

Master of Laws: Advanced Studies in International Children's Rights



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**Off The Rights Spectrum: The Treatment Of Child Offenders Deprived Of
Liberty In Nigeria**

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Executive Summary

Deprivation of Liberty is the limitation of a person's liberty against their will on the order of a public authority. According to the Convention on the Rights of the Child, deprivation of liberty should be a measure of last resort. The Convention, alongside other legal instruments, outlines the standards of deprivation of liberty. This includes the rights of every child deprived of liberty to be treated with humanity and respect of the inherent dignity of the human person and in an age-appropriate manner. Nigeria, being a Member State to this Convention is bound by its standards. This thesis seeks to consider the extent to which the treatment of child offenders deprived of liberty within the Nigerian child justice system is in line with international standards.

Chapter 1 introduces the research question and defines the scope of the research. This research focuses on the treatment of child offenders in Nigeria and addresses the issue by considering the two existing laws relating to matters involving children: The Child's Rights Act and the Children and Young Persons Act.

Chapter 2 provides an in-depth discussion of the international legal framework guiding the conditions of deprivation of liberty. It commences with a brief discussion on the emergence of children's rights, the rights of children within the child justice context and the principles of child justice. This chapter concludes that in situations where deprivation of liberty is chosen as a disposition option, the treatment must be in accordance with the principles outlined in Article 37(c) of the Convention on the Rights of the Child: (a) Humanity and Inherent Dignity (b) Age-Appropriate Treatment.

Chapter 3 discusses the Nigerian Child Justice on the conditions of deprivation of liberty of child offenders. It provides a background discussion on Nigeria and its legal structure. It analyses the child justice legislative framework (the Child's Rights Act and the Children and Young Person's Act) and the practice of deprivation of liberty in these jurisdictions. It finds that although the laws adopt different approaches, the reality on the treatment of child offender deprived of liberty is the same in both jurisdictions.

Chapter 4 analyses the extent to which the Nigerian law and practice pertaining the conditions of deprivation of liberty of child offenders is in line with international standards. It finds that the Nigerian system is to a large extent contrary to the standards outlined in the international child's rights framework. It considers the reasons for the gap and finds that they are the resultant effects of the continuous application of the Children and Young Person's Act in 12 States and the failure to implement the provisions of the Child's Right's Act regarding this issue in the 24 States that have adopted the Act as well as the Federal Capital Territory. This chapter also analyses the reason for the failure in implementation and finds that it is due to the lack of relevant facilities, reliable data and awareness and training on the child's rights approach on the deprivation of liberty

Chapter 5 concludes the thesis by providing a summary of the discussions and findings of the research and it proffers recommendations to ensure Nigeria's compliance with international child's rights standards.

Overview of Main Findings

This thesis finds that the law and practice pertaining the deprivation of liberty of child offenders in Nigeria, to a large extent, is contrary to the standards of the international children's rights framework.

It also recognises that although the Child's Rights Act is a domestication of the international legal standards, there has been failure to implement these Standards. Therefore, the conditions of deprivation of liberty in the States where the Child's Rights Act has been adopted neither uphold the principle of inherent dignity nor recognises the need for age-appropriate treatment of child offenders. This thesis finds three reasons for the failure to implement the provisions of deprivation of liberty as outlined in the Child's Rights Act, namely: the lack of relevant facilities, lack of data and the lack of training and awareness on the child's rights approach on deprivation of liberty.

The research also recognises that the failure of the Nigerian law and practice on deprivation of liberty to meet international standards is as a result of the nature of the Children and Young Persons Act. The Children and Young Persons Act, which was first enacted during the colonial era as an Ordinance fails to recognise children as rights holders but rather adopts a welfarist approach in dealing with issues regarding the child. This thesis finds that the provisions of the Children and Young Persons Act are not founded on any guiding principle like the principle of inherent dignity. It also finds that as a result of the lack of any guiding principle, the provisions in this Act are contradictory and some of the provisions also conflict with the international standards on the deprivation of liberty. For instance, the Children and Young Persons Act which expressly prohibits the imprisonment of children and young persons still permits the imprisonment of children where there are no available child-appropriate facilities for the child and where there is no other sufficient disposition option for the young offender. This conflict between the CYPA and international standards is also evident in other matters such as the provisions on the discipline of child offenders in these institutions.

In light of these findings, this thesis provides recommendations on methods of enhancing compliance by the Nigerian law and practice, with the international standards of deprivation of liberty. In relation to the legislation, it recommends the annulment of the Children and Young Person's Act in the other 12 States and the ratification of the Child's Rights Act 2003 in order to ensure a uniform and child's rights-based treatment of child offenders deprived of liberty in Nigeria. Besides the legislative recommendations, this thesis also recommends the need for data collection, evaluation and research, the investment in alternatives to imprisonment and likewise the improvement of child-specific institutions. It also recommends awareness creation and training on the child's rights approach on deprivation of liberty as well as the establishment of effective reporting and monitoring mechanisms.

List of Abbreviation

African Children's Charter	African Charter on the Rights and Welfare of the Child
Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
CRC	United Nations Convention on the Rights of the Child
CRC Committee	United Nations Committee on the Rights of the Child
CYPA	Children and Young Persons Act
Havana Rules	United Nations Rules for the Protection of Juveniles Deprived of Their Liberty
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights

Key Words

Child Offender, Children's Rights, Conditions of Detention, Deprivation of Liberty, Nigeria

Chapter 1: Introduction

Sitting outside the chapel on a cemented slab was a boy of about sixteen. He was covered in sores from the crown of his head to the soles of his feet. He was literally in a state of decay while still alive.

“Help me,” he said in a feeble voice wracked with hunger.

“Don’t mind him,” a prison warder said, “He has already been convicted.”

(Nigerian Tribune, 6th of August 2017)¹

1.1. Overview

In August 2017, the attention of the Nation of Nigeria was drawn to reports on the state of the prisons child inmates were placed in Badagry Prison, Lagos, Nigeria after the visit of the Chief Judge of Lagos State.² These prison cells were said to contain adults convicted of murder, armed robbery and such related crimes, as well as children convicted of crimes like petty theft, street hawking and wandering. The reports also noted the poor health conditions of the children which included skin diseases, starvation, with one child suffering from stroke. In 2018, the Vice President of Nigeria, Yemi Osinbajo, whilst narrating his visit to prisons in Port-Harcourt, Rivers State, Nigeria, expressed his immense dissatisfaction with the inhuman living conditions of the prisoners especially the level of congestion of those prisons.³ Osinbajo stated that these prisons were built in 1918, to contain about 800 inmates but it currently contains over 5000 inmates.⁴ He remarked that “anybody who goes into that place as a human being is coming out as an animal”.⁵ Also in 2018, the Nigerian Senate Committee on Interior expressed its utter disappointment concerning the state of the prisons, including the paltry budgetary allocation of 450 Naira (about 1 Euro) for a meal per day of one inmate: 300 Naira for the meal and 150 Naira for the cooking.⁶ More recently, on the 22nd of March, 2019, there surfaced a harrowing documentation by an adult inmate concerning the alleged sexual abuse and exploitation of children (including a mentally ill child) detained with adults in Maiduguri Maximum Security Prison, Borno State, Nigeria.⁷ These reports raise major concerns, one of which pertains to the treatment of children deprived of their liberty.

¹Tribune Online, ‘The Child-Inmates of Badagry’ *Nigerian Tribune* (6 August 2017)

<<https://tribuneonline.com/105498/>> accessed 6 June 2019; Emphasis (*in italics*) by author of this thesis.

²Tribune Online, ‘The Child-Inmates of Badagry’ *Nigerian Tribune* (6 August 2017) <<https://tribuneonline.com/105498/>> accessed 6 June 2019; Onanuga Adebisi ‘Badagry Prison Where Children Are Dumped for Minor Offences’ *The Nation* (8 August 2017) < <https://thenationonline.com/badagry-prison-children-dumped-minor-offences/>> accessed 6 June 2019

³ Editorial Board, ‘On the Conditions of Nigeria’s Prisons’ *The Guardian* (19 February 2018) < <https://guardian.ng/opinion/on-the-condition-of-nigerias-prisons/>> accessed 6 June 2019; Adelani Adepegba ‘Nigerian Prisons Turn Inmates to Animals-Osinbajo’ *Punch Newspaper* (2 February 2018) < <https://punchng.com/nigerian-prisons-turn-inmates-to-animals-osinbajo/>> accessed 6 June 2019

⁴ *ibid*

⁵ *ibid*

⁶ ‘Poor Budgetary Allocation for Feeding of Prisoners’ *Independent* (6 February 2018) < <https://www.independent.ng/poor-budgetary-allocation-feeding-prisoners/>> accessed 6 June 2019;

⁷ ‘Child Prostitution, Sodomy, Forced Abortions...It’s Hell Inside Maiduguri Maximum Security Prison’ *Sahara Reporters* (22 March 2019) < <http://saharareporters.com/2019/03/23/child-prostitution-sodomy-forced-abortions-it%E2%80%99s-hell-inside-maiduguri-maximum-security/>> accessed 6 June 2019; Amnesty International, ‘Nigeria: Children and Women Face Sexual Violence in Borno Prisons’ (29 April 2019) < <https://www.amnesty.org/en/latest/news/2019/04/nigeria-children-and-women-face-sexual-violence-in-borno-prisons/>> accessed 6 June 2019

The Nigerian Prisons Service records a total of 73,248 inmates with 98% of the population being male.⁸ In its published statistics, the Nigerian Prisons Service failed to state the number of children deprived of liberty; Hence, children deprived of liberty, though present are somewhat invisible. Just like these statistics, very little research has been conducted particularly addressing the rights of children deprived of liberty within the Nigerian Child Justice System. There has so far been little discussion about the rights of children deprived of liberty within the child justice context, this is the motivation behind this study.

1.2. Research Question

This research aims to consider the extent to which the Nigerian Child Justice System in regard to the rights of child offenders deprived of liberty is in line with the International Legal Standards and how compliance could be enhanced. The issue will be addressed in four sub questions:

- a) What is the International Legal Framework on the conditions of children deprived of liberty within the Child Justice context?
- b) What is the Law and Practice on the deprivation of liberty of child offenders in Nigeria?
- c) To what extent does the Nigerian Law and Practice on child offenders deprived of liberty meet international standards?
- d) In case there are shortcomings, how can the Law and Practice in Nigeria be improved to meet international standards on the conditions of deprivation of liberty of child offenders

The underlying essence and value of the whole narrative is canvassing the entrenchment of a scope of intervention that offers better protection for children, especially those who are deprived of liberty as a result of their conflict with the law.

1.3. Scope and Definitions

The Nigerian legal system is characterised by the concept of legal pluralism: the system is comprised of Common Law, Sharia Law and Customary Law.⁹ Also, Nigeria is a federal republic comprised of 36 States and its federal capital territory, Abuja.¹⁰ The legislature of every State is vested with the power to enact laws on matters outside the exclusive list contained in the Constitution.¹¹ Thus far, the Child's Rights Act 2003 has been domesticated by 24 out of 36 States in Nigeria - with some States making reservations on some provisions – whilst the Children and Young Persons Act (CYPA)¹² is still applicable in the other 12 States.¹³ The presence of these two laws has yielded disparities in matters regarding

⁸Nigerian Prisons Service, 'Summary of Inmate Population By Convict and Awaiting Trial Persons' (27 May 2019) < <https://www.prisons.gov.ng/statistics> > accessed 18 June 2019

⁹ Daniel Ogunniyi 'The Challenge of Domesticating Children's Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children' (2018) 62(3) *Journal of African Law* 447, 451

¹⁰ Section 2 and 3 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

¹¹ Part I of the Second Schedule to the 1999 Constitution of the Federal Republic of Nigeria (as amended), Daniel Ogunniyi 'The Challenge of Domesticating Children's Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children' (2018) 62(3) *Journal of African Law* 447, 452-454

¹² Children and Young Persons Act Chapter 485 L.F.N. 1990 (hereinafter CYPA)

¹³ The 24 States are: Abia, Akwa Ibom, Anambra, Bayelsa, Benue, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Imo, Jigawa, Kogi, Kwara, Lagos, Nassarawa, Niger, Ogun, Oyo, Ondo, Plateau, Rivers, Taraba, Akwa Ibom; The 11 States are: Adamawa, Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto, Yobe, Zamfara-UNICEF, 'On Nigerian Children's Day, UNICEF calls for an end to violence against children and adoption of Child's Rights Act in all States' (27 May 2017) < <https://www.unicef.org/nigeria/press-releases/nigerian-childrens-day-unicef-calls-end-violence-against-children-and-adoption-child> > accessed 24 June 2019 Currently, the Child's Rights Bill is before the Jigawa State House of Assembly – Nan, 'Jigawa House of Assembly to Pass Child Rights

children. Therefore, the scope of this research on the Nigerian Child Justice system, would involve an analysis of both the Child's Rights Act and the CYPA, alongside the practice in the respective States.

This thesis focuses on the deprivation of liberty of *children* in Nigeria. The United Nations Convention on the Rights of the Child 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". This definition is regarded as acceptable as it takes into consideration the different legal and social constructs of childhood. Having said that, its interpretation is restricting to permitting only ages that would be in compliance with the principles and provisions of the CRC.¹⁴ Given the protective nature of the standards of deprivation of liberty, lowering the age of majority from 18 is not permitted.¹⁵ This stance has been reiterated by the Human Rights Committee as it provides that "all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice".¹⁶ The Africa Charter on the Rights and Welfare of the Child takes a straight-18 approach by stipulating that a child "is every human being below the age of 18 years". In the national sphere, the Nigerian Child's Rights Act 2003 defines the child as any person under the age of eighteen years¹⁷ whilst the CYPA defines a child as a person below the age of 14 and a young person as any person from the age of 14 to any person below the age of 17 years.¹⁸ Evidently, the CYPA definition is contrary to international standards.

Deprivation of liberty can occur in different context such as migration, child protection, child justice and others. The discussion on deprivation of liberty in this thesis is solely within the *child justice* system. The terms "child justice", "juvenile justice" and "youth justice" are often used interchangeably amongst different actors and in legal instruments. According to the United Nations Committee on the Rights of the Child, Juvenile Justice refers to the "legislation, norms and standards, procedures, mechanisms and provisions, institutions and bodies specifically applicable to children considered as offenders".¹⁹ The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter the Beijing Rules) defines a juvenile offender as "a child or young person who is alleged to have committed or who has been found to have committed an offence".²⁰ There are moves towards referring to a child offender as a "child or youth" rather than a "juvenile" given that the term arguably places a "judgmental layer" on the offender, which may therefore inhibit the child's ability to rehabilitate and reintegrate.²¹

Bill' Leadership (12 November, 2018) <<https://leadership.ng/2018/11/12/jigawa-house-of-assembly-to-pass-child-rights-bill-official/>> accessed 9 November 2019

¹⁴ UN Office of the High Commissioner for Human Rights, 'Manual on Human Rights Reporting Under Six Major International Human Rights Instruments' (1997) UN Doc. HR/PUB/91/1 (Rev.1) 415

¹⁵ William Schabas and Helmut Sax, 'Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty' in André Alen and others (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 56

¹⁶ UN Human Rights Committee, 'CCPR General Comment No. 21: Humane Treatment of Persons Deprived of Their Liberty' (1992) para. 13; See also Rule 11(a) of the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty 1990

¹⁷ Section 277 of the Child's Rights Act 2003

¹⁸ Section 2 of the Children and Young Persons Act 1943

¹⁹ Article 40(3) of the Convention on the Rights of the Child; UN Committee on the Rights of the Child, 'General Comment No 24: Children's Rights in Juvenile Justice' (draft) UN Doc. CRC/C/GC/24 para. 6

²⁰ Rule 2.2(c)

²¹ Sarah Dillon, *International Children's Rights* (Carolina Academic Press, 2009) 655; see also UN Committee on the Rights of the Child, General Comment No. 24(draft): Children's Rights in Juvenile Justice' (2007) UN Doc. CRC/C/GC/24 para. 6

Under the Nigerian Child Justice Framework, the Child's Rights Act has since adopted this approach even before the recognition and change by the International Sphere, but the CYPA is based on the older approach. Likewise, this thesis uses the term 'child justice' rather than 'juvenile justice' and the term 'child' rather than 'juvenile'.

Also within the context of child justice, deprivation of liberty could be administered at different stages of the criminal proceeding: the pre-trial, trial or the disposition stage.²² Generally, children deprived of liberty are often stigmatized and this leads to deprivation of their human rights.²³ This could be particularly worse for child offenders given that they are deemed the 'authors of their own misfortune' as their current status is a result of their conflict with the law.²⁴ They are oftentimes seen as undeserving of rights and as persons whose "interests and needs should not be privileged over that of law-abiding impoverished children".²⁵ In essence, child offenders are regarded as 'off the rights spectrum'. Noting the effects of stigmatization and discrimination on the treatment of children, especially those perceived as deserving of such inhumane and undignified treatment, this research focuses specifically on the rights of *child offenders* deprived of liberty within the Nigerian child justice system.

1.4. Outline and Methodology

The discussion in this research proceeds in four chapters: To set the pace, chapter 2 analyses the international (and regional) legal framework on the deprivation of liberty of child offenders. This would involve a conceptualization of the principles embodying deprivation of liberty, as laid down in legal instruments like the United Nations Convention on the Rights of the Child, African Charter on Human and Peoples' Rights, African Charter on the Rights and Welfare of the Child, non-binding legal standards like the UN Rules for the Protection of Juveniles Deprived of Liberty, UN Standard Minimum Rules for the Administration of Juvenile Justice, UN Committee on the Rights of the Child's General Comment on Children's Rights in Juvenile Justice and other relevant legal provisions. This thesis will proceed, in its 3rd Chapter to appraise the national legal framework and practice on the deprivation of liberty of child offenders in Nigeria. A section is dedicated to outlining the legal framework as stated in the Child's Rights Act 2003 and the CYPA. In the course of the discussions, the nature of detention facilities and the conditions and treatment of children in these institutions is brought under scrutiny. The 4th Chapter of this research probes and analyses the extent to which the Nigerian Law and Practice is in line with international standards. The existing gaps in the current legislation are identified, whilst contributing to the contemporary debate on how best to promote efforts to strengthen human rights protection for children. Finally, Chapter 5 concludes and proffers recommendations on ways for Nigeria to ensure better compliance with international standards. This thesis employs a secondary research method which involves a review of binding and non-binding legal instruments, academic resources, reports and other relevant sources.

²² Yannick Van Den Brink, 'Voorlopige hechtenis in het Nederlandse jeugdstrafrecht. Wet en praktijk in het licht van international en Europese kinder-en mensenrechten' (Doctoral Thesis, Universiteit Leiden, 2018) cited in Ton Liefwaard 'Deprivation of Liberty of Children' in Ursula Kilkelly and Ton Liefwaard (eds.) *International Human Rights of Children* (Springer, 2019) 331

²³ Ton Liefwaard 'Deprivation of Liberty of Children' in Ursula Kilkelly and Ton Liefwaard (eds.) *International Human Rights of Children* (Springer, 2018) 3

²⁴ Patricia Soung, 'Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equity' (2011) 6(2) *Northwestern Journal of Law and Social Policy* 428, 431

²⁵ Lilian Ayete-Nyampong, 'Situating CRC Implementation Processes in the Local Context of Correctional Institutions for Children in Conflict with the Law in Ghana' in Robert Kwame Amede, Debrenna Lafa Agbenyiga and Nana Araba Apte (eds.) *Children's Rights in Ghana: Reality or Rhetoric?* (Lexington Books; 2011) 178

Chapter 2: International Legal Framework

2.1. Introduction

The Child's Rights Approach for the treatment of child offenders deprived of liberty is laid down in several international and regional legal instruments. Nigeria has ratified the Convention on the Rights of the Child (CRC),²⁶ which is the principal international legal document embodying the rights of every child. Article 37(c) of the CRC outlines the right of every child deprived of liberty to be treated with humanity and respect for their inherent dignity and in a manner which takes into account the needs of persons of that particular age bracket. This chapter analyses the standards on the treatment of child offenders deprived of liberty. In analysing the framework, this chapter first discusses the emergence of children's rights (2.2), secondly, it discusses principles pertaining to children's rights and child justice (2.3), finally, it analyses the concepts embodied in Article 37(c) of the CRC on the treatment of a child offender (2.4) and makes concluding remarks on the child's rights international standards on deprivation of liberty (2.5).

2.2. Emergence of Children's Rights

The conceptualization of children's rights has evolved over time. The aftermath of World War I ushered in a clime where children were beginning to be perceived as rights holders.²⁷ Declarations like the Geneva Declaration on the Rights of the Child²⁸ and the UN Declaration on the Rights of the Child²⁹ which specifically referred to the rights of children heralded this discussion. Nevertheless, these instruments are non-binding, thus the extent of their impact on the treatment of children as rights holders is limited. Children, being humans have rights enshrined in international legal instruments like the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁰ and the International Covenant on Civil and Political Rights (ICCPR).³¹ However, these instruments amongst other factors, failed to recognise and address the physical, psychological and other peculiarities associated with childhood. There was therefore the need for a Convention which would capture the peculiarities and introduce innovations particularly relevant to the child and contain rights that are not only relating to care and protection.³² The creation of the Convention on the Rights of the Child and its adoption by State parties was an endorsement of the need for children's rights to be taken seriously.³³ This treaty which has received almost universal ratification is the foundation upon which regional and some national legal instruments pertaining children's rights are formulated. For instance the African Charter on the Rights

²⁶ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) *Treaty Series* 1577 at 3 (hereinafter CRC)

²⁷ Jaap E. Doek 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefwaard (eds.) *International Human Rights of Children* (Springer, 2018) 2

²⁸ Geneva Declaration of the Rights of the Child (adopted 26 September 1924) League of Nations O.J. Spec. Supp. 21 at 43

²⁹ Declaration of the Rights of the Child (adopted 20 November 1959) A/RES/1386(XIV)

³⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) *Treaty Series* 993 at 3 (hereinafter ICESCR)

³¹ International Covenant on Civil and Political Rights (adopted 16 December 1966) *Treaty Series* 999 at 171 (hereinafter ICCPR)

³² Jaap E. Doek 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefwaard (eds.) *International Human Rights of Children* (Springer, 2018) 10

³³ See Michael Freeman 'Why it Remains Important to Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5

and Welfare of the Child (African Children's Charter)³⁴ was created for the purpose of applying the CRC within the African context by recognising the culture and norms of the region.³⁵ Alongside these binding legal instruments are non-binding principles which outline standards on specific matters. They include the General Comments of the CRC Committee particularly the General Comment on Children's Rights in Juvenile Justice,³⁶ the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (Havana Rules),³⁷ the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)³⁸ and others. Currently, the UN Committee on the Rights of the Child is working on a new General Comment (No. 24) to replace the existing General Comment No.10 on Children's Rights in Juvenile Justice.³⁹ In sum, an analysis of the framework on deprivation of liberty of child offenders involves a holistic assessment of these relevant binding and non-binding principles.

2.3. Children's Rights and Child Justice

Child Justice, a facet of the criminal justice system, is aimed at promoting reintegration and rehabilitation, preventing recidivism and preserving public safety.⁴⁰ Its aims are interrelated and interdependent and they can only be fulfilled upon the proper recognition and implementation of the rights of the child.⁴¹ The CRC outlines the leading principles of child justice and deprivation of liberty. State parties are obligated to apply both the general principles of children's rights as outlined in Article 2,3,6 and 12 of the CRC as well as the fundamental principles of child justice as outlined in Article 37 and 40 of the CRC.

2.3.1. General Principles

First, the principle of non-discrimination as stated in Article 2 of the CRC provides for the impartial treatment of every child regardless of any factor such as the child or their parent or guardian's race, sex, language, religion, colour, opinion, origin, property, disability, birth or other status. For instance, a child convicted of a crime and deprived of liberty is still a rights holder and his rights, pursuant to the aim of the deprivation of liberty, shall be respected, protected and fulfilled. This is in respect of the inherent dignity of the child, who though being an offender, is still human and therefore should be treated as

³⁴ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49 (hereinafter 'African Children's Charter')

³⁵ See Julia Sloth-Nielsen and Benyam D. Mezmur 'A Dutiful Child: The Implications of Article 31 of the African Children's Charter' (2008) 52(2) *Journal of African Law* 159

³⁶ United Nations Committee on the Rights of the Child, 'General Comment No.10: Children's Rights in Juvenile Justice' (2007) UN Doc. CRC/C/GC/10

³⁷ United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (adopted 14 December 1990) A/RES/45/113 (hereinafter 'Havana Rules')

³⁸ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (adopted 29 November 1985) A/RES/40/33 (hereinafter 'Beijing Rules')

³⁹ United Nations Committee on the Rights of the Child, 'General Comment No.24: Children's Rights in Juvenile Justice' (draft) UN Doc. CRC/C/GC/24

⁴⁰Article 40(1) of the CRC; UN Committee on the Rights of the Child, 'General Comment No. 10: Children's Rights in Juvenile Justice' (2007) UN Doc. CRC/C/GC/10 paras 10 and 14; Ton Liefwaard 'Juvenile Justice from an International Children's Rights Perspective' in Wouter Vandenhoe and others (eds.) *Routledge International Handbook of Children's Rights Studies* (Routledge, 2015) 252;

⁴¹ UN Committee on the Rights of the Child, 'General Comment No. 10: Children's Rights in Juvenile Justice' (2007) UN Doc. CRC/C/GC/10 para. 14; See also UN Committee on the Rights of the Child, 'General Comment No 24: Children's Rights in Juvenile Justice' (draft) UN Doc. CRC/C/GC/24 para. 2

one.⁴² The Committee on the Rights of the child therefore highlights the importance of establishing laws and policies that promote the equal treatment of child offenders such as the training of professionals involved in the administration of child justice.⁴³ This provision and directive is reiterated in Article 2 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (hereinafter “the Nelson Mandela Rules”).

Second, the best interest principle laid down in Article 3 of the CRC provides that the best interests of the child shall be a primary consideration in all matters concerning the child. This principle therefore outlines the need for a child-specific justice system which takes into consideration the fact that children differ from adults in terms of their physical and psychological development as well as with regards to their emotional and educational needs.⁴⁴ The purpose of this principle is not to change the context of the child’s rights but rather provides a tailored approach to the case concerning that individual child.⁴⁵ It recognises that children are not a homogenous group but comprise of persons with differences such as age, level of maturity and development, sex, which need to be recognised when making decisions. This is one of the peculiarities of the CRC compared to the other general international human rights instruments.

Third, the principle outlined in Article 6 of the CRC is a tripartite combination of the right to life, survival and development. The inherent right to life has been described as the most basic human right or the supreme right for without which, all other rights cannot be realized.⁴⁶ It is of cardinal importance to the existence and efficacy of all other rights of the child.⁴⁷ Having said that, the rights to survival and development aim to ensure good quality of life; they therefore promote a life compatible with the inherent dignity of the child. These rights emphasise the need for the “full and harmonious development of the child” by not solely focusing on the physical aspects like quality health care, nutrition and environment but taking steps to holistically develop the child to prepare them to live responsible lives in society. This principle laid down in Article 6 of the CRC requires a consideration of the needs of children of that age and the evolving capacities of that particular child.

The fourth general principle is the right of the child to participate in matters concerning him or her. This right requires that in all matters concerning the child, State parties must ensure that the views of the child is heard and given due weight, in accordance with his or her age and maturity. For instance, a child offender deprived of his liberty can file complaints regarding a violation of his rights whilst in the institutions or a complaint concerning the standard of programmes and schemes available in the institutions. The CRC Committee has pointed out that “the voices of children involved in the juvenile

⁴² See the Preamble of the UN Convention on the Rights of the Child

⁴³ UN Committee on the Rights of the Child, ‘General Comment No. 10: Children’s Rights in Juvenile Justice’ (2007) UN Doc. CRC/C/GC/10 para 6; UN Committee on the Rights of the Child, ‘General Comment No 24: Children’s Rights in Juvenile Justice’ (draft) UN Doc. CRC/C/GC/24 para 8

⁴⁴ UN Committee on the Rights of the Child, ‘General Comment No. 10: Children’s Rights in Juvenile Justice’ (2007) UN Doc. CRC/C/GC/10 para. 10; UN Committee on the Rights of the Child, General Comment No.24: Children’s Rights in Juvenile Justice (draft) UN Doc. CRC/C/GC/24 para. 12

⁴⁵ Geraldine Van Beuren, *Child Rights in Europe* (Council of Europe Publishing, 2007) 34

⁴⁶ Human Rights Committee, General Comment No. 14: Nuclear Weapons and the Right to Life (1994) UN Doc. HRI/GEN/1/Rev.8 para.1; Human Rights Committee, General Comment No. 6: Right to Life (1982) UN Doc. HRI/GEN/1/Rev.8 para. 1

⁴⁷ Peter Newell and Rachel Hodgkin, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn. UNICEF, 2008) cited in Alistair MacDonald, *The Rights of the Child: Law and Practice* (Jordan Publishing Limited, 2011)

justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfilment of their rights⁴⁸

2.3.2. Fundamental Principles of Child Justice

The fundamental principles of Child Justice are outlined in Article 40(1) of the CRC. It provides that:

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Article 40(1) of the CRC thereby obligates State parties to provide fair and age-appropriate treatment to the child in contact with the child justice system in view of the child's sense of dignity and the need to respect the rights of others. The principles are to be observed, applied and respected at every stage of the child justice process, right from the child's first contact with the system through law enforcement agencies to the point of implementation of the measures required in dealing with that particular case.⁴⁹ It therefore entails the "establishment of laws, procedures, authorities and institutions specifically applicable to children".⁵⁰ This includes the application of the principle of necessity to determine whether a formal trial proceeding should be conducted or diversionary options should be adopted. In promoting the well-being and effective reintegration of the child offender, Article 40(3)(b) provides for the use of diversion in appropriate and desirable circumstances.⁵¹ This approach aims to "create a balanced approach that is offender-directed and, at the same time, victim-centred" as it gives the victim the opportunity to play a central role in determining the child offender's punishment.⁵²

In situations where a formal trial procedure is required, the trial also has to be conducted fairly through the recognition and fulfilment of the procedural standards outlined in Article 40(2) of the CRC. The treatment of children at this stage is based on the notion of presumption of innocence which specifies that the child is innocent until proven guilty beyond reasonable doubt.⁵³ Accordingly, the CRC Committee points that the use of pre-trial as a punishment is a violation of this notion.⁵⁴ Where it is proven that the child committed the offence, Article 40(4) requires the application of the principle of proportionality in the determination of the disposition option for that particular case. It requires a child

⁴⁸ UN Committee on the Rights of the Child, 'General Comment No. 10: Children's Rights in Juvenile Justice (2007) UN Doc. CRC/C/GC/10 para. 12; UN Committee on the Rights of the Child, General Comment No.24: Children's Rights in Juvenile Justice (draft) UN Doc. CRC/C/GC/24 para. 14

⁴⁹ UN Committee on the Rights of the Child, 'General Comment No. 10: Children's Rights in Juvenile Justice (2007) UN Doc. CRC/C/GC/10 para. 13; UN Committee on the Rights of the Child, General Comment No.24: Children's Rights in Juvenile Justice (draft) UN Doc. CRC/C/GC/24 para.15

⁵⁰ Article 40(3) of the CRC

⁵¹ Geraldine Van Beuren, 'Article 40: Child Criminal Justice' in André Alen and others (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 27-28

⁵² *ibid* 29-30

⁵³ UN Committee on the Rights of the Child, 'General Comment No. 10: Children's Rights in Juvenile Justice (2007) UN Doc. CRC/C/GC/10 para. 42; UN Committee on the Rights of the Child, General Comment No.24: Children's Rights in Juvenile Justice (draft) UN Doc. CRC/C/GC/10 para. 53

⁵⁴ *ibid* para. 80

specific rather than a blanket approach in ordering the disposition option and it obligates State parties to ensure the availability of a wide range of options besides institutional care.⁵⁵

In sum, the aims of child justice can only be fulfilled when it is conducted in a manner which fulfils the principles of child justice as laid down in CRC. These standards are to be upheld at all stages including the disposition stage.

2.4. Deprivation of Liberty of Children

The use of deprivation of liberty as a measure in dealing with children within the child justice system has always been a topical discussion.⁵⁶ Deprivation of liberty is “any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority”.⁵⁷ Article 37 of the CRC which contains the leading principles for the use of deprivation of liberty, consists of a “unique blend of general human rights norms, child rights concepts and criminal justice developments”; In addition to the principles of deprivation laid down in other human rights instruments like the ICCPR, it introduces unique and child centred concepts.⁵⁸ It contains both the procedural rights for the implementation of deprivation of liberty as well as the standards regarding the conditions and treatment of children deprived of liberty.⁵⁹

2.4.1. Principles of Deprivation of Liberty

Deprivation of liberty of a child is based on the principles that: (a) no child shall be deprived of his or her liberty unlawfully or arbitrarily; and (b) its use shall be a measure of last resort and for the shortest appropriate period of time.⁶⁰

2.4.1.1. Lawfulness and Non-Arbitrariness

The CRC provides that deprivation of liberty should satisfy both criteria of lawfulness and non-arbitrariness.⁶¹ These criteria are a review of the grounds and procedure on which the child has been

⁵⁵ Geraldine Van Beuren, ‘Article 40: Child Criminal Justice’ in André Alen and others (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 30

⁵⁶ Ton Liefwaard, ‘Juvenile Justice from an International Children’s Rights Perspective’ in Wouter Vandenhoele and others (eds.), *Routledge International Handbook of Children’s Rights Studies* (Routledge, 2015) 252

⁵⁷ Rule 11(b) of the Havana Rules; William Schabas and Helmut Sax, ‘Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty’ in André Alen and others (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 60; see also Art 9(1) ICCPR, Art 3 UDHR and Art 5 and 6 African Charter on Human and Peoples’ Rights

⁵⁸ William Schabas and Helmut Sax, ‘Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty’ in André Alen and others (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 35

⁵⁹ UN Committee on the Rights of the Child, General Comment No.10: Children’s Rights in Juvenile Justice (2007) UN Doc. CRC/C/GC/10 para. 78; UN Committee on the Rights of the Child, General Comment No.24: Children’s Rights in Juvenile Justice (draft) UN Doc. CRC/C/GC/24 para. 95

⁶⁰ Article 37(b) of the CRC; UN Committee on the Rights of the Child, General Comment No.10: Children’s Rights in Juvenile Justice (2007) UN Doc. CRC/C/GC/10 para 79; UN Committee on the Rights of the Child, General Comment No.24: Children’s Rights in Juvenile Justice (draft) UN Doc. CRC/C/GC/24 para. 96

⁶¹ Article 37(b) of the CRC; *ibid*

deprived of his or her liberty.⁶² The requirement that deprivation of the child's liberty must be lawful and non-arbitrary stems from the provision of Article 9(1) ICCPR which states that "[e]veryone has the right to liberty and security of person", that [n]o one shall be subjected to arbitrary arrest or detention" and that [n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law".⁶³ The 'lawful' criterion means that the administration of the deprivation of liberty should be in compliance with the applicable domestic law.⁶⁴ It therefore requires that the domestic law must explicitly state the grounds upon which deprivation of liberty can occur as well as the procedures to be undertaken to deprive a person of their liberty.⁶⁵ The 'non-arbitrary' requirement on the hand, is "directed at both the national legislation and the organs of enforcement".⁶⁶ The requirement prescribes that the domestic law specifying for the deprivation of liberty must be just, proportionate and predictable and the manner in which the deprivation of liberty is enforced must also be proportionate and void of discrimination. For instance, the continuation of deprivation of liberty after the end of a child's disposition period would be termed arbitrary and therefore unlawful and contrary to the principles of deprivation of liberty.⁶⁷

2.4.1.2. Last Resort and Shortest Appropriate Period of Time

The CRC in ensuring and respecting child's right to develop provides in Article 37(b) that deprivation of liberty shall be a measure of last resort and for the shortest appropriate period of time.⁶⁸ The principle of 'last resort' obligates State parties to use the measure of deprivation of liberty in matters concerning children "with the utmost restraint and only after careful consideration"⁶⁹ Careful consideration in such a case entails an individual assessment based on the best interest principle, on whether deprivation of

⁶² William Schabas and Helmut Sax, 'Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty' in André Alen and others (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 78

⁶³ Sharon A. Detrick, *Commentary on the United Nations Convention of the Rights of the Child* (Kluwer Law International, 1999) cited in Ton Liefaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Intersentia, 2008) 174

⁶⁴ William Schabas and Helmut Sax, 'Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty' in André Alen and others (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 76

⁶⁵ Ton Liefaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Intersentia, 2008) 174; Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel Verlag, 2005) 236; William Schabas and Helmut Sax, 'Article 37, Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty', in André Alen (eds.) *A Commentary on the United Nations Convention on the Rights of the Child*, (Martinus Nijhoff Publishers, 2006) 77

⁶⁶ Manfred Nowak, *UN. Covenant on Child and Political Rights CCPR Commentary* (N.P. Engel Verlag, 2005) para. 28; William Schabas and Helmut Sax, 'Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty' in André Alen and others (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 79

⁶⁷ Ton Liefaard Liefaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Intersentia, 2008) 176

⁶⁸ UN Committee on the Rights of the Child, General Comment No.10: Children's Rights in Juvenile Justice (2007) UN Doc. CRC/C/GC/10 para. 11; UN Committee on the Rights of the Child, General Comment No.24: Children's Rights in Juvenile Justice (draft) UN Doc. CRC/C/GC/24 para. 13

⁶⁹ Ton Liefaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Intersentia, 2008) 84

liberty is necessary and proportionate, considering the facts of the matter.⁷⁰ The principle of last resort requires that all other options as listed in Article 40(4) of the CRC have been considered and deemed inappropriate to be used in that particular case. With regards to the requirement of ‘shortest appropriate period of time’, a disposition term that would be deemed appropriate would be decided in light of the objectives of child justice. The disposition term has to be for a period wherein recidivism would be prevented, reintegration and rehabilitation of the child, as well as the protection of public safety would be achieved. This requirement does not mean that deprivation of liberty would be for the shortest period of time; in situations where a longer period of time would aid in the fulfilment of the objectives, such would be appropriate. In sum, the determination of the suitability of the use of deprivation of liberty in a case first requires the assessment of individual child’s development and his or her interaction with the environment and others before a consideration of the social reaction to the child’s actions.⁷¹

2.4.2. Conditions of Detention

Article 37(c) of the CRC provides the standard upon which the deprivation of liberty of the child must satisfy. It states that every child deprived of liberty must be: (a) treated with humanity and respect for the inherent dignity of the human person; and (b) in a manner which takes into account the needs of persons of his or her age. This provision is also reiterated in Article 17(1) of the African Charter on the Rights and Welfare of the Child. The right requires that in the course of the deprivation of liberty, children deprived of liberty should not also be denied their rights as are in compliance with the objectives of the detention.⁷² These principles are reinforced in the Havana Rules as it outlines that children “deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law which are compatible with the deprivation of liberty”.⁷³ The conditions of detention of child offenders entails the fulfilment of both the general requirement as well as the child specific requirement.

2.4.2.1. Humanity and Inherent Dignity

The treatment of persons with humanity and respect for the inherent dignity of the human person is a foundational principle of human rights and is non-derogable.⁷⁴ This provision emanates from Article 10 of the ICCPR which provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. McCrudden notes that the minimum core of human dignity communicates that: first, “every human being possesses an intrinsic worth merely by being human”; second, that this “worth should be recognised and respected by others” and third, that “the State should be seen to exist for the sake of the individual human being and not vice versa”.⁷⁵ In

⁷⁰ Ton Liefaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Intersentia, 2008) 84

⁷¹ William Schabas and Helmut Sax, ‘Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty’ in André Alen and others (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 81

⁷² Newell P. and Hodgkin R. *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn. UNICEF, 2008) 563

⁷³ Rule 13 of the Havana Rules

⁷⁴ See the Preambles of the UDHR, CRC ICCPR, ICESCR and the African Charter on Human and Peoples’ Rights; Human Rights Committee, “General Comment No. 29: Derogations During a State of Emergency” (2001) UN Doc. HRI/GEN/1/Rev 8 para 13(a)

⁷⁵ Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) *The European Journal of International Law* 679

essence, a child offender deprived of liberty has an intrinsic worth which should be recognised and respected by all and the State is the main duty bearer in securing this worth. The intrinsic worth of the child offender is realized by the protection, respect and fulfilment of his rights.⁷⁶ International and regional instruments outline standards for detention that reflect humane treatment and respect for the inherent dignity of the human person.

The Havana Rules provide that children should be detained only in “conditions and circumstances which ensure respect for the human rights of juveniles”.⁷⁷ These conditions include the availability of sufficient and clean sleeping accommodation and beddings,⁷⁸ sanitary utilities, adequate clothing,⁷⁹ proper medical care and nutrition.⁸⁰ These requirements are all linked to the health and well-being of the child, the absence of one requirement could lead to the death of the child and in cases where the illness is communicable, it could lead to the death of more than one child. In essence, the non-provision of these facilities and services to child offenders deprived of liberty is an imminent death sentence. Child offenders deprived of liberty also have the right to engage in religious and recreational activities.⁸¹ Given that deprivation of liberty in confinement, the child in most facilities are deprived of these activities that are particularly important for rehabilitation, well-being and development. On matters of disciplining child offenders, the Committee on the rights of the child maintains that the disciplinary measures adopted in dealing with a child “must be consistent with upholding the inherent dignity of the child and the fundamental objectives of institutional care”.⁸² This means that placement in dark cells or any other punishment which may affect the child’s physical or mental health or well-being is not permitted.⁸³ Children should also be given educational and vocational training.⁸⁴ This ensures that upon release from detention, more opportunities are available to the child to assume a constructive role in society rather than resorting to the life of crime.

In providing these facilities and services, it is important to recognize that the group- child offenders- is not a homogeneous group and one of the many differences is in their gender. Males make up the majority of the population in different detention facilities worldwide;⁸⁵ it is important not to overlook the special needs of the female population such as sanitary towels and hygienic items. Ignoring the gender

⁷⁶ John Tobin, ‘Justifying Children’s Rights’ (2013) 21 *International Journal of Children’s Rights* 21 at 407

⁷⁷ Rule 12 of the Havana Rules

⁷⁸ Rule 33 of the Havana Rules, UN Committee on the Rights of the Child, ‘General Comment No. 10: Children’s Rights in Juvenile Justice’ (2007) UN Doc. CRC/C/GC/10 para. 89; Rules 12-17 and 21 of the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)

⁷⁹ Rule 36 of the Havana Rules, Rules 15-16 and 19-20 of the Nelson Mandela Rules

⁸⁰ Rule 37 and 49 of the Havana Rules

⁸¹ Rule 47 and 48 of the Havana Rules

⁸² UN Committee on the Rights of the Child, ‘General Comment No. 10: Children’s Rights in Juvenile Justice’ (2007) UN Doc. CRC/C/GC/10 para. 89

⁸³ UN Committee on the Rights of the Child, ‘General Comment No. 10: Children’s Rights in Juvenile Justice’ (2007) UN Doc. CRC/C/GC/10 para. 89; See also UN Committee on the Rights of the Child, General Comment No. 13: The Rights of the Child to Freedom from All Forms of Violence (2011) UN Doc. CRC/C/GC/13

⁸⁴ UN CRC GC, Havana Rules, etc.

⁸⁵ UN General Assembly, ‘Report of the Independent Expert for the United Nations Study on Violence Against Children’ (2006) UN Doc. A/61/299 para. 53

difference amongst the group is discriminatory and also results in the violation of the rights of the females to be treated humanely and with dignity.⁸⁶

In sum therefore, the treatment of child offenders deprived of liberty with humanity and respect for the inherent dignity of their human person is fundamental. But to achieve the objectives of deprivation of liberty in the context of child justice, the age of the child has to be considered.

2.4.2.2. Age-Appropriate Treatment

The provision of Article 37(c) requires not only that the child be treated with humanity and respect of their inherent dignity but also that the particular needs of that child, considering his age, be addressed.⁸⁷ This treatment is the differentiating factor between the provision of Article 10 ICCPR and that of the CRC as it “highlights a specific child developmental-orientation within the general principle outlined in the ICCPR”⁸⁸ The requirement is an application of the concept of evolving capacity within the context of deprivation of liberty of children.⁸⁹ State parties are obligated to recognize that children deprived of liberty are human beings in development.⁹⁰ Development does not occur only in childhood, however this emphasis on an age-appropriate treatment is a result of the fact that childhood “offers a period of both opportunity and vulnerability”.⁹¹ Treatment tailored in accordance with the age of the child offender also prevents the infantilization of the older CRC rights holders. By balancing the concepts of autonomy and vulnerability, detrimental outcomes in the treatment of child offenders are prevented.

In fulfilling this standard of age-appropriate treatment as well as the right to be treated with humanity and respect of their inherent dignity, Article 37(c) of the CRC requires that children deprived of liberty should be separated from adults unless it is in the child’s best interest not to do so. Separation of child offenders from adult offenders is primary towards the creation of an environment suitable for addressing the peculiarities of the child offenders. It involves the creation of a child-appropriate environment which includes child-centred personnel, policies and practice.⁹² The CRC Committee therefore mention that such an environment should comprise of educational and vocation resources suitable to the child’s needs and abilities.⁹³ It should also consider the child’s need to participate in leisure time activities like sports, games, association with friends.⁹⁴ Furthermore, the child should be permitted to communicate with the wider community such as with family, friends and persons of reputable organizations.⁹⁵

⁸⁶ See also Rule 2 of the CRC, Rule 13.5 of the Beijing Rules and Rule 28 of the Havana Rules

⁸⁷ See also Rule 13.5 of the Beijing Rules and Rule 28 of the Havana Rules

⁸⁸ Ton Liefwaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Intersentia, 2008) 228

⁸⁹ See Article 5 of the CRC

⁹⁰ Ton Liefwaard, ‘Deprivation of Liberty of Children in Light of International Human Rights Law and Standards (Doctoral Thesis, Universiteit Amsterdam, 2008) 32

⁹¹ Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF, 2005) 16

⁹² The Committee on the Rights of the Child, General Comment No.10: Children’s Rights in Juvenile Justice (2007) UN Doc. CRC/C/GC/10 para. 85; UN Committee on the Rights of the Child, General Comment No.24: Children’s Rights in Juvenile Justice (draft) UN Doc. CRC/C/GC/24 para.104

⁹³ The Committee on the Rights of the Child, General Comment No.10: Children’s Rights in Juvenile Justice (2007) UN Doc. CRC/C/GC/10 para. 89; UN Committee on the Rights of the Child, General Comment No.24: Children’s Rights in Juvenile Justice (draft) UN Doc. CRC/C/GC/24 para.108

⁹⁴ *ibid*

⁹⁵ *ibid*

Age-Appropriate treatment results in effective rehabilitation and reintegration of the child offender. Besides that, a plethora of reports display the negative consequences of detaining children with adults.⁹⁶ Children in adult prisons are often the targets for physical, sexual, and emotional abuse. Such actions pose serious threats to the child's development, survival and life. It is axiomatic that the placement of child offenders with adult offenders could lead to further indoctrination of the children into the world of crime. Even in the environments where children are separated from adult offenders, age appropriate treatment also prevents abuse and peer influence that may transpire amongst the children, especially between the older children and the younger children.⁹⁷ This form of treatment involves a microscopic approach in dealing with matters relating to child offenders as it views the group as a heterogeneous entity. This approach thereby further tackles issues that would have been overlooked in instances where there is no differentiation between children and adults or where all children are seen and treated as the same. In the light of the foregoing, it is therefore not out of place to conclude that the lack of an age-appropriate treatment for child offenders inhibits the fulfilment of the objectives of detaining the child offender and leads to grave violation of the child's rights.

2.5. Conclusion

Deprivation of Liberty of children should be a measure of last resort and be instituted in accordance with the fundamental and general principles of child justice. The use of deprivation of liberty should be aimed towards the rehabilitation and reintegration of the child, prevention of recidivism and the protection of society. Child offenders deprived of liberty are still rights holders and these rights must be respected, protected and fulfilled in accordance with the objectives of the deprivation of liberty. The standards in the deprivation of liberty of children are outlined in international and regional standards, with the CRC being the primary legal instrument on the rights of the child. Article 37(c) provides that children deprived of liberty should be treated with humanity and with respect to the inherent dignity of the human person as well as in an age-appropriate manner. This age appropriate method addresses in depth, the issues relating to the deprivation of child offenders. These standards create the appropriate environment for the recognition and implementation of the child's rights as well as the effective realization of the aims of the deprivation of liberty. These standards constitute the framework to be complied with by State parties like Nigeria.

⁹⁶ UN Committee on the Rights of the Child, 'General Comment No.10: Children's Rights in Juvenile Justice' (2007) UN Doc. CRC/C/GC/10 para. 85; UN Committee on the Rights of the Child, General Comment No.24: Children's Rights in Juvenile Justice (draft) UN Doc. CRC/C/GC/24 104; Barry Goldson and Ursula Kilkelly, 'International Human Rights Standards and Child Imprisonment: Potentialities and Limitations' (2013) 21 *International Journal of Children's Rights* 345, 353

⁹⁷ Barry Goldson and Ursula Kilkelly, 'International Human Rights Standards and Child Imprisonment: Potentialities and Limitations' (2013) 21 *International Journal of Children's Rights* 345, 353

Chapter 3: Child Justice Administration in Nigeria

3.1. Introduction

The Federal Republic of Nigeria is a country with a population of about 201 million persons, with 63 percent of its population being below the age of 25.⁹⁸ It is a multiculturally diverse nation with a plural legal system comprising of Common Law, Sharia Law and Customary Law.⁹⁹ As stated earlier, only 24 out of the 36 States in Nigeria have adopted the Child's Rights Act 2003 whilst the other States still apply the CYPA in making decisions concerning children. This chapter discusses the law and practice in Nigeria relating to the treatment of child offenders deprived of liberty. First, it provides an insight on the nature of child justice in Nigeria. Subsequently, it delves into the discussion on deprivation of liberty in the Nigerian Child Justice System. As a start point, the legislative framework as stipulated by the Child's Rights Act and the CYPA is brought into the spotlight. Thereafter, it goes ahead to discuss the reality of deprivation of liberty of child offenders in Nigeria.

3.2. Child Justice in Nigeria

The Nigerian Child Justice system is characterized by the existence of two separate legislation guiding its administration in different parts of the country, namely: Children and Young Persons Act (CYPA) and Child's Rights Act. In 1943, the CYPA was first enacted in the Lagos colony by the British colonial government as the Children and Young Persons Ordinance and later on amended and enacted for the entire country in 1948.¹⁰⁰ Its scope is limited to matters concerning "children in [or allegedly in] conflict with the law, children in need of care and protection and children considered beyond parental control".¹⁰¹ Its purpose is to "make provision for the welfare of children and the young, the treatment of young offenders and the establishment of juvenile courts".¹⁰² From this statement and its provisions, it is evident that the CYPA operates via a welfarist approach rather than a rights-based approach. This is not surprising because the Act is a reflection of the era in which it was enacted. At the time of its enactment, children were not truly regarded as rights holders but only given that which mankind could offer.¹⁰³

Given the inadequacies and shortcomings of the CYPA, the Child's Rights Act was enacted and it is currently applicable in 24 States. The Child's Rights Act provides a child's rights-based approach in dealing with matters relating to the child. In addressing a wider scope of issues, the Child's Rights Act provides that in all matters concerning the child, the best interest of the child shall be the paramount or primary consideration.¹⁰⁴ It emphasizes on "the need for proper care, protection, treatment and

⁹⁸ UN Department of Economic and Social Affairs, 'World Population Prospects 2019: Data Booklet' (ST/ESA/SER.A/424) 15

⁹⁹ Akintunde O. Obilade, *The Nigerian Legal System* (Sweet and Maxwell, 1979) 64

¹⁰⁰ Grace A. Arowolo, 'An Appraisal of the Legal Framework for Child Justice Administration in Nigeria' (2018) 6(1) *Journal of Law and Criminal Justice* 82

¹⁰¹ Mariam A. Abdulraheem-Mustapha, 'Child Justice Administration in the Nigerian Child Rights Act: Lessons from South Africa' (2016) 16 *African Human Rights Law Journal* 435, 436

¹⁰² Long Title of the Children and Young Persons Act Chapter 485 L.F.N. 1990

¹⁰³ See 1924 Geneva Declaration of the Rights of the Child

¹⁰⁴ Contrary to international and regional standards, the terms 'primary' and 'paramount' are used interchangeably in the Child's Rights Act in its discussion on the best interest of the child. See Article 1 of the Child's Rights Act 2003

development in the administration of [child] justice”.¹⁰⁵ Based on this approach, children in conflict with the law are not referred to as ‘juveniles’ and neither is the system referred to ‘juvenile justice’ rather, the terms ‘child’ and ‘child justice’ are used respectively. The change in terminology aims to ensure the protection of every child by tackling issues of discrimination and stigmatization arising from the terminologies. The system is geared towards the reformation and rehabilitation of children in conflict with the law.¹⁰⁶

3.3. Deprivation of Liberty in the Nigerian Child Justice System

The Constitution of the Federal Republic of Nigeria stipulates the fundamental human rights of persons in Nigeria. Every person has the right to personal liberty, however, this right to liberty can be deprived in the event of certain circumstances as stated in the Constitution, such as, the execution of a court order by reason of the accused being found guilty of a crime.¹⁰⁷ Also, every person has the right to life and is entitled to respect for the dignity of his person.¹⁰⁸ It is upon this foundation that the treatment of persons including children deprived of liberty, is based.

3.3.1. Law in the Books – Legislative Framework

3.3.1.1. *Child's Rights Act*

The Child's Right Act states that the aim of deprivation of liberty is for “the treatment and training of the child by the provision of “care, protection, education and vocational skill with a view to assisting the child to assume socially constructive and productive roles in the society”.¹⁰⁹ This Act provides that institutional care must be a measure of last resort and reasons must be given by the court for its issuance of this disposition option.¹¹⁰ It provides for other disposition orders such as community service, payment of fine, counselling, care, guidance and supervision order, or any other order which is deemed legal according to the Act.¹¹¹ The Act however failed to include that deprivation of liberty should only be for the shortest appropriate period of time.

The Act prohibits the imprisonment of children and requires that children deprived of liberty be placed in child-specific approved institutions.¹¹² This therefore requires for the separation of child offenders from adult offenders. In addition, the Act also requires separate institutions for child offenders from children awaiting trial.¹¹³ There are two facilities available for the placement of child offenders, namely: the child residential centres and the child correctional centres.¹¹⁴ The difference between both institutions is that in reference to the child residential centre, there is specific mention for the provision of regular

¹⁰⁵ Mariam A. Abdulraheem-Mustapha, ‘Child Justice Administration in the Nigerian Child Rights Act: Lessons from South Africa’ (2016) 16 *African Human Rights Law Journal* 435, 443

¹⁰⁶ Mariam A. Abdulraheem-Mustapha, ‘Child Justice Administration in the Nigerian Child Rights Act: Lessons from South Africa’ (2016) 16 *African Human Rights Law Journal* at 435, 436

¹⁰⁷ Section 35 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

¹⁰⁸ Section 34 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

¹⁰⁹ Section 236(1) of the Child's Rights Act 2003

¹¹⁰ Section 223(2) of the Child's Rights Act 2003

¹¹¹ Section 223 of the Child's Rights Act 2003

¹¹² Section 247 and 248(1)(a) of the Child's Rights Act 2003

¹¹³ Section 250(2) of the Child's Rights Act 2003

¹¹⁴ Section 250(3) and 250(4) of the Child's Rights Act 2003

school education for the child offender whilst being in the institution.¹¹⁵ These institutions are to be inspected and effectively managed and in the event where there is no vacancy in these institutions, the court cannot order the institutionalization of the child.¹¹⁶ This aids to curb overcrowding and prevent the placement of children in prisons. The provision of specific detention facilities for child offenders provides an environment suitable for addressing the specific needs of child offenders both as a specific group and as individuals, considering their age, sex and other status. It also prevents the negative influence and abuse that emanates from the placement of child offenders with adult offenders. In addition, it prevents the peer influence of children awaiting trial by child offenders.

On the conditions and treatment of child offenders deprived of their liberty, the Child Rights Act provides for the respect of every child's right to dignity of his person.¹¹⁷ Section 236(2) of the Child's Rights Act states that child offenders placed in institutions are entitled to "care protection and all necessary assistance, including social, educational, vocational, psychological, medical assistance and physical exercise, that he may require, having regard to his age, sex, personality and in the interest of his development".¹¹⁸ Female child offenders are therefore to be treated fairly, equally but also given special attention to their specific needs as females.¹¹⁹

The Act therefore specifies for the age-appropriate treatment of child offenders deprived of liberty with respect to their rights and the principle of inherent dignity.

3.3.1.2. *Children and Young Persons Act*

The CYPA provides, amongst other options, for the deprivation of liberty of children and young offenders.¹²⁰ It neither states that deprivation of liberty should be a measure of last resort, nor for it to be used for the shortest appropriate period of time. This therefore increases the likelihood of placing children in institutions. Also, given that the provisions of the CYPA is not based on the concept of possession of rights, the child's best interest is not specified as a requirement to be considered in matters relating to the child. This could further lead to the institutionalization of children and young offenders as the placement in institution is wholly left to be decided at the discretion of the court, without any guiding principles or factors to be considered in all of such matters.

As stated earlier, under the CYPA, a child is any person below the age of 14 years and a young person is one who has attained the age of 14 and is below the age of 17 years.¹²¹ The Act prohibits the imprisonment of children¹²² but provides that young persons can be imprisoned if there are no other suitable disposition options for that case.¹²³ It also provides that in the event of a lack of remand centres, a child or young person can be placed in prison provided that he also is not allowed to associate with adult offenders.¹²⁴ These exceptions thereby provide loopholes where the rights of the child can be

¹¹⁵ Section 250(3) of the Child's Rights Act 2003

¹¹⁶ Section 223(4) and 248(1)(b) of the Child's Rights Act 2003

¹¹⁷ Section 11 of the Child's Rights Act 2003

¹¹⁸ See also Section 236(5) of the Child's Rights Act 2003

¹¹⁹ See also Section 236(5) of the Child's Rights Act 2003

¹²⁰ Section 14 and 15 of the CYPA

¹²¹ Section 2 of the CYPA

¹²² Section 11(1) of the CYPA

¹²³ Section 11(2) of the CYPA

¹²⁴ Section 15(3) of the CYPA

gravely violated as a result of their placement in institutions specially created for adults and not centred on child-specific approaches towards the rehabilitation and reintegration of the child offender. It also creates a disparity in the treatment of child offenders across Nigeria given that children within the Children's Rights Act States are for no reason permitted to be imprisoned but children in the CYPA States can be imprisoned in certain circumstances despite its prohibition on imprisonment. The facilities specifically for the deprivation of liberty of child offenders are borstal institutions and remand centres. Having said that, these facilities are established to also detain persons up to the age of 21 years.¹²⁵ This also is contrary to the law's earlier provision for the separation of child offenders from adult offenders. It further creates avenues for the violation of children's rights such as physical or sexual abuse and increases the likelihood of recidivism resulting from influence from the adults present. In essence, despite its stated ban on imprisonment of children and the separation of child offenders from adult offenders, its provisions also permit the operation of the contrary.

The CYPA in its subsidiary legislation makes specific provisions regarding the conditions and treatment of children deprived of liberty. Rule 10 of the Children and Young Persons (Approved Institutions) Regulations provides that children in the approved institutions are to receive educational training in line with their age and development. Adequate sleeping conditions, like the provision of separate beds and separate accommodations for both genders must be provided at these facilities.¹²⁶ Also in line with catering for the welfare of the child offenders, the regulations also provide that food, clothing, medical and dental attention must be provided in these facilities.¹²⁷ It also provides that the child offenders shall receive vocational and religious training.¹²⁸ In aiding their development and ensuring effective reintegration upon release from prison, arrangements are also to be made for child offenders to attend lectures, go on excursions and camps, or work outside the institution.¹²⁹ Children are also permitted to engage in physical training and games as well as contact family and friends.¹³⁰ These provisions seek to provide the adequate treatment conditions for child offenders deprived of liberty. Nevertheless, its provisions are not based on any overarching principle such as the respect of the inherent dignity of the human person. The conditions and treatment of the child offender is therefore limited to the provisions made in the regulations. In addition, these provisions can be deprived of the child for the sake of disciplining the child offender: both regulations provide that in disciplining a child, several measures can be adopted such as the reduction in the quality or quantity of food.¹³¹ This provision buttresses the absence of any overarching guiding principle like dignity in the discussion of the treatment and conditions of child offenders deprived of liberty in States where the CYPA is applied.

¹²⁵ Section 3(b) of the Borstal Institutions and Remand Centres Act 1962

¹²⁶ Section 10 and 11 of the Children and Young Persons (Remand Home) Rules

¹²⁷ Rule 22 of the Children and Young Persons (Approved Institutions) Regulations; Rules 12, 13, and 14 of the Children and Young Persons (Remand Homes) Rules

¹²⁸ Rules 11 and 12 of the Children and Young Persons (Approved Institutions) Regulations; Rule 16 of the Children and Young Persons (Remand Homes) Regulations

¹²⁹ Rule 13 of the Children and Young Persons (Approved Institutions) Regulations

¹³⁰ Rule 14 and 15 of the Children and Young Persons (Approved Institutions) Regulations; Rule 15 of the Children and Young Persons (Remand Homes) Regulations

¹³¹ Rule 17(b) of the Children and Young Persons (Remand Homes) Regulations; Rule 4(b) of the Children and Young Persons (Approved Institutions) Regulations

3.3.2. Law in Action

The law in action differs from the law in the books in the jurisdictions of both the Child's Rights Act and the CYPA. This is evident upon the analysis of the present facilities and the conditions of treatment in these facilities.

3.3.2.1. Facilities

In practice, the imprisonment of children is the norm in both the jurisdictions that have adopted the Child's Rights Act and the jurisdictions still operating with the CYPA. For instance, Lagos which is one of the States in Nigeria to have adopted the Child's Rights Act still has child offenders in its prisons.¹³² In the Maiduguri Maximum Security Prison located in Borno, a state applying the CYPA, children are also still imprisoned as well as alongside adults.¹³³ Even in the Country's capital, Abuja, child prisoners are present in its Kuje prison.¹³⁴ This issue has also been recognised by the CRC Committee as it expressed its concern in its latest Concluding Observation to Nigeria.¹³⁵ There is also a lack of separation as children awaiting trial are also placed with child offenders and the adult offenders. Contrary to the laid down legal provisions, imprisonment of child offenders seems evidently to be the prevailing norm. On the availability of institutions for children, there are only 3 borstal institutions for the placement of child offenders in the country: Abeokuta, Ilorin and Kaduna.¹³⁶ There are also a few remand homes and schools without specific documentation on the number of available facilities. Furthermore, there is no mention of the existence of the child-centred facilities like the correctional and residential facilities, as prescribed by the Child's Rights Act.

These available facilities are insufficient to cater for the number of child offenders in a country with a youthful population of over 200 million people. Overcrowding is therefore a major issue in all institutions including the prisons. For instance, the Kaduna Borstal institution which was established for the placement of 200 persons (i.e. children and persons below the age of 21 years) now contains over 600 persons. This is also true for prisons, with Kano Central Prison(Gidan Yari) housing over 1000 extra inmates and the Enugu prison housing over 750 inmates.¹³⁷ Prisons in some areas like Port Harcourt, Owerri, Benin, Aba and others often have an over subscription of inmates up to the tune of 500%.¹³⁸ Besides the limited number of facilities, they are also outdated, dilapidated and hence inadequate to ensure the treatment of child offenders. Some of the institutions, like the child custodial institution in the

¹³² Omojuyigbe Oluwatosin, 'Lagos CJ releases more underage inmates from Ikoyi Prison' *Punch* (17 August, 2017) < <https://punchng.com/lagos-cj-releases-more-underage-inmates-from-ikoyi-prison/>> accessed 24 June, 2019

¹³³ Amnesty International, 'Nigeria: Children and Women Face Sexual Violence in Borno Prisons' (29 April, 2019) < <https://www.amnesty.org/en/latest/news/2019/04/nigeria-children-and-women-face-sexual-violence-in-borno-prisons/>> accessed 6 July 2019

¹³⁴ Editorial Board, 'Underage Imprisonment, Sign of a Broken Society' *Punch* (17 August, 2017) < <https://punchng.com/underage-imprisonment-sign-of-a-broken-society/>> accessed 24 June 2019

¹³⁵ UN Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Nigeria' (2010) UN Doc. CRC/C/NGA/CO/3-4 90

¹³⁶ United Kingdom Home Office, 'Country Policy and Information Note- Nigeria: Prison Conditions' (November, 2016) 10; Anthony A. Olashore, Oluyemi O. Akanni and Odunayo O. Olashore, 'Associate Factors of Delinquency Among Incarcerated Male Juveniles in a Borstal Institution in Nigeria' (2017) 16(3) *International Journal of Forensic Mental Health* 207, 209; Nisrine Abiad and Farkhanda Z. Mansoor, 'Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytic Perspective' (British Institute of International and Comparative Law, 2010) 217

¹³⁷ Jombo Onyekachi, 'Problems and Prospects of Administration of Nigerian Prisons: Need for Proper Rehabilitation of the Inmates in Nigerian Prisons' (2016) 5(4) *Journal of Tourism and Hospitality* 5

¹³⁸ Emeka P. Nwosuji, 'An Overview of the Challenges and Rehabilitation of Prisoners in Nigeria' (2015) 5(3) *International Journal of Social Sciences and Humanities Reviews* 73, 75

Enugu prison was built in the colonial era therefore besides its inadequacies, they were structured based on a more punitive approach which totally ignored the concept of rights ownership of persons, including children. The Ebonyi State Government in Nigeria has commenced the building of a new prison facility in Ebonyi in order to curb overcrowding and provide better treatment and training of persons deprived of liberty.¹³⁹ In general, very little action has been taken to provide suitable facilities for the treatment and training of children based on an age-appropriate approach.

3.3.2.2. Conditions

The conditions and treatment of child offenders deprived of liberty is reliant on the availability and adequacy of the resources. As stated earlier, the structural facilities are inadequate and dilapidated. Most of the institutions lack even the basic amenities for the survival of the detainees. These institutions lack sufficient and quality food, proper toilet facilities, humane sleeping conditions, proper ventilation.¹⁴⁰ In some cases, a room built to accommodate 4 persons may be accommodating 100 as they sleep in the congested room on bare concrete floors or at best, a shared bed with others.¹⁴¹ These situations are highly detrimental to the health of the persons detained especially the children and such environments are breeding grounds for epidemics. There have been outbreaks of several diseases like tuberculosis, skin diseases, HIV/AIDS, small pox, and others which have also led to the death of persons.¹⁴² These instances of illnesses and death is further heightened by the lack of adequate medical services and supplies.¹⁴³ Besides the physical illnesses, the child offenders also experience psychological illnesses which may go unnoticed, unaddressed or treated in an inadequate manner. A study conducted by the department of psychiatry in the College Hospital and University of Ibadan showed that child offenders deprived of liberty required serious mental health needs with anxiety, suicidal and depressive symptoms being the most common amongst the children.¹⁴⁴

There has been little action taken towards the provision of opportunities for child offenders in order to prevent recidivism. The Nigerian Prisons Service alongside other government officials have taken steps towards the training of offenders by providing vocational tools.¹⁴⁵ The Nigerian Prisons Service has also partnered with National Open University to provide educational training and it has also enrolled offenders to write the national examinations such as the Unified Tertiary Matriculation Examination

¹³⁹ Nigerian Prisons Service, 'Introducing an Ultra-Modern 3000 Capacity Prison in Nigeria' (17 July 2018) <https://www.prisons.gov.ng/news?id=55089> accessed 24 June 2019

¹⁴⁰Emeka P. Nwosuji, 'An Overview of the Challenges and Rehabilitation of Prisoners in Nigeria' (2015) 5(3) *International Journal of Social Sciences and Humanities Review* 73, 74-76; Iyabode Ogunniran, 'The Lock and Key Phenomenon: Reforming the Penal Policy for Child Offenders in Nigeria' (2013) *Justice Policy Journal* 10(1) at 7 - 10

¹⁴¹ Jombo Onyekachi, 'Problems and Prospects of Administration of Nigerian Prisons: Need for Proper Rehabilitation of the Inmates in Nigerian Prisons' (2016) 5(4) *Journal of Tourism and Hospitality* 5

¹⁴² Abah A.E. Nduka F.O. Amadi Q. Aguocha O.C. and Neji P. 'Malaria Infection among Prison Inmates of the Maximum Security Prison Borokiri, Port-Harcourt, Rivers State, Nigeria' (2018) 39(2) *Nigerian Journal of Parasitology* 127

¹⁴³ Emeka P. Nwosuji, 'An Overview of the Challenges and Rehabilitation of Prisoners in Nigeria' (2015) 5(3) *International Journal of Social Sciences and Humanities Review* 73, 76; Amari C. Omaka, 'Decongesting Prisons in Nigeria: the EBSU Law Clinic Model' (2010) 20 *International Journal of Clinical Legal Education* 533, 552

¹⁴⁴ Atilola O. Bella T.T. and Omigbodun O.O. 'Children within the Juvenile Justice System in Nigeria: Psychopathology and Psychosocial Needs' (2010) 8(1) *Annals of Ibadan Postgraduate Medicine* 34

¹⁴⁵ Nigerian Prisons Service 'Governor Bagudu Donates Tools to Prison Inmates' (4 July 2018) < <https://www.prisons.gov.ng/news?id=31877>> accessed 24 June, 2019

(UTME).¹⁴⁶ These opportunities are mainly applicable to adults or older children; this may also be as a result of the fact that prisons are not structured for children but adults. The borstal institution in Abeokuta, Ogun State is equipped with educational facilities such as a lecture hall, library and there are teachers.¹⁴⁷ There are also vocational training services in the areas of carpentry, tailoring, welding and others.¹⁴⁸ It is undisputed that these are indeed steps taken towards promoting the effective reintegration of the child. Having said that, the inhuman living conditions faced by the child offenders has a huge detrimental effect on the performance of the children and their ability to take hold of the opportunities provided for them. Also, these institutions are riddled with the issue of inadequate staffing both in terms of quantity and quality. There is a shortage of staff, trained in the areas of children's rights, child welfare, psychology and other related fields.¹⁴⁹ The absence of such staff hinders the administration of a child justice system which promotes the treatment of the child offender with humanity and respect for his inherent dignity and ensures the child's ability to reintegrate upon release.

3.4. Conclusion

The Nigerian child justice system is formulated by the provisions of the Child's Rights Act and the CYPA. Both legal provisions exist separately in different parts of the country. The aim of the child justice system is to aid reintegration and rehabilitation, protect society and prevent recidivism. The Child's Rights Act domesticates international standards as it specifies for an age-appropriate treatment which upholds the inherent dignity of the child offender deprived of liberty. This therefore prohibits the imprisonment of children and permits, as a measure of last resort, the placement of children in child appropriate institutions geared towards achieving the aims of deprivation of liberty. The CYPA on the other hand, adopts a welfarist approach, making no reference to children as rights holders but provides specific conditions for the treatment of children and young persons in institutions and prisons. Despite the differences in the laws, the practice in both Child's Rights Act and CYPA jurisdictions across the country is similar and contrary to the normative framework provided by international standards.

¹⁴⁶ United Kingdom Home Office, 'Country Policy and Information Note- Nigeria: Prison Conditions' (November 2016) 11-12; Jombo Onyekachi, 'Problems and Prospects of Administration of Nigerian Prisons: Need for Proper Rehabilitation of the Inmates in Nigerian Prisons' (2016) 5(4) *Journal of Tourism and Hospitality* 5;

¹⁴⁷ Anthony A. Olashore, Oluyemi O. Akanni and Odunayo O. Olashore, 'Associate Factors of Delinquency Among Incarcerated Male Juveniles in a Borstal Institution in Nigeria' (2017) 16(3) *International Journal of Forensic Mental Health* 207, 209

¹⁴⁸ *ibid*

¹⁴⁹ E.E.O. Alemika and I.C. Chukwuma, *Juvenile Justice Administration in Nigeria: Philosophy and Practice* (Centre for Law Enforcement Education, 2001) 71

Chapter 4: Comparative Analysis of the Nigerian Law and Practice with International Children's Rights Standards on Deprivation of Liberty

4.1. Introduction

In the deprivation of a child offender's liberty, international and regional standards specify for it to be conducted with humanity and respect for the inherent dignity of the human person as well as in an age-appropriate manner. Nigeria, having ratified International and Regional legal instruments like the United Nations Convention on the Rights of the Child and the African Children's Charter, respectively, is bound by these standards. This chapter analyses the extent to which the law and practice in Nigeria with regards to the deprivation of liberty of child offenders is in line with international standards. This would be viewed and analysed through two major lenses and conditions: (a) Humanity and Inherent Dignity; and (b) Age- Appropriate Treatment. It considers the extent to which the country's law and practice complies with the child's rights approach and discusses the reasons for its shortcomings.

4.2. Conditions of Deprivation of Liberty

4.2.1. Humanity and Inherent Dignity

The Child's Rights Act of Nigeria, just like international standards on the subject matter, outlines the rights of every child to be treated with respect for the inherent dignity of the human person. This principle is the foundational provision for all conditions and treatments of child offenders deprived of liberty in States that have adopted the Child's Rights Act. Although specific provisions are not explicitly mentioned, it is implied that all forms of treatment must comply with this principle, that is, tailored towards the best interest of the child and void of discrimination. The CYPA on the other hand makes specific provisions on the conditions and treatment of child offenders deprived of liberty. These provisions as laid down in its subsidiary legislation are similar to the provisions outlined in guiding standards like the Havana Rules and Beijing Rules. Also, the provisions are aimed at reintegrating and rehabilitating the child offender and they specifically address the living conditions, well-being and development of the child. However, despite its robust provisions on the conditions and treatment of child offenders, the CYPA completely ignores the rights-based approach which views the child offenders, or the child in general as a rights holder. This in essence side-lines the principles of humanity and inherent dignity, hence providing no basis for its choice of provisions. Given the absence of a foundational principle guiding the legal provisions of the CYPA, some of its provisions are contrary to the child's rights approach. For instance, the CYPA provides that a child offender deprived of liberty can be disciplined by the reduction of his or her quantity or quality of food.¹⁵⁰ This disciplinary method tampers with the health and well-being of the child; imposing such punishment leads to the malnourishment of the child, thereby negatively affecting their growth and development and exposing the body to further ailments. This is indeed contrary to international standards which specifies that disciplinary measures adopted must be in compliance with the principle of inherent dignity and aimed at fulfilling the objectives of deprivation of liberty. The reduction in the quality or quantity of a child's food is an inhuman and degrading treatment and definitely contrary to the guiding principles of the conditions of deprivation of liberty.

The practice in both jurisdictions across the country is to a large extent similar and contrary to the international legal standards. There is a huge gap between the stated provisions in the laws and the reality of the conditions and treatment of children deprived of liberty. Several cases of abuse and inhuman treatment in the facilities have arisen in both jurisdictions. It is as though the Child's Rights Act

¹⁵⁰ Rule 17(b) of the Children and Young Persons (Remand Homes) Regulations; Rule 4(b) of the Children and Young Persons (Approved Institutions) Regulations

is not truly implemented in its applicable States in disposition matters. Both jurisdictions lack even the basic resources for survival and very little facilities pertaining the development of the child whilst in the institution. The available institutions are few and the conditions therein as earlier stated are dehumanizing which means that there is basically no consideration of the principles of humanity and inherent dignity. The concept of rights as mentioned is totally unrecognised as some of the amenities and services provided to the offenders such as food, hygiene supplies, medical care are on the basis of charity by organisations and individuals, including government officials.

In essence, the international children's rights standards which specifies for the treatment of child offenders with humanity and respect for their inherent dignity are the foundational principles guiding the provisions of the Child's Rights Act. The CYPA on the other hand lacks any guiding principle hence the presence of conflicting provisions and provisions contrary to international standards. The practice in both jurisdictions, with regards to the treatment of child offenders deprived of liberty with humanity and inherent dignity remains far from international standards.

4.2.2. Age-Appropriate Treatment

The child's rights approach as stipulated primarily by the CRC provides that the deprivation of liberty shall be conducted in a manner which takes into consideration the needs of children of that particular age. The legal provisions of the Nigerian child justice system as provided by the Child's Rights Act aims to provide a child-centred environment where care, protection and assistance, having regards to his age and other factors are considered. This principle therefore requests the prohibition of imprisonment, the separation of child offenders from adult offenders as well as the provision for the creation of child correctional and residential centre for child offenders. For the CYPA, although the requirement of an age-appropriate treatment is not expressly outlined, the Act also prohibits imprisonment and the association of child offenders with adult offenders and requests for the placement of children in approved institutions. Having said that, the CYPA, contradicts itself and makes provisions contrary to age-appropriate treatment. For instance, despite its outright prohibition of imprisonment of children in Article 11(1) CYPA, it permits the imprisonment of children in situations where there are no conveniently situated child appropriate facilities. Also, its provision that young persons can be imprisoned in the absence of no other suitable disposition option is also a violation of the age-appropriate treatment as these young persons are also children (they are persons from the age of 14 and below 17 years). As stated earlier, the CYPA's definition of a 'child' (and 'young person') is already contrary to international standards which the country is bound and therefore permits the varied treatment of children deprived of liberty across the country. Furthermore, children still associate with adults because person above the age of 18 are placed in borstal institutions with children and this practice is not based on a consideration of the child's rights approach of the best interest principle.

In practice, there is little to no evidence of an age-appropriate treatment within the Nigerian child justice system. The provisions outlined in the Child's Rights Act is once again not implemented in the States where it has been adopted. As stated in Chapter 3, the practice in the Child's Rights Act jurisdictions mainly emulate the practice in the CYPA States. There are no reports on facilities based exactly on the Child's Rights Act specifications, rather, the available facilities are from the CYPA era and they are inadequate, dilapidated and outdated. The lack of sufficient and quality staff to aid the administration of an age-appropriate approach also hinders the fulfilment of this international standard. Furthermore, limited action has been taken towards providing educational and vocational facilities catering for the different age groups as thus far, most of these facilities are suitable for the older child offenders.

In sum, the legislative framework of the Child's Right's Act is framed in accordance with the requirements of international standards to provide an age-appropriate treatment of child offenders deprived of liberty. The CYPA on the other hand has no foundational basis upon which its provisions emanate from; it

therefore contains provisions both in support of an age-appropriate treatment and provisions contrary to this requirement. In practice, there is also no difference between the operation in the jurisdictions of the Child's Rights Act and that of the CYPA States as it is evident that the Child's Rights Act has also not been implemented in regard to the conditions of deprivation of liberty of child offenders in Nigeria. Thus, the international standard on the age-appropriate treatment of children deprived of liberty is not fulfilled in the Nigerian child justice system.

4.3. The Gap: Shortcomings of the Nigerian Law and Practice on Deprivation of Liberty

It is evident upon analysis that there is a gap between the international standards on the conditions of deprivation of liberty and the Nigerian framework both in law and practice. First, this is as a result of the continued existence of the CYPA, a legal instrument void of any foundational or guiding principle therefore resulting in its contradictory and conflicting framework with itself and international standards. Second, the gap between international standards and the national law and practice is also as a result of the failure to implement the provisions of the Child's Rights Act on such matters in States that have already adopted this Act. The lack of implementation of the Child's Rights Act could be for reasons such as the lack of relevant facilities, data, training and awareness on the child's rights approach on deprivation of liberty.

4.3.1. Relevant Facilities

The fulfilment of the child's rights standards on the conditions of deprivation of liberty requires the availability of child-specific facilities. The Child's Rights Act strictly prohibits the imprisonment of children and provides for the establishment of approved institutions which cater for different demographics of children. For child offenders, it provides that child residential centres and correctional facilities be established. The only facilities for children are the forms of approved institutions operating before the Child's Rights Act which as mentioned earlier are outdated, insufficient and inadequate to function towards the rehabilitation and reintegration of child offenders. Given this lack of facilities, rather than adhering to the Child's Rights Act provision of not ordering the disposition of deprivation of liberty, the court still proceeds to make this order; consequently, children are imprisoned. The prison facilities neither meet the standards for humane treatment nor the standards for an age-appropriate treatment. Such facilities prevent the fulfilment of the objectives of the deprivation of liberty of child offenders and the conditions and treatment constitutes grave violation of human rights which has sometimes led to death. Given the lack of these facilities, it is therefore impossible to implement the provisions of the Child's Rights Act, hence preventing the adherence to international standards on deprivation of liberty.

4.3.2. Data

The lack of data on the Nigerian child justice system is a hindrance to the implementation of the Child's Rights Act and therefore the failure to meet international standards. It is undeniable that insufficient funding is one of the reasons for the lack of relevant facilities and hence the delay in the interpretation of the Child's Rights Act. However, the lack of data, for instance with regards to the number of child offenders deprived of liberty makes it impossible for the allocation of sufficient funding for the implementation of the Child's Rights Act with regards to disposition matters. Given that there is no information such as the exact or estimated number of children deprived of liberty, the number of child offenders within this group, their age, sex, and other relevant factors, difficulties arise as to the number of facilities and capacity that would be sufficient to provide an age-appropriate treatment in respect of the child's inherent dignity. Bodies like the National Human Rights Commission in Nigeria conduct annual audits of prisons across the country, however, only a few of these audits have been released to the general public thus far. Withholding of such statistics, creates obscurity and vagueness in the plans put forward to the government to improve the conditions of children deprived of liberty and therefore leads to a failure to meet international standards.

4.3.3. Training and Awareness on the Child's Rights Approach

The lack of training and awareness on the rights of the child and the child's rights approach on the deprivation of liberty of child offenders prevents the implementation of the Child's Rights Act and therefore prevents the achievement of the international standards. The child's rights approach requires that child offenders be treated as rights holders and that the psychological and physiological peculiarities of childhood and of that individual child be taken into consideration in the treatment and training of the child. This approach addresses both general and individual issues in order to ensure the total rehabilitation and reformation of the child for him or her to assume a constructive role in society. Unfortunately, there is lack of awareness on the importance and effectiveness of this approach as well as the lack of training of persons involved in the child justice process on the implementation of this approach. For instance, the lack of awareness of judges on the individual and societal impact of ignoring the child's rights approach causes them to unflinchingly order for the institutionalization of child offenders despite the lack of the child-specific resources including the trained staff that would ensure the achievement of the objectives of deprivation of liberty. The effect of the lack of awareness of this approach is also evident upon the observance of the actions and inactions taken by the government in its quest to tackle the issue of recidivism and insecurity in society. Furthermore, the lack of trained staff in these institutions also permits the gross violation of the rights of child offenders deprived of liberty

4.4. Conclusion

The administration of child justice in Nigeria is bound by the child's rights standards outlined by the international and regional standards and domesticated by the Child's Rights Act 2003. Based on these standards, children deprived of liberty are to be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into consideration the age of the child. The Child's Rights Act upholds these principles as its guiding principles in the administration of deprivation of liberty of child offenders. On the other hand, the provisions of the CYP A is not guided by any overarching principle hence the presence of contradictory and conflicting statements. In practice, the conditions of treatment of child offenders across both jurisdictions are similar given the failure to implement the provisions of the Child's Rights Act in this matter. This failure is as a result of the lack of the relevant facilities, reliable data and awareness and training on the child's rights approach of deprivation of liberty. The gap between the international standards on deprivation of liberty of child offenders and the national law and practice can be bridged through the adoption of certain recommendations.

Chapter 5: Conclusion and Recommendations

5.1. Conclusion

The respect for the inherent dignity of the human person should be the guiding principle for the treatment of persons alleged as, accused of or recognized as being in conflict with the law. Deprivation of liberty as a disposition option in the administration of child justice should be a measure of last resort to be applied only for the shortest appropriate period of time. It is pertinent that it should be conducted lawfully and non-arbitrarily. The Convention on the Rights of the Child states in Article 37(c) that a child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of that particular age.

Nigeria is a Member State to the Convention on the Rights of the Child, the African Children's Charter, amongst others, so these standards are expected to be foundational principles in its child justice system. The legal provisions on matters relating to children are the Child's Rights Act which is applicable in 24 States of the Federation and the CYPA, applicable in 12 States. The provisions for the legislation of the 24 States is based on the rights-based approach which recognises the right of the child to be treated with humanity and respect for the inherent dignity of the human person as well as the need to provide an age-appropriate treatment. This thesis finds that the legislative framework of the CYPA on the other hand, adopts a welfarist approach and provides no underlying basis for the nature of provisions outlined in its Act. This therefore leads to a conflict in provisions within the Act itself and with international children's rights standards. In practice, there is no difference between the practice in the CYPA States and in the Child's Rights Act States. In both jurisdictions, the conditions of most of the institutions are unfit for human habitation, with children being placed in prisons with adults or in outdated borstal institutions with adults as well. The practice completely neglects the requirement for age-appropriate treatment. This thesis concludes that the law and practice of the deprivation of liberty of child offenders in Nigeria is to a large extent, contrary to the international standards on deprivation of liberty of child offenders.

From the foregoing, it could be safe to state that the two main reasons creating the gap between the international standards and the national law and practice is first, the continuous existence of the CYPA, a legislation which contradicts its own self and that of international standards and second, lack of implementation of the provisions of the Child's Rights Act in matters regarding deprivation of liberty. This delay in the implementation of the Child's Rights Act could be attributed to the dearth of facilities, unavailability of reliable data or statistics and the lack of awareness and training on the importance and impact of the child's rights approach.

5.2. Recommendations

Nigeria's compliance with international standards on the treatment of child offenders deprived of their liberty can be achieved through the adoption of certain recommendations with regards to its law and practice.

5.2.1. The Law

- *Annulment of the Children and Young Persons Act*- The annulment of the CYPA eliminates the confusion the Act brings in matters relating to the child. It has been established that the CYPA contradicts itself and conflicts with international standards. Besides that, the Act is a reflection of the era in which it was established: an era where children were not regarded as rights holders, hence, it is outdated and unsuitable to effectively address issues concerning children.

- *Ratification of the Child's Rights Act 2003 by the other 12 States* – Upon the annulment of the CYPA, the Child's Rights Act should be ratified by all the other 12 States. This provides for a child's rights-based approach in resolving issues relating to the child. It ensures uniformity in the treatment of child offenders across the country and secures the concept that children deprived of liberty would only be treated with humanity and respect for their inherent dignity as well as in an age-appropriate manner. This approach seeks to better achieve the goals of deprivation of liberty and eliminates confusion. Having said that, in the adoption of this Act by the other States, clarification should be made on the principle of best interest. The Child's Rights Act interchangeably refers to the best interest principle as 'primary' and 'paramount' and therefore fails to recognise the difference between both terms. This clarification should also be made by the other 24 States.

5.2.2. The Practice

- *Awareness Creation and Training on the Child's Rights Approach* – Lack of awareness on the Child's Rights Approach would result in actions which may be counterproductive to the objectives of deprivation of liberty and a violation of the rights of the child. First, awareness creation as well as the training of persons involved in the administration of child justice system on the child's rights standards of deprivation of liberty is needful. The creation of awareness also involves informing the child offenders of their rights. The right to information is a right of every child and it should be conducted in a manner which takes into consideration the child's age, development level, language and other factors relevant for informing the child of their rights. The lack of awareness of the rights possessed is already a major step towards the violation of the child's rights.¹⁵¹
- *Data Collection*- Secondly, just as the CRC Committee has recommended,¹⁵² data collection, evaluation and research is necessary towards the effective protection, respect and fulfilment of the child's rights. The relevant authorities should provide updated statistics on matters such as the number of children in contact with the child justice system, the number of children deprived of liberty, the number of child offenders in that group, their age, sex, the number of available facilities and all other relevant factors. This aids in the effective administration of child justice as data is essentially required in the formulation of policies, allocation of resources and the operation of all other matters.
- *Investment in Alternatives to Imprisonment and Improvement of Child-Specific Institutions*- Thirdly, in ensuring that the child assumes a constructive role in society, there should be investment in alternative measures of dealing with children in conflict with the law besides the formal trial procedure; even within the formal trial procedure, other disposition options should be explored. The investment in and use of these alternatives would particularly address the issue of overcrowding in prisons and the child-specific institutions. The institutions also need to be improved. The smaller group of child offender that would be placed in institutions still need to be placed in child-appropriate environments suitable for the achievement of the objectives of deprivation of liberty and in compliance with their inherent dignity.

¹⁵¹ see also United Nations Committee on the Rights of the Child, 'General Comment No.10: Children's Rights in Juvenile Justice' (2007) UN Doc. CRC/C/GC/10 para 96-97

¹⁵² United Nations Committee on the Rights of the Child, 'General Comment No.10: Children's Rights in Juvenile Justice' (2007) UN Doc. CRC/C/GC/10 para 98-99

- *Establishment of Effective Reporting and Monitoring Mechanisms* – Finally, there should be a means whereby rights violation can be reported and acted upon in a child appropriate manner by the officials of the institution. Every child has a right to express his views in all matters concerning him and for these views to be taken into consideration. Reporting and the ability to monitor the progress made, following on from the report curb rights violation. It ensures a secure environment where children can be treated with humanity and respect of their inherent dignity.

As long as these issues are not addressed and international norms on the deprivation of the liberty of the child are not enforced, the foundations remain in place for the encroachment on the rights of the child to take on more extreme forms and spread to all spheres of society. Due consideration must be had to the fact that effective combat against deprivation of child's rights requires composite strategy that involves targeted and sincere steps against these conducts that undermine the enjoyment of the rights of the child.

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Appendix 2: Declaration statement



Date: 12.07.2019
Location: THE HAGUE, NETHERLANDS

Declaration Statement

I further hereby certify that this is an original work, that this thesis does not contain any materials from other sources unless these sources have been clearly identified in footnotes, and any and all quotations have been properly marked as such and full attribution made to the author('s) thereof.

I further authorise Leiden University, the Faculty of Law, the LL.M. Adv. Programme in European and International Business Law, its Programme Board and Director, and/or any authorised agents of the Institution, and persons named here in and above, to place my thesis in a library or other repository including but not limited to associated websites, for the use of the visitors to or personnel of said library or other repository. Access shall include but not be limited to hard copy or electronic media

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