

**TOWARDS THE REALISATION OF THE RIGHT TO A FAIR HEARING OF CHILD OFFENDERS
IN POST-CONFLICT SIERRA LEONE**

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DECLARATION

I, **Jennifer Nellie Beckley**, declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

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DEDICATION

To the men in my life...

- Daddy - because you are my inspiration and my role model
- Ernest - because you understand and that means a lot to me
- Stanley - because you care and I appreciate that

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I would first like to thank God for without His grace and mercy I would not have made it this far. I am greatly indebted to the Center for Human Rights, University of Pretoria, for affording me the opportunity to undertake this course. Special thanks go to Prof Viljoen and Prof Michelo Hansungule for their assistance during the program.

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To my friend Gladys Mirugi-Mukundi and all the house mates at 1214 South Street, I say 'thank you' for the friendship and good times we shared. To the LLM class of 2006, I have nothing but love for you all. God bless.

Lastly and most importantly, I am grateful to my husband for his love and support throughout my study. Ernest, I would not have done this without you. Thank you very much.

LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CAT	Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment
CHR	Commission on Human Rights
CPA	Criminal Procedure Act
CPC	Criminal Procedure Code
CRC	Convention on the Rights of the Child
ECHR	European Court of Human Rights
FGM	Female Genital Mutilation
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organisation
JOP	Justice of the Peace
JSDP	Justice Sector Development Programme
NacWAC	National Committee for War-affected Children
P.I	Preliminary Investigation
UDHR	Universal Declaration of Human Rights
UN	United Nations (Organisation)

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CHAPTER ONE

INTRODUCTION

1.1 Background of the study

It is established under international law that children are rights bearers and that they do not lose their claim to human rights even if they become involved in crime.¹ Rather, international law recognises that children are vulnerable and in need of special care and protection.² As such, special standards accrue to children who are involved in criminal activities to safeguard them from the full rigours of the criminal justice system until they attain a certain age when they are deemed capable of taking personal responsibility for their actions. These special standards characterise the juvenile justice system and distinguishes it from adult criminal justice by virtue of its educational approach.³ Thus, under the juvenile justice system, specially constituted courts, procedures and sanctions exist, which are structured to take into account several factors such as the age, understanding and experience of child offenders with the primary aim of reforming and rehabilitating them.

However, under international law diversion is stated as a preferable response to criminal justice.⁴ Thus, international law encourages states to implement strategies to ensure that children are diverted out of the courts.⁵ Apologists of diversion contend that child delinquency is usually a phase in a child's normal development which must be addressed in a way that will not reinforce the child's criminal proclivities. They submit that formal and technical legal procedures stigmatise children and stifle their development.⁶ On the other hand, it is contended that society should be protected from the ills of child delinquency and that legal proceedings make child offenders accountable for their

¹ J Fortin *Children's rights and the developing law* (2003) 12.

² Preambles to the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) respectively.

³ M Nowak *U.N. covenant on civil and political rights: CCPR Commentary* (1993) 265-266.

⁴ Diversion is a mechanism for removing children from juvenile court processes before they are formally summoned or prosecuted.

⁵ Article 40(3)(b) of the CRC.

⁶ Fortin (n 1 above) 546.

wrongdoings, foster their effective reform and reinforce their respect for the human rights of others.⁷ In this regard, policy makers are constantly faced with the challenge of striking a balance between protecting societies from child delinquency and protecting the welfare of the child. The debate as to whether or not child offenders should be subjected to court proceedings goes beyond the scope of this study. However, in recognition of the fact that children are invariably subjected to criminal proceedings the need that their rights be protected and guaranteed during trial becomes essential particularly in a post-war setting as is the case with Sierra Leone. It is with this consideration in mind that the study develops.

Sierra Leone is emerging from a ten-year civil war.⁸ One of the major outcomes of the civil war is that the conflict turned out an alarmingly large number of displaced and orphaned children who have become 'street children'. Given the fact that Sierra Leone lacks the infrastructure to accord them alternative parental or foster care, it appears that these children have become bound to their fates.⁹ In a survey carried out by the National Committee for War-affected Children (NacWAC),¹⁰ it is reported that there are 9955 street children in Sierra Leone, 65% of which are internally displaced.¹¹ Furthermore, 53.5% of street children have at least one parent dead or missing while 14% are orphans.¹² This state of affairs compel these street children to resort to thievery, prostitution and drug trafficking in order to eke out a living, which eventually brings them in conflict with the law. As such, there has been a dramatic increase in child delinquency in Sierra Leone since the inception of the war. Indeed, it is estimated that 90% of child offenders in Sierra Leone's Capital of Freetown are street children. In 2003, 212 children were found to be in conflict with the

⁷ M Bloomquist & M Frost 'Punishment, accountability and the new juvenile justice' (1992) 43 *Juvenile and Family Court Journal* 1-10.

⁸ The civil war started in 1991 by the Revolutionary United Front (RUF) under the leadership of Foday Sankoh. It was officially declared over by the reinstated President of Sierra Leone, Ahmad Tejan Kabbah on 18 January 2002: <http://news.bbc.co.uk/2/hi/special_report/1999/01/99/sierra_leone/251251.stm>(accessed 1 September 2006).

⁹ Justice Sector Development Programme (JSDP) '*Juvenile Justice Strategy Workshop Report*' (2006) 2 para 4.

¹⁰ NacWAC Report 'Rapid assessment survey on street children and other war-affected children in Sierra Leone' January 2004.

¹¹ Sierra Leone has a population of 5.5 million people, one-third of which were displaced by the ten-year civil war: CIA World Fact Book on Sierra Leone: <<https://www.cia.gov/cia/publications/factbook/geos/sl.html>>(accessed 9 October 2006).

¹² As above.

law and many of them were detained by the police. By 2004, the number of child offenders in police custody had increased to 1184.¹³

Furthermore, the economic and social status of street children make them susceptible to criminal and exploitative influences, which inevitably bring them into conflict with the law.¹⁴ Thus for instance, a significant number of street children are often arrested and brought before criminal courts for 'offences' like loitering and begging, thereby making them status offenders.¹⁵ Against this background, the need to safeguard their wellbeing becomes a pressing social concern. Additionally, the need for children to be protected by the law and to be able to claim their rights and freedoms under a system of social justice becomes even more urgent. Social justice for children especially street children is a pre-condition to juvenile justice which if not met, can greatly compound the existing *status quo*.¹⁶

Although the laws of Sierra Leone provide for street children to be 'arrested' and brought before a Juvenile Court, it also imposes a duty on the court to enquire into the circumstances of the child and to make such orders that would ensure and enhance the child's care and protection in the community.¹⁷ Such orders include *inter alia*, a direction that the child be sent to an Approved School until he or she attains the age of majority.¹⁸ However, as the only Approved School in Sierra Leone lacks the capacity to rehabilitate child offenders, children are usually reprimanded and let off with a warning or incarcerated; often times with adult offenders.¹⁹ In many cases upon release, these children often resort to the same activities for which they were arrested. As such, a repetitive cycle is created whereby street children are usually arrested, detained and tried several times for the

¹³ NacWAC Report (n 10 above).

¹⁴ AD Viccica 'The promotion and protection of children's rights through development and recognition of an international notion of juvenile justice and its child-centered perspective in the United Nations' (1989) 58 *Nordic Journal of International Law* 7.

¹⁵ JSDP Report (n 9 above).

¹⁶ Viccica (n 14 above) 70.

¹⁷ Section 27 Children and Young Persons Act Cap 44 of 1960.

¹⁸ As above.

¹⁹ Defence for Children International Final Report 'The administration of juvenile justice in the Western Area of Sierra Leone' September 2003–August 2004.

same offences.²⁰ This clearly indicates the culture of injustice and disregard for the welfare of children that is prevalent in post-conflict Sierra Leone.

Furthermore, fundamental institutional and legislative inadequacies in the juvenile justice system of Sierra Leone provide a grey area for the systematic violation of the rights of children in conflict with the law to a fair hearing.²¹ For instance, one of the requirements of a fair hearing is that children should be tried in separate Magistrate Courts (usually referred to as Juvenile Courts) that sit in a different building from those used by the ordinary courts.²² This requirement is based on the notion that children in conflict with the law should receive special treatment that is separate and distinct from that which is given to adults, so as to promote their sense of dignity and worth as well as their reintegration into society. Additionally, it also ensures that the child's identity during trial is protected from the public in order to avoid stigmatisation. However, the fact that there is only one make-shift Juvenile Court in Freetown, which lacks well-trained Magistrates and Court Officials and which in addition to dealing with other cases also handles children's matters, means that juvenile proceedings are never held *in camera* as required by law, thereby violating of the right of child offenders to a fair hearing.²³

The legal system of Sierra Leone comprises of customary law and general law. Customary law consists of traditional norms and covers every aspect of daily life such as marriage, divorce, children's issues and death.²⁴ The norms of customary law differ from one tribe to another and because they are generally uncodified, it is usually difficult to ascertain what norm governs a specific issue at any point in time. Under customary law, child discipline is administered by the family or the community. Within the community, children are disciplined by the head of the community (usually the Chief) in an informal setting that encourages them to participate actively. In

²⁰ JSDP Report (n 9 above).

²¹ Country Reports on Human Rights Practices (2004) released by the Bureau of Democracy, Human Rights and Labor in 2005 reported several violations of the rights of children who are in conflict with the law. Among these were lack of access to justice and a fair trial. The report cited the poor state of the judiciary, delay in justice and backlog of cases as some of the factors which limit the right of children to a fair trial: <<http://www.state.gov.ig/drl/rls/hrrpt/2004/41635.htm>>(accessed 11 March 2006).

²² Although this requirement is provided for under the law of Sierra Leone, it is has not been met. This represents one of the numerous disparities that exist between what the law stipulates and what actually happens in practice: see section 3(1) Children and Young Persons Act 1960.

²³ OR Wilson '*Juvenile justice in Sierra Leone*' (2004) 25.

²⁴ B Thompson 'Child abuse in Sierra Leone: Normative disparities' (1991) 5 *International Journal of Law and the Family* 13.

such a setting, formal rules of procedure that take into account fair hearing rights are not recognised or applicable. Rather, traditions and customs influence the decision that would reform the child.

The general law of Sierra Leone consists of common law and statutes that were inherited from Britain.²⁵ It is generally codified and applied within the formal court setting. Under the general law, the primary legislation that deals with children in conflict with the law is the Children and Young Persons Act (Cap 44).²⁶ This legislation does not only conflict with other domestic laws but also deviates from standards²⁷ laid down by major international instruments on child protection to which Sierra Leone is a party. Some of these international instruments include the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC) and the International Covenant on Civil and Political Rights (ICCPR).²⁸

Sierra Leone is a dualist system.²⁹ Thus, for international law to become part of its domestic law, it must be incorporated into domestic law by an Act of Parliament.³⁰ In February 2000, the CRC-Committee emphasised the need for Sierra Leone to develop an overall strategy for the effective protection of children's rights.³¹ Pursuant to that, the government of Sierra Leone in March 2005 indicated its intention to domesticate the CRC inline with its obligations under international law.³² In this regard, the Ministry of Social Welfare, Gender and Children's Affairs of Sierra Leone (the Ministry) has drafted a Child Rights Bill (the Bill), which may hopefully be tabled before Parliament by the end of 2006.³³ The Bill incorporates all existing domestic laws on children and is aimed at

²⁵ As above.

²⁶ Children and Young Persons Act Cap 44 of 1960.

²⁷ JSDP Report states that the laws which deal with child offenders are "inadequate" and "out-dated" and "do not conform to international standards" (n 9 above).

²⁸ Sierra Leone was the 7th country in the world to sign the CRC; it ratified the CRC in 1990; the ACRWC in 2002 and the ICCPR in 1990.

²⁹ Section 40(4)(h) of the Constitution of Sierra Leone Act 6 of 1991 states that Sierra Leone is a dualist system. Under the dualist system international law and municipal law are regarded as two separate systems of law in terms of applicability.

³⁰ As above.

³¹ See Concluding Observations/Comments of the CRC-Committee: Sierra Leone 2000 CRC/C/15/Add.116 para 9.

³² 'After CEDAW Convention on the Rights of the Child' *Juvenile Voice* Vol. 2 Issue 1 March 2005 3.

³³ As above.

strengthening the legislative and institutional framework relating to the protection of children's rights and the administration of juvenile justice in Sierra Leone. Furthermore, the Ministry has completed a Draft National Policy on Child Wellbeing, which has been submitted to Parliament for assent. The aim of the Policy is the progressive and maximum attainment of the survival, development, participation and protection of every child in Sierra Leone. It is envisaged that the Policy together with other laws on children will enhance the promotion and protection of children's rights generally.³⁴

Under international law, children in conflict with the law are entitled to a fair hearing.³⁵ The right to a fair hearing guarantees protection against abuse of state power through established safeguards that are designed to afford due process. Indeed, the importance of the right to a fair hearing has led some scholars to posit that it has attained the status of international customary law from which states should not be allowed to deviate.³⁶ The right to a fair hearing lies at the heart of a fair trial. However, the right to a fair hearing is distinct from the right to a fair trial and is much wider in scope.³⁷ The right to a fair trial consists of specific guarantees which are articulated under international law. Thus for instance, the right to a fair trial of children in conflict with the law are the set of 'minimum guarantees' that are enshrined under article 40(2)(b) of the CRC.³⁸

On the other hand, the right to a fair hearing refers to principles that have been developed progressively to assess not only the fairness of the due process but also the fairness of the legal proceedings as a whole.³⁹ Thus, the right to a fair hearing encompasses all the elements of a fair trial as well as formulated guarantees viz, access to a court, equality of arms and equality before

³⁴ Sierra Leone's Country Report to the CRC-Committee on the implementation of the Convention on the Rights of the Child (2005) para 58-61: <http://www.ohchr.org/english/bodies/crc/docs/AdvanceVersions/sierra_leone2nd.doc> (accessed 9 October 2006).

³⁵ Articles 40 of the CRC & 17 of the ACRWC respectively.

³⁶ D Harris 'The right to a fair trial in criminal proceedings as a human right' (1967) 16 *International and Comparative Law Quarterly* 353.

³⁷ C Beyani 'The right to a fair trial in an international context' in Lawyers Committee for Human Rights (ed) *Islam and justice: Debating the future of human rights in the Middle east and North Africa* (1997) 127-128.

³⁸ Under article 40(2)(b) of the CRC 'minimum guarantees' include *inter alia*, the right to presumed innocent, the right of appeal and the right to a private trial. These guarantees are deemed as 'basic procedural safeguards' of fair trial under Rule 7 of the Beijing Rules.

³⁹ Beyani (n 37 above).

the court.⁴⁰ As the right to a fair hearing embodies elements of a fair trial (herein after called express rights) as well as formulated guarantees (herein after called implied rights), this study will analyse the right of child offenders to a fair hearing in the light of these express and implied rights, using post-conflict Sierra Leone as a case study. Furthermore, for purposes of consistency, any reference to a child in this study means 'any person below the age of 18 years'.

1.2 Research question

Has the ten-year civil conflict in Sierra Leone affected the right to a fair hearing of children in conflict with the law?

1.3 Hypotheses

The study is based on the following hypotheses:

- a) That the laws of Sierra Leone on the administration of juvenile justice are at variance with regional and international treaty provisions.
- b) That the ten-year civil war in Sierra Leone has affected the right of children in conflict with the law, particularly street children to a fair hearing.

1.4 Objectives of the study

The objectives of this study are as follows:

- a) To assess the workability of the domestic laws of Sierra Leone that deal with child offenders and to determine their compatibility with regional and international treaty provisions
- b) To evaluate the problems associated with lack of access to fair hearing of child offenders in post-conflict Sierra Leone
- c) To enquire into bridging the gap between normative standards of domestic and international laws on the one hand and actual practices on the other.

⁴⁰ These guarantees were developed by the Human Rights Committee (HRC) and the European Court of Human Rights (ECHR) in a series of cases and will be discussed in-depth under subsequent chapters in this study. See for e.g. *Moraël v France* (207/1986) UNHR Committee (4 November 1988) 210 & *Kraska v Switzerland* (1993) 18 EHRR 188 para 30.

1.5 Research methodology

The study is primarily conducted using the desk method and it is analytical. Under the desk method, international and regional human rights instruments as well as domestic legislations of Sierra Leone on the administration of juvenile justice will be consulted and examined. Articles, books, newspapers and information gathered from the internet will also form part of the study. The scope of the study will embrace a number of related issues including the current state of the laws on juvenile justice in Sierra Leone, the legal and social mechanisms that exist for the administration of juvenile justice and the extent to which they conform to international standards.

1.6 Literature review

Issues pertaining to the administration of juvenile justice have been greatly exploited by legal scholarship. As such, literatures on juvenile justice are replete. Many of these literatures owe their renaissance to the writings of philosophers like Jeremy Bentham⁴¹ and John Stuart Mills⁴² who were among the first scholars to raise awareness on the subject. Since their time, scholarly works on juvenile justice continues to expand with each contribution addressing unique issues pertaining to the subject. Hence, juvenile justice has proven to be a versatile topic for debate and discussion.

However, little of what has been written so far touches on juvenile justice and the right to a fair hearing within a post-conflict setting like Sierra Leone. Therefore, this study embraces the task of reviewing literature on juvenile justice in order to provide an analysis that is both specific and unique to post-conflict Sierra Leone.

James Midgley is among some of the scholars who have addressed the concept of juvenile justice and the right to a fair hearing. He investigates the history and development of juvenile justice and examines its philosophy against the backdrop of the South African Juvenile Court, thus posing as a useful material for the purpose of comparative analysis.⁴³ Dominick McGoldrick assesses the significance and importance of the provisions of the CRC in the light of international human rights

⁴¹ J Bentham *An introduction to the principles of morals and legislation* translated (1907 reprint of 1823 ed) I-XVII.

⁴² JS Mill *On Liberty* D Bromwich & G Kateb (eds) (2003) 1-247.

⁴³ J Midgley '*Children on trial: A study of juvenile justice*' (1975) 11-18.

law and practice; and highlights some of the shortcomings of the CRC as a universal instrument for the protection of children's rights.⁴⁴

Mark R Fondacaro *et al* seek to 'reconceptualise' due process in the administration of juvenile justice. He argues that conceptions of procedural due process for children should not be assessed in terms of due process guarantees for adults. He relies on social psychological research on procedural justice to advance his submission that the adversarial nature of adult due process does not necessarily ensure fairness in juvenile justice. He proposes that conceptions of due process in juvenile justice allow for 'empirical research and a performance-based management system' that will evaluate the objectives of juvenile justice such as crime prevention and rehabilitation.⁴⁵

Rachel Harvey investigates the operation of juvenile justice in Sierra Leone. Her contribution analyses domestic rules and procedures in all stages of criminal proceedings in the Juvenile Court and offers a perspective into the realities of the juvenile justice system.⁴⁶ However, she does not provide a detailed analysis of the administration of juvenile justice and fair hearing rights of children in conflict with the law. Furthermore, she does not investigate juvenile justice within the framework of a post-conflict setting and as such, it is opposite to the objectives of this study.

Mohamed Pa-Momoh Fofanah analyses the various methods of reforming and reintegrating the ex-child soldier into society using post-conflict Sierra Leone as a case study. He evaluates concepts of rehabilitation, reformation and reintegration with a view to achieving the same for ex-child combatants.⁴⁷

Much of the available literatures do not deal specifically with juvenile justice and the right to a fair hearing in post-conflict Sierra Leone. Rather, the focus seems to be much more on other aspects of children's rights such as education, health etcetera. It was only in January 2006 that the Justice

⁴⁴ D McGoldrick 'The United Nations Convention on the Rights of the Child' in MDA Freeman (ed) *Children's Rights Vol. II* (2004) 132-169.

⁴⁵ MR Fondacaro *et al* 'Reconceptualising due process in juvenile justice: Contributions from law and social science' (2006) *57 Hastings Law Journal* 955-989.

⁴⁶ R Harvey 'Juvenile justice in Sierra Leone: An analysis of legislation and practice' (2000): <http://www.essex.ac.uk/armedcon/story_id/000038.doc>(accessed 1 September 2006).

⁴⁷ Unpublished: MP Fofanah 'Juvenile justice and children in armed conflict: Facing the fact and forging the future via the Sierra Leone test' unpublished LLM thesis, Harvard Law School 2004.

Sector Development Programme (JSDP) highlighted the need for attention to be given to juvenile justice in Sierra Leone.

Marie Saine examines the rights of children deprived of their liberty and centers her research on the rights of child offenders in pre-trial detention;⁴⁸ in contrast to this study which focuses on the rights of juvenile offenders during criminal proceedings.

1.7 Limitations of the study

The scope of this study is limited in terms of volume. Therefore, the study will focus specifically on fair hearing rights of child offenders in post-conflict Sierra Leone and will not address the right of child offenders to a fair hearing in other post-conflict situations. However, reference to some 'good practices' in juvenile justice elsewhere, specifically in Cameroon where the study is undertaken will be made. Such reference shall be confined to legislative prescriptions since like Sierra Leone; Cameroon has no case reporting system in place. Furthermore, it should be noted that in post-conflict Sierra Leone, the notion of child offenders encompasses either former child soldiers or ordinary children in conflict with the law. As such, the study will embrace both classes of child offenders and will not focus on a particular class. Thus, the study will be concerned with child offenders irrespective of their status. Additionally, the empirical data adopted in this study is not the author's but rather, is gathered from secondary sources. It is submitted that the study will adopt the most reliable and recent available data.⁴⁹

1.8 Rationale of the study

Although there is a wealth of literature on juvenile justice and its pertinent issues, there are insufficient scholarly writings on juvenile justice and the right of children to a fair hearing in post-conflict Sierra Leone. Thus, scrutiny of juvenile justice in post-conflict Sierra Leone is imperative in order to stimulate reform, especially with regard to the flaws that will be highlighted in the body of the essay and the recommendations that will be provided.

⁴⁸ Unpublished: M Saine 'Protecting the rights of children in trouble with the law: A case study of South Africa and the Gambia' unpublished LLM thesis, University of Pretoria 2005.

⁴⁹ The study will use empirical data collected by NacWAC (n 10 above).

1.9 Overview of chapters

Chapter one gives a brief outline of the research topic. It also contains the objectives and rationale of the study.

Chapter two gives a historical perspective of juvenile justice. It traces the development of child welfare principles and protectionism from Anglo-Saxon America and evaluates its impact both on the international sphere and on the criminal justice system of Sierra Leone. It also analyses various international and regional instruments as well as domestic legislations on the administration of juvenile justice and the right to a fair hearing.

Chapter three looks at the substantive and procedural issues that underlie the operation of juvenile justice in Sierra Leone at all stages of criminal proceedings and evaluates their workability within the framework of the right to a fair hearing.

Chapter four assesses the current operation of juvenile justice in Sierra Leone. It does so in the light of some major principles of a fair hearing and attempts to discover whether there are any disparities between what the law stipulates and what actually happens in practice.

Chapter five concludes with observations and recommendations.

CHAPTER 2

THE BASIS OF JUVENILE JUSTICE

2.1 The origins and evolution of juvenile justice

Juvenile justice is not a recent trend in national justice systems. It can be traced as far back as the nineteenth century when emerging social welfare principles were used to influence the then practice of treating children and adult offenders in the same manner.⁵⁰ Prior to that, specifically the 1600s, child offenders were mainly disciplined within the family context although they could formally be imprisoned or executed under the stringent laws which existed within the criminal justice system. Thus for instance, the Massachusetts Stubborn Child Act 1646 harshly provided that:⁵¹

[If] a man have a stubborn or rebellious son of sufficient years of understanding (viz 16 years), which will not obey the voice of his mother and that when they have chastened him, will not harken unto them, then his father and mother, being his natural parents lay hold on him and bring him to the Magistrates assembled in Court and testify unto them that their son is stubborn and rebellious and will not obey their voice and chastisement, but live in sundry and notorious crimes: such son shall be put to death.

Such stringent laws were synonymous with the practice of treating children in the same manner as adults. Thus, notwithstanding their immaturity, children were subjected to the full rigours of a formal adult criminal trial. Elsewhere in Europe, specifically in Britain, children as young as eight years of age were executed for minor offences.⁵² With time, welfare principles began to gain momentum as consciousness concerning the protection of dangerous children and children in danger began to increase. This gave way to criticisms about the practice of punishing children and the negative effects of imprisoning them. In response, special youth facilities and institutions were created to care for and protect the child. Unlike adult institutions, the youth facilities and institutions focused primarily on reforming and rehabilitating the child offender and contributed significantly to the creation of a special status for children within the criminal justice system. Although welfare

⁵⁰ Midgley (n 43 above) 11.

⁵¹ The Massachusetts Stubborn Child Act 1646 reproduced in JR Bell 'Imposing the death penalty against minors' (1989-1990) 2 *John F Kennedy University Law Review* 38.

⁵² Midgley (n 43 above).

principles were influential in terms of changing the attitudes and perceptions of the public towards the plight of children and also in establishing special institutions to rehabilitate the child offender as an alternative to severe punitive responses, they were largely divorced from the criminal process to which children were subjected. As such, child offenders were to a large extent treated as adult offenders.

Within the American juvenile justice system, the establishment of the first Juvenile Court in Illinois in 1899 signified the beginning of the concept of juvenile justice and stood as a testament to the fact that perceptions of the status of children were changing.⁵³ Thus, children were no longer tried in adult courts but in specially constituted courts with special rules and procedures, enforced by specially trained court officials. The primary goal of the Juvenile Court was to rehabilitate and reform the child. The Juvenile Court sought to achieve this through procedural informality that encouraged judicial understanding of the child's character, lifestyle and background.

Furthermore, the Juvenile Court surrendered the welfare of the child in the hands of the state. Thus, the state became the *parens patriae* of the child and was charged with the duty of protecting the interest and welfare of the child.⁵⁴ Subsequently, the *parens patriae* principle was criticised both as ineffective in its rehabilitation and reformatory goals and detrimental to the welfare of the child because it encouraged the practice of institutionalising child offenders for long periods without giving them due process.⁵⁵

Significant changes came about with the decisions of the United States (US) Supreme Court in *Kent v United States*⁵⁶ and *Re Gault*⁵⁷ respectively. In *Kent*, the accused was a 16 year old boy who was charged with the offences of housebreaking, robbery and rape. After he admitted his guilt to the police, he was summarily transferred from a Juvenile Court to an adult court without due process.

⁵³ The creation of the Juvenile Court in 1899 in Illinois, Chicago is reported to be the first Juvenile Court in the world.

⁵⁴ Bell (n 51 above) 39.

⁵⁵ As above.

⁵⁶ 383 US (1966) 541, 556.

⁵⁷ 387 US 1(1967) 31-59.

In holding that failure to grant him due process infringed the Constitution, the Supreme Court observed that:⁵⁸

The child receives the worst of both worlds: he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Similarly, in *Re Gault*, a 15 year old was remitted to a state detention home for nearly six years without due process. The Supreme Court held that children were entitled to most of the due process guarantees as adults in any criminal proceedings including the right to counsel and the right to free counsel (if they cannot afford one), the right to examine and cross-examine witnesses, the right to be informed of the charges against them and the right to protection from self-incrimination. The decisions in both cases formalised the Juvenile Courts and made them more like criminal courts in which children were regarded not solely as objects of needs, but also as rights holders.

Unlike the developments that were taking place in the US in the 1960s, the English juvenile justice system from which Sierra Leone garnered its own structure was going through a different phase. In England, social welfare principles and ideals were at the center of all matters pertaining to the child. As such, emphasis was placed on the social and psychological needs of the child rather than on the criminal law. However, despite the divergence in the development of juvenile justice in both countries, it is widely contended that the development that took place in the US is not significantly different from that of the English juvenile justice system.⁵⁹ Infact, it is contended that movement for juvenile justice reform was informed by the sixteenth century educational reform movement in England that perceived children to be different from adults with less developed moral and cognitive capacities.⁶⁰ This view is supported by Claire Breen who claims that the English common law impacted on the development of juvenile justice in the US.⁶¹

Similarly, juvenile justice in Sierra Leone was greatly influenced by developments in England. As such, the administration of juvenile justice in Sierra Leone was structured to replicate the English

⁵⁸ n 56 above, 553-554.

⁵⁹ Center on Juvenile and Criminal Justice '*History of the Juvenile Court*': <<http://www.cjcj.org/jjic/intro.php>> (accessed 6 August 2006).

⁶⁰ As above.

⁶¹ C Breen *The standards of the best interest of the child: A western tradition in international and comparative law* (2002) 213.

juvenile justice system. This is evident by Cap 44, which is a legislation that Sierra Leone acquired from England and transposed to its domestic legal system to deal with children in conflict with the law.⁶² Cap 44 is founded on social welfare demands regarding the treatment of child offenders, thereby testifying to its English origins. As such, it lays strong emphasis on rehabilitating and reforming child offenders rather than punishment. For example, section 24 prohibits imprisonment of children.⁶³ As the death penalty in Sierra Leone does not apply to children, children who are convicted of serious offences are spared the fate of execution, in contrast to other jurisdictions like the US which still applies the death penalty on children.⁶⁴ Thus, the subtlety of domestic law is clearly evident: it reflects the influence of welfare ideals in dealing with child offenders, rather than emphasis on the criminal law; concordant with what obtained in England in the twentieth century. However, since 1960, England has updated its laws on children while Sierra Leone is still stuck with the 1960 Statute which it inherited from its colonial master.⁶⁵

2.1.1 The development of juvenile justice in international law

While fair trial rights for children had received recognition within the criminal justice system of several countries by the 1960s, its recognition on the international plane at that time remained elusive. Indeed, international recognition of children as rights bearers generally posed as a topic for scholarly debate even though there was a general consensus that a universal document for the protection of children's rights was essential.⁶⁶ It is commonly believed that international recognition of children's rights emerged with the adoption of the 1924 Declaration of the Rights of the Child (the Geneva Declaration). However, a review of the historical development leading to the creation of an international normative framework for the protection of children's rights indicate that children's rights had gained a significant stronghold on the international sphere as far back as 1919, when the International Labour Organisation (ILO) adopted a series of Conventions for the protection of

⁶² Children and Young Persons Act Cap 44 1960.

⁶³ Section 24 Cap 44.

⁶⁴ For a critic of the death penalty on children in the US, see Bell (n 51 above) 37-52.

⁶⁵ Children Act 1989 of England.

⁶⁶ MH Sutter 'Mixed-status families and broken homes: The clash between the US Hardship Standard in cancellation of removal proceedings and international law' (2006) 15 *Transnational Law and Contemporary Problems* 789.

children's rights.⁶⁷ Although the Geneva Declaration was an important step in the direction towards achieving recognition of children's rights, it was more concerned with the needs of children, rather than their rights. Similarly, the 1948 Declaration of the Rights of the Child failed to address the rights of children and appeared instead to be an extension of the welfare principles contained in the Geneva Declaration. In 1959, the UN officially recognised children's rights by adopting the UN Declaration of the Rights of the Child.⁶⁸ This move signalled a significant change from perceiving children as objects of the law to rights holders.

However, among the ten principles enshrined in the 1959 Declaration, the right of children to a fair hearing was conspicuously absent. It is submitted that such a shortcoming was not an oversight on the part of the drafters but rather, a deliberate omission, given the prevailing situation of child offenders at the time. Specifically, the fact that children in conflict with the law were being tried as adult offenders in the various domestic courts of member states, and in many cases were also being subjected to capital punishment.⁶⁹ The question then arises as to whether it is possible that an international instrument which claims to protect the rights of children and guarantee their welfare could conveniently omit to include the rights of children to due process. Surely, if mankind owes children the best treatment, then the right to a fair hearing constitutes such? Against this background, it could be argued that the right to a fair trial in article 10 of the Universal Declaration of Human Rights (UDHR) also applies to children in which case, a separate legal document for children would not have been necessary.⁷⁰

Furthermore, if the spirit of the 1959 Declaration mirrors the development of juvenile justice that was taking place at the domestic level (which was basically a development along social welfare lines), then it succeeds in contradicting the language of rights which it adopts and its intention to move away from a welfare approach to dealing with children's issues to a human rights discourse. Indeed the UDHR is the first international instrument which expressly recognises the right to a fair trial as a civil and political right. Although it represents soft law, it has influenced the creation of

⁶⁷ For e.g. the ILO Convention Fixing the Minimum Age for Admission of Children to Industrial Employment and the ILO Convention Concerning the Night work of Young Persons Employed in Industry respectively of 28 November 1919.

⁶⁸ Adopted by UN General Assembly resolution 1386 (XIV) 1959.

⁶⁹ Midgley (n 43 above).

⁷⁰ Adopted by UN General Assembly resolution 217A (III) 1948.

subsequent international treaties and conventions. In 1966, the principle of fair trial was incorporated in the International Covenant on Civil and Political Rights (ICCPR)⁷¹ in accordance with the spirit of the UDHR.

Article 14 of the ICCPR guarantees the right of children to a fair hearing and expressly provides that any proceedings against children must take into account their age as well as the desirability of promoting their rehabilitation in society. Despite the explicit guarantee of fair hearing rights of children in the ICCPR, it was felt that a separate children's document was needed. As was noted earlier, the need for child offenders to be treated differently from adult offenders had already received widespread recognition and acceptance in the domestic legal systems of most countries by the 1890s. As such, Juvenile Courts were created and special rules and procedures to deal with child offenders were developed.

Gradually, the right of child offenders to a fair trial was established. However, the recognition which existed at the domestic level was not made manifest at the international level. This could be seen in relation to the drafting history of the CRC. Thus, while it was accepted generally that children were entitled to special treatment; there was no universal consensus that such special treatment should be entrenched in a legally enforceable universal instrument. Thus for instance, Jonathan Todres contends that the initial draft of the CRC submitted by Poland was met with numerous objections and criticisms and that while some governments viewed the CRC as admirable, they did not consider it to be a pressing issue.⁷² As such, the attention and dedication which they should have put into drafting the CRC was instead diverted to the drafting of the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (CAT).⁷³ Similarly, Molly Hazel Sutter contends that the Polish proposal was 'questioned' by many countries.⁷⁴

These objections and criticisms resulted in considerable tension throughout the drafting process as governments strove towards creating a universal document that would both mirror their individual

⁷¹ Adopted by UN General Assembly resolution 2200A (XXI) 1966.

⁷² J Todres 'Emerging limitations on the rights of the child: The United Nations Convention on the Rights of the Child and its early case law' (1998–1999) 30 *Columbia Human Rights Law Review* 164-165.

⁷³ Adopted by UN General Assembly resolution 39/46 1984.

⁷⁴ Sutter (n 66 above).

perspectives and adequately protect the rights of children.⁷⁵ Poland's initial proposal was a reproduction of the 1959 Declaration. The proposal consisted of twenty articles including an article protecting the rights of children in conflict with the law. The Working Group of the Commission on Human Rights (CHR) which was entrusted with the task of drafting the CRC had as its primary aim, the provision of fair trial rights to be at par with existing international human rights standards.

However, the initial draft article on the administration of juvenile justice and the right to a fair trial which was then article 19, failed to meet the standards set by the ICCPR.⁷⁶ Eventually, after several years of discussions and consultations with governments and NGOs, the drafting of a criminal justice protection provision for children was able to successfully overcome a plethora of setbacks to develop into a comprehensive provision on the rights to a fair trial and juvenile justice which came in the shape of article 40 of the CRC.⁷⁷

2.2 The normative framework of juvenile justice and the right to a fair hearing

The administration of juvenile justice and the right to a fair trial is guaranteed in an impressive number of international and regional legal instruments. The proliferation of these instruments indicates the seriousness with which children's rights have come to be recognised and accepted universally. It also shows the level of commitment that underlies states' actions at the international plane and attempts to end the on-going debate of whether children are infact rights holders. In Sierra Leone, the normative framework on the administration of juvenile justice is limited to a single piece of legislation that imports welfare principles and ideals.

2.2.1 International and regional instruments on the administration of juvenile justice

An evaluation of the international and regional instruments on the administration of juvenile justice shall encapsulate the CRC, ACRWC and other declarations on juvenile justice.

⁷⁵ Todres (n 72 above).

⁷⁶ CP Cohen 'Juvenile justice provisions of the draft Convention on the Rights of the Child' (1989–1990) 7 *New York Law School Journal of Human Rights* 3.

⁷⁷ As above.

2.2.1.1 Convention on the Rights of the Child (CRC)

The CRC is currently the most universally accepted document protecting children's rights and welfare.⁷⁸ This is evidenced by the fact that it has been ratified by every country in the world with the exception of the US and Somalia. Among its shortcomings are its failure to address the need for children to be protected against status offences, the need for protection against double jeopardy and the requirement of compensation in cases of miscarriages of justice. The inherent failure of the CRC to address status offences constitutes a serious blow to the administration of juvenile justice particularly in cases involving street children, as is the case with post-conflict Sierra Leone.

2.2.1.2 Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)

The Beijing Rules⁷⁹ is the first international instrument in the juvenile justice field which protects the rights of children in conflict with the law within the framework of a separate and specialised system of juvenile justice.⁸⁰ It is divided into six parts and embraces all the legal and social processes that make up the juvenile justice system. The Beijing Rules represent some of the minimum standards which should be observed by any 'good' juvenile justice system and reflect welfare concerns of children as well as the use of the criminal law in dealing with children in conflict with the law.⁸¹

In tandem with article 40 of the CRC, the Beijing Rules advocate for children to be diverted from the criminal justice system. It also postulates definitions of several key terms that are analogous to juvenile justice. For instance, rule 2.2(c) defines a juvenile offender as a child or young person who is alleged to have committed or has been found to have committed an offence.⁸² It is submitted that this definition defeats the essence of the document. This is because the imputation of an allegation invokes the presumption of innocence on behalf of the accused. As such, reference to the term 'juvenile offender' in rule 2.2(c) rebuts the presumption of innocence because by labelling a child in conflict with the law as an offender, it automatically imputes liability on the child way before his or

⁷⁸ Adopted by UN General Assembly resolution 44/25 1989.

⁷⁹ Adopted by UN General Assembly resolution 40/33 1985.

⁸⁰ Viccica (n 14 above) 68-69.

⁸¹ Rule 5 Beijing Rules.

⁸² Rule 2.2(c) Beijing Rules.

her guilt is established by a court. As such, the definition of juvenile offender in rule 2.2(c) is contrary to the spirit and purpose of the instrument.

2.2.1.3 UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)

The Riyadh Guidelines focus on the prevention of juvenile delinquency with the aim of dispensing with the need for the criminal justice system in the long term.⁸³ It adopts a comprehensive list of methods that could assist in preventing juvenile delinquency, such as: policies for general prevention of juvenile delinquency, social processes, social policy, legislation and juvenile justice administration and research, policy development and coordination. The Riyadh Guidelines acknowledge that juvenile delinquency is often a natural process in the maturation and growth of children, which tends to disappear in them with the transition to adulthood.

In this regard, it recommends that children engage in lawful and socially useful activities and also adopt a humanistic orientation towards society and life so as to foster 'non-criminogenic' attitudes.⁸⁴ The Riyadh Guidelines discourage the use of terminologies such as 'deviant', 'delinquent' and 'pre-delinquent' on children, as this contributes negatively to children's development. Significantly, the Riyadh Guidelines explicitly discourage the application of status offences and recommends that legislation be enacted to discourage their use. Like the Beijing Rules, the Riyadh Guidelines are non-binding.

2.2.1.4 UN Rules for the Protection of Juveniles Deprived of their Liberty (UN Rules)

The UN Rules apply to all children who are deprived of their liberty.⁸⁵ They stipulate specific principles which define the parameters within which children should be detained and emphasise that imprisonment should be used as a last resort. The scope of the UN Rules is not limited to arrests and pre-trial detentions only, but also extends to cover the detention of children in welfare institutions.

⁸³ Adopted by UN General Assembly resolution 45/112 1990.

⁸⁴ Riyadh Guidelines 1.

⁸⁵ Adopted by UN General Assembly resolution 45/113 1990.

2.2.1.5 African Charter on the Rights and Welfare of the Child (ACRWC)

The ACRWC was adopted in 1990 following calls by the African Union (AU) to create a treaty specifically dealing with children's rights and issues in Africa.⁸⁶ It was felt that the CRC was alien to the socio-political and cultural plight of children in Africa and as such it was perceived as a document with western ideals.⁸⁷ Thus, the ACRWC was drafted to reflect the virtues and values of African civilisation pertaining to the rights and welfare of children. Although the ACRWC imbibes the spirit of the CRC, it goes beyond the provisions of the CRC to include *inter alia*, guarantees for the protection of refugee children, children in armed conflict and children with imprisoned mothers.

However, unlike the CRC which was unanimously accepted and ratified, the ACRWC was received with great apprehension and skepticism by African Governments. This has prompted questions about whether the ACRWC was genuinely a pressing concern or necessity. Indeed, African leaders did not show the slightest reluctance to ratify the CRC and their effective participation in the drafting process substantially weakens their arguments that the CRC is a western import. It is argued that the stringent provisions contained in the ACRWC could explain why African leaders are wary of ratifying the ACRWC.⁸⁸ However, given the unique status of children in Africa, as is rightly pointed out in the ACRWC, it is natural that a higher or more stringent standard be imposed.

Alternatively, the drafting process of any document generally embraces participation and discourse among the parties which it is intended to affect. The inclusiveness of the drafting process is aimed at ensuring that a consensus is reached. In this regard, the fact that African leaders appear unreceptive to the language of the ACRWC suggests that African Governments were not instrumental in the creation of the ACRWC which in turn undermines the initial concern for a separate treaty on children rights in the African human rights system. Furthermore, it is also contended that AU member states do not fully comprehend the need to ratify the ACRWC as they are ignorant of its significance and importance to children's rights in Africa.⁸⁹ This further supports the submission that the opinions of AU member states on the need to adopt an African children's

⁸⁶ OAU Doc.CAB/LEG/24.9/49 (1990).

⁸⁷ Todres (n 72 above) 161.

⁸⁸ A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *International Journal of Children's Rights* 182.

⁸⁹ As above.

treaty were not fully consulted, in which case initial concerns for a separate treaty on children's rights in Africa were greatly unwarranted. With respect to the administration of juvenile justice and the right to a fair hearing, the provision of the CRC will be given primary consideration since it has received wider acceptance and appears to be more elaborate and sophisticated in comparison to the ACRWC.

2.2.2 The domestic legal framework

The normative framework of juvenile justice and the right to a fair hearing in Sierra Leone encompasses specific provisions of the Constitution of Sierra Leone and Cap 44 respectively. These provisions shall be evaluated below and reference to the draft Bill will also be made.

2.2.2.1 Constitution of Sierra Leone Act 6 of 1991 (the Constitution)

Section 23 of the Constitution guarantees every individual the security and protection of the law.⁹⁰ The secure protection of the law is the right to a fair hearing and applies to every person who is charged with a criminal offence or against whom proceedings are instituted for the determination of the existence or extent of civil rights and obligations. Hence, section 23 of the Constitution protects the right of every individual to a fair hearing within a reasonable time by an independent and impartial court established by law.

For criminal proceedings, section 23 contains a general right to a fair hearing as well as numerous specific rights including, the right against double jeopardy, the right to call and examine witnesses, the right to have without payment, the assistance of an interpreter, the right to be informed of the criminal charges, the right to defend oneself, the right to be presumed innocent until proven guilty and the right to be given adequate time for the preparation of one's defence.⁹¹ As section 23 applies to every person, it is contended that the non-discrimination clause under section 15 of the Constitution extends fair hearing rights to children in conflict with the law.⁹² This is also evident in the language of section 23(3) which expressly excludes public hearings in the interest and welfare

⁹⁰ Section 23 of the Constitution of Sierra Leone Act 6 1991.

⁹¹ Sections 23(4) & (5) of the Constitution.

⁹² Section 15 of the Constitution.

of persons under the age of 21 years. In this regard, it follows that section 23(3) of the Constitution could be invoked to protect the right to a fair hearing of every individual under the age of 21 years.

2.2.2.2 Children and Young Persons Act 1960 (Cap 44)

Cap 44 is the primary legislation that deals with children in conflict with the law. It contains both welfare principles and punitive methods for reforming and rehabilitating child offenders. However, it lays stronger emphasis on welfare approach rather than punishment in the treatment of child offenders. For instance, section 24 provides that no child shall be sentenced to imprisonment. As such, convicted children are given other forms of punishment such as remittance to an Approved School for a specific period of time or repatriation to the child's district of origin.⁹³

An order repatriating a convicted child to his or her district of origin emanates from a general conception that every Sierra Leonean must have his or her roots in one of Sierra Leone's twelve districts.⁹⁴ This conception is fallacious, particularly in light of numerous inter-marriages and inter-tribal adoptions. As such, issues of inter-tribal arrangements do not usually identify with a particular district. This may pose problems for magistrates who may want to mete out repatriation as a form of punishment to convicted children. In the case of street children, most of whom are either displaced or orphaned, it is submitted that a repatriation order would be unreasonable.

In terms of fair hearing rights, Cap 44 contains limited guarantees of fair hearing of children in conflict with the law. This may be due to the fact that the drafters intended it to be composed primarily of welfare principles and therefore avoided strong emphasis on formal court proceedings as that would have been opposite to its welfare ideals. Cap 44 affords to children the right to a private hearing, the right to call and examine witnesses and the right to have the substance of the alleged offence explained. By the wording of Cap 44, the right to be presumed innocent and the right to free assistance of an interpreter are implied. However, Cap 44 does not contain a significant number of fair hearing guarantees such as the right to a speedy trial, the right not be compelled to give testimony or confess, the right against double jeopardy and right to protection from status

⁹³ Section 25 Cap 44.

⁹⁴ In Sierra Leone, a person's district of origin is determined according to his or her family name: for e.g. persons with 'English' surnames are deemed to be descendants of freed slaves from England having their origin in Freetown which is the Capital City of Sierra Leone.

offences. As such, Cap 44 does not sufficiently meet international standards for the effective protection of child offenders to a fair hearing.

2.2.2.3 Draft Child Rights Bill (the Bill)

The Bill is primarily structured along social welfare lines.⁹⁵ Although it adopts a rights-based approach to dealing with children's issues,⁹⁶ its substantive provisions incorporate existing welfare methods of dealing with children in conflict with the law which is similar to Cap 44. This is evident in respect to the various mechanisms which it proposes for dealing with children; such as the establishment of Village and Chiefdom Welfare Committees, District Councils for the Protection of Children, a National Commission for Children and Child Panels.⁹⁷ The Bill encourages criminal proceedings as a last resort for children in conflict with the law and suggests an informal family setting for handling disputes between child offenders and victims.⁹⁸ Infact, the Bill provides that a family setting should be the primary forum for resolving all disputes involving children.⁹⁹

It is submitted that the Bill's emphasis on diversion is a laudable one since it will ensure that children are not unnecessarily brought to court. Thus, in the case of street children, the welfare provisions of the Bill could be used to address their plight and to keep them out of the criminal justice system. However, latent shortcomings of the Bill could be seen by its lack of fair hearing guarantees for children who may come into the criminal justice system. Indeed, by focusing primarily on welfare protectionism the Bill ignores the possibility that some children may invariably come into the criminal justice system. For example, children charged with treason. Thus, the Bill fails to include guarantees of fair hearing rights for such children; such as the right to a speedy hearing and the right to free legal assistance. Hence, although it proposes significant reforms in matters concerning children, the Bill suffers from the same shortcomings of the existing law in terms

⁹⁵ The Bill is an attempt by the Government of Sierra Leone to bring its domestic laws on children in conformity with international law. In recognition of the fact that this study is an investigation of the administration of juvenile justice in Sierra Leone, it is considered appropriate that the Bill be alluded to.

⁹⁶ For e.g. the Short Title to the Bill reads "An Act to provide for the promotion of the rights of the child compatible with the CRC and the ACRWC and for other related matters."

⁹⁷ Part IV of the Bill.

⁹⁸ Section 71 of the Bill.

⁹⁹ As above.

of fair hearing rights of children in conflict with the law. In this regard, it is submitted that the Bill does not contain effective reforms of juvenile justice in Sierra Leone.

2.3 Conclusion

An analysis of the international, regional and national legal instruments on the administration of juvenile justice reveals that each instrument is fraught with its own inadequacies. Nevertheless, each instrument represents a major contribution to the continued strive towards the effective protection and promotion of children's rights universally. Furthermore, the development of international and regional norms on children ensures that the advancement of children's rights does not remain static, but evolves to meet changing needs and circumstances. A golden thread that runs through each instrument is the unified approach to children's rights which merges both punitive and rehabilitative functions of juvenile justice with welfare principles and ideals of child protectionism.

CHAPTER THREE

THE OPERATION OF THE JUVENILE JUSTICE SYSTEM

3.1 Introduction

The operation of any justice system comprises of substantive and procedural considerations. Substantive considerations refer to existing factual elements that are embodied within the justice system whilst procedural considerations refer to legal methods that have been developed to deal with persons before the law. In this chapter the substantive and procedural aspects of juvenile justice shall be evaluated with the aim of discerning how juvenile justice is administered in Sierra Leone.

3.2 Substantive considerations

The substantive considerations shall be limited to examining the framework within which certain prefatory terminologies that are analogous to the administration of juvenile justice are postulated in international and domestic law and determining the extent to which these terms converge.

3.2.1 The definition of a child under international law

The definition of a child is a crucial element in any juvenile justice system. Its construct represents the basis on which the juvenile justice system operates and is important in creating a framework within which special rules and procedures can be developed to deal with the needs, concerns and circumstances of child offenders. However, the definition of a child is characterised by lack of uniformity and inconsistency as perceptions of 'childhood' permutate from one society to the other. This may be due to disparate political, social and economic constructs that exist in each country, which makes it difficult for a universal definition to be achieved. These vicissitudes may have influenced the definition of a child at the international plane as is evidenced by article 1 of the CRC, which does not only fail to provide a fixed construct but also permits state parties to use their discretion in formulating a definition under their respective domestic laws.¹⁰⁰ An adverse implication

¹⁰⁰ Article 1 of the CRC defines a child as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained at earlier.

of this is that where national laws so provide, an individual would become entitled to all the human rights of an adult, but not to the special protection applicable to children.¹⁰¹ This quandary has led the HRC to comment that state parties cannot absolve themselves from their international law obligations to persons under the age 18 years, notwithstanding that they may have attained the age of majority under domestic law.¹⁰² Thus, it is established under international law that a child is any person below the age of 18 years.¹⁰³ As mentioned earlier, the need for a uniform definition of a child is crucial not only to provide a guideline according to which rules and procedures can be developed to meet the needs and demands of child offenders, but also to establish a minimum age of criminal responsibility. The minimum age of criminal responsibility and the principle of *doli incapax* shall be discussed in paragraph 3.2.3 of the study.

3.2.2 The definition of a child under the laws of Sierra Leone

Cap 44 makes a distinction between a child and a young person but does not define a juvenile.¹⁰⁴ Additionally, the definition of a child or young person varies according to the offences or issues in question, the circumstances in which they occurred and the respective laws which relate to them. Thus for instance, section 2 defines a child as any person below the age of 14 years and a young person as any individual between the ages of 10 and 14 years.¹⁰⁵ Since the age of criminal responsibility in Sierra Leone is fixed at 10 years, it therefore means that a child is any person between the ages of 10 and 14 years.

Under section 2 of the Prevention of Cruelty to Children Act¹⁰⁶ a child is defined as a person under the age of 16 years,¹⁰⁷ whereas under section 1(3) of the Sierra Leone Citizenship Act a person is

¹⁰¹ McGoldrick posits that the drafters of the CRC should have included a minimum age limit for the declaration of majority under national laws, McGoldrick (n 44 above) 133.

¹⁰² HRC General Comment 17 para 4.

¹⁰³ In unanimity with the CRC the ACRWC also stipulates that a child is any person less than 18 years.

¹⁰⁴ However, the Act defines a Juvenile Court for the purposes of identifying the special treatment that are accorded to child offenders.

¹⁰⁵ Section 2 Cap 44.

¹⁰⁶ Prevention of Cruelty to Children Act Cap 31 of 1960.

¹⁰⁷ Section 2 Cap 31.

deemed to have attained the age of majority at 21 years of age.¹⁰⁸ Section 2 of the Corporal Punishment Act defines a juvenile as any person under the age of 17 years.¹⁰⁹ It further stipulates that in the absence of direct evidence of age, the court shall determine the age of the juvenile according to his or her appearance.¹¹⁰

Furthermore, section 1 of the Adoption Act defines a juvenile as any person under the age of 17 years¹¹¹ while the Interpretation Act adopts the term 'infant' to refer to persons below the age of 21 years.¹¹² Pursuant to section 2 of the Criminal Procedure Act (CPA),¹¹³ a child means any person under the age of 14 years.¹¹⁴ With regard to offences against women and girls, the Protection of Women and Girls Act require that victims of the offence of procurement for unlawful carnal connection should be below the age of 21 years.¹¹⁵ Additionally, section 23(3) of the Constitution provides that court proceedings and judgments should not be made public in the interest of the welfare of persons under the age of 21 years.¹¹⁶ It therefore appears that for purposes of a fair hearing, the Constitution perceives a child as any person under 21 years. However, the same Constitution provides that persons under the age of 18 years are matured enough to vote.¹¹⁷ This apparent lack of uniformity and inconsistency in standards of assessing childhood under domestic law is further exacerbated by variations between statutes and customary law.

Under customary law there is no acceptable age of childhood nor is there a certified standard for determining the same. Rather, the age of an individual is determined according to his or her physical and cognitive capacities. Thus, an individual's passage to adulthood is marked by physical changes which signify puberty. Such pubescent attributes are normally used to assess whether a

¹⁰⁸ Sierra Leone Citizenship Act 1973.

¹⁰⁹ Section 2 Corporal Punishment Act Cap 41 of 1953.

¹¹⁰ Section 6 Cap 41.

¹¹¹ Section 1 Adoption Act 9 of 1989.

¹¹² The Interpretation Act 8 of 1971.

¹¹³ Criminal Procedure Act 32 of 1965.

¹¹⁴ Section 2 CPA.

¹¹⁵ Sections 2-4 Protection of Women and Girls Act Cap 30 of 1960.

¹¹⁶ Section 23(3) of the Constitution.

¹¹⁷ Section 31 of the Constitution.

person is ready for marriage or initiation rituals. Hence, customary law perceives a child as someone who is not puberal. The danger with such conception is that a child who has a more developed physiognomy would be treated as an adult. Thus, a child who is mentally immature and vulnerable would be subjected to adult treatment because of his or her advanced physical attributes. This indicates the extent to which customary law deviates from international law standards.

3.2.3 The minimum age of criminal responsibility

The minimum age of criminal responsibility represents the age at which children are obliged to take responsibility for their criminal actions. Thus, children become criminally accountable when they attain the minimum age of criminal responsibility. On the other hand, children below the minimum age of criminal responsibility are presumed to be *doli incapax*; that is: incapable of committing an offence, in which case they cannot be held legally responsible for their criminal acts. Under article 40(3)(a) of the CRC, states are required to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. However, article 40(3)(a) does not give any guidance as to what constitutes an appropriate minimum age in law.

Similarly, Rule 4.1 of the Beijing Rules unhelpfully provides that the beginning of the age must not be fixed at too low an age level bearing in mind the emotional, mental and intellectual maturity of the child; thereby encouraging subjectivity among states, as is evident by the varying ages of criminal responsibility in numerous legal systems.¹¹⁸ In Sierra Leone the minimum age of criminal responsibility is 10 years. The CRC-Committee has criticised this age as 'too low' and has recommended that Sierra Leone raises its minimum age 'to meet acceptable international law standards.'¹¹⁹ However, the CRC-Committee has failed to indicate what those acceptable international law standards are. As was noted earlier, the CRC does not give any guidance as to what constitutes an appropriate minimum age in law. As such, its recommendation to Sierra Leone may prove difficult to implement as it lacks guidance and specificity.

¹¹⁸ For instance, the age for criminal responsibility is 10 years in Sierra Leone and Britain, 7 years in Cyprus, Switzerland and Liechtenstein and 8 years in Scotland.

¹¹⁹ CRC-Committee (n 31 above) para 29.

Nevertheless, in response to the CRC-Committee's recommendation, the Bill increases the minimum age of criminal responsibility from 10 to 14 years; thereby suggesting that persons below the age of 14 years are *doli incapax*.¹²⁰ In a post-conflict society where many children have been exposed to criminogenic activities and indeed have participated in some of the most gruesome atrocities known to mankind, certain conceptual concerns relating to accountability and mischievous discretion arise.¹²¹ In Cameroon, persons between the ages of 10 and 14 years are usually presumed to be *doli incapax*;¹²² but such presumption is rebuttable on proof that the child had a mischievous discretion. That is, the child knew that he or she was doing something seriously wrong.¹²³

However, in Sierra Leone, neither statutes nor the Bill itself allude to any such precept, thus granting blanket protection to all children under the age of 14 years who commit serious felonies. While it is acknowledged that there is a need to protect children in conflict with the law, it is submitted that protectionism should not come at the expense of accountability. It is therefore proffered that the current minimum age of criminal responsibility in Sierra Leone is reasonable and any attempt to increase it will foster unaccountability, irresponsibility and delinquency.

3.2.4 Child offences and their respective penalties

Cap 44 categorises the offences with which children can be charged into 'homicide' and 'other offences'. Homicide is a capital offence which is punishable by death.¹²⁴ However, as the death penalty does not apply to persons under the age of 18 years, children convicted of homicide are usually remitted into custody.¹²⁵ Similar considerations also apply to the offence of treason, which carries the death penalty. 'Other offences' or non-capital offences encompass a spectrum of numerous specific crimes ranging from assault and simple larceny to attempted murder; each of

¹²⁰ Section 70 of the Bill.

¹²¹ The civil war in Sierra Leone was notorious for its use of child soldiers: <http://www.bbc.co.uk/worldservice/people/features/childrensrights/childrenofconflict/soldier.html> (accessed 7 October 2006).

¹²² Part XV Criminal Procedure Code (CPC) 2006. The CPC will come into effect on 1 January 2007.

¹²³ As above.

¹²⁴ Section 21 CPA.

¹²⁵ Section 216 CPA.

which carries a penalty of either a fine or imprisonment or both fine and imprisonment. However, irrespective of the offence for which a child is convicted, the general rule is that a convicted child shall not be sentenced to imprisonment.¹²⁶ Thus, where a child is convicted of a non-capital offence, he or she shall receive other forms of punishments such as custody in an Approved School.

Cap 44 further makes provision for children who are in need of care and protection to be brought before the Juvenile Court. Pursuant to section 27, children who qualify as 'persons in need of care and protection' include street children. Essentially, Cap 44 caters for the welfare of such children but fails to appreciate the possibility of them becoming status offenders as is the case with post-conflict Sierra Leone. It could be argued that such omission is due to the fact that when Cap 44 was being drafted, it was not done to take into account post-conflict situations. However, it is submitted that one of the qualities of a good draftsman is the ability to draft with foresight and skill that would not only cover existing circumstances, but would also adapt to meet changing trends. Alternatively, an Act to amend Cap 44 would have been equally appreciated. Needless to say, four years after the war ended, Sierra Leone has failed to achieve effective protection of its children.

3.3 Procedural considerations

The administration of juvenile justice hinges on three stages of criminal proceedings, namely: pre-trial, trial and post-trial stages. Each stage involves the application of different sets of rules and procedures and as such, regard would be given to each stage consecutively.

3.3.1 Pre-trial stage

The administration of juvenile justice commences from the moment a child is apprehended or arrested. The initial apprehension of the child on an allegation of a criminal offence signifies the start of criminal proceedings against the child and automatically brings into play notions of welfare and human rights norms. Generally, when a child is arrested, he or she should be immediately brought before a Juvenile Court for trial. However, where it is impossible for the child to be immediately brought to court, he or she is entitled to be released on bail unless the offence is of a serious nature or bail is not in the best interest of the child. In the event that the child is not granted bail, he or she should be separated from adult offenders while in detention and the period of

¹²⁶ Section 24 Cap 44.

detention should not exceed 72 hours after which, the child should be brought before a Juvenile Court. This is a general procedure which is recognised in juvenile justice systems including that of Cameroon.¹²⁷

In addition to the above pre-trial procedures, the Criminal Procedure Code of Cameroon (CPC) further dictates that special institutions (called Borstal institutions) and special sections of a prison should be reserved specifically for detaining children, so as to ensure that they are separated from adult detainees.¹²⁸ Thus pre-trial detention of children in adult prisons is only encouraged as a last resort and in the absence of the above-mentioned institutions. Furthermore, the CPC demands that children who are detained in adult prisons should be separated from adult detainees.¹²⁹ Unfortunately, such legislative provisions and practices are lacking in Sierra Leone.¹³⁰

The right to be presumed innocent until proven guilty takes effect from the moment a child is apprehended. Additionally, the right to free legal representation (if a child cannot afford one) and the right to be informed of the nature of the arrest also come into play. While in custody, children should have the right to family contact. In light of the above pre-trial procedures, it is observed that Cap 44 does not adequately address pre-trial procedures and treatment of arrested children. In Cap 44 there are only two provisions dealing with pre-trial procedures; namely, sections 5 and 6 respectively. Section 5 provides that children who are arrested should be granted bail and lays down the conditions under which bail may not be practicable. Section 6 imposes a duty on the Commissioner of Police to ensure that children in custody do not associate with adults 'other than a relative charged with an offence.'

The above provision imports two sets of meaning depending on how it is interpreted. Firstly, section 6 could be interpreted to mean that children should not be detained with adults except in cases where an adult detainee happens to be a relative of the child. Secondly, section 6 could be interpreted to mean that children should not be detained with adults and should further be granted opportunity to contact their relatives while in custody. If the first interpretation prevails, then it follows that Cap 44 fails to live up to its objective of protecting the child as it makes a distinction

¹²⁷ Part XV CPC.

¹²⁸ Section 706 CPC.

¹²⁹ Section 706(2) CPC.

¹³⁰ Country Reports on Human Rights Practices 2004 (n 21 above).

between an adult offender who is not related to the child and an adult offender to whom the child is related for the purposes of detention. Furthermore, Cap 44 does not give sufficient recognition to the rights of children in custody. For instance, it fails to stipulate the length of time for which children could be detained and does not expressly guarantee access to legal counsel, family contact or a social worker while in custody. Additionally, the right of children to be informed of the offence for which they are arrested is absent from the provisions of Cap 44.

The right of the child to legal counsel or family contact at the pre-trial stage ensures that his or her other rights are protected; such as the right to remain silent during police interviews and the privilege against self-incrimination. It could be contended that the inadequacies of Cap 44 concerning pre-trial procedures are remedied by the protection afforded by the Constitution. Section 17(2) of the Constitution expressly recognises and protects the rights of every arrested and detained person and guarantees them several rights and freedoms such as access to legal counsel, the right to be informed of the facts and grounds of the arrest, the right to be arraigned before the court within a specific period and the right to compensation for unlawful arrest or detention. However, it should be recalled that Cap 44 was enacted specifically to deal with children in conflict with the law and as such, should contain adequate provisions that take into account all possible circumstances that may affect the child. To this end, the fact that section 17 of the Constitution acts as a 'fall back' provision indicates the stark reality of the shortcomings of Cap 44 and leaves room for concern.

3.3.2 Trial procedure

The trial stage of any criminal proceedings against children is fraught with inconsistency. This is because Cap 44 postulates different procedures and treatment for child offenders depending on whether the child is charged alone or jointly with adults and whether the child is charged with homicide or any other offences. For the purpose of clarity, each aspect shall be considered individually.

3.3.2.1 Children charged alone for offences other than homicide

After the child has gone through the pre-trial stage and is before the Juvenile Court, the procedures and treatment change. This is because the child is now before the formal justice system where matters pertaining to his or her liability are decided. In effect, the future of the child may depend on

the outcome of the proceedings during trial. It is a general norm of international law that every child who is accused of a criminal offence be treated in a manner consistent with the promotion of his or her sense of dignity and worth and which takes into account the desirability of promoting his or her reintegration in society. In this regard, Juvenile Courts are constituted to hear and determine cases relating to children. Juvenile Courts are required to sit in a different building from ordinary courts and proceedings should be informal. Furthermore, the atmosphere of the court room should be friendly so as to enable the child to participate in the proceedings. Parents and guardians are required be present during trial and should be allowed to play an active role in the proceedings. Additionally, specific rights must be afforded to the child during trial including the right to call and examine witnesses, the right to a speedy trial, the right not to be compelled to testify or confess guilt, the right to appeal, the right to privacy and the right to free legal counsel (if the child cannot afford one). These rights are deemed as minimum guarantees that will ensure the fairness of the hearing. Therefore, if any of them is infringed, it will render the hearing unfair.

Cap 44 charges the Juvenile Court to hear and determine cases relating to children. The Juvenile Court is presided by a Magistrate and two or more Justices of the Peace (JOP).¹³¹ However, the jurisdiction of the Juvenile Court is limited to dealing with non-capital offences.¹³² This is in contrast to the practice in Cameroon, where Juvenile Courts have jurisdiction over all offences pertaining to children.¹³³ The procedure during trial is such that the child is arraigned before the court and the substance of the alleged offence is explained to him or her in a language which the child understands. Throughout the proceedings, the court uses a simple language which the child understands, so as to enable the child to participate effectively in the proceedings.

After the substance of the alleged offence is explained to the child, the response of the child to the allegation is considered. If the child admits the offence, the court will dispose of the case. If however the child denies the allegation, the court will proceed to hear and determine the case. It is submitted that this practice does not guarantee fair hearing of accused children because it does not consider the possibility that the accused child could admit guilt under duress. As stated earlier, children who are detained in police custody are not allowed access to legal counsel or family members. Thus the possibility that they could be intimidated by the police during interrogation

¹³¹ Section 2 Cap 44.

¹³² Section 7 Cap 44.

¹³³ Section 713 CPC.

cannot be discounted. Such intimidation could cause children to admit guilt before the court. In Cameroon where due process is afforded to children irrespective of their reply to the charges against them, their chances of receiving a fair hearing are increased.¹³⁴

After the prosecution and defense have presented their case, the magistrate will dispose of the matter by handing down orders and sentences in proportion to the gravity of the offence with which the child is charged. From the foregoing, certain expressed and implied fair hearing rights accrue to children during trial. Expressed rights include the right to be presumed innocent until proven guilty, the right to a private hearing, the right to call and examine witnesses, the right to counsel of one's choice, the right not to be compelled to testify or confess guilt and the right to be informed of the charges. The right to free assistance of an interpreter is an implied right, since proceedings are conducted in a language which the child understands.

All of the above rights are contained in the CRC and indicate the extent to which domestic laws conform to international standards. However, Cap 44 does not contain all the rights and guarantees in the CRC. Thus for instance, Cap 44 is silent on the right to free legal assistance. Similarly, the Constitution itself is silent on this issue. One could contend that the absence of certain provisions in Cap 44 is indicative of the priority that welfare concerns take over adversarial criminal proceedings in dealing with children in conflict with the law. On the other hand, questions of fairness arise when the alleged victim is in the hands of an experienced counsel and the accused child is without counsel because he or she cannot afford it. This is the case particularly with street children.

3.3.2.2 Children charged jointly with adults

Where a child is jointly charged with an adult or where he or she is charged alone for an offence of homicide, different procedures apply. To begin with, children who are jointly charged with adults or with homicide are not tried in Juvenile Courts; but in ordinary courts where they are subjected to the same treatment as adults. As such, the child loses the special treatment that he or she would otherwise have been entitled to had he or she been tried in a Juvenile Court. Where a child is charged jointly with an adult, the usual procedure is for the Magistrate to conduct a Preliminary Investigation (P.I) into the matter. A P.I is a judicial inquiry into charges of serious offences triable on indictment and is geared towards discerning whether there is substantial evidence to commit the

¹³⁴ Section 719(2) CPC.

case to the High Court. The procedures governing P.Is are contained in the CPA.¹³⁵ P.Is are conducted in the same way as ordinary trials, with both sides calling witnesses and adducing evidence in support of their respective cases. At the conclusion of the case, depending on the weight of the evidence before it, the Magistrate will dispose of the matter, pass a suitable sentence or warrant the case to the High Court for further determination.

The above procedure also applies to children who are charged with homicide. Section 7 of Cap 44 states that except for homicide, all offences may be disposed of in the Juvenile Court. However, it is usually the case that offences like treason and robbery with aggravation are also tried in Magistrate Courts, thereby creating inconsistency between what the laws stipulates and what actually happens in practice. Furthermore, the CPA which deals with P.I clearly provide that children accused of criminal offences including homicide should be tried in accordance with the provisions of Cap 44.¹³⁶ But Cap 44 stipulates that the jurisdiction of the Juvenile Court is limited to dealing with offences other than homicide. Magistrate Court proceedings are usually opened to the general public. This is the case despite the fact that section 109 of the CPA demands that all P.Is be conducted in private.¹³⁷ Considerations as to the interest and welfare of the child only comes into play when the Magistrate Court is passing its sentence, in which event judgment is handed down in private.¹³⁸

3.3.2.3 High Court trials

Generally, proceedings against children in the High Court takes place in one of the following circumstances viz, on committal from the Magistrate Court following a P.I or by way of an appeal from a Juvenile Court. In both cases, children are tried in the Juvenile Chambers of the High Court, where proceedings are held *in camera*. However, where a child is charged jointly with an adult and the case is remitted to the High Court, the child is treated as an adult. Inconsistencies as to the rules of procedure and practice arise where a child who is charged alone is afforded a juvenile trial in the High Court, but was not treated as a child in the Magistrate Court in the course of a P.I.

¹³⁵ Part III CPA.

¹³⁶ Section 210 CPA.

¹³⁷ Section 109 CPA.

¹³⁸ Part III CPA.

Furthermore, there are no express provisions governing appeal proceedings from the Juvenile Court or the Magistrate Court (in the case of a P.I) to the High Court.

3.3.3 Post-trial stage

After both sides have presented their case, the Juvenile Court will then weigh the evidence before it and reach a decision. In reaching its decision, the Court is required to obtain information as to the character, occupation and circumstances of the child so as to enable it deal with the case in the best interest of the child.¹³⁹ Under Cap 44 imprisonment of children is prohibited.¹⁴⁰ Rather, provision is made for alternative measures of punishing convicted children such as repatriating them to their districts of origin or committing them to an Approved School.¹⁴¹ It is not certain whether similar sentences apply in the High Court. However, it would appear that if the offence with which the child is charged is a capital offence, the child would be punished as an adult offender.

Theoretically, if a child is convicted of a capital offence, he or she should face death, which is the punishment for capital offences. But since the death penalty does not apply to persons under the age of 18 years, it follows that convicted children are absolved from its application. Infact, section 216 of the CPA provides that children convicted of capital offences should be kept in safe custody at the order of the President.¹⁴² At this juncture, it should be emphasised that it is not always clear whether safe custody refers to an Approved School or a prison. However, it is common knowledge that convicted children in Sierra Leone are often sentenced to imprisonment and are usually detained with adult convicts.¹⁴³

3.4 Conclusion

An evaluation of the substantive and procedural considerations on the administration of juvenile justice in Sierra Leone reveals that the juvenile justice system is rife with inconsistency. This is largely due to the fact that in Sierra Leone, standards of assessing childhood are influenced by

¹³⁹ Section 16 Cap 44.

¹⁴⁰ Section 24(1) CPA.

¹⁴¹ Section 26 Cap 44.

¹⁴² Section 216 CPA.

¹⁴³ Country Report on Human Rights Practices 2004 (n 21above).

various factors including, the nature of the offence with which the child is charged and the statute regulating the offence. As such, there is no uniform conception of childhood which applies across the board and which takes into account the maturation and experience of the child. Additionally, the need for clarity in certain aspects of juvenile justice in Sierra Leone, such as procedures for appeal and conduct of P.I cannot be overemphasised as the future of every child depends on it.

CHAPTER FOUR

ASSESSMENT OF THE CURRENT JUVENILE JUSTICE SYSTEM IN RELATION TO ESTABLISHED LEGAL STANDARDS

4.1 Introduction

In this chapter an assessment of juvenile justice in Sierra Leone shall be made against the backdrop of the concept of a fair hearing and the standard of the best interest of the child. The aim of this chapter is to determine whether there are any disparities between what obtains in international law and what actually happens in practice in Sierra Leone. At the end of this chapter it shall be disclosed whether child offenders in post-conflict Sierra Leone have access to a fair hearing.

4.2 The concept of a fair hearing

There is a general practice of perceiving fair hearing and fair trial as synonymous concepts. This practice is evident in numerous literatures which utilise the concepts interchangeably when referring to a singular process. The right to a fair hearing is distinct from the right to a fair trial. However, the distinction between both concepts is a subtle albeit important one as it hinges on their respective scopes. The right to a fair trial refers to the set of 'minimum guarantees' that every person in conflict with the law is entitled to under international law.¹⁴⁴ For example, the right to a fair trial of children in trouble with the law are the guarantees enshrined in article 40(2)(b) of the CRC. Since the elements of a fair trial are deemed as minimum guarantees, it follows that infringement of any one of them will render a trial unfair. In contrast to fair trial which is limited to criminal charges only, fair hearing covers both the determination of criminal charges and civil obligations.¹⁴⁵ Additionally, fair hearing encompasses both the elements of fair trial as well as principles which have been developed progressively by international treaty bodies such as the HRC to assess the fairness of the legal proceedings as a whole.¹⁴⁶

¹⁴⁴ Beyani (n 37 above) 127-128.

¹⁴⁵ As above.

¹⁴⁶ As above.

4.3 The elements of a fair hearing

For ease of reference, the study shall divide the elements of a fair hearing into expressed rights and implied rights respectively. As fair hearing embraces both guarantees of fair trial and established principles of international treaty bodies, implied rights shall refer to the principles of fair hearing of international treaty bodies whilst expressed rights shall refer to the guarantees of fair trial under article 40(2)(b) of the CRC.

4.3.1 Expressed rights of a fair hearing

An assessment of the expressed rights to a fair hearing of child offenders in Sierra Leone will be restricted to evaluating the right to a speedy hearing and the right to appeal respectively.

4.3.1.1 The right to a speedy hearing

Article 40(2)(b)(iii) of the CRC demands that every accused child should have the right to have his or her case determined without delay. In *Munoz Hermoza v Peru*, the HRC noted that the concept of fair hearing entails that justice be rendered without delay.¹⁴⁷ Although the HRC or the CRC does not give any guidelines as to what constitutes 'delay', the assessment of whether a case amounts to delay is usually made in terms of the notion of reasonableness. In *Konig v Germany*, the ECHR identified the factors which should be taken into account when assessing the reasonableness of the length of proceedings to include *inter alia*, the complexity of the case, the applicant's conduct and the manner in which the matter was dealt with by the judicial authorities.¹⁴⁸

Generally, in criminal trials, time starts running from the date when an individual is charged and covers the entire proceedings including appeals. The HRC has stated that the right to a speedy hearing relates not only to the time by which a trial should commence but also to the time by which proceedings should end and judgment rendered.¹⁴⁹ Where a child is detained pending trial, the right to a speedy hearing becomes even more important as there is a need for the child's liability to be

¹⁴⁷ Communication 203/86 para 11(3).

¹⁴⁸ Communication 6232/73 para 99.

¹⁴⁹ HRC General Comment 13 para 10.

ascertained as quickly as possible. In this way, the right to a speedy hearing is linked to the presumption of innocence.

Following the ten-year civil war in Sierra Leone, there has been an enormous brain-drain in the country which has resulted in shortage of legal practitioners. The problem is evident by the fact that most cases in the Juvenile Court are conducted by police officers who lack the expertise and training to handle court cases. Furthermore, legal practitioners are usually reluctant to serve in the Judiciary because conditions of service are poor.¹⁵⁰ As a result, Sierra Leone can boast of only one make-shift Juvenile Court, presided by a single Magistrate who sits twice weekly.

This arrangement is not only contrary to Cap 44 which provides for Juvenile Courts to be constituted of a Magistrate and two JOP; it also means that the Juvenile Court (which also sits as a Magistrate Court during the week) is invariably overloaded with cases. The result therefore is that the Juvenile Court suffers from excessive workload, backlog of cases and shortage of court officials. In effect, children in conflict with the law are not afforded a speedy hearing. In *Muti v Italy*, the ECHR held that excessive workload cannot be used as an excuse for delays in trial because states are under a duty to organise their judicial systems in such a way that their courts can meet each of its requirements.¹⁵¹

Indeed, if the reasonableness test is used to assess delays in trial, in light of the above problems, it would be absurd to conclude that such delays are reasonable; given the fact that there are no complexities involved in trying children, especially for 'offences' like bullying and loitering. The problem of delays in trial is further exacerbated by some of the stringent legal procedures involved. For instance, when a child is brought before the court, the issue of bail arises.

Unless the offence is one of homicide or treason, all persons are entitled to bail. The requirements for bail are that the accused must have at least one adult surety who is resident in the western area of Freetown and owns property. These conditions cannot be met by street children, most of whom are either orphaned or internally displaced. The result is that street children are usually not granted bail while pending the outcome of their trial. As trials are often protracted, it follows that accused

¹⁵⁰ Human Rights Watch Report '*Human rights overview: Sierra Leone*' (2004) express concerns that law salaries paid to Magistrates and Judges make them susceptible to corruption:
<<http://hrw.org/english/docs/2004/01/21/sierra6989.htm>>(accessed 9 October 2006).

¹⁵¹ Communication 14146/88 para 15.

children often remain in custody for long periods of time. In *R v F*, a child who was charged with the offence of larceny by trick was denied bail because her surety, who was a student, was unable to meet the bail conditions.¹⁵² The question which arises here is: if this is the case for children who have guardians, how much more for street children? The offence of larceny by trick is punishable by a term not exceeding five years in prison. Where the alleged offender is a male under the age of 16 years, he is liable to corporal punishment on conviction.¹⁵³

4.3.1.2 The right to appeal

Article 40(3)(b) of the CRC guarantees every child in conflict with the law the right to appeal to a higher court 'according to law'.¹⁵⁴ The CRC-Committee has not pontificated the expression 'according to law' but the HRC has interpreted it to mean that the existence of the right to appeal is not at the discretion of state parties.¹⁵⁵ Furthermore, in *Henry v Jamaica* the HRC held that the expression 'according to law' means that if domestic law provides for more than one instance of appeal, a convicted person must have 'effective access' to each of them.¹⁵⁶ 'Effective access' means that the appellant is also entitled to fair hearing guarantees during appeal proceedings.¹⁵⁷ Thus, the right to appeal is a fundamental right of due process and applies to everyone in conflict with the law regardless of the nature of the offence in question.¹⁵⁸

In Sierra Leone the right of convicted children to appeal is ambiguous. Cap 44 stipulates that when a child is brought before a Juvenile Court for any offence except homicide, the case shall be finally disposed of in the Juvenile Court.¹⁵⁹ This means that the Juvenile Court is the final court for the determination of all cases involving children except for homicide. As such, it follows that where a decision is reached in the Juvenile Court, it should not be subjected to review. Thus, only children

¹⁵² (unreported) 2006: cited in J Fallah 'Juvenile sent to Pademba Road Prison' <<http://www.concordtimesl.com/humanrightd.htm>>(accessed 27 September 2006).

¹⁵³ Section 2 Larceny Act 1916.

¹⁵⁴ Article 40(3)(b) CRC.

¹⁵⁵ *Salgar de Montejo v Columbia* Communication 64/1979 para 10.

¹⁵⁶ Communication 230/1987 para 8.4.

¹⁵⁷ As above.

¹⁵⁸ HRC (n 149 above) para 17.

¹⁵⁹ Section 7 Cap 44.

who have been tried and convicted of homicide are entitled to appeal. In this regard, Cap 44 violates the right of convicted children to appeal. Complications ensue from section 41 of Cap 44 which states that:

Every appeal against an order or sentence made or passed by the Juvenile Court shall be entered within seven days of the date of the order or sentenced appealed against.

When appraised, it appears as if section 41 was included in the statute as an afterthought. Hence, its insertion seems rather awkward and obviously conflicts with section 7 which postulates that the Juvenile Court is the final court for the determination of all cases involving children. Additionally, in the light of such conflict it is unclear which provision takes precedence over the other. Furthermore, Cap 44 fails to address the procedures for appeal, thereby leaving an aggrieved party in limbo. It is generally presumed that where Cap 44 fails to clarify certain procedural issues, recourse could be had to the CPA. However, the CPA merely provides that all matters concerning children should be determined in accordance with the provisions of Cap 44.¹⁶⁰ Thus, the CPA makes it clear that none of its provisions apply to children in conflict with the law.

Appeals are usually complicated and expensive processes. Their complicated nature dictates that children cannot by themselves institute the process. Therefore, the need for legal assistance is imperative. The costly nature of appeals demands that children who cannot afford the process should be granted legal aid. The fact that there is no legal aid available in Sierra Leone means that poor children, like street children for example, are effectively denied the right to appeal and hence the right to a fair hearing. Furthermore, assuming that fortuitously, a convicted child has access to appeal such appeal would go to the Juvenile Chambers of the High Court. As stated earlier, the procedures governing appeal in the High Court are also unclear, thereby compounding the problem.

4.3.2 Implied rights of a fair hearing

The HRC has stated that implied rights to a fair hearing include *inter alia*, respect for the principle of adversary proceedings, the right to equality of arms, an expeditious procedure, the right to equality before the law and the right to access to a court.¹⁶¹ This chapter shall assess the right of child

¹⁶⁰ Section 210 CPA.

¹⁶¹ *Morael v France* Communication 207/1986 para 9.3.

offenders to a fair hearing in relation to the implied rights of equality before the courts and access to a court respectively.

4.3.2.1 The right to equality before the courts

It is axiomatic that under the criminal justice system of every country, children and adults are liable to be charged and convicted for the same offences. Hence, the criminal justice system does not create special offences for children that are distinct from ordinary offences. Thus like adults, children can also be charged with *inter alia*, murder, treason and simple larceny. Also like adults, the prosecution needs to establish the *actus reus* and *mens rea* of the offence with which the child is charged beyond reasonable doubt. However, the difference between the juvenile justice system and the criminal justice system lies in their approach to dealing with children in conflict with the law.

The right to equality before the courts means that the law should be applied without discrimination by the judiciary.¹⁶² This does not suggest that child offenders should be treated like adult offenders in criminal proceedings.¹⁶³ Rather, it means that offences which apply to children should apply equally to adults. Thus, offences like bullying and begging which apply to children but not to adults (generally called status offences) are perceived to be discriminatory because they foster inequality in the application of the criminal law; and hence, deny the right of children to a fair hearing.

In Sierra Leone, specially crafted 'offences' against children like bullying, loitering and begging do not apply to adults who are found to be engaged in similar acts. Furthermore, there is no legislation in Sierra Leone which provides for such acts by children as constituting an offence. Cap 44 recognises 'begging' and 'wandering' as social vices that characterise children as persons in need of care and protection. Thus, section 27 provides for child beggars and wanderers to be brought before the Juvenile Court for an order committing them to a welfare institution or to the care of a fit and proper person.¹⁶⁴

¹⁶² Nowak (n 3 above) 239.

¹⁶³ The right to equality before a court could be distinguished from the right to non-discrimination which is an expressed provision under international law. The right to equality before the law is an implied right which concerns fairness in the application of judicial power by judicial officers in procedures before the courts whereas the right to non-discrimination applies generally and is not restricted to criminal proceedings only: S Joseph *et al* *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2005) 395.

¹⁶⁴ Section 27 Cap 44.

The existing practice of treating street children as offenders denotes the despondency which beleaguers the social problem of how to deal with street children and child delinquency in post-conflict Sierra Leone. It also demonstrates that street children are constantly persecuted for acts which they have no control over. The fact that child bullies are punished with imprisonment poses as a matter for grave concern¹⁶⁵ and testifies that children generally and street children specifically are denied the right to equality before the court and as such, the right to a fair hearing.

4.3.2.2 The right to access to court

The right to access to court covers two aspects of criminal proceedings namely: the right to institute proceedings and the right to be tried on the charges against you in a court of law.¹⁶⁶ The right to access to a court could apply when a convicted child wishes to appeal to a higher court against his or her conviction or sentence. In such a case, given the expenses involved in appeal proceedings and the complicated nature of appeals, the need for legal assistance becomes crucial. Where the child can not afford legal assistance, he or she should be afforded one free of charge. However, the poor status of street children in Sierra Leone denotes that if they come into conflict with the law, are convicted and wish to appeal against their conviction or sentence, they would not be able to afford legal assistance. Yet there is no domestic legislation that guarantees legal aid or free legal assistance to children in conflict with the law.

The Constitution guarantees every accused person access to a legal practitioner of their choice.¹⁶⁷ However, the Constitution is silent on the issue of legal aid. Thus, in the event of miscarriage of justice, convicted children would be unable to exercise their right to appeal and hence their right to access to a court. Indeed, evidence of miscarriages of justice is numerous in Sierra Leone. One example is the recent case of *R v A*.¹⁶⁸

In *R v A*, a 16 year old was brought to court by a probation officer on allegations that he was bullying other inmates at the Remand Home. Although the child denied the allegation, the

¹⁶⁵ See *R v A* Unreported (2006) where a 16 year old was sentenced to prison for bullying: cited in J Fallah '*Juvenile sent to Pademba Road Prison*' <<http://www.concordtimes.sl.com/humanrightd.htm>>(accessed 27 September 2006).

¹⁶⁶ *Golder v United Kingdom* (1975) 1 EHRR 542 para 36.

¹⁶⁷ Section 23 of the Constitution.

¹⁶⁸ Fallah (n 165 above).

Magistrate failed to grant him due process and sentenced him to prison with the accompanying words ‘since you’re strong, I will send you over there for you to flex your muscles’.¹⁶⁹ Besides the fact that the case epitomises blatant miscarriage of justice and infringement of due process, it also indicates the tremendous disregard for the welfare of children that is prevalent in post-conflict Sierra Leone. In such a case, a proper procedure would be to appeal against the conviction. However, lack of access to free legal assistance and legal aid denies the right to access to a court of many children who may find themselves in similar situations.

4.4 The principle of the ‘best interest of the child’

A cardinal principle that underlies every aspect of children’s rights is that in all actions concerning children, their ‘best interest should be a primary consideration.’¹⁷⁰ This principle is usually referred to as ‘the best interest principle’. The philosophy of the best interest principle has formed the premise of numerous theses and it is generally expected that any discussion on children would allude to it. An application of the best interest principle gives rise to questions of what standards should be used to assess whether an action is in the child’s best interest. As there is a global divergence of cultures, it follows that no uniform standard exists to determine which actions are in the child’s best interest.

Philip Alston analyses article 3(1) of the CRC and uses the best interest principle to examine the content of the CRC and the relationship between culture and human rights.¹⁷¹ He contends that the divergence of cultures which make it difficult to achieve a universal standard of the principle could act to benefit the child as it would allow for greater flexibility of international norms that will apply across the board.¹⁷² In effect, the best interest principle will become the cohesive element that holds in place all the other rights in the CRC. Thus, ‘where culture conflicts with rights the latter will prevail.’¹⁷³

¹⁶⁹ As above.

¹⁷⁰ Article 3 of the CRC provides for the best interest of the child to be a primary consideration whereas article 4 of the ACRWC advances that it should be *the* primary consideration. The difference between the two provisions transcends semantics with the CRC being criticised as importing a weaker standard.

¹⁷¹ P Alston ‘The best interest principle: Towards a reconciliation of culture and human rights’ (1994) 8 *International Journal of Law and Family* 1-25.

¹⁷² As above, 19.

¹⁷³ As above, 21.

Jonathan Todres examines the best interest principle within the cultural setting of certain countries and observes that although there is no universal consensus of the standard, it nevertheless advances children's rights.¹⁷⁴ While he concedes that the indeterminacy of the best interest standard may permit governments to use culture as an excuse for ignoring human rights abuses against children, he maintains that indeterminacy itself does not produce negative results.¹⁷⁵ This chapter will not attempt to indulge in the cultural-relativism debate but rather, it shall investigate the way in which juvenile justice in Sierra Leone is modelled to take into account the best interest of the child.

However, in light of the above contentions, it is submitted that in concordance with the above authors, the absence of a standard of the best interest of the child is not detrimental to the child. Thus for example, many African cultures, including Sierra Leone condone female genital mutilation (FGM) and perceive the practice to be in the best interest of the girl child.¹⁷⁶ However, the fact that the standard of the best interest of the child is undetermined does not mean that FGM is esteemed universally. Indeed, in recognition of the harmful effects of the practice and its denunciation in international law, many countries have passed legislation criminalising FGM.¹⁷⁷

Article 3 of the CRC refers to the principle being adopted in 'all actions concerning children'. The implication of this phrase is that it covers actions that directly and indirectly impact upon children.¹⁷⁸ Although the CRC provides no guidance as to what constitutes 'an action concerning children', it would seem that every undertaking at national and family levels must be informed by factors which give prominence to the best interest of the child. In this study, the standard of the best interest of the child shall be taken to mean any decision that is geared towards promoting and protecting the wellbeing and advancement of the child.

¹⁷⁴ Todres (n 72 above).

¹⁷⁵ Todres (n 72 above) 174.

¹⁷⁶ Country report on human rights practices (2005) released by the Bureau of Democracy, Human Rights and Labor in March 2006 reports that FGM is widely practiced and supported in Sierra Leone with 80–90% of women and girls having undergone the practice.

¹⁷⁷ Nearly 25 African countries including Cameroon have legislations criminalising FGM.

¹⁷⁸ Todres (n 72 above) 171.

Under customary law, children are deemed as properties of their parents.¹⁷⁹ As such, customary law does not recognise children as rights holders whose best interest should be a primary consideration in all activities that may affect them. Furthermore, it is generally assumed albeit mistakenly that parent wants the best for their children.¹⁸⁰ Thus, parents are perceived as the most appropriate persons to determine what is in their children's best interest. In this regard, they are given unlimited power to treat their children as they deem fit. However, in the light of many unfavourable customary law practices such as early child marriages and FGM, which parents believe to be beneficial to their children, the best interest of their children is not always a primary consideration but rather it is usually conditioned on the suitability and perceptions of parents, which means that their interests often take precedence over those of their children.

The position under customary law does not mirror the prescriptions of statutory law. Thus, statutes dealing with children's issues recognise that all actions concerning children should consider their best interest. Section 16 of Cap 44 charges the Juvenile Court with the task of handling all matters 'in the best interest of the child.' However, Cap 44 does not stipulate a standard for assessing what actions would be in the child's best interest. Rather, it merely requires the presiding Magistrate to enquire into the child's character, home life and health in order to arrive at a decision that would be in the child's best interest.

However, it could be contended that since Cap 44 is founded on welfare ideals, an assessment of the standard of the best interest of the child is made in relation to mechanisms that foster their reformation and reintegration in society. Thus for example, it could be advanced that section 24(1) which prohibits imprisonment of child offenders recognises that imprisonment will not foster the reintegration and reformation of the child and is therefore not in the child's best interest. However, this contention could be defeated in light of the fact that Cap 44 subjects children charged with capital offences, to adult criminal trials. Against this background, one could surmise that Cap 44 does not give primacy to the best interest of the child, contrary to the stipulations under international law.

¹⁷⁹ Thompson (n 24 above) 13.

¹⁸⁰ This assumption stems from the fact that under customary law a person's wealth is determined in accordance with the number of children he or she has.

CHAPTER FIVE

CONCLUDING OBSERVATIONS AND RECOMMENDATIONS

5.1 Concluding observations

The study affirms that Sierra Leone recognises and accepts that children in conflict with the law have the right to a fair hearing. This recognition is made manifest by the number of international and regional child rights' instruments which Sierra Leone has signed and ratified. At the domestic level, recognition of fair hearing rights of children in conflict with the law is evident by the Government's attempt to bring its domestic laws in conformity with international norms *via* the draft Child Rights Bill.

The study concludes that the ten-year civil conflict in Sierra Leone has impacted negatively on the right of children to a fair hearing; but that prior to the civil-conflict, certain shortcomings were already prevalent in the juvenile justice system which denied children access to fair hearing. As such, denial of fair hearing of children in conflict with the law cannot be attributed solely to the civil conflict; as the conflict merely acted to compound an existing *status quo*. Problems in juvenile justice prior to the civil conflict relate specifically to legislative inadequacies, which do not guarantee sufficient fair hearing rights of children who come into conflict with the law. Hence the absence of legal aid and free legal assistance for example, which are corollaries of fair hearing, already existed before the civil conflict.

The ten-year civil conflict brought its own set of problems which affected the juvenile justice system such as the destruction of infrastructure of juvenile justice and the social problem of street children and the attendant increase in child delinquency; which cause officials to inappropriately resort to the criminal law as a means of ensuring that children are kept off the streets. This is evident by the use of status offences, which repeatedly bring street children into a criminal justice system that is not adequately equipped to effectively address their problem.

5.2 Recommendations

It is clear that the problem of child delinquency in Sierra Leone needs to be tackled. In this regard, it is suggested that one of the ways in which child delinquency could be reduced is through processes

that are structured to remove children from the streets. One such process involves the establishment of foster homes that would give street children care and protection and prevent them from engaging in activities that could bring them into conflict with the law.

Children who come into conflict with the law should have access to free assistance of a legal counsel at all stages of criminal proceedings. This would guarantee access to fair hearing especially in cases where there has been a miscarriage of justice, necessitating an appeal. Alternatively, social workers and persons qualified in children's issues could be used to assist children during criminal proceedings, as is the practice in Cameroon.¹⁸¹

Pre-trial detention of children should be prohibited. Furthermore, it is recommended that bail conditions be removed for children who come into conflict with the law. Instead, children should be detained in special welfare institutions like the Remand Home or placed under the care and supervision of a social worker.

As there is currently only one Juvenile Court in Sierra Leone, it is recommended that additional Juvenile Courts be established throughout Sierra Leone, preferably, in all the 18 districts in Sierra Leone and should consist of magistrates, social welfare workers and court officials that are highly trained and well-versed in children's rights. Furthermore, Juvenile Courts should sit specifically for child cases and should only deal with children's issues.

It is recommended that the status of every child in conflict with the law should be investigated and assessed by qualified social workers and a written assessment report of the child's status should be compiled and made available to the Magistrate and the child's parents or guardian. Furthermore, the Magistrate should consider such report throughout the criminal proceedings and when deciding the outcome of the case, to enable him reach a decision that would be sensitive to the child's situation and circumstance.

Lastly, it is recommended that Cap 44 should be amended to expressly prohibit the use of status offences on children. Alternatively, such prohibition should be incorporated into the draft Child Rights Bill.

¹⁸¹ Section 719 CPC.

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ANNEXURE A

Convention on the Rights of the Child

**Adopted and opened for signature, ratification and accession by
General Assembly resolution 44/25
of 20 November 1989**

Entry into force 2 September 1990, in accordance with article 49

Article 40

1. States Parties 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 freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law and in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

ANNEXURE B

CHAPTER 44.

CHILDREN AND YOUNG PERSONS.*

35 of 1945.
12 of 1947.
22 of 1949.
19 of 1952.

An Ordinance relating to Children and Young Persons.

[31ST DECEMBER, 1945.]

1. This Ordinance may be cited as the Children and Young Persons Ordinance, and shall apply to the Colony and to the Protectorate. Short title.

PART I.—PRELIMINARY.

2. In this Ordinance, unless the context otherwise requires— Interpreta-
tion.
“ approved school ” means a school established by the Governor under the provisions of section 31 or any place or institution declared to be an approved school under the provisions of that section;

“ child ” means a person under the age of fourteen years;

“ guardian ” in relation to a child or young person includes any person who, in the opinion of the court having cognisance of any case in relation to the child or young person or in which the child or young person is concerned, has for the time being the charge of or control over the child or young person;

“ juvenile court ” means a Magistrate’s Court sitting as prescribed in sub-sections (1) and (2) of section 3 for the hearing and determination of cases relating to children or young persons and includes a juvenile court held by a Magistrate and two or more Justices of the Peace by virtue of an Order in Council made under section 4; 19 of 1952.

“ probation officer ” means a person appointed as such under this Ordinance and includes a deputy probation officer or assistant probation officer;

“ young person ” means a person who is fourteen years of age or upwards and under the age of seventeen years.

PART II.—SPECIAL PROVISIONS AS TO PROCEDURE.

3. (1) A Magistrate’s court when hearing charges against children or young persons shall, if practicable, unless the child or young person is charged jointly with any other person not Juvenile
courts.

* The title of this Ordinance has been changed from “ Young Persons and Children ”.

being a child or young person, sit in a different building or room from that in which the ordinary sittings of the court are held or on different times from those at which the ordinary sittings are held.

(2) If in the course of any proceedings in a Magistrate's court it appears to the court that the person charged or to whom the proceedings relate is under the age of seventeen years the court shall continue with the hearing and determination of the case in accordance with the provisions of this Ordinance, but nothing herein shall be deemed to make it necessary for such court to adjourn the case in order to comply with the provisions of this section, and a court so sitting shall be a juvenile court for the purposes of this Ordinance.

(3) If in the course of any proceedings in a juvenile court it appears to the court that the person charged or to whom the proceedings relate is of the age of seventeen years or upwards the court shall proceed with the hearing and determination of the case in accordance with the provisions of the Criminal Procedure Ordinance but nothing herein shall be deemed to make it necessary for such court to adjourn the case into the public court room unless the court considers it desirable so to do, and the court so constituted shall be a Magistrate's court:

Cap. 39.

19 of 1952.

Provided that where the juvenile court is being held by a Magistrate and two or more Justices of the Peace in accordance with the provisions of an Order in Council made under section 4, the Justices of the Peace shall withdraw and the Magistrate shall proceed with the hearing and determination of the case.

(4) Provision shall be made for preventing persons apparently under the age of seventeen years whilst being conveyed to or from court, or whilst waiting before or after their attendance in court, from association with adults charged with or convicted of any offence other than an offence with which the person apparently under the age of seventeen years is jointly charged or convicted.

(5) In a juvenile court no person other than the members and officers of the court, the relatives of the accused and the parties to the case, their advocates, and other persons directly concerned in the case, shall, except by leave of the court, be allowed to attend:

Provided that *bona fide* representatives of a newspaper or news agency shall not be excluded except by special order of the court:

Provided further that no person shall publish the name, address, school, photograph or anything likely to lead to the

identification of the child or young person before the juvenile court save with the permission of the court or in so far as required by the provisions of this Ordinance. Any person who acts in contravention of the provisions of this proviso shall be guilty of an offence and shall be liable, on summary conviction, to a fine not exceeding ten pounds.

4. Notwithstanding the provisions of section 32 of the Courts Ordinance the Governor in Council may by Order provide that, in any Judicial District specified therein, a juvenile court may, subject to the directions of the Chief Justice, be held by a Magistrate having jurisdiction therein and two or more Justices of the Peace.

Special juvenile courts.

Cap. 7.

19 of 1952.

5. Where a person apparently under the age of seventeen years is apprehended with or without a warrant and cannot be brought forthwith before a court, the officer in charge of the police station to which such person is brought shall—

Bail of children and young persons arrested.

(a) unless the charge is one of homicide or any offence punishable with imprisonment for a term exceeding seven years; or

(b) unless it is necessary in the interest of such person to remove him from association with any undesirable person; or

(c) unless the officer has reason to believe that the release of such a person would defeat the ends of justice,

release such person on a recognisance being entered into by him or by his parents or guardian, or other responsible person, with or without sureties for such amount as will in the opinion of the officer secure the attendance of such person upon the hearing of the charge.

6. It shall be the duty of the Commissioner of Police to make arrangements for preventing, so far as practicable, a child or young person while in custody, from associating with an adult, other than a relative, charged with an offence.

Association with adults whilst in custody.

7. When a child or young person is brought before a juvenile court for any offence other than homicide the case shall be finally disposed of in such court.

Juvenile court may dispose of all cases other than homicide.

8. It shall be the duty of a juvenile court when hearing a charge against a child or young person to explain to him in simple language the substance of the alleged offence.

Charge to be explained.

Accused to be asked to show cause.

9. After explaining the substance of the alleged offence the court shall ask the child or young person what he has to say in explanation thereof and whether he admits the offence.

Record of proof of offence.

10. If the statement made by the child or young person amounts to a plea of guilty the court shall record that the offence is proved.

Hearing.

11. If the child or young person does not admit the offence or if the court does not accept the accused's statement or a plea of guilty the court shall then hear the evidence of witnesses for the prosecution.

Cross-examination of witnesses.

12. At the close of the evidence of each witness the court shall put to the witness such questions as appear to be necessary or desirable—either for the purpose of establishing the truth or otherwise of the facts alleged or to test the credibility of the witness.

Accused may question prosecution witnesses.

13. The accused may put questions to each witness produced against him, and the answer of the witness thereto shall be part of his evidence.

Duty of Court when accused is without counsel.

14. If the accused does not employ counsel, the court shall at the close of the examination of each witness for the prosecution, ask the accused whether he wishes to put any questions to that witness.

Defence.

15. If after the prosecution witnesses have given their evidence the court is satisfied that the facts properly before it establish a *prima facie* case against the accused which, unanswered, would leave no reasonable doubt as to his guilt the court shall hear the witnesses for the defence and any further statement which the accused may wish to make in his defence.

Procedure upon proof of offence.

16. If the child or young person admits the offence and the court accepts his plea or if after hearing the witnesses the court is satisfied that the offence is proved the court shall record that the offence is proved and shall then, except in cases where the circumstances are so trivial as not to justify such a procedure, obtain such information as to his character, antecedents, his life, occupation and health as may enable it to deal with the case in the best interest of the child or young person, and not put to him any question arising out of such information. For the purpose of obtaining such information or for special medical examination or observation the court may from time to time remand the child or young person or may release him on bail.

17. Where a child or young person is charged with any offence, the court may in its discretion require the attendance of his parent or guardian and may make such orders as are necessary for the purpose.

Attendance at court of parent of child or young person charged with an offence.

18. (1) When a person is brought before any court otherwise than for the purpose of giving evidence and it appears to the court that he is a child or young person the court shall, having made such inquiry as it considers necessary, record a finding as to the age of such person.

Determination of age.

(2) No order or judgment of a juvenile court shall be invalidated by any subsequent proof that the age of the person has not been correctly stated to the court, and the age found by the court to be the age of the person brought before it shall, for the purposes of this Ordinance, be deemed to be the true age of that person.

19. Where it appears to the court that any person brought before it is of the age of seventeen years or upwards, that person shall for the purposes of this Ordinance be deemed not to be a child or young person.

Persons appearing to be of the age of seventeen years or upwards.

PART III.—TREATMENT OF YOUNG OFFENDERS.

20. (1) The Governor may, by notice in the *Gazette*, appoint a fit and proper person or persons of either sex, and either by name or as holding any public office for the time being, to be a probation officer or officers for each district, and may from time to time appoint a deputy probation officer for any district to act in the absence or during the illness or incapacity of the probation officer, and may appoint an assistant probation officer to perform under the direction of the probation officer all or any of the duties of a probation officer in any portion of a district.

Appointment of probation officers.

A probation officer when acting under a probation order shall be subject to the control of the courts for the district for which he is appointed.

(2) Where a child or young person is charged with an offence other than homicide, and the court is satisfied that the charge is proved, the court may make an order discharging the offender conditionally on his entering into a recognisance, with or without sureties, to be of good behaviour and to appear to be further dealt with when called upon at any time during such period, not exceeding three years, as may be specified in the order. A recognisance entered into under this section shall, if the court so order, contain a condition that the offender be under the supervision of such person as may be named in the order

Probation orders.

during the period specified in the order, such person being willing to undertake such supervision, and such other conditions for securing such supervision as may be specified in the order.

(3) The person named in any probation order shall be—

(a) a probation officer appointed by the Governor for the district in or for which the court acts; or

(b) if the court considers it expedient on account of the place of residence of the offender, or for any special reason, a probation officer appointed by the Governor for some other district; or

(c) if the court considers that the special circumstances of the case render it desirable, or if no person has been appointed as a probation officer, a person who has not been appointed a probation officer for any district.

(4) The person named in such an order may at any time be relieved of his duties, and in any such case or in case of the death of the person so named, another person may be substituted by the court before which the offender is bound by his recognisance to appear for conviction or sentence.

(5) It shall be the duty of the probation officer, subject to the control of the Court—

(a) to visit or receive reports from the person under supervision at such reasonable intervals as may be specified in the probation order or subject thereto as the probation officer may think fit;

(b) to see that he observes the conditions of his recognisance;

(c) to report to the court as to his behaviour; and

(d) to advise, assist and befriend him and when necessary to endeavour to find him suitable employment.

Power to vary conditions of release.

21. The court before which any person is bound by his recognisance under this Ordinance to appear to be further dealt with may, after notice to the offender, vary the conditions of the recognisance and may, on being satisfied that the conduct of that person has been such as to make it unnecessary that he should remain longer under supervision, discharge the recognisance.

Provision in case of offender failing to observe conditions of release.

22. (1) If the court before which an offender is bound by recognisance to appear to be further dealt with, or any court, is satisfied by information on oath that the offender has failed to observe any of the conditions of the recognisance, it may issue a warrant for his apprehension, or may if it thinks fit,

instead of issuing a warrant in the first instance, issue a summons to the offender and his sureties (if any) requiring him or them to attend at such court and at such time as may be specified in the summons.

(2) The offender, when apprehended, shall, if not brought forthwith before the court before which he is bound by recognisance to appear to be further dealt with, be brought before any other magistrate's court.

(3) The court before which an offender on apprehension is brought, or before which he appears in pursuance of such summons as aforesaid may, if it is not the court before which he is bound by recognisance to appear to be further dealt with, remand him to custody or on bail until he can be brought before the last-mentioned court.

(4) A court, before which a person is bound by recognisance to appear to be further dealt with, on being satisfied that he has failed to observe any condition of the recognisance, may forthwith deal with him as for the original offence.

23. (1) Where a child or young person has been found guilty of an offence for the commission of which a fine, compensation or costs may be imposed, and the court is of opinion that the case would be best met by the imposition of a fine, compensation or costs, whether with or without any other punishment, the court may in any case and shall if the offender is a child, order that the fine, compensation or costs awarded be paid by the parent or guardian of the child or young person instead of by the child or young person unless the court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child or young person.

Power to order parent to pay fine instead of child or young person

(2) An order under this section may be made against a parent or guardian who, having been required to attend has failed to do so, but no such order shall be made without giving the parent or guardian an opportunity of being heard.

(3) Any sums imposed and ordered to be paid by a parent or guardian under this section may be recovered from him by distress.

(4) A parent or guardian may appeal against an order under this section to the Supreme Court.

24. (1) No child shall be sentenced to imprisonment.

Imprisonment.

(2) No young person shall be sentenced to imprisonment unless the court considers that none of the other methods in

which the case may be legally dealt with by the provisions of this or any other Ordinance is suitable.

(3) A young person sentenced to imprisonment shall, so far as circumstances permit, not be allowed to associate with adult prisoners.

Alternative punishment in certain cases.

25. Where a child or young person is charged with any offence other than homicide or other than an offence punishable with imprisonment for a term exceeding seven years, and the court is satisfied that the offence is proved, the court may, in addition or alternatively to any other order which may be made, under this Ordinance in its discretion either—

(a) discharge the child or young person without making any order;

(b) order the child or young person to be repatriated at the expense of Government to his home or district of origin; or

(c) order the child or young person to be handed over to the care of a fit person or institution named in the order, such person or institution being ready to undertake such care.

When approved school order may be made.

26. (1) Where a child or young person is charged with an offence punishable, in the case of an adult, with imprisonment and the court is satisfied that the offence is proved, the court may order that he be committed to custody of an approved school until he attains the age of eighteen years or for any shorter period:

Provided that no person shall be committed to an approved school for a shorter period than two years, unless at the time of the order the young person is over the age of sixteen years, in which case the order for committal shall be for the period until such person attains the age of eighteen years.

(2) An order made under this section is in this Ordinance referred to as an approved school order.

PART IV.—CHILDREN AND YOUNG PERSONS IN NEED OF CARE AND PROTECTION.

Power of juvenile courts in respect of children in need of protection.

22 of 1949.

27. (1) Any administrative officer, police officer above the rank of sub-inspector or authorized person may bring before a juvenile court any child or young person who—

(a) is found begging or receiving alms (whether or not there is any pretence of singing, performing, offering anything for sale or otherwise), or being in any street, premises or place for the purpose of so begging or receiving alms; or

ANNEXURE C

No.



2006

A BILL ENTITLED

The Child Rights Act, 2006.

Short title.

Being an Act to provide for the promotion of the rights of the child compatible with the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20th November, 1989, and its Optional Protocols of 8th September, 2000; and the African Charter on the Rights and Welfare of the Child, and for other related matters.

f

J Date of commencement.

Family
Courts.

76. Subject to section 77, there shall be a Family Court which shall exercise the jurisdiction conferred under this Act.

Composition
of Family
Court.

77. A Family Court shall be duly constituted by a panel consisting of a chairman who shall be a Magistrate and not less than two and not more than four other members all of whom shall be appointed for their knowledge or experience in child rights issues, including a social welfare officer, appointed by the Chief Justice on the recommendation of the chief social welfare officer.

Jurisdiction
of Family
Court.

78. A Family Court shall have jurisdiction in matters concerning parentage, custody, access and maintenance of children and shall exercise such other powers as are conferred on it by this Act or under any other enactment.

Family Court
sittings

79. (1) A Family Court shall sit either in a different building or room from that in which sittings of other courts are held, or on different days from those on which sittings of other courts are held and no person shall be present at any sitting of a Family Court except -

- (a) members and officers of the Family Court;
- (b) parties to the case before the Family Court, their counsel, witnesses and other persons directly concerned in the case;
- (c) the parent or guardian of the child before the Family Court;
- (d) probation and social welfare officers; and
- (e) any other person whom the Family Court authorises to be present.

(2) The chairman of a Family Court shall arrange for its sitting as often as possible to dispose of cases expeditiously.

80. (1) The proceedings at a Family Court shall be as informal as possible and shall be by enquiry and not by adversarial procedures. Procedure at family Court

81. (1) A child shall have a right to legal representation at a Family Court. Rights of child at family Court.

(2) A child shall have a right to give an account and express an opinion at a Family Court.

(3) A child's right to privacy shall be respected throughout the proceedings at a Family Court.

(4) The right of appeal shall be explained to the child, guardian and parents.

82. (1) No person shall publish any information that may lead to the identification of a child in any matter before a Family Court except with the permission of the Family Court. No publication of information on child.

(2) Any person who contravenes this section commits an offence and is liable on summary conviction to a fine not exceeding two million leones or imprisonment for a term not exceeding one year or to both such fine and imprisonment.

PART VI - PARENTAGE, CUSTODY AND MAINTENANCE OF CHILDREN

83. (1) The following persons may apply to a Family Court for an order to confirm the parentage of a child - Application for parentage.

- (a) the child;
- (b) the parent of a child;
- (c) the guardian of a child;
- (d) a probation officer;
- (e) a social welfare officer; or
- (f) any other interested person.

ANNEXURE D

Criminal Procedure Code 2006 Cameroon

PART XV

Prosecution and trial of juveniles

Chapter I: Institution of prosecution

Section 706

(1) Infants shall be detained only in:

- a Borstal institution
- a special section of a prison meant for the detention of minors

(2) Where there is no Borstal institution or special section of a prison, the infant may be detained in a prison for adults but must be separated from them.

Chapter IV: Jurisdiction

Section 713

The court of First Instance sitting in cases of juvenile delinquency shall have jurisdiction to try all felonies, misdemeanours and simple offences committed by minors aged more than ten (10) years but less than eighteen (18) years of age. However, where there are accomplices or co-offenders who are adults, only the ordinary law courts shall have jurisdiction to hear the case.

Chapter V, sub-chapter I: Full trial

Section 719

(1) The Court of First Instance sitting in cases of juvenile delinquency shall apply the procedure applicable in ordinary courts subject to the provisions of sections 712 and following.

(2) A minor shall be assisted by counsel or by any other person who is a specialist in the protection of children's rights.

(3) Where the minor has no counsel, the court shall of its own motion, assign one to him.

(4) Where the minor's counsel, who has been summoned by all means with written proof, does not attend two consecutive court sessions, the court shall assign another counsel. Mention of this fact shall be made in the record book and in the judgment.

Section 721

(1) The court shall not stay the trial except in the following cases:

- (a) where the minor's age cannot be ascertained;
 - (b) where it is deemed necessary to proceed to a further medical examination, medico psychological or further inquiry;
 - (c) if it is deemed necessary to fix an observation period.
- (2) Judgment shall be pronounced at a public hearing in the presence of the minor and may be published provided that no mention be made of the minor's name or initials and that no personal or family particulars be disclosed concerning him, under pain of the penalties provided for in section 198 of the Penal code.