Juvenile Justice in Zimbabwe: A Contradiction Between Theory and Practice: An analysis of Zimbabwe's compliance with Article 37and 40 CRC and Article 17 ACRWC

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ABREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
CROC	Committee on the Rights of the Child
CRC	UN Convention on the Rights of the Child
CPEA	Zimbabwe's Criminal Procedure and Evidence Act
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
UDR	Universal Declaration of Human Rights
UN	United Nations
USA	United States of America
UNICEF	United Nations Children's Fund
ZACRO	Zimbabwe Association for Crime Prevention and Rehabilitation of the Offender
ZLHR	Zimbabwe Lawyers for Human Rights

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DEDICATION

To my loving parents, Elis and Enias Vengesai

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CHAPTER 1: HISTORICAL AND THEORETICAL BACKROUND TO JUVENILE JUSTICE

1.1 Introduction

Juvenile justice refers to legislative, institutional, and procedural mechanisms that specifically deal with juvenile offenders or children in conflict with the law[1]. According to the Children's Act, the terms 'juvenile offenders' and 'children in conflict with the law' refer to persons below the age of 16[2]. International law however, particularly with respect to the African Charter on the Rights and Welfare of the Child, hereinafter referred to as the ACRWC and the Convention on the Rights of the Child, hereinafter referred to as the CRC, defines a child as every human being below the age of 18 years. The CRC leaves discretion for state parties to lower the bar and let the legal age of majority to be attained earlier. The Zimbabwean definition, which lowers the bar to 16 years of age, is therefore very strict and allows for the legal age of majority to be attained earlier than what is generally accepted in international law.

Although a child is defined with respect to age in international law, the term juvenile, as defined in the UN minimum Standard for the Administration of Juvenile Justice hereinafter referred to as the Beijing Rules), does not necessarily correspond to the concept of age[3]. According to Rule 2 (2) (a) of the Beijing Rules, a juvenile is a child or a young person, who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult[4]. Hence, it is the way in which the law is applied which dictates whether a young offender is also a juvenile for purposes of the law. This is an important criminal justice aspect because in some jurisdictions, a person below age 18 may be tried as an adult for the commission of a grave offense[5].

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[1] E. N. Njungwe, "International standards on juvenile justice: Implications of the new criminal procedure code on the administration of juvenile justice in Cameroon", in *Journal on Democracy and Human Rights* Vol. 2 No. 2 - December 2008

[2] Children's Act Chapter 5:06

[3] Geraldine Van Bueren , The International Law on the Rights of the Child, retrieved on the 15th of November 2013 from http://books.google.co.zw/books?id=xEAmkaqn8lMC&pg=PA171&lpg=PA171&dq=definition+of+juvenile+justice+international+law&source=bl&ots=Ley7dbY1Tt&sig=fr4T9tt0nXWmx5DOd-ZlRPPDtbM&hl=en&sa=X&ei=6geGUpnfD8XPtQb-3IHYCg&ved=0CCcQ6AEwAA#v=onepage&q=definition%20of%20juvenile%20justice%20international%20law&f=false

[4] Rule 2(2) (a) of the Beijing Rules

[5] E. N. Njungwe, "International standards on juvenile justice: Implications of the new criminal procedure code on the administration of juvenile justice in Cameroon", in *Journal on Democracy and Human Rights* Vol. 2 No. 2 - December 2008

Therefore, the terms child and juvenile are not always synonymous. The UN Program of Action does not concern Juvenile Justice but rather, it concerns children in the criminal justice system. Geraldine Van Bueren thus, queried the adoption and use of the term juvenile justice by a number of English speaking jurisdictions[6]. She adds that as a result of the international legal developments, it is now time to question the rationale behind describing a young person in conflict with the law as a juvenile offender while a person under the age of 18 and in need of state protection is described in terms of child welfare. Therefore, according to her, the terms child and juvenile have to be construed to mean different things because juvenility sometimes include those over 18. In international law, the special protections attach because of childhood and childhood is defined solely with regard to age[7]. For the purpose of this research, a child will be defined as someone who is criminally responsible but has not reached criminal majority, which, in the present case of Zimbabwe, is 16 years of age.

1.2 Historical Background to Juvenile Justice

Before the advent of juvenile justice systems in the late 19th century[8], young people in conflict with the law were generally viewed only in the narrow perspective as law breakers and a threat to the public[9]. The fuller picture of children who are in need of understanding and assistance and who themselves are often victims of violence and social injustice was not seen. It was at this time when the juvenile court had not yet been invented that young persons in conflict with the law were dealt with in terms of the general criminal justice system wherein young persons in conflict with penal law were treated with little or no distinction from adults in terms of the applicable criminal justice rules, procedures and sentencing options[10].

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[6] Geraldine Van Bueren , The International Law on the Rights of the Child, retrieved on the 15th of November 2013 from http://books.google.co.zw/books?id=xEAmkaqn8lMC&pg=PA171&lpg=PA171&dq=definition+of+juvenile+justice+international+law&source=bl&ots=Ley7dbY1Tt&sig=fr4T9tt0nXWmx5DOd-ZlRPPDtbM&hl=en&sa=X&ei=6geGUpnfD8XPtQb-3IHYCg&ved=0CCcQ6AEwAA#v=onepage&q=definition%20of%20juvenile%20justice%20international%20law&f=false

[7] Ibid

[8] M. Hoghuhi, The Delinquent: Directions for Social Control London: Burnet Books, 1983, page 13

[9] O. G. Odhiambo, The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context, 2005,

[10] F. E. Zimring, "The Common Thread: Diversion in the Jurisprudence of Juvenile Courts" in M. K. Rosenheim, et al (eds) *A Century of Juvenile Justice*, Chicago/London: University of Chicago Press, page 142-157

The criminal justice institution, designed to mete out appropriate sanctions to those found in conflict with penal law is as old as the dawn of civilization, but the idea of a separate justice system designed to deal specifically with young people in conflict with the law in a manner that takes into consideration their age and their vulnerability is a recent invention that was a product of the general development of criminal justice systems in the Western world[11].

There is a legal scholarly consensus that the first separate juvenile justice system was established in the United States in 1899 by the setting up of the first juvenile court in Chicago[12]. Thereafter, particularly in the second half of the 20th century, juvenile courts became a feature in each and every jurisdiction of the United States and Western Europe. In Africa, the phenomenon was of colonial import[13]. It has to be emphasized however, that the introduction of a juvenile must not be understood to entail the introduction of a juvenile justice system. A closer look at the definition of juvenile justice given earlier on in this chapter, shows that the later is not necessarily limited to courts. Rather, it is broader than that as it encompasses various other institutions other than the court. Nevertheless, this was an important step towards the realization of complete juvenile justice systems.

The beginning of the 20th century saw a similar trend in the treatment of juvenile delinquents differently from adults by way of enactment of legislation that established juvenile justice systems in Western Europe. Netherlands established separate jurisdictions and penal laws for children in 1905. The Juvenile Delinquents Act in Canada, the Children Act in England and Wales and the Children Act in Ireland were all enacted in 1908, and they all created juvenile courts in these respective jurisdictions. In 1912, special courts for children were set up in Belgium and France[14].

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[11] N. Naffine, "Philosophies of Juvenile Justice" in F. Gale, N. Naffine, and J. Wundersitz, (eds), 1993

[12] F. E. Zimring, "The Common Thread: Diversion in the Jurisprudence of Juvenile Courts" in M. K. Rosenheim et al (eds) Zimring, *A Century of Juvenile Justice*, Chicago/London: University of Chicago Press. page 142-157

[13] O. G. Odhiambo, The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context, 2005, page 18

[14] L. Walgrave, and J. Mehlbye, "An Overview: Comparative Comments on Juvenile Offending and its Treatment in Europe" in J. Mehlbye, and L. Walgrave, Confronting Youth in Europe-Juvenile Crime and Juvenile Justice Copenhagen: AKF Forlaget, 1998 page 22-23

1.3 The theoretical framework of Juvenile Justice

As has already been noted above, the child rights centred approach to juvenile justice is a modern phenomenon. Before this approach, the idea that children in conflict with the law should be treated differently from adults has been argued from a number of theoretical standpoints[15] These theories were developed in the absence of a child rights' orientation that was at the time, nominally developing, if not absent altogether.[16]

Of these theories, two were prominent theories. These are the welfare model and the justice model, which will be discussed in this chapter. Since these theories originated from western criminological research and debate, this Chapter will also briefly discuss their relevance to the African context of juvenile justice.

1.3.1 The Welfare theory

In terms of this theory, which is also referred to as the protection model by virtue of its inclination towards to protection of the "innocent and vulnerable" child, the court has to be a primary protector of the child because the latter is both mentally and physically immature. By virtue of this immaturity, children cannot be considered to be rational, let alone self-determining[17]

As such, they have to be treated separately from the adults through a separate justice system**.** Children found in conflict with the law, in terms of this theory, are supposed to be nurtured in such a way that they become responsible adults instead of being subject to criminal punishment[18]. It places a heavy emphasis on the vulnerability of children on the one hand, and a reduced punishment or alternatives to punishment, on the other hand. The theory is strongly rooted in the doctrine of *parens patriae,* which is an English law doctrine which states that the state has a responsibility to protect vulnerable parties in the courts of equity and children form part of this group of vulnerable parties. Welfarism therefore, is simply an extension of this doctrine to children.

The starting point is a presumption that children in general and those that are in conflict with the law in particular, are vulnerable and as such, they deserve special protection. Such

[15] O. G. Odhiambo, The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context, 2005, page 5
[16] Ibid page 16
[17] Ibid page 24
[18] Ibid

special protection can only be granted by the state by way of establishing a separate criminal justice system for them which will offer them a different treatment from the one that is accorded to adults. In terms of this theory, the judiciary must be granted powers to extend protection measures for children[19].

Such protections include, but not limited to probation, supervision, institutionalization in foster homes, etc., as opposed to custodial sentences or any other such treatment as would be deemed inappropriate for the enhancement of the rights of the child. It can be argued thus, that it is this theory that informed juvenile law reform in Western Europe and elsewhere in the early 20th century. The concept of the "best interest of the child" as a primary consideration in all decisions involving children, and which formed the basis of the CRC, the ACRWC and all the relevant international statutes that serve to promote the rights of the children, is clearly evident in this welfarist approach to juvenile justice[20].

The theory envisages a children's court which reacts to juvenile delinquency in such a manner as would reform and rehabilitate the child offender rather than punish them. Thus, in terms of the welfare theory, rehabilitation of the child offender as opposed to their punishment is an essential component. The welfarist approach emphasizes an enhanced role of social workers in the juvenile court[21]. Such experts include, among others, social workers, probation officers as well as clinicians. These experts will assist the judge of the juvenile court in the examination of the specific needs of the child offender and in the determination of the best treatment and appropriate sanctions for them[22]. This later on became common practice in the juvenile justice practices of many countries worldwide. The influence of the welfarist theory is clearly evident in the wording of the provisions of the CRC and the ACRWC as well as other relevant international statutes that seek to promote the rights of children in conflict with penal law. For example, the preambles of both the CRC and the ACRWC make reference to the physical and mental immaturity of the children and the need to treat them in a special way that accrues therefrom.

[19] Schissel, B (1993) Social Dimensions of Canadian Youth Justice Toronto: Oxford University Press, 1993
[20] O. G. Odhiambo, The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context, 2005, page 20
[21] Ibid
[22] Ibid page 22

The theory relied a lot on both criminological and sociological research. One of the criminological theories from which the welfare theory borrowed was the moral intellectual development theory in criminology, which states that the younger the actor, the less probable it is that the sense of right and wrong always informs the actor's behaviour[23].

The problem with welfarism however is that by granting wide discretion to juvenile court judges, it led to a departure by these judges from the established principles of due process, thus leading to arbitrariness[24]. In short, welfarism does not guarantee the children in conflict with the law the due process safeguards of the law such as legal representation, *Miranda rights*, presumption of innocence, *habeas corpus* to mention but a few. It has thus, an inherent potential for discriminatory treatment. Such absence of due process safeguards motivated the US Supreme Court in Re Gault to rule that the juvenile in conflict with the law is entitled to right to counsel and other due process rights, because "the condition of being a boy does not justify a kangaroo court"[25].

1.3.2 The Justice Theory

In stark contrast to the welfare theory, children are perceived under the justice theory as mature, rational, self-determining, fully responsible for their actions and thus accountable before the law[26]. Retribution rather than reformation or rehabilitation was the primary goal of this theory. The theory places no distinction between children and adults in terms of treatment in criminal justice proceedings. It's a significant departure from the notion of the "immature" and "innocent" child under the welfare theory, and an erosion of the distinction between an adult and innocent offender[27]. A justice system modelled in terms of this theory exposes the young children in conflict with the law to the danger of adversarial criminal proceedings. It places a heavy emphasis on the weight of the offence rather than the circumstances of the child offender[28]. A good example of a functioning justice model is the Scandinavian countries where there are no special courts for young people in conflict

[23] L. Kohlberg, Stages in the Development of Moral Thought and Action New York: Holt, Rinehart & Winston, 1969.

[24] Re Gault No. 116 Argued December 6, 1966 Decided May 15, 1967 387 U.S. 1
[25] Ibid
[26] O. G. Odhiambo, The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context, 2005, page 32
[27] Ibid
[28] Ibid

with the law. These are dealt with by the adult criminal courts. However, most cases involving young offenders in these countries have resulted in less punitive sanctions as compared to those involving adult offenders[29].

The justice theory is antithetic to *doli incapax,* a widely accepted principle of criminal law that states that under a certain age young people are *doli incapax* , i.e., incapable of forming an intention to commit a crime and should not be held fully responsible for their actions. It runs contrary to the reality that in virtually all countries, there are special institutions, procedures and laws that pertain to the differential treatment between adult and young offenders. By tearing the borders that distinguish young and adult offenders, the theory promotes the adultification of the juvenile justice systems.

1.4 Relevance of the theories

As has been stated earlier, the concept of juvenile justice in Africa is of colonial import and the theories of juvenile justice discussed in the previous sections are products of western philosophical, social and criminological research. The philosophy of how to deal with young people in conflict with the law in Africa thus mirrors the social construction of childhood as conceptualised by the colonizing countries[30]. African states therefore adopted models of juvenile justice systems which were a result of social, economic and political circumstances obtaining in Europe at that time. These circumstances were not necessarily the same circumstances prevalent in African states at the same time.

Although an assessment of whether the image of the colonial country's child was similar to that of the African child is not a subject of discussion herein, it suffices to say such an assumption may have been misplaced. For example, by 2005, Zimbabwe's Children Protection and Adoption Act (Chapter 33) and the Criminal Procedure and Evidence Act (Chapter 57) still mirrored the provisions Britain's Children and Young Persons Act of 1933 which was by that time, now defunct as it had been repealed[31]. It is not the subject of focus

[29] Ibid
[30] E O Chukwuma, Juvenile Justice Administration in Nigeria: Philosophy and Practice, Lagos: Centre for Law Enforcement Education, 2001 page 10
[31] O. G. Odhiambo, The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context, 2005, page 45

in this chapter or elsewhere in this thesis however, to assess if these western models of juvenile justice were suitable to the African context, nor will there be an assessment with regards to the extent to which this superimposition of western modelled juvenile justice systems had consequences on the administration of juvenile justice in Africa.

1.5 Conclusion

Juvenile justice has followed an evolutionary trajectory that began from the early times prior to the 19th Century when children were perceived not to have any 'rights' of their own, to the era dominated by the doctrine of *parens patriae*, from which the welfare theorists borrowed, thus advocating the treatment of children in conflict with the law as objects of intervention. The late twentieth century saw the advent of children being perceived as legal subjects, holding rights of their own[32]. With the adoption of the UN Convention on the Rights of the Child in 1989, the concept of children's rights revolutionized all issues concerning children and the area of juvenile justice was altered as well[33]

The provisions of the CRC and the ACRWC reveal a heavy alignment to welfarism by the drafters. The idea of a physically and mentally immature child is heavily emphasized in the preambles of both conventions. Both the Conventions obliges states to act as custodians of children's rights with respect to juvenile justice proceedings by way of drafting appropriate legislation, creating suitable institutions and widening the role of social workers in the juvenile justice systems. One can thus argue that both the conventions are products of the influence of welfarism in the minds of their drafters.

Juvenile justice systems modelled in line with the dictates of welfarism, which, in and of itself, is a product of western philosophical and criminological thought, were superimposed on African states by their colonial masters without paying due regard to the peculiarities of the African context. Zimbabwe, which is the subject of discussion in this essay, was a British colony, and as have been noted earlier on this chapter, inherited pretty much the entirety of its juvenile justice models from Britain. In the interest of space and time however, this thesis will not delve into the assessment of how such superimposition impacted on the

[32] Ibid page 45
[33] Ibid

development and administration of juvenile justice in Africa in general and in Zimbabwe in particular.

CHAPTER 2: THE ADMINISTRATION OF JUVENILE JUSTICE IN INTERNATIONAL LAW

2.1. Introduction

The end of the Second World War heralded a new era in as afar as international law is concerned. It marked the dawn of the present international human rights regime with the adoption of the Universal Declaration of Human Rights (UDHR)[34].The UDHR is important in so far as it laid down the framework for specific human rights conventions which address different rights interests[35].

The International Covenant on Civil and Political Rights (ICCPR) of 1966 was the first international treaty that contained a specific provision, that is, Article 14 that regulated the administration of juvenile justice among states. It can be argued therefore that Article 14 of the ICCPR provided the impetus for the positive development of international law in the 1980s, towards an acknowledgement that there is need for an international treaty that underscores the fact that children in conflict with the law could benefit from being separated from adults in the administration of justice.

At the United Nations level, the Convention on the Rights of the Child (CRC) of 1989 was a direct consequence of such a development. It was the first binding international treaty that addressed specifically the human rights of children in conflict with the law and set the norms and standards of their treatment. It recognized that separation in the justice system for adults and children can only occur if the system of justice to which children are subject observes the safeguards which are incorporated into international human rights law[36].

Regionally, African States, under the human rights regime established with the adoption of the African Charter on Human and Peoples' Rights (African Charter), adopted in 1990, the

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[34] E.J. Njungwe, "International Standards on Juvenile Justice: Implications of the New Criminal Procedure Code on the Administration of Juvenile Justice in Cameroon", in Cameroon Journal on Democracy and Human Rights, Vol.2, No.2, December 2008, retrieved on the 10th of April 2014 from: http://www.cjdhr.org/2008-12/Eric-Njungwe.pdf

[35] Ibid

[36] Geraldine Van Bueren , The International Law on the Rights of the Child, retrieved on the 15th of November 2013 from http://books.google.co.zw/books?id=xEAmkaqn8lMC&pg=PA171&lpg=PA171&dq=definition+of+juvenile+justice+international+law&source=bl&ots=Ley7dbY1Tt&sig=fr4T9tt0nXWmx5DOd-ZlRPPDtbM&hl=en&sa=X&ei=6geGUpnfD8XPtQb-3IHYCg&ved=0CCcQ6AEwAA#v=onepage&q=definition%20of%20juvenile%20justice%20international%20law&f=false

ACRWC[37].This complemented and strengthened the international human rights regime of the UN with respect to the administration of juvenile justice.

2. 2 Standards for the Administration of Juvenile Justice under the United Nations Human Rights System

2.2.1 The ICCPR

Although not a children's treaty in its entirety, the ICCPR, adopted in1966 incorporated aspects of juvenile justice aimed at providing special protection for young offenders under Article 14[38]. The treaty prohibited capital punishment to anyone under the age of 18 years who would have been convicted of any offence. It also provides for the separation of young people from adults in the places of detention, as well as the speedy determination of cases involving young children. It also provided that young person in conflict with penal law must be treated in a manner that pays due regard to their circumstances as children. Lastly, it provided that the trial procedures for young persons must take into account the desirability of promoting their rehabilitation[39].

2.2.2 The Beijing Rules

The so called the Standard Minimum Rules for the Administration of Juvenile Justice or simply the Beijing Rules, were adopted by the UN General Assembly in 1985,and sets out minimum guarantees for young people in conflict with the law in the administration of juvenile justice by member states. These Rules are comprehensive and provide guarantees to the juvenile offender at all stages of the criminal justice process[40]. The Beijing Rules emphasize on the need for diverting young people in conflict with the law from the formal criminal justice proceedings and the need to detain them only as a measure of last resort and for the shortest period of time possible. The Beijing Rules were a resolution of the general Assembly, so they did not have the binding legal force such as that of a Convention.

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[37] E.J. Njungwe, "International Standards on Juvenile Justice: Implications of the New Criminal Procedure Code on the Administration of Juvenile Justice in Cameroon", in Cameroon Journal on Democracy and Human Rights, Vol.2, No.2, December 2008, retrieved on the 10th of April 2014 from: http://www.cjdhr.org/2008-12/Eric-Njungwe.pdf

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

[39] Ibid

[40] E.J. Nungwe (n37 above)

There was still a need for a legally binding document to protect young people in conflict with the law.

2.2.3 The CRC

The 1989 UN Convention on the Rights of the Child is by far the one of the most universally accepted treaties, if the fact of ratification by States is of any guidance[41].There are only two countries namely the United States of America and Somalia, which did not ratify the Convention. Nevertheless, they both signed the Convention in 1995 and 2002 respectively[42]. The USA did not ratify the CRC because right wing politicians feared that the CRC may disempower parents in the upbringing of their children and undermine the family.[43] Somalia is a war torn state, and as such, has, for a very long time, without an effective government which could have potentially ratified the treaty[44]. The fact that the USA and Somalia did not ratify the CRC does not mean that they do not subscribe to the object and purpose of the treaty because they have both completed the first step towards ratification. Although they did not ratify the Convention, the United States for example, has played a leading role in juvenile justice reform, as has been shown in the first chapter.

This almost universally ratified Convention provided the much-needed framework for the administration of juvenile justice. Specifically, articles 37 and 40 address the issue of children in conflict with the law. Article 37 of the Convention on the Rights of the Child guarantees the juvenile offender the right to be protected against torture, inhuman or degrading treatment; capital punishment; and life imprisonment.

It bars unlawful arrest or arbitrary deprivation of liberty, and that imprisonment of young offenders should only be used as a matter of last resort and for the shortest period of time possible. It also lays down conditions for the arrest, detention, and imprisonment of young offenders such as respect for the child's inherent dignity, separation from adult offenders

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[41] O. G. Odhiambo, The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context, 2005, page 1

[42] The list of signatures and ratifications to the CRC, retrieved on the 5th of April 2014 from : https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

[43] S. Kilbourne, "United States Failure to Ratify the UN Convention on the Rights of the Child: Playing Politics with Children" 6, *Transnational Law and Contemporary Problems*, 1996, *page* 437

[44] O. G. Odhiambo, The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context, 2005, page 1

while in custody, maintaining contact with family, access to legal assistance, access to court, and a quick trial[45].

Article 40 of the Convention on the Rights of the Child incorporates most of the essential principles of the 1985 Beijing Rules, thereby making the Rules legally binding on all State parties to the Convention[46]. It also extends a number of legal guarantees mentioned in article 14 to 17 of the International Covenant on Civil and Political Rights[47]. Article 40 is very protective of juvenile offenders as it covers treatment from time of allegations through investigation, arrest, charge, trial, and sentencing[48]. It details out a list of minimum guarantees for young offenders among others the obligation on state parties to set a minimum age of criminal responsibility and to provide alternative measures for dealing with children who infringe penal laws without necessarily resorting to judicial proceedings[49].

States parties are required to establish and promote distinctive juvenile justice mechanisms for children with specific emphasis on positive rather than punitive aims, such as institutional care for rehabilitation[50]. The International Covenant on Civil and Political Rights, the Beijing Rules, and the UN Convention on the Rights of the Child have further been strengthen and complemented by other UN resolutions such as the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) adopted by the UN General Assembly in 1990 which covers all levels and forms of prevention of juvenile delinquency, including social reintegration[51]. More so, it provides an enlightened conceptual framework approach and vision with respect to progressive delinquency prevention policy and promotes desirable action to be pursued by the world community[52]. Furthermore, these Guidelines call for a 'child centred' orientation and child developmental perspective to delinquency prevention, as an integral part of juvenile justice administration[53].

[45] E.J. Nungwe (n37 above)
[46] E.J. Nungwe (n37 above)
[47] Ibid
[48] Article 40, Convention on the Rights of the Child
[49] Ibid
[50] E.J. Nungwe (n37 above)
[51] Ibid
[52] E.J. Nungwe (n37 above)
[53] E.J. Nungwe (n37 above)

2.2.4 Committee on the Rights of the Child (CROC)

The Committee on the Rights of Children is the independent monitoring body of the CRC. It has, in accordance with its mandate under Article 44 of the CRC, developed considerable jurisprudence through an examination of States Reports, thematic discussions and General Comments. Its work now spans approximately two decades[54]. To date, it has passed 17 General Comments and has examined a plethora of state reports for which it has issued concluding observations. The last consideration of the report by Zimbabwe was done in June 1996, wherein it expressed concern over Zimbabwe's acceptance in the legislation of the use of corporal punishment[55] and the lack of a clear legal prohibition of capital punishment, life imprisonment without the possibility of release and indeterminate sentencing[56].

2.2.5 Complementary UN Resolutions

In 1990, the General Assembly adopted the United Nations Rules for the Protection of Juveniles Deprived of their Liberty[57]. These rules set out standards applicable when juveniles are confined to any facility whether penal, correctional, educational or protective, and when children are simply deemed to be 'at risk' on grounds of conviction or suspicion for an offence[58]. Another complementary resolution of the UN on juvenile justice is the 1997 Guidelines for Action on Children in the Criminal Justice System whose main objectives were, but not limited to, the implementation of the Convention on the Rights of the Child, the pursuit of the goals set forth in the Convention with regard to children in the context of the administration of juvenile justice, as well as the use and application of the United Nations standards and norms in juvenile justice and other related instruments, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power by state parties[59].

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[54] R. Murray, "Children's Rights in the OAU/AU" in Murray, R *Human Rights in Africa*: *From the OAU to the African Union*, Cambridge: Cambridge University Press, 2004 page 163)

[55] Concluding Observations of the Committee on the Rights of the Child: Zimbabwe, CRC/15/Add/55, 7 June 1996, paragraph 18

[56] Concluding Observations of the Committee on the Rights of the Child: Zimbabwe, CRC/15/Add/55, 7 June 1996, paragraph 21.

[57] A/RES/45/113 68th plenary meeting, 14 December 1990. 45/113. United Nations Rules for the Protection of Juveniles Deprived of their Liberty

[58] Ibid

[59] Guidelines for Action on Children in the Criminal Justice System: Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997

2.3 Standards for the Administration of Juvenile Justice under the African Union Human Rights System

2.3.1 The African Charter on Human and People's Rights

The African regional human rights regime was established with the adoption of the African Charter on Human and Peoples' Rights (African Charter) which operates within the institutional framework of the African Union (AU).The African Charter makes only one mention of the child in its provisions, that is, Article 18(3) wherein it provides that states parties should ensure the protection of the rights of the child as stipulated in international declarations and covenants.

Although it is apparent from this that the African Charter effectively endorses internationally adopted principles on children's rights, including all provisions on the administration of juvenile justice, the fact that there is only one mention of the child undermines the commitments of member states to protect the rights of young people in general, and young offenders in particular. In short, the Charter does not effectively protect children's rights in general and by implications, those of young offenders.

It deals with the rights of 'every individual', 'human beings', 'every citizen', and 'all peoples' under the jurisdiction of states. Although by interpretation or through common sense, these phrases would support the view that children are also protected both as individuals, as human beings, as citizens, and as members of a group (peoples), the absence of specific mention of children (to which young offenders belong) as a special group of people whose rights require special protection leaves the Charter with a very thin protective layer in as far as the rights of the children are concerned. In fact, the Charter does not draw a clear distinction between the administration of justice and the administration of juvenile justice and by implication, it allows for no distinction between children and adults in terms of treatment in the administration of justice, which is a major flaw.

Article 7 of the African Charter guarantees every individual the right to have his or her case heard by a competent national organ; the right to presumption of innocence until proven

guilty; the right to be defended by a counsel of his or her choice; and the right to be tried within a reasonable time by an impartial court. Although it can be argued that the term "every individual" also include children, the logical conclusion from such an interpretation is that children and adults must be treated similarly and are entitled to similar rights in the administration of juvenile justice. Nevertheless, it should be noted that Africa is the only continent with a region-specific child rights instrument.

2. 3.2. The African Charter on the Rights and Welfare of the Child

The Declaration on the Rights and Welfare of the African Child in 1979 by the Organization of African Unity (now African Union) set the precedence for the eventual signing of the ACRWC. Under this declaration, states affirmed their commitment to taking all the appropriate steps to protect the rights of children. The declaration did not however, have any binding legal force. It is very interesting to note that the ACRWC was adopted barely a year after the CRC was adopted. It can be argued therefore, that the ACRWC was adopted as an African regional response to the Convention on the Rights of the Child[60].

Some argue that the African statesmen felt that the drafting of the CRC was Euro-centrist as African states were not included therein[61]. This argument is misplaced in the sense that if that was the case, then the provisions of the ACRWC would have taken a significant departure from those of the CRC. Instead the ACRWC, at least with respect to juvenile justice under Article 17, repeats almost verbatim the provisions of the CRC under Article 37 and 40. The Committee of Experts on the Rights and Welfare of the African child even acknowledges that the ACRWC builds on the same basic principles as the CRC[62]. The only reasonable explanation therefore would be that of the need for a regional instrument that would take into account the peculiar needs and issues pertinent to the African child[63].

As of January 2014, all member states of the AU have signed the Children's Charter and all save for 7 have ratified it[64]. The 7 member states which have signed but not yet ratified the Charter are: Central African Republic, Democratic Republic of Congo, Sahrawi Arab

[60] E.J. Nungwe (n37 above)
[61] Ibid
[62] The website of the Committee http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acrwc/ retrieved on the 10th of April 2014
[63] The Committee of Experts on the Rights and Welfare of the Child states on its website (in 62 above) that AU Children's Charter highlights issues of special importance in the African context.
[64] Ibid

Democratic Republic, Somalia, Sao Tome and Principe, South Sudan and Tunisia[65] As with the CRC, the ACRWC reflects a consensus among states in as far as juvenile justice reform is concerned. A closer look at the reservation shows that they were mainly religion based, rather than a reflection of the absence of consensus on much of the clauses of the charter.

The African Children's Charter defines a child as every human being below the age of 18[66] years. Issues pertaining to the administration of juvenile justice are dealt with under Article 17 of the Charter. It guarantees special treatment for children accused of or found guilty of crimes, including respect for their inherent dignity and fundamental rights. State parties have an obligation to ensure that detained or imprisoned children are separated from adults and not subjected to torture, inhuman and degrading treatment.

Children accused of crimes are also guaranteed the right to presumption of innocence; to be informed promptly of the charge and be entitled to an interpreter if the child cannot understand the language used; to be afforded legal and other appropriate assistance in the preparation and presentation of his or her defence; to be given a speedy trial and be accorded the right to appeal; and prohibits the press and the public form trials involving a child[67]. Article 17 further provides that the essential aim of the treatment of a child either during the trial or after the child has been found guilty should be his or her reformation and reintegration into the family and social rehabilitation; and obliges States to set a minimum age below which children shall be presumed not to have the capacity to infringe the penal law[68].

2.3.3. African Committee of Experts on the Rights and Welfare of the Child (ACERWC)

The body in charge of monitoring the implementation and ensuring the protection of the rights enshrined in the Charter African Charter, (the African Committee of Experts on the Rights and Welfare of the Child) is still in its infancy. It was formed and started its monitoring work as recently as the year 2001. Since its initial stages of work and as such, its jurisprudence is limited. By 2014, the Committee had only received two state reports from

[65] Ibid
[66] Article 2 African Charter on the Rights and Welfare of the Child
[67] Article 17 ACRWC
[68] Ibid

Algeria and Angola. Zimbabwe, which is the subject of discussion in this thesis, was scheduled to deliver its initial report to the Committee in November 2001 but it did not do so. It was also scheduled to deliver its first periodic report in November 2004 but did not do so either[69].

2.4. The Juvenile Justice Package

The Standards for the Administration of Juvenile Justice under both the African Union Human Rights System and the UN Human Rights system constitute what can be said to be a properly functioning juvenile justice package. This package includes, but is not limited to, the obligation of states to craft measures aimed at preventing delinquency among children, measures that prioritize diversion rather than trial, minimize the number of children in pre-trial diversion, offer alternatives to detention as well as provide for all the rights provided for under Article 37 and 40 of the UN Convention on the Rights of the Child, Article 17 of the African Charter on the Rights and Welfare of the Child as well as other relevant international legal instruments.

2.4.1. Diversion

In terms of Article 40(3) of the CRC, states must, whenever appropriate and desirable, promote measures for dealing with children alleged to have infringed, accused of infringing or recognized as having infringed penal law, without resorting to judicial proceedings. Diversion thus, should be a core objective of every juvenile justice system, and should be explicitly stated in legislation. The Committee on the Rights of the Child has recommended that measures to divert children from the juvenile justice process to social services should be a well-established practice that can and should be used in most cases[70]. It has also recommended that the law must contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and other agencies to make decisions should be clearly defined, regulated and kept under regular review[71]. Completion

[69] State Reports: African Committee of Experts on the Rights and Welfare of the Child, retrieved on the 7th of April 2014 from: http://acerwc.org/member-states/state-reports/
[70] General Comment No 10, para 24
[71] Ibid

of the diversionary measure by the child must result in the closure of the case and may not be viewed as a criminal record or an equivalent thereto[72].

To safeguard the quality of the diversionary process, it is necessary that those implementing such schemes and programs are appropriately qualified and receive regular training in international standards, juvenile justice and child development. Their effectiveness and compliance with principles set out in the CRC and ACRWC must be thoroughly and objectively monitored. It is therefore not permissible under international law to place child criminal justice at the bottom pile of resource allocation[73]. States are under an obligation to craft coherent legal frameworks that govern the implementation of such programs.

2.4.2. Pre-trial detention:

Placing children in pre-trial detention for long periods while waiting for trial is a grave violation of Article 40 CRC[74]. Pre-trial detention should only be resorted to under 'exceptional circumstances'[75]. To meet their obligations under Article 40 (4) CRC, states must put appropriate measures in place that aim to reduce the number of children in pre-trial detention and make a variety of alternatives to pre-trial detention[76]. Alternative measures include structured bail support, mentoring programs and residential alternatives. The ACRWC however does not provide for alternatives to detention and hence, does not unfortunately forbid it. This may have consequences on the administration of juvenile justice by African states. Where it is absolutely necessary however, that a child be put in pre-trial detention, for example, to ensure his/her safety, the law should state clearly the conditions that must be met, particularly to keep its length to a minimum[77]. Expediting proceedings for those in pre-trial detention can be useful in this regard. Placing rigid limits

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[72] T. Hammarberg, Commissioner for Human Rights, Children and juvenile justice: proposals for improvements, retrieved on the 14th of November 2013 from: https://wcd.coe.int/ViewDoc.jsp?id=1460021

[73] Geraldine Van Bueren , The International Law on the Rights of the Child, retrieved on the 15th of November 2013 from http://books.google.co.zw/books?id=xEAmkaqn8IMC&pg=PA171&lpg=PA171&dq=definition+of+juvenile+justice+international+law&source=bl&ots=Ley7dbY1Tt&sig=fr4T9tt0nXWmx5DOd-ZlRPPDtbM&hl=en&sa=X&ei=6geGUpnfD8XPtQb-3IHYCg&ved=0CCcQ6AEwAA#v=onepage&q=definition%20of%20juvenile%20justice%20international%20law&f=false

[74] Committee on the Rights of the Child, General Comment No 10, para 28. CRC Article 40(2) (b) (iii) and ACRWC Article 17 (2) (c) (4) provides for the speedy determination of the matter

[75] Ibid

[76] Article 40 (4) CRC provides for alternatives to pre-trial detention

[77] UN Office on Drugs and Crime, Handbook of the Basic principles and Promising Practises on Alternatives to Imprisonment, Criminal Justice Handbook Series, retrieved on the 10th of April 2014 from: http://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf

on the duration of any pre-trial detention of children and regularly reviewing the need for such detention should be also clearly provided for in the laws[78].

Detained children must be treated in a manner that respects their dignity and personal integrity[79]. This obliges states to improve the quality of pre-trial detention, ensure separation between the accused and the convicted juveniles, and avail recreational facilities to the children given that they remain innocent until proven guilty[80]. Children must be detained separately from adults and be kept out of the sight and hearing of adult detainees as much as possible, with no opportunity for contact and communication between children and adult detainees[81]. They should also be entitled to adequate health facilities.

Children in detention are entitled to all the rights enjoyed by their peers in the community. While in imprison, the right to protection from harm, the right to health and health care, the right to maintain contact with their family, the right to education and training, right to play and leisure assume additional importance. Detention must be tailored to prepare the children for release and reintegration into society. The conditions therefore, must promote the child's physical and mental health, foster self-respect and a sense of responsibility and develop attitudes and skills that will prevent re-offending. As such children should enjoy appropriate physical conditions and have access to care and facilities which facilitate their continuing education and personal development[82].

2.4.3. Sentencing

When prevention has failed to succeed and when pre-trial diversion been deemed inappropriate, the matter is brought before an adjudicating body competent to pass a sentence[83]. Article 3 and 40 of the CRC as well as Article 17 of the ACRWC provide clear guidelines on how matters involving children should be adjudicated. Such guidelines include emphasis on the best interest of the child, their well-being, their rights, particularly fair trial rights and their personal circumstances in all decisions concerning them. These guidelines

[78] T. Hammarberg, Commissioner for Human Rights, Children and juvenile justice: proposals for improvements, retrieved on the 14th of November 2013 from: https://wcd.coe.int/ViewDoc.jsp?id=1460021
[79] Article 37 (c) of the CRC
[80] Article 17 (2) (b) ACRWC and Article 37 (c) CRC
[81] Ibid
[82] Ibid
[83] T. Hammarberg, Commissioner for Human Rights, Children and juvenile justice: proposals for improvements, retrieved on the 14th of November 2013 from: https://wcd.coe.int/ViewDoc.jsp?id=1460021

should be expressly provided for by law and assistance must be provided to the judiciary in implementing them. This entails training of the judiciary in such areas as child development, psychology and children's rights so as to equip them with the necessary skills to undertake the challenging and onerous task of sentencing[84].

The imprisonment of children is not only ineffective in addressing offending behaviour, but it can also be harmful to children's development and health[85]. In fact, imprisonment should be a measure of last resort and for the shortest appropriate period of time in all cases involving child offenders. This will not be possible where there are few alternatives, and as such states must put in place a wide range of alternative sanctions to custodial sentencing. Therefore, when sentencing the juveniles, the judiciary must prioritize the use of non-custodial or community-based measures as an alternative to detention, as stated in Article 40 (4) read together with Article 17 (3) ACRWC. States must therefore; put in place a large several measures which allow for flexibility and a tailored response to each individual case and to ensure that detention is a last resort[86]. Such measures may include, but not limited to guidance and supervision orders, probation orders, community service orders, financial penalties and compensation, treatment orders, orders to participate in group counselling or similar activities and orders concerning foster care, residential care or care in other educational settings[87].

2.5 Conclusion

International law with regard to juvenile justice has developed in a very positive manner since the specific provisions regulating the administration of juvenile justice were first enshrined in a global treaty, that is, the ICCPR in 1966. The CRC was the first international instrument to adopt a coherent child rights approach to the international legal regulation of juvenile justice.

Africa, under the auspices of the ACRWC, became the first continent, and to this day remains the only one, which has a regional children's rights treaty, and consequently, a regional juvenile justice regime. Zimbabwe is party to both the CRC and the ACRWC and

[84] T Hammarberg, Commissioner for Human Rights, Children and juvenile justice: proposals for improvements, Strasbourg,19 June 2009 Comm DH/Issue Paper (2009)1
[85] Ibid
[86] Article 40 paragraph 4, CRC
[87] Ibid

hence, is obliged under these treaties, to establish a juvenile justice system which is in accordance with the provisions of these two treaties. The administration of juvenile justice is dealt with under Article 40 and Article 17 of the CRC and the ACRWC respectively.

The rights of the children in conflict with the law under Article 40 and Article 17 of the CRC and ACRWC respectively, can be put together into a package that consists of the need for diverting young offenders from the formal criminal justice proceedings, the acknowledgement that pre-trial detention of young offenders must be resorted to only as a measure of last resort and for the shortest period of time, and the need to sentence children after paying due regard to the special circumstances that accrue from them being young and vulnerable and the need for paying due regard to their best interests in all the decisions that involve them, including sentencing them. For Zimbabwe to have a properly functioning juvenile justice system must have, at a minimum, this package in place. The following chapters will assess if Zimbabwe's juvenile justice system satisfies these benchmarks.

CHAPTER 3: THE LAW OF JUVENILE JUSTICE IN ZIMBABWE

3.1 Introduction

Both the CRC and the ACRWC provide frameworks within which the provisions set out in these conventions must be implemented in Zimbabwe. Article 4 of the CRC obliges Zimbabwe to undertake appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention while Article 1 of the ACRWC obliges member it to take constitutional, legislative and such other measures as may be necessary, to give effect to the provisions of this Charter.

Although both the CRC and the ACRWC are not so prescriptive as to listing the constitutional, legal and administrative measures that states are required to undertake, the Committee on the Rights of the Child (hereinafter referred to as CROC) which is the CRC monitoring body, clarified this point through a General Comment [88] wherein it stated that different mechanisms are called for at the state level[89]. These include, but not limited to, the need for a comprehensive national strategy such as a National Plan of Action (NPA) on Children, independent human rights institutions such as children's ombudspersons and national human rights commissions, making children visible in budgets, training and capacity building, to mention just a few of the measures[90]. The absence of a particular prescription of the constitutional, legal and legislative measures that states have to undertake was "in keeping with the CRC's broad and flexible approach which enables the particularities of the legal and administrative system of each state, as well as other relevant considerations, to be taken into account"[91].

Thus, upon ratification of the CRC and the ACRWC, Zimbabwe became under an obligation to review and reform all its child laws. For it to be in full compliance, it has, in terms of CROC's wording, to undertake a comprehensive review of all domestic legislation and

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[88] CROC (2003) *General Comment No. 5*: "General Measures of Implementation for the Convention on the Rights of the Child." CRC/GC/2003/5 (Adopted at the 34th session on 27 November 2003).
[89] Ibid
[90] Ibid
[91] O. G. Odhiambo, The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context, page 69, retrieved on the 4th of April 2014 from: http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_9110_1176963955.pdf

related administrative guidance to ensure full compliance with the Convention[92]. It came under an obligation to craft a child-rights orientated juvenile justice system which entails, among other things, the establishment of a juvenile justice system which comprises of distinct and dedicated legislation in the form of separate laws, procedures and institutions to deal with children in conflict with the law[93].

3.2. Applicability of international law in Zimbabwe

The impact of the CRC and the ACRWC, like any other international Convention, depends on the system applicable for the domestication of international treaties in each and every country[94]. There are two systems applicable**.** Under the monist system, international conventions are directly applicable in the domestic courts, that is to say, there is no need for domestication of international conventions by way of, for instance, act of parliament.

The dualist system on the other hand, is whereby treaties can only be incorporated into national law by domestic statutes. Zimbabwe belongs to the second category, hence Section 34 of the Constitution which states that the state must ensure that all international Conventions, Treaties and agreements to which Zimbabwe is party are incorporated into domestic law. This echoes calls by CROC for the formal adoption of the CRC into national law by state parties.[95]

Therefore, upon ratification of the CRC and the ACRWC, Zimbabwe came under an obligation to align all its laws that pertain to juvenile justice to the dictates of these two treaties. Sufficient transposition of the Article 37 and 40 of the CRC and Article 17 of the ACRWC into domestic law in Zimbabwe entails that the constitutional and legislative provisions that relate to children in conflict with the law, the constitution, the Children's Act, the Criminal Law Codification (and Reform) Act, the Prisons Act, the Legal Aid Act as well as the Criminal Procedure (and Evidence) Act have to be in line with the provisions of Article 17 ACRWC as well as Article 37 and 40 of the CRC.

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[92] General Comment No.5 (n1 above) Para 15.
[93] CRC Article 40 paragraph 3
[94] Veerman, P and Gross, B "Implementation of the United Nations Convention on the Rights of the Child in Israel, the West Bank and Gaza" *The International Journal of Children's Rights,* 1995, page 296.
[95] CROC (2003) *General Comment No. 5*: "General Measures of Implementation for the Convention on the Rights of the Child." CRC/GC/2003/5 (Adopted at the 34th session on 27 November 2003). Paragraph 19

3.3 The Zimbabwean Legal System

3.3.1 The Constitution

The new constitution which came into force in 2013 has been very progressive in domesticating international legal instruments thus making them law in Zimbabwe, particularly those under study. Although there is no compulsory legal monism in Zimbabwe, Section 46 (c) of the new constitution clearly states that when interpreting the bill of rights as enshrined in Chapter 4 of the constitution, the courts must take into account international law and all treaties to which Zimbabwe is party. This new Constitution, which came into force barely a year ago, also obliges the state to incorporate all international Conventions, treaties and agreements to which Zimbabwe is party into domestic law[96].

Thus in terms of this provision, there is compulsory domestication of international treaties in Zimbabwe. The inclusion of Section 34 into the new constitution marks a significant improvement from the old constitution which was repealed in 2013, wherein Section 111 stated that international Conventions, treaties and agreements to which Zimbabwe is party can only become law after being incorporated thereto by an act of parliament, but did not oblige the later to undertake such domestication.

Section 81 of the Constitution specifically deals with the rights of children in conflict with the law. It repeats Chapter 37 (b) and (c) verbatim by providing that children under the age of 18 must not be detained except as a measure of last resort and if detained, must be kept therein for the shortest period of time and while there, must be treated in a manner, and kept in conditions that take into account the child's age. With regards to the shortest period of time mentioned above, the provision is rather vague, for it does not specify the exact length of this shortest period of time". Nevertheless, such clarification is provided for in terms of the Children's Act as will be shown later in this Chapter. The same Section also provides for detaining children separately from persons over the age of 18. All the decisions made with regard to young persons in conflict with the law must take into consideration the best interests of the child.

[96] Section 34 of the Zimbabwean Constitution

Although the Constitution does not provide for mandatory legal aid specifically for juvenile offenders, it can be argued that children are included under Section 31 which states that the state must provide legal aid in criminal and civil cases for people who need it are unable to afford it. The term "people" here can be interpreted broadly to include children. The only limitation to this clause however, is that the provision of such legal aid is subject to availability of resources. In the absence of such resources, juvenile offenders can still face the criminal justice system without legal representation, thus contravening Section 17 (c) (iii) of ACRWC which provides for mandatory legal aid for children in conflict with the law.

The general rights of persons deprived of their liberty provided for under Section 50 and Section 70 of the constitution which include, among others, *Miranda rights, habeas corpus*, presumption of innocence until proven guilty, the right to judicial review, the right to be informed promptly of the charges upon arrest, the right to be visited by family and friends while in detention, the right to food, shelter and so on, also apply to children. In Section 86, the constitution has gone so far as declaring freedom from torture, inhuman and degrading treatment, the right to a fair trial and *habeas corpus* as absolute rights which cannot be derogated from under any circumstances.

One of the most progressive aspects of the new constitution is the abolition of the death sentence for juvenile offenders. Section 12 of the Old Constitution, which provided for the right to life, stated that "no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted". Unlike the new constitution which exempts persons who were less than 21 years of age at the time when the offence was committed from capital punishment[97], children found guilty of criminal offences were not accorded such exemption under the old constitution.

The old constitution, which was repealed last year, expressly allowed judicial corporal punishment "in execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law"[98]. The clause was included as a limitation clause to the right to freedom inhuman treatment. The new constitution does

[97] Section 48 of the New Constitution exempts young offenders from capital punishment

[98] Section 15 of the Zimbabwe constitution, as amended on the 14th of September 2005 (up to, and including amendment number 17

not include such a limitation clause with respect to the right to freedom from torture, cruel, inhuman and degrading treatment. In fact, the right to freedom from torture, cruel, inhuman and degrading treatment has been made absolute by the new constitution under Section 86 (3) (c).

3.3.2 The Children's Act, Chapter 5:06

In terms of Section 20 paragraph 3 (a) a child or young person found to be guilty of infringing penal law may be liable to a sentence of corporal punishment[99]. Corporal punishment is also provided for under Section 353 of the Criminal Procedure and Evidence Act, Chapter 9:07. It gives instructions as to how such punishment has to be administered on a male juvenile offender.

Clearly, these provisions are unconstitutional in that they violate Section 53 of the new Constitution which prohibits torture, inhuman and degrading treatment in as much as they violate Article 17 (2) (a) of the ACRWC and Article 37 (a) of the CRC. The Children's Act and the Criminal Procedure and Evidence Act were passed under the auspices of the now defunct old constitution, which allowed corporal punishment and which was repealed in 2013.The old constitution prohibited cruel, inhuman and degrading punishment under Section 15 but included a limitation clause wherein it stated that corporal punishment in execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law shall not be held to be in contravention of the section that prohibits cruel, inhuman and degrading treatment.

Section 53 of the new constitution, which prohibits cruel, inhuman and degrading treatment, does not contain such a limitation clause as in the old constitution but rather makes the prohibition of torture, cruel and inhuman treatment absolute under Section 86 and as such, it expressly bans corporal punishment. It follows therefore, that the Children's Act and the Criminal Procedure and Evidence Act, which allow for corporal punishment have to be amended in line with the provisions of the new constitution. As they stand, they are in violation of Article 37 (a) of the CRC and Article 17 (2) (a) of the ACRWC both of which prohibits torture, inhuman and degrading treatment of juvenile offenders.

[99] Children's Act: Chapter 5: 06

The rest of the provisions under the children's Act, repeats, almost verbatim, the provisions of Article 37 and 40 of CRC, read together with Article 17 of the ACRWC. It provides for the setting up of a children's court, in line with Article 40 (3) CRC read together with Article 17 (2) (b) of the ACRWC. This Court has to be a special court in the sense that "it shall not be bound by any rules relating to civil or criminal proceedings"[100] but instead "shall be conducted in such manner as to the officer presiding over the children's court seems best fitted to do substantial justice"[101]. In addition to that, child detention (for child suspects or convicts) must be done in a special way at a special place, which, in terms of Section 15, is called a place of safety. Section 63 paragraph 2 (d-e) clearly states that adult people must be separated from young people in their place of detention.[102]

Another special way in which the juvenile court has to be administered is through the empowerment of probation officers as provided for in Section 46 of the Children's Act. These are social workers whose role in the juvenile court includes, but is not limited to, producing a probation report for use by the magistrate or the court which is basically an enquiry into the circumstances of the child, e. g his or her environment, causes or circumstances contributing to juvenile delinquency, advising, carrying out measures to correct tendencies to delinquency in children, discovering and removing conditions causing or contributing to juvenile delinquency, counselling, supervising, controlling any person placed under the supervision of the probation officer. In a typical welfarist approach, Section 46 makes it mandatory for every children's court to have such officers.

Article 40 holds that the identity of the child offender has to be kept secret at all levels of the criminal proceedings. This secrecy is guaranteed under Section 5 paragraph 5 and 6, which state that the child offenders' identity to be kept a secret and those children's courts must be inaccessible to the public, respectively. The revealing of the identity of a child offender is also expressly forbidden under Section 195 of the Criminal Procedure and Evidence Act which states that

> no person shall at any time publish by radio or television

[100] Children's Act: Chapter 5: 06, Section 5 paragraph 1
[101] Ibid
[102] Prison Act Chapter 7:11

> or in any document produced by printing or any other method of multiplication, the name, address, school or place of occupation or any other information likely to reveal the identity of any person under the age of eighteen years who is being or has been tried in any court on a charge of having committed any offence"[103]

Preventing delinquency, which in Chapter 2 was considered to be part of a functional juvenile justice package is evident in Section 13 of the Children's Act which imposes a heavy sanction on parents or guardians who fail to take reasonable steps to ensure that young people under their custody do not commit offences[104].

A child who is alleged to have committed an offence and has been arrested and detained, is entitled under Article 40(2) (b) (iii) CRC, read together with Article 17 (2) (c) to have their matter determined promptly. As has already been mentioned earlier in this chapter, the constitution, pursuant to these provisions, state that young offenders must be detained for the shortest period of time, but it does not specify the exact length of this "shortest period of time". Section 17 of the Children's Act clarifies this anomaly by clearly stating that pre-trial detention of a young offender must not last more than seven days and in terms of Section 25:

> A child may remain in the place determined by the court or shall remain in the certified institution or training institute or in the custody in which he was placed or ordered to return to or remain in any other certified Institution, training institute or custody, shall render service for the benefit of the community for not more than 3

[103] Criminal Procedure and Evidence Act, Chapter 9:7, Section 195

[104] The Section provides that "Any parent or guardian of a child or young person who fails to take reasonable steps to ensure that that child or young person does not commit an offence is guilty of an offence and liable to a fine of two thousand five hundred dollars or six months imprisonment"

> years. A court may extend detention, community service, and confinement to an institution for a further three years if it deems necessary[105]

Section 86 of the Children's Act mandates the government to make grant-in-aid to any local authority, certified institution, any association of persons working in Zimbabwe for the protection, care, control of children and young persons. This provision is in line with CROC's General Comment Number 5[106] which encourages the establishment and support of such institutions, organizations and associations that work in the area of juvenile justice. It is also useful in so far as it prevents states from putting juvenile justice at the bottom pile of resource allocation.

3.3.3. Criminal Law (Codification and Reform) Act Chapter 9:23

3.3.3.1. *Doli Incapax*

A rule which has its genesis in the Roman-Dutch common law system and later reflected in the English common law, allows for tender age to play a role in relation to presumption of criminal capacity. According to this rule, persons under the age of fourteen years are presumed not to possess the sufficient criminal responsibility to commit a crime, though the presumption is rebuttable between the ages of seven and fourteen[107]. Individuals of fourteen years and older are presumed criminally responsible. Without major variations, this rule has been embraced by the criminal justice system of Zimbabwe as reflected in Section 6, 7 and 8 of the Criminal Law Codification and Reform Act[108].

Pursuant to Article 17 (4) of the ACRWC, and Article 40 (3) (a) of the CRC, these sections set out a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. In terms of Section 7, a child who is of or over the age of seven years but below the age of fourteen years at the time of the conduct constituting any crime which he or she is alleged to have committed shall be presumed to be *doli incapax*, i.e. to lack the

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[105] Children's Act: Chapter 5: 06, Section 25

[106] CROC (2003) *General Comment No. 5*: "General Measures of Implementation for the Convention on the Rights of the Child." CRC/GC/2003/5 (Adopted at the 34th session on 27 November 2003).

[107] O. G. Odhiambo, The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context, page 18-19, retrieved on the 4th of April 2014 from: http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_9110_1176963955.pdf

[108] Act No. 23/2004 of 2005 on Criminal Law (Codification and Reform) [Zimbabwe], 3 June 2005

capacity to form the intention necessary to commit the crime; or where negligence is an element of the crime concerned, to lack the capacity to behave in the way that a reasonable adult would have behaved in the circumstances unless the contrary is proved beyond a reasonable doubt[109]. The wording of this section shows that the defence of infancy is rebuttable for young people of, or over the age of seven. The defence of *doli incapax* is not applicable for persons over the age of 14, in terms of Article 8 of the Criminal Law Codification and Reform Act. *Doli incapax* mirrors Article 17 paragraph 4 of the ACRWC and Article 40 paragraph 3 (a) of the CRC which states that there should be a minimum age below which children shall be presumed to not have the capacity to commit criminal offences.

3.3.4 Legal Aid Act, Chapter 7:16

In terms of Section 7 of The Legal Aid Act, any person is entitled to apply for legal aid. The eligibility of such applicant is determined by, insufficient means, reasonable grounds for success in the case in court; and the need for the services provided by the act[110]. Legal aid, in the form of a legal practitioner or law officer to represent the indigent person may also be obtained at the attorney General's office or a criminal court[111].

Every accused person, including children, has the right to legal representation in terms of the constitution. Although children can apply for legal Aid in terms of The Legal Aid Act, the act does not make it mandatory for legal assistance to be provided to them. Provision of legal aid is recognised by the government, but legislation regulating the same is limited to covering administrative aspects of the operation of the legal aid directorate. There is no mention of preference in giving legal assistance to children who are in conflict with the law. The Constitution does not guarantee the right to legal assistance for children in conflict with penal law. Therefore, the Zimbabwean legal system has failed to domesticate the provisions of Article 17 (2) (c) of the ACRWC and Article 40 (2) (b) (ii) of the CRC into national legislation.

[109] Ibid
[110] Legal Aid Act: Chapter 7:16, Section 8
[111] Section 10 of the Legal Aid Act

3.4. Conclusion

Zimbabwe has a dualist legal system where international law in the form of treaties, Conventions and other agreements do not have a direct legal effect at a national level. They have to be transposed into domestic law for them to be applicable. Since the ratification of both the CRC and the ACRWC, Zimbabwe has made a significant progress in terms of legally domesticating the provisions of these Conventions.

The new constitution which came into force in 2013 is an epitome of such progress. As compared to the previous constitution which was repealed in 2013 by the coming into force of the new constitution, the bill of rights has been widened to encompass most of the rights of the children in conflict with the law as provided for under Article 40 CRC and Article 17 ACRWC. Of particular interest is the abolition of Corporal punishment and the death sentence for male juvenile offenders under the new constitution.

However, the provisions of Article 17 ACRWC and Article 37 and 40 of the CRC are not sufficiently transposed into domestic law in Zimbabwe. The deficiency is with respect to judicial corporal punishment which is still permitted under the Children's Act and the Criminal Law Codification and Reform Act. Another deficiency lies in the absence of a constitutional or legislative guarantee of mandatory legal aid for young persons in conflict with penal law.

Whether the provisions of the Children's Act, The Prisons Act, the Criminal Law Codification and Reform Act and the Criminal Procedure and Evidence Act which still allow corporal punishment for male juvenile offenders will be repealed so that the Acts are aligned to the new Constitution is unclear yet. Zimbabwe must take advantage of the ongoing process of aligning the legislation with the new constitution to repeal these provisions which are not only unconstitutional but also stand in violation of Article 17 of the ACRWC and Article 40 CRC.

CHAPTER 4: JUVENILE JUSTICE IN PRACTICE IN ZIMBABWE

4.1 Introduction

There is a contradiction between theory and practice in Zimbabwe with respect to the administration of juvenile justice. Zimbabwe has signed and ratified the ACRWC, the CRC and all the other relevant international legal instruments that pertain to juvenile justice. It has not ended there, but has rather gone further to domesticate these statutes, albeit not sufficiently as has been noted in the previous chapter, into national legal legislation, as is required under a dualist legal system. A study of the Zimbabwean legal system as it pertains to juvenile justice would produce a false impression that the rights of young people in conflict with the law are largely protected in Zimbabwe.

However, in practice, the rights that the young people in conflict with the law are entitled to under the CRC, the ACRWC as well as the Zimbabwean legal system are not always extended to them. Signing and ratifying a treaty, which entails formally committing oneself to uphold the provisions of a convention is one thing, and implementing such provisions at the national level is another thing.

After the ratification of the CRC and ACRWC, focus has now inevitably turned not only on the remarkable formal commitment by Zimbabwe to these treaties, but on actual practice in Zimbabwe. According to UNICEF, despite the rhetoric in the international community about the importance of children's rights, monitoring such rights, norms and principles is "regularly ignored and seriously violated virtually throughout the world… on a scale …unmatched in the field of [human] rights implementation[112] . States have in several ways treated juvenile justice as "an unwanted child" of their responsibilities[113]. Worldwide, states have allowed the borders between jurisdictions of the juvenile court and the adult criminal court to remain porous and blurred a phenomenon which B.J. Jacobs described as the 'adultification' of the juvenile justice system. He laments the worldwide phenomenon in many states whereby juvenile justice is retrogressing rather than developing as evidenced by juvenile justice law reform in the direction of treating juvenile offenders more severely

[112] UNICEF Innocenti Digest No. 3 on Juvenile Justice Florence: UNICEF 2, 1998

[113] Defence for Children International , Juvenile Justice: the Unwanted Child of State Responsibilities Geneva: Defence for Children International 1, 2001

and more like adult offenders[114]. Despite the presence in many African countries of the required juvenile justice institutions such as the juvenile courts, foster homes, training institutions, to mention just a few, the juvenile justice system is still widely understood to be an appendage of the adult criminal justice system[115]. Therefore, there is indeed a worldwide shunning by states of their responsibilities under the CRC, and the same applies to the African states with regards to the ACRWC. Zimbabwe is no exception to that.

This chapter will discuss this supposition in the context of pre-trial diversion, the administration of corporal punishment, separation of young offenders from adult offenders and the provision of legal aid to young persons in conflict with penal law.

4.2 Pre-trial diversion

Pursuant to its obligations under Article 40 paragraph 4 of the CRC, Section 81 (1) (i) (ii) of the new Constitution and sections 28 and 29 of the Children's Act, the Zimbabwean government, with the support from partners such as Save the Children and UNICEF among others, launched the pre-trial diversion programme in May 2013[116]**.** The programme is aimed at finding ways of diverting cases of juvenile delinquency and other crimes not considered to be serious from the formal criminal justice system. Crimes considered to be serious under this program are charges of treason, murder and rape[117]. Young people charged with such offences are not eligible for diversion. Under this program, young people in conflict with the law will receive rehabilitative, educative and restorative support through training so as to reintegrate them into society without such stigma as a criminal record would entail.[118]

When a young offender is already appearing in Court and it comes to the attention of the attorney General or his representative that the young offender meets the requirements for diversion in terms of national and international law, charges will be withdrawn before plea and the matter will be referred to the pre-trial diversion officer**.** When a young offender has been arrested by the police and the alleged young offender meets the requirements for

[114]B. J. Jacobs,"The Evolution of U.S. Criminal Law" in 6(1) *Issues of Democracy* page, Vol 6 No. 1, 2001, page 15.
[115]O. G. Odhiambo, The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context page 19-20
[116] "Pre-trial Detention in Zimbabwe: An Analysis of the criminal Justice System and conditions of pre-trial detention", report produced by Zimbabwe Lawyers for Human Rights, Law Society of Zimbabwe and the Community Law Centre of the University of Western cape, 2013.
[117] Section 135 of Criminal procedure and evidence act
[118] Ibid

diversion in terms of international and national law, the police will press charges against the young offender and a docket will be opened but no prosecution will take place[119]**.** The police will continue to give police cautions in terms of their rules and regulations. The case will be dealt with in terms of Section 351 of the Criminal Procedure and Evidence Act and the young offender may either be committed to a training institute or a reform school.

The Universal Periodic Report of Zimbabwe pointed to the contradictions between theory and practice with respect to diversion. It noted that "despite the availability of statutes to regulate the juvenile justice system, the challenge has been that judges have not been applying the protections provided for in the provisions. Consequently, some children have had to go through the rigorous process of trial."[120] This regrettable situation has been reported in numerous newspaper articles and has been confirmed by children's rights related NGOs. This author has had an opportunity to interview a 15 year old child ex-detainee who served a six month sentence for theft.

Simon Dube (real name withheld), 15 years of age, served a three-month sentence for theft. His mother confessed that her son returned from custody withdrawn, with frequent temper tantrums, nightmares, as well as a persistent cough and symptoms of scurvy. Although the son did not want to tell much about his experience in detention, it is clearly evident he went through a tough time. Dube was remanded in custody for seven weeks prior to his trial, which was in contravention of Article 17 (2) (c) and Article 40 (2) (b) (iii) of the ACRWC and the CRC respectively, which provide for a speedy determination of cases involving child offenders as well as Section 17 of the Children's Act which stipulates that pre-trial detention must not last more than seven days.[121]

Pre-trial diversion is not only necessary in as much as it diverts young offenders from the harsh, adversarial criminal justice proceedings, but it also shields them from the appalling conditions that are characteristic of Zimbabwean prisons. Most of them do not have either artificial or natural lighting, ventilation, running water, a wash basin, shower, soap, bedding,

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[119] Ibid

[120] ZIMBABWE: Child Rights References in the Universal Periodic Review, 17 August 2011, retrieved on the 14th of March 2014 from: http://www.bettercarenetwork.org/violence/search/closeup.asp?infoID=25817

[121] ZIMBABWE: Imprisoned youths open to abuse, 11 April 2012 retrieved on the 14th of march 2014 from: http://www.irinnews.org/printreport.aspx?reportid=95265

seating, heating or toilet paper. The toilets overflow, cannot be flushed from the inside, and are not separated from the remainder of the cells and cannot not be used except in full view of the other prisoners[122]. Up to seven detainees are placed in each cell, and the cells contain litter and human excrement. Detainees are not provided with food, blankets, or access to medical treatment, and are required to wear only one layer of clothing and go barefoot, despite the cold and unsanitary conditions in the cells[123]. These conditions of detention are indeed a nightmare for the juvenile offenders for they are inconsistent with human dignity as provided for under Article 37 CRC.

Dzimbabwe Chimbga, programme manager of local NGO Zimbabwe Lawyers for Human Rights (ZLHR), said child detention in Zimbabwe under the conditions described above is frequent and not uncommon. According to him, children are jailed for numerous crimes, including armed robbery, theft, fraud, rape and murder. He added that what was alarming, from a human rights point of view, was the fact that the minors are lumped up with hard core criminals in cramped conditions while awaiting trial, sometimes for six months[124]. All of the above clearly point to a pre-trial diversion programme which is not copying with the task/s for which it was formed.

4.3. The Cane

It has already been stressed in the previous chapters that judicial corporal punishment is a violation of Article 37 (a) of the CRC, read in conjunction with Article 17 (2) (a) of the ACRWC. Torture, cruel, inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment are prohibited. State practice has established such abolition as a norm of customary international law[125]. Section 20 (3) (a) of the Children's Act and Section 353 of the Criminal Procedure and Evidence Act expressly allow for judicial corporal punishment. In as much as these sections are unconstitutional, for they violate

[122] Pre-trial Detention in Zimbabwe: An Analysis of the criminal Justice System and conditions of pre-trial detention", report produced by Zimbabwe Lawyers for Human Rights, Law Society of Zimbabwe and the Community Law Centre of the University of Western cape, 2013.
[123] "Pre-trial Detention in Zimbabwe: An Analysis of the criminal Justice System and conditions of pre-trial detention", report produced by Zimbabwe Lawyers for Human Rights, Law Society of Zimbabwe and the Community Law Centre of the University of Western cape, 2013.
[124] Ibid
[125] Rule 90 of the Rules of customary international humanitarian law, identified by the Study on customary international humanitarian law, conducted by the International Committee of the Red Cross (ICRC) and published by Cambridge University Press in 2005. Retrieved on the 12th of March 2014 from http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule90

Section 53 of the later, they are also in violation of the two respective Articles of the CRC and ACRWC mentioned above.

The reasoning above is supported by Zimbabwean case law as it pertains to judicial corporal punishment. In S v. Ncube' a full bench of the Supreme Court of Zimbabwe unanimously held that the sentence of whipping contravened section 15(1) (now Section 53 under the new constitution, albeit with a few amendments) of the Declaration of Rights which is contained in the Constitution of Zimbabwe in that it constituted a punishment which in its very -nature is both inhuman and degrading.[126]

In passing this sentence, the Supreme Court of Zimbabwe paid due regard to the manner in which judicial corporal punishment is administered. It consists of flogging at the whipping post, which is, according to Justice Gubbay, a barbaric occurrence[127]. The punishment is not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but it also strips the recipient of all dignity and self-respect. To put it in his words:

> It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole civilized world ...By its very nature it treats members of the human race as non-humans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord him human status. … it is a procedure easily subject to abuse in the hands of a sadistic and unscrupulous prison officer who is called to administer it. It is degrading to both the punished and the punisher alike. It causes the executioner, and through him society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime

[126]John Hatchard, "The Fall and Rise of the Cane in Zimbabwe" *Journal of African Law*, Vol. 35, No. 1/2, Recent Constitutional Developments in Africa, 1991, pp. 198-204

[127] Ibid

in particular and the system of justice in general.[128]

The generation of hatred against the system of justice by judicial corporal punishment undermines the purpose of the juvenile justice system, which according to Article 17.1 ACRWC, read together with Article 40 paragraph 1 of the CRC, is to reinforce the child's respect for human rights and fundamental freedoms of others. What is particularly interesting in this case is that, in reaching this decision, the judge relied on the ECtHR case law, particularly Tyrer v. United Kingdom where a judicial birching of a 15-year-old child was held to contravene Article 3 ECHR as amounting to a degrading punishment[129]. The influence of European human rights law on Zimbabwean practice is also evident from the fact that the wording of Article 3 ECHR is virtually identical to the then Article 15 and now Article 53 of the Zimbabwean Constitution.

In another case, an 18-year-old male was convicted of an aggravated assault and sentenced to receive four cuts in accordance with the then section 330 and now section 353 of the Criminal Procedure and Evidence Act which allows a court to sentence young offenders to as much as ten cuts. In this case, chief Justice Dumbutshena described the sentence as "a type of institutionalized violence inflicted on one human being by another"[130]. He added that the whipping of juveniles is counter-productive because it breeds resentment and hostility towards society and frustrates any attempt at social readjustment.

If such is the outcome of judicial corporal punishment, then the aims of juvenile justice as enshrined in Article 17 paragraph 3 ACRWC are severely undermined. This Article clearly states that "the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation". Judicial corporal punishment achieves exactly the

[128] John Hatchard, "The Fall and Rise of the Cane in Zimbabwe" *Journal of African Law*, Vol. 35, No. 1/2, Recent Constitutional Developments in Africa (1991), pp. 198-204

[129] Tyrer v The United Kingdom, Case No. 5856/72, Judgement Strasbourg, 25 April 1978

[130] John Hatchard, "The Fall and Rise of the Cane in Zimbabwe" *Journal of African Law*, Vol. 35, No. 1/2, Recent Constitutional Developments in Africa (1991), pp. 198-204

opposite, no wonder why Justice Dumbutshena was able to conclude that it is antithetic to the evolving standards of decency that mark the progress of a maturing Zimbabwean society[131].

These two supreme court decisions are important to Zimbabwe in so far as they demonstrate that corporal punishment has no place in an enlightened criminal justice system and that Zimbabwe needs fresh approaches towards the development of rational sentencing policies. Presently Zimbabwe is violating its obligations under Article 37 (a) of the CRC and Article 17 (2) (a) of the ACRWC. Article 40.4 of the CRC provides a host of alternatives to judicial corporal punishment including, among others, care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes[132]. Regrettably however, the provisions that allow for judicial corporal punishment were not struck off from the Children's Act or the Criminal Procedure and Evidence and as a result, it is practised until the present day.

4.4 Detention and Separation from Adults

The Provisions of Article 40 CRC and Article 17 ACRWC with regard to the separation of young offenders from adult ones have been transposed into domestic law, as evidenced by the provisions of Section 81 (1) (i) (ii) of the new constitution and Section 63 (2) (d-e) of the Prisons Act.

In terms of Section 84 (1) of the Children's Act, a juvenile who is suspected of committing an offence must not be detained in a police cell, prison or any other detention facility unless the detention is necessary and there is no suitable remand home available. The Criminal Procedure and Evidence Act also empowers the magistrate, judge or police officer to release on free bail a child who is not facing charges of treason, murder or rape[133].

Excluding children accused of the so called serious offences such as rape, murder or treason from free bail in terms Section 135 of the Criminal Procedure and Evidence Act amounts to what Jacobs describe as adultification of the juvenile justice system[134] because such children are stripped off of their rights as juveniles by virtue of having committed serious offences

[131] Ibid
[132] Article 40 CRC
[133] Section 135 of Criminal procedure and evidence act
[134] B. J. Jacobs, "The Evolution of US Criminal Law", in *Issues of Democracy*, 2001, Vol.6, No. 1 page 15

and are consequently treated more severely, like adults. In short this means that children cease to become children for the purposes of their rights under the constitution, the Children's Act or the Criminal Procedure and Evidence Act the moment they commit serious offences. Indeed in Zimbabwe, the fact that the borders between the jurisdictions of the juvenile court and the adult criminal court remain porous is regrettable.

According to Section 135 of the Criminal Procedure and Evidence Act, release of a juvenile is permitted in cases when the child is not accompanied by an adult. In this case, the child has to be warned to appear in court at a future date. When accompanied by an adult, the juvenile is released into the custody of the adult who is warned to bring the child to court[135]. Alternatively a child can be placed in a place of safety as stipulated in Section 15 of the Children's Act. The Prisons Act does not necessarily set up special detention places for children, but when children are detained in the same prison complex with adults, they must be kept in separate holding cells from adults[136].

The only condition upon which a young person in conflict with the law may not be detained is that there is no suitable remand home available[137]. This is a flawed piece of legislation in that it justifies juvenile detention on the grounds that there is no suitable remand home available. It puts the rights of children in conflict with the law under precarious circumstances given that Zimbabwe does not have enough of such facilities.

For example the right of children deprived of their liberty to education and training in terms of Article 40 paragraph 4 of the CRC is seriously undermined by the fact that there is only one juvenile prison, Khami Medium in Matabeleland province, which offers four years secondary education[138]. As a result, not all young offenders in detention have access to education. One then wonders what will happen to the right to education and training of those young people detained in other detention facilities other than Khami.

According to the universal periodic review of Zimbabwe conducted by the UN Office of the High Commissioner for Human Rights in 2011[139], Zimbabwe fared dismally in as far as the

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[135] Ibid
[136] Section 63 (2) (d-e) of the Prisons Act
[137] Section 84 of the Children's Act.
[138] Universal Periodic Review : Zimbabwe: Defence for Children International –Zimbabwe, retrieved on the 10th of April 2014 from: http://lib.ohchr.org/HRBodies/UPR/Documents/session12/ZW/DCI-DefenceChildrenInternational-eng.pdf
[139] Ibid

separation of young offenders from adults is concerned. The report concluded that most juvenile offenders are imprisoned with adults and often abused. Not all young offenders can be accommodated in so few juvenile detention facilities.

4.5 Legal Aid

Zimbabwe has an obligation under Article 40 (2) (b) (ii) of the CRC and Article 17 (2) (c) of the ACRWC to provide mandatory legal aid to young people in conflict with the law. While it is commendable that the government has created a Legal Aid Directorate to provide legal advice to the poor, indigent and marginalised, it is regrettably manned by just fifteen lawyers, who mostly work in the capital city and who primarily take civil cases[140]. Apart from the fact that they are only based in Harare, which is only one province out of ten, they do not have any mandate to prioritize cases involving young people in conflict with the law. As a result of such limitations, a lot of accused persons, including children, fail to secure any legal representation upon arrest. This is particularly pronounced in areas outside the capital city, where there are no provisions for free legal services for those who cannot afford legal representation[141].

In terms of The Legal Aid Act, Part iii, Section 7.2 (a) (ii), the success of any application for legal aid in terms of Section 7 and 8 is subject to the availability of resources at the Legal Aid Directorate and the Legal Aid Fund. Due to the fact that government institutions are financially constrained, legal aid cannot, unfortunately, be made available to all that require it[142]. As already noted, this is the only piece of legislation upon which the children who are in conflict with the law can rely on.

As a result, local prisons often end up being populated with inmates who might not have committed the crimes they were accused of or who received custodial sentences longer than necessary because they had no legal representative to support them in arguing their cases[143]. Consequently, this added to the population pressure in detention facilities in the country. Children are not spared from this unfortunate situation, as has been stated in the

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[140] "Pre-trial Detention in Zimbabwe: An Analysis of the criminal Justice System and conditions of pre-trial detention", report produced by Zimbabwe Lawyers for Human Rights, Law Society of Zimbabwe and the Community Law Centre of the University of Western cape, 2013.
[141] Ibid
[142] Ibid
[143] Ibid

Universal Periodic Review Report of 2011, which condemned the Zimbabwean Juvenile Justice System for not providing free legal services to juveniles whose parents or guardians lack the means to engage a lawyer[144]

4.6 Juvenile Detention Facilities

The conditions in the detention facilities are so appalling that they present a nightmare for the children that are sent there. The conditions obtaining in these prisons strip the children of their humanity and dignity. The right to health, food and education are flagrantly violated. Toilets at Wha Wha Young Offenders Prison in the Midlands Province, for instance, where approximately 90 percent of the 400 young offenders are incarcerated for rape[145], do not flush and the children have to use buckets to clean their excrement[146]. As if that is not enough, the inadequacy of toiletries is alarming and it is not uncommon for inmates to suffer from cracked skins due to cold weather coupled with lack of skin detergents such as Vaseline, which is commonly used in Zimbabwe to prevent such drying and cracking of the skin[147].

No warm clothing is provided and cases of children who suffer from pellagra due to protein deficiency are not uncommon, particularly among juvenile detainees who are allergic to beans, which is the only source of protein available to them[148]. It is normal for food to run out and juveniles rely on supplies from relatives when they visit[149].

In 2011, the government failed to pay examination fees for the majority of the inmates at Khami and Wha Wha and as a result, they were not able to sit for their exams[150]. During a tour of Zvishavane Prison by the Zimbabwe Association for Crime Prevention and Rehabilitation of the Offender (ZACRO) there was a boy aged 15 years, who had been in pre-trial detention for a full month, in clear violation of Section 17 of the Children's Act which states that pre-trial detention of young persons must not last more than 7 days. This is

[144] ZIMBABWE: Child Rights References in the Universal Periodic Review, 17 August 2011, retrieved on the 14th of March 2014 from: http://www.bettercarenetwork.org/violence/search/closeup.asp?infoID=25817

[145] Universal Periodic Review : Zimbabwe: Defence for Children International –Zimbabwe (see 138 above)
[146] Zimbabwe Association for Crime Prevention and Rehabilitation of the Offender (ZACRO) Prison Report, 2012
[147] Ibid
[148] Ibid
[149] Ibid
[150] Ibid

particularly disturbing because the Zvishavane prison is an adult Prison which does not have special facilities for juveniles.

There are also reports of young offenders being imprisoned in similar cells as adults who would have been convicted of rape, murder and robbery at the Wha Wha Prison thus exposing them to both physical and sexual abuse. The facility is overcrowded, with more than 70 people sharing a single cell[151], thus undermining the young offenders' right to health. Regrettably therefore, apart from having been so progressive in domesticating international law with regard to juvenile justice, Zimbabwe has not taken practical measures to ensure that children are dealt with in a manner appropriate to their well-being and special circumstances, as required under Article 40 paragraph 4 CRC read together with Article 17 paragraph 1 of the ACRWC.

It is clear therefore that Zimbabwe has put juvenile justice at the bottom pile of its resource allocation, in violation of its obligations under Section 37 and 40 of the CRC as well as Article 17 of the ACRWC, which oblige it to put in place legislative and administrative measures for the attainment of the rights provided for under these Articles to the intended beneficiaries.

No meaningful efforts have been done to upgrade the conditions of prisons for juveniles. The stark contradiction between theory and practice in the juvenile justice system of Zimbabwe is also evident in the fact that in terms of Section 86 of the Children's Act, the government must provide grant-in-aid to local non-governmental organizations working in Zimbabwe for the protection of the rights of the children. During interviews conducted by this author, such organizations, which include Justice For Children Trust, ZACRO, Save the Children, to mention a few, have testified that they do not receive any funding from the government.

4.7 Conclusion

The Zimbabwean legal system, particularly the Constitution, the Children's Act, the Criminal Law Codification and Reform Act, the Criminal Procedure and Evidence Act, the Prison Act as well as the Legal Aid Act have made impressive progress in as far as domesticating the

[151] "Pre-trial Detention in Zimbabwe: An Analysis of the criminal Justice System and conditions of pre-trial detention", report produced by Zimbabwe Lawyers for Human Rights, Law Society of Zimbabwe and the Community Law Centre of the University of Western cape, 2013.

provisions of Article 37 and 40 CRC and Article 17 ACRWC. However, the rights of the children in conflict with the law, as provided for under the Constitution and the pieces of legislation mentioned above, are not always granted to them in practice in Zimbabwe. The Zimbabwean juvenile justice system is not in practice what it is in theory.

Judicial corporal punishment is still permissible under the Criminal Procedure and Evidence Act and is still being practised despite the fact that it is forbidden under Article 37 and Article 17 of the CRC and the ACRWC as well as under Section 53 of the Constitution of Zimbabwe. Apart from the fact that such barbaric acts as judicial corporal punishment are forbidden under customary international law, they have also been shown to constitute conduct which is degrading by the Zimbabwean Supreme Court.

While it is commendable that Zimbabwe has launched the pre-trial diversion program in line with its obligations under the CRC and the ACRWC, it is regrettable that the program is not copying with the task for which it was formed as most young offenders still find it difficult, if not impossible, to escape the formal criminal justice proceedings. Their trial, sentencing and detention are not uncommon in Zimbabwe. They are jailed for crimes ranging from theft, robbery, fraud and rape, among others.

Their detention is not done according to standards and norms of international human rights law. They are kept in detention for longer than what is stipulated under both national and international law. As if that is not enough, they are in several cases detained together with adults, in violation of both international and domestic law.

The availability of legal aid for children is not guaranteed by any constitutional or legal instrument in Zimbabwe. In fact, it is subject to the availability of resources at the Legal Aid Directorate and the Legal Aid Fund. When such resources are not available, children face the full wrath of the criminal justice proceedings without any legal representation. This is a clear violation of Article 17 (2) (c) of the ACRWC which provides for mandatory legal representation of children in criminal justice proceedings.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

There is no universally agreed definition of the term juvenile or child for the purposes of juvenile justice. International law only obliges states to have a minimum age below which children shall be deemed to lack capacity to commit criminal offences but does not set in stone this minimum age. Rather it leaves discretion to different states to set up this minimum age and as such, this minimum age varies between states. There is a consistent trend though, that most states set up this age between 16 and 18 years of age. An appropriate working definition then would be the one that takes into consideration such variations. A child or juvenile, for the purposes of juvenile justice is any young person who under the respective legal systems may be dealt with for an offence in a manner different from an adult.

The history of juvenile justice shows a traceable evolutionary trajectory from a time when young persons in conflict with the law were dealt with for offences in a manner similar to adults, to a time when they were subjects of state intervention and protection under the auspices of the doctrine of *parens patriae*. The 19th century criminological theorists, particularly welfarists, revolutionized the concept of juvenile justice by enlightening the states to the necessity of treating young persons in conflict with the law in a manner that is different from adults. The influence of the doctrine of welfarism was such that Western states began to create separate juvenile justice institutions to deal with young persons in conflict with penal law. The first of such institutions emerged in 1899 in Chicago when the first juvenile court was established. The trend quickly spread to the rest of the United States of America and Western Europe. Africa became the beneficiary of this idea of a separate justice system for young persons in conflict with the law by virtue of it being under the colonial influence of the West.

The concept of a separate juvenile justice system for young persons in conflict with the law became incorporated into international human rights law through a series of UN Conventions. Notable examples are the International Covenant on Civil and Political Rights of 1966, the Beijing Rules 0f 1985, the Convention on the Rights of the Child of 1989, the African Charter on Human and people's Rights of 1981,the African Charter on the Rights and Welfare of the Child of 1990, to mention but a few. All of these conventions attest to a

heavy influence of welfarism by embracing the idea of that children are weak, immature and vulnerable, and as such, have to be treated differently from adults particularly in cases when they are accused, or are found guilty of infringing penal law.

The present international human rights regime as it pertains to juvenile justice began with the UDR which laid down the framework for specific human rights which address different rights interests. The provisions of Article 14 ICCPR of 1966 represent the first inclusion of provisions that pertain to the administration of juvenile justice in a global treaty.

The CRC of 1989, which has a worldwide universal acceptance save for the failure of the US and Somalia to ratify it, was the first international instrument to adopt a coherent child rights approach to the international legal regulation of juvenile justice. Article 37 and 40 make it the first binding treaty that acknowledged that young persons in conflict with penal law had to be dealt with in a manner different from that of adults. It goes further and prescribes ways by which young persons in conflict with penal law have to be treated, from arrest, interrogation, trial and sentencing. These two Articles set out a list of human rights guarantees that have to be accorded to these young persons at all stages of the criminal justice proceedings.

The Convention has an independent monitoring body, the CROC, which oversees the implementation of the Convention by state parties. It has already passed concluding observations on Zimbabwe's compliance to the convention in 1966 and made constructive recommendations thereto.

At the regional level, Africa states, save for seven of them, have signed and ratified the ACRWC, Article 17 of which almost repeat verbatim the provisions of Article 37 and 40 of the CRC. It obliges states to treat children in conflict with penal law in a special, prescribed manner that takes into consideration their human rights. Although its independent monitoring body, the Committee of Experts on the Rights and Welfare of the Child is still in its infancy with respect to its responsibility to monitor the implementation by state parties of the ACRWC, its existence is an important step in the positive direction.

International law that govern the administration of juvenile justice in terms of Article 37 and 40 of the CRC and Article 17 of the ACRWC forms a package that consists of the need to

divert young persons in conflict with penal law from formal, adversarial criminal justice proceedings, the importance of detaining them only as a measure of last resort and for the shortest period of time possible. Such detention has to be done in a manner that respects their human rights. The package also includes several due process guarantees for these children that, despite the necessity to divert them, are brought before the formal, criminal justice proceedings. When they are found guilty of an offence, their sentencing should be done in a manner that takes into consideration their special circumstances in line with the guidelines provided for under Article 37 and 40 of the CRC as well as Article 17 of the ACRWC. Such guidelines include, among other things, the prioritization of non-custodial sentences.

The CRC and the ACRWC set frameworks within which the provisions set out therein have to be implemented at the domestic level. Zimbabwe, by virtue of it being party to both treaties, is under an obligation to undertake legislative, administrative and other measures for the implementation of the rights set out therein. The only way to do this is to craft a child rights oriented juvenile justice system comprising of specific laws, procedures and institutions that deal with young persons in conflict with penal law.

Zimbabwe is a dualist state and as such, treaties to which it is party, which in this case are the CRC and the ACRWC, do not form part of the law unless they have been incorporated into domestic law by an act of parliament. The new constitution, which came into force barely a year ago, thus repealing the old constitution, encourages the courts, under Section 46, to take into account international law and all treaties to which Zimbabwe is party when interpreting the bill of rights, which itself have been widened under the new constitution to include most, if not all of the provisions of Article 37 and 40 of CRC as well as Article 17 of the ACRWC. The new constitution also introduced compulsory domestication of all international treaties to which Zimbabwe is party under Section 34.

Neither the Constitution nor the Legal Aid Act provides for the mandatory legal aid to young persons in conflict with penal law. Legal aid for children in conflict with penal law is only made available subject to availability of human and financial resources at the Legal Aid Board. The provision of legal Aid by the Legal Aid Board is also discriminatory in that it is in most cases made available to those that live in the capital, Harare. All staffers of the Board

are resident in Harare, making it difficult for those outside the capital to benefit from their services.

In line with the 1996 recommendations of the Committee on the Rights of the Child in its concluding observations on Zimbabwe's compliance with the CRC, the new constitution now expressly prohibits capital punishment for young persons found guilty of infringing penal law. This is a significant improvement since the old constitution was silent in this regard. In yet another improvement in line with CROC's recommendations, corporal punishment is now prohibited under the new constitution. However, the Criminal Procedure and Evidence Act and the Children's Act have not been amended in line with this new constitutional dispensation and as such, they still allow for corporal punishment to be administered to young persons found guilty of infringing penal law under Section 353 and Section 20 respectively.

Nevertheless, the domestication of the Article 37 and 40 of the CRC as well as Article 17 ACRWC Children's is clearly evident in the provisions of the Children's Act and the Criminal Procedure and Evidence Act. In some instances, particularly with regards to the Children's Act, these provisions are repeated verbatim.

There is a contradiction between theory and practice with respect to the administration of juvenile justice in Zimbabwe. Zimbabwe has signed and ratified the CRC and the ACRWC. The domestication of the same, particularly Article 17 ACRWC and Articles 37 and 40 of the CRC, though not complete, has been generally satisfactory, thus giving a false impression that the rights of the of young persons in conflict with the law are largely protected in Zimbabwe.

These rights and Protections are not always extended to their supposed beneficiaries in practice. This scenario is not only limited to Zimbabwe but is regrettable a worldwide practice. As in many other states, there are instances where the adultification of the juvenile justice system is evident.

Judges do not always apply the protections provided for under the constitution and the relevant pieces of legislation when they deal with matters involving young people. In contrast to the Criminal Procedure and Evidence Act as well as the Children's Act which

provide for diversion of young offenders from the formal criminal justice proceedings, children have in several cases regrettably had to go through the rigorous and adversarial process of trial. In many instances they are subjected to custodial sentences wherein they are detained with adults in violation Article 17 and 40 of the ACRWC and CRC respectively.

The determination of cases involving children is not done speedily in terms of Article 17 ACRWC and Article 40 CRC. Children stay in detention for lengthy periods of time pending the finalization of their cases. This is particularly unfortunate considering the appalling conditions of Zimbabwean prisons. The children's Act makes the detention of Children separately from adults subject to the availability of suitable remand homes. Thus the detention of children with adults can be justified in terms of the absence of suitable remand homes. There is only one juvenile detention facility that offers secondary education and one wonders what happens to children in the rest of the detention facilities with respect to their education.

Case Law in Zimbabwe has ruled judicial corporal punishment to be inhuman and degrading but the provisions of the Children's Act and the Criminal Law Codification and reform Act that allows for judicial corporal punishment have not been repealed in line with the Supreme Court rulings. They exist until the present day.

Only young persons charged with offences other than treason, murder or rape, the so called serious offences, are deemed suitable for diversion. This amounts to adultification of the juvenile justice system in that children are stripped of their rights as children, or they cease to become children for the purposes of their rights under the Constitution, the Children's Act or the Criminal Procedure and Evidence Act, the moment they commit these so called serious offences.

Zimbabwe must remove juvenile justice from the bottom of the pile in as far as resource allocation is concerned. Adequate resources have to be allocated towards the upgrading of juvenile detention facilities so that they can be able to provide essential services such as education, health, food, to mention a few. Pre-trial diversion must be accorded the prominence that it deserves according to international law. If more children are diverted from the formal criminal justice system, and if the courts prioritize non-custodial sentences, this will help depopulate the prisons in Zimbabwe. The government must provide support to

local NGOs working in the area of juvenile justice in terms of Section 86 of the Children's Act.

The constitution and the Legal Aid Act have to be amended to allow for mandatory legal aid for juveniles in conflict with penal laws. The Children's Act and the Criminal Procedure and Evidence Act have to be aligned to the new constitutional dispensation, thus removing provisions that allow for judicial corporal punishment, paying due regard to the fact that the later has been ruled to be inhuman and degrading by the supreme court.

Zimbabwe has a constitution which is progressive in terms of treating young persons in conflict with the law according to the norms and standards of international human rights law. But constitutionalism, that is the will and ability to put these norms and standards into practice, is lacking. Therefore, with respect to juvenile justice, Zimbabwe can be said to have a constitution without constitutionalism. Having constitutional, legal and institutional frameworks for the rights of young persons in conflict with the law is one thing. The actual enjoyment of such rights by the intended beneficiaries is another thing and this is regrettably the case in Zimbabwe.

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