

**Assessing the protection of child offenders in Burundian criminal law:  
international human rights law perspective**

**Submitted in partial fulfillment of the requirements of the degree LLM (Human  
Rights and Democratisation in Africa) of the University of Pretoria**

**By**

**Eric Bizimana**

**Student No. 13414292**

**Prepared under the supervision of**

**Dr Iyabode Ogunniran**

**Faculty of Law, University of Lagos, Nigeria**

**31 October 2013**

## Declaration

I, Student No **13414292** declare as follows:

1 I understand what plagiarism entails and am aware of the University's policy in this regard.

2 This dissertation is my own, original work. Where someone else's work has been used (whether from a printed source, the internet or any other source) due acknowledgment has been given and reference made according to the requirements of the Faculty of Law.

3 I did not make use of another student's work and submit it as my own.

4 I did not allow anyone to copy my work with the aim of presenting it as his or her own work.

**Signature:** \_\_\_\_\_

**Date:** 31 October 2013

## Dedication

To my mother, your hospitality, generosity and humanness mean a lot to me. We love you and pray for you.

My God richly bless you.

## Acknowledgment

I thank God for His favour and protection since my tender childhood up to now.

I would like to express my gratitude to the Centre for Human Rights, University of Pretoria for giving me the opportunity to undertake this LLM/MPhil Study which widened and shaped my thinking in regard to human rights and democracy in Africa.

Particular thanks go to Dr Martin and Eric for all kind of assistance the both of them rendered to me. I also thank my academic tutors particularly Ademola Jegede and Remember Miamingi.

I am particularly grateful to Dr Iyabode Ogunniran for her kind supervision, advice, comments and documentation. Without her assistance, this dissertation would not have achieved the current standing.

Special appreciation goes to my family for their support and assistance. I am not unmindful of the suffering endured by my fiancée Odette Nitonde and her constant sacrifices during my long absence.

Finally, I am grateful to LLM/MPhil Class 2013 for the good time together. I cannot forget the family atmosphere in Pretoria, South Street, 1220 and the hospitality of Nigerians especially the academic and administrative staff of the Faculty of Law, University of Lagos as well as co-residents in Erastus Akingbola Postgraduate Hall.

Thank you all.

## Acronyms

African Charter: African Charter on Human and Peoples' Rights

African Children's Charter: African Charter on the Rights and Welfare of the Child

African Children's Committee: African Committee of Experts on the Rights and Welfare of the Child

Beijing Rules: United Nations Standard Minimum Rules for the Administration of Juvenile Justice

CEDAW: Convention on the Elimination of All forms of Discrimination against Women

CESCR: International Covenant on Economic, Social and Cultural Rights

Constitution: Constitution of the Republic of Burundi (Law 1/010 of 18 March 2005)

CRC Committee: Committee on the Rights of the Child

CRC: Convention on the Rights of the Child

DCI: Defence for Children International

Geneva Declaration: Declaration of the Rights of the Child of 1924

Havana Rules: United Nations Rules for the Protection of Juveniles Deprived of their Liberty

HRW: Human Rights Watch

ICCPR: International Covenant on Civil and Political Rights

MACR: Minimum Age of Criminal Responsibility

NGO: Non-Governmental Organisation

OAG: Observatory of Governmental Action

OIDEB: Observatoire Ineza des Droits de l'Enfant au Burundi.

PPC: Penal Procedure Code

Riyadh Guidelines: United Nations Guidelines for the Prevention of Juvenile Delinquency

TGI: Tribunal of Grand Instance

Tokyo Rules: United Nations Standard Minimum Rules for Non-custodial Measures

UN: United Nations

UNICEF: United Nations Children's Fund

Universal Declaration: Universal Declaration of Human Rights

US: United States

VCLT: Vienna Convention on the Law of Treaties

## Table of contents

Cover page .....	i
Plagiarism declaration.....	ii
Dedication.....	iii
Acknowledgment.....	iv
Acronyms.....	v
Table of contents .....	vi

### Chapter 1 Introduction

1.1 Background to the study .....	1
1.2 Problem statement .....	2
1.3 Objectives .....	2
1.4 Methodology .....	3
1.5 Significance of the study .....	3
1.6 Limitations .....	3
1.7 Literature review .....	3
1.8 Chapters outline .....	5

### Chapter 2 Development of juvenile justice under international law and in Burundi

2.0 Introduction .....	6
2.1 Concepts of child and juvenile.....	6
2.2 Development of juvenile justice in international law.....	9
2.2.1 International human rights law specific to children.....	9
2.2.2 General norms applicable to children .....	10
2.3 Development of juvenile justice in Burundi .....	11
2.3.1 Pre-colonial period .....	11

2.3.2 Colonial period .....	12
2.3.3 Post-colonial period.....	12
2.4 Conclusion .....	13

### **Chapter 3 Ameliorations provided by the new criminal law to protect child offenders**

3.0 Introduction .....	15
3.1 Age of criminal liability.....	15
3.2 Pre-trial stage of the criminal procedure.....	17
3.2.1 Notification of apprehension of the child to parents and legal guardians .....	17
3.2.2 Notification of the charges and the rights to the child .....	17
3.2.3 Conduct of inquiry .....	18
<i>Mandatory assistance during the questioning .....</i>	<i>18</i>
<i>Social enquiry .....</i>	<i>19</i>
<i>Custody and detention of the minor.....</i>	<i>20</i>
3.3 Trial Stage.....	20
3.3.1 Institutionalisation of chambers for minors.....	21
3.3.2 Confidential hearings .....	21
3.3.3 Judicial and legal assistance.....	22
3.3.4 Alternatives to deprivation of liberty.....	23
3.4 Conditions of imprisonment and alternatives to incarceration.....	24
3.4.1 Separation from adults .....	24
3.4.2 Education programs .....	26
3.5 Conclusion .....	26

### **Chapter 4 International standards applicable to child offenders and status of International law within the Burundian legal system**

4.0 Introduction .....	27
------------------------	----



4.1 The best interests and welfare principle in criminal adjudication.....	28
4.1.1 Relevance of the best interests of the child .....	28
4.1.2 Conventional standards.....	29
<i>Entrenchment of the best interest principle in CRC and African Children’s Charter.....</i>	<i>29</i>
<i>Indicators for evaluating the best interests of the child .....</i>	<i>31</i>
<i>Positive obligations of state parties .....</i>	<i>32</i>
4.1.3 Soft law standards.....	33
4.2 Status of international law within Burundian legal system.....	35
4.2.1 Domestication process .....	35
4.2.2 Obligations stemming from ratification.....	36
4.2.3 Justiciability of international human rights .....	37
4.3 Conclusion .....	38

**Chapter 5 Appraisal of the guarantees provided by the new criminal law from an international law perspective**

5.0 Introduction .....	39
5.1 Specialisation of police and court chambers.....	39
5.2 Age of criminal responsibility .....	40
5.3 Pretrial procedure.....	42
5.3.1 Social enquiry .....	42
5.3.2 Speedy process .....	42
5.3.3 Deprivation of liberty as a measure of last resort.....	44
5.4 Adjudicatory procedure and safeguards .....	45
5.4.1 Right to counsel .....	45
5.4.2 Right to privacy .....	47
5.5 Alternatives to deprivation of liberty.....	48
5.6 Imprisonment facilities.....	50

5.6.1 Separate detention from adults .....51

5.6.2 Humanitarian treatment.....51

5.7 Conclusion .....53

**Chapter 6 Conclusion and recommendations**

6.1 Conclusion .....54

6.2 Recommendations.....55

**Bibliography ..... 57**

# Chapter 1

## Introduction

### 1.1 Background to the study

On 22 April 2009, Burundi has enacted a new penal code replacing that of 1981. The new criminal law contains some innovations as to the protection of child offenders. By way of illustration, the age of criminal responsibility has been increased from 13 years to 15 years and the system provides alternatives to the deprivation of liberty. It is only after the enactment of the criminal procedure code on 3 April 2013 that some of the innovations were modelled into a practical form.

The advent of that law is very useful on a practical level. Indeed, Burundian law enforcement agencies are accustomed to using domestic texts and seldom make reference to international law. Despite the explicit entrenchment of international instruments relating to children in the Constitution<sup>1</sup>, courts appear to ignore it while adjudicating cases.

Thus, so far the Burundian penal system has not proved to be child friendly. This stems from, *inter alia*, undue delay, long pre-trial detentions, trial in adult courts and bad conditions in custody. This seems to be due to the lack of preparedness of judges, prosecutors, lawyers and prison personnel to deal adequately with children in conflict with the law.

Facing a purely retributive system, Non-Governmental Organisations (NGOs) have devised programs to provide legal assistance to children deprived of liberty. However, the latter is very limited due to the lack of financial means and coordination of efforts.

The new penal law appears to offer a sigh of relief to children and eases the work of lawyers who used to encounter many problems trying to convince courts to apply international standards.

It is worthy of mention that at first glance, the few provisions specifically dedicated to children appear to be an incomplete legislation. Therefore, there is a need to assess those ameliorations in a bid to find whether they can promote the welfare of child offenders, and if not, propose further improvements.

---

<sup>1</sup>Arts 19 & 292 of the Constitution.

## 1.2 Problem statement

Children constitute a vulnerable group in respect to their physical, emotional and psychological development. International community expressed the need for their special protection in the 1924 Geneva Declaration. A subsequent number of hard and soft laws have seen the light both globally and regionally. Binding laws place obligation upon state parties to domesticate and implement the rights enshrined therein.

In regard to juvenile justice, Burundi ratified relevant instruments applicable to children including the Convention on the Rights of the Child (CRC)<sup>2</sup> and the African Charter on the Rights and Welfare of the Child (African Children's Charter).<sup>3</sup> Although Burundi theoretically adhered to those binding instruments, practical implementation has not ensued. Law enforcement institutions manifest either ignorance or reluctance as concerns using international human rights law. Rather, police, prosecutors and judges give pre-eminence or even exclusivity to domestic laws. This entails the situation whereby child offenders are not given appropriate treatment as contained in international law.

The inclusion of specific provisions applicable to children in the penal and penal procedure codes is relatively new and unprecedented in Burundian legal system and requires assessment in order to see whether the system stipulated can ensure adequate protection of child offenders.

## 1.3 Objectives

This study intends to critically assess the effectiveness of the Burundian criminal law to protect child offenders. Its main objectives are:

- a. To analyse the ameliorations provided for child offenders in the new criminal legislation in Burundi.
- b. To examine the international law standards applicable to child offenders and the status of international law within Burundian legal system.
- c. To assess the adequacy of this new Burundian criminal law in the light of international law norms protecting child offenders.

---

<sup>2</sup>Adopted by General Assembly resolution 44/25 of 20 November 1989.

<sup>3</sup>Adopted on 27 June 1981.

- d. To determine how the new criminal law can comply with international law standards to protect child offenders in Burundi.

## **1.4 Methodology**

The study is a desktop research. It will focus on review of primary sources such as relevant treaties, national legislation and judgments.

It will also use secondary sources: Treaty bodies general comments, UN Reports, Reports by NGOs, academic writings, and newspapers among others.

## **1.5 Significance of the study**

This scholarship touches on an issue of great concern worldwide and particularly in Burundi. This appears from intervention of both national and international NGOs in cases involving children. The study will contribute to better understanding of the relevance of special protection for children and how the latter should be led in a criminal procedure. Put differently, the study will propose answers to problems characterising adjudication of offences committed or involving children. The relevance of the study lies particularly in the fact that the issue of child offenders in Burundi has not yet been thoroughly explored. Scant existing studies are limited to imprisoned children and predate the enactment of the new legislations.

## **1.6 Limitations**

The legislation assessed especially the penal procedure code is very recent and it would be premature to evaluate its implementation. Although some aspects of implementation are explored, the scholarship mainly concentrates on theoretical aspects of the legislation.

## **1.7 Literature review**

Juvenile justice is a domain which draws attention of many stakeholders ranging from international bodies, regional communities, national institutions, NGOs and scholars.

At international level bodies like the CRC Committee and United Nations Children Fund (UNICEF) deal, among other things, with children in conflict with the law. Even treaties bodies which are not primarily concerned with children's right have elaborated useful guides as to the protection of child offenders. In that respect, the Human Rights Committee has set up a General Comment number 21 relevant to administration of juvenile justice. Moreover, the inter-agency coordination panel has also devised a framework to guide states willing to reform their juvenile justice

At the African level, it is worthy of mention that the African Children's Committee is a clear manifestation of growing will to enhance protection of children plagued by many problems including administration of justice.

As far as Burundi is concerned, although very recent and less developed, standards of protection are adhered to, at least from a theoretical point of view. The Burundian legal system lacks specialised institutions dealing with children. Until now, a limited assistance of children deprived of liberty is assured by NGOs. The latter write reports which are indicative of the low level of protection at all phases of the criminal process. On the other hand, there is no scholarly study assessing the new regime.

Many scholars like Freeman, Van Bueren, Cipriani, Schabas and Sax have greatly contributed to the literature on international child justice. For stance, Freeman has analysed in details the best interests principle enshrined in article 3 of CRC.<sup>4</sup> Van Bueren tackled various aspects of juvenile justice. She thoroughly scrutinised the scope of article 40 of CRC<sup>5</sup> which is the central section on the administration of juvenile justice.<sup>6</sup> Schabas and Sax commenting on article 37 of CRC expatiated on the global standards for the rights of juveniles deprived of liberty.<sup>7</sup>

Burundian writers appear not to have concentrated on children's rights. There are no studies specifically dealing with juvenile justice. A few studies addressing the criminal juvenile justice predate the new penal law. There were reports produced by NGOs and the independent expert Akich Okola. Studies conducted on that issue including that of De Blauwe showed that law

---

<sup>4</sup>M Freeman *A commentary on the United Nations Convention on the Rights of the Child. Article 3 The best interests of the child* (2007).

<sup>5</sup>G Van Bueren *A commentary on the United Nations Convention on the Rights of the Child. Article 40 of the Convention on the Rights of the Child* (2006).

<sup>6</sup>G Van Bueren *The international law on the rights of the child* (1994).

<sup>7</sup>W Schabas & H Sax *A commentary on the United Nations Convention on the Rights of the Child. Article 37 Prohibition of torture, death penalty, life imprisonment and deprivation of liberty* (2006).

enforcement institutions are not prone to making use of international standards and sometimes display ignorance of these norms.

## **1.8 Chapters outline**

Chapter one provides an introduction to the scholarship with focus on the background, the statement of the problem, methodology, limitation of the study, its significance and an overview of the literature.

Chapter two describes briefly the evolution of the juvenile justice from on a global perspective on one hand and a Burundian one on the other.

Chapter three lays down ameliorations provided by the 2009 penal code and the 2013 penal procedure code. These are juxtaposed against the prevailing situations under the former criminal legislations.

Chapter four is focused on international standards applicable to child offenders as they are contained in both binding conventions and non-binding rules and guidelines. It also analyses their level of domestication in Burundi.

Chapter five weighs the ameliorations against international standards and draws comparison from South African and Nigerian child justice system.

Chapter six contains the general conclusion and proposes recommendations for further improvements in Burundian child justice system.

## Chapter 2

# Development of juvenile justice under international law and in Burundi

### 2.0 Introduction

The development of juvenile justice varied across different countries of the world.<sup>8</sup>The ideal was to evolve a separate juvenile justice systems from the criminal justice systems based on humanitarian ideals.<sup>9</sup> The jurisprudence has equally grown in international law which recognised that separation can only occur if the countries' systems of justice observe the safeguards which are incorporated into international human rights law.<sup>10</sup>Differently, in traditional African societies, kinship and seniority were the two overarching principles that guided human relations.<sup>11</sup> The principle of kinship entailed that the training of the young was by communal and co-operative efforts whilst that of seniority demanded that the young unquestioningly defer to other. Any child that exhibited acts of infraction was punished by agents of social control in the community.<sup>12</sup>

This chapter describes the development of juvenile justice in international law and emphasises the role recently played by UN and regional communities in the creation of juvenile justice norms. Also, the chapter traces the history of juvenile justice in Burundi until the adoption of the new criminal law in 2009.

### 2.1 Concepts of child and juvenile

The definition of childhood in international law is crucial as it determines which specific rights attach to the status of childhood and which legal remedies are available to them as a class.<sup>13</sup> However, states hold fundamentally conflicting views on the question of 'who is a child', that is, beginning and ending of childhood. In regards to the former, some countries believe that the

---

<sup>8</sup> J Junger Tas 'The Juvenile Justice System: Past and Present Trends in Western Society' cited in I Weijers & A Duff (eds) *Punishing Juveniles Principle and Critique* (2002) 30 Some of these countries were Norway, Belgium, France, Canada, Netherlands and Switzerland.

<sup>9</sup>As above.

<sup>10</sup>G Van Bueren (n 6 above) 169.

<sup>11</sup>SOA Bulumo 'History of Juvenile Justice in Nigeria' in DJ Shoemaker (ed) *International Handbook on Juvenile Justice* (1996) 220.

<sup>12</sup>As above.

<sup>13</sup>Van Bueren (n 6 above) 32.



concept of childhood begins from conception; in some others, childhood is limited to the womb and yet in other jurisdictions, childhood begins from birth.<sup>14</sup>

Nevertheless, there appeared to be a realisation as reflected in the CRC that there has to be some congruity among the legal limits. Article 1 defines a child as ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’. Though it rests with the states to determine when a childhood starts and when it ends, the CRC establishes 18 as the standard to which states parties should strive to extend their special protection.<sup>15</sup>In similar terms, article 2 of the African Children’s Charter provides that ‘a child means every human being below the age of 18 years’. Under the African human rights system, the establishment of a low age by member states would amount to the violation of the African Children’s Charter.

The concept of the child in Burundi varies depending on the field concerned. Under the code of personal and family affairs the age of marriage is 18 years for girls and 21 years for boys.<sup>16</sup> The labour law fixes the age of employment at 16 years<sup>17</sup> while the electoral majority is acquired at 18 years<sup>18</sup>. The criminal law provides 15 and 18 years to be respectively the age of partial and full criminal liability. It is worthy of mention that Burundian law uses interchangeably the concepts of child and minor.<sup>19</sup>

Concerning the concept of juvenile, rule 2.2(a) of the Beijing Rules provides that: ‘A juvenile is a child or young person, who under the respective legal systems, may be dealt with an offence in a manner which is different from an adult’. Hence, the rules used juvenile when referring to justice applicable to children or young person.

Similar to the Beijing Rules above, the Human Rights Committee has observed that the juvenile age is to be determined by ‘each state party in the light of relevant social, cultural and other conditions’. The Committee is of the opinion that ‘all persons under the age of 18 should be treated as juveniles, at least in all matters relating to criminal justice’.<sup>20</sup>The commentary of rule 2.2 of the Beijing Rules considers that in accordance with different legislations the definition of the term juvenile encompasses all persons ‘ranging from 7 years to 18 years or above’.

---

<sup>14</sup>As above.

<sup>15</sup>Van Bueren (n 6 above) 36-37.

<sup>16</sup> Art 88 of the Decree-Law 1/024 of 28 April 1993.

<sup>17</sup> Art 3 of the Decree-Law 1/037 of 7 July 1993.

<sup>18</sup> Art 4 of Law 1/22 of 18 September 2009.

<sup>19</sup> See arts 44-47 of the Constitution; arts 28-30 of the penal code & arts 222-243 of the penal procedure code.

<sup>20</sup>Human Rights Committee, General Comment 21, para 13.

As the Beijing Rules 'focus on children who have already come into conflict with the law'<sup>21</sup>, it may appear that the concept juvenile is reserved to children who have reached the age of criminally responsibility in the state concerned. On the other hand, the concept child is used in other hypotheses to refer to all persons below the age of 18 years

Bueren rightly opines that article 40 of the CRC applies to all children up to majority, regardless of whether the national criminal law treats them as if they were adults. Hence, it has raised the standard of international law in relation to child and the juvenile justice system. The concept of juvenility and childhood for those under 18 is linked.<sup>22</sup>

Burundian criminal law does not use the term juvenile, rather it uses interchangeably the concepts of child and minor as noted above.<sup>23</sup>

In its consideration of the second report submitted by Burundi on 17 July 2008, the CRC Committee neither criticised nor commended Burundi in regard to the age of criminal responsibility fixed at 13 for 'partial criminal responsibility' and at 18 for 'full criminal responsibility'.<sup>24</sup>

Arguably, juvenile justice system predates 1989. Since the adoption and ratification of the CRC, most jurisdictions refer to child justice system. It is our submission that both concepts signify the method of administering justice to child offenders within the context of various legal systems.

Since the literature of juvenile justice uses many concepts, in the framework of this scholarship, the term juvenile, child offender<sup>25</sup>, child in conflict with the law<sup>26</sup> or minor are used interchangeably.

---

<sup>21</sup>DCI 'Protecting the rights of children in conflict with the law. Research on alternatives to the deprivation of liberty in eight countries' (2008) 15.

<sup>22</sup>Van Bueren (n 6 above) 172.

<sup>23</sup>As n 20 above.

<sup>24</sup><<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/400/78/PDF/G1040078.pdf?OpenElement>> (accessed 21 August 2013).

<sup>25</sup> This concept is for instance used by rule 2.1 of the United Nations Standards Minimum Rules for Non-custodial Measures.

<sup>26</sup> The term child in conflict with the law is for instance used in the CRC, General Comment 10, paras 30-39.

## 2.2 Development of juvenile justice in international law

The protection of children in international law evolved slowly from declarations to conventions. These instruments can be divided into two categories: human rights law specific to children and general norms.

### 2.2.1 International human rights law specific to children

After World War I, concern arose about children who lost their life or who became orphans as well as those who were 'caught up in armed conflict'.<sup>27</sup> Consequently, more pressure was put on 'post-war governments to protect children's rights'.<sup>28</sup> In 1924, the Fifth Assembly of the League of Nations adopted the Geneva Declaration which put on men and women of all nations the obligation to provide to children the best they have to give. On the contrary, it did not place any duty upon states nor does it consider children as subjects of international law. Thus, the problem of juvenile justice was left behind. The Geneva declaration was mainly concerned with 'children's economic, psychological and social needs'.<sup>29</sup>

In 1959, the United Nations adopted a new Declaration on the rights and welfare of the child. In addition to all mankind, the declaration extended the duty to ensure and respect children's rights to voluntary organisations. Like the Geneva Declaration, the 1959 Declaration did not place any binding obligation upon states nor did it provide for a particular treatment of children in conflict with the law. An ostensible progress should however be mentioned in as much as the 1959 Declaration considered children as subjects and not objects of international law. The Declaration was adopted by all the member states of the United Nations (UN) which shows that states were becoming more sensitive to problem haunting children.

The period (1985-1990) witnessed an accelerated development of international norms specific to children which insisted primarily on the protection of children but which also ensure child offenders guarantees in a criminal process. Thus, The Beijing Rules in 1985; the CRC in 1989; Riyadh Guidelines in 1990 and the Havana Rules in 1990 were adopted.

As the CRC does not tackle some aspects of child protection in Africa, the Organisation of African Unity member states thought more appropriate to protect children's rights within an

---

<sup>27</sup> Van Bueren (n 6 above) 17.

<sup>28</sup> <<http://www.childrenswales.org.uk/history-of-children-rights.aspx>> (accessed 21 August 2013).

<sup>29</sup> Van Bueren (n 6 above) 7.

African context.<sup>30</sup> Thus, the African Children's Charter was adopted in 1990 and entered into force in 1999.

## 2.2.2 General norms applicable to children

Children as human beings are entitled to the protection provided for in different human rights instruments. However, certain rights such as the right to vote or to marriage can only be exercised from a determined age of maturity.

The general instruments and special ones are complementary in providing maximum protection of children.<sup>31</sup> Thus, the Universal Declaration and the two pacts of 1966 also apply to children and complement the CRC. For instance, article 10.2(b) of International Covenant on Civil and Political Rights (ICCPR) provides that 'accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication'.<sup>32</sup> Article 14(4) provides that criminal procedure involving juveniles should take into account their age. Likewise, the ICPRR right to compensation for unlawful arrest, for instance, should not be overlooked in the CRC context as well. It is to be noted that ICCPR is the first global binding treaty which contains provisions regulating juvenile justice.<sup>33</sup> Other relevant human rights treaties strengthen the protection regime, particularly in states not parties to the CRC (US and Somalia): Covenant on Economic, Social and Cultural Rights<sup>34</sup> (CESCR) (articles 6 and 7), 1979 Convention on the Elimination of All Forms of Discrimination against Women<sup>35</sup> ( article 15 (1) and (2)); 1965 Convention on the Elimination of All Forms of Racial Discrimination<sup>36</sup> ( article 5, a ,b); 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>37</sup> ( articles 16 and 17); 2002 Optional Protocol to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ( articles 1,4 (1,2)).<sup>38</sup>

---

<sup>30</sup>A Lloyd 'A theoretical analysis of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) *African Human Rights Law Journal* 5.

<sup>31</sup>G Van Bueren *A commentary on the United Nations Convention on the Rights of the Child Article 40: Child criminal justice* (2006) 8-9.

<sup>32</sup>Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.

<sup>33</sup>Van Bueren (n 31 above) 4.

<sup>34</sup>Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.

<sup>35</sup>Adopted by the General Assembly on 18 December 1979.

<sup>36</sup>Adopted by General Assembly resolution 2106 (XX) of 21 December 1965.

<sup>37</sup>Adopted on 18 December 1990 and entered into force on 1 July 2003.

<sup>38</sup>W Schabas & H Sax (n 7 above) 40-41.

At the regional level, article 18 of the American Convention on Human Rights<sup>39</sup> places a specific duty on states to create specialized tribunals for children subjected to criminal proceedings. The European Convention on Human Rights (1950) as well as the American Declaration on the Rights and Duties of Man (1948) applies to both adults and children.

A considerable number of soft law norms are applicable to children. The relevant norms<sup>40</sup> include the Standard Minimum Rules for the Treatment of Prisoners and the United Nations Standard Minimum Rules for Non-custodial Measures.

## 2.3 Development of juvenile justice in Burundi

This will be analysed from the pre-colonial, colonial and post-colonial periods.

### 2.3.1 Pre-colonial period

In Burundi as in many African countries, 'childhood has always been regarded as the time to grow up, to learn, to build character and acquire the social and technical skills necessary for participation in adulthood'.<sup>41</sup>

The protection of children is strongly anchored in the society as the proverb Kirundi illustrates: '*uwanka agakura abaga umutavu*' which means 'who opposes the growth kills the child'.<sup>42</sup> Traditionally, a child was considered as belonging to the extended family and to the country as a whole. As knowledge was transmitted orally from one generation to another, this approach of children's protection can be found in numerous proverbs and sayings. For instance, it was said that '*Umwana ni uwu Burundi, umwana ni uwu muryango*' which can be translated into 'a child belongs to the country and to his family'.

The behaviour of a child was basically imputable to his father and mother who bore the responsibility to prepare him to become an adult. It was also the responsibility of each adult to advise and when necessary to punish any child who is misbehaving. The sanctions consisted of

---

<sup>39</sup>Adopted on 22 November 1969.

<sup>40</sup>More details can be found in United Nations Office on Drugs and Crimes *Compendium of United Nations standards and norms in crime prevention and criminal justice* (2006).

<sup>41</sup>T Kaime *The African charter on the rights and welfare of the child. A socio-legal perspective* (2009) 73.

<sup>42</sup>OIDEB' *Guide des droits de l'enfant au Burundi* (2008) in International Bureau for Children's Rights *Faire des droits de l'enfant une réalité dans la région des grands lacs africains : Les profils national du Burundi, de la République du Congo, de la République Démocratique du Congo et du Rwanda* (2009) 15.

the execution of some chores as well as in whipping the guilty child. As persons got married while they were still young, all unmarried persons were considered to be children. However, the role played by the community in educating a child progressively diminished as the latter grew up.

### 2.3.2 Colonial period

The Burundian criminal law was firstly inherited from Belgium which as most of European countries drew the system from France. The French model of juvenile justice was vastly influenced by the Roman law. Before the Revolution, France had fixed the penal majority at 16 years. There was no limitation as to children who could not be held criminally liable. For children below 16 years, they incurred penalties with mitigating factors if it was determined that they acted with discernment.<sup>43</sup> From 1791 until 1912, the minimum age of criminal responsibility was fixed at 13 years.<sup>44</sup> France colonised Belgium until 1830 and the French were, to some extent, transposed in Belgium. Belgium introduced those provisions in its former colonies, including Burundi. Burundi was colonised by Belgium from 1916 until 1962. The Germanic colonisation (1986-1916) left the customary law untouched.<sup>45</sup>

### 2.3.3 Post-colonial period

In the 1981 Burundian penal code, few provisions were specific to child offenders. These are limited to the age of criminal liability (13 years according to article 14), and reduced sanctions were applied to children whose age varies from 13 to 18 years (article 16). The criminal procedure code of 1999 dedicates no specific treatment to children during a criminal procedure.

Today, customary law coexists with the modern law. But, the role played by the former is disappearing and all offences committed by children are prosecuted under the criminal law provided that those children have of at least 15 years.

---

<sup>43</sup>D Cipriani *Children's rights and the minimum age of criminal responsibility. An global perspective* (2009) 74.

<sup>44</sup>As above.

<sup>45</sup>'Le Burundi sous la domination étrangère. De 1903 à 1962' <<http://guidetouristique-clubkaribu.over-blog.com/article-le-burundi-sous-la-dominacion-etrangere-de-1903-a-1962-106664656.html>> (accessed 5 October 2013).

Burundi ratified CRC and the African Children's Charter respectively on 18 May 1990<sup>46</sup> and 28 June 2004.<sup>47</sup> The ensuing legislation embodies some principles drawn from those human rights instruments. The Constitution of 2005 expressly stipulates that the rights enshrined in CRC form part of it (article 19). Article 30 provides that every child is entitled to special protection from the State. Article 46 of the Constitution provides that the detention of a child shall be used only as a measure of last resort and for the shortest period of time. In addition, it stipulates that every detained child is entitled to be separated from adults who are more than 16 years old and has the right to an appropriate treatment in accordance with his age.<sup>48</sup> Until the adoption of a new penal code in 2009, no juvenile justice system existed in Burundi.<sup>49</sup> It is to be noted that in the absence of a child act, protection of child offenders is exclusively provided by the criminal law and international norms which are domesticated.

According to a study carried out by Human Rights Watch (HRW), the number of children in prison has considerably increased from 2003 to 2007<sup>50</sup> and children were being detained in the same conditions as adults which exposed them to many abuses.<sup>51</sup>

Unlike the 1981 code, the new criminal code contains many provisions specific to children. The implementing legislation of that code (2013 penal procedure code) fixes practical modalities in regard to the protection of child offenders during a judicial process.

It is the new criminal law (2009 penal code and 2013 criminal procedure code) that is to be assessed in this dissertation and whose ameliorations are dealt with in the third chapter.

## 2.4 Conclusion

International law pertaining to children is well developed to guide states policies and legislation in regard to the protection of child offenders. The different instruments uses different concepts namely, child, juvenile, child offender and children in conflict with the law.

---

<sup>46</sup>[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (accessed 21 August 2013).

<sup>47</sup><http://acerwc.org/ratifications/> (accessed on 21 August 2013).

<sup>48</sup> Art 46 of the Constitution.

<sup>49</sup> Direction for International Cooperation for Peace building 'Human rights in African criminal justice system' (2010) 128.

<sup>50</sup> HRW 'Paying the price. Violation of children's rights in detention in Burundi' (2007) 10-12.

<sup>51</sup> 'Juvenile delinquency: an integrated approach'

[http://samples.jbpub.com/9780763758103/58103\\_CH01\\_FINAL.pdf](http://samples.jbpub.com/9780763758103/58103_CH01_FINAL.pdf). Accessed 5 October 2013 (accessed 5 October 2013) See also JJ (n 9 above) 506.

Burundian juvenile law is embryonic and still needs to be developed. The Burundian penal law uses interchangeably the concepts of children in conflict with the law and minors when referring to children in a penal process.

The next chapter critically analyse the new criminal frontiers against the backdrop of the situations under the former criminal legislation.



## Chapter 3

# Ameliorations provided by the new criminal law to protect child offenders

### 3.0 Introduction

Burundian legal framework has recently evolved to strengthen the protection of child offenders. In that respect, article 46 of the Constitution stated clearly that the detention of the child must be taken as a measure of last resort and for the shortest period of time. Subsequent legislation complemented that provision in laying down an array of non-custodian measures to be taken in lieu of detention and imprisonment. In the same vein, the legislation provides for special sections or chambers for minors in each Tribunal of Grand Instance (TGI). The procedure to be followed before those jurisdictions has subsequently been reviewed.

This chapter is therefore concerned with describing and examining the ameliorations brought by the new criminal legislation namely the 2009 penal code and the 2013 penal procedure code (PPC). It is articulated around the different steps of a classic criminal process. Firstly, it focuses on the preliminary issue of competency as the age of the respondent. The second part examines the ameliorations provided for in the pre-trial stage. The third part scrutinises the trial phase and the fourth section considers the imprisonment regime.

### 3.1 Age of criminal liability

The determination of the age of criminal responsibility is one feature of modern criminal law. Most countries agree that, owing to their physical and intellectual immaturity, children until a certain age are presumed to lack the mental capacity to commit crimes and understand the implication of their acts.<sup>52</sup> Hence, the age of criminal responsibility had been defined as ‘the point at which the jurisdiction can prosecute a child for a crime’.<sup>53</sup> Article 28 of the 2009 penal code fixes the ages of partial criminal responsibility and full criminal responsibility at the ages of 15 and 18 years respectively. Offences committed by children beneath 15 years are punished by civil compensation of the damage caused by the child’s act. The minimum age of criminal

---

<sup>52</sup>Cipriani (n 43 above) 98-109.

<sup>53</sup>N Hazel ‘Youth Justice Board Cross-national comparison of youth justice’ (2008) 30 <[http://www.academia.edu/1621782/Cross-national\\_comparison\\_of\\_youth\\_justice](http://www.academia.edu/1621782/Cross-national_comparison_of_youth_justice)> (accessed 5 September 2013).

responsibility (MACR) has been raised from 13 years (article 14 of 1981 penal code) to 15 years.

The application of that provision poses problem in as much as many children are not registered after birth. For instance, in 2012, the estimates of non-registered children oscillated between 40 and 60 per cent.<sup>54</sup> The fact is equally buttressed by courts decisions whereby children's years of birth were only mentioned. The two following cases illustrate this unfortunate situation. In one judgment issued on 4 September 2012 by the TGI Bujumbura city, the birthday of Bagabo Eric was 1996.<sup>55</sup> Likewise, in another case issued on 14 May 2010 by the TGI Kirundo, the age of Miburo Gaudence was 1993.<sup>56</sup> It is my contention that by virtue of the principle *actori incumbit probatio*, the onus to prove the date of birth rests with the prosecution. If that proof cannot be administered, the accused should be declared not criminally liable (*in dubio pro reo*). The tribunal itself should verify through any legal means its competency over the accused. The omission to provide the month and day of birth can prejudice a child alleged to have violated the penal law. In practice however, the prosecution and the judges neglect to verify the accurate age. Often, the child offenders ignore this protection. In his study, De Blauwe found that at least, in three tribunals, three children had been sentenced whereas they were beneath the age of criminal responsibility.<sup>57</sup>

Another underlying issue is that the police or the prosecution arbitrarily ascribe to the accused an age that meets the legal requirement. The ensuing difficulty that arises is that some child offenders who are later informed that they should enjoy some guarantees challenge the competency of the tribunal. That procedural exception entails delay of cases.<sup>58</sup>

Under article 222 of the 2013 PPC, a clear professional obligation is placed upon policemen, prosecutors and judges to verify the age prior to any investigation, prosecution or judgment involving minors. The former penal procedure code did not contain such provision. However, the obligation remains weak in so far as there is no sanction towards an agent who disregards that provision.

---

<sup>54</sup>Compilation des reportages sur la campagne d'enregistrement tardif des naissances dans les provinces de Kirundo et Ngozi (2012).

<sup>55</sup>RMP 140718/NZ.M Public prosecutor v Bagabo Eric (2012).

<sup>56</sup>RP4396 Public Prosecution v Miburo Gaudence & Murerwa (2010).

<sup>57</sup>T De Blauwe 'Analyse jurisprudentielle de la justice pour mineurs en conflit avec la loi au Burundi' (2011) 30.

<sup>58</sup>eg Public Prosecution v Niyubahwe Francine (2012); Public Prosecution v Ntambara Omar (2012).

## 3.2 Pre-trial stage in the criminal procedure

The new legislation contains provisions which did not exist in previous regimes. These relate both to the notification of offence to caregivers of the child in conflict with the law and to judicial assistance in the pretrial process.

### 3.2.1 Notification of apprehension of the child to parents or legal guardians

In terms of article 223 of the 2013 PPC, when the presumed author of an offence is a minor beneath 18 years, a police officer or a prosecutor in charge of the dossier shall immediately notify parents, tutors or guardians of the minor, the social assistance, or if any, a habilitated association, of the proceedings brought against him. More importantly, the proof of such a communication rests with the police officer or to the prosecutor.

This innovation of the new criminal law is a very important step towards an effective protection of children in conflict with the law, especially those who leave their home in order to seek jobs in towns. When such children are arrested, their parents may remain ignorant of their detention. For instance, Hakizimana Désiré<sup>59</sup> contacted in January 2013 after 18 months of detention at the prison of Mpimba asserted that his parents did not know his whereabouts.

Life conditions in prison are deplorable, which means that a detainee needs material assistance from outside. In 2007 for instance, Human Rights Watch has reported the lack of mattress, blankets and bad conditions of hygiene in Burundian prisons.<sup>60</sup> Alongside material relief, a child needs psychological assistance. The notification will help the child offenders obtain assistance from parents or other caregivers, which will assuredly enhance their welfare from the first contact of the law enforcement agencies up to the end of the criminal process.

### 3.2.2 Notification of the charges and the rights to the child

Article 10, paragraph 5 of the new PPC provides that prior to any questioning, the person interrogated is informed of his rights *inter alia* the right to keep silence in the absence of his counsel. Before the enactment of this law, the right to keep silence was ignored by judges. For

---

<sup>59</sup>RMP 135145/JC *Public Prosecution v Hakizimana Désiré* (2011).

<sup>60</sup>HRW 'Un lourd fardeau à porter. Les violations des droits des enfants en détention au Burundi' (2007) 31.

instance, on 31 December 2009 the TGI Gitega sentenced a child to an aggravated sentence on the grounds that he refused to denounce his accomplices<sup>61</sup>; this showed that judges were ignorant of the right of any person to keep silence. The Burundian criminal law does not expressly provide for a notification of charges to children in conflict with the law. It is my contention that the notification of the charges to his or her parents, tutors or guardians fills partly this gap.

The new law is silent about law enforcement agents who detain children without investigating their charges. Such is the cases of domestic employees who are often falsely denounced to the police in order to avoid claim of their payment.<sup>62</sup> Other persons are held in detention without any dossier<sup>63</sup>, which means that formally they are not notified of the charges brought against them. Similarly, they are left with the impossibility of challenging the legality of their detention.

### **3.2.3 Conduct of inquiry**

The phase of investigation is characterized by mandatory assistance during the questioning, social inquiry as well as measures pertaining to custody and detention of minors.

#### ***Mandatory assistance during the questioning***

Article 224 of the 2013 PPC provides that, under penalty of nullity, any interrogation of a minor beneath 18 years must be conducted in the presence of a lawyer or any other person having knowledge in the field of juvenile justice duly approved by the judicial authority in charge of the dossier.

The lawmaker seems to have closed eyes on the Burundian reality. First of all, the police officers who conduct investigations usually live in the capital of each Commune.<sup>64</sup> They may move from one place to another if the situation so requires. Presently, there is neither lawyer nor any other person knowledgeable in juvenile justice accompanying them. Secondly, almost all the lawyers live in the capital Bujumbura and their number is widely limited to cover the

---

<sup>61</sup> De Blauwe (n 57 above) 26.

<sup>62</sup> Amnesty International 'Poverty, isolation and ill-treatment. Juvenile justice in Burundi' (2002) 15-16.

<sup>63</sup> eg *RMP 135145/JC Ministère public v Hakizimana Désiré*.

<sup>64</sup> A commune is an administrative entity and the country counts 129 communes.

country's needs in judicial assistance.<sup>65</sup> Finally, there is no legal framework determining how those lawyers will be paid. According to a study conducted in 2011, lawyers plead only 2.7 per cent of cases handled by courts in Burundi.<sup>66</sup>

This leads to the unfortunate consequence that, in the short term, it is impossible to implement that provision. The subsequent issue is whether juveniles related cases will be suspended until a solution is found or whether the provision of the new criminal law will be simply put aside. In either hypothesis, the procedure followed will be unlawful and open to challenge by the child offenders and their lawyers.

Regarding the guardianship of child defenders, article 241 of the new PPC charges the police officer, prosecutor or the judge to determine the amount of money to be allocated to the receiving person or institution. Even in this case, it seems that in the absence of a complementary measure, the provision is unrealistic. Indeed, all the public expenses are determined in the general budget and before any disbursement there must be a special allocation thereat.<sup>67</sup> Furthermore, the number of children to be assisted will be necessary fixed in advance.

In all events, the lack of funds will inevitably remain the principal issue. In this respect, a study carried out by the Observatory of the Governmental Action (OAG) shows that from 2003 to 2007 the jurisdictions have been unable to implement cases settled to the insufficiency of funds.<sup>68</sup> The context of poverty in which Burundi languishes will certainly hamper the implementation of the provision. According to United Nations Development Program, 70 per cent of the Burundian population was living below the poverty threshold in 2011.<sup>69</sup> For the time being, it is necessary to enact a legal framework fixing practical modalities of the implementation.

## ***Social inquiry***

Under article 225 of the 2013 PPC, the investigator in charge of a child dossier shall, from his or her own initiative or upon request by a judicial authority or another qualified person, collect such information that leads to ascertaining the personhood of the minor. Such inquiry may include the

---

<sup>65</sup> J Moriceau & C Niyonzima 'Etude de base sur l'aide légale au Burundi' (2011) 14.

<sup>66</sup> J Moriceau 'Le fonctionnement de la chaîne pénale au Burundi' (2011) cited in T De Blauwe (n 57 above) 27.

<sup>67</sup> OAG 'Analyse de la loi de finances du Burundi. Exercice 2013' (2013) 36.

<sup>68</sup> OAG 'Analyse critique du système de règlement du contentieux administratif au Burundi' (2008) 63.

<sup>69</sup> <[http://www.bi.undp.org/index.php?option=com\\_content&view=article&id=343%3Aelimination-de-la-pauvrete-le-burundi-a-besoin-dun-a-appui-de-ses-partenaires-au-developpement-&Itemid=206](http://www.bi.undp.org/index.php?option=com_content&view=article&id=343%3Aelimination-de-la-pauvrete-le-burundi-a-besoin-dun-a-appui-de-ses-partenaires-au-developpement-&Itemid=206)> (accessed 2 September 2013).

family background of the juvenile, his character, his criminal record, his school frequentation, his behaviour and the conditions in which he has been raised.

Again, this requires a competent police officer whereas currently, the serving policemen are not trained to carry out social inquiry. The investigative policemen, supposed to keep all criminal records, clearly lack performance and professionalism. Apart from the quasi inexistence of electronic system, the archives are not well classified which hampers a follow up of former criminals' behaviour.<sup>70</sup>By way of illustration, for the time being, the police issue a police clearance without any verification, that is, there is no adequate system to monitor the criminal record of persons who have previously been convicted of offences. Accordingly, the implementation of the provision should be preceded by training and equipping the police.

### ***Custody and detention of the minor***

Article 226 of the 2013 PPC vests the police officer and the prosecutor with the power to entrust the minor in conflict with the law to his parents, tutor or to another trustworthy person. However, only the judge can decide to place the minor in a fostering family, a specialised institution, a fostering centre, or in a professional or sanitary establishment. In either case, the decision must be motivated and precise as to the length of the custody.<sup>71</sup>Furthermore, the decision can be reviewed or revoked in the interest of the minor. The decision taken by a judge in this respect can be appealed against by the minor, his parents, tutor, guardian, public prosecutor or the victim.<sup>72</sup>

### **3.3 Trial stage**

Under the new legislation, the proceedings involving children must take place in special chambers for minors. Systematic confidentiality, legal assistance and alternatives to imprisonment are equally ameliorations provided by the new penal regime.

---

<sup>70</sup> From my personal experience, I have obtained a police clearance in 2003, 2010, 2011 and 2012; and each time the document was issued without any reference to my file. The non-reference to archives was confirmed by two serving police officers in 2012.

<sup>71</sup> Art 227 of the 2013 penal procedure code.

<sup>72</sup> Art 228 of the 2013 penal procedure code.

### 3.3.1 Institutionalisation of chambers for minors

Article 234 of the 2013 PPC stipulates that the minor is prosecuted before the chamber for minors established within the TGI.<sup>73</sup> Attempts in the past to create such chambers have failed probably due to the lack of funds because the project was initiated by NGOs. In terms of benefits for minors to be tried by special chambers, it may be noted that specialised judges become more familiar with the juveniles cases and are therefore better equipped to deal with cases adequately. Unlike cases from other jurisdictions, the reading of cases handled by the special chamber for minors of the TGI Ngozi reflected that judges were more familiar with the CRC and made reference to it in their decisions.

However, even if juvenile courts are important, we should keep in mind that they are not the panacea against juvenile delinquency. This stems from an old observation that ‘factors contributing to delinquency are beyond the reach of juvenile courts to resolve’.<sup>74</sup> Indeed, most of child offenders belong to low-income families and the offences they are accused of or convicted for are mainly offences to property such as theft or burglary. According to Observatoire Ineza des Droits de l’Enfant au Burundi (OIDEB), more than 80 per cent of children imprisoned are charged with theft.<sup>75</sup>

### 3.3.2 Confidential hearings

Article 236 of the 2013 PPC provides that in any case involving a minor, the hearings must be confidential. The non-observance of that provision entails the nullification of the ensuing judgment. The same provision lists persons allowed to attend the court hearings: witnesses, parents, tutors, attorneys, social assistants and representatives of associations or services whose object is the promotion of children’s rights. The provision limits the confidentiality to the hearings. It may be thought that the prohibition to disclose information related to the identity and charges of the juvenile extends to judges, prosecutors and lawyers by virtue of their respective codes of conduct. It is also obvious that the victim, witnesses and other persons allowed to participate in the proceedings are not subjected to the obligation of confidentiality.

---

<sup>73</sup> Each province has one TGI.

<sup>74</sup>EH Pena ‘Introduction: The role of the juvenile court- social or legal institution’ (1978) 5 *Pepperdine Law Review* 634.

<sup>75</sup>‘Condition carcérale des mineurs au Burundi’ <[www.justice.gov.bi/IMG/ppt/OIDEB-\\_Mineurs-prisons.ppt](http://www.justice.gov.bi/IMG/ppt/OIDEB-_Mineurs-prisons.ppt)> (accessed 30 August 2013).

In addition, the provision is silent as to the point whether the juvenile record may be used in other cases where the juvenile or the former juvenile is involved. Also, the law does not provide for expunging the records after the juvenile becomes an adult. Likewise, the press is not prohibited to publish information pertaining to the identity of a juvenile and the proceedings. The confidentiality is therefore restricted to the minimum and probably aims to provide the juvenile with a good environment of pleading without fear. In fact, before the enactment of the new PPC, courts held confidential hearings upon request of a party.<sup>76</sup> The consequence would be the labelling and stigmatisation of the juvenile as a delinquent and his record would lessen his prospects of getting a job or scholarship in as much as the calls for application always specify that the applicants must not have been convicted for any criminal offence.

### 3.3.3 Judicial and legal assistance

Article 235 of the new PPC law provides that the chamber of minors decides after hearing the minor and his counsel. The introduction of a mandatory assistance by a counsel is unprecedented in Burundi. Admittedly, article 38 of the Constitution provides for a right to a fair trial which implies assistance by a lawyer for persons unable to adequately defend themselves. However, this provision was not effectively implemented. Indeed, the law on the Profession of Advocates envisaged the designation of *pro deo* advocates by the President (Bâtonnier) of Burundi Bar Association to assist poor people.<sup>77</sup> However, the implementation of those provisions has been very limited due to the lack of funds.<sup>78</sup>

The new law is neither precise on how the counsel will be appointed nor how he or she will be paid. Accordingly, an implementing measure is necessary before the assistance takes place. To date, only a limited number of persons assisted by NGOs can have a free access to a judicial assistance by a counsel. It is worth noting that the counsel is assigned to persons who are already imprisoned. The implication is that minors who are not deprived of their liberty do not enjoy judicial and legal assistance.

---

<sup>76</sup>eg *RP 4396 Public Prosecution v Miburo Gaudence & Murerwa (2010)*; *RP 6090 Public Prosecution v Ntambara Omar (2012)*.

<sup>77</sup>Arts 55 & 56 of the Law 1/14 of 29 November 2002 on the profession of advocates.

<sup>78</sup> N Assogba & F Nyamoya 'Avant-projet de loi portant cadre légal de l'aide juridique et de l'assistance judiciaire au Burundi et proposition de mise en œuvre' (2009) 3.



### 3.3.4 Alternatives to deprivation of liberty

The incarceration of child offenders is applied to a large extent by courts in Burundi whereas its harmful effect is evident. Many arguments have been developed to support non-custodial sanctions. For instance, it has been argued that:<sup>79</sup>

Firstly they are considered more appropriate for certain types of offences and offenders. Second, because they avoid 'prisonisation', they promote integration back into community as well as rehabilitation, and are therefore more humane. Third, they are generally less costly than sanctions involving imprisonment. Fourth, by decreasing the prison population, they ease prison overcrowding and thus facilitate administration of prisons and the proper correctional treatment of those who remain in prison.

In case of Burundi, persons awaiting their trial, including those accused of petty offences are deprived of their liberty, which overcrowds prisons up to four times their capacity.<sup>80</sup> Alternatives to incarceration will help to reduce the population of prisons to the benefit of those who really deserve to be deprived of their liberty.

Article 46 of the Constitution provides that the detention of a child shall be taken as a measure of last resort and for the shortest appropriate time. That provision is clearly a legal basis for alternatives to imprisonment. The words 'detention as a last resort' means that there must be a bulk of other measures to address child offenders. And as far as less restrictive measures have not failed, detention of a child would not be legally justified. The 2009 penal code took into consideration that requirement and provides alternatives to incarceration. Article 30 of the 2009 penal code points out that the measures of protection, education and surveillance which may be taken against a minor are: (a) warning, (b) call to law, (c) handling the minor to parents, to a tutor, or to a confident person; (d) educative assistance and (e) placement in an institution of social character, a school or another habilitated educative institution.

The lawmaker did not specify the form in which the warning will be given. It may then take either the written or oral form. It is my submission that the oral form would be more appropriate for at least two reasons. On one hand, there are numerous children who are not educated or who have a lower level of education. Warning them in a written way would not help them to understand the norms they are alleged to have infringed and the potential consequences the

---

<sup>79</sup> JS Nielsen & J Gallinetti (eds) *Child justice in Africa. A guide to good practices* (2004) 87.

<sup>80</sup> Conseil des Droits de l'Homme 'Rapport de l'expert indépendant chargé d'examiner la situation des droits de l'homme au Burundi, Akich Okola' (2010) 12-13.

recidivism would entail. On the other hand, the formal legal jargon is not always easily understandable to non-professionals. The warning in the form of a verbal dialogue would facilitate communication in a language making sense to the juvenile. The framer should have been more precise as did his counterpart Sierra Leonean by using the words ‘verbal warning’ in the 2007 Child Rights Law.<sup>81</sup> This is imperative as the juveniles need to understand the laws they have violated.

In addition to a fine, the judge in charge of the dossier can decide to place the minor under an educative assistance or in (f) a fostering family or in another habilitated institution determined by the judge. At any stage of the procedure, the judge can, on his own initiative, upon the request of the public prosecutor, parents or legal representatives, or upon a report of a social assistant, modify or end the measures of protection, surveillance or education applied to the minor.

The handling of children to custodians seems to have been dictated by the scourge of vagrancy and associated offences. Indeed, there are countless unaccompanied children circulating in the street (street children) who often commit offences of begging, robbery, consumption of drugs and rape. On the whole, while some of street children have been abandoned by their parents others are pushed by the poverty prevailing in their families.<sup>82</sup> It is my contention that this provision should pursue the welfare and the best interests of the child in as much as those street children have no access to housing, clothing, education, health facilities and other children’s rights.

### **3.4 Conditions of imprisonment and alternatives to incarceration**

The term imprisonment is used here in the sense of deprivation of liberty both in the pretrial process and as a result of criminal conviction.

#### **3.4.1 Separation from adults**

Article 46, paragraph 2 of the Constitution states that a child has the right to be separated from other detainees aged of 16 years and above and is entitled to a treatment and conditions of detention in accordance with his age. In a similar vein, article 229 of the new PPC stipulates that

---

<sup>81</sup>DCI ‘From legislation to action? Trends in juvenile justice systems across 15 countries’ (2007) 51.

<sup>82</sup><<http://gvnet.com/streetchildren/Burundi.htm>> (accessed 4 September 2013).

in case of necessity, a minor will be detained in (a) a reeducation establishment or in (b) a special quarter meant to host minors, or (c) in an adults' prison where the separation will be effective and permanent.

The conditions of incarceration in Burundi are deplorable. According to a report of HRW<sup>83</sup>, the overcrowding of prisons hinders the segregation between adults and minors. Although each prison has a separate apartment for minors, children and adults spend the day together.<sup>84</sup> Cases of authorised or forced intrusion in their rooms by adults have also been monitored. Furthermore, children and adults share the same toilets and bathrooms. It is also to be mentioned that there is no separation between detainees and convicted persons.

As a consequence, children are exposed to the influence of adults and to abuses. Cases of sexual exploitation of children have been reported.<sup>85</sup> This complicates their situation because children are either afraid to face more abuses or scary of social perception of homosexuality. Children are also in some instances refused to have access to mattress or food,<sup>86</sup> which seriously affects their moral and physical health.

Experience from other countries has shown that incarceration, besides the physical and psychological suffering it is associated with, provokes indirect sanctions to the minor. In USA for instance, children who have a prison record encounter much difficulties to get jobs.<sup>87</sup> Also, the CRC Committee has observed that children in conflict with the law face discrimination when they get 'to the labour market'.<sup>88</sup>

Hence, the above provision should be accompanied with concrete action for an effective implementation of alternatives and separation of minors from adults. This ascertains that alternatives to incarceration which primarily focus on welfare and best interests of child offenders are very necessary.

---

<sup>83</sup>HRW (n 60above) 30-40.

<sup>84</sup>R Nininahazwe 'Du respect des droits des mineurs en cas d'arrestation et de détention en droit burundais' unpublished dissertation, University of Burundi, 2009 28. <[http://www.justice.gov.bi/IMG/pdf/DESS-\\_Nininahazwe\\_R-\\_Mineurs\\_conflit\\_loi-\\_TFE.pdf](http://www.justice.gov.bi/IMG/pdf/DESS-_Nininahazwe_R-_Mineurs_conflit_loi-_TFE.pdf)> (accessed 9 October 2013).

<sup>85</sup>As above.

<sup>86</sup>As n 84 above.

<sup>87</sup>M Mauer 'Thinking about prison and its impacts in the twenty-first century' (2005) 2 *Ohio State Journal of Criminal Law* 610.

<sup>88</sup>CRC Committee, General Comment 10, para 7.

### **3.4.2 Education programs**

As stated above, when the gravity of the offence makes inevitable the incarceration of the minor, the later should be placed in a reeducation establishment, a special quarter for minors or a separate place in an adult prison. The law does not specify what kind of education will be provided in those facilities. The words 'reeducation' suggests that it is an education lost which has to be reestablished. In that sense, the education to be provided would aim at teaching the juvenile how to respect the law. Put differently, the measure would seek to deter the juvenile from reoffending the criminal law.

It is my submission that an effective educative program should help the child offender, in addition to preventing reoffending, to start or continue the classic education. This would help him to reintegrate the society after terminating the punishment. Such measures should primarily be directed but not limited to first-time child offenders. However, these measures seem to be not sufficient for authors of property offences which are linked to social and economic circumstances. As far as the underlying issues are not addressed, the probability of reoffending will remain.

### **3.5 Conclusion**

The Burundian penal law has recently incorporated number of children's rights in the penal process which is a good step in the protection of children. However, the next chapter identifies some cogent international law standards protecting child offenders.

## Chapter 4

### International standards applicable to child offenders and status of international law within the Burundian legal system

#### 4.0 Introduction

The ‘best interests of the child’ principle appeared for the first time, under international law, in the 1959 Declaration on the Rights of the Child.<sup>89</sup> Later on, the principle was reintroduced in the CRC and African Children’s Charter.

Although the principle has attracted the attention of academics, the literature often avoids defining what these best interests are and prefers to highlight what is not in the best interests of the child. One of the works defining the concept in family law conceives the best interests of the child as the ‘least detrimental alternative’ to be adopted in cases involving children placement.<sup>90</sup> Others put their attention on the standards of the best interests without mentioning a conceptual definition.<sup>91</sup>

International law is also not clear on that point as will be seen below. Both conventional and soft law only indicate the measures that have to be taken by states in the best interests of the child offender.

Conventional law refers to the ‘agreement between states or between states and international organisations, operating in the field of international law’.<sup>92</sup> The agreement creates binding obligations upon states parties. In the ambit of this paper, only agreements between states will be taken into account.

Soft law covers all non-binding principles, rules and guidelines contained in various international texts adopted by states or international organisations. They are meant to inform a state’s conduct and, in principle, cannot be invoked to challenge the legality of a state’s behaviour. Dugard defines soft law as:<sup>93</sup>

---

<sup>89</sup> M Freeman *A commentary on the United Nations Convention on the Rights of the Child Article 3 The best interests of the child* (2007) 25.

<sup>90</sup> J Goldstein et al *Before the best interests of the child* (1986) 21.

<sup>91</sup> C Breen *The standard of the best interests of the child. A western tradition in international and comparative law* (2002).

<sup>92</sup> J Dugard *International law. A South African Perspective* (2011) 25.

<sup>93</sup> Dugard (n 92 above) 33.

imprecise standards generated by declarations adopted by diplomatic conferences or resolutions of international organisations that are intended to serve as guidelines to states in their conduct, but which lack status of 'law'.

However, with time and practice of states soft law can evolve towards customary international law. It has for instance been argued that the Universal Declaration has acquired customary international law status.<sup>94</sup>

This chapter is aimed at assessing what standards are set up in different conventions applicable to children as well as the soft law. By the same token, the status of those texts and their level of implementation in Burundian legal system will be analysed.

## **4.1 Best interests and welfare principles in criminal adjudication**

The best interests and welfare of the child seem to constitute two concepts with a similar aim and meaning. Both concepts concern the consideration of a child's need in all aspects of life, including criminal law. As criminal law is particularly concerned, the best interests and welfare principle operate as a guide to determine the appropriate measures to be taken at all stages of the judicial process. After briefly elaborating on the relevance of the principle, this section seeks to identify some indicators which help to evaluate whether the best interests of the child are considered or not.

### **4.1.1 Relevance of the best interests of the child**

Freeman has summarised the grounds on which the 'best interests' principle is based. He argued that:<sup>95</sup>

First, children have the right to have their welfare prioritised. Secondly, children are more vulnerable. In a world run by adults, there would be a danger that children's interests would be completely ignored. Thirdly, children must be given the opportunity to become adults. Fourth, adults create children.

---

<sup>94</sup>H Hannum 'The status of the universal declaration of human rights in national and international law' (1996) 25 *GA. J. INT'L & COMP.L* 317-340.

<sup>95</sup>HRW (n 60 above) 40.

The fifth argument stems from the Bible considering that ‘to sacrifice one’s own interest to those of one’s child is what a parent is all about. The true mother, it will be remembered was prepared to give up her child rather than see him cut in two’.<sup>96</sup> Several other arguments can be given to support the best interests of a child such as the will to preserve the survival of mankind or lack of physical, psychological and emotional maturity are some grounds in favour of special protection of children.

The best interests’ standard has become a yardstick by which a state’s behaviour can be appreciated. In the Nubia case, the African Children’s Committee considered that it cannot be in the best interests of children to delay the judicial process in order to fulfil formalistic legal procedures.<sup>97</sup>

#### **4.1.2 Conventional standards**

The CRC and the African Children’s Charter are the global and African instruments exclusively dedicated to children. The protection provided in those instruments is complemented by general conventions applicable to all human being such as the ICCPR.

#### ***Entrenchment of the best interests principle in the CRC and African Children’s Charter***

Article 3.1 of the CRC says that : ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’

The principle of best interests is so important that the CRC Committee considers it as one of the leading principles of a comprehensive juvenile justice policy.<sup>98</sup> It must quickly be noted that the use of ‘a primary consideration’ instead of ‘the primary consideration’ implies that the best interests of the child is only a consideration in adjudicating child offenders. For Alston, the use

---

<sup>96</sup>As above.

<sup>97</sup>Communication 002/09 : IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya, paragraph 29. <[www.acerwc.org](http://www.acerwc.org)>(accessed 9 September 2013).

<sup>98</sup>CRC Committee, General Comment 10, para 10.

of the indefinite article *a* instead of the definite article *the* offers the decision makers more flexibility.<sup>99</sup> That is to say that, other considerations such as protection of public order or the necessity of provoking deterrence may also be taken into account and outweigh the best interests of the child in a criminal process. Article 4 of the African Children's Charter adopts the same wording save that African Children's Charter uses *the* primary consideration instead of a primary consideration contained in the CRC.

Unlike article 3 of CRC, article 4 of the African Children's Charter does not add further conditions which may have effect of diluting the emphasis on the overriding principle of the best interests of the child.<sup>100</sup> The wording of article 3(1) of the CRC led Parker to consider that the article has nothing other than a collective focus.<sup>101</sup> However, he concedes that the statement does not extend to child offenders in as much as 'courts of law often make decision about individual children'.<sup>102</sup> Even in other areas, his opinion is open to criticism. Indeed, international human rights law normally gives rights to individuals, not to groups. The difficulties of individualising each intervention cannot be generalised and children with special needs can be beneficial of special care. Examples include children suffering from physical or mental impairment.

The principle is also vague in that it lacks substantive content, which leaves each state with the power to determine what is in the best interests of the child. Moreover, the CRC Committee has not yet clarified how to determine the best interests of the child. The recommendations given to states illustrate a lack of clear indications as to the content of the principle. For instance, in 2000, the CRC Committee merely recommended that Burundi integrates and duly considers the best interests in future legislation as well as in judicial decisions.<sup>103</sup>

In its recommendations to states parties, the African Children's Committee does not systematically comment on article 4 and does not provide any content to the principle. Take at random two concluding observations. In regard to Niger first report, the African Children's Committee stressed that the culture consisting of promising young girls in marriage hampers the implementation of the best interest principle; and concerning Cameroon first report, the African

---

<sup>99</sup>HRW (n 60 above) 61.

<sup>100</sup> BD Memzur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero sum game?' (2008) 23 *SAPR/PL* 8.

<sup>101</sup>S Parker 'The best interests of the child. Principles and problems' (1994) 8 *International Journal of Law and Family*

28.

<sup>102</sup>As above.

<sup>103</sup> Concluding observations of the CRC Committee, para 29 (CRC/C/15/Add.133).



Children's Committee commended Cameroon for having enacted texts in respect of the best interests principle.<sup>104</sup>

Hence, in the absence of any guidance as to the determination of the best interests, each society may have its own conception of what is in the best interests of a child.<sup>105</sup> A holistic interpretation of the CRC and the African Children's Charter leads to the conclusion that, articles 37 and 40 of the CRC as well as article 17 of the African Children's Charter fix the standards for the best interests of child offenders.

### ***Indicators for evaluating the best interests of the child***

There are many indicators which can be used to measure the best interests of the child. This section is restricted to some of them.

Doubtless, the prohibition of arbitrary and unlawful detention is in the best interest of the child.<sup>106</sup> The term lawful addresses the compliance with the domestic law for the deprivation of liberty whereas non-arbitrary adds 'elements to the principle of legality, including reasonableness of the law itself and proportionality of the measures'.<sup>107</sup> Another important principle is the deprivation of liberty as a measure of last resort and for the shortest appropriate period of time (article 37 CRC and rule 13 (1) of the Beijing Rules). According to Van Bueren, 'the phrase "measure of last resort" implies that deprivation of liberty can only be imposed in cases where there is "no other appropriate response"'.<sup>108</sup>

Others indicators contained in article 37 CRC concern for instance the treatment of the child with humanity and respect for human dignity, the taking into consideration of the needs of the child, the separation of child offenders from adult offenders and the right to legal and other appropriate assistance. Reflecting on this article, Schabas and Sax have pointed out that the emphasis on respect for all rights of children deprived of their liberty is due to the fact that 'the restriction of persons to closed locations naturally creates situations of power imbalances and dependencies, and abuse and exploitation is likely to occur in such settings'.<sup>109</sup> Article 10 of

---

<sup>104</sup> <[www.acerwc.org](http://www.acerwc.org)> (accessed 16 September 2013).

<sup>105</sup> HRW (n 60 above) 27-31.

<sup>106</sup> Art 37 CRC.

<sup>107</sup> W Schabas & H Sax (n 7 above) 76.

<sup>108</sup> G Van Bueren 'Child-oriented justice—an international challenge for Europe' (1992) 6 *International Journal of Law and the Family* 389.

<sup>109</sup> W Schabas & H Sax (n 7 above) 88.

ICCPR contains a similar provision. In its General Comment no 10, the Human Rights Committee held the position that persons deprived of their liberty, including children, must enjoy the guarantee provided in article 7, that is to say, not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. The Human Rights Committee went on to highlight that ‘persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment’.<sup>110</sup>

Article 37(c) also provides that a child deprived of liberty must be separated from adults and has right to keep contact with his or her family. Furthermore, article 37(d) stipulates: ‘Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action’.

Judicial guarantees are also of particular importance in ensuring the best interests of a child in conflict with the law. Article 40 of CRC lists a number of guarantees to be offered to a child in a judicial process. First, the principle of non-retroactivity is reaffirmed and implies that the alternatives to deprivation of liberty must be clearly specified in the law. This highlights the consideration that the welfare measures which amount to a detention exceeding the delay fixed by the law is unlawful and consequently proscribed by CRC. Other guarantees include the presumption of innocence, the right to be notified of charges, the right to a free legal assistance, the right to a fair trial, to right to lodge appeal, the right to privacy and the right to be not compelled to give a testimony or plead guilty.

### ***Positive obligations on state parties***

Article 40.3(a) of the CRC obliges state parties to ensure that a minimum age of criminal responsibility is set by law. Likewise, states are obliged to seek appropriate non-judicial procedures to deal with children in conflict with the law. Furthermore, article 40.3(b) provides that: ‘a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care 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’.

---

<sup>110</sup>Human Rights Committee, General Comment 21, para 3.

Furthermore, article 3 of the CRC obliges states to ensure that the best interests of the child are considered in all actions taken by private and public institutions dealing with the welfare of the child.

A perusal of article 4 shows that states have an unconditional obligation to implement civil and political rights whereas in regard to social, economic and cultural rights states have a duty to progressively realise those rights.

As the CRC supplements other existing instruments including ICCPR, states are obliged to implement rights enshrined in those instruments.<sup>111</sup>

When these measures are applied by a state, the best interests of the child are better protected. Measures like diversion and the prohibition of sentencing children to imprisonment in Ghana<sup>112</sup> and a system setting norms and standards for legal representation and sentencing in South Africa<sup>113</sup> have been described as best practices of protection of children in Africa..

#### **4.1.3 Soft law standards**

The treatment of child offenders is well delineated by other standards and guidelines not vested with a binding force. These are enshrined in, among other, the Beijing Rules, the Havana Rules, the Riyadh Guidelines and the Guidelines for Action on Children in the Criminal Justice System. In this section, emphasis is limited to certain aspects of these rules and guidelines.

The Beijing Rules, for instance, contain measures relating to the best interests and welfare of children who are in conflict with the law. Rule 5.1 on the aims of juvenile justice provides that: 'The juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence'. In order to ensure the well-being, rule 1.2 provides that juvenile offenders deserve a fair and humane treatment. Rule 6.1 allows law enforcement agents to use discretion in adjudicating child offender so that their particular needs be met. While rule 11 provides that diversion measures should be considered in order to avoid formal trial, rule 14 says that judicial guarantees must be preserved.

---

<sup>111</sup>M Rishmawi *A commentary on the United Nations Convention on the Rights of the Child. Article 4: the nature of States Parties' Obligations* (2006) 15.

<sup>112</sup>JS Nielsen & J Gallinetti (eds) (n 81 above) 47.

<sup>113</sup>T Boezaart (ed) *Child law in South Africa* (2009) 648.

Rule 12 stipulates for the formation of specialised police and rule 16 provides for a social enquiry into the background and circumstances in which the juvenile is living and the conditions under which the offence has been committed. Rule 17.1 (d) reaffirms that the well-being of the juvenile shall be the guiding factor in the consideration of her or his case. Rule 18 proposes a non-exhaustive list of non-custodial sanctions, thus complementing CRC provisions. Rule 21 provides that records of juvenile offenders shall be kept strictly confidential and shall not be used in subsequent cases involving the same offender when she or he is an adult.

The Havana Rules also embody numerous minimum standards<sup>114</sup> meant to preserve the best interests of detained juveniles. Rule 1 for instance reaffirms that juvenile justice should promote physical and emotional well-being of juveniles. Rule 27 provides for measures to determine what needs a child has and the appropriate care to be taken and pursued. Rule 38 elaborates on education and, vocational training and work of children deprived of their liberty. More significantly, the Havana Rules apply to all those who are under 18 years deprived of their liberty, irrespective of 'national definitions of childhood and without being dependent upon the jurisdiction of special juvenile proceedings'.<sup>115</sup>

In regard to status offences, unlike other norms applicable to children, guideline 58 of the Riyadh Guidelines provides that 'legislation should be enacted to ensure that any conduct not considered an offence or not penalised if committed by an adult is not considered an offence and not penalised if committed by a young person'. Status offences are defined as 'any specific behaviour which would not be punishable if committed by an adult'. They include offences which are unique to children such as truancy, incorrigibility, running away from home, using vulgar language and drinking.<sup>116</sup>

The list of indicators is too long to be exhaustively dealt with in the framework of this dissertation.

---

<sup>114</sup>Rule 3 of the Havana Rules.

<sup>115</sup>Van Bueren (n 6 above) 208.

<sup>116</sup>Van Bueren (n 108 above) 394.

## 4.2 Status of international law within the Burundi legal system

The determination of the status of international law in domestic law requires knowledge of how treaties ratified by a country are domesticated. Two classic approaches serve as the yardstick by which the domestication occurs: monism and dualism. The monism approach posits that a norm of international law ratified by a country becomes automatically part of domestic legal system. On the other hand, the dualism approach posits that to be part of internal system, a norm of international law needs an implementing statute.<sup>117</sup> This section will identify which of the two approaches Burundi follows.

Formal domestication does not necessarily mean that substantive implementation is achieved. That is to say, international norms ratified may practically not enjoy the same applicability as national law due, *inter alia*, to the lack of precision or the ignorance of international norms. This section will explore the obligation stemming from ratification as well as the level of application of international law in Burundi.

### 4.2.1 Domestication process

The incorporation of international law within Burundian legal system is governed by title XIII (articles 289-296) and article 19 of the Constitution of Burundi.

The Constitution provides for two procedures for entering into international agreement. On one hand, there are treaties which can be negotiated and ratified without any act of parliament.<sup>118</sup> The President of the Republic possesses full powers to negotiate and ratify those treaties. On the other hand, article 290 contains an exhaustive lists of areas in which treaties have to be ratified through a law passed by the parliament. These are treaties related to peace and trade, those related to international organisation, those engaging public funds, those modifying legislative dispositions and those related to the status of persons. After ratification, the treaty concerned becomes part of the national legal system by virtue of article 292.

In addition, article 19 of the Constitution stresses that the rights and duties proclaimed and guaranteed, *inter alia*, in the Universal Declaration, the international covenants related to human rights, the African Charter, the CEDAW and the CRC are part of the Constitution. This suggests

---

<sup>117</sup>CM Picciotto *The relation of international law to the law of England and the United States* (1915) 10.

<sup>118</sup> Art 289 of the Constitution.

that all treaties ratified by Burundi can directly be invoked before and applied by a national court. The direct applicability extends to the Universal Declaration which is normally not binding.

This wide adhesion to international law seems to have been dictated by the circumstances of adoption of the 2005 Constitution. The latter was adopted after a long civil war characterised by mass violations of human rights on a political and ethnic basis. To ensure that no repetition of such massacres reoccurs, many safeguards have been incorporated in the Constitution. The study of those safeguards is not in the remit of this dissertation. However, it is worth noting that the recognition of wide range of rights was a manifestation of a will to say 'never again' to mass violations.

In regards to juvenile justice, the provision offers a real advantage to children in that, for instance, the CRC and the African Children's Charter can be directly applied and interpreted by national courts. The guarantees proclaimed by the soft law seem not to have been integrated in Constitution. Moreover, the formal adhesion to international law may not necessarily be followed by substantive implementation of those rights.

#### **4.2.2 Obligations stemming from ratification**

Obligations flowing from ratification can be read in the Vienna Convention on the Law of Treaties (VCLT). Under article 11 of VCLT, ratification of a treaty means that a state accepts that it is bound by the treaty. The only way to limit the binding scope of a treaty is to formally record reservations<sup>119</sup> at the time when the treaty is ratified<sup>119</sup> which Burundi did not do. In terms of the principle of *pacta sunt servanda*, Burundi has an obligation to implement the instruments that it has ratified in good faith.<sup>120</sup>

Article 292 of the Constitution stipulates that treaties take effect after ratification, subject to the condition that reciprocity be observed in bilateral treaties. For multilateral treaties, the entry into force is only subject to the realisation of conditions provided for entry into force in each case.

---

<sup>119</sup> Art 19 of VCLT.

<sup>120</sup> Art 26 of VCLT.

Human rights treaties have a particular feature that they do not create obligations between states parties. On contrary, states assume unilateral obligations. According to Goodman:<sup>121</sup>

In consenting to multilateral human rights treaties, states generally try to accomplish two goals: (1) to promote human rights standards (whether domestically or internationally or both); and (2) to minimise the treaty's infringement on aspects of domestic sovereignty that the state does not want to relinquish.

As human rights treaties do not create obligations between states, Burundi has a unilateral obligation to implement a treaty upon ratification. In order to assess the substantive implementation of treaties, one needs to assess the level of implementation and particularly the justiciability of international human rights law.

#### 4.2.3 Justiciability of international human rights

The term justiciability here means that persons can claim a violation of a right enshrined in treaties and seek remedy before national courts.<sup>122</sup>As mentioned above, in Burundi, human rights treaties enter immediately into force upon ratification and certain human rights treaties have acquired a constitutional value.<sup>123</sup> Other provisions related to juvenile justice have been incorporated in national law such as the penal law and the penal procedure law. Although, there is no doubt that international human rights law is justiciable in Burundi, courts have so far been very reluctant in enforcing international human rights law. What have been described as reasons for a poor record in enforcement of international human rights instruments still prevails in Burundi courts.<sup>124</sup>

On one hand, Burundian judges do not have a culture of applying international law when adjudicating cases. In most cases, the judges do not consider international law even when lawyers invoke international law to substantiate their pleadings.<sup>125</sup>On the other hand, the Constitutional Court which is vested with the power to ensure the respect for the Constitution

---

<sup>121</sup>R Goodman 'Human rights treaties, invalid reservations, and state consent' (2002) 96 *American Journal of International Law* 536.

<sup>122</sup>F Viljoen *International human rights law in Africa* (2012) 7.

<sup>123</sup> Art 19 of the Constitution.

<sup>124</sup>M Ndayikengurukiye 'The international human rights law as a source of law in the Burundian judicial system' unpublished dissertation, University of Pretoria, 2005 21.

<sup>125</sup>Eg *RMP 140625/NK E Public Prosecution v Bagabo Eric & Basitinyakamwe Joseph*; *RMP 140718/NZM*. See also egs in M Ndayikengurukiye (n 125 above) 22-26.

and the Bill of Rights<sup>126</sup>, and to interpret and apply same is not accessible to citizens. Admittedly, citizens can challenge the unconstitutionality of any law and regulatory act,<sup>127</sup> but in practice few people refer cases to the Constitutional Court. Many reasons explain that state of affairs. Citizens ignore the laws and do not consider it important to take cases to the Constitutional Court. Indeed, when a litigant refers a matter to a court, she or he expects a remedy at the end the day. The jurisprudence of the Constitutional Courts makes it clear that decisions are limited to declaring (un)constitutional a law or regulation which is challenged and are silent as regard to the consequential remedy.<sup>128</sup> Persons can base their claims on the unconstitutionality in order to seek remedy before other courts. However, most litigants are not assisted and are not aware that the constitutionality of a norm or law can be questioned.

For the same reasons, although the Constitutional Court has competency under article 228 to assure that state organs and other institutions respect and comply with the Constitution and the Bill of Rights, no case has been brought to it challenging their conduct. It is my submission that the term 'institution' includes private actors.<sup>129</sup>

Using the ordinary meaning of words, it would be impossible to read a natural person in the term 'institutions'. As a result, individuals do not have standing to challenge the constitutionality of natural person's behaviour.

### 4.3 Conclusion

Theoretically, international law occupies a privileged place in the Burundi legal system. At first glance, the attribution of a constitutional value to ratified conventions and the Universal Declaration would mean that international law enjoys a higher position than non-constitutional laws. In practice, this does not happen and child offenders do not always enjoy the rights proclaimed in binding instruments.

---

<sup>126</sup> Art 228 of the Constitution.

<sup>127</sup> Art 230 of the Constitution.

<sup>128</sup> eg RCCB 213 of 5 June 2008.

<sup>129</sup> According to Oxford Advanced Learner's Dictionary (2010), institution means 'a large important organization that has a particular purpose'.



## Chapter 5

# Appraisals of the guarantees provided by the new criminal law from an international law perspective

### 5.0 Introduction

The overall objective of the juvenile justice is to seek the welfare and best interests of child offenders during a judicial process. Rule 5 of Beijing Rules, article 3 of CRC and article 4 of the African Children's Charter contain relevant provisions in that respect. Article 222 of the 2013 penal procedure code provides that the best interest of the child has to be privileged in any measure taken during inquiry, investigation or judgment of a minor.

The achievement of those objectives requires a bulk of legislation and institutions devised to respond to children's needs while in conflict with the law. Burundian penal law provides for measures aimed at dealing adequately with child offenders. Thus, when investigating a case involving children, special professional obligations are placed on the police. Likewise, the adjudication of child offenders requires from courts a special procedure and grants the minors judicial guarantees which are not recognized to adults. Furthermore, deprivation of liberty is considered to be a measure of last resort and children imprisoned have right to special conditions of detention.

This chapter assesses the compliance of those provisions with international standards regarding children in conflict with the law. Admittedly, all the aspects of the Burundian criminal law will not be dealt with; but the methodic approach will take account of various stages of a normal criminal process. The appraisal will also compare the Burundian legislation with those of Nigeria and South Africa.

### 5.1 Specialisation of police and court chambers

The creation of juvenile courts was from the outset informed by the will to limit the destructive impact that the traditional criminal processes exerted on children in conflict with the law.<sup>130</sup> The CRC obliges states to 'seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having

---

<sup>130</sup> FE Zimring 'The common thread: Diversion in juvenile justice' (2000) 88 *California Law Review* 2481.

infringed on the penal law'.<sup>131</sup>The Beijing rules also obliges states 'to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice.'<sup>132</sup>

For the time being, no specific legislation to children has been enacted in Burundi. Provisions protecting child offenders are included in the penal law and in the penal procedure law. In relation to prison facilities, there is a law applicable to all prisoners regardless of their age. The consequence would be that the system is not unified and complicates its reading and application. Furthermore, there is no particular specialisation of policemen, prosecutors or judges dealing with child offenders. The same judges serving in adult courts seat in chambers of minors even though they are obliged to apply different procedure standards.

Burundi framers should have been informed by other countries applying specific legislation to children. In Nigeria for instance, the Child's rights act 2003 is exclusively dedicated to children and more explanatory as to what rights a child is entitled. Likewise, the South African Child Justice Act 2008 applies to children in conflict with the law.

Article 232 of Burundian penal procedure law says that in case of joint-crime cases, the procedure applied to child defenders does not extend to adults. The separateness of procedures may hinder the administration of justice, especially in the establishment of evidence. As rightly put by Wen, while separation of cases should be strictly observed in detention, the separate investigation is not favourable to the efficiency in the establishment of criminal facts.<sup>133</sup> As far as separation of persons is concerned, Burundi has theoretically fulfilled the international standards under article 10 of ICCPR and rule 13 of the Beijing Rules.

## 5.2 Age of criminal responsibility

The age of criminal responsibility varies widely from one country to the other and legislations display a kind of arbitrariness in fixing the age of criminal liability.<sup>134</sup>Doubtless children do not

---

<sup>131</sup> Art 20(3) of CRC.

<sup>132</sup>Rule 2.3 of the Beijing Rules.

<sup>133</sup>X Wen *Comparative research of juvenile justice* (2002) 26.

<sup>134</sup>Cipriani (n 43 above) 98-109.

reach maturity at the same time and what is wrongful may be different from one culture to another. However, as a common ground, MACR assumes that a child is able to know what is wrong as what is right. Indeed, to be guilty of an offense, a person must act with a wrongful act (*actus reus*) and a guilty mind (*mens rea*). According to CRC Committee, 'children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law.'<sup>135</sup>

Many human rights instruments contain the obligation for states to establish a MACR. Article 14 (4) of ICCPR obliges states to consider the age of juvenile in criminal adjudication which 'refers to the span of years between the MACR and the minimum age of criminal majority'.<sup>136</sup> ICCPR obliges states to establish a MACR falling within the internationally recognized norms and indistinctively applicable to boys and girls. Likewise, the Beijing Rules oblige states to ensure that the age of criminal responsibility is not fixed at a low level.<sup>137</sup> Article 40 of CRC obliges states to establish a MACR. In the same line, article 17(4) of the African Children's Charter obliges states to fix a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

Burundian penal code establishes the MACR at 15 years while at 18 years a person bears the full criminal responsibility. That MACR is in the remit of commendable level in accordance with CRC General Comment 10, paragraph 30. Acts committed by a child below 15 years are punished by civil compensation if they entail damage.

The South African law does not fix the MACR. It however graduates responsibility according to the age of the child. Those under 10 years can be punished and the minority ends at the age of 21 years.<sup>138</sup> This approach is more realistic in as much as a child of 10 years does not have the same degree of maturity as another of 18 years.

In line with article 40(3) of CRC, It is my submission that Burundi law should seek non-judicial measures in regard to children below 15 years because it is hardly defensible to argue that a 14 years old child cannot distinguish the wrong from the right and cannot predict the consequences of his or her behaviour. Cases should however be individually treated in order to determine whether a child below 15 years who commits a wrongful act did so with a guilty mind.

---

<sup>135</sup>General Comment 10, para 10.

<sup>136</sup>Cipriani (n 43 above) 98-109.

<sup>137</sup>Rule 4.

<sup>138</sup>Secs 4 of the 2008 Child Justice Act.

## 5.3 Pretrial procedure

From a Burundian perspective, it has been established that children's rights are constantly violated in the pretrial stage. Long delay in detention, incarceration without charges and lack of any priority policy to treat children cases speedily are among other shortcomings of the criminal process. This section is limited to three aspects namely social enquiry, speed of the process and exceptional feature of the detention.

### 5.3.1 Social enquiry

Article 225 of the 2013 penal procedure code obliges the investigator in charge of a child dossier to collect such information necessary to ascertain the personhood of the minor. That requirement is in line with rule 5 of the Beijing Rules that requires for any reaction to juvenile offenders to be 'in proportion to the circumstances of both the offenders and the offence'.

The obligation is only placed upon policemen and prosecutor to the exclusion of judges which runs against rule 16 of the Beijing Rules. This state of affairs may hamper the application of proportionate sanctions if the investigators have not collected all useful circumstances. Judges may not consider necessary to request complementary investigation because they are not legally required to do so. In addition, the proportionality of reaction should also be imposed to prison administrators.

Consequently, this writer agrees with Wen that the principle of proportionality 'should apply to every stage throughout the entire juvenile criminal process.'<sup>139</sup> This is in line with rules 6 and 16 of the Beijing Rules.

### 5.3.2 Speedy process

This principle is expressly enshrined in article 10(2)(b) of ICCPR which provides that 'accused juveniles shall be brought as speedily as possible for adjudication'. The requirement to adjudicate children quickly is also enshrined in rule 20(1) of the Beijing Rules which recommends states to handle juvenile cases 'expeditiously, without any unnecessary delay'.

---

<sup>139</sup>Wen (n 133 above) 23.

The principle is buttressed by article 40(2)(b)(iii) of CRC obliging states to terminate children cases 'without delay'. In line with Van Bueren, this writer submits that the wording of those instruments 'appears to indicate that the well-being of the child is consistent with issues being decided at a pace which is over and above that which is generally applicable to adults'.<sup>140</sup> This principle is reflected in article 46 of the Constitution. Moreover, in terms of article 230 of the PPC the delay of detaining a minor prior to his or her presentation to a judge lasts a maximum of 7 days whereas under article 34 of the same code that delay extends to 14 days for adults.

The same principle is underscored by section 66 of South African Child Justice Act obliging to conclude all trials of children as speedily as possible. The section gives set time limit for certain court actions. A child justice court may, prior to the commencement of trial, not postpone the proceedings for a period longer than 14 days at a time for a child in detention in prison. The limit is fixed to 30 days for a child detained in a child and youth care, and extends to 60 days if a child has been released.

There is no similar precision in Burundian law. Experience from the past has shown that Burundian judges do not constantly try children speedily. Four cases illustrate that situation.

In one case<sup>141</sup>, the trial was postponed from 27 February 2006 to 23 March 2006, then to 9 June 2006, then to 7 September 2006, then to 23 November 2006 and finally to 11 January 2007. The delay was due to a deficiency in the administration of prisons in as much as for two times the appellant in detention did not appear, which implies that either he was not notified of the hearing or the prison administration did not arrange his transportation. On another occasion, the case was postponed because the representative of the victim had not yet produced a procuration. The last postponement was due the fact that the lawyers have not exchanged their submissions. In that respect, it is to be noted that lawyers may be assigned by NGOs a bit late.

In another case<sup>142</sup>, the trial was postponed to the following dates: 18 September 2009, 16 October 2009, 30 October 2009, 20 November 2009, 18 December 2009, 15 January 2010, 17 February 2010 and finally to 5 March 2010. It is to be noted that the postponements were dictated by the non-appearance of a co-accused.

---

<sup>140</sup>Van Bueren (n 5 above) 175.

<sup>141</sup>*RPA 624 Public Prosecution v Ndayisaba Samuel and others (2007)*.

<sup>142</sup>*RP 4396 Public Prosecution v Miburo Gaudence and another (2010)*.

In the third case<sup>143</sup>, the trial took only one hearing while in the fourth<sup>144</sup> the case was postponed once in order to wait the counsel to the defendant. Unfortunately, the new PPC does not contain any indication as to the speed of the trial. The Nigerian child's rights act contains the same principle obliging courts to use detention for 'the shortest possible period of time'.<sup>145</sup> Likewise Burundian law, there is no time limit in dealing with cases.

### 5.3.3 Deprivation of liberty as a measure of last resort

The criminalisation and its consequence deprivation of liberty is the most intrusive measure that a state exerts on individuals. It should then be applied exceptionally and priority in dealing with individuals' behaviors should be given to other means.

In that respect, Stratenwerth argues that:<sup>146</sup>

Punishment is, as a rule, the State's severest intrusion into the personal rights of a human being. Therefore, it should be used only where other measures, in particular private law and administrative law measures, fail.

The criminalisation being a measure of last resort, its modalities should also be mainly directed to less harsh form, avoiding deprivation of liberty as far as possible.

The standard is set by article 37(b) of CRC and means that 'interference to personal liberty as a fundamental aspect of the child's development should be limited to the absolute minimum, with the ultimate goal of avoiding deprivation of liberty'.<sup>147</sup> The Beijing Rules and Havana Rules use similar words. The Beijing Rules use 'the shortest possible period of time' and the Havana Rules use 'for the minimum necessary period'.

The CRC Committee explained the words 'last resort' as meaning that 'deprivation of liberty can be used only if there is no other way of giving the child the protection that he or she needs'.<sup>148</sup>

Article 222 of the Burundian PPC buttresses a principle enshrined in article 46 of the Constitution stipulating that the detention of a minor must be envisaged as a measure of last

---

<sup>143</sup>RP 10442, *TGI Gitega* (2010).

<sup>144</sup>RP 7253 *Public Prosecution v Gerard Nzimenya and another* (2008).

<sup>145</sup>Sec 212.

<sup>146</sup>N Jareborg 'Criminalization as last resort' (2005) 2 *Ohio State Journal of Criminal Law* 525.

<sup>147</sup>W Schabas & H Sax (n 7 above) 58.

<sup>148</sup>International Review of Criminal Policy Nos 49 and 50, 1998-1999, United Nations, New York (1999) 25 in X Wen *Comparative research of juvenile justice* (2002) 64.

resort. Article 46 of the Constitution adds that the detention shall last the shortest period of time. Thus the wording is different from that of article 37 (b) of CRC in as much as the Burundian law limits the measure to the detention while CRC extends it to arrest and imprisonment. However, the Burundian law does not define the detention which may be synonymous to the deprivation of liberty. This view is confirmed by the use of detention in other provisions relating to the separation from adults as will be seen below.

The use of deprivation of liberty as a last resort also requires review of inmates' behavior in order to free them if they have made progress after being convicted. Burundian penal law contains no specific provision in that respect. Child offenders may benefit from conditional release in the same conditions as convicted adults by virtue of articles 127-135 of the penal code.

## **5.4 Adjudicatory procedure and safeguards**

In regard to trial stage, a need for accentuated guarantees is justified in as much as the result of that critical process may amount to labelling children as delinquent. Such a result has to be reached when it is absolutely necessary. As a child cannot defend him or herself properly, assistance is necessary. Such assistance may include social workers and lawyers. The prevention of stigmatization requires that hearings are closed to persons not directly involved in the case. When compelling evidences of culpability are established, courts should primarily apply non-custodial measures.

### **5.4.1 Right to counsel**

The right to counsel is very important for any person in a judicial procedure. Stating on necessity of judicial guaranteed, the US Supreme Court emphasised that:<sup>149</sup>

A lawyer occupies a critical position in our system...Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the legal rights of that person in his dealings with the police and the courts.

---

<sup>149</sup> *Fare v Michael C* cited by HA Davidson 'The child's right to be heard and represented in judicial proceedings' (1991) 18 *Pepperdine Law Review* 265.

While assistance by a counsel is mandatory in the pre-trial procedure, the right to legal and judicial assistance in the trial stage is implicitly enshrined in article 235 of the PPC. However, the law neither indicates how the counsel will be appointed nor how the representation will be funded. As a result, child offenders are left with an empty right and their assistance is presently awarded by NGOs.

This clearly contravenes article 40(b)(ii) and (iii) of CRC which provides that every child accused of having infringed the penal law is 'to have legal and other appropriate assistance in the preparation and presentation of his or her defence' and is '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'. Article 37(d) of the CRC also makes provision for the right of children deprived of their liberty to a 'prompt access to legal and other appropriate assistance'. The same right is embodied in article 17(2)(c)(iii) of the African Children's Charter.

The Child's Rights Act of Nigeria explicitly provides that 'a child has to be represented by a legal practitioner and to free legal aid in the hearing and determination of any matter concerning the child in the court'.<sup>150</sup> Unlike the Burundian law which does not precisely stipulate that the counsel to a child must be a legal practitioner, the Nigerian formulation is more specific and contains an unambiguous entitlement.

Under section 80 of South African Child Justice Act, the right to counsel is not automatic. The award of a state-funded legal representation only exists in certain instances. The Legal Aid Board assesses the application and decides whether or not the child is not able to afford a legal representation of his or her own choosing. The South African provision is more practical in as much as owing to financial constraints it would be illusory to grant a legal assistance to every child offender.

---

<sup>150</sup>Sec 155 of the 2003 Child's Rights Act.



## 5.4.2 Right to privacy

The privacy of hearing in relation to child related proceedings has been a subject of debate since many years ago. American and British laws have restricted the publicity of such proceedings before the 1950s<sup>151</sup> and the right to privacy was guaranteed by US courts in the dawn of 20<sup>th</sup> century and the prevention of the criminal stigma is one of the goals of the juvenile court.<sup>152</sup>

In pursuance to rule 8 of the Beijing Rules the juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling and in principle, no information that may lead to the identification of a juvenile offender shall be published.

According to the official commentary of the Beijing Rules, the preservation of privacy seeks to prevent the stigmatization and labelling resulting from the permanent identification of young person's as 'delinquent' or 'criminal'.

Article 236 of the Burundian PPC provides that hearings of children must be confidential save that witnesses, parents, tutors, attorneys, social assistants and representatives of associations or services whose object is the promotion of children's rights are allowed to participate.

The Burundian penal law does not spell any specific prohibition of persons attending the hearings to disclose information and does not make provisions for the right to privacy in pre-trial and post-trial stage of the judicial process. Furthermore, the law is silent as to the point of keeping juvenile record nor does it prescribe any obligation to law enforcement agencies who inevitably will have knowledge of a child offender's criminal record. It is therefore evident that the right to privacy is not well protected by Burundian penal law.

---

<sup>151</sup> G Geis 'Publicity and juvenile court proceedings' (1958) 30 *Rocky Mountain Law Review* 118.

<sup>152</sup> JB Jacobs 'Juvenile criminal record confidentiality' (2013) 2-3<[http://lsr.nellco.org/cgi/viewcontent.cgi?article=1405&context=nyu\\_plltwp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1405&context=nyu_plltwp)> (accessed 22 September 2013).

## 5.5 Alternatives to deprivation of liberty

Alternatives to deprivation of liberty are and should be based on ‘the principle of minimum intervention’<sup>153</sup> to achieve the criminal goal of rehabilitation and reintegration of the offender in society.

Article 40 of CRC provides alternatives to judicial proceedings and alternatives to institutionalisation during pre-arrest and post-trial stage. Rule 11 of Beijing Rules devises measures designed to remove juveniles from the formal trial, but places more emphasis on redirecting juveniles towards community or other services at the same time.<sup>154</sup> Therefore, international standards contain diversionary measures and non-custodial measures. According to Zimring, diversion to normal criminal processes is at the heart of the creation of juvenile courts and he describes the criminal court as the common enemy that launched juvenile courts in America.<sup>155</sup> Alternatives sanctions seek therefore to fulfill the dual goal of juvenile justice of ‘protecting public safety while rehabilitating youth offenders’.<sup>156</sup>

Section 51 of South African Child Justice Act captures those objectives in a detailed manner. Those objectives are: non-judicial treatment of child offenders in appropriate cases, encouragement of the child to be accountable, to meet a child’s need, promotion of reintegration into his or her family and community, receive the views of victims, compensation of the victim, reconciliation of the offender with the victim and the community affected, prevention of stigmatization, reduce the potential of reoffending, to prevent the child from having a criminal record and to promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.

Article 40(3)(b) of CRC obliges states to seek measures for dealing with child offenders without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected. The diversionary measures provided by CRC seek to avoid judicial proceedings and serve ‘as an alternative to institutionalisation during post-arrest and post-trial stage’.<sup>157</sup>

Rule 11 of the Beijing Rules urges states to use diversionary measure when appropriate. The rule makes provision for considering the consent of the offender or that of her/his parent or

---

<sup>153</sup> Rule 2(6) of the Tokyo Rules.

<sup>154</sup> Wen (n 133 above) 43.

<sup>155</sup> FE Zimring ‘The common thread: Diversion in juvenile justice’ (2000) 88 *California Law Review* 2482.

<sup>156</sup> A Petrisino & C Turpin-Petrosino & S Guckenberg *Formal system processing of juveniles: effects on delinquency* (2010) 4.

<sup>157</sup> I Ogunniran ‘The lock and key phenomenon: reforming the penal policy for child offenders in Nigeria’ (2013) *Justice Policy Journal* 10.

guardian. In taking into account the consent, the rule underlines that any diversionary measures should not be applied under coercion and intimidation.<sup>158</sup> Without imposing a hierarchy of appropriate measures between non-judicial and judicial measures dealing with child offenders, the CRC Committee encourages states to use diversionary measures in most cases.<sup>159</sup>

In addition, the CRC Committee subjects diversion to the following conditions: existence of compelling evidence that the child committed the alleged offence, free acceptance of responsibility by the child, diversion shall not be used against the child in subsequent legal proceedings, adequate and specific information on the nature, content and duration of the diversion measure, request of the consent of parents, possibility of review of the measure, the child must be given the opportunity to seek assistance on the appropriateness and desirability of the diversion and the possibility of review, the completion of diversion close definitively the case and it should not be considered as a criminal record and access to diversion related information should be time limited.<sup>160</sup>

Article 30 of the 2009 Burundian penal code makes provision for the following alternatives: (a) warning, (b) call to law, (c) handling the minor to parents, to a tutor, or to a confident person; (d) educative assistance and (e) placement in an institution of social character, a school or another habilitated educative institution.

Those measures can be divided into two categories. On one hand, there are measures that can be taken out of judicial proceedings, that is warning, call to law, handling the minor to parents, a tutor or another fit person. On the other hand, there are measures that can only be taken by a judge namely placement in an educative institution, or in an institution of social character, a school or another habilitated educative institution.

The consent to diversionary measures by the child or by his parents or tutor is set aside by Burundian law. However, the minor, his or her parents, guardian, the public prosecutor can appeal against the decision taken by virtue of article 228 of the PPC. This decision may lead to think that the diversion process is participatory. As the law is silent to that point, it remains to see how the practice will address the problem. It is my contention that the lawmaker should have been more explanatory on how the offender, his or her caregivers as well as the victim and the public will participate in the process.

---

<sup>158</sup>Ogunniran (n 157 above) 11.

<sup>159</sup>CRC Committee, General Comment 10, para 24.

<sup>160</sup>CRC Committee, General Comment 10, para 27.

Furthermore, the law does not structure the discretion left to law enforcement institutions which may lead to abuses especially because there is no need to justify the decision as in a normal prosecution. The free taking diversionary measures toward drunkards has led to abuses in Australia as the law enforcement authorities did not have to prepare for the prosecution.<sup>161</sup> Therefore, there is a need to structure guidelines for police, prosecutors to determine under which circumstances the diversionary measures can be taken.

Nigerian and South African laws adopt a bifurcated approach to child offenders. There are child offenders eligible to diversionary measures and those who are not. Burundian law contains only non-custodial sanctions which are not to be confused with diversion. While diversion extracts child offenders from judicial proceedings, non-custodial measures are taken in a judicial process

The Nigerian law provides that the police, prosecutor or any other person dealing with a case involving a child offender has the power to dispose of it without resorting to a formal trial.<sup>162</sup> However this power is restricted to petty offenses.<sup>163</sup>

The South African Child Justice Act of 2008 provides more elaborate diversionary measures. It stipulates three ways of diversion: prosecutorial diversion, diversion at preliminary inquiry and diversion by the child justice court before the finalization of the case.<sup>164</sup> The restorative approach is in my opinion more appropriate to achieve the criminal justice goal of protecting the society without compromising the rehabilitation of the child offender. The involvement of the victim and the community is conducive to a more acceptable solution. Burundi can learn from the two countries in regard to diversion.

## 5.6 Imprisonment facilities

International law insists on rehabilitation of children in conflict with the law. Accordingly, law enforcement agencies should give them such a treatment that a child goes out the criminal process able to assume a constructive role in society. Put differently, the deprivation of liberty facilities should prepare a child offender to become a law-binding citizen. To that end, measures such as separation from adults, human treatment and dignity should be provided.

---

<sup>161</sup>United Nations Office on Drugs and Crime *Handbook on basic principles and promising practices on alternatives to imprisonment* (2007) 14.

<sup>162</sup>Sec 209(1)(a) of the Nigerian Child's Rights Act

<sup>163</sup>Sec 209(2) of the Nigerian Child's Rights Act.

<sup>164</sup>W Schabas & H Sax (n 7 above) 658.

### 5.6.1 Separate detention from adults

Under article 37(c) of CRC, a child shall be detained separately from adults, unless it is not in the child's best interests. This obligation is also enshrined in article 10(3) of ICCPR. These provisions take account of situations where the segregation from adults will not profit the child. Van Bueren argued for instance that separation is not in the best interests of child when it 'may be tantamount to solitary confinement'.<sup>165</sup>

Article 46 of the Constitution provides that every child is entitled to be detained separately from persons beyond 16 years and to be subject to a treatment and conditions appropriate to his or her age. There is no reason to limit the segregation to the detention and the rationale of that provision leads to a broad interpretation to extend to all persons deprived of their liberty as a result of conviction.

Unlike CRC, article 229 of the PPC omits to mention that exception to the segregation shall be admitted if such a measure will profit the child in conflict with the law.

It may wrongly be thought that CRC having a constitutional value, the appraisal is irrelevant. Far from that, Burundian judges are accustomed to apply almost exclusively national and do not usually pay heed to international norms domesticated.

### 5.6.2 Humanitarian treatment

The goal of any criminal system is to protect the society from crimes and criminals. The deprivation of liberty as a sanction should therefore be carried out in such a way to develop the ability for a child to become a law binding citizen. The conditions of detention should be calculated so that at the end of the procedure the child offender is ready to assume a constructive role in society and avoid reoffending.

Article 37(c) of CRC obliges states to treat a child deprived of liberty with humanity and respect for human dignity taking into account his or her needs and age. A similar obligation is enshrined in article 10(1) of ICCPR. The Human Rights Committee construed that right as to include treatment guaranteed by article 7 of ICCPR namely not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. The detainees should in any circumstances be

---

<sup>165</sup>A Alen et al (eds) *The UN Children's Rights Convention: theory meets practice. Proceedings of the International Interdisciplinary Conference on Children's Rights* (2006) 577.

‘subjected to any hardship or constraint other than that resulting from the deprivation of liberty’, meaning ‘unavoidable restrictions in a closed environment’.<sup>166</sup>

Furthermore, to achieve a humanitarian treatment a child needs special assistance such as social workers, counsel and separation from adults. It goes without saying that in a bid to prevent negative influence, convicted children should be separated from those awaiting trial.

However, the separation should not be applied in a mechanical and absolute way. Rather, if the best interests of the child can be best served under an adult presence, such a solution must be envisaged.

Burundian criminal law provides for an absolute separation and detention of children in special and educative facilities.<sup>167</sup> Besides, the law<sup>168</sup> governing prisons contains provisions similar to article 10(1) ICCPR even though the principle is not widely applied in practice. Niyonkuru pointed out for instance that children are held in custody in dirty facilities without any separation between convicted children and those awaiting trial.<sup>169</sup> Likewise, children in detention have no specific treatment as to their special needs.<sup>170</sup> Consequently, there is a need for reviewing the prison law in order to align it with the ameliorations provided for in the 2013 PPC.

Future efforts should take into account the principle of indivisibility of children’s rights as reminded in guideline 10 of the Guidelines for Action on Children in the Criminal Justice System. In the light of guideline 24 of the Guidelines for Action on Children in the Criminal Justice System, the effective protection shall also include education and training in human rights of prison officers.

---

<sup>166</sup> Human Rights Committee, General Comment 21, para 3.

<sup>167</sup> Art 229 of the penal procedure code.

<sup>168</sup> Loi 1/016 du 22 Septembre 2003 portant régime pénitentiaire au Burundi.

<sup>169</sup> AP Niyonkuru ‘La justice pénale des enfants en droit positif burundais : les principes et les pratiques’ unpublished LLM dissertation, University of Burundi 2006 25. <[http://www.justice.gov.bi/IMG/pdf/DESS-\\_Niyonkuru\\_A-P\\_-\\_Justice\\_penale\\_mineurs-\\_TFE.pdf](http://www.justice.gov.bi/IMG/pdf/DESS-_Niyonkuru_A-P_-_Justice_penale_mineurs-_TFE.pdf)> (accessed 9 October 2013).

<sup>170</sup> Niyonkuru (n 169 above) 27.

## 5.7 Conclusion

The assessment of the protection of child offenders under Burundian penal law reveals that, although improvement has already taken place, Burundi still has a long way to go in order to align its legislation and practices with international standards.

Apart from the fact that the practice widely defers from the legislation, the Burundian criminal law displays anachronism in legislations themselves. While the penal law and the penal procedure law contain recent ameliorations, the law on prison old of 10 years has not yet been reviewed to reflect these new developments. The legislation itself still needs substantial improvements. Some of these, considered by the writer to be more important, will be object of recommendations in the next chapter.

## Chapter 6

### Conclusion and recommendations

This study has tackled various aspects of juvenile justice in Burundi from an international law framework. As the legislation has been enacted recently, the appraisal was, to a large degree, limited to theoretical aspects. Some relatively recent judgments helped us to ascertain that the advent of specific provisions forms a potential powerful tool to increase the quality of adjudication of child offenders' cases.

The assessment was conducted in view of international existing standards — binding and soft law — and in comparison with Nigerian and South juvenile justice systems. The existence of international standards which are widely unchallenged, at least in theory, constitutes a tangible development of children rights.

What are therefore the conclusion and recommendation can we make from that analysis. This chapter sets out the conclusion stemming from the study and recommend elements which should guide further efforts of the lawmaker to ensure adequate protection to child offenders in Burundi.

#### 6.1 Summary and Conclusion

This study has shown that international standards applicable to child offenders use various concepts such as child, child offender, child in conflict with the law, minor or juvenile. It has therefore opted to use interchangeably those terms in the framework of this scholarship.

The study established that the Burundian juvenile justice is embryonic and displays a lack of comprehensiveness as regards international standards. However, it has been observed that like in other African societies, children in Burundi benefit from a collective care although in continuing decline.

The ameliorations provided by the new penal law are, to a large extent, less explanatory and unclear which would hinder the effective protection of child offenders. However, the system provides many guarantees in the prosecution, trial and execution of sentences regarding child offenders.



In order to appropriately assess the ameliorations, an overview of international standards applicable to children has been conducted with particular emphasis on binding norms.

The assessment of Burundian criminal law showed that the new penal law has brought substantial legal improvement in regard to the protection of child offenders. The increase of the MACR, the inclusion of a special chapter dedicated to children, the creation of special chambers in the TGI and appellate courts, alternatives to custody are among positive aspects of the penal law. The system still needs considerable improvements in regard to the creation of real specialised institutions as well as to various aspects at all stages of the criminal process.

Thus, it is appropriate to make recommendations which would guide further actions in regards to child offenders in Burundi.

## **6.2 Recommendations**

In the light of the above, to make the Burundian criminal law more effective as concerns international standards, the following specific recommendations are suggested:

1. There is need for specialisation within the child justice institutions. Dealing with child offenders requires special knowledge with the ultimate purpose being to help them to assume a constructive role in society. Hence, there is a need for continuous training of judges, police, and prosecutors, prison staff as well as lawyers and social workers. This will comply with article 40 of CRC and article 17 of the African Children's Charter.
2. Diversion should be encouraged in order to limit the involvement of child offenders with the justice system. Hence, there should be clear guidelines for law enforcement institutions as under which conditions a diversionary measure is to be taken. Before, taking any diversion, there must be an assessment of conditions as determined in CRC General Comment 10, paragraph 27, particularly the existence of sufficient evidence that the offence was committed and the acceptance of the responsibility by the offender
3. A comprehensive child rights act must be enacted. This will encapsulate the protection of child offenders under international law. It must include provisions for a speedy treatment of child offenders and clear indication of time limit in holding and postponing their hearings. In order to better protect the society, there must be provisions of establishing whether a child under 15 years acted with a wrongful mind. Other provisions would for instance deal with persons

qualified to assist children, their appointment, their formation and payment. To protect children from stigmatisation and labelling, the act has to make provision on how their records will be kept. The publication of children's record as well as using such against the minor after becoming adults should be proscribed in pursuance to rule 21 of the Beijing Rules.

4. Admittedly, judges are accustomed to apply certain guides such as presumption of innocence, mitigating circumstances and the principle according to which the proof of an offence is incumbent to the prosecution. To avoid errors which would amount to compromising the future of child offenders, there is a need for sentencing guidelines.<sup>171</sup>

5. The existing act on prison was enacted in 2003 and predates the 2005 Constitution, the penal code of 2009 and the PPC of 2013. It is silent as regards most of special needs of children deprived of liberty. For instance, no provision concerns the pursuance of education, the confidentiality of records or psychological services to determine the special needs of children in accordance with their sex, personality and the type of offences they are accused or convicted of.<sup>172</sup> Accordingly, the prison act needs to be reviewed and brought in line with both the penal code and the PPC. The amendment should take into account the international guidelines such as the Havana Rules.

**Word count: 19, 884 (table of contents, bibliography and annexes excluded)**

---

<sup>171</sup> Thus, the following factors are to be taken into consideration: the seriousness of the offence in terms of its degree of culpability, aggravating circumstances and the extent of the harm which results from its commission; the character, personality and criminal record of the offender; the role and the degree of participation of the offender in the process of crime commission, the prevalence of the offence; and any other special factors as appropriate, in the determination of the sentence to be imposed upon or other measure to be ordered against an offender at the conclusion of a criminal trial. Nigerian Law Reform Commission 'Sentencing guidelines in Nigeria' (2012) 25.

<sup>172</sup> United Nations rules for the protection of juveniles deprived of their liberty, para 28.

## Bibliography

### 1. Books and Chapters in Books

Boezaart, T (ed) (2009) *Child law in South Africa* Juta & Co Ltd

Breen, C (2002) *The standard of the best interests of the child. A western tradition in international and comparative law* Martinus Nijhoff Publishers

Bulumo, SO A (1996), 'History of Juvenile Justice in Nigeria' *International Handbook on Juvenile Justice* Westport Connecticut Greenwood

Cipriani, D (2009) *Children's rights and the minimum age of criminal responsibility. An global perspective* Ashgate Publishing Limited

Corriero, MA (2007) *Judging children as children. A proposal for juvenile justice* Temple University Press Philadelphia

Dugard, J (2011) *International law. A South African Perspective* Juta & Company Limited

Freeman, M (2007) *A commentary on the United Nations Convention on the Rights of the Child Article 3 The best interests of the child* Martinus Nijhoff Publishers

Goldstein, J et al (1986) *Before the best interests of the child* The Free Press

JungerTas, J (2002) 'The Juvenile Justice System: Past and Present Trends in Western Society' *Punishing Juveniles Principle and Critique* Oxford Hart Publishing

Kaime, T (2009) *The African charter on the rights and welfare of the child. A socio-legal perspective* Pretoria University Law Press

Liefaard, T 'The right to be treated with humanity: implications of article 37 (c) of the CRC for children in detention' in Alen, A et al (eds) (2006) *The UN Children's Rights Convention: theory meets practice. Proceedings of the International Interdisciplinary Conference on Children's Rights* Hart Publishing Limited

Nielsen, JS & J Gallinetti, J (eds) (2004) *Child justice in Africa. A guide to good practice:* Community Law Centre. University of the Western Cape

Petrisino, A & Turpin, Petrosino, C & Guckenber, S (2010) *Formal system processing of juveniles: effects on delinquency*: Campbell Systematic Reviews

Picciotto, CM (1915) *The relation of international law to the law of England and the United States*: McBride, Nast & Company

Rishmawi, M (2006) *A commentary on the United Nations Convention on the Rights of the Child. Article 4: the nature of States Parties' Obligations*: Martinus Nijhoff Publishers

Schabas, W & Sax, H (2006) *A commentary on the United Nations Convention on the Rights of the Child Article 37: Prohibition of torture, death penalty, life imprisonment and deprivation of liberty*: Martinus Nijhoff Publishers

Van Bueren, G (1994) *The International Law on the Rights of the Child*: Martinus Nijhoff Publishers

Van Bueren, G (2006) *A commentary on the United Nations Convention on the Rights of the Child Article 40: Child criminal justice*: Martinus Nijhoff Publishers

Viljoen, F(2012) *International human rights law in Africa*: Oxford University Press

Wen, X (2002) *Comparative research of juvenile justice*: Oxford University Press

## **2. Journal articles**

Davidson, HA 'The child's right to be heard and represented in judicial proceedings' (1991) 18 *Pepperdine Law Review* 265

Geis,G 'Publicity and juvenile court proceedings' (1958) 30 *Rocky Mountain Law Review* 118

Goodman, R 'Human rights treaties, invalid reservations, and state consent' (2002) 96 *American Journal of International Law* 536

Hannum, H 'The status of the universal declaration of human rights in national and international law' (1996) 25 *GA. J. INT'L & COMP.L* 317-340

Jareborg, N 'Criminalization as last resort' (2005) 2 *Ohio State Journal of Criminal Law* 525

Lloyd, A 'A theoretical analysis of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) *African Human Rights Law Journal* 5

Mauer, M 'Thinking about prison and its impacts in the twenty-first century' (2005) 2 *Ohio State Journal of Criminal Law* 610

Memzur, BD 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero sum game?'(2008) 23 *SAPR/PL* 8

Parker, S 'The best interests of the child. principles and problems' (1994) 8 *International Journal of Law and Family* 28

Van Bueren, 'Child-oriented justice—an international challenge for Europe' (1992) 6 *International Journal of Law and the Family* 389, 393

Zimring, FE 'The common thread: Diversion in juvenile justice' (2000) 88 *California Law Review* 2481-282

### 3. Reports/Papers

Amnesty International (2002) 'Poverty isolation and ill-treatment. Juvenile justice in Burundi'. <<http://www.refworld.org/pdfid/3d9302f07.pdf>> (accessed 15 October 2013)

Assogba, N & Nyamoya, F (2009) 'Avant-projet de loi portant cadre légal de l'aide juridique et de l'assistance judiciaire au Burundi et proposition de mise en œuvre'  
<[http://www.justice.gov.bi/IMG/pdf/BINUB-\\_Avant-projet\\_de\\_loi\\_aide\\_jurid-\\_et\\_judic-.pdf](http://www.justice.gov.bi/IMG/pdf/BINUB-_Avant-projet_de_loi_aide_jurid-_et_judic-.pdf)>  
(accessed 17 October 2013)

Conseil des Droits de l'Homme (2010) 'Rapport de l'expert indépendant chargé d'examiner la situation des droits de l'homme au Burundi, Akich Okola'  
<[http://www2.ohchr.org/english/countries/bi/mandate/docs/A-HRC-16-CRP-1\\_fr.pdf](http://www2.ohchr.org/english/countries/bi/mandate/docs/A-HRC-16-CRP-1_fr.pdf)> (accessed 17 October 2013)

De Blauwe, T (2011) *Analyse jurisprudentielle de la justice pour mineurs en conflit avec la loi au Burundi*. <[http://www.justice.gov.bi/IMG/pdf/ASF-AnalyseJurispr-\\_JustiJuven\\_2011.pdf](http://www.justice.gov.bi/IMG/pdf/ASF-AnalyseJurispr-_JustiJuven_2011.pdf)> (accessed 15 October 2013)

Defence Children International (2007) *From legislation to action? Trends in juvenile justice systems across 15 countries* <<http://www.defenceforchildren.org/files/DCI-JJ-Report-2007-FINAL-VERSION-with-cover.pdf>> (accessed 15 October 2013)

Defence Children International (2008) *Protecting the rights of children in conflict with the law. Research on alternatives to the deprivation of liberty in eight countries* <[http://www.defenceforchildren.org/files/gabriella/ResearchMCR\\_alternativesToDetention.pdf](http://www.defenceforchildren.org/files/gabriella/ResearchMCR_alternativesToDetention.pdf)> (accessed 15 October 2013)

Hazel, N (2008) 'Youth Justice Board Cross-national comparison of youth justice'. <[http://www.academia.edu/1621782/Cross-national\\_comparison\\_of\\_youth\\_justice](http://www.academia.edu/1621782/Cross-national_comparison_of_youth_justice)> (accessed 5 September 2013)

Human Rights Watch (2007) 'Un lourd fardeau à porter. Les violations des droits des enfants en détention au Burundi'. <<http://www.hrw.org/sites/default/files/reports/burundi0307frweb.pdf>> (accessed 17 October 2013)

Interagency Panel on Juvenile Justice (undated) 'Protecting the rights of children in conflict with the law'. <[http://www.unodc.org/pdf/criminal\\_justice/Protecting\\_children\\_en.pdf](http://www.unodc.org/pdf/criminal_justice/Protecting_children_en.pdf)> (accessed 8 October 2013)

JB Jacobs 'Juvenile criminal record confidentiality' (2013) <[http://lsr.nellco.org/cgi/viewcontent.cgi?article=1405&context=nyu\\_plltwp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1405&context=nyu_plltwp)> (accessed 22 September 2013)

Moriceau, J & Niyonzima, C (2011) *Etude de base sur l'aide légale au Burundi*. <[http://www.burunditransparence.org/201107\\_EtudeAideLegaleBurundi\\_JMoriceau.pdf](http://www.burunditransparence.org/201107_EtudeAideLegaleBurundi_JMoriceau.pdf)> (accessed 15 October 2013)

Nigerian Law Reform Commission (2012) 'Sentencing guidelines in Nigeria'

Nindorera, A (2002.2003) 'Ubushingantahe as a base for political transformation in Burundi' <<http://0-www.genderandsecurity.umb.edu.innopac.up.ac.za/Agnes.pdf>>(accessed 10 October 2013)

OIDEB' Guide des droits de l'enfant au Burundi' (2008) in International Bureau for Children's Rights *Faire des droits de l'enfant une réalité dans la région des grands lacs africains : Les profils national du Burundi, de la République du Congo, de la République Démocratique du Congo et du Rwanda* <<http://www.ibcr.org/editor/assets/document%20complet%20Grand%20Lacs%20-%204%20fevrier%202009%20-%20with%20cover.pdf>>(accessed 13 August 2013)

#### 4. Dissertations

Unpublished: Ndayikengurukiye, M 'The international human rights law as a source of law in the Burundian judicial system' unpublished dissertation, University of Pretoria (2005) <[www.chr.up.ac.za](http://www.chr.up.ac.za)>(accessed 28 July 2013)

Unpublished : Nininahazwe, R 'Du respect des droits des mineurs en cas d'arrestation et de détention en droit burundais' unpublished dissertation, University of Burundi (2009) <[http://www.justice.gov.bi/IMG/pdf/DESS-\\_Nininahazwe\\_R--\\_Mineurs\\_conflit\\_loi-\\_TFE.pdf](http://www.justice.gov.bi/IMG/pdf/DESS-_Nininahazwe_R--_Mineurs_conflit_loi-_TFE.pdf)>(accessed 9 October 2013)

Unpublished : Niyonkuru, AP 'La justice pénale des enfants en droit positif burundais : les principes et les pratiques' unpublished dissertation, University of Burundi (2006) <[http://www.justice.gov.bi/IMG/pdf/DESS-\\_Niyonkuru\\_A-P-\\_-\\_Justice\\_penale\\_mineurs-\\_TFE.pdf](http://www.justice.gov.bi/IMG/pdf/DESS-_Niyonkuru_A-P-_-_Justice_penale_mineurs-_TFE.pdf)>(accessed 9 October 2013)

#### 5. International instruments

Convention on the Elimination of All forms of Discrimination Against Women

Convention on the Rights of the Child

CRC Committee, General Comment 10.

Declaration of the Rights of the Child of 1924

Declaration on the Rights of the Child of 1959

Human Rights Committee, General Comment 21 (1994)

Guidelines for Action on Children in the Criminal Justice System

International Convention on the Elimination of All forms of racial Discrimination

International Convention on the protection of the rights of all migrant workers and members of their families

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Optional Protocol to the 1984 convention against torture and other cruel, inhuman or degrading treatment or punishment

Standard Minimum Rules for the Treatment of Prisoners

United Nations Guidelines for the Prevention of Juvenile Delinquency

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

United Nations Standard Minimum Rules for Non-custodial Measures

United Nations Standard Minimum Rules for the Administration of Juvenile Justice

Universal Declaration of Human Rights

Vienna Convention on the Law of Treaties

American Convention on Human Rights

European Convention on Human Rights

American Declaration on the Rights and Duties of Man



## **6. African regional instruments**

African Charter on Human and Peoples' Rights

African Charter on the Rights and Welfare of the Child

## **7. Concluding observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child**

Recommandations et Observations adressées au Gouvernement du Burkina Faso par le Comité Africain d'Experts sur les Droits et le Bien-être de l'Enfant sur le Rapport initial de la mise en œuvre de la Charte africaine des droits et du bien-être de l'enfant.

Observations and requests for clarification addressed to the government of Togo by the African Committee of Experts on the Rights and Welfare of the Child.

Recommandations et Observations adressées au Gouvernement du Mali par le Comité Africain d'Experts sur les Droits et le Bien-être de l'Enfant sur le Rapport initial de la mise en œuvre de la Charte Africaine sur les Droits et du Bien Etre de l'Enfant.

Recommandations par le Comité Africain d'Experts sur les Droits et le Bien Etre de l'Enfant au Gouvernement du Rwanda.

Concluding recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of Tanzania report on the status of implementation of the African Charter on the Rights and Welfare of the Child.

Recommandations du Comité Africain d'Experts sur les Droits et le Bien-Etre de l'Enfant au Gouvernement du Niger sur le rapport initial de mise en œuvre de la charte africaine sur les droits et le bien-être de l'enfant.

Recommandations du Comité Africain d'Experts sur les Droits et le Bien-Etre de l'Enfant au Gouvernement du Cameroun sur le rapport initial de mise en œuvre de la charte africaine sur les droits et le bien-être de l'enfant.

## **8. African Committee of Experts on the Rights and Welfare of the Child case law**

Communication 002/09: IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya.

### **Burundian case law**

*RMP 140718/NZ.M Public prosecution v Bagabo Eric (2012) (TGI Bujumbura-Mairie)*

*RP4396 Public Prosecution v Miburo Gaudence & Murerwa (2010) (TGI Kirundo)*

*RMP 135145/JC Public Prosecution v Hakizimana Désiré (2011) (TGI Bujumbura-Mairie)*

*RP 6090 Public Prosecution v Ntambara Omar (2012) (TGI Muyinga)*

*RCCB 213 (2008) (Constitutional Court of Burundi)*

*RPA 624 Public Prosecution v Ndayisaba Samuel and others (2007) (Court of Appeal of Ngozi)*

*RP 7253 Public Prosecution v Gerard Nzimenya and another (2008).(TGI Ngozi)*

*RP 10442 (2010) (TGI Gitega)*

## **9. Concluding observations of the Committee on the Rights of the Child**

Concluding observations of the CRC Committee, paragraph 29 (CRC/C/15/Add.133).

## 10. Foreign legislations

Nigerian Child's Rights Act of 2003

South African Juvenile Justice Act of 2008

## 11. Burundian legislation

Décret du 6 août 1959 portant code de procédure pénale

Décret-Loi 1/6 du 4 Avril 1981 portant réforme du code pénal

Loi 1 / 015 du 20 Juillet 1999 portant réforme du code de procédure pénale

Loi 1/014 du 29 Novembre 2002 portant réforme du statut de la profession d'avocat

Loi 1/016 du 22 Septembre 2003 portant régime pénitentiaire au Burundi.

Loi 1/010 du 18 Mars 2005 portant promulgation de la constitution de la République du Burundi.

Loi 1/05 du 22 Avril 2009 portant révision du code pénal

Loi 1/10 du 3 Avril 2013 portant révision du code de procédure pénale

## 12. Websites

'Condition carcérale des mineurs au Burundi'. <[www.justice.gov.bi/IMG/ppt/OIDEB-\\_Mineurs-prisons.ppt](http://www.justice.gov.bi/IMG/ppt/OIDEB-_Mineurs-prisons.ppt)> (accessed 30 August 2013)

'Juvenile delinquency: an integrated approach' (undated)

17<[http://samples.jbpub.com/9780763758103/58103\\_CH01\\_FINAL.pdf](http://samples.jbpub.com/9780763758103/58103_CH01_FINAL.pdf)> (accessed 5 October 2013)

'Juvenile delinquency: an integrated approach'.

<[http://samples.jbpub.com/9780763758103/58103\\_CH01\\_FINAL.pdf](http://samples.jbpub.com/9780763758103/58103_CH01_FINAL.pdf)> (accessed 5 October 2013)

'Le Burundi sous la domination étrangère. De 1903 à 1962'. <http://guidetouristique-clubkaribu.over-blog.com/article-le-burundi-sous-la-domination-etrangere-de-1903-a-1962-106664656.html> (accessed 5 October 2013)

'Le Burundi sous la domination étrangère. De 1903 à 1962'. <<http://guidetouristique-clubkaribu.over-blog.com/article-le-burundi-sous-la-domination-etrangere-de-1903-a-1962-106664656.html>> (accessed 5 October 2013)

<<http://acerwc.org/ratifications>>(accessed 21 August 2013)

<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/400/78/PDF/G1040078.pdf?OpenElement>>(accessed 21 August 2013) 21

<<http://gvnet.com/streetchildren/Burundi.htm>> (accessed 4 September 2013)

<[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)>(accessed 21 August 2013)

<[http://www.bi.undp.org/index.php?option=com\\_content&view=article&id=343%3Aelimination-de-la-pauvrete-le-burundi-a-besoin-dun-a-appui-de-ses-partenaires-au-developpement-&Itemid=206](http://www.bi.undp.org/index.php?option=com_content&view=article&id=343%3Aelimination-de-la-pauvrete-le-burundi-a-besoin-dun-a-appui-de-ses-partenaires-au-developpement-&Itemid=206)>(accessed 2 September 2013)

<<http://www.childrenswales.org.uk/history-of-children-rights.aspx>>(accessed 21 August 2013)

Interagency Panel on Juvenile Justice (undated) 'Protecting the rights of children in conflict with the law' (undated)

46<[http://www.unodc.org/pdf/criminal\\_justice/Protecting\\_children\\_en.pdf](http://www.unodc.org/pdf/criminal_justice/Protecting_children_en.pdf)>(accessed 8 October 2013)