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The Child Justice System and
the Rights of the Child in Conflict
with the Law: A Case Study of
Zambia

By

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Abbreviations

ACHPR	African Charter on Human and Peoples Rights
AU	African Union
CAT	International Convention Against Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
HURID	Institute of Human Rights, Intellectual Property and Development Trust
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LRF	Legal Resources Foundation
OAU	Organisation of African Unity
RYOCHIN	Rural Youth and Children in Need
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations Children's Fund
VOM	Victim Offender Mediation

1 CHAPTER ONE

1.1 Background

The author's background and experiences as a Resident Magistrate, prior to joining the International Law and Agreements Department of the Ministry of Justice have inspired this study. As a Magistrate, the author had the opportunity to hear and determine criminal matters that involved children in conflict with the law. It follows, therefore, that the author has special insight into some of the issues and problems pertaining to the protection of the rights of children in conflict with the law discussed in this research.

The United Nations Convention on the Rights of the Child¹ (CRC) adopted by the UN General Assembly in 1989 is one of the most widely ratified international human rights treaties with all but two states of the world being party to it. It is a holistic instrument in that it covers civil, economic and social rights of children. A layperson would therefore consider it safe to assume that the implementation of this Convention is not problematic considering its attendant popularity with states when compared to other international human rights instruments. However, careful study in all areas of the development and welfare of the child reveals that this is not the case.

Numerous scholars on the rights of children have observed that children, because of their physical and mental immaturity are especially vulnerable in any given society hence the need for special protection measures. Having said this, children in conflict with the law are especially vulnerable within the group as a result of their exposure to state machinery and strangers who wield substantial power and influence over them. The international community has recognised the dangers that these children are exposed to and has set up various norms and legal standards to ensure protection and promotion of their rights. These standards began to emerge before the

¹ UN Doc. G.A Res. 44/25 annex 44 UN GAOR Supp. (No.49) at 167

adoption of the CRC² and have continued to be adopted after the CRC. The norms and legal standards referred to above cover all aspects of the rights that must be particularly protected for children in conflict with the law. The problem does not therefore lie with the adequacy or lack thereof of the legal standards *per se*, but with their implementation.

Zambia is a state party to the CRC and a majority of other international and regional human rights instruments that protect the rights of the child in general and the rights of the child in conflict with the law in particular. Zambia's domestic legal framework also provides for the protection of the rights of the child but this has remained inadequate. The rights of the child in conflict with the law continue to be violated because domestic legislative provisions are not sufficient to guarantee the protection and promotion of human rights. An examination of other reasons for this state of affairs will be conducted in this research.

1.2 Statement of the Problem

The realisation that children in conflict with the law remain at great risk of having their rights violated seventeen years after the adoption of the CRC has spurred the international community and scholars into searching for means of ensuring that these rights are protected. The UN has called for further action in this field of human rights through, for example, the adoption of the report of the independent expert for the UN study on violence against children and by holding thematic discussions on the reform of criminal justice systems by having recourse to UN standards and norms. Some states like Sweden and Denmark have entered into bilateral arrangements to provide financial and other aid to support juvenile justice reform in countries that continue to lag behind in the protection of the child in conflict with the law.

² Declaration of the Rights of the Child, UN Doc G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19

The United Nations Children’s Fund (UNICEF), in conjunction with the Governments of Zambia, Sweden and Denmark and other cooperating partners embarked on three pilot projects aimed at creating a child friendly juvenile justice system that fully protects the rights of the child in conflict with the law. Various factors, mostly related to Zambia’s economic situation and archaic laws still pose a challenge to the promotion and protection of the rights of the child in conflict with the law. It is the concern of this research therefore, to look at the international legal obligations that Zambia has assumed for the protection of the rights of the child in conflict with the law. The study will also analyse the extent to which Zambia has discharged these obligations in order to determine how international human rights law can solve the failure, if any, in the implementation of the human rights instruments. The study will also look at whether Zambia has used all available resources for the promotion and protection of not only civil rights but also economic and social rights of the child in conflict with the law. The situation of the child in conflict with the law appears to suggest that Zambia is in violation of its obligations under international human rights law concerning the child.

1.3 Aim and Purpose of the Study

The aim and purpose of this study is to examine the international legal obligations that states, including Zambia, have assumed for the protection of the rights of the child in conflict with the law. The researcher will also critically analyse Zambia’s implementation of these obligations on the ground through an analysis of the domestic legal framework and its effects on children in conflict with the law. A critical analysis of the mechanisms that have been introduced, such as the three pilot projects, to deal with the problems in the administration of juvenile justice will also be carried out by looking at other domestic factors that undermine the rights of the child in conflict with the law. Additionally, the research will look at the Swedish child justice model as an alternative legal framework for Zambia’s child justice system.

1.4 Scope of the Study

The research focuses on the rights of children in conflict with the law in Zambia and will embark on a comparative analysis of the situation of children in conflict with the law in Zambia and Sweden. The study will be conducted against the backdrop of the jurisprudence of the Committee on the Convention on the Rights of the Child and the Commentaries on various aspects of the administration of child justice systems.

1.5 Methodology

This research is a desk-based research to the extent that it is based on existing international and domestic legal instruments relating to the protection of the rights of the child in conflict with the law. The researcher has also examined reports, commentaries, decisions and judgements on the subject matter. The research has also involved the perusal and analysis of existing academic literature, textbooks and research studies, journals and materials on the subject in both hard copy and electronic form.

1.6 Structure

The research is divided into six Chapters inclusive of this introduction. The second Chapter looks at the international legal framework for the protection of the rights of the child in conflict with the law. The Third Chapter looks at the international soft law on the topic. Although international soft law is not binding, it is indicative of general consensus of states on particular issues. The Fourth Chapter looks at the Zambia's child justice system, the domestic legal framework for the protection of the child in conflict with the law, the recent developments in the field and the challenges in the implementation of the rights of the child in conflict with the law. Chapter Five of the study looks at the domestic legal framework for the protection of the rights of the child in conflict with the law in Sweden as an alternative to the situation prevailing in Zambia. Chapter Six contains the author's concluding remarks and recommendations.

2 CHAPTER TWO

2.1 INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF CHILDREN IN CONFLICT WITH THE LAW

INTRODUCTION

Over time, states have realised and accepted the importance of a separate legal regime for the protection of the child. This can be seen from the adoption of the United Nations Convention on the Rights of the Child (CRC) and other UN standards and norms for juvenile justice that has led to the adoption of similar conventions at regional levels.³ In order to determine whether there is a violation of the rights of the child in conflict with the law, this Chapter will identify the international legal framework that exists for the protection of the rights of the child in conflict with the law. The need for a separate child justice system that is responsive to the needs and welfare of children in conflict with the law is premised on the realisation that children who become involved in crime do not, by so doing; lose their right to be treated as children. It is for this reason that it has been said that the law should protect children from the rigours of the criminal justice system until they are old enough to take full responsibility for their actions.⁴

2.2 The United Nations Convention on the Rights of the Child

The CRC is the most fundamental Convention relating to the protection of the rights of the child. Its ratification rate is a sure indicator of the importance that states have attached, on paper, to the rights of the child. The author will not look at all the substantive rights covered by the CRC but will

³ The African Charter on the Rights and Welfare of the Child and the European Convention on the Exercise of Children's Rights, although the latter Convention grants procedural rights to children and facilitates the exercise of these rights by ensuring that children are informed and allowed to participate in proceedings affecting them before judicial authorities.

⁴ J Fortin *Children's Rights and the Developing Law*. 2nd Edition, Butterworths, London, 2003 p. 545

focus on those rights that relate to the implementation of the child justice system and the protection of the rights of the child. The CRC is considered to be a framework treaty whose purpose is to stipulate the development of laws and policies for the benefit of children as defined in the Convention, although it has mandatory provisions such as the prohibition of capital punishment, torture and discrimination.⁵

The provisions of the CRC flow from Article 25 (2) of the Universal Declaration of Human Rights⁶ (UDHR), which provides that childhood is entitled to special care and assistance.⁷ The CRC is premised on the principle of “best interests of the child” by providing, in Article 3, that in all actions concerning children, the best interests of the child must be the primary consideration. The actions envisaged by this provision include the actions of both public and private social welfare institutions, the judicial and legislative arms of government.⁸ The principle of “best interests of the child” is said to encompass certain essential points such as adequate care, safe physical surroundings, respect, continuity and stability, the need to take the needs of the child seriously and the creation of a sense of security for the child.⁹ This principle entails that where there is a conflict of interests of the society, the family and the child, the interests of the child ought to prevail. According to Alston, the “best interests” principle serves three main purposes. It can be used in conjunction with other articles of the CRC in order to support, justify or clarify a particular approach to matters arising under the CRC. It can also be used as an aid to the construction and as an element that needs to be taken into account when implementing other rights and it can be used as a mediation tool in resolving conflicts that might arise

⁵ J. Sorensen and J. Jepsen (eds.) *Juvenile Justice in Transition: Bringing the Rights of the Child to Work in Africa and Nepal*, Danish Institute of Human Rights (2005) p. 80

⁶ G.A Res. 217 A (III), UN Doc. A/810 at 71 (1948)

⁷ See paragraph 4 of the Preamble to the CRC

⁸ Sloth-Nielsen and J. Gallinetti (eds.) *Child Justice in Africa: A Guide to Good Practice*, Community Law Center, 2004 p. 22

⁹ I. Sagel-Grande (ed.) *In the Best Interests of the Child: Conflict Resolution for and by Children and Juveniles*, Rozenberg Publishers, Amsterdam, (2001) p. 10

between rights within the framework of the CRC.¹⁰ The obligations that states parties have relating to the CRC are contained in Article 4 of the Convention as follows;

“States parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.”

This latter part of the obligation is similar to that contained in the International Covenant on Economic Social and Cultural Rights (ICESCR) and as we shall see later, it raises problems for children in conflict with the law. The CRC deals with child justice in article 40, a cardinal provision to this research. This is the longest and most detailed provision of the CRC. Under Article 40(1) of the Convention, state parties recognise the rights of every child accused of or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth. The said treatment must reinforce the child’s respect for human rights and fundamental freedoms of others and must take into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society. Article 40 (2) (a) embodies the principle of *nullum crimen sine lege* in accordance with other relevant provisions of international law such as Article 15(1) of the ICCPR from which no derogation is permitted.¹¹ The article further lays down the minimum guarantees that a child in conflict with the law is entitled to and these include;

¹⁰ see generally P. Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, International Journal of Law, Policy and Family, Oxford University Press, (1994) p. 1- 25

¹¹ see Article 4 of the ICCPR on non-derogable rights

- the right to be presumed innocent until proved guilty according to law
- the right to be informed promptly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
- the right to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
- the right not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
- where the child is considered to have infringed the penal law, he or she has the right to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
- the right to have the free assistance of an interpreter if the child cannot understand or speak the language used and to have his or her privacy fully respected at all stages of the proceedings.

Article 40 (3) deals with the establishment and implementation of a juvenile justice system. It provides that states *parties must seek*¹² to promote the establishment of laws, procedures, authorities and institutions that are specifically applicable to children alleged as, accused of, or recognised as being in conflict with the law. Such measures must establish a minimum age below which children shall be presumed not to have capacity to infringe the penal law and whenever appropriate and desirable, measures for dealing

¹² emphasis added

with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. It has been submitted that rather than create a legal obligation, this paragraph points out a direction that must be followed by states in matters relating to the administration of juvenile justice.¹³ States are obliged to seek to promote child friendly child justice systems and as such, this that this is a mandatory provision.

Article 40(4) provides that a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care, education and vocational training programmes and other alternatives to institutional care must be available to ensure that children are dealt with in a manner appropriate for their well being and proportionate both to their circumstances and the offence. Article 40 also obliges states parties to provide mechanisms of dealing with children in conflict with the law without resorting to judicial measures that can sometimes have adverse effects on the child that outweigh the gravity of the offence the child is charged with. The CRC therefore advocates for alternative methods, outside the judicial system, of dealing with the child in conflict with the law.¹⁴ This provision relates to the availability of diversion programmes.

Article 40 has been said to cover the treatment of the child between his or her arrest right through to his or her final release from the child justice system.¹⁵ It upholds what should be the positive aim of a child justice system, which is to rehabilitate children in conflict with the law in line with the principle of best interests of the child.¹⁶ The underlying principle in Article 40 is the right of every child accused of infringing a penal law to be treated in manner that reinforces his sense of dignity and respect for the rights and fundamental freedoms of others. Article 40 therefore outlines minimum guarantees for the treatment of children in conflict with the law.

¹³ supra note 5 at p. 81

¹⁴ Article 40 (3) (b) of the CRC

¹⁵ R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, 1998 p.540

¹⁶ *ibid* p. 547

Although the CRC defines who a child is in Article 1, it does not set out what the minimum age for criminal responsibility should be nor does it state what criteria should be used to determine the minimum age of criminal responsibility. This may be viewed as a weakness in the Convention. The rationale behind setting a minimum age for criminal responsibility is to protect children who infringe penal laws but have no capacity for necessary *mens rea* or guilty intent to commit the offence. The fact that the CRC does not stipulate this minimum age leaves states with unfettered discretion to determine the minimum age for criminal responsibility. In Zambia, for example, the minimum age is eight years.¹⁷ According to the Committee on the Rights of the Child, the minimum age for criminal responsibility should not be too low and has rightly expressed concern over Zambia's minimum age.¹⁸

Article 37, a corollary of article 40 prohibits the imposition of the death penalty and life imprisonment on a child. The Article further prohibits arbitrary deprivation of liberty and states that any arrest, detention or imprisonment must be used as a measure of last resort and for the shortest period.¹⁹ If a child is deprived of liberty, he or she should be treated in a humane manner, respectful of the inherent dignity of human beings, which takes into account the special needs of a person of that age. The obligations under this article are mandatory and immediate. Depriving young persons of their regular family and social life, of educational opportunities and of simple choices such as to enter, stay or leave places at their own will has fundamental impact on the personal development as well as exercise of human rights.²⁰ From the foregoing, it is clear that effective implementation of the CRC is cardinal to the protection of the rights of the child in conflict with the law.

¹⁷ Section 14 (1) of the Penal Code, Chapter 87 of the Laws of Zambia

¹⁸ See Concluding Observations of the Committee relating to Zambia's initial report on the CRC contained in UN Doc. CRC/C/15/Add.206 adopted on the 2nd of July, 2003.

¹⁹ Article 37 (b) of the CRC

²⁰ W. Schabas and Sax H. *A Commentary on the United Nations Convention on the Rights of the Child: Article 37*, Martinus Nijhoff Publishers, Leiden 2006 p. 34

The CRC has been criticised for not having an individual complaints procedure. The argument against such a provision is that it would promote duplicity and inconsistency in the interpretation of the same rights. This can be foreseen in different interpretations that might arise between the Committee on the Rights of the Child and the Human Rights Committee.²¹ The arguments for an individual complaints mechanism is that it will advance the enforcement of the rights contained in the CRC and will assist in the development of jurisprudence of the CRC. Since the CRC protects fundamental civil, economic and social rights of the child, it requires an individual complaints mechanism that would be responsive to the right of the child to enforce effectiveness. At the time of this research, state party reporting was the major mechanism for monitoring the implementation of the CRC by states. The major problem of state party reporting is that although it is mandatory once a state ratifies or accedes to the CRC, the consequences of failing to submit a state party report are minimal and where states actually submit reports, the concluding observations of treaty body are not legally binding and enforceable. This obviously curtails this mechanism's effectiveness. It has been observed that even where concluding observations contain strong statements indicating that violations of the treaty have occurred, this does not amount to condemnation of non-fulfilment of treaty obligations.²²

2.3 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights²³ (ICCPR) does not have detailed provisions relating to the administration of a child justice system. Article 10 of the Covenant deals with the treatment of persons deprived of their liberty and provides that children in conflict with the law should be detained separately from adults and must be brought to trial in the

²¹ L. Smith in M. Bergsmo (ed) *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide*, Martinus Nijhoff Publishers, Leiden 2003 p. 748

²² V. Dimitrijevic State Reports. Alfredsson G. *et al* (eds.) *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller*, Martinus Nijhoff Publishers, The Hague (2001) p. 198

²³ U.N. Doc. A/6316 (1966)

shortest possible time. It further provides that they must be accorded treatment that is appropriate for their age and legal status. Article 10 (3) does not define the term juvenile and the Committee has attempted to shed some light on this by providing that while states parties must indicate the limits for juvenile age, article 6 (5) of the Covenant suggests that all persons below eighteen years must be treated as juveniles.²⁴ The Human Rights Committee has stated that article 10 applies to anyone deprived of liberty under the laws and authority of the state. States are therefore obliged to ensure that the principle of humane treatment of detained persons is observed in all their institutions of detention.²⁵ Apart from stressing the social aims of a criminal justice system, the article places a positive obligation on states in respect of all persons deprived of their liberty.²⁶ The Human Rights Committee has acknowledged the fact that persons deprived of their liberty are very vulnerable and are often the victims of abuse by persons acting in official capacity. Judge Moller submits that

“bad prison conditions such as overcrowded, infested cells, lack of light, ventilation or bedding, lack of hygienic or sanitation facilities, insufficient or poor quality food, lack of medical care, unduly harsh prison regime and lack of recreation lead to a finding of a violation of Article 10.”²⁷

Article 24 of the ICCPR states that every child has the right to such measures as are required by his status as a minor from his or her family, society and the state without any discrimination. This provision can be interpreted as covering the obligation of states to put in place measures that protect the rights of a child in conflict with the law. The Human Rights

²⁴ General Comment Number 21 (1992) paragraph 13. Article 6(5) of the Covenant relates to the prohibition of the imposition of the sentence of death on persons below the age of eighteen years.

²⁵ *ibid* paragraph 2

²⁶ J. T Moller in Bergsmo M (ed.) *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide*, Martinus Nijhoff Publishers, Leiden 2003 p. 665

²⁷ *ibid* p. 667

Committee has stated that the implementation of this provision requires the adoption of special measures for the protection of children, in addition to the obligations outlined under article 2 of the ICCPR.²⁸ It has stated that the rights provided for under this article are not the only rights that accrue to children but that they are entitled to benefit from all the other rights contained in the Covenant.²⁹ It follows that all due process rights and provisions relating to security of persons contained in the ICCPR accrue to a child in conflict with the law. Article 24 requires states parties to put in place measures to ensure that children lawfully deprived of their liberty are separated from adult offenders, based on the fact of their age and level of maturity and are entitled to be brought before an adjudicator without undue delay.³⁰ The Committee has further stated that Article 24 would also require that where children in conflict with the law are convicted, they must be held in a separate penitentiary system that is responsive to their needs as children and whose aim should be to foster reformation and social rehabilitation.

Article 9 deals with the right to liberty and security of person and is thus relevant in the protection of the rights of a child deprived of his or her liberty. The ICCPR, which was adopted before the CRC can be said to have been of great importance before the adoption of the CRC and continues to be so in states that are not parties to the CRC as it was the first legally binding international instrument that protected the rights of detained children. Article 14 covers equality before the courts of law and the right to a fair and public hearing by an independent court established by law. Article 14 (4) provides that the trial procedures for children in conflict with the law should take into account their age and the desirability of promoting the rehabilitative aim of child justice. According to the Human Rights Committee, Article 14 is aimed at ensuring the proper administration of justice.³¹

²⁸ See supra note 21, paragraph 2

²⁹ *ibid*

³⁰ Human Rights Committee General Comment No. 17, (1989) Paragraph 2

³¹ Human Rights Committee General Comment No. 13 (1984) Paragraph 1

2.4 The African Charter on the Rights and Welfare of the Child

The Organisation of African Unity (OAU), now the African Union (AU), adopted the African Charter on the Rights and Welfare of the Child in 1990.³² It entered into force in 1999 and it recognises the fact that the child requires particular care due to his or her physical and mental development. It should be noted from the outset that although Zambia has signed but not ratified the Charter, its provisions bind her by virtue of article 18 (a) of the Vienna Convention on the Law of Treaties.³³ Although the Charter is aimed at protecting children by virtue of their inherent vulnerability, it recognises that within this group are even more vulnerable children³⁴ (such as children in conflict with the law). According to the Charter, the child requires protection in conditions of dignity, freedom and security.³⁵ The States Parties to the Charter have reaffirmed adherence to the principles elucidated in other international treaties such as the African Charter for Human and Peoples Rights, general United Nations human rights instruments and the CRC in particular.³⁶ The Committee of Experts on the Rights and Welfare of the Child was established in 2001 to monitor implementation of the Charter.

Although the Charter is not as detailed as would be expected and desired, it embodies the principles contained in the CRC such as the principle of best interests of the child.³⁷ States parties to the Charter are obliged to recognise the rights contained therein and to undertake the necessary steps to adopt measures that give effect to the provisions of the charter in accordance with their constitutional processes.³⁸ The wording of the obligations under the

³² OAU Doc. CAB/LEG/24.9/49 (1990)

³³ UN Doc. A/Conf.39/27 1155 U.N.T.S 331

³⁴ A. Lloyd, *Report of the Second Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child*, (2003) 3 AHRLJ p.337

³⁵ Paragraph 6 of the Preamble to the African Charter on the Rights and Welfare of the Child

³⁶ *ibid*, Paragraph 9

³⁷ see Article 4 (1) of the Charter

³⁸ see Article 1 of the Charter

Charter is less onerous on states parties when compared to the CRC, which obliges states to ensure and respect the rights contained therein.³⁹

The rights of the child in conflict with the law are dealt with in Article 17 of the Charter. This article is not as exhaustive and comprehensive as article 40 of the CRC and bears the same weaknesses as the CRC in that states are only obliged to implement the Charter to the maximum extent of their resources and it neither gives a minimum age for criminal responsibility nor does it propose guidelines for determining this age. Article 17 (1) of the Charter grants the child in conflict with the law, the right to special treatment that is consistent with the child's sense of dignity and worth. The CRC goes further by requiring that child justice systems should take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. The provision that is akin to the CRC in this respect is fundamentally flawed in two respects.⁴⁰ Firstly, the provision does not make any reference to the need to take the age of the child into consideration. The age of the child is cardinal to the proper implementation of any child justice system. Secondly, the provision only relates to the treatment of the child during trial and after being found guilty and is silent on pre-trial treatment. A child comes into contact with state machinery before trial and therefore needs protection from the time of contact. The Charter does not refer to the internationally recognised rule that a person cannot be convicted of an act that was not an offence at the time of commission or omission.⁴¹

Under article 43(1) of the Charter, state parties are obliged to submit their initial reports within two years of ratification. The effectiveness of this mechanism can be seen from the fact that at the time of this research, thirty three state party reports were overdue from all thirty three state parties that

³⁹ Compare Article 1 of the Charter to Article 2 of the CRC.

⁴⁰ Article 17 (3) of the Charter

⁴¹ Article 40 (2) (a) of the CRC

had ratified the Charter.⁴² The most positive aspect of the Charter is that article 44 gives the Committee on the Rights and Welfare of the Child mandate to receive and determine communications relating to any matter covered by the Charter from any individual, NGO or group that is recognised by the AU. The Committee is also authorised to conduct appropriate investigations on any matter that falls within the ambit of the Charter and it may publish its findings after consideration by the Assembly of Heads of States. These two features are not present in the CRC and are a positive step in the protection of the rights of the African child.⁴³

The African Commission on Human and Peoples Rights has also adopted Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. The guidelines expand and explain the requirements that need to be in place in order to protect the right to a fair trial contained in Articles 5, 6, 7 and 26 of the African Charter. The guidelines also specifically deal with children in conflict with the law in line with the African Charter on the Rights and Welfare of the Child. States are obliged to recognise any person under the age of eighteen years as a child. They recognise the fact that in addition to all fair trial guarantees applicable to adults, children are also entitled to some additional protection. It is interesting to note that unlike the Beijing Rules and other United Nations standards and norms for juvenile justice which end at obliging states to establish a minimum age for criminal responsibility, the African Guidelines state that the minimum age of criminal responsibility should not be less than fifteen years and that no child below this age should be arrested or detained.⁴⁴

⁴² see website of the Committee on the Rights and Welfare of the Child available at <http://www.africa-union.org/child/Due%20date%20of%20reports.pdf>

⁴³ Article 45

⁴⁴ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and Peoples Rights

3 CHAPTER THREE

3.1 INTERNATIONAL STANDARDS FOR THE TREATMENT OF CHILDREN IN CONFLICT WITH THE LAW

INTRODUCTION

Other than the international legal instruments referred to in the previous Chapter, there is also a wealth of international “soft law”⁴⁵ that deals with the administration of child justice systems. This Chapter will focus on this soft law, which, although not legally binding on states, reinforces and expands the provisions contained in the CRC and the African Charter on the Rights and Welfare of the Child. This Chapter will also highlight the problems that arise in the administration of child justice systems as being related to the fact that most provisions relevant to the protection of the child in conflict with the law are exhaustively covered in international soft law or non-binding international instruments. International soft law is not binding and it is not a source of law as enumerated in article 38 of the Statute of the International Court of Justice. It appears that it is less onerous for states to enter into non-binding agreements in this area of international human rights law than for them to enter into detailed binding treaties because the latter not only protects civil rights of the child but economic social and cultural rights as well. Various reasons have been advanced as to why states enter into non-binding agreements, which include the desire to create preliminary and flexible regimes that would provide for its development and the fact that international soft law has simpler methods of adoption.⁴⁶ Of particular interest is the unchallenged extension of the legal force that the Committee on the CRC has ascribed to them in concluding observations and General Comments. Rather than see them as non-binding *per se*, states appear to have accepted without comment, the application of the rules to the child

⁴⁵ C. M. Bassiouni, *The Protection of Human rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards*, Transnational Publishers Inc. New York (1994) p. 191

⁴⁶ H. Hillgenberg, *A Fresh Look at Soft Law*, EJIL (1999) Vol. 10 No. 3 p. 501

justice system.⁴⁷ International soft law is relevant in this field in that it is influential in policy development within states and its role, therefore, cannot be ignored.

3.1.1 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice⁴⁸ (the Beijing Rules) are notably one of the most important non-binding norms relating to the administration of child justice systems. The Rules were adopted by the General Assembly in 1985 under Resolution 40/33 following a recommendation by the Interregional Preparatory Meeting that was held at Beijing. The overall aim of the drafters was to have a set of Rules that would be applicable within different legal systems while at the same time setting the minimum standards for dealing with children in conflict with the law.⁴⁹ The Rules were adopted before the CRC but some of the provisions have been incorporated into the CRC and are as such, legally binding.

The Rules are of importance in that they are based on the principles of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.⁵⁰ They also recognise that children, owing to their stage of development require particular care and assistance with regard to their physical, mental and social development and require legal protection in conditions of peace, dignity and security. The Rules invite member states of the United Nations to adapt their national legislation, policies and practices to bring them in line with the Rules.⁵¹ According to the Rules, child justice should be conceived as an integral part of the national development process.

⁴⁷ G. Van Bueren *A Commentary on the United Nations Convention on the Rights of the Child: Article 40*, Martinus Nijhoff Publishers, Leiden (2006) p. 3

⁴⁸ UN Doc. A/RES/40/33

⁴⁹ see Commentary to Rule 2

⁵⁰ Paragraph 1 of the Preamble to G.A Resolution 40/33

⁵¹ *ibid* Paragraph 5 and 9

It follows therefore, that their implementation should be in the context of the economic, social and cultural conditions prevailing in each member state.⁵² This may be argued as to constitute a weakness in the effectiveness of the Rules, in that states have leeway to argue that they cannot afford to implement the Rules owing, for example, to their economic situation. However, certain provisions in the Rules do not require financial or other resources to implement, such as the non-discrimination principle⁵³ and the principle of best interests of the child. According to the commentary to Rule 1, Rule 1.5 seeks to take account of the existing conditions in member states that would cause the manner of implementation of particular Rules to be different from those adopted by other states.

In terms of defining who is a juvenile, the Rules do not refer to a specific age, they state that a juvenile is a child who may be dealt with differently from an adult in any respective legal system. The discretion to decide who might be dealt with differently under the legal system was left to states and the decision on the scope of application of the Rules was also left to the domestic legislation. A juvenile offender is defined as a child or young person who is alleged to have committed an offence, the latter being any act or omission that is punishable by law under the respective legal systems.⁵⁴ According to the Commentary to Rule 2, the age limits whose importance cannot be overstated, is dependant on and explicitly made dependant on each respective legal system in an attempt to fully respect the economic, social, cultural and legal systems of member states. This is the root of the problem relating to the determination of the minimum age for criminal responsibility. States have excessive discretion and there are no laid down criteria for determining the minimum age for criminal responsibility.

Rule 4 deals with the age of criminal responsibility and provides that the minimum age should not be fixed too low bearing in mind the fact of

⁵² see Rule 1.5

⁵³ Contained in Rule 2.1 of the Rules and in most, if not all international human rights instruments

⁵⁴ Rule 2

emotional, mental and intellectual maturity. It can be argued that this is the criterion to be used when determining the minimum age but the question that arises pertains to who determines or assesses the emotional, moral and intellectual maturity of the child. The justification for this is that historical and cultural factors play a role in determining the minimum age of criminal responsibility.⁵⁵ The two most important objectives of a child justice system is the promotion of the wellbeing of the child in conflict with the law and the principle of proportionality.⁵⁶ The problems with the implementation of child justice systems lies in the failure of states to put in place measures that carry out both objectives. It is in this vein that the Rules advocate for a measure of discretion to be given to institutions and individuals that have influence within the child justice system.⁵⁷ The Commentary to Rule 6 recognises that in order to curb abuse of discretionary powers, professionalism and accountability are cardinal. This, in turn, requires special training, a challenge for most, if not all third world countries including Zambia.

It is submitted that leaving the decision of determining the minimum age for criminal responsibility entirely in the discretion of states is detrimental to the child in conflict with the law. It is detrimental because it exposes children to the possibility of entering the criminal justice system at a very young age, the disadvantages of which are highlighted in other parts of this research. It has been suggested that the modern approach to determining the age for criminal responsibility would be to consider whether a child, by his or her individual discernment and understanding could be held responsible for an offence.⁵⁸ Although there is a recommendation that efforts be made to agree on a reasonable lower age limit that is applicable internationally,⁵⁹ there is still no internationally accepted minimum age for criminal responsibility, twenty-one years after the adoption of the Rules.

⁵⁵ Commentary to Rule 2

⁵⁶ Rule 5

⁵⁷ Rule 6

⁵⁸ Commentary to Rule 4

⁵⁹ *ibid*

3.1.1.1 The Rights of the Child in Conflict with the Law under the Beijing Rules

Rule 7 of the Beijing Rules outlines the basic rights of a child in conflict with the law, similar to the provisions of the article 11 of the UDHR, article 14 (2) of the ICCPR and the CRC. The right to privacy of a child in conflict with the law is also protected under Rule 8. In order to grant further protection, the Rules do not preclude the application of the Standard Minimum Rules for the Treatment of Prisoners.⁶⁰ Investigation and prosecution is also dealt with by the Rules and they require that the contact between the law enforcement agencies and the child be managed in a way that respects the status of the child, promotes the wellbeing of the child and protects him or her from harm. It should be noted that this can only be achieved, as we shall see later, if there is adequate infrastructure and training for officers that come into initial contact with children. This is the problem that is encountered by most states in the administration of juvenile justice. Training and infrastructure requires financial resources in addition to political will. The requirement to respect the status of the child can be said to move in tandem with the right of the child or indeed any accused person to be brought before a competent tribunal without undue delay. A child who is detained may be released pending the determination of the matter even before the matter has been brought before a competent tribunal.⁶¹ This is especially important in states that have a problem with congestion in detention facilities in order to protect the child from harm and exposure to adult criminal behaviour.

3.1.1.2 Detention Pending Trial

It is internationally accepted that detention of a child should be a measure of last resort and that where a child in conflict with the law is detained, the detention ought to be separate from adult suspects or convicts. This

⁶⁰ UN Doc. A/CONF/611, annex 1, ESC Res. 663C, (XXIV) (1957), UN ESCOR, Supp. No. 1, at 11, UN Doc. E/3048 (1957), amended by ESC Res. 2076, (LXII) (1977), UN ESCOR, Supp. No. 1, at 35, UN Doc. E/5988 (1977)

⁶¹ Rule 10 and Article 9 (3) of the ICCPR

requirement is honoured in its breach than in its implementation because of the lack of resources and training. The Rules further require that while in detention, children in conflict with the law receive care, protection and individual assistance in terms of their social, educational, vocational, psychological, medical and physical needs. This might appear to be idealistic in the sense that the Rules acknowledge that their implementation should be based on the social and economic factors of the states.

Rule 17 outlines the guiding principles that must be employed when adjudicating and disposing of a matter relating to a child. The principle of proportionality is of paramount importance in that the reaction to the offence should not only take into account the circumstances and the gravity of the offence but the circumstances and needs of the child in conflict with the law. Another principle (which has been referred to above) is that restrictions on personal liberty should only be used as a measure of last resort and for the shortest period. The implementation of the latter principle is dependant on the availability of human resources and infrastructure to dispose of matters relating to children in the shortest period of time and the availability of diversion programmes, the lack of which leads to over-detention. The Rule goes on to state that deprivation of liberty should only be used where a child is charged with a serious offence that involves violence against another person or he or she has had problems with the law previously.

The other guiding principles under Rule 17 include the fact that the wellbeing of the child in conflict with the law must be the guiding factor in the consideration of his or her case. Capital and corporal punishment are prohibited and any competent authority must be able to discontinue the proceedings at any time. This is in line with the requirement that officials that encounter children within the criminal justice system should be allowed an acceptable level of discretion.

3.1.1.3 Trial

Where a child is not dealt with through diversion and is therefore subjected to the justice system, the Rules provide that a competent tribunal should use the principles laid down for a just and fair trial. The Rules recognise the right to legal representation and the right to have free legal aid. They also allow the parents and legal guardians of the child to attend and participate in the proceedings. The effective implementation of this requirement entails a fully functional and well-funded legal aid system. The requirement that the reaction taken must always be proportionate not only to the circumstances and gravity of the offence but also to the circumstances and needs of the child in conflict with the law entails a holistic approach to looking at each individual case to include socio-economic factors of the child.

Another guiding principle is that deprivation of liberty should only be imposed upon careful consideration and must be kept to the minimum. This is necessary in order to protect children from coming into contact with harmful effects of criminal justice systems and can serve as a useful tool for dealing with congestion problems in detention facilities. The principle on deprivation of liberty is further extended by the requirement that detention must only be imposed in situations where the crime committed involves violence against another person or where the child has previously breached the penal law. The prohibition of corporal and capital punishment is accordance with article 6 and 7 of the ICCPR, the second Optional Protocol to the ICCPR on the abolition of the death penalty, article 2 of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment (CAT) and article 6 and 37 of the CRC. Records relating to children in conflict with the law must be kept confidential in order to protect the child's right to privacy enumerated in Rule 8 of the Beijing Rules. The use of these records in subsequent matters involving adults is explicitly prohibited.

3.1.2 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty were adopted by the General Assembly in 1990.⁶² The Rules reiterate the desired aims and objects of a juvenile justice system already discussed above which include the fact that it should uphold the rights, safety and well being of the child. The rules set a minimum standard that should be upheld when a child is deprived of his or her liberty.

The difference between these Rules and the Beijing Rules is that the latter largely pertain to the administration of the entire child justice system and the protection of the rights of the child in conflict with the law while the former relates to the treatment of children deprived of their liberty. A juvenile is defined as any person below the age of eighteen years. This definition is a marked improvement to that contained in the Beijing Rules which is somewhat vague and unhelpful.⁶³ This difference in definition can perhaps be attributed to the fact that the Beijing Rules were adopted before the CRC while the United Nations Rules for the Protection of Juveniles Deprived of their Liberty were adopted after the adoption of the CRC.

Children deprived of their liberty are ideally supposed to be kept in environments that allow them to engage in meaningful activities, have access to education and sustain their health and self-respect. The general thrust of these rules relates to the enjoyment of economic, social and cultural rights whose challenge the author has addressed in various sections of this thesis. The scope of the Rules extends to all types of detention facilities. The application of the Rules, like the Beijing Rules and the

⁶² UN Doc. A/RES/45/113

⁶³ The Beijing Rules define a juvenile as “a child or young person who, under the respective legal systems may be dealt with for an offence in a manner which is different from an adult.”

Riyadh Guidelines⁶⁴ are dependent on the economic, social and cultural conditions prevailing in each member state.

The presumption of innocence for children under pre-trial detention is emphasised. Detention must be limited to exceptional circumstances and must only be used for the shortest possible period as provided for by the Beijing Rules. The child is more affected than an adult accused person in the sense that there are a lot of players involved in the case and it is difficult to monitor and ensure that all these players perform their functions. For instance, there is the need to have guardians or parents present at the proceedings, social welfare also needs to investigate the child's socio-economic situation and prepare a report for the competent tribunal and the prosecution and the defence have to be ready to proceed with the matter. It is therefore a challenge to get all these individual players who are often over-worked and underpaid to do their job on time as and when they are required to do so. The Rules also require that children in pre-trial detention should be separated from those that have been found to be in breach of the penal law. The rules recognise the right to free legal aid and the right to contact with lawyers.⁶⁵ Conditions for a suitable environment and accommodation for the children are set out in the Rules and they should promote the right to privacy, health and human dignity of the children. According to the Rules, the enjoyment of the right to education should not be hampered by reason of detention. As such, the system of education should be suited to the child's needs and abilities and should promote the possibility of reintegration into society upon release. The right to medical care, freedom of religion and access to information are also protected.

⁶⁴ see paragraph 3.1.3 for the detailed discussion on the Riyadh Guidelines.

⁶⁵ see Part III of the Rules

3.1.3 The United Nations Guidelines for the Prevention of Juvenile Delinquency

The United Nations Guidelines for the Prevention of Juvenile Delinquency⁶⁶ (The Riyadh Guidelines) are also of significant importance in the administration of child justice systems as they set minimum standards for the prevention of juvenile delinquency. The Guidelines were adopted by the General Assembly under Resolution 45/112 in 1990, following their adoption by an International Meeting of Experts in Riyadh. The Guidelines, like the Beijing Rules are based on other international human rights instruments that protect the rights of the child in general such as the UDHR, the CRC, the ICCPR and CAT. The guidelines recognise the dangers posed by the harsh socio-economic problems that a lot of children are exposed to which renders them a social risk. By adopting the Guidelines, states recognise that the prevention of juvenile delinquency is an indispensable part of crime prevention.⁶⁷ It is for this reason that the guidelines operate hand in hand with the Beijing Rules and other international legal standards for the protection of the child in general.

3.1.4 Guidelines for Action on Children in the Criminal Justice System

The Guidelines for Action on Children in the Criminal Justice System⁶⁸ (The Vienna Guidelines) were developed by a group of twenty nine experts and were adopted by the Economic and Social Council by Resolution 1997/30. They were adopted upon consideration of the views expressed and the information submitted by Governments. They are based on the principle that the responsibility to implement the provisions of the CRC rests squarely on states.⁶⁹ These Guidelines focus on the implementation of the provisions of the CRC and unlike the other soft law on the subject, they are addressed

⁶⁶ U.N. Doc. A/45/49 (1990)

⁶⁷ Guideline I

⁶⁸ Annexed to Economic and Social Council Resolution 1996/13 of 23 July 1996

⁶⁹ Paragraph 6 of the Guidelines

to all stakeholders in the administration of juvenile justice in addition to states.

“The Guidelines for Action are addressed to the Secretary-General and relevant United Nations agencies and programmes, States parties to the Convention on the Rights of the Child, as regards its implementation, as well as Member States as regards the use and application of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, hereinafter together referred to as United Nations standards and norms in juvenile justice.”⁷⁰

3.1.4.1 Aims and Objectives

The aims of the Guidelines are to provide a framework for the achievement of two main objectives, which are the implementation of the CRC in order to achieve the goals set out for the administration of juvenile justice and to facilitate the provision of assistance to states for the implementation of the CRC. They also aim to promote and apply the United Nations standards and norms in juvenile justice and other related instruments. The Vienna Guidelines recognise that improved cooperation among various players in children’s rights such as Governments, the United Nations system and NGOs is essential for the implementation of the CRC and the UN standards and norms for juvenile justice. They promote the respect for human dignity that is compatible with the principles that underlie the CRC, a holistic implementation of the CRC through the maximisation of resources, child participation, accountability and transparency in all operations related to the child in conflict with the law.⁷¹

⁷⁰ Office of the United Nations High Commissioner for Human Rights available at <http://www.ohchr.org/english/law/system/htm> accessed on 28/09/2006

⁷¹ see generally paragraph 4 - 9 of the Guidelines

The importance of a comprehensive and consistent national approach in the area of child justice with respect to the interdependence and indivisibility of all rights of the child is recognised in the Guidelines.⁷² The aims of policy and decision-making should be ensuring that the principles embodied in the CRC and the United Nations standards and norms for juvenile justice are embodied in national legislation. As such, national legislation should reflect a child oriented child justice system that guarantees the rights of children and prohibits the violation of such rights, promotes their dignity and sense of worth, respects their age and stage of development among other things.

The Guidelines encourage all stakeholders to ensure that the CRC and the United Nations standards and norms are widely disseminated to both children and other stakeholders. States must also ensure that they have in place an effective birth registration programme, an independent and objective system of ascertaining a child's age in cases where this information is not available. States are encouraged to ensure that children within their territory benefit from their rights, especially those rights that are embodied in articles 3, 37 and 40 of the CRC regardless of the age for criminal responsibility. The child justice system should have established procedures that take into account the needs of the child. The Guidelines advocate for a child-centered child justice process, an independent expert or panel to review existing child justice legislation and the establishment of juvenile courts with primary jurisdiction over children in conflict with the law.⁷³ States cannot therefore justify their failure to meet the latter requirement on the basis of their economic situation because the Guidelines are addressed to all national and international stakeholders and there is an emphasis on cooperation to achieve these goals. Further, no child under the age of criminal responsibility should be charged with an offence. The problem however is not that children under the age of criminal responsibility are being charged with offences, the problem is that the minimum age for criminal responsibility in most states, Zambia inclusive, is

⁷² Paragraph 10

⁷³ see generally paragraph 11 – 14 of the Guidelines

too low and does not take into account the child's intellectual, physical and mental needs and level of intellectual maturity. It is acknowledged that the concept of criminal responsibility cannot be divorced from the age at which children are able to understand the consequences of their actions.⁷⁴

The Guidelines support the principle of diversion to avoid recourse to criminal justice as provided for by the CRC and the Beijing Rules. In order for diversion to work, states must comply with the standards that are laid down in the various UN instruments on the topic. The Guidelines also raise the issue of legal representation for children in conflict with the law and that states should ensure that children have access to legal assistance from the moment they are exposed to state machinery. This is further supported by the requirement that a child who is deprived of his or her liberty should be allowed to maintain contact with family, society and other individuals who have a legitimate interest in the child.⁷⁵

States are also encouraged to establish an independent body to monitor and regularly report on conditions in detention facilities. A number of states have independent human rights institutions and what may be required in some instances would be the extension of their mandates to include inspections and reports on the situation of detained children. The Human Rights Commission in Zambia performs this function to some extent.⁷⁶ However, the problems that most national human rights institutions face pertain to their lack of independence from governmental influence, which undermines their credibility and ability to discharge their functions. States are urged to grant concerned humanitarian, human rights and other organisations access to detention facilities. All persons who have contact or are involved in the administration of juvenile justice should be educated on the rights of the child and the international standards on the protection of the child in conflict with the law. These persons include

⁷⁴ supra note 47 at p. 26

⁷⁵ see paragraph 15 - 16

⁷⁶ see generally Chapter Four for a detailed discussion on Zambia's child justice system.

“the police and other law enforcement officials; judges and magistrates, prosecutors, lawyers and administrators; prison officers and other professionals working in institutions where children are deprived of their liberty; and health personnel, social workers, peacekeepers and other professionals concerned with juvenile justice.”⁷⁷

States should ensure that mechanisms exist for investigating allegations of rights violations and should enforce sanctions against any person found liable. The Vienna Guidelines are a step forward in the protection of the rights of the child in conflict with the law as they show a realisation that all stakeholders including non-state actors have to be involved in the promotion and protection of these rights and the task should not be left to states alone. In conclusion, the Guidelines call on those involved in the administration of child justice systems to act in accordance with the four general principles of the CRC which are non-discrimination, the best interests of the child, the child’s right to life, survival and development and respect for the views of the child.⁷⁸

⁷⁷ Paragraph 24

⁷⁸ supra note 37

4 CHAPTER FOUR

4.1 ZAMBIA'S CHILD JUSTICE SYSTEM

INTRODUCTION

The aim of this study, as has been mentioned in the first Chapter, is to determine whether Zambia's child justice system complies with internationally laid down standards for the administration of juvenile justice. Having looked at international instruments and the United Nations standards and norms for juvenile justice in the preceding Chapters, this Chapter will focus on Zambia's juvenile justice system. Recent developments in the administration of child justice will also be looked at. Children make up almost half of Zambia's population⁷⁹ and the HIV/AIDS epidemic that has brought the extended family system to its knees has increased their vulnerability. Although Zambia is considered one of the world's poorest countries with about sixty-eight per cent of its population living below the World Bank poverty threshold of US\$1 per day,⁸⁰ at the time of this research, the economy had undergone some major boosts such as the cancellation of a substantial amount of its external debt, the rise in copper prices, agricultural output and improved fiscal management of public funds.⁸¹ It is with this background that child justice system operates in Zambia. This Chapter will look at the domestic legal framework for the protection of the rights of the child in conflict with the law and will also look at the challenges that the juvenile justice system is facing and how this impacts on the rights of the child within the setting of the child justice system. Some recent developments have taken place in the administration of Zambia's child justice system and the paper will critically assess whether they have been to the benefit of the child.

⁷⁹ It is estimated that children below the age of fourteen years make up 46.3% of Zambia's population. See the World Fact book, available at <http://www.cia.gov/cia/publications/factbook/geos/za.html#People>

⁸⁰ The BBC available at http://news.bbc.co.uk/2/hi/africa/country_profiles/1069294.stm accessed on 20/09/2006 at 17:20 hours.

⁸¹ see generally, The World Fact Book available at <http://www.cia.gov/cia/publications/factbook/geos/za.html#Econ>

4.2 Domestic Legal Framework for the Protection of the Rights of the Child in Conflict with the Law

4.2.1 The Constitution

The Constitution of the Republic of Zambia⁸² is the Supreme law of the land and as such any law that is inconsistent with the Constitution is, to the extent of its inconsistency, void⁸³. It recognises and protects fundamental rights and freedoms of the individual that are applicable to every person in the territory. Part III of the Constitution (the Bill of Rights), provides, *inter alia* that every person in Zambia is entitled to and shall continue to be entitled to fundamental rights and freedoms of the individual. The rights and freedoms covered under this part include the right to life, liberty, security of person and the protection of the law.⁸⁴ These rights are particularly fundamental in any child justice system and indeed in any democratic society as their enforcement entail the prohibition of arbitrary arrest, detention and torture. The right to privacy is also protected under Article 11(d). Young persons are protected from exploitation under article 11(c) which should be read with Article 24. A young person is defined as any person below the age of 15 years.⁸⁵ All these rights are emphasised in other provisions of the Bill of Rights in greater detail.

Article 13 provides that no person can be deprived of his personal liberty except as may be authorised by law. The provision lays down circumstances under which a person may be deprived of his liberty such as execution of a court order or if the person is suspected of having committed an offence. The protection covered under this Article is similar to Article 9 of the ICCPR, which not only recognises the right to liberty and security of person but also explicitly prohibits arbitrary arrest and detention. The Bill of Rights provides for due process rights by requiring that any person that is arrested

⁸² 1996, Chapter 1 of the Laws of Zambia

⁸³ Article 3 of the Constitution of Zambia (1996), Chapter 1 of the Laws of Zambia

⁸⁴ Article 11 (a)

⁸⁵ 1996, Chapter 1 of the Laws of Zambia

or detained must be informed, of the reasons for his or her arrest or detention in a language he or she understands. Such a person is entitled to be brought to court for hearing and where this is not done within a reasonable period; he or she is entitled to bail. Although the Constitution does not have specific provisions relating to children apart from article 24, the provisions of the Bill of Rights are applicable to children as they apply to all persons within the territory. Article 15 of the Constitution prohibits torture and inhuman and degrading treatment. This is in accordance with Article 7 of the ICCPR and CAT, although mention should be made of the fact that Zambia falls short of meeting its international obligations as torture is not an offence under domestic law. The offences that a person who commits torture may be charged with are assault and battery which carry minimum sanctions. Torture should be criminalised under domestic law because the prohibition of torture is not only a *jus cogens* norm⁸⁶ but is an *erga omnes* obligation.⁸⁷ Children require special protection against this vice because of their physical and mental immaturity.

This *lacuna* in the law puts persons, including children in conflict with the law at risk of being subjected to torture or inhuman and degrading treatment. This problem is compounded by the fact that the police are not adequately trained in matters relating to investigation techniques and there are no functioning forensics laboratories. As such, heavy reliance is placed on information that might be obtained from the suspect. Matters have also not been helped by the holding of the Supreme Court in the case of *Liswaniso and Another v The People* where it held that while a confession statement obtained through illegal means such as torture is not admissible in a court of law, other evidence that might be obtained as a result of the illegal confession is admissible. The court held as follows;

⁸⁶ Article 53 of the Vienna Convention on the Law of Treaties defines a norm of *jus cogens* or peremptory norm as a norm that is accepted and recognised by the international community of states as a norm which cannot be derogated from and which can only be modified by a subsequent norm having the same character.

⁸⁷ *A (FC) and Others (FC) vs. Secretary of State for the Home Department* (2005) UKHL 71 p. 27

“...it is our considered view that evidence illegally obtained, for example as a result of an illegal search and seizure or as a result of an inadmissible confession is, if relevant, admissible on the ground that such evidence is a fact, regardless of whether or not it violates a provision of the Constitution (or some other law)...It seems to us good law that an involuntary confession should as a general rule be excluded because of the danger that it might be untrue but that the evidence of anything obtained as a result of an illegal act should be admissible because it is a relevant fact and therefore trustworthy. It would be difficult to appreciate how a court could consciously close its eyes to a relevant fact that has been presented before it.”⁸⁸

The Committee on CAT and Zambia both agree that this, coupled with the fact that torture is not an offence in Zambia has given the police incentives to use torture as a means of extracting evidence from suspects.⁸⁹ The Committee on the African Charter on Human and Peoples Rights adopted the Robben Island Guidelines in 2003.⁹⁰ The Guidelines urge states to ensure that acts that fall within the definition of torture based on article 1 of the CAT must be criminalised and that national courts should have jurisdiction to hear matters involving allegations of torture. The Robben Island Guidelines further outline the basic procedural safeguards for all persons deprived of their liberty whose aim is to ensure that detention is legally controlled. The safeguards include the right to have relatives notified of the detention, the right to an independent medical examiner and the right of access to a lawyer.

⁸⁸ (1976) ZLR p. 297

⁸⁹ see Paragraph 97 of Zambia’s Initial Report on CAT, UN Doc. CAT/C/47/Add.2 and Paragraph 28 of the summary record of the meeting of the Committee against Torture on Zambia, UN Doc. CAT/C/SR.494

⁹⁰ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel and Inhuman or Degrading Treatment for Punishment in Africa, Adopted at the 32nd Ordinary Session of the African Commission on Human and Peoples Rights, ACHPR/Res.61 (XXXII) 02

Article 18 of the Constitution provides for due process rights in that any person who is charged with a criminal offence has a right to a fair hearing before an independent and impartial court established by law. Such a person is to be presumed innocent until proved guilty, shall be informed of the nature of the offence he or she is charged with, is entitled to adequate time to prepare his or her defence and shall be allowed to defend himself or herself by counsel or in person and is also entitled to legal aid. The due process rights covered under article 18 also include the right to call witnesses and examine prosecution witnesses and to have an interpreter where the suspect does not understand and or speak the language of the court. Article 18(4) provides for the principle of *nullum crimen sine lege*. The provisions of article 18 are similar to the provisions of Article 14 of the ICCPR although the former does not make specific provision for children, a feature that is present in article 14(4) of the ICCPR. Zambia has not domesticated the ICCPR and its provisions are not directly applicable under domestic law. Article 18 of the Constitution is therefore, very important in this regard.

Since the Constitution recognises and protects fundamental rights and freedoms in the Bill of Rights, the need for remedies for the violation of these rights arises. Article 28 provides that where any person alleges the violation of any of the rights contained in the Bill of Rights, the person may apply for redress to the High Court that is mandated to hear and determine the application and make such order or give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the Bill of Rights. This provision is a reflection of the right to an effective remedy contained in the UDHR. Article 8 of the UDHR provides that

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.”

In considering Article 13 of the European Convention on Human Rights that is similar to Article 8 of the UDHR, Ovey and White argue that the remedy required under Article 13 must be “effective in practice as well as in law.”⁹¹ This entails access to an effective remedy and the right to an effective investigation of the violation. From the foregoing, it is clear that the Constitution protects, to some extent substantive rights that are fundamental to this research.

The CRC and the UN standards and norms for juvenile justice also address the economic social and cultural rights of children in conflict with the law in addition to civil rights. These can be seen from or read into the overall aim of the child justice system, which are rehabilitation, reformation and reintegration. All these aims involve education, skills training, health and the provision of food and an adequate standard of living both in detention facilities and within societies and communities since the prevalence of crime is linked to the standard of living and availability of social amenities. One of the major problems facing Zambia’s child justice system is the lack of resources, compounded by the questionable political will to seriously address the current problems. According to a three year study commenced by United Nations Children’s Fund (UNICEF) in 2003, Zambia had recorded a one hundred per cent (100%) increase in violence against children. According to the study, the number of children in conflict with the law, which stood at over five hundred in 2003, had doubled at the time of writing this thesis. UNICEF attributes this development to the economic status of most families in Zambia.⁹²

In order for all the three aims referred to above to be fulfilled, protection and promotion of economic, social and cultural rights for children cannot be ignored, especially where children in conflict with the law undergo

⁹¹ C. Ovey and R.C. White *A Jacobs and White European Convention on Human Rights*, 3rd Edition, Oxford University Press, Oxford 2002 p. 387

⁹² A. Kamwendo, Child Protection Officer, UNICEF, statement available at <http://www.znbc.co.zm/media/news/viewnews.cgi?category=3&id=1163502114> accessed on 14/11/2006 at 17:01 Hours

detention. Placing a child within the criminal justice system interferes with his or her right to be cared for by the parents or guardians, the right to healthcare, the right to nutrition and this leaves the child particularly vulnerable to violence and exploitation.⁹³ Article 110 of the Constitution lays down Directive Principles of State Policy whose purpose is to guide the Executive, the Legislature and the Judiciary in the development and implementation of national policies in the making, enactment and application of the Constitution and any other law.⁹⁴ These principles can only be observed as far as the state resources can sustain their application or if the general welfare of the public demands, as may be determined by Cabinet. The Directives are not justiciable and are not legally enforceable in any court, tribunal or administrative institution or entity.⁹⁵ The Directives are listed in Article 112 and include, *inter alia*, the fact that the state is based on democratic principles, it shall endeavour to create conditions to enable individuals secure adequate means of livelihood, to provide clean and safe water, adequate health and medical facilities, to provide equal and adequate educational opportunities, to promote the practice, enjoyment and development of culture, tradition, custom and language. The state cannot be held accountable for failing to provide economic, social and cultural rights for children in conflict with the law especially that Zambia has not domesticated the ICESCR. Accessible and effective national means are the primary means of protecting economic and social rights.⁹⁶ As the UN Committee on Economic Social and Cultural Rights has rightly observed,

“The rule requiring exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual

⁹³ supra note 20 at p.34

⁹⁴ Article 110(1)

⁹⁵ Article 111

⁹⁶ S. Liebenberg in A. Eide *et al* (Eds.) *Economic, Social and Cultural Rights*, 2nd Revised Edition, Martinus Nijhoff Publishers, Dordrecht (2001) p. 55

claims is important, but such procedures are ultimately only supplementary to effective national remedies.”⁹⁷

The provision of economic and social rights such as healthcare and education for children in conflict with the law undergoing detention is entirely left to the mercy and goodwill of the state, a situation that is not ideal for the realisation of the three aims of child justice systems.

4.2.1.1 Establishment of the Judiciary

The Judiciary is established under Article 91 of the Constitution, which provides that the judicature shall be composed of the Supreme Court, the High Court, the Subordinate Court, the Local Courts and any other courts that might be prescribed by an Act of Parliament. The Subordinate courts are empowered to hear and determine matters involving children in conflict with the law. This is provided for under section 63 of the Juveniles Act Chapter 53 of the Laws of Zambia. The Act provides that any subordinate court that sits for the purposes of hearing a matter relating to a juvenile must be referred to as a “juvenile court.” Such a court is empowered to hear any matter involving any offence other than homicide or attempted homicide.

4.2.2 The Juveniles Act

One of the most important pieces of legislation for the protection of children in general and children in conflict with the law in particular is the Juveniles Act. It is an Act that makes provision for the custody and protection of children in need of care, provides for the correction of juvenile delinquents and other related matters. One of the major problems relating to the rights of the child in Zambia relates to the lack of a single definition of who a child is. The definition changes depending on what legislation one is looking at and as such there is a lack of harmonisation. Section 2 of the Act defines a child as a person who has not attained the age of sixteen years. A juvenile is defined as a person who has not attained the age of nineteen years and

⁹⁷ General Comment Number 9 (1998) on the domestic application of the ICESCR paragraph 4.

includes a child or a young person. A young person, on the other hand is defined as a person who has attained the age of sixteen years but has not attained the age of nineteen years. Article 24(4) of the Constitution defines a young person as anyone below the age of fifteen years.

It is interesting to note that the definition of a young person in the Constitution differs with the definition in section 2 of the Juveniles Act. The Juveniles Act does not deal with matters relating to the treatment of children in conflict with the law when they come into contact with the criminal justice system, as this has, perhaps been left to Article 18 of the Constitution. This is a major flaw in the Act as it is an act whose overall aim is the protection of children. Section 46 provides that anyone who wilfully assaults, ill-treats, neglects, abandons a child or exposes it to all these vices is guilty of an offence. However this provision falls under the section that deals with voluntary homes and it is questionable as to whether it can be used for the protection of children in conflict with the law during detention.

Under section 58 of the Act, the Commissioner of Police has a duty to make arrangements for preventing a child in conflict with the law from associating with an adult other than a relative during detention, transportation to and from court and while waiting for his or her matter to be heard unless the child is jointly charged with an adult. It is difficult to justify this exception because a child should be treated as such whether he or she is jointly charged with adults or not. A child that is jointly charged with an adult should not lose his or her status as a child. In fact, it can be argued that a child who is jointly charged with adults requires separation from adults, especially the ones he is jointly charged with because they might have greater influence on him or her before the matter is disposed of. The Commissioner of Police is only obliged to apply these measures “as far as possible” and there are no legal consequences for failure to do so.

Section 59 of the Act provides that children in conflict with the law are entitled to bail upon arrest. This is the case where the offence charged is a

bailable offence as opposed to a non-bailable offence such as homicide, aggravated robbery and drug trafficking. There are no special provisions for children that commit offences that are not bailable. For example, section 43 of the Narcotic Drugs and Psychotropic Substances Act of 1993 ousts the courts' discretion to grant bail to any person charged with an offence under the Act. It follows that a child charged with such an offence must remain in detention until the court disposes of the matter. Where the offence is bailable, bail can be granted in the child's own recognisance which entails that he or she is not required to pay any money and that payment of the stipulated amount will only become due if the child fails to appear in court. The Act empowers police officers to detain children who are not released on bail or police bond in a place of safety until such a time that the child can be brought to court. A "place of safety" is not defined by the Act although this can be inferred from the requirements laid down by international instruments on the best interests of the child and the fact that a child in conflict with the law requires protection. The Act further provides that where it is impracticable to separate children in conflict with the law from adults in remand prisons, children may be detained in suitable dwelling places other than a detention camp or remand prison.

The situation on the ground is however clearly different from what is envisaged in the Act and herein lies the violation of the rights of the child in conflict with the law. Zambia's prisons and other detention facilities are overcrowded and this makes the separation of children from adults impossible. Although the Act provides that alternative accommodation for children must be found, this has not been the case. In December 2005, the prison population is reported to have stood at three hundred and thirty per cent (330%).⁹⁸ The prison infrastructure has remained largely unchanged from the time Zambia gained her independence from Britain in 1964. This has contributed to overcrowding in the prisons considering that Zambia's population has more than doubled after independence. It is therefore not uncommon to see children detained with adults and being transported to and

⁹⁸ see infra note 119

from court with adults. As has already been stated, the Human Rights Committee would consider this a violation of article 10 of the ICCPR. Violations of the rights of the child are common despite the Constitution providing for the protection of human rights. An example of this can be seen from the six-year-old child who was detained at Zambia's only maximum-security prison on suspicion of having committed murder. The child was arrested and detained despite the fact that the law provides that a child below the age of eight years is incapable of committing a crime. The child was only released after the Legal Resources Foundation (LRF), an NGO, commenced judicial review proceedings to challenge the child's incarceration.⁹⁹ According to LRF lawyers that commenced the proceedings against the state on behalf of the said child,

“there is a tendency to charge young children and incarcerate them with adults despite the fact that children's rights are protected even under the penal law.”¹⁰⁰

4.2.2.1 Procedure during Trial

The procedure to be followed during the trial of a child in conflict with the law is provided for under section 64 of the Act. It is worth noting here that the procedure complies with the provisions of the CRC and the international standards considered under Chapter Three of the study. The court is obliged to explain to the child the offence that he faces and to establish whether the child admits or denies the charge. As a way of further protecting the child, section 64 (3) of the Act provides that court may proceed to trial even where the child has admitted the offence if the court is not presided over by a senior magistrate or where the child is not legally represented. The right to examine prosecution witnesses is guaranteed and where the child is not

⁹⁹ Mwansa A. Boy Six in Maximum Security Prison, Community Law Center, University of Western Cape, available at http://www.communitylawcentre.org.za/children/2004art40/Vol16_no1_boy.php accessed on 20/09/2006 at 10:45 hours. See also M.P. Siyauya, Juvenile Remanded at Chimbokaila, The Legal Resources Foundation News, Number 70, January 2004, available at <http://www.lrf.org.zm/Newsletter/january2005/juvenile.html> accessed on 22/09/2006

¹⁰⁰ *ibid*

legally represented, the court may assist the child in framing the questions for the prosecution witnesses. The child in conflict with the law is also permitted to call witnesses and to address the court.¹⁰¹ Where the charge against the child is proved, the court is obliged to obtain additional information about the child relating to his or her general conduct, home surroundings, educational background and medical history “*as may enable it to deal with the case in the best interests of the juvenile.*”¹⁰² The Act incorporates the internationally accepted principle of best interests of the child, but as will be seen, this is merely a drop in the ocean of what is required to meet internationally accepted standards for the administration of juvenile justice.

The Commissioner for Juvenile Welfare, appointed under section 5 of the Act is under a duty to provide the court with additional information relating to the child before the court makes its order relating to the child. Section 8 of the Act outlines the role of the Commissioner of Juvenile Welfare as being protective in that he or she is empowered to enter and examine any institution or dwelling in which a child is detained or placed. It is an offence to deny the Commissioner access to any such building. The department’s operations are hampered by lack financial and human resources, which inevitably undermines its ability to perform its functions. This puts the child in jeopardy of being sentenced without the court being aware of his or her background or it might extend the period of detention until the report is received from the Commissioner of Juvenile Welfare because the court is empowered to extend the period of detention while waiting information about the child. Section 66(4) of the Act provides that where a child is detained to enable the court obtain further information on the socio-economic situation of the child, he or she must appear before court once every twenty-one days.

¹⁰¹ Section 64 (3), (4) and (5)

¹⁰² emphasis added

Section 65(1) (i) of the Act provides that the trial procedure outlined above is not applicable to a child in conflict with the law who is jointly charged with an adult. The Human Rights Committee has expressed concern at the provisions of the penal code relating to the age of criminal responsibility¹⁰³ and the fact that children may be jointly charged with adults and can, therefore, be tried in the ordinary criminal courts. According to the Committee, this is incompatible with articles 14 (4) and 24 of the ICCPR.¹⁰⁴ An argument may be raised to the effect that the adults with whom the child is charged with cannot be subjected to the proceedings of a juvenile court. The compromise that may be reached to resolve this impasse would be to incorporate features of the procedure in a juvenile court into the criminal trial, such as requiring the entire proceedings to be held in camera. The other alternative would be to have two separate trials for the child and another for the adult. There is no restriction on the frequency that the subordinate courts may sit as juvenile courts and this can help in clearing the backlog of cases that is a constant feature of Zambia's entire criminal justice system.

The juvenile courts can be said to have wide discretion when dealing with children in conflict with the law. In terms of sentencing, the only restrictions that courts have pertains to section 72 of the Act which prohibits the sentencing of a child to imprisonment in a detention camp and imprisonment if there are other means of dealing with him or her. The section also lays down subjective criteria that ought to be fulfilled before a child can be sent to a Reformatory such as the fact that the court has to be satisfied that it is expedient for his or her reformation and the prevention of crime. This provision aims to incorporate the best interests of the child principle and one of the aims of a juvenile justice system, reformation. Article 73, although not exhaustive lays down possible orders that the court can make regarding a child who is adjudged to have committed an offence. It should be noted that Section 73 (1) (e), a section that authorised canning

¹⁰³ Concluding observations of the Human Rights Committee: Zambia, UN Doc. CCPR/C/79/Add.62

¹⁰⁴ *ibid*

as a form of punishment was repealed after the Supreme Court's decision in the case of *John Banda V The People*.¹⁰⁵ The court held that corporal punishment was contrary to article 15 of the Constitution, which prohibits torture and other inhuman and degrading treatment. This decision also led to the repeal of section 12 of the Education Act, a section that allowed the Minister of Education to make regulations for the administration of corporal punishment.

In *Mbewe v The People*,¹⁰⁶ the Supreme Court held that the Juveniles Act stresses the importance which the legislature attaches to the attendance, whenever possible, during all stages of the proceedings in court of a parent or guardian of a child although there is no such provision in the Act for the attendance of a parent or guardian at the police station. The court went on to state that it was desirable in the interests of both the police and the juvenile to have a parent or guardian present at the police station when a statement was being taken from a child.¹⁰⁷

The Juvenile Courts are empowered under section 73 of the Act to sentence children in conflict with the law who have been adjudged to be in conflict with the law to an Approved School or a Reformatory. At the time of this research, one Approved School for the reception, maintenance and training of children in conflict with the law existed in Zambia. Only one Reformatory also existed at the time of this research. An analysis of whether these institutions meet internationally laid down requirements relating to health, education and skills training aimed at assisting the child in reintegration will not be considered in this study. Suffice to say that this is highly unlikely considering the serious lack of financial and human resources that permeates the entire child justice system.

¹⁰⁵ HPA/6/1998

¹⁰⁶ (1976) Z.R at p. 317

¹⁰⁷ *ibid.* p. 319 – 320, the court arrived at the same decision in *Dimeni V The People* (1980) ZR p. 234

The Committee on the Rights of the Child is concerned that in Zambia, the courts can sentence a child to detention under the President's pleasure.¹⁰⁸ The Penal Code grants the President the powers to determine the conditions and place of detention. The court is obliged to forward any notes of the evidence adduced in court and recommendations to the President.¹⁰⁹ This was the case in the matter of *The People v Mazuba and Others*¹¹⁰ in which two of three brothers charged with the murder of an eight-year old girl were sentenced to this form of detention because they were below the age of eighteen years at the time the offence was committed. Section 25 (2) of the Penal Code¹¹¹ prohibits the sentence of death from being imposed on someone who was under eighteen years of age at the time of commission of the offence, hence the sentence to detention under the President's pleasure in the above case.

4.3 CHALLENGES IN THE PROTECTION OF THE RIGHTS OF THE CHILD IN CONFLICT WITH THE LAW

4.3.1 Justiciability of Human Rights in Zambia

Justiciability of the rights recognised and protected in international human rights instruments is critical to their enforcement. It entails domestication and full applicability of the rights under domestic law. Rights can only be fully protected if there is a possibility of the state or an individual being held accountable for any violation. The Human Rights Committee has stated that implementation does not depend solely on constitutional and legislative enactments¹¹² and as such, states need to put other measures such as an independent judiciary, education and dissemination of human rights treaties in place.

¹⁰⁸ Concluding observations of the Committee on the Rights of the Child: Zambia, UN Doc. CRC/C/15/Add.206

¹⁰⁹ Section 25 (3)

¹¹⁰ Child Killer to Hang, Times of Zambia available at <http://www.times.co.zm/news/viewnews.cgi?category=4&id=103869794> accessed on 20/09/2006 at 10:50 Hours

¹¹¹ Chapter 87 of the Laws of Zambia

¹¹² General Comment Number 3 (1981), Paragraph 1

While civil rights are catered for in the Zambian Constitution giving a child in conflict with the law an opportunity to seek redress in the event that his or her rights are infringed upon, the difficulty lies with the fact that economic, social and cultural rights are not fully protected. It is therefore difficult to reconcile Zambia's juvenile justice system that is based on the welfare theory and its position on economic social and cultural rights. The welfare theory of juvenile justice focuses on reformation, reintegration and rehabilitation. The three aims can only be achieved in a situation where economic, social and cultural rights are fully enjoyed. Zambia is obliged to respect, protect and fulfil both civil and political rights as well as economic, social and cultural rights. The failure to perform any of these three obligations, which are to respect, protect and fulfil constitutes a violation of the Covenant.¹¹³

Although the nature of obligations that a state party assumes under the ICESCR differs from the obligations under the ICCPR in that the former obligations are progressive and states are only obliged to take steps to the maximum of their available resources, General Comment number 3 on the nature of states party's obligations obliges states to take steps for the full realisation of the Covenant rights. According to the Committee on the ICESCR, while the full realisation of the relevant rights might be achieved progressively, steps towards that goal must be taken immediately, using all appropriate means once the Covenant comes into force for the relevant state party.¹¹⁴ Zambia maintains a dual legal system, which entails that international legal instruments that she ratifies or accedes to are not directly applicable under domestic law. From a human rights perspective, this is not

¹¹³ Paragraph 6 of the Maastricht Guidelines on Violations of Economic Social and Cultural Rights as quoted in B. G. Ramcharan, *Judicial Protection of Economic Social and Cultural Rights*, Martinus Nijhoff Publishers, Leiden (2005) p. 555. According to Eide and Alfredsson, the Maastricht guidelines are authoritative in determining and understanding violations of Economic Social and Cultural Rights. They state that failure by a state party to comply with treaty obligations under the ICESCR is, under international law, a violation of the Covenant.

¹¹⁴ Paragraph 2 of the General Comment Number 3 (1991) on the domestic implementation of the Covenant.

ideal in that domestication and applicability of international human rights standards is largely dependent on the political will of a state. It is for this reason that there is very little domestic jurisprudence on the rights contained in these international instruments. Judicial activism on the part of judges and magistrates is very important. As has been noted, the most important means or mechanisms for the enforcement of rights protected by statutes or international human rights instruments is the availability of and access to domestic remedies.

4.3.2 Infrastructure, Trained Personnel and the Law

The main thread that runs through the challenges of implementing the CRC and other United Nations standards and norms for a juvenile justice system is resource constraints. There are severe resource constraints on all levels of the system. The legislation that governs the juvenile justice system is ancient and does not take into account the new developments in the law. The Juveniles Act is based on an approach to juvenile offending prevalent in Britain in the 1930s.¹¹⁵ Most officials involved in the administration of juvenile justice are not trained to deal with children in conflict with the law and there is a lack of recognition for the rights of the child in the criminal justice system. Another issue that compounds the problem is related to the high turn over of police officers, magistrates, police prosecutors and probation officers, a factor that undermines investment in training.

There is no budgetary allocation expressly for juvenile justice administration. It has been noted that although Zambia has made some progress in the protection of the rights of the child in general, the government's commitment to realising children's rights is constrained by persistent under funding bringing the authenticity of the commitment into question.¹¹⁶ The lack of priority in budgeting for children's rights is a consequence of the inadequate classification of child programmes in the

¹¹⁵ *infra* note 117 p. 22

¹¹⁶ A. Mukuka-Luombe *et al*, *Zambia's Commitment to Children's Rights: The Budget Perspective*, Idasa, (2004) p. ix

budget. There is lack of information on the extent and overall requirements for child related activities and the absence of child rights advocates in the budget process perpetuates the invisibility of children in the national budget.¹¹⁷

The official capacity of the prison system as at 2nd December 2005 was 4,340 but its occupancy level on the same date was over three hundred and thirty per cent (330%). Over Thirty five per cent (35%) of the prison population were pre-trial detainees.¹¹⁸ Although the percentage of children in detention stood at 2.2 percent, it is high in terms of actual figures considering that the prison population was treble what the prison infrastructure could hold. This has caused a wide ranging host of problems for the administration of criminal justice in general and juvenile justice in particular. The problems include an endemic shortage of transport to move suspects to and from remand prisons to court, a shortage of trained magistrates especially in matters related to children in conflict with the law, backlogs of cases, insufficient interpreters and courtroom infrastructure which has led to magistrates sharing courtrooms. It is not uncommon for courts to wait for an interpreter in matters where the language the child understands and speaks is not very common in the region. It is doubtful whether police prosecutors who undergo a six-month training course are sufficiently trained to deal with children in conflict with the law. Although the problems outlined above affect both children and adults within the criminal justice system, they are much more magnified for children as they directly impact on the duration of time the child has to spend within the system and in detention. This is contrary to the requirement that detention of children must not only be a measure of last resort but that where it is used, it must be for the shortest possible period.

¹¹⁷ *ibid* p. x

¹¹⁸ International Center for Prison Studies: Prison brief for Zambia available at http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/africa_records.php?code=52 accessed on 22/09/2006

The Committee on the CRC has shown concern over the absence of juvenile courts, the detention of children with adults, the lack of social workers, very poor sanitation and health conditions in detention facilities. Children who are detained with adult convicted persons or suspects run the grave risk of “contamination” in the sense that they are susceptible to adult criminal influence and they might turn into hard-core criminals when they are released. According to the Committee, overcrowding is largely due to the frequent recourse to and excessive length of pre-trial detention, the very limited rehabilitation and reintegration services for juveniles and the limited training of magistrates, prosecutors and prison staff.¹¹⁹ The Committee has therefore recommended that detention at the President’s pleasure should be abolished and that the minimum age of criminal responsibility should be raised. The Committee further requested Zambia to establish juvenile courts all over the country, appoint trained juvenile judges, and ensure the right to legal representation for children. This study will now discuss whether these recommendations have been effected 5 years after their adoption.

4.4 RECENT DEVELOPMENTS

In recognition of the problems that existed and continue to exist in Zambia’s child justice system, the Zambian government with the help of cooperating partners embarked on projects aimed at reforming the system. The ideas behind the reforms are commendable but as will be seen, a lot still needs to be done in order to bring child justice in line with internationally accepted standards discussed in Chapter Two and Three of this study. After a study commissioned by (UNICEF) in 2000, three pilot projects supported by UNICEF and the donor community were designed. The reform was motivated by the findings of the said study on the situation of Zambia’s child justice system and the situation of children in conflict with the law. The findings of the study where that a lot of children are arrested for trivial offences that could be dealt with outside the child justice system and that most children appeared in court without legal representation and there was

¹¹⁹ UN Doc. CRC/C/15/Add.206. See also C. P. Cohen. *Jurisprudence on the Rights of the Child*, Vol. IV, Transnational Publishers, New York, (2005) p. 3246

no effort to alleviate this problem. The study also found that pre-trial detention was common, children in conflict with the law were being detained in prisons as opposed to places of safety, and law enforcement officers were not trained and that children were not being separated from adults during detention.¹²⁰ Another study was commissioned in 2005 as a follow up to the 2000 study in order to evaluate the reform projects that had been implemented.¹²¹ The reform comprised three pilot projects namely, the Arrest, Reception and Referral Service for Arrested Children (ARRS), Child Friendly Courts (CFC) and the Diversion Programme.

4.4.1 The Arrest, Reception, and Referral Service Project

The aim of the Arrest, Reception, and Referral Service (ARRS) Project was to centralise the arrest of children “*in order to ensure that resources are available and concentrated at the correct point in the criminal justice process.*”¹²² This would allow accurate monitoring and specialisation in dealing with children in conflict with the law. The ARRS system has been established at three police stations in Lusaka. The idea is that an officer who has received basic training on the rights of the child should deal with children in conflict with the law that are referred to that police station and that such officer must ensure that the child is kept separate from adults during detention. The objectives of the ARRS include limiting delays that are encountered by concentrating resources in places in the child justice system where they are most needed. The other aim is to avoid children within the system being “stuck” at a particular stage of the system, to ensure timely tracing of parents or guardians so that the child can be released into their care, to keep detention to the minimum and to facilitate accurate record keeping on all matters related to the child.¹²³ Although this has led to some

¹²⁰ HURID, *Child Justice Administration in Zambia*, Magistrates’ Workshop Handout (2005) p. 1

¹²¹ L. Muntingh, Report on Child Justice in Zambia with Reference to UNICEF Supported Projects, (2005), Pg. 6

¹²² *ibid* p. 6

¹²³ *op cit.* p.39

awareness on the rights of children and to some improvement regarding the treatment of children in conflict with the law, the achievements are minimal. According to the UNICEF Report on child justice in Zambia,

“...the ARRS still faces substantial challenges that primarily relate to case management and the development of key performance indicators to ensure that service delivery is improved.”¹²⁴

It has been submitted that the guiding policy statement for the ARRS project should be that arrests should be avoided at all costs but when it becomes necessary to arrest a child, the actions of the police need to be monitored against well-defined standards and procedures. Arrests should also be followed by an assessment of the child by suitably qualified persons in order to gather information with regard to the personal, social and other circumstances of the child which information is relevant for the juvenile justice officials to make an informed decision about the child.¹²⁵

With the exception of about three police stations, children are not separated from adults during pre-trial detention. This is largely due to the fact that there is insufficient detention space although most police officers are aware that children have to be detained separately. Children remain in detention for an average of 13 days and food is not given to pre-trial detainees. This means that they have to rely on their relatives for food. Transport is a problem although it is often used as a scapegoat for failure to process and have all cases heard on time.

4.4.2 The Child Friendly Court Project

The Child Friendly Court (CFC) Project was established at one of the Subordinate courts in Lusaka and was staffed by trained magistrates and social workers. It was established based on the realisation that criminal

¹²⁴ supra note 122 at p. 7

¹²⁵ L. Muntingh *Indicators for Monitoring the Well-being of Children in the Criminal Justice System*, HSRC, Cape Town (2005)

courts are not child friendly and that alternatives are necessary for dealing with children in conflict with the law. This is especially important in situations like Zambia, where access to legal aid representation is difficult to obtain due to the chronic shortage of human resources at the Legal Aid Department. The main purpose of the CFC was the provision of a court system that assesses the child in a holistic manner and makes decisions based on the best interests of the child while serving the interest of justice. The objectives of the CFC are to create an environment that encourages the participation of children and their families, to impose sanctions that are least restrictive for the shortest period of time, to oversee the treatment of children in the criminal justice system and to divert cases from the criminal justice process.

. However due to high staff turnover and administrative reasons that are not entirely clear, this was stopped in 2004 and at the time of this research, any magistrate could hear a matter involving a child in conflict with the law. The frequent changes in Magistrates have created problems in consistency. For example, of the original group of thirteen people that participated in the training held in the United Kingdom and South Africa, only two were still involved in child justice as at December 2005.¹²⁶ There are no clear guidelines on what constitutes a child friendly court.

4.4.3 The Diversion Programme

The Rural Youth and Children in Need (RYOCHIN), an NGO operates this programme with the support of UNICEF. This is the only organisation in Zambia that provides diversion programmes. The juvenile justice system operated without a functioning diversion programme until 2000. This situation was a breach of the CRC and the United Nations standards and norms for juvenile justice which advocate for diversion programmes in order to protect children from entering the child justice system. It has been observed that one of the problems within child justice systems throughout

¹²⁶ supra note 122 at p. 58

the world is the lack of actual alternatives to the child justice system.¹²⁷ The aim of the diversion programme is to provide suitable diversion programmes for children referred from the CFC as an alternative to prosecution, a guilty finding and passing of an order¹²⁸, to implement a crime awareness and prevention programme and to conduct training for role players in other parts of the country other than Lusaka.

Diversion is provided for under Article 40 (3) of the CRC which provides that states should seek the establishment of measures for dealing with children in conflict with the law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. Article 40 (4) further provides that a variety of dispositions such as care, guidance, supervision orders, counselling, probation, education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well being and proportionate to their circumstances and the offence. Diversion is important because it prevents harm to the offender in that it protects him or her from the harmful effects of the criminal justice system such as sexual and physical abuse and disease. It also promotes rehabilitation of the child in conflict with the law, protects society and makes effective use of state resources.¹²⁹

¹²⁷ J. J. Sorensen and J. Jepsen, (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Danish Institute of Human Rights (2005), p.52

¹²⁸ section 68 of the Juveniles Act prohibits the use of the terms “sentence” and “conviction” in matters involving children in conflict with the law.

¹²⁹ Supra note 128 p. 59

5 CHAPTER FIVE

5.1 SWEDEN AND THE RIGHTS OF THE CHILD IN CONFLICT WITH THE LAW

INTRODUCTION

This Chapter will focus on the treatment of the child in conflict with the law in Sweden and will contrast the same with the situation in Zambia. The aim is to undertake a comparative analysis of the level of protection accorded to a child in conflict with the law in Sweden to that of a Zambian child in conflict with the law. The study focuses on the juvenile justice system in Sweden, which is a civil law country and not, for example, the United Kingdom, a common law country like Zambia for two main reasons. Firstly, Sweden has been one of the cooperating partners that have been instrumental in assisting Zambia reform her child justice system. Secondly, a reading on the United Kingdom's child justice system shows similar problems encountered by the Zambian system and the differences lie in the severity of the problems. The Committee on the CRC in its Concluding Observations relating to the United Kingdom's periodic report on the CRC expressed concern that the situation of children in conflict with the law had worsened since the consideration of the initial report.¹³⁰ It was necessary to look at a system whose legal provisions in the field are more advanced in order to encourage reform based on the information that would be gathered from this research.

5.2 The Domestic Legal Framework

Chapter Two of the Constitution of Sweden¹³¹ (The Instrument of Government) protects fundamental rights and freedoms. It prohibits corporal punishment, arbitrary deprivation of liberty and where a person is deprived of his or her liberty, it provides that such person must be brought before a

¹³⁰ Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland. 09/10/2002. UN Doc. CRC/C/15/Add.188

¹³¹ Regeringsformen

court of law without undue delay. The Constitution recognises the right to free basic education and protects other labour related economic social and cultural rights. Article 23 of the Constitution provides that

“No Act of law or other prescription may be promulgated which contravenes Sweden’s undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

It follows from the foregoing that the legislature cannot enact laws that are inconsistent with the provisions of Article 23. Laws that were in force prior to the adoption of the current Constitution that may be inconsistent with the said provision may still be in force as Article 23 does not operate retroactively. Although this provision is a positive aspect in the protection of the rights of children in conflict with the law, it is submitted that the administration of the juvenile justice system in Sweden is ahead of the European human rights legal framework in the field of child justice administration. This position is based on the decision of the European Court of Human Rights in *V vs. the United Kingdom*¹³² in which the Court held that there was no violation of the prohibition against torture contained in article 3 of the European Convention.¹³³ The European Convention does not appear to have been drafted with children in mind in that it has limited provisions relating to children. Article 6(1) provides very limited protection for children in conflict with the law but is largely silent on the administration of child justice unlike the CRC.

¹³² Application no. 24888/94

¹³³ The court was of the view that that the fact that the child in this case was eleven years old at the time of the trial and was tried in an open criminal court, before twelve adult jurors; the fact that the minimum age of criminal responsibility in the United Kingdom was ten years old and therefore too low did not amount to a violation of article 3. The Court also held that detention under the pleasure of Her Majesty did not amount to a violation of the right protected under Article 3 because English law and custom provided for such detention. The Court’s decision is at variance with the views of the Committee on the CRC and as Van Bueren (see supra note 47 at p. 27) has rightly stated “the decision on the minimum age of criminal responsibility in V and T may be ripe for reopening.” The Committee on the CRC has held that ten years is too low for criminal responsibility.

Sweden is a state party to the CRC and other international human rights instruments relevant to this research such as the ICCPR and the ICESCR. It is submitted that the Swedish system of child justice is built on the principle that children are not psychologically and socially developed as adults. Therefore, a special need exists to adjust the criminal process with regard to children. This realisation is perhaps true for a majority of child justice systems in the world but the challenge arise from the implementation of the policies and laws necessary for the administration of a juvenile justice system that respects, promotes and upholds the rights of the child. The minimum age for criminal responsibility in Sweden is 15 years and this means that a child is presumed not have capacity to commit an offence before attaining the age of 15 years.¹³⁴ The age that the law takes into consideration is the age at the time of the commission of the offence, like Zambia. Although the court may determine that a child under the age of fifteen has committed an offence under Swedish law, the Penal Code provides that no sentence may be imposed on the child.¹³⁵ The Swedish child justice system appears to be a separate system all together in that it is the municipality or local government system that is mandated to deal with children in conflict with the law that are below the age of fifteen years. This is provided for by the Social Services Act.¹³⁶ The Act embodies some of the principles of the Riyadh Guidelines in that it mandates the Social Welfare Committee to work with families and communities in order to prevent juvenile delinquency.¹³⁷

The Social Services Act embodies the principle of best interests of the child and it defines a child as any person below the age of eighteen years.¹³⁸ Social welfare services in Zambia come into play during court proceedings, normally before the court makes an order concerning the child. Sweden does not use the principle of *doli incapax*, a feature that is present in

¹³⁴ Penal Code, Act no. 1962:700, s 1: 6

¹³⁵ *ibid*

¹³⁶ Act no. 1980:620

¹³⁷ s. 5:1

¹³⁸ s. 1:2 the definition of a child meets the internationally accepted standard laid down by the CRC.

common law jurisdictions, this can be justified on the basis of the fact that the minimum age for criminal responsibility is high. Children in conflict with the law are seldom dealt with through the criminal justice system. This is because, as has been stated, the issue of juvenile delinquency and crime falls within the ambit of the Social Services mandate. Where the court is of the view that the child cannot be properly dealt with by Social Services owing to the severity of the offence and other extenuating circumstances, the court may impose a term of imprisonment.

The Penal Code also provides that special regard should be paid to the child's age when imposing a sentence if the child is below the age of twenty-one years.¹³⁹ The imposition of life imprisonment on persons below the age of twenty-one is prohibited. This may be contrasted with the provision in the Zambian Penal Code that provides for children to be detained under the President's pleasure. Courts in Sweden have discretionary powers to order more lenient sentences than those prescribed by law depending on the circumstances of the case. This complies with the Beijing Rules' requirement that some level of discretion should be given to officers that deal with children in conflict with the law. This would be a positive step in countries like Zambia that have a serious problem with overcrowding in detention facilities.

A distinction exists in the treatment of juveniles that are aged between fifteen and eighteen years and those aged between eighteen years and twenty-one years old. Imprisonment may be imposed on the former group *when clear reasons exist*.¹⁴⁰ The reasons that may be required include the seriousness of the offence, previous convictions and any special circumstances that might justify imprisonment.¹⁴¹ The court must however determine that all other alternatives to imprisonment are not appropriate in the particular case and before imprisonment can be ordered, the juvenile has

¹³⁹ s 29:7

¹⁴⁰ K. Johansson and T. Palm, *Children in Trouble with the Law: Child Justice in Sweden and South Africa*, International Journal of Law, Policy and the Family, Vol. 17, No.3, Oxford University Press (2003) p. 314 also refer to s 30:5 of the Penal Code

¹⁴¹ s 30:5 of the Penal Code

to be sentenced to closed juvenile care. Closed juvenile care is a form of institutional treatment for young offenders. It is considered more suitable for children in conflict with the law than imprisonment. In the case of juveniles who have attained the age of eighteen but not twenty-one, imprisonment may be imposed only in circumstances where such a penal sanction can be justified. Section 30:4 guides the court in choosing the form of sanction by providing that courts should pay special attention to any circumstances that might justify the imposition of a less severe punishment as elucidated in Chapter 29:5 of the Penal Code. The courts may impose a fine but where the court considers that this is not sufficient punishment, it may refer the matter to Social Services. The courts are also empowered to put the juvenile on probation and youth service or community service that may be combined with the payment of a fine.

Section 31:1 of the Swedish Penal Code provides that where a child in conflict with the law is under the age of twenty years old and can be dealt with by Social Services under the Social Services Act¹⁴² and the Care for Young Persons Special Provisions Act,¹⁴³ the court may commit the child to the Social Welfare board which is mandated to prepare a treatment plan for the child. Such committal is dependant on whether the treatment plan constitutes a satisfactory sanction considering the nature and gravity of the offence.

5.2.1 Diversion and Mediation

Generally, the juvenile justice system in Sweden appears to lean more towards restorative justice and diversion. Restorative justice entails, *inter alia*, that the offender acknowledges guilt and this is followed by dialogue between the victim and the offender. The aim of the dialogue is to arrive at some form of settlement or resolution. Restorative justice is necessary because the offender is considered as a person that requires special treatment. This assessment is based on the role that Social Services and

¹⁴² Act no. 1980:620

¹⁴³ Act no. 1990:52

local authorities perform within the system and the limited application of imprisonment as a form of punishment for children in conflict with the law. One of the most significant developments that have taken place within the Swedish child justice system has been the introduction of victim–offender mediation (VOM) which is regulated by the Mediation Act, an Act that primarily focuses on children in conflict with the law.¹⁴⁴ The role of VOM is said to be

“for the benefit of both parties, and according to Swedish law its goal is to increase the offender’s level of insight into the consequences of the offence, while the victim is provided with the opportunity to work through his or her experiences. The mediator’s role is to help the parties communicate with one another, and to ensure that a balance is maintained and that neither party is further harmed.”¹⁴⁵

The Committee on the Rights of the Child has welcomed the introduction of VOM in Sweden and has described it as a positive step in reducing the injurious effects of crime.¹⁴⁶ The concerns raised by the Committee relating to the administration of child justice in Sweden is related to the training of judges and prosecutors and ensuring that punitive measures are only taken by judicial authorities. The Committee has recommended that Sweden should strengthen preventive measures against juvenile delinquency by, for example, supporting the role of the families and communities. Although the administration of juvenile justice in Sweden can be said to be complying with most of the internationally laid down standards, the Committee still felt that the legislation, policies and budgets must be reviewed to ensure full implementation of article 37 (b) and 40 (2) (b) (ii) – (iv) and the UN standards and norms for juvenile justice.¹⁴⁷ The administration of juvenile

¹⁴⁴ Act no. 2002:445

¹⁴⁵ Prison Fellowship International, Restorative Justice Online available at <http://www.restorativejustice.org/editions/2006/august06/vomsweden> accessed on 12/10/2006 at 16:10 hours

¹⁴⁶ Concluding observations of the Committee on the Rights of the Child: Sweden, UN Doc. CRC/C/15/Add.248

¹⁴⁷ *ibid* Paragraphs 45 and 46

justice in Sweden appears to be a better model than Zambia's system on paper. However, due to lack of space, the study will not examine the actual implementation of the law on the ground. It is however, submitted that the fact that there is such a legal framework is a positive step as it lays down the foundation for improvement in the area of child justice reform.

6 CHAPTER SIX

6.1 CONCLUSION

The study has looked at the international legal standards and norms for the promotion and protection of the rights of the child in conflict with the law. It has also focused on the situation of the child in conflict with the law in Zambia and has attempted to draw inspiration for reform from Sweden, a dualist state, like Zambia. Violations of the rights of the child in conflict with the law continue to take place in Zambia despite the implementation of the three pilot projects for various reasons. The obligations that Zambia has undertaken by ratifying or acceding to various international human rights treaties are not treated as a priority and this is evidenced by the fact that none of these treaties has been domesticated. There is no serious attempt to educate the general populace on human rights in general and the rights of the child in particular. Insufficient resources are allocated to programmes that relate to the protection of the rights of the child in conflict with the law. All departments that are instrumental in the implementation and protection of the rights of the child such as Social Welfare, the Legal Aid Department, the Prisons Service and the Police Service all suffer from one chronic handicap, insufficient resources. Zambia has not domesticated the human rights instruments, which means that even where certain provisions of the treaties are self-executing, they are not directly applicable in the courts of law. As such, there is very little domestic jurisprudence on the subject.

The challenges relating to the protection and promotion of the rights of the child can also be viewed from an international perspective. It is the author's considered opinion after conducting this study that the issue of juvenile justice is, by its very nature a very sensitive issue with states. This study has attempted to show that it is possible to protect and promote the rights of the child in conflict with the law while protecting the rest of the population from harm. Studies have shown a clear connection between socio-economic

factors and the prevalence of crime in society. Based on the author's experience and findings, it is doubtful whether this fact plays a significant role in policy formulation and implementation.

The CRC has extensive rights for the child in conflict with the law but it does not have an individual complaints mechanism. The African Charter on the Rights and Welfare of the Child on the other hand has such a mechanism but the issues addressed are not as exhaustive as those contained in the CRC. The problem with the issue of juvenile justice can also be seen from the wealth of international soft law available on the subject as opposed to detailed provisions within the internationally binding treaties. The problem of implementation of the rights of the child in conflict with the law has led to the lack of domestic and international jurisprudence on the matter.

Zambia is in breach of her obligations under international law in that she has largely failed to discharge her obligations towards the child in conflict with the law. This finding is based on the fact that children in conflict with the law are not guaranteed the special protection that they are entitled to under international human rights law. Children in conflict with the law are detained in remand prisons with adults as opposed to places of safety and away from adults. Zambia's domestic law does not comply with international standards such as the requirement that children that are jointly charged with adults must be tried in an adult court and that their status can only be taken into account at the time of sentencing. This is a breach of its obligations as it is contrary to the requirements under the CRC and the African Charter on the Rights and Welfare of the Child. There is very limited provision of education, health and other social facilities for children in conflict with the law in breach of the ICESCR and the CRC. The fact that children are tried in most cases without legal representation is also a breach of the fair trial guarantees protected under Article 40 and 14 of the CRC and the ICCPR respectively. International law requires that all persons including children deprived of their liberty ought to be treated humanely and should be kept in an environment that promotes and protects their dignity. The fact

that there is congestions, overcrowding and disease in Zambia's detentions facilities is therefore a breach of international human rights law.

6.2 RECOMMENDATIONS

Zambia needs to not only domesticate the international human rights treaties that she is a party to, but also make the protected rights justiciable as she has undertaken to fully implement all the obligations contained therein. This is necessary for the full implementation of the rights of the child in conflict with the law. It may be achieved by intensive lobbying on the part of all institutions and organisations involved in the administration of juvenile justice. The domestication of human rights standards will lead to the harmonisation of all aspects and issues relating to the child such the definition of the term "child" which as we have seen, has led to a lot of confusion. The minimum age of criminal responsibility should be raised to meet international standards. The Committee on the Rights of the Child considers the age of eight years to be too low. This is one of the least onerous of the obligations in that it does not require resources to implement.

There is need for the training of judges and magistrates on issues such as human rights and judicial activism. The judiciary, which is the protector of human rights should not allow human rights to be violated on the basis that international human rights standards are not directly applicable under domestic law. Training for all officials involved in the administration of juvenile justice on the importance of non-custodial measures and other international standards must be undertaken and measures sought to reduce the high staff turnover in these institutions and organisations. Resort should also be had to the use of trained personnel to represent children in conflict with the law as opposed to the strict requirement for them to be professionally trained lawyers. The emphasis should not be on the qualifications that the representatives have but on the quality of representation. This is especially important in countries like Zambia where the legal aid system is over-stretched and lacks human and financial resources.

The United Nations Guidelines on Children in the Criminal Justice system call upon all stakeholders in the administration of juvenile justice to implement the international legal standards and norms on the subject. This can be a basis for lobbying on the part of civil society. Lobbying should be at all levels within the administration of juvenile justice including the budgeting process for children's activities. Children's rights cannot be prioritised in a situation where civil society does not play an active role in engaging governments on the matter, since the study has shown that States are prone to protecting the citizens from harm as opposed to protecting the rights of the child in conflict with the law. Civil society should also be encouraged to disseminate concluding observations of the various human rights treaty bodies relating to matters that are pertinent to the administration of juvenile justice.

Emphasis should also be placed on issues that do not require financial and other resources to implement as a starting point such the raising of the minimum age for criminal responsibility. The approach to juvenile justice administration should not be a blanket approach because this approach gives states an opportunity to argue that they do not have resources, when in fact there are other aspects that do not require resources to implement. Amending archaic laws for example, in order to update them so that they can be more responsive to the rights of the child and the situation on the ground does not require astronomical amounts of resources. Amending the law in this case would be a positive step forward to begin with. Other alternatives aimed at reducing the occurrence of detention among children such as VOM in Sweden could be explored and Magistrates could be trained to act as Mediators.

The implementation of the three pilot projects is welcome and is evidence of a gradual realisation of the importance of the protection of children in conflict with the law. However, there is need for the full implementation of all three projects in other parts of the country. This can only be done with

effective national budgeting. It entails the commitment of all stakeholders to properly budget for all activities that fall under the administration of the child justice system. The governance issues giving rise to high staff turnover that is trained at great expense must also be addressed.

Children are the future of any nation and the quality of their childhood has a direct impact on the state in future. The ratification record of the CRC and the various campaigns and activities within and outside the UN show that states recognise the importance of the protection of children in general. Children must have the opportunity to develop their potential and this opportunity must not be curtailed. There is evidence to show that poverty reduction starts with children and this entails major and sustained investment in the rights to healthcare, nutrition and education.

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