



ISSN (O): 2582-6646

Summer 2021

Volume 2 Number 1

JOURNAL OF INTERNATIONAL LAW AND COMITY

WEERAMANTRY CENTRE
FOR PEACE, JUSTICE AND
INTERNATIONAL LAW



Journal of International Law and Comity (JILC) is published by Weeramantry Centre for Peace, Justice and International Law (Weera Centre). It is a double peer-reviewed, open-access, biannual journal; welcoming submissions related to the pressing issues of international law that carry high human and non-human impact.

For further details, email at:

weeracentre@gmail.com | weerajilc@gmail.com

URL: <https://weeracentre.org/issues/>

Weera Centre
Chi 3, Greater Noida,
Gautam Buddh Nagar,
Uttar Pradesh, India – 201310.



COPYRIGHT POLICY

The copyright of the published works shall vest jointly with the contributor and Weera Centre. For activities that do not amount to monetization, the material can be shared as per respective territorial laws in force.

All contributors consent to indemnify the Weera Centre towards all claims, suits and consequences based on any claim of copyright infringement or unauthorized use arising as a result of their contribution being published in JILC.

Cite as:

[Volume:Number] J. Int'l Law & Com. [Page] [Year]

Journal of International Law and Comity
Volume 2 / Number 1
Summer 2021

ADVISORY BOARD

CSR Murthy

Formerly Professor, CIPOD, Jawaharlal Nehru University, New Delhi,
India.

Daniel Rietiker

Senior Lawyer, European Court of Human Rights (Strasbourg) and
International Law Lecturer at the University of Lausanne, Switzerland.

Haider Ala Hamoudi

Professor and Vice Dean, School of Law, University of Pittsburgh,
U.S.A.

Michael Fakbri

UN Special Rapporteur on the Right to Food and Associate Professor,
University of Oregon School of Law, U.S.A.

Obiora Chinedu Okafor

Professor, Osgoode Hall Law School, York University, Canada.

Paul Arnell

Reader in Law, Robert Gordon University, Aberdeen, U.K.

Ratna Kapur

Professor, Queen Mary University of London, U.K.

Selvi Ganesh

Associate Professor, Ambo University, Addis Ababa, Ethiopia.

Vasuki Nesiah

Associate Professor, New York University - Gallatin, U.S.A.

Journal of International Law and Comity
Volume 2 / Number 1
Summer 2021

TEAM

EDITOR IN CHIEF

Sabana Reddy

EDITORIAL BOARD

Sheela Rai

Thamil Venthana Ananthavinayagan

Harisankar Sathyapalan

Anwar Sadat

Deepa Kansra

Nizamuddin Siddiqui

Mohammad Umar

Neha Chauhan

Moumita Mandal

Anirudha Choudhury

Nitesh K. Upadhyay

ASSISTANT EDITORS

Naasha F. Anklesaria

Matthew Shuck

Journal of International Law and Comity
Volume 2 /Number 1
Summer 2021

CONTENTS

ARTICLES

Modern Day Slavery in the Tea Gardens of Bangladesh: Abolished in Law, Persisting in Fact

FATEMAA WAARIITHAH AHSAN & PRIYA AHSAN CHOWDHURY 1-28

The Nigeria Correctional Service Act, 2019 and the Right to Diversion: An Appraisal in the Light of CRA and CRC

SYLVESTER TERHEMEN UHAA 29-51

Immunity Passports and the Necessity of Human Rights Compliance by States: A Normative Critique

KAVYA SALIM 52-77

Grand Ethiopian Renaissance Dam and the Nile: International Legal and Political Implications

MENNA KHALED & MICHAEL MULLIGAN 78-97

Domestic and International Legal Evaluation of the Dwindling Space for Dissent in Sri Lanka

PULASTHI HEWAMANNA 98-120

CASE COMMENT

The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé (ICC-AC, 31 March 2021)

LUÍS BARTILOTTI MATOS 121-130

BOOK REVIEW

I Am the People: Reflections on Popular Sovereignty Today- *Partha Chatterjee*

MOHAMMAD UMAR 131-134

**THE NIGERIA CORRECTIONAL SERVICE ACT, 2019 AND
THE RIGHT TO DIVERSION: AN APPRAISAL IN THE LIGHT
OF CRA AND CRC**

Sylvester Terhemmen Uhaa[†]

Abstract

The signing of the NCS Bill into Law in 2019 heralded a new era in the history of the NPS, as it was then called, bringing to an end the old era that emphasized imprisonment, punishment and retribution. Among many innovations, the Act has changed the name of the NPS to the NCS to stress reformation and rehabilitation of offenders over retribution and punishment, as the goal of corrections and created the department of non-custodial service to oversee the implementation of non-custodial measures. However, this article argues that Section 35(2) of the Act, which provides for the establishment of borstal institutions in each State of Nigeria, violates international and domestic norms on children, hinders the realization of children's right to diversion from formal judicial proceedings as contained in the Convention on the Right of the Child and the Nigerian Child Right Act, 2003, and impedes their reformation, rehabilitation, and reintegration.

Keywords: diversion, adjudication, rehabilitation, delinquency, borstal institutions.

[†] Executive Director, Citizens United for the Rehabilitation of Errants (CURE-Nigeria) | Chief Consultant at Vanenge Consult.

✉ sylvesteruhaa@gmail.com

The placement of a child in an approved or Government institution shall – (a) be a disposition of last resort, and (b) not be ordered unless there is no other way of dealing with the child, and the court shall state, in writing, the reason or reasons for making the order.¹

Article 40(4) of the Convention on the Rights of the Child, 1989 (CRC) obligates state parties to, wherever appropriate and desirable, deal with children without resorting to judicial proceedings. Article 37 (b) reiterates that children should be arrested only as a measure of last resort.

I. Introduction

On 31 July 2019, President Mohammadu Buhari, signed into Law, the Nigerian Correctional Service Act, 2019 (NCSA), repealing 'the Prison Act Cap. P29 Laws of the Federation of Nigeria, 2004 (Act) to address new issues that are not covered under the repealed Act and provide clear rules setting out the obligations of the Nigerian Correctional Service (NCS) and the rights of inmates'.²

Justice reform advocates and civil society organizations are excited about the innovations in the Law, which if implemented, will decongest the overcrowded custodial centers or the courts, and help enforce prisoners' rights. Some of the provisions deserve to be mentioned. The Act has changed the name of the Nigerian Prisons Service (NPS) to the NCS. The new name has placed emphasis on correction, reformation, rehabilitation, and reintegration of offenders into society, as opposed to punishment and imprisonment. The Nigerian prisons are notorious for housing inmates without providing adequate rehabilitation, reformation, and reintegration programs. Consequently, the recidivism rate is high -52.4 percent in 2010.³

¹ Child Rights Act, 2003 (CRA), § 233.

² NCSA, § 1.

³ MS Otu, *Analysis of the Causes and Effects of Recidivism in the Nigerian Prison System*, 10:1 INTERNATIONAL JOURNAL OF DEVELOPMENT AND MANAGEMENT REVIEW 137 (2015).

Also, the Act provides for the removal of all mentally ill persons from custody to mental hospitals or other custodial centers for treatment.⁴ One of the most radical innovations is the power given to the State Controller to reject admission of inmate(s) when a facility is overcrowded after all requirements of the law have been fulfilled.⁵ It is expected that this provision will address the enduring problem of prison overcrowding, with some custodial facilities holding twice or thrice their original capacities.⁶ Furthermore, Section 35 (2) of the Act provides for the building of juvenile facilities in each state of the Federation.

This article examines the implications of this provision in relation to provisions in the CRC and the CRA. Article 3 of CRC states that 'in every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration'.⁷

Complimenting it, the CRA provides that 'the placement of a child in an approved accommodation or government institutions shall (a) be a disposition of last resort, and (b) ordered unless there is no other way of dealing with the child, and the court shall state, in writing, the reason or reasons for making the order'.⁸

The article argues for the wide use of diversion measures, insisting that detention should only be used as a last resort, and seeks to answer the question: How does Section 35 (2) of the NCSA fail to support the implementation of Nigeria's international obligations as provided in the CRC and the CRA?

⁴ NCSA, § 24(1)(a),(b).

⁵ CRA, § 18(1)(a-d) and § 18(2)(a-c).

⁶ Awopetu Ronke Grace, *An Assessment of Prison Overcrowding in Nigeria: Implications for Rehabilitation, Reformation and Reintegration of Inmates*, 19:3 JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 21-26 (2014).

⁷ UN Commission on Human Rights, Convention on the Rights of the Child, 7 March 1990, E/CN.4/RES/1990/74 (hereinafter CRC).

⁸ CRA, supra, § 223(2)(a),(b).

II. CRA, CRC and Provisions of NCSA, 2019

Nigeria ratified the CRC in 1991 and domesticated the Convention with the signing of the CRA in 2003. Despite the vagueness of this principle, it plays a key role in actualizing and implementing children's rights, including children in trouble with the law. The principle has three aspects. Firstly, in situation of different interests, the best interest of the child must prevail. Secondly, where a legal provision is vague and open to multiple interpretations, the interpretation that serves the best interest of the child shall be the priority, and thirdly, in matters not governed by positive rights in the CRC, the best interest of the child shall be the basis for evaluating the laws and practices of State Parties.⁹ The best interest of children in conflict with the law, as envisioned by this principle means children must be treated with care in line with the legal doctrine of *parens patriae*, the state as guardian of children.¹⁰ Under this doctrine, the State has the right and duty to act on behalf of the child whenever the child's welfare is not being protected by the parents.¹¹ Despite Section 236 (1) of the CRA that mandates the arrangements towards protection, education, and vocational skills for children, borstal institutions in Nigeria have failed to perform this role, as succinctly observed by Francis:

During the first three months of admission into a borstal home, about seven or eight newly admitted juveniles are packed into a cell that could barely accommodate two persons. The cell is usually poorly ventilated and very dingy. They can hardly all sit down at the same time, not to talk of lying down, therefore leaving them at their own devices on sleeping or sitting arrangement...two persons may sleep at a time while others

⁹ D. Nguyen, *The Development of Four Leading Principles of the Convention on the Rights of the Child in Vietnam's Juvenile Justice*, 2 BERGEN JOURNAL OF CRIMINAL LAW & CRIMINAL JUSTICE 270 (2017).

¹⁰ Id.

¹¹ ALBERT J. REISS, DIVERSION AND SOCIAL CONTROL: ALTERNATIVE MEASURES OF CRIME CONTROL 35 (G. Albrecht & Wolfgang Ludwig-Mayerhofer eds., De Gruyter, 1995).

remain standing, alternating in this fashion until everybody has had about two hours of sleep.¹²

In addition to overcrowding, borstal institutions in Nigeria lack rehabilitation, educational, drug treatment and reintegration programs required to return juveniles into society as productive citizens. Consequently, juveniles return home more hardened, resulting in the high rates of recidivism among juveniles.

A report on Ganmo Borstal, Kwara State in 2016 found that children lived like rats in cells.¹³ Additionally, a study conducted on the hearing acuity among inmates of borstal institutions in Nigeria, showed they consistently had worse hearing thresholds than their control counterparts due to lack of access to medical care, particularly auditory care, and testing at admission and during stay in the institutions.¹⁴ Short point is, borstal institutions have failed to provide the needed rehabilitation and care for children, and the establishment of more institutions in each State as provided in the NCSA will worsen the negative impacts they are having on children. The new facilities will soon become warehouses, where juveniles are crammed in overcrowded and deplorable conditions with poor or no access to rehabilitation facilities. Children will be exposed to harmful and dangerous situations that will threaten their right to survival and development and push more children into delinquency.

The right to life, survival, and development, espoused by the CRC in article 27, recognizes that delinquency has profound negative impacts on children's development and on their right to life. Hence, the

¹² Zakariyya Sarki & Jamilu Ibrahim Mukhtar, *The Role of Borstal Homes in Nigeria: Reformation or Remaking Criminality?*, 12:1 Journal of Advanced Research in Social and Behavioural Sciences 17-23 (2018).

¹³ Id.

¹⁴ Omokanye Habeeb Kayodele, *Hearing Acuity Among Inmates of a Borstal Institution in Ganmo Kwara State, Nigeria* (May, 2015) (unpublished masters dissertation, Department of Otorhinolaryngology, University of Ilorin Teaching Hospital, Ilorin, Kwara State, Nigeria) (on file with University of Ilorin Teaching Hospital).

Convention urges State parties to develop effective national policies to address delinquency.

Such policies include diversion, other intervention measures and the limited use of deprivation of liberty to support children's reintegration into society and prevent inflicting injury on their mental and physical health.¹⁵

This principle provides the basis for Part II, Section 4 of the CRA, which says that 'every child has a right to survival and development', and Part 11, Section 11, which provides that 'no child shall be - (a) subjected to physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse; (b) subjected to torture, inhuman or degrading treatment or punishment; (c) subjected to attacks upon his honor or reputation; or (d) held in slavery or servitude, while in the care of a parent, legal guardian or school authority or any other person or authority having the care of the child'.¹⁶ Nigeria's borstal institutions subject children to all these horrible conditions, and even more. So, building more institutions without the necessary reforms in the justice and security sectors and without addressing the root causes of juvenile delinquency will expose more children to harm in these institutions. So, rather than building more borstal institutions, diversion should be widely applied, except in situations of serious crimes, and when institutionalization is in the best interest of the child.

III. CRA and Diversion

In addition to the principle of the best interest of the child which runs through the Act, the Act, in Section 209 (1) (a, b), gives the police, prosecutor or any other person dealing with a case involving a child the power to dispose of the case without resorting to formal trial by using other measures such as settlement, including supervision, guidance, restitution and compensation of victims; and encourages parties involved to settle the case.¹⁷ The Act, in Section 223(1)(a)(i) further

¹⁵ Nguyen, *supra* note 9, at 272.

¹⁶ CRA, § 11(11)(a-d).

¹⁷ Id. § 209(1)(a),(b).

reiterates that the Court can deal with a child in one of the following ways even when it is satisfied that the child has committed an offence. These include:

(a) dismissing the charge; or (b) discharging the child offender on his entering into a recognizance; or (c) placing the child under care order, guidance order and supervision order, including- (i) discharging the child offender and placing him under the supervision of a supervision officer; or (ii) committing the child offender by means of a corrective order to the care of a guardian and supervision of a relative or any other fit person; or (iii) sending the child offender by means of a corrective order to an approved accommodation or approved institution.¹⁸

Specifically, sub-section 2 (a and b) of Section 223 states that ‘the placement of a child in an approved accommodation or government institution shall – (a) be a disposition of last resort’, and (b) ‘not be ordered unless there is no other way of dealing with the child, and the Court shall state, in writing, the reason or reasons for making the [detention] order’.¹⁹

These provisions clearly make the use of incarceration for juveniles as a last resort in line with international and regional standards. If these provisions were respected, juvenile prison population will drop and there will be no need to establish borstals in each states of the Federation because young offenders, particularly those charged with non-violent offences, will be dealt with through non-custodial and diversionary measures. These measures are not only in the best interest of the child, but they also support child development. In addition, these measures reduce labeling and recidivism, associated with incarceration.

Furthermore, Section 211 (2) of the Act warns against causing harm to children, which includes the use of harsh language, physical violence, exposure to the environment and any consequential physical, psychological, or emotional injury or hurt to a child in conflict with the

¹⁸ CRA, § 223(1) (a-i).

¹⁹ Id. § 223(2)(a),(b).

law. Other provisions such as the protection of privacy,²⁰ professional education and training,²¹ as well as specialization within the Nigerian Police Force,²² are all geared towards protecting the best interest of the child in conflict with the law from harm. However, a study of borstal institutions in Nigeria, conducted by the United Nations Office on Drug and Crime (UNODC) and the European Union (EU) showed a high prevalence of sexual activity in borstal institutions. While 40 percent was reported to be consensual, 14 percent were reported to be forced sex and 40 percent were reported to engage in transactional sex due to parent/guardians neglect and poverty.²³ This clearly shows how borstal institutions expose juveniles to harm, including forced sex, rather than provide 'care, protection and any necessary assistance including social, educational, vocational, psychological...' ²⁴

The same study revealed that out of the estimated 6000 children in adults and juvenile detention centers, about 10 percent are girls, many of whom are trapped in the juvenile justice system because of criminal acts committed against them, such as rape, sexual exploitation, or trafficking.²⁵ Another problem is the criminalization of some informal entrepreneurship activities such as street trading, resulting in the arrest and detention of children involved in such activities.²⁶

These aspects reinforce the position of this article that building borstal institutions in each State without addressing these and other issues will lead to more arrest, prosecution, and detention of juveniles.

Hence, the planned construction of borstals in each State without first addressing the root causes of juvenile delinquency and reforming the

²⁰ Id. §211(2).

²¹ Id.

²² Id. § 207.

²³ UNODC AND EU, SITUATION AND NEEDS ASSESSMENT OF HIV AND AIDS AND RELATED SERVICES IN BORSTAL INSTITUTIONS IN NIGERIA, at 7 (Dec. 25, 2019).

²⁴ Id. at 7.

²⁵ Id.

²⁶ Isabella Okagbue, Children in Conflict with the Law: The Nigerian Experience, UNICEF (Jan. 10, 2021, 2:00 PM), https://www.unicef-irc.org/portfolios/documents/487_nigeria.htm.

juvenile justice system appears to be more of a retributive response to the rising juvenile delinquency and prison population which is presently put at 6000 than about reforming the justice system.²⁷ The planned construction of more borstals shows that, far from attempting to devise laws and policies appropriate to the needs of a developing contemporary society and that comply with Nigeria's international obligations, the government is pursuing the same policies as its colonial predecessor, based on retribution and general deterrence. The researcher agrees with Coldham that increasingly, the criminal law in Nigeria and other developing countries is being used to secure social and economic objectives, and concern about crime levels are leading to an erosion of defendant's rights and the introduction of harsh and retributive policies.²⁸

Rather, Nigeria should fully comply with its international obligations by using non-custodial measures for children and invest in delinquency and crime prevention measures. If these are done, only few additional borstal institutions will be needed for juveniles charged with serious offences and who, for their best interest and for the interest of society, will require institutionalization for the shortest possible time for the purpose of rehabilitation and reintegration.

The use of diversion to process children is not a new strategy, as it has always been an integral part of the criminal justice process.²⁹ In fact, 'the establishment of separate courts for juveniles in the nineteenth century can be perceived as the first great form of diversion in juvenile justice since it was designed primarily to redirect offending children away from adult courts into a more informal system'.³⁰

Diversion will help protect children from harm caused by incarceration. Also, the huge amount of financial resources allocated for the

²⁷ UNDOC, *supra*, at 12.

²⁸ Simon Coldham, *Criminal Justice Policies in Commonwealth Africa: Trends and Prospects*, 2 JOURNAL OF AFRICAN LAW 218 (2009).

²⁹ Aminuddin Mustaffa, *Diversion Under Malaysian Juvenile Justice System: A Case of Too Little Too Late?*, 11 ASIAN CRIMINOLOGY 136 (2016).

³⁰ *Id.*

establishment of these facilities will be deployed for investment in crime prevention measures such as job creation, social protection and health programs, education, and infrastructural development. This is a more sustainable way of fighting crime than simply expanding our penal institutions.

A. Concept of Diversion

Broadly speaking, Evans described diversion as alternatives to prosecution of children and young people.³¹ For Horwitz, diversion is 'handling offenders informally or doing nothing rather than treating them in the formal system'.³² Diversion is a legal process of removing children from formal sanctions of the juvenile justice system. It shifts juvenile offenders from the formal justice system to community-oriented treatment programs that serve to correct rather than punish children.³³ Diversion aims to prevent children from being criminally convicted and to avoid the direct consequences of adjudication on children to avoid unwarranted labeling, stigmatization, harm, and recidivism.³⁴

B. Forms

Diversion primarily serves to keep children in trouble with the law away from the sanctions of the juvenile justice system. Different legal systems adopt different forms of diversion 'depending on the structures, target groups, implementation methods, populations, strategies and others'.³⁵ Diversion measures are divided into two broad categories-non-intervention and formal intervention.³⁶ While the former includes the exercise of powers by authority comprising the police, prosecutor, and the court to divert the offender from formal judicial process by way

³¹ ALLAN HORWITZ, DIVERSION IN THE JUVENILE JUSTICE SYSTEM AND A SOCIOLOGICAL THEORY OF SOCIAL CONTROL 17 (G. Albrecht & Wolfgang Ludwig-Mayerhofer eds., De Gruyter, 1995).

³² Id.

³³ Mustafa, *supra* note 29, at 137.

³⁴ Horwitz, *supra*, at 21.

³⁵ Id.

³⁶ Mustaffa, *supra* note 29, at 137.

of warning, cautioning, releasing the latter refers to the non-judicial alternate programs conducted by various bodies such as youth professional panel, committee, private agencies, non-governmental organizations, and others.³⁷

Both forms can occur at pre-charge stage as well as post-charge. The pre-charge refers to the removal of children from the criminal justice process before a formal prosecution takes place, with no official charge made against children. The post-charge occurs after an official charge has been registered against children.³⁸ Some of the formal intervention programs includes community counseling, victim-offender mediation, fines without conviction, and victim compensation. As a form of social control, formal diversion programs represent less legality, distance, and exclusion than the judicial process. They usually operate with less formalized rules regarding substance and procedure than proceedings in the juvenile court. Peer and/or lay bodies impose sanctions, and offenders are not institutionalized but remain in the community.³⁹

C. Who Can Divert?

As in other places, the power to divert in Nigeria resides with the police, the prosecutor, and the court.⁴⁰ They can also revoke it whenever necessary.⁴¹ Rule 5 (1) of the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) gives the power of diversion to the police and prosecutor for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims.⁴² Given that the police are the get way into the criminal justice system, it is understandable that they are vested with the power to divert. Section 212 (b) of the Child Right Act provides for the

³⁷ Id.

³⁸ Id. at 138

³⁹ Horwitz, *supra*, at 21.

⁴⁰ CRA, § 209(1) and 223(2).

⁴¹ Mustaffa, *supra* note 29, at 218.

⁴² United Nations Standard Minimum Rules for Non-custodial Measures. (The Tokyo Rules). Adopted by General Assembly resolution 45/110 of 14 December 1990.

following forms of diversion- care and placement with a family or in educational setting or home and supervision ⁴³

Mustaffa noted that prosecutors are given the power to divert because of their vital role in the juvenile justice system as gatekeepers. They determine whether the juvenile should be prosecuted in court or diverted.⁴⁴ Exercising such discretionary power 'does not only require the prosecutors to possess enormous legal expertise but also high level of consistency, integrity and accountability'.⁴⁵ A balance must be struck between the need to protect the best interests of the juvenile and the interests of the society,⁴⁶ and it must be appreciated that the power of prosecutors to divert differs from one legal system to another.

D. Diversion in International Law

Many international instruments have promoted alternative measures for children in conflict with the law and have urged each legal system to adopt these measures to avoid judicial proceedings. Article 40 (4) of the CRC obligates state parties to, wherever appropriate and desirable, deal with children without resorting to judicial proceedings. Similarly, Article 37 (b) reiterates that children should be arrested only as a measure of last resort. Though article 37 (c) provides for detention in some cases, it states that children who are detained have the right to humane treatment and respect for their inherent dignity, taking into consideration their age, and must be separated from adults and maintain contact with family. The existing borstal institutions have not met any of these standards, and there is nothing in place to suggest that children will be treated humanely if these facilities are built. The building of these facilities could achieve only two goals – one, the separation of juveniles from adults, and two, it may enhance family contact. But these can also be achieved, and even more effectively through diversion.

⁴³ CRA, § 212

⁴⁴ Mustaffa,, *supra* note 29, at 139.

⁴⁵ *Id.*

⁴⁶ *Id.*

Therefore, only few juvenile facilities should be built for juveniles who commit serious offences.

Additionally, the United Nations Committee on the Rights of the Child, (the Committee), in its General Comments No. 24 clearly states that diversion from the criminal justice system should be a core objective of every youth justice system and that this should be explicitly stated in legislation.⁴⁷ The CRC has provided a variety of dispositions as alternatives measures that state can adapt to the formal judicial process. These include reprimands, discharges, bind overs, community service, compensation, restitution, fines, care, guidance and supervision orders, counseling, probation, foster care, education and vocational training programs and other alternatives to institutional care.⁴⁸

Also, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) states that consideration should be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal hearings and identifies the importance of the role of the police and prosecutors in disposing of cases in this way.⁴⁹ The Rules, while acknowledging the effectiveness of formal and informal methods of diversion in legal systems to avoid the negative effects of subsequent proceedings in juvenile justice administration, urges the devising of new and innovative measures to avoid detention in the best interest and well-being of the juvenile.⁵⁰ Similarly, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (The Havana Rules) highlight the important role of prosecutors in promoting diversion from criminal proceedings for young people and emphasizes that the detention of juveniles should only be used in exceptional cases and as a measure of

⁴⁷ Committee on the Rights of the Child GC No. 24, Children's Rights in the Justice System, 18 September 2019, CRC/C/GC/24 at ¶ 13.

⁴⁸ CRC, art. 40(3)(b).

⁴⁹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), UNGA Res. 40/33 (29 November 1986) at ¶ 11.

⁵⁰ *Id.* ¶ 13.1.

last resort.⁵¹ In its concluding observations, the Committee expressed its concern that the national legislation by which a child can be detained 'Her Majesty's Pleasure' was incompatible with the provisions of the article 37 (b) of the CRC which said that the arrest, imprisonment, or detention of a child shall only be applied as a matter of last resort and in a short appropriate period.⁵² It recommended that the institutionalization and detention of children must be avoided and alternatives to such must be developed and implemented.⁵³ The Committee made similar observations and recommendations in 2005 and 2010.⁵⁴

Other international instruments that have legalized the use of diversion for children include the United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990, which emphatically prohibits criminalizing children for a behaviour that does not cause serious damage to the development of the child or harm to others.⁵⁵ The Guidelines deal with developmental objectives and focus on societal delinquency prevention among children at risk. As stated above, many children in detention are held for minor offences, while some are held for offences committed against them.⁵⁶ Until fundamental reforms have taken place, the building of borstals in each State will worsen the already fragile situation. The new institutions will soon be filled up with innocent children or with children who have committed minor offences and should have been diverted.

⁵¹ United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), UNGA Res 45/113 (14 December 1990).

⁵² CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE RIGHTS OF THE CHILD, NIGERIA, U.N. Doc. CRC/C/15/Add.61 (1996) at ¶ 21 and 40.

⁵³ Id. ¶ 40.

⁵⁴ CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE RIGHTS OF THE CHILD, NIGERIA, 13 April 2005, CRC/C/15/Add.257 at ¶ 81(b),(c) and (d); CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 44 OF THE CONVENTION: CONCLUDING OBSERVATIONS - Nigeria, 21 June 2010, CRC/C/NGA/CO/3-4 at ¶ 91.

⁵⁵ United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), UNGA Res 45/112 (14 December 1990) at ¶ 5.

⁵⁶ UNODC, supra, at 12.

E. Regional Instruments

Besides international instruments, regional instruments also have adopted policies on diversion. For instance, The Council of Europe (CoE) urges member states to develop comprehensive procedures on diversion measures, as seen in Rules 7, 8 and 10 of the CoE's Recommendation (2003) Concerning New Ways of Dealing With Juvenile Delinquency and the Role of Juvenile Justice.⁵⁷ It encourages the development of comprehensive diversion procedures at both the prosecution and police level to ensure effective implementation of the measure.

Although the African Commission on the Rights and Welfare of the Child does not provide for alternative measures for children in conflict with the law, it 'incorporates a number of basic principles on which a child justice system should be based'.⁵⁸ The Charter states that 'a child accused or found guilty of a crime is entitled to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others'.⁵⁹

Chirwa's analysis of article 17 of the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC) is that it breaks new ground for the protection of children's rights in three respects, provides for the speedy determination of matters involving children, and emphasizes that reformation and reintegration of the child must be the essential aim of treatment of the child during trial and after conviction, and reinforces the position that rehabilitation and reformation are rights of every

⁵⁷ Council of Europe Recommendation (2003) 20 Concerning New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice, CoE (July 15, 2021, 2:30 PM), <https://archive.crin.org/en/library/legal-database/council-europe-recommendation-rec200320-concerning-new-ways-dealing-juvenile.html>.

⁵⁸ Violet Odala, Measuring the Conformity of the Malawi Child Justice Law Against Contemporary Interpretations of International and Regional Instruments, (2017) (unpublished doctoral dissertation, University of Pretoria, at 43) (on file with University of Pretoria).

⁵⁹ African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990) (hereinafter ACRWC), art. 17(1).

prisoner⁶⁰. Also, article 17(2)(c)(iii) of the Charter guarantees without qualification, the right of every child to be afforded legal and other appropriate assistance in the preparation and presentation of his defence.⁶¹

If Chirwa's analysis that the reformation and reintegration of the child must be the primary aim of treatment of children before, during and after trial is correct, then it means that alternative measures for children must be prioritized over imprisonment. This is so because alternative measures offer children more prospects to achieve reformation, rehabilitation, and reintegration than judicial proceedings.

F. Merits and Demerits of Diversion

As noted above, diversion serves as a means of taking children away from judicial proceedings to community-oriented programs with a focus on reformation and rehabilitation. So, diversion protects children from criminalization, labeling and harm caused by judicial adjudication and imprisonment,⁶² as well as stigmatization. According to the labeling theory, a person who is perceived as an offender under the justice system tends to begin to behave in ways in line with that label.⁶³

Also, 'the limited disposition options available to the juvenile judge, the limitation of personnel and diagnostic and treatment facilities, the lack of community support - all these factors give pre-judicial dispositions an especially important role with respect to juveniles'.⁶⁴ Additionally, Lipsey has argued that diversion helps to reduce reoffending and recidivism among children than traditional justice system processing.⁶⁵

⁶⁰ Odala, *supra*, at 43.

⁶¹ ACRWC, art. 17(2)(c)(iii).

⁶² Mustafa, *supra* note 29, at 148.

⁶³ *Id.*

⁶⁴ LUDWIG-MAYERHOFER, SENTENCE WITHOUT CONVICTION: NOTES ON DIVERSION FROM THE JUVENILE COURT IN THE FEDERAL REPUBLIC OF GERMANY 105 (G. Albrecht & Wolfgang Ludwig-Mayerhofer eds., De Gruyter, 1995).

⁶⁵ Mustafa, *supra* note 29 at 48.

Diversion offers a therapeutic orientation for children rather than penal styles, and this is more closely linked to the cultural and traditional construction that attributes juvenile misconduct to emotional problems rather than to freely chosen evil actions.⁶⁶ Furthermore, diversion offers speedier case disposal than the formal judicial proceeding that is time consuming and 'involves complex legal issues, rigid procedure, complicated legal technicalities and tedious processes'.⁶⁷ It is well understood that delayed trial is harmful to the accused and it gets worst for children. In Nigeria, trials usually take a long time to complete, and children, some of whom are illiterate, poor and lack family support during trials find the process very tedious. In addition, diversion is more cost-effective than formal juvenile court process. The adjudication process incurs significant cost on various parties. The parties must bear the cost of counsel's 'fee, preparation of documents, transportation, expert witnesses, facilities and others'.⁶⁸ The use of diversion measures will save cost of the adjudication process and protect children from the traumatizing effect of adjudication. Also, diversion of minor offenders can help the courts give greater attention to youths and adults who commit more serious offences.

More so, diversion reduces delinquency and prison population. Davidson and Johnson evaluated programs in multiple sites using a randomized design that tested the effectiveness of diversion compared to traditional juvenile justice processing and found that diversion with services, especially with family support and education, is more effective in reducing delinquency than the traditional juvenile courts' process.⁶⁹

Examples have shown a reduction in the rates of detention and incarceration in states and counties in the United States that use diversion without compromising public safety.⁷⁰ So, the use of diversion will help reduce the rising rates of delinquency among

⁶⁶ Horwitz, *supra*, at 25.

⁶⁷ Mustaffa, *supra* note 29, at 148.

⁶⁸ *Id.*

⁶⁹ IRA SCHWARTZ, THE IMPACT AND ROLE OF JUVENILE DIVERSION IN THE UNITED STATES 81 (G. Albrecht & Wolfgang Ludwig-Mayerhofer eds., De Gruyter, 1995).

⁷⁰ *Id.*

children and help cut down the increasing prison population in Nigeria. This will save cost and help prevent other problems associated with high prison population, particularly, high pre-trial rates, currently at 68.1 percent.⁷¹ The cost of building the planned institutions will be deployed to productive areas of the economy such as job creation, infrastructural development, and education to drive economic growth and development to help reduce crime and juvenile delinquency.

In England and Wales, the juvenile custodial population since the mid-1980s has fallen dramatically and juvenile crime has decreased due to the use of diversion and other reform efforts.⁷²

These examples suggest diversion programs can work. But policymakers and juvenile justice professionals need to take care to guarantee these programs are implemented properly. Furthermore, key officials are involved in the process of developing the programs and supportive of the program goals, and staff are properly trained and supervised and the programs are adequately funded, monitored, and evaluated.⁷³

Another advantage of diversion is connected to the issue of developmental objective and focus on societal delinquency prevention among children at risk mentioned earlier. The idea here is that focusing on diversion encourages investment in crime and delinquency prevention for children. This is so because at the core of diversion is the idea that children need care, and that children can be corrected.

Diversion recognizes the influence of society on children and seeks to aid children overcome society's bad influence on them. And one way of doing this is to prevent negative societal impacts on children,

⁷¹ Allwell Okpi, No way to tell that 70% of Nigerian Inmates Have Never Been Convicted, Africa Check (Jan. 10, 2021, July 24, 12:00 PM), <https://africacheck.org/reports/no-way-to-tell-that-70-of-nigerian-inmates-have-never-been-convicted>.

⁷² ALLEN MATTHEWS, *THE DIVERSION OF JUVENILES FROM CUSTODY: THE EXPERIENCE OF ENGLAND AND WALES* 83 (G. Albrecht & Wolfgang Ludwig-Mayerhofer eds., De Gruyter, 1995).

⁷³ Schwartz, supra, at 81.

includes addressing the factors that impacts children negatively. Horwitz has noted that the development of formal diversion programs in the 1960s and 1970s corresponds to drastic changes that occurred in American families.⁷⁴ These changes weakened informal control systems and expanded social control institutions that could supply services previously provided within the community.⁷⁵ One of such changes was the soaring rate of divorce, resulting in a high number of female householder families without a spouse,⁷⁶ leaving only one parent to take care of children.

He argued further that living with one parent is associated with a variety of negative experiences including delinquency, school dropout, and mental health problems.

Of central interest here is that divorce and single parenthood, as well as the dramatic growth of married women's labor force participation, are also associated with a weakening of informal social control. The most direct effect is that single-parent families have less adult authority present to exercise social control. One monitor cannot control behavior as well as two.⁷⁷

Additionally, a growing number of children are raised by fathers who are not their natural parents. One of every seven households with children involves a remarried parent and a child from a previous marriage. Because stepparents cannot exercise authority with as much legitimacy as natural parents, a further weakening of family social control arises. Finally, mothers who enter the labor force have less time to provide surveillance over their children's behavior.⁷⁸

Local newspapers have reported an increasingly high rate of divorce in Nigeria.⁷⁹ These changes in the family, as Horwitz has argued, are

⁷⁴ Horwitz, *supra*, at 137.

⁷⁵ *Id.* at 25

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Sodiq Oyeleke, *High Divorce Rate Dangerous for Nigeria's Society*, PUNCH, Dec. 5, 2019.

contributing to juvenile delinquency.⁸⁰ A second factor has to do with the economic, security, religious, social, and political problems Nigeria is experiencing. These have huge negative impacts on children. An appropriate and sustainable response is needed to address these problems. The expansion of penal institutions is a wrong response. The best interests of children and their right to development are, in most cases, better protected and enhanced within the family. Where this is not achievable, the State should support affected children with the social, psychological, mental, health and economic programs they need to live productive lives and develop their full potentials. Penal institutions cannot provide these services. It is also concerning that the building of institutions in each state is done in isolation from other provisions of the CRA, such as separate juvenile courts, etc. This implies that juveniles will continue to be tried in adult courts. Alternative measures provided in the NCSA should be fully implemented, especially for children, and this will diminish the need for an institution in each State.

G. Criticism of Diversion

However, diversion has been criticized for widening the net of social control. This means that formal diversion measure process children who commit petty offences under the criminal justice system. Consequently, more children who would have been dealt with informally are brought into the formal justice system.⁸¹ This problem can be resolved by reducing the involvement of the formal criminal justice system in dealing with juvenile delinquency and petty offenders. Moral family and community-oriented programs should be developed to handle children without recourse to formal proceedings.

The strategy has been further criticized for giving too much discretionary and broad power to the police, prosecutors, and courts, as this could result in inconsistency and danger of discriminatory practices

⁸⁰ Umar Yakubu, *Deciphering the High Rate of Divorce in Nigeria*, PREMIUM TIMES, Mar. 1, 2019.

⁸¹ Mustaffa, *supra* note 29, at 149.

to its application and enforcement.⁸² This, too, can be addressed by developing clear sentencing, operational and monitoring and reporting guidelines for the application and enforcement of diversion. Finally, a concern has been raised that children, in the desperate bid to get diversion, may falsely admit to the alleged offence to avoid adjudication.⁸³ These problems can be handled through strengthening procedural rules, as well as oversight and monitoring functions.

IV. Recommendations

To implement diversionary measures effectively and successfully for children in conflict with the law in Nigeria, the author makes the following recommendations:

1 That the CRA should be amended to elaborate and provide specific and clear guidelines on informal and formal diversions in line with the CRC and other international norms.

2 A board, consisting of members that are professionally trained and possess the expertise to deal with juveniles, should be established to handle children released under formal diversion. The board will determine the appropriate educational or rehabilitative measures as opposed to proceeding with the formal process of justice and make recommendations to the court. The court, acting on the advice of the board, may order any juvenile offender to undergo some educational or rehabilitative measures such as mediation, victim-offender reconciliation, community service, training course, recreational programs, warning, fine and others. Any juvenile offender who has satisfactorily undergone this type of diversion may be ordered to be discharged with or without condition and sanction.⁸⁴

It is suggested that where further sanctions apply and the juvenile is sentenced to a jail term, the board may continue to intervene with appropriate measures such as restorative justice, counseling, and others.

⁸² Id.

⁸³ Id.

⁸⁴ Id.

The goal of this is to ensure that the juvenile receives the help he needs in line with the provision of international and domestic laws which have been discussed in the paper.

3 Sections 40, 41, 42 and 43 of NCSA provide for the establishment of parole boards, probation, and community service boards as well as restorative justice measures. It is recommended that a separate parole board for children and separate, probation, community service and restorative justice committees for children should be established. Members of the parole probation and boards, as well as the community service and restorative justice committees should comprise of highly trained professionals and experts in dealing with children. The parole and probation boards and the committees should be equipped with adequate facilities and resources to ensure effective implementation of the diversionary programs. It is further suggested that the boards and the committees may collaborate with Children's Welfare Department at the Federal and State ministries of Women and Social Development, other government agencies and NGO's that already have qualified staff who have experience in dealing with children.

V. Conclusion

Diversion has been proved to reduce the criminalization, stigmatization and labeling effect associated with formal adjudication. Also, diversionary measures have been widely used by different legal systems as an option in reducing juvenile delinquency, recidivism and in protecting the best interest of the child in the criminal justice system.

As this article demonstrates, the legality of diversion is solidified in the CRC and other international and regional instruments as discussed in this paper. Specifically, the CRC and concluding observations by the Committee, as discussed above, obligate State Parties to the Convention to as much as possible, deal with children in conflict with the law without resorting to judicial proceedings. Also, the CRA states that 'the placement of a child in an approved accommodation or government institutions shall (a) be a disposition of last resort, and (b) ordered unless there is no other way of dealing with the child, and the court shall

state, in writing, the reason or reasons for the making the order'.⁸⁵ Hence, Section 35 (2) of the NCSA contradicts the CRC, other international instruments and the CRA.

In addition, if the criminal justice system, particularly the administration of juvenile justice is not reformed, the planned facilities will soon be filled up with innocent children or with children who have committed minor offences that do not warrant detention. Furthermore, financial resources that would be used to build these facilities should be deployed to addressing the social, economic, political, and religious problems that push many children into delinquency and crime. This will reduce child delinquency and diminish the need for borstal institutions in each State. Only a few borstal institutions will be needed for children who commit serious offences. Reformation, rehabilitation, and reintegration should be the primary objectives of institutionalizing children who commit these offences. Above all, the right of children to diversion, as codified in international and domestic law should be respected. Section 223 of the CRA, reiterating the CRC, provides that 'the placement of a child in an approved or Government institution shall – (a) be a disposition of last resort, and (b) not be ordered unless there is no other way of dealing with the child, and the court shall state, in writing, the reason or reasons for making the order'.⁸⁶

⁸⁵ CRA, § 223(2).

⁸⁶ Id.