

Human Rights in African Criminal Justice Systems
- Direction of International Cooperation for Peacebuilding -
アフリカ諸国の刑事司法制度における人権問題
- 平和構築に向けた国際協力の方向性 -

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要 旨

アフリカ諸国の刑事司法制度における子どもの権利違反は深刻である。具体的には、子どもの投獄（長期間にわたることもある）、少年裁判所・少年刑務所・少年更生施設など少年犯罪者のための施設の欠如（刑務所において、子どもと大人が一緒の部屋に収監されていることが多い）、収監された子どもに対する法的支援の欠如や、教育及び健康管理プログラムの欠如などがある。これらの原因として、財政的・人的資源の欠如、刑事手続き上の欠陥、出生登録・戸籍制度が存在しない（年齢が分からない）ことなどがある他、歴史や文化的背景もある。このような問題点を克服し、子どもの権利条約に掲げられた“子どもの利益を最優先”、“子どもの自由を奪うのは最後の手段かつ最短期間とする”という子どもの権利保護を実現するには、アフリカ諸国における刑事責任年齢の見直し、少年裁判所や少年更生施設の設置、修復的司法の導入やマラウイ・シエラレオネで行われているパラリーガルサービス制度の導入などが有効な解決策である。

Introduction

There are more than one million children in prison in the world,¹ although Article 37 (b) of the Convention on the Rights of the Child 1989 (CRC)² and Rule of 13.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile

¹ Jeremy Sarkin, Human Rights in African Prison, Human Science Research Center (HSRC) ed, 2008, p.118.

² Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) p. 167, U.N. Doc. A/44/49 (1989), *entered into force* September 2, 1990. Article 1 of the CRC provides the meaning of child by stating that “a child means every human being below the age of eighteen years.”

Justice 1985 (Beijing Rules)³ stipulate that deprivation of liberty from children should be used only as “a measure of last resort and for the shortest appropriate period of time.”⁴ Many of such detained children are first-time offenders, most of whom committed minor offences.⁵ And, they come from the poor communities where their governments have failed to support and provide necessities for their living.⁶ Because children are on the way of their development and are sensitive, depriving children of liberty causes long-term psychological and physical damage.⁷ Imprisonment deprives children of a connection with their family and friends, takes away their rights to educational opportunities, and brings disadvantage and stigma to them. Imprisonment also prevents children from being rehabilitated and reintegrated into the society.⁸

Since so many children are, in fact, in prison, human rights scholars and practitioners have investigated conditions of detained children. Imprisonment of children is often a first resort, particularly in Africa, and the prison conditions are seriously deplorable.⁹ The governments of African countries can not afford to allocate budget to consider alternatives nor improve the prison conditions for the inmates.

The economic and social infrastructure in African countries is still fragile. These conditions explain in part why so many children are in prison.¹⁰ The poor economic situations drive children to break laws for survival, and commit offences such

³ UN Standard Minimum Rules for the Administration of Juvenile Justice, G.A. res 40/33, *adopted* November 29, 1985.

⁴ Convention on the Rights of the Child, *supra* note 2, Article 37 (a).

⁵ United Nations Children’s Fund (UNICEF), Press Centre, information is available at http://www.unicef.org/media/media_21061.html, last accessed on March 6, 2010.

⁶ *Ibid.*, para.3.

⁷ *Ibid.*, para.2.

⁸ Jeremy Sarkin, *supra* note 1, pp.124-125.

⁹ *See*, Jeremy Sarkin, *supra* note 1, pp.117-118.

The percentage of the child population under the age of 18 in African prisons normally ranges between 0.5% and 2.5% with the exception of Namibia, whose population of children in the general prison is the highest in Africa at 5.5%.⁹ The proportion of child population is small, but the number of the juvenile who are detained is not.

See, also, King’s College of London School of Law, International Centre for Prison Studies, Prison Brief for South Africa.

For example, in South Africa, juvenile prisoners under the age of 18 represent 0.8.% of the total prison population of 164,667. This means there are more than 1,300 child prisoners, (as of October 31, 2009), available at,

http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=45, last accessed on April 30, 2010.

¹⁰ Penal Reform International, Juvenile Justice, available at

<http://www.penalreform.org/juvenile-justice-2.html>, last accessed on March 5, 2008.

as theft, vagrancy, and begging for living.¹¹ Such children often receive a jail sentence not because of the crimes they committed, but because of their status including stateless, homeless, or parentless.¹² Even some children who are victims of human trafficking and/or sexual exploitation are detained because of lack of an identification card or legal immigration documents.¹³ In addition, human rights professionals have found that the problems of prisons in African states are not only because of poor economic situations but also because of some unique and serious aspects in African countries such as culture and history.¹⁴

One of the problems regarding prison conditions in Africa is that children are often held with adult prisoners in an overcrowded cell due to lack of space.¹⁵ It is said that “the level of overcrowding in the [African] prisons is inhuman.”¹⁶ Harsh and overcrowded prison conditions cause damage to children’s welfare. This is a violation of Article 17 (b) of the African Charter on the Rights and Welfare of the Child ensuring that “children are separated from adults in their place of detention and imprisonment.”¹⁷ Such children are at risk of violence, abuse, and the denial of their human rights.

Therefore, African governments must take children’s vulnerability into their consideration, and provide special care for them. Specifically, alternatives to imprisonment of child offenders should be considered in countries where children are suffering from harsh prison conditions since Article 3 of the CRC obliges member states to undertake “the best interests of the child.”¹⁸

This research paper explores human rights conditions in the context of juvenile justice in African criminal justice systems. Section I clarifies recent situations of

¹¹ *Ibid.*, para.2.

¹² Office of the United Nations High Commissioner for Refugees, Executive Committee of the High Commissioner Programme 50th Session, Note on International Protection at para.22, available at <http://ijrl.oxfordjournals.org/cgi/reprint/11/3/557.pdf>, last accessed on April 30, 2008.

¹³ UNICEF, Child protection from violence, exploitation and abuse: Children and Justice, para.4, available at http://www.unicef.org/protection/index_juveniljustice.html, last accessed on April 27, 2010

¹⁴ African Prison Project, introduction, available at <http://www.africanprisons.com/project.html>, last accessed on March 10, 2008.

¹⁵ Jeremy Sarkin, *supra* note 1, p.123.

¹⁶ Adam Stapleton, Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007), p.6. para.2.

¹⁷ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999. Article 17 (b).

¹⁸ Convention on the Rights of the Child, *supra* note 2, Article 3.

violations of the rights of children in Africa with two parts (Part 1 and 2): Part 1 explains the general description of the problems. Part 2 shows some specific country profiles. Section II examines the causes of neglect of the rights of children in the African criminal justice systems. And Section III scrutinizes possible reform of criminal proceedings and prison conditions for the achievement of juvenile justice in Africa.

I. Violation of Children's Rights in African Criminal Justice Systems

1. General description

There are some common challenges regarding juvenile justice in African criminal justice systems. They are: (i) prolonged periods of imprisonment of children; (ii) lack of separation of juvenile prisoners from adult prisoners; and (iii) lack of health care and educational opportunities for child inmates.

(i) Prolonged periods of children's imprisonment

Deprivation of children's liberty must be used as a measure of last resort and for the shortest appropriate or possible time, as it is stipulated in the CRC and the Beijing Rules. However, this fundamental principle is seldom implemented in Africa. Although national courts are obliged to provide alternatives such as probation, house arrest, and reformatory school, they choose imprisonment as a first option against juvenile offenders.¹⁹ This is because they do not have mechanisms and resources to choose the alternatives. Thus, imprisonment becomes sanction of the first resort. In other words, because of lack of financial, material, human, and other resources, the judiciary can not provide alternatives for juvenile offenders.

Lack of capacity of juvenile courts is spurring the deprivation of children's liberty. In Nigeria, for example, "children are tried like adults", although Nigeria's law provides that children under the age of 17 must be tried in a juvenile court. It also says that juvenile courts must be held outside the view of public and the normal court processes.²⁰ In reality, however, child perpetrators are often sentenced to imprisonment "instead of being given more reform-oriented, non-custodial forms of sentencing."²¹

¹⁹ See footnote 9.

²⁰ The Integrated Regional Information Network (IRIN), Africa, Nigeria, Focus on the administration of juvenile justice, available at <http://www.irinnews.org/report.aspx?reportid=33926>, last accessed on April 10, 2010.

²¹ *Ibid.*, para.4.

The right to a speedy trial is rarely protected. Many children in African prisons are simply awaiting trial, and a delay can be prolonged for years.²² The right to a speedy trial is not only for children but also everyone, as provided in the Article 10 (2) (b) and Article 14 (3) (c) of the International Covenant on Civil and Political Rights.²³ Particularly, Article 37 (b) of the CRC and Article 17 (c) (iv) of the African Charter on the Rights and Welfare require governments to provide the shortest period of imprisonment for children. In Mozambique, one research pointed out that 60% of the children in two prisons in the country were not convicted yet in 2003.²⁴ Such detained children in Mozambican prisons were waiting for trials for up to 10 months.²⁵ As another example, over 60% of the prisoners in Nigeria were waiting for their trials in 2002.²⁶ According to sources from Nigeria's prisons, "between 10% and 20% of these prisoners were children under 18 years old, but this was not reflected in official data."²⁷ As of October 2009, the record shows 69% of the prisoners in Nigeria are awaiting first trials.²⁸

(ii) Lack of separation of juveniles from adult prisoners

The fact that juvenile offenders are often imprisoned with adults is a common problem in Africa. This is mainly because there is not enough space in facilities for juvenile offenders. For example, in Ethiopia, there is only one juvenile reformatory facility, and it is able to accommodate only 150 children.²⁹ Thus, many children are incarcerated with adults because of the limitation of the capacity of the reformatory facility.

In Tanzania, the law provides that prisoners must be separated based on age.³⁰ However, juvenile perpetrators are often imprisoned with adults due to lack of child detention centers.³¹

²² Jeremy Sarkin, *supra* note 1, p.117.

²³ International Covenant on Civil and Political Rights, *entered into force* March 23, 1976, 999 U.N.T.S. 171, Article 10 (2) (b) and Article 14 (3) (c).

²⁴ Jeremy Sarkin, *supra* note 1, p.122.para 2. (Ehlers and Mathiti 2003: 58)

²⁵ *Ibid.*, para 3.

²⁶ IRIN, *supra* note 20.

²⁷ *Ibid.*, para.10.

²⁸ King's College of London School of Law, International Centre for Prison Studies, Prison Brief for Nigeria, as of October 2009, available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=38, last accessed on March 28, 2010

²⁹ Jeremy Sarkin, *supra* note 1, p.123.

³⁰ The Prisons Act 34, Tanzania (1967), Human Rights in African Prison (HSRC press) adds that the government of Tanzania regards prisoner between the ages of 18 and 21

In Angola, young offenders had been detained with adults and suffered from violence by adult inmates because of absence of a child rehabilitation center until 2005.³²

An overcrowded situation in a prison is depriving children of separated space. The African governments are unable to allocate space for children. Although a situation of congestion varies from country to country, possibility of such situations is much higher in African countries than the rest of the world.³³ When it comes to the rates of overcrowding, the occupancy rates of African prisons are significant as of March 2010 such as: Benin (307.1%), Burundi (264.2%), Sudan (255.3%), Kenya (223.3%), Uganda (223.0%), Cote d'Ivoire (218.0%), Zambia (207.3%), Rwanda (202.4%), Malawi (197.6%), and Tanzania (145.1%).³⁴ And, in general, the rate of overcrowding is even higher in prisons close to the urban center in a country.

(iii) Lack of health care and educational opportunities for child inmates

Due to lack of funds and resources, both health care and education programs for children are rarely provided or do not exist at all in African prisons.³⁵

Although children need nutrition and adequate healthcare services because of their special status that they are in the growth period, detained children are not regularly given daily meals in many African prisons.³⁶ This happens because of the corruption of prison guards and/or simply lack of funds. For example, it is said that prison guards in southern Sudan do not provide foods unless they take a bribe from prisoners.³⁷ Because children usually do not have valuables or money that they are able to offer to the prison guards, children are unable to obtain foods.

as “young prisoner”. And such young prisoner must be separated from the order adults at night.

³¹ Jeremy Sarkin, *supra* note 1, p.123.

³² Crime and Society, Comparative Criminology, Angola, available at <http://www.rohan.sdsu.edu/faculty/rwinslow/africa/angola.html>, last accessed on March 27, 2008.

³³ Jeremy Sarkin, *supra* note 1, p.14. para.2.

³⁴ King's College of London School of Law, International Centre for Prison Studies, Prison Brief for Highest to Lowest rates, entire world occupancy rates, as of December 2007, available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_occupancy, last accessed on March 2010.

³⁵ Jeremy Sarkin, *supra* note 1, p.125.

³⁶ *Ibid.*, para5.

³⁷ *Ibid.*

In Gabon, it is reported that “food, sanitation, and ventilation were poor, and medical care was almost non-existent.”³⁸ Lice, scabies, tuberculosis and other diseases are widespread in African prisons.³⁹ Insanitation, malnutrition, and lack of adequate health care have negative effects on children’s health.⁴⁰ These conditions are obviously far short of the international standards including the right to an adequate standard of living under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴¹ Article 10 of the ICCPR,⁴² and Rule of 15, 16, 20 and 22-26 of the United Nations Standard Minimum Rules for the Treatment of Prisoners.⁴³

Providing educational programs in prisons is necessary to guarantee the right of access to education for children. It also enables such children to be reintegrated into the society after they are released. In reality, however, there is disparity in providing educational programs for child prisoners depending on the country.⁴⁴ In Lesotho, child detainees are allowed to access literacy trainings and vocational programs. In Swaziland, detained children in juvenile prisons can receive “life-skills programs”, and can attend school in the morning.⁴⁵ On the other hand, in Sierra Leone, children in prison are not provided educational and vocational trainings.⁴⁶

2. Country profiles

There are studies about prison conditions in Africa conducted by United Nations agencies, working groups, NGOs, or African governments themselves. This paper explains the prison circumstances of the following countries: (i) South Africa, (ii) Burundi, (iii) Malawi, and (iv) Liberia.

³⁸ U.S. Department of State, Gabon, Country Reports on Human Rights Practices 2005, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61570.htm>, last accessed on March 9, 2010.

³⁹ Jeremy Sarkin, *supra* note 1, p.125.

⁴⁰ *Ibid.*

⁴¹ International Covenant on Economic, Social and Cultural Rights, *entered into force* Jan. 3, 1976, 993 U.N.T.S. 3. Article 11 of the ICESCR provides adequate living standards.

⁴² ICCPR *supra* note 23, Article 10.

⁴³ United Nations Standard Minimum Rules for the Treatment of Prisoners Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977). Rules 15, 16, 20 and 22-26.

⁴⁴ Jeremy Sarkin, *supra* note 1, p.126.

⁴⁵ *Ibid.*, (Gallinetti 2004).

⁴⁶ *Ibid.*, (US Department of State 2006, Sierra Leone).

(i) South Africa

In South Africa, harsh prison conditions have been traditionally continued from the past. Violence, sexual assaults, contagion of HIV, drugs, gangsterism, and corruption in prisons are chronic in South Africa. The description of prisons as “the universities of crime” can apply particularly to South Africa.⁴⁷ This description means “one emerges worse than one went in or the prison refines criminal behavior rather than correcting it.”⁴⁸ These conditions provoke a high rate of recidivism in the state.⁴⁹ The minimum age of criminal responsibility is 7.⁵⁰ The percentage of juvenile population (under the age of 18) in prison was 0.8% as of February 2010.⁵¹ This indicates approximately 1,300 children are detained in the whole country.⁵² According to a report produced by Human Rights Watch, an overcrowding situation which was afflicting child detainees was particularly severe at the *Pollsmoor* prison in Cape Town, where 300 children aged 14 to 17 were held and are awaiting a pre-trial.⁵³

In 2000, there were 4,253 children in prison in the whole country, of whom, 2,519 were not sentenced, and 1,734 were sentenced.⁵⁴ Compared between 2000 and 2010, the number of children in prison has been decreased. However, there is argument by experts that approximately 6,000 children are circulated through the prison system each year.⁵⁵

There were 286 child detainees younger than 16 years old in July 2007.⁵⁶ Their crimes varied with “about one-third having committed economic crime, that is to say,

⁴⁷ All Africa com, South Africa: Less protection for children in horror jail, para.2, available at <http://allafrica.com/stories/200802200177.html>, last accessed on March 8, 2008.

⁴⁸ *Ibid.*, para.2.

⁴⁹ *Ibid.*, para. 1.

⁵⁰ Hong Kong Law Reform Commission, Chapter 2 the minimum age of criminal responsibility in other jurisdiction, South Africa, available at <http://www.hklii.org/hk/other/hklrc/cp/1999/01/3.html>, last accessed on March 1, 2010.

⁵¹ King's College of London School of Law, International Centre for Prison Studies, Prison Brief for South Africa, available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=45, last accessed on March 10, 2008.

⁵² *Ibid.*

⁵³ Human Rights Watch, Human Rights Watch World Report 2001: South Africa: Human Rights Development, available at <http://www.hrw.org/wr2k1/africa/southafrica.html>, last accessed on March 8, 2010.

⁵⁴ *Ibid.*

⁵⁵ All Africa com, *supra* note 47. para.6.

⁵⁶ *Ibid.*, para.7.

they stole something, about 40% involved in aggressive crime, and about 12% committed sexual crime. The vast majority of them were aged 16 or 17 years old.”⁵⁷

As for South Africa’s laws, the Constitution of South Africa clearly provides that imprisonment of children must be used as an action of last resort and for the shortest period of time.⁵⁸ In addition, South Africa ratified the CRC in 1995, which was the first international convention to be ratified by the country.⁵⁹ Also, South Africa recognizes the African Charter on the Rights and Welfare of the Child as a member of the African Union (AU). Although South Africa has the legal instruments to promote legal protection for juvenile offenders, actual law enforcement is weak.⁶⁰

In 2008, a new child justice bill was debated in the South African parliament.⁶¹ This bill was originally drafted in 2002 to ban incarceration of children.⁶² The bill intended to examine whether children should be diverted from the criminal justice system in consideration of children’s welfare, the situation and nature of the alleged crime, and the background of each child.⁶³ It provided that all children arrested for crime must be examined by a probation officer, and that they must appear before a preliminary inquiry within 48 hours so that important and necessary information could be placed to make a decision whether the child can be diverted from the court and prison.⁶⁴ However, the original bill was highly controversial as they neither define the meaning of the child, nor the minimum age of criminal responsibility.⁶⁵ Also, in reality, South Africa had neither enough probation officers to conduct the assessment nor judicial officers to deal with the preliminary inquiry within 48 hours.⁶⁶ Therefore, the original bill of 2002 was re-drafted in 2008 so as to reduce the number of children who would be assessed and faced with preliminary inquiries.⁶⁷ Currently, only children whose age is under 14 and who were charged with lesser crime can have the

⁵⁷ *Ibid.*, para.7.

⁵⁸ Constitution of South Africa (1996).

⁵⁹ Defense for Children International Australia, Children’s Rights and Law Reform in South Africa, available at <http://www.dci-au.org/html/sa.html>, last accessed on March 9, 2010.

⁶⁰ All Africa com, *supra* note 47. para.8.

⁶¹ *Ibid.* para.9.

⁶² Ann Skelton, Juvenile Laws Violators, Human Rights and the Development of New Juvenile Justice Systems, HART Publishing 2006, p.72.

⁶³ All Africa com, *supra* note 47. para.10.

⁶⁴ *Ibid.*, para.14-16.

⁶⁵ *Ibid.*, para.11.

⁶⁶ *Ibid.*, para.18.

⁶⁷ *Ibid.*, para.19.

preliminary inquiry.⁶⁸ Children who committed serious crime such as murder are not qualified to have the assessment for the diversion.⁶⁹

(ii) Burundi

Burundi is facing a serious need to establish a juvenile justice system which can protect the rights of child detainees. Currently, no juvenile justice system exists in Burundi.⁷⁰ The minimum age of criminal responsibility is 13.⁷¹ Children between 13 and 18 years old only have possibility that their sentences may be reduced because of their status of children.⁷² The percentage of minors (under the age of 18) in prison was 5.4% as of May 2008.⁷³ It was estimated that more than 500 children between the ages of 13 and 18 were in prison, and others were held in communal holdings and police cells.⁷⁴

It is often reported that children in prison are treated as adults, and are sometimes tortured for confessions by the police authorities.⁷⁵ Most of them neither access legal advice nor have legal representation.⁷⁶ There are no separated rooms, showers, and toilets for children, and thus, children in detention are frequently threatened and abused by adult inmates.⁷⁷

Although Burundi ratified the CRC in 1990 and recognizes the African Charter on the Rights and Welfare of the Child as a member state of the African Union, it has not established a juvenile justice system in its legal proceedings.⁷⁸ In March 2007, the Burundian parliament considered amendments to its criminal law and system that can bring about juvenile justice. The proposed amendments intended to increase the age of

⁶⁸ *Ibid.*, para.15.

⁶⁹ *Ibid.*, para.17.

⁷⁰ All Africa.com, Young Detainees Suffer Abuse in Prison – Report, available at <http://allafrica.com/stories/200703150573.html> last accessed on March 12, 2008.

⁷¹ *Ibid.*, para.8.

⁷² *Ibid.*, para.8 and 9.

⁷³ King's College of London School of Law, International Centre for Prison Studies, Prison Brief for Burundi, available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=6 last accessed on March 11, 2008.

⁷⁴ All Africa com, *supra* note 70, para.7.

⁷⁵ *Ibid.*, para.3.

⁷⁶ *Ibid.*, para.2.

⁷⁷ *Ibid.*, para.3-6.

⁷⁸ Office of the High Commissioner for Human Rights (OHCHR), Convention of the Rights of the Child, status of ratification, available at <http://www2.ohchr.org/english/bodies/ratification/11.htm>, last accessed on March 1, 2008.

criminal responsibility to 15, and to provide alternatives to imprisonment.⁷⁹ Furthermore, some legal experts in Burundi called for the creation of special reformatory centers which can accommodate child offenders.⁸⁰

(iii) Malawi

Malawi has acute problems in its prison system. These problems are, for instance, overcrowded and dilapidated facilities, and unhygienic and colonial structure.⁸¹ Above all, the congestion of prisons is one of the most serious issues. The prison population has been dramatically increased in the last decade. In 1994, the total population in prisons was approximately 4,550.⁸² In October 2009, it became 11,996, over double of the population in 1994.⁸³ While the prison population has been increased, the government of Malawi has not taken effective measures to improve the prison conditions. The dramatic increase of prison population is worsening the living conditions of juvenile inmates. It is causing physical and sexual abuse, poor hygiene, and inadequate health care in prisons in Malawi.⁸⁴

In line with other former British colonies, the minimum age of criminal responsibility is 7.⁸⁵ The number of children in adult prisons has been decreased approximately from 1,700 in 1999 to 500 in 2009.⁸⁶ As of October 2009, 4.2% of the total

⁷⁹ All Africa.com, *supra* note 70, para. 10.

⁸⁰ *Ibid.*, para. 11.

⁸¹ Adam Stapleton, the International Child and Youth Crime Network, the state of Juvenile Justice in Malawi, para.2, available at <http://www.cyc-net.org/cyc-online/cycol-0400-malawi.html>, last accessed on March 1, 2010.

⁸² *Ibid.*, para.2.

⁸³ King's College of London School of Law, International Centre for Prison Studies, Prison Brief for Malawi, available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=30, last accessed on March 12, 2010.

⁸⁴ HIV/AIDS in Malawi Prison (1999), Penal Reform International, p.7. According to a research conducted by Penal Reform International, HIV transmission is a problem. HIV is transmitted by means of homosexual activity, child abuse, shred razor blades and toothbrushes, available at <http://www.penalreform.org/resources/rep-1999-HIV-AIDS-malawi-en.pdf>, last accessed on April 28, 2008.

⁸⁵ United Nations Children's Fund, Juvenile Justice, Innocenti Digest, p.5, official age of criminal responsibility, available at <http://www.unicef-irc.org/publications/pdf/digest3e.pdf>, last accessed on February 12, 2008.

⁸⁶ Department for International Development, Reforming juvenile justice in Malawi: Rescuing children from adult prison, available at

prison population was children under 18 years old.⁸⁷ Malawi has two reformatory facilities for children. They are capable of accommodating 210 children.⁸⁸ However, these reformatory centers have been underused because they do not have financial resources to keep juvenile offenders. Children are frequently tried in adult courts without legal aids, given a custodial sentence, and then, detained in adult prisons.⁸⁹ Malawi has four maximum security prisons. In these prisons, there are separated rooms for children. However, it is reported that sexual and physical assaults often happen against child inmates because of inadequate separation.⁹⁰ Other than these four prisons, children are simply detained with adult inmates.

It is reported that 63% of juvenile offenders were beaten and subjected to abuse when they were arrested, and that 65% of the juveniles under the age of 18 in prison committed non-serious offences.⁹¹ Remarkably, legal representation of the juvenile offenders is only 2%, and social service workers visit them twice in 6 years.⁹²

In the *Zomba* prison, one of the prisons in Malawi, where juveniles are often sent, children are abused physically by adults, and not provided sufficient health care services.⁹³ This happens because of insufficient separation in the *Zomba* prison. Although the juveniles are usually kept separated from adult inmates, some child inmates are smuggled to adult prisons in exchange of money for the sexual purpose.⁹⁴ Human rights advocates found that “the children are abused by being beaten and raped, and also bribed with a small sum of money to engage in intercourse with [adult] prisoners.”⁹⁵ HIV/AIDS transmission is so serious in prisons in Malawi, and sexual abuse is accelerating the spread of the infections. During 2006, an average of 20 inmates died in prisons each month, mostly because of HIV/AIDS.⁹⁶ Transmission of

<http://www.dfid.gov.uk/casestudies/files/africa/malawi-youth-justice.asp>, last accessed on March 9, 2010.

⁸⁷ King's College of London School of Law, *supra* note 83, Malawi.

⁸⁸ Department for International Development, *supra* note 86.

⁸⁹ *Ibid.*

⁹⁰ United States Department of State, Malawi, available at <http://www.state.gov/r/pa/ei/bgn/7231.htm>, last accessed on March 9, 2010.

⁹¹ Adam Stapleton, the International Child and Youth Crime Network, *supra* note 81.

⁹² *Ibid.*, Fact Sheet.

⁹³ Sameer Khan, The Chronicle (Lilongwe, Malawi), Afrol news, Malawi, para.6, available at http://www.afrol.com/News2001/maw006_prison_abuse.htm, last accessed on March 9, 2010.

⁹⁴ *Ibid.*, para.6.

⁹⁵ *Ibid.*, para.7.

⁹⁶ United States Department of State, Malawi, *supra* note 90.

HIV/AIDS and other sexual diseases by sexual abuse, particularly homosexual acts, is threatening the life of children.⁹⁷

Malawi acceded the CRC in 1991 and is one of the member states of the AU which recognize the African Charter on the Rights and Welfare of the Child.⁹⁸ Malawi's national law prohibits the detention of children under the age of 18 with adult prisoners. It also stipulates the use of reformatory centers for juvenile offenders.⁹⁹ However, the judicial system sends children to prisons as the only option.¹⁰⁰ Under the Children and Young Prisoners Act in Malawi, child offenders can be detained in the reformatory centers only if the child offenders are "so unruly" or the offence is "so depraved."¹⁰¹ The similar provision can be seen in other countries as the legacy of British colonial rule.¹⁰² Actual criminal proceedings in Malawi are neither complying with international standards nor Malawi's laws.

(iv) Liberia

Juvenile justice in Liberia does not function adequately because Liberia is still at the post-war stage. A war lasted for fourteen years. It devastated its judicial system. It also caused breakdown of law and order which is one of the major reasons for the recent instability in Liberia.¹⁰³ It was estimated that there were 21,000 child soldiers.¹⁰⁴ Liberia has had difficult situations between the punishment on child soldiers who committed atrocities and the attainment of juvenile justice. The government of Liberia, UN agencies, and NGOs has been seeking for an appropriate way to protect ex-child soldiers. They must be treated in accordance with the

⁹⁷ Penal Reform International, HIV/AIDS in Malawi Prison (1999), *supra* 84, p.7.

⁹⁸ OHCHR, Convention of the Rights of the Child, *supra* note 78.

⁹⁹ Emmie Chanika, Still abuse of juveniles in Malawi prison, para.5, available at, http://www.afrol.com/News2001/maw006_prison_abuse.htm, last accessed on March 27, 2010.

¹⁰⁰ Department for International Development, *supra* note 86.

¹⁰¹ The Children and Young Persons Act (Cap 26:03)

¹⁰² The Democratic Republic of the Congo and Belgium laws provides that child offenders could be sent to prison for acts of "notorious disobedient."

¹⁰³ IRIN, Africa, Liberia: juvenile justice system in tatters, para.7, available at, <http://www.irinnews.org/report.aspx?ReportID=74205>, last accessed on April 1, 2010.

¹⁰⁴ Amnesty International, the promises of peace for 21,000 child soldiers, para.1. available at

<http://www.amnesty.org/ren/library/asset/AFR34/006/2004/en/dom-AFR340062004en.html>, last accessed on April 27, 2008

international standards such as the CRC,¹⁰⁵ because they are also victims of conflicts, specifically, victims of the recruitment of child soldiers. The recruitment of child soldiers is one of the war crimes under Article 8 of the Rome Statute of the International Criminal Court (Rome Statute).¹⁰⁶ In terms of the protection of children, the International Criminal Court does not prosecute any person under 18 years old under the Rome Statute.¹⁰⁷

The minimum age of criminal responsibility is set at 16 in Liberia, and any person between 16-18 years old is considered as "a minor" and not "a child".¹⁰⁸ The percentage of minors in Liberia's prisons is 4.3%, approximately 45 children between 16-18 years old exist in prisons as of August 2007.¹⁰⁹

In Liberia, there are some juvenile reformatory centers.¹¹⁰ It is often reported that children are abused by adult inmates in cells, and that children have no mosquito nets and adequate hygiene.¹¹¹ In February 2007, "a 14 year-old boy held at the *Sanniquele* prison in Nimba, one of the counties in Liberia, told the UN officials that he was given drugs and alcohol, and was made to work for adult detainees with whom he shared a cell."¹¹²

Overcrowding in prisons where both juveniles and adults are detained together is one of the biggest concerns in Liberia. For example, in the *Monrovia* Central Prison, 661 people are detained at the time of September 2007, which was more than three times of its intended capacity.¹¹³ In the *Monrovia* Central Prison, minor inmates must interact with adult inmates during exercises, meal times, and in bathrooms, although children are detained in separated cells.¹¹⁴ Moreover, there are worse prison situations

¹⁰⁵ *Ibid.*, Amnesty International insists that child soldiers should be treated in accordance with laws in section "Accountability and the best interest of the child", namely detention and imprisonment must be used as last resort and for the shortest appropriate period of time under the CRC.

¹⁰⁶ The Rome Statute of the International Criminal Court, article 8, 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

¹⁰⁷ *Ibid.*, article 26.

¹⁰⁸ Penal Code, Liberia. chap. 4, sect. 4.1(2000)

¹⁰⁹ King's College of London School of Law, International Centre for Prison Studies, Prison Brief for Liberia, available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=27, last accessed on April 9, 2010.

¹¹⁰ Jeremy Sarkin, *supra* note 1, p.125.

¹¹¹ IRIN, Africa, Liberia: juvenile justice system in tatters, *supra* note 103, para.4.

¹¹² *Ibid.*, para.14.

¹¹³ *Ibid.*, para. 12.

¹¹⁴ *Ibid.*

in rural areas that “juveniles are separated from adults only by a bench or makeshift wall.”¹¹⁵

The right to a speedy trial is absent in Liberia. Many of the inmates including juveniles are not tried for a long time.¹¹⁶ They do not have a chance to see judges.

A juvenile procedural code which is protecting children’s welfare and rights exists in Liberia.¹¹⁷ A Child Protection Officer of the UN Mission in Liberia said “[The code] is actually better than in many other countries”. But, a problem is that it is rarely followed.¹¹⁸ He also states that “[t]he majority of magistrates do not have much grasp of juvenile law.”¹¹⁹ According to the juvenile procedural code, child offenders who are waiting for a trial should not be considered as criminals, and imprisonment of them should be considered as “a protective measure to prevent further delinquency” until their guardians are able to contact them.¹²⁰ In many cases, however, magistrates do not notice the fact that many children are detained for a long time, because their parents and guardians never come to their prisons to pick them up.¹²¹ Long lasted conflicts and civil wars have deprived them of their parents and guardians.

In 1998, some juvenile courts were established by law so as to have exclusive jurisdiction over offenders under the age of 18.¹²² But, only one juvenile court in the whole country has been in operation.¹²³ Therefore, the work of the juvenile court is limited. Juvenile justice has not been achieved enough in Liberia.

II. Causes of the Neglect of Children’s Rights in African Criminal Justice Systems

This section examines factors which prevent the achievement of juvenile justice in African criminal justice systems. First, many of the governments of African countries

¹¹⁵ *Ibid.*, para. 13.

¹¹⁶ All Africa.com, Liberia: Juvenile justice system in tatters, available at <http://allafrica.com/stories/200709101316.html>, last accessed on March 9, 2008.

¹¹⁷ Liberia, Resurrecting the justice system, available at <http://www.ciaonet.org/wps/icg384/icg384.pdf>, last accessed on April 10, 2008.

¹¹⁸ All Africa.com, Liberia: Juvenile justice system in tatters, *supra* note 116. para.15 and 16.

¹¹⁹ *Ibid.*, para.18.

¹²⁰ *Ibid.*, para.18.

¹²¹ *Ibid.*, para.19.

¹²² Global Security org, Military, available at <http://www.globalsecurity.org/military/world/liberia/intro.htm>, last accessed on March 18, 2010.

¹²³ All Africa.com, Liberia: Juvenile justice system in tatters, *supra* note 116. para.20.

do not have budget, facilities, and human resources.¹²⁴ In other words, the protection of human rights for juveniles is not implemented due to a serious shortage of the resources. Second, overcrowded prison conditions deprive the local prison authority of chances to allocate budget and space for child inmates.¹²⁵ Third, absence of a birth registration system and official data on the number of juveniles in prison hamper the promotion of the juvenile justice. This is because police and prison officials can falsify the age of suspects and detainees.¹²⁶ Finally, there are parents who abandon responsibility to foster children. Thus, children become orphans who are vulnerable to crime.

1. Relationship between lack of resources and prison conditions

Many African countries have failed to develop economic systems and basic infrastructure for a number of reasons such as political turmoil, international/internal conflicts, and negative legacies of the colonial period.¹²⁷ The attainment of criminal justice in penal systems was not a common idea in African countries due to the history of Africa, especially, in the colonial period. In this era, colonial authorities established prisons to expand and consolidate “white sovereignty” rather than to develop criminal justice in African countries.¹²⁸ For this purpose, corporal punishment, racial discrimination, and detention of women and minors prevailed in prisons.¹²⁹ Human rights of prisoners were greatly neglected.

With the end of the colonial period, many African countries became independent, and started developing themselves. However, the idea of criminal justice has not been permeated to the governments of African countries as well as among African people. Because African countries are still struggling for the maintenance of the security of the country and economic development, they are allocating their budget to the development of the basic infrastructure. Thus, many of the African governments have not prioritized the reformation and promotion of the criminal justice systems. “[T]he maintenance of prison is often relegated to the last line of national budget.”¹³⁰

¹²⁴ Henry Phoya, Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law, Access to Justice in Africa and Beyond: Making the Rule of Law a Reality (2007), p.31.

¹²⁵ Jeremy Sarkin, *supra* note 1, p.83.

¹²⁶ *Ibid.*, p.118.

¹²⁷ *Ibid.*, p.44.

¹²⁸ *Ibid.*, pp.44 – 49.

¹²⁹ *Ibid.*, pp.49 – 52.

¹³⁰ *Ibid.*, p.53.

As for juvenile justice in the criminal justice systems, because the occupancy rate of juveniles in prison is not very high according to the statistics, the allocation of the governmental budget for the establishment of new facilities and separated space in prisons for child detainees is not a prioritized agendum in most of the African countries.¹³¹

2. Flaws in legal systems causing overcrowding of prisons

Defects in criminal proceedings prevent the prison authorities from protecting the rights of child detainees.¹³² They bring about not only overcrowded situations in prisons, particularly children are frequently detained with adults in an extremely overcrowded cell,¹³³ but also such problems as “spreading communicable diseases, hindering the supervision of prisoners, impeding the categorization of prisoners, and encouraging sexual relations”¹³⁴

First of all, inaccessibility to legal aids is deteriorating congestion in prisons. Although legal aid systems are different among African countries or regions, many of the detained people in African prisons are not allowed to access legal representation because of lack of lawyers.¹³⁵ As a result, the court procedures take longer time, and this causes extreme delay of trials. In Tanzania, for example, there are approximately 700 lawyers in the whole country, while the prison population is about 40,100.¹³⁶ Therefore, a large number of prisoners wait for trials without legal aids. Approximately 48.5% of detainees were just waiting for their first trials as of September 2009.¹³⁷

Second, unnecessary arrest and unlawful detention is one of the main reasons for overcrowding in prisons. There is the fact that children who committed petty offences which are not equivalent to the deprivation of their liberty are imprisoned.¹³⁸ According to research conducted in Mozambique in 2003, 25% of the children were detained for trivial crimes such as vagrancy or not possessing identity documents.¹³⁹

¹³¹ *Ibid.*, p.124.

¹³² *Ibid.*, pp.124-125.

¹³³ *Ibid.*, p.84.

¹³⁴ *Ibid.*, p.84.

¹³⁵ Johann Kriegler, Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007), pp.25-32.

¹³⁶ Adam Stapleton *supra* note 16, pp.11-12, and King’s College of London School of Law, International Centre for Prison Studies, Prison Brief for Tanzania, available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=48, last accessed on April 20, 2010.

¹³⁷ *Ibid.*

¹³⁸ Jeremy Sarkin, *supra* note 1, p.122.

¹³⁹ *Ibid.*

The judicial authority neglected to give children alternatives to imprisonment by considering seriousness and the nature of the crime they committed as well as personal circumstances and other compelling reasons.¹⁴⁰

The police authorities sometimes arrest and detain people without evidence or legal basis.¹⁴¹ Although Article 14 of the Constitution of Ghana provides that “a person who is arrested, restricted, or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence...and who is not released shall be brought a court within forty-eight hours after the arrest”¹⁴², offenders are often arrested without a reasonable suspicion, and detained more than forty-eight hours.¹⁴³ Although the laws are very clear, such laws are not actually applied.

Third, tough bail conditions in African countries are contributing to congestion in prisons.¹⁴⁴ For example, South Africa has not established a clear standard to balance between the right of the accused to bail and the protection of the victim.¹⁴⁵ As a result, potentially qualified offenders for bail are detained for a long time.¹⁴⁶ The bail should be more affordable for the accused who committed petty crime for the purpose of the social reintegration of the accused. In Accra of Ghana, for example, it is estimated that a court granted bail to between 65-75% of the 650 prisoners in the St. James Fort Prison.¹⁴⁷ However, these people remained detained because they could not “pay a surety to the court for their future attendance.”¹⁴⁸ Other statistics in Kenyan prisons show that “among the total number of prisoners who had committedailable offences, 86% were granted bail but could not afford the financial terms set by the court.”¹⁴⁹ In addition, even people who can pay bail are waiting for a bail hearing in a prison for a long time.¹⁵⁰ Long period of time awaiting the bail hearing invalidates the bail system itself.

¹⁴⁰ *Ibid.*, p.85.

¹⁴¹ *Ibid.*

¹⁴² The Constitution, the Republic of Ghana, Article 14 (1992)

¹⁴³ Jeremy Sarkin, *supra* note 1, p.85 and 92 footnote 13.

¹⁴⁴ *Ibid.*

¹⁴⁵ Vera Institute of Justice, South African Bureau of Justice Assistance, available at http://www.vera.org/project/project1_3.asp?section_id=9&project_id=29&sub_section_id=38, last accessed on March 28, 2008.

¹⁴⁶ *Ibid.*

¹⁴⁷ Adam Stapleton, *supra* note 16, p.9. para.3.

¹⁴⁸ *Ibid.*, p.9. para.3.

¹⁴⁹ *Ibid.*, p 9. para.4.

¹⁵⁰ Jeremy Sarkin, *supra* note 1, pp.83-88.

Criminal proceedings in many African countries have not established the proper non-custodial methodologies such as bail, probation, and parole.

3. Absence of a birth registration system and data on juvenile prisoners

A birth registration and family registration system plays an important role in proving personal identification such as age, parents, birth place, and other personal information. Because many of the African countries do not have such registration systems, it is not always possible to know the exact age. In other words, it may be possible to cheat someone's age.¹⁵¹ Although it can be assumed that prison officials and police officers ensure the age of criminal suspects, it is sometimes reported that they try to deal with children as adults in order to escape an intricate and long process to detain children.¹⁵² For example, in Malawi, Media revealed that some police officers forced children to deceive their real age so that they were tried at a national criminal court and given a sentence as adults.¹⁵³ To take another example, in Mozambique, where laws are saying that the minimum age of criminal responsibility is 16 and the minimum age of imprisonment is 18, many children under the age of 18 are actually in prison. Their age is recorded as 18 or older despite their obvious young age.¹⁵⁴ A consultant working for the Mozambican prison authorities conducted a survey of 20 imprisoned children in 2003. It showed that "60% were 17 years old, 30% were 16 years old, and the remaining 10% were younger than 15 years old."¹⁵⁵

Official data on the number of child prisoners is not uniformly available in Africa.¹⁵⁶ Some countries including Sudan, Mozambique, and Ethiopia do not release information on the number of children in prison.¹⁵⁷ However, it does not mean there are no children in prison. It can be assumed that children are imprisoned in these countries.¹⁵⁸ The United Nations Committee on the Rights of the Child has expressed a concern that "general lack of data on children involved in the justice system contributes to imprisonment of a large number of children, and also conceals the fact."¹⁵⁹

¹⁵¹ *Ibid.*, p.118.

¹⁵² *Ibid.*, p.118 and footnote 6.

¹⁵³ *Ibid.*, p.118. para.4.

¹⁵⁴ *Ibid.*, para.4.

¹⁵⁵ *Ibid.*, para.4. (October 2003)

¹⁵⁶ *Ibid.*, para.3.

¹⁵⁷ *Ibid.*, para.3. *see, also*, King's College of London, World Prison Brief, Africa, available at <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/?search=africa&x=Africa>, last accessed on April 27, 2008.

¹⁵⁸ *Ibid.*, para.2.

¹⁵⁹ *Ibid.*, para.3.

4. Lack of parental responsibility to take care of children

Lack of parental responsibility to look after children brings about delinquent behavior of children. According to UNICEF, approximately one in four children became an orphan in Zimbabwe as of 2008. It meant more than 1.5 million orphans existed in the country.¹⁶⁰ A child rights activist in Malawi stated that “there are cases where parents leave children, some as young as eight, on their own to fend for themselves and this creates room for abusive people to come in.” Without doubt, unemployment, economic crisis, and stress in families would be main factors.¹⁶¹

In Zambia, there are cases that children are abused by their family members or relatives such as father, brothers, and uncles.¹⁶² It is also reported that parents forced their daughters to stay in uncle’s house, and the daughters were enduring sexual abuse for years.¹⁶³

Children who are living on the street are subject to sexual violence and to being involved with crime. Such children are attracted by illegal drugs and/or recruited by illegal criminal groups. They steal food or necessities of life to survive. According to the child rights activist in Malawi, many of the abused girls come from poor families, and some of them are encouraged by their parents to seek for older men to obtain income in exchange of sexual relationship.¹⁶⁴

III. Reforming Criminal Proceedings for the Protection of the Rights of Children

Reforming criminal proceedings is necessary for the protection of the rights of juveniles in many African countries. Here, some reform measures are suggested, for example, rethinking of the minimum age of criminal responsibility, establishing juvenile courts, adopting restorative justice system, guaranteeing the right of access to legal counsels (paralegal advisory service), and preventing children from being criminals.

1. Minimum age of criminal responsibility

¹⁶⁰ All Africa .com, Southern Africa: Trying to understand the unspeakable crime, para.3, available at <http://allafrica.com/stories/200803121025.html>, last accessed on April 25, 2008.

¹⁶¹ *Ibid.*, para.1 and 3.

¹⁶² *Ibid.*, para.8.

¹⁶³ *Ibid.*, para.18.

¹⁶⁴ *Ibid.*, para.14.

A minimum age of criminal liability should be set in accordance with the international standard, namely more than 10 years old.¹⁶⁵ Many African countries set the age of criminal responsibility as 10 years old or below, for instance, Sudan (7 years old), Sierra Leone (10), Ghana (7), Egypt (7), Gambia (7), Zambia (7), Nigeria (7), Ethiopia (9), Kenya (8), Malawi (7), Tanzania (7), Zimbabwe (7), Namibia (7), and South Africa (7).¹⁶⁶ Remarkably, some African states including Togo refuse to set a certain age for criminal responsibility in order to leave the discretion to prosecutors and judges and to discuss whether or not child defendants are capable of understanding what he/she have done is wrong and criminal proceedings.¹⁶⁷

Article 40 (3) (a) of the CRC only provides “The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”¹⁶⁸ Also, the Beijing Rules 4.1 encourages governments to set an appropriate minimum age of criminal capacities based on the moral and psychological components of children rather than tradition and culture or public demand in their states.¹⁶⁹ Although neither the CRC nor the Beijing Rules designates any particular minimum age of criminal responsibility, the Committee of the Rights of the Child has continuously indicated that a reasonable minimum age of criminal responsibility would be more than 10. The Committee encourages countries where the age is set at 10 or below to raise the age.¹⁷⁰ The Beijing Rules 4.1 also insists on the importance of setting a reasonable minimum age of criminal responsibility in criminal justice systems by stating that “[i]f the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal

¹⁶⁵ Penal Reform International, juvenile justice, 10 Point Plan for Juvenile Justice, available at <http://www.penalreform.org/10-point-plan-for-juvenile-justice.html>, last accessed on March 10, 2008.

¹⁶⁶ These figures are from various sources: UNICEF, innocent digest, juvenile justice, *supra* note 85, p.5, UNICEF, international juvenile justice and related issues, available at <http://zimmer.csufresno.edu/~haralds/FOREIGNJUVJUS.htm>, last accessed on March 28, 2008, Wikipedia, Defense of infancy, available at http://en.wikipedia.org/wiki/Age_of_criminal_responsibility, last accessed on March 28, 2008, and At What age?, available at <http://www.right-to-education.org/content/age/table.html>, last accessed on March 30, 2008.

¹⁶⁷ *Ibid.*, Wikipedia, Defense of infancy, available at <http://www.right-to-education.org/content/age/table.html>

¹⁶⁸ The Convention of the Rights of the Child, *supra* note 2, Article 40(3) (a).

¹⁶⁹ The Beijing Rules, *supra* note 3, Rule 4.1.

¹⁷⁰ UNICEF, Innocent Digest, juvenile justice, *supra* note 85, pp.4-5.

behavior and other social rights and responsibilities (such as marital status, civil majority, etc.).”¹⁷¹

2. Juvenile courts

Juvenile courts are essential to achieve the protection of the rights of children. For example, in a case of Mali, it has neither a constitutional provision to protect the rights of children nor a juvenile court system.¹⁷² Some countries including Central African Republic and Liberia have juvenile courts. However, in many cases, the courts are not functioning because of insufficient resources, and lack of staff and facilities.¹⁷³

Looking at the rest of the world, many countries have established juvenile courts because of the “widespread notion that children are not always fully responsible for their action.”¹⁷⁴ Trying child offenders at a formal national criminal court may not always be the best benefit for the children nor the best way for the society.

The city of Chicago in the United States of America firstly introduced a juvenile court in 1899.¹⁷⁵ There were two principles for the establishment of the juvenile court.¹⁷⁶ The first principle was that children were not prepared to be accountable for their activities. The second principle was that they could be rehabilitated easier than adults because of their immaturity.¹⁷⁷ In other words, juvenile courts should have authority to discipline children who violated laws.¹⁷⁸ According to Penal Reform International (PRI), one of the leading NGOs dealing with prison reform issues, juvenile courts with less formal legal processes should be established to try children under the age of 18 for the purpose of protecting the welfare of children.¹⁷⁹

¹⁷¹ The Beijing Rules, *supra* note 3, Rule 4.1

¹⁷² Crime and Society & Comparative Criminology tour of the world, Mali, available at <http://www-rohan.sdsu.edu/faculty/rwinslow/africa/mali.html>, last accessed on April 20, 2010.

¹⁷³ U.S. Department of States, Central African Republic, available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27718.htm>, last accessed on March 19, 2010.

¹⁷⁴ Wikipedia, Juvenile Court, available at http://en.wikipedia.org/wiki/Juvenile_court, last accessed on March 30, 2008.

¹⁷⁵ *Ibid.*

¹⁷⁶ David C. Anderson. "When Should Kids Go to Jail?" The American Prospect (2002), available at http://www.prospect.org/cs/articles?article=when_should_kids_go_to_jail, last accessed on March 20, 2010.

¹⁷⁷ Wikipedia, *supra* note 173, para. 2.

¹⁷⁸ David C. Anderson, *supra* note 175, para.2.

¹⁷⁹ Penal Reform International, juvenile justice, 10 Point Plan for Juvenile Justice, *supra* note 164.

3. Restorative justice system, diversion, and non-custodial sentences

Adopting diversionary community alternatives to prosecution is a key to achieve juvenile justice and to reduce overcrowded conditions in African prisons.¹⁸⁰ Some African countries have already developed their own restorative justice system. In South Africa, for example, mediation between the family of a child offender and the family of a victim is used when the juvenile perpetrator admitted his offence.¹⁸¹ The restorative justice system would be effective for the attainment of juvenile justice in African countries where the authority of the court has not permeated in rural areas. In the Democratic Republic of the Congo, for instance, the majority of people in rural areas apply to “their chiefs and elders for the settlements of disputes and judgment even in serious criminal cases due to the absence of the court.”¹⁸² They utilize the official state justice system only when they need “an official stamp.”¹⁸³ Their local justice system is able to achieve both goals: the protection of the rights of children and the rapid compensation for victims. First, children can be removed from the state court system. As a result, children can avoid imprisonment. Thus, they can maintain their rights to liberty, fundamental education, and staying with their family. Second, victims can obtain indemnification from perpetrators or perpetrators’ family quicker than the state court proceedings can provide it. From the viewpoint of the compensation for victims, the restorative justice system is one of the most effective systems in many African countries because the formal court systems often take so long time and are frequently delayed.¹⁸⁴

As Article 37 of the CRC¹⁸⁵ and Rule of 13.1 of the Beijing Rules¹⁸⁶ provide that the deprivation of liberty should be used only as last resort, alternative sentences to imprisonment are essential to protect the child welfare. Since children are so vulnerable to physical and psychological damages in prison, judicial authority in African countries need to recognize that imprisonment as a measure of imposing justice on children may

¹⁸⁰ *Ibid.*

¹⁸¹ Prison Fellowship International, Restorative Justice, News on May 2004, available at <http://www.restorativejustice.org/editions/2004/May/southafrica>, last accessed on April 16, 2010.

¹⁸² United Nations Office on Drug and Crime, Handbook on Restorative Justice Programmes, at 31.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ Convention on the Rights of the Child, *supra* note 2, Article 37.

¹⁸⁶ UN Standard Minimum Rules for the Administration of Juvenile Justice, *supra* note 3, Rule 13.1.

not always be appropriate. The United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), which was adopted in 1986, provides a wide range of the options other than imprisonment.¹⁸⁷ For example, a sentence of community service would be one of the positive options for juvenile offenders rather than incarceration.

Since the 1990s, Zambia, Lesotho, Zimbabwe, and Namibia piloted diversion programs.¹⁸⁸ For instance, Zambia launched a child-friendly court project in Lusaka, and introduced a community service program as one of the alternatives to incarceration in 2004.¹⁸⁹ This program enhanced the notion that children who conflicted with the laws should be taken care and rehabilitated within the community without resorting to police and prison officers.¹⁹⁰ These non-custodial sentences contribute to reducing reliance on incarceration, and thus, contribute to improving prison conditions.¹⁹¹

4. Paralegal advisory service

There are some good examples of legal service for child perpetrators and prisoners in African countries. Malawi and Sierra Leone have established Paralegal Advisory Service (PAS). In Malawi, for example, the number of lawyers is very small, and the cost of hiring a lawyer is very expensive.¹⁹² There are only 350 lawyers in the whole country for 12 million people. The representing ratio is 1:34,000.¹⁹³ In addition, lawyers are available only in southern areas of Malawi, the most populated area. There are few opportunities to access the legal aids in other regions in Malawi.¹⁹⁴ Due to lack of financial and material resources, the Legal Aid Department of Malawi could not provide legal aids for poor people and juveniles.¹⁹⁵ Based on such situations, PAS was launched in cooperation with experts and international NGOs in human rights fields.

¹⁸⁷ UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules), E.S.C Resolution 663C(XXIV) of 31 July 1957 U.N.Doc. E/3048 (1957) and 2076 (LXII) (1957).

¹⁸⁸ Jeremy Sarkin, *supra* note 1, pp.126-127.

¹⁸⁹ Lucas Muntingh, Report on Child Justice in Zambia with reference to UNICEF supported program, available at http://www.unicef.org/evaldatabase/files/Zambia_2005_002_Child_Justice.pdf, last accessed on April 20, 2010.

¹⁹⁰ Jeremy Sarkin, *supra* note 1, pp.126-127.

¹⁹¹ *Ibid.*

¹⁹² Adam Stapleton, *supra* note 16, p.13, table 1, Malawi.

¹⁹³ *Ibid.*

¹⁹⁴ Hillery Anderson, Justice Delayed in Criminal Justice System Paralegals vs. Lawyers, University of Wales Bangor, at 2, issued January 2006, available at www.geocities.com/cj_india/anderson.pdf, last accessed on April 25, 2008.

¹⁹⁵ *Ibid.*, pp.1-2.

PAS is provided by an advisory group which is composed of non-qualified lawyers, but legally trained people on the front-line of the criminal justice system. The purpose of PAS is to advocate the welfare of prisoners, particularly vulnerable people including women, children, mentally ill people, and foreign inmates.¹⁹⁶

Paralegals work to promote release of prisoners by means of bail, discharge of a case, and dismissal or release of prisoners by making compensation for damage to a victim. Paralegals also teach legal processes, and the rights and safeguards under Malawi laws to criminal suspects and prisoners. Many paralegals assist juvenile offenders at the police stations when they are interviewed by criminal investigators and when the screening of juveniles for diversion programs is conducted.¹⁹⁷ Actually, PAS has successfully diverted a number of children who violated a law from the criminal proceedings.¹⁹⁸ For example, during the first six months of the PAS pilot scheme, over 30 juveniles were diverted from involvement in the criminal proceedings in Malawi.¹⁹⁹

5. Crime prevention

Since there are compelling factors which make children become perpetrators such as family problems or extremely poor living conditions, it is important to establish an environment where children can stay home with family and concentrate on school life and vocational training without being involved with crime. Building sound homey environment and educational surroundings is effective to prevent children from being criminals. Although the economic situation of each family largely influences the way of fostering children, the government should take some measures to enhance parents' responsibility to take care of their children and to provide minimum education for children in order to reduce the number of juvenile crime.

First of all, governments or the educational authorities in Africa should plant in people's mind the importance of fulfilling the responsibility of parents. Parents have a great role in educating their children. Children learn from parents about how to talk, walk, communicate with others, and behave in society. They also look to parents to determine what is right and what is wrong.²⁰⁰ Therefore, parents would be the best

¹⁹⁶ *Ibid.*, p.4.

¹⁹⁷ *Ibid.*, p.5.

¹⁹⁸ *Ibid.*, p.7.

¹⁹⁹ *Ibid.*, p.7. (in 2004)

²⁰⁰ National Crime Prevention Council, Parents, available at <http://www.ncpc.org/topics/by-audience/parents>, last accessed on April 26, 2010.

resource to keep their children safe and healthy, and accordingly, to reduce juvenile crime.²⁰¹

Also, the governments should establish orphanages which accommodate children living on the street. In African countries, there are many children whose parents died because of prolonged civil wars and/or conflicts, and children who were abandoned by their parents due to an extremely poor economic situation.²⁰² Such children are seriously vulnerable to crime and are attracting criminal groups.

In addition, the governments need to acknowledge that primary education must be compulsory and free for all children²⁰³. This is one of the obligations of the governments under the CRC and the ICESCR.²⁰⁴ It is essential to provide fundamental education to all children in order to prevent them from being involved with illegal acts. This is because, generally speaking, the majority of prisoners are from a sector of the community in which they do not have access to primary education and thus, do not have literacy.²⁰⁵ This is conspicuous, especially in many African countries where the general population has few educational opportunities.²⁰⁶ Children are bearers who have responsibilities of the nation in the future. The nation will not be developed without basic education for the children.

Providing rehabilitation and reintegration programs for children in prison is also necessary to prevent recidivism of children. The available data show that African prisons have not succeeded in reducing the recidivism rate.²⁰⁷ Mauritius, for example, had “a recidivism rate of between 64% and 74% among male prisoners, and between 47% and 67% among females in 2001.”²⁰⁸ In South Africa, although no official information exists, it was estimated that “a recidivism rate was between 66% and 94%” in 2001.²⁰⁹ These figures are very high. While these high rates do not show the rate of repeated crimes committed by juveniles, it would be possible to assume that the recidivism rate of juveniles was also high. And it does show that “rehabilitation and

²⁰¹ *Ibid.*

²⁰² All Africa .com, Southern Africa: Trying to understand the unspeakable crime, *supra* note 159.

²⁰³ The CRC, *supra* note 2, Article 28.

²⁰⁴ International Convention on Economic, Social and Cultural Rights, *supra* note 41. Article 13.

²⁰⁵ Jeremy Sarkin, *supra* note 1, p.161, para.1.

²⁰⁶ *Ibid.*, para.1 and footnote 9.

²⁰⁷ *Ibid.*, p.172, para.3.

²⁰⁸ *Ibid.*, para. 3.[The Impact of rehabilitation and reintegration services on prisoners]

²⁰⁹ *Ibid.*, para.3.

reintegration programs have not been a focus nor achieved.”²¹⁰ As children are flexible to gain vocational skills and knowledge, providing such programs for children will enhance reintegration into the society after released.

Conclusion

There is little doubt that many of the African criminal justice systems are failing to protect the rights of children due to a number of factors: lack of resources including finance, material, and human resources, corruption, history of Africa, wars and conflicts, and so on. The African governments need to take effective measures against these challenges so as to promote and maintain juvenile justice. It is possible for African countries to promote juvenile justice without allocating swelling resources on criminal justice reform measures. Some African countries have developed unique systems of diversion, community-oriented restorative justice system, and traditional dispute resolution mechanism. Also, some African countries have introduced sentences by community service for juveniles and young offenders. The community service is one of the effective alternatives to imprisonment because of the strong community ties in African countries. In addition, the PAS in Malawi has achieved the diversion of juvenile offenders from the official criminal proceedings. These positive approaches instead of incarceration are the key not only to achieving juvenile justice, but also to improving overall deplorable prison conditions in Africa.

African governments need to consider the universal recognition that the imprisonment of juvenile offenders should be last resort. Juvenile offenders must be given special consideration in criminal proceedings because of their status, and entitled to the legal protection for their welfare.

²¹⁰ *Ibid.*, para.3.