

**PROTECTING THE RIGHTS OF DETAINED JUVENILE
DELINQUENTS: TANZANIA'S COMPLIANCE WITH
INTERNATIONAL STANDARDS**

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DECLARATION

I do hereby declare that this thesis entitled “**Protecting the Rights of Detained Juvenile Delinquents: Tanzania’s Compliance with International Standards**” which is submitted for the award of Degree of **Doctor of Philosophy in Law** has been carried out by me under the guidance of **Prof. L. Jayasree**, the Head, P.G. Department of Legal Studies and Research, Acharya Nagarjuna University. This thesis is original and has not been submitted in part or full for the consideration of any Degree or Diploma to this University or any other University or Institution.

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Mwajuma Kadilu.



DEDICATION

To all Tanzanian children deprived of liberties, who often remain invisible and forgotten.

Abstract

The main idea of this study is to assess Tanzania's compliance with international standards in protecting the rights of detained juvenile delinquents. The study is based on the premise that Tanzania is not protecting the rights of juvenile delinquents up to the required international standards. Sometimes, juveniles are involved in delinquent acts which bring them in contact with the police, courts or find themselves in detentions where they may be incarcerated. Consequently, they become victims of human rights violations as they are often detained for long period of time, sometimes in adult facilities where they are at high risk of violence including sexual violence, acts of torture, punishment and inhuman or degrading treatment. They also lack legal assistance throughout legal processes and in the detentions there are no rehabilitation and reintegration programmes to prepare them for life after release.

Divided into six chapters, this study examines Tanzania's compliance with international standards in protecting the rights of detained juvenile delinquents. The study is confined to the Mainland Tanzania and it is limited to the rights of juvenile delinquents when they are placed in penal detentions only. It does not address the rights of juvenile delinquents in mental health detentions or when they are under the custody of Social Welfare or Immigration Officers. The work consists of data from library research which lays a theoretical framework of the problem and field data that supports the theoretical work. Through library research, books, legislations, articles, international conventions, government notices, various reports and periodicals were examined. In the field research, data were collected from twenty two detention facilities and from individuals dealing with the administration of juvenile justice in Tanzania.

The study revealed that despite the Government's efforts to improve juvenile justice system, the laws and practice governing detained juvenile delinquents are still falling short of international standards which the country has ratified and domesticated. The major reason for non compliance with international standards has been found to be the poor administration of juvenile justice rather than lack of infrastructures as contended by the Government in its various reports. The country is also lacking the actual

implementation of the laws relating to juvenile justice. In the end, the study suggests *inter alia*, that there is a need to establish and operate Retention Homes in all zones of the country and to construct juveniles' cells, wings or wards in all police stations and prisons. Further, the researcher urges the Ministry of Constitutional and Legal Affairs to establish the Government-funded legal aid scheme for juvenile delinquents to ensure free and accessible legal assistance to them so as to realise their rights throughout the justice process.

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Glossary of Abbreviations and Acronyms

AC	Appeal Cases
AIR	All India Reports
AIDS	Acquired Immune Deficiency Syndrome
%	Percentage
(T)	Tanzania
Art	Article
ARV	Anti-Retroviral
C.J.	Chief Justice
Cap	Chapter
CHRAGG	Commission for Human Rights and Good Governance
CJI	Chief Justice of India
Co.	Company
CRC	Convention on the Rights of the Child
Cri.	Criminal
DNA	Deoxyribonucleic acid
DPP	Director of Public Prosecutions
Ed.	Editor
Edn.	Edition
Eds	Editors
Et al	<i>Et alii</i> (and other people)
EWHC	High Court of England and Wales
F	Female
Fed.	Federal
G.N.	Government Notice
H.C.D.	High Court Digest
HC	High Court
HIV	Human Immunodeficiency Virus

http	Hyper Text Transfer Protocol
<i>Ibid.</i>	<i>Ibidem</i> (the same).
ICCPR	International Covenant on Civil and Political Rights
Inc.	Incorporation
J.	Judge
J.A.	Justice of Appeal
JK	Jaji Kiongozi
KWIECO	Kilimanjaro Women Information Exchange
L.J.	Lord Justice
LL.B	Legum Baccalaureus (Bachelor of Laws)
LL.D	Legum Doctor (Doctor of Laws)
LL.M	Legum Magister (Master of Laws).
LLC	Limited Liability Company
<i>Loc. cit.</i>	<i>Loco citato</i> (in the place cited)
LRC	Law Reform Commission
LRT	Law Reports of Tanzania
Ltd.	Limited
M	Male
Misc.	Miscellaneous
N.G.O.	Non-Governmental Organisation
N/A	Not Applicable
No.	Number
NOLA	National Organization for Legal Assistance
Op.cit.	<i>opus citatum</i> (the work cited).
Org.	Organisation
Ors.	others
p.	page
P.G	Postgraduate
Para	paragraph
PC	Primary Court

PhD	Doctor of Philosophy
Pm	Post Meridiem
pp.	pages
R	Republic
R.E.	Revised Edition
S	Section
S/N	Serial Number
SC	Supreme Court
SCC	Supreme Court Cases
SSRN	Social Sciences Research Network
Supdt.	Superintendent
<i>Supra</i>	<i>Supraorbital</i> (earlier cited authority).
TB	Tuberculosis
TLR	Tanzania Law Reports
TLS	Tanganyika Law Society
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNICEF	United Nations International Children's Fund
USA	United States of America
v.	versus
Vol.	Volume
www	World Wide Web

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CHAPTER 1

1. INTRODUCTION

1.1 Background to the Study

This research attempted to examine the protection of detained juvenile delinquents' rights with focus on Tanzania's compliance with international standards. It is concerned firstly with the principles and procedures of the Criminal Law of Tanzania, and secondly, it has its relationship with the principles and procedures as have grown in the domain of Public International Law and in regard to which Member States of the United Nations, Tanzania included, have to adhere to the standards set out in the international instruments so that there is protection to the rights and welfare of the juvenile delinquents apart from other individuals.

Since the inception of the 1959 Declaration on the Rights of the Child,¹ the world States recognised the vulnerability of the child, who by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection when in conflict with the law.² The United Nations Convention on the Rights of the Child, 1989³ is a successor to the 1959 Declaration and it provides for the minimum standard of protection of children's rights, below which States should not go.⁴ Decisions as to the form and scope of legal protection of the child have been left to individual States. Tanzania ratified the United Nations Convention on the Rights of the Child, 1989 on 10th June, 1991.⁵ Again, in 1990, the Organisation of African Unity (now African Union), passed the African Charter on the Rights and Welfare of the Child,⁶ which Tanzania ratified on 9th May, 2003.

¹ United Nations General Assembly Resolution 1386 (XIV) of 20th November, 1959.

² Office of the High Commissioner for Human Rights, "Legislative History of the Convention on the Rights of the Child, 1989, Vol. 1." Geneva: United Nations, 2007, p. 37.

³ United Nations General Assembly Resolution 25/44 of 20th November, 1989.

⁴ Legislative History of the Convention on the Rights of the Child, *loc. cit.*

⁵ United Nations Treaty Collection: *CRC Ratification Status* as at 25th October, 2017.

⁶ Adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Addis Ababa, Ethiopia - July 1990.

Following the ratification of these legal instruments and other children's rights international texts, Tanzania enacted the Law of the Child Act in 2009.⁷ This legislation, among other things, brings the rights of juvenile delinquents enshrined in international legal instruments into practice at the national level. This is a very useful step towards protection of juveniles' rights because Tanzanian law enforcement agencies are accustomed to using domestic texts and rarely make reference to international laws. Therefore, in essence, Tanzania has domesticated the fundamental international legal instruments for the protection of juvenile delinquents' rights. However, the greatest challenge presently, is that of achieving the implementation of the Law of the Child Act, 2009 in line with the domesticated international standards. This is confirmed by the prevalence of undue delay of juveniles' cases, lack of legal assistance and representation of juvenile delinquents during criminal justice processes, long pre-trial and post trial detention of juvenile delinquents, and ill-treatment of juveniles in detentions, to mention a few.

The best ways to ensure protection of juvenile delinquents' rights include avoiding dealing with them through general criminal laws, institutions and procedures and keeping them from being held in detentions while awaiting trial and from being sent to prisons for adult offenders.⁸ Psychologists have argued that juvenile offenders are less culpable for their crimes than adults.⁹ They contend that cognitive processes that are central to sound judgment, especially in group situations, develop during adolescence.¹⁰ Therefore, adolescents should be less culpable for their crimes than adults because of their diminished and still-developing decision making skills.

In the international law perspective, a child is not supposed to be named as an 'accused or convicted person or identified in relation to any other terms which are used to refer to

⁷ Act No. 21 of 2009.

⁸ Jensen, E., and Jepsen, J., (Eds), "Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice Systems." Oxford and Portland: Hart Publishers, 2006, p. 4.

⁹ Robb, C., "Attorney and Lay Beliefs about Factors Affecting Jurors' Perceptions of Juvenile Offender Culpability." *Journal of Psychology, Crime and Law*, Vol. 18, No.1, 2012, pp. 113-128, at p. 114.

¹⁰ *Ibid.*

persons involved in criminal conducts.¹¹ According to Sickmund, juvenile delinquency can be grouped into two general categories; behaviours which would be defined as criminal offences if committed by adults and behaviours that are prohibited only for minors, which are called status offences.¹² Children's harmful activities are only behaviours which are socially undesirable, but they may not be regarded as crimes so as to render the concerned child a criminal. However, in Tanzanian laws and practice, phrases such as 'a child who is accused of, found guilty of, or convicted of...' are usually used along with the phrase 'children in conflict with the law.'¹³ For example, the Law of the Child Act¹⁴ uses the term 'a child in conflict with the law' in Part IX, but provides that where a child is convicted of an offence which if committed by an adult would have been punishable by a custodial sentence, the court may order that child to be committed to custody at an approved school.¹⁵ Further, in *Republic v. Thomas Andrea*,¹⁶ the accused person was a boy of 17 years who was charged with an offence of unnatural offence contrary to section 154 of the Penal Code, 1961 as amended by the Sexual Offences, (Special Provisions), Act, No. 4 of 1998. The victim was a male child aged 7 years. At the conclusion of the trial, the Court held that due to the evidence adduced, "the accused person is found guilty of an offence of unnatural offence as charged."¹⁷ Throughout the proceedings in this case, a juvenile delinquent (Thomas Andrea), was referred to as the accused person.

It should be noted that both the international and Tanzanian laws do not prohibit holding responsible the juveniles for their delinquency acts, but laws require juvenile delinquents

¹¹ See for example Art. 40 (2) (b) (v), United Nations Convention on the Rights of the Child, 1989 and Sickmund, M., "The Context of Juvenile Justice: Defining Basic Concepts and Examining Public Perceptions of Juvenile Crime." Boston: Jones and Bartlett Publishers LLC, 2006, p. 4.

¹² *Ibid.*

¹³ See for example Section 131 (2) of the Penal Code, 1961 as amended by Section 6 of the Sexual Offences, (Special Provisions), Act, No. 4 of 1998. It provides that where the offence of rape is committed by a boy who is of the age of eighteen years or less, if he is a first offender, he should be sentenced to corporal punishment only, but if he is a second time offender, he must be sentenced to imprisonment for a term of twelve months with corporal punishment and if he is a third time and recidivist offender, he should be sentenced to five years imprisonment with corporal punishment.

¹⁴ Act No. 21 of 2009, now Cap. 13.

¹⁵ S. 120 (1), Law of the Child Act, 2009, [Cap. 13].

¹⁶ Criminal Case No. 28 of 2012, Juvenile Court of Dar es Salaam, at Kisutu, (unreported).

¹⁷ *Ibid*, p. 6.

to be dealt with in a way that respects their rights, humanity and dignity.¹⁸ This study examines the extent to which Tanzania complies with the international standards on the protection of detained juvenile delinquents' rights. The researcher has dealt with the laws and institutions applicable to Mainland Tanzania only, and a reference to Tanzania is a reference to Mainland Tanzania. Tanzania is the United Republic, which is a union of two countries, namely, the former Republic of Tanganyika and the People's Republic of Zanzibar.¹⁹ Geographically, Tanzania is located immediately South of the Equator. It lies between latitudes 10 to 110 45' South, and longitudes 290 20' to 400 38' East.²⁰ On the West, the country is bordered by Rwanda, Burundi and Democratic Republic of Congo, on the East by the Indian Ocean, on the North by Kenya and Uganda, on the Southwest by Zambia and Malawi and on the South by Mozambique. It occupies a total area of 885,800 km² and the total population is about 43.6 million people.²¹ Tanzania consists of 26 administrative regions categorized into six administrative zones, namely, the Coastal zone, Lake Zone, Northern zone, Southern zone, Central zone and Southern Highland zone.

In the context of criminal justice, detention is defined as the confinement, custody or imprisonment of a person.²² A person in detention is not only physically restrained but also, by virtue of restriction of liberty, has a diminished capacity to withstand the influences of others.²³ Incarceration imports a relationship of dependency, a detained person cannot walk away and he relies upon his jailers for the basic necessities of life.²⁴ Thus, detention imposes a vulnerability to the detained person and where such person is a juvenile, he becomes more vulnerable. As such, detained juveniles are entitled to

¹⁸ Article 37 (c), the United Nations Convention on the Rights of the Child, 1989, Article 17 (1), African Charter on the Rights and Welfare of the Child, 1990, Section 55 (1), Criminal Procedure Act, 1985 and Article 13 (6) (d) of the Constitution of the United Republic of Tanzania, 1977 which stipulates that human dignity shall be protected in all activities pertaining to criminal investigations and processes.

¹⁹ Shivji, I., "The Legal Foundation of the Union in Tanganyika and Zanzibar Constitutions." Dar es Salaam: Dar es Salaam University Press, 1990, p. 213.

²⁰ https://www.mapsofworld.com/lat_long/tanzania-lat-long.html, last accessed on 22.11.2017.

²¹ The United Republic of Tanzania, "Population and Housing Census." Dar es Salaam: National Bureau of Statistics, 2012, p. 7.

²² Garner, B., "Black's Law Dictionary, 9th ed." Minnesota: West Publishing Company, 2009, p. 469.

²³ Kapoor, K., and Kapila, S., "Custodial Torture: A Gross Violation of Human Rights." *Journal of Legal Studies and Research*, Vol. 2 Issue 2, April, 2016, pp. 125-140, at p. 125.

²⁴ *Ibid*, p. 126.

numerous rights, including the right to be separated from adults, right to be detained for the shortest appropriate period of time, right to the treatment which respects their human rights, right to free legal assistance and representation, and the right to rehabilitation and reintegration programmes while in detentions.²⁵ Article 37 of the United Nations Convention on the Rights of the Child, 1989 establishes the leading principles regarding the detention of the juvenile delinquents and the standards governing the deprivation of liberty of children.

For the avoidance of monotony, in this study, the terms ‘juvenile’ and ‘child’ will be used and construed interchangeably. A child under international, regional and national laws is defined in terms of age.²⁶ However, the domestic laws of countries have laid down different minimum ages below which a person is exempted from prosecution and punishment.²⁷ The definition of a child is, therefore, made dependent on each respective legal system in order to accommodate the different economic, social, political, cultural and legal systems of the respective State.²⁸ The United Nations Convention on the Rights of the Child, 1989, defines a child as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.²⁹ In Article 2 of the African Charter on the Rights and Welfare of the Child, 1990, a child is defined more concisely as ‘every human being below the age of eighteen years.

The Tanzanian Constitution, 1977 does not define a child, but other national laws define a child depending on the context and purpose which a particular legislation intends to achieve. For example, for the purpose of employment, a child is defined as any person

²⁵ Art. 37 and 40, United Nations Convention on the Rights of the Child 1989, Art. 17, African Charter on the Rights and Welfare of the Child, 1990 and Part IX, the Law of the Child Act, 2009.

²⁶ MA Abdulraheem-Mustapha, “Child Justice Administration in the Nigerian Child Rights Act: Lessons from South Africa.” *African Human Rights Law Journal*, Vol. 16 No. 2, 2016, pp. 435-457, at p. 438.

²⁷ Example, the official minimum age of criminal responsibility in countries such as Australia, Bangladesh, Egypt, Tanzania, The Gambia, Ghana, India, Nigeria, Sudan, South Africa, Iraq, Kenya, the United Kingdom, Scotland, Turkey, Canada, Colombia, Sweden, Burundi, Gabon, Netherlands, Saudi Arabia, New Zealand and a host of others ranges from eight years to 18 years. See Save the Children U.K., “Juvenile Justice: Modern Concepts in Working with Children in Conflict with the Law.” London: Save the Children, 2013.

²⁸ MA Abdulraheem-Mustapha, *loc. cit.*

²⁹ Art. 1, United Nations Convention on the Rights of the Child 1989.

below fourteen years,³⁰ for the purpose of marriage, the Law of Marriage Act, 1971, defines a child as a person who is below the age of eighteen years for males and below the age of fifteen years for females.³¹ The Constitutionality of this Section has been challenged before the High Court of Tanzania³² where the same was declared to have lost its usefulness and therefore unconstitutional for giving preferential treatment between boys and girls with regard to the eligible age for marriage.³³ The Government, through the Attorney General, was directed to amend Section 13 of the Law of Marriage Act, 1971 and provide for eighteen years as the eligible age for marriage in respect of both girls and boys.³⁴ Being aggrieved with this decision, the Attorney General appealed to the Court of Appeal of Tanzania where the matter is presently pending for determination. The United Nations Committee on the Rights of the Child expressed its concern that certain laws of Tanzania do not fully comply with the principles and provisions of the Convention on the Rights of the Child, 1989 and hinder the full realization of children's rights in the State Party, notably the Law of Marriage Act, 1971, the Penal Code, 1961 and the laws on inheritance.³⁵ It is hoped that the Tanzanian proposed Constitution of 2014 once approved, will facilitate the harmonization of definitions of the child in other laws.³⁶

The Law of the Child Act, 2009 defines a child as any person who is below the age of eighteen years.³⁷ Therefore, in this study, the definition of a child in the African Charter on the Rights and Welfare of the Child, 1990, which is the same as that of the Law of the Child Act, 2009 of Tanzania is adopted. The Penal Code, 1961, does not define a child but, it provides that a person under the age of twelve years is not criminally responsible

³⁰ S. 4, the Employment and Labour Relations Act, No. 6 of 2004, [Cap. 366]. The proviso to this Section stipulates that if the employment is to be performed in hazardous sectors, a child will be defined as a person under the age of eighteen years.

³¹ S. 13 (1), Law of Marriage Act, 1971, [Cap. 29, R.E. 2002].

³² *Rebeca Z. Gyumi v. Attorney General*, Miscellaneous Civil Cause No. 5 of 2016, High Court of Tanzania at Dar es Salaam, (unreported).

³³ *Ibid*, p. 25.

³⁴ *Ibid*, p. 27.

³⁵ Committee on the Rights of the Child, "Concluding Observations on the combined third to fifth Periodic Reports of the United Republic of Tanzania," dated 3rd March, 2015, para. 7.

³⁶ It incorporates special provisions on child rights in Article 53. Under Article 53 (3), a child is defined as a person below the age of eighteen years. This Constitution is waiting for adoption by the Government.

³⁷ S. 4 (1), Law of the Child Act, 2009, [Cap. 13].

for any act or omission.³⁸ This is the minimum age of criminal responsibility in Tanzania. The minimum age of criminal responsibility is the age at which a child is deemed to be sufficiently mature to be held responsible before the substantive criminal law and which has become one of the most complex, contested and controversial question confronting modern juvenile justice systems.³⁹

An individual's age at the time a criminal act occurs determines whether the conduct falls under the jurisdiction of the Juvenile Court and thus constitutes a juvenile delinquency.⁴⁰ The minimum age of criminal responsibility established by a Government is an important benchmark by which to measure a State's orientation towards juvenile justice.⁴¹ The minimum age of criminal responsibility represents a socially accepted belief that a child cannot morally be held accountable for his or her actions below this age.⁴² In England and Wales, for example, children are held to be fully responsible in criminal proceedings once they reach the age of ten years.⁴³ The legitimacy, or otherwise, of exposing such young children to the full weight of criminal law is increasingly a source of lively debate, attracting interest from a broad range of stakeholders.⁴⁴ Under Article 40 (3) of the United Nations Convention on the rights of the Child, 1989, States parties are encouraged to establish a minimum age below which children are presumed not to have the capacity to infringe the criminal law. In General Comment No. 10, the United Nations Committee on the Rights of the Child concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable.⁴⁵ Worse still, as it has been shown by this study, in Tanzania, even children under the

³⁸ S. 15, the Penal Code, 1961, [Cap. 16, R.E. 2002], as amended by S. 174, Law of the Child Act, 2009.

³⁹ Richard, C., *et al*, "The Minimum Age of Criminal Responsibility: Clinical, Criminological/Sociological, Developmental and Legal Perspectives." *Special Issue: SAGE Journals*, Vol. 13, Issue 2, August, 2013, pp. 99-101.

⁴⁰ Caldwell, B., "Punishment versus Restoration: A Comparative Analysis of Juvenile Delinquency Law in the United States and Mexico." *Cardozo Journal of International and Company Law*, Vol. 20, 2011, pp. 105-139.

⁴¹ *Ibid*.

⁴² *Ibid*, p. 118.

⁴³ Richard, C., *et al*, *supra* note 39.

⁴⁴ *Ibid*.

⁴⁵ United Nations Committee on the Rights of the Child, "General Comment No. 10 (2007): Children's Rights in Juvenile Justice", 25 April 2007, CRC/C/GC/10, para. 32.

established minimum age of criminal responsibility of ten years are frequently detained while held with their imprisoned mothers.

Juvenile delinquents are also referred to as children in conflict with the law. The term ‘delinquents’ refers to all persons subjected to prosecution, trial or execution of a sentence at all stages of the administration of criminal justice irrespective of whether they are suspected, accused or sentenced.⁴⁶ These are children who have violated criminal laws although in some jurisdictions such as the USA, the term juvenile delinquent includes a child involved in status offences, that is, noncriminal but illegal acts by juveniles.⁴⁷ In Tanzania as well, up to now, juveniles have no protection against prosecution for status offences. The Black’s Law Dictionary defines ‘juvenile delinquent’ as a minor who is guilty of criminal behaviour that is usually punishable by special laws, not pertaining to adults,⁴⁸ while the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, (the Beijing Rules), 1985 uses the term ‘juvenile delinquent’ and defines the same as a child or young person who is alleged to have committed or who has been found to have committed an offence.⁴⁹ In this study, the definition of juvenile delinquent in the Beijing Rules, 1985 is considered ideal as it includes the pretrial and post trial juveniles. Tanzania has ratified, among others, the United Nations Convention on the Rights of the Child, 1989 and the African Charter on the Rights and Welfare of the Child, 1990.

By doing so, the country has undertaken a legal obligation to take all necessary steps, legislative, administrative and other measures to implement the rights contained in those instruments.⁵⁰ Such measures should necessarily ensure that children in detentions are afforded and have access to their rights. However, in their review of Tanzania’s implementation of the above legal instruments, while recognising the efforts made by the

⁴⁶ Rule 2.1, Tokyo Rules, 1990.

⁴⁷ Thornton, W., *et al*, “Delinquency and Justice,” 2nd ed. New York: Random House Publishers, 1987, p. 49.

⁴⁸ Garner, B., *op. cit.*, p. 974.

⁴⁹ Rule 2 (2.2) (c), Beijing Rules, 1985.

⁵⁰ Article 4, United Nations Convention on the Rights of the Child, 1989 and Article 1, African Charter on the Rights and Welfare of the Child, 1990.

Government in the field of justice, both the United Nations Committee on the Rights of the Child⁵¹ and the African Committee of Experts on the Rights and Welfare of the Child⁵² concluded that Tanzania is not yet fully implementing these international legal instruments.⁵³ Furthermore, in December 2011, when Tanzania appeared before the United Nations Human Rights Council during the Universal Periodic Review process, members raised concerns relating to both juvenile justice and the access to justice system.⁵⁴

When Tanzania appeared again before the same Council in September 2016, the Council, while commenting on Tanzania's administration of juvenile justice, regretted deeply on the continued use of corporal punishment in the country's penal system and alternative - care institutions. The Council urged Tanzania to explicitly prohibit all forms of corporal punishment in the family, schools, the penal system and other institutional settings and alternative-care systems, as a matter of priority, but the country rejected the recommendation. The Government stated that corporal punishment is a lawful punishment handed out by courts of law for specific offences. It was argued that the punishment is only administered to men below fifty five years of age and subject to guidelines ensuring no harm is caused to the delinquent.⁵⁵ The Government contended further that the majority of citizens are in favour of corporal punishment, believing that this form of punishment plays a significant role in the society.⁵⁶ This aspect is discussed in details in chapter five of this work.

It is clear that Tanzania has, and still is making substantial efforts in strengthening the criminal justice system generally to suit the socio-legal and technological advancements

⁵¹ United Nations Committee on the Rights of the Child, "Concluding Observations: United Republic of Tanzania," UNCRC/C/TZA/CO/2 dated 2nd June, 2006.

⁵² African Committee of Experts on the Rights and Welfare of the Child, "Concluding Recommendations on the Republic of Tanzania: Report on the Status and Implementation of the African Charter on the Rights and Welfare of the Child." Addis Ababa, 2010, p. 9.

⁵³ See for example, United Nations Committee on the Rights of the Child, *op. cit.*, para. 358.

⁵⁴ United Nations Human Rights Council Reports, *Universal Periodic Review*, Office of the High Commissioner, Geneva, 2011.

⁵⁵ Global Initiative to End all Corporal Punishment of Children, "Corporal Punishment of Children in the United Republic of Tanzania." *Report of the Working Group*, Geneva: Addendum, 2016, para. 136.

⁵⁶ *Ibid.*

taking place globally. The admissibility of electronic evidence in criminal proceedings, bargaining between the accused person and the prosecutor in criminal cases (plea bargaining), the introduction of new offences relating to computer systems and information communication technologies (cyber crimes), and new measures to protect crime informers, witnesses and victims of crimes are examples of recent reforms to the criminal justice system of Tanzania. However, the general criminal justice system cannot be perfect while the juvenile justice system is ineffective. Juvenile justice generally and the rights of detained juvenile delinquents in particular, are part of the national criminal justice system. Fortunately, the Law of the Child Act, 2009 enshrines a number of key international juvenile justice standards, but as indicated above, many of them are not being upheld in practice.

The concept of juvenile justice developed in 20th Century.⁵⁷ Before this time, criminal youths and adults were treated in almost the same way. In 1899, a separate juvenile court was established in the United States of America to try juvenile delinquents separately from adult delinquents.⁵⁸ It was from this time that a group of social reformers known as child servers helped to create separate delinquent categories in order to insulate juvenile delinquents from the influence of adult criminals.⁵⁹ Since then, there have been remarkable developments in the international laws towards defining and protecting children's rights in many spheres. For example, in 1924, the League of Nations adopted the Geneva Declaration on the Rights of the Child which recognised and affirmed for the first time the existence of rights specific to children and the responsibility of adults towards children.⁶⁰

According to Kaime, the 1924 Declaration set out five principles aimed at fulfilling the rights of children. The first principle provided that 'the child must be given the means

⁵⁷ Barry, C., "A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?" *Northern Kentucky Law Review*, Vol. 34, Issue 2, 2007, pp. 189-256, at p. 190.

⁵⁸ Mack, J., "The Juvenile Court." *Harvard Law Review*, Vol. 23, 1909, pp. 104-115.

⁵⁹ American Bar Association, "the History of Juvenile Justice." Chicago: Division for Public Education, 2015.

⁶⁰ The League of Nations, Declaration on the Rights of the Child, 1924.

requisite for its normal development, both materially and spiritually.’ The second provided that ‘the child that is hungry must be fed; the child that is sick must be nursed.’ The third principle espoused an element of what has come to be commonly known as the ‘children first principle’. It declared that ‘the child must be the first to receive relief in times of distress.’ Principle four stated that the child must be protected from all forms of exploitation while the fifth principle called on States to inculcate in children a spirit of service towards fellow man.⁶¹

This Declaration was not directed at the States as such, but at all adults whereby they were required to recognize children’s needs. The Declaration stated that humanity owes to the child the best that it has to give. In respect to juvenile delinquents, the Declaration required every adult to reclaim children delinquents.⁶² Unfortunately, there was in fact no reference to rights as such, the Declaration only pointed out adults’ obligations to children. Therefore, the 1924 Declaration was never intended to create legally binding obligations on States and corresponding legal rights for children. After the Second World War in 1945, the United Nations was established and in 1946, it took over the 1924 Declaration.⁶³ However, following the adoption of the Universal Declaration of Human Rights in 1948, the advancement of human rights revealed the shortcomings of the 1924 Declaration. In 1959, the United Nations General Assembly adopted the Declaration on the Rights of the Child.⁶⁴

The 1959 Declaration marked the first major international consensus on the fundamental principles of children’s rights, although it made no reference to children in conflict with the law. Like the 1924 Declaration, the 1959 Declaration was also not legally binding, but it formed the basis for the United Nations Convention on the Rights of the Child,

⁶¹ Kaime, T., “The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account.” *African Journal of Legal Studies*, Vol. 3, 2009, pp. 120-136, at p. 122.

⁶² Coady, M., “International Regulation of Children’s Rights,” in Barbieri-Masini, E., (Ed), *Quality of Human Resources: Gender and Indigenous Peoples*. Oxford: Eolss Publishers Co Ltd, 2008, pp. 308-318, at p. 309.

⁶³ High Commissioner for Human Rights, “Legislative History of the Convention on the Rights of the Child, *supra* note 2, p. 3.

⁶⁴ Resolution 1386 (XIV) of 20th November, 1959.

1989.⁶⁵ In the absence of a legally binding text, it was difficult to effectively protect children's rights. Thus, the need for the United Nations Convention on the Rights of the Child that would be legally binding for all nations was felt. The Convention on the Rights of the Child, 1989 combined all the Declarations on the rights of children which were scattered in several instruments. The United Nations Convention on the Rights of the Child, 1989 provides that State Parties have to ensure the protection of children deprived of their liberty and promote the conditions necessary in realization of juvenile justice, including recognition of the rights of children who are alleged to have infringed the penal laws.⁶⁶

At the African regional level, the African Charter on the Rights and Welfare of the Child, 1990 was intended to be a complementary mechanism to that of the United Nations in order to enhance the realisation of the rights of children in Africa.⁶⁷ This Charter was adopted in 1990, and came into force in 1999.⁶⁸ It provides that every child accused or found guilty of having infringed the penal laws has the right to special treatment in a manner consistent with the child's sense of dignity and which reinforces respect for human rights.⁶⁹ In 2015, when Tanzania submitted the country's periodic report, the African Committee of Experts on the Rights and Welfare of the Child urged Tanzania to work on the Concluding Observations made by the United Nations Committee on the Rights of the Child⁷⁰ aimed at improving the state of juvenile justice in its jurisdiction. In particular, the country was urged to enact comprehensive provisions in the juvenile justice standards, allocate sufficient human and physical resources and conduct regular training to juvenile justice personnel to ensure that juvenile justice is administered in

⁶⁵ Resolution 44/25 of 20th November, 1989.

⁶⁶ Article 37 (c), United Nations Convention on the Rights of the Child, 1989.

⁶⁷ Sloth-Nielsen, J., "Children's Rights and the Law in African Context: An Introduction," in Sloth-Nielsen, J., (Ed), *Children's Rights in Africa: a Legal Perspective*. Aldershot: Ashgate Publishing Ltd, 2008, pp. 3–12.

⁶⁸ Tanzania ratified the African Charter on the Rights and Welfare of the Child on 16th March 2003.

⁶⁹ Article 17 (1), African Charter on the Rights and Welfare of the Child, 1990.

⁷⁰ United Nations Committee on the Rights of the Child, "Concluding Observations for United Republic of Tanzania on the combined third to fifth Periodic Reports of the United Republic of Tanzania." CRC/C/TZA/CO/3-5, dated 3rd March, 2015.

consonance with best practices and international standards, in accordance with Articles 17 and 30 of the African Charter on the Rights and Welfare of the Child.⁷¹

At the national level, after the First World War, the Mainland Tanzania, (then Tanganyika), came under British trust territory and inherited most of the British legislations and legal practices which were applicable in England,⁷² but did not include the laws relating to the protection of juvenile delinquents' rights. On the other hand, the coming of British in Tanzania facilitated among other things, the growth of towns and cities. Consequently, the economic condition in the cities and rural areas became very different, the fact which pushed numerous children to urban areas to look for better life. Unfortunately, on arriving in the towns, these children could not find the best life they thought of, hence, most of them ended up becoming delinquents. It has been argued that in many respects, children are more likely to be victims of human rights violations than adults, and African children are more likely to be victims than children on other continents due to poverty, warfare, famine and disasters, and the devastating impact that is being brought by HIV/AIDS in sub-Saharan Africa.⁷³ Due to the reasons stated above, the need for enactment of the law to deal with juvenile delinquents arose during colonial era and the British Government introduced a special law to deal with youthful delinquents different from rigorous procedures involved in respect of adult criminals. As a result, the Children and Young Persons Ordinance, 1937 was introduced.⁷⁴ This legislation was a replica of the British statute which was known as the Children and Young Persons Act of 1933. After independence in 1961, the application of the Children and Young Persons Ordinance continued in Tanzania with little modifications.⁷⁵ In 2002, the Children and Young Persons Ordinance was named as the Act of Parliament.⁷⁶ Later, the Children and Young Persons Act was, among other things, found to be a less juvenile

⁷¹ African Committee of Experts on the Rights and Welfare of the Child, "Concluding Recommendations for Republic of Tanzania." Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child, 2015.

⁷² Section 2 (2) of the Judicature and Application of Laws Ordinance allowed the application of common law in Tanganyika as it existed in England on the twenty second day of July, 1920.

⁷³ Julia Sloth-Nielsen, *op. cit.*, p. 3.

⁷⁴ Ordinance No. 3 of 1937 which was Cap. 13 of the Laws of Tanganyika.

⁷⁵ See for example the G.N. No. 478 of 1962 which amended the interpretation Section.

⁷⁶ Children and Young Persons Act, 1937, [Cap. 13 R.E. 2002], now repealed.

justice sensitive law. Therefore, the Children and Young Persons Act was repealed and replaced with the Law of the Child Act, 2009.⁷⁷

The Law of the Child Act, 2009 came into force in 2010, but as mentioned above, very limited steps have been taken to operationalize its provisions relating to the rights of detained juvenile delinquents. It is against this background that the researcher decided to carry out a systematic academic study on the protection of detained juvenile delinquents' rights, with focus to Tanzania's compliance with international standards in this regard. In carrying out this study, the theoretical framework for the research problem was examined, the conceptual framework for juvenile justice was surveyed and presented, the international and national legal frameworks for the protection of juvenile delinquents' rights were also analysed while the empirical data were collected, analysed and discussed to appreciate the magnitude of the problem for the purpose of finding conclusions and suggestions which are based on the research findings.

1.2 Need for the Study

This study acknowledges the existing literature on juvenile justice both internationally and in Tanzania. However, the study adds a new dimension to a well documented literature as it focuses on the rights of detained juvenile delinquents. In this focus, the study settles the continuing debate on whether Tanzania complies with the international standards on protection of juvenile delinquents' rights. One significant feature of this study relates to chapter five, which attempts to show the practical aspect of the problem under scrutiny. In meeting its objectives, the study provides some suggestions for Tanzania in order to protect the rights of detained juveniles effectively. These suggestions inform each key stakeholder in the administration of juvenile justice in Tanzania, of the areas that need interventions.

It has to be noted that children contribute a significant percentage in the total population of Tanzania. Presently, among 43.6 million people in Tanzania, 22 million (52%) are

⁷⁷ Act No. 21 of 2009, which is now [Cap. 13]. See Section 160 (1) (d) which repeals the Children and Young Persons Act.

children.⁷⁸ Like other countries in the world, Tanzania is facing the problem of increasing juvenile delinquency. For more than three decades, the country has been undergoing socioeconomic, cultural and political reforms which led to the introduction of free market economy, globalisation and multiparty democracy. Coupled with the narrowing economic base for rural subsistence farming, many rural children and youths are forced to move to the major urban centres where economic stagnation again leaves them unable to cover their basic needs. In their efforts to adjust to these new situations, in most cases by themselves, most of them exhibit delinquency which leads to conflict with the law. Thus, numerous children in conflict with the law are socioeconomic victims who have been denied their rights to parenting, education, health, shelter, care and protection.⁷⁹

According to the Legal and Human Rights Centre of Tanzania, there is a notable increase of children coming in conflict with the law in the country.⁸⁰ In 2011, the Commission for Human Rights and Good Governance conducted a survey to ascertain the condition of children held in Tanzanian prisons and police custodies. The survey revealed that as of May, 2011, there were 570 children in prisons and police stations.⁸¹ As it has been observed by the United Nations Committee on the Rights of the Child, Tanzanian Government has failed to fully comply with the obligations imposed upon it by the United Nations Convention on the Rights of the Child, which include proper administration of the juvenile justice system.⁸² According to the United Nations Secretary-General, children deprived of liberty often remain invisible and forgotten.⁸³ This brings to the fore the need to work on the subject of the rights of detained juvenile delinquents when incarcerated in pretrial and post trial detentions. The large percent of children in Tanzanian population and the increasing number of children in conflict with

⁷⁸ The 2012 Population and Housing Census, *op. cit.*, p. 3.

⁷⁹ Save the Children U.K., "Juvenile Justice: Modern Concepts in Working with Children in Conflict with the Law." London: Save the Children, 2013.

⁸⁰ Legal and Human Rights Centre, "Tanzania Human Rights Report." Dar es Salaam: Legal and Human Rights Centre, 2014.

⁸¹ Commission for Human Rights and Good Governance, "Inspection Report for Children in Detention Facilities in Tanzania." Dar es Salaam: Commission for Human Rights and Good Governance, 2011.

⁸² United Nations Committee on the Rights of the Child, Concluding Observations, *op. cit.*, p. 6.

⁸³ Office of the High Commissioner for Human Rights, "Children Deprived of Liberty: the United Nations Global Study." Geneva: United Nations, 2016.

the law make it necessary to undertake a thorough academic research like the present study so as to inform the key actors in the juvenile justice system about the areas which need immediate intervention and improvement.

1.3 Review of Literature

In this section, the researcher submits her views based on the library research and the empirical study in the form of designating the former as theoretical review of literature and the latter as empirical review of literature. However, at the outset of this task, the researcher would like to point out the nature of literature in Tanzania and the international resources on the subject of Juvenile Justice. Internationally, the area of juvenile justice has been vastly researched on and documented. On the other hand, the researcher is not aware of any systematic academic research that has examined the extent to which Tanzania complies with the international standards in protecting the rights of detained juvenile delinquents.

The present study has been conducted to fill this legal gap. The theoretical and empirical literatures were reviewed. The purpose was to establish the theoretical framework of the study and to show the current practice regarding the problem under scrutiny. In doing so, various previous studies relating to juveniles' rights have been looked at and evaluated. Terblanche, S.,⁸⁴ analysed Section 68 of the Child Justice Act, 2008⁸⁵ of South Africa whereby he averred that sentences for young offenders had for many decades been at least somewhat more lenient than those for adults. The author stated that when called upon to specifically address the sentencing of juveniles, the South African courts have often acknowledged that young offenders should be afforded special treatment. He pointed out that whatever the actual practice, the sentencing principles for child offenders changed fundamentally when the Constitution of the Republic of South Africa, 1996⁸⁶ was adopted. The Constitution introduced a set of rights specifically aimed at the protection of children. Some of these rights directly affect children in conflict with the

⁸⁴ Terblanche, S., "The Child Justice Act: A Detailed Consideration of Section 68 as a Point of Departure with Respect to the Sentencing of Young Offenders." *Potchefstroom Electronic Law Journal*, Vol. 15, No. 5, 2012, pp. 436-478.

⁸⁵ Act No. 75 of 2008.

⁸⁶ Act No. 108 of 1996.

law. In relation to sentencing, Terblanche explained the important rights as including the best interests of the child are paramount, and that children should not be imprisoned unless such imprisonment is unavoidable. This study goes further to investigate whether juvenile delinquents in Tanzania enjoy the same rights as their counterpart in South Africa.

Julia Sloth-Nielsen⁸⁷ documented the domestication of children's rights in Africa. The author reviewed the domestication processes and law reform initiatives that were taking place across the continent since the adoption of the African Charter on the Rights and Welfare of the Child, 1990. The author contended that the domestication of international human and child rights standards had the aim of reshaping the colonial heritage, modernising and synthesising child law, targeting especially vulnerable groups of children for enhanced legal protection. It revealed that the law reform processes in each of the examined countries were at various stages of completion, some still being drafted, others been enacted, while others were awaiting introduction to, or passage through, parliament. The current study being on protecting the rights of detained juveniles in Tanzania, it is focused on children's rights while in detentions.

To answer the question whether judges take children's rights seriously by adopting the rights approach in matters involving children, Tobin, J.,⁸⁸ addressed the factors that undermine the capacity of a judge to engage with children's rights. He observed that judges tend to overlook, marginalise or misuse the notion of children as rights-bearers and that a judge's ability to engage with the children's rights is constrained by considerations such as precedent and domestic legislative frameworks. To come up with a model of children's rights which is grounded in the provisions of the CRC, Tobin examined domestic, regional and international case law and concluded that judges must adopt a substantive rights approach which reflects a vision of children's rights that is

⁸⁷ Sloth-Nielsen, J., "Domestication of Children's Rights in National Legal Systems in African Context: Progress and Prospects," in Sloth-Nielsen, J., (Ed), *Children's Rights in Africa: a Legal Perspective*. Aldershot: Ashgate Publishing Ltd, 2008, pp. 53–72.

⁸⁸ Tobin, J., "Judging the Judges: Are they Adopting a Rights Approach in Matters Involving Children?" *Melbourne University Law Review*, Vol. 33, 2009, pp. 579-625.

consistent with the CRC. Unlike Tobin, who was concerned with the analysis of case laws, the researcher in this study examines the laws and practice relating to of juvenile delinquents' rights in Tanzania.

Jepsen, E.,⁸⁹ studied the practice of human rights-based juvenile justice systems for diverse nations and observed that the conditions in prisons and remand facilities in many developing nations are so poor and inhumane that they violate basic human rights standards when seen from any point of view. The study found that the available facilities often subject young delinquents to much hardship and humiliation such as physical, sexual and psychological abuse. The study was conducted ten years ago with focus on juvenile justice system. It does not directly relate to rights of detained juveniles, but it contributes to the present study by highlighting the conditions of detention facilities in developing nations such as Tanzania.

Concerning sentencing the juveniles, Mandopi, K.,⁹⁰ discussed the theories of punishment and the important factors required to be considered by the courts before imposing sentences to convicted juvenile delinquents. He calls attention of the judicial officers in Tanzania to utilise theories of sentencing in the course of sentencing juveniles for the purpose of rehabilitating them. Mandopi observed that in Tanzania, courts overlook factors and theories of sentencing child delinquents, and so, impose sentences which are detrimental to the welfare of the child. The author has contributed to the present research by pointing out one of the causes for prolonged post trial detention of children delinquents in Tanzania, thus, this study goes further to explore other factors, not only for post trial, but also pre trial detentions of juvenile delinquents.

⁸⁹ Jepsen, E., *et al.*, "The Practicality of Human Rights-Based Juvenile Justice Systems for Diverse Nations," in Jepsen, E., *Juvenile Law Violators, Human Rights and the Development of New Juvenile Justice Systems*. Oregon: Hart Publishing, 2006, pp. 1-13.

⁹⁰ Mandopi, K., "The Sentencing Process to the Convicted Juvenile Delinquent: the Judicial Officers Need Attention." *Journal of Asian and African Social Science and Humanities*, Vol.1, No. 2, 2015, pp. 62-84.

Joseph, J.,⁹¹ explored key issues on delinquency and juvenile justice in the United States of America. He found that in the USA, many juveniles were detained in adult jails, and that many jails were in deplorable physical conditions, with inadequate plumbing, poor ventilation, deteriorating buildings, and many were open to fire hazards. His work is relevant to this study as it has indicated that rights of detained juveniles are at stake world-wide even in the developed countries which are considered as human rights champions, and where financial resources to support feasible juvenile justice systems may not be a challenge. Unlike Joseph's work which studied the black youths in the USA, this research focuses on juveniles detained in Tanzania, regardless of their colour, sex, religion or any other distinction.

On different approaches to juvenile delinquency and how best they can meet the needs of children, victims, their families, and the wider society, Hutchinson, R.,⁹² asserted that since the legal processes are long and slow moving, a balance has to be achieved between ensuring that life of juvenile delinquents must go on as naturally as possible during the justice processes, especially in respect of education, career planning and family contacts. He emphasises on the need for meaningful rehabilitation and reintegration programmes in juveniles' detentions to prepare them for life after release. The study was conducted fifteen years ago in Europe with no reflection on detained juveniles in Tanzania. The present study examines *inter alia*, the availability of the same programmes for juveniles in Tanzanian detentions.

The child justice system in mainland Tanzania was examined by Bakta, S.,⁹³ in the light of principles recommended by international child rights law. She averred that Tanzania's child justice system is not as child friendly as one would expect. Judicial mechanisms

⁹¹ Joseph, J., "Black Youths, Delinquency, and Juvenile Justice." Westport: Greenwood Publishing Group, 1995.

⁹² Hutchinson, R., "Placement in Institutions," in Cavadino, P., *Children Who Kill: an Examination of the Treatment of Juveniles who Kill in Different European Countries*. Winchester: Waterside Press, 2002, pp. 102-107.

⁹³ Bakta, S., "Critical Analysis of the Child Justice System in Mainland Tanzania," thesis Submitted in Partial Fulfillment of the Requirements for the Award of PhD, University of Cape Town, 2016, (unpublished).

make provision for the child's rights including the right to expeditious process, but they do not adequately protect, *inter alia*, the child's right to legal representation. The author observed that sentences such as repatriation, detention at the President's pleasure and corporal punishment, which are inconsistent with international law, are still legally allowed. Her study discussed child rights at all stages of criminal justice while the current study is specific on juveniles' rights while in detentions.

At the international level, Hamilton, C.,⁹⁴ conducted a survey of the administrative detention of children and revealed that lack of knowledge on the availability of free legal representation or inability to pay for private legal services together with the lack of external monitoring of the detention prior to the child being detained, results in poor conditions, abusive treatment, and failure to respect children's rights. He averred that with limited access to legal representation, there is little opportunity for detained children to realise their rights. He concluded that without further and better implementation of juvenile justice systems globally, there will be little change in practices which breach children's rights. Lack of legal assistance and representation is one of the drivers for violation of other children's rights during the justice process. The present study investigates, among others, the availability of legal assistance to detained juveniles in Tanzania.

An analysis of international human rights law was made in respect of the condition of children prisoners in the Philippines.⁹⁵ Upon arrest, prior to their transfer to separate facilities, children in Philippines are first detained in cramped police detention cells in various police stations. The author alleged that at this point, children are mixed up with adult prisoners due to lack of separate facilities for them. Generally, children suffer from relatively prolonged detentions in the hands of the police, until the courts order their transfer to children detention facilities. The author called for efforts towards investing in

⁹⁴ Hamilton, C., "Administrative Detention of Children, a Global Report." New York: UNICEF, 2011.

⁹⁵ Caparas, P., "Children Prisoners in the Philippines: an International Human Rights Law Analysis," in Meuwese, S., *Kids Behind Bars: a Study on Children in Conflict with the Law; towards Investing in Prevention, Stopping Incarceration and Meeting International Standards*. Amsterdam: Defence for Children International, 2003, pp. 91-106.

prevention of juveniles' delinquency, stopping incarceration and meeting international standards in protecting juvenile delinquents' rights. This work concentrates on the rights of juvenile delinquents in Tanzania; hence no discussion has been made relating to prevention of juvenile delinquency.

Maina, C.,⁹⁶ discussed the general situation of human rights in Tanzania. Regarding juvenile delinquents, the author explained the role of the institutions in protecting the rights of juvenile delinquents. He emphasized on the need of the institutions to observe in great regard the abusive approach that has become a normal practice when handling detainees while in police custody. The work sheds light on how the situation of general human rights in Tanzania was in the past twenty years. It gives an insight for this study to examine whether the approach of handling juvenile delinquents while in police custodies has improved since that study was conducted.

Critical issues and basic controversies in the field of juvenile justice and the problems encountered by the persons trying to unravel the causes, processes, intervention programs, and outcomes for juvenile delinquents, were discussed by David, W.⁹⁷ He stated that issues of juvenile detention are regularly ignored, criticised and misunderstood. The author contended that juvenile detention is embattled, abused, neglected, underfunded, understaffed, and overcrowded. He concluded that juvenile detention is expected to be all things to all segments of juvenile justice, including mental health, special education, detoxification, shelter care, and maximum security. Unlike David's work which was specific on juvenile's detentions, the current study goes further to investigate more aspects such as treatment and separation of juveniles from adult detainees in detentions.

⁹⁶ Maina, C., "Human Rights in Tanzania: Selected Cases and Materials." Koln: Rüdiger Köppe, 1997.

⁹⁷ David, W., "Juvenile Detention: Issue for 21st Century," in Albert, R. *Juvenile Justice Source Book: Past, Present and Future*. New York: Oxford University Press, 2004, pp. 217 – 246.

A research on the administration of juvenile justice in Tanzania and the country's compatibility with international norms and standards, was carried out by Maganga, C.⁹⁸ She found that Tanzanian laws and international standards on the administration of juvenile justice provide guidance for the children's rights, but the practice of the courts and other State organs defeat the purpose. She alleged that the juvenile justice system which existed earlier targeted only the individual child delinquent and not the rights and justice of the system as a whole. She concluded that Tanzania had still a long way to go towards reforming and upgrading the juvenile justice administration to achieve the minimum standards set by the international human rights instruments. Maganga conducted such research in 2005 before the Law of the Child Act, 2009 was enacted. The present study tries to assess Tanzania compliance to international standards on protection of juvenile delinquents' rights after the enactment of the Law of the Child Act.

Asquith, S. and Hill, M.,⁹⁹ made an account of the implications of the United Nations Convention on the Rights of the Child, 1989 on the juvenile justice. The authors opined that a child must be treated prudently when he is in conflict with the law. They were of the view that in handling the child, the law has to be complied with, and all rights must be provided to the child, including bail pending trial and the right to legal representation. The current study is not concerned with the implications of the CRC, but more with the realisation of the rights enshrined in international legal texts by the juveniles detained in Tanzania.

Odongo, G.,¹⁰⁰ presented an analysis of the legal aspects of children's rights in the African context. As a general proposition, he propounded that child law, international law and national laws provide a useful tool for the advancement of children's rights at a practical level, and that further development of regional child rights jurisprudence is

⁹⁸Maganga, C., "Administration of Juvenile Justice in Tanzania: A Study of its Compatibility with International Norms and Standards." A Dissertation Submitted in Partial-fulfillment of the Requirements for the Award of Master of Laws (LL.M), Lund University, 2005, (unpublished).

⁹⁹ Asquith, S., *et al*, (Eds), "Justice for Children." London : Martinus Nijhoff Publishers, 1994.

¹⁰⁰Odongo, G., "The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context", in Sloth-Nielsen, J., (Ed), *Children's Rights in Africa: a Legal Perspective*. Aldershot: Ashgate Publishing Ltd, 2008, pp. 147-164.

warranted. Odongo opined that successful juvenile justice reforms have been introduced in a number of jurisdictions in Africa, with a growing continental emphasis on diversion and alternative programmatic responses to children in conflict with the law, approaches which at the same time overcome the resource constraints that prevail in African context. The present study does not dwell much on the juvenile law reforms, but the realisation of the international standards in the protection of detained juvenile delinquents' rights in Tanzania.

On separation of juveniles from adults during the prosecution, Kupchik, A.,¹⁰¹ argues that it creates an awkward ambivalence for courtroom decision makers who must apply adult laws to adolescent defendants. The author is of the view that such situation results in a hybrid form of justice in the criminal court, which he called a *sequential model of justice* that borrows from both a criminal justice model and a juvenile justice model. The author elaborated the inconveniences caused by treating children as adult criminals throughout justice processes. This research goes further to explore the extent to which Tanzania complies with the international standards on protection of detained juvenile delinquents' rights.

The discussion of juvenile justice process at the international level was presented by Miller, W.¹⁰² The procedures of arrest and investigation of delinquent acts by juveniles were described. The emphasis was on a need to establish a separate juvenile justice system that would accord more rights to the juvenile delinquents. The systems have to include separate courts and comprehensive laws which adequately protect the rights of the child. In addition to separation of juvenile delinquents from adult offenders in the justice process as discussed by Miller, this research explores the juveniles' enjoyment of other custodial rights such as the right to legal representation, human treatment and after-care programmes.

¹⁰¹ Kupchik, A., "Judging Juveniles: Prosecuting Adolescents in Adult and Juvenile Courts." New York: New York University Press, 2006.

¹⁰² Miller, W. *et al*, "The Juvenile Justice Process, University Casebook, 4th ed." The Foundation Press Inc: New York, 2000.

According to the United Nations Office on Drugs and Crime,¹⁰³ in countries that juvenile delinquents are dealt with in the same way as adults, juvenile justice system may fail to consider the needs and best interests of the child and to address the root causes of conflict with the law. Once in contact with a justice system which is unresponsive to the child's needs, children deprived of liberty are at a heightened risk of abuse, violence, exploitation, and health related concerns such as injury and HIV/AIDS infections. This work addresses Tanzanian juvenile justice system just in passing, the main focus being on the country's compliance with international standards relating to juvenile delinquents in detentions.

Robb, C.,¹⁰⁴ researched on the factors affecting jurors' perceptions of juvenile delinquent culpability. The Jurors' attitudes about juvenile crime trends may affect their perceptions of adolescent delinquent's culpability and the sentence they recommend. The authors averred that Jurors who perceive that juvenile crime is increasing will view juvenile delinquents' culpability more negatively, are likely to convict a juvenile defendant and recommend a harsher sentence than Jurors who do not perceive that juvenile crime is increasing. The present study does not investigate the perceptions and beliefs. It seeks to assess Tanzania's level of compliance with international standards in protecting detained juvenile delinquents' rights.

Hoge, R.,¹⁰⁵ argued that response to juvenile offending can be improved by carefully evaluating programmes and practices to determine whether they are effective and helpful or even potentially harmful. The author cautioned that grouping delinquent youth together in educational, mental health, juvenile justice, and community settings might actually exacerbate offending behaviour, particularly when the programmes group the new and first-time delinquents with more serious and incarcerated delinquents. On top of treatment of juvenile delinquents which was a concern of Hoge's research, this work

¹⁰³ United Nations Office on Drugs and Crime, "Manual for the Measurement of Juvenile Justice Indicators." New York: United Nations, 2006.

¹⁰⁴ Robb, C., "Attorney and Lay Beliefs about Factors Affecting Jurors' Perceptions of Juvenile Offender Culpability." *Journal of Psychology, Crime & Law*, Vol. 18, No.1, 2012, pp. 113-128.

¹⁰⁵ Hoge, R., "Treating the Juvenile Delinquent." New York: The Guilford Press, 2008.

examines more aspects such as the duration of detention, accessibility of legal assistance and treatment of juvenile delinquents which respects their human rights.

The international standards for the protection of children's rights in America and South Africa were examined by Van, J.¹⁰⁶ He pointed out that the child, like everyone else, is also entitled to basic rights related to the administration of criminal justice, including the rule against arbitrary arrests, proscription of detention without trial, protection against violence, freedom from torture, cruel, inhuman and degrading treatment and punishment in detentions. The present work does not explore all human rights of accused persons in the criminal justice process; it investigates only those rights enjoyable by juvenile delinquents in detentions.

In answering the question whether the purpose of juvenile justice is punishment or restoration, Caldwell, B.,¹⁰⁷ studied the trends in dealing with juvenile delinquents in the United States of America and Mexico. He observed that juveniles often suffer human rights abuses when they are incarcerated with adults. Caldwell asserted that juveniles incarcerated in adult facilities are eight times more likely to commit suicide, five times more likely to be sexually assaulted, and twice more likely to be attacked with a weapon or beaten by prison staff than adults in the same facilities. He therefore concluded that the trend is towards punishment and not restoration of juvenile delinquents. As already mentioned, this study is not on juvenile justice as such, it investigates the realisation of international standards in protection of detained juvenile delinquents' rights by Tanzania.

The Tanzanian Commission for Human Rights and Good Governance¹⁰⁸ conducted an inspection for Children in Detention Facilities in Tanzania. It found that a total of Four Hundred Forty One children were detained in adult detentions where they experienced violence and abuse from other detainees, physical punishment, very poor living conditions and limited contact with family and the outside world. These children also lacked access to meaningful programmes to help their rehabilitation and reintegration

¹⁰⁶ Van, J., "International Standards for the Protection of Children's Rights: American and South African Dimensions." *Buffalo Human Rights Law Review*, Vol. 15, 2009, pp. 81 – 108.

¹⁰⁷ Caldwell, B., *supra* note 40.

¹⁰⁸ Commission for Human Rights and Good Governance, *supra* note 81, p. 7.

into society. The current study has been conducted six years after the Commission's report was released. The researcher examines whether the recommendations made by the Commission have been implemented in line with the international standards domesticated by Tanzania.

The prevalence of violence against children in police detentions in Tanzania was investigated by National Organization for Legal Assistance (NOLA).¹⁰⁹ They found that children in police detentions were being badly treated and subjected to violence by the police where violence and torture was used to extract confessions. The study revealed serious acts of abuse and sexual assault in pretrial and post trial detention facilities especially where children were held in adult detentions. Again, this report indicates the situation of detained juvenile delinquents in Tanzania in the past five years. The present study examines whether the shortcomings identified in NOLA's report have been rectified for the country to comply with the international standards.

According to the Ministry of Community Development, Gender and Children reports,¹¹⁰ in Tanzania, there are lack of reliable legal aid services to children, insufficient number of social welfare officers, and insufficient number of personnel with specialized training in juvenile justice. The reports also explained that there is lack of equipment and facilities for the administration of juvenile justice in Tanzania. These reports assist the researcher to get the Government's viewpoint about the reasons for non-compliance with international standards in the protection of juvenile delinquents. The researcher investigates the extent to which the Government has made efforts to comply with international standards since 2012 when the reports were submitted to date.

¹⁰⁹ National Organisation for Legal Assistance, "A Review of Law and Policy to Prevent and Remedy Violence against Children in Police and Pre-trial Detention in Tanzania." London: Penal Reform International, 2012.

¹¹⁰ United Republic of Tanzania, "3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child." Geneva: United Nations Committee on the Rights of the Child, 2012.

The United Nations Children's Fund (UNICEF)¹¹¹ indicated that whether in pretrial detention, administrative detention or detention as a sentence, there is a significant risk of violation of children's rights that arises from being deprived of their liberty. They argued that the more overcrowded the facility, and the lower the staff-to-child ratio, the greater the risk becomes. UNICEF concluded that violence occurs at the hands of staff working in the institutions, adult detainees where children are not separated, other child detainees, and also in the form of self-harm. The report by UNICEF reveals violence against detained children at the global level. The researcher tries to explore the way Tanzania responds to the challenges highlighted by UNICEF regarding children delinquents in detentions.

Mashamba, C.,¹¹² assessed the juvenile delinquents' rights under the Law of the Child Act, 2009 of Tanzania and opined that in Tanzania, although Non-Governmental Organizations and professional associations provide legal assistance and representation to persons having civil cases, no such assistance exists for persons having criminal accusations. He pointed out that children in conflict with the penal laws were not yet included in the schemes of existing legal aid provision. He finally argued that to minimize the inherent sufferings of juvenile delinquents in the country's criminal justice system, it would be meaningful to take initiatives to provide legal assistance and representation to juveniles in conflict with the penal laws. Mashamba conducted his research before the Legal Aid Act¹¹³ was enacted. The present research examines among others, the framework for accessibility of legal assistance and representation of juvenile delinquents in Tanzania.

Anderson, K.,¹¹⁴ analysed the situation of children in conflict with the law in Tanzania and found that children in adult prisons were not wholly separated from adults, in

¹¹¹United Nations Children's Fund, "Prevention of and Responses to Violence against Children within Juvenile Justice System." New York: Office of the Special Representative of the Secretary on Violence against Children, 2012.

¹¹² Mashamba, C., "A Child in Conflict with the Law under the Tanzanian Law of the Child Act (2009): Accused or Victim of Circumstances?" *The Justice Review*, Vol.8 No. 2, 2009, pp. 156-209.

¹¹³ Act No. 1 of 2017.

¹¹⁴Anderson, K., "Analysis of the Situation of Children in Conflict with the Law in Tanzania." London: UNICEF, NOLA and Coram Children's Legal Centre, U.K., 2012, p. 3.

contravention of international law standards. The author explained that in several adult prisons children were placed in separate cells from adults during the nights, but there were no such separation during the day, and while being transported to courts. He elaborated further that in other prisons, children and adults were mixed both during the day and at night. This was found to expose child detainees to the risk of physical violence and sexual abuse by adult detainees. Anderson's work formed the basis for conducting the present research to find out the extent to which this situation has been corrected.

Tanzania Child Rights Forum's report¹¹⁵ contended that the biggest challenge in protecting children in conflict with the law in Tanzania is lack of knowledge and skills on the part of law enforcement officials as well as lack of juvenile courts to facilitate a child friendly environment in court. The report explained that instead of a juvenile court, the Law of the Child Act, 2009 established a special court for the hearing of juvenile cases. It concluded that juveniles who come in conflict with the law are likely to be subjected to disadvantages such as lack of protection of dignity, privacy and other interests of juveniles participating in judicial proceedings. Unlike this report which was on juvenile justice generally, the researcher strives to specifically assess Tanzania compliance with international standards on protection of juveniles in detentions.

Mashamba, C.,¹¹⁶ made a comparative examination of the administration of juvenile justice systems in South Africa and Tanzania with a view to establishing the extent to which Tanzania has effectively honoured its obligations to domesticated international juvenile justice standards for the protection of the rights of children in conflict with the law. The study noted that whereas South Africa has effectively domesticated international juvenile justice standards in the Child Justice Act, 2008,¹¹⁷ Tanzania has not effectively done so because the provisions relating to children in conflict with the law as set out in

¹¹⁵ Tanzania Child Rights Forum, "Child Rights Status Report for 2013." Dar es Salaam: Tanzania Child Rights Forum, 2013.

¹¹⁶ Mashamba, C., "A Study of Tanzania's Non-Compliance with its Obligation to Domesticated International Juvenile Justice Standards in Comparison with South Africa." Thesis Submitted in Partial Fulfillment of the Requirements for the Award of PhD, The Open University of Tanzania, 2013, (unpublished).

¹¹⁷ Act No. 75 of 2008.

the Law of the Child Act, 2009¹¹⁸ are not sufficient to adequately protect the rights of offending children. As stated earlier, the present study is not about domestication of international standards on protection of juvenile delinquents, but the compliance with those standards by Tanzania.

Criminal punishment constitutes one of the most coercive powers of the State and a range of rights exists to ensure that such power is exercised legally, proportionally and only against those guilty of a legal wrongdoing.¹¹⁹ According to Hollingsworth, rights have particular importance during police detention where the risk of coercion, false confession, and maltreatment are at their highest. He explained such rights as including the right to legal advice, to inform another person of the arrest and whereabouts, to have interviews tape-recorded, and to be released if charges are not brought within a certain period. He emphasized that the need for a robust set of pretrial rights is even more important in the case of children, given their age, life experience and immaturity. He concluded that children are potentially the most vulnerable of the vulnerable, and the least able to represent their own best interests, control their behaviour and communicate their needs. Unlike Hollingsworth who researched about best interest, age and rights of children in police detentions; this study examines specific custodial rights of juvenile delinquents in Tanzania.

The Legal and Human Rights Center¹²⁰ report indicated that there was a notable increase of children coming in conflict with the law in Tanzania. Juvenile delinquents are placed together with adult offenders in different prisons and police detentions around the country. The report explained that placing child delinquents with adult offenders in a single facility is a massive violation of the international standards set out by international instruments for the treatment of children in conflict with the law. Three years have lapsed since Legal and Human Rights Center had released their report. The researcher

¹¹⁸ Act No. 21 of 2009.

¹¹⁹ Hollingsworth, K., "Bright Lines and Best Interests: Children, Age and Rights in Police Detention." *Child and Family Law Quarterly*, 2014, pp.78-98.

¹²⁰ Legal and Human Rights Centre, *supra* note 80.

investigates on any measures taken by the Government of Tanzania to correct the shortcomings highlighted in that report.

The review of theoretical and empirical literature has revealed aspects of juvenile justice which call for attention in Tanzania. These are, separation of juvenile delinquents from adult offenders throughout the criminal justice processes, treatment of detained juvenile delinquents in a way that respects their human rights, long pre-trial and post trial detention of juveniles, accessibility of free legal assistance and representation, and the availability of rehabilitation as well as reintegration programmes in detentions to prepare juveniles for life after release. The related literature as surveyed in this part highlighted the juveniles' rights in general. There is no single writer or author either in theoretical or empirical study that has investigated on the extent to which Tanzanian complies with international standards in protecting the rights of detained juveniles. Thus, this thesis intends to bridge the knowledge gaps left by the writers in this study in order to fill these loopholes.

1.4 Statement of the Problem

The international instruments on juvenile justice lay down the condition that children should be kept in separate detention centres,¹²¹ but the present laws of Tanzania allow a child to be arrested, remanded in police lock-up and to be taken to the court where he may be sentenced to imprisonment and committed to a prison.¹²² It is apparent from the literature that juveniles are held in detentions, which are police stations, Retention Homes, Approved School and prisons. As noted in the Legal and Human Rights Centre report,¹²³ the number of juveniles in Tanzanian detentions is increasing as time goes on. The fact that detained juveniles are vulnerable is also evident from many reported violations of their rights.¹²⁴ Regardless of these facts, protection of detained juvenile

¹²¹ Art. 37 (c), United Nations Convention on the Rights of the Child, 1989, Art. 17 (2) (b), African Charter on the Rights and Welfare of the Child, 1990 and Rule 29, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990.

¹²² Rule 22, the Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016, S. 56 (1), Criminal Procedure Act, 1985 and S. 31 (3), the Police Force and Auxiliary Services Act, 1961.

¹²³ Legal and Human Rights Centre, *supra* note 80.

¹²⁴ See for example, Commission for Human Rights and Good Governance Report (2011), National Organisation for Legal Assistance (2012), UNICEF Report (2012) and Anderson, K., (2012).

delinquents' rights has continued to be a challenge in Tanzania, although the country has ratified and domesticated various international and regional legal texts relating to children in conflict with the law.¹²⁵ Despite the fact that Tanzania enacted the Law of the Child Act, 2009 to conform to international standards on children's rights, the same does not adequately meet the standards for protection of detained juvenile delinquents.¹²⁶

For example, the Law of the Child Act, 2009 does not contain a clear list of the diversion measures at each stage of the administration of juvenile justice and it does not abolish corporal punishment in the administration of juvenile justice. The international instruments on juvenile justice provide for legal assistance to be made available to the juvenile delinquents,¹²⁷ but there is lack of a firm obligation on the part of the Government of Tanzania to provide free legal assistance and representation to juvenile delinquents. Literature has revealed that juveniles stay for a long time in pre-trial and post trial detentions, they are not separated from adult offenders during the criminal justice processes and they face treatments which do not suit their welfare and needs. Tanzania has only one Juvenile Court, one Approved School and five Retention Homes to cater to all twenty six administrative regions. Up to June 2011, there were Four Hundred Forty One children detained in adult prisons and their rights were being abused.¹²⁸ Further, numerous children were confined in adult prisons with their breastfeeding mothers contrary to the international law requirements.¹²⁹ These weaknesses indicate that Tanzania does not protect the rights of juvenile delinquents up to the required international standards. Despite this fact, no thorough academic research has been conducted in Tanzania to address this matter sufficiently. It is to fill this gap that

¹²⁵ For example, the United Nations Convention on the Rights of the Child, 1989 and the African Charter on the Rights and Welfare of the Child, 1990, which Tanzania ratified in June, 1991 and March, 2003 respectively. The Law of Child Act, 2009 was enacted to domesticate these legal instruments.

¹²⁶ See also Mashamba, C, *supra* note 116.

¹²⁷ Art. 37 (d), United Nations Convention on the Rights of the Child, 1989, Art. 17 (2) (c) (iii), African Charter on the Rights and Welfare of the Child, 1990 and Rule 7.1, Beijing Rules, 1985.

¹²⁸ Commission for Human Rights and Good Governance, *supra* note 81, p. 7.

¹²⁹ Legal and Human Rights Centre, "Tanzania Human Rights Report." Dar es Salaam: Legal and Human Rights Centre, 2012.

an investigation on the extent to which Tanzania complies with international standards on protecting the rights of detained juvenile delinquents is attempted through this study.

1.5 Objectives of the Research

This study consists of the general and specific objectives. While the general objective states the broader terms of the study, specific objectives examine the issues in detail by scrutinising the general objective. The main objective of this research is to investigate the extent to which Tanzania complies with international standards on protection of detained juvenile delinquents' rights. The specific objectives of this study are to:

- (i) Explore the duration of pre-trial and post trial detention of juvenile delinquents in Tanzania.
- (ii) Find out the level of separation of detained juvenile delinquents from adult detainees in the detentions.
- (iii) Examine the treatment of detained juvenile delinquents in detentions.
- (iv) Investigate the accessibility of free legal assistance and representation of juveniles during criminal justice processes.
- (v) Assess the availability of rehabilitation and reintegration programmes for detained juveniles in Tanzania.

1.6 Research Hypotheses

Based on the reviewed theoretical and empirical literature, the hypothesis formulated for this study is that in Tanzania, the detention of juvenile delinquents at present is not in conformity with the international standards, while the legal system has to respond to the requirements of the international standards as the human rights norms or the general norms in the area of criminal justice. The above hypothesis has been tested by following the two strands of legal research, namely, the library research and the empirical research.

In particular, the study was conducted to test the assumptions that in Tanzania:

- (i) Juveniles are not detained for the shortest appropriate period of time.
- (ii) There is no total separation of juveniles from adults in the detentions.
- (iii) Detained juvenile delinquents are ill-treated.
- (iv) Juvenile delinquents have no access to free legal assistance and representation.
- (v) There are no rehabilitation and reintegration programmes for detained juveniles.

1.7 Scope of the Study

To enhance the focus and manageability of the research topic, this study was restricted to the Mainland Tanzania instead of the entire United Republic of Tanzania, thus leaving Zanzibar. Under the Constitution of the United Republic of Tanzania, the criminal justice system is not a union matter between former Tanganyika and Zanzibar. Each part of the United Republic has its own criminal justice system. Hence, this work is confined to the Mainland Tanzania due to the fact that Zanzibar has its own judiciary, legislature and juvenile justice system which are handled separately from those of Mainland Tanzania. Analysing juvenile justice systems for the two parts of the United Republic would have amounted to two different research projects.

Moreover, this study is limited to the rights of juvenile delinquents when they are in pre-trial and post trial detentions only. It does not address the rights of juvenile delinquents in mental health detentions or when they are under the custody of Social Welfare or Immigration Officers. Therefore, the study consists of four types of detentions namely, the police stations, Retention Homes, prison detentions, and the Approved School. Children reach these detentions in several ways, including when they are suspected to have committed the crimes, when they are found to have committed the offences, as the informants or witnesses in criminal cases, as victims of criminal offences, when arrested for committing disorder offences such as vagrancy, loitering, truancy and touting.

The rights of these children at different stages in the administration of criminal justice are governed by the national Constitution, policies, laws, regulations, guidelines and directives relating to the administration of juvenile justice. As such, the study involved

numerous individuals concerned with the administration of criminal justice in the country, for example, the police officers, social welfare officers, magistrates, advocates, law reformers, prison officers and staff in the detentions.

1.8 Research Design and Methodology

In every research, it is important to describe the process involved in designing a study and to demonstrate a specific research plan that the researcher has decided to use to structure the collection, interpretation and analysis of data.¹³⁰ In this research project, a survey research design was employed to obtain an in-depth data for the research problem. This is a research design whereby a sample of the population is studied through questioning or observation to determine its characteristics, and it is then inferred that the general population has the same characteristics.¹³¹ It is a design which is flexible in data collection and less expensive as it is selective and therefore minimises costs in terms of time and money. The survey design is also chosen for this study because it is useful in solving problems of a specific unit.

1.8.1 Research Methodology

This study is mainly qualitative with limited quantitative inquiries. It attempts to evaluate the extent to which rights of detained juvenile delinquents are protected in Tanzania compared with the international standards that the country has domesticated. The reason for the choice of this research topic is twofold. First, it is an outcome of personal interest in children's matters, coupled with the previous experience obtained from UNICEF study about knowledge, attitude and practices on violence against children in Tanzania, in which the researcher happened to be involved.¹³² Secondly, the topic came as an inspiration from my research Guide's book about Women Prisoners in Custody and their rights in selected custodies in Andhra Pradesh, India.¹³³ Such work convinced the

¹³⁰ Frankfort, C., and Nachmias, D., "Research Methods in Social Sciences, 5th ed." London: Arnold, 1996, p. 99.

¹³¹ Kothari, C., "Research Methodology, Methods and Techniques, 2nd ed." New Delhi: New Age International Publishers, p. 5.

¹³² University of Huddersfield and Mzumbe University, "Study of Knowledge, Attitudes and Practices Concerning Violence against Children in Tanzania Mainland and Zanzibar." Dar es Salaam: United Nations International Children's Fund, 2016, (unpublished).

¹³³ Lakkaraju, J., "Women Prisoners in Custody." New Delhi: Kaveri Books.

researcher that juvenile delinquents in Tanzania are also vulnerable and prone to the violation of their rights when in detentions.

Moreover, several surveys conducted in the area of juvenile justice in Tanzania indicated serious violations of juvenile delinquents' rights when deprived of their liberty. These were the motivation for picking this topic, but specifically on the rights of detained juvenile delinquents in order to understand the Tanzanian compliance with international standards in this aspect. Therefore, the study consists of data collected through library research as well as field research to respond to the research problem and verify the hypotheses formulated.

1.8.2 Library Research

The researcher has undertaken library research to broaden a theoretical understanding of the problem, to lay a foundation for assessment of the legal framework for the protection of juvenile delinquents' rights in Tanzania and get some light on how the problem has been dealt with by previous researchers. Library research is a good method of data collection as it can provide contemporary issues on the subject and help to understand how best the problem at hand can be solved.¹³⁴ Through library research, the researcher accessed works of other researchers relevant to the problem and identified the knowledge gap that this study sought to cover.

Library research was conducted partly in Ambedkar Memorial Library of Acharya Nagarjuna University, and partly in Tanzania. In Tanzania, the researcher consulted the University of Dar es Salaam main library, Mzumbe University main library, the High Court of Tanzania main registry library, and the Commission for Human Rights and Good Governance library. In these libraries, the researcher reviewed textbooks, journal articles, domestic and international legal documents, national policies, guidelines, decided cases, reports, theses, papers and other relevant material. Various world-wide websites were also utilised for accessing online material relevant to the study.

¹³⁴ Marczyk, G., *et al*, "Essentials of Research Design and Methodology." New Jersey: John Wiley and Sons, Inc., 2005, p. 30.

1.8.3 Field Research

Field research was conducted to support the theoretical work. In this regard, the researcher visited selected institutions concerned with the administration of juvenile justice in the country and observed the actual situation of detained juvenile delinquents in pre-trial and post trial detentions.

1.8.4 Area of the Study

On account of time and other resource constraints, it was impracticable to visit all institutions and individuals charged with the administration of juvenile justice in Tanzania. Therefore, field data were collected from twenty two detentions which are the Irambo Approved School, the Retention Homes at Upanga, Tanga, Arusha and Mbeya. The police stations which were visited are, Urafiki, Buguruni, Arusha Central, Babati, Mtwara Central, Kigoma Central, Kasulu and Mbeya Central police stations. Prison detentions included Kigongoni Prison, Segerea, Isanga, Maweni, Babati, Butimba, Lilungu, Kasulu, and Wami Prison for Young Offenders. These institutions are situated in eleven administrative regions, namely, Coastal Region, Dar-es-salaam, Morogoro, Dodoma, Tanga, Arusha, Mbeya, Mwanza, Mtwara, Kigoma and Manyara Regions.

These regions were selected for the study for two main reasons. First, all these regions feature in reports related to the administration of juvenile justice in Tanzania indicating that there are a large number of children being held in adult detentions.¹³⁵ This implies that in Tanzania, there have been insufficient studies concerning detained juvenile delinquents or studies on this aspect have not been effective to bring about interventions in this area. Secondly, these administrative regions have been selected from a wide range of different geographical areas in the country representing all six administrative zones which are, Coastal zone, Lake Zone, Northern zone, Central zone, Southern zone and Southern Highlands zone. Therefore, the studied detentions are representative enough to draw a clear picture of the whole of Mainland Tanzania as they constitute a balance between children's detention facilities situated in urban and those in rural areas.

¹³⁵ Commission for Human Rights and Good Governance Report (2011), Anderson, K., (2012), and Legal and Human Rights Centre Report (2014).

1.8.5 Sample Population, Sample Size and Sampling Techniques

This study involved One Hundred Seventy-five (175) respondents being a combination of 12 Police Officers from police stations where juvenile delinquents were detained, 02 public prosecutors dealing with children's cases at Kisutu Juvenile Court, 03 private advocates, 07 Retention Homes and Approved School staff, 03 Resident Magistrates, 04 officials from NGOs dealing with juvenile justice, 115 detained children, 01 Commissioner of Commission for Human Rights and Good Governance, 01 parent of detained juvenile delinquents, 05 mothers incarcerated with their children, 16 Prison Officers, 3 Lawyers from the Law Reform Commission of Tanzania and 03 lecturers who are conversant with juvenile justice laws.

This sample is made up of persons who, according to their disciplines, expertise, experience, institutional affiliations and geographical localities, are in a position to know the issues pertaining to juvenile justice in Tanzania. These respondents enabled the researcher to collect satisfactory data which cater for the needs of this study and fulfill the purpose for which the research was being conducted. The sample size is supposed to be large enough to attain data saturation, but manageable to permit a deep, case-oriented analysis which is the most important reason for qualitative inquiry.¹³⁶ Ary, D. *et al* (2000)¹³⁷ argue that there is no quantum for a correct sample size, for this depends on the purpose of the study and the nature of the population under scrutiny. Therefore, for the purpose of this study, 175 respondents provided detailed and valuable information to establish frequencies and provide answers that are sufficient to test the research hypotheses.

Regarding the sampling technique, the researcher employed a maximum variation purposive sampling technique to focus on specific institutions and persons that best facilitated the testing of research hypotheses. This technique enabled the researcher to get

¹³⁶ Sandelowski, M., "Sample Size in Qualitative Research." *Journal of Research in Nursing and Health*, Vol. 18, Issue 2, 1995, pp. 179 – 183.

¹³⁷ Ary, D., "Introduction to Research in Education." Tokyo: Harcourt Brace College Publishers, 2000, p. 93.

the right respondents for the study and provided relevant information for the research problem.

1.8.6 Data Collection Tools and Methods

As stated earlier, the theoretical data were collected through library research. On the empirical part of the study, the researcher employed three methods of data collection, namely, semi-structured oral interviews, focus group discussions and non-participatory observations. Tools which were used for data collection are interview guides, observation guide and focus group discussion guide. The nature of respondents and their working environment did not permit the use of questionnaires. In particular, detained juveniles were considered unable to fill the questionnaires properly and timely.

1.8.7 Interviews

A series of semi-structured oral interviews were administered to the Police and Prison Officers, Public Prosecutors, NGO officials, a parent of detained juvenile delinquents, mothers incarcerated with their children, Retention Homes and Approved School staff, Commissioner of Commission for Human Rights and Good Governance, Lawyers from the Law Reform Commission, Resident Magistrates and Lecturers of Law. The reason for using semi-structured interviews with these respondents was to extract in-depth, relevant information for the study, which could not be obtained timely using any other method of data collection. Semi-structured interview saved time and at the same time facilitated the collection of data of equally high quality.

1.8.8 Focus Group Discussions

Focus group discussion is a good way to gather people with similar experiences to discuss a specific topic of interest.¹³⁸ A group of participants is guided by group facilitator who introduces topics for discussion and helps the group to participate in a lively and natural discussion amongst them.¹³⁹ Thus, the researcher selected children for the participation in focus group discussions who had a range of different ages, coming

¹³⁸ Argyris, C., "Action Science, Concepts, Methods, and Skills for Research and Intervention." San Francisco: Jossey-Bass, 1985, p. 58.

¹³⁹ David, L., "Focus Groups as Qualitative Research, 6th ed." New Delhi: SAGE Publications, 2009, p.7.

from different geographical locations, having different cultural backgrounds, gender and histories of offending behaviour. Thirteen focus group discussions were conducted with detained juvenile delinquents who were held in various detentions at the time of data collection. A total of 115 detained juveniles participated in focus group discussions. This method allowed the interaction of the researcher with research participants, giving a chance of stepping into the world of the participants while gaining knowledge about the research problem. In researching with children, this interaction is important as it can ensure the achievement of child-friendly research, as advocated by the United Nations Committee on the Rights of the Child.¹⁴⁰

1.8.9 Observations

The researcher made non-participatory observations during visits to the detentions to see the condition of detentions, treatment of detained juvenile delinquents, as well as the extent to which their rights are being adhered to. By using a set of prepared guidelines according to the international standards, the researcher observed clothing and sleeping material for children, provision of food, treatment of detained children, the infrastructures, hygienic standards, recreation programmes, as well as the availability of rehabilitation and reintegration programmes in the visited detentions.

1.8.10 Data Presentation, Interpretation and Analysis Techniques

It was stated earlier that this research is mainly qualitative, although it consists of a minimal quantitative data. Qualitative data consist of words and observations while quantitative data consists mainly of numbers.¹⁴¹ As with all data, analysis and interpretation are required to bring order and understanding. This requires creativity, discipline and a systematic approach.¹⁴² Therefore, focus group discussion notes, data from interviews, field notes obtained through observations and other texts of published materials are organized by using tables, graphs and charts. Appropriate interpretation, analysis and discussions are supplied to the identified issues while the data of quantitative

¹⁴⁰ United Nations Committee on the Rights of the Child, "General Comment No. 12 (2009): Right of the Child to be Heard," 1st July, 2009, CRC/C/GC/12, para. 120.

¹⁴¹ Taylor-Powell, E., and Renner, M., "Analyzing Qualitative Data: Programme Development and Evaluation." Madison: University of Wisconsin, 2003.

¹⁴² *Ibid.*

nature are systematically categorized and ranked to help the researcher uncover the relationships, make predictions and generalizations based on the hypotheses of the study.

1.8.11 Treatment of the Topic

This work consists of six chapters. Chapter one sets the background to the problem and provides the need for this study. It covers a detailed and comprehensive assessment of literature to lay a foundation for the understanding of the legal framework for juvenile justice systems at the international, regional and national levels. The chapter further presents a statement of the problem, objectives of this research, the research hypotheses and scope of the study. Lastly, this chapter explores the research design and methodology to lay down a plan for the study. It describes issues relating to the area of the study, the sample population of the study, sample size, sampling technique, methods and tools of data collection, as well as the modes of presentation, interpretation and analysis of the research findings.

Chapter two is dedicated for the conceptual foundation of juvenile justice in Tanzania and related terms whereby the concept of juvenile justice is tested against the general criminal justice. Moreover, the models of juvenile justice were discussed in this part to assess the manner in which they are used to influence the treatment of juvenile delinquents world-wide. The models presented in this chapter include the welfare model, justice model, modified welfare-justice model, restorative justice model, participatory model and the crime control model. Chapter three has been exclusively devoted to the application of international laws in Tanzania and examination of international standards relating to juvenile delinquents. An in-depth analysis was made to explore the international standards and the extent to which they influence what is happening in Tanzania concerning protection of detained juvenile delinquents' rights. Chapter four examined the extent to which the international standards analysed in chapter three are reflected in the laws of Tanzania governing juvenile justice.

Chapter five deals with the presentation, analysis and discussion of the research findings so as to link the theoretical and empirical part of the study and enable the researcher to

draw conclusions based on the research findings. In this chapter, the researcher discussed Tanzania's compliance with the international standards for the protection of detained juvenile delinquents' rights. Finally, chapter six presents a summary of the discussion, testing of hypotheses, key findings and the suggestions. This part revisits in general terms the points explored in previous parts of the study and inform the key actors in the administration of juvenile justice of Tanzania about the areas which need intervention for the purpose of improving protection of detained juvenile delinquents' rights.

1.8.12 Limitations of the Study

In the course of the study, the researcher faced some difficulties which however, did not affect the quality of the findings of this research. Firstly, in police stations there were few juvenile delinquents at the time of data collection making it difficult to get a maximum of ten children to constitute focus group discussions as it was planned. Secondly, in Arusha Central Police Station, the researcher was denied an opportunity to see the cells where children were held and talk to them. The effects of these hurdles were however mitigated by using juveniles detained in Retention Homes and prisons where the researcher inquired about their experience when they were in police stations. Moreover, the researcher had an opportunity to observe the condition of detentions and treatment of children detained in this facility for three days spent in that station.

Thirdly, in all prisons and police stations, children were closely supervised by the prison and police officers during the discussions, hence, in some aspects; they failed to participate freely in the discussions. To overcome this obstacle, in aspects which seemed adverse to these officers, the same questions were asked to both juveniles and police or prison officers in different sessions so as to establish the consistency and determine reliability of the answers. Lastly, children held in the Approved School did not participate in this study as they were attending classes during the visit. This also did not affect the quality of data collected due to the fact that the researcher conducted interviews with the staff and had an opportunity to observe the condition of detention by going through the School surroundings and dormitories. Therefore, the purpose of the visit was equally achieved by supplementing the interviews with the observation method.

CHAPTER 2

2. CONCEPTUAL FOUNDATION OF JUVENILE JUSTICE IN TANZANIA

In this chapter, the conceptual foundation of juvenile justice in Tanzania and related terms are discussed where the concept of juvenile justice is given against the background of general criminal justice. Tanzania's juvenile justice is coming into test against the general criminal justice to assess whether the former meets the elements of a child rights-based justice system that places the best interests of the child at the centre. The chapter also presents models of juvenile justice to see the manner in which they are used to influence treatment of juvenile delinquents in the world generally and Tanzania in particular. This is important because a juvenile who is claiming violation of his rights relating to criminal justice in Tanzania may claim for remedies available in international law.

The first law to govern administration of juvenile justice in Tanzania was the Children and Young Persons Act of 1937.¹⁴³ As stated in chapter one, this Ordinance was a replica of the British Children and Young Persons Act of 1933, which incorporated both justice and welfare models.¹⁴⁴ Children and Young Persons Act, 1937 vested jurisdiction in primary and district courts to deal with delinquents, needy children and young persons below the age of sixteen years.¹⁴⁵ Children who were found begging, those who lacked the means of subsistence or had no guardian or parents, were taken to court for special orders, including being sent to an Approved school or committed to the care of a fit person or institution until he attained the age of eighteen years.¹⁴⁶ The court procedures to which juvenile delinquents were subjected were more or less the same as those applicable in the ordinary criminal courts. For example, after a preliminary hearing, and if a *prima*

¹⁴³ It was then named as Ordinance No. 3 of 1937 which in 2002, it was re-named as "Act" in the revised edition of all laws of Tanzania.

¹⁴⁴ Odongo, G., "Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context." Thesis Submitted in Partial-fulfillment of the Requirements for the Award of LL.D, University of Western Cape, 2005, (unpublished), p. 41.

¹⁴⁵ S. 3, Children and Young Persons Act, 1937, read together with Children and Young Persons Act (Extension of Ordinance to Primary Courts) Order, G.N. No. 640 of 1964.

¹⁴⁶ *Ibid*, S. 25 (1).

facie case was established, the court proceeded to hear evidence.¹⁴⁷ The application of such procedures in juveniles' cases implied that in line with the justice model, the procedures were also formal.

Legal assistance and representation of juveniles was not expressly provided for in that Act. However, the Act had some relevant safeguards for protection of juvenile delinquents' rights. It required the privacy of the child to be protected by restricting attendance in court proceedings to parties, parents, advocates and other persons the court deemed proper to allow.¹⁴⁸ The requirement of a trial in camera was, however, limited and applied only to sexual offences.¹⁴⁹ The Act further recognised that juveniles were vulnerable and therefore they were to be separated from adults while in custody.¹⁵⁰ This protection was, however, loosely provided as the Act required that arrangements be made 'so far as practicable' for preventing a child from being associated with an adult.¹⁵¹ Children and Young Persons Act was repealed and replaced by the Law of the Child Act, 2009.

The current Constitution of Tanzania had no Bill of Rights when it was adopted in 1977. The same was incorporated in 1984 via the Constitutional amendment.¹⁵² The Bill of Rights is contained in Articles 12 to 30 of the Constitution which includes rights and duties. At the time of adoption, the 1977 Constitution did not have specific provisions for juvenile rights. This position has not changed even after the incorporation of the Bill of Rights in 1984. According to Bakta,¹⁵³ this omission could be understood before 1984 when Tanzania had not yet incorporated the Bill of Rights in its Constitution. However, despite the adoption of the CRC in 1989 and its ratification by Tanzania in 1991, the Constitution has not been amended to rectify this gap, something that is difficult to understand. As stated earlier, Tanzania is now in the process of reviewing its Constitution

¹⁴⁷ S. 13, Children and Young Persons Act, 1937.

¹⁴⁸ *Ibid*, S. 11 (1).

¹⁴⁹ *Ibid*, S. 3 (5).

¹⁵⁰ *Ibid*, S. 5.

¹⁵¹ *Ibid*.

¹⁵² See the 5th Constitutional Amendment Act, No. 15 of 1984.

¹⁵³ Bakta, S., *supra* note 93, p. 76.

and the Proposed Constitution provides for children's rights under Article 53.¹⁵⁴ When that Constitution becomes operative, then its implementation with regard to protection of detained juvenile delinquents' rights may be assessed.

Concerning juvenile justice models, an analysis of numerous models is presented in this chapter so as to identify the preferable model of juvenile justice that Tanzania can adopt to improve its protection of juvenile delinquents. As far as juvenile justice is concerned, international law does not embody a single model of justice, but it embraces the welfare, justice and restorative justice models to create a juvenile justice system that is truly child friendly and is aimed at protecting and fulfilling a child's best interests.¹⁵⁵ Before examining the juvenile justice models, it is considered useful to explore the juvenile justice systems, within which these models operate. Different authors use the term 'Juvenile Justice System,' without defining it.

Nevertheless, Juvenile Justice System may be described as including the manner in which police arrests or interrogates children, the attitude of lawyers and prosecutors, the way that judges make decisions about guilt or sentencing, handling of children by prison staff, the living, educational, recreational and safety conditions in detention facilities and programs for rehabilitation and reintegration.¹⁵⁶ It is the segment of criminal justice system which is special for children and it includes law enforcement officers, the courts, and correctional agencies, designed to treat youthful offenders.¹⁵⁷

Distinguishing Juvenile Justice System from criminal justice system, Matilda¹⁵⁸ argues that one of the main differences between the juvenile and adult justice systems lies in

¹⁵⁴ The country was expected to have a new Constitution before October 2015 but this has not been achieved and the date for a referendum is yet to be fixed.

¹⁵⁵ Bakta, S., *op. cit.*, p. 69.

¹⁵⁶ Save the Children U.K., "Juvenile Justice: Modern Concepts in Working with Children in Conflict with the Law." London: Save the Children, 2013.

¹⁵⁷ Larry, J., and Brandon, C., "Juvenile Delinquency: Theory, Practice and Law, 10th ed." Wadsworth: Cengage Learning, 2009, p. 11.

¹⁵⁸ Matilda, T., "Victims of Criminal Justice System in Tanzania: The Need for Radical Approach in Advancing Juvenile Justice." A Paper Presented in Tanganyika Law Society Annual General Meeting at Arusha International Conference Centre, February 2015, p. 7.

their overall aim. The main aim of Juvenile Justice System is to rehabilitate and reform the juvenile offenders so they can resume functioning normally in society. Juvenile justice applies to children who are alleged to, or accused of committing a criminal offence, and the term is generally used to describe policies, strategies, laws, procedures and practices applied to children who are over the age of criminal responsibility.¹⁵⁹

Odongo¹⁶⁰ holds the opinion that Juvenile Justice System requires the institution of separate laws, procedures and institutions that apply specifically to children in conflict with the law in contrast to, or alongside but distinct from, the criminal justice system applicable to adult offenders. Whichever way the term Juvenile Justice System may be described, any comprehensive description of this term is expected to include the important aspects such as the people involved in the system, the way such people act, the applicable procedures and the facilities available for use throughout the system.

2.1 The Concept of Juvenile Justice

Juvenile justice is defined as a system that provides a legal setting in which youth can account for their wrongs or receive official protection.¹⁶¹ It is also a term that necessarily implies distinct and separate institutions and treatment among youth and adults in dispensing justice. The way in which a society treats its children and young people, says something about the future of that society, its beliefs, and the viability of those beliefs.¹⁶² It says something about the society's humanity, its morality, resilience, and capacity for self-correction.¹⁶³ Juvenile justice has been and remains a topical issue at the national and international levels because since the first juvenile court was established in the United States of America in 1899 and the subsequent reforms to protect juvenile delinquents from the hassles of criminal justice, until now there have been considerable violations of juvenile delinquents' rights worldwide.¹⁶⁴

¹⁵⁹ *Ibid.*

¹⁶⁰ Odongo, G., *supra* note 100, p. 156.

¹⁶¹ Hess, K., "Juvenile Justice, 5th ed." Belmont: Wadsworth, 2010, p. 3.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ See for instance, Winterdyk, J. (Ed), "Juvenile Justice Systems: International Perspectives, 2nd ed." Toronto: Canadian Scholars Press Inc., 2002, Tamar, R., "Toward a Theory of Procedural Justice for Juveniles." *Buffalo Law Review*, Vol. 57, Issue 5, 2009, pp. 209 – 281 and Aryn, S., "Buried Alive: The

Before the concept of juvenile justice was introduced, children delinquents were treated in almost the same way as adults.¹⁶⁵ In 1833, a boy of nine years was sentenced to be hanged in England for the comparatively trivial offence of poking a stick through a patched up pane of glass and stealing twenty-two penny worth of paint.¹⁶⁶ During this time, most of juvenile delinquents were mixed with adult offenders in the same courts and detention facilities. Putting the delinquent children of tender age with adult prisoners was honored tradition and nobody questioned its irrelevance or illegitimacy.¹⁶⁷ There arose the two concerns which necessitated the reforms in the child justice system. These were the physical abuse of children and moral contamination of children by adult offenders. The need to keep children out of the ordinary criminal justice system was felt more. In theory, it was recognized that it is desirable to treat children according to their underlying needs and not in response to specific acts. This was one of the driving forces for creation of juvenile justice in the Nineteenth Century in which a juvenile delinquent was not regarded as an offender, but as a victim of circumstances who needed protection and proper guidance. Rwezaura¹⁶⁸ argues that childhood in African societies had always been considered as a ‘time to learn, to build a character and to acquire the social and technical skills necessary to perform the future roles of adulthood,’ which include developing the skills and social roles of the child. However, local conceptions of childhood have undergone some fundamental changes due to globalisation, urbanisation, migration and formal education, as a result, children’s family ties and responsibilities to their families and society have been altered.¹⁶⁹ The relevance of juvenile justice concepts to Tanzania may be viewed in the context of influence they brought in the emergence and development of the national juvenile justice system.

Constitutional Question of Life Without Parole for Juvenile Offenders Convicted of Homicide.” *Lewis and Clark Law Review*, Vol. 17, Issue1, 2014, pp. 292 – 332.

¹⁶⁵ Joshi, V., “Juvenile Justice in India: a Study of Legislative Policies, Judicial Trends and Social Perception.” Thesis Submitted in Partial-fulfillment of the Requirements for the Award of Doctor of Philosophy, Maharshi Dayanand University, 2011, (unpublished), p. 13.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ Rwezaura, B., “Competing ‘Images’ of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa.” *International Journal of Law, Policy and the Family*, Volume 12, Issue 3, 1998, pp. 253–278, at p. 255.

¹⁶⁹ *Ibid.*

In USA, a separate juvenile court was established in 1899 to try juvenile delinquents separately from adult offenders.¹⁷⁰ It is from this time that a group of social reformers known as child servers helped to create separate delinquent categories in order to insulate juvenile delinquents from the influence of adult criminals.¹⁷¹ Since then, there have been remarkable developments in international law towards defining and protecting children's rights in many spheres.

It has to be noted that Juvenile Justice System is not designed to respond to the needs of juvenile delinquents only. The system caters for the needs of children generally and in some jurisdictions, it includes the youth or young delinquents. The principal role of Juvenile Justice System has generally been to provide specialized and preventive treatment services for children and young persons.¹⁷² The system has multiple functions and aims. From the beginning, it has been concerned with protecting the society and serving the best interests of the child. The juvenile justice system therefore performs the welfare cum criminal justice functions.

In Tanzania, various components of juvenile justice system fall under different ministerial mandates. Children's welfare and protection generally is dealt with by the Ministry of Health, Community Development, Gender, Elderly and Children, the Justice system itself comes under the Ministry of Constitutional and Legal Affairs while the handling of juveniles by police and prison officers is regulated under the Ministry of Home Affairs. On the other hand, courts are autonomous and the Chief Justice's Office controls the appointments of court officials and magistrates in the juvenile court.

The Law of the Child Act, 2009 is the basic law regarding juvenile justice in Tanzania. It dedicates the whole of Part IX to juvenile justice. It establishes a system of juvenile justice distinct from that of adults, which has laws, procedures, authorities and institutions specifically applicable to children who are alleged to have or accused of, or

¹⁷⁰ Mack, J., *supra* note 58.

¹⁷¹ American Bar Association, *supra* note 59.

¹⁷² *Ibid.*

recognised as having infringed the penal law. It also provides for rights of juvenile delinquents including the rule that the arrest, detention or imprisonment of children must be considered as a measure of last resort, and, if ordered, be limited to the shortest period of time. This aspect is discussed at length in chapter four, but it suffices to point out here that the Tanzanian juvenile justice system is in many respects still inadequate.¹⁷³ While the Law of the Child Act represents a major development towards juvenile justice reform, yet a lot more needs to be done so as to meet juvenile justice international standards. The use of corporal punishment as a criminal sanction, lack of adequate legal aid services, insufficient number of specialised personnel, long detentions, physical and sexual abuse of juveniles in detentions, make the country fall short of international standards on the protection of juvenile delinquents' rights.

To satisfy international standards, an effective juvenile justice system requires dedicated facilities for children at time of arrest, trial and detention.¹⁷⁴ According to the United Nations Office on Drugs and Crime,¹⁷⁵ Government systems for responding to children in conflict with the law vary in name and approach according to the country context. Children may be dealt with through the formal justice or courts system, by the welfare system, or, for minor offences, by an administrative system. Such systems may function within the context of the adult criminal justice system, or may operate largely outside the judicial system through committees, commissions or administrative panels. Wherever the system contains a degree of specialisation for children, whether the system is based on courts, the welfare system, or an administrative system, it is frequently known as a juvenile justice system.¹⁷⁶

¹⁷³ United Nations Committee on the Rights of the Child, "State Report Submitted under Article 44 of the CRC: Concluding Observations for United Republic of Tanzania." CRC/C/TZA/CO 3-5, dated 3rd March, 2015.

¹⁷⁴ Robins, S., "Failing Young Offenders: Juvenile Justice in Sierra Leone, Tanzania and Zambia, Policy Brief No. 8." Pretoria: Institute for Security Studies, 2009, p.1.

¹⁷⁵ United Nations Office on Drugs and Crime, *supra* note 103, p. 1.

¹⁷⁶ *Ibid.*

2.2 The Relationship between Criminal Justice System and Juvenile Justice System

The criminal justice system is primarily the adults' justice system, while juvenile justice system is a justice system for juvenile delinquents, usually persons below the age of 18 years.¹⁷⁷ Criminal justice system and the juvenile justice system resemble in that their goal is to reduce crime and delinquent acts for the safety of the public. Juvenile justice system is a sub-set of criminal justice system. Although the laws that govern criminal justice system may vary from one State to another, there are basic elements that are common to most of the States. They all involve law enforcement organs, the courts and correction facilities.¹⁷⁸ Criminal justice system is a system by which criminals are apprehended, tried, sentenced and jailed. Juveniles are not prosecuted for committing crimes, but for delinquent acts.

Once a juvenile has been deemed delinquent, the court will determine what action should be taken. This stage differs from the criminal justice system in the purpose of the action taken against adult offenders. In the criminal justice system, the goal is to punish the delinquent while in the juvenile justice system, the goal is to rehabilitate and serve the juvenile's best interests. This often takes place in the form of programmes, activities and education. The criminal justice system does not generally see rehabilitation as a goal. As aforementioned, the first juvenile court was established in 1899. The concept and practice of juvenile justice was derived from the developments in the criminal justice system after the establishment of the first juvenile court in 1899. It was also pointed out that prior to the establishment of the first Juvenile Court in 1899; the system for handling juvenile delinquents was contained in the general criminal justice system that dealt with adult criminals. There was little or no differentiation of institutions and treatments which suited the needs of children delinquents as opposed to adult offenders.

In England for example, the juvenile justice system was first embedded in the concept of youth justice that was for the first time introduced in England and Wales through the

¹⁷⁷ Larry, J., and Brandon, C., *supra* note 157, p. 59.

¹⁷⁸ Kerper, J., "Introduction to the Criminal Justice System, 2nd ed." Minnesota: West Publishing Co., 1979, p. 9.

Youthful Delinquents Act of 1854 which for the first time attempted to separate young delinquents from adults in the criminal justice.¹⁷⁹ Like in the USA, in the UK throughout the 19th century, there were widespread public and media concerns about the perceived “crisis of control” of the justice system as a result of corruption, brutality and indiscipline to which children were exposed in adult jails.¹⁸⁰ This led to a shift in the approach from a criminal justice system that sought to punish children and young persons convicted for crimes to the treatment and the need for alternatives to custody. Like many other States in the world, the juvenile justice system of Tanzania is integrated within criminal justice system for adults, the politics, history and culture of the country.¹⁸¹

It has been argued that the performance of the juvenile justice system and the effectiveness of other community responses to juvenile crimes cannot simply be measured in terms of their compliance with the principles governing children’s rights in juvenile justice.¹⁸² Such evaluation must encompass the main objectives of the criminal justice system and the guarantees it offers or fails to offer to juvenile delinquents and adults.¹⁸³ The preservation of public safety is a legitimate aim of any justice system.¹⁸⁴ That aim dictates the choice of the criteria used to evaluate a juvenile justice system. The question is how best to achieve the public safety objectives of the justice system while respecting the principles enshrined in the Convention on the Rights of the Child, 1989 and protecting the rights of juvenile delinquents. Much as it is important to hold juveniles responsible for their delinquent acts and preserve public peace and security, this should not overshadow the overarching principles of the juvenile justice enshrined in the United Nations Convention on the Rights of the Child. A balanced juvenile justice system is expected to be able to restore the victim, protect the community and facilitate the care,

¹⁷⁹ See the Youthful Delinquents Act, 1854, 17 & 18 Vict c. 86. Tanzania is a Commonwealth country, whose legal system follows the English model of common law.

¹⁸⁰ Mashamba, C., *supra* note 116, p. 105.

¹⁸¹ Winterdyk, J., “Juvenile Justice: International Perspectives, Models, and Trends.” New York: Taylor and Francis Group LLC., 2014, p. 104.

¹⁸² United Nations Office on Drugs and Crime, “Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes.” Vienna: United Nations, 2011, p. 5.

¹⁸³ *Ibid.*

¹⁸⁴ United Nations Committee on the Rights of the Child, General Comment No. 10, *supra* note 45.

protection and rehabilitation of the concerned juvenile so that he is more capable of living productively and responsibly in the community.

2.3 Theories and Models for the Understanding of Juvenile Justice Systems

The terms ‘theory’ and ‘model’ are sometimes used interchangeably though they have different connotations. In juvenile justice, theories are used to explain why children commit delinquent acts while models try to explain how best children delinquents can be handled.¹⁸⁵ This research is concerned with the rights of detained juvenile delinquents. It therefore focuses on the models of juvenile justice rather than theories. The models that are presented in this chapter have, at different times and to different extents, been used by various countries in their juvenile justice systems.

Winterdyk,¹⁸⁶ after comparing the general features, key personnel, key agencies, tasks, understanding of client behavior, purpose of intervention, and objectives of the juvenile justice system of many countries, has drawn a range of six juvenile justice models. These are the welfare model, justice model, modified welfare-justice model, restorative justice model, participatory model and the crime control model.¹⁸⁷ Even though there are various standards and guidelines for the administration of juvenile justice, these six models characterize juvenile justice systems worldwide. These six models originate from three basic models which are the welfare model, justice model and modified welfare-justice model. For many years, juvenile justice models have attracted substantial public and Governments’ attention. As a result, there have been considerable reforms to legislation, court procedures, policing and welfare interventions.

2.3.1 The Welfare Model

This is the early and dominant model which is sometimes referred to in some literatures as the “Protection Model.” It emanated from the Positivism theory which contended that children cannot be regarded as rational or self determining agents, but are subject to and

¹⁸⁵ Roberson, C., “Juvenile Justice: Theory and Practice.” New York: Taylor and Francis Group LLC, 2010, p. 82.

¹⁸⁶ Winterdyk, J., (Ed.), *supra* note 179, p. 6.

¹⁸⁷ *Ibid.*

the product of the environment within which they live.¹⁸⁸ Any criminal action on their part can therefore be attributed to dysfunctional elements in that environment.¹⁸⁹ The task of the justice system then, is to identify, treat and cure the underlying social causes of offending, rather than inflicting punishment for the offence itself.¹⁹⁰ This view is opposed to the Classical theory which argues that even juveniles are endowed with free will, with very few exceptions. Being the rational actors therefore, juveniles choose to commit crimes. Juvenile delinquency was seen as the result of calculated decisions by rational actors.¹⁹¹

Juvenile delinquents must be held accountable in law for what they do. The Positivists advocate for the welfare model which emphasises guidance, assistance and rehabilitation of juvenile delinquents while the advocates for classical theory insist on punishment and legal responsibility for the deeds children may have committed, (justice model). Regardless of their differences, both welfare and justice models led to juvenile delinquents being placed in institutions for their own good, for security of the society or for punishment.¹⁹² Later, it became apparent that institutionalisation of children delinquents was damaging to them, ineffective in preventing delinquency and quite unjust. New approaches arose, some emphasising the need to keep children delinquents with their families, in their communities and in contact with their cultures.

The welfare model was governed by the concept of '*Parens Patriae*,' meaning, "Father of his or her country or Parenthood of the State."¹⁹³ It was a doctrine in Roman law where the State was regarded as provider of protection to those unable to care for themselves. That is, the State had responsibility to care for the welfare of children and other helpless

¹⁸⁸ Alder, C. and Wundersitz, J., "New Directions in Juvenile Justice Reform in Australia", in Alder, C. and Wundersitz, J., *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* Canberra: Australian Institute of Criminology, 1994, pp. 15-44, at p. 17.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Australian Government, Attorney-General's Department, "Children's Involvement in Criminal Justice Processes: Juvenile Justice Models." Sydney: Australian Law Reform Commission, 1997.

¹⁹² Skelton, A., "Restorative Justice as a Unifying Force for Child Justice Theory and Practice." A paper presented in the 1st World Congress on Restorative Justice, Lima- Peru, 3rd -7th November, 2009. pp. 30-48

¹⁹³ Garner, B., *supra* note 22, p.1249.

members of the society.¹⁹⁴ Therefore, parental authority was subject to government supervision. If parents failed to provide adequate care, the State would intervene to protect children's welfare. The doctrine was applied broadly, allowing the State to act as a "kind and just parent" in respect of vulnerable children.¹⁹⁵

The focus was on the needs and best interests of the child rather than on the rights of the child or of the parents. Rehabilitation and treatment were considered the goals of the system. When a State assumes the place of a juvenile's parents, it assumes as well the parental duties, and its treatment of its juveniles should, as far as can be reasonably required, be what proper parental care would provide.¹⁹⁶ Without a programme for individual treatment, the result may be that the juvenile will not be rehabilitated, but warehoused.¹⁹⁷ Juvenile courts followed the welfare model with its underlying *parens patriae* philosophy that focused on the best interests of the child. As States experienced the wave of increasing juvenile delinquency during the late 1950s and early 1960s, many responded by viewing juveniles not as having problems, but as being problems.¹⁹⁸ States resorted to justice model whereby children delinquents would be held legally accountable and in some instances, punished for their delinquent acts. This situation is similar to Tanzanian context whereby while the Law of the Child Act, 2009 is being complained about for not effectively protecting the rights of juvenile delinquents, some law enforcers are of the opinion that such law is not stringent enough to curb the delinquent acts of children.

The provisions of the Law of the Child Act, 2009 which are considered as weak for this matter are those relating to the prohibition of custodial sentences and alternative punishments to juvenile delinquents. The Law of the Child Act, 2009 provides that a

¹⁹⁴Nyantakyi, M., "Rethinking Juvenile Justice in Ghana: Proposing Practical Measures through a Child Rights Based Approach." A Dissertation Submitted in Partial Fulfillment of the Requirements for the Award of Master of Arts in Development Studies, International Institute of Social Studies, 2013, (unpublished), p. 19.

¹⁹⁵ Skelton, A., *supra* note 190, p. 4.

¹⁹⁶ Andrew, W., "Limits on Punishment and Entitlement to Rehabilitative Treatment of Institutionalized Juveniles, *Nelson v. Heyne*." *Virginia Law Review*, Vol. 60, No. 5, 1974, pp. 864-883.

¹⁹⁷ *Ibid.*

¹⁹⁸ Hess, K., *supra* note 161, p. 304.

child should not be sentenced to imprisonment. Where a child is convicted of any offence punishable with imprisonment, the court may discharge the child without making any order; or it may order the child to be repatriated at the expense of the Government to his home or district of origin if it is within Tanzania; or order the child to be handed over to the care of a fit person or institution named in the order, if the person or institution is willing to undertake such care.¹⁹⁹ In the view of those law enforcers, the primary purpose of the Law of the Child Act, 2009 in dealing with children delinquents, has been defeated by these provisions stipulating for alternative punishments of juvenile delinquents.

2.3.2 The Justice Model

Justice Model is also known as the Due Process or ‘Back to Justice’ model. This model emphasises the due process of law and accountability. In contrast to the welfare model, justice model is based on the assumption that even young persons are, with certain limited exceptions, gifted with free will. The model assumes that all individuals are reasoning agents who are fully responsible for their actions and so should be held accountable before the law. This means that the primary focus of justice model is the ‘deeds’ of the child rather than their welfare and needs. Within this model, the task of the justice system is to assess the degree of culpability of the individual delinquent and apportion punishment in accordance with the seriousness of the offending behaviour. In so doing, the individual must be accorded full rights to due process, and State powers must be constrained, predictable and determinate.²⁰⁰

Justice model does not emphasise on the treatment of juvenile delinquents. Punishment is the prime ideal of justice model in which children are not regarded as immature or as the victims of the environment within which they live. Justice model is said to be concerned with the dispensing just deserts. This reflects a moralizing but individualistic world-view in which the deviant child is perceived as an independent author of his or her

¹⁹⁹ S. 119, Law of the Child Act, 2009, [Cap. 13].

²⁰⁰ Odala, V., “Spectrum for Child Justice in the International Human Rights Framework: From ‘Reclaiming the Delinquent Child’ to Restorative Justice.” *American University International Law Review*, Vol. 27, 2011, pp. 543 - 554.

actions, endowed with a degree of free will.²⁰¹ The justice model contends that if such a conscious and independent deviant actor has contravened a rule, the balance of the scales of justice has been disturbed and can be restored only if the delinquent is punished.²⁰² Since the justice system is engaged in the administration of punishment that often entails loss of liberty, there is a greater emphasis on the need for procedural rights of due process and appropriate constraints to be placed on the punitive power of the State.²⁰³

The institutional arrangements that are most closely associated with the justice model consist of modified 'junior criminal courts' rather than the socialised welfare tribunals that help to characterise pure versions of the welfare approach. The notion that young people need to be protected from contamination by mixing them with older delinquents is still present but is addressed by introducing relatively minor modifications to the standard lower-tier criminal courts that deal with adult offenders. The justice approach involves two important rules which are the need to protect society against crime and the need to accord special treatment to the juvenile taking into consideration his or her personal circumstances. The justice model however seems to be more in favour of protecting the society and therefore an emphasis on retribution. The best interest of the child is therefore not a primary consideration in this approach.²⁰⁴

2.3.3 Modified Welfare-Justice Model

This is a hybrid of the welfare and justice models. As pointed out above, the concern of juvenile justice system has always been both protecting the society and serving the best interests of the child, while at the same time meeting the child's needs and protecting his rights. The juvenile justice system therefore performs the welfare cum justice functions. In this duality of its roles, the system strives to achieve social goals such as the provision of minimum standards of child care while at the same time safeguarding the rights of children as per the United Nations Convention on the Rights of the Child, 1989.²⁰⁵ Most

²⁰¹ Odongo, G., *supra* note 144, p. 30.

²⁰² *Ibid.*

²⁰³ Caldwell, B., *supra* note 40.

²⁰⁴ Nyantakyi, M., *supra* note 192, p. 20.

²⁰⁵ Joshi, V., *supra* note 165, p. 10.

of the juvenile justice systems of today have been particularly influenced by the welfare-justice model.

As a matter of fact, no juvenile justice system exists exclusively as a welfare or justice model, as described in theory. Elements of either could be found in systems that signify the welfare or justice model.²⁰⁶ Most of the juvenile justice systems have elements of these two models to a varying degree. The balance between the two models has been achieved according to the culture and the stage of development of each country. Although no individual country can be characterized as being truly representative of any one model, the models provide for the frameworks that are useful for describing and differentiating among nations' treatment of youthful delinquents and allow for objective comparative analysis.²⁰⁷ Even when the welfare model was at its strongest in Australia for example, justice elements were never entirely jettisoned.²⁰⁸ Children's courts still retained many of the features of the adult criminal courts.²⁰⁹ This underscores a point frequently forgotten in discussions of juvenile justice that the so-called welfare and justice models are in fact conceptual tools, and no juvenile justice system has ever fitted exclusively into either one or other of these categories.²¹⁰

Moreover, it has been argued that neither model provides for an appropriate description of the juvenile justice system in England, even though the justice-welfare rhetoric was central to analyses of juvenile justice practices in that country.²¹¹ The same comment can apply with equal validity to many countries' juvenile justice systems. The problem with framing juvenile justice reforms in a welfare-justice style is the underlying assumption that the situation of children delinquents can be similarly dichotomized. The myth of this assumption has become increasingly apparent as we begin to observe the consequences

²⁰⁶ Odongo, G., *supra* note 144, p. 41.

²⁰⁷ Winterdyk, J., *supra* note 179, p. 7.

²⁰⁸ *Ibid.*

²⁰⁹ Seymour, J., "Australia's Juvenile Justice System: a Comment," in Wundersitz, J., *et al*, Eds, *Juvenile Justice: Debating the Issues*. Sydney: Allen and Unwin, 1993, pp. 52-57.

²¹⁰ *Ibid.*

²¹¹ Alder, C. and Wundersitz, J., *supra* note 186, p. 4.

for young persons of juvenile justice initiatives which were implemented in the late 1970s and 1980s.²¹²

2.3.4 The Crime Control Model

Crime control model refers to an approach in criminal justice which places emphasis on reducing the crime in the society through increased police and prosecutorial powers. This model was developed by Herbert Packer in 1960s.²¹³ To a large extent, crime control model applies to the general criminal justice system with little focus on juvenile justice. The crime control model tries to deter crimes by all means with less attention on individual rights.²¹⁴ This model stresses on the idea that individual rights must be put aside for the purpose of maintaining public safety. Informally, the crime control model assumes that protection of individual rights through due process of law limits the law enforcement and does not provide enough protection for the society. The model suggests that sometimes one has to give up his personal rights for the benefit of the society as a whole. A key principle of the crime control model is that of the protection of the society rather than individual rights.

On juvenile delinquency, the crime control model suggests that the solution is to subject juvenile delinquents to more adult penalties. Crime is the product of moral breakdown and it does not matter what the age is. Supporters of this model feel that juveniles who commit crime should take full responsibility for their actions and be punished like adults. In the USA for example, by 1980s, the best interests of the society gained recognition over those of the young persons.²¹⁵ The courts returned to a focus on what was right according to the law. As a result, two more Ds were added to America's juvenile justice system: deterrence and deserts. Deterrence involves using punishment to prevent future lawbreaking. It does so in several ways, the most obvious being locking delinquents up so they cannot harm the society further.

²¹² *Ibid.*

²¹³ Schmallegger, F., "Criminal Justice Today, 5th ed." Prentice Hall: Pearson, 1999, p. 28.

²¹⁴ *Ibid.*

²¹⁵ Hess, K., *supra* note 161, p. 56.

Incarceration may result in further deterrence by serving as a direct lesson to the incarcerated person that crime does not pay, and sending the same message to others in the public.²¹⁶ Deserts, or just deserts as it is often called, is a concept of punishment as a kind of justified revenge. This is the concept of *lex talionis*, or an eye for an eye.²¹⁷ It tends to emphasise on the custodial provision of children delinquents when it can be shown that they are a risk to the public. Unless crime is controlled, the rights of law-abiding citizens will not be protected, and the security of the society will be diminished. In crime control model, prevention of crime is the most important responsibility of criminal justice system because order is a necessary condition for a free society.²¹⁸ Crime control proponents believe that criminal justice system should concentrate on protecting the victim's rights rather than on vindicating the defendant's liberties. Police authority should be increased to make it easier to investigate, search, arrest, prosecute and convict. Legal technicalities that restrain the police should be removed and dismissed.²¹⁹ In the crime control model, the criminal process should operate like an assembly-line, pushing cases quickly and smoothly along toward the disposition and conviction. For example, if the police make an arrest and a prosecutor files criminal charges, then the accused should be presumed guilty because the investigation of police and prosecutors is highly reliable.²²⁰

The goal of crime control model is achieved if there is a decline of crime in the society. Prevalence of violent children delinquency for example, is often cited to justify harsher reactions to dealing with juvenile delinquents. According to Odongo, G., the majority of offences committed by children in African societies comprise minor economic crimes but this fact is never given publicity and dissemination by the governments and the media.²²¹ If this fact was published and disseminated widely, it could end the norm of using crime

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ Collier, D., "The Ideal Pendulum Swing: From Rhetoric to Reality." *Berkeley Journal of Criminal Law*, Vol. 13, Issue 1, 2008, pp. 175-200, at p. 177.

²¹⁹ Packer, H., "Two Models of the Criminal Process." *University of Pennsylvania Law Review*, Vol. 113, No. 1, 1964, pp. 25- 32.

²²⁰ *Ibid*, p. 27.

²²¹ Odongo, G., *supra* note 144.

control approach in relation to children delinquents, at least in African region. It is argued that where a State is willing to implement the provisions of the United Nations Convention on the Rights of the Child relating to juvenile justice, it may have to overcome, or ignore, public resistance to reforms. Public opinion should not be an excuse for the violation of children's rights.²²² In this regard, a better informed public is said to be less punitive. The political will to implement the provisions of the child rights-oriented juvenile justice systems seriously is undoubtedly affected by public pressure.²²³ Hence, governments, in cooperation with other non-government actors such as the civil society and the media must make intense and coordinated efforts to influence the public opinion in order to counter popular sentiment premised on an attitude of crime control.²²⁴

2.3.5 Restorative Model of Juvenile Justice

The restorative model emerged as an influence on lawmakers to encourage delinquents to accept responsibility for their criminal behaviour and its consequences for others.²²⁵ One of the key features of this model is the involvement of victims in dealing with the offence. It does not overlook rehabilitation and punishment, but places them in the context of individuals taking responsibility for their actions. The paradigm of restorative justice argues that criminal behaviour is a conflict between individuals and that when a crime is committed; it is the victim who is harmed rather than the State. Thus, rather than the delinquent owing a debt to the society which must be expunged by experiencing some form of punishment such as a fine or imprisonment, the delinquent owes a debt to the victim, which can only be repaid by making good the damage caused to that particular individual.²²⁶ Restorative justice is regarded as an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities.²²⁷

²²² Hamilton, C., and Harvey, R., "The Role of Public Opinion in the Implementation of International Juvenile Justice Standards." *International Journal of Children's Rights*, Vol. 11, No. 4, 2003, pp. 369-390.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ Australian Law Reform Commission, *supra* note 189.

²²⁶ *Ibid.*

²²⁷ Preamble to the Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, 2002, para. 3.

In restorative model, the aim of the criminal justice process is to bring about reconciliation, not to exact punishment. The restorative model is often integral to diverting young delinquents from the formal court system. It is a contextual model that acknowledges the desirability of balancing juvenile delinquents' rights against their responsibilities to the community. Supporters of restorative justice model argue that when a crime is committed, harm has been caused and that healing or restoration needs to be facilitated. When an incident occurs which upsets the balance of rights and responsibilities, methods must be found to restore the balance so that community members, including the delinquent and the victim, may come to terms with the incident and carry on with their lives.²²⁸

The underlying principle is that the response to crime cannot be effective without the joint and active involvement of victims, delinquents, and the community.²²⁹ The restorative justice model is based on three concepts of the old and traditional understanding of the wrong doing. Firstly, that when a crime occurs, the focus is on the harm that has been done to people and relationships. Secondly, when harm has been done, it creates obligations and liabilities. Thirdly, the resolution of a wrongful act involves wrongdoers, victims and the community in efforts to heal the harm and put things right.²³⁰ Restorative justice emphasises on reconciliation rather than punishment.²³¹ It entails accountability by the delinquent for his wrong- doing, family or community responsibility towards the delinquent and the delinquent's eventual reintegration into the society.

Although the ideas and principles of restorative justice have been taken from indigenous justice systems around the world, nowadays restorative justice has gained prominence in juvenile justice systems as an alternative approach which seeks to address the problems

²²⁸ Johansson, K., "Children in Trouble with the Law: Child Justice in Sweden and South Africa." *International Journal of Law, Policy and the Family*, Vol. 17, Issue 3, 2003, pp. 308 - 337.

²²⁹ *Ibid.*

²³⁰ Zehr, H., "The Little Book of Restorative Justice, Revised ed." New York: Skyhorse Publishing Inc, 2014, p. 19.

²³¹ Odongo, G., *supra* note 144.

of the welfare-justice approach.²³² The provisions of Article 40 (1) of the United Nations Convention on the Rights of the Child, 1989 that refer to reintegration as the primary objective of the juvenile justice system and the need for the child to assume a constructive role in the society have been said to hint at a more restorative justice approach.²³³ Further, the necessity of having a variety of dispositions at hand when sentencing a young delinquent is stated in Article 40 (4) of the United Nations Convention on the Rights of the Child, 1989 which also supports the provisions of Article 40 (3) on diversion. States' laws on juvenile justice today contain provisions with some features of restorative model of juvenile justice.

The Law of the Child Act, 2009 of Tanzania incorporates the restorative justice model by providing that where a child is convicted of any offence for the commission of which a fine, compensation or costs may be imposed, and the court is of the opinion that the case would be best disposed of in the interest of the child by the imposition of a fine, compensation or costs, whether with or without any other punishment, the court may in any case, order that the fine, compensation or costs awarded be paid by the parent, guardian or relative of the child instead of being paid by the child, unless the court is satisfied that the parent, guardian, or relative of child cannot be found or that he has not contributed to the commission of the offence by neglecting to exercise due care of the child.²³⁴

The problem with this provision is that it shifts the criminal responsibility of a child to the parent, guardian or relative of the child. The legal obligation to pay the fine, compensation or costs is transferred to the parent, guardian or relative as if he is actually the one who committed the offence. If the parent, guardian or relative fails to comply with the court's order to pay the fine, compensation of costs, the same may be recovered

²³² Sloth-Nielsen, J., "Children's Rights in Africa: A Legal Perspective." Aldershot: Ashgate Publishing, Ltd, 2008, p. 131.

²³³ Skelton, A., "Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice," in Keightley, R., ed., *Children's Rights*. Kenwyn: Juta and Co., 1996, pp. 98 - 113.

²³⁴ S. 118 (1), the Law of the Child Act, 2009, [Cap.13].

from him by distress or imprisonment in the same manner as if the order had been made on the conviction of the parent, guardian or relative of the child who was charged.²³⁵

2.3.6 The Participatory Model

This is a juvenile justice approach which emphasises on active participation by community agencies and citizens in an effort to contain the offending behaviour of young persons. It focuses on the integration of marginalized youth or young delinquents into the mainstream of social life and the minimization of formal legal intervention. Juvenile delinquents have to be treated bearing in mind that children are different from adults and the juvenile justice system should reflect these differences. Recognising that young people may be less culpable than adults and more amenable to change, the society has responsibility to protect children and create a system whose central tenets are not punishment and retribution, but protection, treatment and rehabilitation.²³⁶ The participatory model tries to remedy the weaknesses of welfare and justice models.

The problem with welfare and justice models is that the welfare model is based upon notions of economic and social justice through State planning and Welfare, with administrators making the main decisions. Justice model is based on the concept of legality, the role of law, due process, and the professional lawyers making the main decisions. The resolution of this problem with respect to these two models is essential for the proper development of a mechanism to control and protect juvenile delinquents. The participatory model resolves this problem because juvenile justice can more meaningfully take place at the macro level, with greater participation of citizens in resolving or containing conflicts at the local level with a minimum intervention of the centralized power structures of the modern State.²³⁷

²³⁵ *Ibid*, S. 118 (3).

²³⁶ Steinberg, L., "Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question." *Journal of Criminal Justice*, Vol. 18, Issue 3, 2003, pp. 20-25.

²³⁷ Gupta, M., "A Study on the Identification of Continuing Challenges that Impede the Effective Implementation of Juvenile Justice System in India." Thesis Submitted in Partial-fulfillment of the Requirements for the Award of PhD, Gauhati University, 2014, (unpublished).

It was pointed out earlier that juvenile justice models in different countries have combined the characteristics of various models to evolve models to suit their own needs. Participatory model exists in industrialized countries such as Japan and is applied to juvenile and youthful delinquents in the developing countries.²³⁸ Like most of other juvenile justice systems, the juvenile justice system of Tanzania too cannot be described entirely in terms of one of these models but rather in terms of a combination of them, with features from the welfare, justice, modified justice, participatory, restorative and crime control models. The strength of participatory model is that it encourages the involvement of citizens and agencies outside the formal legal arena. The Law of Child Act, 2009 of Tanzania contains the provisions that reflect some features of the juvenile justice models discussed in this chapter.

However, the implementation of the Law of the Child Act, 2009 depends on other laws and regulations, such as the criminal laws, criminal procedure laws, marriage law, civil laws, *et cetera*. For instance, some principles have been provided for the protection of juvenile delinquents in the criminal proceedings, but they are missing in criminal procedure laws. There are provisions which require the juvenile suspects to be detained separately from adult suspects during pre-trial detentions, the provisions that prohibit the disclosure of information on juvenile suspects and accused juveniles by print or other media before a final judgment has been made, *et cetera*. The Law of the Child Act, 2009 provides that,

A person shall not publish any information or a photograph that may lead to the identification of a child in any matter before the court except with the permission of the court.²³⁹ Any person who publishes any information or photograph contrary to this section commits an offence and upon conviction shall be liable to a fine of not less than two million shillings and not more than fifteen million shillings or to imprisonment for a term not exceeding three years or to both.²⁴⁰

²³⁸ *Ibid*, p. 3.

²³⁹ S. 33 (1), Law of the Child Act, 2009, [Cap. 13].

²⁴⁰ *Ibid*, S. 33 (2).

All these provisions are consistent with the United Nations Convention on the Rights of the Child, 1989 and other international instruments on the handling of juvenile delinquents. Nevertheless, the problem with the implementation is that there are no specific procedures available for complaint mechanisms, for filing a lawsuit in order to appeal against violations; and there are not any criminal or administrative sanctions made known to the victims of possible violations. No cases have been reported to be brought before the courts during the seven years of the Law of the Child Act, 2009's operation challenging the violations of children delinquents' rights stipulated in this legislation.

As there is no country's juvenile justice system that is absolutely perfect, the researcher argues that regardless of the juvenile justice model employed in any particular country, the focus should always be on the implementation of the provisions of the United Nations Convention on the Rights of the Child, 1989 regarding the protection of juvenile delinquents' rights. This in turn will result in having in place the children's rights oriented juvenile justice systems world-wide; regardless of the names by which such models may be called. Most of the models presented in this chapter indicated that juvenile delinquents are one of the most vulnerable groups which need special treatment and protection of their legal rights throughout the justice processes.

This study adopts all the propositions and features of the discussed juvenile justice models with emphasis on the idea that juvenile delinquents are vulnerable and prone to the violation of their human rights when in detentions. It can be argued that an accused person in the custody of the State is not only physically restrained but also, by virtue of restriction of liberty, has a diminished capacity to withstand the influences of others. Custody imports a relationship of dependency because the prisoner cannot walk away and he relies upon his or her jailers for the basic necessities of life.²⁴¹ The child, like everyone else, is also entitled to the basic rights applying to the administration of criminal justice, such as the rule against arbitrary arrest, the prohibition of detention without trial, protection against violence, freedom from torture, cruel, inhuman and degrading

²⁴¹ Kapoor, K., and Kapila, S., *supra* note 23.

treatment or punishment.²⁴² Apart from these general protections, juvenile delinquents are also entitled to the right to be separated from adult criminals in detentions, right to be detained for the shortest appropriate period of time, right to free legal assistance and the right to rehabilitation and reintegration programmes in the detentions. Essentially, it is apparent that due to their age, juvenile delinquents are vulnerable to abuse and neglect and they need special protection against such threats. This makes it imperative that a child who comes in contact with the criminal justice system has to be protected more than adult offenders due to the former's vulnerability and potential to change from a criminal to the law-abiding citizens.

²⁴² Van, J., "International Standards for the Protection of Children's Rights: American and South African Dimensions." *Buffalo Human Rights Law Review*, Vol. 15, 2009, pp. 81-108.

CHAPTER 3

3. INTERNATIONAL STANDARDS APPLICABLE TO JUVENILE DELINQUENTS AND STATUS OF INTERNATIONAL LAW WITHIN TANZANIAN LEGAL SYSTEM

In the previous chapter, a discussion on Tanzanian juvenile justice system was presented and juvenile justice models were analysed with a view to seeing the way they affect treatment of juvenile delinquents. Moreover, the discussion aimed at identifying the appropriate model of juvenile justice for Tanzania to enhance an effective protection of juvenile delinquents' rights. The analysis indicated that no country's juvenile justice system is absolutely perfect. Tanzania, like most of the States, applies a blended model consisting of two or more models of juvenile justice. The researcher has argued that there is no single model which fits the Tanzania's circumstances. Thus, the appropriate model of juvenile justice for Tanzania should be one which attains the children's rights-oriented juvenile justice system, focusing on the implementation of the United Nations Convention on the Rights of the Child.

This chapter examines the application of international law within Tanzanian legal system. It also analyses the international standards on juvenile delinquents. In doing so, international and African regional instruments applicable to juvenile delinquents are discussed to lay a foundation for assessment of Tanzanian compliance with the standards enshrined therein. International standards discussed here are those derived from the conventional and soft laws. In international law context, conventional law refers to the agreements between States or between States and international organisations operating in the field of international law, while soft law covers all non-binding principles, rules and guidelines contained in various international texts adopted by the States or international organisations.²⁴³ The later, though not binding, are helpful in this work as they usually inform a State's conduct, and with time and States' practice, they can evolve into international customary law.²⁴⁴ International customary law means general practice

²⁴³ Dugard, J., "International Law: A South African Perspective, 4th ed." Kenwyn: Juta & Co. Ltd, 2011, p.25.

²⁴⁴ *Ibid.*

accepted as law.²⁴⁵ Thus, soft laws are not treaties, but they elaborate useful guides as to the protection of juvenile delinquents' rights. The level of implementation of international standards discussed in this part is assessed in chapter five which is concerned with the discussion of research findings.

Generally, the international legal framework on juvenile delinquents' rights is in top-down approach from the global, regional and sub-regional levels to the national level.²⁴⁶ At the national level, it is where children experience the life and are supposed to enjoy all their rights. However, the way States perceive and implement children's rights generally may not reflect the reality of those rights as stipulated in various international and regional instruments. The general comments and concluding observations of the United Nations Committee on the Rights of the Child, and African Committee of Experts on the Rights and Welfare of the Child have been referred to. This is important since these Committees are the bodies which have mandate to promote, protect and monitor the implementation of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.²⁴⁷

3.1 The Application of International Law in Tanzania

Protection of juvenile delinquents' rights is abided by two prominent theories that offer explanations about the relationship between international law and municipal law, namely, monism and dualism theories. According to monism, international law and municipal law are mutually complementary aspects of one system of law in general. But to dualism, international law and municipal law represent two entirely distinct legal systems of law with international law having an intrinsically different character from that of municipal law. Tanzania's legal system is based on English common law which follows dualist system as opposed to monist system. In monist systems, ratified international treaties or

²⁴⁵ Art. 38 (1) (b), the Statute of the International Court of Justice, 1946. A good example of soft law which has acquired international customary law status is the Universal Declaration of Human Rights, 1948.

²⁴⁶ Vandenhoe, W. *et al*, Eds, "International Handbook of Children's Rights Studies." New York: Routledge, 2015, p. 122.

²⁴⁷ See Art. 43 (1), United Nations Convention on the Rights of the Child, 1989 and Art. 32, the African Charter on the Rights and Welfare of the Child, 1990.

conventions can be enforced directly in national courts, but in dualist systems, apart from being ratified, treaties cannot be enforced until they have been incorporated into national law.²⁴⁸ This position was affirmed by the then Court of Appeal for Eastern Africa in the case of *East African Community v. Republic*,²⁴⁹ where it was expressly decided that the provisions of a treaty entered into by the Government do not become part of the municipal law save in so far as they are made such by laws of that country. In Tanzania, conventions and treaties are incorporated via national legislation,²⁵⁰ which may be done directly, where the whole of an instrument is adopted in a single national law or in a piecemeal through a number of separate subject-specific Acts and amendments.

The common law, doctrines of equity and the statutes of general application which were in force in England on 22nd July 1920, are applicable in Tanzania, subject to their conformity with local circumstances.²⁵¹ The Constitution vests in the State's authorities, the responsibility to ensure that in discharging their duties, human dignity and other human rights are respected, cherished, preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights, 1948.²⁵² As stated earlier, the Constitution does not contain specific provisions relating to juvenile delinquents, but legislations enacted pursuant to the Constitution make provisions for juveniles' rights. The redress for violation of human rights in Tanzania is sought in court through the Basic Rights and Duties Enforcement Act, 1994.²⁵³

Moreover, other non-human rights procedures such as under the Criminal Procedure Act, 1985 and other laws may be invoked to obtain appropriate legal remedies. Sometimes the courts in Tanzania use international and regional conventions on human rights in interpreting the Bill of Rights. For example, in the case of the *DPP v. Ally Haji Ahmed*

²⁴⁸ Geary, P., "CRC in Court: The Case Law of the Convention on the Rights of the Child." London: Child Rights International Network, 2012, p.5.

²⁴⁹ [1970] E.A. 457.

²⁵⁰ This is pursuant to Article 63 (3) (d) and (e) of the Constitution of United Republic of Tanzania, 1977.

²⁵¹ S. 2 (3), the Judicature and Application of Laws Act, [Cap. 358 R.E. 2002].

²⁵² Art. 9 (f), the Constitution of United Republic of Tanzania, 1977.

²⁵³ [Cap. 3 R.E. 2002].

and others,²⁵⁴ the Court of Appeal invoked the provisions of the Universal Declaration of Human Rights, 1948 for guidance in the application and interpretation of the Tanzanian Bill of Rights. The contentious issue before the Court was whether the High Court of Tanzania when sitting in its ordinary capacity has jurisdiction to grant bail pending trial to persons accused of economic crimes under Economic and Organised Crime Control Act, 1984.²⁵⁵ The DPP was of the view that the Act vitiates the jurisdiction of the High Court. The Court of Appeal was, however, aware of the possibility of bail being granted by the High Court sitting as an Economic Crimes Court after formal charges had been filed against the accused persons. The Court of Appeal observed that such differences of practice would violate the basic principle of equality before the law as stipulated under Article 13 of the Constitution, particularly when interpreted in light of the relevant provisions of the Universal Declaration of Human Rights, 1948. The Court of Appeal relied on Article 9 (f) of the Constitution on Fundamental Objectives and Directive Principles of State Policy. Although the Fundamental Objectives and Directive Principles of State Policy are not enforceable in a court of law as per Article 7 (2) of the Constitution, still under Article 7 (1) of the Constitution, all organs of state including the judiciary are required to take cognizance of it, observe and apply all its provisions.²⁵⁶

3.2 Universal Declaration of Human Rights, 1948

The entire framework for the protection of children's rights is viewed in the context of human rights as embodied in the Universal Declaration of Human Rights, 1948.²⁵⁷ The Universal Declaration of Human Rights, 1948 provides a world-wide understanding of human rights obligations undertaken by all the United Nations Member States. Although the Universal Declaration of Human Rights, 1948 does not address children's specific issues, in particular juvenile delinquents, it contains some provisions relating to the basic procedural safeguards in the criminal justice generally. Some of the safeguards are the

²⁵⁴ Criminal Appeal No. 44 of 1985, Court of Appeal of Tanzania at Dar es Salaam, (unreported).

²⁵⁵ [Cap. 200 R.E. 2002].

²⁵⁶ Also See Kabudi, J., "The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms", *Journal of Law and Politics in Africa, Asia and Latin America*, Vol. 24, No. 3, 1991, pp. 271-281, at p. 278.

²⁵⁷ United Nations General Assembly Resolution 217 A (III) of 10th December, 1948.

right to be free from torture, arbitrary arrest, detention and exile, presumption of innocence, and the right to security of person and privacy.²⁵⁸

The significance of the Universal Declaration of Human Rights, 1948 is that although it is not legally binding, it has been adopted in or has influenced most of the national Constitutions since 1948.²⁵⁹ The Universal Declaration of Human Rights, 1948 has also served as the foundation for numerous treaties, national laws, as well as the institutions protecting and promoting human rights globally. One instrument that has its roots in the Universal Declaration of Human Rights, 1948 is the International Covenant on Civil and Political Rights, 1966.

The provisions of these texts are incorporated in the Constitution of the United Republic of Tanzania in the form of Bill of Rights.²⁶⁰ As stated earlier, the Courts in Tanzania use international instruments to interpret the Bill of Rights. For example, **Mwalusanya, J.**, (as he then was), once advised that in interpreting the Constitution, courts should take into account the provisions of the Universal Declaration of Human Rights, 1948 and other treaties which Tanzania has ratified.²⁶¹ In the case of *Christopher Mtikila v. Attorney General*,²⁶² it was stated that the international conventions must be taken into account in interpreting, not only our Constitution but also other laws, since Tanzania does not exist in isolation, it is part of a comity of nations. In fact, the whole of the Bill of Rights was adopted from the rights promulgated in the Universal Declaration of Human Rights.²⁶³

²⁵⁸ Art.5, 9, 10 and 11, the Universal Declaration of Human Rights, 1948.

²⁵⁹ Komal, H., "Proceedings of the 3rd International Conference on Global Business, Economics, Finance and Social Sciences," held on 19th-21st December, 2014, Mumbai.

²⁶⁰ Tanzania incorporated the Bill of Rights in its Constitution in 1984. See the 5th Constitutional Amendment Act, No. 15 of 1984.

²⁶¹ *Ephrahim v. Pastory and Another*, (PC) Civil Appeal No. 70 of 1989, High Court of Tanzania at Mwanza, Reported in [1990] LRC 757.

²⁶² [2006] TLR 279.

²⁶³ Kabudi, J., *supra* note 254.

3.3 Juvenile Delinquents' Rights under the UN Convention on the Rights of the Child, 1989

The United Nations Convention on the Rights of the Child, 1989²⁶⁴ provides for an international framework for the protection of children's rights generally. It consists of a comprehensive list of the legally binding obligations towards children that State parties are required to implement. Up to November, 2017, all United Nations member States were parties to the United Nations Convention on the Rights of the Child, 1989 except the United States of America.²⁶⁵ Tanzania became party to this Convention on 10th June, 1991.²⁶⁶ The Convention provides that in all actions concerning children, the best interests of the child should be a primary consideration.²⁶⁷ Although the 'best interest of the child' principle has attracted attention of numerous authors, most of them have avoided defining what these best interests are and preferred to highlight what is not in the best interest of the child.²⁶⁸ One of the authors has defined it as the least detrimental alternative to be adopted in cases involving children's placement.²⁶⁹

The United Nations Convention on the Rights of the Child, 1989 is also not clear in this point as it only indicates the measures that have to be taken by States to ensure best interests of the child.²⁷⁰ Kaime opines that since the list of factors competing for the core of the child's best interests is almost endless and will vary depending on each particular factual situation, Article 3 of the United Nations Convention on the Rights of the Child requires and indeed demands that careful and objective assessment of the child's

²⁶⁴ United Nations General Assembly Resolution 44/25 of 20th, November 1989.

²⁶⁵ United Nations Treaty Collection: United Nations Convention on the Rights of the Child. Ratification Status as at 6th November, 2017.

²⁶⁶ *Ibid.*

²⁶⁷ Art. 3 (1), United Nations Convention on the Rights of the Child, 1989.

²⁶⁸ See for instance, Freeman, M., "The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?" *International Journal of Law, Policy and the Family*, Vol. 11, Issue 3, 1997, pp. 360–388, Breen, C., "The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law." The Hague: Brill - Nijhoff, 2002 and Freeman, M., "A Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child." The Hague: Brill - Nijhoff, 2007.

²⁶⁹ Goldstein, J., *et al*, "Before the Best Interests of the Child." New York: MacMillan Publishing Co., 1986, p. 21.

²⁷⁰ Art. 3 (2) and (3), United Nations Convention on the Rights of the Child, 1989.

competing needs are made.²⁷¹ Taking the best interests and welfare principles together, they may be construed as a consideration of a child's needs in all aspects of life, including during justice processes. In the Nubian case,²⁷² the African Committee of Experts on the Rights and Welfare of the Child considered the procedural technicalities which were taking place in the High Court of Kenya concerning Children's case and stated that it cannot be in the best interests of the child to delay the judicial process in order to fulfill the formalistic legal procedures.²⁷³

In Tanzania, 'the best interests of the child' principle was considered in the case of *Elizabeth Mohamed v. Adolf John Magesa*²⁷⁴ where the contentious issue was whether children born out of wedlock have a right to inherit from the deceased father's estate. It was decided that since the deceased was the actual biological father of those children, they were entitled to inherit from his estate. The court stated that depriving children's reasonable enjoyment of the estate of their father on the ground that they were born out of wedlock, cannot be in their best interests as required by Article 3 of the United Nations Convention on the Rights of the Child, 1989 and Sections 3 and 10 of the Law of the Child Act, 2009. The United Nations Committee on the Rights of the Child had expressed its concern that the right of the child to have his or her best interests taken as a primary consideration is not incorporated in policies and programmes concerning children in Tanzania and therefore, this right is not adequately applied or interpreted by legislative bodies.²⁷⁵

The administration of juvenile justice is dealt with under Articles 37 and 40 of the United Nations Convention on the Rights of the Child, 1989. The Convention provides that the

²⁷¹ Kaime, T., "Protection of Refugee Children under the African Human Rights System: Finding Durable Solutions in International Law," in Sloth-Nielsen, J., (Ed), *Children's Rights in Africa: a Legal Perspective*. Aldershot: Ashgate Publishing Ltd, 2008, pp. 183-198, at p. 186.

²⁷² *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, Decision No. 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child, judgment of 22nd March, 2011.

²⁷³ *Ibid*, p. 6.

²⁷⁴ [2016] TLS Reports, 174.

²⁷⁵ Committee on the Rights of the Child, "Concluding Observations on the combined third to fifth Periodic Reports of the United Republic of Tanzania," dated 3rd March, 2015, para. 27.

arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time.²⁷⁶ The term “shall be” as used in the creation of the juveniles’ right to be detained for the shortest period, is a legal phrase of special strength, which leaves no leeway for State parties’ discretion.²⁷⁷ Accordingly, State parties are under strict legal obligation to undertake necessary measures to fully implement this right for all children restrained in detentions. This obligation restricts detention of juveniles in two ways, the frequency (a measure of last resort) and time (for the shortest appropriate period). The rationale is to limit detention of juvenile delinquents in terms of its necessity and time.²⁷⁸

The Convention imposes a clear legal obligation on State parties to recognize the right of juvenile delinquents to be detained for the shortest period and ensure the enjoyment of this right by the detained juvenile delinquents. The concern is however on the interpretation of the phrase “the shortest appropriate period of time.” From the drafting history of this Convention, it is said that the reason for referring to the ‘shortest appropriate period of time’ was to encourage judges to consider the use of other educational or correctional measures than deprivation of liberty and to ensure that custodial measures would only be used as a measure of last resort.²⁷⁹ In the researcher’s view, the way this phrase has featured in the United Nations Convention on the Rights of the Child, does not reflect such intention. The provision refers to a child who is already deprived of liberty; there is no more room for the consideration of alternative measures to detention.

Moreover, a good number of long period detentions of juvenile delinquents occur before full trial by the courts. At the time the judge considers whether or not to use custodial measures, the child has already over-stayed in the pretrial detention facility and most of

²⁷⁶ Art. 37 (b), the United Nations Convention on the Rights of the Child, 1989.

²⁷⁷ United Nations Committee on the Rights of the Child, “General Comment No. 12 (2009): Right of the Child to be Heard,” 1st July, 2009, CRC/C/GC/12, para. 19.

²⁷⁸ Commentary to Rule 91.1 Beijing Rules, 1985.

²⁷⁹ Manco, E., “Detention of the Child in the Light of International Law: A Commentary on Article 37 of the United Nations Convention on the Rights of the Child, 1989.” *Amsterdam Law Forum*, Vol. 7, Issue 1, 2015, pp. 55-75.

his rights as a child would have already been violated. Having no specific time frame to regulate the duration for pretrial and post trial detention of juvenile delinquents, the phrase is capable of a wide interpretation and abuse by State authorities to the detriment of detained juveniles. Like most of States' national criminal laws and procedures,²⁸⁰ the United Nations Convention on the Rights of the Child, 1989 would have set a maximum duration beyond which the juvenile delinquent is not supposed to be held in the detention except where the best interest principle requires so. This would not result in the miscarriage of justice since in most cases; juvenile delinquents are detained for long periods due to the delayed investigation of their cases by States' authorities. In such situations, the benefit has to be given to the detained juvenile delinquents due to many reasons including the equity principle which states that *Commodum Ex Injuria Sua Nemo Habere Debet*, meaning, a wrongdoer, should not be enabled by law to take any advantage from his actions.²⁸¹

As regards the treatment of juvenile delinquents, it is said that no one truly knows a nation until one has been inside its jails.²⁸² A nation should not be judged by how it treats its highest citizens, but its lowest ones.²⁸³ Likewise, on this aspect, the United Nations Convention on the Rights of the Child, 1989 states that:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.²⁸⁴

²⁸⁰ For example, under S. 32 (1) of Tanzanian Criminal Procedure Act, 1985, once the accused person has been arrested by a police officer, he must be taken to court within 24 hours. Also under S. 225 (4) of the same Act, the court is not permitted to adjourn the case for more than sixty days while the accused person is in remand custody. There are some exceptions to this rule.

²⁸¹ Garner, B., *supra* note 22, p. 1848.

²⁸² Mandela, N., "Long Walk to Freedom: The Autobiography of Nelson Mandela." London: Little, Brown and Co., 1994.

²⁸³ *Ibid.*

²⁸⁴ Art. 37 (c), United Nations Convention on the Rights of the Child, 1989.

The rationale for the above quoted provision is to ensure that juvenile delinquents are not subjected to any hardship or constraint other than that resulting from the deprivation of liberty which by itself makes them vulnerable. The provision imposes two strict obligations upon State parties; namely, to separate children in detentions from adult offenders, and to guarantee to them the right to maintain contact with family. The problematic part of this provision is the clause “save in exceptional circumstances” which may act as a defence to deviating State parties that the circumstances did not permit the child to enjoy the right to maintain contact with the family. Instead of leaving it open-ended for every State party to interpret as it deems fit, the Convention should have ended in imposing the obligation upon States or list the circumstances that may be acceptable as hindering juvenile delinquents from contacting their family. This would minimise the States’ varied practices on this aspect.

The Convention provides further that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before the court or other competent, independent and impartial authority, and to a prompt decision on any such action.²⁸⁵ The researcher is of the opinion that the child’s right to challenge the legality of the deprivation of liberty is heavily dependent upon his right to free legal assistance and representation. It is inconceivable that a person below 18 years and who is in detention can successfully challenge the legality of deprivation of liberty before a competent authority without legal assistance and representation.

The State parties are obliged to recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedom of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the

²⁸⁵ *Ibid*, Art. 37 (d).

child's assuming a constructive role in society.²⁸⁶ To implement the provisions of the United Nations Convention on the Rights of the Child, 1989, State parties are required to promote the enactment of laws, establishment of procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal laws. This provision is impliedly encouraging the State parties to establish separate juvenile justice systems for dealing with juvenile delinquents.

In addition, States are required to have a variety of dispositions such as care, guidance and supervision orders, counseling, probation, foster care, education and vocational training programmes for children in detentions.²⁸⁷ These provisions aim at ensuring the availability of programmes in the detentions so as to prepare detained juveniles for reintegration in the society after their release. However, the obligation vested in the States has been just a promotional one. State parties are directed to promote the establishment of separate juvenile justice systems in their jurisdictions, but no specific obligation has been imposed on States to ensure that these systems and programs are established and functioning. The States' obligation in this aspect is a secondary one since before a particular right is promoted, it must be created and recognised. Some States such as Tanzania have interpreted this provision to mean setting aside a special court for children who are in conflict with the law.²⁸⁸

The Law of the Child Act, 2009 does not describe procedures of arrest, search or investigation of crimes alleged to be committed by a child, which are different from those provided in the Criminal Procedure Act, 1985.²⁸⁹ Legally, having a separate juvenile justice system and having a special court for juvenile delinquents are completely two different things. While the latter means the ordinary court sitting as a juvenile court in special sessions, the former means having professionals and staff working in the juvenile

²⁸⁶ *Ibid*, Art. 40 (1).

²⁸⁷ *Ibid*, Art. 40 (3) and (4).

²⁸⁸ See National Organisation for Legal Assistance, *supra* note 109, p. 16.

²⁸⁹ See Rule 22, the Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016.

institutions, judges, lawyers and social workers with special training in the field of legal, psychological and fundamental rights of the child.²⁹⁰

To ensure the progress made by the State parties towards the implementation of this Convention and to achieve the realization of States' obligations, the United Nations Committee on the Rights of the Child is established under Article 43 of the Convention and its jurisdiction is recognised by the State parties. State parties are required to submit to the Committee, through the Secretary-General of the United Nations, the country reports on the measures they have adopted to give effect to the rights recognized in the Convention and the progress made on the enjoyment of those rights by the children.²⁹¹

In 2007, the United Nations Committee on the Rights of the Child observed that many States still had a long way to go in achieving full compliance with this Convention, especially in the areas of procedural rights, development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort.²⁹² In the light of its general comment No. 10 (2007) on children's rights in juvenile justice, in 2015, the Committee urged Tanzania to bring its juvenile justice system fully into line with the Convention on the Rights of the Child and other relevant standards.²⁹³

In particular, the Committee was concerned about the lack of adequate legal aid services for children in conflict with the law, insufficient number of professionals with specialized training on juvenile justice, lack of appropriate detention facilities for juveniles, long duration of detention of children, in most cases in adult prisons, the use of corporal punishment as a judicial sanction, cases of ill-treatment of children in police custody and physical or sexual abuse of children in prisons.²⁹⁴ These concerns were raised in 2007,

²⁹⁰ Save the Children U.K., *supra* note 156, p. 7.

²⁹¹ Art. 44 (1), United Nations Convention on the Rights of the Child, 1989.

²⁹² United Nations Committee on the Rights of the Child, *supra* note 45, para. 1.

²⁹³ Committee on the Rights of the Child, "Concluding Observations on the combined third to fifth Periodic Reports of the United Republic of Tanzania," dated 3rd March, 2015, para. 73.

²⁹⁴ *Ibid*, para. 72.

repeated in 2015, yet at the time of conducting this study in 2017, the Committee's recommendations were not fully complied with.

3.4 Rights of Juvenile Delinquents under the Beijing Rules, 1985

In 1985, the United Nations General Assembly adopted the Standard Minimum Rules for the Administration of Juvenile Justice,²⁹⁵ commonly known as 'the Beijing Rules'. These rules provide that detention of a juvenile pending trial should be used only as a measure of last resort and for the shortest possible period of time.²⁹⁶ The rules stipulate that juveniles under detention must be kept separate from adults, throughout the justice process; they must have the right to be represented by a legal adviser or apply for free legal aid where there is provision for such aid in the country.²⁹⁷ While in custody, juveniles are required to receive care, protection and all necessary individual assistance-social, educational, vocational, psychological and medical that they may require in view of their age, sex and personality.²⁹⁸

Despite the use of the word 'shall' which implies an obligation, these Rules have used the language which gives a leeway in conferring duties to the State parties. This is evidenced by the phrases such as "...the shortest possible period of time." These phrases raise the question as to what is the exact duration for which a juvenile is required to be detained. Having no specific time frame, the primary objective of ensuring that juvenile delinquents are tried expeditiously to shorten their duration of detention, is not reflected in the Rules because without time restriction, whichever time that the trial will take may be regarded as the shortest possible time in that particular situation. The researcher understands that the Rules avoided setting a specific time limit so as to accommodate State parties' variations based on local circumstances, but being the minimum standard Rules, they could have provided a reasonable shortest time restriction that would be applied internationally.

²⁹⁵ Resolution 40/33 of 29th November, 1985.

²⁹⁶ Rule 13.1, Beijing Rules, 1985.

²⁹⁷ *Ibid*, Rule 15.1.

²⁹⁸ *Ibid*, Rule 13.4, 13.5 and 15.1.

While juvenile delinquents are entitled to free legal representation as of a right, the Rules confer no serious obligation on any person or institution from whom/which such right can be enjoyed or claimed. By providing that juvenile delinquents will enjoy this right if there is any available in the country, the State parties may not feel compelled to establish free legal aid schemes for juvenile delinquents. This may be the reason why, to date, there is no Government-funded free legal aid provision for juvenile delinquents in numerous State Parties to the Beijing Rules including Tanzania.²⁹⁹ Lacking free legal assistance and representation makes it almost impossible for children in conflict with the law to realise their rights as guaranteed in various international legal instruments.

Commentary to Rule 13.5 of the Beijing Rules states that juveniles under detention pending trial are entitled to all the rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners as well as the International Covenant on Civil and Political Rights, 1966. It is well known that prisoners do not lose all of their human rights simply because they are incarcerated, they are supposed to retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement.”³⁰⁰ Non-compliance with the international standards for protection of prisoners generally and juveniles in particular, makes this assertion more theoretical than practical.

3.5 UN Rules for Protection of Juveniles Deprived of their Liberty, 1990

These Rules were adopted by the United Nations General Assembly in 1990.³⁰¹ They elaborate the norms contained in the United Nations Convention on the Rights of the Child, 1989, especially those governing the deprivation of liberty of the persons below the age of 18 years. The Rules establish the minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights, fundamental freedoms and with a view to counteracting the

²⁹⁹ Tanzania Child Rights Forum, “Civil Society Organisations’ Alternative Report on Tanzania’s Implementation of the United Nations Convention on the Rights of the Child, 1989.” Dar es Salaam: Tanzania Child Rights Forum, 2014, p. 41.

³⁰⁰ Also See *Charles Shobhraj v. Supdt. Central Jail, Tihar*, AIR (1978) SC 1515.

³⁰¹ Resolution 45/113 of 14th December 1990.

detrimental effects of all types of detention and to fostering integration in the society.³⁰² The term ‘deprivation of liberty’ in these Rules is required to be construed in the widest meaning possible. The Rules adopt an expansive definition of detention as ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at will.’³⁰³

Among the minimum standards addressed in these Rules are the rights and guarantees of juveniles in the detentions, the management of detention facilities, the conditions of accommodation at detention facilities, and the grounds upon which juveniles can be detained. The Rules provide that juveniles who are detained waiting for trial have to be presumed innocent and be treated as such.³⁰⁴ There should be efforts to apply alternative measures to detention and when detention is used, juvenile courts and investigative bodies must give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention.³⁰⁵ Juvenile detainees waiting for trial are supposed to be separated from convicted ones and the conditions under which they are detained must permit juveniles’ right to legal counsel, free legal aid, regular communication with their legal advisers and family.³⁰⁶

Concerning detained juveniles, the Rules require *inter alia*, that in detentions, there should be programmes for education, vocational training and work.³⁰⁷ Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities which is designed to prepare him or her to return to the society. Such education has to be provided outside the detention facility in the community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education

³⁰² Flynn, M., “Statement to the Working Group on the Use of Mercenaries Panel on Private Military Security Companies in Places of Deprivation of Liberty and their Impact on Human Rights.” Geneva: Global Detention Project, 2017, p. 2.

³⁰³ Rule 11 (b), United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990.

³⁰⁴ *Ibid* Rule 17.

³⁰⁵ *Ibid*.

³⁰⁶ *Ibid*, Rule 18 (a).

³⁰⁷ *Ibid*, Rule 38.

system of the country so that after release, juveniles may continue their education without difficulty.³⁰⁸

With regard to the condition of detentions, the standards cut across the globe and they are relatively similar. For example, the Inter-American Court of Human Rights once stated that all persons detained have the right to live in prison conditions that are in keeping with their dignity.³⁰⁹ In respect of children deprived of their liberty and thus in the custody of the State, the Court held that the State's obligations include that of providing the detained children with health care and education, so as to ensure to them that their detention will not destroy their life plans. In the case of the right to human treatment of a child deprived of his or her liberty, the State's obligations are intimately related to quality of life. The standard applied to classify treatment or punishment as cruel, inhuman or degrading must be higher in the case of children.³¹⁰

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 provide further that where appropriate, States should incorporate these Rules into their legislation or amend it accordingly and provide effective remedies for their breach, including compensation when injuries are inflicted on juveniles.³¹¹ States should also monitor the application of these Rules in their national courts. Like other international instruments on the protection of juvenile delinquents, these Rules stipulate excellent safeguards against the violation of rights of juvenile delinquents, but the Rules used optional phrases like 'where appropriate', 'except in exceptional circumstances,' 'where such aid is available', *et cetera*, thus leading to the weak protection of the rights of juvenile deprived of their liberty by the States authorities.

The Rules recognise the importance of separating juveniles not only from adult offenders, but also from the convicted juveniles. They also introduce an important aspect of

³⁰⁸ *Ibid*

³⁰⁹ *Juvenile Re-education Institute" v. Paraguay*, Inter-American Court of Human Rights, Judgment of 2nd September, 2004, para. 151.

³¹⁰ *Ibid*, para.162.

³¹¹ Rule 7, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990.

compensation to juvenile delinquents for the injuries caused by a breach of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990. It is a well known principle of the International Law that any violation of an international obligation that has caused injury generates an obligation to adequately redress the said injury.³¹² A wrong doing party is usually under legal obligation to redress the damage caused to the injured party in an adequate form.

3.6 UN Standard Minimum Rules for Non-custodial Measures, 1990

These Rules are commonly known as the Tokyo Rules for Non-Custodial Measures and they were adopted by the United Nations General Assembly in December, 1990.³¹³ The Tokyo Rules define ‘delinquents’ as all persons subjected to prosecution, trial or execution of a sentence at all stages of the administration of criminal justice irrespective of whether they are suspected, accused or sentenced.³¹⁴ These Rules apply to all delinquents without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status.³¹⁵ The Rules provide that pre-trial detention should be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of the society and the victim.³¹⁶

The Tokyo Rules provide explicitly under Rule 5.1 that where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the delinquent if they consider that it is not necessary to proceed with the case for the protection of the society, crime prevention or the promotion of the respect for the law and the rights of victims. The Tokyo Rules have introduced the notion of extra-judicial discharge of delinquents by the prosecution so as to mitigate the detention hardships, but its essence was lost by the inclusion of a clause ‘where appropriate and compatible with the legal system.’ The

³¹² Inter-American Court of Human Rights, in *Gómez-Paquiyaury Brothers v. Peru*, Judgment of 8th July 2004, para. 187.

³¹³ Resolution 45/110 of 14th December 1990.

³¹⁴ Rule 2.1, Tokyo Rules, 1990.

³¹⁵ *Ibid*, Rule 2.2.

³¹⁶ *Ibid*, Rule 6.1.

national legal systems are supposed to be designed to conform to the international standards, not vice versa. As such, the Rules were expected to urge the United Nations member States to reform their national legal systems so as to marry with the Tokyo Rules for Non-Custodial Measures, 1990. These Rules impose no firm obligation on the State Parties. Each State wishing to depart from this obligation may simply contend that the idea is not compatible with its legal system. As stated earlier, these Rules apply to delinquents generally, both at the pre-trial and post trial stage.

The Rules do not take into account the fact that the first step towards the protection of juvenile delinquents' rights is to avoid as far as possible detaining them in custodies because deprivation of liberty often affects the enjoyment of other human rights apart from the right to personal liberty. These Rules have, therefore, disregarded the vulnerability of children detained and their specific rights where non-custodial measures are inappropriate and the detention is unavoidable. It cannot be questioned that children are amongst the most vulnerable groups in any society. They represent almost one-third of the world's population, and unless they are provided with proper opportunities, the opportunity of making them grow into responsible citizens of tomorrow will slip out of the hands of the present generation.³¹⁷ An efficient juvenile justice system is expected to facilitate children to become parents of the next generation regardless of their delinquent acts.

3.7 Vienna Guidelines for Action on Children in the Criminal Justice System, 1997

These Guidelines were recommended by the Economic and Social Council of the United Nations in 1997.³¹⁸ They give directives on how to implement the principles of the United Nations Convention on the Rights of the Child, 1989 and other international standards relating to the administration of juvenile justice. The Guidelines require the States to ensure that measures relating to policy, decision-making, leadership and reforms are taken with the goal of ensuring that the principles and provisions of the United Nations Convention on the Rights of the Child, 1989, United Nations standards and

³¹⁷ Kabir, A., in *Salil Bali v. Union of India & Another*, Writ Petition No. 10 of 2013, at para. 41.

³¹⁸ The United Nations Economic and Social Council Resolution 1997/30 of 21st July 1997.

norms in juvenile justice are fully reflected in their national and local legislation, policy and practice.³¹⁹ In implementing these Guidelines, States are directed to establish child-oriented juvenile justice systems that guarantee the rights of children, respect their age, prevent violation of their rights, promote children's sense of dignity and their right to participate in meaningful activities which contribute to the society.³²⁰ The Guidelines insist that juveniles deprived of their liberty must be guaranteed a range of meaningful activities and benefit from the programmes designed to enable them to develop through less restrictive regimes and prepare them for release and reintegration into society.

The Vienna Guidelines emphasise that the above activities and measures are supposed to promote the development of attitudes and skills that will prevent re-offending by the detained juvenile delinquents once released. Regardless of the age of criminal responsibility as defined by the national legislation, States are required to ensure that children benefit from all their rights, as guaranteed to them in the provisions of the United Nations Convention on the Rights of the Child, 1989. These Guidelines are commendable for providing the most effective and practical directives on how States can use the existing international standards on the protection of juvenile delinquents' rights. The provisions of Rule 13 of these Guidelines cure the deficiency of the United Nations Convention on the Rights of the Child, 1989, that is, the absence of the minimum age of criminal responsibility. They provide that States must ensure the enjoyment of juvenile delinquents' rights set out in the United Nations Convention on the Rights of the Child, 1989 notwithstanding the States' disparities concerning the age of criminal responsibility.

3.8 International Covenant on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights, 1966 is a multilateral treaty³²¹ which contains the binding commitments of States parties to respect the civil and political rights of individuals including those of juvenile delinquents. It provides that accused persons should, except in exceptional circumstances, be segregated from convicted

³¹⁹ Rule 11(a), Guidelines for Action on Children in the Criminal Justice System, 1997.

³²⁰ *Ibid.*

³²¹ United Nations General Assembly Resolution 2200A (XXI) of 16th December 1966. It came into force on 23rd March 1976 and Tanzania became a party on 11th June, 1976.

persons and be subject to separate treatment appropriate to their status as unconvicted persons.³²² A suspect has the right to be presumed innocent until proved otherwise, while the convict's innocence has already been contradicted through a due process of law and he is serving a lawful sentence. Even for the convicted persons, the conditions of their detention and treatment are not supposed to be harsh as to cause more hardships than their sentence as pronounced by the court. The instrument stipulates that children delinquents must be segregated from adult offenders and be accorded treatment appropriate to their age and legal status.³²³ For juveniles who are detained awaiting trial, this Covenant requires that they should be brought for adjudication as speedily as possible.³²⁴

As regards the detained juvenile delinquents, more protection is needed compared with adult offenders. By reason of their physical and mental immaturity, children need special safeguards and care including the legal protection of their rights before and after birth.³²⁵ Article 10 of the International Covenant on Civil and Political Rights which addresses issues of the criminal justice, is drafted in mandatory terms by using the word 'shall' in vesting obligation on the State Parties. The rules of statutory interpretation direct that where the word 'shall' is used in legislation, the concerned provision must be implemented as it is, with no room for derogation.

However, the State's obligation has been weakened in the same Article 10 of the International Covenant on Civil and Political Rights, 1966 by using phrases like "except in exceptional circumstances" and "as speedily as possible" in Article 10 (2). The Article provides that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Further, accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. Article 10 (3) provides further

³²² Art. 10 (2) (a), the International Covenant on Civil and Political Rights, 1966.

³²³ *Ibid*, Art. 10 (2) (b).

³²⁴ *Ibid*, Art. 10 (3).

³²⁵ Mashamba, C., *supra* note 112, p. 156.

that juvenile delinquents shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Thus, the International Covenant on Civil and Political Rights, 1966 protects the rights of prisoners and juvenile delinquents weakly since the State Parties have avenues not to comply with the Covenant, provided they can show that the exceptional circumstances existed which prevented them from compliance. As there is no definition of what constitutes the exceptional circumstances, the list of excuses will not end so as to justify the States' non-compliance with the Covenant. The State Parties may also explain that a certain situation occurred which made the speedy trial of juvenile delinquents not possible. It is common for instance, to find the juvenile delinquents being treated brutally, not separated from adult prisoners, they are detained for long time without trial, and the conditions of their detentions are devastating.

On inquiry as to why the State failed to fulfill its international obligations on the juvenile delinquents, resource availability acts as a defence coupled with loosely drafted provisions providing for State parties' obligations. For example, the Tanzanian Ministry of Community Development, Gender and Children once reported that there was lack of equipment and facilities for the administration of juvenile justice in the country, hence the failure to comply with the international standards on the matter.³²⁶

3.9 UN Code of Conduct for Law Enforcement Officials, 1979

The Code of Conduct for Law Enforcement Officials was adopted by the United Nations General Assembly in 1979.³²⁷ It defines 'law enforcement officials' as all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.³²⁸ This Code sets the standards which aim at eliminating human rights abuses by law enforcement officials during the arrest and in detention facilities. Under Article 5, it provides *inter alia*, that no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or

³²⁶ United Republic of Tanzania, *supra* note 110.

³²⁷ Resolution 34/169 of 17th December 1979.

³²⁸ Commentary (a), on Art. 1, the United Nations Code of Conduct for Law Enforcement Officials, 1979.

punishment. The Code requires that the term ‘cruel, inhuman or degrading treatment or punishment’ should be interpreted widely so as to extend the protection against abuses, whether physical or mental.³²⁹

Although the Code does not address specific rights of juvenile delinquents, it generally recognises that detainees are naturally vulnerable for the reason that they are under the control of law enforcement officials. Therefore, these officials have a duty to protect detainees from any violation of their rights by strictly observing the procedures designed to respect the inherent dignity of the human person.³³⁰ There is a special relationship and interaction of subordination between a person deprived of his liberty and the State. Typically, the State can be rigorous in regulating what the prisoner’s rights and obligations are, and determines what the circumstances of the confinement will be.³³¹ The inmate is prevented from satisfying, on his own, certain basic needs that are essential if one is to live with dignity. Given this unique relationship and interaction of subordination between an inmate and the State, the latter must undertake a number of special responsibilities and initiatives to ensure that persons deprived of their liberty have the conditions necessary to live with dignity and to enable them to enjoy those rights whose restriction is not a necessary consequence of their deprivation of liberty.³³²

3.10 UN Resolution on Human Rights in the Administration of Justice, in Particular Juvenile Justice, 2011

This Resolution was adopted by the Human Rights Council at its 18th session, on 23rd September 2011. It provides that every child in conflict with the law must be treated in a manner consistent with his or her rights, dignity and needs, in accordance with the international law and bearing in mind relevant international standards on human rights in the administration of justice.³³³ The Resolution calls upon the State parties to the United Nations Convention on the Rights of the Child, 1989 to abide strictly by its principles and

³²⁹ *Ibid*, Commentary (c), on Art. 5.

³³⁰ Office of the High Commissioner for Human Rights, “Basic Standard No. 8: United Nations Law Enforcement, Criminal Justice and Human Rights Standards.” Geneva: United Nations.

³³¹ *Juvenile Re-education Institute v. Paraguay*, supra note 307, para. 152.

³³² *Ibid*.

³³³ Resolution 8, United Nations Resolution on Human Rights in the Administration of Justice, in Particular Juvenile Justice, 2011.

provisions.³³⁴ The Resolution reaffirms the principle that the best interests of the child must be a primary consideration in all decisions concerning the deprivation of liberty of a juvenile delinquent. It also directs the deprivation of liberty of children to be a measure of last resort and for the shortest appropriate period of time.³³⁵

The resolution encourages States that have not yet integrated children's issues in their overall rule of law efforts to do so and promote, *inter alia*, the use of alternative measures such as a diversion. States are further encouraged to avoid, wherever possible, the use of pretrial detention for children.³³⁶ This resolution emphasises the importance of including the rehabilitation and reintegration strategies for former juvenile delinquents in juvenile justice policies through education programmes with a view to their assuming a constructive role in the society. Basically, this resolution, among other things, maintains the position that the detention of children delinquents must be a matter of extremely exceptional circumstances and where confinement to the detention is unavoidable, its length must be kept to a minimum by speeding up the proceedings for children who are in detentions awaiting trial.

This notion is in line with the case of *Asimov v. Bulgaria*,³³⁷ where the prosecution detained one Asimov, a 14 years boy on remand for two years contrary to the Bulgarian legislation providing that children should be detained on remand only in exceptional cases. On application to the European Court of Human Rights, the prosecution submitted that it took two years for the case to come to trial because it was particularly complex, requiring a lengthy investigation. The European Court of Human Rights held that it is more than usually important for the State authorities to display special diligence in ensuring that child criminal suspects are brought to trial within a reasonable time.

³³⁴ *Ibid.*

³³⁵ *Ibid*, para. 9.

³³⁶ *Ibid.*

³³⁷ Application No. 39272/98, European Court of Human Rights, Judgment of 3rd December, 2003.

3.11 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012

These Principles and Guidelines³³⁸ are aimed at giving effect to the international standards on the right to a fair trial generally.³³⁹ The Guidelines recognise that certain persons are more vulnerable when involved with the criminal justice system and are entitled to the additional protection on the ground of the vulnerability.³⁴⁰ They provide that children should have access to legal aid under the same conditions as or more lenient conditions than adults.³⁴¹ Under these Principles and Guidelines, States are obliged to ensure that imprisoned persons and children deprived of their liberty have access to legal aid. Where legal aid is not available, States must ensure that such persons are held in prisons in conformity with the law.³⁴² States are further required to ensure special measures to enable children who are suspected, arrested, detained, accused of, or charged with a criminal offence to contact their parents or guardians at once and prohibit any interviewing of a child in the absence of his or her lawyer or other legal aid provider.³⁴³

In other words, States are required to ensure that prompt legal aid is provided to children in all criminal cases, unless special circumstances indicate that it is not in the best interest of the child. In the case of *Benham v. United Kingdom*,³⁴⁴ Benham was a secondary school boy who failed to pay a community charge of £325 and had no sufficient goods on which to levy the outstanding community charge. The Magistrates' Court issued an order committing him to 3 months imprisonment. He was not assisted or represented by a lawyer, although he was eligible for legal advice and assistance. On application to the European Court of Human Rights, this was seen as severe enough to require that the defendant was supposed to be granted legal aid free of charge.

³³⁸ Adopted by the United Nations General Assembly Resolution 67/187 of 2012.

³³⁹ See for example Art. 11, Universal Declaration of Human Rights, 1948 and Art. 3, International Covenant on Civil and Political Rights, 1966 which provide for the right to a fair trial. Legal aid is an important aspect of the right to a fair trial.

³⁴⁰ Guideline 12, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012.

³⁴¹ *Ibid*, Guideline 22.

³⁴² *Ibid*, Guideline 46.

³⁴³ *Ibid*, Guideline 53 (b).

³⁴⁴ European Court of Human Rights, Application No. 19380/92, Judgment of 23rd January 1995, para. 61.

The Court stated that if a deprivation of liberty is at stake, the interests of justice in principle calls for legal representation. According to that Court, factors that must be taken into consideration in order to determine when the interests of justice require free legal assistance include the severity of the penalty risked by the accused, the complexity of the case and the capability of the accused to defend himself.

3.12 Treatment of Juvenile Delinquents under the Nelson Mandela Rules, 2015

These are the revised version of the United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955.³⁴⁵ The 1955 Rules were revised in 2015 to, *inter alia*, change the name from the United Nations Standard Minimum Rules, to the ‘Nelson Mandela Rules.’³⁴⁶ This was in honour of the late President of South Africa, Nelson Mandela. Mr. Mandela spent 27 years in prison in the course of his struggle for global human rights, equality, democracy and the promotion of a culture of peace.³⁴⁷ These Rules do not contain specific provisions for juvenile delinquents, but they apply to prisoners generally. The Nelson Mandela Rules, 2015 define “untried prisoners” as persons who are detained in police or prison custody but have not yet been tried and sentenced.³⁴⁸ Regarding treatment of untried prisoners, the Rules provide that these prisoners have the right to be presumed innocent and should be treated as such.³⁴⁹

With regard to the separation of juvenile delinquents from adult offenders, the Rules stipulate clearly that different categories of prisoners are required to be kept in separate institutions or in separate parts of institutions, taking into account their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment.³⁵⁰ The purpose is to separate from others, those prisoners who, by reason of their criminal

³⁴⁵ Adopted by the 1st United Nations Congress on the Prevention of Crime and Treatment of Delinquents, 1955.

³⁴⁶ United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), 2015, adopted by the 3rd Committee of United Nations General Assembly on 5th November, 2015.

³⁴⁷ Penal Reform International, “A Short Guide on the Revised United Nations Standard Minimum Rules for the Treatment of Prisoners, (Nelson Mandela Rules).” London: Penal Reform International, 2016, p. 2.

³⁴⁸ Rule 111 (1), Nelson Mandela Rules, 2015.

³⁴⁹ *Ibid*, Rule 111 (2).

³⁵⁰ *Ibid*, Rule 112 (1).

records or character, are likely to exercise a bad influence on others. As such, untried prisoners have to be kept separate from convicted prisoners and young prisoners should be kept separate from adults and must in principle be detained in separate institutions.³⁵¹ Concerning education and recreation programmes in detentions, the Nelson Mandela Rules, 2015 stipulate that provision shall be made for further education of all prisoners capable of profiting thereby, including religious instructions in the countries where this is possible.

The Rules insist that education of illiterate and young prisoners shall be compulsory and special attention shall be paid to it by the prison administration. So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.³⁵² Under this Rule, education of juvenile delinquents in detentions is compulsory and the prison administration is obliged to pay a special attention to ensure education of these delinquents. In relation to legal assistance, the Rules emphasise that if an untried prisoner does not have a legal adviser of his or her own choice, he or she should be entitled to have a legal adviser assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by the untried prisoner if he or she does not have sufficient means to pay.³⁵³ The Rules require that the denial of access to a legal adviser must be subject to independent review without delay.

3.13 African Regional Instruments for Protection of Juvenile Delinquents

Worldwide, children's rights generally were not recognised until around the 17th Century. Before that time, there was no concept of juvenile justice and the special nature of children was ignored.³⁵⁴ Children in conflict with the law were not given any special treatment because they were considered as miniature adults.³⁵⁵ In Africa, during the 1990s and 2000s, there were immense juvenile justice law reform initiatives influenced by the United Nations Convention on the Rights of the Child, 1989 and the African

³⁵¹ *Ibid*, Rule 112 (2).

³⁵² *Ibid*, Rule 104.

³⁵³ *Ibid*, Rule 119 (2)

³⁵⁴ Mashamba, C., *supra* note 116.

³⁵⁵ *Ibid*, p. 78.

Charter on the Rights and Welfare of the Child, 1990. These reforms, by implication, helped to do away with the colonially inherited juvenile justice laws in many Sub-Saharan countries.³⁵⁶ For example, in the past three decades, many African countries have been busy overhauling their inherited colonial laws and replacing them with the modern, more accessible and comprehensive children's statutes.

Therefore, these reforms, among other things, promote and protect the rights of detained juvenile delinquents.³⁵⁷ Although the Constitutive Act of the African Union does not mention anything about children in conflict with the law, one of the African Union's objectives is to 'promote and protect the human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights, 1981 and other relevant human rights instruments.³⁵⁸ For that reason, in Africa, rights of juvenile delinquents are implied in the African Union's Constitutive Act. Nonetheless, under the African legal framework, there have been developed and adopted a handful of regional human rights instruments expressly providing for the rights of juvenile delinquents.

3.14 African Charter on Human and Peoples' Rights, 1981

The Banjul Charter is the principal source of human rights in Africa, which incorporates the international human rights instruments. One of the primary aims of this Charter is to promote international cooperation in line with the Charter of the United Nations, 1945 and the Universal Declaration of Human Rights, 1948.³⁵⁹ Although the Banjul Charter mentions the word 'child' only once as seen in Article 18 (3) where States are required to ensure protection of the rights of the woman and the child, all the rights guaranteed by the Charter apply to children as much as they apply to everyone. On criminal trials, the Charter provides that every individual shall have the right to be presumed innocent until proved guilty by a competent court or tribunal.³⁶⁰

³⁵⁶ *Ibid*, p. 105.

³⁵⁷ Also See Sloth-Nielsen, J., *supra* note 230.

³⁵⁸ Article 3 (h) of the Constitutive Act of the African Union. See also Olowu, D., "Regional Integration, Development and the African Union Agenda: Challenges, Gaps and Opportunities." *Transnational Law and Contemporary Problems*, Vol. 13 No. 1, 2003, pp. 211-253.

³⁵⁹ Preamble to the African Charter on Human and Peoples' Rights, 1981, para. 4.

³⁶⁰ Article 7(2), African Charter on Human and Peoples' Rights, 1981.

The Banjul Charter, 1981 stipulates that each individual coming into contact with the criminal justice is entitled to the right to defense, including the right to be defended by counsel of his choice as well as the right to be tried within a reasonable time.³⁶¹ Impliedly, the Charter recognises the right of juvenile delinquents to be presumed innocent and treated as such until the contrary is proved, right to a timely trial, and the right to legal assistance. State parties are required to ensure the elimination of every form of discrimination against women and ensure protection of the rights of the women and the children as stipulated in the international declarations and conventions.³⁶² Many African countries, including Tanzania, have given recognition to this Article of the Banjul Charter, 1981 by ratifying the United Nations Convention on the Rights of the Child, 1989, and the Convention on the Elimination of All Forms of Discrimination against Women, 1979.³⁶³

3.15 African Charter on the Rights and Welfare of the Child, 1990

The African Charter on the Rights and Welfare of the Child, 1990 is the first and only single African regional human rights treaty to specifically protect and promote the rights and welfare of the child.³⁶⁴ It was adopted in 1990 by the Organisation of African Unity to provide for a specific and comprehensive mechanism for the protection and promotion of children's rights in Africa. Some of the reasons for adopting the African Charter on the Rights and Welfare of the Child, 1990 are, firstly, the under-representation of the African States during the preparatory work of the United Nations Convention on the Rights of the Child, 1989.³⁶⁵ Secondly, in preparatory work for the United Nations Convention on the Rights of the Child, issues peculiar to Africa including child soldiers, early marriages, female genital mutilation, illiteracy, as well as the role of the family, in particular the

³⁶¹ *Ibid*, Article 7(1).

³⁶² *Ibid*, Article 18(3).

³⁶³ Tanzania ratified the Convention on the Elimination of All Forms of Discrimination against Women, on 20th August, 1985.

³⁶⁴ Lloyd, A., "The African Regional System for the Protection of Children's Rights," in Sloth-Nielsen, J., (Ed.), *Children's Rights in Africa: A Legal Perspective*. Aldershot: Ashgate Publishing Co., 2008, pp. 33-51.

³⁶⁵ Sloth-Nielsen, J., and Mezmur, B., "Surveying the Research Landscape to Promote Children's Legal Rights in an African Context." *African Human Rights Law Journal*, Vol. 7, No. 2, 2007, pp. 330-353.

extended family, were not clearly taken into account.³⁶⁶ Therefore, when the decision to formulate a charter for African children was taken up, it took into account all these issues.

As of 24th June 2015, the African Charter on the Rights and Welfare of the Child, 1990 had been ratified by 47 States out of 54 African Union member States.³⁶⁷ Tanzania ratified the African Charter on the Rights and Welfare of the Child on 9th May, 2003. Because of such ratification, the Government has a legal obligation to promote and protect the rights and welfare of detained juvenile delinquents as stipulated in the Charter. Tanzania has an obligation to implement two international children's rights instruments concurrently, namely the United Nations Convention on the Rights of the Child, 1989 and the African Charter on the Rights and Welfare of the Child, 1990. It therefore implements both the United Nations Convention on the Rights of the Child, 1989 and the African Charter on the Rights and Welfare of the Child, 1990 in a complementary mode.³⁶⁸ The Charter recognises the principle of the best interests of the child or "the child's welfare principle" by expressing that any person or authority undertaking any action concerning the child, the best interests of the child shall be the primary consideration.³⁶⁹

With reference to the administration of juvenile justice, unlike the United Nations Convention on the Rights of the Child which guarantees the juvenile's liberty by stating clearly that no child shall be deprived of his or her liberty unlawfully or arbitrarily,³⁷⁰ the African Charter on the Rights and Welfare of the Child is absolutely silent on this point. The Charter proceeds to address issues of arrest, detention, investigation, prosecution and treatment of juvenile delinquents, implying that they can simply be deprived of liberty as long as the deprivation is in conformity with the stated rules. This is coupled with lack of

³⁶⁶ Chirwa, D., "The Merits and Demerits of the African Charter on the Rights and Welfare of the Child." *International Journal on Children's Rights*, Vol. 10, Issue 2, 2002, pp. 157-177.

³⁶⁷ The ratification status as at 19th February, 2016.

³⁶⁸ Mashamba, C., "Domestication of International Children's Norms in Tanzania." *The Justice Review*, Vol. 8, No. 2, 2009, pp. 1-17, at p. 9.

³⁶⁹ Article 4 (1), African Charter on the Rights and Welfare of the Child, 1990.

³⁷⁰ Art. 37 (b), United Nations Convention on the Rights of the Child, 1989.

the provision prohibiting life imprisonment of children without the possibility of parole and stating that the arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time.

The Charter is also lacking provisions guaranteeing legal remedies for children deprived of their liberty. Presumably, the drafters assumed that children deprived of their liberty shall have an automatic right to appeal against such deprivation before a competent legal authority. The Charter however emphasises that the aim of the treatment of a child during the trial and in the justice process should be his or her reformation, reintegration into family and social rehabilitation.³⁷¹ Every child accused or found guilty of having infringed the penal law has the right to special treatment in a manner consistent with his sense of dignity and which reinforces the child's respect for human rights and fundamental freedom of others.³⁷² In particular, States are required to ensure that children are separated from adults in their place of detentions or imprisonment and no child who is detained, imprisoned or otherwise deprived of his or her liberty should be subjected to torture, inhuman, degrading treatment or punishment.³⁷³ States have to ensure further that every child accused of infringing the penal law is afforded legal and other appropriate assistance in the preparation and presentation of his defense, and has the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal.³⁷⁴

Relating to children imprisoned with their mothers, in the first place, State parties are required to ensure that mothers are not imprisoned with their children. If it happens that children are imprisoned with their mothers, States must provide special treatment to mothers of infants, the young children and expectant mothers.³⁷⁵ The African Committee of Experts on the Rights and Welfare of the Child had acknowledged the fact that when mothers are imprisoned, children have their rights violated whether they reside in prison

³⁷¹ *Ibid*, Art. 17 (3).

³⁷² *Ibid*, Art. 17 (1).

³⁷³ *Ibid*, Art. 17 (2).

³⁷⁴ *Ibid*.

³⁷⁵ *Ibid*, Art. 30 (1) (d).

with their mothers or are separated from them.³⁷⁶ The Committee suggested that in situations where custodial sentence cannot be avoided, the living conditions of children residing with their mothers in prison should be as close as possible to those of children living outside.³⁷⁷

3.16 Kampala Declaration on Prison Conditions in Africa, 1996

This Declaration represents a great step forward taken by the President of the African Commission on Human and Peoples' Rights, Ministers of States, Prison Commissioners, Judges, international, regional and national non-governmental organisations concerning the prison conditions in Africa. The Declaration outlines that in most of African countries the level of overcrowding in the prisons is increasingly inhuman as there is a lack of hygiene, insufficient or poor food, difficult access to medical care, lack of physical activities or education, as well as an inability to maintain family ties.³⁷⁸ It was declared that any person who is denied freedom has a right to human dignity, and that the universal norms on human rights place an absolute prohibition on torture of any description.³⁷⁹

The Declaration recognises that some groups of prisoners, including juveniles, women, the old people, the mentally and physically ill, are especially vulnerable and require particular attention. The juveniles must be separated from adult prisoners and they must be treated in a manner appropriate to their age.³⁸⁰ The Kampala Declaration, 1996 is drafted in broad and general terms covering conditions of all prisoners in Africa. It addresses matters such as human rights of prisoners, living conditions, prisoners' maintenance and development of links with their families and access to education and skills training. The members recommended that the detrimental effects of imprisonment should be minimised so that prisoners do not lose their self respect and sense of personal

³⁷⁶ The African Committee of Experts on the Rights and Welfare of the Child, General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers." Adopted by the Committee at its 22nd Ordinary Session held on 4th - 8th November, 2013, para. 3 and 4.

³⁷⁷ *Ibid*, para. 29.

³⁷⁸ Preamble to the Uganda Declaration, 1996, para. 1.

³⁷⁹ *Ibid*, para. 2.

³⁸⁰ *Ibid*, para. 4

responsibility.³⁸¹ They further urged that the conditions in which prisoners are held and the prison regulations should not aggravate the suffering already caused by the loss of liberty.³⁸² Prisoners should retain all rights which are not expressly taken away by the fact of their detention.³⁸³ The members called upon the States' authorities to pay special attention to vulnerable prisoners.³⁸⁴

It was finally recommended that all the norms of the United Nations and the African Charter on Human and People's Rights on the treatment of prisoners should be incorporated into national legislations in order to protect the human rights of prisoners in Africa.³⁸⁵ On prisoners awaiting trial, the Declaration elaborates that most of prisons in Africa have great proportion of prisoners who are awaiting trial, sometimes for several years. The members observed that for this reason, the procedures and policies adopted by the police, the prosecuting authorities and the judiciary can significantly influence prison overcrowding.³⁸⁶ They recommend that the judicial investigations and proceedings should ensure that prisoners are kept in remand detentions for the shortest possible period, avoiding, for example, continual remands in custody by the court; and there should be a system for regular review of the time detainees spend on remand.³⁸⁷

3.17 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), 2002

The African Commission on Human and Peoples' Rights meeting at its 32nd ordinary session held in Banjul adopted the "Robben Island Guidelines, 2002" for the prohibition and prevention of torture and ill-treatment in Africa.³⁸⁸ The important provisions of these Guidelines include those which require all persons who are deprived of their liberty by

³⁸¹ Recommendation 5, the Uganda Declaration, 1996.

³⁸² *Ibid*, Recommendation 4.

³⁸³ *Ibid*, Recommendation 2.

³⁸⁴ *Ibid*, Recommendation 8.

³⁸⁵ *Ibid*, Recommendation 9.

³⁸⁶ The participants at the International Seminar on Prison Conditions in Africa, held in Kampala from 19th to 21st September 1996.

³⁸⁷ *Ibid*.

³⁸⁸ The meeting was held on 23rd October, 2002.

public order or authorities to be held in detentions controlled by properly and legally constructed regulations.³⁸⁹ Such regulations should provide a number of basic safeguards, all of which must apply from the moment when the detainees are first deprived of their liberty.³⁹⁰ These safeguards are, *inter alia*, the right to have a relative or other appropriate third person notified of the detention, right of access to a lawyer and notification of these rights in a language which the person deprived of liberty understands.³⁹¹

The Guidelines require the States to take steps to ensure that the treatment of all persons deprived of their liberty is in conformity with international standards guided by the United Nations Standard Minimum Rules for the Treatment of Prisoners.³⁹² Where the treatment does not conform to the United Nations Standard Minimum Rules for the Treatment of Prisoners, these Guidelines require the States to improve the conditions in places of detention, which do not conform to the international standards.³⁹³ States are also directed to take measures to ensure that pretrial detainees are held separately from convicted persons, ensure that juveniles, women, and other vulnerable groups are held in appropriate and separate detention facilities and take measures to reduce overcrowding in places of detention by encouraging the use of non-custodial sentences for minor crimes.³⁹⁴

3.18 Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, 2004

This Declaration was passed by the participants of the Conference on Legal Aid in Criminal Justice who discussed the role of lawyers, non-lawyers and other legal service providers in Africa.³⁹⁵ The conference was held in Lilongwe (Malawi) where the participants declared the importance of recognising and supporting the right to legal aid in criminal justice. They pointed out that all States have the primary responsibility to recognise and support basic human rights, including the provision of and access to legal

³⁸⁹ Guideline 20, the Robben Island Guidelines, 2002.

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

³⁹² Guideline 33, the Robben Island Guidelines, 2002.

³⁹³ *Ibid.*, Guideline 34.

³⁹⁴ *Ibid.*, Guidelines 35, 36 and 37.

³⁹⁵ The Conference was held on 24th November 2004.

aid for indigent persons in the criminal justice system.³⁹⁶ As part of this responsibility, States are encouraged to adopt measures and allocate funds sufficient to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable groups, especially women and children.³⁹⁷

The Declaration requires legal aid to be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution. It directs that legal aid should include a wide range of stakeholders like Non-Governmental Organizations, Community-Based Organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions. Legal aid needs to be provided at all stages of the criminal process, including during the investigation, arrest, pretrial detention, bail hearings, trials, appeals, and other proceedings to ensure that human rights are protected.³⁹⁸

The Lilongwe Declaration requires that suspects, accused persons, and detainees should have access to legal assistance immediately upon arrest and/or detention wherever such arrest and/or detention occurs.³⁹⁹ A person subjected to criminal proceedings should never be prevented from securing legal aid and should always be granted the right to see and consult with a lawyer, accredited para-legal or legal assistant. Governments should ensure that legal aid programs provide special attention to persons who are detained without charge, or beyond the expiration of their sentences, or who have been held in detentions or in prisons without access to the courts.⁴⁰⁰ Special attention should be given to women and other vulnerable groups such as children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally and seriously ill, refugees, internally displaced persons, and foreign nationals.⁴⁰¹

³⁹⁶ Art. 1, Lilongwe Declaration, 2004.

³⁹⁷ Preamble to Lilongwe Declaration, 2004, para. 1.

³⁹⁸ *Ibid*, para. 3.

³⁹⁹ *Ibid*.

⁴⁰⁰ *Ibid*.

⁴⁰¹ Art. 3, Lilongwe Declaration, 2004.

The Declaration advocates for sensitisation programmes for all criminal justice stakeholders, including the government officials, police and prison administrators, judges, lawyers, and prosecutors. Emphasis should be on the crucial role that legal aid plays in the development and maintenance of a just and fair criminal justice system. Since those in control of criminal justice agencies control access to the detainees and to prisoners, they should ensure that the right to legal aid is fully implemented.⁴⁰² Government officials are encouraged to allow legal aid to be provided at police stations, in pretrial detention facilities, in the courts, and in prisons. Governments should also sensitize the criminal justice system administrators to the societal benefits of providing effective legal aid and the use of alternatives to imprisonment.⁴⁰³ These benefits include elimination of unnecessary detention, speedy processing of cases, fair and impartial trials, and the reduction of prison populations.⁴⁰⁴ Like the Robben Island Guidelines of 2002, the Lilongwe Declaration, 2004 has no direct connection with detained juvenile delinquents. Their rights are implied in the rights of vulnerable groups such as the elderly, persons with disabilities and those living with HIV/AIDS.

3.19 The African Youth Charter, 2006

This charter was adopted by the Executive Council of African Union Commission at its 6th Ordinary Session in Banjul in June, 2006. It prescribes responsibilities to member States for the development of youth in Africa. The Charter uses the term ‘minors’ instead of ‘children’ and defines it as young people aged 15 to 17 years. The phrase ‘youth or young person’ is defined in the Charter to mean every person between the ages of 15 and 35 years.⁴⁰⁵ The Charter addresses, among others, the issues of law enforcement to youths by providing that every young person accused or found guilty of having infringed the penal law shall have the right to be treated with humanity and respect for the inherent dignity of the human person.”⁴⁰⁶ It provides further that State parties should ensure that

⁴⁰² *Ibid*, Art. 2.

⁴⁰³ *Ibid*.

⁴⁰⁴ *Ibid*.

⁴⁰⁵ See the definition Section of the African Youth Charter, 2006. Definitions of ‘minors’ and ‘youth’ give an option for a person aged 16 and 17 years to be construed as a child or youth. This is not healthy especially for juvenile delinquents who deserve special treatment peculiar to juveniles only.

⁴⁰⁶ Article 18 (1), the African Youth Charter, 2006.

youth who are in rehabilitation centres, detained or imprisoned are not subjected to torture, inhumane or degrading treatment or punishment.⁴⁰⁷ Under the Charter, the accused minors are required to be segregated from convicted persons and should be treated differently according to their status. State parties are directed to build rehabilitation facilities for accused and imprisoned youth who are still minors and house them separately from adults. States are also directed to make provisions for the continued education and skills development for imprisoned young people and ensure that accused and convicted youth are entitled to a lawyer.⁴⁰⁸ This Charter does not directly relate to juvenile delinquents but it stipulates some useful directives for State parties in handling juveniles.

3.20 Guidelines on Action for Children in the Justice System in Africa, 2011

These Guidelines provide for pre-trial detention and custodial sentencing of juveniles. The Guidelines prohibit pre-trial detention of children to be used as a sanction and in violation of the right to be presumed innocent until proven guilty.⁴⁰⁹ They direct that before trial, a child may only be detained as a measure of last resort and for the shortest possible period of time and separated from adults. Specifically, the Guidelines provide that:

The competent authorities shall ensure that children are not held in detentions for any period beyond 48 hours before appearing in a court. Children who are detained pending trial or finalisation of the proceedings shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults. Girl children shall be kept separately from males and boy children. The national legislation shall specify a maximum period of pretrial detention for children, upon the expiry of which a child shall be released from the detention whether or not the criminal proceedings have been concluded.⁴¹⁰

The law in Tanzania has tried to comply with the requirements of these Guidelines by requiring a child who has been arrested to be brought before the court on the day of arrest

⁴⁰⁷ *Ibid*, Art. 2 (a).

⁴⁰⁸ *Ibid*, Article 18 (2) (a-f).

⁴⁰⁹ Guideline 54, the Guidelines on Action for Children in the Justice System in Africa, 2011.

⁴¹⁰ *Ibid*, Guideline 52.

or not later than the next day following the arrest.⁴¹¹ However, where it is not possible to bring the arrested child before the court within 24 hours, the child is required to be placed in the approved residential home, institution or with a fit person until he is brought before the court.⁴¹² One major downside of these rules is that they do not specify a maximum period of pre-trial detention for children and the effect upon the expiry of such period before the child is taken to court or before the conclusion of the trial, if criminal proceedings have been initiated against the said child.

The Guidelines provide further that any child who has been arrested for having committed a crime should be released into the care of his or her parents, legal guardians or family relatives unless there are exceptional reasons for his or her detention.⁴¹³ These Guidelines extend the definition of ‘parent’ beyond biological parents to an individual caregiver, extended family member or any person performing a parental role.⁴¹⁴ With regard to the right to legal counsel and representation, the Guidelines provide that every accused child has the right to free legal assistance by the Government.⁴¹⁵ It is directed that if it is found appropriate and in the best interests of the child, his or her parents, relatives or legal guardians must be present during the proceedings.⁴¹⁶

State parties are urged to ensure that the legal representation provided to the child is in a language he or she understands and enable him or her to make informed decisions.⁴¹⁷ Agencies and programmes are to be established to ensure the availability of other professionals such as psychologists specialising in children in conflict with the law. State parties are to ensure the right of every child deprived of liberty to access legal assistance while in detention is respected. Different forms of restorative justice processes must be aimed at reformation, social rehabilitation and reintegration of the child into the

⁴¹¹ Rule 23 (4), the Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016. See Rule 23 (4) (a) and (b) for exceptions.

⁴¹² *Ibid*, Rule 23 (5) (b).

⁴¹³ Guideline 51, the Guidelines on Action for Children in the Justice System in Africa, 2011.

⁴¹⁴ *Ibid*, Guideline 5.

⁴¹⁵ *Ibid*, Guideline 55(c).

⁴¹⁶ *Ibid*, Guideline 55(e).

⁴¹⁷ *Ibid*, Guideline 55(c).

family.⁴¹⁸ The guidelines provide further that children deprived of their liberty have the right to maintain regular contact with families and to reintegration services upon release from detention.⁴¹⁹

Children should not be subjected to corporal punishment, no capital punishment should be imposed for any crime committed by children, and the sentence of life imprisonment should not be imposed for an offence committed by a person below the age of 18 years.⁴²⁰ These rights apply regardless of the nature of charges brought against the child, including charges related to terrorism and States are reminded that the derogation of rights enshrined in the African Charter on the Rights and Welfare of the Child, 1990 is not permitted even during the state of emergency.⁴²¹

3.21 Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa (the Luanda Guidelines), 2014

The Luanda Guidelines, 2014 were adopted by the African Commission on Human and Peoples' Rights during its 55th ordinary session in Luanda (Angola).⁴²² These guidelines assist States in implementing the obligations set out in the African Charter on Human and Peoples' Rights, 1981 concerning the specific context of arrest, police custody and pretrial detention.⁴²³ Like other international and regional instruments, the Luanda Guidelines, 2014 emphasise that pre-trial detainees are not supposed to be treated in the same way as sentenced prisoners.⁴²⁴ It has been observed that pre-trial detainees experience conditions of detention that do not accord with the right to life and dignity.⁴²⁵ Pretrial detainees are vulnerable to human rights violations such as the risk of torture and other ill-treatments. They are also exposed to corruption (where their release or access to

⁴¹⁸ *Ibid*, Guideline 28.

⁴¹⁹ *Ibid*, Guideline 58.

⁴²⁰ *Ibid*, Guideline 59.

⁴²¹ *Ibid*, Guideline 62.

⁴²² The Commission sat from 28th April to 12th May 2014.

⁴²³ Kaggwa, Med SK, Commissioner of the African Commission on Human and Peoples' Rights and Special Rapporteur on Prisons and Conditions of Detention in Africa: Foreword to the Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa, 2014, Luanda.

⁴²⁴ Guideline 26, the Luanda Guidelines, 2014.

⁴²⁵ Kaggwa, Med SK, *loc. cit.*

services can be dependent on their willingness to meet monetary or other demands from law enforcement officers).⁴²⁶

It is on this basis that the Luanda Guidelines, 2014 were adopted to promote a rights-based approach to decisions to arrest and detain suspects, and to the conditions and safeguards with respect to police custody and pre-trial detentions. The Guidelines require States to ensure that detaining authorities hold pre-trial detainees separately from the convicted prison population.⁴²⁷ States are also urged to ensure that detaining authorities take the necessary measures to provide for the special needs of vulnerable groups or persons such as women, children, non-nationals and persons with disabilities.⁴²⁸

Regarding children in conflict with the law, the Luanda Guidelines, 2014 provide that the principle of the best interests of the child must be paramount in any decision-making and action taken in relation to child suspects and detainees.⁴²⁹ In these Guidelines, a child is defined as every person below the age of 18 years.⁴³⁰ It is further provided by these Guidelines that if there is uncertainty regarding the age of an arrested or detained person, but there is a reason to believe that the person may be under the age of 18 years, the State must ensure that such person is treated as a child until such time as his or her age is determined to be 18 years or older.⁴³¹ States are encouraged to establish a process of age assessment for children.⁴³² Like other international instruments discussed in this chapter, Luanda Guidelines, 2014 direct that a child may only be detained in police custody or pre-trial detention as a measure of last resort and for the shortest possible time.

As a safeguarding mechanism, the Luanda Guidelines, 2014 stipulate that every child deprived of his or her liberty should be treated with respect to human rights and in a

⁴²⁶ *Ibid.*

⁴²⁷ Guideline 26, the Luanda Guidelines, 2014.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*, Guideline 31 (a) (i).

⁴³⁰ *Ibid.*, Guideline 31 (a) (ii).

⁴³¹ *Ibid.*, Guideline 31 (a) (iii).

⁴³² *Ibid.*

manner that takes into account the needs of persons of his or her age.⁴³³ States are obliged to enact laws and establish policies that prioritise the non-custodial alternatives and diversion programmes for children in conflict with the law. Whenever possible, pretrial detention should be replaced by alternative measures such as close supervision, intensive care or placement with a family, in an education setting or home, or other place of safety.⁴³⁴ Tanzania has not yet included the provisions relating to diversion of juvenile delinquents in the Law of Child Act, 2009.

If police custody or pre-trial detention of a child is absolutely necessary, Guideline 31 (d) of the Luanda Guidelines directs children to be detained separately from adults, unless it is in their best interests to be kept with family members also detained. Female children are supposed to be held separately from male children unless it is in their best interests to be kept with family members also detained. Children must be guaranteed the right to the presence of a parent or guardian at all stages of the proceedings, unless it is considered not to be in their best interests. While in custody, children should receive care, protection and the necessary social, educational, vocational, psychological, medical and physical assistance they may require.⁴³⁵

As regards legal assistance, the Luanda Guidelines stipulate that children are supposed to be guaranteed the right to the presence of a lawyer, or other legal service provider of their choice and, where required, access to free legal services, from the moment of arrest and at all subsequent stages of the criminal justice process.⁴³⁶ Legal assistance must be accessible, age-appropriate and responsive to the specific needs of the child.⁴³⁷

This chapter has examined the application of international law within Tanzanian legal system and the international standards on juvenile delinquents applicable to Tanzania. In doing so, international and African regional instruments on juvenile delinquents have

⁴³³ *Ibid*, Guideline 31 (a) (v).

⁴³⁴ *Ibid*, sub- Guideline (b) and (f).

⁴³⁵ *Ibid*, Guideline 31 (d)

⁴³⁶ *Ibid*, sub- Guideline (g)

⁴³⁷ *Ibid*.

been discussed. The international standards examined in this chapter are those relating to detention of juvenile delinquents, separation of juveniles from adults in detentions, treatment of detained juveniles, legal assistance and representation of juveniles and establishment of rehabilitation and reintegration programmes for detained juvenile delinquents. Analysis of international standards on juvenile justice has shown that there is no shortage of international standards and legal principles for the protection of juvenile delinquents' rights.

Generally, both the international and African regional instruments maintain that the detention of juvenile delinquents should be used only as a measure of last resort and for the shortest appropriate period. The instruments have also emphasised the position that juvenile delinquents must be separated from adult criminals in the detentions, they should be treated with respect to humanity and in a manner that takes into account the needs of persons of their age. The instruments require further that juveniles must be afforded free legal assistance and representation by the Governments, and there should be rehabilitation and reintegration programmes in the detentions to prepare the detained children for integration in the society after their release.

The African regional instruments have, to a large extent, conformed to the standards laid down in the United Nations Convention on the Rights of the Child, 1989 and other international instruments for the protection of juvenile delinquents. The analysed instruments provide for the rights of detained juvenile delinquents and the detailed guidance to assist State parties to reform their approaches to juvenile justice. The main setback that has been identified and which is the weakness of the international laws generally is the use of phrases which permit flexibility to the States, and that are sometimes abused by the States' authorities to violate the rights of juvenile delinquents. To fully comply with the enumerated international standards, the concerned instruments have to contain obligatory rules which will lead to the States' response by putting in

place systems which are effective; and rights-based in order to secure the welfare of juvenile delinquents.⁴³⁸

The general comments and concluding observations of the United Nations Committee on the Rights of the Child, and African Committee of Experts on the Rights and Welfare of the Child have indicated that States are not yet fully implementing the discussed instruments. It must be noted that the purpose of this study is not to find out gaps in the international law standards on protection of juvenile delinquents' rights. It is rather to take the international standards as they presently exist and examine the extent to which Tanzania complies with them, to see what gaps exist and to suggest how they might be filled. This is done in the subsequent chapters which evaluate the national legal framework as well as Tanzanian practice in protecting the rights of detained juvenile delinquents.

⁴³⁸ Also See Hammarberg, T., "Children and Juvenile Justice: Proposals for Improvements." Dublin: Irish Penal Reform Trust, 2009.

CHAPTER 4

4. REFLECTION OF INTERNATIONAL STANDARDS ON PROTECTION OF JUVENILE DELINQUENTS IN THE LAWS OF TANZANIA

In the preceding chapter, international standards on protection of juvenile delinquents' rights were presented and analysed. This chapter examines Tanzania's substantive and procedural laws as well as policies relating to protection of detained juvenile delinquents' rights to assess the extent to which they reflect international standards discussed in the previous chapter.

4.1 Protection of Juvenile Delinquents under the Constitution of United Republic of Tanzania, 1977

It has long been settled that the Constitution of the United Republic of Tanzania, 1977 is the supreme law in Tanzania.⁴³⁹ It binds all the State organs and all people. Every statute must draw its legitimacy from the Constitution, otherwise, it will, to the extent of the inconsistency, be void.⁴⁴⁰ The spirit of the Constitution must, therefore, preside, and permeate the process of judicial interpretation and judicial discretion.⁴⁴¹ It has been argued that child rights are fundamental rights which are not gifts from the State, thus, they must be recognised, promoted and protected.⁴⁴²

The Constitution of the United Republic of Tanzania, 1977 does not directly protect rights of detained juvenile delinquents, rather, it protects the basic rights and fundamental freedoms of every person deprived of liberty.⁴⁴³ The term "every person" is defined as any word or expression descriptive of a person, which includes a child.⁴⁴⁴ Therefore, children are indirectly entitled to all the rights and freedom set out in the Constitution, 1977 in relation to persons deprived of liberty. In this regard, the Constitution prohibits

⁴³⁹ See for example, the case of *Bank of Africa (T) Limited v. Intersales Tanzania Limited & Others*, [2016] TLS Reports, 518, where it was stated that the Constitution, as the highest law of our land and grund norm, is "sacred."

⁴⁴⁰ Art. 64 (5), the Constitution of the United Republic of Tanzania, 1977.

⁴⁴¹ Also See **Mohamed, J.A.**, in *S. v. Acheson* 1991 (2) SA 805 (Nm), at p. 813.

⁴⁴² Mandopi, K., "Incorporation of Child Natural Rights in the Constitution: Comparative between Tanzania and South Africa." *Journal of Law, Policy and Globalization*, Vol. 32, 2014, pp. 104-109.

⁴⁴³ Art. 15, the Constitution of the United Republic of Tanzania, 1977.

⁴⁴⁴ S. 4, the Interpretation of Laws Act, 1996, [Cap. 1 R.E. 2002].

the arrest, imprisonment, detention, deportation or any form of deprivation of liberty of any person except according to the procedures established by law.⁴⁴⁵ State authority and all its agencies are obliged to direct their policies and programmes towards ensuring that human dignity and human rights are preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights, 1948.⁴⁴⁶ The Government organs and all persons or authorities exercising executive, legislative or judicial functions are required to take cognizance of, observe and apply the provisions of the Constitution relating to the fundamental objectives and directive principles of the State policy.⁴⁴⁷

In the Constitution, ‘Government’ is defined to include local government authorities and any person who exercises power or authority on behalf of the Government of the United Republic or the Revolutionary Government of Zanzibar.⁴⁴⁸ Provisions of the Constitution relating to fundamental objectives and directive principles of State policy are not enforceable by any court of law.⁴⁴⁹ This is to say, no court is competent to determine the question whether or not any action or omission by any person or any law or judgment has complied with such provisions.⁴⁵⁰ The effect of this stipulation is to render the provisions of this part of the Constitution applicable at the desire of the Government and its organs.

No one can be compelled to or be held accountable for failure to comply with the founding principles articulated in this part of the Constitution. A wider debate is necessary on this aspect, especially because the country has started a Constitutional reform process. It is clear that individual freedom and fundamental rights are not unlimited as the society would not be able to function. Then to treat them as being absolute is to invite anarchy in any society.⁴⁵¹ Governments limit the individual rights in order to serve important societal interests. Those rights can be limited, but the limitation

⁴⁴⁵ Art. 15 (2), the Constitution of the United Republic of Tanzania, 1977.

⁴⁴⁶ *Ibid*, Art. 9 (f).

⁴⁴⁷ *Ibid*, Art. 7 (1).

⁴⁴⁸ *Ibid*, Art. 6

⁴⁴⁹ *Ibid*, Art. 7 (2).

⁴⁵⁰ *Ibid*.

⁴⁵¹ Limpitlaw, J., “Media Law Handbook for Southern Africa, Volume 2.” Johannesburg: Konrad-Adenauer-Stiftung, 2013.

must not be arbitrary, unreasonable and disproportionate to any claim of State interest.⁴⁵² For example, if the right to freedom of movement were absolute, the State would not be able to imprison convicted criminals, but it seems unreasonable where the State, which is an interested party to arrogate itself so much power in restricting the accused persons' freedom. In the case of the *Director of Public Prosecutions v. Daudi Pete*,⁴⁵³ the Court of Appeal of Tanzania held that because of the co-existence of the basic rights of the individual and the collective rights of the society, it is common to find limitations to the basic rights of the individual in practically every society.⁴⁵⁴ The concern is how the legal system harmonises the two sets of rights. The court has to take into account and strike a balance between the interests of the individual and those of the society of which the individual is a component.⁴⁵⁵

The Constitution, 1977 requires State authority to make procedures which are appropriate or which take into account the principle that no person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence.⁴⁵⁶ Essentially, this Article stipulates for the presumption of innocence and it prohibits acts of treating accused persons as convicts until the contrary is proved. It is also stipulated that for the purposes of preserving the right or equality of human beings, human dignity should be protected in all activities pertaining to criminal investigations, process, and in any other matters for which a person is restrained or in the execution of a sentence.⁴⁵⁷ No person should be subjected to torture, inhuman or degrading punishment or treatment.⁴⁵⁸ The rights of juvenile delinquents are implicitly protected under these provisions of the Constitution. Unlike the provisions of the Constitution relating to fundamental objectives and directive principles of State policy, which are not enforceable by any court of law, the rights provided in the part dealing with the basic rights and duties are enforceable

⁴⁵² **Samatta, C.J.**, (as he then was), in *Ndyanabo v. Attorney General*, Civil Appeal No. 64 of 2001, Court of Appeal of Tanzania at Dar es Salaam, (unreported).

⁴⁵³ *Director of Public Prosecutions v. Daudi Pete*, [1993], TLR 22.

⁴⁵⁴ *Ibid*, p. 22.

⁴⁵⁵ *Ibid*.

⁴⁵⁶ Art.13 (6) (b), the Constitution of the United Republic of Tanzania, 1977.

⁴⁵⁷ *Ibid*, Art. 13 (6) (e).

⁴⁵⁸ *Ibid*.

before the full bench of the High Court of Tanzania.⁴⁵⁹ Therefore, the violation of the rights of detained juvenile delinquents may be claimed in the High Court of Tanzania seeking for an appropriate remedy.

4.2 Juvenile Delinquents' Rights under the Law of the Child Act, 2009

According to the long title of the Law of the Child Act, 2009, it is an Act to provide for reform and consolidation of the laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of a child with a view to giving effect to the international and regional conventions on the rights of the child. So, the Act harmonises various existed statutes which governed children's matters, including juvenile delinquency.⁴⁶⁰ In Part IX, it contains provisions relating to a child in conflict with the law. The Act has amended numerous provisions of the Penal Code, 1961 relating to the age of the child.⁴⁶¹ Under the Law of the Child Act, a child is defined as any person who is below the age of eighteen years.⁴⁶²

In relation to the minimum age of criminal responsibility, the Act has amended Section 15 of the Penal Code and provides that any person under the age of twelve years who commits an act or omission which is unlawful shall be dealt with under the Law of the Child Act, 2009.⁴⁶³ Therefore, by implication, this Act has increased the minimum age of criminal responsibility from ten to twelve years and diverged juvenile delinquents from being dealt with under general criminal laws. Like the United Nations Convention on the Rights of the Child, 1989, the Law of the Child Act, 2009 provides that the best interest of a child should be the primary consideration in all actions concerning a child, whether undertaken by public or private social welfare institutions, courts or administrative bodies.⁴⁶⁴ It stipulates that where in the course of any proceedings in any court, it appears

⁴⁵⁹ S. 4 of the Basic Rights and Duties Enforcement Act, 1994, [Cap. 3 R.E. 2002]. The Section provides that if any person alleges that any of the provisions of Articles 12 to 29 of the Constitution, 1977 has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.

⁴⁶⁰ See Part XIII of the Law of the Child Act, 2009 which is titled, "Consequential Amendments."

⁴⁶¹ *Ibid.*

⁴⁶² S. 4 (1), Law of the Child Act, 2009, [Cap.13].

⁴⁶³ S. 15, the Penal Code, as amended by S. 174 (4), the Law of the Child Act, 2009, [Cap. 13].

⁴⁶⁴ S. 4 (2), Law of the Child Act, 2009, [Cap.13].

to the court that the person charged or to who the proceedings relate is a child, the court should stay the proceedings and commit the child to the Juvenile Court.⁴⁶⁵ The Act defines ‘court’ as a primary court, the District Court, the Resident Magistrates’ Court or the High Court, and for purposes of parentage; ‘court’ means a Juvenile court.⁴⁶⁶ This implies that the present justice system of Tanzania does not allow a juvenile and an adult to be tried in the same court except where a child is charged jointly with an adult.⁴⁶⁷ In such a situation, the two are tried in ordinary courts where the Law of the Child Act, 2009 is not applicable.⁴⁶⁸

Juvenile delinquents charged with capital offences are tried in the High Court where the Law of the Child Act and its Rules are not applicable as well. It is surprising that the juvenile’s vulnerability that led the legislature to require prosecution to be conducted in a separate court can easily cease for the simple reason that a child is charged jointly with an adult or the fact that he is charged with a capital offence. It is like saying that once a child is charged jointly with an adult or he is charged with a capital offence, he ceases to be a child, which is not the case. The purpose of the legislature in enacting children’s laws is to give separate treatment to juvenile delinquents in the trial, conviction and punishment for offences including those punishable with death or imprisonment for life since such sentences are not supposed to be imposed on juveniles.

The intention is to make the provisions for the trial of delinquent children and dealing with them in accordance with such procedure so that juvenile delinquents do not come in contact with accused persons who are not children but are hardened criminals. The idea is undoubtedly to reclaim delinquent children and rehabilitate them in such a way that they become useful citizens later in life.⁴⁶⁹

⁴⁶⁵ *Ibid*, S. 100 (2).

⁴⁶⁶ *Ibid*, S. 3.

⁴⁶⁷ *Ibid*, S. 100 (1) and (3).

⁴⁶⁸ *Ibid*.

⁴⁶⁹ Also See **Islam, B.**, in *Ragbir v. State of Haryana*, [1981] AIR, 2037.

Regarding age determination, the Law of the Child Act provides that where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is a child, the court should make due inquiry as to the age of that person. In making such inquiries, the court may rely on the information from any primary school attended by the child as to the child's date of birth, the child's birth certificate or such medical evidence as is necessary to provide proof of birth and it may include the DNA test.⁴⁷⁰ Unless otherwise rebutted, the birth certificate is presumed to provide a conclusive proof of the age of the child.⁴⁷¹

In the case of *Elizabeth Michael Kimemeta @ Lulu v. R.*,⁴⁷² the Court observed that without in any way prejudging the determination of the contentious issue regarding the applicant's age, it would be fair to assume that "the best interests of the child" principle enacted through Section 4 (2) of the Law of the Child Act is to be applied presumptively to any person whose age is to be determined. The rationale for determining the age of a person whose apparent age suggests that he is a child is to accord him treatment of a juvenile delinquent which is different from that of adult offenders. This is supposed to be done immediately after the arrest of a child so as to treat him as such from the early stages of the criminal justice process.

The Act specifies that it is the court which has the mandate to determine the age of a child victim or accused of an offence, not a police officer or public prosecutor. On forwarding an accused person or a victim of a criminal offence to the court, a police officer or public prosecutor has to merely form an opinion that such person is a juvenile or not. The Law of the Child Act vests in the court not only the powers, but also the duty to determine the age of the person before it, if it has reasons to believe that the person is a child.⁴⁷³ To leave that role to be performed by the investigators or prosecutors would amount to abandoning the statutory duty of the court.⁴⁷⁴ The provision requiring the age

⁴⁷⁰ S. 113 (1) and (2), Law of the Child Act, 2009, [Cap. 13].

⁴⁷¹ Rule 12 (3), the Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016.

⁴⁷² Misc. Criminal Application No. 46 of 2012, High Court of Tanzania at Dar es Salaam, (unreported).

⁴⁷³ S. 100 (2), read together with S. 113 (1), Law of the Child Act, 2009, [Cap. 13].

⁴⁷⁴ **Twaib, J.**, in *Elizabeth Michael Kimemeta @ Lulu v. R.*, *op.cit.* p. 10.

of a juvenile delinquent to be determined by the court is problematic since a juvenile delinquent is arraigned before the court by using a charge that is prepared by the police officer, and which, as a rule of practice, specifies *inter alia*, the age of the charged person.

The question is, from when should the age of a juvenile who is brought before the court be counted? Is it from the date of commission of the alleged offence or from the day that he was brought to the court? It is pertinent to note that neither the provision defining a child, nor any other Section of the Law of the Child Act specifically provides the date by reference to which the age of juvenile delinquent has to be determined so as to find out whether he or she is a juvenile or not. The Act does not require the age to be determined in reference to the date of commission of an offence or at the time a juvenile delinquent is brought before the court, it only directs the court to determine the age. Section 113 (1) of the Law of the Child Act stipulates:

Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purposes of giving evidence, and it appears to the court that he is a child, the court shall make due inquiry as to the age of that person.

Moreover, Section 100 (2) of the same Act provides that where in the course of any proceedings in a court it appears that the person charged or to whom the proceedings relate is a child; the court shall stay the proceedings and commit the child to the Juvenile Court. From the above provisions, it is clear that the age of a juvenile delinquent is determined when he or she is brought to the court whether as an accused person or a victim of a criminal offence. It is irrelevant what the age of that person was on the date of the commission of the offence, the position which is an absurdity. Indeed, determination of the age of juvenile delinquents is of paramount importance as it determines whether that child will be treated as a child or as an adult throughout the justice process. It is the researcher's view that the age of a juvenile delinquent needs to be determined immediately after the arrest and reference has to be made to the date of the commission

of the alleged delinquent act, and not when the juvenile is brought to the court. The court's role should be to verify the accuracy of the child's age, just as it does in relation to the pleas. This may minimise the delinquents' long-time allegations that the police officers do forge juvenile delinquents' ages so they could treat them as adults.

In *Republic v. Elizabeth Michael Kimemeta@ Lulu*,⁴⁷⁵ Lulu was charged for unlawful killing of Steven Kanumba in the fight which was triggered by love jealousy. It was in 2012 and by then, Lulu was only 16 years. In 2017 when judgment was delivered, she was 22 years. She was convicted as charged and sentenced to a term of two years in jail. The court then stated that, perhaps at the time of commission of the offence, the accused was a child and could not appreciate her deeds. But, it is maturity level, and not a number of birthdays that one may have celebrated, that counts. Getting older is one thing and maturity is the other. The character of the accused person in this case is not for all intents and purposes the character of a child intended to be protected under the Law of the Child Act. If a 'child' as in this case, can ably behave and lead life like adults do, and yet expect protection under the Law of the Child, then one should expect one day to see those few adults who behave like children seeking amnesty under the legislation.⁴⁷⁶

The court did not expound specific circumstances in which a juvenile delinquent can seek amnesty under the Law of the Child Act, if even those who had committed delinquent acts at their tender age are disqualified from the same. It is common knowledge that a person may commit an offence and try to escape justice until when he or she is arrested several years later, but Lulu's scenario is different as she attained the majority age during the justice process. The essence of international standards requiring juvenile cases to be determined expeditiously can manifestly be appreciated in the situations like this. Unfortunately, the same spirit is not well articulated in the laws of Tanzania governing juvenile justice. In the case of *Arnit Das v. State of Bihar*,⁴⁷⁷ the contentious issue was age of the accused person, where the court posed a question as to what happens if a boy

⁴⁷⁵ Criminal Sessions Case No. 125 of 2012, High Court of Tanzania at Dar es Salaam, (unreported).

⁴⁷⁶ *Ibid*, p. 9.

⁴⁷⁷ AIR [2000] (SC), 2264.

or a girl of just less than 16 or 18 years commits an offence and then leaves the country or for any reasons neither appears nor is brought before the competent authority until he or she attains the age of say 50 years? Would he be required to be dealt with by the Juvenile Court and sent to juvenile facilities where there would all be boys and girls of less than 16 and 18 years of age?

The court opined correctly that this was not the intention of the legislators, and if it was, they would have specifically stated so. It is a basic principle that the primary object of statutory construction is to ascertain the intention of the legislature as expressed in the words used. The bounded duty of the court, indeed its only duty, is to give effect to that intention as articulated in the Act.⁴⁷⁸ The reasoning of the court in the above case raises a controversial point which the legislators did not foresee or they omitted intentionally to discourage delays of juvenile cases. When a juvenile attains majority age during the justice process, he or she cannot be committed to juveniles' facility, but at the same time, it is unfair to commit him or her to adults' prison like the case of Lulu, since she is still too young to be subjected to the prison environment for the offence committed at the age of immaturity. In this kind of scenario, the need for a detention facility for youth offenders becomes of utmost importance. Unfortunately, Tanzania has only one prison for young offenders and which does not accommodate female offenders.

4.2.1 Treatment of Juvenile Delinquents

When considering the treatment of juveniles deprived of their liberty, regard should be the issues relating to the conditions of detention, whether the detained children can complain about their treatment or conditions of their detention to an independent body and whether there is a system of independent inspection of detentions.⁴⁷⁹ One specific aspect to be considered when examining treatment of detained children is whether there is mechanism for communication with parents, guardians or members of their families when in pretrial or post trial detentions. Other important aspects to look at include the standard of hygiene, quality and quantity of food offered, medical services, children's

⁴⁷⁸ **Othman, J.A.**, in *Republic v. Dodoli Kapufi & Another*, Criminal Revision No. 1 of 2008, Court of Appeal of Tanzania at Mbeya, (unreported), p. 11.

⁴⁷⁹ United Nations Office on Drugs and Crime, *supra* note 103.

clothing and sleeping materials, and the existence of acts of beating, sexual harassment, corporal punishment or other inhuman treatment.

There are Rules made under the Law of the Child Act, 2009 to facilitate its application. For example, the Retention Homes Rules⁴⁸⁰ require *inter alia*, that the Commissioner for Social Welfare must ensure that the Retention Homes for juvenile delinquents have sleeping materials which are clean and well maintained.⁴⁸¹ Children remanded in the Retention Homes are allowed to wear their home dresses at all times. The Commissioner is supposed to ensure that sanitary facilities meet the standards of health and are kept in hygienic condition at all the time. The Rules provide further that every child in the Retention Home has the right to food in adequate quantities, which is properly prepared, wholesome and nutritious.⁴⁸² Unfortunately, no person or institution has been vested with an obligation to ensure that the right to such quality and quantity of food is enjoyed by children in the Retention Homes because the Rule just provides that “Every child in Retention Home has the right to food,” without mentioning a person on whom an obligation to provide such food is vested. Presumably, it is the Government’s obligation to be monitored by the Commissioner for Social Welfare.

Concerning the health services, every child in the Retention Home is entitled to prompt, adequate and appropriate health services and medical treatment.⁴⁸³ As a way of exposing children in Retention Homes to the world outside the Homes, they are permitted to receive visits from and communicate freely with parents, guardians, relatives and other persons who are significant to such children, and the Home Manager is obliged to assist children in communicating with telephones, as well as sending and receiving letters or parcels where possible.⁴⁸⁴ Children remanded in the Retention Homes are entitled to make complaints orally or in writing about any aspect of their treatment.⁴⁸⁵ A complaint

⁴⁸⁰ Law of the Child, (Retention Homes), Rules, G.N. No. 151 of 4th May, 2012.

⁴⁸¹ *Ibid*, Rule 18 (1).

⁴⁸² *Ibid*, Rule 21 (1).

⁴⁸³ *Ibid*, Rule 23 (1).

⁴⁸⁴ *Ibid*, Rule 36 (1) and Rule 38 (1).

⁴⁸⁵ *Ibid*, Rule 50 (1).

may be made to the Retention Home Staff, the Commissioner for Social Welfare or Commissioner for Human Rights and Good Governance. As to what happens after the complaint is made, that is governed by the Complaints Guidelines which are issued by the Commissioner for Social Welfare.⁴⁸⁶

With the exception of the Commissioner for Human Rights and Good Governance, all other persons to whom a complaint may be made are involved in the administration and management of the Retention Homes. There can be no guarantee of impartiality because in some instances, the complaint may be against one or more of such persons in which situation; one may be a judge in his own case. With regard to the inspection of detention facilities by an independent authority, the Commissioner for Social Welfare has powers to direct the inspection of an approved residential home or institution to be carried out by the social welfare officer at any time to ensure that the approved residential home or institution is being maintained at the required standards.⁴⁸⁷ However, inspection by the social welfare officer cannot constitute an inspection by an independent authority. The social welfare officers are part of the Retention Homes' staff and at some point, the inspection may relate to their performance.

The Minister responsible for social welfare has powers to establish a Board of Visitors in respect of any Approved School, which will have the mandate to visit the School from time to time, inspect and test the quality and quantity of the pupils' food and investigate any complaint made by any pupil or member of the staff.⁴⁸⁸ Moreover, the Commission for Human Rights and Good Governance of Tanzania has the mandate to visit the prisons and places of detention or related facilities with a view to assessing and inspecting the conditions of persons held in such places and making recommendations to redress the existing problems.⁴⁸⁹ The laws do not accord to children detained in the police stations and prisons the same treatment as children in the Retention Homes and Approved School

⁴⁸⁶ *Ibid*, Rule 49 (1) and Rule 50 (3) (d).

⁴⁸⁷ S. 136, Law of the Child Act, 2009, [Cap. 13].

⁴⁸⁸ *Ibid*, S. 122 (1) and S. 123 (1).

⁴⁸⁹ S. 6 (1) (h), Commission for Human Rights and Good Governance Act, 2001, [Cap. 391].

because while there are the Approved School Rules which are more or less similar to the Retention Homes Rules, the same do not apply in police stations and prisons.

This may be contributed by the fact that the police stations and prisons in Tanzania were constructed in the colonial era during which the harsh treatment during detention was part and parcel of delinquents' entitlements. Presently, the Law of the Child Act, 2009 prohibits any person to subject a child to torture, or other cruel, inhuman punishment or degrading treatment, including any cultural practice which dehumanizes or is injurious to the physical and mental well-being of the child.⁴⁹⁰ The term 'degrading treatment' as used in the Law of the Child Act means an act done to a child with the intention of humiliating him or lowering his dignity.⁴⁹¹ The Law of the Child Act does not prohibit the use of corporal punishment as a sentence or disciplinary measure. It prohibits torture or other cruel, inhuman punishment or degrading treatment, but it does not repeal the laws that allow the use of corporal punishment to children. Therefore corporal punishment is still permitted in several laws of Tanzania despite the enactment of the Law of the Child Act, 2009.

In 2016, the United Nations Committee on the Rights of the Child called upon the Government of Tanzania to prohibit all forms of corporal punishment for persons under the age of 18 years in penal institutions.⁴⁹² The reasons advanced by the Committee were that corporal punishment does nothing to address the underlying causes of juvenile delinquency and does not have the required rehabilitative purpose or effect that is required in the sentencing of juvenile delinquents. To this, the Government responded that studies have been conducted and revealed that corporal punishment to children is still important in the country.

Thus, in Tanzania, children are subjected to the infliction of corporal punishment and it is not considered as a humiliation to children, but as a rehabilitative measure. It is therefore

⁴⁹⁰ S. 13 (1), Law of the Child Act, 2009, [Cap. 13].

⁴⁹¹ *Ibid*, S. 13 (3).

⁴⁹² Global Initiative to End all Forms of Corporal Punishment of Children, *supra* note 55. para. 2.

argued that permitting the use of corporal punishment to children as a sentence is equivalent to the statutory as well as judicial endorsement of torture and inhuman treatment of children. The contravention of the provisions of the Law of the Child Act, 2009 regarding the rights and welfare of the child (including the prohibition of torture and degrading treatment), constitutes an offence and, upon conviction, it attracts a penalty of a fine not exceeding five million shillings or an imprisonment for a term not exceeding six months or both fine and imprisonment.⁴⁹³

In what appears as the furtherance of protection against torture, cruel, inhuman punishment or degrading treatment, the Law of the Child Act prohibits any child to be sentenced to imprisonment. It provides that “Notwithstanding any provisions of any written law, a child shall not be sentenced to imprisonment.”⁴⁹⁴ The word ‘imprisonment’ is not defined in the Law of the Child Act. Nevertheless, it can be defined as the restraint of one’s personal liberty so as to prevent a free exercise of his freedom of movement.⁴⁹⁵ It is not a necessary part of the definition that the confinement should be in a place usually appropriated to that purpose. Imprisonment may take place without the application of any physical agencies of restraint such as locks or bars.⁴⁹⁶ In Tanzania, children who are in conflict with the law are detained in prisons and other institutions which are not prisons such as the police stations, Retention Homes and the Approved School. It is not clear whether in prohibiting the imprisonment of children, the Law of the Child Act regards children incarcerated in these non-prison institutions as imprisoned or not.

The Law of the Child Act sets out alternative measures which may be imposed by the Juvenile Court instead of custodial sentence. These include conditional discharge, probation orders, power to order parents to pay fine, compensation or costs instead of the

⁴⁹³ S. 14, Law of the Child Act, 2009, [Cap. 13].

⁴⁹⁴ *Ibid*, S. 119 (1), as amended by S. 37 of the Written Laws (Miscellaneous Amendments) Act, No. 2, 2016.

⁴⁹⁵ Black’s Law Dictionary, *supra* note 22.

⁴⁹⁶ **Lucky, J.**, in *Steere v. Field*, 22 Fed, Case No.1221.

child, and discharging the child without making any orders.⁴⁹⁷ As a form of sentence, placement of a child in an Approved School is required to be only in exceptional circumstances, as a measure of last resort and for the shortest appropriate period of time.⁴⁹⁸ In case the child is convicted of a serious offence of violence, or he is proved to be a persistent delinquent, or the Court believes that there is a significant risk of harm to members of the public, the Court may order the child to be committed to the custody at an Approved School for a period not exceeding three years or until the child attains the age of eighteen years, whichever is earlier.⁴⁹⁹

When the child committed in the Approved School attains the age of eighteen years before the completion of his custodial sentence, he will be transferred to the prison for youth and young offenders. Up to September 2016, Tanzania had only one Approved School situated at Irambo in Mbeya region, but it does not accommodate female delinquents. Moreover, currently, Tanzania has only one prison for youth and young offenders situated at Wami in Morogoro region and which also does not accommodate female delinquents. Therefore, it can generally be said that the custodial sentence of a child in Tanzania can only be imposed on male delinquents, and in exceptional circumstances, only at an Approved School, and for a period not exceeding three years.

It is important to note that the Law of the Child Act does not seek to replace the statutory and common law principles governing the administration of criminal justice in Tanzania. The Law of the Child Act functions in association with other laws such as the Penal Code, 1961, the Criminal Procedure Act, 1985 and the Prisons Act, 1967. Surprisingly, while the Law of the Child Act prohibits the imprisonment of persons of less than 18 years, the Penal Code, 1961 emphasises on the same. It is not clearly stated in the Penal Code or the Law of the Child Act that whenever the two are conflicting, which one

⁴⁹⁷ Sections 16, 18 and 19, Law of the Child Act, 2009, [Cap. 13] and Rule 51 (1), Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016.

⁴⁹⁸ Rule 49 (2) (d), Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016.

⁴⁹⁹ *Ibid*, Rule 54 (1).

should prevail. As stated earlier, the purpose of statutory interpretation is to ascertain and give effect to the intent of the legislature.⁵⁰⁰

The legislative intent in drafting section 119 (1) of the Law of the Child Act which prohibits the imprisonment of juvenile delinquents was to discourage the imprisonment of persons below 18 years while the intention of Section 131(2) of the Penal Code, which provides for the imprisonment of delinquents in cases of rape, is to impose a stringent punishment to deter other persons from committing rape offences. The general rule of statutory construction is that where two statutes relating to the same subject matter are in conflict, the specific statute prevails over the general statute.⁵⁰¹ In this circumstance, the Penal Code, 1961 is the general statute while the Law of the Child Act is a specific statute; and hence, the latter prevails in matters concerning children.

Also, it has been noted that section 119 (1) of the Law of the Child Act was enacted subsequent to section 131 (2) of the Penal Code.⁵⁰² Section 119 (1) of the Law of the Child Act is presumed to have been drafted taking into account all the prevailing circumstances of the juvenile delinquents in Tanzania. Since a more recent statute prevails and exists as an exception to a general statute covering the same subject matter, it can be ruled out that the legal position in Tanzania prohibits the imprisonment of persons below 18 years. Section 131 (2) of the Penal Code should be amended to harmonise it with the Law of the Child Act to avoid the undesired effect which may result from its application.

The Law of the Child Act prohibits torture or other cruel, inhuman punishment or degrading treatment, but the Rules made under the Act permit corporal punishment.⁵⁰³

⁵⁰⁰ Also See *Gottacker Real Estate Co. v. State of Wisconsin*, 121 Wis. 2d 264, N.W.2d, 164 (1984), U.S.A.

⁵⁰¹ *Kramer v. City of Hayward*, 57 Wis. 2d 203, N.W. 2d, 871, [1973], U.S.A.

⁵⁰² S. 131 (2) of the Penal Code, 1961 was introduced in 2007 via the Written Laws, (Miscellaneous Amendments), Act, No. 2 of 2007, while S. 119 (1), Law of the Child Act, 2009, was introduced by the Written Laws, (Miscellaneous Amendments), Act, No. 2, 2016.

⁵⁰³ Law of the Child, (Retention Homes) Rules, G.N. No. 151 of 4th May, 2012.

The Rules confirm the child's right to protection from all forms of violence,⁵⁰⁴ but they authorise the use of corporal punishment, though as a matter of last resort and in exceptional circumstances.⁵⁰⁵ The same stipulation appears in the Approved Schools Rules⁵⁰⁶ in which, among other things, the use of corporal punishment has to be justified under the Education, (Corporal Punishment) Regulations.⁵⁰⁷

4.2.2 Prolonged Detention of Juvenile Delinquents in Tanzania

The Law of the Child Act, 2009 stipulates that where a child has been taken to a Juvenile Court for any offence other than offences triable by the High Court, the case should be disposed by the Court on the same day.⁵⁰⁸ For any reason to be recorded in the proceedings, the Juvenile Court is permitted to adjourn the case to another day and may release the child on bail. The Law of the Child Act is silent on the duration within which juvenile cases have to be disposed by the High Court. A critical examination of section 123 of the Law of the Child Act implies that normal procedures and practices regarding criminal proceedings in the High Court apply equally to juvenile cases.

The Rules made under the Law of the Child Act, 2009 provide that any case triable by the Juvenile Court should be completed within six months after the child has first appeared on the charge before the court, but upon expiry of the six months and on a good cause to be recorded, the Court may extend this period for another three months, making a total of nine months.⁵⁰⁹ Both the amendment to the Law of the Child Act, 2009 and the Rules made under it are of the same year, that is, 2016, but they provide differently on the time frame within which juvenile cases must be finalised in the Juvenile Court. Nevertheless, since the Rules are specific legislation on this aspect, they prevail over the position in the

⁵⁰⁴ *Ibid*, Rule 4 and Rule 52.

⁵⁰⁵ *Ibid*, Rule 43 (8).

⁵⁰⁶ Law of the Child, (Approved School) Rules, 2011.

⁵⁰⁷ See Rule 46 (7) (c) of Law of the Child, (Approved School) Rules, 2011 which requires that corporal punishment in Approved Schools must be administered in accordance with the Education, (Corporal Punishment) Regulations, G.N. No. 294, of 2002.

⁵⁰⁸ S. 103 (1), Law of the Child Act, 2009, as amended by S. 36 of the Written Laws (Miscellaneous Amendments) Act, No. 2, 2016.

⁵⁰⁹ Rule 34, Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016.

Law of the Child Act, 2009.⁵¹⁰ Therefore, in Tanzania the maximum period for the completion of juvenile delinquents' cases is nine months. The Rules provide as a compulsory procedure for the court to dispose juvenile cases within stipulated time, but they do not direct what should be done by the Court or the parties in a situation where the nine months expire yet the case is not finalised.

At the Bill stage, when the public was called to give views regarding the Law of the Child Act, 2009, Civil Society Organisations proposed *inter alia*, that each case involving a juvenile should be handled expeditiously without any unnecessary delay. They recommended that in order to preserve the best interest of the child, all cases against children in conflict with the law must be finished within three months with an option of extending this time for further three months. If the case is not determined after the expiry of a six months period, they said, it should be dismissed forever.⁵¹¹ This resembles the position in India in which the Supreme Court considered a period of three months from the date of filing of the complaint or lodging of the First Information Report as the maximum time permissible for the investigation, and a period of 6 months from the filing of the charge sheet as a reasonable period within which the trial of the child must be completed. The Court ruled that if that is not done, the prosecution against the child would be liable to be quashed.⁵¹²

Unfortunately, the Government of Tanzania did not heed the advice by these Civil Society Organisations. The right to speedy trial is a fundamental right and if an accused is not tried speedily and his case remains pending before the court for an unreasonable length of time, it is clear that his fundamental right to speedy trial would be violated unless the trial is held up on account of any interim order passed by a superior court or the accused is responsible for the delay in the trial of the case.⁵¹³ The right to speedy trial

⁵¹⁰ See *Kramer v. City of Hayward*, *supra* note 501.

⁵¹¹ Civil Society Organisations, "Position Paper on the Bill to Enact the Law of the Child Act, 2009." Presented to the Parliamentary Standing Committee (Community Development), on 7th – 8th October, 2009, at Karimjee Hall, Dar es Salaam.

⁵¹² *Sheela Barse & Ors v. Union of India & Ors*, [1986], SCC. (Cri) 337.

⁵¹³ *Ibid.*

stems from the Constitution, 1977 which stipulates that the Judiciary is the final authority in dispensation of justice in Tanzania and that in delivering decisions in matters of civil and criminal nature, the courts should not delay the dispensation of justice without reasonable ground.⁵¹⁴ Under the Law of the Child Act, 2009, a juvenile case is not required to be taken to the Juvenile Court unless the investigation of the case has been completed or the offence requires committal proceedings.⁵¹⁵ In the case of *Jackson Ole Nemeteni & Others v. Attorney General*,⁵¹⁶ it was stated that several factors may be attributed to the delay of not only juvenile cases but criminal cases generally. For example, the court observed that:

Our criminal justice system is still growing. We have not reached the level where all investigations are carried before arrest. Our criminal detection mechanisms are not yet advanced. Our manpower is not yet seasoned and in many cases, our people do not have permanent or reliable physical addresses. With globalization, crime is becoming more sophisticated and criminals more mobile. Cross boarder criminal activities are also on the increase.⁵¹⁷

Moreover, the prosecution often contends that causes for delay of criminal cases cannot be solely attributed to the prosecution side, rather, they are contributed to also by the accused and other stakeholders at different stages of the process. They argue that expediting disposal of criminal cases depends on a number of factors in the investigation process such as the cooperation of the accused, availability of witnesses, human and financial resources, and competence of both magistrates and prosecutors.⁵¹⁸ However, much as the prosecution's contention might be valid, children, not being the actors in the criminal justice process, are not to be blamed for the delay of cases which result in their long detentions. The detaining of children delinquents for a long time amounts to treating

⁵¹⁴ Art. 107A (2) (b), the Constitution of the United Republic of Tanzania, 1977.

⁵¹⁵ S. 103 (1), Law of the Child Act, 2009, as amended by S. 36 of the Written Laws (Miscellaneous Amendments) Act, No. 2, 2016.

⁵¹⁶ Miscellaneous Civil Cause No. 117 of 2004, High Court of Tanzania at Dar es Salaam, (unreported).

⁵¹⁷ *Ibid*, p. 44.

⁵¹⁸ *Zephrine Galeba v. Attorney General*, Miscellaneous Civil Application No. 21 of 2013, High Court of Tanzania at Dar es Salaam, (unreported), p. 8.

them as the convicted criminals. This is contrary to the Constitution, 1977 and the international law requirements to which Tanzania has ascribed.

As to which time may be regarded as ‘long time’ for the purpose of pretrial detention, it depends on numerous factors, including the nature of the accusations. The researcher opines that in any case, if a child stays in pretrial detention for longer than the duration he or she would serve if convicted, this amounts to long pretrial detention. With respect to post trial detention, the researcher is of the view that if a child serves a sentence similar to an adult who committed the same offence, this constitutes a long detention of the child. In such a situation, the court may be said not to have balanced between the best interests of the child and the interests of justice. For instance, in one case, the appellant was a boy aged seventeen years who was charged of rape. His trial was improperly conducted, but he was consequently convicted and sentenced to life imprisonment. The Court of Appeal of Tanzania in acquitting such child ordered his immediate release from the prison where he had been under custody for almost six years.⁵¹⁹

This indicates that in Tanzania, children delinquents are not detained as a matter of last resort and for the shortest possible time as required by the international laws which Tanzania has domesticated. The Law of the Child Act permits the release on bail of a child apprehended with or without a warrant and who cannot be taken immediately before a Juvenile Court.⁵²⁰ Moreover, the officer in charge of the police station to which the child is brought is obliged to release such child on a recognisance being entered into by the child, his parent, relative, or guardian, with or without sureties.⁵²¹ However, the officer in charge of the police station to which the child is brought may not release a child if the child is charged with homicide or any offence punishable with imprisonment for a term exceeding seven years, or if it is necessary in the interest of that child to remove him

⁵¹⁹ **Rutakangwa, J.A.**, in *Furaha Johnson v. Republic*, Criminal Appeal No. 452 of 2015, Court of Appeal of Tanzania at Arusha, (unreported), p. 6.

⁵²⁰ S. 101, Law of the Child Act, 2009, [Cap. 13].

⁵²¹ *Ibid.*

from association with any undesirable person, or if the officer has reason to believe that the release of that child would defeat the ends of justice.⁵²²

This section contravenes the presumption of innocence, which is the most important right embodied in criminal justice systems around the world and which is a Constitutional right in Tanzania. Every accused person has the right to be presumed innocent until the contrary is proved. It also contravenes the provisions of the Criminal Procedure Act, 1985 which governs the general administration of criminal justice in the country. In the Criminal Procedure Act, the duration of imprisonment for which the accused person is likely to serve if convicted is not a relevant factor to be considered on whether or not to grant bail to the accused person.⁵²³ In considering bail for a juvenile delinquent, the merit or the nature of the offence should have no relevance because at this stage the child is just an accused person. Denying him bail on the ground that he is charged with an offence punishable with an imprisonment exceeding seven years is prematurely treating him as a convict. After all, the Law of the Child Act prohibits the imprisonment of persons below eighteen years.

It is unreasonable to deny bail to the detained juvenile on a mere speculation that he may be convicted and sentenced to imprisonment for a term of more than seven years. Although the right of the accused person to be released on bail is the right enjoyable with limitations, such limitations are not supposed to be arbitrary.⁵²⁴ Under the Juvenile Court's Rules, before the child is remanded to custody, the Court is required to consider that bail should not be denied where the child is unlikely to receive a custodial sentence upon conviction and that the deprivation of liberty pending trial has to be used in exceptional circumstances, as a measure of last resort and for the shortest possible period of time.⁵²⁵ This Rule is drafted in mandatory terms, which means that although the

⁵²² *Ibid*, subsections (a-c).

⁵²³ S. 148 (5) of the Criminal Procedure Act, 1985, stipulates the conditions to be considered by the courts in granting bail to accused persons.

⁵²⁴ **Ruhangisa, J.**, in *Jeremia Mtobesya v. Attorney General*, Miscellaneous Civil Cause No. 29 of 2015, High Court of Tanzania at Dar es Salaam, (unreported), p. 12.

⁵²⁵ Rule 29 (1), Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016.

Magistrate has the discretion to release the child on bail or to remand him to custody, he must act in accordance with the provisions of this Rule 29 (1), Juvenile Court Rules, 2012.

Therefore, the release of the juvenile delinquent on bail should be a rule and the exception has to be rooted on reasonable grounds for believing that the child is in immediate danger or he may cause danger to others or he was previously granted bail and absconded.⁵²⁶ It can be argued that with the prohibition of the imprisonment of juvenile delinquents, the importance of categorising offences into bailable and unbailable ones has diminished because even if convicted of a serious offence such as murder, the child will not be sentenced to death or any term of imprisonment.

Where the offence is triable by the High Court and the Juvenile Court remands a child or commits a child for trial before the High Court and the child is not released on bail or is not permitted to go free, the Juvenile Court may, instead of committing the child to prison, order him to be handed over to the care of the Commissioner, fit person or institution named in the order.⁵²⁷ The child shall remain in the custody of that person or institution during the period mentioned in the order or until he is further dealt with according to the law and shall be deemed to be in the legal custody during that period.⁵²⁸ The rationale is to ensure easy availability of the child during his trial, and at the same time, avoid sending him to a detention which may cause him more harm than good. When the Court releases a child on bail in the above circumstances, it is not supposed to require a financial surety.⁵²⁹

4.2.3 Separation of Detained Juvenile Delinquents

The Law of the Child Act, 2009 obliges the police officers to make arrangements for preventing, so far as practicable, a child while in custody, from associating with an adult

⁵²⁶ *Ibid*, sub-Rule (2).

⁵²⁷ S. 104, Law of the Child Act, 2009, [Cap. 13].

⁵²⁸ *Ibid*.

⁵²⁹ Rule 28 (4), Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016.

charged with an offence unless he is a relative.⁵³⁰ The Law of the Child Act is silent about separation of children when incarcerated in detentions other than police stations. The United Nations Convention on the Rights of the Child, 1989, provides that every child deprived of liberty should be separated from adults unless it is considered in the child's best interest not to do so.⁵³¹ It was stated earlier that in Tanzania, children delinquents are detained in police stations, Retention Homes, prisons and in the Approved School, but the law talks about the separation of children in police stations only.

The Law of the Child Act provides weakly the requirement to separate children delinquents from adult offenders without clearly indicating the degree of separation, whether it should be partial or total. Again, the use of the word 'shall' in section 102 indicates that the provision is mandatory; hence, making the separation of children from adults in detentions a compulsory requirement. The Law of the Child Act proceeds to use a phrase 'so far as practicable' which dilutes the whole essence of separation requirement. This phrase vests the police officers with the discretion to separate or not to separate children from adult offenders depending on the manner considered practicable by them.

The Juvenile Court Rules, 2012 stipulate that where a child is remanded into custody, he must be held separately from adults and receive care, protection and all necessary individual, social, educational, vocational, psychological, medical and physical assistance that he may require in view of his age, gender, disability, health status and personal circumstances.⁵³² Further, the Rules provide that where the Court is sitting in the same building with the court which tries adults, the Registry Officer must ensure that children attending the Court do not share the same waiting room or area with the adults accused of a criminal offence.⁵³³ In the Retention Homes, female children are required to be totally separated from adult male staff as well as the male children detained in the same

⁵³⁰ S. 102, Law of the Child Act, 2009, [Cap. 13].

⁵³¹ Art. 37 (c), the United Nations Convention on the Rights of the Child, 1989.

⁵³² Rule 29 (9), Law of the Child, (Juvenile Court Procedure), Rules, G.N. No. 182 of 20th May, 2016.

⁵³³ *Ibid*, Rule (6) (3).

Retention Home. The Rules provide that female children must be accommodated in separate sleeping rooms and be provided with separate toilets and bathing facilities from those of male children.⁵³⁴

The Rules are also silent on whether a girl who gives birth to a baby while in the Retention Home should be separated from other girls or not as she is no longer a girl, but a teen mother. The International standards stipulate that women should be separated from men, children from adults, untried persons from convicted detainees, and civil detainees from detainees imprisoned for criminal offenses.⁵³⁵ A total separation can be achieved by allocating units strictly separate from each other within the same institution, then during movements inside the institution; measures should be taken to avoid contact between the separated categories of detainees. However, in any case, separation measures are not supposed to lead to deterioration in the treatment or material conditions of the persons concerned.⁵³⁶

4.2.4 Free Legal Assistance and Representation

Another essential entitlement of a juvenile delinquent is the right to free legal assistance throughout the criminal justice process. Legal assistance is an important part of the right to a fair trial.⁵³⁷ Therefore, in discussing the field of juvenile justice in Tanzania, the importance of legal aid provision to juvenile delinquents should not be forgotten. Most of the juveniles who commit offences do not know their rights, they do not know how to apply for a free legal aid and they cannot afford expenses to hire a private legal counsel. In this regard, it is necessary to have the law, policy and practice for a Government-funded legal aid system for juvenile delinquents to ensure that free legal aid is available to them at all stages of the criminal justice process. It is internationally recognised that most of the accused and aggrieved persons are unable to afford legal services due to the

⁵³⁴ Rule 19, Law of the Child, (Retention Homes), Rules, G.N. No. 151 of 4th May, 2012.

⁵³⁵ See for example Article 8 of the United Nations Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, 1988.

⁵³⁶ United Nations Basic Principles for the Treatment of Prisoners, 1990.

⁵³⁷ Lesnie, V., "What is a Fair Trial? A Basic Guide to Legal Standards and Practice." New York: Lawyers Committee for Human Rights, 2000, p. 23.

high cost of court and professional fees.⁵³⁸ As such, it is the duty of Governments to provide legal assistance and representation to indigent persons in order to make the right to a fair trial more effective.⁵³⁹

The Law of the Child Act stipulates that in all proceedings against a child, where the parents, guardian, relatives or a social welfare officer attends, anyone of them may, with the prior consent of the court, assist the accused child in the conduct of his case and, in particular, in the examination and cross examination of witnesses.⁵⁴⁰ The Act has ignored a unique role of legal counsel in criminal trials. The examination of witnesses is an important and technical aspect in any legal proceedings which requires techniques that may not necessarily be known to everyone, including the parents, guardian, relatives or social welfare officers. For the legal assistance and representation of juvenile delinquents to be meaningful, the same must be provided by advocates or any other persons who are qualified to practice laws in Tanzania.

Under the Law of the Child Act, procedure for conducting proceedings by the Juvenile Court in all matters are required to be in accordance with the rules made by the Chief Justice for that purpose, but in any case, the child must have a right to next of kin and representation by an advocate.⁵⁴¹ Where a child who is a party to the proceedings has no legal representation, such representative should be provided to the child free of charge whenever practicable.⁵⁴² Currently, there are organisations that provide legal assistance in Tanzania which include the National Organisation for Legal Assistance, Legal and Human Rights Centre, University of Dar es Salaam, Tanzania Women Lawyers Association, to mention a few. However, most of these legal aid providers do not take criminal cases due to their nature, the objective of their organisations, or due to the

⁵³⁸ Art. 9, Resolution on the Right to a Fair Trial and Legal Assistance in Africa, (the Dakar Declaration), 1999. The Declaration was adopted by the African Commission on Human and Peoples' Rights at its 26th Ordinary Session in November, 1999.

⁵³⁹ *Ibid.*

⁵⁴⁰ S. 108 (2), Law of the Child Act, 2009, [Cap. 13].

⁵⁴¹ *Ibid.*, S. 99 (1) (f).

⁵⁴² Rule 14, Law of the Child, (Juvenile Court Procedure), Rules, G.N. No. 182 of 20th May, 2016.

reason that they have a limited number of advocates who may legally represent clients in court.⁵⁴³

The cases that some of these organisations take is shown in the table below:

Table 4:1: Some Organisations Providing Legal Assistance in Tanzania

Legal Aid Provider	Nature of Cases
National Organisation for Legal Assistance	Almost exclusively civil.
Legal and Human Rights Centre	Civil, but may take criminal case of a juvenile delinquent if there is a clear abuse of process.
Tanzania Women Lawyers Association	Civil cases.
Kilimanjaro Women Information Exchange and Consultancy Organization (KWIECO)	Civil and criminal.
Babati Legal Aid Centre	Civil, but may take criminal cases for a child victim of a crime.
University of Dar es Salaam	Civil and only 'hardship' cases and strategic litigation.

Source: Hamilton, C. and Barnes, R., "Assessment of Access to the Justice System for under-18s in Tanzania." London: UNICEF, NOLA & Coram Children's Legal Centre, UK, 2011, pp. 62-65.

The Juvenile Court Rules create a child's right to free legal representation, but they do not vest obligation on any person to provide such right, thus, making this right an abstract and hard to realise or claim whenever it is denied. One of the Civil Society Organisations' suggestions was that a child arrested and charged of an offence should

⁵⁴³ Hamilton, C. and Barnes, R., "Assessment of Access to Justice System for under-18s in Tanzania." London: UNICEF, NOLA and Coram Children's Legal Centre, U.K., 2011. Requirements for practicing advocates are provided in sections 8, 34, and 35 of the Advocates Act, [Cap. 341 R.E. 2002].

have the right to free legal assistance and court representation which must be accorded to him by the State, institution, organisation or any other interested person.⁵⁴⁴ As stated earlier, the flexible nature of phrases such as ‘whenever practicable’, diminishes the mandatory character of a provision. It is difficult to ascertain how ‘practicable’ should be construed in the circumstances of each case without unreasonably escaping legal responsibility towards the rights of a child delinquent.

Moreover, in determining whether the confession by the child was made voluntarily, the Juvenile Court takes into account, among other things, whether the parent, guardian, child supporter or legal representative was present to assist the child at the time of making a confession.⁵⁴⁵ The Rules do not stipulate clearly the effect of conducting proceedings to which a child is a party in the absence of his or her legal representative. **Bhagwati, J.**, (as he then was), once stated that:

...let it not be forgotten that if the law is not only to speak justice but also deliver justice, legal aid is an absolute imperative. If free legal services are not provided to every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or in communicado situation, the trial itself may run the risk of being vitiated...⁵⁴⁶

This contention is supported by *Kharshiing, M.*,⁵⁴⁷ when he observed that the absence of a lawyer in a juvenile Court on account of poverty of the juvenile delinquent will be detrimental to the delinquent and his incarceration in any institution will be unreasonable, unjust and unfair. Free legal assistance and representation to juvenile delinquents needs to be considered seriously by making it accessible to children facing not only murder charges but also any proceedings before the court. A juvenile who cannot afford to engage a counsel for his defence is not guaranteed an equal protection of law and fair trial according to the international standards. The absence of legal representation may mean

⁵⁴⁴ Civil Society Organisations’ Position Paper, *supra* note 511.

⁵⁴⁵ Rule 41 (3), Law of the Child, (Juvenile Court Procedure), Rules, G.N. No. 182 of 20th May, 2016.

⁵⁴⁶ *Hussainara Khatoon v. State of Bihar*, AIR [1979], SC. 1374.

⁵⁴⁷ Kharshiing, M., “Juvenile Justice with Special Reference to the State of Meghalaya.” Thesis Submitted in Partial-fulfillment of the Requirements for the Award of PhD, Gauhati University, 2012, (unpublished).

the end of juvenile's liberty by incarcerating him in jail or any institution under the contaminating influence of adult offenders or other hardened juvenile delinquents.

4.2.5 Diversion of Juvenile Delinquents, Rehabilitation and Reintegration Programmes

The Law of the Child Act does not contain the provisions which allow children to be diverted out of the formal criminal justice system and referred to rehabilitative services and support. Diverting juveniles out of the criminal justice system is the first step towards the protection of their rights which are prone to violation when juveniles come into contact with the criminal justice system. Lack of the provisions for formal diversion programmes is a contravention of the international laws relating to children in conflict with the law. Formal diversion is generally a good practice and positive alternative to putting children through the criminal justice system if focused on the best interests of the child. The Juvenile Court Rules⁵⁴⁸ have been made to enable the implementation of the Law of the Child Act, but the Rules can only implement the principal Act, that is, the Law of the Child Act. The Rules cannot amend the Act or fill in gaps in respect of the issues which are missing in the principal Act.

Concerning the rehabilitation and reintegration programmes, the international standards specify that all juvenile delinquents should benefit from arrangements designed to assist them when leaving detention. They should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release. Such support is an important step towards successful reintegration into society and the prevention of re-offending. The Rules made under the Law of the Child Act, contain educational and vocational training programmes to rehabilitate and help in integrating juveniles to the community, but those programmes are not effective enough to prepare children to lead decent lives after release or get reputable employment opportunities.

⁵⁴⁸ Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016. Rule 125 of these Rules repeals the Law of the Child (Juvenile Court Procedure) Rules of 2014, which were G.N. No. 251 of 2014.

The Law of the Child Act is supposed to provide for the establishment or recognition of rehabilitation and reintegration facilities to take care of juveniles after they leave the detentions for the purpose of enabling them to lead an honest, industrious and useful life in the society. Whether these programmes need to be established in police detentions, this may be considered later when the programmes in prisons, Retention Homes and Approved School are effective.

Under the Retention Homes Rules, the Commissioner for Social Welfare, in collaboration with the Ministry responsible for education and vocational training, is required to ensure that every child in a Retention Home has the right to education suited to her or his needs and abilities.⁵⁴⁹ In doing so, children of compulsory school age in the Retention Homes must get primary education in accordance with the national curriculum available to children in the community. Moreover, children who completed primary school should be granted access to secondary education in accordance with the national curriculum provided to children in the community, and special education programmes should be provided for children with cognitive or learning difficulties and children who have missed schooling.⁵⁵⁰

The Commissioner is further obliged to ensure that adequate education materials are provided to every child in the Retention Home. In addition, the Rules stipulate that every child in a Retention Home is entitled to participate in vocational training programmes to promote skills and prepare him or her for future employment.⁵⁵¹ In this regard, the child has to be able to select programmes of his or her interest. The Manager of a Retention Home has a legal duty to establish programmes designed to facilitate a child's reintegration into the community.⁵⁵²

⁵⁴⁹ Rule 31 (1), Law of the Child, (Retention Homes) Rules, G.N. No. 151 of 4th May, 2012.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid*, Rule 32.

⁵⁵² *Ibid*, Rule 33.

4.3 The Penal Code, 1961 and Protection of Juvenile Delinquents

The Penal Code, 1961⁵⁵³ is the primary legislation in Tanzania which provides for most of criminal offences and their penalties. One of the basic legal principles is that one cannot be punished for doing something which is not prohibited by law, that is to say, there can be no punishment without a law authorising it. This principle is expressed in a Latin phrase, “*Nulla poena sine lege*.”⁵⁵⁴ It should be noted that the Penal Code does not provide the definition of ‘a child,’ but it provides that a person under the age of ten years is not criminally responsible for any act or omission.⁵⁵⁵ It provides further that a person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or make the omission.⁵⁵⁶

Also, the Penal Code provides that any person under the age of twelve years who commits an act or omission which is unlawful shall be dealt with under the Law of the Child Act, 2009.⁵⁵⁷ In addition, a male person under the age of twelve years is presumed to be incapable of having sexual intercourse.⁵⁵⁸ Therefore, under the Penal Code, 1961 the minimum age of criminal responsibility is twelve years. This means that in Tanzania, a person under the age of twelve years cannot be arrested or formally charged with an offence.

The minimum age of criminal responsibility under the Penal Code, 1961 is so low that a person who has not yet attained the emotional, mental and intellectual maturity is held responsible for his actions through formal criminal law procedures and measures.⁵⁵⁹ Although there is no categorical international standard regarding the minimum age of criminal responsibility, there is nothing to prevent Tanzania from increasing the same to 18 years as long as the country recognises a person below the age of 18 years as a child.

⁵⁵³ Penal Code, 1961, [Cap. 16 R.E. 2002].

⁵⁵⁴ Black’s Law Dictionary, *supra*, note 22, p. 1201.

⁵⁵⁵ S. 15, Penal Code, 1961, [Cap. 16 R.E. 2002].

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid*, S. 15 (4), as amended by S. 174, Law of the Child Act, 2009, [Cap. 13].

⁵⁵⁸ *Ibid.*

⁵⁵⁹ Also See Mashamba, C., *supra*, note 116, p. 346.

Moreover, the Penal Code provides that where the offence of rape is committed by a boy who is of the age of eighteen years or less, if he is a first delinquent, he should be sentenced to corporal punishment only, but if he is a second time delinquent, he must be sentenced to imprisonment for a term of twelve months with corporal punishment and if he is a third time and recidivist delinquent, he should be sentenced to five years imprisonment with corporal punishment.⁵⁶⁰ Regarding gang rape, the Penal Code stipulates that where the commission or abetting of the commission of a gang rape involves a person of or under the age of eighteen years, the court should, in lieu of sentence of imprisonment, impose a sentence of corporal punishment based on the actual role played in the rape.⁵⁶¹

Therefore, imprisonment and corporal punishment to children are permitted as types of sentences under the Penal Code, 1961.⁵⁶² Corporal punishment is also legally allowed as a disciplinary measure to children in penal institutions. It is pertinent to note that the Nyalali Commission, 1992⁵⁶³ was of the view that corporal punishment is inherently cruel, inhuman, degrading and contrary to Article 13 (b) (e) of Tanzanian Constitution, 1977 which stipulates that no person shall be subjected to torture, inhuman or degrading treatment.⁵⁶⁴ One would expect that such a considered view from eminent Tanzanians would weigh highly in the courts, but this was not the case.

As a safeguard mechanism, the Penal Code provides that for the promotion and protection of the right of the child, nothing should prevent the court from exercising discretionary powers in imposing sentences to persons of or below the age of eighteen years or to exercise revisionary powers to satisfy that cruel sentences are not imposed on

⁵⁶⁰ S. 131 (2), Penal Code, 1961, [Cap. 16 R.E. 2002], as amended by S. 177 (a), the Law of Child Act, 2009.

⁵⁶¹ *Ibid*, S. 131A (3), as amended by S. 8 of the Written Laws, (Miscellaneous Amendments), Act, No. 2 of 2007.

⁵⁶² S. 25 (c), the Penal Code, 1961, [Cap 16 R.E. 2002].

⁵⁶³ United Republic of Tanzania, "Presidential Commission (Nyalali Commission), on whether Tanzania should adopt a one-Party or Multi-party System, 1992 (unpublished), p. 10.

⁵⁶⁴ *Ibid*.

persons of or below the age of eighteen years.⁵⁶⁵ The word ‘court’ as used in the Penal Code means the court of competent jurisdiction.⁵⁶⁶ Concerning treatment of children, the Penal Code stipulates that any person having the custody, charge or care of any person under eighteen years of age, who ill-treats, neglects or abandons that person or procures that person to be assaulted, ill-treated, neglected or abandoned in a manner likely to cause him suffering or injury to health, including injury to, or loss of sight or hearing, or limb or organ of the body or any mental derangement, commits the offense of cruelty to children.⁵⁶⁷

Any person who commits the offence of cruelty to children is liable on conviction to imprisonment for a term of not less than five years and not exceeding fifteen years or to a fine not exceeding three hundred thousand shillings or to both the fine and imprisonment, and shall be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to that person.⁵⁶⁸

4.4 Rights of Juvenile Delinquents under Criminal Procedure Act, 1985

Like the Constitution, 1977, the Criminal Procedure Act, 1985 does not directly provide for the rights of children in conflict with the law. The Criminal Procedure Act, 1985 is basically a procedural legislation for the investigation, trial and punishment of all offences under the Penal Code, 1961 and offences under other laws, except where any other law provides a different manner of dealing with offences created under it. The Criminal Procedure Act, 1985 does not apply in primary courts. Primary Courts have their own procedures contained in the third Schedule to the Magistrates’ Courts Act, 1984 namely, the Primary Courts Criminal Procedure Code.

Thus, the application of the Criminal Procedure Act, 1985 relates to every person who is accused of or committed an offence, and as stated earlier, in the context of the

⁵⁶⁵ S. 60B, Penal Code, 1961, [Cap. 16, R.E. 2002].

⁵⁶⁶ *Ibid*, S. 5.

⁵⁶⁷ *Ibid*, S. 169A (1).

⁵⁶⁸ *Ibid*, s. 169A (2).

Interpretation of Laws Act, the term “person” includes a child.⁵⁶⁹ Therefore, children in conflict with the law are entitled to all the rights, freedom and safeguards set out in the Criminal Procedure Act, 1985. The Criminal Procedure Act defines a ‘child’ as a person who has not attained the age of sixteen years.⁵⁷⁰ This age is again very low for a child to be dealt with as a criminal through the application of the Criminal Procedure Act, 1985 in the ordinary criminal justice system. Although at the age of sixteen years a child may have the capacity to appreciate the nature of his actions, he is still not mature enough to withstand the hassles of the criminal justice processes.

Under the Criminal Procedure Act, 1985, a person is considered to be under restraint if he is in the company of a police officer for a purpose connected with the investigation of an offence and the police officer would not allow him to leave if he wished to do so. It is immaterial whether or not the police officer has reasonable grounds for believing that such person has committed an offence.⁵⁷¹ It is also irrelevant that such person is not in a lawful custody in respect of the offence. For the purpose of the Criminal Procedure Act, a person is in a lawful custody if he is under restraint after being lawfully arrested or he was unlawfully arrested in connection with an offence, but the police officer believes on reasonable grounds that the said person has committed the offence.⁵⁷²

The Criminal Procedure Act, 1985 prohibits the person arrested to be subjected to more restraint than is necessary to prevent his escape.⁵⁷³ In performing their duties and exercising powers conferred on them, police officers are obliged to comply with the provisions of the Criminal Procedure Act, 1985 relating to the procedures for criminal investigation.⁵⁷⁴ However, where a police officer contravenes or fails to comply with such provisions, the contravention or failure should not be punishable as an offence against the Criminal Procedure Act, 1985, unless a penalty is expressly provided in

⁵⁶⁹ S. 4, Interpretation of Laws Act, 1996, [Cap. 1 R.E. 2002].

⁵⁷⁰ S. 56 (2), Criminal Procedure Act, 1985, [Cap. 20, R.E. 2002].

⁵⁷¹ *Ibid*, S. 5 (1).

⁵⁷² *Ibid*, S. 5 (2).

⁵⁷³ *Ibid*, S. 12.

⁵⁷⁴ *Ibid*, S. 6 (2).

respect of the contravention or failure.⁵⁷⁵ Moreover, it is not a contravention or a failure to comply with the Criminal Procedure Act, 1985 if a police officer commits any act which constitutes a breach of discipline under the Police Force and Auxiliary Services Act⁵⁷⁶ for which he may be dealt with under that Act.⁵⁷⁷ The act by a police officer may not be regarded as a contravention or failure to comply with the Criminal Procedure Act, 1985 if it constitutes grounds for the exclusion of evidence in proceedings for the reasons that the said evidence was illegally obtained.

Additionally, if the act constitutes grounds for the institution of civil proceedings against the concerned police officer, it will not be punishable as an offence against the Criminal Procedure Act, 1985.⁵⁷⁸ Where a person is under restraint, a police officer is not supposed to ask him any questions, or ask him to do anything for a purpose connected with the investigation of an offence, unless the police officer has told him his name and rank.⁵⁷⁹ Moreover, the restrained person must be informed by a police officer, in writing or orally if practicable, the fact that he is under restraint and the offence in respect of which he is restrained in a language in which he is fluent.⁵⁸⁰ He should be cautioned by a police officer by informing him, or causing him to be informed that he is not obliged to answer any question asked to him by a police officer, other than a question seeking particulars of his name and address and that he may communicate with a lawyer, relative or friend.⁵⁸¹ Upon request by a restrained person, a police officer is required to provide him with reasonable facilities to enable him to communicate with a lawyer, a relative or friend of his choice.

As for a child, immediately after he is placed under restraint, a police officer in charge of investigating an offence in respect of which the child is under restraint, is required to cause a parent or guardian of the child to be informed that the child is under restraint and

⁵⁷⁵ *Ibid.*

⁵⁷⁶ Police Force and Auxiliary Services Act, 1961, [Cap. 322, R.E. 2002].

⁵⁷⁷ S. 6 (3), (a), Criminal Procedure Act, 1985, [Cap. 20, R.E. 2002].

⁵⁷⁸ *Ibid.*, S. 6 (3), (c).

⁵⁷⁹ *Ibid.*, S. 53 (a).

⁵⁸⁰ *Ibid.*, S. 53 (c).

⁵⁸¹ *Ibid.*

of the offence for which he is restrained.⁵⁸² A police officer may refuse to facilitate the restrained person in communicating with a relative or friend if he believes on reasonable grounds that it is necessary to prevent him from communicating with the person for the purpose of avoiding the escape of an accomplice of the person under restraint or the loss, destruction or fabrication of evidence relating to the offence.⁵⁸³ A police officer investigating an offence for the purposes of ascertaining whether the person under restraint has committed an offence may record a statement of that person and show the statement to the person and ask him to read it and sign at the end.⁵⁸⁴

With regard to detention of the arrested persons, the Criminal Procedure Act stipulates that when any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which that person is brought may, if it does not appear practicable to bring him before an appropriate court within twenty four hours after he was so taken into custody, inquire into the case and, unless the offence appears to that officer to be of a serious nature, release the person on his executing a bond with or without sureties.⁵⁸⁵ If the arrested person is not released, so he has been retained in custody, he must be brought before the court as soon as practicable. This is also the position where any person is arrested under a warrant of arrest or he has been taken into custody without a warrant for an offence punishable with death.

An officer in charge of a police station may release a person arrested on suspicion of committing any offense if after due police inquiry, insufficient evidence is, in his opinion, disclosed in which to proceed with a charge.⁵⁸⁶ Regarding treatment of restrained persons, the Criminal Procedure Act, 1985 requires that while a person is under restraint, he should be treated with humanity and with respect for human dignity.⁵⁸⁷ No person

⁵⁸² *Ibid*, S. 56 (1).

⁵⁸³ *Ibid*, S. 54.

⁵⁸⁴ *Ibid*, S. 58, as amended by S. 15 of the Written Laws, (Miscellaneous Amendments) Act, 2011.

⁵⁸⁵ S. 32 (1), Criminal Procedure Act, 1985, [Cap. 20, R.E. 2002].

⁵⁸⁶ *Ibid*, S. 32 (4).

⁵⁸⁷ *Ibid*, S. 55 (1).

under restraint should be subjected to cruel, inhuman or degrading treatment. Where a person under restraint makes a request to a police officer to be provided with medical treatment, advice or assistance in respect of an illness or an injury, the police officer must forthwith take such reasonable action as is necessary to ensure that the person is provided with medical treatment, advice or assistance.⁵⁸⁸

In excluding children from criminal justice processes, the Criminal Procedure Act, 1985 stipulates that children are not allowed to be present in the court during the trial of any other person charged with an offence or during any proceedings preliminary thereto, except during such time as their presence is required as a witness or otherwise for the purposes of justice.⁵⁸⁹

The Criminal Procedure Act provides further that every accused person is entitled to be released on bail except if he is charged with a serious offence such as murder, treason and armed robbery.⁵⁹⁰ A person brought under the custody of a police officer on reasonable suspicion of having committed an offence should be released immediately, where the police officer who arrested him believes that the person has in fact committed no offence or the police officer who arrested him believes that he arrested the wrong person, or after twenty four hours since the person was arrested, no formal charge has been laid against that person unless the police officer in question reasonably believes that the offence suspected to have been committed is a serious one.⁵⁹¹ Where the person arrested is under the age of fifteen years, that person may be released after his parent, guardian, relative or any other reliable person has entered into a recognisance on his behalf.⁵⁹² So, not every child arrested is entitled to police bail for the mere reason that he is a child. Only those with less than fifteen years may be released with a condition that the parent, guardian or relative enters into recognisance on behalf of the child. Under these circumstances, a child of say, sixteen years, is required by the law when arrested to be treated like an adult

⁵⁸⁸ *Ibid*, S. 55 (3) (b).

⁵⁸⁹ *Ibid*, S. 187.

⁵⁹⁰ *Ibid*, S. 148 (5) and S. 152.

⁵⁹¹ *Ibid*, S. 64 (1).

⁵⁹² *Ibid*, S. 64 (3).

offender, contrary to the international law requirements. In the United Kingdom, for example, a 17 years boy was arrested and held in London Police Station on suspicion of robbery of a mobile phone on a bus. The boy stayed in police custody for eleven hours and he was denied communication with his mother. In a case challenging such treatment, the Court held that most of the statutory provisions relating to criminal justice draw a line between those who have reached 18 and those under that age. Such provisions treat those under 18 differently from adults, but when they are taken into custody by police, they are treated as adults. This is an anomaly. The treatment of 17 year-olds as adults when arrested and detained is inconsistent with the United Nations Convention on the Rights of the Child, 1989 and the views of the United Nations Committee of the Rights of the Child.⁵⁹³

The police officer is not compelled to release a child on bail because the word ‘may’ as used in Section 64 (3), of the Criminal Procedure Act, 1985 does not generally mean ‘must.’ Where in a written law the word ‘may’ is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at the discretion, while where the word ‘shall’ is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.⁵⁹⁴ It is well settled that the word ‘may’ is capable of meaning ‘must’ or ‘shall’ in the light of the context.⁵⁹⁵ The researcher opines that the protection of juvenile delinquents’ rights is one of such contexts which require the construction of the word ‘may’ to mean ‘must.’

Considering the danger of incarcerating children in detentions, the age of the accused person referred to in Section 64 (3), of the Criminal Procedure Act, 1985 would preferably be eighteen years instead of fifteen years. Moreover, instead of conferring the discretion to the police officer to treat the word ‘may’ as optional or mandatory, the legislature could clearly impose an obligatory duty to the police officer to release on bail any arrested person who is below the age of eighteen years except where the

⁵⁹³ *The Queen on the Application of HC (a child, by his litigation friend CC) v. The Secretary of State for the Home Department & Another*, [2013], EWHC 982.

⁵⁹⁴ S. 53, Interpretation of Laws Act, 1996, [Cap. 1 R.E. 2002].

⁵⁹⁵ Lakkaraju, J., *supra* note 133, p. 92.

incarceration is for the best interest of the concerned child. This could be achieved by using the word 'shall' in Section 64 (3), of the Criminal Procedure Act, 1985 and construe the same in the light of Section 53 (2) of the Interpretation of Laws Act, 1996 that requires the word 'shall' to mean mandatory. For the same reason, the Law of the Child Act, 2009 permits the child to be released on a recognisance being entered into by him, and if it is impracticable, to get his parent, guardian, relative or any other reliable person who can enter into a recognisance on his behalf.

Concerning the time frame for the disposition of criminal cases, the Criminal Procedure Act, 1985 stipulates that during the hearing of any case, the court may adjourn it from time to time and release the accused person on bail or commit him to prison. The adjournment must not exceed fifteen days at any one time if the accused person has been committed to prison. If the accused person has been released on bail, the said adjournment is not supposed to exceed thirty days.⁵⁹⁶ It is unlawful for a court to adjourn a case in respect of offences specified in the First Schedule to the Criminal Procedure Act, 1985 for an aggregate exceeding sixty days except under the enumerated circumstances, including filing of a certificate by the Government stating the need and grounds for an adjournment.⁵⁹⁷ If the accused person has not been tried within a reasonable time, and if no certificate has been filed by the Government to explain the delay, the Court is required to discharge the accused person, though this will not operate as a bar to a subsequent charge being brought against the accused person for the same offense.⁵⁹⁸

The researcher is of the view that allowing the accused person who was discharged for non-compliance of the law by the prosecution to be charged again for the same offence, defeats the very purpose of setting the time limit for the disposition of criminal cases. Once the prosecution has failed to comply with the prescribed conditions, the logical thing to do for the trial magistrate is to discharge the accused person. The magistrate

⁵⁹⁶ S. 225 (2) and S. 248, Criminal Procedure Act, 1985, [Cap 20, R.E. 2002].

⁵⁹⁷ *Ibid*, S. 225 (4).

⁵⁹⁸ *Ibid*, S. 225 (5).

cannot force the prosecution to proceed if they are not ready nor can the magistrate prosecute the case himself. Discharging the accused person while permitting his re-arrest for the same offence will almost surely result in his immediate re-arrest and the charges being laid against him again. This means the whole move starts afresh. The discharge does not serve any useful purpose unless it was clearly stated that the discharged person may not be re-arrested before investigations are completed, in which case, the trial could be conducted right away.

For the same purpose of promoting fair and expeditious trials, the Criminal Procedure Act, 1985 provides for accelerated trials and disposal of cases in which before the actual trial of the accused person, preliminary hearings are conducted to determine matters not in dispute between the parties.⁵⁹⁹ Likewise, in murder and treason cases which are triable by the High Court, committal proceedings are conducted in the subordinate courts of competent jurisdiction before information is filed in the High Court.⁶⁰⁰ As stated above, these procedures were intended to expedite criminal trials, but whether they achieve the purpose for which they were introduced or not, it is still debatable and subject to research. It suffices to point out that juvenile delinquents were not specifically intended to be the beneficiaries of these accelerated trial arrangements; hence, nothing meaningful has been achieved to save them from the long pretrial and post trial detentions.

As to the legal assistance and representation of the accused persons, the Criminal Procedure Act, 1985 provides that any person, accused before any criminal court, other than a primary court, may be defended by an advocate of the High Court subject to the provisions of any written law relating to the provision of professional services by the advocates.⁶⁰¹ As far as legal aid in Tanzania is concerned, there are two different legislations which are currently regulating this matter. These are the Legal Aid, (Criminal Proceedings), Act, 1969 and the Legal Aid Act, 2017.⁶⁰² The Legal Aid Act, 2017 repeals the Legal Aid, (Criminal Proceedings) Act, 1969, but it provides that all orders, rules,

⁵⁹⁹ *Ibid*, S. 192 (1).

⁶⁰⁰ *Ibid*, S. 244.

⁶⁰¹ *Ibid*, S. 310.

⁶⁰² Act No. 1, 2017.

guidelines, directives and regulations made under the Legal Aid (Criminal Proceedings) Act, 1969 shall have effect until such other subsidiary legislations are made under the new Legal Aid Act.⁶⁰³

Under the Legal Aid, (Criminal Proceedings), Act, 1969, the Chief Justice or the Principal Judge of the High Court or the Judge in charge of the district registry where the proceeding is conducted, are regarded as the certifying authority.⁶⁰⁴ Thus, in any criminal proceeding, where it appears to the certifying authority that it is desirable, in the interests of justice, that an accused person should have legal aid in the preparation and conduct of his defence or appeal, but his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have such legal aid and upon such certificate being issued, the Registrar should, where it is practicable to do so, assign to the accused an advocate for the purpose of the preparation and conduct of his defence or appeal.⁶⁰⁵ This is only the case where the accused person is charged with an offence involving complicated or novel legal issues, or he is charged with an offence involving capital punishment, life imprisonment or a possible sentence of not less than fifteen years imprisonment, or he is a child, or he is suffering from disabilities or serious illness.⁶⁰⁶

The Legal Aid Act, 2017 provides that the Police Force or Prison Services shall designate mechanisms for facilitating the provision of legal aid services by legal aid providers to the accused or convicts in custody.⁶⁰⁷ Concerning the juvenile delinquents, the Legal Aid Act, 2017 provides that where any person is charged with the duty of supervising the welfare of the child, in execution of his duties deals with the child who has come into a conflict with the law, he shall cause that child to obtain legal aid immediately.⁶⁰⁸ The Legal Aid Act, 2017 is now in force as per the Legal Aid (Date of Commencement) Notice, 2017.⁶⁰⁹ This Notice appoints the first day of July, 2017 as the day on which the

⁶⁰³ *Ibid*, S. 49 (2).

⁶⁰⁴ S. 2, Legal Aid, (Criminal Proceedings), Act, 1969, [Cap. 21, R.E. 2002].

⁶⁰⁵ *Ibid*, S. 3.

⁶⁰⁶ Rule 3 (1), Legal Aid, (Criminal Proceedings), Rules, G.N. No. 353 of 26th September, 2014.

⁶⁰⁷ S. 36 (1), Legal Aid Act, 2017.

⁶⁰⁸ *Ibid*, S. 35.

⁶⁰⁹ G.N. No. 217 of 19th May, 2017.

Legal Aid Act, 2017 came into operation. However, the functioning of this Act is still waiting for the Regulations to be made by the Minister for Constitutional and Legal Affairs. It is hoped that the Regulations which will govern the provision of legal aid to the juvenile delinquents will establish clear mechanisms for the enjoyment of the right to free and accessible legal assistance for the children in conflict with the law as per the international standards.

4.5 Police Force and Auxiliary Services Act, 1961

According to its long title, the Police Force and Auxiliary Services Act, 1961 is a legislation to provide for the organisation, discipline, powers and duties of the Police Force, Auxiliary Services, and Police Reserve. Among the powers of the Police Force are the preservation of peace, maintenance of law and order, prevention and detection of crime, the apprehension and guarding of delinquents and the protection of property throughout the United Republic of Tanzania.⁶¹⁰ In carrying out its duties in the apprehension and guarding of delinquents, the Police Force comes into contact with juvenile delinquents. Every police officer is, as part of his duties, required to take all steps necessary to prevent the commission of offences and public nuisances and to detect and bring delinquents to justice, and to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient ground exists.⁶¹¹

In the exercise of his duties, a police officer may use arms against any person who by force rescues or attempts to rescue any other person from lawful custody or prevents or attempts to prevent the lawful arrest of any other person where such police officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm and that he cannot otherwise effect such arrest or prevent such rescue. A police officer may also use arms against any person in lawful custody charged with or convicted of an offence when such person is escaping or attempting to escape where such police officer has reasonable ground to believe that he cannot otherwise prevent the escape and

⁶¹⁰ S. 5 (1), Police Force and Auxiliary Services Act, 1961, [Cap. 322, R.E. 2002].

⁶¹¹ *Ibid*, S. 27 (3).

has given a warning to such person that he is about to use such arms against him and such warning is unheeded.⁶¹²

Concerning bail, the Police Force and Auxiliary Services Act, 1961 provides that a person brought under the custody of police on reasonable suspicion of having committed any offence shall be released immediately, where the police officer who arrested him believes that such person has in fact committed no offence, or that police officer has no reasonable grounds on which to continue holding that person in custody.⁶¹³ This is also the case where the police officer who arrested such person believes that he arrested a wrong person or after twenty four hours since the person was arrested, no formal charge has been laid against him.⁶¹⁴ The exception to this rule is where the police officer in question reasonably believes that the offence suspected to have been committed is a serious one.

Regarding juvenile delinquents, the Police Force and Auxiliary Services Act provides that where the person arrested is under the age of fifteen years, that person may be released after his parent, guardian, relative or any reliable person has entered into a recognisance on his behalf.⁶¹⁵ This provision is a replica of Section 64 (3) of the Criminal Procedure Act, 1985. As mentioned earlier, to minimise the incidents of sending children to the detentions, the Law of the Child Act, 2009 allows the arrested child to be released after entering into a recognisance by him, and if it is not practicable, to find his parent, guardian or relative without undue delay. Every police officer arresting a person reasonably suspected of committing any offence has a legal duty to inform that person of his right to bail and where any police officer refuses to grant bail to any person under his custody, he should reduce into writing all the reasons for his refusal.⁶¹⁶

⁶¹² *Ibid*, S. 29 (1).

⁶¹³ *Ibid*, S. 31 (1).

⁶¹⁴ *Ibid*.

⁶¹⁵ *Ibid*, S. 31 (3).

⁶¹⁶ *Ibid*, S. 31 (5).

Where a person who is being interviewed by a police officer for the purpose of ascertaining whether he has committed an offence makes, during the interview, either orally or in writing, a confession relating to an offence, the police officer is required to record that statement and show it to the person and ask him to read it and sign at the end.⁶¹⁷ However, a confession made to a police officer is inadmissible unless it is proved that it was voluntarily made by the accused person. If a confession was made voluntarily to a police officer by a person accused of an offence, it may be used as evidence against that person.⁶¹⁸ A confession is considered to be made involuntarily if the court believes that it was induced by threat, promise or other prejudice held out by the police officer to whom the confession was made or by any member of the Police Force or by any other person in authority.⁶¹⁹ In the case of *R. v. Mlakeh*,⁶²⁰ the court stated that where a statement is made to a police officer, that statement is inadmissible unless proof of its voluntariness is given. The burden of proving that the confession made by an accused person was made voluntarily by him lies on the prosecution. However, Section 29 of the Evidence Act, 1967 has introduced a new dimension in the admissibility of confessions. In addition to the test of voluntariness, the test whether or not the inducement or torture was likely to affect the truth of the confession has been introduced.

If despite torture or undue influence, the truth content of the confession is not affected; mere allegations of torture will not render the confession automatically inadmissible.⁶²¹ Section 29 of the Evidence Act, 1967 stipulates that no confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing unless the Court is of the opinion that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made.⁶²² The researcher is wary about this provision for the reason that it is likely to be abused by the police officers and actuate torture to the accused persons, including juvenile delinquents under the authority of police officers.

⁶¹⁷ *Ibid*, S. 33.

⁶¹⁸ S. 27 (1), Evidence Act, 1967, [Cap. 6, R.E. 2002].

⁶¹⁹ *Ibid*, S. 27 (3).

⁶²⁰ [1971], HCD. No. 74.

⁶²¹ Also See the case of *Richard Lubilo and Mohamed Selemani v. R.*, [2003] TLR 149.

⁶²² S. 29, Evidence Act, 1967, [Cap. 6 R.E. 2002].

4.6 Rights of Prisoners under the Prisons Act, 1967

The Prisons Act aimed at amending and consolidating the laws relating to prisons, to provide for the organization, discipline, powers and duties of prison officers, and for matters incidental thereto.⁶²³ It replaced the colonial Prisons Ordinance⁶²⁴ which was Chapter 58 in the Revised Laws of Tanganyika, with no substantial changes in terms of managing the prisons. The colonial approach to prisons was based on a philosophy of retribution, with a view that the punishment should be sufficient for deterrent purposes.⁶²⁵ The enforcement of that deterrence was based on the confinement, general loss of liberty, hard work and inadequate funds for rations.⁶²⁶ Being colonial-times legislation, the Prisons Act was enacted without juvenile delinquents in mind; hence, their needs were not taken into consideration. The Act categorises prisoners into various groups. There is the ‘adult prisoner’ who is a prisoner of the apparent age of twenty one years or more and the ‘young prisoner’ who is a prisoner between the apparent ages of sixteen and twenty one-years. There is also the ‘civil prisoner who is a debtor, or a lunatic or a detainee under the Preventive Detention Act, 1962. On the other hand, there is the ‘criminal prisoner’ who is under sentence of a court or court-martial or other bodies with similar authority.⁶²⁷

Under the Prisons Act, 1967, any prison officer may use force against a prisoner, as is reasonably necessary to make him obey lawful orders which he refuses to obey or in order to maintain discipline in a prison.⁶²⁸ In using such force, a prison officer may use weapons like firearms and the circumstances which may warrant the use of force are, first, if the concerned prisoner is escaping or attempting to escape and refuses, when called upon, to return. Second, the prisoner is engaged with other persons in breaking out or attempting to break out any part of a prison and continues to break or to attempt to break when called upon to desist. Third, a prisoner is engaged with others in riotous

⁶²³ Long title to the Prisons Act, 1967, [Cap. 58, R.E. 2002].

⁶²⁴ S. 105, Prisons Act, 1967, [Cap. 58, R.E.2002].

⁶²⁵ Nyoka, J., “Can Prison Reforms Impact on Public Safety?” *The Law Reformer Journal*, Vol. 4, No. 1, 2013, pp. 39-56.

⁶²⁶ *Ibid*, p. 41.

⁶²⁷ S. 2, Prisons Act, 1967, [Cap. 58, R.E. 2002].

⁶²⁸ *Ibid*, S. 13 (1).

behaviour in a prison and refuses to stop when called upon to do so. Fourth, a prisoner is endangering the life of, or is likely to inflict grave injury to the prison officer or any other person and the use of weapons, including firearms, is the only practicable way of controlling the prisoner.⁶²⁹ However, the Prisons Act prohibits the use of weapons on the prisoners unless the prison officer has a reasonable cause to believe that he cannot otherwise prevent the escape, breaking out or riotous behavior, and has given a warning to such prisoner that he is about to use weapons against him and such warning is unheeded. Moreover, the Prisons Act provides that the use of a weapon should be aimed, as far as possible, to disable and not to kill.⁶³⁰

The Prisons Act stipulates further that in every prison, there should be a medical officer who is responsible for the health of all prisoners in a prison and who may conduct medical examinations of any prisoner at such times as may be prescribed.⁶³¹ In the case of serious illness of a prisoner confined in a prison where adequate facilities do not exist for the treatment of sick prisoners, the medical officer may order his removal to a government hospital.⁶³² Whenever a medical officer is of the opinion that any prisoner other than a remand prisoner is of unsound mind, he must prepare and transmit to the Minister of Home Affairs a written report and recommendation for the treatment of the prisoner in a mental hospital, and the Minister on receipt of such a report and recommendation may direct that such prisoner be transferred to any mental hospital in Tanzania and be detained therein.⁶³³ In the case of a remand prisoner that appears to be of unsound mind, the prison officer is required to make and transmit to the court that remanded him a written report on that person's condition and the court should thereupon proceed in accordance with the provisions of the Criminal Procedure Act, 1985.⁶³⁴

⁶²⁹ *Ibid*, S. 13 (2), (a-d).

⁶³⁰ *Ibid*, proviso to S. 13 (2).

⁶³¹ *Ibid*, S. 20.

⁶³² *Ibid*, S. 53 (1).

⁶³³ *Ibid*, S. 57 (1).

⁶³⁴ *Ibid*, S. 57 (2).

The Prisons Act provides that no prisoner should be admitted into a prison unless accompanied by a remand warrant, certificate, warrant or other order of detention or a warrant of conviction or of committal.⁶³⁵ In this regard, an infant child of a female prisoner may be received into prison with its mother. A child of a female prisoner admitted to prison is supposed to be provided with all necessities.⁶³⁶ The Act does not provide anything relating to the special needs of female prisoners such as sanitary pads.

Male and female prisoners are required to be confined in separate prisons, or separate parts of the same prison in a manner that prevents, as far as practicable, their seeing or conversing or holding any communication with one another.⁶³⁷ Civil and unconvicted prisoners should not be kept with other classes of prisoners if conditions allow such separation.⁶³⁸

Unconvicted persons are to be delivered to courts of competent authority at the time named and according to the terms of the remand warrant. The Prisons Act is silent about the separation of juvenile delinquents from adult criminal prisoners, whether convicted or remanded. Within a prison, there are isolation cells for solitary confinement where the need arises, but the cells and wards where prisoners are confined are required to be illuminated at night and be under the constant supervision of a prison officer.⁶³⁹ While in the prison, every prisoner is entitled to food in a prescribed dietary scale and must be supplied with and should wear such prison clothing as may be determined by the Commissioner General of Prisons. In addition, every prisoner has to be provided with separate bedding adequate for warmth and health as may be determined by the medical officer and be prescribed by regulations.⁶⁴⁰ An unconvicted prisoner may be permitted to maintain himself and purchase or receive from private sources at proper hours, food, bedding, clothing, or other necessities, but subject to the examination and to such other conditions as the Commissioner General of Prisons may direct.⁶⁴¹

⁶³⁵ S. 25 (1), the Prisons Act, 1967, [Cap. 58 R.E. 2002].

⁶³⁶ *Ibid*, S. 65.

⁶³⁷ *Ibid*, S. 28.

⁶³⁸ *Ibid*, S. 75.

⁶³⁹ *Ibid*, S. 67 (2).

⁶⁴⁰ S. 65 (2), the Prisons Act, 1967, [Cap. 58 R.E. 2002].

⁶⁴¹ *Ibid*, S. 76.

The Commissioner General of Prisons may determine the manner of training, employment and treatment of prisoners, whether they are within or outside the boundaries of any prison and for that purpose, such prisoners must, at all times, perform such labour, tasks and other duties as may be assigned to them by the officer in charge or any other prison officer in whose charge they may be.⁶⁴² In relation to their employment, prisoners may be paid gratuities by the Government in accordance with the prescribed rates.⁶⁴³ Every prisoner is required to abide by the prison discipline and regulations during the whole time of his imprisonment, whether he is or is not within the precinct of any prison. The Prisons Act, 1967 makes the provisions for offences by prisoners, both minor and major offences and their punishment.⁶⁴⁴ Such offences are known as prison offences.

A prisoner who is found guilty of a prison offence involving personal violence to a prison officer may be punished by, among others, the award of corporal punishment with a cane, after confirmation by the Commissioner General of Prisons.⁶⁴⁵ Where corporal punishment is prescribed for any offence, the number of strokes should not exceed ten in the case of persons under the apparent age of sixteen years, and eighteen strokes, in all other cases.⁶⁴⁶ Corporal punishment should not be inflicted upon any civil prisoner, any female prisoner, or male prisoners under sentence of death or over the age of forty five years, nor upon any prisoner imprisoned as a vagrant.⁶⁴⁷ Prisoners are allowed to worship according to every one's religion and belief. However, worship facilities, sending and receiving letters, receiving visitors and talking to any visiting justice who visits the prison, are permissible to prisoners as privileges, not rights.⁶⁴⁸ A visiting justice is any

⁶⁴² *Ibid*, S. 61.

⁶⁴³ *Ibid*, S. 66.

⁶⁴⁴ Part VIII, Prisons Act, 1967, [Cap. 58 R.E. 2002].

⁶⁴⁵ S. 34, Prisons Act, 1967, [Cap. 58 R.E. 2002].

⁶⁴⁶ *Ibid*, S. 39 (1).

⁶⁴⁷ *Ibid*, S. 34 (5).

⁶⁴⁸ See Part IX, Prisons Act, 1967, [Cap. 58 R.E. 2002], it provides for privileges of prisoners and remission of sentences.

person appointed by a Regional Commissioner, with the approval of the Minister of Home Affairs, to be a visiting justice in his region.⁶⁴⁹

The Ministers and Judges of the High Court are ex-officio visiting justices of all prisons in the mainland Tanzania. Every Regional Commissioner is an ex-officio visiting justice of all prisons in his region; members of the National Assembly are ex-officio visiting justices of all prisons in their respective constituencies; also the District Commissioners, Magistrates and Justices of the Peace are ex-officio visiting justices of all prisons within their respective areas of jurisdiction.⁶⁵⁰ Moreover, the Commissioner General of Prisons has an obligation to periodically visit and inspect, or cause to be visited and inspected, all prisons within mainland Tanzania.⁶⁵¹ He is further required to submit a report to the President on the general condition and conduct of young prisoners serving indeterminate sentences as soon as the prisoner has completed one year of the sentence.

As for the adult prisoners serving fixed sentences of more than eight years, as soon as the prisoner has completed four years of his sentence, the Commissioner General of Prisons is supposed to submit such a report to the President, and for the prisoners with indeterminate sentences, the report has to be submitted as soon as the prisoner has completed one year of his sentence.⁶⁵²

4.7 Juvenile Delinquents under Tanzanian Child Development Policy, 1996

This Policy aims at, among other things, defining a child in the Tanzanian context so as to avoid confusion in fulfilling the child's rights, and to educate the community on the basic rights of a child.⁶⁵³ The Policy defines a 'child' in accordance with the United Nations Convention on the Rights of the Child, 1989, and the national Constitution, 1977. The Child Development Policy, 1996 uses this definition of a child to protect the rights and interests of the child, particularly in the aspects of marriage, employment, protection

⁶⁴⁹ S. 100 (1), Prisons Act, 1967, [Cap. 58 R.E. 2002].

⁶⁵⁰ *Ibid*, S. 100 (2) to (5).

⁶⁵¹ *Ibid*, S. 6.

⁶⁵² *Ibid*, S. 51.

⁶⁵³ Para. 19 (i) and (ii), Tanzanian Child Development Policy, 1996.

against abuse, punishment and care by the parents or guardians.⁶⁵⁴ Thus, in this Policy, the child is defined as a person below the age of eighteen years. However, the Policy pays no particular attention to the peculiar needs of children in conflict with the law. It addresses this category of children, just by the way, when providing for the measures to promote the rights of the child in Tanzania.

The Child Development Policy, 1996 provides that institutions involved in overseeing and enforcement of laws including the Ministry concerned with Legal Affairs, the Police and the Judiciary should ensure that the rights enshrined in the existing laws are not violated and are respected.⁶⁵⁵ In addition, these institutions are required to ensure that deficient laws are rectified in accordance with the rights of the child.⁶⁵⁶ The Ministry, which is responsible for social welfare is urged to ensure that the interests of children involved in criminal offences are protected. In doing so, the Police, Judiciary and Prisons are obliged to ensure that child delinquents are treated in a way that respects their rights as children according to the existing laws.⁶⁵⁷ Although the Child Development Policy was drafted in 1996 before the Law of the Child Act was enacted, the Policy could draw some inspiration from the international legal instruments to which Tanzania is a party so as to lay a foundation for the best law of the child in the country. For example, Tanzania ratified the United Nations Convention on the Rights of the Child on 10th June, 1991 which contains all the important aspects for the protection of children's rights, including the provisions for effective protection of juvenile delinquents' rights.

Usually, a policy outlines what the Government intends to achieve as well as the methods and principles it will use to achieve them. Therefore, to implement the policy, it is usually necessary to pass a law enabling the Government to put in place the necessary institutional and legal frameworks to achieve their aims. Consequently, if the policy contains loopholes or offers a weak protection to certain groups of persons, the law enacted for its implementation is likely to be full of loopholes as well and the practice

⁶⁵⁴ *Ibid*, para. 2.

⁶⁵⁵ *Ibid*, para. 26.

⁶⁵⁶ *Ibid*.

⁶⁵⁷ *Ibid*, para. 28 and 29.

should be expected to be even worse. The Tanzanian Child Development Policy, 1996 was not a good guiding tool for the Law of the Child Act, 2009 as it failed to address the important principles and standards for the protection of juvenile delinquents' rights.

The analysis of Tanzanian laws relating to the protection of detained juvenile delinquents' rights has in general terms, indicated that there are weak and indirect protection in some legal texts such as the Child Development Policy, the Constitution of the United Republic of Tanzania, 1977 and the Criminal Procedure Act, 1985. Owing to their significance in the justice system, these legal texts were expected to contain specific provisions for the protection of detained juvenile delinquents' rights. Despite being the vital part of the criminal justice system, legislations such as the Penal Code, 1961, the Prisons Act, 1967 and the Police Force and Auxiliary Services Act, 1961 address the rights of juvenile delinquents just by the way when dealing with the rights of criminals generally. It has been found that with the exception of the Law of the Child Act, 2009 and its Rules, no law in Tanzania provides for rehabilitation and reintegration programmes to prepare detained children for reintegration into the society after their release.

The study has established that although derivation is the fundamental step towards protection of juvenile delinquents' rights, there is no legislation in Tanzania which provides for derivation as a means of dealing with juvenile delinquents outside the formal criminal justice system. Regarding the essential rights of detained juvenile delinquents, the analysis has shown that there is no mandatory requirement for total separation of children from adult offenders throughout criminal justice processes. The laws still provide for inhuman and degrading treatments or punishments such as corporal punishment. Detention of children delinquents is not firmly required to be a measure of last resort by all criminal laws in the country and the duration of detention of juveniles is not yet the shortest appropriate period of time as required by the international and regional laws.

Most of the laws analysed in this chapter do not stipulate the time frame within which juveniles' cases have to be finalised. The Law of the Child Act provides for such time limit, but in very weak and impractical terms, resulting to the prolonged detention of children both before and after trials. Finally, there is no guarantee for free legal assistance and representation of juvenile delinquents and legislations which provide for it confine the assistance to only certain specified offences such as capital offences. Although the Law of the Child Act, 2009 does not guarantee free legal representation of juvenile delinquents during the justice process; assistance from a parent, relative, guardian or Social Welfare Officer during the trial is considered important.⁶⁵⁸ The Act does not however provide for such assistance apart from the context of trial proceedings.

⁶⁵⁸ S. 112, Law of the Child Act, 2009, [Cap. 13].

CHAPTER 5

5. TANZANIA'S COMPLIANCE WITH INTERNATIONAL STANDARDS FOR THE PROTECTION OF JUVENILE DELINQUENTS' RIGHTS

In the preceding chapters, secondary data from relevant international and regional legal instruments, the domestic laws, decided cases, journal articles, theses, textbooks, declarations, State reports, general comments and concluding observations of international treaty bodies on juvenile justice were critically analysed in an attempt to evaluate the international and Tanzanian legal framework for the protection of detained juvenile delinquents' rights. In this chapter, data from field research are presented, analysed and discussed with a view to assess Tanzania's practice and compliance with the international standards in the protection of detained juvenile delinquents' rights. Field research was conducted in Tanzania from 18th May, 2016 to 7th September, 2016.

5.1 Field Data Collection

Primary data were collected from twenty two detention facilities, namely, Arusha Central Police Station, Mtwara Central Police Station, Kigoma Central Police Station, Mbeya Central Police Station, Urafiki Police Station, Buguruni Police Station, Babati Police Station and Kasulu Police Station. Other detention facilities which were visited are Upanga Retention Home, Tanga Retention Home, Arusha Retention Home, Mbeya Retention Home, Irambo Approved School, Wami Prison for Young Offenders, Segerea Remand Prison, Isanga Prison, Maweni Prison, Babati Prison, Butimba Prison, Lilungu Prison, Kasulu Prison and Kigongoni Prison.

Apart from the detention facilities, data were also collected from interviews with key juvenile justice stakeholders such as parents of detained children, Resident magistrates, Non-Governmental Organisations' officials, Lecturers of Law, a Commissioner of the Commission for Human Rights and Good Governance of Tanzania, lawyers from the Law Reform Commission of Tanzania, Public Prosecutors and private advocates. A total of One Hundred Seventy-Five (175) respondents participated in this study. In the detention facilities the researcher conducted interviews with the detention staff, reviewed

the admission books and conducted focus group discussions with detained children. In addition, the researcher used a set of prepared guidelines according to the international standards⁶⁵⁹ to observe the infrastructure and material conditions such as the provision of food, accommodation, transport, hygienic facilities, social service provision programmes and exercise facilities that were available for juvenile delinquents in those detentions. Due to the fact that the study aimed at examining the Tanzanian compliance with the international standards for the protection of detained juvenile delinquents, a set of relatively similar questions were asked to all respondents through semi-structured interviews and focus group discussions. Resemblance of questions helped to eliminate biases and ensure reliability of the answers provided by the respondents. The table below indicates the number of respondents who participated in this study.

Table 5.1: Number of Respondents who Participated in this Study

S/N	Category	Gender		Total
		M	F	
1	Detained Children	100	15	115
2	Police Officers	5	7	12
3	Retention Homes and Approved School staff	3	4	7
4	Prison Officers	9	7	16
5	Parent of Detained Children	0	1	1
6	Resident Magistrates	1	2	3
7	Officials from Non Governmental Organisations	0	4	4
8	Lecturers of Law	1	2	3
9	CHRAGG Commissioner	1	0	1
10	Lawyers from the Law Reform Commission	2	1	3
11	Public Prosecutors at Kisutu Juvenile Court	0	2	2
12	Private advocates	3	0	3
13	Mothers Detained with their Children	0	5	5
Total		125	50	175

⁶⁵⁹ United Nations Office on Drugs and Crime, supra note 103, p. 5.

In Tanzania, juvenile delinquents are detained in four categories of detention facilities. These are the police stations, Retention Homes, Prisons and the Approved School. For the purpose of this study, data were collected from Eight (8) police stations, Four (4) Retention Homes, Nine (9) prisons and One (1) Approved School. There were no children detained in Tanga Retention Home during the time of visit so, data were collected from an interview with the Home Manager only. In Tanzania, all Retention Homes and the Approved School are under the Ministry of Health, Community Development, Gender, Elderly and Children while the police stations and prisons are under the Ministry of Home Affairs. Irambo Approved School is the only Approved School in the Mainland Tanzania. It is designated for the detention of post trial boys only.

Irambo Approved School has a capacity to accommodate Three Hundred (300) boys aged 12 to 17 years. The Approved School accommodates the post trial boys who are serving sentences not exceeding three (3) years. During the visit to this School, the researcher found the girls' dormitory which was ready for use, but it was waiting for the inauguration. The table below shows the visited detentions and the number of children held therein at the time of data collection.

Table 5.2: Detentions Visited and the Number of Children Held at the Time of Visit

S/N	Name of Detention	Region	M	F	Total
1	Upanga Retention Home	Dar es Salaam	27	1	28
2	Wami Prison for Young Offenders	Morogoro	82	N/A	82
3	Segerea Remand Prison	Dar es Salaam	36	16	52
4	Isanga Prison	Dodoma	36	0	36
5	Kigongoni Agricultural Prison	Coastal Region	9	0	9
6	Lilungu Prison	Mtwara	21	0	21
7	Mtwara Central Police Station	Mtwara	0	0	0
8	Urafiki Police Station	Dar es Salaam	1	2	3
9	Tanga Retention Home	Tanga	0	0	0
10	Maweni Prison	Tanga	16	2	18
11	Babati Police Station	Manyara	4	0	4
12	Babati Prison	Manyara	15	1	16
13	Arusha Retention Home	Arusha	8	0	8
14	Arusha Central Police Station	Arusha	4	0	4
15	Mbeya Retention Home	Mbeya	9	3	12
16	Irambo Approved School	Mbeya	23	N/A	23
17	Mbeya Central Police Station	Mbeya	0	0	0
18	Kasulu Prison	Kigoma	7	0	7
19	Kasulu Police Station	Kigoma	0	0	0
20	Kigoma Central Police Station	Kigoma	2	0	2
21	Butimba Prison	Mwanza	37	1	38
22	Buguruni Police Station	Dar es Salaam	0	0	0
Total			337	26	363

In these detentions, there were Three Hundred Sixty Three (363) children below the age of eighteen (18) years who were held during the time of the visit. This number does not include children who were found incarcerated with their mothers. Thirty Six (36) children (9.9%) were found detained with their mothers in various detentions. Among these mothers, Thirty (30) were in the pre-trial stage, while Six (06) were convicted. Three (03) of these mothers were in police stations, while Thirty Three (33) were in prisons. This

means that there were thirty three children detained with their mothers in adult prisons and three (3) children held with their remanded mothers in police stations.

Among 363 detained children, Three Hundred Thirty Seven (337) children (92.8%) were boys while Twenty Six (26) children (7.2%) were girls. Out of 363 children, Two Hundred Seventy Nine (279) children (76.9%) were detained in adult prisons, Thirteen (13) children (3.6%) were held in police stations, Forty Eight (48) children (13.2%) were in Retention Homes, and Twenty Three (23) children (6.3%) were held in the Approved School. Out of One Hundred Fifteen (115) children who participated in focus group discussions for this study, Ninety Three (93) children (80.9%) were in pre-trial stage, while Twenty Two (22) juvenile delinquents (19.1%) were post-trial. In all visited prisons, pre-trial children were held with the post-trial juvenile delinquents, while girls were held with women prisoners, but with the exception of Urafiki police station, in all other detentions there was a complete separation of girls from boys. The following table illustrates the number of children held in the visited detentions during data collection and those who participated in this study.

Table 5:3: Children in Detentions according to the Category of Detention Facility

Detained Children				Children Respondents		
Detentions	Male	Female	Total	Male	Female	Total
Police Stations	11	2	13	4	2	6
Retention Homes	44	4	48	10	1	11
Prisons	259	20	279	86	12	98
Approved School	23	0	23	0	0	0
Total	337	26	363	100	15	115

5.1.1 Duration of Pretrial Detention of Juvenile Delinquents

During data collection, the researcher inquired about the duration of both pretrial and post trial detention of child delinquents in Tanzania. On pretrial detention, the researcher asked about the time limit within which a juvenile delinquent may stay in the detention before the case is completed and obtain sentence. One Hundred Twenty Eight (128)

respondents (100%) answered this question. Fifty One (51) respondents (39.8%) replied that a juvenile delinquent may be detained up to twelve months before his case is completed. Twelve (12) respondents (9.4%) said juvenile cases take up to twenty four months before completion. Ten (10) respondents (7.8%) explained that depending on the nature of the offence, juvenile cases take up to thirty six months to be finished. Thirty (30) respondents (23.4%) stated that a juvenile who is accused of a serious offence such as murder or armed robbery stays in the detention up to forty eight months before the conclusion of the case. Further, Eight (8) respondents (6.3%) explained that it takes up to sixty months for juvenile cases to be finished. Thirteen (13) respondents (10.2%) said it may take up to seventy two months before a juvenile case is completed. One (1) respondent (0.8%) stated that murder cases take up to eighty four months. Three (3) respondents (2.3%) responded that juvenile cases may take ninety six months to be disposed and during this period, a child remains in the detention. The table below shows the duration of pretrial detention of juvenile delinquents in the visited detentions.

Table 5:4: Duration of Pre Trial Detention of Juvenile Delinquents in Tanzania

Timescale (Months)	No. of Respondents	Percentage (%)
0-12	51	39.8
13-24	12	9.4
25-36	10	7.8
37-48	30	23.4
49-60	08	6.3
61-72	13	10.2
73-84	01	0.8
85-96	03	2.3
Total	128	100

Therefore, from the above findings, it is evident that juvenile delinquents are held in detentions for a long time before their cases are finalised. The International and Tanzanian laws on the protection of juvenile delinquents' rights require the detention of juvenile delinquents to be used only as a measure of last resort and for the shortest possible duration.⁶⁶⁰ The Tanzanian Criminal Procedure Act, 1985 provides that once the accused person has been arrested by a police officer, he must be taken to court within 24 hours.⁶⁶¹ Moreover, the Law of the Child Act, 2009 requires that once a juvenile delinquent is brought before the court, the case must be disposed of on the same day. However, the practice shows that no juvenile case has ever been disposed in one day, and the detention of juvenile delinquents has continued to be the first and the only measure in dealing with the juvenile delinquents in Tanzania. For example, in the case of *Republic v. Ally Yahaya Masudi*,⁶⁶² a 15 year old boy committed an offence of murder in 2004 contrary to Section 196 of the Penal Code, 1961. The court judgment revealed that he stayed in remand custody awaiting trial for nine years until in 2013 when he was sentenced, then aged 25 years.⁶⁶³

It has to be noted that, although international law is clear on acceptability and restrictions on the use of detention, neither the United Nations Convention on the Rights of the Child nor the African Charter on the Rights and Welfare of the Child provides a specific time frame within which a child should be brought to court. It is therefore up to individual States to prescribe such time frames, although the Human Rights Committee has recommended that 'delays must not exceed a few days.'⁶⁶⁴ It can be argued that the time limit within which a child is brought to court must be shorter compared to that for adult offenders. Chirwa, for example, has argued that the requirement under the African

⁶⁶⁰ Rule 13 (1), Beijing Rules, 1985 and Art. 37 (b), United Nations Convention on the Rights of the Child, 1989. Also See Rule 49 (2) (d), Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016.

⁶⁶¹ S. 32 (1), Criminal Procedure Act, 1985, [Cap. 20 R.E. 2002].

⁶⁶² Criminal Session Case No. 45 of 2010, High Court of Tanzania at Dar es Salaam, (unreported), p. 14.

⁶⁶³ *Ibid.*

⁶⁶⁴ Office of the High Commissioner for Human Rights, "CCPR General Comment No. 8: 'Article 9,' (Right to Liberty and Security of Persons)," adopted at the 16th Session of the Human Rights Committee, on 30th June 1982, para. 2.

Children's Charter that criminal matters against children shall be determined as 'speedy as possible' entails a pace that is over and above that applicable to adults.⁶⁶⁵

The researcher inquired about the causes of delays in disposing juvenile cases. Seventy Eight (78) respondents (100%) responded to this question. Nine (09) respondents (11.5%) said the delays are caused by the slow investigation of not only juvenile cases, but the criminal cases generally. Ten (10) respondents (12.8%) explained that there are slow court procedures which cause delays in the completion of juvenile cases. Six (06) respondents (7.7%) stated that witnesses do not attend the courts during the hearing and this leads to unnecessary adjournments, hence, the delay in the conclusion of juvenile cases. Three (03) respondents (3.8%) explained that the Law of the Child Act, 2009 requires juvenile cases to be disposed within one day, but the courts do not comply with this requirement, thus delaying the completion of juvenile cases. Seven (07) respondents (9.0%) said lack of legal assistance and representation of children in conflict with the law causes delay of their cases.

Further, Six (06) respondents (7.7%) stated that most of parents do not cooperate with appropriate authorities processing juvenile cases, therefore, the cases take a long time to be finished. Nine (09) respondents (11.5%) said there is insufficient number of social welfare officers despite the fact that they are required to be involved in every stage of juvenile cases. Their absence at any stage of the case leads to the adjournment of a juvenile case, thus delaying it. Twelve (12) respondents (15.5%) stated that lack of knowledge of juvenile laws causes delay of juvenile cases. They said that only few judges, magistrates, police officers and parents of juvenile delinquents are conversant with the laws relating to juvenile justice in Tanzania. Two (02) respondents (2.6%) replied that they do not know exactly the causes of delays in disposing juvenile cases.

Lack of transport to and from the court is one of the problems mentioned by most of respondents as causing delay of juvenile cases. Fourteen (14) respondents (17.9%) stated

⁶⁶⁵ Chirwa, D., *supra* note 364, at p. 166.

that lack of transport to courts causes delay of juvenile cases. Explaining this problem, one of the respondents stated as follows during the focus group discussion: “I am charged with theft. I was not taken to the court on the hearing date due to lack of transport. Police vehicle had no fuel. I do not know the next hearing date. This happens several times for each of us.” *Source:* Information obtained during data collection in Babati prison, Manyara. (Translation from Swahili to English is mine).

This finding corresponds with what the Commission for Human Rights and Good Governance found out in the 2011 report on children’s detentions inspection whereby it was shown that about seventy percent (70%) of children sent to police stations are detained for more than twenty four hours before being sent to the courts. Lack of transport to take children from police stations to courthouses was cited by many of the prison and police officers as an explanation for this excessive delay.⁶⁶⁶ With regard to the compliance with the Law of the Child Act, 2009 in disposing juvenile cases, one of the respondents remarked that by requiring the juvenile cases to be disposed within a day, the legislators intended to curb unnecessary adjournments of juveniles’ cases, but ‘the one day rule’ is practically not possible.

In this aspect, the Law of the Child Act, 2009 stipulates that where a child has been taken to the Juvenile Court for any offence other than offences triable by the High Court, the case should be disposed by the Court on the same day.⁶⁶⁷ However, this provision is silent about the time frame for the finalisation of juvenile cases that are triable by the High Court and subordinate courts which have jurisdiction to entertain juvenile cases. The Juvenile Court Rules, 2012 require any juvenile case to be completed within six months after the child has first appeared before the Juvenile Court.⁶⁶⁸ Upon the expiry of the six months, if the case is not completed, for any good reason to be recorded in the

⁶⁶⁶ Commission for Human Rights and Good Governance, *supra* note 81, p. ix.

⁶⁶⁷ S. 103 (1), Law of the Child Act, 2009 as amended by S. 36 of the Written Laws (Miscellaneous Amendments) Act, No. 2, 2016.

⁶⁶⁸ Rule 34 (1), Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016.

proceedings, the Juvenile Court is permitted to extend the period of completion of a case for a period not exceeding three months.⁶⁶⁹

Regarding non-attendance of witnesses during the trials, this reason featured across different categories of respondents. For instance, one resident magistrate explained during the interview that in the cases involving children of the same family, it becomes more difficult to get witnesses due to fear of family conflicts. Like in many other countries, people in Tanzania are generally not willing to testify against their friends, relatives, or neighbours. This is probably due to the fact that the arrest, investigation and prosecution of criminal cases are usually done by the police officers. The relationship between the police and the public is quite tense and people are generally scared of the policemen. Therefore, people would rather avoid any contact with the police officers. The witnesses, as well have real fears regarding the possible infliction of violence on them by the police, thus they avoid them.

The Law of the Child Act, 2009 vests powers to determine juvenile cases to the Juvenile Court or subordinate courts where the presiding magistrate is a resident magistrate.⁶⁷⁰ This contributes to the delays in disposing juvenile cases because resident magistrates deal with ordinary cases generally, and only occasionally, juvenile cases. For this reason, resident magistrates may not be familiar with juvenile laws and standards. There was a general consensus among the respondents that most of stakeholders of juvenile justice in Tanzania are not aware of the juvenile laws, both national and the international ones. It was once contended that the biggest challenge in protecting children in conflict with the law in Tanzania is lack of knowledge and skills on the part of law enforcement officials as well as lack of juvenile courts to facilitate a child friendly environment in court.⁶⁷¹ When interviewed on whether the involvement of resident magistrates facilitates a speedy disposal of juvenile cases, majority of the respondents answered in the affirmative, but opined that resident magistrates have a backlog of cases, criminal, civil, matrimonial and miscellaneous. This

⁶⁶⁹ *Ibid*, Rule 34, (2).

⁶⁷⁰ S. 97, the Law of the Child Act, 2009, [Cap. 13].

⁶⁷¹ Tanzania Child Rights Forum, *supra* note 115.

makes it difficult to concentrate on juvenile issues. These findings are in line with what the Commission for Human Rights and Good Governance found out in the 2011 detentions inspections report where it was remarked that:

...there is a lack of general knowledge on the rights of children in Tanzanian society. Even the main stakeholders in juvenile justice, including Government officials, law enforcement agents, judicial personnel, local government officers, prison officials, Social Welfare Officers and community leaders, do not know about the contents of the United Nations Convention on Rights of the Child, 1989 and the Law of the Child Act, 2009. Even those who are aware of the existence of these documents have not always read the documents or are aware of the obligations they create for them.⁶⁷²

On the delay of investigation of criminal cases, apart from other reasons, it was assert that in processing the criminal cases, the police officers lack cooperation from the general public. Commenting on this, one of the respondents said that ordinarily, nobody is willing to volunteer information about the commission of an offence and be readily available for testifying before the court during the hearing of the case. This is the effect of a general tendency among the people to keep away from the problems of others. The most common difficulty arises when the police officer is investigating a case against a juvenile and he puts such delinquent under arrest. Every kind of pressure will be directed to the police by the members of the society, politicians and human rights activists. In such situations, the investigation work becomes more difficult, resulting in the delay of the investigation and disposal of that kind of cases.

⁶⁷² Commission for Human Rights and Good Governance, *supra* note 81, p. 38.

Table 5:5: Causes of Prolonged Pretrial Detention of Juvenile Delinquents

Causes	No. of Respondents	Percentage (%)
Delay in investigation	09	11.5
Slow court procedures	10	12.8
Non-attendance of witnesses in court	06	7.7
Non-compliance with the Law of the Child Act	03	3.8
Lack of legal assistance	07	9.0
Lack of transport to court	14	17.9
Lack of cooperation from parents and the public	06	7.7
Insufficient number of social welfare officers	09	11.5
Lack of knowledge on juvenile justice issues	12	15.5
Do not know/not sure	02	2.6
Total	78	100

In pretrial detentions, the researcher observed some children delinquents who attained more than 18 years before their cases were completed. During data collection, an example was given in the Retention Home where a 17 years boy was arrested in 2010, remanded in prison and brought before the District Court. In 2013, his case was transferred to the Juvenile Court and he was detained in the Retention Home. Up to May 2016 when he was 23 years old, the case was not yet completed and he was still remanded in the Retention Home. Another example was with regard to three boys who in 2014 were convicted of rape by the subordinate court and appealed to the High Court. Up to June, 2016, their case was not heard even once. It was adjourned eight times for the reason that there was no judge assigned to that case after the retirement of a judge who was formerly assigned to it.

International standards for the protection of detained juvenile delinquents' rights direct that there should be efforts to apply alternative measures to detention and when detention is used, juvenile courts and investigative bodies are supposed to give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention.⁶⁷³ While most of the blames were directed to the prosecution for the delay of juvenile cases, the prosecutors on their side contended that the nature of the offence alleged to have been committed contributes greatly on the duration within which the investigation would be completed. They said that some offences are so complex that they require technical investigations involving different individuals and Government departments. One of the respondents had this to say concerning delay in investigating criminal cases:

Whether the investigation of any criminal offence takes a long or short time depends heavily on the nature of the offence committed. Investigation of some offences takes longer since they involve various government institutions. For example, they may require samples to be taken to the government's chemist office, which is in Dar es Salaam only serving the whole country. This contributes to the delay of investigation, hence, delay of criminal cases generally and juvenile cases in particular. *Source:* Information obtained during data collection in Arusha Central Police Station. (Translation from Swahili to English is mine).

The respondent explained further that the delay in investigating criminal offences is also contributed by lack of modern investigative tools or a complete absence of investigation machinery which forces the investigators to resort to the crude tools of investigation despite the fact that the criminals are becoming more modern and more technical. As stated earlier, the prosecutors always contend that the causes for delay of criminal cases cannot be solely attributed to the prosecution side, and that they are contributed to also by the accused and other stakeholders at different stages of the criminal justice process. They argue that expediting the disposal of criminal cases depends on a number of factors in the investigation and prosecution process such as the cooperation of the accused

⁶⁷³ Rule 17, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990.

person, availability of witnesses, human and financial resources, and competence of both magistrates and prosecutors.⁶⁷⁴

5.1.2 Post Trial Detention of Juvenile Delinquents in Tanzania

In Tanzania, children receive excessive and disproportionate sentences that violate the national as well as international laws which require that the imprisonment of children should be used only as a measure of last resort and for the shortest appropriate period of time. It has been shown above that juvenile delinquents stay for a long time in detentions waiting for the trial of their cases. In the case of post trial detentions, some juvenile delinquents are facing indefinite sentences and they are held in the prisons. The case of *Furaha Johnson v. R.*⁶⁷⁵ is one of such examples in which a 17 years boy was imprisoned for life by the subordinate court. On appeal to the High Court, the subordinate court's decision was upheld. He appealed to the Court of Appeal, but he stayed in the prison for six years before his appeal was heard by the Court of Appeal which ordered for his immediate release. The international standards regarding the imprisonment of children prohibit the imposition of capital punishment or life imprisonment to persons below the age of eighteen years without possibility of release.⁶⁷⁶ Therefore, the imposition of long sentences of imprisonment to juvenile delinquents is impermissible under the national, regional and international laws. Under the laws of Tanzania, the majority of these imprisoned juveniles have no possibility of release due to the fact that the conditions for a prisoner to benefit from parole under the Parole Boards Act, 1994 excludes the prisoners who are serving long sentences of imprisonment. The Parole Boards Act, 1994 provides that:

A prisoner who is serving a sentence of imprisonment for a period of eight years or more shall be eligible for parole if he is not serving a life sentence, he is not serving a sentence for the offence of armed robbery, dealing in dangerous drugs or defilement, his sentence has not otherwise been commuted, he has served his sentence for four years or one third of the sentence, whichever of the two periods is longer,...⁶⁷⁷

⁶⁷⁴ *Zephrine Galeba v. Attorney General*, Miscellaneous Civil Application No. 21 of 2013, High Court of Tanzania at Dar es Salaam, (unreported), p. 8.

⁶⁷⁵ Criminal Appeal No. 452 of 2015, Court of Appeal of Tanzania at Arusha, (unreported), p. 6.

⁶⁷⁶ Art. 37 (a), United Nations Convention on the Rights of the Child, 1989.

⁶⁷⁷ S. 4, Parole Boards Act, 1994, [Cap. 400, R.E. 2002].

From the above quoted provision, it is evident that majority of juveniles in this study are convicted of the offences whose nature disqualify these children from eligibility for parole. Alternatively, these juveniles could be released under the Community Service Act, 2002, but Section 3 (1) of this Act stipulates that an offender qualifies for Community Services if he has been convicted of an offence punishable by imprisonment of a term not exceeding three years. Thus, their terms of imprisonment make these juveniles ineligible for release under the Community Service Act. Tsekooko, J., Justice of the Supreme Court of Uganda, once observed that:

We need to move with the world trends. We need to move away from the tradition of believing in incarceration as the only way of punishment. With such innovations, it is no longer necessary to prove a Magistrate's toughness by giving the toughest prison sentence. It is better to promote reform of the offender. The tradition of prosecution praying for harsh prison sentences as the only way of deterrence also needs to be re-examined.

Justice Tsekooko expressed these views when delivering closing remarks in a Community Service Workshop at Kampala on May, 2012.

In other jurisdictions such as the United States of America, the imposition of life imprisonment without parole to juveniles when they breach criminal laws constitutes cruel and unusual punishment.⁶⁷⁸ During focus group discussions, detained juveniles expressed their disappointment about long sentences some of them are serving in prisons. Some went to the extent of suggesting that although it is believed that prisons are correctional centres, the long sentences they are serving do not correct them in any way. They said they are only learning to become revengeful in case they become free one day, and that they do not see the essence of wearing prison uniforms written "Correctional," while they have no opportunity to demonstrate that they have been corrected. This concern corresponds with the position laid down in the case of *Uswewe Bukuku v. R.*,⁶⁷⁹ where the court stated that in sentencing young persons, the objective should be

⁶⁷⁸ *Re Juveniles Sentences to Life Without Parole in the United States of America*, Inter-American Court of Human Rights, Petition 161-06, Report No. 18/12 (March, 20 2012), p. 14.

⁶⁷⁹ [2001] TLR 337.

rehabilitation, not punishment. The courts should take into account that those of tender age can be channeled away from the long term criminal behaviour by not sending them to jail where they meet hardened criminals. The following table indicates the duration of post-trial detention of juvenile delinquents in the visited detentions.

Table 5:6: Duration of Post trial Detention of Juvenile Delinquents

Age (Years)	Sex	Length of Detention	Offence	Detention
16	M	15 Years	Cattle theft	Wami Prison
16	M	5 Years	Rape	Segerea remand prison
16	M	5 Years	Terrorism	Segerea remand prison
17	M	30 Years	Armed robbery	Lilungu
17	M	Life imprisonment	Rape	Lilungu
18	M	30 Years	Rape	Lilungu
16	M	27 Years	Armed robbery	Maweni
17	M	30 Years	Rape	Maweni
17	M	35 Years	Rape	Maweni
15	M	3 Years	Theft	Kasulu
16	M	1 Year	Illegal immigrant	Kasulu
17	M	Life imprisonment	Gang rape	Butimba
18	M	Life imprisonment	Gang rape	Butimba
17	M	6 Months	Theft	Butimba
16	M	30 Years	Defilement	Butimba
Not known	M	30 Years	Defilement	Butimba
16	M	15 Years	Rape	Wami
16	F	2 Years	Theft	Maweni
Not known	M	3 Years	Theft	Maweni
Not known	M	1 Year	Illegal immigrant	Maweni
	M	1 Year	Illegal immigrant	Kasulu
14	M	3 Months	Unknown*	Lilungu

The boy with an asterisk was alleged to have committed an offence of theft, but he had never been tried by any court for the alleged offence. He said he was taken to the nearby primary court allegedly that he had stole a chicken. The magistrate declined to entertain that case, advising the police officer to resolve the matter amicably with the parents of this child. Then the police officer took him to the prison and ‘talked to the prison boss.’ Consequently, the boy was directed to stay in the prison for three (3) months. When the researcher inquired about this from the prison authority, the response was that the boy was not mentally okay, that was why he gave such explanations. The Prisons Act, 1967 provides that no prisoner should be admitted into a prison unless accompanied by a remand warrant, certificate, warrant or other order of detention or a warrant of conviction or of committal.⁶⁸⁰

It is surprising that a child who is mentally challenged (if that is the case) has been detained in the prison instead of being admitted to the mental hospital after undergoing the procedures stipulated under the Criminal Procedure Act, 1985.⁶⁸¹ The Constitution of the United Republic of Tanzania, 1977 provides clearly that no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom except under circumstances and in accordance with procedures prescribed by law.⁶⁸² The Prisons Act, 1967 is clear that whenever a medical officer of any prison is of the opinion that any prisoner other than a remand prisoner is of unsound mind, he must prepare and transmit to the Minister of Home Affairs a written report and recommendation for the treatment of the prisoner in a mental hospital. The Minister on receipt of such a report and recommendation, may direct that such prisoner be transferred to any mental hospital in Tanzania and be detained therein.⁶⁸³ The Law of the Child Act, 2009 prohibits any child to be sentenced to imprisonment, let alone life imprisonment. It provides clearly that

⁶⁸⁰ S. 25 (1), the Prisons Act, 1967, [Cap. 58 R.E. 2002].

⁶⁸¹ S. 216, Criminal Procedure Act, 1985, [Cap. 20 R.E. 2002].

⁶⁸² Art. 15 (2) (a), the Constitution of the United Republic of Tanzania, 1977.

⁶⁸³ S. 57 (1), the Prisons Act, 1967, [Cap. 58 R.E. 2002].

notwithstanding any provisions of any written law, a child shall not be sentenced to imprisonment.⁶⁸⁴

Even in a situation where a juvenile delinquent has been found to have committed the offence of gang rape, the Penal Code, 1961 stipulates that where the commission or abetting of the commission of a gang rape involves a person of or under the age of eighteen years, the court should, in lieu of sentence of imprisonment, impose a sentence of corporal punishment based on the actual role played in the rape.⁶⁸⁵ In the case of *R v. Asia Salum and Another*,⁶⁸⁶ the accused mother and her 16 years son were convicted of assault causing actual bodily harm. They were each sentenced to twelve months imprisonment. The High Court called the record of proceedings to satisfy itself as to *inter alia*, the sentences imposed. **Mnzava, J.K.**, (as he then was) stated that juvenile delinquents should not be sent to prison where there is an opportunity to mix with and learn bad habits from more seasoned criminals. The trial court ought to have resorted to alternative punishments provided for juvenile delinquents that include probation, committal to an Approved School and absolute discharge.⁶⁸⁷

As a measure of last resort, where a child is convicted of an offence and the court believes there is a significant risk of harm to members of the public, it may commit such child to the custody of the Approved School for a period not exceeding three years.⁶⁸⁸ Thus, as a general rule in Tanzania, a child delinquent can only be committed to the custody of the Approved School, and the duration of custody should not exceed three years. It was mentioned earlier that in Tanzania there is only one Juvenile Court; as a result, majority of juvenile delinquents are tried in subordinate courts presided over by

⁶⁸⁴ S. 119 (1), Law of the Child Act, 2009, as amended by S. 37 of the Written Laws (Miscellaneous Amendments) Act, No. 2, 2016.

⁶⁸⁵ S. 131A (3), Penal Code, 1961 as amended by S. 8 of the Written Laws, (Miscellaneous Amendments), Act, No. 2 of 2007.

⁶⁸⁶ [1986] TLR 12.

⁶⁸⁷ *R. v. Fidelis John*, [1988] TLR 165.

⁶⁸⁸ Rule 54 (1) (b), the Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016.

resident magistrates. In those courts, the Juvenile Court Rules are not applicable.⁶⁸⁹ Having only one Approved School in the country for the detention of boys between the age of twelve and seventeen years, a good number of juvenile delinquents are detained in prisons.

5.2 Separation of Detained Juvenile Delinquents from Adult Offenders in the Visited Detentions

Concerning separation of detained children from adult offenders, the study revealed that out of 363 detained children, Seventy One (71) children (19.6%) were detained in detention facilities which are special for children only; these juvenile delinquents do not associate with adult offenders. Three (03) children (0.8%) who were held in Urafiki Police Station were totally separated from adults as they were held in a room which is usually used as an office. However, a boy was held in the same room with his two sisters. Out of Nine (09) visited prisons, in Six (06) prisons there were Two Hundred Forty Seven (247) children (68%) who were held in separate sleeping areas, but they work together with adult offenders during the day and share all other facilities such as dinning and washing areas. Forty Two (42) children (11.6%) were held in the same detention cells or wards with adult criminals. The table below shows what has been stated above.

Table 5:7: Separation of Juveniles from Adult Offenders in the Visited Detentions

Degree of Separation	Name of Detention	No. of Children
Children in the same cells or wards with adult offenders	• Babati Prison	16
	• Kigoma Central Police	2
	• Kasulu Prison	7
	• Kigongoni prison	9
	• Babati Police Station	4
	• Arusha Police Station	4

⁶⁸⁹*Ibid*, Rule 2.

Children held in separate cells but sharing facilities such as dinning and washing areas with adult prisoners	• Butimba prison	38
	• Isanga prison	36
	• Segerea prison	52
	• Lilungu prison	21
	• Maweni prison	18
	• Wami Prison	82
Children held in separate sections from adults and have separate facilities	Urafiki Police Station	3
The institution is for children only	• Upanga Retention Home	28
	• Arusha Retention Home	8
	• Mbeya Retention Home	12
	Irambo Approved School	23
	Total	363

The percentage of children in detentions who were not completely separated from adults exceeds the percentage of those who were totally separated from adults. Moreover, even in the facilities where boys were separated from girls, there was no further separation according to the status of the detainees, age of children or the categories of offences committed or alleged to have been committed. Children who were detained for committing murder, rape, armed robbery, simple theft, illegal immigration and the baggers were held together. Irambo Approved School was an exception in this respect as it was found that there was a separation of detained children according to their age.

International standards for the protection of juvenile delinquents' rights require that juvenile detainees waiting for trial should be separated from convicted ones.⁶⁹⁰ The United Nations Convention on the Rights of the Child, 1989 stipulates that every child deprived of liberty has the right to be separated from adults unless it is considered in the child's best interests not to separate him or her.⁶⁹¹ Likewise, the Beijing Rules, 1985 provide that juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.⁶⁹² The African Charter on the Rights and Welfare of the Child, 1990 provides that States must ensure that children are separated from adults in their place of detention or imprisonment, and that every child accused of infringing the penal law is presumed innocent until duly recognized guilty.⁶⁹³ The principle of separation of juvenile delinquents from adult offenders has two purposes, namely, to protect children from exploitation, abuse and negative influences by adults, and to ensure that the detention of juvenile delinquents is implemented in the facilities that cater for their special needs.⁶⁹⁴ In the case of *Republic v. Njama Zuberi*,⁶⁹⁵ a boy of tender age stood charged with the capital offence of murder contrary to Section 196 of the Penal Code. He was held in custody from 1982 to 1985 at Handeni where there were no detention facilities for juvenile delinquents. The High Court held that a child was likely to be contaminated by undesirable persons when in detention and therefore in the best interests of the accused juvenile, it ordered his release on bail pending trial. The Law of the Child Act, 2009 complies with the international standards in this respect by urging the police officers to make arrangements for preventing, as far as practicable, a child while in custody, from associating with an adult charged with an offence unless he is a relative.⁶⁹⁶ However, in all visited police stations, there were no special cells for children. Children were held in the same cells with adults or in vacancies available within the offices. As illustrated

⁶⁹⁰ Rule 18 (a), United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990.

⁶⁹¹ Article 37 (c), United Nations Convention on the Rights of the Child, 1989.

⁶⁹² Rule 26 (2), Beijing Rules, 1985.

⁶⁹³ Art. 17 (2), the African Charter on the Rights and Welfare of the Child, 1990.

⁶⁹⁴ United Nations Office on Drugs and Crime, *supra* note 103, p. 16.

⁶⁹⁵ [1985] TLR 241.

⁶⁹⁶ S. 102, Law of the Child Act, 2009, [Cap. 13].

above, this is in contravention of the international, regional and national laws. Worse still, there has been no judicial intervention to remedy this situation.

In the case of *Lucien Ikili Rashid v. Mussa Ruganda Leki & Others*,⁶⁹⁷ the plaintiff, a citizen of the Democratic Republic of Congo, sued the defendants for maliciously having reported him, his wife and two children to the Immigration Department of Tanzania, leading to their arrest and detention in Segerea Prison. In Segerea Prison, the plaintiff was detained for thirteen days in the same cell together with his children. He contended in evidence, *inter alia*, that while in prison, when the prison officers were in search of opium and money, they undressed the plaintiff in the presence of his two children.

The fact that prisoners are subjected to invasive body searches including their private parts is common knowledge.⁶⁹⁸ Indeed, conducting searches of prisoners in prison is a very important exercise so as to discover concealed articles wherever they may be hidden, but such searches must be done with utmost decorum and respect for human dignity.⁶⁹⁹ It is advised that where necessary, such invasive body searches should be done by using modern technology such as those employed in some airports.⁷⁰⁰ Unfortunately, the case was about claim for compensation for unlawful arrest and detention; therefore, the court did not address the question of separation of children from adults in the detentions and the humiliating invasive body search of the plaintiff.

5.2.1 Treatment of Juvenile Delinquents in Studied Detention Facilities

In respect of treatment of detained children, the researcher investigated aspects such as the hygienic condition of detentions, quality and quantity of food offered to children per day, children's clothing and sleeping materials, torture, sexual abuse and other inhuman treatments, availability of medical services, as well as communication with parents and the outside world. Numerous questions were posed to the respondents to ascertain treatment of children in the visited detentions. These questions were answered by all

⁶⁹⁷ [2016] TLS Reports, 13.

⁶⁹⁸ *R.M. v. Attorney General & 4 others*, [2010] eKLR, at p. 58.

⁶⁹⁹ *Ibid.*

⁷⁰⁰ *Ibid.*

respondents who participated in this study, and their answers were coupled with the researcher's observation during the visit in detention facilities.

In the first place, in all detention facilities the researcher inquired about the actual number of inmates per detention cell compared with the capacity of each cell. The purpose was to establish the relationship between overcrowding and poor standard of hygiene in detentions. Except in detentions where children were mixed with adult offenders, all visited detentions had fewer detained juveniles than the capacity of each detention facility and therefore, the standard of hygiene was satisfactory. For example, Irambo Approved School, which can accommodate 300 boys, had 23 boys only while Tanga Retention Home which can accommodate 40 children had no children at the time of the visit. Wami Prison for Young Offenders has the capacity to accommodate 255 young male offenders, but it had 82 inmates only. Mbeya Retention Home's capacity is to accommodate 50 children, but there were 12 children only. Likewise, Upanga Retention Home can accommodate 60 children, but there were 28 children only while Arusha Retention Home can accommodate 50 children but there were only 8 children. This is a commendable condition, but there could be more improvement if there was an effective coordination between the Ministry of Home Affairs and the Ministry of Health, Community Development, Gender, Elderly, and Children, to transfer children detained in police stations and prisons to the Retention Homes and the Approved School, at any time whenever there are vacancies. It is difficult to justify for instance, the reasons for holding 38 children in Butimba prison while there are vacancies at Irambo Approved School. Likewise, 18 children were held in Maweni prison in Tanga while there was no child in Tanga Retention Home, 52 children were detained in Segerea prison while there were vacancies in Upanga Retention Home, and 8 children were incarcerated in Arusha Central police station while Arusha Retention Home which is close to the police station had vacancies.

The respondents in Retention Homes said this situation is caused by reluctance on the part of the police officers to send children to the Retention Homes. The police and prison officers on their part contended that always there is a lack of information about the

vacancies available in Retention Homes. In addition, they said the transfer of children from police stations or prisons to the Retention Homes poses numerous administrative challenges such as financial and security issues. In this regard, the international standards require that the inter-ministerial and interdepartmental cooperation should be fostered in handling juvenile delinquents in order to consider the needs and best interests of the child.⁷⁰¹

In 2015, the United Nations Committee on the Rights of the Child urged the Government of Tanzania to establish an appropriate body at a high inter-ministerial level with a clear mandate and sufficient authority to coordinate all sectors relevant to the implementation of the Convention on the Rights of the Child at the national, regional and local levels.⁷⁰² The Government was required to ensure that this coordinating body is provided with the necessary human, technical and financial resources to operate effectively.⁷⁰³ To date, no such feasible coordinating body has been established.

Children detained in prisons face the problem of overcrowding just as adult prisoners. The problem is more acute with male prisoners than females. Most of visited prisons were found accommodating inmates nearly twice their actual capacity. For example, Isanga prison can accommodate 784 prisoners, but there were 1080 inmates at the time of the visit. In Kasulu District Prison, there were 323 prisoners during the visit, but the prison's capacity is to accommodate only 180 inmates. Butimba prison can accommodate 934 prisoners, but the researcher found 2,212 inmates during the visit. During the interview, one prison officer revealed that one prison cell can accommodate 20 prisoners, but there are instances in which 53 inmates are held in one cell and share one toilet.

The United Nations Convention on the Rights of the Child, 1989 directs that every child deprived of liberty should be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his

⁷⁰¹ Rule 26.6, Beijing Rules, 1985.

⁷⁰² United Nations Committee on the Rights of the Child, "Concluding Observations on the Combined third to fifth Periodic Reports of the United Republic of Tanzania," dated 3rd March, 2015, para. 12.

⁷⁰³ *Ibid.*

or her age.⁷⁰⁴ Furthermore, the Beijing Rules stipulate that juveniles in institutions should be kept separate from adults and must be detained in a separate institution or in a separate part of an institution also holding adults.⁷⁰⁵ This serves the avoidance of negative influences through adult offenders and the safeguarding the wellbeing of juveniles in an institutional setting. Juveniles often suffer more human rights abuses when they are incarcerated with adults. It has been said that juveniles incarcerated in adult facilities are eight times more likely to commit suicide, five times more likely to be sexually assaulted, and twice more likely to be attacked with a weapon or beaten by prison staff than adults in the same facilities.⁷⁰⁶

5.2.2 Quality and Quantity of Food Offered to Detained Juveniles

Regarding the quality and quantity of food offered to detained children, the researcher found that children in Retention Homes and Approved School were served with meals three times a day. The meals constituted a balanced diet and there was consensus among the respondents that the food was adequate. In prisons, children were offered food twice a day, that is, porridge in the morning and meals at 2:00 pm in the afternoon. The dominant type of food was stiff-porridge served with beans or meat stew on a few occasions. Most of the respondents indicated that food was usually sufficient. At Lilungu prison, the researcher was informed that in every day, each prisoner is entitled to get a daily ration of porridge 150g, stiff-porridge 500g, beans 120g, or meat 150g, fats 30g, fruits 100g, salt 30g, sardines 50g and green vegetables 100g. The study revealed that this requirement is not being complied with in any of the investigated prison detentions. For instance, in Segerea prison, detained juveniles complained that they were offered enough main dishes, that is, stiff-porridge, but served with very little sauce.

In Isanga Prison, detained juveniles complained that meal was offered too early, that is, at 2:00 pm, leaving them hungry during the night. The prison authorities explained that according to the prison Rules, inmates must be locked in at 5:00 pm, so meal was offered early in order to have enough time for checking security and records of the inmates

⁷⁰⁴ Art. 37 (c), United Nations Convention on the Rights of the Child, 1989.

⁷⁰⁵ Rule 26.3, Beijing Rules, 1985.

⁷⁰⁶ Caldwell, B., *supra* note 40.

before locking them in. In all visited police stations, there was no food offered to detained children. They solely relied on food brought to them by relatives, if any. For detained children who have no relatives to offer them food, they were assisted by police officers to get shares from their colleagues. The police officers explained this situation as being caused by the Government's delay in paying the suppliers of food to police stations, hence; they stop supplying food until they are paid.

5.2.3 Detained Children's Clothing and Sleeping Materials

Children detained in police stations, Retention Homes and the Approved School, do not wear uniforms. They wear home dresses brought to them by parents or donated by the well-wishers such as religious groups, members of the Non-Governmental Organisations and university students. Apart from home dresses, children in the Approved School wear school uniforms supplied to them by the Government. The researcher was informed that sometimes the Government does not supply uniforms in time, hence; children wear torn uniforms or go to school with home dresses. In all studied Retention Homes and the Approved School, sleeping materials were adequate and clean.

However, in all the visited police stations, there were no sleeping materials. Detained juveniles slept on the bare floor with no covering materials. This situation is considered normal, being part and parcel of the results of becoming delinquent. One juvenile delinquent explained during focus group discussion that he requested for a blanket in the police station, but he was told that "...there is no luxury in police station, so he better shut up and stop disturbing."

On this aspect, the Beijing Rules stipulate that juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners, 2015 adopted by the United Nations.⁷⁰⁷ While in custody, juveniles shall receive care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical and physical, that they may require in view of their age, sex and personality.⁷⁰⁸ Commentary to Rule 13.5 of the Beijing Rules

⁷⁰⁷ Rule 13.3, Beijing Rules, 1985.

⁷⁰⁸ *Ibid*, Rule 13.5.

explains that juveniles under detention pending trial are entitled to all the rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners, 2015 as well as the International Covenant on Civil and Political Rights, 1966.

Concerning clothes for children detained in the prisons, these are categorised into two groups, namely, pre-trial and post-trial juvenile delinquents. Those who are under trial wear home dresses while the post trial children wear prison uniforms. There were no beds in studied prisons. Children sleep on mattresses placed on the floor.

Table 5:8: Situation of Children’s Clothing and Sleeping Materials in the Visited Detentions

Name of the prison	Children’s uniforms	Sleeping Materials	Cleaning agents
Wami	Inadequate. One pair per each detained child.	Not enough. Mattresses are worn out.	No detergents and washing utensils.
Isanga	Inadequate. One pair per each detained child.	They are enough.	No detergents. They depend on donations from visitors.
Segerea	They are enough.	They are enough, but torn. No mosquito nets.	No detergents. They depend on donations from visitors.
Kigongoni	They are enough.	They are enough.	Children are offered soaps.
Lilungu	Inadequate. One pair per each detained child.	They are enough and clean.	Children are offered soaps.
Maweni	Uniforms are inadequate, not only for children, but also for prison officers.	They are enough, but no mosquito nets except when one is sick.	No detergents. They depend on donations from visitors.
Babati	They are enough.	They are enough, but no mosquito nets.	Children are offered soaps.
Kasulu	Inadequate. One pair per each detained child.	They are enough, but mattresses are worn out. No mosquito nets.	No detergents. They depend on donations from visitors.
Butimba	Not enough.	Mattresses are enough, but due to overcrowding, children share mattresses. Blankets are few and torn out. No mosquito nets.	No detergents. They depend on donations from visitors.

In Butimba prison, the researcher was informed that overcrowding and lack of prison uniforms forced some detained juveniles to wear home dresses and share sleeping materials while in prison. The Prisons Act, 1967 stipulates that while in prison, every prisoner is entitled to food in a prescribed dietary scale and must be supplied with and should wear such prison clothing as may be determined by the Commissioner General of Prisons.⁷⁰⁹ In addition, every prisoner has the right to be provided with separate bedding adequate for warmth and health as may be determined by the medical officer and be prescribed by Regulations.⁷¹⁰ However, in the detentions visited, there were no facilities to cater to the needs of detained children as per the requirements of national and international standards. These findings resemble what was presented in the 2015 Tanzanian National Report of Human Rights Institution⁷¹¹ in which it was revealed that eighty percent (80%) of children held in prisons and police cells are not separated from adults, have limited access to legal representation, and there are few children's facilities including transportation to and from the courts. There are inadequate social workers to handle children in conflict with the law.⁷¹² It has been argued that where conditions within a prison are such that inmates incarcerated therein will inevitably and necessarily become more socio-pathetic than they were prior to the sentence, the court's punitive purpose, charged with healing hope is stultified by the prison authorities.⁷¹³ This means the treatment of detained children which does not conform to their rights amounts to punishing them more than their sentences as pronounced by the courts.

5.2.4 Sexual Abuse and Inhuman Treatment of Detained Children

Prohibition against torture, cruel or inhuman and degrading treatment implies that an action is barbarous, brutal or cruel, while degrading treatment is that which brings a person into dishonour or contempt.⁷¹⁴ It has been found that children detained in Retention Homes and the Approved School face corporal punishment when they commit

⁷⁰⁹ S. 65 (1), the Prisons Act, 1967, [Cap. 58 R.E. 2002].

⁷¹⁰ *Ibid*, S. 65 (2).

⁷¹¹ UN Human Rights Council, "Universal Periodic Review: United Republic of Tanzania, Individual Report of Tanzania National Human Rights Institution." Geneva: United Nations, 2015, p. 4.

⁷¹² *Ibid*.

⁷¹³ **Krishna Iyer, J.**, in *Charles Sobhraj v. Supt, Central Jail, Tihar*, AIR [1978] SC 1515.

⁷¹⁴ **Okwengu, J.**, in *R.M. v. Attorney General & 4 others*, *supra* note 698.

serious misconduct such as use of abusive language, bullying, attempt to escape and sexual violence. In case of less serious misconduct, children are given alternative punishments, which may include cleaning the dormitory, gardening or washing cooking utensils. The right to protection against inhuman and degrading treatment is an absolute right, only limited in one instance, that is, where the act complained of is the infliction of a punishment authorised by law.⁷¹⁵ Corporal punishment of juvenile delinquents, though authorised by law, is not part of their punishments as pronounced by the court and cannot therefore limit their Constitutional right to protection against inhuman and degrading treatment.

Children detained in Retention Homes and prisons complained to have been tortured in police stations in order to confess to the offences or sign statements given to them by the police officers. Sixty Eight (68) respondents answered the question relating to the acts of torture, sexual abuse and inhuman treatment of detained children. Corporal punishment is one of the complained treatments of detained juvenile delinquents. Out of five respondents who answered a question relating to corporal punishment, four (4) respondents (5.9%) said that children in detentions are caned for breaching detention Rules, while one (1) respondent (1.5%) said there is no caning of children in detentions. Twenty Eight (28) respondents mentioned the acts of torture of children by police officers. Nineteen (19) children (27.9%) explained that children were tortured when they were detained in police stations. On the other hand, Nine (9) respondents (13.2%) stated that nobody tortures children detained in police stations. Further, among Sixteen (16) respondents who answered the question relating to beating of children by prison officers, Seven (7) respondents (10.3%) confirmed that sometimes prison officers beat detained children on disciplinary grounds. Nine (9) respondents (13.2%) replied that children detained in prisons were never beaten by prison officers, they were only warned.

Four (4) respondents mentioned sexual abuse as one of the problems faced by children in prisons. Out of these four respondents, Three (3) respondents (4.4%) said that such acts

⁷¹⁵ *Ibid*, p. 59.

did exist in prisons. One (1) respondent (1.5%) replied that there is no sexual abuse of children in detentions. Fifteen (15) respondents responded to the question about inhuman treatments of detained children. Fourteen (14) of these respondents (20.6%) said that in some situations, detained children were treated in an inhuman manner. One (1) respondent (1.5%) stated that children in detentions were not maltreated because people tended to sympathise with these children.

A large number of respondents who answered questions relating to treatment of detained juvenile delinquents confirmed that children in detentions were ill-treated. For example, respondents detained in Babati prison complained of being threatened in police stations to be shot with guns if they refused to confess, others said they were burnt with an electric iron on the thighs, others narrated to have been given electric shock when they refused to confess, while others complained that they were badly insulted outside the court in the presence of relatives. It is a requirement of the law that a person who is under restraint must be treated with humanity and with respect for human dignity.⁷¹⁶ Like international laws, Tanzanian laws prohibit subjecting of a person who is under restraint to cruel, inhuman or degrading treatment.⁷¹⁷ Another respondent in Butimba prison explained that when he was in police station, he saw other boys being beaten severely by police officers; then he decided to confess to the offence so as to save his life. He was charged with theft. He said the complainant never came to court to testify, but the boy was convicted and sentenced to six months imprisonment.

It is a settled principle of law that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.⁷¹⁸ When a person is bound to prove the existence of any fact, the burden of proof lies on that person.⁷¹⁹ It is important to observe here that the standard of proof in criminal cases is beyond any reasonable doubt and the prosecution must discharge this duty, except in a few cases where the burden of proof usually shifts to the

⁷¹⁶ S. 55 (1), Criminal Procedure Act, 1985, [Cap. 20 R.E. 2002].

⁷¹⁷ *Ibid*, S. 55 (2).

⁷¹⁸ S. 110 (1), Evidence Act, 1967 [Cap. 6 R.E. 2002].

⁷¹⁹ *Ibid*, S. 110 (2).

accused person.⁷²⁰ Theft offence is not one of such exceptions. Moreover, in any criminal trial, the starting point is that the accused person is innocent. This innocence has to be contradicted beyond reasonable doubt by using evidence and the applicable laws for the accused person to be declared guilty of the offence as charged.⁷²¹

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove the existence of those facts. This principle is based on the Latin phrase, “*incumbit probatio qui dicit, non qui negat*,” that is, the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it.⁷²² Therefore, although the proof of a criminal case beyond reasonable doubt is not dependent upon the number of witnesses called to testify, it is quite unfair to find conviction of the accused child relying solely on the evidence of the same police officer to whom the offence was reported, he arrested, investigated and prosecuted the said child. If that particular child had representation during his defence, the court’s decision would be different. As noted earlier, with a limited legal assistance and representation, juvenile delinquents can hardly realise their rights during the criminal justice processes.

Concerning inhuman treatment of children by police officers, one respondent who was detained in Kigoma Central Police Station narrated as follows during focus group discussion:

I am sixteen years old. After being arrested, I was brought to this police station. I was forced to confess that I participated in the theft with my friend who we were arrested together. I did not confess. My head was rolled down, legs on the top while my hands were handcuffed. I was injured and sustained bruises, but I did not confess. My friend was also beaten and then he explained that he was alone when he stole a cell phone from the shop in town. Now I am told today I will be released. *Source:* Information obtained during data collection in Kigoma Central Police Station. (Translation from Swahili to English is mine).

⁷²⁰ *Ibid*, S. 3 (2) (a).

⁷²¹ Also See Kadilu, M., “Criminalisation of Intentional Transmission of HIV/AIDS: The Tanzanian ‘Paradox’.” *International Review of Basic and Applied Sciences*, Vol. 4, Issue, 2, 2016, pp. 8-18, at p. 13.

⁷²² **Maugham, L.J.**, in *Liversidge v. Anderson*, [1942] AC, 206.

During the interview, one police officer explained the incidents of torture by police officers in the following words:

We do not have the investigation tools. We conduct investigations by using too much energy, brain, psychology and sometimes torture. In our circumstances, torture is unavoidable. We depend so much on the use of force to obtain evidence. If police officers refrain totally from torturing in gathering evidence, no criminal case will ever go to the court. Evidence will always be wanting. However, in the case of children, they confess easily, no need of torture. *Source:* Information obtained during data collection in Babati police Station. (Translation from Swahili to English is mine).

Therefore, the police officers use torture as a means to enhance crime investigations. This has been so despite numerous complaints from the general public as well as the international and national laws prohibiting torture of the detained persons. The Constitution, for example, provides that, "...no person should be subjected to torture, inhuman or degrading punishment or treatment."⁷²³ Moreover, the Law of the Child Act, 2009 prohibits any person to subject a child to torture or other cruel, inhuman punishment or degrading treatment, including any cultural practice which dehumanizes or is injurious to the physical and mental well-being of a child.⁷²⁴ Still, the police officers resort to torture as a short-cut to proper investigation, perhaps because they know for sure that there will be no repercussions for their actions. The Criminal Procedure Act, 1985 stipulates that where a police officer contravenes or fails to comply with the provisions relating to the arrest, restraint of the accused person and investigation of the offence, the contravention or failure should not be punishable as an offence against the Criminal Procedure Act, 1985, unless a penalty is expressly provided in respect of the contravention or failure.⁷²⁵

⁷²³ Art. 13 (6) (e), the Constitution of United Republic of Tanzania, 1977.

⁷²⁴ S. 13 (1), Law of the Child Act, 2009, [Cap. 13].

⁷²⁵ S. 6 (2), Criminal Procedure Act, 1985, [Cap. 20 R.E. 2002].

To make the situation worse, in certain circumstances torture is permitted in Tanzania if it leads to confession. The Court of Appeal of Tanzania once held that if despite torture or undue influence, the truth of the confession is not affected; mere allegations of torture will not render the confession automatically inadmissible. But, the admissibility of such confession requires two tests, first the court has to satisfy itself that the confession was voluntary in which case admissibility of the same causes no problem, and secondly, if there are allegations of torture, the same court has to be satisfied that notwithstanding the torture, the truth of the confession was not affected.⁷²⁶ In this situation, the confession is an outcome of torture, but the Court of Appeal did not provide for remedy that the accused person has if torture does not result in a confession.

These findings show a disconnection between law and practice and between public condemnation of torture and the wide-spread misconception that this is the way it has to be for the society to be kept secure. This is a typical characteristic of a crime control model that was discussed in chapter two. Crime control model refers to an approach in the criminal justice, which places emphasis on reducing the crime in the society through increased police and prosecutorial powers. It applies to the general criminal justice system with little focus on the needs of juvenile delinquents. Crime control model tries to deter crime by all means with less attention to the individual rights. For instance, a seventeen years boy narrated the follows during focus group discussion in Butimba prison:

I was detained in Igogo police station from 22/3/2016 to 7/4/2016. I did not record any statement, but on 7/4/2016, I was taken to the Chief Detective's office and required to sign a certain statement which I was not aware of its contents. I refused to sign. I was hit hard with a hammer on my knees. I signed the statement as recorded by the police officer. The offence was defilement. After being taken to the court, I was convicted and sentenced to thirty years imprisonment. Due to that beating, nowadays I cannot walk properly, my legs tremble. By then I was 16 years old, but now I am seventeen years old. *Source:* Information obtained during data collection in Butimba prison, Mwanza. (Translation from Swahili to English is mine).

⁷²⁶ *Richard Lubilo and Mohamed Selemani v. R.*, [2003] TLR 149.

Concerning sexual abuse of detained juveniles, this problem was mentioned in prison detentions only. Both prison officers and detained children said that there have been a few cases of sexual abuse which were reported, but they become hard to prove, so no action has ever been taken. In Lilungu prison for instance, one participant in the focus group discussion had this to say regarding sexual abuse:

When we are mixed with adult prisoners during the day, they entice us to engage in homosexuality. If one refuses, the adults talk to our leaders who are commonly known as Nyapara so as to give us hard work. We have reported this matter several times, but no action is taken, and these actions are increasing. *Source:* Information obtained during data collection in Lilungu Prison, Mtwara. (Translation from Swahili to English is mine).

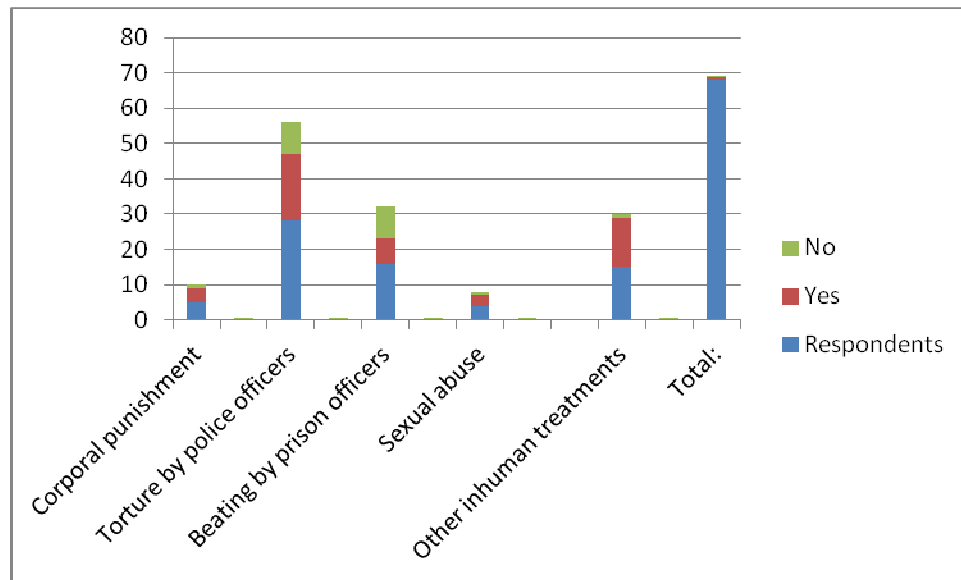
The prison officers said they control sexual abuse by using children's leaders to report any such incidents and the prison officers conduct a patrol outside the children's cells during the nights to monitor what is going on inside the cells. They explained that the prison cells and wards are usually illuminated at night and they are under constant supervision of prison officers at all times. Other inhuman treatments that were mentioned in prisons include reduction of meal rations, confinement in punishment cells up to fourteen days, denial of food up to two days, denial of being visited, beating from prison offices and adult prisoners, hard labour such as carrying heavy loads, agricultural work and cutting down trees. The prison officers explained that these punishments are implemented in accordance with the Prisons Rules. They agreed that sometimes they beat detained children if they misbehaved in the presence of a prison officer, for example, if one used abusive language, fought against another detainee or he got into the prison with unauthorized items.

The confinement of a prisoner in a punishment cell is in law known as solitary confinement. It has a dehumanizing and degrading effect on the prisoners' wellbeing. It is one of the brutal treatments of prisoners generally, let alone children delinquents. It can correctly be said that where a prisoner is subjected to brutality exploiting the fact that he

is helplessly within the custody of the jail administration, it deprives him of his life and liberty beyond the prescribed limits set by the court.⁷²⁷

Under international laws, the State has an obligation to protect children from all forms of sexual exploitation and sexual abuse by taking measures to prevent the inducement, coercion or encouragement of a child to engage in any sexual activity.⁷²⁸ The Law of the Child Act, 2009 stipulates that it is unlawful for any person to use inducement or coercion in the encouragement of a child to engage in any sexual activity.⁷²⁹ Any person who contravenes this provision commits an offence and on conviction he shall be liable to a fine of not less than one million Tanzanian shillings and not exceeding five hundred million shillings or to imprisonment for a term of not less than one year and not more than twenty years or to both fine and imprisonment.⁷³⁰ However, as stated above, no culprit of sexual abuse of detained juvenile delinquents has ever been held responsible by prison authorities as there has been no evidence to prove them.

Figure 5:1: Sexual Abuse and Inhuman Treatment of Detained Juvenile Delinquents



⁷²⁷ Also See *Sunil Batra v. Delhi Administration*, [1979] AIR SC 557.

⁷²⁸ Art. 27 (1), African Charter on the Rights and Welfare of the Child, 1990.

⁷²⁹ S. 83 (2), Law of the Child Act, 2009, [Cap. 13].

⁷³⁰ *Ibid*, S. 83 (3).

5.2.5 Corporal Punishment to Children in Detentions

On this aspect, one respondent from the Law Reform Commission of Tanzania remarked that corporal punishment to children cannot be stopped abruptly in Tanzanian society. He said, perhaps it will phase out automatically with the changing generations. The respondent said this is due to the fact that stakeholders' views have indicated that most of the parents, teachers, policy makers and law enforcers are in favour of corporal punishment as an effective way of disciplining children in Tanzania. These views resemble the findings of the study by the United Nations International Children's Fund which found that justifications for the use of physical punishment in Tanzania seem to be deeply embedded in social norms and consolidated through sayings such as '*samaki mkunje angali mbichi*' (the fish is easier to bend when it is fresh from the water), quoted to justify sticking.⁷³¹ Some Tanzanians also justify the use of corporal punishment through religion by quoting the Bible, Proverbs 22:15, 13:24, 22:6, *et cetera*, as well as the Koran as validating such practices, including situations where children do not want to learn religious teachings.⁷³² The Prisons Act, 1967 permits the infliction of corporal punishment to a prisoner who is found guilty of a prison offence. Where corporal punishment is prescribed for any prison offence, the number of strokes is not required to exceed ten in the case of persons under the apparent age of sixteen years, and eighteen strokes, in all other cases.⁷³³

The leading case in this regard is the decision of the European Court of Human Rights in the case of the *Tyrer v. U.K.*,⁷³⁴ where a 15 years boy was sentenced by a juvenile court in the Isle of Man to three strokes on conviction of assault. The court found that, while the punishment in the instant case did not constitute torture, or inhuman punishment, it did amount to degrading punishment and therefore was in violation of article 3 of the

⁷³¹ University of Huddersfield and Mzumbe University, *supra* note 132, p. 88.

⁷³² *Ibid.*

⁷³³ S. 39 (1), the Prisons Act, 1967, [Cap. 58 R.E. 2002].

⁷³⁴ European Court of Human Rights, *Application No. 5856/72*, Judgment of 25th April, 1978.

European Convention⁷³⁵ which is identical to article 13 (6) (d) of the Constitution of the United Republic of Tanzania, 1977. The said paragraph reads:

The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. It is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State apparatus.⁷³⁶ Although the applicant did not suffer any severe or long lasting physical effects, his punishment, whereby he was treated as an object in the power of authorities constituted an assault on precisely that which it is one of the main purposes of article 3 to protect, namely a person's dignity and physical integrity.⁷³⁷ Neither can it be excluded that the punishment may have had adverse psychological effects. The institutionalised character of this violence is further compounded by the whole aura of official procedure attending punishment and by the fact that those inflicting it were total strangers to the offenders.⁷³⁸

It was pointed out in chapter four that in Tanzania, corporal punishment to children is permitted as a type of sentence under the Penal Code, 1961. In the case of *Goodluck Kyando v. R.*,⁷³⁹ the appellant, aged sixteen years, was convicted of attempted rape and sentenced to 30 years imprisonment by the District Court. On appeal to the High Court against the conviction and sentence, the sentence was reduced to 15 years imprisonment. In his second appeal to the Court of Appeal of Tanzania, he appealed against sentence and also challenged the conviction on the basis that his trial was not held in camera in terms of Section 3 (5) of the Children and Young Persons Act, 1937 (now repealed). The Court of Appeal held that since Section 131 (2) of the Penal Code, 1961 as amended by Act number 4 of 1998 introduced a distinction between boys and men, the same concept should be reflected in Section 132 of the Penal Code, 1961 by adopting a 'purposive' approach in interpreting a statutory provision. For that reason, the accused being a first

⁷³⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14 of 4th November 1950.

⁷³⁶ *Tyrer v. U.K.*, European Court of Human Rights, *op.cit.*, p. 23.

⁷³⁷ *Ibid.*

⁷³⁸ *Ibid.*

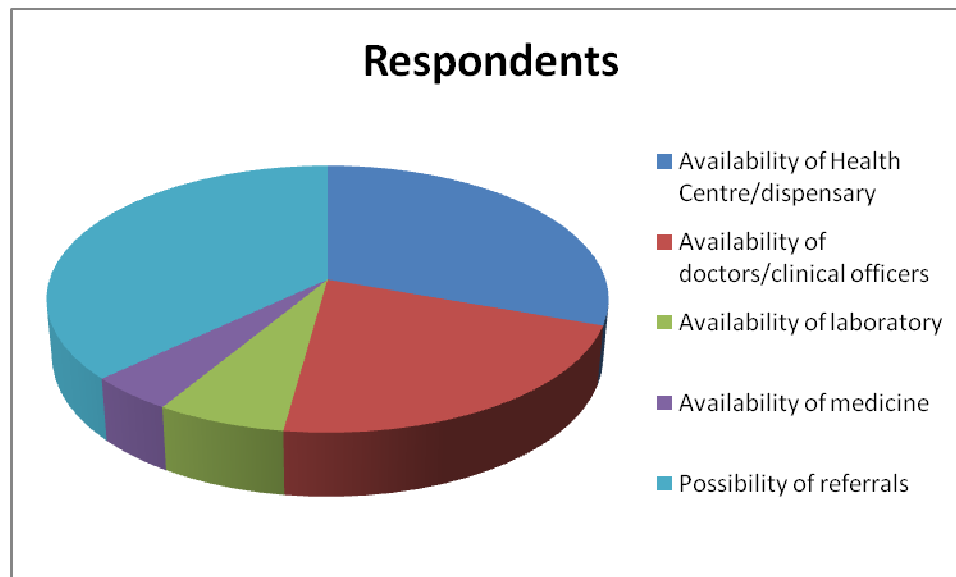
⁷³⁹ [2006] TLR 363.

offender, he is liable to corporal punishment only. Therefore, it can be said that the laws and practices in Tanzania are in favour of corporal punishment to children.

5.2.6 Availability of Medical Services to Detained Juvenile Delinquents

With regard to the availability of medical services to detained juvenile delinquents, this question was asked in all Twenty Two (22) detention facilities. Out of Twenty Two detentions, Fourteen (14) detentions (63.6%) had health centres or dispensaries. In Eight (8) detentions (36.4%) there were neither dispensaries nor health centres. In Ten (10) detentions (45.5%) there were medical doctors or clinical officers, while in Twelve (12) detentions (54.5%) there were neither doctors nor clinical officers. Among the Fourteen (14) available health centres or dispensaries, only Three (3) health centres or dispensaries (13.6%) had laboratories, while the remaining Nineteen (19) health centres or dispensaries (86.4%) had no laboratories. Only Two (2) health centres (9.0%) had medicine. Twenty (20) health centres or dispensaries (91.0%) had a shortage of or no medicine at all. In Seventeen (17) detentions (77.3%) there was a possibility for referrals to a nearby Government hospital in case of serious sickness or lack of appropriate treatment in a particular detention. In Five (5) detentions (22.7%) there was no such possibility as there were no transport services to the Government hospitals. These findings illustrate that there is no appropriate medical service to detained juvenile delinquents in Tanzania because apart from the fact that some detentions have no dispensaries or health centres, in the detentions with dispensaries or health centres, there are no medical doctors or clinical officers. Again, in detentions with medical doctors or clinical officers, there are no laboratories, and in detentions where there are laboratories, there are no medicine. The diagram below shows the respondents' responses relating to the availability of medical services to detained juvenile delinquents.

Figure 5:2: Availability of Medical Services to Detained Juvenile Delinquents



On matters relating to appropriate medical services to detained juveniles, the Criminal Procedure Act, 1985 is clear that where a person under restraint appears to the police officer to require medical treatment or where he makes a request to a police officer to be provided with medical treatment, advice or assistance in respect of an illness or an injury, the police officer shall forthwith take such reasonable action as is necessary to ensure that the person is provided with medical treatment, advice or assistance.⁷⁴⁰ The words ‘police officer’ in this provision may be substituted with any detention staff that is in charge of the restrained persons.

Further, the Prisons Act, 1967 provides that in every prison, there should be a medical officer who is responsible for the health of all prisoners in a prison and who may conduct medical examination to any prisoner at such times as may be prescribed.⁷⁴¹ In the case of serious illness of a prisoner confined in a prison where adequate facilities do not exist for the treatment of sick prisoners, the medical officer may order his removal to a

⁷⁴⁰ S. 55 (3), Criminal Procedure Act, 1985, [Cap. 20 R.E. 2002].

⁷⁴¹ *Ibid*, S. 20.

government hospital.⁷⁴² During focus group discussion, one of the detained children expressed his detention experience in the following narration:

I am 17 years and I am charged with robbery while in fact I bought a cell phone which was stolen. I am charged with another person, aged 27 years whom we met at the police station. When I was in the police station, I contracted tuberculosis (TB) and I was admitted to the hospital. I was not present when my colleague was interrogated and recorded a statement. When I was returned to the police station, I was arraigned to court by using the information recorded by my colleague. I stayed in the police station for 15 days. I am suffering from HIV/AIDS, but since I was arrested, I have stopped using ARVs, which I have been using since I was 5 years old. *Source:* Information obtained during data collection in Butimba prison, Mwanza. (Translation from Swahili to English is mine).

With reference to persons living with HIV/AIDS, the HIV and AIDS (Prevention and Control), Act, 2008 of Tanzania stipulates that every person, institution and organisation, living, registered or operating in Tanzania shall be under the general duty to reduce adverse effects of HIV and AIDS by *inter alia*, increasing access, care and support to persons living with HIV and AIDS from community or health care facilities.⁷⁴³

5.2.7 Detained Juveniles' Communication with Parents and the Outside World

In this respect, the researcher inquired about the extent to which detained children can meet and talk to their parents and members of the families. Moreover, the researcher wanted to know whether children in detentions were exposed to the world outside the detentions through various forms of media such as radios, televisions and the newspapers. In all Twenty Two (22) visited detentions (100%) detained children were allowed to be visited at least once per month. In Ten (10) detentions (45.5%) detained children listen to the radios while children in Twelve (12) detentions (54.5%) had no radios to listen to. Children detained in Eleven (11) detentions (50%) watched television programmes while children detained in other Eleven (11) detentions (50%) have no access to televisions as there were no television sets or the televisions were out of order. There was no detention with the arrangement for newspapers for detained juvenile delinquents. If the detention

⁷⁴² S. 53 (1), the Prisons Act, 1967, [Cap. 58 R.E. 2002].

⁷⁴³ S. 4 (1) (b) and (f), the HIV and AIDS (Prevention and Control), Act, No. 28 of 2008.

staff or the visitors go with a newspaper in the detention, the same is usually left for the children to read. The table below shows respondents' responses about detained children's communication to parents and the outside world.

Table 5:9: Juveniles' Communication with Parents and the Outside World

Visited by parents		Listen to the radio		Watch television		Read newspapers	
Yes	No	Yes	No	Yes	No	Yes	No
22	0	10	12	11	11	0	22
(100%)	(0%)	(45.5%)	(54.5%)	(50%)	(50%)	(0%)	(100%)

The United Nations Convention on the Rights of the Child, 1989 provides that every child deprived of liberty shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.⁷⁴⁴ Further, the international standards require that every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the defence counsel.⁷⁴⁵ According to the United Nations Manual for the Measurement of Juvenile Justice Indicators, the child's right to regular direct contact with his or her parents and to maintain contact with his or her family can be seriously challenged during deprivation of liberty. Denial of contact between a detained child and his or her parents and family has a number of serious adverse consequences.⁷⁴⁶ Regular contact is of particular importance with respect to the

⁷⁴⁴ Art. 37 (c), the United Nations Convention on the Rights of the Child, 1989.

⁷⁴⁵ Rule 60, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990.

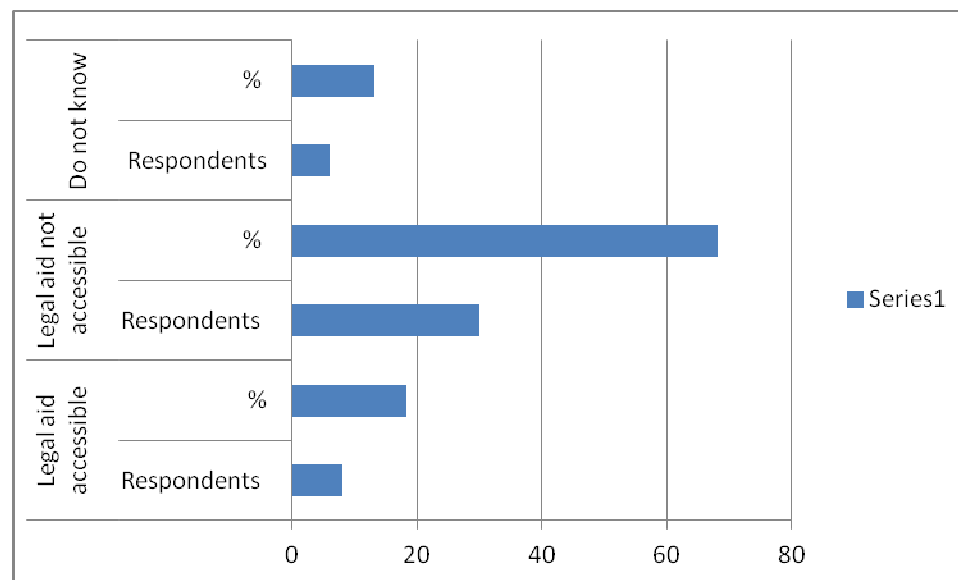
⁷⁴⁶ The United Nations Office on Drug and Crime, *supra* note 103, p. 7.

reintegration of the child back into his or her family following release, and the well-being and psychological health of the child during the period of detention.⁷⁴⁷

5.3 Free Legal Aid to Juvenile Delinquents in Tanzania

As stated earlier, juvenile delinquents are entitled to free legal assistance and representation throughout the criminal justice process to ensure fair trial. To ascertain whether the children detained in Tanzania have access to free legal assistance and representation, the researcher asked this question to Forty Four (44) respondents. Eight (8) respondents (18.2%) replied that detained juvenile delinquents have access to free legal assistance from private advocates if the said juveniles were charged with murder cases. Thirty (30) respondents (68.2%), said children detained in Tanzania have no access to legal representation. Six (6) respondents (13.6%), explained that they were not aware that children are entitled to free legal assistance, hence, they do not know whether the same was available or not. The figure below illustrates what has been stated

Figure 5: 3: Free Legal Aid to Juvenile Delinquents in Tanzania



⁷⁴⁷ *Ibid.*

Concerning free legal aid in criminal cases, this right is provided in the country to persons accused of serious offences such as murder and treason. In the case of *Joseph Munene and Ally Hassani v. R.*,⁷⁴⁸ the accused persons were Kenyans who were charged with, prosecuted and convicted of armed robbery in the District Court of Rombo, Tanzania. Their appeal to the High Court was dismissed, and they appealed to the Court of Appeal complaining that they were tried in Tanzania and not assigned legal aid on Government expenses. The Court of Appeal stated clearly that the Government of Tanzania does not provide legal aid in cases of armed robbery, regardless of the nationality of the accused person.⁷⁴⁹

In Tanzania, it is practically not mandatory for a juvenile delinquent to be represented by an advocate during criminal trials. Throughout the criminal justice process, juvenile delinquents are accompanied by the social welfare officers, but these are not practicing lawyers. They are not skilled in criminal procedures and practices. The role of a social welfare officer during criminal proceedings is only to counsel and provide a psychological guidance to the child. The rules require that when a child is being tried for a criminal offence, the social welfare officer should sit at the end of the table opposite the magistrate and where the child does not have a parent, the social welfare officer shall take the sit of a parent.⁷⁵⁰ During focus group discussions, most of detained children requested for free legal aid services throughout justice process. They argued that some of them did not even know how to read and write, hence, they should not be expected to be able to defend themselves against criminal charges. In the criminal proceedings, including criminal charges against juveniles, the Republic is usually represented by state attorneys who are practicing advocates. The researcher emphasises that with limited access to legal representation, there is little opportunity for a juvenile delinquent to successfully defend himself in the court during criminal trials against him. One of the prosecution lawyers commented as follows during the interview:

⁷⁴⁸ [2005] TLR 141.

⁷⁴⁹ *Ibid.*

⁷⁵⁰ Rule 7 (2) (h), Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 20th May, 2016.

Juvenile delinquents have no legal representation at all. They are assisted by social welfare officers, but these are few and they are supposed to be neutral third parties, not defence lawyers. In the cases where a child is charged with a serious offence such as armed robbery or rape, lack of legal representation causes convictions which would be otherwise avoidable if the child was represented. *Source:* Information obtained during data collection in Juvenile Court of Dar es Salaam at Kisutu. (Translation from Swahili to English is mine).

The international Principles and Guidelines require States to ensure that imprisoned persons in general and children deprived of their liberty in particular, have access to legal aid and representation. The Beijing Rules, 1985 for instance, stipulate that throughout the justice process, juveniles must have the right to be represented by a legal adviser or apply for free legal aid where there is provision for such aid in the country. At the national level, the Criminal Procedure Act, 1985 stipulates that any person accused before any criminal court, other than a primary court, may of right be defended by an advocate of the High Court subject to the provisions of any written law relating to the provision of professional services by advocate.⁷⁵¹

Likewise, the Law of the Child Act, 2009 provides that in any case, the child must have a right to next of kin and representation by an advocate during criminal proceedings.⁷⁵² The Legal Aid Act, 2017 stipulates that where any person is charged with the duty of supervising the welfare of the child, and in the execution of his duties he deals with the child who has come into a conflict with the law, that person should cause the child to obtain legal aid immediately.⁷⁵³ This was also emphasised by **Samatta, J.**, (as he then was) in the case of *Almasi Kalumbeta v. Republic*⁷⁵⁴ when he said:

Legal representation for an accused is a right which is almost universally recognised. In some jurisdictions the right is a Constitutional right. That right is so jealously guarded by the law that if an accused is deprived of it through no fault of his own and through no fault of his advocate and he is, in the end convicted, that conviction cannot be allowed to stand on appeal.

⁷⁵¹ S. 310, Criminal Procedure Act, 1985, [Cap. 20 R.E. 2002].

⁷⁵² S. 99 (1) (f), Law of the Child Act, 2009, [Cap. 13].

⁷⁵³ S. 35, the Legal Aid Act, No. 1 of 2017.

⁷⁵⁴ [1982] TLR 329, at p. 330.

Therefore, any child in conflict with the law in Tanzania is not supposed to be involved in criminal proceedings without legal assistance and representation. However, the practice has shown that these children have no access to free legal assistance and representation unless one is charged with a capital offence such as murder.

5.4 Availability of Rehabilitation and Reintegration Programmes for Detained Juveniles

In this respect, data were collected from fourteen (14) detentions consisting of Retention Homes, Prisons and the Approved School. Respondents in police stations were not involved in answering the questions relating to the availability of rehabilitation and reintegration programmes, as it was considered premature to talk about the introduction of rehabilitation and reintegration programmes in Tanzanian police stations. In the detentions where this question was asked, the researcher investigated on the availability of primary as well as secondary education programmes, vocational training programmes, availability of appropriate teaching and learning equipment and the availability of qualified teachers of the offered programmes.

Out of Fourteen (14) detentions, in Four (4) detentions (28.6%), there were primary education programmes, while in Ten (10) detentions (71.4%), there were neither primary nor secondary education programmes. Among Fourteen (14) detentions, only One (1) detention (7.1%) had a secondary education programme. Eight (8) detentions (57.1%) had vocational training programmes for detained children while in Six (6) detentions (42.9%), there were no such programmes. In Four (4) detentions (28.6%), there were qualified teachers for the offered programmes while Ten (10) detentions (71.4%) had no teachers. In some prisons, for example, some prisoners who had undergone secondary education before imprisonment were used to teach detained children. Only Six (6) detentions (42.9%) had teaching and learning equipments of the offered programmes while Eight (8) detentions (57.1%) had no appropriate teaching and learning equipments

for the programmes offered. The table below shows the situation about rehabilitation and reintegration programmes for detained juvenile delinquents in Tanzania.

Table 5:10: Rehabilitation and Reintegration Programmes for Detained Juveniles

Programme	Available	Not available
Primary education	4 (28.6%)	10 (71.4%)
Secondary education	1 (7.1%)	13 (92.9%)
Vocational training	8 (57.1%)	6 (42.9%)
Qualified teachers	4 (28.6%)	10 (71.4%)
Teaching/learning equipments	6 (42.9%)	8 (57.1%)

One of the participants in focus group discussion said he was a secondary school student before the case, but since the day of arrest, his studies were discontinued. He narrated: “Some of us were students before we came here. There is no education programme in this prison; therefore; we no longer continue with studies.” One prison officer was of the same view when he said that children who were in education programmes before being imprisoned lack a systematic programme to proceed with studies. However, he remarked that even if they went back to school in the community, they would not be accepted. It would be better to have a secondary school for young offenders.

In this respect, Mbeya Retention Home may be a good model for other children’s detentions in the country. In this Home, there are formal programmes for primary and secondary education. Qualified teachers employed by the Government have been

designated for that Home. The Retention Home serves as a centre for the national examinations where detained children sit as private candidates. The candidates who pass their primary education examinations are given opportunity to proceed to secondary education in the same Retention Home. This is in line with the requirement of the Retention Homes Rules, 2012 which directs that every child in a Retention Home should be provided with primary as well as secondary education in accordance with the national curriculum available to children in the community.⁷⁵⁵ Concerning vocational training programmes in the prisons, one respondent had a different opinion and was wary about it where he said: ‘Serious vocational training for children in prisons is not possible because it leads to the mixing up of children with adult offenders during the training.’ It may also constitute hard labour to detained children.

This concern seems sensible as the United Nations Convention on the Rights of the Child, 1989 provides that, ‘In all actions concerning children, whether undertaken by public or private social welfare, institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be of primary consideration.’⁷⁵⁶ In this regard, the Law of the Child Act, 2009 complies with the requirements of the United Nations Convention on the Rights of the Child, 1989 by providing for reform and consolidation of the laws relating to children, which stipulate, protect and maintain their rights. Most of the respondents in prisons opined that instead of having vocational training for children in prisons, it would be better to transfer children who intended to benefit from these programmes to Wami Prison for Young Offenders, if at all there are vacancies.

The Retention Homes Rules, 2012 stipulate that every child in a Retention Home is entitled to participate in vocational training programmes to promote skills and prepare him or her for future employment.⁷⁵⁷ For this, the child should be able to select programmes of his or her interest. The Manager of a Retention Home has a legal duty to

⁷⁵⁵ Rule 31 (1) (a-b), Law of the Child, (Retention Homes) Rules, G.N. No. 151 of 4th May, 2012.

⁷⁵⁶ Art. 3, United Nations Convention on the Rights of the Child, 1989.

⁷⁵⁷ Rule 32, Law of the Child, (Retention Homes) Rules, G.N. No. 151 of 4th May, 2012.

establish programmes designed to facilitate a child's reintegration into the community.⁷⁵⁸ To ensure non-discrimination of children of the same status, the same position can be adopted and implemented to children detained in prisons. The international legal instruments caution that a sudden release of a juvenile from detention without any rehabilitation or reintegration programme to ensure a smooth transition from detention to life outside the institution poses a great threat to the future of the child concerned.

Generally, the international standards require *inter alia*, that in detentions, there should be programmes for education, vocational training and work.⁷⁵⁹ Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and the education programmes must be designed to prepare him or her to return to the society. Such education should be provided outside the detention facility in the community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that after release, juveniles may continue their education without difficulty.⁷⁶⁰

During data collection, the researcher observed the existence of pilot schemes for diversion, community rehabilitation and reintegration of juvenile delinquents and children at risk of offending in Temeke, Dar es Salaam and at Kihumbe, in Mbeya. These programmes provide support to young offenders and children at risk of offending while they remain in their community where they receive a number of rehabilitative services. The researcher opines that to ensure sustainability and the full implementation of these programmes to every juvenile delinquent in Tanzania, the same needs to be incorporated in the Law of the Child Act, 2009 and the operational guidelines be developed promptly.

In summary, this chapter has dealt with the presentation, analysis and discussion of the research findings with a view to assessing the Tanzania's compliance with international standards. Basically, the chapter has attempted to look into five aspects, namely, the duration of detention for juvenile delinquents, the degree of separation of detained

⁷⁵⁸ *Ibid*, Rule 33.

⁷⁵⁹ Rule 38, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990.

⁷⁶⁰ *Ibid*.

juveniles from adult offenders in detentions, treatment of detained juvenile delinquents, juvenile's access to free legal assistance, and the availability of rehabilitation as well as reintegration programmes for children detained in Tanzania. The examination of Tanzanian practice regarding protection of detained juvenile delinquents has shown that children are generally detained for a long period of time, both during pretrial and post trial, where there is no total separation of children from adult offenders.

The study has also revealed that children in detentions are frequently visited by parents and members of their families; they watch television and listen to the radios. However, detained children face beatings from adult detainees and the detention staff, they do not get balanced diet, three times per day, as required by the World Health Organisation Guidelines, they lack clothes and sleeping materials and they do not get appropriate medical examination and treatment in case of illness. Finally, the findings have shown that juvenile delinquents have no access to free legal assistance and representation, in the detentions there are no rehabilitation and reintegration programmes to prepare detained children for life after release.

Concerning pre-trial detention of juveniles, the researcher is aware of the Chief Justice's directive to law enforcers to fast track cases involving children so as to reduce the time children spend in detentions, and the DPP's directive to all actors in the investigation process to ensure that cases involving children are prosecuted in the Resident Magistrates' Courts or District Courts only after the completion of investigation to avoid initiating unnecessary criminal cases against children where the evidence is yet to be completely gathered.⁷⁶¹ The DPP's office has also started conducting regular monitoring missions of police lock-ups and prison facilities to assess the situation prevalent therein with a view to improving the treatment of children incarcerated in those facilities.⁷⁶² While commending these efforts, the researcher is of the view that these measures lack sufficient legal foundation, they are not used consistently throughout the country, and thus their sustainability is questionable.

⁷⁶¹ See Directive No. 3 of 2010, and Consolidated 2nd, 3rd and 4th Reports on the Implementation of the African Charter on the Rights and Welfare of the Child by the United Republic of Tanzania, Submitted to the African Committee of Experts on the Rights and Welfare of the Child, October 2015, p. 9.

⁷⁶² *Ibid.*

CHAPTER 6

6. CONCLUSION AND SUGGESTIONS

6.1 Summary of the Discussion

This study aimed at assessing the extent to which Tanzania complies with the international standards in the protection of detained juvenile delinquents' rights. It has been observed that in Tanzania, like other countries in the world, the rate of children coming into conflict with the law is increasing day by day, while the country has been falling short of international standards in protecting their rights. Tanzania has ratified and domesticated numerous international instruments on children's rights including those relating to juvenile delinquents, but the existing laws and practice in this respect do not effectively meet the prescribed international standards. The study revealed that despite the Government's efforts to improve juvenile justice system, still in Tanzania there are substantial violations of detained juvenile delinquents' rights. In this regard, juvenile delinquents stay for a long time in detention, both before and after the trial, and mostly in adults' detentions where they are being mixed with adult offenders. Also, detained juveniles face treatment which does not suit their welfare and needs, they lack legal assistance and representation at all stages of the justice process, and they are denied aftercare programmes to prepare them for reintegration into the society after release from detentions.

The aim of this study being to evaluate Tanzania's compliance with international standards in the protection of detained juvenile delinquents' rights, in chapter one, a presentation was made on the general introduction and background to the problem and establish the need for the study. It also attempted a detailed and comprehensive assessment of the literature and laid a foundation for the understanding of the legal framework for juvenile justice systems at the international and national levels. Chapter one also presented a statement of the problem, objectives of this research, the research hypotheses and scope of the study. Lastly, the research design and methodology were presented to lay down a plan for the study. Issues relating to the area of the study, sample

population, sample size, sampling techniques, methods and tools of data collection, modes of presentation, interpretation and analysis of research findings were explored.

In chapter two, the conceptual foundation of juvenile justice in Tanzania and related terms were explored where the concept of juvenile justice was examined against the general criminal justice. Moreover, the models of juvenile justice were discussed in the chapter to assess the manner in which they are used to influence the treatment of juvenile delinquents in the world generally and in Tanzania in particular. The models of juvenile justice that were discussed include the welfare model, justice model, modified welfare-justice model, restorative justice model, participatory model and the crime control model. It was noted that the legal framework for the protection of juvenile delinquents' rights in Tanzania does not use any particular model among those discussed in the chapter; rather, the country has combined the characteristics of various models of juvenile justice to suit the local circumstances.

In this regard, it was observed that the Law of the Child Act, 2009 contains provisions that reflect the participatory model of juvenile justice, but the implementation of this Act depends on other laws and regulations such as criminal laws, criminal procedure laws, marriage laws, civil laws, *et cetera*. Thus, some juvenile justice principles have been provided for in the Law of the Child Act, 2009, but they are missing in the general criminal procedure laws. In addition, the Law of the Child Act consists the provisions which require juvenile suspects to be detained separately from adult suspects during pre-trial detentions, provisions that prohibit disclosure of information on juvenile suspects and accused juveniles by print or other media before a final judgment has been made, to mention a few.

All these are typical characteristics of the welfare model of juvenile justice, but they are not reflected in other laws working in association with the Law of the Child Act. It was realised that this is a problem to not only Tanzania, but also other countries since there is no country's juvenile justice system which is absolutely perfect. The researcher argued that regardless of the juvenile justice model employed in any particular country, the focus

should always be the implementation of the provisions of the United Nations Convention on the Rights of the Child, 1989. This in turn will result in having in place the children's rights oriented juvenile justice systems, regardless of the names, these models may be called by.

In chapter three, an attempt was made to examine the application of international laws within the legal system of Tanzania. The chapter also analysed the international standards relating to the protection of juvenile delinquents' rights, so as to lay a foundation for assessment of Tanzania's compliance with these standards. The analysis showed that the international instruments are drafted in a way that allows a broad interpretation of the rules and principles enshrined therein, in order to accommodate a wide range of States' needs. The study has established that there is no shortage of international standards and legal principles for the protection of juvenile delinquents' rights. For example, at the regional level, the African Charter on the Rights and Welfare of the Child, 1990 has, to a large extent, conformed to the standards laid down in the United Nations Convention on the Rights of the Child, 1989.

The analysed instruments adequately protect the rights of detained juvenile delinquents in respect of the treatment which respects their human rights and dignity, right to be separated from adult offenders, right to be detained for the shortest appropriate period of time, right to maintain contact with their families, right to prompt legal assistance and the right to foster care, probation, education and vocational training programmes. The instruments have also been found to contain detailed guidance to assist State parties to reform their approaches to juvenile justice. Nevertheless, the study noted a slight weakness in the examined instruments and which is the characteristic of international laws generally. This is the use of phrases which permit deviation by the States and that are sometimes abused by States' authorities to violate the rights of detained juvenile delinquents. It was observed that to fully comply with the enumerated international

standards, States, including Tanzania, should put in place systems which are effective and rights-based in order to secure the welfare of juvenile delinquents.⁷⁶³

Chapter four attempted to assess the extent to which international standards analysed in chapter three are reflected in the laws of Tanzania governing juvenile justice. In that respect, Tanzania's laws concerned with protection of juvenile delinquents' rights were analysed and interpreted. It was found that the Government of Tanzania recognises that juvenile delinquents are one of the most vulnerable groups that need special treatment and protection of their legal rights throughout the justice system. This recognition has been manifested by the enactment of the Law of the Child Act, 2009 to domesticate the international standards on the rights of the child, including delinquent juveniles. The Government has also established the institutions such as a Juvenile Court, Retention Homes and an Approved School for the implementation of the Law of the Child Act.

These efforts aim at ensuring that juvenile delinquents are tried in a different court environment from those used for adult offenders, juveniles are detained in separate institutions before trial and if convicted, they are detained in the Approved School which is special for juvenile delinquents only. However, it was observed that Tanzanian laws relating to juvenile justice have numerous weaknesses compared with the international law standards. For example, it has been revealed that despite being the vital part of the criminal justice system, legislations such as the Penal Code, 1961, the Prisons Act, 1967 and the Police Force and Auxiliary Services Act, 1961 address the rights of juvenile delinquents just by the way, when dealing with the rights of criminal offenders generally.

With regard to the rights of detained juvenile delinquents, the study indicated that the Government's intention to ensure compliance with the international standards in this matter has been diluted by the legislators, since the legislations do not firmly required the detention of juvenile delinquents to be a matter of last resort and for the shortest appropriate time. Further, the laws do not compulsorily provide for free and accessible legal assistance for juvenile delinquents throughout criminal justice processes and the

⁷⁶³ Hammarberg, T., *supra* note 438.

laws still provide for inhuman and degrading treatments or punishments such as corporal punishment of juvenile delinquents. It is clear that where there are weaknesses in the laws, the practice can never be justifiable.

Chapter five dealt with the presentation, analysis and discussion of research findings so as to link the theoretical, legal and empirical part of the study and enable the researcher to draw conclusions based on research findings. The study established that apart from the weaknesses in the legal framework, there is also a disconnection between the laws and the practice relating to the protection of detained juvenile delinquents. As mentioned above, there are weaknesses in the laws of Tanzania on the protection of juvenile delinquents' rights. As a result, the practice is not even conforming to the said weak laws, but it goes astray, thus escalating the violation of detained juveniles' rights. Examination of Tanzanian practice regarding protection of detained juvenile delinquents' rights has shown that juvenile delinquents stay for a long time in detentions, mostly in adults' detentions where they are being mixed with adult offenders. They face treatment which does not suit their welfare and needs, they lack legal assistance and representation at all stages of the justice process, and they are denied aftercare programmes to prepare them for reintegration into the society after release from detentions.

Finally, chapter six presented a summary of the discussion, testing of hypotheses, key findings and the suggestions. The chapter revisited in general terms, the points explored in the previous chapters so as to uncover the areas which need intervention for the purpose of improving protection of detained juvenile delinquents' rights in Tanzania.

6.2 Testing of Hypotheses

This detailed study made through analytical and empirical methods clearly substantiates the following hypotheses which were formulated for the study.

- (i) Detention of juvenile delinquents is not a measure of last resort and for the shortest appropriate period of time:
 - (a) Children are held in detentions for petty offences such as loitering, and very little effort is made to release them on bail considering their welfare as children.

- (b) Juvenile delinquents are held in detentions for up to four years before their cases are completed.
 - (c) There is slow investigation of juvenile cases which causes delays in completion of their cases.
 - (d) There is lack of transport facilities to take children to courts whenever they are required.
 - (e) Juvenile delinquents are serving long sentences of imprisonment without possibility of release; some of them have been imprisoned for life.
 - (f) Juvenile justice stakeholders are not conversant with national and international juvenile laws.
- (ii) There is no total separation of child delinquents from adult offenders throughout criminal justice processes:
- (a) Most of the detained juvenile delinquents are held in adult prisons.
 - (b) Juveniles detained in police stations are held in the same cells with adults.
 - (c) When children are transported to courts, they are not separated from adult detainees.
 - (d) In the detentions, children are not separated according to their age or according to categories of offences committed or alleged to have been committed.
 - (e) In prisons, children are not completely separated from adult prisoners.
 - (f) Pretrial juvenile delinquents are not separated from post trial juveniles.
- (iii) Detained juvenile delinquents are not treated with humanity and with respect for their welfare as children:
- (a) Children held in police stations and prisons were overcrowded and the standard of hygiene was poor.
 - (b) There was no guarantee of food for children held in police stations while in prisons, children were offered meals only twice per day.
 - (c) There are no appropriate medical services for children in detentions.
 - (d) In police stations, children sleep on bare floor with no materials to cover themselves.
 - (e) In prisons, there were not enough uniforms for detained juveniles and sleeping materials for children were inadequate.

- (f) Children in detentions suffer from beatings and corporal punishment as a way of disciplining them.
- (g) Juveniles detained in police stations are tortured in order to confess to the offences and their ages are altered so as to justify the violation of their rights as children.
- (h) In prisons, juveniles suffer from inhuman treatments such as reduction of meal rations, solitary confinement for up to fourteen days, denial of food up to two days, denial of being visited, hard labour which includes carrying heavy loads, agricultural work and cutting down trees.
- (i) Cases of sexual abuse of juveniles have been reported in prisons, but these cases were hard to prove, so no action has been taken.
- (iv) Juvenile delinquents have no access to free legal assistance and representation during criminal justice processes:
 - (a) There is no Government-funded legal aid for juvenile delinquents throughout the criminal justice process.
 - (b) Juvenile delinquents are not provided with free legal representation by advocates except where one is charged with a capital offence.
- (v) There are no rehabilitation and reintegration programmes for detained juvenile delinquents to prepare them for living in the society after release from detentions.
 - (a) In prisons where most of the juveniles are held, there are no primary and secondary education programmes for detained juveniles.
 - (b) Apart from Mbeya Retention Home, in all other Retention Homes there are no primary and secondary education programmes for detained children.
 - (c) In detentions, there are no vocational training programmes to prepare children for life after release.

6.3 Key Findings of the Study

This study has established that the Tanzanian laws and practice are ineffective in protecting the rights of detained juvenile delinquents. The laws have failed to prescribe a reasonable time limit within which juvenile cases must be finalised so as to achieve the shortest duration for pretrial detentions as required by international standards. The time limit stipulated by the Law of the Child Act, 2009 has proved impracticable. Concerning

post trial detention of juveniles, the Law of the Child Act, 2009 has failed to accommodate the reality that most of juvenile delinquents are detained in prisons, not in the Approved School. The findings have shown that among three hundred sixty three (363) children who were held in various detentions at the time of the data collection, only twenty three (23) children were detained in the Approved School.

Consequently, the object of the Law of the Child Act, 2009 that detention of juvenile delinquents must be used only as a measure of last resort, for the shortest appropriate period of time and at the Approved School, has not been achieved. Therefore, the provisions of the Law of the Child Act, 2009, addressing the duration of detention for children detained in the Approved School, are relevant only for the few children who are held in that facility, leaving out the large number of children who are detained in Prisons. Likewise, the laws still allow corporal punishment of detained children and there are no legal mechanisms for juvenile delinquents to access free legal assistance and representation especially, when they are facing criminal charges not related to capital offences. The study has proved that in practice, still juvenile delinquents are held in detentions for a long time during both pretrial and post trial.

One of such examples is a case of a sixteen years juvenile who in 2010 was arrested and detained in Segerea prison until 2013 when his case was transferred from Temeke District Court to Kisutu Juvenile Court, and then he was removed from Segerea prison to Upanga Retention Home. Juveniles are held in adult prisons and they are not separated to minimise the violation of their rights and the possibility of being induced to become hardened criminals. The study has confirmed that children in detentions are beaten by adult offenders and the detention staff. They also lack appropriate food and medical services while in detentions, although they have opportunities to be visited, they watch televisions and listen to the radios.

The study concludes that despite numerous efforts of the Government to improve the criminal justice system, Tanzania has not yet been able to fully comply with the

international standards in the protection of detained juvenile delinquents' rights. The main reason explained for this weakness is lack of financial and human resources hence, no infrastructure for handling juvenile delinquents. This research has however revealed that the major reason for non-compliance with international standards is the poor administration of juvenile justice coupled with lack of the actual implementation of the laws governing juvenile justice in Tanzania.

6.4 Suggestions

Tanzania has ratified different international instruments relating to the rights of children in conflict with the law. By doing so, the Government has undertaken a legal obligation to comply with the standards illustrated in those instruments including the provisions relating to the protection of detained juvenile delinquents' rights. This research acknowledges the Government's efforts toward protection of children's rights by enacting the Law of the Child Act, 2009 and its Regulations.⁷⁶⁴ To a large extent, the Law of the Child Act, 2009 complies with the requirements of the United Nations Convention on the Rights of the Child, 1989 although the former needs some amendments to make it perfect. The practice has however indicated glaring inadequacies in protection of juvenile delinquents' rights. For example, the requirement that detention of juvenile delinquents should be used only as a measure of last resort and for the shortest period of time has become difficult to implement in Tanzania.

As literature has indicated, juvenile delinquency is a problem in all parts of the world. Even in economically strong countries like the USA, still they are concerned with this problem. Like many African countries, Tanzania's ability to fully comply with international standards on protection of juvenile delinquents' rights is limited by numerous factors which include the historical and economic background of the country. Nevertheless, the Constitution and other laws, though not in full compliance with the international standards, can fairly protect juvenile delinquents in Tanzania if the law enforcement agencies observe and implement these laws effectively. The researcher

⁷⁶⁴ Example, Law of the Child, (Retention Homes) Rules, G.N. No. 151 of 2012, Law of the Child, (Children's Homes – Amendment) Regulations, G.N. No. 9 of 2015, and Law of the Child, (Juvenile Court Procedure) Rules, G.N. No. 182 of 2016.

concurr with the view that to successfully protect juvenile delinquents, the country needs to begin with prevention of delinquency so as to minimise the number of children conflicting with the law.⁷⁶⁵ There must also be Governmental commitment to fulfill children's rights, ensure legislation enforcement, change of attitudes and practices toward children delinquency, increasing the capacity of those dealing with juvenile delinquents, and have effective monitoring mechanism to ensure juveniles' protection throughout the justice processes.⁷⁶⁶

The researcher suggests for further studies to, firstly, investigate the implementation of the laws of Tanzania on protection of detained juveniles' rights, especially the Proposed Constitution of 2014, when it becomes operative, and the Legal Aid Act, 2017, which is very recent and it would be premature to evaluate its implementation in this study. The second suggestion is for a further research on the causes for the imposition of long term sentences of imprisonment to juvenile delinquents by the courts in Tanzania contrary to the laws. Thirdly, the Ministry of Health, Community Development, Gender, Elderly and Children is urged to establish Retention Homes in all zones of the country and one more Approved School with the same capacity and facilities as Irambo Approved School which is in Mbeya region. Fourth, the researcher suggests to the Ministry of Constitutional and Legal Affairs to establish the Government-funded legal aid scheme for juvenile delinquents to ensure free and accessible legal assistance and representation to juvenile delinquents. These are general suggestions.

Further, the following are suggestions to specific organs dealing with the administration of juvenile justice in Tanzania. These suggestions are in addition to the recommendations already made by the Commission for Human Rights and Good Governance in 2011, but they were not fully implemented.

⁷⁶⁵ United Nations Economic and Social Council, UNICEF Child Protection Strategy, Executive Board Annual Session, 3rd -5th June 2008, E/ICEF/2008/5/Rev.1, p. 4.

⁷⁶⁶ *Ibid.*

6.4.1 Suggestions to the police

It is suggested that the Police Force:

- (a) Construct juvenile cells in the police stations.
- (b) Ensure that children are separated from adult detainees in police stations.
- (c) Establish a transparent and accessible complaints mechanism in police stations.
- (d) Ensure that all allegations of torture and inhuman treatment by police officers are investigated and officers who are involved in these allegations disciplined or prosecuted.
- (e) Cooperate with Tanganyika Law Society and all legal aid providers to facilitate legal assistance and representation to juvenile delinquents at all stages of the criminal justice process.
- (f) Establish the Police Gender and Children's Desks in all police stations.
- (g) Ensure that juvenile delinquents are interrogated in the presence of their legal representatives.
- (h) Allocate adequate resources to facilitate the transportation of juvenile delinquents from police stations to courts so that their cases are completed within the statutory time limits.
- (i) Ensure that juvenile delinquents are provided with basic needs such as food and medical services while in detentions, especially the police detention.
- (j) Cooperate with the Commissioner for Social Welfare to transfer juveniles from police stations to Retention Homes.

6.4.2 Suggestions to the prison authorities

It is suggested that the prison authorities:

- (a) Ensure a complete separation of juvenile delinquents from adult offenders at all times and places within the prisons.
- (b) Allocate adequate resources to facilitate the transportation of detained juveniles from prisons to courts so that their cases are dealt with within the statutory time limits.
- (c) Protect juvenile delinquents from all forms of abuse while in prison.

- (d) Provide prison officers with in-service training on the Law of the Child Act, 2009 and child rights generally.
- (e) Refuse the receipt and admission in prison any person below the age of eighteen years.
- (f) Cooperate with the Commissioner for Social Welfare to transfer juveniles from prisons to Retention Homes and the Approved School.

6.4.3 Suggestions to the Commissioner for Social Welfare

It is suggested that the Commissioner for Social Welfare:

- (a) Allocate adequate resources to facilitate the transfer of children from the Retention Homes to courts so that their cases are reviewed and dealt with within the statutory time limits.
- (b) Encourage maximum use of Retention Homes by the judiciary in the areas where there are Retention Homes.
 - (c) Collaborate with legal aid providers to offer legal assistance and representation to juvenile delinquents throughout the criminal justice processes.
 - (d) Develop comprehensive rehabilitation and reintegration programme for juveniles at the Retention Homes and Approved School.
 - (e) Increase the number of social welfare officers at all stages of criminal justice for juveniles delinquents so as to speed up juvenile cases.
 - (f) Abolish the use of corporal punishment in Retention Homes and the Approved School as a disciplinary mechanism.
 - (g) Cooperate with the Police Force and Prison Authorities to transfer juveniles from police stations and prisons to Retention Homes and the Approved School.

6.4.4 Suggestions to the Judiciary

It is suggested that the judiciary:

- (a) Raise the awareness among the judicial officers in order to stop the pretrial detention of juvenile delinquents in adult prisons in the areas where there are Retention Homes.

- (b) Promote the use of non-custodial measures among the judicial officers to avoid sending juvenile delinquents to custodies.
- (c) Raise the awareness amongst magistrates and judges that the Law of the Child Act, 2009 prohibits imprisonment of juvenile delinquents.
- (d) Appoint adequate number of resident magistrates to preside over juvenile cases.
- (e) Provide training on the United Nations Convention on the Rights of the Child, 1989 to magistrates presiding over juvenile cases.
- (f) Ensure that the magistrates and judges have up-to-date information about vacancies in Retention Homes and the Approved School before sentencing juvenile delinquents.
- (g) Expedite juvenile cases to minimise the violation of their rights caused by long pretrial detentions.
- (h) Extend the application of the Juvenile Court Rules, 2016 to all courts dealing with juvenile cases.

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APPENDIX 1: Focus Group Discussion Guide for Detained Juveniles

Research title: *Protecting the Rights of Detained Juvenile Delinquents: Tanzania's Compliance with International Standards*

1. Which offences are you accused of/ convicted for?
2. How did you record your statement in police station? Who was present?
3. Were you taken to court immediately after arrest?
4. Are you represented in courts during your cases? Who represents you?
5. How long did it take for your case to be finished? Why did it take such time?
6. Are there children imprisoned for life or sentenced to death in this detention?
7. Are there separate dormitories for children in this detention?
8. Are you visited by parents, guardians or adult family members? How many times per month?
9. Are there formal educational, vocational or training programmes for children in this detention?
10. How are you treated if you are sick while in this detention?
11. In which circumstances can there be acts of beating, sexual harassment, corporal punishment or inhuman treatment of children in this detention, and who does these? Give examples of such acts.
12. Do you have enough clothes and sleeping materials? What about detergents?
13. How are you transported from detention to court and return?
14. How many times do you get meals per day in this detention? Give examples of types of food offered. What about quantity, is the food adequate?
15. Do you read news papers, watch televisions or listen to the radios in this detention?

APPENDIX 2: Interview Guide for Magistrates

Research title: *Protecting the Rights of Detained Juvenile Delinquents: Tanzania's Compliance with International Standards*

1. Which offences are alleged to have been committed by most of the juveniles brought to this court?
2. Are juvenile delinquents entitled to any legal protection during the justice processes? What are the examples of such rights?
3. Have you ever committed a juvenile delinquent to diversion scheme instead of criminal justice process? Why?
4. In your estimation, for how long do children cases take to be finalised? What causes them to take such time?
5. During the justice process of a juvenile, where is he or she placed? Is it necessary to detain them before and during their trial?
6. Can custodial sentence of juvenile delinquents be legally avoided in Tanzania? How can this be achieved?
7. In which circumstances can a juvenile delinquent be imprisoned for life or sentenced to death?
8. What is your opinion about this?
9. In sentencing female offenders, can breast-feeding be a factor for imposing non-custodial sentence? Is this provided for in our laws?
10. Are juvenile delinquents represented during the justice processes? Who does this?
11. Are issues of juvenile justice incorporated in the training of magistrates?
12. How did you learn issues of juvenile justice and handling of children delinquents?
13. What do you consider to be the legal challenges in dealing with juvenile delinquents?
14. What is the best way of handling juvenile delinquents in the challenging environment?

APPENDIX 3: Interview Guide for Police Officers

Research title: *Protecting the Rights of Detained Juvenile Delinquents: Tanzania's Compliance with International Standards*

Urafiki Police Station, Buguruni Police Station, Arusha Central Police Station, Babati Police Station, Mtwara Central Police Station, Kigoma Central Police Station, Kasulu Police Station and Mbeya Central Police.

1. How many children are currently detained in this police station? How many are girls and how many are boys?
2. In your estimation, for how long do children stay in this station before they are taken to court? What causes them to stay for such duration before they are taken to court?
3. Are children informed of their rights at the time of arrest and detention in police stations? What are the examples of such rights?
4. How do parents, guardians or relatives know that the child has been arrested and detained at police station?
5. Who are usually present at police station during the interview of a juvenile delinquent?
6. What happens if the juvenile delinquent is not accompanied by any person during his interview at police station?
7. What are the ways of assisting juveniles to get legal assistance while at police stations?
8. Are there separate cells for children in this police station? Where are children placed in this station?
9. What happens if a juvenile delinquent gets sick while at police station?

10. In which circumstances can there be acts of beating, sexual harassment, corporal punishment or inhuman treatment of children in this police station?
11. How are the sleeping materials for children in this station?
12. How are children transported from police station to court and return?
13. How many times do children get meals per day in this police station? Give examples of types of food offered. What about quantity, is the food adequate?
14. Do children watch television, listen to the radio and read newspapers while detained in this station?
15. How many children are detained with their mothers in this police station? How are they cared for in terms of meals, shelter and medical facilities?
16. Are issues of juvenile justice incorporated in the training of police officers?
17. What do you consider to be the challenges of protecting the rights of juvenile delinquents in this police station?

APPENDIX 4: Interview Guide for Prison Officers

Research title: *Protecting the Rights of Detained Juvenile Delinquents: Tanzania's Compliance with International Standards*

1. How many children are currently detained in this prison?
2. In your estimation, for how long do children stay in this prison before they are sentenced?
3. Which offences are most children in this detention accused of or convicted for?
4. Are there children imprisoned for life or sentenced to death in this prison?
5. Are there separate cells for children in this prison? (What do you consider to be the degree of separation?):
 - (a) Children are held in the same rooms, wards or cells with adults,
 - (b) Children are held in separate rooms or cells from adults but share facilities such as washing or dining areas with adults,
 - (c) Children are held in a separate section from adults and have separate facilities,
 - (d) This institution is for children only.
6. Are children in this detention visited by parents, guardians or adult family members? How many times per month?
7. Are there formal educational, vocational or training programmes for children in this prison?
8. How do you rate the level of medical care for children in this prison, and what makes you think so?
 - (a) Does not exist at all,
 - (b) Exists but very poor,

(c) Exists and fairly good,

(d) Exists and excellent.

9. What are the examples of sexual harassment, corporal punishment or inhuman treatment of children in this prison? Who does these?
10. Are children clothing adequate in this prison? How about sleeping materials, are they appropriate?
11. In case of sickness or injury of a detained child, how is he or she treated?
12. How are children transported from prison to court and return?
13. How many times do children get meals per day in this prison? Give examples of types of food offered. What about quantity, is the food adequate?
14. Do children read news papers, watch televisions or listen to the radios in this prison?
15. Are there educational or vocational training programmes in this prison to prepare children for life after their release?
16. How many children are detained with their imprisoned mothers in this prison?
How are they cared for in terms of meals, shelter and medical facilities?
17. Are issues of juvenile justice incorporated in the training of prison officers? Are there in-service courses on this aspect?
18. What do you consider to be the challenges of protecting the rights of juvenile delinquents in this prison?

APPENDIX 5: Interview Guide for Retention Homes and Approved School Staff

Research title: *Protecting the Rights of Detained Juvenile Delinquents: Tanzania's Compliance with International Standards*

1. How many children are currently detained in this Retention Home/Approved School?
2. In your estimation, for how long do children stay in this detention before they are sentenced? What causes them to stay for such time?
3. Which offences are most of the children in this facility accused of/ convicted for?
4. Are there children imprisoned for life or sentenced to death in this Retention Home/Approved School?
5. Are juvenile delinquents represented in courts during their cases? Who represents them?
6. Are there separate dormitories for children in this Retention Home/Approved School?
 - (a) Children are held in the same rooms or wards with adults,
 - (b) Children are held in separate rooms or wards from adults but share facilities such as washing or dining areas with adults,
 - (c) Children are held in a separate section from adults and have separate facilities,
 - (d) This institution is for children only.
7. Are children in this detention visited by parents, guardians or adult family members? How many times per month?
8. Are there formal educational, vocational or training programmes for children in this Retention Home/Approved School?

9. How do you rate the level of medical care for children in this detention, and why do you find so?
- (a) Does not exist at all,
 - (b) Exists but very poor,
 - (c) Exists and fairly good,
 - (d) Exists and excellent.
10. In which circumstances can there be acts of beating, sexual harassment, corporal punishment or inhuman treatment of children in this Retention Home/Approved School? Give examples.
11. Are children clothing adequate in this Retention Home/Approved School? How about sleeping materials, are they appropriate?
12. How are children transported from Retention Home/Approved School to court and return?
13. How many times do children get meals per day in this detention? Give examples of types of food offered. What about quantity, is the food adequate?
14. Do children read news papers, watch televisions or listen to the radios in this Retention Home/Approved School?
15. What do you consider to be the challenges of protecting the rights of juvenile offenders in this Retention Home/Approved School?

APPENDIX 6: Interview Guide for Public Prosecutors, Private Advocates, Parents, CHRAGG Commissioner, NGO Officials, Lecturers and LRC Lawyers

Research title: *Protecting the Rights of Detained Juvenile Delinquents: Tanzania's Compliance with International Standards*

1. Which offences are alleged to have been committed by most of the juvenile delinquents?
2. Are juvenile delinquents entitled to any legal protection during the justice processes? What are the examples of such rights?
3. Are juvenile delinquents committed to diversion scheme instead of criminal justice process? Why?
4. In your estimation, for how long do children cases take to be finalised? What causes them to take such time?
5. During the justice process of a juvenile, where is he or she placed? Is it necessary to detain them before and during their trial?
6. Can custodial sentence of juvenile delinquents be legally avoided in Tanzania? How can this be achieved?
7. In which circumstances can a juvenile delinquent be imprisoned for life or sentenced to death?
8. What is your opinion about this?
9. In sentencing female offenders, is breast-feeding considered as a factor for imposing non-custodial sentence? Is this provided for in our laws?
10. Are juvenile delinquents represented during the justice processes? Who does this?
11. Are issues of juvenile justice incorporated in the training of lawyers generally?
12. How did you learn issues of juvenile justice and handling of children delinquents?
13. What do you consider to be the legal challenges in dealing with juvenile delinquents?
14. What is the best way of handling juvenile delinquents in the challenging environment?

APPENDIX 7: Observation Guide

During visits in detentions, the researcher noted the following aspects and afterwards they were written as field notes:

1. The standard of hygiene in detentions, quality of food offered to children, treatment of detained juveniles, accommodation, social services provision and sports facilities.
2. Number of children in pre-trial stage compared to the number of children in post trial stage.
3. Time spent in detention by children before sentencing.
4. Time spent or expected to be spent in detention by children after sentencing.
5. Percentage of children in detention not wholly separated from adults.
6. Percentage of children in detention who have been visited by parents, guardian or an adult family member in the last 3 months.
7. Percentage of children who are being represented or had legal representation during their cases.
8. Existence of formal education or vocational training programmes for children in detentions.

LIST OF PUBLICATIONS