

# The nexus between the best interests of the child and detention of children in conflict with the law

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## Abstract

*The principle of the best interests of the child is a universally recognised norm of the Convention on the Rights of the Child (CRC). While there is no consensus on the definition of this principle, various soft law documents, academic literature, and judgments demonstrate its centrality in both private and public spheres. The Children Act of 2022 provides a detailed articulation of this principle, facilitating its application in the Kenyan context. This paper examines the Kenyan and international legal and normative framework on the detention of children in the child justice system. It explores the nexus between the detention of children in conflict with the law and the principle of the best interests of the child. The authors contend that the detention of children in conflict with the law should be guided by the principle of the best interests of the child, as enshrined in Article 53(2) of the Constitution of Kenya, 2010 and international law. It reaffirms the position, adopted by courts of law, that there should be a limit to the institutionalisation of children in Kenya. The authors further advocate diversionary measures to judicial proceedings, such as family group conferencing, as suitable options.*

**Keywords:** best interests of the child, children in conflict with the law, Children Act of 2022, diversionary measures

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## Introduction

Children constitute a vital component of the social fabric as they embody the prospective destiny of the collective. They ensure the perpetuation of the familial lineages and heritages, manifesting the aspirations and visions of the milieu in which they are nurtured. Hence, it is imperative that their welfare is prioritised, even in circumstances where they are incapable of articulating their own preferences. The global recognition of children's rights is evidenced by the ratification of the Convention on the Rights of the Child (CRC) by 196 states. Constitutions that encompass a broad spectrum of rights under their bill of rights, such as those of Kenya and South Africa, also attest to the centrality of children's rights within them.<sup>1</sup> Therefore, both domestic and global legislation acknowledge the pivotal role of these rights, and the duties on states and individuals they impose.

The African Charter on the Rights and Welfare of the Child (ACRWC) of 1990 establishes the legal framework on children's rights in the continent.<sup>2</sup> One of the initial milestones in the juridical evolution of children's rights was the ratification of the Geneva Declaration on the Rights of the Child by the League of Nations in 1924.<sup>3</sup> This document established a set of principles and norms to safeguard and promote the well-being and dignity of children across the world. Among these developments, which are relevant to the discussion of this paper, was the codification of four significant principles attached to the CRC namely: the best interest of the child principle; non-discrimination principle; the right to survival and development; and the views of the child.<sup>4</sup>

The best interest of the child is premised on the idea that while making any decision involving a child, the interests of the child take

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<sup>1</sup> Constitution of Kenya (2010), Article 53; Constitution of South Africa (1996), Section 28.

<sup>2</sup> 11 July 1990, CAB/LEG/24.9/49.

<sup>3</sup> United Nations Children's Fund (UNICEF), 'History of child rights' UNICEF--<<https://www.unicef.org/child-rights-convention/history-child-rights>> on 4 March 2024 .

<sup>4</sup> Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 3, Article 3.

priority.<sup>5</sup> For instance, where there is a custodial dispute, the best interest of the child is considered paramount as opposed to those of the state, parents or any other person. Article 3 of the CRC provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

Accordingly, it is evident from the above provision of the CRC that the best interest of the child applies to children in conflict with the law who have been detained in the criminal justice system. A comprehensive consideration of the best interest of a child who is in conflict with the law would encompass the entire process of legal involvement, from the initial contact with the law enforcement authorities, to the appearance in court as a witness or a victim, to the sentencing and subsequent reintegration into the community. Moreover, the best interest of the child would also entail diverting the child from the criminal justice system whenever possible.

A paramount principle in various legal instruments at the international and national levels, such as the African Charter on Human and Peoples' Rights (African Charter), is the principle of non-discrimination.<sup>6</sup> Constitutions of states such as Kenya and South Africa proscribe discrimination on the basis of an open-ended list of grounds.<sup>7</sup> In relation to children, the CRC stipulates that no child shall be subjected to discrimination on the basis of the status of the child or the parents.<sup>8</sup> Kenya has recently even extended the rights of intersex children, who endure marginalisation and discrimination.<sup>9</sup> The Children Act of 2022 imposes a penalty of 'imprisonment for a term not exceeding twelve months or to a fine not exceeding two hundred thousand shillings or to

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<sup>5</sup> CRC, Article 3.

<sup>6</sup> African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, Article 2.

<sup>7</sup> Constitution of Kenya (2010), Article 27(4); Constitution of South Africa (1996), Section 9(3).

<sup>8</sup> Convention on the Rights of the Child, Article 2.

<sup>9</sup> Children Act (No 29 of 2022), Section 21.

both' on persons who discriminate a child.<sup>10</sup> Such legislative sanctions that foster equality and non-discrimination are in conformity with the international standards embedded in, for example, the African Charter and CRC.

Thirdly, the right to survival and development relates to the achievement of children's social and economic rights.<sup>11</sup> Article 6(2) of the CRC provides that states ought to 'ensure to the maximum extent possible the survival and development of the child'. This is tied to a child's inherent right to life.<sup>12</sup> States, therefore, are obligated to ensure that its citizens (including children) are well-equipped to develop physically and psychologically.

Finally, the principle on the views of the child is founded on Article 12(1) of the CRC, which requires State parties to guarantee children's liberty and space to express themselves. Such views should be 'given due weight in accordance with the age and maturity of the child'.<sup>13</sup> In doing so, the capability of a child to develop their independent views on matters that affect them is safeguarded.

Among the four principles outlined above, the best interest of the child is the most commonly applied and studied. This paper critically explores the concept of the best interests of the child as a normative framework for the detention of children in conflict with the law. It examines how the Children Act of 2022 incorporates this concept into its provisions and evaluates the extent to which it is applied in practice. The paper also identifies the main gaps and challenges that hinder the effective implementation of this principle and offers some recommendations for improvement. The paper argues that the best interests of the child should not be seen as a mere rhetorical device, but as a substantive and procedural standard that guides all decisions and actions affecting children in detention.

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<sup>10</sup> Children Act (No 29 of 2022), Section 9.

<sup>11</sup> United Nations Children Fund (UNICEF), 'Four principles of the CRC', UNICEF, 24 June 2019.

<sup>12</sup> Convention on the Rights of the Child, Article 6(1).

<sup>13</sup> UNICEF, 'Four principles of the CRC'.

Having introduced some of the principles and contexts affecting children in conflict with the law, this article proceeds as follows: Part II outlines the different approaches that have defined best interest of the child since its inception and details on the tripartite classification of the best interest of the child, applied as a working definition of best interest of the child in this paper. Part III explores the legal and normative framework on detention of children in conflict with the law. This section investigates the intersection between the principle of the best interest of the child and the role of the child justice system in applying the principle during the detention of a child in conflict with the law. In Part IV, the paper explores the possibility of implementing non-custodial interventions for juvenile offenders, as a way to avoid the negative consequences of incarceration on their development and well-being. Part V concludes and makes some recommendations.

### **Scholarly perspectives on the definition of the best interest of the child principle**

First codified in the 1959 United Nations Declaration of the Rights of the Child,<sup>14</sup> the best interest of the child principle has metamorphosed to become a 'distinct right and rule of procedure'.<sup>15</sup> Despite its universal recognition and codification, lack of a definite definition of the best interest of the child has been a challenge.<sup>16</sup> Philip Alston argues that the best interest of the child principle should not be applied in a uniform way across different contexts.<sup>17</sup> He claims that the best interest of the child is a vague and confusing concept that can be interpreted

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<sup>14</sup> UN General Assembly, Declaration of the Rights of the Child, 20 November 1959, A/RES/1386(XIV), Principle 13.

<sup>15</sup> Fambasayi Rongedzai and Moyo Admark, 'The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe' 36(1) *South African Journal on Human Rights*, 3.

<sup>16</sup> Aron Degol and Shimelis Dinku, 'Notes on the principle "best interest of the child": Meaning, history and its place under Ethiopian law' 5(2) *Mizan Law Review* (2011) 325.

<sup>17</sup> Philip Alston, 'The best interest principle: Towards a reconciliation of culture and human rights' 8(1) *International Journal of Law, Policy and Family* (1994) 1.

differently depending on the social values and norms of each society. In his view, the best interest of the child should be given a wide and flexible interpretation that takes into account the national, regional and international circumstances of each case.

In essence, defining the principle requires consideration of 'the particular realities of a given state'.<sup>18</sup> This open-ended definition allows pluralistic morals and values to be applied. To give context, for instance, is the different morals and values applied in traditional Africa and the West due to communalism and individualism respectively.<sup>19</sup> Traditional African cultures tend to emphasise the interdependence and solidarity of the community, while Western cultures tend to value the autonomy and achievement of the individual.

This difference may have implications for how the best interest of the child principle is applied in different contexts as we shall illustrate. For instance, in some African societies, the child's welfare may be seen as inseparable from the family's or the community's well-being, while in some Western societies, the child's interests may be prioritised over those of others. It is crucial to note, however, that communalism in Africa, as Peter Bisong observes, 'will be dysfunctional or more properly has been dysfunctional for contemporary societies'.<sup>20</sup> Therefore, the binary opposition between communalism and individualism, which informs the present analysis, may not be valid for the long-term perspective of cultural evolution. Thus, the interpretation of the principle remains subjective,<sup>21</sup> leaving decision-making bodies such as courts of law with wide discretion over the task.

Meanwhile, commentaries on the implications of best interest of the child's subjective definition abound. In the early days of CRC, scholars

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<sup>18</sup> Degol and Dinku, 'Notes on the principle "best interest of the child": Meaning, history and its place under Ethiopian law' 325.

<sup>19</sup> Peter Bisong Bisong, 'Between communalism and individualism: Which way Africa?' 2(2) *RAIS Journal for Social Sciences* (2018) 1.

<sup>20</sup> Bisong, 'Between communalism and individualism: Which way Africa?' 3.

<sup>21</sup> Alston, 'The best interest principle: Towards a reconciliation of culture and human rights' 1.

such as Michael Freeman and Philip Alston grappled with best interest of the child from the outlined angles. Alston illustrates the complexity of a fixed meaning of the best interest of the child by comparing highly industrialised countries to traditional societies. He notes that the highly industrialised societies tend to favour an approach that emphasises a child's individuality and autonomy while traditional societies route the child's interests in favour of the family, since family and community ties may be considered to be more essential.<sup>22</sup> Freeman, whose core is from a criminology perspective, adds that it should also be taken into consideration that the definition of the best interest of the child is closely linked to culture.<sup>23</sup>

Marit Skivenes analyses how the Norwegian Supreme Court applies the best interest of the child test to reach judicial decisions. She cites a 2007 case involving a nine-year-old boy named Benjamin, who was placed in foster care at the age of one year and eight months after suffering a brain haemorrhage caused by physical abuse from his biological parents.<sup>24</sup> The court decided that it was in Benjamin's best interests to be adopted by his foster parents, since he needed a safe and stable environment and he had expressed his wish to be adopted.

On the other hand, Sarah Elliston reviews the best interest of the child test in the context of healthcare, especially when parents refuse treatment for their children. She observes that one of the most contentious areas is the refusal of blood transfusions, often based on religious grounds. She also notes that many times the decisions of the parents do not meet the threshold for compromising significant interests of the child.<sup>25</sup>

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<sup>22</sup> Alston, 'The best interest principle: Towards a reconciliation of culture and human rights' 1.

<sup>23</sup> Michael Freeman, 'The James Bulger tragedy: Childish innocence and the construction of guilt', *The moral status of children: Essays on the rights of the child*, Martinus Nijhoff, 1997, 235-253.

<sup>24</sup> Marit Skivenes, 'Judging the child's best interests: Rational reasoning of subjective presumptions?' 53(4) *Acta Sociologica* (2010) 346.

<sup>25</sup> Sarah Elliston, *The best interests of the child in healthcare*, Routledge-Cavendish, 2007, 14.

The best interest of the child has also been understood as considering the needs of a child while making determinations affecting the child. Yvonne Dausab defines the principle as ‘considering the child before a decision concerning the child’s life is made’.<sup>26</sup> The best interest of the child is determined by the circumstances of each case.<sup>27</sup> This has been the approach taken by the courts as they primarily determine the best interests of specific children.<sup>28</sup>

Degol and Dinku prefer taking a rights-based approach towards the principle, reasoning that in order for the best interest of the child to be fulfilled, it should be examined in light of other rights of the child.<sup>29</sup> Similarly, the African Child Policy Forum (ACPF) puts forward that the best interest of the child embodies all the rights of the child as well as everything that is of benefit to a child, comprising the moral, mental, physical and material well-being of the child.<sup>30</sup>

Even though the best interest of the child principle is widely recognised, it lacks ‘binding content’.<sup>31</sup> State parties to the CRC are, therefore, tasked with developing a meaning suitable to them and to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best interests assessment by any decision-maker tasked with ascertaining the principle.<sup>32</sup> Under the CRC and the ACRWC, there is no definition of the best interest of the child, but a declaration under article

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<sup>26</sup> Yvonne Dausab, ‘The best interests of the child’ in Oliver Ruppel (ed) *Children’s rights in Namibia*, Macmillan Education Namibia, 2009, 147.

<sup>27</sup> Bernard Bekink and Mildred Bekink, ‘Defining the standard of the best interest of the child’ 37 *De Jure*, 12.

<sup>28</sup> *CK v TKM*, Civil Appeal 41 of 2016, Judgment of the Court of Appeal at Malindi, 30 September 2016 (eKLR) para 4; *MA v ROO*, HC Civil Appeal 21 of 2009, Judgment of High Court at Busia, 27 June 2013 (eKLR) para 3.

<sup>29</sup> Degol and Dinku, ‘Notes on the principle “best interest of the child”: Meaning, history and its place under Ethiopian law’ 325.

<sup>30</sup> African Child Policy Forum, ‘In the best interest of children: Harmonising laws on children in West and Central Africa’ 2011, 82.

<sup>31</sup> Degol and Dinku, ‘Notes on the principle “best interest of the child”’ 324.

<sup>32</sup> Committee on the Rights of the Child (CRC Committee) General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para 1), 14 January 2013, CR/C/GC/14, para 51.



3 of the CRC and article 4 of the ACRWC that 'the best interest of the child shall prevail'.<sup>33</sup>

Therefore, the standard approach by courts of law has been to consider all the rights and welfare questions afforded to the child in order to determine their best interests. The United Nations High Commissioner for Refugees describes best interest of the child as the wellbeing of a minor in a broad sense. Wellbeing, in turn, is defined in view of individual circumstances such as age, level of development of a child, relations with parents, environment and experience of a minor.<sup>34</sup>

### Kenya's position on the best interest of the child principle

The High Court of Kenya has upheld the universal requirements that make up the best interest of the child. In *MA v ROO* for instance,<sup>35</sup> the High Court singled out the right to education, welfare of the child, having a favourable environment to live in and the right to parental responsibility, as some of the constituents of the best interest of the child principle. In *NMN v JOW*,<sup>36</sup> the High Court observed that there are common aspects in the best interest analysis constituting a child's views and the need for a stable home environment. Further, it asserted that the ultimate goal of the best interest of the child principle is to protect and promote the happiness, security, mental health and emotional development of the child.<sup>37</sup>

Furthermore, Section 2 of the Children Act, 2022 defines the best interest of the child as:

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<sup>33</sup> Convention on the Rights of the Child, Article 3; African Charter on the Rights and Welfare of the Child, Article 4.

<sup>34</sup> United Nations High Commissioner for Refugees, 'UNHCR guidelines on determining the best interest of the child', 2008, 14.

<sup>35</sup> *MA v ROO*, para 3.

<sup>36</sup> *NMN v JOW*, Civil Appeal No 30 of 2016, Judgment of High Court at Kakamega, 27 September 2016, (eKLR), para 67.

<sup>37</sup> *NMN v JOW*, para 69.

the principles that prime the child's right to survival, protection, participation and development above other considerations and includes the rights contemplated under Article 53 (1) of the Constitution and Section 8 of the Act.

### The tripartite classification of the best interest of the child

This paper adopts a tripartite classification of the best interest of the child, expressed in detail by the Committee on the Rights of the Child's (Committee) in General Comment No 14.<sup>38</sup> The principle has been classified into three: a substantive right; a fundamental interpretative legal principle; and a rule of procedure.<sup>39</sup>

As a substantive right, the best interest of the child is self-executing, meaning it is directly applicable and can be invoked before a court.<sup>40</sup> Debates arose – as is apparent from the preparatory works of the CRC – whether the best interest of the child is 'a' or 'the' primary consideration. The former connotes that there would be room for other interests (majorly state or parents' interests) to be taken into consideration, while the latter would mandate the strict application of the principle. While the wording of Article 3 of the CRC adopts the former,<sup>41</sup> care has been taken to give significant priority to the interest of the child in matters where the child is affected.<sup>42</sup>

Secondly, best interest of the child as a fundamental interpretative legal principle signifies that interpretative bodies have the obligation of ensuring that their decisions are weighed against the best interest of the child. Further, where a provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be taken.<sup>43</sup>

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<sup>38</sup> CRC Committee, General Comment No 14, para 9.

<sup>39</sup> Nikolett Takács, 'The threefold concept of the best interests of the child in the immigration case law of the ECtHR' 62(1) *Hungarian Journal of Legal Studies*, 96, 100.

<sup>40</sup> CRC Committee, General Comment No 14, para 6(a).

<sup>41</sup> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

<sup>42</sup> CRC Committee, General Comment No 14, paras 39-40.

<sup>43</sup> CRC Committee, General Comment No 14, para 6(b).

Thirdly, the best interests of a child as a rule of procedure entails a procedural guarantee that whenever a decision that will affect a child or an identified group of children is to be reached, the process of decision-making should include an assessment of the possible impact – whether positive or negative – on the child or children concerned. The justification of the decision must also show that the child’s interests have been explicitly taken into account, how the child’s best interests have been respected, the criteria in which it is based on, and how the best interest of the child has been weighed against other considerations.<sup>44</sup>

The next section of this paper discusses the general principles on detention of children in conflict with the law. It seeks to analyse diversionary measures as an alternative to the detention of children in conflict with the law.

## **Detention of children in conflict with the law**

Children in conflict with the law who have been detained are often subjected to psychological and physical abuse, especially in countries that have deplorable justice systems.<sup>45</sup> The abuse emanates from adults with whom children are detained, police officers and staff in the institutions of detention. Several legal developments call for the protection of detained children which also prescribe rights such as not to be detained, except as a measure of last resort, for the shortest appropriate period of time and to be held separately from adults.<sup>46</sup>

The Constitution of Kenya, 2010 under Article 53(1)(f) provides for the rights of a child while in detention. Since Articles 2(5) and 2(6) of the 2010 Constitution allow for the application of international law, a set of international legal instruments relating to detention of children are relevant to this discussion. The CRC under Article 37 provides that

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<sup>44</sup> CRC Committee, General Comment No 14, para 6(c).

<sup>45</sup> National Council on the Administration of Justice, ‘Status report of children in the justice system in Kenya’, 2019, 43.

<sup>46</sup> Constitution of Kenya (2010), Article 53(1)(f).

a child is only to be deprived of liberty as a measure of last resort.<sup>47</sup> In addition to this, the CRC reiterates the centrality of a child's dignity and worth despite the child's nature of conflict with the law.<sup>48</sup> Article 17 of the ACRWC echoes Article 40 of the CRC by reaffirming the right of children to 'special treatment in a manner consistent with the child's sense of dignity and worth'.

The Committee through its General Comment No 24 requires state parties to 'systematically' apply the general principles contained in the CRC together with dignity in the administration of justice.<sup>49</sup> Regardless of the severity of crime that a child may have committed, the best interest of the child remain the primary consideration.<sup>50</sup> The Committee has recommended further that children need a separate child justice system that treats children differently from adults.<sup>51</sup>

A similar view was taken by the South African Constitutional Court in *Centre for Child Law v Minister for Justice*, where the Court held that the best interest of the child is applicable to child offenders, even when they commit the most heinous crimes.<sup>52</sup> The Court also noted the physiological and physical vulnerability of children and their better capability of rehabilitation than adults as the premises on which the South African Constitution requires the courts and Parliament to differentiate child offenders from adults. The Court opined thus:

...the Constitution requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because we recognise that children's crimes may stem from immature judgement, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because

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<sup>47</sup> CRC, Article 37(b).

<sup>48</sup> CRC, Article 40(1).

<sup>49</sup> CRC Committee, General Comment No 24 (2019) on children's rights in the child justice system, 18 September 2019, CRC/C/GC/24, para 8.

<sup>50</sup> CRC Committee, General Comment No 24, para 13.

<sup>51</sup> CRC Committee, General Comment No 24, para 13.

<sup>52</sup> *Centre for Child Law v Minister for Justice and Constitutional Development and others*, CCT98/08, Judgment of the Constitutional Court, 15 July 2009, para 29.

they are not yet adults. Hence, we afford children some leeway of hope and possibility.<sup>53</sup>

The Committee has interpreted the concept of best interest of the child, in the context of child justice, to mean that the traditional objectives of criminal justice like repression must give way to rehabilitation and restorative justice objectives when dealing with children in conflict with the justice system.<sup>54</sup> The ACRWC, with regard to administration of juvenile justice, also notes that the aim of child justice is to promote reformation and reintegration into society and family.<sup>55</sup> The Children Act of 2022 defines restorative justice as ‘an approach to justice that focuses on the needs of the victims and the offenders, as well as involving the community’.<sup>56</sup> The Constitutional Court of South Africa in *J v National Director of Public Prosecutions* held that an imperative aspect in realising the reformative aims of child justice is for child offenders to be given a chance to be reintegrated into the society.<sup>57</sup>

The High Court of Kenya in *MWK v Attorney General* noted that the police are mandated to arrest a child through the lens of the Bill of Rights under the Constitution of Kenya 2010 and afford special attention to the best interest of the child; otherwise, such arrest, search or detention would be inconsistent with the Constitution and consequently unlawful.<sup>58</sup> The Court, appreciating the inclusion of the best interest of the child in the Bill of Rights, held that it was an ‘important development for Kenyan children, many of whom have suffered and continue to suffer long imprisonment and detention in harsh conditions’.<sup>59</sup> Further, the Court held that the rule on best interest of the child considers

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<sup>53</sup> *Centre for Child Law v Minister for Justice and Constitutional Development and others*, para 28.

<sup>54</sup> CRC Committee, General Comment No 24, para 13.

<sup>55</sup> African Charter on the Rights and Welfare of the Child, Article 17(3).

<sup>56</sup> Children Act (No 29 of 2022), Section 2.

<sup>57</sup> *J v National Director of Public Prosecutions and another*, CCT 114/13, Judgment of the Constitutional Court, 6 May 2014, para 44.

<sup>58</sup> *MWK and another v Attorney General and 4 others*, Constitutional Petition 347 of 2015, Judgment of the High Court at Nairobi, 2017 (eKLR), para 75.

<sup>59</sup> *MWK and another v Attorney General and 4 others*, para 92.

‘the developmental age of the child and the desirability of the child’s reintegration in [society] and assumption of a constructive role in society’ as per the principles of restorative justice.<sup>60</sup>

Fambasayi and Moyo contend that treating the best interests of a child as a substantive right requires courts to give effect to law and policies that intersect with all the rights of the child, including the right to be detained only as a measure of last resort and for the shortest appropriate period of time giving due regard to the age, maturity and evolving capacities of the child.<sup>61</sup> This was illustrated by South Africa’s Supreme Court of Appeal in *Director of Public Prosecutions Kwazulu-Natal v P*. By giving due regard to the best interest of the child of children in conflict with the law, the Court considered that the age of the child – who was only twelve years and five months old at the time of committing the offence of murder – mitigated the sentence and thus ordered the trial court to consider a suspended custodial sentence that would promote the child’s reintegration into society.<sup>62</sup>

The CRC has founded the primary principles in regards to the detention of children. These are: arrest, detention or imprisonment as a measure of last resort, detention for the shortest appropriate period of time, and that no child shall be deprived of his or her liberty unlawfully or arbitrarily.<sup>63</sup> The Constitution of Kenya, 2010, similarly safeguards the best interest of the child in conflict with the law by providing the right not to be detained, except as a measure of last resort, and when detained, to be detained for the shortest period of time.<sup>64</sup> Notably, the ACRWC is silent on the principle of detention of the child as a measure of last resort and for the shortest appropriate period of time. The best interest of the child can also be read into the Beijing Rules provision which provides that child justice shall emphasise the wellbeing of the

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<sup>60</sup> *MWK and another v Attorney General and 4 others*, para 92.

<sup>61</sup> Rongedzayi Fambasayi and Admark Moyo, ‘The best interest of the child offender in the context of detention as a measure of last resort’ 8.

<sup>62</sup> *Director of Public Prosecutions Kwazulu-Natal v P*, 363/2005) [2005] ZASCA 127, Judgment of the Supreme Court of Appeal, 1 December 2005, para 20, 28.

<sup>63</sup> CRC, Article 37(b).

<sup>64</sup> Constitution of Kenya (2010), Article 54(f)(i).

child in conflict with the law.<sup>65</sup> All the rights contained in the CRC are in the 'child's best interests'.<sup>66</sup>

From the foregoing, it is clear that protecting the right of the child not to be detained, except as a measure of last resort and for the shortest appropriate period of time protects the fundamental principle of best interest of the child. The following subsections further explore the principles encompassing detention of children.

### **Non-arbitrariness and lawfulness in the detention of children**

The Constitution of Kenya 2010 in acknowledging the right of every person to freedom and security, guarantees in Article 29(a) that the right shall also include the right not be deprived of freedom arbitrarily or without just cause.<sup>67</sup>

The CRC safeguards the right of the child to be protected from arbitrary or unlawful interference with his or her privacy.<sup>68</sup> The first part of Article 37(b) of the CRC provides that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily'. The Committee does not however elaborate on the lawfulness and non-arbitrariness of a child's detention.<sup>69</sup>

Thus, a reference to Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) suffices.<sup>70</sup> Article 9(1) of the ICCPR provides that deprivation of liberty is only permissible when it is not arbitrary and when it is in accordance with the procedure established by law.<sup>71</sup> This provision can be interpreted through a parliamentary statute

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<sup>65</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 29 November 1985, A/RES/40/33, Rule 5.1.

<sup>66</sup> CRC Committee, General Comment No 14, para 4.

<sup>67</sup> Constitution of Kenya (2010), Article 29(a).

<sup>68</sup> CRC, Article 16. See, also, Children Act, Section 27(1).

<sup>69</sup> CRC Committee, General Comment No 24, para 96.

<sup>70</sup> Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff, 1999, 629.

<sup>71</sup> International Convention on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, Article 9(1).

or the equivalent, or an unwritten norm of common law available to individuals who are subject to the relevant jurisdiction. It also implies that any deprivation of liberty provided for by law should be just, proportionate, non-discriminatory and suitable to the circumstances of the case.

The principle of proportionality requires that any reaction to children in conflict with the law shall be proportionate to the circumstances of the offenders and the offences.<sup>72</sup> Notably, the Children Act of 2022 similarly obliges that orders imposed on a child on conviction shall be proportionate to the nature of the offence and the circumstances of the child.<sup>73</sup> The Committee notes that in the case of children, such considerations must be weighed in favour of the child's right to have his or her best interests considered as a primary consideration and to promote his or her reintegration.<sup>74</sup>

Courts in Kenya have affirmed the position that in the detention of a child, leave of the court ought to be sought. A detention conducted with leave of the court is, therefore, deemed reasonable and lawful in the event that the child in custody has been presented before court within 24 hours.<sup>75</sup> Similarly, the Committee, commenting on the degrading effect of strip searching, insisted that it should be used only as a last resort and should be conducted in a manner that respects the privacy and dignity of the child.<sup>76</sup>

International standards such as the Havana Rules<sup>77</sup> and the Standard Minimum Rules for the Treatment of Prisoners<sup>78</sup> limit the use of restraint and of force in all forms of detention. These provisions

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<sup>72</sup> Beijing Rules, Rule 17.1(a).

<sup>73</sup> Children Act (No 29 of 2022), Section 239(6).

<sup>74</sup> CRC Committee, General Comment No 24, para 90.

<sup>75</sup> *DMO & another v Republic*, High Court Petition No 396 and 397 of 2012, Judgment of the High Court at Nairobi, 13 May 2013, para 31.

<sup>76</sup> CRC Committee, General Comment No 24, para 113.

<sup>77</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), 14 December 1990, A/RES/45/113, Rule 63.

<sup>78</sup> UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), 8 January 2016, A/RES/70/175, Rules 47, 48 and 82.



on detention should not only be applicable while the child is held in police custody, during pre-trial detention or after receiving a custodial sentence but also during the apprehension or arrest stage. This is owed to the fact that the arresting authority is dealing not with an adult but with a child who is more susceptible to violence. The Committee in discussing the principle and rules that need to be observed in all cases of children deprived of liberty, stated that force may only be used when the child possesses a forthcoming threat of injury to him or herself or others and only when all other means of control have been exhausted. It further rules that restraint should never be used to secure compliance and should never involve deliberate infliction of pain.<sup>79</sup>

In certain circumstances, detention may be deemed lawful and non-arbitrary. It becomes arbitrary in the event that the detention is prolonged and without justification. Where a child has been arbitrarily detained, such detention violates the principle of detention for the shortest appropriate period of time.<sup>80</sup> The Committee observes that many children suffer in pre-trial detention for months or even years,<sup>81</sup> which ultimately leads to violation of a child's right to development<sup>82</sup> and does not promote the reintegration of the child into the society to assume a constructive role as is the objective of child justice.<sup>83</sup>

### **Detention for the shortest appropriate period of time**

This rule follows Article 37(b) of the CRC, which provides that restraint on the personal liberty of the child should be imposed only after careful consideration (as measure of last resort) and should be limited to the shortest appropriate period of time. It is similarly contained in the Beijing and Havana Rules.<sup>84</sup> The Committee recommends that the

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<sup>79</sup> CRC Committee, General Comment No 24, para 113. See also, Havana Rules, Rule 64.

<sup>80</sup> Constitution of Kenya (2010), Article 53(1)(f)(i). CRC, Article 37(b).

<sup>81</sup> CRC Committee, General Comment No 24, para 92.

<sup>82</sup> CRC, Article 6.

<sup>83</sup> CRC, Article 40(1).

<sup>84</sup> Beijing Rules, Rule 17.1(c). Havana Rules, Rule 2.

duration of pre-trial detention should be limited by law and subject to regular review.<sup>85</sup> It further requires that every child arrested and deprived of his or her liberty should be brought before a competent authority to examine the legality of the deprivation of liberty or its continuation within 24 hours.<sup>86</sup>

As noted earlier, the High Court of Kenya in *DMO & another JB v Republic* affirmed that the 24-hour rule can be prolonged with leave of the court.<sup>87</sup> The Beijing Rules require that after being arraigned in court, the judge or any other competent body or authority should consider the release from custody of the child without delay.<sup>88</sup>

In *AOO & 6 Others v Attorney General & another*, the High Court held that indeterminate imprisonment does not conform with the provisions of Article 53(1)(f)(i),(ii) and Article 53(2) of the Constitution requiring the best interest of the child to be of paramount importance in every matter concerning the child.<sup>89</sup> The Court further declared that Sections 25(2) and (3) of the Penal Code that allows detention of a child at the President's pleasure was unconstitutional for violating Article 53(f)(i) and (ii), 53(2) and Article 160(1) of the Constitution, and international conventions governing the rights of children.<sup>90</sup> The Court cited with approval the decision in the South African case of *DPP KwaZulu-Natal v P* to highlight that in every case involving a child offender, the scope of sentencing should be a measure of last resort and for the shortest appropriate period of time.<sup>91</sup>

In the spirit of the principle of detention of children for the shortest appropriate period of time, sentencing of children should be compliant to the aims of child justice and with the principle of best interest of

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<sup>85</sup> CRC Committee, General Comment No 24, para 103.

<sup>86</sup> CRC Committee, General Comment No 24, para 107.

<sup>87</sup> *DMO and another JB v Republic*.

<sup>88</sup> Beijing Rules, Rule 10.2.

<sup>89</sup> *AOO & 6 others v Attorney General & another*, Petition 570 of 2015, Judgment of the High Court at Nairobi, 12 May 2017 (eKLR) para 74(a).

<sup>90</sup> *AOO & 6 others v Attorney General & another*, para 74(a).

<sup>91</sup> *AOO & 6 others v Attorney General & another*, para 34.

the child.<sup>92</sup> The CRC provides that neither capital punishment nor life imprisonment without possibility of release should be imposed for offences committed by children.<sup>93</sup> It is important to note that the ACRWC is silent regarding the imposition of life imprisonment on children. However, it provides for the inherent right to life and prohibits the death penalty for crimes committed by children.<sup>94</sup>

The Committee, on the imprisonment of children with parole, notes that sentencing of children should have the possibility of release and should be realistic and regularly considered. It further observes that meting out life imprisonment on children makes it impossible to achieve the goals of child justice – even where there is a possibility of release. Consequently, it is contrary to the best interest of the child.<sup>95</sup> Kenya has restricted punishment of children in conflict with the law who are found guilty of committing an offence and further prohibiting death penalty.<sup>96</sup>

### Detention as a measure of last resort

The expression ‘measure of last resort’ means that the detention of a child should happen when all else has failed, in its ordinary meaning.<sup>97</sup> The principle does not differentiate between children convicted of serious offences and children convicted of minor offences.<sup>98</sup> The Committee notes that use of deprivation of liberty has very negative aftermaths for a child’s harmonious development and gravely hinders his or her reintegration in society.<sup>99</sup> Paulo Pinheiro notes that institutionalisation of children can result in poor physical health, severe developmental delays, disability and potentially irreversible physiological damage.<sup>100</sup>

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<sup>92</sup> CRC Committee, General Comment No 24, para 97.

<sup>93</sup> CRC, Article 37(a).

<sup>94</sup> African Charter on the Rights and Welfare of the Child, Article 5.

<sup>95</sup> CRC Committee, General Comment No 24, para 97.

<sup>96</sup> Children Act (No 29 of 2022), Section 238.

<sup>97</sup> *MWK & another v Attorney General & 4 others*, para 76.

<sup>98</sup> *AOO & 6 Others v Attorney General & another*, para 12.

<sup>99</sup> CRC Committee, General Comment No 24, para 14.

<sup>100</sup> Paulo Sérgio Pinheiro, ‘World report on violence against children’, United Nations Secretary-General’s Study on Violence against Children, Geneva, 2006, 189.

The International Committee of the Red Cross in outlining the negative effects of detention on children stated that:

No matter what kind of detention facility it is and how well it separates adults from children, when children are detained, there is always a risk to their health, wellbeing and security not only in the present, but also in the future. Children face an uphill struggle to become well-adjusted adults if they grow up in detention. They are at increased risk of violence, neglect or exploitation, which for many will be a further hardship to bear.<sup>101</sup>

Similarly, the High Court of Kenya in pronouncing itself on the effects of detention had this to say:

It is a known fact that our detention centres, be it police holding cells or correctional centres, are not ideal places. They are not homes. They are bereft of most facilities which one requires for raising children. It is worse for children. The atmosphere is not conducive to their normal growth, healthy psycho-emotional development and nurturing as children.<sup>102</sup>

The Preamble to the CRC states that state parties recognise that the child should grow up in a family environment. In observing the situation of children behind bars, Meuwese notes that children are excluded from a family environment, from school and the society, and their situation is 'unknown' to the general public and politicians.<sup>103</sup> In addition, the Children Act of 2022 limits the institutionalisation and detention of children in conflict with the law as only a measure of last resort.<sup>104</sup> The Beijing Rules also require that 'careful consideration' be given before the passing of a sentence that limits the child's personal liberty and that such a sentence be imposed only when the child is found to have committed a serious act involving violence against another person or has persisted in committing other serious offences, and only if there is no other appropriate response.<sup>105</sup>

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<sup>101</sup> International Committee of the Red Cross, *Children and detention*, November 2014, 5.

<sup>102</sup> *MWK & another v Attorney General & 4 others*, para 77.

<sup>103</sup> Stan Meuwese (ed), 'Kids behind bars. A study on children in conflict with the law: Towards investing in prevention, stopping incarceration and meeting international standards' Defence for Children International, 2003, 9.

<sup>104</sup> Children Act (No 29 of 2022), Section 223(1). See also the Judiciary Sentencing Policy Guidelines.

<sup>105</sup> Beijing Rules, Rule 17.1(b) and (c). See also, Havana Rules, Rule 2.

The import of the principle of detention as a measure of last resort is that alternative measures to detention must be used at all stages of the administration of criminal justice.<sup>106</sup> Non-custodial measures should be employed to reduce pre-trial detention except where community placement is apparently not possible.<sup>107</sup> The Committee notes that the use of pre-trial detention is a violation of the right to be presumed innocent and that state parties to the CRC should use it only as a measure of last resort for instance, in cases where the child is an immediate danger to himself or herself, or others.<sup>108</sup> The Children Act of 2022 similarly limits pre-trial detention 'as far as is reasonably practicable' and should only be a measure of last resort.<sup>109</sup>

Children in conflict with the law should be dealt with in a manner that promotes reintegration into the society and assumption of their constructive role into the society rather than seeking to punish the child.<sup>110</sup> The next section explores the possibility of implementing non-custodial interventions for juvenile offenders, as a way to avoid the negative consequences of incarceration on their development and well-being.

### **Diversionsary measures as an alternative to detention of children: The legal framework and application**

One of the fundamental tenets inherent in a comprehensive framework pertaining to the equitable administration of justice for minors entails the implementation of diversionsary practices. Diversion, as it is defined, denotes a set of measures adopted by authorised entities to address the involvement of children in criminal activities, without

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<sup>106</sup> United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), 14 December 1990, A/RES/45/110, Rule 2.1.

<sup>107</sup> CRC Committee, General Comment No 24, para 86.

<sup>108</sup> CRC Committee, General Comment No 24, para 103.

<sup>109</sup> Children Act (No 29 of 2022) Section 223(1). See also the Havana Rules, Rule 17.

<sup>110</sup> CRC, Article 40(1). See also the Beijing Rules, Rules 5 and 17.1 and the accompanying commentary to both rules.

necessitating resort to formal legal proceedings.<sup>111</sup> In the course of deliberating on the significance of diversion and its applicability to children entangled in the criminal justice system, a comprehensive analysis of various legal provisions supporting the utilisation of diversionary approaches for such children shall be undertaken in this section of the paper.

### The legal framework on diversionary measures

The Constitution of Kenya, 2010 encompasses provisions safeguarding the rights of children embroiled in unlawful activities, as elucidated in Article 53. Of particular relevance to the diversion of children within the criminal justice system is the constitutional guarantee that children ought not to be subjected to detention except as a measure of last resort. Our previous discussion on the principle of detention as a measure of last resort has underscored that confinement should only be employed when all other alternative options have been exhausted. Furthermore, the Constitution emphasises the paramountcy of the child's best interests. In relation to diversionary measures, as previously discussed, it is noteworthy that detention deprives children of a familial environment. Despite the clarity of the law regarding the detention of children solely as a last resort, some minors find themselves incarcerated for minor offences, such as petty theft, where diversionary measures would be adequate.<sup>112</sup>

Significantly, the Children Act of 2022 has introduced diversion as an alternative to judicial proceedings for children involved in criminal activities.<sup>113</sup> The Act encompasses diverse objectives pertaining to diversion, including the utilisation of alternative methods for holding children accountable for their unlawful acts or omissions, facilitating the rehabilitation of children, and mitigating the stigmatisation that may

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<sup>111</sup> Constitution of Kenya (2010), Article 53(1)(f)(i).

<sup>112</sup> National Council on the Administration of Justice, Special Taskforce on Children Matters, *Status report on children in the child justice system in Kenya*, 2019, 2.

<sup>113</sup> Children Act (No 29 of 2022), Section 224.

arise from subjecting them to the criminal justice system.<sup>114</sup> However, the Act specifies certain eligibility criteria for a child in conflict with the law to be considered for diversion, including the voluntary admission of responsibility and the exclusion of capital offences, among other factors.<sup>115</sup>

The Act further establishes three tiers of diversion. The initial tier encompasses options such as an oral or written apology, a formal caution, placement under a reporting order not exceeding three months, symbolic restitution to an individual or group, counselling or psychotherapy for a period not exceeding three months, and other comparable measures.<sup>116</sup> The second tier incorporates the initial tier options but extends their duration to six months, and introduces additional measures such as community service, referral to appear at a family group conference, or providing a specified sum or benefit to a designated victim or victims.<sup>117</sup> The third tier encompasses the second tier options but extends their duration to twelve months, and introduces further measures like non-remunerated community service, among others.<sup>118</sup> Courts, as part of their range of potential orders, may employ diversion when handling children involved in criminal activities.<sup>119</sup>

The Children Act of 2022 stipulates that courts may employ a 'restorative justice order' as a means of addressing children in conflict with the law.<sup>120</sup> Furthermore, Article 40(3)(b) of the CRC urges states to promote laws and procedures for handling children in conflict with the law, avoiding resort to judicial proceedings. The adoption of restorative justice programmes for children serves to alleviate the burden on the criminal justice system<sup>121</sup> by providing practical and effective alternatives

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<sup>114</sup> Children Act (No 29 of 2022), Section 226.

<sup>115</sup> Children Act (No 29 of 2022), Section 227(2).

<sup>116</sup> Children Act (No 29 of 2022), Section 230(2)(a).

<sup>117</sup> Children Act (No 29 of 2022), Section 230(2)(b).

<sup>118</sup> Children Act (No 29 of 2022), Section 230(2)(c).

<sup>119</sup> Children Act (No 29 of 2022), Section 230(1)(n).

<sup>120</sup> Children Act (No 29 of 2022), Sections 239(1), 29(7).

<sup>121</sup> United Nations Office on Drugs and Crime (UNODC), *Handbook on restorative justice programmes*, United Nations, 2006, 2.

to formal, and often stigmatising measures, thereby significantly contributing to the reintegration and rehabilitation of children involved in criminal activities.<sup>122</sup> The Act also incorporates the use of family group conferencing as a diversionary method for children in conflict with the law, which will be explored in subsequent discussions.

Although the ACRWC does not explicitly address diversion, it underscores that the primary aim in adjudicating matters involving children accused of violating the law is their reformation and subsequent reintegration into their families and society.<sup>123</sup> The CRC imposes obligations upon state parties to establish laws, procedures, authorities, mechanisms, and institutions concerning children in conflict with the law, with a specific emphasis on measures that obviate the need for resorting to judicial proceedings.<sup>124</sup> The Committee advocates the application of restorative approaches at every stage of the legal process, as outlined in the best interests of the child principle.<sup>125</sup> Additionally, the Committee recommends that diversion from the criminal justice system should be the preferred approach in the majority of cases, encouraging state parties to progressively expand the range of offences eligible for diversion, including serious offences when appropriate,<sup>126</sup> and establish facilities that provide a less restrictive environment.<sup>127</sup>

The Beijing Rules establish a minimum standard for the treatment of children within the criminal justice system. In order to prevent stigmatisation and the detrimental effects associated with formal criminal proceedings resulting in a child's conviction, the Beijing Rules advocate non-intervention as the most suitable response.<sup>128</sup> Rule 11 emphasises

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<sup>122</sup> UNODC, *Handbook on restorative justice programmes*, 26.

<sup>123</sup> African Charter on the Rights and Welfare of the Child, Article 17(3).

<sup>124</sup> CRC, Article 40(3)(b).

<sup>125</sup> CRC Committee, General Comment No 24, para 19.

<sup>126</sup> CRC Committee, General Comment No 24, para 28.

<sup>127</sup> Beijing Rules, Explanatory note to Rule 19.1 para 2; According to this requirement, precedence should be given to so-called 'open' institutions over 'closed' institutions. Moreover, the Committee in General Comment No 24 strongly favours the application of alternative dispositions rather than resorting to court proceedings and the deprivation of liberty.

<sup>128</sup> Beijing Rules, commentary to Rule 11.



the necessity of empowering police, prosecution, and other relevant agencies to handle such cases at their discretion, without resorting to formal hearings, while adhering to the norms and regulations of the respective legal system. Consent from the child and/or parent should be obtained regarding the recommended diversionary measure.<sup>129</sup>

The United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) call for measures that avoid criminalising and penalising children, prioritising the safeguarding of their well-being and interests.<sup>130</sup> Governments bear the responsibility of enacting and enforcing specific laws and procedures that promote and protect the rights and well-being of children involved in criminal activities.<sup>131</sup>

The United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) are founded on the premise that alternatives to imprisonment can effectively address offender treatment within the community.<sup>132</sup> The Tokyo Rules advocate the use of non-custodial measures without resorting to court proceedings, highlighting the necessity for a broad range of non-custodial options within the criminal justice system, from pre-sentencing to post-sentencing dispositions.<sup>133</sup>

The Children Act of 2022 lists family group conferencing as a diversionary measure. The discussion below will also include police cautions, which can be borrowed as a best practice from Australia since it has been incorporated into their law.

## Family group conferencing

The primary function of the family group conference is to discuss the offence committed by a child in conflict with the law, so that the child may understand the impact of their offence, acknowledge it and

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<sup>129</sup> Beijing Rules, Rule 11.3.

<sup>130</sup> United Nations Guidelines for the Prevention of Juvenile Delinquency, (Riyadh Guidelines), 14 December 1990, A/RES/45/112, Guideline 5.

<sup>131</sup> Riyadh Guidelines, Guideline 52.

<sup>132</sup> Tokyo Rules, Rule 1.

<sup>133</sup> Tokyo Rules, Rule 2.

obtain support for the reform of his or her behaviour.<sup>134</sup> It involves a children officer who facilitates a meeting attended by the offender and their family; the victim and their family; and such other persons significant in their lives, police and advocates.<sup>135</sup>

Diversionsary measures have also been applied in certain jurisdictions and have been successful. For instance, in New Zealand, family group conferences have been regarded as successful diversionsary measures and have been applied on moderately serious offences with an exception to murder and manslaughter.<sup>136</sup> The proceedings at a family group conference are confidential and no statement made therein may be used as evidence in court proceedings.<sup>137</sup>

### Police cautions

This is an unconditional diversion that has not been included in the Kenyan legislation. However, best practice can be borrowed from Australia, which has notable success on the use of police cautions. The Young Offenders Act of Australia in Sections 18 to 30 sets out police cautions as a measure for diverting children in conflict with the law. Among the conditions for considering whether it is appropriate to issue cautions is the seriousness of the offence.

Despite this means of diversion not being outlined in Kenya, the police system is the first point of contact for children in conflict with the law. Many children in Kenya alleged to have committed minor offences still face psychological abuse from exposure to the criminal justice system.

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<sup>134</sup> Children Act (No 29 of 2022) Section 232(5).

<sup>135</sup> Children Act (No 29 of 2022) Section 232(2),(3).

<sup>136</sup> Yin Ha NG and Gabriel Tsz Wah Wong, 'An alternative to prosecution: A comparative study between restorative service provision in Queensland and Hong Kong' 1 *SS student e-journal*, 2012, 267. See also, New Zealand's Children, Young Persons and their Families Act (1989), whose aim is to reform the law relating to child and young offenders by making provisions for family group conferencing (Sections 20-38).

<sup>137</sup> Children Act (No 29 of 2022) Section 232(12).

## **Conclusion**

This paper has examined the application of the best interests of the child principle in the context of juvenile detention. It has argued that the principle is a subjective and context-dependent concept that requires legal guidance and judicial discretion. It has reviewed the Kenyan legal framework, especially the Children Act of 2022, which provides a clear definition and operationalisation of the principle in both private and public spheres. It has also advocated a rights-based and diversionary approach to child justice, which minimises the use of detention and maximises the potential for rehabilitation and reintegration of children in conflict with the law. It has suggested that diversionary measures, such as family group conferences, should be adopted as early as possible in the legal process and expanded to cover a wider range of offences. The paper concludes that the best interests of the child principle is a fundamental and flexible tool that can enhance the protection and development of children in conflict with the law, if implemented effectively and consistently by all relevant actors.

