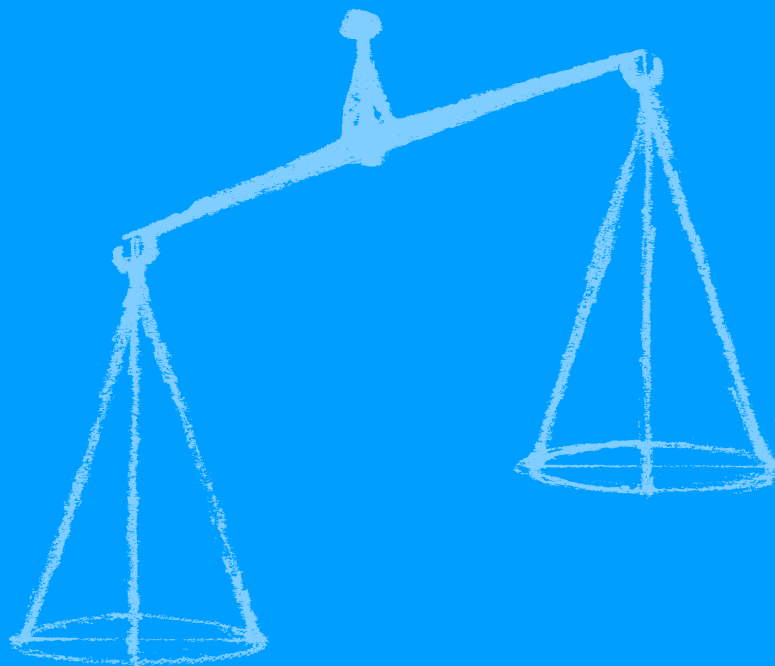


SOUTH ASIA AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY



Raising the Standard of Protection for Children's Rights

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Foreword

What emerges strikingly from this valuable piece of work is that the legal systems in South Asia too often do not recognise childhood.

Not only does the region have the lowest average Minimum Age of Criminal Responsibility in the world, but there is a woeful lack of provision in justice systems to handle juvenile hearings in an appropriate way and to ensure that custodial sentences are served in anything other than adult jails.

Children who come into conflict with the law are especially vulnerable and are likely to be from marginalised sectors of society. They will find themselves enmeshed in a system that sends a variety of confusing messages about their status and which is sometimes itself a prisoner of colonial laws rooted in a world that no longer exists.

Some ground breaking pieces of legislation have been approved in the region and even adopted in part by neighbouring countries. But scant birth registration and patchy adherence can undermine the best of intentions.

Childhood is a special time, and the formal structures used to handle the very young say a lot about a state and its social and welfare priorities for children. A legal system should be at the heart of all efforts to protect the most vulnerable, and in South Asia we know that children are some of the most vulnerable members of society.

UNICEF Regional Office for South Asia commissioned this work in the hope that it will act as a springboard and accelerator for appropriate reform. I would urge all those concerned with justice in the region to join UNICEF and work towards ensuring that the rights of children are respected and that childhood does not stand unfairly condemned.



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Executive Summary

The minimum age of criminal responsibility (MACR) is the lowest age at which children may potentially be held criminally liable for alleged crimes. In general, it is the lowest age at which children in a given country can be prosecuted in any court, and is therefore a fundamental concern for the protection of children's rights and juvenile justice. Children younger than the MACR – for whom there is no possibility of criminal responsibility – should still be held accountable for their actions, but they must be held accountable by entirely non-punitive, welfare- and education-oriented measures. Furthermore, all children, both younger and older than the MACR, are entitled to full protection of their rights and dignity in accordance with the Convention on the Rights of the Child (CRC) and other international juvenile justice standards.¹

Human rights bodies have weighed various aspects of the MACR over time against the principles of international juvenile justice and children's rights, and a certain body of guidance has evolved on the MACR. Among other points, this guidance holds that the MACR must serve in law and in practice as a single, invariable, and country-wide age limit of at least 13 years of age, and this age limit must be applied uniformly to all children at all times in each country. Already, challenges emerge in the context of South Asia, where the very highest MACRs – in just two countries – are set at 10 years of age, the lowest MACR is technically at birth, and the average MACR of 7 years is easily the lowest regional average MACR in the world.

The MACR becomes even more complicated

in practice, as any one of a series of common problems can quickly render the MACR meaningless. The lack of birth registration opens the door to manipulation of children's ages. MACRs and juvenile justice laws may not apply or may not be implemented nationwide, leaving the status of the MACR in doubt. Anti-terrorism legislation and other special laws may directly undermine the MACR. Other broader factors can have just as tangible an effect – such as inflammatory media coverage, public awareness of children's rights, and training for officials that deal directly with children in conflict with the law. In essence, attempts at meaningful MACR reform – based on a comprehensive children's rights perspective – need to bring into consideration a wide range of factors that can affect children both younger and older than MACRs.

Fortunately, South Asia is in a good position overall to make such meaningful MACR reforms. Indeed, positive steps are already underway: Afghanistan, Bangladesh, Bhutan, and Sri Lanka have all recently established MACRs, increased their MACRs, or proposed MACR increases in draft legislation. India and Pakistan both passed historic juvenile justice laws in 2000, while many countries are experiencing broad movements for progressive juvenile justice reform. Afghanistan has crafted a model MACR balance in its draft Juvenile Code between traditional Islamic law and CRC provisions, and several governments have undertaken significant initiatives to increase birth registration. South Asia, on the MACR, should be ready to raise the standard of protection for children's rights.

¹ These standards include, inter alia, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, and the Vienna Guidelines for Action on Children in the Criminal Justice System.

The MACR in Brief: Definitions, Current Status, and CRC Guidance

The following sections offer a basic introduction to the minimum age of criminal responsibility (MACR) and related age limits. After establishing some practical working definitions, a snapshot of South Asian MACRs is presented, which is then matched up against MACRs in other regions of the world. Finally, a brief analysis of human rights jurisprudence – developed largely under the Convention on the Rights of the Child (CRC) – concludes with the basic children’s rights standards for MACR provisions, and a short comparison of South Asia’s provisions against those standards.

Practical Definitions of the MACR and Related Age Limits

The Minimum Age of Criminal Responsibility (MACR)

Article 40(3)(a) of the CRC obliges States parties to establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.” This CRC language and relevant text from the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (see Box 1) may be condensed and restated in the following basic definition:

The MACR is the lowest statutory age at which children may potentially be held criminally liable for infringements of the penal law in a given country.

It is important to note that children, upon reaching the age stipulated by an MACR, do not automatically become guilty for

BOX 1:

Children's Rights Instruments - Excerpts on the MACR

Convention on the Rights of the Child (CRC) (1989)

Article 40:

3. State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
 - (a.) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (1985)

4. Age of Criminal Responsibility
 - 4.1 In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

Commentary

The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility of delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.

suspected offenses. The MACR simply marks the onset of the possibility for criminal responsibility, while actual guilt for a suspected offense must still be proven in an appropriate court (if formal criminal proceedings, rather than informal or diversion options, are initiated). On the other hand, children younger than a respective MACR at the time of alleged acts must not bear any criminal responsibility whatsoever; instead, they should face only non-penal welfare and educational measures, according to their best interests, as a state response to their actions.

This final point is crucial for understanding the MACR and its implications, and is further discussed in later sections of this study: a comprehensive children's rights perspective sustains that *children younger than MACRs should also be held accountable for their inappropriate actions*. State responses to children younger than MACRs should be based upon re-education, rehabilitation, and social service measures, and they can neither impose nor imply, under any circumstances, punishment or penalty. In virtually all cases, these conditions exclude any form of deprivation of liberty for children younger than MACRs. Therefore, neither MACRs nor increases in MACRs mean that children somehow become free from accountability or discipline – instead, they are subject to substantially different methods of accountability as compared to children older than MACRs.

The Age of Penal Majority

For the sake of clarification, a related but distinct age limit is the age of penal majority. In brief, the age of penal majority is the lowest statutory age at which children may potentially be held criminally responsible within the adult criminal justice system for infringements of the penal law. This age limit denotes the beginning of possible adult criminal court jurisdiction, and the Committee on the Rights of the Child has therefore

consistently recommended under the CRC that all ages of penal majority be raised to at least 18 years. While the MACR and the age of penal majority share some similarities, and may occasionally coincide as actual ages, they remain fundamentally distinct age limits that neither define nor substitute for each other. As such, the age of penal majority generally lies beyond the scope of this study.

Doli Incapax Provisions

The final age categories relevant to the MACR arise in legal provisions known as *doli incapax* provisions, which are found in the criminal law statutes of roughly 60 countries worldwide, including in 4 of the 8 South Asian countries. *Doli incapax*, meaning “incapable of doing harm” in Latin, refers to a rebuttable presumption of innocence for children between two specified ages, for example 7 and 12 in India. The lower *doli incapax* age limit is the MACR, just as India's MACR is 7, and no child younger than that age can ever be found criminally responsible. Between the MACR and the higher *doli incapax* age limit, children are always assumed to be free from criminal responsibility, unless and until court evidence specifically proves that a child in a given case is mature enough to face criminal responsibility. If the court thus appraises an individual child and overturns his or her presumed innocence, actual guilt for the alleged offense must still be proven. Beyond the upper *doli incapax* age limit, 12 years and older in India, all children are potentially criminally responsible. The concept of *doli incapax* evolved in English common law beginning in the 1300s, inspired directly by ancient Roman law. British legal influences carried it around the world, and in particular to South Asia via enactment of the 1860 Indian Penal Code. Since the penal codes of Bangladesh, India, Pakistan, and Sri Lanka all share this same source, they feature virtually identical *doli incapax* provisions, with slight age range variations as discussed below.

Current South Asian MACRs and Recent Trends

Table 1 (see page 5) summarizes the basic status of the MACR and related ages in South Asia. Notably, 4 out of the 8 countries – Afghanistan, Bangladesh, Bhutan, and Sri Lanka – have recently established an MACR, increased the MACR, or proposed an MACR increase in draft legislation. On the other hand, Pakistan’s current MACR is listed as 0 because the 1979 Hudood Ordinances hold all Pakistanis criminally responsible, regardless of age, for a range of specific offenses. Overall, when considering all the MACRs currently in force in South Asia, the average MACR is roughly 7 years of age.

Around the world, MACRs range from 0 – such as in Pakistan’s case or in countries where there is no effective MACR established – all the way to 18 years of age. Based on the most recent data available, the worldwide average MACR is approximately 12 years of age, while the median MACR is also 12. In a comparative perspective, as seen in Table 2, South Asia has the lowest average MACR in the world by UNICEF-designated region.

Among the countries of the world, an array of historical, ideological, cultural, and religious

TABLE 1:
Status of the MACR and Related Age Provisions in South Asia²

Country	Recently Abrogated MACR	Current MACR	Proposed MACR	Age of Responsibility: Other Crimes	<i>Doli Incapax</i> Provisions Age Range
Afghanistan	–	7	12	–	–
Bangladesh	7 ³	9	–	–	9-12
Bhutan	0 ⁴	10	–	–	–
India	–	7	–	–	7-12
Maldives	–	7 ⁵	–	14 ⁶	–
Nepal	–	10	–	–	–
Pakistan	–	0 ⁷	–	7 ⁸	7-12
Sri Lanka	–	8	10 ⁹	–	8-12

² Detailed descriptions of MACR provisions by country are provided in the appendices at the end of this study.

³ The Bangladesh Penal Code (Amendment) Act, approved in November 2004, increased Bangladesh’s MACR from 7 to 9, and correspondingly raised the *doli incapax* age range from 7-12 to 9-12.

⁴ Article 114 of the Bhutan Penal Code 2004 established Bhutan’s first ever MACR.

⁵ Children become criminally responsible at the age of 7 years with regard to offenses punishable by hadd in Islamic law, as well as for certain secular offenses such as some financial and property related crimes, intentional killing, counterfeiting, and terrorism and narcotics offenses. In addition, a child would theoretically be criminally responsible before the age of 7 years if he or she had begun puberty and were accused of a *zina* offense.

⁶ With regard to many but not all offenses (see the preceding footnote), criminal responsibility begins at the age of 14 years.

⁷ The 1979 Hudood Ordinances hold all Pakistanis criminally responsible - regardless of age - for offenses such as rape, adultery, the use of alcohol and drugs, theft, armed robbery, and slander.

⁸ For crimes defined in the Penal Code and most other statutes, criminal responsibility begins at 7 years of age. Since children even younger than 7 years may be held criminally responsible for other crimes (see the preceding footnote), Pakistan’s *doli incapax* provisions only regard these Penal Code and related crimes.

⁹ The draft Juvenile Justice Procedure Act proposes an increase in the MACR from 8 to 10 years. It would also increase both the lower and upper *doli incapax* age limits, from the current *doli incapax* range of 8-12 up to the proposed range of 10-14.

TABLE 2:
MACR Averages by UNICEF Region

UNICEF Region(s)	Average MACR
Americas and the Caribbean	11
Central and Eastern Europe, Commonwealth of Independent States and the Baltic States	13
East Asia and Pacific	9
Eastern and Southern Africa	9
Middle East and Northern Africa	9
South Asia	7
West and Central Africa	12
Western Europe; North America; Australia and New Zealand; Japan and Republic of Korea	13

factors have led to the establishment of different MACRs. More specifically, European colonial law and Soviet law have had the greatest impact by far on global trends in MACRs, and are probably the most important explanatory factors for the average MACRs in Table 2. In South Asia, as previously suggested, English colonial law in particular had a great influence on South Asian MACRs. In more recent times, the clear trend is to establish and increase MACRs, just as in South Asia. Over the past 25 years, more than 40 countries around the world have established effective MACRs or increased existing MACRs, or are currently deliberating proposals to do so. In contrast, only about 5 countries are known to have reduced their MACRs or to currently have proposals on the table to decrease their MACRs.

MACR Guidance from the Committee on the Rights of the Child and the Human Rights Committee

The Committee on the Rights of the Child was created by Article 43 of the CRC, and is the international body that oversees the implementation of the Convention. As such, the Committee bears the responsibility of

interpreting the CRC's MACR provisions in the course of its deliberations. The Committee's examination of and jurisprudence on the MACR has evolved considerably over the past 12 years, and continues to evolve in each of the Committee's sessions. Therefore, in order to draw out a series of principles on how MACRs should be established in light of the CRC, it is necessary to turn to the Committee's MACR-related commentary on South Asia as well as the rest of the world. The following sections review and summarize the most important guidance to date.

MACRs Must Be 13 Years of Age or Higher

In essence, the Committee has disapproved of MACRs of 12 years and lower, supported MACRs of at least 13 years, and preferred the highest possible MACRs. The Committee, from its inception through its September-October 2004 session, has recommended on roughly 65 occasions that a State party either increase an existing MACR of 12 years of age or lower, or establish an MACR for the first time. 11 of these recommendations regarded South Asian countries – a vastly disproportionate share compared to the rest of the world – once for each initial and periodic report that the Committee on the Rights of the Child has

reviewed from South Asia. As South Asian MACRs currently range from birth to 10 years of age, the Committee has made such recommendations on every possible occasion. It is worth noting that even for the very highest South Asian MACR of 10 years, one Committee member noted, “The age of criminal responsibility, which was fixed at 10 years, was too low: it was inconceivable that a 10-year-old child could be deprived of his or her liberty.”¹⁰ Even when Bangladesh noted a past proposal to increase its MACR from 7 to 12, one Committee member remarked, “The age of criminal responsibility was to be raised in Bangladesh from 7 to 12 years, but that age was still unacceptably low in terms of the requirements of the Convention.”¹¹

For other countries with MACRs from 13 years of age and higher, the Committee has expressed approval. It specifically recommended that Poland establish an MACR of 13 years of age (based on pre-existing national regulations), expressed appreciation for Estonia’s MACR increase to 14 years, noted with appreciation Sao Tome and Principe’s MACR of 16 years of age, and welcomed Nigeria’s proposal to increase its MACR to 18 years.¹² The Committee has never stated disapproval for an MACR that was too high, and as seen in these examples, it even supports the overlapping of the MACR with the definition of the child

and the age of penal majority, which are both set at 18 years under the CRC.

In addition, any instance of lowering an MACR seems to be problematic, even if a proposed, lower MACR remains above the threshold of 13 years. For example, the Committee recommended that the Czech Republic maintain its MACR at 15 years rather than lower it to 14 years as proposed, while it expressed concern that Japan’s MACR decrease from 16 to 14 years was not in the spirit of the principles and provisions of the CRC.¹³

In Law and in Practice, No Child Younger than the MACR Should Ever Face Criminal Procedures or Sanctions – Only Protective and Educative Measures

The Committee on the Rights of the Child has insisted that the MACR serve as a practical, definitive cut-off point for procedures and consequences related to criminal responsibility. In South Asia, the MACR is nominally set at a given age level, while children younger than that age are sometimes treated as if they were criminally responsible. In Bangladesh, one Police Commissioner admitted that children as young as 4 or 5, several years younger than Bangladesh’s MACR, are sometimes arrested and charged by the police.¹⁴ In India, some children suspected of illegal acts but younger than the MACR are

10 Committee on the Rights of the Child, Summary Record of the 302nd Meeting: Nepal, CRC/C/SR.302, 24 June 1996.

11 Committee on the Rights of the Child, Summary Record of the 382nd Meeting: Bangladesh, CRC/C/SR.382, 30 May 1997.

12 Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Poland, CRC/C/15/Add.194, 30 October 2002. Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Estonia, CRC/C/15/Add.196, 17 March 2003. Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Sao Tome and Principe, CRC/C/15/Add.235, 1 July 2004. Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Nigeria, CRC/C/15/Add.61, 30 October 1996.

13 Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Czech Republic, CRC/C/15/Add.201, 18 March 2003. Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Japan, CRC/C/15/Add.231, 26 February 2004.

14 Rahman, Mizanur, et al., Tracing the Missing Cord: A Study on the Children Act, 1974, Save the Children - UK, Dhaka, 2003.

incarcerated.¹⁵ Nepali police officers are known to arrest, detain, and charge children younger than the MACR, and there are cases of children as young as 4 found in custody and jail.¹⁶ When the Committee on the Rights of the Child has had the opportunity to examine such practices in other countries, it has stipulated that children younger than the MACR must not face such treatment. For example, Liberia's MACR was 16 years of age, yet the Committee found that children younger than 16 faced juvenile court procedures anyway that bore all the markings of criminal responsibility. The Committee noted that such children should only face protective and educative measures.¹⁷ Likewise, Libya's MACR was formally set at 14 years, while under other provisions children as young as 7 were punished by custodial sentences and other measures, even if this was not termed criminal responsibility. Again, the Committee's Concluding Observations make it clear that the MACR bears a precise meaning that must be effective both in law and in practice.¹⁸

Doli Incapax Provisions are Generally Problematic, But Should Only Be Revoked if the MACR is Also Increased To At Least 13

As described above, *doli incapax* provisions bestow criminal responsibility to children in a stipulated age range when judges decide, on a case-by-case basis, that they are sufficiently mature. Bangladesh, India, Pakistan, and Sri Lanka have shared virtually identical *doli incapax* statutes for over 120

years. In basic terms, though, the evolving children's rights view is that *doli incapax* provisions are problematic in general and should be revoked, but they should only be revoked if the MACR is simultaneously raised to at least 13.

There is a wide range of human rights opinion that opposes the notion of *doli incapax* procedures in general. One example comes from the Human Rights Committee, which is the international human rights body that monitors the International Covenant on Civil and Political Rights (one of the six core international human rights treaties besides the CRC). Besides its concern for Sri Lanka's low MACR of 8 years, the Human Rights Committee noted concern for Sri Lanka's *doli incapax* statutes:

The low age of criminal responsibility and the stipulation within the Penal Code by which a child above 8 years of age and under 12 years of age can be held to be criminally responsible on the determination by the judge of the child's maturity of understanding as to the nature and consequence of his/her conduct are matters of main concern to the Committee.¹⁹

As explained later in this study, *doli incapax* courtroom practices in South Asia often omit any meaningful assessment of children. In at least Pakistan and Sri Lanka, they even subvert *doli incapax*'s presumed lack of responsibility into presumed criminal

15 Ganguly Thukral, Enakshi (ed.), *Children in Globalising India: Challenging Our Conscience*, HAQ: Centre for Child Rights, New Delhi, 2002.

16 Pradhan, Gauri, *Juvenile Justice in Nepal With a Reference to CWIN's Experience Working on Children in Conflict with the Laws*, presented at "South Asia Children Justice Workshop," Sri Lanka, May 26-29, 1997. Amnesty International, *Children in South Asia: Securing their Rights*, 1998. UNICEF Regional Office for South Asia, e-mail correspondence with author, August 2001.

17 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Liberia*, CRC/C/15/Add.236, 1 July 2004.

18 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Libyan Arab Jamahiriya*, CRC/C/15/Add.209, 4 July 2003.

19 Human Rights Committee, *Comments of the Human Rights Committee: Sri Lanka*, CCPR/C/79/Add.56, 27 July 1995.

responsibility. The Chairperson of the Committee on the Rights of the Child commented on this dilemma in Sri Lanka:

He expressed concern that the legal principle of *doli incapax*, according to which a child between the ages of 8 and 12 was not punishable for a crime unless he or she was proved to be sufficiently mature, was reversed in Sri Lanka; consequently, a child was punishable unless it could be proved that he or she was not mature enough to be punished....²⁰

Despite these criticisms of *doli incapax* provisions, the Committee on the Rights of the Child has recommended against simply abolishing them. In its consideration of the United Kingdom, the historical source of most *doli incapax* provisions throughout the world, the Committee noted with concern that the proposed abolition of *doli incapax* provisions for children between the ages of 10 and 14 would, in effect, make all children automatically criminally responsible at the age of 10.²¹ In light of the Committee's broader guidance on the MACR, one can infer that it would thus only be acceptable to abolish *doli incapax* provisions if the MACR is simultaneously raised to the higher limit of the *doli incapax* range (or at least 13 years of age). As such, it seems likely that the Committee would have welcomed a proposal to increase the United Kingdom's MACR to 14 years and to abolish its *doli incapax* procedures for children between the ages of 10 and 14.

Puberty Should Never Mark the Onset of Criminal Responsibility

Reference to puberty as the starting point of criminal responsibility is deemed unacceptable under the CRC as an arbitrary and discriminatory practice. Of course, children of the same gender may undergo puberty at different ages, and girls on average reach puberty long before boys. Thus, one member of the Committee on the Rights of the Child stated with respect to Pakistan that "[t]he use of puberty to determine criminal responsibility was too subjective a criterion and promoted discrimination against girls who attained puberty at an earlier age than boys."²² Similarly, the Committee expressed concern for Iran's reliance on puberty in this manner, which "result[s] in arbitrary and disparate application of laws and discriminate[s] between girls and boys with respect to ... age of criminal responsibility."²³ As discussed in Appendix 5, puberty is a similar factor for criminal responsibility in Maldives. However, the draft Afghani Juvenile Code entirely avoids this problem by proposing a uniform MACR of 12 as an objective, chronological substitute for the subjective limit of puberty.

The Same MACR Must Apply Regardless of the Seriousness of the Alleged Offense

A number of countries around the world actually specify two ages of criminal responsibility. The lower age limit of the two, and therefore by definition the true MACR, is effective in cases of crimes that are deemed more serious. The second and higher age

20 Committee on the Rights of the Child, Summary Record of the 872nd Meeting: Sri Lanka, CRC/C/SR.872, 1 July 2003.

21 Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.188, 9 October 2002. Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland - Isle of Man, CRC/C/15/Add.134, 16 October 2000.

22 Committee on the Rights of the Child, Summary Record of the 134th meeting: Pakistan, CRC/C/SR.134, 11 April 1994.

23 Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Iran (Islamic Republic of), CRC/C/15/Add.123, 28 June 2000.

limit is effective in cases of other specified crimes. As noted in Table 1 above, Maldives and Pakistan both feature two ages of criminal responsibility depending upon the category of alleged crime. In a related phenomenon, and as discussed elsewhere in this report, various South Asian countries have resorted to anti-terrorism and/or emergency laws which effectively void the statutory MACR with respect to specified crimes. There is in theory no binding MACR for these crimes, but the normal MACR continues to apply for other crimes. The Committee has inspected such dual ages of criminal responsibility, depending solely upon the gravity of the alleged offense, in New Zealand and has found them to be in contradiction with CRC principles:

The Committee notes with concern the lack of conformity of relevant domestic laws with the definition of the child under the Convention, especially with regard to the minimum age for charging a child with serious offences [T]he Committee suggests that the minimum age for being charged with very serious criminal offences . . . be reviewed as a matter of priority.²⁴

On another occasion, the Committee recommended that New Zealand increase its MACR and "ensure that it applies for all criminal offences."²⁵

The Same MACR Must Apply Throughout the State Party

Systems where the MACR varies among political subdivisions within the State party are also in violation of the CRC. In some

cases in South Asia, governments have applied special emergency laws to specific regions or political subdivisions, and these laws legally undermined the statutory MACR with respect to specific crimes. In addition to a series of other problems that such laws pose, they contradict the CRC's provisions in opening the door to different MACR provisions within the same country. As one Committee member remarked during discussions on Mexico's Initial Report,

It appeared that the minimum legal age for criminal responsibility was generally 18 years but lower in some parts of Mexico. It was difficult to see how children could be treated equally if their status in that respect depended on their place of residence. Article 40, paragraph 3(a), of the Convention clearly did not allow for different ages of criminal responsibility. . . .²⁶

The MACR Must Refer to the Age of the Child at the Time of the Alleged Offense

Standard criminal law practices throughout the world regard age limits as effective at the time of alleged commission of the offense, and the Committee has supported this standard. Nonetheless, the Supreme Court of India recently decided that a suspected offender should be deemed a juvenile or an adult based on his or her age at the time of trial, not at the time of the alleged offense. The Committee expressed concern for this development, and recommended that India amend its laws to consider age at the time of the suspected offense.²⁷ In a similar problem, as discussed in greater detail in Appendix 7, the Province of Punjab

²⁴ Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: New Zealand, CRC/C/15/Add.71, 24 January 1997.

²⁵ Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: New Zealand, CRC/C/15/Add.216, 3 Oct 2003.

²⁶ Committee on the Rights of the Child, Summary Record of the 106th Meeting: Mexico, CRC/C/SR.106, 14 January 1994.

²⁷ Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: India, CRC/C/15/Add.228, 26 February 2004.

(Pakistan) has determined the age of children at the time of arrest or the initiation of proceedings, not at the time of the alleged crime.

Summary of CRC Guidance

In summary, the Committee encourages a single, invariable, and country-wide MACR in each State party - one which is set as high as possible, and which is applied uniformly to all children at all times. More specifically, the guidance developed under the CRC includes the following:

- MACRs Must Be 13 Years of Age or Higher
- In Law and in Practice, No Child Younger than the MACR Should Ever Face Criminal Procedures or Sanctions – Only Protective and Educative Measures
- *Doli incapax* is Problematic as a System, But It Should Only Be Revoked if the MACR is Also Increased To At Least 13 Years of Age

- Puberty Should Never Mark the Onset of Criminal Responsibility
- The Same MACR Must Apply Regardless of the Seriousness of the Alleged Offense
- The Same MACR Must Apply Throughout the State Party
- The MACR Must Refer to the Age of the Child at the Time of the Alleged Offense

In view of this guidance, and as seen in Table 1 and the foregoing discussion, current South Asian MACR provisions fall short in various respects. Indeed, the very highest MACRs in South Asia – 10 years of age in Bhutan and Nepal – still fall 3 years short of the minimum acceptable age. However, the MACR is often far more complex in practice than by its legal definition, and its practical problems are widespread in South Asia. The following section examines other faces of the MACR and their implications for children's rights.

The MACR in Practice: Challenges Directly Undermine the MACR's Effectiveness

In practice, the MACR calls into question a wide range of unexpected factors, but unfortunately, this often signifies various ways in which the MACR is undermined. The manipulation of ages, laws that do not apply or are not applied, special legislation that partially voids MACR provisions, and discriminatory *doli incapax* courtroom practices are some of the problems that can characterize and undermine the MACR in reality. South Asian countries are also active in addressing many of these issues, by seeking better implementation of laws, more consistent training of law enforcement officials, and promoting birth registration. More actions of this sort are needed, both in order to protect children's rights in the present, and to help lay the foundation for MACR reforms and better protection of children's rights in the future.

Low Birth Registration Allows Manipulation of Children's Ages

In South Asia, almost 65% of all births go unregistered – meaning that approximately 22.5 million children in the region do not

have birth certificates to prove their ages.²⁸ With figures this high, it is no surprise that children in conflict with the law often face disputes over their ages, bringing into question whether they are older or younger than the MACR or related age limits. Procedures to make official estimates of children's ages often prove impractical; when medical examinations are required for this purpose in most South Asian countries, the limited availability of doctors means that cases are further delayed. Overloaded judges do not take the time to examine school records or to question witnesses to ascertain children's true ages, and in the end they frequently ignore the required procedures altogether. If there is still some question over a child's age by the time his or her case reaches a judge's attention, such as in Bangladesh, judges may simply guess the child's age by appearance.²⁹

At other times, the matter does not even reach the judge's attention. There are widespread reports in Bangladesh, Nepal, and Pakistan that police officers and/or prosecutors commonly exaggerate children's ages in court documents, usually to avoid the additional procedural safeguards granted to

²⁸ Neither figure includes Afghanistan, which as recently as 2000 did not have any effective birth registration system or relevant data available. UNICEF Innocenti Research Centre, "Birth Registration: Right from the Start," Innocenti Digest 9, Florence, 2002.

²⁹ Penal Reform International, Access to Justice and Penal Reform: Special Focus: Under-trials, Women and Juveniles: Conference Report, from "PRI Second South Asia Regional Conference, 12-14 December 2002, Dhaka, Bangladesh," London, 2003. Uddin Siddiqui, Kamal, The Age of Criminal Responsibility and Other Aspects of the Children Act, 1974, Concept Paper presented at "Raising the Age of Criminal Responsibility and Other Aspects of the Children Act, 1974" workshop, Dhaka, 16 January 2004. Asian Centre for Human Rights, "A gravy train and shackled kids in Bangladesh," ACHR Review, New Delhi, 4 February 2004. Rahman, Mizanur, et al., Tracing the Missing Cord: A Study on the Children Act, 1974, Save the Children - UK, Dhaka, 2003.

children by law.³⁰ Street children and poor children, who may be less likely to have proof of age, are at a heightened risk for this practice. Busy magistrates then accept without question the ages reported by officers and prosecutors, and children often lack adequate legal representation so as to challenge the falsified ages. When so many children lack proof of age, and their estimated ages are so easily confused or distorted, the protective value of the MACR quickly fades.

Positive developments are already underway which can help address these challenges in the long term, such as the impressive national campaigns for birth registration in several of the South Asian countries. Maldives, which is the only South Asian country without significant problems of this nature, could potentially achieve 100% birth registration within a matter of years. Some countries, such as Afghanistan and Bangladesh, have in essence successfully created their first birth registration systems ever, while India and Pakistan have even played leadership roles in promoting birth registration across Asia (in addition to their own national campaigns). A few countries have modified their age estimate procedures to offer greater protection to children, such as in India's 2000 Juvenile Justice (Care and Protection of Children) Act (JJA), which makes irreversible a competent authority's determination that a given person is a child. Courts have also played a crucial role, for instance the Nepal Supreme Court's decision

in one case that lower courts had not sufficiently considered a child's claims about his own age.

Limited Applicability and Implementation of Laws Leaves the MACR in Doubt

South Asia's general trend of uneven implementation of laws, plus the limited applicability of some laws, may at times directly prevent the statutory MACR from being applied. For example, Afghanistan's 1976 Penal Code – which establishes the current MACR of 7 years – is not widely applied or enforced across the country.³¹ Although they help to replace patchworks of old provincial laws, India's 2000 JJA and Pakistan's equally groundbreaking 2000 Juvenile Justice System Ordinance (JJSO) still do not apply in the entirety of either country. Many executing state mechanisms are still lacking where the laws should apply, and some judges continue to apply pre-existing laws that are legally null and void.³² Of course, as suggested by these few examples of larger trends, the MACR cannot be an effective protection when related laws do not legally apply or are not implemented nationwide. On the other hand, the governments of these and other countries are taking steps towards better implementation of laws, while courts and independent bodies are applying leverage to ensure implementation. In India, the New Delhi Juvenile Justice Board and High Court

30 World Organisation Against Torture (OMCT), Rights of the Child in Bangladesh: Report on the implementation of the Convention on the Rights of the Child in relation to Children in Conflict with the Law by Bangladesh: A report prepared for the Committee on the Rights of Child 34th Session - Geneva, September 2003, Geneva, 2003. Kathmandu School of Law, "Part II: Baseline Survey on Juvenile Delinquency," Research Report on Juvenile Justice System in Nepal, Kathmandu, 2003. Lal Singh, Indra, Street Children and Juvenile Justice in Nepal: A Case Study, UNICEF Nepal, unpublished report presented at the Innocenti Global Seminar on Children Involved with the System of Juvenile Justice, UNICEF Innocenti Research Centre, Florence, October 1997. Society for the Protection of the Rights of the Child (SPARC), The State of Pakistan's Children 2003, Islamabad, 2004.

31 Lau, Martin, Afghanistan's Legal System and its Compatibility with International Human Rights Standards, International Commission of Jurists, Geneva, 2002.

32 Integrated Regional Information Network, Pakistan: Young Offenders Excluded from Justice in Tribal Areas, UN Office for the Coordination of Humanitarian Affairs, 9 September 2004.

have both taken the initiative to enforce implementation of India's JJA. The Bangladesh Supreme Court, upon indications that the Penal Code's MACR provisions had not been heeded, in effect ordered that the provisions be retroactively applied to children already deprived of their liberty.

Anti-Terrorism Acts May Directly Undermine the MACR

As discussed in the respective appendices, anti-terrorism laws in India, Pakistan, Nepal, and Sri Lanka have at times undermined the legal force of statutory MACRs. Sri Lanka's Prevention of Terrorism Act, which was suspended just a few years ago, applied without any age restriction to all people, and superseded all other laws in the regions where it was in effect. Pakistan's 1997 Anti-Terrorism Act also overrides other national laws, yet it is still in force, and the anti-terrorism courts that it creates could potentially try children younger than the Penal Code's standard age of responsibility of 7 years. In addition, the Committee on the Rights of the Child specifically expressed its deep concern for the failure of India's 2002 Prevention of Terrorism Act to respect CRC provisions. While some courts in these countries have at times upheld juvenile justice laws over such anti-terrorism measures, the legal footing of the MACR is generally ambivalent or simply undermined directly. Furthermore, some observers fear that suspended anti-terrorism laws may always be reinstated, or new laws promulgated, and that such risks may continue in the future.

The Protective Intent of *Doli Incapax* Provisions Is Distorted in Reality

In the South Asian countries that maintain *doli incapax* provisions, courtroom procedures commonly distort their original design as a measure of protection. Even though *doli incapax* statutes theoretically limit criminal responsibility to children with sufficient maturity, in practice they sometimes become a mechanism of discrimination against street children, child prostitutes, and poor children. In Bangladesh, "sufficient maturity" may simply mean that a given child fits into one of these categories; criminal responsibility is assigned to him or her, and no true assessment of maturity is made.³³ In Pakistan and Sri Lanka, judges are often so overwhelmed that children in the *doli incapax* age range are actually presumed to be criminally responsible – rather than presumed to be innocent – unless defense lawyers raise the issue and prove children's absence of maturity.³⁴ Most children do not have adequate legal representation to argue these points, and *doli incapax* provisions remain an instrument of discrimination rather than an additional legal protection.

Children's Ages are Noted at the Time of Trial, Not at the Time of Alleged Offences

As noted previously, the Committee on the Rights of the Child specifically recommended that India amend its laws so that age limits refer to children's ages at the time of alleged offenses, not at the time of their trials.

³³ Uddin Siddiqui, Kamal, The Age of Criminal Responsibility and Other Aspects of the Children Act, 1974, Concept Paper presented at "Raising the Age of Criminal Responsibility and Other Aspects of the Children Act, 1974" workshop, Dhaka, 16 January 2004.

³⁴ Amnesty International, Pakistan: Denial of basic rights for child prisoners, 2003. Jillani, Anees, Cries Unheard: Juvenile Justice in Pakistan, Society for the Protection of the Rights of the Child (SPARC), Islamabad, 1999. Committee on the Rights of the Child, Summary Record of the 872nd Meeting: Sri Lanka, CRC/C/SR.872, 1 July 2003.

However, this legal discrepancy is not limited to India. In Pakistan, the Province of Punjab modified its Youthful Offenders Ordinance in 1984 to consider children's ages at the time of arrest or at the outset of trial proceedings. Since children sometimes await trial for months or even years, this provision can easily leave children's true ages behind as an insignificant factor. Notably, Pakistan's 2000 JJSO attempts to remedy this situation by superseding the Punjab Youthful Offenders Ordinance, and by defining children upon their ages at the time of the alleged commission of offenses. Even so, as suggested above, persistent implementation difficulties mean that some Punjabi judges continue to apply provisions of the abrogated Punjab Youthful Offenders Ordinance.³⁵ Afghanistan's current draft Juvenile Code provides a useful model on this point; it explicitly states that determining and recording a child's age is based upon the date of the crime in question.

Weak Prosecution of Adults Enables the Criminal Exploitation of Children

Crime experts believe that adults illegally use children to carry out crimes in every country in the world, and children younger than MACRs are sometimes at a heightened vulnerability for such exploitation. In South Asia, as discussed in greater detail in Appendix 7, evidence suggests that at least Pakistan has significant problems of this nature.³⁶ In one diffuse phenomenon, adult drug traffickers pay young children to deliver small drug shipments for them. If the child is caught, lax prosecution efforts make it very unlikely that the responsible adult will ever be

held accountable for either the illegal drug activities or for the illegal child exploitation. However, traffickers sometimes use bribes to influence the estimations of children's ages, or to influence *doli incapax* assessments, so that the exploited children will not be found criminally responsible. Since care and protection measures are not usually provided in practice to such children, the adult traffickers are able to continue exploiting the children for drug deliveries.

It must be underscored that a children's rights perspective sees the affected children as victims of exploitation whose rights must be protected. Where children are found to be exploited for criminal acts, they must be assured physical safety as well as appropriate services and protection from continued exploitation. Indeed, exploitative practices must be immediately halted – and the responsible adults must be prosecuted – in order to eliminate any incentive for adults to further exploit children in this manner. One positive example in this regard is Sri Lanka's 1998 Penal Code Amendment Act (No. 29), which defines in Section 288(B)(1) the Offence of Hiring or coercing Children to traffic in articles restricted by the Poisons, Opium and Dangerous Drugs Ordinance.³⁷

It seems critical to bear in mind the foregoing points upon revising MACR provisions, since MACR increases could potentially make problems of criminal exploitation more visible. As children of older ages are deemed free from criminal responsibility, due to higher MACRs, criminal adults may be more likely to seek to exploit them – in part because of their greater ability to actually complete the task assigned by the adult criminals. However, criminal exploitation

³⁵ Integrated Regional Information Network, Pakistan: Young Offenders Excluded from Justice in Tribal Areas, UN Office for the Coordination of Humanitarian Affairs, 9 September 2004.

³⁶ Integrated Regional Information Network, Pakistan: Focus on Boys Behind Bars, UN Office for the Coordination of Humanitarian Affairs, 10 September 2001.

³⁷ Government of Sri Lanka, United Nations Secretary-General's Study on Violence against Children: Questionnaire to Governments, Responses, 2004.

victimizes all involved children, and appropriate care and protection services must be provided to all of them – whether they are older or younger than the MACR. In other words, any argument that the MACR should not be raised because it could heighten problems of instrumentalization is

faulty. Such arguments avoid the heart of the matter – states' obligations under the CRC to ensure effective care and protection for all children victimized by exploitation, and to vigorously prosecute the criminal adults who are truly responsible.

Broader Perspectives on MACR-Related Challenges

The following sections examine a series of broader issues, beyond actual MACR provisions and their direct application, that also have important influences on the MACR. Among other points, religious law concepts, appropriate programs to respond to children in conflict with the law, and the role of the media can have a surprising impact on the MACR and on the possibilities for reforming MACR provisions.

The MACR, Juvenile Justice, and Children's Rights

The MACR is a fundamental juvenile justice protection, but it must be seen at all times within a larger, interdependent children's rights framework. Among other purposes, the MACR is essential to define the beginning of juvenile court jurisdictions, and to determine which state responses are appropriate for children of different ages. However, as preceding sections of this study demonstrate, it cannot stand alone and be an effective measure as such. In the same manner, a simple MACR increase cannot be expected to solve the problems in how children are treated, nor does it reflect a comprehensive children's rights perspective. The actual application of MACRs, and meaningful MACR reform, are intrinsically linked to effective juvenile justice systems, which in turn rely upon the implementation and protection of all children's rights. It is also important to recall that the guarantees of children's rights apply at all times to children both younger and older than MACRs, and MACR reforms must consider the likely consequences for both. For those above the MACR, this holds true in all contexts,

including formal juvenile justice settings, non-formal mechanisms, social welfare-oriented systems, restorative justice programs, and even where children are tried and sentenced in adult settings. For children younger than the MACR, the provision of social services, re-education, and rehabilitation are also subject to international juvenile justice and children's rights standards.

For these reasons, MACR reforms cannot be isolated measures, but instead must be pursued along with broader juvenile justice improvements. Once children are arrested (and even before) – whether older or younger than the MACR, and whether or not the MACR has been heeded – they may all begin to face the same risks in current juvenile justice systems. In a general sense, South Asian juvenile justice systems are often weak or almost nonexistent. As discussed in the respective appendices, India and Pakistan both face chronic difficulties in establishing juvenile justice systems in accord with their groundbreaking 2000 laws, while Sri Lanka has similar problems in bringing about effective juvenile justice nationwide. Bangladesh and Nepal, among others, often see rushed courtroom proceedings and unaccountable police handling that directly infringe upon children's rights.³⁸ Afghanistan and Maldives have only one special juvenile court in their respective countries, while Bhutan does not have any juvenile courts at all. Other common juvenile justice problems in South Asia include inadequate delinquency prevention efforts, overreliance on the deprivation of liberty, unacceptable conditions of detention, and physical violence against children.

Often, and almost always in violation of CRC principles, children are tried and/or deprived of their liberty in adult settings. For example, Afghanistan, Bangladesh, Bhutan, Nepal, and Sri Lanka begin adult court jurisdiction before the CRC-mandated age of penal majority of 18 years, and therefore consistently hold trials and imprison some children in the adult criminal justice system. In general, adult criminal courts and adult court judges do not take into account the special considerations and protections that the CRC obliges for all children in conflict with the law. Indeed, the juvenile justice setting, with specially-trained judges and personnel, provides the best approach to fair justice, rehabilitation, and reintegration into society for children. Unfortunately, India, Nepal, Pakistan, and Sri Lanka have at times made children liable for trial in special anti-terrorism courts, which have proven even less likely to uphold children's rights safeguards. Children have thus been deprived of their liberty with adults in military barracks, military camps, and other adult settings.³⁹ With South Asia's weak or inexistent juvenile justice systems, and these practices of trying and detaining children in adult settings, it becomes clear that MACRs are just one issue in a series of broader children's rights challenges.

Implications of Islamic, Hindu, and Buddhist Precepts for MACR Provisions

Islam, Hinduism, and Buddhism are widely influential in various South Asian legal systems, and their effects are tangible for the MACR. Maldives and Pakistan are two of the few countries in the world that explicitly base their MACR provisions upon interpretations of Islamic law. As noted above, their current MACR formulations are problematic in light of the CRC, but other religious interpretations and practices show that Islamic law and children's rights are compatible on the MACR. Likewise, a close appraisal of Hindu and Buddhist principles suggests a striking overlap with CRC guidance on the MACR.

In brief, Pakistan's 1979 Hudood Ordinances are derived from Islamic law, and their defined offenses do not have any age limits for criminal responsibility. The Ordinances supersede Pakistan's Penal Code, which for other offenses first holds children responsible at the age of 7 years. In Maldives, criminal responsibility can begin at 7 years for a series of hadd-liable offenses, plus other specified crimes. However, even

³⁸ Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Bangladesh*, CRC/C/15/Add.221, 27 October 2003. Lal Singh, Indra, *Street Children and Juvenile Justice in Nepal: A Case Study*, UNICEF Nepal, unpublished report presented at the Innocenti Global Seminar on Children Involved with the System of Juvenile Justice, UNICEF Innocenti Research Centre, Florence, October 1997. Amnesty International, *Children in South Asia: Securing their Rights*, 1998. Kathmandu School of Law and the Center for Legal Research and Resource Development, "Part I: Juvenile Justice System in Nepal a Glance in View of International Standards," Research Report on Juvenile Justice System in Nepal, Kathmandu, 2003. Kathmandu School of Law, "Part II: Baseline Survey on Juvenile Delinquency," Research Report on Juvenile Justice System in Nepal, Kathmandu, 2003.

³⁹ Asian Centre for Human Rights, *The Status of Children in India: An alternate report to the United Nations Committee on the Rights of the Child on India's first periodic report*, New Delhi, 2003. Penal Reform International (South Asia Regional Office) and Advocacy Forum, *Assessment Report: Juvenile Justice System in Nepal*, UNICEF Nepal, 2004. Jilani, Anees, *Cries Unheard: Juvenile Justice in Pakistan*, Society for the Protection of the Rights of the Child (SPARC), Islamabad, 1999. Society for the Protection of the Rights of the Child (SPARC), *The State of Pakistan's Children 2003*, Islamabad, 2004. World Organization Against Torture, *Sri Lanka Report for The Committee on the Rights of the Child 1995*, 1995.

children younger than 7 could theoretically be found responsible for zina offenses if they have reached puberty. For certain other crimes, criminal responsibility is delayed until the age of 14 years. Each country's MACR provisions are discussed in further detail in the respective appendices.

There are numerous schools of thought within Islamic law, which offer diverse viewpoints even on questions of children's age and responsibility. Pakistani and Maldivian laws certainly fall among these, while other interpretations of traditional Islamic law conclude that children should not be held responsible at such young ages. For example, two scholars of Islamic law and secular criminal law have identified the minimum mandates of Islamic Shari'a, in which children pass through the following three distinct phases of responsibility:⁴⁰

- 1) From birth to age 7: Children are considered non-discriminating in this phase, and are not held criminally responsible for any reason.
- 2) From age 7 to the onset of puberty: In this "age of discretion," children should not be held criminally responsible either. For example, Al-Zayla'i suggested that any supposed premeditation on the part of a child in this phase should be regarded as a mistake. However, certain schools of thought maintain that such children may be held accountable in other ways. Thus, the Hanafi school (the dominant school in South Asia) permits beneficial consequences or outcomes for children in this stage, or in certain circumstances, neutral outcomes (i.e., not harmful, and with no manifest loss). Likewise, Al-Shafei commented that children in this phase may be disciplined

and restrained, but neither retribution nor punishment is permissible.

Generally, there is no full consensus on which physical signs prove the onset of puberty for boys and girls. However, at least in Pakistan, the majority of jurists deem that puberty can be presumed by the age of 15 for both boys and girls, even in the absence of physical signs. According to Abu Hanifah, that presumption can be made by the age of 17 for girls and 18 for boys.

- 3) From the onset of puberty and beyond: Children who have reached puberty and who possess *rushd* (i.e., discrimination or maturity of actions) should bear criminal responsibility. Khan Nyazee notes that the *dalil* (legal evidence) for this point lies in the following verse of the Qur'an:

Make trial of orphans until they reach the age of marriage; then if ye find sound judgement in them, release their property to them; but consume it not wastefully, nor in haste against their growing up. (Qur'an 4:6)

Thus, in order for children to acquire the complete capacity and responsibility for execution, they must have reached both puberty and sound judgment. Khan Nyazee emphasizes, "In traditional Islamic law, a child who has not attained puberty along with *rushd* (mental maturity) HAS NO CRIMINAL LIABILITY. . . . This translates into a conclusive presumption that a child who has not attained puberty is not capable of committing a crime."⁴¹

⁴⁰ Khan Nyazee, Imran Ahsan, *General Principles of Criminal Law (Islamic and Western)*, Advanced Legal Studies Institute, Islamabad, 1998. Bahnassi, Ahmad Fathi, "Criminal Responsibility in Islamic Law," M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System*, Oceana Publications, London, 1982.

⁴¹ Khan Nyazee, Imran Ahsan, *General Principles of Criminal Law (Islamic and Western)*, Advanced Legal Studies Institute, Islamabad, 1998, 135.

These three stages of responsibility under Islamic Shari'a correspond well with MACR guidance developed under the CRC. According to the majority view's consideration of the age of puberty, criminal responsibility should not begin before the age of 15 years. Likewise, guidance under the CRC supports an MACR of at least 13 years. Children under that age, in the Islamic age of discretion, should still be held accountable for their actions and disciplined, yet they should not be harmed or punished. For this reason, Khan Nyazee further suggests that those under the age of puberty should be handled by care proceedings, and that they should never be detained, imprisoned, or deprived of their liberty. Again, this is very similar to the CRC and international juvenile justice standards, which maintain that children under the MACR should indeed be held accountable for their actions, but in a non-penal manner, and never with the deprivation of liberty.

Afghanistan's current draft Juvenile Code is probably the best example in the world of juvenile justice legislation that integrates traditional Islamic principles with international children's rights standards for the MACR. In brief, the draft code proposes an MACR of 12 years – essentially an objective, gender-neutral chronological substitute for the limit of puberty, and one that is acceptable under the view of various schools of Islamic thought. A range of non-punitive measures of accountability is available for children younger than the MACR. For children older than the MACR, the factor of *rushd* is included wherein judges are duty bound to consider the degree of psychological development, character and aptitude, and behaviour of each child during and after offenses. Finally, the draft code sets the age

of penal majority at 18 years, and defines all people beneath this age as children. Appendix 1 on Afghanistan includes a more detailed discussion of the draft Juvenile Code.

In Maldives, the government continues to review one noted Islamic theologian's analysis of the compatibility of Shari'a law with the CRC. In his draft report, "The Application of the CRC in the Republic of the Maldives from the Perspective of Islamic Law," Prof. Dr. Mohamed El-Said El-Dakkak reached very similar conclusions to those noted above. Among other points, he specifically recommends an MACR of 12 years based upon Islamic texts and principles. Furthermore, on the question of gender discrimination, which is implicit in the use of puberty to determine criminal responsibility, he writes:⁴²

The principle of equality is highly appreciated under Islam especially between the male and female. Therefore, Islamic law condemns the discrimination against the female child.... When the CRC calls for the prevention of sexual discrimination in article 3, it accords with the Islamic conjunction in this regard.

Hindu law is also extremely influential in South Asia, even in the context of the MACR. Notably, fundamental Hindu precepts strongly support the notion of the innocence of children, and tend to lend support to higher MACRs.⁴³ In particular, Hindu law and philosophy have had a strong historic influence on Nepali law, drawing especially from religious texts such as *Geeta*, which provides codes of conduct in various aspects of life. The original

⁴² El-Dakkak, Mohamed El-Said, *The Application of the CRC in the Republic of the Maldives from the Perspective of Islamic Law*, Unpublished Draft, UNICEF Maldives, 2000.

⁴³ Sangroula, Yubaraj, "The Roles Opportunities and Challenges of the Juvenile Justice System in Nepal: Need of a Diversion from the Criminal Justice System," *Kathmandu School of Law Journal*, 2004.

philosophy of *Geeta* and several other related texts characterize the child as an incarnation of God, with a deeply rooted conception of the child's soul as a residence of the God: "the God resides in every child." In this light, many Hindu religious texts establish a clear principle that children are innocent, incapable of causing harm to others, and free from any stigma. In contrast, the Hindu concept of *karma* has frequently been misinterpreted as justifying the punishment of children to rectify their next lives. This error, however, transgresses the fundamentals of Hindu philosophy concerning the treatment of children.

Finally, Buddhism also has tremendous importance in South Asia. Most notably, Bhutan's laws are based on Buddhist principles, which are considered conducive to the protection of children's rights in general.⁴⁴ The Buddhist perspective sees children as coming to the world with a pure mind, but in this world there are 80,000 identified types of outside disturbances which can affect children's minds. Since children and young adults are susceptible to such disturbances, caring adults bear the responsibility to protect the development of children. Indeed, of the Four Stages or Four Seasons of Life (i.e., childhood, adolescence, adulthood, and old age), the springtime of childhood and adolescent life brings the strongest requirement of compassionate nurturing. These precepts, of course, have direct bearing on how one considers the MACR, and the 2004 Bhutan Penal Code reflects them. The Penal Code lies in line with Lord Buddha's guidance to "perpetuate good and chaste actions" and "His Majesty's vision for enlightened laws . . . and [for the] innocent not to suffer." Furthermore, Bhutan's Chief Justice has emphasized that one of the Code's core

objectives is to provide opportunities for rehabilitation, reform, and personal improvement.⁴⁵ Therefore, in light of the relevant Buddhist principles, the Penal Code refuses any possibility of criminal liability for children younger than 10, while it explicitly grants judges the authority to consider reduced sentences and other appropriate facilities, instead of imprisonment, to respond to children above the MACR.⁴⁶ Furthermore, these core Buddhist precepts on children can be seen as supporting in broad terms the guidance evolved under the CRC for MACRs of 13 years.

Lack of Appropriate Programs for Children in Conflict with the Law, Particularly for Those Younger than the MACR

In many countries around the world, resistance to MACR increases comes down to one core, but mistaken, argument: the government needs to retain full discretion to respond to young children in conflict with the law, and thus it is better not to raise the MACR. Indeed, this point was raised in opposition to Bangladesh's recent MACR reforms. While the instinct to somehow respond to young children in conflict with the law is understandable, both the children's rights and scientific perspectives make the following point abundantly clear: young children in conflict with the law should be held accountable by entirely non-punitive measures for guidance and re-education. There is no need to maintain a low MACR to respond to children as such. Indeed, it is incumbent upon States parties, under international juvenile justice standards, to respond effectively to children younger than the MACR with such appropriate measures.

⁴⁴ UNICEF Bhutan, *The Future of the Nation Lies in the Hands of Our Children: A resource guidebook supporting the rights and needs of Children*, Thimphu, 2000.

⁴⁵ Choden, Karma, "Bhutan Penal Code passed," *Kuensel Online*, 16 August 2004.

⁴⁶ Bhutan Penal Code, 2004, Articles 115-116.

From a scientific viewpoint, there is little research available on the effectiveness of delinquency prevention programs in South Asia. However, researchers in the United States have comprehensively examined the question of how to respond to children under 12 who come into conflict with the law. They concluded decisively that the best intervention and service programs “provide a treatment-oriented, nonpunitive framework,” and that effective non-punitive programs can reduce disruptive behavior and delinquency at an early age.⁴⁷ They also uncovered the critical importance of such welfare-oriented responses: in the absence of effective interventions, children who commit crimes while still under 13 are three to four times as likely to develop into serious, chronic, or violent offenders.⁴⁸ Other studies suggest that punitive approaches, including the deprivation of liberty, are less effective and may even worsen delinquency problems over time. Furthermore, the deprivation of liberty of children is consistently more expensive than non-custodial programs and services. In other words, the most effective approach is to respond to all children younger than 12 or 13 in conflict with the law via non-punitive programs and services; other approaches are significantly more expensive and may even worsen delinquency problems over time. These research conclusions match international juvenile justice standards on the MACR in their entirety.

In many South Asian countries, the reality often reflects just the opposite. There is a lack of non-punitive options to respond to children in conflict with the law, and resource-demanding deprivation of liberty is often the primary response – unfortunately,

at times even for children younger than the MACR. Juvenile justice laws often stipulate a variety of other options, but in reality these are rarely used. In general terms, this is a challenge with regard to children both older and younger than MACRs, and it should be addressed concurrently with any proposal to increase MACRs.

Inflammatory Media Reports Hinder MACR Reform Efforts

Media reports and public statements by officials carry both high visibility and influence over public opinion, and can have a tangible impact on the promotion of children’s rights. For such reasons, the Committee on the Rights of the Child consistently stresses the fundamental role of the mass media in publicizing the CRC’s principles and in promoting children’s rights. Unfortunately, in numerous juvenile justice systems across the world, isolated yet extreme acts of juvenile crime have been sensationalized, presented in an incorrect or misleading context, and then used to justify new policy measures that clearly run counter to CRC principles. In many cases, in countries such as the United Kingdom, Japan, the United States, Slovakia, New Zealand, Honduras, and Canada, this type of phenomenon has led to reductions in MACRs or has blocked proposed increases in MACRs and related age limits. In South Asia, there are signs that similar factors may be at play in at least Bangladesh and India.

For example, one recent Indian newspaper article, entitled “Law with them, bad kids give cops the slip,” describes a group of children who had allegedly broken into a series of

⁴⁷ Burns, Barbara J., James C. Howell, Janet K. Wiig, Leena K. Augimeri, Brendan C. Welsh, Rolf Loeber, and David Petechuk, *Treatment, Services, and Intervention Programs for Child Delinquents*, United States Department of Justice - Office of Juvenile Justice and Delinquency Prevention, 2003.

⁴⁸ Snyder, Howard N., Rachele C. Espiritu, David Huizinga, Rolf Loeber, and David Petechuk, *Prevalence and Development of Child Delinquency*, United States Department of Justice - Office of Juvenile Justice and Delinquency Prevention, 2003.

homes in New Delhi and committed burglaries.⁴⁹ The article immediately focuses on one member of the group who, at 6 years of age, was younger than the MACR and could not be arrested. It uses this last point as the nexus to an entirely unrelated 6-year-old boy who had allegedly committed two murders within the span of a few months. The conclusion in the article's final paragraph: "Senior police officials agree that the JJA often acts as a major hindrance in checking crime." Besides its problematic reference to "bad kids," the article fails to note that Section 32(1) of the JJA explicitly grants any police officer the power to produce any child in need of care and protection before a Child Welfare Committee. Children younger than the MACR should always be held accountable by non-punitive care and protection measures, and the JJA expressly created these committees to dispose of cases for the care, protection, treatment, development and rehabilitation of children. The act also envisages a wide range of options for such purposes.

Of course, this point recalls the preceding section on appropriate responses to children. Even if there is a perception that children are somehow unaccountable, or if effective responses to children are not known and available in practice, opponents of MACR increases sometimes seize upon the lack of programs to rationalize low MACRs. Inflammatory media coverage is often the vehicle for such messages. As discussed above, among other consequences these misleading arguments actually promote the most counterproductive crime control policies possible.

However, examples from South Asia demonstrate that the media can play a positive role in informing the public about children's rights. Sri Lanka's National Child Protection Authority (NCPA) regularly engages and collaborates with various media outlets (including, *inter alia*, print media, radio, television, and theatres) to disseminate information about children's rights to the public.⁵⁰ For example, on International Children's Day in 2002, major newspapers all dedicated one full page to NCPA information on children's rights. The Sri Lanka Press Council's Code of Ethics for journalists even establishes standards for reporting on juvenile justice cases. In Pakistan, media agencies recognized the problem of negative reporting on children, and independently and voluntarily developed a media code of ethics on children's issues.⁵¹ This code was seen as having an important impact for promoting children's rights awareness, particularly in the print and electronic media.

Limited CRC Awareness Among Citizens and Direct-Service Officials Limits Reforms

In a broad sense, there is limited understanding of children's rights and juvenile justice among ordinary citizens in South Asia. The experience of many countries shows that low citizen awareness permits inflammatory messages, such as those discussed above, to take hold in public opinion and incur lasting negative effects. NGOs' active collaboration in awareness and sensitivity campaigns for the public – as well

49 Ganguly Thukral, Enakshi (ed.), *Children in Globalising India: Challenging Our Conscience*, HAQ: Centre for Child Rights, New Delhi, 2002.

50 Government of Sri Lanka, United Nations Secretary-General's Study on Violence against Children: Questionnaire to Governments, Responses, 2004.

51 Committee on the Rights of the Child, Summary record of the 901st meeting: Pakistan, CRC/C/SR.901, 30 September 2003.

as continuous capacity building on juvenile justice for their own staff – is fundamental in creating pro-children’s rights environments.

Moreover, the officials who have the most direct contact with children in conflict with the law – police officers, public prosecutors, and trial court judges – still tend to show little interest in matters of children’s rights and juvenile justice. Throughout the region, as reflected in various appendices to this study, officials who deal directly with children in conflict with the law often fail to uphold MACR standards. Even worse, they are often responsible for subverting those standards in practice.

As a representative example, Nepal’s most common challenge falls precisely along these lines – police officers and prosecutors that falsely inflate children’s ages, and courts

that generally accept those ages.⁵² Indeed, the Committee on the Rights of the Child recommended in its 1996 Concluding Observations that Nepal pursue technical assistance for professional training programs, and that “[s]pecial attention should be paid to training programmes on the relevant international standards, in particular for judges, law enforcement officials, correctional officers and social workers.”⁵³ Of course, the practical significance of any MACR provision or reform depends exactly upon such officials, thus a steadfast, long-term investment in education, training, and awareness seems critical. Nepal, for example, has stepped up to this challenge with numerous CRC training initiatives for police officers, and the Nepali police force has even recently proposed that specialized Juvenile Justice Officers respond to all juvenile cases in 10 pilot districts.

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- 52 Lal Singh, Indra, *Street Children and Juvenile Justice in Nepal: A Case Study*, UNICEF Nepal, unpublished report presented at the Innocenti Global Seminar on Children Involved with the System of Juvenile Justice, UNICEF Innocenti Research Centre, Florence, October 1997. Amnesty International, *Children in South Asia: Securing their Rights*, 1998. UNICEF Regional Office for South Asia, e-mail correspondence with author, August 2001. Kathmandu School of Law and the Center for Legal Research and Resource Development, "Part I: Juvenile Justice System in Nepal a Glance in View of International Standards," Research Report on Juvenile Justice System in Nepal, Kathmandu, 2003. Kathmandu School of Law, "Part II: Baseline Survey on Juvenile Delinquency," Research Report on Juvenile Justice System in Nepal, Kathmandu, 2003.
- 53 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Nepal*, CRC/C/15/Add.57, 7 June 1996.

Conclusion and Recommendations

South Asia is a region full of promising juvenile justice developments – from historic new laws, to cross-sector support for bold legal reform, to innovative balances between traditional Islamic law and children’s rights principles, and exemplary campaigns and regional leadership for higher birth registration. Even specific to the MACR, the clear trend is towards closer alignment between national law and CRC principles. Afghanistan, Bangladesh, Bhutan, and Sri Lanka have all recently established MACRs, increased their MACRs, or proposed MACR increases in draft legislation.

However, this study demonstrates the need to push even further the momentum that is already behind juvenile justice reform in South Asia. Despite trends in the right direction, the region still has the lowest average MACR in the world, and no South Asian country’s MACR provisions fully meet the guidance that has evolved under the CRC. These same provisions – which already fall short in theory – fall even shorter in practice, and often become an empty measure of protection for children’s rights. Among other obstacles, low birth registration opens the door to falsification of children’s ages; limited applicability of laws and weak implementation of those laws leave the status of MACR provisions unclear; anti-terrorism legislation undercuts the MACR’s protection; and to the detriment of children, *doli incapax* provisions are turned upside down.

However, any MACR reforms from a children’s rights perspective also need to consider factors beyond the legal statute and

direct practical problems. Religious law – Islamic, Hindu, and Buddhist – can be an important foundation for constructive MACR reform. Furthermore, MACR reform must be seen in the broader context of meeting international juvenile justice and children’s rights standards. As one fundamental component to those standards, appropriate services and measures of accountability – depending upon whether children are older or younger than the MACR – must be provided to all children in conflict with the law. In addition, proactive efforts to engage the mass media, raise public awareness on children’s rights, and train direct-service officials are fundamental to the long-term value of the MACR as a measure of protection for children’s rights.

South Asia is moving towards more effective juvenile justice that respects the dignity of all children – and it is full of opportunities on the MACR to reach a higher standard of protection for children’s rights.

General Recommendations

- Amend current MACR provisions and practices, as necessary, to meet the standards which have evolved under the CRC:
 - Increase the MACR to at least 13 years, and stipulate by law that it is the sole relevant age limit with respect to all alleged crimes.
 - Upon increasing the MACR to at least 13, revoke *doli incapax* provisions in their entirety (in Bangladesh, India, Pakistan, and Sri Lanka).
 - Specify that children’s ages shall be

- assessed and considered as at the time of their alleged commission of offenses.
- Stipulate that the same MACR applies immediately and uniformly throughout the country without exception, and that it is not subject to derogation by separate existing or future special legislation (including, *inter alia*, martial law, anti-terrorism legislation, emergency legislation, state/provincial laws, etc.).
 - Ensure that, in law and in practice, children younger than the MACR who are in conflict with the law face appropriate protective and educative measures of accountability, and never criminal procedures or sanctions.
 - Amend current laws so that criminal responsibility neither depends upon nor is implied by puberty.
 - Pursue broader juvenile justice reforms, as needed and in tandem with MACR amendments, to ensure the respect of all children's rights.
 - Expand children's rights training programs to include all relevant officials and personnel involved in the juvenile justice system.
 - Strengthen current efforts to register all children at birth, and undertake further measures to provide proof of age and identity to all children who were not already registered at birth.
 - Devise practical, uniform procedures for prompt and accurate estimation of children's ages in cases where no reliable proof of age is available.
 - Expand appropriate programs and services for children in conflict with the law, and make a variety of non-punitive programs available for children younger than the MACR.
 - Take all steps necessary to prevent the instrumentalization of children for criminal purposes, and ensure appropriate responses and services to all exploited children.
 - Engage media outlets and associations to encourage informed and responsible coverage of children's issues.
 - Conduct comprehensive public awareness and education campaigns on children's rights and juvenile justice.
 - Ensure that traditional justice systems respect children's rights in their handling of children accused of crimes.

Appendices: MACR Analyses by Country

Appendix 1: Afghanistan

Article 72 of Afghanistan's 1976 Penal Code establishes an MACR of 7 years of age. However, stemming from an impressive consensus for progressive juvenile justice reform with a children's rights perspective, the Afghani Ministry of Justice recently submitted to the Cabinet a draft Juvenile Code that would raise the MACR to 12 years of age. The Cabinet may soon approve the draft code, and it is further anticipated that the government will officially enact the code in the near future. Afghanistan, although it is a State party to the CRC, is the only South Asian country that has yet to submit its Initial Report for consideration by the Committee on the Rights of the Child.

Positive Developments

A high-level working group – including representatives from the Ministry of Justice, the Supreme Court, the Juvenile Court, the Ministry of the Interior, the Ministry of Education, the Ministry of Labour and Social Affairs, the Juvenile Rehabilitation Center, the Italian Government's Italian Justice Project, the Judicial Reform Commission, UNIFAM, and UNICEF – convened for well over one year to design the draft Juvenile Code. In that time, it created the plans for advancing Afghanistan's juvenile justice system, and forged innovative compromises between Islamic law principles and international juvenile justice standards.

The draft Juvenile Code is a significant

development for other MACR-related aspects beyond just its actual MACR increase. Indeed, the proposed MACR provisions are perhaps the best example in the world of an attempt to integrate classic Islamic law principles with MACR standards from a children's rights approach. For example, the current draft law includes the following:

Article 4

The following terminologies have to be interpreted as follows:

- 1) Child: A person who has not completed the age of 18
- 2) Non-discerning child: A person who has not completed the age of 7
- 3) Discerning child: A person who has completed the age of 7 and has not completed the age of 12
- 4) Juvenile: A person who has completed the age of 12 and has not completed the age of 18

Article 5

A person who has not completed the age of 12 is not criminally responsible....

Just as in Islamic *Shari'a*, draft Article 4(2) delimits the first chronological phase of children's responsibility from birth to age 7, during which time children are considered non-discriminating, and are not to be held responsible for any reason.⁵⁴ The second Islamic law phase is known as the "age of

⁵⁴ Khan Nyazee, Imran Ahsan, *General Principles of Criminal Law (Islamic and Western)*, Advanced Legal Studies Institute, Islamabad, 1998. Bahnassi, Ahmad Fathi, "Criminal Responsibility in Islamic Law," M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System*, Oceana Publications, London, 1982.

discretion,” and goes from age 7 until the onset of puberty. In this range, Islamic law generally accepts that children should be held accountable for their actions and be disciplined, yet they should not be harmed, punished, or otherwise held criminally responsible. Article 4(3) of the draft Juvenile Code has, in essence, established the age of 12 years as an objective substitute for the limit of puberty, which is indeed an acceptable age substitute for puberty under the view of various schools of Islamic thought. Also in accord with Islamic law, it creates in subsequent articles a range of non-punitive measures of accountability for children under the age of 12 years. Finally, the third stage of responsibility in Islamic law begins at the onset of puberty and continues into adulthood; here, the draft Juvenile Code begins its final stage at age 12 and ends it with the additional, CRC-based age limit for the definition of the child at 18 years. In Islamic law, children in this stage who possess *rushd* (i.e., discrimination or maturity of actions) should bear criminal responsibility. Likewise, the draft code restricts criminal responsibility to children 12 years and older, and Articles 17 and 36 dictate that judges are duty bound to consider (when issuing any order relative to a child) the child’s degree of psychological development, character and aptitude, and behaviour while committing the crime and thereafter. From this perspective, the careful alignment between international children’s rights standards and Islamic law is striking.

The draft Juvenile Code is also noteworthy for its addition to the age verification standards already established in the Afghani Penal Code and Criminal Procedure Law. Article 6(4) of the draft code specifies, “Determining and fixing the child’s age is based on the date the crime was committed.” In light of contradictory court rulings on this point in neighboring countries, this seems to be a sound contribution to Afghanistan’s MACR and age standards.

As suggested above, the draft Juvenile Code is just one of a series of encouraging developments for Afghanistan’s juvenile justice system. Already by mid-2002, the Afghanistan Transitional Administration was eager to collaborate on juvenile justice with UNICEF, and the Ministry of Justice made a strong long-term commitment to create a juvenile justice system based upon children’s rights principles. By the end of 2002, the government hosted a two-day policy seminar on “Juvenile Justice: Promoting the Rights of Children in Conflict with the Law in Afghanistan.” These governmental commitments blossomed into a broad cross-sector consensus for juvenile justice reform, despite the challenges of an extraordinarily difficult post-conflict environment. Since then, the government has supported interdisciplinary training workshops for civil society partners and professionals from relevant Ministries. The Ministry of Justice, in collaboration with UNICEF, further commissioned a 2003 comparative study on the CRC and Afghani legislation, and that same year opened the first pilot semi-custodial Juvenile Rehabilitation Center. The recent submission of the draft Juvenile Code to the Cabinet is symbolic of these broader collaborative efforts for juvenile justice reform.

Finally, Afghanistan’s advances in birth registration merit special attention. In 2003, the new Ministry of Interior launched a national birth registration campaign toward the goal of universal registration. As the cornerstone of this campaign, the Ministry of Interior, the Ministry of Health, and UNICEF have collaborated on a House-to-House Registration Project that combines birth registration and National (Polio) Immunization Days. A volunteer trained in birth registration accompanies each polio vaccination team and together they visit households, both immunizing and registering children. By combining the two programs, and using almost 55,000 trained volunteers,

the Project cost one-third less than a comparable stand-alone birth registration campaign. Yet the results are exceptional: all children under one year were registered in 2003, and 2,000,000 children under five were registered by mid-October 2004. While data collection is ongoing, almost 90% of all children under five were registered in the 19 provinces that have reported so far. In a related initiative, the Ministry of Interior is engaging and enlisting on a massive scale the village elders and religious leaders who already perform religious rituals upon children's births. The Ministry expects to train 1,300 staff members and up to 50,000 village elders in birth registration as a long-term, sustainable, and economical route to universal registration.

MACR-Related Challenges

Birth Registration and Proof of Age

Despite Afghanistan's recent progress in birth registration, there was no meaningful registration system in place as recently as 2002. Indeed, Afghanistan was among the very few countries in the world for which there was no published information available on its registration rates. The Ministry of Interior's strategic, long-term campaigns are the best way to meet challenges of this magnitude, but in the meantime the juvenile justice system will likely face equally long-term challenges in ascertaining and proving children's ages.

Statutory Law and Practical Significance of MACR

Afghanistan is currently in the midst of comprehensive legal reform, but just as importantly, the country faces a historic and

chronic chasm between statutory law and legal reality.⁵⁵ Statutory, *Shari'a*, and customary laws overlap in diverse forms throughout the country, yet in practice, courts typically apply Islamic and customary law rather than national laws. In fact, almost all courts, including the Supreme Court, rely directly upon Islamic law, and most judges do not even express a willingness to refer to national statutory law. As such, the 1976 Penal Code, the source of Afghanistan's MACR provisions, is neither widely applied nor enforced, and in accord with the general legal trend, Islamic law generally governs criminal law matters. Courts and other statute-based legal institutions are well-established in Kabul and Mazar-e-Sharif, but the status and operation of courts in major provincial capitals has only solidified in recent years. Regardless of the Islamic law source of Afghanistan's higher, proposed MACR of 12 years, there are widely varying interpretations of puberty as the basis for maturity in religious courts, and there is no guarantee that the MACR will serve as a significant legal protection for Afghanistan's children.⁵⁶

Besides Islamic law, roughly 80% of the population lives by any one of various highly localized forms of tribal or customary law - especially in rural areas.⁵⁷ The courts and law enforcement officials respect such systems in practice, even though they are not legally recognized under the Constitution, and customary law mechanisms enjoy far more credibility among citizens than national statute-based institutions.⁵⁸ Some customary law systems offer greater children's rights protections anyway; for example, the traditional law MACR is

55 Lau, Martin, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*, International Commission of Jurists, Geneva, 2002.

56 Winter, Renate, *Children's Rights: A Comparative Study of the Convention on the Rights of the Child and the Legislation of Afghanistan*, UNICEF Afghanistan, Kabul, 2004.

57 Winter, Renate, *Children's Rights: A Comparative Study of the Convention on the Rights of the Child and the Legislation of Afghanistan*, UNICEF Afghanistan, Kabul, 2004.

58 Cappelaere, Geert, "Crime has no future. You have!": *Juvenile Justice Mission to Afghanistan: 6-20 February 2002: Trip Report, Draft*, UNICEF, 2002.

apparently 12 in Kabul, and 15 in Masar, as children beneath these ages are held accountable by their families. Upon reaching these traditional law MACRs, their cases are referred to the local *shura*, a type of traditional dispute resolution council.⁵⁹ However, such standards vary extremely widely by locality, and traditional law does pose other challenges for children's rights, such as the lack of children's participation in their own cases. Obviously, the cultural, legal, and religious complexities of such an environment leave the MACR – defined by national statute and applied by statute-created courts – as a measure of dubious practical significance.

Recommendations for Reform

- In final deliberations over the draft Juvenile Code, take into account the General Recommendations of this study (see page 27).
- Enact promptly the draft Juvenile Code and take all measures necessary for full implementation.

⁵⁹ Kabul University Faculty of Law and Political Science, Customary Law Survey and Children Rights: Report on Customary Law Survey Results, Draft, UNICEF Afghanistan, December 2003.

Appendix 2: Bangladesh

On 1 November 2004, Bangladesh's Parliament approved the Penal Code (Amendment) Act 2004, which raises the MACR from 7 to 9 years. The new law also increases the age range for *doli incapax* provisions from the former 7-12 years to 9-12 years. As discussed below, this legal reform is part of a larger wave of juvenile justice and children's right reform activities in Bangladesh. With particular regard to the new MACR, the 1997 and 2003 Concluding Observations of the Committee on the Rights of the Child, recommending an MACR increase on both occasions, were an important motivating factor. Nonetheless, in consideration of the Committee's jurisprudence to date – and if Bangladesh's MACR is still 9 years upon submission of its next Periodic Report to the Committee – it seems almost certain that the Committee would commend the government for its efforts in raising the MACR from 7 to 9 years, but would note that 9 years is still unacceptably low. There is also the possibility for concerns about its *doli incapax* provisions as well.

Positive Developments

This MACR increase, although it unfortunately fails to meet the current guidance interpreted under the CRC, does offer several positive lessons for other South Asian countries. Importantly, the amendment grew out of a larger groundswell of advocacy, awareness, and cooperative efforts in juvenile justice reform among government officials, UNICEF, and NGOs since at least the mid-1990s. When the Committee on the Rights of the Child specifically recommended an MACR increase in its 1997 Concluding Observations to Bangladesh, the

government began to take special note of the issue. In 2003, the Committee again shared its concerns about the low MACR – both in person with the Bangladeshi delegation and in its Concluding Observations – and this led the Government of Bangladesh and its Inter-Ministerial Committee on Juvenile Justice to make a direct commitment to increase the MACR. The Minister of Law, Justice and Parliamentary Affairs, as well as other high-ranking ministry and parliamentary officials, originally intended to increase the MACR to a full 12 years. Unfortunately, it eventually became clear that further awareness-raising on children's rights and juvenile justice principles would be needed before lawmakers would be willing to make the increase to 12 years.

Bangladesh's increase in its MACR can be considered one of many steps in the right direction for juvenile justice reform in recent years. Currently, the government is in the process of finalizing a National Social Policy on Alternative Models of Care and Protection for Children in Contact with the Law.⁶⁰ This proposed policy treats juvenile justice from a children's rights approach, and is modelled after international standards in the field, with a particular focus on diversion mechanisms to keep children out of the formal justice system. Previously, the Ministry of Home Affairs issued directives on police responsibilities regarding suspected child offenders, including requirements such as the notation of all children's ages in red ink in the general registry, separate charge and information sheets for each arrested child, and immediate notification of a Probation Officer to begin tracking children's case. Furthermore, the government has taken

⁶⁰ Uddin Siddiqui, Kamal, The Age of Criminal Responsibility and Other Aspects of the Children Act, 1974, Concept Paper presented at "Raising the Age of Criminal Responsibility and Other Aspects of the Children Act, 1974" workshop, Dhaka, 16 January 2004.

steps to train police officers on these requirements and other measures regarding children.

Bangladesh's Supreme Court has also begun to play a crucial role in ensuring an equitable juvenile justice system.⁶¹ In a far-reaching 2003 decision, its High Court Division instructed the government to take specific steps for system-wide improvement as mandated by various criminal and juvenile justice laws. Notably, with regard to children already in custody, the Court specifically ordered officials to review the possible discharge of juveniles under Sections 82 and 83 of the Penal Code – in other words, to apply the Penal Code's MACR and *doli incapax* provisions and release children either too young or immature (by *doli incapax* standards) to bear criminal responsibility. Among several other directives, the Court also ordered the expedition of cases against juveniles, greater involvement of legal aid committees to make bail motions for accused juveniles, effective separation of children from adults in places of detention, and the transfer of juveniles to the appropriate places of custody, remand, or detention.

In other developments directly relevant to the MACR, the Government of Bangladesh has taken impressive strides in recent years towards more complete birth registration.⁶² The task essentially entailed starting birth registration procedures and campaigns for the first time, and the government has shown commitment to this effort at all levels. Numerous high profile campaigns have been carried out across the country at district and municipal levels, involving full canvassing

from house to house to register children. By such efforts, at least one million children were registered between 1997 and 2000. In cases of older children, innovative approaches have been considered to permit births to be registered even up to 6 years of age. Even more recently, Parliament enacted the Births and Deaths Registration Act, 2004, on 30 November 2004. This Act replaces outdated laws and rules regulating birth registration in Bangladesh, and removes cumbersome processes for birth registration.

MACR-Related Challenges

Lack of Birth Registration and Proof of Age

One of the central problems in Bangladesh's juvenile justice system is children's frequent lack of proof of age, which puts them at great risk for procedural irregularities and may quickly render meaningless age-based protections such as the MACR. As noted above, Bangladesh has taken impressive steps to increase birth registration in the past years, but it has essentially started from zero. One survey in the mid-1990s found that only 3-4% of births were registered, while 2000 data suggests that the figure may still have been lower than 10%.⁶³ The situation is not made any easier by the wide availability and circulation of false birth certificates.

Section 66 of the 1974 Children Act was clearly designed to work around these challenges, and takes a conservative approach in the best interests of children:

Whenever a person whether charged with an offence or not, is brought before

⁶¹ World Organisation Against Torture (OMCT), Rights of the Child in Bangladesh: Report on the implementation of the Convention on the Rights of the Child in relation to Children in Conflict with the Law by Bangladesh: A report prepared for the Committee on the Rights of Child 34th Session - Geneva, September 2003, Geneva, 2003.

⁶² UNICEF Innocenti Research Centre, "Birth Registration: Right from the Start," Innocenti Digest 9, Florence, 2002.

⁶³ Sattar, Nacela, and Gopalan Balagopal, Traditional Means of Dealing with Children in Conflict with the Law with Specific Reference to Bangladesh: Bringing Juvenile Justice into Focus, UNICEF Bangladesh, 1997.

any criminal Court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child, the Court shall make an enquiry as to the age of that person and, for that purpose, shall take such evidence as may be forthcoming at the hearing of the case, and shall record a finding thereon, stating his age as nearly as may be.

Unfortunately, the reality of busy day-to-day courtrooms does not reflect this approach. There are no well-established procedures to determine children's ages, and in the best-case scenario, a medical examination is ordered – which causes significant trial delays and extends children's time in custody.⁶⁴ In general, though, no inquiry is conducted at all, and judges simply guess children's ages based upon their appearance, and record those ages.⁶⁵

On the one hand, judges often assume that it is the police's responsibility to determine children's ages, and thus they do not conduct any further inquiry or examine any evidence (e.g., birth registration, school records, medical examinations, etc.). Yet on the other, according to the Chief Metropolitan Magistrate of Dhaka, "the police usually do not mention the age of the arrested person

or intentionally enhance the actual age."⁶⁶ Indeed, there are widespread reports that police officers consistently inflate children's ages upon arrest to avoid extra procedures mandated for juveniles under directives from the Ministry of Home Affairs (discussed above); even so, judges typically accept these falsified ages.⁶⁷ While this set of problems typically revolves around the age of penal majority, there are also cases where it involves the distinction between those older or younger than the MACR. One Police Commissioner even admitted that some police officers had intentionally arrested and prepared charge sheets against boys who were actually 4 or 5 years old.⁶⁸

Doli Incapax Provisions

Challenges with the use of *doli incapax* procedures follow the trends discussed above, and *doli incapax* assessments of children's maturity are not given any special consideration in practice. Children with "sufficient maturity of understanding," according to one study, have simply come to mean street children, child prostitutes, and poor children. Just as age assessments are often little more than a guess, maturity assessments are informal judgments about children's backgrounds and the nature of their alleged offenses.⁶⁹

⁶⁴ Save the Children UK, Shoshur Bari: Street Children in Conflict with the Law, Dhaka, 2000.

⁶⁵ Penal Reform International, Access to Justice and Penal Reform: Special Focus: Under-trials, Women and Juveniles: Conference Report, from "PRI Second South Asia Regional Conference, 12-14 December 2002, Dhaka, Bangladesh," London, 2003. Uddin Siddiqui, Kamal, The Age of Criminal Responsibility and Other Aspects of the Children Act, 1974, Concept Paper presented at "Raising the Age of Criminal Responsibility and Other Aspects of the Children Act, 1974" workshop, Dhaka, 16 January 2004. Asian Centre for Human Rights, "A gravy train and shackled kids in Bangladesh," ACHR Review, New Delhi, 4 February 2004. Rahman, Mizanur, et al., Tracing the Missing Cord: A Study on the Children Act, 1974, Save the Children - UK, Dhaka, 2003.

⁶⁶ Quoted in World Organisation Against Torture (OMCT), Rights of the Child in Bangladesh: Report on the implementation of the Convention on the Rights of the Child in relation to Children in Conflict with the Law by Bangladesh: A report prepared for the Committee on the Rights of Child 34th Session - Geneva, September 2003, Geneva, 2003, from "Our Children in Jail," Report on the State of Juvenile Justice and Violence against Children in Bangladesh, Save the Children UK and ODHAKAR, 2003.

⁶⁷ World Organisation Against Torture (OMCT), Rights of the Child in Bangladesh: Report on the implementation of the Convention on the Rights of the Child in relation to Children in Conflict with the Law by Bangladesh: A report prepared for the Committee on the Rights of Child 34th Session - Geneva, September 2003, Geneva, 2003.

⁶⁸ Rahman, Mizanur, et al., Tracing the Missing Cord: A Study on the Children Act, 1974, Save the Children - UK, Dhaka, 2003.

⁶⁹ Uddin Siddiqui, Kamal, The Age of Criminal Responsibility and Other Aspects of the Children Act, 1974, Concept Paper presented at "Raising the Age of Criminal Responsibility and Other Aspects of the Children Act, 1974" workshop, Dhaka, 16 January 2004.

Therefore, children enter a system – upon arrest – where they are fully vulnerable to arbitrary procedures for which their true ages, the MACR, and other protections are usually meaningless. In this respect, it is also important to note that police have very wide discretionary powers to arrest children under a plethora of laws and categories, including upon suspicion. Mass arrests, raids, and sweeps sometimes occur, which place street children, girls, and child prostitutes at heightened risk for arrest, and therefore for MACR-related problems.⁷⁰

Lack of Appropriate Programs for Children in Conflict with the Law, Particularly for Those Younger than the MACR

In Bangladesh's recent efforts to increase its MACR from 7 years to 9 years, one of the main counterarguments was that the government needed to retain full discretion to respond to young children in conflict with the law, and thus it was better not to raise the MACR too much. As discussed in the main body of this report, both scientific research and international juvenile justice standards are clear on this point: countries should respond to all children younger than the MACR who come into conflict with the law, and they should respond to them with non-punitive programs and services. The MACR does not constrain countries from responding to children as such. Punitive responses such as the deprivation of liberty are much more expensive and, similar to no response at all, may actually increase delinquency problems over time.

Part of the challenge in Bangladesh is the current lack of appropriate measures to respond to children in conflict with the law. For those children older than the MACR, the only option typically resorted to is deprivation of liberty, a practice that directly contradicts the CRC's mandate to use the deprivation of liberty only as a measure of last resort.⁷¹ In accord with trends worldwide, the deprivation of liberty of children in Bangladesh – as one judge from the Appellate Division of Bangladesh's Supreme Court has noted – has shown a poor success rate in rehabilitating children.⁷² The Children Act 1974 envisions the possibility of probation, but probation officers are limited and lack sufficient training, and are therefore rarely consulted. Other options, including dismissal, reprimand, and parole, are also used infrequently. However, the lack of non-punitive programs – which again are more effective and cost less – is little reason to rely on the deprivation of liberty as a response to children in conflict with the law.

Recommendations for Reform

- Take advantage of the continuing momentum in juvenile justice reform to evaluate the practical and political impediments to further increasing the MACR to 13 years, in accord with current CRC guidance as described in the main body of this report, and pursue a strategic plan to address each point and enact this additional MACR increase.
- In these efforts, take into account the General Recommendations of this study (see page 27).

⁷⁰ Asian Centre for Human Rights, "A gray train and shackled kids in Bangladesh," ACHR Review, New Delhi, 4 February 2004. World Organisation Against Torture (OMCT), Rights of the Child in Bangladesh: Report on the implementation of the Convention on the Rights of the Child in relation to Children in Conflict with the Law by Bangladesh: A report prepared for the Committee on the Rights of Child 34th Session - Geneva, September 2003, Geneva, 2003. Save the Children UK, Shoshur Bari: Street Children in Conflict with the Law, Dhaka, 2000. UNICEF Bangladesh, Children of Bangladesh and Their Rights, Second Version, 1997. Police may arrest children under, inter alia, the Penal Code, Children Act 1974, Special Powers Act 1974, Arms and Explosive Act 1878, Drugs Act, Public Safety Act, Murder and Special Powers Act, Control of Oppression of Women and Children Act, various vagrancy laws and provisions, the Code of Criminal Procedure 1896, and the Dhaka Metropolitan Police Ordinance.

⁷¹ CRC Art. 37(b)

⁷² Asian Human Rights Commission, "Bangladesh: Bangladesh Court bails Minors out of Major Crisis," ACR Weekly Newsletter, Vol. 2, No.20, 14 May 2003.

Appendix 3: Bhutan

Article 114 of the Bhutan Penal Code 2004 establishes an MACR of 10 years, which is Bhutan's first ever MACR. 2001 Concluding Observations by the Committee on the Rights of the Child, recommending that Bhutan establish an MACR, added an extra incentive to juvenile justice reform efforts that were already underway. In August 2004, Bhutan's National Assembly passed the new Penal Code and MACR.

Positive Developments

Bhutan had considered a draft Juvenile Justice Act as early as 1998, which itself grew out of several prior years of increasing interest in juvenile justice prevention and programming. In 1999, Her Majesty Tshering Pem Wangchuk launched the Youth Development Fund, which bolsters juvenile delinquency prevention by providing positive youth development activities and programs for all youth. These include health and education programs, career counseling, non-formal education, training opportunities, general counseling, organized recreational activities, and adult mentoring programs. The 2001 Civil and Criminal Procedure Code further reflects heightened attention to children's rights, as Chapter 44 of the Code is devoted to special provisions and protections for juveniles. Some other juvenile justice issues that had been under consideration have been incorporated directly into the 2004 Penal Code. Also, in January 2004, the Council of Ministers approved the establishment of the National Commission on Women and Children (NCWC). The NCWC will become the main body to coordinate fulfillment of Bhutan's obligations under the CRC and related international conventions. The Council of Ministers directed that the membership of the NCWC represent a wide array of relevant sectors, including elected officials, officials from various governmental ministries, NGOs, the private sector, the media,

academic institutions, law enforcement officials, and civil society. Among other activities, the NCWC will monitor CRC implementation efforts, disseminate information on the CRC, and lead the writing and submission of periodic reports pursuant to the CRC. Along these lines, the NCWC recently completed a nationwide child protection survey, which forms part of its increasing willingness to tackle difficult child protection issues.

While these efforts were underway, other juvenile justice initiatives were also put into place. The Royal Government of Bhutan opened its Youth Development and Rehabilitation Centre, which among other services offers programs for children in conflict with the law. The Royal Bhutan Police has also organized workshops for its officers on law enforcement and administration procedures under international juvenile justice standards, and provided orientation to officers on the resources and services available at the Youth Development and Rehabilitation Centre to respond to children in conflict with the law.

MACR-Related Challenges

Birth Registration and Proof of Age

As in other South Asian countries, the lack of birth registration presents a major obstacle to the effective administration of juvenile justice in Bhutan. The Committee on the Rights of the Child noted Bhutan's low rate of birth registration in 2001, while also recognizing geographic and other difficulties to more complete registration. The absence of proof of age has often led to courtroom disputes over the ages of children. In one reported case, prosecutors apparently inflated a child's age by more than 20 years in court, and the court at least initially denied the defendant's request to produce

witnesses who might testify as to his true age.⁷³ While this case is apparently a rare example, it does seem likely that proof of age challenges will also hinder the effective application of Bhutan's new MACR.

Recommendations for Reform

- In the ongoing efforts for juvenile justice improvements, take into account the General Recommendations of this study (see page 27).

⁷³ Amnesty International, *Children in South Asia: Securing their Rights*, 1998.

Appendix 4: India

Section 82 of the 1860 Indian Penal Code defines the MACR at 7 years of age, while Section 83 lays out *doli incapax* provisions for children between 7 and 12 years of age, based upon a child's attainment of "sufficient maturity of understanding to judge of the nature and consequences of his conduct." Even though India made important progress in juvenile justice with enactment of the 2000 Juvenile Justice (Care and Protection of Children) Act (JJA), and some NGOs advocated for an MACR increase in it, the act does not alter the Penal Code's MACR provisions nor are there any further efforts to increase India's MACR. This is true despite the concerns of the Committee of the Rights on the Child – noted in both its 2000 and 2004 Concluding Observations – and the Committee's recommendations that India increase its MACR. In 2004, the Committee also stated its concern for the Indian Supreme Court's decision that the age of a suspected child offender does not refer to the time of the alleged commission of an offense, but to the time of trial. The Committee specifically recommended that India take legislative measures to confirm the MACR as referring to a child's age at the time of the alleged commission of an offense. Furthermore, the Committee deemed the Prevention of Terrorism Act, 2002, as incompatible with the CRC's provisions, due to the possibility of children's prosecution by special courts.

Positive Developments

These cautions and recommendations, however, do not signify a lack of significant reform efforts in India for juvenile justice. Instead, children's rights are increasingly playing a prominent role on the national agenda, as evidenced by the first ever

inclusion of children's rights as a priority in the Government of India's Policy Document. Ruling party leader Sonia Gandhi specifically urged in a recent speech that the children's agenda needs to move ahead in India. One practical example is the current draft bill to create a National Commission for Children, which as part of the government's agenda is likely to move ahead and be approved by Parliament. The Ministry of Human Resource Development strengthened the bill in the drafting process, granting more power to the proposed commission members; the bill also envisages a State Commission for Children in each state of India.⁷⁴ The Ministry of Social Justice and Empowerment is sponsoring training and orientation programs for stakeholders in juvenile justice, while the Department of Women and Child Development has shown increasing willingness to address difficult child protection issues in its agenda. In other developments, there is growing interest in supporting non-custodial services in lieu of institutionalization, NGOs are conducting important delinquency prevention programs, and efforts continue to train and sensitize police officers on children's rights.

Independent bodies have also played a fundamental role in advancing juvenile justice in India. The Juvenile Justice Board in New Delhi (established under the JJA) investigated allegations of improper conditions at a local observation home for boys.⁷⁵ The board verified in a report that conditions at the facility were unacceptable under the provisions of the JJA, and the board's principal magistrate issued an order to the government directing that the boys held there be transferred to an appropriate rehabilitation home. In February 2004, the

⁷⁴ Newindpress.com, Distressed children: HRD's answer is a Children's Commission, 28 August 2004.

⁷⁵ Krishnan, Rakesh, "Torture, Hunger Daily Fare In India's Juvenile Homes," *OneWorld South Asia*, 26 August 2004. Snehi, Yogesh, "State and Child Justice: Stories of Delinquent Juveniles," *Economic and Political Weekly*, 9 October 2004.

New Delhi High Court took notice of the board's report, actually considering it as a criminal writ petition, and issued notices to the relevant officials for failures to meet the terms of the JJA. Also on its own initiative, and acting upon widespread reports of lagging JJA implementation, the National Human Rights Commission requested information in mid-2004 from each Indian state on its progress in implementing the act.⁷⁶ In September 2004, the Commission officially urged non-complying states to immediately implement the JJA.

The Government of India has undertaken noteworthy measures for over a decade to increase birth registration, just as it was a leader at the regional level in establishing the Asian Birth Registration Committee, a network formed in 2000 by Civil Registrars General of various countries to promote birth registration across Asia.⁷⁷ Complete birth registration in India poses challenges on a grand scale: a population of over one billion people, current birth registration coverage of roughly 35%, registration decentralized to the country's 25 states and 7 union territories, and 130,000 registrars and sub-registrars actually recording births and issuing certificates. The Ministry of Home Affairs has coordinated a civil registration campaign for over 10 years, which includes an innovative barrage of high-profile public awareness campaigns in 15 different languages and close support by each of India's states. While serious challenges remain, some parts of India have raised their birth registration rates to over 90%, thanks in part to such comprehensive efforts.

Notably, drafters of the JJA also gave close consideration to birth registration and proof of age. Section 49 of the Act, on the "Presumption and determination of age,"

seeks a conservative approach on determining age in the best interests of the child. Once a competent authority has made the determination that a person before it is a child, that determination cannot subsequently be overturned:

(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person.

MACR-Related Challenges

Birth Registration and Proof of Age

Despite the impressive efforts described above to boost birth registration in India, there are problems with children who currently do not have a birth certificate or other proof of age. Indeed, some regions of India, particularly rural areas, still only register fewer than 30% of births. Since it is common for children to lack proof of age, disputes over their ages are common in the context of the MACR.⁷⁸ For either age disputes or officials' failure to heed the

⁷⁶ WebIndia123.com, Most states yet to implement Juvenile Justice Act: NHRC, 15 September 2004.

⁷⁷ UNICEF Innocenti Research Centre, "Birth Registration: Right from the Start," Innocenti Digest 9, Florence, 2002.

⁷⁸ Amnesty International, *Children in South Asia: Securing their Rights*, 1998.

MACR, children younger than 7 years of age are incarcerated for being in conflict with the law.⁷⁹ At this point, it is not clear to what extent the JJA “Presumption and determination of age” procedures are followed, nor how *doli incapax* procedures are exercised in practice; however, broader failures to correctly follow JJA procedures cast doubt on the effectiveness of these measures.

Inflammatory Media Reports Pose an Obstacle to MACR Reform

As discussed in the main body of this report, media coverage of juvenile justice can have a tremendous impact on public opinion and legal reform, particularly in the context of the MACR. Beyond the example previously discussed, a sampling of recent media reports in India suggests a certain risk for the same types of negative influences on public sentiment. At times, reports include distortions or even outright errors. One noteworthy article summarizes the rationale for recent court decisions with the incorrect statement “Under the Juvenile Justice Act, a minor cannot be punished or sentenced to imprisonment, however serious the offence.”⁸⁰ Another newspaper article cites the JJA, Article 20, as saying “if the trial is pending on the date when the new Act came into force, by raising the age of the juvenile offender from 16 to 18 years, the sentence cannot be passed in respect of the juvenile.”⁸¹ Unfortunately, this citation is incorrect and apparently fabricated, as Article 20 instead states that such trials must be completed in the original court and then forwarded to the Juvenile Justice Board for sentencing in case of conviction. Such statements are sometimes paired with

conclusive quotations from public officials, such as one state’s Minister for Prisons and Legislative Affairs who stated, “Children knowingly or unknowingly indulge in criminal acts. Hence I strongly feel the age should be reduced.”⁸² Such reports and quotations may seem of little significance, yet other countries’ experiences prove that one sensationalized case is all that is required for a lasting change in juvenile justice legislation and the MACR.

Applicability and Implementation of Juvenile Justice Legislation

Even though the JJA introduced a great number of important innovations, it is true that there are widespread implementation problems. First, many states still have not established the requisite executing mechanisms to enforce the act, and the act does not apply anyway to the State of Jammu and Kashmir. Where the JJA is in effect, its application is constrained by a lack of adequate resources, insufficient police training on new procedures, delays in processing cases, and continuing practices that contradict the new regulations. Of course, it would be unrealistic to bill the JJA as an immediate panacea for systematic challenges that predate the act itself. Such problems also include the arbitrary arrest of children by the police – with signs of particular discrimination against street children – and the processing of children by overwhelmed institutions that accept police reports and claims without question.⁸³ These types of practices are known to render the MACR meaningless in numerous countries, and in this overall environment, any future MACR reforms will require better implementation, training, and enforcement to serve as an effective protection.

⁷⁹ Ganguly Thukral, Enakshi (ed.), *Children in Globalising India: Challenging Our Conscience*, HAQ: Centre for Child Rights, New Delhi, 2002.

⁸⁰ Thomas, Shibu, “HC acquits 1997 murder accused,” *Mid Day News*, 22 January 2004.

⁸¹ Kumar Menon, Vinod, “State to review amendment to Juvenile Act,” *Mid Day News*, 28 June 2004.

⁸² “Panel to review Maharashtra law on juveniles,” *New Kerala India News*, 29 June 2004.

⁸³ Amnesty International, *Children in South Asia: Securing their Rights*, 1998. National Movement of Working Children (India), *Alternate Report Submitted to The Committee on the Rights of the Child*, July 2003. Human Rights Watch, *Police Abuse and Killings of Street Children in India*, New York, 1996.

Anti-Terrorism Legislation

Future MACR reforms must also give due consideration to the dubious legacy of the 2002 Prevention of Terrorism Act (POTA) for children's rights.⁸⁴ Even though there are currently no indications that the POTA has been applied to undermine the Penal Code's MACR provisions, the legislation is very problematic and should be given close scrutiny in drafting any future reforms. As noted above, the Committee on the Rights of the Child expressed its concern that POTA provisions for children's prosecution by special courts are incompatible with the CRC. Notably, the Madras High Court has likewise ruled that children should not be tried under the POTA, but instead under the

JJA. Even so, a large number of children – as young as 12 years old – have been arrested and detained as alleged terrorists; the POTA may be applied to both “terrorist acts” and to a wide range of other standard crimes including robbery and theft. Legal amendments should stipulate that MACR provisions cannot be abrogated by any existing or future emergency, anti-terrorism, martial, military, or other special law.

Recommendations for Reform

- Prioritize ongoing juvenile justice reform efforts, and take into account therein the General Recommendations of this study (see page 27).

⁸⁴ Asian Centre for Human Rights, *The Status of Children in India: An alternate report to the United Nations Committee on the Rights of the Child on India's first periodic report*, New Delhi, 2003.

Appendix 5: Maldives

The MACR in Maldives is 7 years of age, which is effective with regard to a list of specific offenses. These include all offences for which *hadd* has been laid down under Islamic *Shari'a* (i.e., "Apostasy, Revolting against the state, Crime of fornication, Accusing a women of unchastely, Consumption of alcohol, and Theft"), plus other offenses including certain financial and property related cases, intentional killing, counterfeiting, and terrorism and narcotics offenses. For most other offenses, children become criminally responsible at the age of 14 years. There is, at least in theory, one other exception to these rules for criminal responsibility. In cases of *zina* (i.e., consensual or non-consensual sex outside of marriage), a woman's pregnancy can prove her commission of the offence, which in practical terms may not take into consideration whether or not the woman was a rape victim. At least theoretically, therefore, a girl could be held criminally responsible for *zina* if she were to reach puberty and become pregnant before the age of 7 years; of course, it is even less likely that boys reach puberty before the age of 7 years and be accused of *zina*.

In its 1998 Concluding Observations, the Committee on the Rights of the Child stated that it was especially concerned by the low MACR in Maldives.⁸⁵ For this and other reasons, Maldives has initiated numerous progressive juvenile justice measures over the past several years, and the government is currently drafting a new Penal Code. It has given consideration in recent years to raising its MACR to 12 years of age, based upon the explicit recommendations of a

respected Muslim academic and theologian, and the drafters of the Penal Code have examined current MACR provisions. The ongoing legal reform processes offer an ideal opportunity to bring the MACR into closer alignment with the CRC as such.

Positive Developments

Maldives moved quickly to ratify the CRC and shortly thereafter enacted the Law on the Protection of the Rights of Children (Law No. 9/91), which is modelled after the CRC and established specific juvenile justice rehabilitation-oriented procedures. As noted above (and further discussed in the main body of this report), and in further efforts towards CRC implementation, the government is considering the draft study on the compatibility of *Shari'a* law with the CRC by the respected Muslim theologian, Prof. Dr. Mohamed El-Said El-Dakkak. Government officials continue to give close consideration to his report, "The Application of the CRC in the Republic of the Maldives from the Perspective of Islamic Law," which among other items specifically recommends an MACR of 12 years based upon a thorough analysis of Islamic texts and principles.⁸⁶

In terms of birth registration, Maldives is the only country in South Asia without significant problems involving birth registration and proof of age. According to 2001 data, 91% of children between 0 and 11 months were registered at birth, and trends from 1997-2001 reflect progressively higher percentages of registration at birth.⁸⁷ These figures contrast sharply with the regional average for South Asia, where just over 35% of children are registered.⁸⁸ Among many

⁸⁵ Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Maldives, CRC/C/15/Add.91, 5 June 1998.

⁸⁶ El-Dakkak, Mohamed El-Said, The Application of the CRC in the Republic of the Maldives from the Perspective of Islamic Law, Unpublished Draft, UNICEF Maldives, 2000.

⁸⁷ Government of the Maldives, Maldives Country Paper, Paper Submitted for "Third Asia Regional Conference on Birth Registration - A Child's First Right," Bangkok, January 2003.

⁸⁸ UNICEF Innocenti Research Centre, "Birth Registration: Right from the Start," Innocenti Digest 9, Florence, 2002.

other factors, Maldives achieved universal primary education in 2002, and by linking mandatory birth registration to school enrollment, the government was successful in boosting registration. Indeed, Maldives has created a detailed strategy to reach and maintain 100% birth registration in the coming years.

The government has undertaken a wide range of other juvenile justice initiatives in recent years.⁸⁹ It established a national council for the protection of the rights of children; issued detailed guidelines on juvenile justice procedures; created a Child Protection Unit to which the police refer all juvenile justice cases; and it has made available through these bodies a range of appropriate programs and services. The Ministry of Gender, Family Development and Social Security also features a Unit for the Rights of Children, which conducts an array of other activities, including CRC advocacy and awareness-raising; the formulation of recommendations for legal, judicial and administrative reforms; the establishment of a national child protection system; training of child care workers; and relevant research and database activities. The Criminal Court Chief Judge and Head of the Juvenile Court has been personally active and innovative in such efforts, while the Attorney General's Office – through the Juvenile Court – has teamed with UNICEF to raise legal awareness via informational and training workshops for youth. Likewise, the government is currently working to implement alternative approaches to diverting children away from the formal justice system.

MACR-Related Challenges

Dual Ages of Criminal Responsibility, and Islamic Law Interpretations

Current Maldivian law presents some challenges with respect to the MACR.

Clearly, the system of dual ages of criminal responsibility – with the MACR at 7 years for some offenses, and a second age of responsibility at 14 years for other offenses – lies outside the norms under the CRC. It is noteworthy that this MACR of 7 years is not based solely upon interpretations of Islamic law, but also refers to generally secular offenses such as counterfeiting.

With respect to Islamic law, Maldivian law is generally based on *Shari'a*, and as a rule *Shari'a* law prevails over national laws and international treaties. Under certain interpretations, there might appear to be conflicts between Islamic law and the guidance on the MACR that has evolved with the CRC. For example, *hadd*-liable offenses currently bear an MACR of 7 years, zina offenses can theoretically carry criminal responsibility upon puberty, and both of these scenarios are deemed incompatible with provisions of the CRC. However, other viewpoints find that Islamic principles support approaches in harmony with the principles of the CRC and international juvenile justice standards. Of course, there are numerous schools of thought within Islam, and there are different approaches on questions relevant to children's responsibility. Yet, as discussed above and elsewhere in this study, the government is reviewing findings by the theologian Prof. Dr. Mohamed El-Said El-Dakkak, who determined that only an MACR of at least 12 years would be in accord with Islamic law. Also as discussed in the main body of this report, other Islamic scholars have reached similar conclusions. With such considerations in mind, current Penal Code reforms can successfully incorporate MACR provisions that are fully in accord with both CRC principles and Islamic law.

Recommendations for Reform

- Take advantage of the draft Penal Code to incorporate the General Recommendations of this study (see page 27).

Appendix 6: Nepal

Section 11(1) of Nepal's 1992 Children's Act establishes an MACR of 10 years of age, and there are currently broad juvenile justice legal reform efforts underway which would be able to reconsider this age level. Such activities are consistent with the 1996 Concluding Observations of the Committee on the Rights of the Child, which in the area of juvenile justice recommend such reform, with particular attention to be paid to increasing the MACR. In this respect, Nepal benefits from a number of highly positive recent developments – a clear asset in the ongoing efforts – yet at the same time any MACR revision should also take into consideration a series of related, outstanding challenges discussed below.

Positive Developments

Nepal is well poised to re-examine its current MACR of 10 years. On the one hand, Nepal is witnessing unprecedented cross-sector interest and momentum in its current juvenile justice reform efforts, including government leadership at the highest levels. It can point to the successful enactment of innovative legislation; moreover, the Supreme Court has handed down crucial decisions that support the rule of law in juvenile justice cases. Finally, as further discussed in the main body of this study, it should be recalled that Hindu concepts about children strongly support an MACR higher than Nepal's current 10 years of age.

Perhaps the most visible sign of progress is the recent creation of the Juvenile Justice Strengthening Committee (JJSC) by the Central Child Welfare Board of the Ministry of Women and Children. Among the three major sectors of reform with which the JJSC is charged, juvenile justice legal reform is the first item. It has already initiated a review of the 1992 Children's Act with respect to juvenile justice, and requested UNICEF's participation to ensure a critical children's

rights-based analysis. Behind the JJSC's work lies a growing momentum of interest and support among donors, UNICEF, other government officials, NGOs, the police, as well as the pro-children's rights participation of the press and media. With such support, the JJSC has proposed 10 pilot districts for innovative approaches to juvenile justice, and the police responded by requesting that the JJSC establish specialized Juvenile Justice Officers in all 10 districts to handle juvenile cases. The police further requested UNICEF's assistance in training and capacity building for the Juvenile Justice Officers. This step builds upon recent collaborations with UNICEF for conducting children's rights training for police officers.

In terms of legislation, Nepal moved quickly after its ratification of the CRC to enact the 1992 Children's Act. This Act, despite the challenges associated with it, was a significant first step in Nepal toward a modern juvenile justice system. Another example of Nepal's strides to meet its international commitments is the Treaty Act, 1993, which recognizes the precedence of international treaties and conventions wherever domestic law lies in conflict with them.

Likewise, the Supreme Court has played a crucial role in assuring the rule of law in the field of juvenile justice. In one 2001 decision, related to the disputed age of a juvenile offender, the Supreme Court held that the District Court had not given due consideration to the child's own assertions about his age. In examining and accepting the child's asserted age, the Supreme Court overturned the District Court's order and applied the appropriate provisions of the Children's Act. In various other decisions in 2000 and 2001, the Supreme Court interpreted the Children's Act as obligating the establishment of juvenile benches in all

trial courts, mandating the establishment of a juvenile rehabilitation home, and forbidding the incarceration of minors with adults.

MACR-Related Challenges

Birth Registration and Proof of Age

There are widespread reports that Nepali police officers and prosecutors manipulate children's ages at various stages in justice proceedings; opportunities for such practices are not rare, since only about one-third of children were registered at birth and have proof of age. The circumstances and motivations for age falsification seem to vary widely. In some cases, officers coerce children into inflating their actual ages beyond the age of penal majority to avoid the extra protections and processing requirements for juvenile offenders.⁹⁰ In other reported cases, the absence of birth registration enables police to simply declare children adults. Thus, the police arbitrarily submit children younger than the MACR to penal processes, while simultaneously claiming that there are no juvenile offenders at all – in order to create an image of model crime control.⁹¹ Street children seem to face a higher risk for such treatment – there are reports that street children are sometimes arrested on minor charges, classified as adults in the absence of birth registration, and then charged under adult penal laws for more serious offences. Through such practices, cases emerged in 1996 of children as young as 9 years old and 4 years old in custody and jail.⁹²

Once these cases go to court, the reality is a strong bias in favor of the claims that police officers and prosecutors make about children's ages.⁹³ Indeed, one of the key findings of a recent survey conducted by the Kathmandu School of Law and the National Police Academy, in coordination with the Judge's Society, was that "investigators and prosecutors tended to increase the 'age' of the child in conflict with laws." Prosecutors record the age of a suspected child offender on the official charge sheet, yet they also guide the process of collecting further evidence – if the child disputes the claimed age – and ultimately record the higher age if any doubt remains. Children still have the right to rebut the age in court, but despite provisions for legal representation of children, children commonly do not have such representation, especially in the courts that hear the majority of juvenile cases. Thus, it seems unlikely that children could effectively rebut such claims. Furthermore, there are no facilities for medical examination outside the Kathmandu valley – and most children are not sent for such examination anyway, even when their ages are contested. Thus, at best, the court may ask for school or other records that may substantiate age.

Anti-Terrorism Legislation

Anti-terrorism laws also pose a threat to the effective force of the MACR in Nepal. Provisions of the 2001 Terrorist and Destructive Activities (Prevention and Control) Ordinance, promulgated at the

⁹⁰ Lal Singh, Indra, *Street Children and Juvenile Justice in Nepal: A Case Study*, UNICEF Nepal, unpublished report presented at the Innocenti Global Seminar on Children Involved with the System of Juvenile Justice, UNICEF Innocenti Research Centre, Florence, October 1997.

⁹¹ Amnesty International, *Children in South Asia: Securing their Rights*, 1998. UNICEF Regional Office for South Asia, e-mail correspondence with author, August 2001.

⁹² Pradhan, Gauri, *Juvenile Justice in Nepal With a Reference to CWIN's Experience Working on Children in Conflict with the Laws*, presented at "South Asia Children Justice Workshop," Sri Lanka, May 26-29, 1997.

⁹³ Kathmandu School of Law and the Center for Legal Research and Resource Development, "Part I: Juvenile Justice System in Nepal a Glance in View of International Standards," Research Report on Juvenile Justice System in Nepal, Kathmandu, 2003. Kathmandu School of Law, "Part II: Baseline Survey on Juvenile Delinquency," Research Report on Juvenile Justice System in Nepal, Kathmandu, 2003.

same time that a State of Emergency was declared, have led to the detention of children upon accusations of Maoist involvement.⁹⁴ The Royal Nepalese Army has thus arrested and detained children in military barracks, where NGOs have not been granted access, and where human rights abuses reportedly occur.⁹⁵ With this Ordinance in place in 2002 and 2003, Nepal had the highest number in the world of enforced disappearances by security forces, according to the U.N. Working Group on Enforced and Involuntary Disappearances.⁹⁶ Among these are documented cases of enforced disappearances of children.⁹⁷ The 2001 Ordinance lapsed earlier in 2004, but on October 13, 2004, King Gyanendra issued a new version, the Terrorist and Disruptive Activities (Control and Punishment) Ordinance. The new Ordinance further broadens the powers of security forces, allowing preventive detention – even in military barracks – for up to one full year without charge, trial, or judicial oversight. Although there are no indications to date that the ordinance has been used to undercut the MACR of 10 years, experiences in neighboring countries suggest that it remains a possibility that should be taken seriously and addressed.

Traditional Justice Systems

One final point deserves mention in the context of the MACR in Nepal. Obligations under the CRC include the protection of the rights of all children within a given State party, and it is important to note that in Nepal, the majority of cases of children in conflict with the law are apparently handled locally without any government involvement of any sort. Indeed, there is a multitude of traditional, village-based, and non-formal social justice systems across different regions of Nepal that respond to such children. While such systems may actually pose great advantages in terms of the protection of children's rights, it is not clear at all how questions of age and responsibility are approached. Religion and religious law are often important in such settings, and these questions merit further consideration. For example, there are indications that the caste system seriously hinders justice at the local level, bringing potential problems of discrimination by both caste and gender.

Recommendations for Reform

- Take advantage of the Juvenile Justice Strengthening Committee's proposed legal reform to take into account the General Recommendations of this study (see page 27).

⁹⁴ Kathmandu School of Law and the Center for Legal Research and Resource Development, "Part I: Juvenile Justice System in Nepal a Glance in View of International Standards," Research Report on Juvenile Justice System in Nepal, Kathmandu, 2003.

⁹⁵ Penal Reform International (South Asia Regional Office) and Advocacy Forum, Assessment Report: Juvenile Justice System in Nepal, UNICEF Nepal, 2004.

⁹⁶ Human Rights Watch, Nepal: Terror Law Likely to Boost "Disappearances," 26 October 2004.

⁹⁷ Human Rights Watch, *Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal's Civil War*, 2004.

Appendix 7: Pakistan

Section 82 of the Pakistan Penal Code sets the age of criminal responsibility for most offenses at 7 years, while Section 83 lays out *doli incapax* provisions for most offenses for children between 7 and 12 years of age. However, Pakistan's 1979 Hudood Ordinances hold all people criminally responsible, regardless of age, for specific offenses including rape, adultery, the use of alcohol and drugs, theft, armed robbery, and slander. Therefore, there is no lowest age at which children may potentially be held criminally liable for infringements of the penal law, and by definition Pakistan has no MACR. The Committee on the Rights of the Child recommended in its 1994 Concluding Observations that Pakistan scrutinize its age of criminal responsibility provisions for conformity with the CRC, while one Committee member noted in 1994 "that the consistently serious accounts by UNICEF and various NGOs of the treatment of children under Pakistan's legal system confirmed the need for a major overhaul of the country's legislation to eliminate the apparent inconsistencies in the ages of criminal responsibility [and] the conflict between *hudood* and other criminal legislation..."⁹⁸ In its 2003 Concluding Observations, the Committee on the Rights of the Child noted its concern for the conflict between the CRC's principles and the definition of the child in Pakistan's Hudood Ordinances, and for the very low age of criminal responsibility. Nonetheless, there are no known, significant movements at the present to reform Pakistan's MACR provisions.

Positive Developments

The complexity of Pakistan's age-related provisions does not signify the lack of important juvenile justice advances in recent years. For example, despite the ongoing challenges associated with it, the 2000 Juvenile Justice System Ordinance (JJSO) is surely an historic step forward for juvenile justice in Pakistan. Among other new provisions, the JJSO prohibits for the first time labour during imprisonment, corporal punishment in police custody, arrest under preventive laws, the use of fetters and handcuffs, and the death penalty for children. The JJSO has led to a wide range of other positive developments, including the following: many jails have designated separate cells for children so as to avoid detention with adults; some child-specific juvenile justice institutions have been created; national NGOs have expanded legal assistance programs to children; various organizations have worked closely with the government to provide training on the JJSO to relevant officials in all 4 provinces; and the government is giving greater consideration to ways to ameliorate the problem of high numbers of children detained while under-trial.⁹⁹ Likewise, significant collaborative efforts are underway to establish better data collection systems and more useful data in juvenile justice, and to improve prison conditions for children.¹⁰⁰

At the same time, the government has redoubled its efforts to fully implement the Juvenile Justice System Ordinance by this year, while some provincial governments, such as Punjab, plan to introduce new laws to protect children's rights and improve

98 Committee on the Rights of the Child, Summary record of the 134th meeting: Pakistan, CRC/C/SR.134, 11 April 1994.

99 Tufail, Pervaiz, Feeny, Thomas, and Marie Wernham, *Street Children and Juvenile Justice in Pakistan*, AMAL Human Development Network and the Consortium for Street Children, 2004.

100 UNICEF Pakistan, e-mail correspondence with author, December 2004. Meuwese, Stan (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 - The Netherlands, Amsterdam, 2003.

juvenile justice.¹⁰¹ There are important signs that the courts are also beginning to play a more active role in ensuring respect for the JJSO. In one initiative, judges personally and regularly visit places of detention to free children who, under the JJSO, should not be deprived of their liberty.¹⁰² On several occasions, provincial high courts have ordered the police to produce illegally detained children in court, following the filing of *habeas corpus* petitions by family members.¹⁰³

In other related efforts, the Government of Pakistan conducted a formal review in 2002-2003 of all its child-related laws. In view of the CRC and related national and international commitments, the review identified and compiled in one volume 78 relevant laws, noted the shortcomings of each law, proffered recommendations for amendments to existing laws, and outlined areas requiring new legislation. This process examined the JJSO in detail, and highlighted conflicts between the JJSO and other laws. The government subsequently convened a high-level meeting of judges, senior lawyers, law faculty and law institute directors, law commission members, Ministry of Social Welfare representatives, and civil society representatives to consider and discuss the review. Finally, it should be noted that the Government of Pakistan played an important leadership role at the regional level in establishing the Asian Birth Registration Committee, a network formed in 2000 by Civil Registrars General of various countries to promote birth registration across Asia.¹⁰⁴ These and other examples demonstrate an

impressive array of initiatives to further improve Pakistan's juvenile justice system.

MACR-Related Challenges

Doli Incapax Provisions

Section 83 of the 1860 Pakistan Penal Code stipulates that a child between the ages of 7 and 12 may only bear criminal responsibility if he or she has "attained sufficient maturity of understanding to judge the nature and consequences of his [or her] conduct on that occasion." However, beyond this dictate there are no guidelines on what "maturity" means or on how it should be assessed, thus judges withhold or confer criminal responsibility to individual children as they see fit. Since most judges are overwhelmed with cases on a daily basis, and many lack interest anyway, courts are simply unlikely to assess the maturity of such children.¹⁰⁵ This *doli incapax* provision, which historically signified a presumption of innocence of children in the stated age range, has thus evolved into a presumption of responsibility for children between 7 and 12. Indeed, one court case held that the prosecution does not even need to provide any evidence of a child's maturity – even if such evidence would be desirable. As such, defense lawyers must specifically plead and prove children's immaturity in court to rebut the effective presumption of criminal responsibility. Unfortunately, the typical child in conflict with the law does not have access to such knowledgeable counsel. For these reasons, Pakistan's *doli incapax* provisions have apparently lost any practical value for children in conflict with the law. It should be

¹⁰¹ Human Rights Watch, *Prison Bound: The Denial of Juvenile Justice in Pakistan*, New York, 1999. Daily Times, "New laws on children's rights soon," Lahore, 5 November 2003.

¹⁰² Amnesty International, *Pakistan: Denial of basic rights for child prisoners*, 2003.

¹⁰³ Human Rights Watch, *Prison Bound: The Denial of Juvenile Justice in Pakistan*, New York, 1999.

¹⁰⁴ UNICEF Innocenti Research Centre, "Birth Registration: Right from the Start," *Innocenti Digest* 9, Florence, 2002.

¹⁰⁵ Amnesty International, *Pakistan: Denial of basic rights for child prisoners*, 2003. Jillani, Anees, *Cries Unheard: Juvenile Justice in Pakistan*, Society for the Protection of the Rights of the Child (SPARC), Islamabad, 1999.

recalled, as noted in the main body of this study, that the Chairperson of the Committee on the Rights of the Child has specifically expressed concern for this same phenomenon in Sri Lanka.¹⁰⁶

Hudood Ordinances and Islamic Law Interpretations

The 1979 Hudood Ordinances were passed during a period of military dictatorship and martial law, and formed part of a larger effort to Islamize national law, but were never revoked after martial law was suspended.¹⁰⁷ Under the Ordinances, children of all ages throughout Pakistan are accountable for offenses such as the use of alcohol and drugs, theft, robbery, and slander. Despite the overlap of some of these crimes with crimes in the Penal Code, the Hudood Ordinances override both the Penal Code and the JJSO in all cases. Therefore, by definition, there is no actual MACR in Pakistan beyond birth. The Ordinances only give children special consideration for their ages in determining the type of sentence applicable to them, and even then, children are defined as those who have not yet reached puberty.

A further complication regarding gender discrimination arises with the 1979 Offense of *Zina* (Enforcement of Hudood) Ordinance (No. VII), one of the Hudood Ordinances, which specifically regulates adultery, premarital sex, and rape. In basic terms, in order for such a sexual crime to have occurred, the perpetrator of the rape, or the participants in consensual premarital or extramarital sex, must have reached puberty.

Consequently, girls – due to the earlier onset of puberty – potentially bear criminal responsibility several years before their male cohorts for this class of crimes. In contrast, not only does criminal responsibility for certain crimes begin later for boys due to the biological onset of puberty, but procedural and evidentiary requirements tend to delay the conferral of responsibility even longer. For girls, menstruation is a clear and irrefutable sign of puberty and criminal responsibility. For boys, it can be much more difficult to prove the onset of puberty, and there is no religious consensus on the correct physical evidence of puberty in boys anyway. Girls, by virtue of reaching puberty earlier, are then also exposed to the possibility of severe, fixed *hadd* punishments earlier than boys.¹⁰⁸ Following the promulgation of the *Zina* Ordinance, the number of women in prison increased sharply, while the percentage of girls in prison accused of *zina* has become extremely disproportionate to the percentage of girls accused of other crimes.¹⁰⁹

It should be noted that there have been many attempts to repeal the Hudood Ordinances, including prominent efforts by the Commission of Inquiry for Women in 1997 and the Special Committee of the National Commission on the Status of Women in August 2003. In fact, the latter group was established in 2002 with the specific purpose of reviewing the ordinances. However, both attempts ultimately failed, in large part because an act of Parliament is required to abrogate or replace the ordinances. Such legislative action further

¹⁰⁶ Committee on the Rights of the Child, Summary Record of the 872nd Meeting: Sri Lanka, CRC/C/SR.872, 1 July 2003.

¹⁰⁷ Di Martino, Kirsten, Analysis of the Juvenile Justice System In Pakistan for the UN Juvenile Justice Project, UN Centre for Human Rights, Geneva, 1996 Draft.

¹⁰⁸ However, the actual imposition of *hadd* punishments is rare, and there are no known cases of girls receiving them. Geiger, Andrea, "International Law - Juvenile Justice in Pakistan," 23 Suffolk Transnational Law Review 713, 2000.

¹⁰⁹ Tufail, Pervaiz, Feeny, Thomas, and Marie Wernham, Street Children and Juvenile Justice in Pakistan, AMAL Human Development Network and the Consortium for Street Children, 2004. Amnesty International, Pakistan: Denial of basic rights for child prisoners, 2003.

requires a 2/3 majority vote and the consent of all political parties, and is thus very difficult to obtain.¹¹⁰

Despite these various conflicts with CRC principles, other interpretations of Islamic law support a close alignment with the current guidance evolved under the CRC regarding the MACR. As discussed in detail in the main body of this study, such interpretations conclude that MACRs should be set at an age of no lower than 12 years, and various scholars in Afghanistan, Pakistan, and Maldives have supported this conclusion.

Anti-Terrorism Legislation

The Government of Pakistan has periodically instituted emergency laws and special tribunals in attempts to address ethnic conflict and related disturbances, but these measures may counteract other statutory age provisions on criminal responsibility.¹¹¹ For example, the 1997 Anti-Terrorism Act stipulates in Section 32 that it overrides all other laws currently in force. Among other things, at least for offenses included under the Anti-Terrorism Act, this means that the corresponding anti-terrorism courts could potentially undermine the age provisions in the Pakistan Penal Code and find even children younger than 7 years of age criminally responsible.

Related cases from anti-terrorism courts – where age disputes have played a factor – give reasons for concern over such a possibility.¹¹² In June 2003, the Supreme Court dismissed a review petition regarding one death sentence originating in an anti-terrorism court case. A lower appellate court

mistakenly recorded the defendant's age as 30 years, due to an apparent clerical error, yet the defense counsel failed to dispute the error at the appropriate point in the judicial review. Thus, the death sentence stood for the defendant – who was apparently less than 17 years old at the time of his offense. The most recent information available on the case suggests that the defendant awaits a decision on his appeal to the President of Pakistan for commutation of the sentence.

In the past, Martial Law Regulations were in effect in Pakistan from 1977 to 1985, and military courts tried several youths in that period.¹¹³ The Sindh High Court left an ambivalent jurisprudence on the applicable law in such trials. At one point, it held that the 1955 Sindh Children Act continued to apply to juveniles' trials, despite the Martial Law Regulations. In other cases, it upheld juveniles' death sentences as determined under the Regulations, reasoning that the two laws conflicted but that the Martial Law Regulations superseded and left inoperative the Sindh Children Act. In summary, as the government's representative explained to the Committee on the Rights of the Child upon consideration of Pakistan's Initial Report, the effect of martial law "had been to suspend most other legislation" including even basic clauses of the Constitution.¹¹⁴ As such, if martial law were hypothetically imposed again in the future, there would be some risk that Penal Code provisions on children's responsibility would be undermined.

Other Considerations for the MACR

If Pakistan does increase its MACR in the coming years, to meet the current guidance

¹¹⁰ Committee on the Rights of the Child, Summary record of the 134th meeting: Pakistan, CRC/C/SR.134, 11 April 1994.

¹¹¹ Human Rights Watch, *Prison Bound: The Denial of Juvenile Justice in Pakistan*, New York, 1999.

¹¹² Society for the Protection of the Rights of the Child (SPARC), *The State of Pakistan's Children 2003*, Islamabad, 2004.

¹¹³ Jilani, Anees, *Cries Unheard: Juvenile Justice in Pakistan*, Society for the Protection of the Rights of the Child (SPARC), Islamabad, 1999.

¹¹⁴ Committee on the Rights of the Child, Summary record of the 134th meeting: Pakistan, CRC/C/SR.134, 11 April 1994.

of a uniform MACR of at least 13 years, it would also be advisable to pre-empt any foreseeable implementation challenges that could arise. With this proactive approach in mind, and upon consideration of Pakistan's current juvenile justice system, it is possible to anticipate a few age-related issues that certainly merit consideration in the context of MACR reform. In essence, adolescents in Pakistan's juvenile justice system are already prone to certain age-related risks, and by increasing the MACR into the adolescent years, certain procedural complications will probably become more salient. The same types of challenges that are now prevalent with the age of penal majority may very well become significant with an increased MACR.

Birth Registration and Proof of Age

One primary example is the lack of birth registration and its related difficulties in juvenile justice, especially for children in rural areas and street children – who are less likely to have proof of age. Where there is no proof of age, or where there is some doubt over whether a person is a child or not, the JJSO mandates that Juvenile Courts conduct an inquiry, including the completion of a medical report, to determine the person's age.¹¹⁵ Some critics argue that the medical exam requirement only adds further delays to lengthy trial processes, and suggest that permanent examining boards should be established to determine suspects' ages at the start of the investigative stage, well before trial.¹¹⁶ At other times, further delays arise when people either submit potentially falsified documents so as to prove

that a suspect is a child, or victims alternatively fabricate charges that authentic age documents are false, so as to force the accused to be tried as an adult.¹¹⁷ Such age-related delays further hamper the slow juvenile justice system, wherein roughly 80% of children deprived of their liberty at any given time are still under investigation or in trial, and have not been convicted. As the MACR is increased into adolescence, there will likely be more cases where the age of a suspected child offender is disputed to be either higher or lower than the MACR. Due to age discrepancies and delays, more children who in fact are younger than the MACR will be probably be stuck waiting in the system – and the majority of the worst physical violations of children's rights are known to occur while children are in custody awaiting trial.¹¹⁸

There are also widespread reports that police officers intentionally inflate children's ages into legal adulthood on charge sheets, to avoid the extra protections and procedural requirements afforded to juveniles.¹¹⁹ Furthermore, courts tend to accept police officers' age claims without question, even in the face of authentic documents that challenge such claims. In many observed cases, the physical appearance of juvenile defendants has been obviously younger than the ages stated in their files. Even though disputes may now be rare over whether or not a child is younger or older than the Penal Code's age limit of 7 years, a uniform MACR at 13 years or higher would surely bring more questions regarding children's ages and criminal responsibility.

¹¹⁵ Section 7, "Determination of Age."

¹¹⁶ Chaudhry, M. Irshad, "A Review of the Juvenile Justice System Ordinance 2000," PRI South Asia Newsletter, No. 1, Penal Reform International South Asia Regional Office, Kathmandu, 1 February 2003.

¹¹⁷ Amnesty International, Pakistan: Denial of basic rights for child prisoners, 2003.

¹¹⁸ Jillani, Anees, *Cries Unheard: Juvenile Justice in Pakistan*, Society for the Protection of the Rights of the Child (SPARC), Islamabad, 1999. Human Rights Watch, *Prison Bound: The Denial of Juvenile Justice in Pakistan*, New York, 1999.

¹¹⁹ Society for the Protection of the Rights of the Child (SPARC), *The State of Pakistan's Children 2003*, Islamabad, 2004.

Such problems are compounded by the significant extent of police corruption and extortion, a challenge that even one Provincial Police Inspector General has acknowledged and addressed.¹²⁰ Typical claims are that police officers use false arrests to extort bribes from children and their families, or that officers arrest children on patently false charges in order to deflect the blame from the known, culpable adults.¹²¹ Of course, children from families that are able to pay bribes are promptly released, while almost all of those that remain accused, arrested, and detained are poor children and street children. Furthermore, as noted above, it is these very same children who are more likely to lack proof of age, and who are therefore more vulnerable at the hands of such officers. Again, it seems very likely that children younger than any higher, new MACR will increasingly face related difficulties, with a disproportionate burden upon street children and children from poor backgrounds.

Applicability and Implementation of Juvenile Justice Legislation

Pakistan's historic implementation of juvenile justice laws suggests that different approaches will be needed to put into force any new MACR standards. For example, the JJSO does not apply in Federally Administered Tribal Areas and the territories comprising the Northern Areas and the State of Azad Jammu and Kashmir, due to the extra legislative requirements arising from

their special constitutional status. Just outside some of their borders, there are recent reports that officials arrest and detain suspects, as well as children and relatives of suspects, under the 1901 Frontier Crimes Regulation's collective responsibility clause. These agents then remove the suspects and relatives to the tribal areas where the JJSO does not apply, and where local leaders and officials have wider discretionary powers.¹²² There is some concern that such agents could do the same with child suspects.

Even though the JJSO should in theory apply throughout the remainder of Pakistan, superseding earlier provincial juvenile justice laws, there are continuing widespread failures at every step in the juvenile justice system to implement the JJSO. These problems are similar to the historic lack of effective implementation and enforcement of past juvenile justice laws.¹²³ Knowledge about the JJSO among concerned officials is still lagging; among other examples, some judges in Punjab and Sindh provinces continue to apply, respectively, the legally inoperative Punjab Youthful Offenders Ordinance and the Sindh Children's Act.¹²⁴ Moreover, the Lahore (Punjab) High Court ruled on 6 December 2004 that the JJSO is "unreasonable, unconstitutional and impracticable," and that juvenile courts created by it no longer have effective jurisdiction.¹²⁵ The actual implications of this ruling are still unclear, and the Ministry of Law plans to appeal the decision before the

¹²⁰ Tufail, Pervaiz, Feeny, Thomas, and Marie Wernham, *Street Children and Juvenile Justice in Pakistan*, AMAL Human Development Network and the Consortium for Street Children, 2004.

¹²¹ Committee on the Rights of the Child (citing UNICEF reports), Summary record of the 134th meeting: Pakistan, CRC/C/SR.134, 11 April 1994.

¹²² Human Rights Watch, *Prison Bound: The Denial of Juvenile Justice in Pakistan*, New York, 1999. World Organisation Against Torture (OMCT), *Pakistan: Children excluded from juvenile justice reform*, Press Release, 16 June 2004.

¹²³ Jillani, Anees, *Cries Unheard: Juvenile Justice in Pakistan*, Society for the Protection of the Rights of the Child (SPARC), Islamabad, 1999. Amnesty International, *Pakistan: Denial of basic rights for child prisoners*, 2003. National Commission for Child Welfare and Development, *Situation Analysis of Juveniles in Jails*, Pakistan Ministry of Women Development, Social Welfare, and Special Education, 2001.

¹²⁴ Integrated Regional Information Network, *Pakistan: Young Offenders Excluded from Justice in Tribal Areas*, UN Office for the Coordination of Humanitarian Affairs, 9 September 2004.

¹²⁵ Amnesty International, *Pakistan: Death Penalty for Juveniles Reintroduced*, Press Release, 9 December 2004. Zia, Sajid, "Juvenile Justice System Struck Down," *The Nation (Pakistan)*, 7 December 2004.

Supreme Court. However, this case is another timely example of the challenges that may lie in the future of any new MACR provisions.

One contradiction between the technically void Punjab Youthful Offenders Ordinance and the JJSO adds another element for consideration. Following the introduction of the Hudood Ordinances, the Province of Punjab modified its Youthful Offenders Ordinance to exclude, in the definition of the child, children who have reached puberty. Moreover, the amendment defines the child “at the time of initiation of any proceeding against him under the Ordinance or at the time of his arrest.”¹²⁶ On the other hand, the JJSO clearly defines a child as “a person who at the time of commission of an offence has not attained the age of eighteen years.”¹²⁷ The difficulty, as suggested above, is that courts and officials oftentimes continue to apply old pre-JJSO provincial laws in practice – with noted confusion over the relevant, effective legal age limits. This scenario underscores the importance of ensuring, with absolute clarity in any new MACR regulations, that the MACR refers to the age of children at the time of their alleged offenses. It should further be emphasized that the MACR is the effective age limit despite any past or future provincial laws.

Instrumental Use of Children for Criminal Activities

Adults instrumentally use children for criminal activities in every country of the

world, and there are claims that this is a significant problem in Pakistan.¹²⁸ Adult drug traffickers pay children small amounts of cash to carry wrapped packages, without necessarily telling them that the packages are drug shipments. If the delivery goes through successfully, the drug trafficker has a cheap courier available for future deliveries. If the police stop and arrest the child, there is virtually no risk of liability for the trafficker, due to the limited prosecution of such exploitation in practice. Police bribes help ensure that the cycle continues without actually ever holding accountable the adults at hand. Traffickers are also known to use bribes to prevent child couriers from being held responsible – not for the children’s protection, but to keep them available for further drug deliveries. Across Pakistan, there are roughly 5,000 children in jail, and one expert has estimated that the most common charge against them is drug carrying – even for children as young as 8 years old.¹²⁹

Another type of adults’ criminal instrumentalization of children in Pakistan involves revenge killings. More common in rural areas, family members order children to carry out murders, usually in revenge for previous family killings. One expert claims that 20% of children in one prison are awaiting trial on charges of murder, in most cases for such revenge killings.¹³⁰

Unfortunately, the practical likelihood that such children will face little or no

¹²⁶ Punjab Youthful Offenders (Amendment) Ordinance 1984 (No. XXX), Section 2.

¹²⁷ Juvenile Justice System Ordinance (No. XXII) 2000, Section 2(b).

¹²⁸ David, Pedro, 'The Instrumental Use of Juveniles in Criminal Activities', in United Nations Centre for Human Rights, et. al., *Children in Trouble: United Nations Expert Group Meeting*, report on "United Nations Expert Group Meeting: Children and Juveniles in Detention Application of Human Rights Standards, Vienna, 30 October to 4 November 1994", Austrian Federal Ministry for Youth and Family, Vienna, 1995. Integrated Regional Information Network, Pakistan: Focus on Boys Behind Bars, UN Office for the Coordination of Humanitarian Affairs, 10 September 2001.

¹²⁹ Society for the Protection of the Rights of the Child (SPARC), *The State of Pakistan's Children 2003*, Islamabad, 2004. Integrated Regional Information Network, Pakistan: Focus on Boys Behind Bars, UN Office for the Coordination of Humanitarian Affairs, 10 September 2001.

¹³⁰ Integrated Regional Information Network, Pakistan: Focus on Boys Behind Bars, UN Office for the Coordination of Humanitarian Affairs, 10 September 2001.

consequences for their actions – and the practical likelihood that the crime will not be traced back to the liable adult – tends to make children younger than the MACR more attractive in the eyes of such exploiters. However, as discussed in the main body of this report, a children’s rights approach views any incidence of exploitation as just that – exploitation. Child victims of criminal exploitation must be guaranteed effective care and protection measures, and responsible adults must be promptly and

vigorously prosecuted. The prospect of the criminal instrumentalization of children is not a valid argument against increasing the MACR; it is an argument for the importance of effective implementation and protection of children’s rights.

Recommendations for Reform

- Prioritize ongoing juvenile justice reform efforts, and to take into account therein the General Recommendations of this study (see page 27).

Appendix 8: Sri Lanka

Section 75 of the 1885 Sri Lanka Penal Code establishes an MACR of 8 years, while Section 76 lays out *doli incapax* guidelines wherein a child between ages 8 and 12 may bear criminal responsibility if he or she has “attained sufficient maturity of understanding to judge of the nature and consequence of his [or her] conduct on that occasion.” The Committee on the Rights of the Child stated its deep concern for this low MACR in its 1995 Concluding Observations, and reiterated its serious concern in its 2003 Concluding Observations. The Human Rights Committee, which is the international monitoring body for the 1966 International Covenant on Civil and Political Rights, also noted in 1995 that Sri Lanka’s low MACR was a matter of main concern. It expressed equal concern for Sri Lanka’s *doli incapax* statutes, apparently for the discretionary power of individual judges to determine children’s potential criminal responsibility.¹³¹ The Chairperson of the Committee on the Rights of the Child also stated his concern for the distortion of Sri Lanka’s *doli incapax* provisions in practice, wherein children were assumed to be criminally responsible unless they could specifically demonstrate that they were too immature to bear responsibility for their actions.¹³²

In partial response to these remarks, the Government of Sri Lanka has taken full independent initiative in drafting a Juvenile Justice Procedure Act that, in its current version, would increase the MACR to 10 years of age, with *doli incapax* provisions for children between the ages of 10 and 14. The current draft also includes updated

procedures for estimating children’s ages where there is either dispute over a claimed age or no proof of age available. The Ministry of Justice is still considering the draft law, and this review stage presents a timely opportunity to bring the draft bill into full conformity with the latest MACR guidance developed under the CRC – that MACRs should be at least 13 years, and that there should be no *doli incapax* procedures applicable to children younger than 13 years – besides broader juvenile justice practices and reforms reiterated below.

Other Positive Developments

The draft Juvenile Justice Procedure Act is a direct outgrowth of the government’s willingness to take ownership for child protection and children’s rights issues. In 1998, with a law that also consolidated children’s legislation and the definition of the child, the government created the National Child Protection Authority (NCPA). The NCPA includes key representatives from the education, medical, law enforcement, and legal professions, and reports directly to the President. Part of its explicit mandate is to secure the safety and protection of children involved in the juvenile justice system. Indeed, the NCPA has played a crucial leadership role in developing and drafting the Juvenile Justice Procedure Act, including its new MACR provisions. At the same time, Probation and Child Care Services has played an important role as the implementing body of the existing Children and Young Persons Ordinance, and has engaged in reviewing the recent draft from a practitioner’s point of view.

¹³¹ Human Rights Committee, Comments of the Human Rights Committee: Sri Lanka, CCPR/C/79/Add.56, 27 July 1995.

¹³² Committee on the Rights of the Child, Summary Record of the 872nd Meeting: Sri Lanka, CRC/C/SR.872, 1 July 2003.

The NCPA carries out a wide range of other children's rights activities.¹³³ It has at its disposition a Special Police Unit, staffed by 16 officers, that responds to complaints made to or information received by the NCPA. The NCPA also established and coordinates 12 District Child Protection Committees, which are involved in managing selected cases and general issues relating to child protection at the district level. Some District Child Protection Committees are also monitoring children's institutions and conducting awareness campaigns, among other projects. Across this spectrum of activities, the NCPA has effectively engaged and collaborated with various media outlets (including, *inter alia*, print media, radio, television, and theatres) to make its programs more visible, and to increase overall public awareness of children's rights.

Sri Lanka features a series of other institutions and practices that support the protection of children's rights. A 1996 Act created the Human Rights Commission, and granted it the power to monitor the welfare of persons deprived of their liberty, including children, and to recommend improvements in conditions of detention. The Commission and its regional officers receive complaints and conduct inquiries on possible infringements of human rights. In another step to bolster Sri Lanka's current juvenile justice system, the Ministry of Justice is collaborating with UNICEF to develop a practical juvenile justice manual. Likewise, the police has taken important initiatives; from the first Children and Women's Desk in Colombo in 1979, the police now maintains Children and Women's Desks in the majority of police stations nationwide. The Women's and Children's Division coordinates with 34

district offices and all station desks, and most of the relevant officers have followed specialized courses of training. As a final example, the Department of Probation and Child Care includes Probation Officers as well as Child Rights Promotion Officers to help ensure the implementation of children's rights.

MACR-Related Challenges

Birth Registration and Proof of Age

Even though existing juvenile justice law – the 1939 Children and Young Persons Ordinance – includes provisions on estimating children's ages in cases of doubt or lack of proof, Sri Lanka does face problems related to the MACR and proof of age. In cases where children do not have birth certificates – which is a common problem – government medical officers are supposed to provide probable age certificates as legal proof of age.¹³⁴ However, doctors are not always available, nor is this procedure always followed, thus children either face delays in their trials, or authorities estimate and record children's ages based upon informal, non-medical assessments.

Anti-Terrorism Legislation

The 1979 Prevention of Terrorism Act (POTA) continued in force for most of the 1990s during the declared state of emergency in the North East zone and border areas, and it applied to all people with no age restriction whatsoever, nor with any distinction between children and adults.¹³⁵ Even though there are no known cases where children younger than the MACR of 8 years were arrested under the POTA – which superseded all other written law – the act

¹³³ Government of Sri Lanka, United Nations Secretary-General's Study on Violence against Children: Questionnaire to Governments, Responses, 2004.

¹³⁴ Samaraweera, Vijaya, Report on the Abused Child and the Legal Process of Sri Lanka, National Monitoring Committee on the Children's Charter, Colombo, 1997.

¹³⁵ World Organization Against Torture, Sri Lanka Report for The Committee on the Rights of the Child 1995, 1995.

directly undermined Sri Lanka's MACR statutes while it was in force.¹³⁶ Furthermore, as some stakeholders fear, if armed combat hostilities increase in the future, POTA or similar legislation could be put back into force. While the legislation was still in effect, security forces arrested and detained many children in military camps under summary procedures; detention was permissible for up to 18 months under administrative orders that were not subject to judicial review.¹³⁷ Since it was often difficult to produce evidence of POTA offenses, convictions were usually based upon confessions, and this practice led to the problematic possibility of manipulation and forced confessions of children in particular. Not surprisingly, the Committee on the Rights of the Child welcomed the information that the POTA had been suspended by the time of its 2003 Concluding Observations. Civil society advocates have forcefully argued, in tandem with UNICEF Sri Lanka, that any such future legislation must exclude jurisdiction over children, and this matter is crucial to the effectiveness of MACR safeguards.

Applicability and Implementation of Juvenile Justice Legislation

As in other South Asian countries, Sri Lanka has historically faced challenges in successfully implementing its juvenile justice

laws, and such problems also endanger the enforcement of MACR guidelines. For example, officials only began to translate the 1939 Children and Young Persons Act into Sinhala and Tamil in 2004 – meaning that the majority of service providers have not used or even had effective access to Sri Lanka's primary law on juvenile justice. Not surprisingly, there is a continuing lapse between legislation and policy on the one hand, and practice on the other. In one juvenile detention home, where neither the department nor province had issued any standing orders or formal operating guidelines, the superintendent held unlimited authority essentially without legal oversight, and it was suspected that responsible legislators and policy makers did not even know of the home's existence.¹³⁸ In light of such situations, some argue that the decentralized responsibility for services has limited the possibility for better implementation or improvement in juvenile justice.

Recommendations for Reform

- Take advantage of the government's initiative in juvenile justice, as seen in drafting the Juvenile Justice Procedure Act, to pursue all the General Recommendations of this study (see page 27).

¹³⁶ 1979 Prevention of Terrorism Act, Section 28.

¹³⁷ World Organization Against Torture, Sri Lanka Report for The Committee on the Rights of the Child 1995, 1995. 1979 Prevention of Terrorism Act, Sections 9-10.

¹³⁸ Dias, Malsiri, Study on State Receiving Homes, Remand Homes and Detention Centres for Children, Centre for Women's Research, Colombo, 2001.

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