enshrining the rights stated above and various state parties. This Study, however, considers the application of the CRC and the ACRWC in the domestic framework of Kenya.

Geraldine Van Bueren in his book, *International Law on the Rights of the Child*,⁶⁴ first examines the history of the international law on the rights of the child. He looks at the rights of children, both provided for under the law as well as morally. He states that children hold civil, political, economic, social and cultural rights. He argues that “denying that children are capable of exercising entire categories of rights is too simplistic.” However, not all rights that are exercised by adults can apply to children. For instance, the political right to vote cannot be exercised by children.

Geraldine Van Bueren’s analysis of the legal instruments specific to children includes: The Declaration of the Rights of the Child 1924, The Declaration of the Rights of the Child, 1959 and The Convention on the Rights of the Child (CRC), 1989. To a limited extent, he explores what the legal instruments achieve. For example, the CRC creates new rights for children under international law where previously they were none existent.

⁶⁴ Geraldine Van Bueren (1998) *International Law on the Rights of the Child*, Kluwer Law International Publishers, The Hague, The Netherlands.

Further, Geraldine Van Bueren ventures into the current international legal instruments promoting human rights including the Charter of the United Nations, the Universal Declaration of Human Rights, 1948, the ICESCR, 1966, and the ICCPR, 1966. He analyses the definition of a child under international law, exploring in detail the international legal status of the child. Further, he explores the delicate balance between the rights and responsibilities of a child. Pertinent to this Study, however, is his analysis of the administration of juvenile justice and the prevention of juvenile delinquency. He looks at the aims of a juvenile justice system and examines the rights of the children deprived of their liberty, problematising the established minimum age which children should not be imprisoned. He reasons that imprisonment should be explored as a measure of last resort when punishing children. Other forms of treatment of punishment should first be explored as means to ensure that child offenders are rehabilitated and reintegrated back to society.

The rest of the book explores other aspects of the rights of the child which are not necessarily pertinent to this study on children in conflict with the law. For instance, the rights of children in armed conflict analyzing the minimum age of recruitment and the situation of child prisoners of war and how they are treated when captured during war. The book explores the rights of children generally and where it focuses on children in conflict with the law, it takes an international law angle. The international legal framework regulating the interactions of children in conflict with the law is explored in detail. This Study, however, examines both the international legal framework and the domestic legal framework providing for access to justice for children in conflict with the law.

Geraldine Van Bueren⁶⁵ examines the international law regulating juvenile justice and the profound consequences that it has had in Europe. He notes that the international law promoting the rights of children obligates states to enact child oriented laws for the benefit of children in the state. He opines that international law rejects the idea of rehabilitation of child offenders, rather focusing on reintegration of the child back into society. This, he argues, is due to fact that the concept of rehabilitation severs the relationship that the child has with society since it holds the child responsible for their actions. Thus, the child may be removed from society for the purpose of treatment.

The concept of reintegration on the other hand considers the social environment of the child as a factor contributing towards the actions of the child. It focuses on assisting the child develop a sense of responsibility to the society. Geraldine analysis the historical development of international law governing juvenile justice noting how the definition of terms such as “juvenile” aided in the development of protection of children.

This enables child offenders to benefit fully from the protection offered for minors under international law. He examines the child-oriented justice systems and the principles upon which they should be based upon. For instance, the concept of criminal responsibility should be based upon the age of the child and the ability of the child to understand the consequences. He also addresses the rights of children when determining their criminal responsibility stating that judicial systems should take into account the child’s age when determining criminal responsibility but should promote the child’s reintegration into society.

⁶⁵ Geraldine Van Bueren (1992) “Child-Oriented Justice – An International Challenge for Europe,” 6:3 *International Journal of Law and the Family* 381-400.

He concludes by stating that in as much as international law on juvenile justice is aggressive in its protection, they are mainly recommendations without specific mechanism for enforcement. The focus of the article, however, is on Europe. This study focuses on Kenya, the domestic legal instruments operational in Kenya and the enforcement mechanisms available.

In her journal article, “Children’s Access to Justice,”⁶⁶ Gail Chang Bohr generally discusses the implications of the landmark case of *Re Gault* and *Kent v. United States* on the access to justice by children in legal proceedings. She addresses juvenile protection proceedings, the party versus participant status of the child in legal proceedings and the effective assistance of a lawyer during court proceedings. Gail Chang Bohr delves into the systematic and substantive issues that impact on the access to justice for children, for instance, legal representation for children. The journal article postulates that the right to legal representation is an aspect of access to justice to which children in the legal system are entitled to. Her discussion problematises the need for lawyers whenever children are involved with the judicial system. She states that there were instances when children lacked lawyers or if they did, then there was lack of continuity since different lawyers represented them at different stages of the trial. This situation threatened their right to access justice during court proceedings.

The article explored the associated rights, which are part of the right to access to justice for children, when in a party versus a participant status in legal proceedings. She leans towards the status of a participant in legal proceedings due to the more weighty rights. Lastly, the article explores the dynamics of the relationship between a lawyer and the child they are representing during the legal proceedings. Such a relationship is premised primarily on communication between the parties. Such

⁶⁶ Gail Chang Bohr (2001) “Children’s Access to Justice,” 28:1 *William Mitchell Law Review* 229-242.

effective communication is normally based on the child's age, degree of language acquisition, level of education and their cultural context. Gail Chang Bohr unpacks aspects of access to justice by discussing the right to legal representation for children. Her focus has been geographically limited to Minnesota in the USA and a specific aspect of access to justice that is the right to legal representation. This Study, however, looks at the right to access to justice in Kenya while broadly addressing its different aspects within Kenya's legal framework.

Madalyn K. Wasilczuk in the article "Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense,"⁶⁷ lays out the international and domestic sources of the law enshrining the rights of children in conflict with the law. The journal article extends the argument initially propounded by Gail Chang Bohr in the journal article, "Children's Access to Justice," laying out the importance of legal representation for minors. The author examines the current status of children's rights under the applicable domestic and international legal framework operational in Kenya. The article notes that the international legal framework lays the basis for respecting and upholding the right to access justice for minors and the Constitution of Kenya, 2010 is consistent to the provisions of international law. The Constitution of Kenya, 2010, categorically provides for the right to legal representation, however, it fails to define what amounts to "substantial injustice," to warrant legal representation funded by the state.

The Article by Madalyn K. Wasilczuk notes that judicial decisions on the matter have coloured what amounts to "substantial injustice," to mean capital offenses to where the penalty is loss of life or other grave offences, without stating what categories of individuals the state funded legal representation is particularly required. The author

⁶⁷ Madalyn K. Wasilczuk (2013) "Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense," in 45:291 *International Law and Politics* 291-333, at <http://nyujilp.org/wp-content/uploads/2013/04/45.1-Wasilczuk.pdf> (accessed 5/11/2015).

further details that the right to legal representation availed to minors under trial lacks assurance on the minimum child sensitivity training standards and is not clear whether the legal assistance is independent of other institutional players within the court, and lastly whether it gives the requisite voice to accused children. This renders the position of Kenya unclear as to whether it is in compliance with the CRC. However, what is clear is that the provisions are inadequate in protecting children. The lack of government aid to fund adequate legal representation for the minors contributes to the current challenge. Hence, this diminishes the likelihood of an outcome favourable to the interests of the children. However, similar to Gail Chang Bohr, the Author focuses on the right to legal representation for minors. They differ with Gail Chang Bohr in that the article focuses on Kenya. Both authors unfortunately dwell on the right to legal representation without addressing the other rights that comprise the right to access justice. For instance the rights of the child before and after trial. This Study addresses these facilitative rights substantially.

Odhiambo Millie Akoth⁶⁸ in the journal examines the substantive legal provisions found in the Children Act. She discusses, in brief, the history of the enactment of the Act, the various provisions found in the part I to XIV of the Act and the various rights found therein. She then discusses the rights of a child offender as found in part XIII of the Act and the rights that should be accorded to a child offender. She further discusses in brief the available international framework for the same and in particular she emphasises the need for child friendly courts, legal aid especially for the children in need of care and protection specifically the orphans and the vulnerable children. She further discusses the rights of children infected and affected with HIV/AIDS pandemic, their rights to education, health, amongst other rights, and, what the law provides and the gaps that exist in the protection of the property rights of the orphans

⁶⁸ Odhiambo Millie Akoth; *After the Promise, A Situational Analysis of Child Rights Protection under the Children's Act; 2003*. The Juvenile Justice Quarterly; Volume 2, Issue 2.

and vulnerable children. She does not however discuss the gaps that exist in the children Act in so far as the protection of the child in conflict with the law is concerned. These gaps are appropriately addressed in this Study and recommendations given in that respect.

Godfrey Odongo,⁶⁹ discusses the rights of a child as provided by the Children Act and the rights of the child that has been constitutionalised and the importance of such constitutionalisation. Odongo then discusses the four principles that are applicable in all the matters touching on the children which include the right to life survival and development, the principle of best interest and non-discrimination and the right to participation. He then goes on to discuss parental care, corporal punishment, child abuse, education and health rights of the children. He has also touched on juvenile justice. Under juvenile justice he just mentions in one paragraph the need to raise the minimum age of criminal responsibility and also diversion. Again despite discussing the rights in the children Act, he has not highlighted the gaps in the Children Act vis-a-vis the CRC and the ACRWC. This Study addresses these lacunas in Kenya's domestic legal framework vis-à-vis the CRC and ACRWC as standards of best practice.

1.8. Research Methodology

This study places emphasis on an analysis of the relevant available literature on the subject. In this regard, the study relies on secondary sources including international law instruments, the Kenyan constitution, various child care and juvenile justice legislation, report of Kenya law reform commission, case law, resolutions, declarations, general comments and the CRC and ACRWC concluding observations. The study also places considerable reliance on background papers, books and

⁶⁹ Godfrey Odongo, 'Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms'.(2012) 1 *AHRLJ*112-141.

academic articles. Various internet sites have been consulted for relevant data and information.

1.9. Limitation of the study

Whereas the subject of juvenile justice has been well researched in other jurisdiction, in Kenya there is scarcity of research sources in relation to the shortcoming and the gaps in the Children Act vis a vis the provisions article 37 and 40 of the CRC and Article 17 of the ACRWC. Attention has mainly been on the general rights available in the Act.

1.10 Scope of the Study

The study will only deal with access to justice for children in conflict with the law. It will specifically focus on the provisions on juvenile justice in the CRC and the ACRWC. It will highlight the shortcomings of the Children's Act against these instruments and the challenges that poses for an efficient and effective delivery of child justice in Kenya and the way forward.

1.11 Chapter Breakdown

This project paper will be presented in the following four chapters.

- a. Chapter one outlines the background of the study, Statement of the problem, the justification of this study, what theoretical frameworks are relied on, research objectives, the research questions which will guide the entire study, hypothesis, the research methodology that will be used to get materials, the study limitation and how the conclusion will be arrived at.
- b. Chapter two discusses the requirements of a child rights-oriented juvenile justice system as set out in Articles 37 and 40 of the CRC and Article 17 of the ACRWC.

- c. Chapter three discusses the compliance of the Kenyan law with the set international standards by the CRC and the ACRWC and the recommendations.
- d. Chapter four will deal with conclusion and recommendations.

CHAPTER TWO

THE INTERNATIONAL AND THE REGIONAL LEGAL FRAMEWORK ON CHILD JUSTICE

2.0 Introduction

The CRC, ACRWC and the United Nations guidelines on the juvenile justice are the main instruments that have provisions that deal with child justice. These guidelines are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules),⁷⁰ the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules)⁷¹ and the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines).⁷² These United Nations guidelines on the juvenile justice all constitute a comprehensive framework for the

⁷⁰ Adopted by the General Assembly in its resolution 40/33 on the 29th of November 1985 <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf> Accessed on 13th May 2015 .The Beijing Rules provide a framework within which a national juvenile justice system should operate. They set standards for a fair and humane response to juveniles who find themselves in conflict with the law from the time they are arrested, throughout the ensuing processes of investigation, prosecution, adjudication and disposition, non-institutional treatment, institutional treatment and aftercare.

⁷¹ The guidelines were adopted and proclaimed in its resolution 45/112 on the 14th of December 1990 Available at <http://www.un.org/documents/ga/res/45/a45r112.htm>. Accessed on 13th May 2015. The JDLs stipulate the standards applicable to juveniles deprived of their liberty in all forms and emphasise that deprivation of liberty must be a means of last resort, for the shortest possible period of time and limited to exceptional cases. These rules outline specific circumstances under which children can be deprived of liberty. They are essentially intended to counteract the detrimental effects of deprivation of liberty by ensuring the protection of the rights of child offender and their welfare while in custody.

⁷² The guidelines were adopted and proclaimed in its resolution 45/112 on the 14th of December 1990 http://www.ohchr.org/Documents/ProfessionalInterest/res45_113.pdf Accessed on 13th May 2015 .The Riyadh Guidelines offer a comprehensive and proactive approach to prevention of delinquency and the social reintegration of children at risk of being abandoned, neglected and abused. They are aimed at minimising the circumstances and conditions, which drive children to crime or expose them to victimization and entrapment in irregular situations. They indicate situations which would need official intervention and encourage an environment conducive to healthy development, integration and adjustment.

treatment of children who come into conflict with the law. Their main limitation is that they are mere recommendations and are non-binding.⁷³

Both the CRC and the ACRWC are premised on a set of four principles which guide consideration of all issues relating to the rights of the child, including the administration of child justice. These are the best interests of the child,⁷⁴ non-discrimination,⁷⁵ the right to life, survival and development,⁷⁶ and the right to be heard.⁷⁷

⁷³ A D Viccica 'The promotion and protection of children's rights through the development and recognition of an international notion of child justice and its child centred perspective in the United Nations' (1989) 68 *Nordic Journal of International Law* 68 at 81.

⁷⁴Article 3 of the CRC; article 4 (1) of the ACRWC and CRC General Comment No 5: General Measures for the Implementation of the Convention on the rights of the Child, CRC/GC/2003/5 (2003).The best interest of the child is an interpretative principle that guides the application of the other three principles. According to the CRC Committee on the Rights of the Child, its application requires systematic consideration of how children's rights and interests are or will be affected by decisions and actions concerning the child, undertaken by public or private welfare institutions including judicial and administrative decisions as well as policy formulation⁷⁴. In all actions and decisions, affecting the child, the best interests of the child must be the subject of active consideration and it must be shown that children's interests have been explored and taken into account as a primary consideration. See also Rachel Hodgkin & Peter Newell *Implementation handbook for the Convention on the Rights of the Child* (2007) 39. Available at http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf.

⁷⁵Article 2 of the CRC; Article 3 of the ACRWC.

The principle of non-discrimination prohibits discrimination on the basis of gender, ethnic or social origin, race, disability or any other status, and calls for the equal treatment of children. It underpins approaches to all other rights enshrined in the Convention including the rights of children who come into conflict with the law. By this principle, state parties are obliged to take all the necessary steps to ensure that all children in conflict with the law are treated equally by establishing rules, regulations or protocols, which enhance the equal treatment of child offenders and provide redress, remedies and compensation. See also CRC General Comment No 10 'Children's rights in juvenile justice' CRC/C/GC/10 25 April 2007 paragraph 6.

⁷⁶Article 6 of the CRC; article 5 of the ACRWC.

By conferring the right to life survival and development upon all children, both treaties place an obligation upon state parties to recognise every child's inherent right to life and to ensure, to the maximum extent possible, the survival and development of the child. States parties are expected to interpret development in its broadest sense as a holistic concept embracing the child's physical, mental, spiritual, moral, psychological and social development, to achieve optimal development of all children. see also CRC General Comment No 10 'Children's rights in juvenile justice' CRC/C/GC/10 25 April 2007 paragraph 12.

⁷⁷Article 12 of the CRC makes provision of the child's right 'to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law...' The ACRWC has a similar provision in article 4(1). Child participation highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights and applies equally to all measures adopted by states to implement the CRC. The principles impress upon governments to open their decision-making processes to children and to ensure respect for their views in matters that affect them. Within the child justice context, the right must be fully respected and

As mentioned in Chapter One the CRC and the ACRWC in Articles 37 and 40 and 17 respectively set out the requirements of a child rights-oriented juvenile justice system. These requirements include the establishment of separate laws, institutions and procedures applicable to children accused of committing crimes; the setting of a minimum age of criminal capacity; the principle of detention as a last resort and for the shortest period of time; the desirability of diversion; procedural guarantees in a juvenile justice framework and the limitation of certain sentences and need for alternative dispositions at the sentencing stage.

2.1 Requirements relating to separate procedures and courts applicable in the pre-trial and trial stages of the juvenile justice system

A juvenile justice system requires the institution of separate laws, procedures and institutions that apply specifically to children in conflict of law alongside but distinct from the criminal justice system applicable to adult offenders. This is the requirement of the CRC in Article 40(3). The requirement of separation relates to various aspects traversing the different stages of trial. From the moment of a child's arrest through to subsequent stages of the criminal procedure, international law requires a system which is unique to child offenders and distinct from the adult criminal justice system.⁷⁸ This requires the establishment of specialised units within the police, judiciary, court system, prosecutor's office and provision of specialized defenders or other representatives for children. According to international standards, a juvenile justice system must uphold the rights and promote the physical and mental well-

implemented through every stage of the process, by giving children the right to participate either directly or through competent legal representation. The child's participation must be genuine and not a mere formality. The older and more mature the child is, the more weight should be given to his or her views⁷⁷. According to the CRC, a child is every human being below the age of 18 years unless under the national law of a country, majority is attained earlier. Under the ACRWC article 1 a child is an every human being below the age of 18 years, with no room for flexibility.

See also Human rights in the administration of justice: A manual on human rights for judges, prosecutors and lawyers' (2003) United Nations. New York and Geneva, available at

www.ohchr.org/Documents/Publications/training9Titleen.pdf Accessed on 13th May 2015.

⁷⁸ Julia Sloth-Neilson 'The international framework' in Julia Sloth- Neilson & Jacqui Gallinetti (eds) *Child justice in Africa: A guide to good practice* (2004) 22.

being of children in conflict with the law. This is to ensure that children are treated differently from adults in a safe environment which complies with norms regarding the wellbeing of the child. The specific national legislation should strike a fair balance between the interests of the child, the state and the community.⁷⁹

One of the rules in the CRC and the ACRWC under this head is the rule that the arrest, detention of children must be considered as a last resort, and if nevertheless ordered, be limited to the shortest period of time.⁸⁰ This rule is the first of its kind and has no counterpart in earlier international human rights instruments.⁸¹ The State obligation regarding detention as a last resort has been consistently affirmed by the CROC in its examination of State Reports.⁸² The import of the principle of detention as a last resort and, when resorted to, for the shortest period of time, is that alternative measures to detention must be used at all stages of the juvenile justice procedure including in relation to pre-trial detention. This principle aims to restrict institutionalization in two regards; in quantity (“last resort”) and time (“minimum necessary period”).⁸³

The other requirement under this head is that of separate procedures and courts applicable to children.⁸⁴ It has been described as being a means for the fulfillment of the aims of juvenile justice in international law.⁸⁵ The rationale is that a separate juvenile justice system can be adjusted to the specific needs of children and can better

⁷⁹ *ibid*

⁸⁰ Article 37 CRC and article 17 ACRWC.

⁸¹ Van Bueren, G (1995) *The International Law on the Rights of the Child* Dordrecht/Boston/London: Martinus Nijhoff Publishers 210.

⁸² See generally, Abramson, B “An Analysis and Commentary on Issues of Juvenile Justice in the Concluding Observations of the UN Committee on the Rights of the Child, 1993-2000” in *Defence for Children International* (2001) *Juvenile Justice: ‘The Unwanted Child’ of State Responsibilities* Geneva: Defence for Children International.

⁸³ United Nations (1999) *The United Nations and Juvenile Justice: A Guide to International Standards and Best Practice* New York: United Nations 11.

⁸⁴ Article 3CRC and article 17(2)ACRWC.

⁸⁵ See Van Bueren (above) 175.

ensure their successful reintegration.⁸⁶ In this regard, the requirement of separation at the pre-trial and trial levels is involvedly linked with the objectives of a juvenile justice system which involves the adoption of measures for the reintegration and rehabilitation of child offenders.

The overall emphasis is to be placed on the competence of the forum and whether its procedure adheres to the aims of a juvenile justice system in international law.⁸⁷ Abramson records that the CROC has routinely disapproved legislative provisions and practice in many States which permit children accused of crimes to be tried in regular courts rather than specialised juvenile courts.⁸⁸

To ensure compliance with the CRC, Article 40(3) expresses the desirability, as a general rule, of specialised juvenile courts or other forum to deal with cases of children in conflict with the law. In limited instances where jurisdiction is vested on adult (regular) courts, States Parties must ensure that the standards apply fully to the proceedings the Beijing Rules emphasize the need for specialised training for the officials in charge of juvenile justice administration.⁸⁹ This requirement has been considered most vital in realizing the need for separate courts which apply to children.⁹⁰

⁸⁶ *Ibid.*

⁸⁷ Detrick, S (1999) A Commentary on the United Nations Convention on the Rights of the Child The Hague: Martinus Nijhoff Publishers. See also Cantwell, N "Juvenile Justice" in UNICEF (1998) Innocenti Digest No. 3 on Juvenile Justice Florence: UNICEF 10. and Cappelaere, G, Grandjean, A and Naqvi, Y (2005) Children Deprived of Liberty: Rights and Realities Amsterdam: Defence for Children International 51-52.

⁸⁸ See Abramson, B above 9

⁸⁹ That international law requires a juvenile justice system separate from the criminal justice system which applies to adults is further evident in rules that require specialization on the part of a host of juvenile justice officials, Beijing Rules, Rule 12.1, requires that "in order to best fulfill their functions, police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime shall be specially instructed and trained. In large cities, special police units should be established for that purpose". Rule 22.1 provides that "professional education, in-service training, refresher courses and other appropriate modes of instruction shall be utilized to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases.

⁹⁰ O'Donnell, D "Juvenile Justice and the Rights of the Child, Defence for Children International" (A paper prepared for the Seminar on Human Rights and Juvenile Justice, Barbados, 1989) cited in Van Bueren (above) 179

2.2 International law standards applicable to juvenile justice systems

The aim of every juvenile justice system should be the right of every child in the system to be treated in a manner consistent with the promotion of the child's sense of dignity and worth. These juvenile justice systems must take into account the child's age, the desirability for promoting the child's reintegration and helping the child assume a constructive role in the society.⁹¹

Second, the principle of proportionality must be reflected in the decisions taken at all levels of the juvenile justice system. This principle requires that 'any reaction' to juvenile offending must be proportionate to the circumstances of both the offender and the offence.⁹²

Third, a child rights-centered approach is encouraged. This approach would ensure the centrality of the child's well-being,⁹³ that a child in the juvenile justice system maintains contact with his family⁹⁴ the right of the child to participate in the adjudication process and proceedings⁹⁵ and that the best interests of the child are a paramount consideration in all actions concerning children. This is regardless of whether the actions are undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.⁹⁶

A number of provisions are further relevant in this regard. The first of these provisions is Article 40(2) (vii) of the CRC which stipulates the right of the child "to have their privacy fully respected at all stages of the proceedings."⁹⁷ The Beijing Rules

(arguing that "it would be difficult if not impossible for a tribunal which does not include a trained judge or magistrate to meet this requirement.").

⁹¹ CRC, Article 40(1), Article 17(2) ACRWC.

⁹² CRC, Article 40(4), Beijing Rules, Article 5(1). Article 17(3) ACRWC.

⁹³ Beijing Rules, Rule 5(1).

⁹⁴ Beijing Rules, Rule.

⁹⁵ CRC, Article 12. Article 4(2) ACRWC.

⁹⁶ CRC, Article 3. Article 4(1) ACRWC. See Van Bueren above 172 when he asserts that at the heart of these principles is "a duty on States Parties to maintain a balance between informality of proceedings [on the one hand] and [on the other] the protection of the fundamental rights of the child."

⁹⁷ Beijing Rules, Rule 8.1. Article 17 ACRWC.

prohibit the publication of information which may lead to the identification of a juvenile offender.⁹⁸ This is to avoid stigmatisation of the child. The Commentary to the Beijing Rules refers to criminological studies which provide evidence of the detrimental effects resulting from the labeling of a child as a delinquent.⁹⁹

In addition, the due process rights which apply to both adults and child offenders are included in the CRC and the Beijing Rules. In non-exhaustive lists the CRC, Beijing Rules and the ACRWC provide for the right not to be charged under the penal law for acts or omissions which were not prohibited by law at the time they were committed, the right to a presumption of innocence, the right to be promptly notified of the charges, the right to remain silent, the right to counsel, the right to confront and cross examine witnesses and the right to appeal to a higher authority at all stages of proceedings.¹⁰⁰

Another fundamental principle of international law that must guide the treatment of children in the juvenile justice process is that of speed.¹⁰¹ The ICCPR provides for juveniles to be brought “as speedily as possible” to adjudication. The need for speedy adjudication is also inherent in the principle of detention as a last resort and for the shortest period of time as contained in the CRC and discussed in the preceding section of this Chapter. The Beijing Rules reinforce this need for speedy adjudication by recommending that each case should be handled, “expeditiously without any unnecessary delay.”¹⁰² The emphasis that emerges from these provisions is that speedy disposal of the matter is consistent with the best interests of the child and limiting any period of deprivation of liberty.

⁹⁸ *ibid.*

⁹⁹ Van Bueren, G and Tootell, A “United Nations Standard Minimum Rules for the Administration of Juvenile Justice” (Unpublished Commentary submitted to the Defence for Children International) available at http://child-abuse.com/childhouse/childrens_rights/dci_bei.html (last accessed 10th November 2015).

¹⁰⁰ Article 17ACRWC, article 40 CRC.

¹⁰¹ *Supra* note 93, pg 175.

¹⁰² Beijing Rules, Rule 20. Article 17ACRWC.

The upshot is that there should be separate specialised courts that uphold the aims of the juvenile justice system. These courts must strive for informality of proceedings such as may be sensitive to the need for effective participation by children and to prevent the stigmatisation of children. In striving for such informality, however, the procedures in these courts must incorporate children's due process and fundamental procedural rights.

2.3 Minimum age of criminal responsibility

It has long been accepted that childhood is relevant to the general consideration of criminality.¹⁰³ The view that young children are slow to develop mental capacity and an acknowledgement that the criminal justice system is an inappropriate place to deal with their misbehaviour finds reflection in the concept of an age of criminal capacity.¹⁰⁴

International law acknowledges the link between age and criminal capacity. The most direct reference to this is found in Article 40 (3) (a) of the CRC requiring state parties to establish 'a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.' This obligation is reiterated in the ACRWC which is worded in similar terms.¹⁰⁵ These provisions, however, fall short of prescribing such an age, a clear illustration of the lack of an international standard on the age at which criminal capacity should be imputed.¹⁰⁶ Detrick notes that during the drafting stages

¹⁰³ P.Cane (2002) *Responsibility in law and morality*, Hart Publishing Oxford 65. See also the Royal College of Psychiatrists (2006) *Child Defendant*, Occasional Paper OP 56 where it is argued that children frontal lobes that are responsible for behavior and planning action mature at 14 years.

¹⁰⁴ Ncube, W "The African Cultural Fingerprint? The Changing Concept of Childhood" in Ncube, W (ed) (1998) *Law, Culture, Tradition, and Children's Rights in Eastern and Southern Africa* Dartmouth/Ashgate: Aldershot 16. SEE also LeBlanc, L (1995) *The Convention on the Rights of the Child-United Nations Lawmaking on Human Rights* Nebraska: University of Nebraska Press 123.

¹⁰⁵ ACRWC Article 17(4).

¹⁰⁶ Ramphal Mxolisi Sillah and Tawanda William Chibanda: -Assessing the African Charter on the Rights and Welfare of The Child (ACRWC) As a Blueprint Towards the Attainment of Children's Rights in Africa. IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 11, Issue 2 (May. - Jun. 2013), PP 50-55. Available at

of the Convention there was no specific discussion on the issue of age and criminal responsibility. The only reference was to recognition by States of “the right of children accused or recognised as being in conflict with the penal law not to be considered criminally responsible before reaching a certain age.”¹⁰⁷

A comparison of the minimum ages of criminal capacity set by different States even those within relatively homogenous social and economic status show disparities. This further explains the absence of an international standard in an area where notion concerning the age at which children are able to understand the consequences of their actions differ widely across cultures, and even within a given society.¹⁰⁸ Some guidance is, however, provided in the Beijing Rules to the effect that the minimum age should not be fixed at too low an age level, bearing in mind the facts of a child’s emotional, mental and intellectual maturity.¹⁰⁹

Since the adoption of the CRC, the CROC has interpreted and developed jurisprudence of this obligation on the part of States in three ways. First, the Committee has been unequivocal that failure to establish a minimum age of criminal capacity is a violation of the CRC. This has been its message to States which have submitted their implementation reports and appeared before the Committee without ever having set such an age. Criticisms in the Concluding Observations to the initial State Reports of Guatemala, Micronesia, Panama and Senegal are illustrative of this stance.¹¹⁰

http://figshare.com/articles/Assessing_The_African_Charter_on_the_Rights_and_Welfare_of_The_Child_ACRWC_As_a_Blueprint_Towards_the_Attainment_of_Children_s_Rights_in_Africa/1273777.

¹⁰⁷ Detrick, S (1992) *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* Dordrecht: Kluwer Law 492-494.

¹⁰⁸ Freeman, M “The James Bulger Tragedy: Childish Innocence and the Construction of Guilt” in Freeman, M, (1997) *The Moral Status of Children - Issues on the Rights of the Child* The Hague: Martinus Nijhoff Publishers 235-253.

¹⁰⁹ Beijing Rules, Rule 4(1).

¹¹⁰ As pointed out by Abramson, B (2001) “An Analysis and Commentary on Issues of Juvenile Justice in the Concluding Observations of the Committee on the Rights of the Child” in *Defence for Children International: Juvenile Justice: the Unwanted Child of State Responsibilities* Geneva: Defence for Children International 3

Second, the Committee has considered certain minimum ages set by States as very low and hence a violation of the CRC. The CROC has asserted that a very low age for criminal responsibility shows that the State does not have a clear idea of what the criminal law can achieve with young children, and does not appreciate the harm it can cause.¹¹¹ The impact of having an inappropriately low age for criminal responsibility is that the child offenders do not appreciate the effects of their actions nor can they participate fully in the trial process.¹¹²

Finally, the third approach the Committee has adopted related to the *doli incapax* rule and its reaction to a proposal that sought to abolish this doctrine in the Isle of Man. The CROC was of the view that abolition would be in violation of the CRC.¹¹³ The CROC condemned the UK when it abolished the doctrine. It criticized the low minimum age of criminal responsibility set at 10 years for the rest of the UK and 8 years for Scotland. It recommended that the UK considers raising the age of criminal responsibility from 10 years. The Committee stopped short of specifically recommending the reinstatement of the *doli incapax* rule.¹¹⁴

The issue of setting a minimum age of criminal responsibility remains contentious. The committee's approach distils what can be said to be an emerging 'minimum' threshold that requires the minimum age to be set at 12 years or more. This is therefore a guide to all state parties.

¹¹¹ *Ibid* 3. See also Cantwell, N "Juvenile Justice" in UNICEF (1998) Innocenti Digest No. 3 on Juvenile Justice Florence: UNICEF 3., JUSTICE (1996) Children and Homicide - Appropriate Procedures for Juveniles in Murder and Manslaughter Cases London: also JUSTICE, cited in Urbas,G (2000) "The Age of Criminal Responsibility" in Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice Series No.1812

¹¹² This is attributable to their lack of emotional and mental capacity. See J.Fionda (2005) Devils and angels youth policy and crime, Hart Publishers Oxford, Chapter 1. See also H.L.A. Hart (1968) Punishment and responsibility . Clarion Press, Oxford, page 152

¹¹³ CROC, Concluding Observations: Isle of Man (United Kingdom of Great Britain and Northern Ireland), CRC/C/15/Add.134, 16 October 2000 Paras 18-19.

¹¹⁴ CROC, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add. 188, 04 October 2002 Para 59.

2.4 Diversion

Diversion is a central pillar of a child's rights-orientated juvenile justice system. The extent to which a juvenile justice system incorporates diversion both in legislation and practice is one pointer to the system's adherence to children's rights.

Broadly, diversion has been defined as entailing "strategies developed in the youth justice system to prevent children from committing crime or to ensure that they avoid formal court action and custody if they are arrested and prosecuted."¹¹⁵ In relation to children in conflict with the law who are the subjects of this study, the concept of diversion assumes a much more limited meaning. Thus, it involves the referral of cases away from formal criminal court procedures where there is enough evidence to prosecute.¹¹⁶

Diversion can be used in the course of trial or at the post-trial stage of criminal proceedings. Although pre-trial diversion represents the earliest stage at which child offenders may be channeled away from the formal criminal justice process, diversion may occur at any stage of the process.¹¹⁷ Diversion is a process of flexible nature with no demands for formal programs as an alternative to formal court procedure.

As discussed in chapter one the establishment in the late 19th century of a separate court system for young people accused of crimes is considered as the beginning of diversion, as this was a form of channeling children away from the adult criminal justice system. With the establishment of separate courts, reformatories especially for children emerged. The programs in these reformatories involved the provision of

¹¹⁵ Muncie, J (1999) *Youth and Crime: A Critical Introduction*, London: Sage 305 quoted in Wood, C (2003) *Diversion in South Africa: A Review of Policy and Practice, 1990-2003* Institute for Security Studies (ISS) Paper 79 Pretoria: ISS 1.

¹¹⁶ Gallinetti, J, Muntingh, L and Skelton, A "Child Justice Concepts" in Sloth-Nielsen, J and Gallinetti, J (2004) *Child Justice in Africa: A guide to good practice* Community Law Centre: Cape Town 32.

¹¹⁷ Muntingh, L "The Development of Diversion Options for Young Offenders" in ISS (1997) *Policing the Transformation* Monograph No. 12 Pretoria: ISS.

treatment and moral education aimed at preventing recidivism. This amounted to diversion by virtue of the premise that these programs were intended as an alternative to formal criminal justice systems' institutions such as prisons.

As again discussed in Chapter one, abuse of the welfarist philosophy led to increased and indeterminate periods of incarceration of children under the guise of rehabilitation. This led to the shift in the philosophy to justice theory which was marked with advocacy which called for the implementation of 'the 3-Ds' (de-institutionalisation, decriminalisation, and diversion).¹¹⁸

Apart from the above explanation concerning the development of diversion, diversion has been justified as discussed below. First in this regard is the link between diversion and the 'labelling theory' of crime. The theory argues that contact with the justice system burdens a child with a label that makes the child behave according to such a label. The theory further explains that labelling encourages stigma, which fosters low self-esteem and, eventually, such low self-esteem prompts anti-social behaviour. Thus, an offending child is also potentially spared of a criminal record and the child's future opportunities (such as employment) and individual development are not hampered as would have been the case if a criminal charge was pursued in a formal criminal proceeding.¹¹⁹

Second, the practice of diversion, is widely acknowledged to promote more humanitarian and less stigmatising responses to child offending than punitive sentences. Van Bueren and Tootell contend that diversion practices which involve the removal of children from criminal justice processes serve to hinder negative

¹¹⁸ Walgrave, L and Mehlbye, J "An Overview: Comparative Comments on Juvenile Offending and its Treatment in Europe" in Mehlbye, J and Walgrave, L (1998) *Confronting Youth in Europe-Juvenile Crime and Juvenile Justice* Copenhagen: AKF Forlaget 21-53, 22.

¹¹⁹ See Becker, H.S (1963) *Outsiders: Studies in the Sociology of Deviance* New York: The Free Press 9. 14 and Dorhne, C and Gewerth, K (1995) *American Juvenile Justice: Cases, Legislation and Comments* Maryland: Austin and Winfield 295. I.

effects of subsequent proceedings in juvenile justice administration, such as the stigma of conviction and sentence.¹²⁰

Further, diversion has been lauded as being more effective in comparison to criminal trials.¹²¹ Studies have shown that through diversion child offenders are encouraged to accept responsibility for their actions, to provide restitution to the community or victims of offence, and to channel individual skills to the community, hence lowering re-offending rates by comparison conventional sentences.¹²²

The fact that most (pre-trial) diversion practices are devoid of the technical rigours and time delays that traditionally characterise formal criminal proceedings has also been cited as making diversion a better alternative to formal criminal proceedings.¹²³ Diversionary options have been said to recognize that most juvenile offending is “episodic and transitory (since) most young people mature out of criminal behaviour.”¹²⁴

Since the 1970s, different forms of diversion became an integral part of juvenile justice systems in most western countries; however, in most African countries this still remains a new concept yet to be fully utilized.¹²⁵

These include first, Caution. Caution is a formal procedure whereby if a child admits the commission of an offence, then at an arranged time they attend a police station accompanied by their guardian and an official caution will be administered by a

¹²⁰ Van Bueren, G and Tootell, A “United Nations Standard Minimum Rules for the Administration of Juvenile Justice” (Unpublished Commentary submitted to Defence for Children International) available at < http://child-abuse.com/childhouse/childrens_rights/dci_be29.html >(last accessed 14th November 2015).

¹²¹ Muntingh, L “Does Diversion Work?” (1999) 3 Article 40 8.

¹²² *ibid.*

¹²³ Sloth-Nielsen, J (2001) “The Role of International Law in Juvenile Justice Reform in South Africa” University of the Western Cape Journal 242-245.

¹²⁴ Australian Human Rights and Equal Opportunity Commission (2001) “Human Rights Brief No. 5 -Best practice principles for the diversion of juvenile offenders.”

¹²⁵ Sarre, R “Deconstructing and Criminal Justice Reforms: Rescuing Diversion Ideas from the Waste Paper-basket” (1999) 10(3) Current Issues in Criminal Justice 259-272, 259.

senior police officer.¹²⁶ The child must agree to the caution process. Cautions are not available for serious offences.¹²⁷ The underlying rationale for this is to restrict the applications of the cautioning scheme to the less serious offences.

Examples of informal police cautions and warnings can be found in New South Wales as early as the 1930s even though it was in the mid-1980s that the formal introduction of police cautioning was seen in this jurisdiction.¹²⁸ Juvenile justice practice in England and Wales has included the widespread use of police cautions. This continues to date, albeit on the strength of a new procedure which provides for the reprimand and final warning of child offenders (in lieu of cautioning) that was introduced by the UK Crime and Disorder Act, 1998.¹²⁹

Most western jurisdictions recognise that the police are the first point of contact for juvenile offenders and so allocate substantial discretion to them in terms of who qualifies for diversion. The police have thus been described as the “gatekeepers” to diversion in England, Germany, Ireland and New Zealand.¹³⁰

Juvenile Mediation is another form. This is most appropriate for young offenders being encouraged to make direct amends to victims of crime. This places the responsibility of the offence directly on the young offender and addresses the plight of the victim, as criminal justice proceedings are substantially offender-oriented. Mediation is particularly appropriate for the youth as it encourages a sense of responsibility. Young offenders are given the opportunity of facing the consequences

¹²⁶ John Heslop: Diverting Young Offenders from the formal Justice System. Juvenile Mediation/Reparation Scheme. http://www.aic.gov.au/media_library/publications/proceedings/09/heslop.pdf. Accessed 13th November 2015

¹²⁷ Diversion in Juvenile Justice: A Discussion Paper. <http://humandevlopment.gov.bz/wordpress/wp-content/uploads/2015/02/Diversion-Discussion-Paper-by-Bob-Kary.pdf> Accessed 13th November 2015

¹²⁸ Bagen, J, et al “Regulating Police Discretion: An Assessment of the Impact of the New South Wales Young Offenders Act, 1997” (2005) Criminal Law Journal 130.

¹²⁹ *ibid*

¹³⁰ Lyne B.C “Finding a Place for Juveniles in the Irish Criminal Justice System: Easy Question, Impossible Answer” (2005) Cork On-line Law Review 1-12, 7.

of their action in a way that should foster reform. It also provides educational elements to the young offender that allows them to realize the human consequences of their crime. This provides the victim with an avenue of gaining recompense, in a symbolic sense, for the offence committed against them. The offender may write an apology or verbally apologise directly to the victim; may perform some work directly for the victim or in an area agreed to, by the victim and offender. At all times a neutral person (the mediator) ensures that the needs of both parties are satisfied.¹³¹ This is found in New Zealand, Australia and United Kingdom. In Africa, South Africa and Namibia recognise it as a form of diversion.¹³²

The third is Family time & Peer association orders. These orders require a child to spend a specified number of hours with their family or to associate with persons who can contribute to their positive behavior or to refrain from associating with certain specified persons. Its purpose is to assist the child to change their behavior in the family setting with parental assistance.

Community service order is the fourth. This order requires a child to report to a probation officer at times specified for monitoring the child's behavior; and based on the assessment of the officer the child may be required to either perform certain duties for a specified amount of time or may only involve reporting to the officer. The officer then reports to the prosecutor of the child's progress. This order may be granted for serious offences with the purpose of placing children in trouble with the law under a very strict form of supervision at their home within the community.¹³³

¹³¹ Morris, A and Maxwell, G (eds) (2001) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* Oregon/Oxford: Hart Publishing.

¹³² BuyiMbambo 'Diversion: A central feature of the new child justice system' available at <http://issafrica.org/pubs/Monographs/No111/Chap7.pdf>. Accessed on 8th June 2015.

¹³³ Hallett, C "Where Do We Go From Here? The International Context: Trends in Juvenile Justice and Child Welfare" available at < <http://www.scotland.gov.uk/cru/documents/ech4-02.asp> > Accessed 8th June 2015).

Counseling or therapy is the fifth. Counseling is offered by a professional and the focus is to help the child with behavior problems at home, school and in the community; parent-child conflict; and adjustment to family traumas. This will usually be offered to minors abusing drugs or alcohol and as a result come into conflict with the law.

These different forms can also be combined depending on the circumstances of child being diverted.¹³⁴

For a long time, the practice of diversion in Western jurisdictions was based on the discretion of the police and other criminal justice role players. The lack of statutory recognition and definition of diversion led to a number of factors which amounted to problems to the effectiveness of diversion. Issues of lack of consistency, lack of uniformity and inequity in the application of diversion options were therefore inevitable. For example, abuse of police discretion and police disbelief in the effectiveness of cautions has over the years inhibited their use.¹³⁵

Further, the actual implementation of diversion programs often was incompatible their intended purposes. In some cases, discrimination in child offender access to diversion was unearthed.¹³⁶ These disquiets gradually led to statutory recognition and regulation of diversions in many jurisdictions.¹³⁷ The increasing statutory recognition of diversion and regulation of its practice demonstrates legislative attempts at

¹³⁴BuyiMbambo 'Diversion: A central feature of the new child justice system' available at <http://issafrica.org/pubs/Monographs/No111/Chap7.pdf>. Accessed on 8th June 2015.

¹³⁵ Barga, J, et al "Regulating Police Discretion: An Assessment of the Impact of the New South Wales Young Offenders Act, 1997" *op. cit.* 130.

¹³⁶ *ibid.*

¹³⁷ As a result, the New South Wales' (Australia) Youth Offender Act 1997 was enacted. In New Zealand, this led to the enactment of the Children, Young Persons and their Families Act 1989 (CYPFA). And in the United Kingdom they enacted Crime and Disorder Act, 1998.

addressing some of the concerns in relation to diversion and hence reduce the potential for violation of children's rights in diversion.¹³⁸

2.5 Sentencing and alternative sentencing regimes

A child rights-oriented juvenile justice system requires the limitation of certain sentences and the need for alternative sentences applicable to child offenders. This is one of the requirements of the CRC in Article 40. Traditionally, decisions about punishment of criminal offenders have been within the sovereignty of each state.¹³⁹ This is not true anymore as the applicable standards are included in a number of UN and regional human rights instruments.

In relation to sentencing of children, the standards in international children's rights demand that first the aims of sentencing must always be upheld and secondly, there must be restrictions on sentences that may be imposed on children.¹⁴⁰

A number of vital guiding principles have been included in both the CRC and Beijing Rules that are relevant to the sentencing of children. First is the 'principle of proportionality.' This Rule provides that the reaction taken in the adjudication and disposition of a case involving a child should be in proportion to the gravity of the offence, the circumstances and needs of the child and of society.¹⁴¹ One writer explains that "the principle of proportionality implies that the circumstances of the individual child should influence the manner and the form of the reaction in the juvenile justice system."¹⁴²

¹³⁸ Detrick, S (1999) A Commentary on the United Nations Convention on the Rights of the Child. The Hague: Martinus Nijhoff Publishers 702.

¹³⁹ Kurki, L "International Standards for Sentencing and Punishment" in Tonry, M and Frase, S (eds) (2001) Sentencing and Sanctions in Western Countries New York: Oxford University Press 331-378 at 331

¹⁴⁰ *ibid.*

¹⁴¹ Beijing rule 17(1) (a). CRC, Article 40(4). ACRWC Article 17.

¹⁴² Van Bueren, G (1995) The International Law on the Rights of the Child Dordrecht, Boston, and London: Martinus Nijhoff Publishers 183.

The CRC has established a common principle that should serve as the aim of juvenile justice. This principle is that Juvenile justice should aim at ensuring that children are treated in a manner consistent with their “age and the desirability of promoting the child’s reintegration and their assuming of a constructive role in society.”¹⁴³ Cappelaere has been asserted that a State Party to the CRC which adopts a sentencing policy for children which is punitive and aimed at general deterrence cannot attain this aim.¹⁴⁴

Second is the principle that deprivation of liberty, if used, should only be used as a measure of last resort and for the shortest period of time.¹⁴⁵ As highlighted earlier in this chapter, this principle limits institutionalisation in quantity and in time. It also implies an emphasis on the use of alternatives to institutional care to the maximum extent possible. Detrick writes that the aim of this standard is to avoid incarceration in the case of children, unless there is no other appropriate response that would protect the public safety.¹⁴⁶

By virtue of the restriction upon deprivation of liberty, international law makes it clear that different sentencing policies should apply to children in contrast to adults. The CROC has expressed concern at custodial sentences for children. It has also criticised the imposition of indeterminate sentences.¹⁴⁷

¹⁴³ Detrick, S (1999) *A Commentary on the United Nations Convention on the Rights of the Child* The Hague: Martinus Nijhoff Publishers 703.

¹⁴⁴ Cappelaere, G “Juvenile Punitive Law” in Cappelaere, G (ed) (1990) *The Future of the Juvenile Justice System* Amersfoort: Acco 275-284, 275.

¹⁴⁵ Beijing rule 17(1) (b). CRC, Article 37(b). ACRWC Article 17.

¹⁴⁶ Detrick, S (1999) *A Commentary on the United Nations Convention on the Rights of the Child* The Hague: Martinus Nijhoff Publishers 704.

¹⁴⁷ Hodgkin, R and Newell, P (2002) *Implementation Handbook for the Convention on the Rights of the Child* New York: UNICEF 551 (Citing the CROC, Concluding Observations: Burkina Faso, CRC/C/3/Add. 19, 15 July 1993, Para 11 thus: “The Committee notes that the sanctions set forth in the legislation as regards juvenile offenders, especially in cases carrying the death penalty or life imprisonment, reduced respectively to life imprisonment or to 20 years imprisonment, are excessively high....and not in conformity with Articles 37 and 40 of the Convention.”) and in respect of Nigeria, CROC, Concluding Observations : Nigeria, CRC/C/8/Add. 26, 21 August 1995, Paras 21 and 40 thus: “...The Committee is also concerned that the provisions of national legislation by which a child may be detained at [the President’s pleasure] may permit the indiscriminate sentencing of

In order to ensure that children are dealt with in a manner proportionate both to their circumstances and the offence, a variety of dispositions are required, including alternatives to institutional care. States Parties are required under Article 40(4) of CRC to make available a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programs; and other alternatives to institutional care.¹⁴⁸

The principle of proportionality and an emphasis on the well-being of a child reflect an individualised approach to sentencing. Therefore, sentences that are of a mandatory nature would be in violation of states' obligation under the CRC. Also in violation of the CRC would be the concept of minimum sentences.¹⁴⁹ The CROC has criticised countries where children are liable to be sentenced under minimum sentencing laws.¹⁵⁰

The international law, the CRC and the ACRCWC prohibit three main sentences. These are death penalty, life imprisonment and judicial corporal punishment. The imposition of the death penalty for children who commit offences whilst under the age of 18 years is prohibited under Article 6(5) of the ICCPR, Article 37(a) of CRC and Article 5(3)ACRWC. The prohibition of the juvenile death penalty is so universally practiced and accepted, it has reached the level of a norm of *jus cogens*.¹⁵¹

children for indeterminate periods. The Committee wishes to emphasize that the Convention requires that detention be a measure of last resort and for shortest period of time. The institutionalization and detention of children must be avoided as much as possible and alternatives to such practices must be developed and implemented.

¹⁴⁸ Detrick, S (1999) A Commentary on the United Nations Convention on the Rights of the Child The Hague: Martinus Nijhoff Publishers 704.

¹⁴⁹ See Sloth-Nielsen, J and Ehlers, L (2005) "A Pyrrhic Victory? Mandatory Sentences in South Africa" (Institute for Security Studies (ISS) ISS Occasional Paper 111 of July 2005); and Van Zyl Smit, D "Mandatory Minimum Sentences and Departures From Them in Substantial and Compelling Circumstances" (1999) 15 South African Journal of Human Rights 270-276.

¹⁵⁰ See CROC, Concluding Observations: Australia CRC/C/15/Add.79, 21 October 1997 Para 22.

¹⁵¹ According to Article 53 of the Vienna Convention on the Law of Treaties (1969), such a norm constitutes a general international law accepted by a large majority of States as a whole and is immune from derogation by states and is modifiable only by a norm of the same status.

The CROC has raised the issue of juvenile death penalty with a number of State Parties through its Concluding Observations on State Reports.¹⁵² The Committee emphasised that it is not enough that the death penalty is not applied to children but its prohibition must be confirmed by legislation.¹⁵³

Article 37 (a) of the CRC and Article 5(3) ACRWC prohibit the imposition of life imprisonment without the possibility of parole or release. This prohibition accords with the principle limiting detention to the shortest period of time. The Beijing Rules recommend that confinement shall be imposed only after careful consideration and for the shortest period possible.¹⁵⁴ The principle of detention as a last resort and for the shortest period of time would be violated if a prison sentence does not allow for the possibility of release or parole as it would be indefinite.

The CROC has in its Concluding Observations on State Reports submitted to it, urged the repeal of domestic laws which authorise the imposition of the life imprisonment so as to ensure compliance with the CRC.¹⁵⁵ Further, in one of its recommendations of a general nature, the Committee:

¹⁵²Hodgkin, R and Newell, P (2002) Implementation Handbook for the Convention on the Rights of the Child New York, *op. cit.* 548. The Committee has expressed concern in instances where Belgian law allowed for young persons between 16 and 18 years of age “to be tried as adults and thereby face the possibility of the imposition of a death sentence or a sentence of life imprisonment”. CROC, Concluding Observations: Belgium, CRC/C/15/Add.38, 20 June 1995 Para 11. Further, in respect of China, where the national legislation permits the imposition of death sentences on persons aged 16 to 18, the Committee was of the opinion that such sentencing of children “constitutes cruel, inhuman or degrading treatment or punishment”. CROC, Concluding Observations: China, CRC/C/15/Add.56, 07 June 1996 Para 21.

The Committee was also ‘deeply concerned’ about the fact that in Guatemala, the national legislation did not prohibit capital punishment. CROC, Concluding Observations: Guatemala, CRC/C/15/Add.58, 07 June 1996 Para 15

¹⁵³ Hodgkin, R and Newell, P (2002) Implementation Handbook for the Convention on the Rights of the Child New York, *op. cit.* 548.

¹⁵⁴ Beijing Rules, Rule 17.1(b).

¹⁵⁵ CROC, Concluding Observations: Zimbabwe, CRC/Add.55, 07 June 1996 Para 21 and China (above) Para 21.

“...urge[d] States Parties to repeal, as a matter of urgency, any legislation that allows the imposition of unacceptable sentences (death or life imprisonment) for offences committed before the age of 18, contrary to Article 37(a) of the Convention.”¹⁵⁶

The prohibition of corporal punishment as a sentence in juvenile justice system draws from the right of the child to be protected from torture or other cruel, inhuman or degrading treatment or punishment. This right is provided for in Article 37(a) of the CRC, Article 17(2) of the ACRWC and a host of other international human rights instruments.¹⁵⁷In addition, Article 19 of the CRC provides for the right of the child to be protected against child abuse and neglect while in the care of parent(s), legal guardian(s) or other persons who have the care of the child. The Beijing Rule 17(3) is more direct, providing expressly that “juveniles shall not be subject to corporal punishment.”

The CROC has gone beyond condemnation of ‘excessive’ chastisement, and noted in its Concluding Observations on States’ Parties reports and in other comments that any corporal punishment of children, however light, is incompatible with the CRC.”¹⁵⁸ Therefore under the CRC and the ACRWC, children’s physical integrity is absolute: any corporal punishment as a means of discipline wherever it is used, is prohibited. There is no doubt that the Committee’s jurisprudence affirms a total prohibition on judicially-imposed corporal punishment.¹⁵⁹

2.5.1 Restorative Justice as an alternative sentence

¹⁵⁶ CROC, “Recommendations adopted during the Day of General Discussion on ‘Violence Against Children’, in Report on the twenty-fifth session, September/October 2000, CRC/C/100, 130 cited in UNICEF, Hodgkin and Newell (above) 548.

¹⁵⁷ ICCPR, Article 7, Article 5 of the African Charter on Human and Peoples’ Rights; Article 5(2) of the American Convention on Human Rights; and Article 3 of the European Convention on Human Rights. In addition, by its resolution of 39/46 of 10 December 1984, the UN General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, which entered into force on 26 June 1987.

¹⁵⁸ Hodgkin, R and Newell, P (2002) Implementation Handbook for the Convention on the Rights of the Child New York, *op. cit.* 546.

¹⁵⁹ Kurki, L “International Standards for Sentencing and Punishment” *op. cit.* 339-340.

Restorative justice seeks to address offenses by understanding the harm that was caused, understanding who was harmed, and deciding what can be done to repair the harm. Within this model, repairing broken relationships caused by crime is paramount.¹⁶⁰ Restorative justice has been characterized as a form of justice that relies on reconciliation rather than punishment.¹⁶¹ The establishment of a restorative justice program is framed by significant international standards on the protection of the rights of children involved with the criminal justice system.¹⁶²

The CRC in article 40 recognizes the right of every child accused of having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth.¹⁶³ The ACRWC provides for child justice, based on a vision of social rehabilitation, reformation and reintegration of the child into the family.¹⁶⁴ The ACRWC provides a basis for restorative practices, even though it does not elaborate on the implementation of these values.¹⁶⁵

For the justice process to be truly restorative and address the needs of all those involved, there are a number of requirements that must be met and which determine the feasibility of a restorative approach. First, there must be sufficient evidence to support the charge against the child (a *prima facie* case), and the alleged offence must

¹⁶⁰ *Restorative Justice: A Primer and Exploration of Practice Across Two North American Cities* http://www.adler.edu/resources/content/4/1/documents/rj_whitepaper_final_13_04_29.pdf. Accessed on 8th June 2015.

¹⁶¹ Johansson, K "Children in Trouble with the Law: Child Justice in Sweden and South Africa" (2003) 17 *International Journal of Law, Policy and the Family* 308.

¹⁶² Denov, S "Children's Rights or Rhetoric? Assessing Canada's Youth Criminal Justice Act and its Compliance with the UN Convention on the Rights of the Child" (2004) 12(1) *The International Journal on Children's Rights* 1-20.

¹⁶³ See article 40,(1,3 and 4) which encourages the establishment of a separate justice system specifically applicable to children and anticipates measures to deal with the child without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected and also foresees a variety of dispositions to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate both to their circumstances and to the offence.

¹⁶⁴ Skelton, A "Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective" (2002) 42(3) *British Journal of Criminology* 496-513. See also Article. 17 (3).

¹⁶⁵ Violet Odala (2012) "Spectrum for Child Justice in the International Human Rights Framework: From Reclaiming the Delinquent Child to Restorative Justice," 27:3 *American University International Law Review*, 543-580.

fall within the scope of offences eligible for diversion as defined by the law. The child offender must admit responsibility for the offence in question. It is imperative that the entire process be undertaken voluntarily and, consequently, a child's admission of responsibility must never be obtained through undue pressure or coercion.¹⁶⁶ For the restorative process to take place, it is also necessary to obtain the consent of the child's parent(s), guardian or responsible adult, as well as the consent of the victim to diversion to a restorative process. Likewise, the victim of the offence must voluntarily agree to participate in the process, again, without coercion or undue pressure.¹⁶⁷

The UN Economic and Social Council has long recognised the benefits of mediation and restorative justice processes and programs as an alternative to formal criminal justice mechanisms in settling a variety of disputes, and providing for an appropriate response to the needs, rights and interests of victims, offenders, communities and all parties.¹⁶⁸ The council's Basic Principles on the use of Restorative Justice Programs in Criminal Matters establish a set of procedural safeguards that should be assured to all participants in restorative processes, including special safeguards for children.¹⁶⁹

¹⁶⁶Miers, D (2001) An International Review of Restorative Justice Crime Reduction Research Series no. 10. London: Home Office.

¹⁶⁷Promoting Restorative Justice for Children, 2013. Available at https://srg.violenceagainstchildren.org/sites/default/files/publications_final/srsgvac_restorative_justice_for_children_report.pdf. Accessed on 8th June 2015.

¹⁶⁸ See ECOSOC Resolution 1999/26, *Development and implementation and restorative justice measures in criminal justice*, available at http://www.restorativejustice.org/legislative-assembly/15statutes-cases-regulations-and-recommendations-from-national-regional-and-intergovernmental-bodies/copy_of_un/mediation. Accessed on 8th June 2015. Although the principles are technically not legally binding, they express generally accepted principles and represent a moral and political commitment by States. The Guidelines can act as a blue-print for states in enacting legislation and formulating policies aimed at giving effect to restorative justice practices.

¹⁶⁹ECOSOC Resolution 2002/12, *Basic principles on the use of restorative justice programs in criminal matters*, adopted in 2002. <http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf> Accessed on 8th June 2015. The principles provide that both the victim and the offender should have the right to legal counsel throughout the restorative process. In addition, children have the right to the assistance of a parent or guardian. The parties have the right to be informed about the process, their rights during the process and the possible consequences of their decision, before agreeing to participate. The restorative justice program should be a process undertaken freely and voluntarily, and consent can be withdrawn by either party at any time in the process. Children participating in restorative processes may need further support and additional safeguards to ensure that they are fully informed and that their consent is validly given. Consent given to participate in a restorative program should not be taken as evidence of admission of guilt in subsequent legal proceedings. All agreements should also be reached voluntarily,

Restorative justice can be used to replace formal justice processes by means of diversion, or it can be used to complement them as part of a court proceeding, as a sentence, or as a dimension of the child's reintegration.¹⁷⁰ This is because it enables an amicable settlement of problems with the prevention of recidivism as a core element of the negotiations and it also provides a platform for the offender to appreciate their culpability and make good their deviance through material compensation, guarantees of non-recurrence and other forms of atonements. It also provides room for rehabilitation of the offender.

2.6 Conclusion

This Chapter considered requirements of a child rights-oriented juvenile justice system. It discussed the establishment of separate laws, institutions and procedures applicable to children accused of committing crimes; the setting of a minimum age of criminal capacity; diversion; the principle of detention as a last resort and for the shortest period of time; procedural guarantees in a juvenile justice framework and the limitation of certain sentences namely prohibitions on juvenile death penalty; life imprisonment without the possibility of parole; judicial corporal punishment, a restriction on the use of deprivation of liberty and restorative justice as an alternative sentence.

without coercion or unfair means. They should also be reasonable and proportionate to the offence. The confidentiality of the proceedings should be ensured; a principle protected under various human rights instruments, including the CRC. Where appropriate, restorative processes should be judicially supervised, and in such cases the agreements should have the same status as a judicial decision or judgment. If the parties fail to reach an agreement through the restorative process, the case will be referred back to formal criminal justice proceedings. This situation shall not be used against any of the parties in subsequent criminal justice proceedings. Similarly, the failure to uphold an agreement reached through a restorative process should not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

¹⁷⁰Promoting Restorative Justice for Children. Available at https://srsg.violenceagainstchildren.org/sites/default/files/publications_final/srsgvac_restorative_justice_for_children_report.pdf. Accessed on 8th June 2015.

The CRC and the ACRWC contain elaborate set of guidelines for maintaining human rights standards in child justice systems.¹⁷¹ They are comprehensive. They give standards of the laws that all countries should enact for the treatment and protection of children in conflict with the law. Kenya, a signatory to both the CRC and the ACRWC is bound to respect and ensure that the rights set forth in the two instruments are assured to all children within her jurisdiction, and in the context of this study - child offenders.

The next chapter will discuss and analyse the Kenyan law that deal with juvenile justice and the extent to which it measures up with the CRC and the ACRWC standards and norms.

¹⁷¹ Julia Sloth-Neilson 'The international framework' in Julia Sloth- Neilson & Jacqui Gallinetti (eds) *Child justice in Africa: A guide to good practice* (2004) 22.

CHAPTER 3

A CRITIQUE OF STATUTORY FRAMEWORK ON THE CHILD JUSTICE IN KENYA

3.0 Introduction

Before the enactment of the Children Act 2001¹⁷² issues of children rights in Kenya were regulated by over 60 pieces of legislation even though the Children and Young Person Act¹⁷³ was the primary legislation on child offenders.¹⁷⁴ What this multifarious approach meant is that the Penal Code detailed the core of the criminal offence and the punishment thereto; the Criminal Procedure Code governed the trial process and the Probation of Offenders Act was relevant for the aspects of social inquiry reports and the supervision of probation orders. In relation to child justice, this was found untenable since the international legal framework advocated for a different standard of dealing with child offenders.¹⁷⁵

Consequently, the Law Reform Commission embarked on reviewing laws relating to children in 1984.¹⁷⁶ After Kenya ratified the CRC on the 30th of July 1990,¹⁷⁷ the Attorney General commissioned a multidisciplinary task force of 13 experts to review the laws relating to children. The task force developed the Children Act which was

¹⁷²Chapter 586 Laws of Kenya published by the Government Printer, Nairobi Kenya.

¹⁷³ Chapter 141 Laws of Kenya (now repealed) published by the Government Printer, Nairobi Kenya.

¹⁷⁴ Other legislations that had a bearing on child justice include Borstal Institution Act Chapter 92 Laws of Kenya; Evidence Act Chapter 80 Laws of Kenya, The Penal Code Chapter 63 laws of Kenya , The Probation Of Offenders Act Chapter 64 laws of Kenya, The Criminal Procedure Code Chapter 75 laws of Kenya , and The Police Act Chapter 84 laws of Kenya among others. Other laws with a bearing on child rights and justice included sectoral laws such as the Employment Act Chapter 226, Laws of Kenya; the Education Act Chapter 211, Laws of Kenya; the Immigration Act Chapter 172, Laws of Kenya; the Betting, Lotteries and Gaming Act Chapter 131, Laws of Kenya; Chief's Authority Act Chapter 128, Laws of Kenya, (now repealed); Firearms Act Chapter 114, Laws of Kenya amongst others.

¹⁷⁵See Odhiambo Millie Akoth; After the Promise, A Situational Analysis of Child Rights Protection under the Children's Act; The Juvenile Justice Quarterly; Volume 2, Issue 2; Published by the CRADLE-The Children's Foundation; Nairobi, 2003. page 2

¹⁷⁶ See generally Kenya Law Reform Commission (1993) A New Law on Children: Report of the Child Law Task Force.

¹⁷⁷ See United Nations Treaty Collection website, at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4&lang=en (accessed 21/03/2016).

passed in the year 2001 and finally came into effect on the 1st of March 2002.¹⁷⁸ The Children Act domesticates the CRC and ACRWC. The domestication of the CRC and ACRWC into Kenya's legal framework was actuated by the Children Act prior to the promulgation of the Constitution, 2010, and the coming into effect of Article 2 (6).

On 27th of August 2010 Kenya, promulgated the Constitution which has provisions that incorporates child rights as a special category for the first time in Kenya.¹⁷⁹ Article 2 (6) incorporates treaty law ratified by Kenya. Article 21 (3) obligates State organs and all public officers to address the needs of vulnerable groups in society including children and further in Article 21 (4) buttresses Article 2 (6) by providing that the government must fulfill its treaty obligations through law.

Kenya's Constitution and the Children Act provide most of the core principles of a child friendly justice system. Despite having such elaborate provisions, the implementation of some of the core guarantees has not materialised due to lack of legal, procedural guidelines or institutional framework as discussed below. There are also concepts such as diversion, crime prevention and restorative justice system that need to be incorporated in the Kenyan justice system so that it is in line with the CRC and the ACRWC.

3.1 Requirements relating to separate procedures and courts applicable in the pre-trial and trial stages of the juvenile justice system in Kenya

As discussed in chapter two, a juvenile justice system requires the institution of separate laws, procedures and institutions that apply specifically to child offenders. This requires the establishment of specialised units within the police, judiciary, court system, prosecutor's office and provision of specialized representatives for children.

¹⁷⁸Ibid page 4

¹⁷⁹ See Article 53. Article 19 provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. By virtue of article 19(3) (a) and article 20(2) we can safely infer that these rights are also applicable to the children. They are said to be enjoyed by every person.

The children should be accorded all the due process rights as enumerated in Article 40 and 17 of the CRC and ACRWC respectively.

Before the enactment of the Children's Act (2001), no separate procedures were made for children in conflict with the law. Currently, however, the Constitution and Children Act provide most of the rights relevant in juvenile justice as found in the CRC Article 40 and the ACRWC Article 17.

Kenya in its law provides for the four principles which guide consideration of all issues relating to the rights of the child, including the administration of child justice. These are the best interests of the child,¹⁸⁰ non- discrimination,¹⁸¹ the right to life, survival and development,¹⁸² and the right to be heard.¹⁸³

Articles 49 of the Constitution and section 186 of the Children Act make comprehensive provisions for due process rights and the rights of arrested persons. These rights seek to ensure expeditious, dignified and fair process of justice.¹⁸⁴ Further, Article 50 of the Constitution guarantees the right to a fair hearing.¹⁸⁵

Part VI of the Children Act establishes special Children's Courts and provides for their jurisdiction. These courts have jurisdiction to hear all matters on child offenders except where the child is charged for murder or alongside an adult.

¹⁸⁰ Article 53 (2) of the Constitution and Section 4(2) of the Children Act.

¹⁸¹ Article 27 of the constitution and section 5 of the Children Act.

¹⁸² Article 53 of the Constitution and sections 4(4), 6,7,8,9 and 16 of the Children Act.

¹⁸³ Section 4(4) of the Children Act.

¹⁸⁴ See article 49(1)(a-h) and section 186 (a)-(f) Some of the core rights worth mentioning include the right to be informed promptly of reasons for arrest; the right to remain silent; the right to counsel of one's choice; the right against self-incrimination; the right to expeditious trial and particularly that a person arrested shall be arraigned in court within twenty four hours of arrest; the right to be released on bail unless there are compelling reasons against the same.

¹⁸⁵ The Constitution protects the right of presumption of innocence until proven guilty; the right to adequate defence; the right to public and fair trial; the right to counsel of one's choice and to have an advocate assigned to the accused person by the State and at the State expense, if substantial injustice would otherwise result, and to be informed of this right promptly. Constitution of Kenya, 2010, Article 50 (2) on the rights to a fair hearing.

Under section 190(1) and 190(2) children are protected from capital punishment, corporal punishment and imprisonment.¹⁸⁶ Children of tender years are also protected from being committed to rehabilitation schools.¹⁸⁷

Despite the above, practice has run counter to the provisions as discussed below.

3.1.1 Separate courts, remand and rehabilitation facilities, and child friendly procedures.

3.1.1.1 Separate Courts.

As discussed in chapter two, specialized separate court are desirable in the child justice system. It was the legislative intention that children courts must sit in a different building or on different days or at different times from regular courts for adults, and that they should be closed to the general public.¹⁸⁸ In Kenya, even though the provision of a child-friendly court is stipulated in the Children's Act, this has not been implemented. In Kenya, it is only in Nakuru, Mombasa and Kakamega law courts that have separate court house for children. In Nairobi, children courts have separate court rooms designated as juvenile courts but these courts are within the main law courts house hence there is no privacy. Elsewhere children Magistrate's Courts, sit *in camera* in ordinary criminal court rooms designated for adult offenders hence making the environment uncondusive for the children. Where there are no specially designated rooms for a juvenile court, children and their guardians have to wait in the court corridors along with adult offenders, for cases to be called for

¹⁸⁶ Section 191 of the Act in compliance with the CRC and the ACRWC provides the methods of dealing with offenders. These include orders for probation, surcharge, placement under the care of a fit person or qualified counselor; placement in an educational institution or vocational training program or an order to perform community service or any other lawful manner.

¹⁸⁷ Section190(3)

¹⁸⁸ Section 74

hearing.¹⁸⁹ Allowing children and adults to share the same waiting area and courtroom, and to mingle freely while they wait for their cases, clearly violates the right of the child offender to privacy. It exposes children to the adult criminal system from which they are supposed to be shielded.¹⁹⁰

In 2007 the CROC recommended that Kenya should establish juvenile courts in different places throughout the country.¹⁹¹ In its concluding recommendations, the African committee of experts on the ACRWC also recommended that Kenya establish child friendly courts.¹⁹² The CRC recommended that the former Nairobi children court would act as a model for such establishment.¹⁹³ Clearly Kenya is in violation of the CRC and the ACRWC

3.1.1.2 Remand and rehabilitation facilities

The Act also provides for separate remand and rehabilitation homes for children.¹⁹⁴ The Children's Services Department currently only has eleven children's remands, ten rehabilitation homes¹⁹⁵ and only three borstal institutions. There is no borstal institution in Kenya for girls. This means that most of the children are remanded at the police stations or in adult remand home. The Kenyan government admitted in its Initial Report to the CROC that this practice "violates the spirit of the CRC ..."¹⁹⁶ In

¹⁸⁹ Human Rights Watch (1997) *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* New York: Human Rights Watch 21-33. available at <https://www.hrw.org/reports/1997/kenya/> Accessed on 15th November 2015.

¹⁹⁰ The Cradle and Odhiambo, M (2003) *Juvenile Justice Journal: after the Promise - A Situational Analysis of Child Rights Protection under the Children's Act*, The Cradle 13-17.

¹⁹¹ Concluding Observations: Kenya, CRC/C/Ken/CO2 19 June 2007 Para 68(c)

¹⁹² Concluding recommendations by the African committee of experts on the rights and welfare of the child on the Kenya .1st periodic report on the status of implementation of the African charter on the rights and welfare of the child. Para 48. Available at <http://www.ihrda.org/wp-content/uploads/2015/01/kenya-Concluding-Observation-final.pdf> . Accessed on 15th November 2015

¹⁹³ Concluding Observations: Kenya, CRC/C/Ken/CO2 19 June 2007 Para 68(c)

¹⁹⁴ See part V of the Act.

¹⁹⁵ Nairobi Children's Home, Getathuru Rehabilitation School, Dagoretti Rehabilitation School, Kirigiti Rehabilitation School. Wamumu, Othaya, Likoni, Kericho and Kakamega rehabilitation centres.

¹⁹⁶ CROC Kenya's Initial State Report to the CROC, CRC/C/3/Add.62, 16 February 2001, Para 499

most of the remand homes there are no separate facilities for either gender.¹⁹⁷ Most of the facilities that exist are in pathetic conditions.¹⁹⁸

The CROC and the African committee recommended that Kenya does put measures in place to separate children in need of care and protection from those who are in conflict with the law, separate children from adults in pretrial and trial phases and also to improve the conditions in the homes where the children are kept.¹⁹⁹

The CRC and the ACRWC committees recommend the increase in number of remand and rehabilitation facilities for children. This will curb incarceration of children in adults remand homes and the mixing of child offenders with those who are in need of care and protection. The failure by Kenya to put in place such facilities even after acknowledging it is in breach is a clear violation of the CRC and the ACRWC

3.1.1.3 Child friendly procedures

3.1.1.3 .1 Trained personnel

Having a child friendly court is not enough. The personnel working there must also be trained. In light of the vulnerability of children, it is imperative to ensure judicial officers and other personnel working at children court, are trained appropriately to understand and appreciate a trial involving children. It has also been noted that many Magistrates have limited understanding of the provisions of the Children Act or the procedures of a juvenile court or what constitute a child friendly court.²⁰⁰ Many

¹⁹⁷ Borstal Institutions in Kenya. Available at <http://softkenya.com/law/borstal-institutions-in-kenya/>.

¹⁹⁸ Human Rights Watch (1997) *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* New York: Human Rights Watch 21-33.

¹⁹⁹ Concluding Observations: Kenya, CRC/C/Ken/CO2 19 June 2007 Para 68(g), Concluding recommendations by the African committee of experts on the rights and welfare of the child on the Kenya Para 48

²⁰⁰ Yodon Thonden *et. al.* (1997) *Juvenile Justice: Police Abuse and Detention of Street Children in Kenya*, Human Rights Watch, New York, Pg 72; United Nations (2013) *Consideration of reports submitted by States parties under Article 44 of the Convention*, CRC/c/ken/3-5, pg 6.

officers still use language that is not child-friendly and referring to children as accused persons and not subjects as stipulated.²⁰¹

There is also still lack of awareness of children rights, among the criminal justice personnel, which often results in violations of such rights. This is further compounded by the status of children as minors and their inability to claim for such rights on their own.²⁰²

Rwezaura, has argued that the best interests of the child in African states Kenya included remain closely tied to those of adults.²⁰³ As a result, the concept of children's rights is still not widely accepted in most of these societies and a paternalistic interpretation is still dominant in defining and giving effect to the rights of children.²⁰⁴

3.1.1.3 .2 Privacy

As discussed in chapter two of this Study, both the CRC and the ACRWC require the privacy of a child in conflict with the law be fully respected at all stages of the proceedings, to avoid harm to the children by undue publicity.²⁰⁵ In order to protect the child's right to privacy, the Children Act prohibits the publication of the information on the child offenders likely to lead to their identification except with the written permission of the court.²⁰⁶ Contravention of this provision constitutes an offence, which attracts a fine of Kenya shillings one hundred thousand or three

²⁰¹ The under the Children's Act, The Cradle 13-17.

²⁰² *ibid*

²⁰³ Rwezaura, B "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa" in Alston, P (ed) (1994) *The Best Interests of the Child: Reconciling Culture and Human Rights* Clarendon Press: Oxford 82-115,

²⁰⁴ Rwezaura, B "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa" in Alston, P (ed) (1994) *The Best Interests of the Child: Reconciling Culture and Human Rights* Clarendon Press: Oxford 82-115,

²⁰⁵ Articles 40(2)CRC and 17(2)ACRWC

²⁰⁶ Section 76(5)

months imprisonment or both.²⁰⁷ The above measures are intended to make the court environment less intimidating to the child since there are less strangers and unknown adults in the court; to avoid their stigmatisation and to protect and respect the privacy of the child. They also promote the child's reintegration and assumption of a constructive role in society.

The prohibition against the publication of the name and address of any person before a juvenile court is not only inadequate; it is also not strictly enforced or adhered to. In many cases, the media still uses photos, names and other descriptive terms that can easily lead to the identification of the child. This was what happened in the case of Felix Mambo Ngumbao and David Onyango Otieno the suspects of the Kyanguli Secondary School fire tragedy who were at the time of the offence aged 17 years.²⁰⁸ The courts in Kenya have been very reluctant to take any measures when the privacy of the child is exposed especially where the crime is considered of public interest or a serious crime. This is because there are no rules or guidelines that are in place to guide how children matters should be covered by the media.²⁰⁹

Of concern also is the fact that the prohibition of the publication of identification information on a child is limited to court proceedings and not other stages of the criminal justice process.²¹⁰ This means that before the child offender is taken to court, there is no protection for the child's privacy and the media takes advantage of this lacuna in the law. The CRC guarantees children in conflict with the law the right to

²⁰⁷ Section 76(6)

²⁰⁸In March 2001 Local and International newspapers carried a story about the two juveniles. Along with the story, the newspapers and the TV stations had the photographs of the suspects and other details with sufficient clarity to lead to easy identification of the suspects and their parents. This went on even as the matter was being heard in the High Court and the High Court did nothing to prevent the said exposure. The juveniles were tried in public through the media. This also happened when there was a spate of burning schools in 2008. The newspapers and the TV stations would carry the story and show full photographs of the minors and sometimes even their parents.

²⁰⁹This problem is compounded by the fact that any journalist can enter court and report on the court proceedings without the knowledge of the court. There are no designated journalists to cover the court proceedings. .

²¹⁰ Other stages of investigation include arrest and investigation.

have their privacy fully respected at all stages of the proceedings.²¹¹ The Committee on the Rights of the Child has interpreted ‘at all stages of the proceedings’ as including from the initial contact with the law enforcement agency, until the final decision by a competent authority, or on release from supervision custody or penitentiary.²¹²

Finally, the full names of the children in conflict with the law in Kenya are used in the record of proceedings and in the law reports. The anonymity of the children is therefore not maintained. This practice clearly defeats the whole purpose of protecting the privacy of the child, and as a result, the stigma of a criminal conviction will stay with them throughout their life.

3.1.1.3. 3 Speedy trial

A frequently violated right is that relating to a speedy trial. With regard to children in conflict with the law, this right assumes a particular significance because the passage of time and attainment of a higher age effectively takes the child concerned out of the child justice system and its procedures processes and protections and catapults them into the adult criminal system. The speedy conduct of the formal procedures in the juvenile court is of paramount importance, to ensure that the child is able to relate to the procedures and the consequent disposition to the offence, both intellectually and psychologically.²¹³

Child offender rules had been gazetted, setting the time limit in which to finalise the matters relating to the children.²¹⁴ These rules were, however, declared unconstitutional by the court of appeal in 2006 in the case of *Kazungu Kasiwa*

²¹¹ See article 40(2)

²¹² CRC General Comment No 10 Children’s Rights in Child Justice CRC/C/GC/10 (2007) paragraph 23.

²¹³ Beijing Rule 20.

²¹⁴ See rule 10(4) and 12 child offender rules schedule 5 of the children Act.

*Mkunzo and Swaleh Kambi Chai Versus Republic.*²¹⁵ In declaring the rules unconstitutional the court said,

“The Act itself, as we have seen does not set out any time -limit within which trials shall be held. Section 186(c) merely says that the child is entitled to have the case against it “determined without delay”. We have anxiously gone through the Act and we do not find any provision authorizing the Minister to set time limits within which trials are to be held. The power to “generally make regulations for the better carrying out of the provisions of this Act” does not appear to us to give the Minister power to set time-limits within which trials are to be held. Such a power would fly in the face of various laws including the Constitution itself”.²¹⁶

That is the position to date and no time lines has been set. The import of the Court of Appeal's judgment is that for this rule to have stood legal scrutiny, it should have been passed into law as part of the Act and not subsidiary legislation to the Act.²¹⁷

3.1.1.3. 4 Legal representation

The problem of lack of legal representation has been noted to be endemic in Kenya. The realization of this right has almost been non- existent despite the Constitution and the Children Act recognising the right to legal representation without necessarily assuring it for those without the financial means to engage a lawyer.²¹⁸²¹⁹ This is a

²¹⁵(2006)eKLR.

²¹⁶ EZ Ongoya 'The emerging jurisprudence on the provisions of Act No 8 of 2001, Laws of Kenya – The Children's Act' (2007) 1 Kenya Law Review 214 -251;235.

²¹⁷ Godfrey Odongo, 'Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms'.(2012) 1 *AHRLJ*112-141.

²¹⁸ See article 50(2)(h) which says it can only be provided if substantial injustice would otherwise result and section 186(b) and section 18(2)which says the government assistance can only come in if the child is unable to get legal assistance.

²¹⁹ See Republic of Kenya (2016) Kenya Gazette: Gazette Notice No. 370, Government Press, Nairobi. The obligation to represent children takes effect from July 1, 2016. Prior, those charged with non-capital offences including children, were tried without legal representation if they cannot afford an advocate. The appointment of counsel to represent an accused person on *pro bono basis* is not a rule of law but of practice that has been followed consistently in all murder cases

right that should be guaranteed in all stages of child justice process, but much more at the trial phase in compliance with Article 37 (d) of the CRC.²²⁰ In Kenya this is a service that is predominantly provided for by the civil societies.

There is therefore no comprehensive national legal aid scheme and not all child offenders get access to legal counsel.²²¹ In Kenya the position has been described as follows:

“...A number of common problems transcend the implementation of children's rights in the region with particular focus on juvenile justice issues. It is apparent that at the apex of these common constraints is the issue of lack of legal representation for children accused of committing crimes or child victims of crime... Current efforts on the part of a number of civil society organisations in providing free legal services to children in the Kenya, has been noted and appreciated. However, it is evident that institutionalised legal aid schemes, not only for children, but also for the general populace is markedly non-existent and still ranked low in these regional governments' priorities. The ambivalence on the part of the government towards this aspect of children's rights is made all the more glaring by the case of equally lethargic and indifferent legal profession in Kenya. In Kenya, very few lawyers are willing to take up cases on the basis of voluntary legal aid or assistance...”²²²

Now, the constitutional right of ensuring the paramount importance of a child in any matter, under Article 53 (2) is operationalized through ensuring that children in conflict with the law are assured legal representation that is financed by the State.

In 2007 the UN Committee on the Rights of the Child recommended that Kenya should establish a legal aid program funded by the government.²²³ The Legal Aid Bill

²²⁰ Madalyn K. Wasilczuk (2013) “Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense,” in 45:291 *International Law and Politics* 291-333, at <http://nyujilp.org/wp-content/uploads/2013/04/45.1-Wasilczuk.pdf> (accessed 5/11/2015).

²²¹ The Cradle and Odhiambo, M (2003) *Juvenile Justice Journal: after the Promise - A Situational Analysis of Child Rights Protection under the Children's Act*, The Cradle 27-28

²²² Odongo, G.O “The Birth of a Regional Juvenile Justice Network in East Africa” (2004) 6(1) *Article* 40 10.

²²³ *Concluding Observations: Kenya, CRC/C/Ken/CO2 19 June 2007 Para 68(i)*

which was meant to provide guidelines on the legal aid is yet to become a Law. The President is yet to assent to the Bill. Continued failure to provide rules or guidelines on legal aid provision continues to deny the children in conflict with the law justice.

The Gazette Notice issued by the former Chief Justice, Hon Mutunga, is a step in the right direction.²²⁴ The implementation process, however, is yet to be seen. This may be a daunting task for those involved since the scheme to offer legal services is an option exercised at the discretion of the advocates. There are no provisions in statute to operationalize the right to legal representation as the Constitution of Kenya, 2010, envisions. These lacunas in the law deny children in conflict with the law, their rights as envisaged in international legal instruments.

3.2 The minimum age of criminal responsibility

As with most common law jurisdictions, such as the United Kingdom and Australia, Kenya embraced the common law rule of *doli incapax*. In Kenya the Penal Code provides that children below the age of eight do not have criminal capacity but children aged twelve are treated as lacking in capacity unless this is otherwise proven by the prosecution.²²⁵ The Children Act, though the primary piece of legislation on Children, does not make provision for the age of criminal responsibility for children. The drafters of the Act defined who a child is but never set the minimum age of criminal responsibility.²²⁶ The result is that the Children Act makes detailed provisions for a new juvenile justice system with explicit reference to standards

²²⁴ Republic of Kenya (2016) Kenya Gazette: Gazette Notice No. 370, Government Press, Nairobi.

²²⁵ Section 14 of the Penal Code, Cap 63, Laws of Kenya.

²²⁶ The motivations for the Kenyan Law Reform Commission's study leading to the retention of the rule were rooted in the reform body's interpretation of the CRC obligation in this regard. Despite the consultative nature of the Kenyan reform study as was highlighted in the last Chapter, the Law Commission did not receive much response on this specific issue and much of its interpretation was by and large predicated on the reform team's own reasoning. Thus, the Law Commission's Report records specific support of the reform team for the operation of the existing rebuttable presumption for children between the age of 8 and 12 and recommends "that their cases be considered exclusively in juvenile courts where they are likely to benefit from the practice of privacy and informal procedures

drawing from the CRC. It remains silent on the issue of a minimum age of criminal capacity and the *doli incapax* rule, however, leaving the position in the Penal Code to hold sway. The Kenyan position to date remains inconsistent with the provisions of the CRC. The retention of the common law rule without increasing the minimum age from 8 years, coupled with the absence of provisions strengthening the rebuttal procedure, is in violation of the CRC.

There has been a consistent call by the CRC and the ACRWC Committees for Kenya to increase the age of criminal responsibility. In 2002 and 2007 the CROC recommended that Kenya should raise its minimum age of criminal responsibility from the current age of eight years to 12 years and consider increasing it.²²⁷ In its concluding recommendations, the African committee of experts on the rights and welfare of the child recommended that Kenya should raise the age of minimum age of criminal responsibility to 12.²²⁸ However, to date, the age of criminal responsibility remains eight, a clear violation of CRC and the ACRWC.

3.3 Incorporation of Diversion

As discussed in chapter two, diversion is the channeling of children into appropriate reintegrative programs and services, where the intervention of the formal court system is not necessary. It aims to find viable and constructive ways of keeping a child from coming into contact with the justice system unnecessarily, and has been internationally acknowledged as a key element in the shift from the retributive to the restorative justice system for child offenders.²²⁹

²²⁷ See CROC Concluding Observations: Kenya, CRC/C/15/Add.160 07 November 2001 Para 22 and Concluding Observations: Kenya, CRC/C/Ken/CO2 19 June 2007 Para 68

²²⁸ Concluding recommendations by the African committee of experts on the rights and welfare of the child on the Kenya .1st periodic report on the status of implementation of the African charter on the rights and welfare of the child. Para 13. Available at <http://www.ihrda.org/wp-content/uploads/2015/01/kenya-Concluding-Observation-final.pdf> . Accessed on 15th November 2015

²²⁹BuyiMbambo 'Diversion: A central feature of the new child justice system' available at <http://issafrica.org/pubs/Monographs/No111/Chap7.pdf>. Accessed on 8th June 2015.

Though a critical component of child justice as discussed in chapter two and encapsulated under article 40 of the CRC, diversion is not provided for in Kenyan law. The Act is similarly silent on the conditions upon which a child may be diverted at the pre-trial stage, and when it is appropriate to divert a child. Odongo has remarked that:

“The lacuna occasioned by this absence only serves to perpetuate the misplaced notion that justice can only be obtained through certain laid down procedures in court. Thus the popular refrain remains chorused that the only answer to child offending is the subjection of child offenders to court or custodial/institutional care. To a large extent this has been the prevailing norm in the Kenyan juvenile justice system.....²³⁰

There is however, a diversion program ran by Save the Children Fund but focus is on children in need of care and protection through familial integration, as opposed to a focus on child offenders through elaborate diversion alternatives to sentencing.²³¹

The above pilot projects filter social welfare cases out of criminal justice system and redirects them to community based alternatives. The project refers to criminal trial children who have committed criminal offences. The total exclusion of certain categories of child offenders from the possibility of pre-trial diversion (without the

²³⁰ Odongo, G.O (2003) “Report on the Juvenile Justice System in Kenya in Light of Best Practices and Challenges”

²³¹The Diversion Program in Kenya. Available at

http://www.sida.se/contentassets/da322fb86bb04e60b611a10600fe2e2f/the-diversion-program-in-kenya_1768.pdf.

Accessed on 8th June 2015 The diversion project had however, been introduced in 14 pilot project districts, namely, Kilimani, Kamukunji, Buruburu, Kasarani, Naivasha, Nakuru, Bondeni, Kitale, Busia, Kakamega, Kisumu, Siaya, Kisii and Gucha but this has not been without problems and challenges .The challenges include legal, financial, structural and low awareness. Some of these projects have also collapsed. There have been several challenges in the implementation of the Program. For example, diversion does not have a float in the government budget meaning there are no funds directly allocated to diversion activities. Therefore, the program has to depend on funding from Save the Children which is also not enough. Structurally, some of the stakeholders do not compliment each other as much as they should. For example the link between the police, children’s department and the Community Based Support System for Children (CBSSC) seem quite weak to an extent that each is operating almost independent of each other. In some cases police officers find themselves stranded with children with nowhere to take them, prompting them to take children to their homes illegally. Another challenge is that welfare children find their way into the juvenile justice system pausing other challenges. Firstly, these children are treated as criminals and secondly they consume a higher part of the diversion budget.

individual assessment of the circumstances of the child as required by international law) has led to the criticism that:

“In keeping with the provisions of international law on diversion (which permit diversion for all child offender cases) it would have been desirable that the pre-trial exclusion of a formal criminal trial be the general rule in all the cases. In essence this would have meant that diversion can be considered in each and every case and only rejected in appropriate cases.²³²

Under section 191 of the Act deals with orders that a court may impose in the aftermath of a criminal trial. These indirectly invite the possibility of post-trial diversions through a range of alternative sentences. However the Act does not explicitly recognise the possibility of diversion processes before trial. The limited scope for diversion under the Act does not comply with the general spirit of CRC.²³³

One study has noted that the biggest step towards entrenching diversion in the system is to entrench it into the law. Until then, it was concluded that diversion remains elusive in the Kenyan law and most of what is going on through goodwill arrangements between those involved in the justice system may not last forever.²³⁴ In 2007 the UN Committee on the Rights of the Child recommended that Kenya should entrench diversion into its legal framework to be compliant with Article 40 of the CRC.²³⁵

3.4 Restorative justice

²³² Odongo, G.O “The Juvenile Justice System in Kenya and Challenges to Law, Policy and Practice in Regard to Diversion” (2004) 13(2) The Chronicle 6-11.

²³³ Odongo, G.O “The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan example” (2004) 12(4) The International Journal of Children’s Rights 425

²³⁴The Diversion Program in Kenya. Available at http://www.sida.se/contentassets/da322fb86bb04e60b611a10600fe2e2f/the-diversion-program-in-kenya_1768.pdf. Accessed on 8th June 2015. See also Nikhil Roy & Mabel Wong ‘Juvenile justice: modern concepts of working with children in conflict with the law’ available at https://www.crin.org/docs/save_jj_modern_concepts.pdf. Accessed on 8th June 2015.

²³⁵ Concluding Observations: Kenya, CRC/C/Ken/CO2 19 June 2007 Para 68(h)

As discussed in chapter two juvenile justice should aim at ensuring that children are treated in a manner consistent with their “age and the desirability of promoting the child’s reintegration and their assuming of a constructive role in society”.²³⁶

Restorative justice influence has spread around the world rapidly and with visible success. This is because of the innovation by countries in their use of restorative justice, and integration of restorative ideas into their justice systems. Most of the countries that have recorded success have used various methods. Examples of innovative restorative practices include customary practices being adapted for use in the criminal justice system a case in point being Uganda, Victim-offender encounters taking place inside prisons in Europe and North America,. "Circles of Support" in Canada work with serious sexual offenders(often guilty of paedophilia) released into fearful communities at the conclusion of their sentences, unique prison regimes in Latin America in which prisoners volunteer to stay at facilities run largely by volunteers and the prisoners, Victim-offender-community meetings in Canada, the Truth and Reconciliation Commission in South Africa. Many of these countries have entrenched restorative justice in their legal system which has reduced legal or systemic barriers to the use of restorative programs.²³⁷ South Africa has entrenched restorative justice in its Child Justice Act 75 of 2008.²³⁸ There is no reason why Kenya has not embraced the same.

²³⁶ Van Bueren, G (1995) *The International Law on the Rights of the Child* Dordrecht, Boston, and London: Martinus Nijhoff Publishers 183.

²³⁷ Restorative Justice Briefing Paper -1 What is Restorative Justice? Available at <http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf> . Accessed on 15th November 2015

²³⁸ In the preamble the Act statesTo establish a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the constitution and the international obligations of the Republic; to provide for the minimum age of criminal capacity of children; to provide a mechanism for dealing with children who lack criminal capacity outside the criminal justice system; to make special provision for securing attendance at court and the release or detention and placement of children; to make provision for the assessment of children; to provide for the holding of a preliminary inquiry and to incorporate, as a central feature, the possibility of diverting matters away from the formal criminal justice system, in appropriate circumstances; to make provision for child justice courts to hear all trials of children whose matters are not diverted; to extend the sentencing options available in respect of children who have been convicted; to entrench the notion of restorative justice in the criminal justice system in respect of children who are in conflict with the law; and to provide for matters incidental thereto.

3.5 Conclusion

The Children Act provides for the protection of children in conflict with the law within the criminal justice system. Its effectiveness, however, is hampered by the inadequate implementation of some of its provisions due to lack of procedural and institutional framework on which the effective operation of the Act depends and also lack of provision of core principles as discussed above found in the CRC and the ACRWC. In order to ensure that children in conflict with the law access justice, it is essential to overhaul the Children Act to bring it in line with international standards and also put into operation the recommendations as discussed in Chapter 4. This will also be in line with Kenya fulfilling her constitutional obligations as provided by Articles 2(6) and 21(4).

CHAPTER 4

GENERAL CONCLUSIONS AND RECOMMENDATIONS

4.0 CONCLUSION

The aim of this study was to assess and critically examine the protection and access to justice for children in conflict with the law within the Juvenile justice system in Kenya. The central focus was however, the extent to which Kenya's Children Act is compatible with the international standards and norms on juvenile justice as set out by the CRC and the ACRWC and in particular Articles 37, 40 of the CRC and 17 of the ACRWC.

As shown in Chapter 1 this thesis proceeds from the point that the children's rights model offers an alternative theory within which juvenile justice can be hinged. This model provides a theoretical framework for addressing the practical constraints and deficiencies of earlier juvenile justice theories based on the welfare-justice continuum. New standards and ideals have emerged in international children's rights law on which all juvenile justice systems may be established. Overall, it was considered that these standards as discussed below require (a) the establishment of separate laws, institutions and procedures applicable to children accused of or alleged to have committed crimes; (b) the setting of a minimum age of criminal capacity; (c) the incorporation of the principle of detention as a last resort and for the shortest period of time; (d) the desirability of diversion as a binding obligation on State Parties; (e) the limitation of certain sentences and the need for alternative dispositions at the sentencing stage.

4.01 The establishment of separate laws, institutions and procedures applicable to children accused of or alleged to have committed crimes.

The study has discussed the principle of international child rights law requiring the establishment of separate procedures, authorities and courts specifically applicable to children. The ideal of separate procedures commences at the pre-trial phase, where the principle of pre-trial detention is emphasized as a last resort and for the shortest period of time (Article 37 of CRC), continues through to the trial phase where there is emphasis of separate procedures and courts which apply to children in conflict with the law.

While State Parties to the CRC have considerable margin of discretion on the issue of separate juvenile justice systems, international juvenile justice instruments, the CRC and the jurisprudence of the CROC provide minimum standards with which individual States must comply. These relate to the desirability of specialised courts so as to realize the aims of juvenile justice and the need to balance informality in juvenile justice proceedings with protection of due process safeguards. Further, in instances when courts or tribunals other than specialised courts are used, these standards should be applicable.

As discussed in chapter 3, Kenya has failed in putting into place some of those standards in terms of institutional and procedural safeguards. These as discussed include provision of child-friendly court as stipulated in the Children's Act. As shown there are only three child-friendly courts in the whole Republic. It was also noted that there are very few remand homes and rehabilitation centers contrary to the international standard. It was also contended that there is also still lack of awareness of children rights, among the criminal justice personnel.

Another safeguard that has not been put in place is privacy. As discussed, the Children Act prohibits the publication of the information that may lead to child's identification. It is noted that the prohibition is not only inadequate; it is also not strictly enforced or adhered to. The media still uses photos, names and other

descriptive terms that can easily lead to the child's identification. It was also noted that the prohibition of the publication of identification information on a child is limited to court proceedings and not other stages of the criminal justice process.

As discussed in the study there are no rules that set time to finalise a child's trial. As noted in the study the court of Appeal in the case of *Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai Versus Republic* declared the Child offender rules that had been gazetted, setting the time limit in which to finalise the matters relating to the children as unconstitutional. The import of this decision was fully discussed.

As pointed out in the study the problem of lack of legal representation has been noted to be endemic in Kenya. The realization of this right has almost been non-existent despite the Constitution and the Children Act recognising the right to legal representation, without necessarily assuring it for those without the financial means to engage a lawyer. It was noted that there is therefore no comprehensive national legal aid scheme and most of the children rely on civil society to provide the same.

4.02 The setting of a minimum age of criminal capacity

The issue of age and criminal capacity is central to a child rights-centred juvenile justice system. As discussed in chapter 2 the CRC and the ACRWC have not specifically given a particular age as the minimum age of criminal responsibility. This as discussed is partly due to universal differences about social interpretations of childhood and notions on children's guilt. However, it was argued that there are some general guiding international law standards which are discernible from the CROC's approach to this issue. It was submitted that these standards seem to advocate what can be said to be an emerging 'minimum' threshold that requires the minimum age to be set at 12 years or more. Related to this is a developing norm relating to States which apply the doctrine of *doli incapax*. This norm can be considered to militate

against the abolition of this doctrine where the result would be a low minimum age of criminal capacity (of below 12). The foregoing emerging principles culminate in the conclusion that the choice of a minimum age of criminal capacity must not be arbitrary.

As noted in the study, the Children Act, though the primary piece of legislation on Children, does not make provision for the age of criminal responsibility for children. The drafters of the Act defined who a child is but never set the minimum age of criminal responsibility. The result as discussed is the Children Act makes detailed provisions for a new juvenile justice system with explicit reference to standards but it remains silent on the issue of a minimum age of criminal capacity and the *doli incapax* rule leaving the position in the Penal Code to hold sway. The Kenyan position to date remains inconsistent with the provisions of the CRC.

4.03. Diversion

Diversion is an important part of child rights oriented juvenile justice systems. As noted in the study, following the adoption of the CRC, the desirability of diversion is now provided for in a legally binding treaty. Article 40(3) of the CRC makes provision for diversion by calling for measures to deal with children...without resorting to judicial proceedings. Read together with the provisions of other relevant international law standards (particularly, the Beijing Rules) and the interpretation of the CROC, this provision upholds that diversion should be a feature of all States' juvenile justice systems.

As discussed, the CRC and the ACRWC do not specifically detail how diversions are to be given effect in domestic juvenile justice systems. It was noted however that there are a number of standards with which diversion must comply. These include the need for viable diversionary measures, the availability of diversion at any point of decision-making by juvenile justice officials and all stages of the juvenile justice

procedure, the consideration of diversion in each and every case including where more serious offences are alleged to have been committed by the child and equal and non-discriminatory access to diversion. Further, any diversionary options must respect children's human rights and procedural safeguards.

As contended in the study though a critical component of child justice as encapsulated under article 40 of the CRC, diversion is not provided for in Kenyan law. The Act is similarly silent on the conditions upon which a child may be diverted at the pre-trial stage, and when it is appropriate to divert a child. It was noted whereas section 191 of the Act deals with orders that a court may impose, in the aftermath of a criminal trial which indirectly invite the possibility of post-trial diversions through a range of alternative sentences the Act does not explicitly recognise the possibility of diversion processes before trial. The limited scope for diversion under the Act does not comply with the general spirit of CRC.

4.0 4 The limitation of certain sentences and the need for alternative dispositions at the sentencing stage.

The study has also discussed that a child rights-oriented juvenile justice system require the limitation of certain sentences and the need for alternative sentences applicable to child offenders. The study noted that International children's rights law applies to juvenile sentencing in two respects. The first involves the principles which should underpin the aims of sentencing. The second relates to limitations on sentences that may be imposed on children, namely; prohibitions on juvenile death penalty (now constituting a *jus cogens* norm); life imprisonment without the possibility of parole; judicial corporal punishment and a restriction on the use of deprivation of liberty. It was contended that the over-reliance on the use of custodial sentences was in violation of CRC (Article 40(4)).

It was submitted that the prohibition of juvenile death penalty is in line with the prohibition of juvenile death penalty in international law (now constituting a norm of *jus cogens* character). It was also noted that prohibition of life imprisonment the use of judicial corporal punishment is a requirement in the international law in relation to juvenile sentencing laws.

Restorative justice was also discussed. It was contended that for the justice process to be truly restorative and address the needs of all those involved, there are a number of requirements that must be met and which determine the feasibility of a restorative approach. It was noted that there must be sufficient evidence to support the charge against the child (a *prima facie* case), the alleged offence must fall within the scope of offences eligible for diversion as defined by the law, the child offender must admit responsibility for the offence in question, the entire process be undertaken voluntarily and, consequently, a child's admission of responsibility must never be obtained through undue pressure or coercion. For the restorative process to take place, it is also necessary to obtain the consent of the child's parent(s), guardian or responsible adult, as well as the consent of the victim to diversion to a restorative process. Likewise, the victim of the offence must voluntarily agree to participate in the process, again, without coercion or undue pressure.

The study noted that Kenya is compliant in terms of the prohibited sentences, the law allows for the detention, at the pleasure of the president, of any child convicted of a capital offence and this may lead to long periods of imprisonment and even life imprisonment for such children. It was argued that whereas most of the countries have embraced restorative justice, Kenya is yet to embrace the same making it not compliant with the CRC and the ACRWC.

Overall, the study has found Kenya law not compliant with articles 37, 40 CRC and 17 ACRWC. Kenya can however become compliant through putting in place legal and extra-legal measures as recommended below.

4.1 RECOMMENDATIONS

As pointed above legal and extra-legal measures are required to ensure compliance. These measures include three key areas namely legal and procedural reform, training and sensitisation of professionals and the general public, budgeting for children's rights at the national and county government and reform within state institutions requiring innovation and dedication of different officials in the implementation process. These are discussed below as recommendations.

4.1.1 Legal and procedural reform

As recommended both by the CRC and ACRWC committees the Children Act needs to be amended in the areas below.

4.1.1.1 Minimum age of criminal responsibility

Since 2002 there has been a consistent call by the CRC and the ACRWC Committees for Kenya to increase the age of criminal responsibility. Many countries in Africa and the world have heeded this call and set higher age of criminal responsibility.²³⁹This being the trend in Africa and the world at large, Kenya's minimum age of criminal responsibility is not only very low but also inconsistent with both the CRC and the ACRWC. It is recommended that the Children Act be harmonised with international

²³⁹For instance, the 1996 Ugandan Children's Statute set the minimum age at 12, in Ghana the minimum age is at 14, in Sudan the age is set at 15 and in Burkina Faso and Senegal the age is 13. Other countries that have heeded the call are countries like Libya which has set the minimum age at 14, Denmark, Sweden and Finland have set the age at 15, Netherlands is 12 years and France is 13 years. Apart from a few other countries like Cyprus, Zimbabwe and Namibia that has a minimum age as 7 Kenya can also be classified as ranging at the end of the continuum. See also Justice for Children Briefing No. 4 ;The minimum age of criminal responsibility http://www.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf. Accessed on 8th June 2015.

law by amending the same to provide for criminal responsibility to at least the age of 12 years as recommended by the CRC and the ACRWC Committees. If possible the age should be enhanced to fourteen years.²⁴⁰ This is when a child is able to fully appreciate the impact of their actions as well as fully participate in the trial process if they are required to do so.

4.1.1.2 Diversion

In 2007 the UN Committee on the Rights of the Child recommended that Kenya should entrench diversion into its legal framework to be compliant with Article 40 of the CRC.²⁴¹ This being the case therefore this study recommends that the Children Act should be amended to legislate diversion. The amendment will need to provide what Diversion entails, delineation of the mandates of bodies in dealing with cases of children considered for diversion measures to guard against abuse of the diversion process and a threshold test on eligibility by considering instances such as gravity of the offence and other circumstances. Such a law must also provide that the due process rights and fundamental principles and rights must be safeguarded even during the diversion process.

4.1.1.3 Restorative justice as an alternative sentence

Whereas many countries have entrenched restorative justice in their child justice system with considerable success, the Children Act does not make a provision for Restorative Justice. For children to benefit from the process of restorative justice processes and also for Kenya to comply with international standards there is need to entrench restorative justice in the Children Act and put policies and incentives in place to encourage the use of restorative processes in court or within the community.

²⁴⁰ See the Royal College of Psychiatrists (2006) Child Defendant, Occasional Paper OP 56 where it is argued that children frontal lobes that are responsible for behavior and planning action mature at 14 years.

²⁴¹ Concluding Observations: Kenya, CRC/C/Ken/CO2 19 June 2007 Para 68(h)

4.1.1.4 Speedy trial

The Court of Appeal in the case of *Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai Versus Republic* ruled that for the rule setting the timelines to have stood legal scrutiny; it should have been passed into law as part of the Act and not subsidiary legislation to the Act. The Children Act needs to set out time limit within which trials shall be held to bring it into full compliance with the CRC and the ACRWC.

4.1.1.5 Legal representation

An examination of the current constitutional and legal framework reveals that there is need for rules, guidelines or policies to be put in place to cater for legal representation. It is recommended the Legal Aid Bill be fast tracked and signed into law so that the children can enjoy that right of legal representation. This will operationalise the right to legal representation as the Constitution of Kenya, 2010, envisaged.

4.1.1.6 Privacy

As discussed in Chapter 3, it is very important that anonymity of the child be maintained before and after the contact of the child with the justice system. It is therefore imperative for the Act to be amended to extend this protection to children at the earliest contact with the criminal justice system and to ensure that they remain anonymous throughout the proceedings and in the law reports. Regulations also need to be put in place to guide the coverage and reporting by the media. Furthermore, the penalty for violating this provision on privacy is very low and needs to be enhanced as what is there currently and may not deter a media house from publishing a story that it considers newsworthy.

4.1.2. Allocation of resources, Separate courts, remand and rehabilitation facilities and child friendly procedures

In line with the recommendation by the CROC and the African committee of experts on the ACRWC it is recommended that Kenya should establish child friendly courts. It is also recommended that every county should have its own remand home with separate facilities for either gender and for the child offenders and the children in need of care and protection.

Establishment of more child-friendly court rooms, more remand and rehabilitation homes, the recruitment of more probation and social welfare officers to undertake various roles in the juvenile justice system require resources.

In spite of the goodwill of non-governmental organisations to put in place good practices and the provisioning for affordable of children's rights-centred juvenile justice systems, the actual success depends on the actual allocation and spending of financial resources. Both the national and county governments must specifically allocate resources in their budgets for those areas even where NGOs and civil society are involved in the service delivery of these programs.

4.1.3 Training and creation of awareness

The African committee of experts on the rights and welfare of the child as discussed in Chapter 3 recommended that Kenya should put measures and allocate funds to the training and sensitise magistrates and the police handling children in the justice system and also carry out refresher courses for them.

In view of the it is recommended that the government set aside resources and put systems in place to train all those charged with the administration of juvenile justice such as the police, judicial officers, social welfare officers in human rights principles and in particular children's rights. This will provide them with the necessary means and enable them to be responsive to the needs of children in conflict with the law and thus fulfill their functions more effectively.

Training and sensitisation may not fully guarantee a commitment to the implementation of the proposed juvenile justice systems. In order to ensure that processes such as capacity-building process benefits the juvenile justice system in the long term, it is recommended that specialisation on the part of the different personnel involved, is encouraged and matched by professional job terms and incentives which aim at ensuring these personnel are retained to work in the juvenile justice system from whichever place they are in. This can be done by ensuring for instance a magistrate once gazetted as a children magistrate remains so even on transfer to another station. This should also apply to the police officers.

It is also recommended that there be Capacity building constant reinforcement to ensure there is always a stream of trained personnel. This will prevent a situation where, when the existing staffs leave, they are replaced with new people unfamiliar with the objectives of a child rights-oriented juvenile justice system and its components.

The government and all other stake holders should create of public awareness on the child's right. This will play an important role in the access to justice. Children and their parents need to be informed about the law, their rights and legal responsibilities. This may be done through educational outreach programs in schools and the community at large.

There is also need for the creation of public awareness on the child's right to decide on a range of issues such as giving consent to referrals to diversion processes and participating in their legal representation. This will play an important role in the access to justice especially in the rural areas.

4.2 Conclusion

This study has shown there are gaps in the Children Act that need to be urgently addressed. It has shown there that ultimately for Kenya to be fully compliant with Article 37, and 40 of the CRC and Article 17 of the ACRWC it must legislate, establish and put into practice separate institutions and procedures applicable to children accused or alleged of committing crimes; the setting of a minimum age of criminal capacity; the desirability of diversion and procedural guarantees in a juvenile justice framework. It must also allocate resources to carry out the above functions.

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