



**ANALYSIS OF THE LEGISLATION OF AZERBAIJAN IN RESPECT OF  
ACCESS TO JUSTICE FOR CHILDREN**

**BAKU 2014**

## **Abbreviations**

<b>AR</b>	<b>Azerbaijan Republic</b>
<b>CAO</b>	<b>Code of Administrative Offences</b>
<b>CC</b>	<b>Civil Code</b>
<b>CmC</b>	<b>Criminal Code</b>
<b>CPC</b>	<b>Criminal Procedural Code</b>
<b>CRC</b>	<b>Convention on the Rights of the Child</b>
<b>ILO</b>	<b>International Labor Organization</b>
<b>MIA</b>	<b>Ministry of Internal Affairs</b>
<b>NGO</b>	<b>Non-governmental organization</b>
<b>PEC</b>	<b>Penalties' Execution Code</b>
<b>UN</b>	<b>United Nations</b>
<b>UNICEF</b>	<b>United Nations' Children's Fund</b>

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## Introduction

Azerbaijan has been a member of the UN family for many years. Being a member of an organization which includes different States imposes to Azerbaijan to comply with international standards, resolutions and programs adopted by this organization and to develop its own legislative system in conformity with existing international norms. Like other States, Azerbaijan has also conducted reforms in many fields with the view to achieve compliance of national laws with international law. One of the spheres, where reforms are deemed to be necessary, is the sphere of "child justice" or "juvenile justice" as well as the sphere of "access to justice for children" which encompasses wider range of relations than previous terms and which regulates access of children to national judicial, administrative (law enforcement) and monitoring (supervision) authorities and covers all relevant judicial proceedings, affecting children without limitation, including children alleged as, accused of, or recognized as having infringed the penal law, child victims and witnesses or children coming into contact with the justice system for other reasons, such as regarding their care, custody or protection. In this respect, "justice" means all mentioned instances (such as judicial, administrative/law enforcement and monitoring/supervision).

The UN Common Approach to Justice for Children expands on this definition. Access to justice can be defined as "the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards (including the CRC)... Lack of access to justice is a defining attribute of poverty and an impediment to poverty eradication and gender equality. Proper access to justice requires legal empowerment of all children: all should be enabled to claim their rights, through legal and other services such as child rights education or advice and support from knowledgeable adults."

In order to fulfil international standards, access to justice for children requires that on one hand there be a child-sensitive fully functional justice system and on the other that children be provided with information and support that will enable them to claim their rights and obtain redress.

As regards the definition of "child", this term equals to the term of "minors" used by national legislation.

Relevant reforms started firstly in relation to "juvenile justice" in the country. A review of the analysis of the juvenile justice system was conducted in Azerbaijan while reporting to the UN Committee on the Rights of the Child in 2006 with the view to determine to which extent Azerbaijani legislation complied with relevant international standards, including the UN Convention on the Rights of the Child and the relevant UN norms and standards on juvenile justice.

The Committee expressed the following concerns in the field of juvenile justice:

- (a) The State party has not adopted legislation on juvenile justice that addresses the situation of children in conflict with the law in accordance with the provisions of the Convention;
- (b) There are no law enforcement personnel specialized in child-related investigations and in interrogation of children in conflict with the law;
- (c) There are offences for which persons under the age of 18 are tried as adults;
- (d) Persons under the age of 18 are often held in pretrial detention for long periods and are not always detained separately from adults, particularly in the case of female detainees;
- (e) Alternatives to the deprivation of liberty are not sufficiently considered and applied, and persons under the age of 18 can be sentenced to detention for a period of up to 10 years;
- (f) The conditions of detention are often poor and inadequate, and overcrowding is frequently a serious problem;
- (g) Recovery, assistance and reintegration services for persons under the age of 18 in conflict with the law are insufficient.

Consequently, the Committee recommended to the Republic of Azerbaijan, in its concluding observations, summarizing the result of the analysis, to:

- (a) Consider establishing a specialized police service for children, particularly with regard to training on child-sensitive investigations and interrogations;
- (b) Take all necessary measures to ensure that persons under the age of 18 are deprived of liberty only as a last resort and for the shortest appropriate period of time, in particular by developing and implementing alternatives to custodial sentences, including the establishment of diversion centres and/or legal clinics for children in conflict with the law;
- (c) Ensure that all persons under the age of 18 in custody, particularly females, are separated from adults as required under article 72.1 of the Penal Enforcement Code;
- (d) Take urgent steps to substantially improve the conditions of detention of persons under the age of 18, and bring them into full conformity with international standards;
- (e) Provide that persons under the age of 18 deprived of liberty are given a comprehensive programme of educational activities (including physical education);
- (f) Train professionals in the area of recovery and social reintegration of children and establish special units within the police for the handling of cases of all persons under the age of 18 in conflict with the law;.

In 2007, the Azerbaijani Ministry of Internal Affairs, UNICEF Azerbaijan, the OSCE Office in Baku and the NGO Alliance on Children's Rights signed a Memorandum of

Understanding on cooperation to improve the national juvenile justice system. Reforms on the juvenile justice in Azerbaijan commenced from the same year..

### **Objectives of the review**

The objective of the review to assess the compliance of all relevant existing laws and Codes of Azerbaijan with international norms and standards pertaining to children's access to justice and to propose suggestions on how to ensure that laws and policies better promote the establishment of a comprehensive juvenile justice systems..

State's obligations with regard to access to justice for children have been provisionally divided into two groups in this report. The first group encompasses issues relating to criminal and administrative law and the second group covers issue regarding civil, family and other laws. Rules of international law on certain matters concerning access to juvenile justice were clarified separately and the extent to which those rules were incorporated in national legislation is specified. Furthermore, gaps, shortcomings and contradictions in national legislation as well as the level of implementation in practice have been described and recommendations have been made in order *to provide guidance on how access to justice for children can be assured* and reforms promoted and conducted in the relevant sphere.

In our opinion, the national legislation of the Republic of Azerbaijan is, in general, in conformity with international rules and standards in relation to access to justice for children. However, it is undeniable that some difficulties and contradictions do really emerge in this sphere due to the lack of conformity of several provisions and omissions in national law. In addition, notwithstanding the existence of several provisions in the national legislation relating to juvenile justice, they are not always respected in practice and the adherence to the Convention and other standards by judiciary and law-enforcement authorities has to be strengthened. Consequently, there is a need to make some modifications as well as institutional changes in order to enhance the access of children to justice and to ensure better conformity with international requirements.

This report has been commissioned by UNICEF with the support from the EU and prepared by UNICEF national experts Mr. Zaur Naghiyev and Mr. Javidan Hajizada, UNICEF international consultant Ms. Guillemette Meunier, all with vast experience in the field of the child rights and justice for children. It should also be noted that UNICEF Office in Azerbaijan made significant contributions and provided assistance while relevant researches were undertaken as a part of this report. We would like to express our special gratitude to all relevant colleagues of UNICEF office in Azerbaijan, particularly, Mr. Ramiz Behbudov, Child Protection Manager, for their close cooperation and assistance in the course of drawing up this report.

## **International law, rules and standards regulating access to justice for children**

The legal framework for access to justice for children can be found in a wide range of binding and non-binding international human rights instruments. Several international instruments provide the legal framework for access to justice for children, including: the Universal Declaration of Human Rights; the International Covenant on civil and political rights; the Convention on the elimination of all forms of discrimination against women; the UN Convention on the Rights of the Child (hereinafter referred to as "CRC" or "the Convention"); the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules", UN Resolution 40/33); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("Havana Rules", 4th Annex to the UN Resolution 45 / 113); the United Nations Guidelines for Action on Children in the Criminal Justice System; the UN Guidelines on Judicial Matters Involving Child Victims and the Witnesses of Crime; the UN Guidelines for Action on Children in the Criminal Justice System; the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

The Convention on the rights of the child is of particular relevance. The Republic of Azerbaijan became a State Party to this ground breaking instrument in 1992 without any reservation and is legally bound by its provisions. Under this instrument, The Republic of Azerbaijan is required to ensure that its domestic legal framework is consistent with the rights and obligations provided, including the adoption of appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice.

Notwithstanding the fact that not all international instruments are binding upon Azerbaijan, the other Rules and Guidelines, which regulate and supplement the principles defined in the CRC in more detailed manner, offer a useful and practical guidance for bringing national legislation in conformity with international standards.

The General Comments of the Committee on the Rights of the Child (CRC Committee), in particular General Comment No. 10, must also be mentioned as sources of guidance and recommendations to States parties in their efforts to establish an administration of juvenile justice in compliance with the CRC.

The rights of minors in relation to civil matters, are defined in international instruments such as the UN Declaration of Human Rights, the International Covenant on Civil and Political rights as well as the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights and Fundamental Freedoms (1953), the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, the United Nations ``Convention against Transnational Organized Crime`` and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the 1930 ILO Convention Concerning Forced or Compulsory Labor, the 1951 UN Convention relating to the Status of Refugees, the 2006 Convention on the Rights of Persons with Disabilities and

the 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption. Although provisions of the CRC were mainly assessed, in most cases references were also made to provisions of other international instruments and norms while conducting research for the report. There are also a number of instruments, guidelines, resolutions and documents adopted at regional level such as the European Convention on Human Rights and Fundamental Freedoms and by the Council of Europe that contain important provisions on access of children to justice.

## ***I. CHILDREN'S ACCESS TO JUSTICE IN CRIMINAL AND ADMINISTRATIVE LAW***

Rights of children in criminal and administrative law are mainly defined in the UN Convention on the Rights of the Child (hereinafter referred to as the "Convention" or the "CRC"). Articles 37, and 40 of the Convention set out the most important principles and rights which shall be recognized to children involved in criminal proceedings as suspected, accused, victims or witness and which are imposed on States parties. Article 39 requires in addition measures to help children victims of any form of violence, neglect, exploitation or abuse.

During the analysis for this report, most of those fundamental rights and principles have been considered and the issue of compliance with national legislation has also been interpreted. Along with the Convention, provisions of other standards and guidelines have also been referred to and relevant provisions have been examined as a whole.

In general terms, while not representing a formal legal obligation under international law, the enactment of a specific juvenile justice law would in itself be a major advance. The government would stress its intention to specifically and adequately address the issue within its legal system, which would indicate a strong commitment in favor of children. The enactment of a separate legislation would also enable all those concerned to focus on the rights of children.

### **A. GENERAL PRINCIPLES**

#### **1. Non-discrimination**

Article 2 of the Convention requires that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

According to article 25 of the Constitution of the Republic of Azerbaijan, everyone is equal before the law and the courts. In addition, pursuant to article 6 of the Law on the Rights of the Child, all children have equal rights and may not be subjected to discrimination

regardless of their social or property status, state of health, racial or ethnic origin, language, education, political opinions or residence, or the residence of their parents or the persons acting as their parents. While reviewing the last report submitted by Azerbaijan, the Committee on the rights of the child expressed concerns about the discrimination frequently experienced by children in vulnerable situations, particularly by children with disabilities confronted to deprivation of liberty, children without parental care, and children in economically disadvantaged households.

## 2. Best interests of the child

Article 3(1) CRC provides that *“in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”*.

According to article 5 of the Law on the Rights of the Child, the governmental bodies, all physical persons and legal entities must give priority to children’s interests and create conditions for observation of their rights.

The Committee on the rights of the child, while noting that the Republic of Azerbaijan legislation does make reference to the best interests of the child, expressed however concerns about the inadequate application of the principle of best interests within the State party. In the context of judicial proceedings, the Committee pointed “the lack of capacity among law professionals in understanding and representing the child’s perspective and best interests”. It urged the State to strengthen its efforts to ensure that the principle of the best interest of the child is appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings as well as in all policies, programmes and projects relevant to and with an impact on children. The legal reasoning of all judicial and administrative judgments and decisions should, where relevant, also be based on this principle.”

No provision of the domestic legislation defines in fact “the best interests of the child”, although it is a key principle. In view of the problems that could be encountered by the relevant authorities, **it is suggested to include one norm listing contents, facts and circumstances that need to be taken into account when taking a decision in relation to the child.**

## 3. Prohibition of capital punishment and life imprisonment without release

Article 37(a) CRC, article 6(5) of the International Covenant on Civil and Political Rights and Rule 17.2 of the Beijing Rules all prohibit the use of capital punishment for crimes committed by persons below the age of eighteen years. Article 37(a) of the CRC provides specifically that, member states undertake that *“neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by*

*persons below eighteen years of age*`. In this regard, the CRC Committee has strongly recommended that all forms of life imprisonment for children should be abolished.

Article 57.2 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred as ``Criminal Code``) states, that persons below eighteen years of age which commit a crime shall not be sentenced to life imprisonment. Indeed, if we consider the relevant text of the Convention carefully, it becomes obvious that the Convention only prohibits life imprisonment without possibility of release. From this perspective, national criminal legislation prohibits life imprisonment either without possibility or with possibility of release, demonstrating more humanistic approach.

## **B. ARREST AND PRE-TRIAL PROCEEDINGS**

According to article 37(b) of the Convention, *no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time*`. Moreover, as mentioned before, the UN Committee on the Rights of the Child recommended that the government: *“Take all necessary measures to ensure that children are only deprived of liberty as a last resort and for the shortest appropriate period of time, in particular by developing and implementing alternatives to custodial sentences”*.

International law strictly limits the circumstances in which children can be placed in detention either after being charged and awaiting trial or while under investigation pre-charge. Such detention is only permitted as a measure of last resort, for the shortest appropriate period of time and only in exceptional circumstances. Whenever possible, pre-trial detention should be avoided, and judges should consider alternative measures. If it is decided for the child to be formally charged and stand trial, the Court or other competent official or body should, without delay, consider the issue of release.

### **1. Arrest, detention or imprisonment as last resort and for “the shortest period of time”**

The CRC requires that a child charged with a criminal offence shall be brought to trial within a ‘reasonable’ period of time and that delay should be avoided. The various international instruments all use slightly different terms, but the essence of the provisions is that there should be no delay. While it is clear that pre-trial detention should only be used as a last resort and only for ‘the shortest appropriate period’ of time, there is no definition of what is meant by an “appropriate period”. However, the CRC Committee in General Comment No 10 has recommended that the period of pretrial detention before the child is charged (i.e. the period when the child is under investigation) should not exceed 30 days.

#### **a) In criminal law**

The Law on the Rights of the Child requires that detention or arrest of any person under age 18 be lawful and exceptional and that the child's parents or other legal representative be informed immediately. The duty to inform parents without delay is also recognized by the Code of Criminal Procedure.

The Code of Criminal Procedure provides that the detention of accused minors shall be "exceptional ... and for the shortest possible time," and may not be imposed unless the offence charged is a violent or other serious offence. Serious offences are those bearing a sentence of seven years or more. Release under supervision – of parents or guardians – is an alternative to pretrial detention applicable only to juvenile offenders.

Provisions in national law reflect to a certain extent the principle enshrined in international relevant standards at sentencing level. According to article 59.1.2 of the Criminal Code, the fact that a crime is committed by a juvenile is recognized as a mitigating circumstance which directly affects final applicable sentence. Furthermore, Article 85.5 of the Criminal Code provides that "*imprisonment can be appointed to minor condemned for the term not over ten years*". This term is certainly less than that the one that can be appointed to adults which is maximum 15 years but has attracted the attention of the Committee on the rights of the child as mentioned above. If the recognition of the minority of the offender as a mitigating factor that impact the maximum length applicable to minors is globally compliant with the international norms, it is worth to note that the term is certainly too high as it is only 5 years less than the one applicable to adult. It should be in this regard suggested for better compliance that the maximum length of imprisonment be reduced.

It should therefore be noted that, other criminal penalties can be applied to minors for shorter period and under easier conditions. (Articles 85.2, 85.3, 85.4 of Criminal Code). In this regard, national legislation contains significant provisions allowing application of other measures than deprivation of liberty as a penalty in respect of minors.

It is however difficult to say that the obligation, imposed by the Convention on Azerbaijan as a member state, is completely fulfilled in legislation with regard to the principle of detention of minors for the shortest period of time.

Article 148.4 of the Code of Criminal Procedure provides that, "*If no decision to start the criminal case is taken within 24 hours of the person being detained, the person shall be released immediately. Even if this decision is taken, the detention of the person may not exceed 48 hours*". There is no provision in the relevant chapter of the Code which stipulates that detention should be used for the shortest appropriate period of time in relation to minors. In other words, national legislation makes no difference in this regard between adults and minors.

Distinction is only to be found in relation to arrest as article 434.2 of the Code of Criminal Procedure states that *“restrictive measure of arrest may be applied to a minor as an exceptional measure and for the shortest possible time.”* For this reason, similar provision should be introduced in the relevant article of the Code of Criminal Procedure in relation to detention of minors as well.

According to Article 433.2 of the Code of Criminal Procedure, as soon as the judge exercising judicial supervision is informed of the detention of the minor, he/she shall consider the question of his release. However, the Code does not clearly define the delay in which such consideration has to be made. Therefore, it seems appropriate to make necessary amendments to the Code to clarify the maximum period in which such consideration should take place.

Finally, provisions of the Code of Criminal Procedure must be read together with the more detailed provisions applicable to all suspects and accused persons. According to the general rule applicable to all accused persons detained while awaiting trial, such detention shall not exceed three months. This can be extended for certain reasons, up to 12 months, depending on the gravity of the crime.

### ***Recommendation***

- *Amendments to the Code of Criminal Procedure should include precise length for detention of minors as well as delay in which the judge can consider the question of the release of minor;*
- *Term of imprisonment of minors defined in article 85.5 of the Criminal Procedure Code should be reduced.*

### **b) In administrative law**

Nevertheless, the principle of “use of detention for the shortest period of time” is reflected as far as the rights of minors, who commit an administrative offence, are concerned. For example, a person over 16 years of age may be held liable for administrative offence (Article 15.1 of Administrative Offences Code of the Republic of Azerbaijan). The national legislation prohibits application of an administrative arrest to minors (Article 30.2 of Administrative Offences Code). Application of administrative measure to minors such as “delivery of persons” is prohibited by law as well.

However, the Administrative Offences Code neither contains any provision restricting application of administrative detention to minors nor differentiates period of detention in relation to minors. In this regard, a substantial contradiction emerges. If the relevant law prohibits application of “administrative delivery” hence it neither restricts administrative detention nor defines its period, in relation to minors. This means that both adults and minors are subject to the same period of administrative detention. It is remarkable that, in some circumstances the period of administrative detention may be

even 3 days. It is clear from the stated provisions that, the above mentioned principle has not been taken into account in relation to administrative detention of minors in national legislation. Therefore, the prohibition of administrative detention for minors or reflection of a period of such detention in article 399 (Administrative Detention) is recommended in order to overcome such discrepancy.

## **2. Investigation**

The Code of Criminal Procedure provides that “the investigation concerning a minor shall be conducted, as far as possible, by special departments of the investigating authorities or by persons who have relevant work experience with minors.” After completion of the investigation the case is submitted to the court for final judgment. This procedure is followed when the person who committed a crime is above the age of criminal responsibility. If the person who committed a crime is under the age of criminal responsibility ( 14 years of age) then the relevant case pertaining to that person shall be sent, by the bodies of enquiry or investigation, to the Commission on Minors and Protection of the Rights of Minors (hereinafter referred as “Commission on Minors”) for the purpose of referring those persons to the special closed-typed correctional-educational institutions within 3 days” (Article 235-1.1 of the Code of Criminal Procedure). Having considered relevant materials sent by the bodies of investigation or enquiry, the Commission on Minors submits the case to the relevant court of 1st instance. All materials pertaining to the juvenile committing an administrative offence are also sent to the Commission on Minors for relevant decision.

In accordance with international standards, article 42 of the Law on the Rights of the Child provides that “investigations involving children shall be conducted on the basis of a special methodology that protects their dignity and self-esteem and takes into consideration their age and individual characteristics” and that detention facilities shall offer conditions allowing children “to grow as honest and worthy citizens and acquire the necessary education and occupational habits.” It also provides that children shall have access to a lawyer as soon as they are arrested or detained as suspects or accused and that parents, guardians or teachers shall be present during the questioning of children. Physical or mental pressure designed to force the child to confess or give evidence is prohibited, as is the detention of children with adult prisoners or detainees.

In addition, the Code of Criminal Procedure establishes time limits for the completion of criminal investigations. The limit for completing the preliminary investigation is 10 days; the limit for completing the entire investigation is, in principle, two to four months, depending on the gravity of the case. Delays caused by the defence are not taken into account. Under Article 218.10 of Code of Criminal Procedure, primary investigation on criminal case must be completed within 6 months on crimes that don't represent serious danger to public, 9 months on crimes of minor gravity, 12 months on grave crimes and 18 months on especially grave crimes. These time limits apply to adults and juveniles alike, whether or not the accused is deprived of liberty.

### **3. The minimum age for prosecution**

In national legislation, juveniles are divided into: a) juveniles over fourteen years of age but who have not attained sixteen years of age at the time when the offence is committed; and b) juveniles over sixteen years of age but who have not attained eighteen years of age at the time when the offence is committed.

The above division by age is in line with principal international regulations and the European standards. The legislation meets also the standard embedded in the UN Convention on the Rights of the Child (Article 40, paragraph 3, item (a)), according to which States Parties must, inter alia, establish a minimum age below which children will be presumed not to have the capacity to infringe the penal law.

Sixteen years is the general age of criminal liability and 18 the age of majority. Persons of 16 or 17 years accused to have participated in any crime listed in the Criminal Code may be prosecuted. Children aged 14 or 15 years also may be prosecuted under the relevant provisions of the Criminal Code and the Code of Criminal Procedure when accused of any of 17 listed offences listed in Article 20.2 of the Criminal Code, including murder, rape, kidnapping, assault resulting in injury, sexual assault, robbery, theft, destruction of property, theft or firearms, ammunition, explosives or drugs, terrorism and aggravated hooliganism (disorderly conduct).

The Law on the regulation of Commissions on Minors' Affairs and Protection of their Rights applies to children under age 14 who commit any offence and those aged 14 or 15 years who commit any offence other than the serious crimes listed in article 20.2 of the Criminal Code. Some provisions of this law are echoed in the Law on Juvenile Homelessness and Delinquency Prevention. Article 5(21) of the Law on Juvenile Homelessness and Delinquency Prevention authorizes the Commissions on Minors to "consider material received from the corresponding State agencies [i.e., the police] about minors having committed crimes" while under the age of criminal responsibility. The Commissions have competence to impose "disciplinary measures" designed to instill respect for the law and prevent the commission of new offences. Some of these measures, such as warnings, reparation of the victim or placing a child under parental supervision, are of non-custodial nature.

One provision of this law allows children having committed misdemeanors to be placed in the "open special school" with parental consent. Another provision empowers the Commissions on Minors to request a court to place juveniles under the age of criminal liability who have been involved in a serious crime in the "closed special vocational school". Both of these provisions are, in principle, compatible with international standards concerning juvenile justice.

The meaning of article 9.6 of the Law on Juvenile Homelessness and Delinquency Prevention regarding the placement in the special school of minors over the age of criminal liability who have committed a minor offence is unclear. If it gives Commissions the power to deprive such children of liberty without parental consent and without judicial review, it would be incompatible with international standards. Although the special school is classified as an open facility, placement in such establishment is considered as deprivation of liberty under the relevant international law.

#### **4. Alternative measures to prosecution**

In Azerbaijan, the police have limited discretion not to refer to the prosecutor cases in which the evidence shows that a crime has been committed. Similarly, prosecutors have limited discretion not to prosecute when evidence indicates that a suspect is guilty of a crime. However, the investigation of a crime may be discontinued if the suspect shows remorse, has pled guilty, has reconciled with and compensated the victim, or no longer represents a danger to society. Discontinuance is allowed, in any of these circumstances, only for first offences and for crimes that do not represent a significant danger to the public. The prosecutor may desist in the prosecution of a case after proceedings have begun, on the same grounds. In addition, a court may discontinue a criminal case if the victim and offender are reconciled. The same prerequisites apply to the decisions of a prosecutor or court to desist or discontinue.

Rather than by conducting criminal procedure at any cost, the general goals set in the CRC can in many situations be achieved more efficiently and effectively with diversionary measures and with various models of alternative procedures in general. That calls for the introduction of other diversionary measures at the prosecutor disposal. It is important to bear in mind that the decision of the prosecutor not to initiate criminal proceedings against a juvenile may, given the consent of the juvenile, his parents, adoptive parents or guardians be made conditional on the fulfilment of one or more obligations. But consent of the child should be sufficient in several situations including when a conflict of interest arise with parents or legal representatives.

The establishment of Specialized Rehabilitation Center and regulation of its activities through legislation could be effective to achieve social rehabilitation of minors who commit crime or an administrative offense and prevent negative factors which they can acquire as a convict and to avoid "stigmatization" of the child who still can successfully build his/her future. According to international standards, it is more beneficial to refer children, who are accused to have committed a crime or an administrative offence, to community focused rehabilitation or educational institutions, than to process them through the formal criminal justice system. This principle is described in article 40(3) as follows: "*Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected*".

## *Recommendations*

*It is recommended the following measures:*

- *Pre-conditions of detention and arrest of minors during criminal procedure shall be specified and certain instructions while the decision, relating to application of criminal sentence, is made by court shall be envisaged in legislation;*
- *The legislation should include the prohibition of administrative detention for minors or reflect a period of such detention in article 399 (Administrative Detention);*
- *Time limits of investigation applicable to minors should be differentiated in the Criminal procedure code and reduced by comparison of those applicable to investigation in relation to adults.*
- *Establishment of community based Specialized Rehabilitation Center (hereinafter referred as ``Center``) is recommended to avoid punitive trends in relation to minors and to provide their referral to social rehabilitation. The Center shall provide correction of minors who committed a crime or an administrative offence through application of social rehabilitative and educational measures to them instead of sentencing them to penalties such as imprisonment and abridgment of freedom as a last resort;*
- *Competence of the relevant state bodies, as regard to the referral while making final decision in relation to minors who committed a crime or an administrative offence, shall be reflected in the national legislation. Decisions, concerning minors who commit a crime or an administrative offence, are made by courts or Commission on Minors. Therefore, special provisions reflecting competence of these bodies, as regards referral to the Center, shall be defined clearly in the Code of Criminal Procedure and Regulation on Commissions, respectively;*
- *Having taken into consideration current workload, necessary changes, as regard the need to increase number of regular employees of the Commission, shall be made, by relevant bodies, both in legislation and in practice;*
- *Certain circumstances defining when cases of minors may be referred to such Centers shall be envisaged in existing relevant legislation (say, Criminal Procedure Code, The Code of Administrative Offences and Regulation of the Commission);*
- *Necessary measures shall be taken to strengthen belief of judges or other bodies who make decisions on cases of minors (such as Commission) in effectiveness of referral of minors to the Centers or application of forced measures of educational influence in lieu of application of imprisonment or sentencing to criminal penalty.*

## C. TRIAL PROCEEDINGS

Article 40 of the Convention on the Rights of a Child provides certain provisions regarding the protection of the rights of child who have committed or are accused to have committed a crime. Such provisions are envisaged in Rule 7 of the Beijing Rules as well according to which State Parties shall guaranteed to children at all stages of the proceedings basic procedural safeguards such as the presumption of innocence, the right to be notified of charges , the right of not being compelled to give testimony or to confess guilt, the right to appeal , to a higher authority or judicial body , the right to defense lawyer and the right to the presence of his or her parents or legal representatives.

### 1. Presumption of innocence

According to article 40(b) of the Convention on the rights of the child, every child alleged as or accused of having infringed the penal law shall be presumed innocent until proven guilty according to law. This principle is reflected in the Constitution as well as in the legislation of Azerbaijan. Being affirmed in article 63 of the Constitution of the Republic of Azerbaijan, this principle is defined in the relevant Code (Article 21 of the Code of Criminal Procedure) and other laws as follows:

- Any person suspected of committing an offence shall be found innocent if his guilt is not proven in accordance with this Code and if the court has not delivered a final judgment to that effect;
- Even if there are reasonable suspicions as to the guilt of the person, this shall not cause the latter to be found guilty. The accused (the suspect) shall receive the benefit of any doubts which cannot be removed in the process of proving the charge in accordance with the provisions of this Code, within the appropriate legal proceedings. He shall likewise receive the benefit of any doubts which are not removed in the application of criminal law and criminal procedure legislation;
- The accused shall not be obliged to prove his innocence. It shall be for the prosecution to prove the charge or to refute the evidence given in defence of the suspect or the accused;
- The accused shall not be obliged to prove his innocence. It shall be for the prosecution to prove the charge or to refute the evidence given in defense of the suspect or the accused.

It is obvious that the presumption of innocence principle is envisaged in the Constitution and in laws. In accordance of this, no one should be found guilty without a judgment to that effect in Azerbaijan. However, in some circumstances this principle is violated. Sometimes courts deliver judgment on conviction even though guilt is not proven in a

manner as it is provided by law. The accused minors do not receive the benefit of the doubt even when there is a lack of substantial evidences to prove that he or she is guilty.

Another important issue arising from the respect of the presumption of innocence in practice is linked to the cancellation of all legal consequences after release or removal of conviction. This provision is reflected in article 83.6 of the Criminal Code as follows: "Release or removal of conviction cancels all legal consequences connected to a previous conviction". However, negative legal consequences are not eliminated in relation to persons convicted in accordance with judgment (this includes a fine as well which is regarded as the most mitigate penalty), even after completion of serving the punishment and after release or removal of conviction. Information about conviction of persons is in fact preserved in the database of the Ministry of Internal Affairs (MIA) and thus impairs social rehabilitation and reintegration of those persons. For example, in some circumstances if a minor commits a crime and serves his/her time of punishment or his/her conviction is released or removed, some employers may apply to the Ministry and obtain information about previous conviction of the minor who intends to integrate into normal social life. Even though the person has ever been convicted and his/her conviction has been released or removed many years ago, that person, as a general rule, can face a refusal to be employed or to hold certain appointed or electoral position in governmental authorities on this basis. Thus, the person's integration into society and his/her beneficial role in society become restricted. It is worth to note that in contradiction with international instruments and standards these kinds of limitations applying to conviction are reflected in internal procedural guidelines of some state or private legal entities.

### ***Recommendations***

*In order to eliminate these kind of negative circumstances, it is recommended to:*

- *restrict the flow out of information from the MIA database;*
- *amend legislation in order to make information about conviction available only for courts for the purpose of using it while differentiating liability of the accused minor;*
- *take measures to make state, municipal authorities and private legal entities, under jurisdiction of the state, abstain from generating impediments and restriction in relation to ``past conviction`` of minors. With this aim in view, it is necessary to promote and amend relevant subordinate legislation.*

## **2. Child sensitive procedure**

Article 40.1 of the Convention provides that "*States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of*

*others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".*

Unfortunately, the right of being treated in a manner as described in Article 40.1 of the Convention has not been envisaged in the Code of Criminal Procedure of Azerbaijan. Although, Article 432.3 of the Code of Criminal Procedure defines that, *"During the investigation the relationship between the minor and the investigator shall be based on consideration of the facts of the criminal case to the requisite extent, a respectful approach to the minor, concern for his welfare and protection of the minor from harm"*, there is not a provision in the Code reflecting that the treatment of the child shall be conducted in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account his or her age and the desirability of promoting his or her reintegration as well as the constructive role he or she should assume in society.

### ***Recommendation***

*In this regard, it is suggested that the principles mentioned in the above stated provisions of the Code and in the Convention shall be generalized and adapted and certain measures, to be taken by state bodies, courts which conduct investigation and by the Commission, deriving from these principles shall be envisaged in national law. In our opinion, the sphere of such measures or actions should be applied in educational and punishment establishments as well.*

### **3. Rights of children during criminal proceedings**

According to article 40.2(a) of the Convention *"No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed"*. Article 5.1 of the Criminal Code states that, *"criminal action (actions or inaction), and also punishments for this actions and other measures of criminal or legal nature shall be determined only by the present Code"*. At the same time, article 3 of the Code provides that, *"the ground of the criminal liability shall be committing of action (action or inaction), structure of which provided only by the present Code"*. This provision is applicable in case of an offence that has been committed either by a minor (provided that the minor has already reached the age of criminal liability) or by an adult.

However, it should be recalled that the age of criminal liability is separated into two groups in accordance with Article 20 of the Criminal Code. Criminal liability is effective for certain crimes (such as intentional manslaughter, deliberate causing of heavy or less heavy harm to health, kidnapping etc.) when the minor is 14. For the rest of crimes, the age for criminal liability is 16. Consequently, the minor shall be subjected to criminal liability only if the social dangerous action that he is suspected or accused to have

committed constitutes one or more structures of crimes as defined in the Criminal Code. From this point of view, it is clear that the relevant requirement of the Convention has been fulfilled in national criminal law.

#### **a) Right of the child to be informed of the charges**

Article 40.2(2) of the Convention provides two kinds of rights of minors to be ensured. First of them is the right to be informed promptly and directly of the charges against him or her, and, if appropriate through his or her parents or legal guardians. This right has been reflected in article 432.4.1 of the Code of Criminal Procedure.

According to Article 224.2, after verifying the identity of the accused, the investigator shall inform the child of the decision to prefer charges and explain the nature of the charges. The investigator and the accused shall sign the decision as a confirmation of the formal announcement of the charges. In addition, according to Article 224.3 after announcing the charges, the investigator shall explain to the accused his rights and duties under Article 91 of the Code. The Code also recognizes the right to respectful treatment, to be informed of the charge, to remain silent as well as to the confidentiality of the investigation.

It is clear from these provisions that relevant provision of the Convention is envisaged widely enough in the legislation of Azerbaijan Republic. However, in practice these provisions are not always respected in manner as provided in international instruments. In most cases while familiarizing the person with the decision taken on charges as well as producing the relevant notice on the rights and duties reflected in Article 91 will be sufficient to obtain the signature of the decision by the accused person, prosecutor or investigator never explains the meaning of those rights and duties to that person. Naturally, for the purpose of preventing of these kind of negative circumstances, criminal procedural law requires the mandatory presence of defense lawyers while accusation or charges are announced to a minor. However, in most cases defense lawyers, assigned by State, do not explain the substance of accusation or relevant rights and duties to the minors. In other words, these procedures are carried out formally. Eventually, the minor cannot organize his/her defense in a fully effective manner. It would be expedient to accompany relevant procedural actions with video recording (while announcing the substance of accusation or explaining the rights and duties to a minor) and to include such compulsory measures in legislation.

#### **b) Due process rights**

The Code of Criminal Procedure provides that procedural rules of laws other than the Code that are incompatible with human rights and, in particular the right to a fair trial, "shall not be applied". The Code also recognizes key principles of due process, such as the principle of legality, the presumption of innocence, the right to professional legal

assistance, including free legal assistance if needed, the right to receive information about the charge brought, the right to refuse to make a statement as well as the right to secrecy.

Special provisions applicable to accused minors are contained in chapter L of the Code of Criminal Procedure. One provides that criminal proceedings concerning minors “shall be conducted without delay.” The investigator shall ensure the participation of a teacher or psychologist in the conduct of investigative procedures involving a person under 16 or a minor who shows signs of mental disability. In addition, minors must be represented by an attorney during all criminal proceedings, including trial. The parents of the accused minor have a right to “participate” in the trial and be requested to do so but the court has discretion to refuse their participation or other legal representatives participation “if there are grounds for supposing that it would be detrimental” to the in the interests of the child (article 435.3 of the Code of Criminal Procedure).

In order to fulfil international obligations, parents should be notified immediately of their child’s apprehension and a child should have a parent, guardian or other appropriate adult present when they are questioned. The presence of parents or an appropriate adult during police questioning of a child is seen as an essential element of good practice and ensuring access to justice for children. Without parent present it is difficult to ensure that the child understands what is being said, both in terms of content and language. An adult can also assist the child to express him or herself clearly (if in the best interest of the child).

### **c) Legal aid and assistance**

Article 40(2) (b) (ii) of the Convention provides that the State shall ensure that every child shall be provided with “legal or other appropriate assistance in the preparation and presentation of his or her defence.” Article 37 of the CRC provides that children shall have prompt access to legal and other appropriate assistance upon arrest.

In addition, Rule 15.1 of the Beijing Rules provides for the right of the minor to apply for the provision of legal aid. While international standards refer to the right to “legal or other appropriate assistance”, children should not be deprived of the right to have legal assistance simply because other assistance is available. Children should be granted time alone with their legal representative before questioning commences to allow them to consult with their lawyer, to ask them questions and generally understand the situation they are in.

Children should have legal representation from the moment of arrest, at the initial hearing at which charges are laid and in preparation and presentation of his or her defence.

While the CRC does not address the issue of “free” legal aid, the International Covenant on Civil and political rights enshrines the right to free legal assistance for the child if he or she, or the parents, cannot pay for a lawyer.

The Criminal Procedure Code places an obligation on police officers, prior to commencing questioning or any other investigative actions, to inform suspects that they may communicate with particular persons, including a lawyer or relative. However, this does not amount to a right for every child to have a lawyer present during questioning and to consult with a lawyer prior to being questioned. It also does not provide for free access to a lawyer where a child or his or her parent/s cannot afford to pay for legal assistance, in contravention of international law.

The CRC Committee in General Comment 10, echoing Rule 10.1 of the Beijing Rules recommends that States explicitly provide in law for the maximum possible involvement of parents or legal guardians in the proceedings against a child.

The CRC Committee, during its most recent periodic review of the Republic of Azerbaijan report recommended to the government that it “ensure that persons under 18 years of age in conflict with the law have access to legal aid.”

Under the national legislation, the procedural capacity of minors to act is limited and they do not have the right to apply independently for the provision of legal aid and assistance. The law should set out the right of the minor to have the possibility to apply independently for legal aid. Legal assistance is necessary for the child at two stages, both during preparation for his or her defense, which is in preliminary investigation period, and during presentation of his or her defense- which is within consideration of the case by the court. Presence of a defense lawyer during criminal prosecution of a minor is obligatory and the minor has no right to refuse participation of a defense lawyer (Articles 92.3.5 and 432.2 of the Code of Criminal Procedure). Legislation also reckons compulsory participation of a defense lawyer while the cases of minors, which are under age of criminal liability when they committed a crime, are heard in the courts of first instance. If the minor is unable to pay for defense lawyer, he or she receives free legal aid by State (Article 19.4 of the Code of Criminal Procedure).

Similar provisions are reflected in the Administrative Offences Code as well (Articles 376.1, 376.2 and 177.4 of that Code).

However, some deficiencies have been observed in the field of legal assistance to minors. Most of the lawyers do not have in fact any experience of working with children or pedagogical experience. There is no special division within the College of Lawyers or another institution which deals with cases of minors, reflected in national legislation of Azerbaijan. Secondly, lawyers who can assist under free legal aid should be selected from defense lawyers appointed by the College of Lawyers for certain administrative area. It should be noted that for each area not more of 2 lawyers are appointed, making impossible to find adequate defense lawyer to assist a minor on the produced list. Thirdly, defense lawyers only represent minors in the process of criminal prosecution (during investigation and court hearings as well as during consideration of the case by

Commission). They do not consult minors on legal issues. The fourth factor is that, too low fees are paid to the defense lawyers who are appointed by state free of charge. This affects the defense lawyer's effective work and the possibility for the minor to receive proper legal assistance.

### ***Recommendations***

*In order to prevent these difficulties, it would be recommended to:*

- *The law should set out the right of the minor to have the possibility to apply independently for legal aid;*
- *Support materially the defense lawyers appointed by state to assist minors free of charge and to establish a special group of defense lawyers who possess adequate work experience with minors.*

#### **4. Rights of the minors before the Commission on minors**

According to the domestic law, the child and his parents have the right to "participate" in the proceeding and to make representations to the Commission, but there is no mention of any right to present witnesses or evidence, or challenge evidence presented by the authorities. Indeed, there is no requirement that the Commission's decision should be based on a determination that the child in fact participated in an offence, nor that it should consider issues such as self-defence or compulsion that have an impact on responsibility for acts prohibited by law. Nor does the law provide that decisions of the Commission must comply with the "best interests" principle, and with the principle that "deprivation of liberty should be the last resort".

The law does provide that the decision of a Commission must identify the evidence and the law on which it is based, and recognizes the right to appeal against the decision to the local court. The filing of an appeal suspends the implementation of the Commission's decision. Which legal and/or factual issues could be reviewed by the court is unclear. In practice, however, appeals are rarely, if ever, made.

#### **5. Right to privacy**

According to Rule 8 of the Beijing "*the juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labeling*". In fact, there are various provisions in both the Code of Criminal Procedure and the Code on Administrative Offences in relation to the protection of the privacy. In practice, privacy of minors is respected during the preliminary investigation. However, the principle of privacy is breached at courtrooms. In some cases, due to work overload, judges hold meetings on criminal and administrative cases without breaks between hearings. Therefore, a lot of people enter one court room to participate in various cases. The criminal legislation does not provide that proceedings involving minors

(whether as offenders or victims) should be closed to the public. Courts do not have special rooms for trials involving children and accused juveniles. The most serious problems remain the lack of specialization of judges and prosecutors to handle cases involving juvenile offenders and the poor performance of defence lawyers.

Even in the cases of the provisions of the domestic legislation reflect international standards, in practice, proceedings of minors do not meet international standards. For example, although international standards provide that proceedings concerning juvenile offenders should be closed to the public, proceedings before the Commission on Minors are open to the public, unless the Commission decides otherwise.

### *Recommendation*

*In order to make judges pay more attention to issues of confidentiality, the Judicial-Legal Counsel of the Republic of Azerbaijan should prepare guidelines and strengthen supervision on judges and disciplinary measures in situation of breach of privacy.*

## **D. SENTENCING**

According to international law, States should have a variety of sentencing measures available to ensure that children are dealt with in a manner that is appropriate to their well-being, proportionate both to their circumstances and the offence, takes into account their age and is such as will promote their re-integration and the child's assuming a constructive role in society. Measures that should be contained in the legislation are to be found in Article 40 CRC and include care, guidance and supervision orders, counselling, probation, foster care, educational and vocational training programmes and other alternatives to custody.

### **1. Proportionality**

The principle of proportionality is present in many international and regional human rights treaties. Beijing Rule 5 provides that "any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence". Furthermore, Beijing Rule 17.1(a) states that "*the reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society*".

The Beijing Rules require that in all cases, except those involving minor offences, there should be a social inquiry report before a sentence is handed down. Social inquiry reports should include the family background of the child, the child's current circumstances, including where the child is living, with whom, the child's educational background and health status, as well as the circumstances surrounding the commission of the offence and the child's understanding of the offence. When sentencing decisions are made, international law requires that the best interests of the child shall be a primary

consideration, the response should be proportionate to the child's circumstances and the offence, and the purpose of sentencing should be re-integrative and constructive and not punitive.

The provisions of the Code of Criminal Procedure concerning the sentencing of convicted juveniles reflect to a certain extent Rule 17 of the Beijing Rules. Article 435 provides that sentences should correspond not only to the circumstances and seriousness of the offence committed, but also to the situation and requirements of the juvenile and the community. Custodial sentences should be imposed only after meticulous examination of the matter and should be reduced to the minimum. Sentences are "not advisable" unless a minor is convicted of a violent offence deliberately causing serious damage or other serious offence. The court may also substitute educational measures for a punitive sentence if it concludes that the minor may be reformed without being sentenced under the Code of Criminal Procedure.

The Criminal Code also requires that the personal characteristics of juveniles, including the influence of third parties, be taken into account in sentencing. However, no specific agency has responsibility for preparing reports on the background of an offender. To the extent that courts do take such factors into account, it is probably on the basis of information provided by the police and, possibly, the defence attorney.

The following types of penalty may be imposed on juvenile offenders: fines, community service, correctional work, and deprivation of liberty for a specified term.

According to the Criminal Code, juveniles serving custodial sentences may be released after serving as little as one third of the sentence, depending on the gravity of the crime. Moreover, in accordance with Article 91 of Criminal Code of Azerbaijan Republic, at release of minors from criminal liability or imprisonment, the total terms defined in Articles 75 (release from criminal liability in connection with expiration of time-limits) and 80 (release from serving punishment in connection with expiration of time-limits for decision on accusation) of Code shall decrease half. Similarly, in accordance with Article 92 of Criminal Code, for the minors from mentioned category, who have made crimes, terms of removing a previous convictions shall be reduced: to one year (for adults 3 year) from the date of serving a punishment at imprisonment for a crime with minor gravity and to three years (for adults 6 and 8 years accordingly) from the date of serving punishment at imprisonment for grave or especially grave offences.

Pursuant to article 92 of the Criminal Code, in the case of juvenile offenders the period required for the expunging of criminal records is reduced to the following levels, as appropriate:

- (a) One year from the day of completion of a sentence of deprivation of liberty for a crime not representing a great social danger or for a less serious crime (92.0.1);
- b) Three years from the day of completion of a sentence of deprivation of liberty for a serious or exceptionally serious crime (art 92.0.2);

## 2. Non-custodial measures

The Convention and the UN Minimum standards and norms on juvenile justice place States under the obligation to develop a range of non-custodial measures, including both social and/or educational measures, as an alternative to deprivation of liberty, and ensure that these dispositions are available and effective.

There are some relevant provisions in national legislation in this regard. Article 84.2 of the Criminal Code defines in this regard that, “criminal sentence or coercive educational measures may be applied to minors when they commit a crime”. This provision makes clear that the court is entitled to use criminal sentence or coercive educational measure in relation to minors while considering their cases.

The Criminal Code distinguishes between “punishments” and “educational measures”, both of which may be custodial or non-custodial. Non-custodial punishments include fines and public works (i.e., community service) sentences. Non-custodial educational measures include warnings, release under parental supervision, restitution and reparation, and restrictions or obligations concerning movement or activities (e.g., curfews, school attendance).

Educational measures may be imposed instead of a criminal sentence provided the convicted juvenile is a first offender, the offence is not serious and educational measures appear likely to be an effective means of rehabilitation and reintegration. Release under parental supervision may be imposed instead of a criminal sentence even if the convicted juvenile is not a first offender, provided the other conditions mentioned above are met. The court may also decide not to punish a juvenile convicted of a less serious crime if it considers that the purposes of punishment can be achieved only by means of placement in a re-education or medical/re-education institution for such juveniles. The duration of a juvenile’s stay in such an institution may not exceed the maximum term prescribed by the Code for the offence in question. However, in accordance with the decision of the competent State organ concerning a juvenile’s correction and the consequent discontinuation of the need to impose the measure in question, a juvenile may be released from the institution before the expiry of the period specified in article 89.2 of the Criminal Code.

### a) Coercive educational measures

Criteria to differentiate between sentences and educational measures used by the court are defined mainly in article 88.1 of the Criminal Code. This article provides that “*The minor, who for the first time has committed a crime, that do not represent big public danger or less serious crime, can be released from a criminal liability if it will be recognized that his correction can be achieved by application of forced measures of educational influence*”. Forced measures of educational influence include (a) warning-

an explanation to the minor of the harm caused by his action, and consequences, (b) transfer under supervision of parents or persons, replacing them, or on the appropriate state body, (c) putting on duty to remove the caused harm ( duty to smooth down the caused harm shall be assigned in view of a property status of the minor and presence at him of appropriate labor skills), (d) restriction of leisure and establishment can provide an interdiction of visiting certain places, as well as certain forms of leisure, duty on educational influence on minor and to control over his behavior such as the management of a mechanical vehicle, restriction on living outside of a house after certain time of day, departure to other districts without a permission of the appropriate state body and (e) assignment to continue education or to be employed with the help of the appropriate enforcement authority (article 87 of the Criminal Code).

It is clear from the above mentioned provisions that the criminal law reflects that the imprisonment should be as a last resort and provides alternative sentences in accordance with section 37(b) of the Convention. Unfortunately, this principle is not always respected in practice. For example, in many instances, accused minors are sentenced to criminal sentence, particularly to imprisonment, instead of forced measures of educational influence. The main reasons are that the bodies performing criminal procedure and sometimes even courts are prone to achieve correction of the minors by applying criminal sentence, and due to low quality and effectiveness of forced measures of educational influence judges do not generally believe those measures can actually reached correction of accused minors. Because of their compulsory nature, even forced measures of educational influence abridge the rights of minors, particularly the right to freedom and free movement.

It is also worth to note that, notwithstanding the fact that the Commission on Minors consists of 11 members, only two of them are paid as regular employees. Difficulties arise in managing its educational and supervision functions as well as ensuring the protection of the rights of the minors.

## **b) Fines and public work**

Fine may be imposed only when the juvenile offender has independent earnings or property on which the fine may be levied. A fine may amount to between 30 and 300 times the minimum wage fixed by law.

Pursuant to Article 85 of Criminal Code of Republic of Azerbaijan, the amount of fines imposed on juveniles contrary to that of adults cannot exceed 600 MAN.

Community service, which may be ordered for a period of between 40 and 160 hours, consists of work suited to the juvenile offender's capabilities performed in his free time from school or main occupation. The duration of this kind of sentence may not exceed two hours a day for persons aged up to 15 or three hours a day for persons aged 15 to 16.

Correctional work may be imposed on juvenile offenders for between two months and one year.

## **E. INSTITUTIONAL TREATMENT**

### **1. Prohibition of corporal punishment**

The CRC Committee has stated that the use of any form of corporal punishment as a sentence would be contrary to Article 37 of the CRC and should be strictly forbidden by States.

In its last concluding observations while reviewing the last report of the Republic of Azerbaijan, the Committee noted “While noting that the State party has a draft law on the protection of children against all forms of corporal punishment under consideration, the Committee is concerned that current legislation fails to explicitly prohibit corporal punishment in all contexts”. The Committee recommended that the State party introduce and fully implement legislation explicitly prohibiting all forms of corporal punishment of children in all settings, including the home. It also recommends that the State party conduct awareness-raising and public education campaigns promoting non-violent, participatory forms of child-rearing and education.”

#### *Recommendation*

*It is recommended to fully implement legislation explicitly prohibiting all forms of corporal punishment of children in all settings and establish/strengthen the mechanisms of supervision of educational institutions.*

### **2. Complaints mechanisms**

Mechanisms through which children in closed institutions can file a complaint regarding their treatment are of utmost importance to these children. When a child is placed in such an institution, States are responsible for ensuring their safety, protection, welfare and appropriate care and treatment. Without access to complaint mechanisms, these children face an increased risk of suffering abuse of authority, humiliation, ill-treatment and other unacceptable deprivations of rights.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty provide that children in closed facilities of any kind “should have the opportunity of making requests or complaints to the director”, and the right to make complaints to administrative and judicial authorities, and to be informed of the response without delay. The Rules also call for the establishment of an independent office, such as an ombudsman, to receive and investigate complaints made by juveniles deprived of their liberty and to assist in the achievement of settlements. Moreover, the UN Guidelines for the Alternative Care of Children provide that “[c]hildren in care should have access to a known, effective and impartial mechanism whereby they can notify complaints or concerns regarding their treatment or conditions of placement”.

There should be independent organization, which is mandated to monitor the conditions, treatment, services and facilities, and to receive complaints from children and young people detained in the institution, who should be able to access these complaints mechanisms with ease and without fear of reprisals. All complaints regarding maltreatment and abuse by personnel must be investigated and followed up with disciplinary action and/or criminal proceedings, where appropriate. The role of the Ombudsperson should be reviewed accordingly to effectively deal with complaints from children as well as provide remedies for violations of their rights.

### *Recommendation*

*It is recommended to allow the Ombudsperson to effectively deal with complaints from children as well as to provide remedies for violations of their rights.*

### **3. Separation from adults**

It becomes clear from the analysis of the domestic legislation that, requirements defined in article 37(v) of the Convention, which clearly states that “every child deprived of liberty shall be separated from adults”, have been partially met .,

According to Article 123.1 of the Penalties Execution Code, “minors sentenced to imprisonment serve time in educational establishment of general and strengthened mode”. . Whereas, at the same time, article 128.1 of Penalties’ Execution Code provides that “convicts who reach the age of 18 are generally transferred from educational establishments to punishment establishments. Convicts may be held in educational establishments until the age of 20, according to the judgment”. This means that adults may also serve punishment together with minors. From this point of view, current requirement of the Convention is not completely fulfilled. In addition, criteria on which the court should rely while making this kind of decisions are remained open in Penalties’ Execution Code. The exclusion of the second sentence of article 128.1 of the Code would be effective in order to eliminate of the above mentioned contradictions. Quite another point of this issue is more prejudicial for interests of minors.

If a minor commits a crime when he is under 18 and if he is transferred from an educational to a punishment establishment as a result of reaching maturity age of 18, the risk of being negatively influenced by other convicted adults is much higher. Such influence can result with hampering of minor’s integration to society, increasing delinquent proneness as well as psychological degradation. Our understanding is that, adoption of relevant measures in legislation is desirable in order to prevent convicted minors, recently transferred to punishment establishments, from negative influence of adults. For example, it is reasonable to separate minors, transferred to punishment establishments, from adults or to put limitations to communications with them.

Moreover, it is necessary to conduct thorough research in order to determine to what extent such transfer to punishment establishments can affect future life of a minor.

#### ***Recommendation***

*It is recommended to adopt measures in order to prevent convicted minors, recently transferred to punishment establishments, from negative influence of adults and ensure effective supervision of establishments.*

#### **4. Inspection**

Article 23.2 of the Beijing Rules, emphasizes the importance of monitoring the performance of disposition by an independent authority (parole board, probation office, youth welfare institutions or others). In the Republic of Azerbaijan, the penitentiary system is monitored by the Ministry of Justice and some other state authorities. There is no independent body that can monitor performance of disposition.

We are of the opinion that the execution of increased supervision measures should be supplemented bearing in mind international legal obligations of the Republic of Azerbaijan. It would be in this regard desirable to create more transparent mechanisms for the protection of the rights of children and for the supervision of the relevant authority, when such an authority is in charge of enforcing sentences and measures in relation to minors.

#### ***Recommendation***

*It is proposed that government founds such bodies and determines their powers and stimulates establishment of such bodies in order to meet the requirements of international instruments.*

#### **F. PREVENTION OF DELINQUENCY**

Another important issue is to prevent minors from committing illegal actions or crimes. Article III (b) and (c) of the United Nations Guidelines for the Prevention of Juvenile Delinquency (hereinafter referred as ``Riyadh Guidelines``) states that ``comprehensive prevention plans should be instituted at every level of Government and include well-defined responsibilities for the qualified agencies, institutions and personnel involved in preventive efforts, and methods for effectively reducing the opportunity to commit delinquent acts``. Paragraph (f) of that article also defines ``Community involvement through a wide range of services and programmes`` as a necessary measure serving for prevention of juvenile delinquency. Obligations to take relevant measures for prevention of juvenile delinquency and other illegal actions are imposed on different state bodies in accordance with the legislation of the Republic of Azerbaijan. The most important of these bodies is the Commission on Minors 'Affairs and Protection of the Rights of Minors. One of the main functions of the Commission is providing pedagogical and educational

measures to supervise behavior of minors and to prevent them from committing illegal actions. Another governmental authority is the Specialized Child Inspectors (hereinafter referred as ``Inspectors``) who function within subordinate organizations of the Ministry Of Internal Affairs. Their activities are regulated by internal documents of the Ministry. Inspectors take relevant measures in relation to minors and in circumstances stated below:

- Who have been released from a custodial sentence or closed institution;
- Whose cases have been considered by the Commission on Minors (but who have not been placed away from home);
- Who are addicted to drugs;
- Who are involved in anti-social behavior;
- Who persistently fail to attend school;

In case information about minors who comply with criteria stated above is received by Inspectors, then those persons are registered in the special registration book in order to prevent them from delinquency and other illegal actions. However, in practice, preventive measures taken are limited and are of low quality. Inspectors only inform and warn minors about legal measures that can be applied to them in case of their criminal or illegal actions, but they do not follow further consequences of their conversations with minors. Another problematic feature concerning inspectors is that parents abstain from application to Inspectors. The main reason is that, registration records are preserved for a long period of time after registering the minor in the registration book (registration period is 1 year and can be extended twice for 6 months each) and the most important matter, which disturbs parents, is that registration records could have an effect of ``stigma`` on the life of minors. Such disturbance, by the parents or those who substitute for parents, are logical because there were circumstances when before admission some private and state educational institutions or before conclusion of the contract of labor some employers applied to police to obtain information whether child candidates had ever been registered in those registration books or not. However, the period of preservation and the rate of effectiveness of such records are unknown in practice.

Prevention of juvenile delinquency and bringing up a child in spirit of respecting laws depend on some factors. Among those factors parental upbringing is the most important one. However, because parents or legal representatives of minors are usually at work and cannot spend enough time with children, it ends up with child`s committing a crime or other illegal action. Moreover, Inspectors take preventive measures only during or after committing an administrative offence by minor or in circumstances mentioned above. Similarly, Commission commences its activities only after receipt of relevant signals as regards violation of laws or after commitment of illegal action by minor. Unfortunately, the circle of persons, to whom application may be made to and those who may apply, was not envisaged clearly in the legislation of the Republic of Azerbaijan in order to prevent illegal actions of minors before committing illegal actions by them.

## *Recommendations*

*It is important to take following measures for the purpose of performance of community based, preventive and educational measures as a whole to prevent above mentioned circumstances, as well as to fulfill requirements of article III of Riyadh Guidelines, particularly its section (f):*

- As already mentioned, to achieve stated targets, it is preferable to establish a Specialized Rehabilitation Center and to regulate its activities through special act of legislation for the purpose of performance of community based, preventive and educational measures as a whole. The Center should be responsible for prevention of not only minors who already have committed, but also minors who are at risk of committing a crime or an administrative offence. Instead of achieving reasonable results by threat of criminal sentence, the Center should organize pedagogical programs, provide minors with relevant preventive conversations by psychologist and other social employees of the Center, define interests and disturbances of minors through these conversations, consequently take necessary measures to promote interests of minors, make relevant applications to state bodies or other organizations, departments and institutions if necessary; and assist minors or their parents in obtaining appropriate documents. In addition, having considered exceptional importance of parents and legal representatives of a child, the Center should establish appropriate relations with parents or legal representatives, hold discussions with them, determine difficulties in the families of the parents and make reasonable endeavors to assist them, draw up and provide parents with educational-correctional curriculum for proper upbringing of minors and prevention of juvenile delinquency or other illegal action. This kind of curriculum shall be drawn up, taking into consideration life, education, age etc. factors of minors and their parents as well as complying with individuality features;*
- Activities, competences of the Center and persons who may apply to the Center shall be envisaged in legislation;*
- Basis for applications, for preventive measures to be taken in relation to minors, to the Center by parents, legal representatives and schools shall be defined in the level of national legislation (in the Family Code). If school intends to make this kind of application, then it should present relevant confirming documentation and obtain consent of parents or other legal representatives;*
- Legal basis of the establishment of this Center and regulation of its activities must be adopted in the Family Code of the Republic of Azerbaijan.*

## II. CHILD SENSITIVE JUSTICE AND PROTECTION OF CHILD VICTIM AND WITNESS

### A. Protection of child victims and witness

The international standards protecting children who are the victims of criminal acts, or who are witnesses to such acts, are to be found in the CRC, but more detailed guidance on the treatment of child victims and witnesses and on their access to justice is to be found in the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. International standards require that children must receive access to *'the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered, as well as access to fair and adequate compensation'*.

#### 1) Access to justice for child victims

According to article 39 of the CRC *"States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child"*.

While reviewing Azerbaijan report, the Committee on the rights of the child recommends that the State party ensure, through adequate legal provisions and regulations, that all children who are victims and/or witnesses of crimes, for example, child victims of abuse, domestic violence, sexual and economic exploitation, abduction and trafficking, and witnesses of such crimes, are provided with the protection required by the Convention and that the State party take fully into account the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20, annex).

The provisions of the Criminal Code ensure reaction to crime against children, , which in accordance with the CRC defines all forms of violence, maltreatment, abuse or neglect of children that threaten or harm their physical, mental and sexual integrity as violations of the children's right to life, survival and development. Moreover, f a crime against a juvenile is considered as a circumstances aggravating punishment (CC Article 61.1.7). Under national legislation it is possible to initiate inquiry by investigative authorities based on any kind of complaint (whether written or oral) made by a minor. However, in some cases minors become subject to violence and cruel treatment by their parents. Complaint against the parents is negatively seen by the society and children victims of domestic violence are themselves too afraid to make such complaint.

Moreover, in practice, state authorities demonstrate insensitivity regarding protection of child's rights and interests even after there has been a complaint by the child. The Code of Criminal Procedure that *"the participant of the criminal process who does not have the capacity to act, cannot exercise his/her rights independently under this Code. Those rights are exercised by such participant's legal representative in accordance with this Code."* (Article 100.7 of the Code). It is also noted that a victim aged between 14 and 18 years has limited procedural capacity to act. The ability of such persons to exercise their rights as participants of criminal process is limited by consent of their legal representatives in cases defined under this Code (Article 100.4 of the Code these provisions have been stipulated to assist the minors who are participants of criminal proceedings in exercising their rights with the support of their legal representatives. Nevertheless, difficulties arise where a child has been a victim of a crime committed by his/her parents or legal representatives and is looking for redress and compensation.. Furthermore, in Azerbaijan relevant services are provided only to the minor victims of human trafficking and domestic violence (such minors are provided with shelter, medical assistance and social rehabilitation services). The issue of social rehabilitation services for minor victims of other crimes is still open

### *Recommendations*

*For the reasons mentioned above and in order to meet the requirement of Article 39 of the CRC in the Republic of Azerbaijan, it is recommended to take the following measures:*

- *Pursuant to Article 10 of the Regulation on Commissions, various measures can be taken to protect minors from danger and threat of illegal acts by their legal representatives (it is even possible to apply to guardianship and trusteeship commissions to take children away from their legal representatives). However, nothing is said in the Regulation on Commissions regarding the power to have access to the houses and other places of residence of the children to check for illegal acts against them. In order to protect children from cruel, inhuman or degrading treatment by parents the powers of the Commission should be expanded or children should be kept under constant supervision by social workers. Either the Commission or the social worker should from time to time check the minors at their homes and in their families, inquire their problems, be available to receive information or signal about illegal treatment against children, closely cooperate with schools and other education facilities, and conduct at schools collective and individual discussions with children about illegal acts against them. The powers of a social worker should either be expanded under the legislation or regulated by a separate chapter under the Family Code and the institute of social worker strengthened. Where the social worker is refused access to apartments or other places of residence in order to carry out the supervision on the minors, it is important that the social workers be entitled to bring motion in the court for granting such access. The purpose of the social worker 'intervention should not to conduct criminal procedural acts but to warn and deter parents and other legal representatives in order to prevent*

*illegal acts against the minor. In case it is revealed that such act is a crime or an administrative offence, relevant body should bring motion before law enforcement authorities. Such social workers shall, of course, comply with the requirements of other statutory acts and supervision of social workers should also be adequately regulated under legislation.*

- *Where the parent or legal representative commits crime against the minor, necessary provisions should be set out in the CPC for such minors to exercise their rights independently or for the appointment by the court of other legal representative for such minors to protect their rights and interest during the criminal proceedings.*
- *The Government has established the Center for the Support of Victims of Human Trafficking under the Ministry of Labor and Social Security of the Republic of Azerbaijan. However, the programs and regulations are applied only in respect of victims of human trafficking and there is no data for identification and protection of victims of other crimes. It is strongly recommended to make relevant amendments and modifications to statutory acts in order to ensure social-psychological rehabilitation and social integration of minor victims of crime.*

## 2) Hearing of a child victim or a child witness

The hearing of a child is a difficult process and can even be traumatic, in particular for child victims. Therefore, article 12 of the Convention on the Rights of the Child requires States to ensure a safe, child-sensitive environment in which the child feels respected, as well as conditions that take into account a child's individual situation. During proceedings, the privacy and confidentiality of children must be protected and their safety ensured.

These provisions are reflected in several manner in domestic legislation. According to article 226.1 of the Criminal Procedure Code: *"Witnesses, victims, suspects, the accused and other persons shall be called to appear before the investigator by a summons served on them in person, or in their absence, transmitted via an adult member of their family, a neighbor, a representative of the relevant housing organisation or their place of work or study. Summons may be issued by telegram, telephone or fax."*

Article 228 of criminal procedure code is specific to the questioning of under-age witnesses as it states that *"If an under-age witness can provide information of significance to the case either verbally or in another form, he may be questioned notwithstanding his age. If a witness is under 14 years old, or, at the investigator's discretion, under 16 years old, the interview shall be held with the participation of his teacher or, where necessary, a doctor and the witness's legal representative"*. A witness who is under 16 years old shall merely be informed of his duty to tell the truth. However, he shall not be warned of the criminal responsibility incurred for refusal to testify, evading questioning and intentionally false testimony."

According to article 231 of criminal procedure code applicable to questioning of children “an interview of a victim shall be conducted in accordance with the rules laid down in Articles 227-230 of this Code for the questioning of witnesses.”

Such guarantees are also extended to a minor who is accused.

In addition, in exceptional circumstances when such action is necessary in order to establish the facts of the case, the court may order any person involved in the case or any other person present at the hearing to leave the courtroom when a minor witness is to be questioned. When a person involved in the case has returned to the courtroom he or she must be informed of the details of the evidence given by the minor witness and offered an opportunity to question the witness.

## **B. Child-sensitive justice**

Another problematic area is the lack of child sensitive procedures in juvenile justice system both in legislation and in practice. Minors are, due to their age, sensitive and require adequate treatment. Rule 12 of the Beijing Rules states that *“In order to best fulfill their functions, police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime shall be specially instructed and trained. In large cities, special police units should be established for that purpose.”*

As mentioned before, various state authorities deal with minor in relation with criminal and administrative law including inquiry and investigation departments of police, investigators of prosecution office, inspectors on minors’ affairs and Commissions’ workers. There are some provisions stipulated in the legislation of the Republic of Azerbaijan that address the issues related with the minors due to their sensitivity and age specificity.

Article 432.1 of the Code of Criminal Procedure of the Republic of Azerbaijan states that *“preliminary investigation on a minor shall, to the extent possible, be conducted by special units of preliminary investigation authorities or by persons who have necessary skills in dealing with the minors.”* It is indicated in Article 435.2 of the Code that *“criminal cases regarding crimes committed by minors shall be considered by more experienced judges”*. It is worth to emphasize that in practice there are no such "special units" and this requirements of law is not enforced. Furthermore, cases regarding crimes committed by minors are not investigated by persons who have the necessary skills to conduct such investigation. In general, it is possible to say that officers of inquiry and investigation authorities in the Republic of Azerbaijan do not have necessary experience and expertise in dealing with minors. Moreover, the provision in the law calling on “consideration of criminal cases regarding minors by more experienced judges” does not necessarily mean that the needs of minors are adequately considered in practice. More accurately, the judge may be experienced but not skilled in dealing with minors. From this aspect, the requirements under legislation are not adequate. Additionally, there are

no programs or rules to guide officers of such authorities for dealing with cases concerning minors. Generally, there are no police units, prosecution offices or courts specialized in dealing with minors' cases. The only specialized body are the inspectors on minors' affairs under police departments. Such inspectors only deal with preventive measures and do not run inquiry or investigation and are not properly specialized in this field.

In addition, there is no provision in the legislation that would cover sensitive procedures for the minor victims of crimes and nothing is said about the best interests of minors as well as on the necessary mechanisms for identifying such interests. Furthermore, there is no legal norm requiring that cases involving minor victims be considered in an expedited manner. Investigators, prosecutors, judges or advocates and other specialists do not have necessary skills to communicate with minor witnesses, defendants or victims of crime.

The existing systems for processing cases of children who are victims and witnesses currently fail to meet international standards and current understanding of good practice, denying children effective access to justice. Children who are victims and witnesses are not truly heard in the justice systems and the systems themselves are not arranged to be child friendly. Even where practitioners attempt to act in the interests of the child, lack of training for working with child victims and witnesses can mean that these proceedings are not child friendly and that they finally do not contribute to access to justice for children. The authors take the view that the Guidelines could be fully implemented, and children's access to justice greatly improved without great difficulty, and without great cost.

### *Recommendations*

*In order to prevent the aforementioned difficulties and ensure compliance of the domestic legislation with the requirements of international instruments in this sphere, it is recommended that:*

- *Police operating procedures should set out the procedures to be followed when a child makes a complaint/ alleges he or she has been the victim of a crime. These should include a requirement for police, and where possible a member of the child friendly unit to speak to all children who make a complaint and determine the nature of the complaint;*
- *A child victim or a child witness should be accompanied by his parents or guardians (unless his parents are the accused or are otherwise unsuitable). In the absence of the parents, the investigator as well as the court should ensure that a person accompanies the child;*
- *Consideration should be given to allowing a child victim to make a statement to the court in writing or orally of the impact that the offence has had upon him or her;*

- *The Code of Criminal Procedure of the Republic of Azerbaijan shall set out legal norms requiring judges to have special skills in order to ensure sensitivity in dealing with minors. Special units on minors should be instituted within preliminary inquiry and investigation authorities;*
- *Judges, prosecution officers, police investigators and inquiry officers, inspectors, advocates and other specialists shall be trained on rules of behavior in dealing with minors, and guidelines and programs on “Treatment of Minors” should be prepared and submitted. Minimal requirements on minors as well as non-application of procedures (e.g. handcuffing during arrest) applicable to adults should be described in such guidelines and rules*
- *The legislation should set out norms regarding sensitive procedures for minor victims of crime, provisions on best interests of minors and mechanisms on identification of those best interests as well as legal requirements that cases where minors are victims of crime be considered in an expedited manner.*
- *Court administrators should ensure that the accused and the child witness or the child victim are not required to wait in the same area at the court. It is advised to arrange separate meeting rooms at courts in order to keep minors away from formal criminal procedures. It would be more effective if such rooms looked more like conference rooms rather than courtrooms. Similarly, it is recommended to arrange special rooms for interrogation of minor during preliminary investigation and inquiry with making such rooms different from other room by decorating those rooms so that minors do not get psychologically tense. UNICEF is already running the project encompassing establishment of police rooms for minors and guidelines on treatment of minors. However, this project should be applied not only at the police departments but also at prosecution offices and in courts, and application of this project should be stimulated in all regions of the country;*
- *Legislation should be amended to allow the hearing of child witness evidence and child victims in closed court, with all members of the public and the media removed.*

### III. ACCESS TO CIVIL AND FAMILY JUSTICE FOR CHILDREN

Civil, family and other law norms regarding the protection of children's rights are expressed in various statutory acts of the Republic of Azerbaijan. The Constitution of the Republic of Azerbaijan is one and the most supreme of those acts. It is stated in Article 12.2 of the Constitution that rights and liberties of a person and citizen listed in the Constitution are implemented in accordance with international treaties to which the Azerbaijan Republic is party. Pursuant to Article 148.2 of the Constitution, international agreements constitute an integral part of legislative system of the Republic of Azerbaijan, which means that international conventions ratified by the Republic of Azerbaijan are directly applied within the territory of Azerbaijan.

Furthermore, children's access to civil and family justice as well as protection of their interests are detailed in the Family Code, the Law on the Rights of the Child, the Law on

Juvenile Homelessness and Delinquency Prevention, the Law on Targeted Social Assistance, the Law on Prevention of Disabilities and Limited Health Conditions of Children and Rehabilitation and Social Protection of Children with Disabilities and Limited Health Conditions, the Law on the Regulation on the Commissions of Minors' Affairs and Protection of Minors' Rights, the Law on "Education (special education) of persons with limited health conditions" and other statutory acts and by-laws.

#### **A. Protection of children's rights and interests by relevant state authorities**

Article 19 of the Convention on the Rights of Children requires from the States parties that they *"take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child"*. A similar clause is included in article 28 of the Law on the Rights of the Child, which envisages responsibility for such behavior or act.

Article 17.2 of the Constitution provides that parents must take care of their children and their education and also provides that state controls implementation of this duty.

Articles 58 and 59 of the Family Code place the duty to ensure health and education, protection of child's rights and interests on their parents and those who are substitute for parents. It is also noted in the Family Code State intervention is allowed only where such intervention serves the interests of the child.

Although there are many provisions in the legislation regarding protection of children's rights and interests, there are no detailed procedures for identification, reference, investigation, decision making in respect of children subjected to abuse, negligence, violence, exploitation and other negative situations that could give rise to criminal as well as civil liability.

Pursuant to Article 5 of the "Regulation on the Commissions of the Minors' Affairs and Protection of Minors' Rights" wide powers are given to the commissions for the protection of minors' rights and interests. Local commissions function within the district (city) executive authorities and are coordinated by the Commission of Minors' Affairs and Protection of Minors' Rights under the authority of the Cabinet of Ministers of the Republic of Azerbaijan. Although the commissions have wide powers including but not limited to ensure coordination between the organizations and entities dealing with the protection of minors' rights and interests, and exercise disciplinary measure against the parents who do not fulfill their parental duties under Article 10 of the Regulations, it is possible to say that powers and functions of the commissions are defined in quite general terms without proper details on how those powers can be exercised. In the "Rules for state supervision on implementation of children's rights" approved by the Decree of the President of the Republic of Azerbaijan, an effort has been made to strengthen the coordination between the authorities carrying out such supervision. However, the

document has failed to succeed as the powers of relevant State bodies overlap and there is still a lack of proper coordination between them.

### *Recommendations*

*Based on the aforementioned issues, it is recommended that a new entity be established that would encompass the functions of local commissions of minors' affairs and protection of minors' rights and local guardianship commissions. Such entity should deal with identification, referral, investigation of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation of children and should initiate child protection measures, make decisions upon alternative care and decide on measures to be applied.*

#### **B. Family as the primary environment for the child's upbringing and State support to families**

As recognized in the preamble of the CRC *"the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding"*. This provision emphasizes the importance recognized to the family environment for the child. From this perspective, it is desirable that a child be brought up and cared for by his/her parents (if it does not harm the best interests of the child).

In Azerbaijan, lack of resources one of the main reasons why parents are not able to raise *their children themselves* and give their children to specialized institutions. Low-income families are often obliged to have recourse to specialized state institutions in order to *take care of their child*. Special state programs need to be initiated and applied to prevent such situations. It is stipulated in Article 3 of the "Law on Children's Rights" that, *"state policy on children is directed to ensure proper material and family conditions of care, education in accordance with contemporary requirements for the child and that the child grows as an adequate citizen. State policy is carried out through social programs for children with due consideration of national and local characteristics."*

Several statutory acts and state programs exist in this respect. Various provisions are stipulated in "The Law on Social Security Benefits", "the Law on Targeted Social Assistance", the «State Program on socio-economic development of the regions of the Republic of Azerbaijan in 2008-2014", the "State Program on Reduction of Poverty and Sustainable Development in the Republic of Azerbaijan in 2008-2015". Pursuant to Article 4 of the Law on Social Security Benefits, the following benefits are envisaged to help parents caring for their children:

- a) social benefit for taking care of a child up to 3 years old;
- b) social benefit for low-income families with a child up to a year old;
- c) social benefit for handicapped children up to 18 years old.

It is also provided in this law that a mother who gives birth shall receive onetime payment to cover costs associated with birth and natal care.

Moreover, it is indicated in Article 4 of the Law on Targeted Social Assistance that the main purpose of the law is to provide social security for the low-income families. In accordance with the "Law on Threshold of Need Measure for the year 2014", the threshold of need measure for the purposes of calculation of targeted social assistance in year 2014 has been set as 100 manats. By virtue of the "Law on Living Minimum", the living minimum for the year 2014 is set as 125 manats. In this regard, there is an inconsistency between the living minimum and the value of minimum consumer basket, the latter being lower than the former.

According to the "State Program on Reduction of Poverty and Sustainable Development in the Republic of Azerbaijan in 2008-2015", children and families with many children are at highest risk of poverty. It is possible to reduce the risk of poverty by improving the opportunities for the elder family members to earn income as extra costs are incurred in connection with children in household. Furthermore, measures should be taken to improve social security of low-income families with children in order to provide them with necessary assistance.

At first sight, it seems that there are many provisions in law and state programs aiming at assisting low-income families and improving their financial situations. However, in fact, such provisions are only formal and do not provide much help. Pursuant to the Law on Social Security Benefits, the amount of social benefit for taking care of a child up to 1.5 years is 30 manats and such benefit for the child from 1.5 to 3 years is only 15 manats. The amount of social benefit to be paid to mothers who give birth is 90 manats. Taking into account that the inflation rate in Azerbaijan and the fact that amount of social benefits are too low, such amount is not only insufficient to provide normal conditions of life for children but even fall short of providing them with their basic needs. Moreover, local authorities do not run proper investigation on the financial situation of families in order to provide targeted social assistance whose attribution is mainly based on family's application, leaving uneducated and uninformed families without assistance.

### ***Recommendation***

***It is recommended that the amount of social benefits stipulated in laws and state programs be kept at a level adequate in relation with socio-economic situation in the country, and that relevant authorities take appropriate measures to inform people about opportunities as well as terms and conditions for receiving social benefits.***

### **C. Alternative care of children**

In accordance with Article 20.1 of the CRC ***"a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance***

*provided by the State". Furthermore, according to article 20.3 of the CRC care for a child "could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children."* The CRC emphasizes the role of alternative care and envisages admission of children to residential care as a measure of last resort.

It is noted in Article 31 of the Law on Children's Rights that protection of children deprived of parental care is carried out through adoption, guardianship, trusteeship, fostering, and where these are not possible placement of the child in specialized institutions., Preference is given to alternative care methods over the placement of the child in specialized institutions.

### **1) Guardianship and trusteeship of children**

Guardianship (for children under 14 years) or trusteeship (for children aged between 14-18 years) is one of the measure of alternative care for children deprived of parental care. Pursuant to Article 18.2 of the CRC, *"for the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to legal guardians in the performance of their child-rearing responsibilities"*.

The Civil Code and the Family Code of the Republic of Azerbaijan are the main corpus juris regulating the relations arising from guardianship and trusteeship. In accordance with Article 35 of the Civil Code *"adult natural persons who have civil legal capacity may be appointed guardians and trustees. Natural persons who are deprived of their parental rights may not be appointed as guardians or trustees"*. Article 31 of the Civil Code states that, *"a guardian or trustee is appointed by guardianship or trusteeship authority at the place of residence of person in need of guardianship or trusteeship"*.

Guardianship and Trusteeship Commissions functioning within district (city) executive authorities act as guardianship and trusteeship authority under the legislation of Azerbaijan. Furthermore, by virtue of Article 35.5 of the Civil Code, *"guardians and trustees are not compensated for the performance of their duties, except as provided by law"*.

Several problems exist in legislation and practice in respect of the regulation of guardianship and trusteeship. First, so far there is no legislative document regulating the operation of Guardianship and Trusteeship Commissions. Taking into account that the functions of these commissions are not limited to appoint guardians and trustees but also include supervision of appointed guardians and trustees, as well as making decisions and taking measures on issues arising from guardianship and trusteeship, absence of legislative document that would regulate the operation of these commissions in details may delay decisions and measures regarding care for children in reaction to negative situations that may happen to the child and thus may harm his or her best interests .

Secondly, because guardianship and trusteeship commissions function under the district (city) executive authorities, members of these commissions also hold other positions within the executive authorities. Being responsible for other jobs within the district (city) executive authority, such members are often short of time and means to carefully deal with guardianship and trusteeship issues and commit omissions and mistakes in making decisions on guardianship for children deprived of parental care.

Thirdly, the issue of payment to guardians and trustees is also ambiguous under the legislation of Azerbaijan. It is stated in Article 141.6 of the Family Code that “guardianship (trusteeship) on a child is performed gratuitously. State pays a certain sum to the guardian (trustee) for purposes of child maintenance.” Under Article 36.2 of the Civil Code “without the preliminary consent of the guardianship and trusteeship authority, a guardian or trustee has the right to incur such expenses necessary for maintenance of the person under guardianship or trusteeship from funds due to the latter as income”.

Various problems arise where there are no funds due to the child under guardianship (trusteeship). According to Article 7.0.8 of the Law on Social Benefits, guardians (trustees) appointed on children deprived of parental care shall be entitled to social benefit, provided that such guardian (trustee) is entitled to receive targeted social assistance under the Law on Targeted Social Assistance and the child under guardianship (trusteeship) is not under full state provision. According to current legislation, such guardians (trustees) shall be paid 50 manats. In fact, however, when guardians (trustees) apply to state authorities to get paid payment is refused on the basis of the first sentence of Article 141.6 of the Family Code which states that “guardianship (trusteeship) on a child is performed gratuitously”. In any case, taking the value of consumer products and inflation rate in Azerbaijan into account, 50 manats is far from being sufficient for the purposes of child maintenance.

### *Recommendations*

*Based on the aforementioned, it is proposed that:*

- *The regulation on Guardianship and Trusteeship Commissions be adopted in order to increase the efficiency of their work.*
- *here the child under guardianship (trusteeship) does not have sufficient funds due to him/her to cover maintenance costs, the payment to be made to guardian (trustee) for the child's maintenance should be increased to an adequate level.*

## **2) Placement of the child**

Another method of alternative care under Article 20.3 of the CRC is the placement of the child with foster family or carers. Articles 141-145 of the Family Code regulate the legal relationships in connection with fostering placement. Pursuant to Article 142.2 of the Family Code “the regulation on fostering family is approved by relevant executive state authority”. In accordance with the legislation of the Republic of Azerbaijan the executive

authority adopting such regulation is the Cabinet of Ministers of the Republic of Azerbaijan. Although the Family Code has been adopted in 2000, the regulation on foster family has not yet been adopted by the Cabinet of Ministers.

Furthermore, according to Article 143 of the Family Code, the foster family should be compensated in consideration for fostering services. The amount of such payment is not clearly defined in the legislation. There is no statutory act that would describe how such payment is calculated and paid to the foster family. There seems to be a confusion due to similarity of terms “fostering family” and “trustee” in Azerbaijani language (the former being “himayədar ailə” and the latter “himayəçi”). Assuming that for the purposes of compensation the legislator sees these two institutions as the same, it is possible to say that foster families are also entitled to 50 manats as compensation for their services under the Decree of the President of the Republic of Azerbaijan on Increase of Social Benefits dated August 29, 2013. However, this assumption seems to be unlikely as differentiation has been made between these two terms in the Family Code.

Generally, it is possible to conclude that most of the problems present in connection with guardianship (trusteeship) also exists in relation to fostering of children deprived of parental care.

### *Recommendations*

*In this regard, it is proposed that:*

- *Regulation that would address the issues of the selection of foster family, placement of children with foster families or carers and supervision of foster families be adopted.*
- *Second, taking into account that there are only few cases of placement of children with foster families (only few random pilot projects on fostering placement) in Azerbaijan, it is proposed that the government takes necessary measures to promote this alternative care method and encourage families to participate in fostering children deprived of parental care.*
- *Third, the compensation of foster families or carers should be clearly and adequately set under the legislation.*

### **3) Adoption of the child**

Article 21 of the CRC is dedicated to the issue of adoption. It is noted, as a general principle of adoption, in the first paragraph of the Article 21 that “*States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration*”.

According to article 117.1 of the Family Code, adoption is permitted regarding minors and only in their best interests. After the child deprived of parental care and the person willing to adopt child is registered, the guardianship and trusteeship authority shall

match the child available for adoption and potential adopting parents in order to ensure that the best interests of the child are protected as enshrined in the Family Code.

Pursuant to article 21 of the 1967 European Convention on Adoption of Children, States shall ensure that social workers dealing with adoption are appropriately trained in the social and legal aspects of adoption. In practice, however, such child available for adoption is not matched with prospective adopting persons. In fact, the prospective adopters whose turn has come visit the institution where children available for adoption are placed and choose the child they like.

In accordance with Article 124 of the Family Code, for the adoption of the child "*consent of guardian (trustee), fostering family, the head of the institution where that child is placed is required*". These persons are only temporary steps in the care of r the child deprived of parental care and therefore the fact that their consent is required for adoption of the child is neither compliant with international standards nor is reasonable.

Article 20 of the European Convention on Adoption of Children provides *that the public authorities shall ensure the promotion and proper functioning of adoption counseling and post-adoption services to provide help and advice to prospective adopters, adopters and adopted children*. The legislation of Azerbaijan does not set out provisions for such counseling to advise prospective adopters, adopters and adopted children.

Pursuant to Article 19 of the European Convention on Adoption of Children, it may be required that "*the child has been in the care of the adopter before adoption is granted for a period long enough to enable a reasonable estimate to be made by the competent authority as to their future relations if the adoption were granted. In this context the best interests of the child shall be the paramount consideration.*" There is no provision in the domestic legislation that would require this kind of probation period before grant of adoption. In practice, the institution where the child available for adoption is placed only advises the prospective adopter to spend two days with the child and only after that time make decision on adoption. Such a short period is not enough to identify how the future relations between the adopted child and adopter may develop and therefore is not adequate to ensure that the decision is in the best interest of the child.

Article 21 of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention) says that an intercountry adoption may take place "*only if the competent authorities of the State of origin have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests*". Article 117 of the Family Code states that the child deprived of parental care becomes available for intercountry adoption 6 month after he/she has been registered by relevant authorities under Article 115.5 of the Family Code. In general, intercountry adoption of a child is accompanied with high risk of abuse and lack of supervision by the state of origin. From this aspect, in the opinion of the author, making intercountry adoption of a child deprived

of parental care conditional upon 6 months period is not rational and does not meet the standard of "last resort" and the requirements set out in the Hague Convention.

According to articles 124.5, 124.6, 127.1 and 127.2 of the Family Code, the consent of the child is required in cases of the adoption of children aged 10 years or older. If a child was living in the family of the person wishing to adopt him before the adoption application is submitted and regards that person as his parent, the adoption may proceed without the child's consent. At their request a court may order the names of adoptive parents to be entered in the register of births as the parents of the adopted children. The consent of the adopted child to such registration is required when the child is aged 10 years or older, except in the case addressed in article 124.6 of the Family Code.

Revocation of a child's adoption may be ordered by the courts (art. 131.1 of the Family Code). Cases concerning revocation of adoption are heard by the courts with the participation of a tutorship and guardianship agency (art 131.2).

An adoption is revoked when: (a) the adoptive parents refuse to discharge their parental obligations (art. 132.1.1); (b) the adoptive parents abuse their parental rights (art. 132.1.2); (c) the adoptive parents treat the adopted child cruelly (art. 132.1.3); or (d) the adoptive parents exhibit chronic alcoholism or drug addiction (art. 132.1.4).

The courts are empowered to revoke adoption orders on other grounds in the child's best interests, having heard his views (art. 132.2). The revocation of an adoption order may be requested by the adoptive parents themselves, the child's biological parents, an adopted child aged 14 years or older or the competent tutorship and guardianship agencies (art. 133).

Adoption cases are heard by the courts in closed session with the mandatory attendance of the prospective adoptive parent or parents, a representative of the tutorship and guardianship agency and, when necessary, other interested persons and the child himself if he is at least 10 years old (art. 349 of the Code of Civil Procedure).

### *Recommendations*

*Based on the issues stated above, it is proposed that:*

- *It should be clearly and comprehensively determined by the legislation that adoption be carried out not based on sole discretion of the prospective adopter but by matching the child available for adoption with prospective adopter based on all characteristics and other relevant information that may affect grant of adoption, such matching being performed by skilled and properly trained social workers.*
- *It is proposed that the requirement of consent by guardian (trustee), fostering family or the institution where the child is placed be cancelled.*

- *It is proposed to make necessary amendments to the legislation to provide necessary counseling for prospective adopters, adopters and the child available for adoption making the outcome of such probation period crucial for the decision on the grant of adoption.*
- *The requirements for inter-country adoption should be made more stringent and the minimum period of 6 month should be extended under legislation.*

#### **D. Status and rights of children in civil proceedings**

##### **1. Child's best interest as primary consideration in civil and family laws**

In accordance with Article 3 of the CRC, *"in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."* It is stated in Article 3 of the Family Code (*Objectives of the Family Code*) that "comprehensive protection of the child's and mother's interests is one of the duties of the Family Code." Protection of child's interests is also flagged in some other provisions of the Family Code. The same situation is present in the Code of Civil Procedure which includes few provisions upon the protection of child's interests. Such provisions mainly cover the matters regarding children's testimony (Article 197), closed court hearings where open hearings may harm child's interests (according to article 10.2 "all courts shall hear cases in open hearings, except for instances of disclosure of state, professional, commercial secret, dissemination of personal and family secrets, pursuing interests of minors"), right to bring claim on dissolution at the place of residence where the claimant has children (Article 36.5).

However, the Code of Civil Procedure does not clearly stipulate any other detailed provisions or particular mechanisms directed at protection of minors' best interests, and in particular the following questions have not been addressed in the Code:

- whether such testimony is in the best interests of the child;
- whether the child is of sufficient age and capacity to understand the nature of testimony;
- whether information has been presented indicating that the child may be at risk emotionally if he or she is permitted or denied the opportunity to address the court or that the child may benefit from addressing the court;
- whether the subject areas about which the child is anticipated to address the court are relevant to the court's decision making process; and
- whether any other factors weigh in favor of or against having the child address the court, taking into consideration the child's desire to do so.

Furthermore, Article 197 of the Code of Civil Procedure states that *"a minor below the age of 14 years, and upon discretion of the court, a minor between the ages of 14 and 16 years shall testify at court with the participation of a representative of an educational establishment being attended by such witness."* However, nothing is said about requirements of experience, skills, knowledge and professionalism in respect of the

representative of educational establishment participating at testimony. Where the representative of the educational establishment does not have necessary knowledge and experience in dealing with minors in such situation, it is possible that the best interests of the minor giving testimony become affected and that he/she may suffer from psychological stress.

In general, it is possible to conclude that, in comparison with the requirements of the CRC, the protection of best interests of the child is not clearly defined as the primary principle in the laws of the Republic of Azerbaijan, and no mechanisms for identification of such interests have been set out.

## **2) Right of the child to be heard**

Article 12 of the CRC provides that "*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*". Furthermore, it is stated in the same article that for the same purpose, "*the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law*".

Similar provisions are provided in the Family Code. Article 52 of the Family Code states that "*a child has the right to be heard during judicial investigation and administrative inquiry*". The opinion of a 10 year old child must be taken into account, except where it is against his/her interests. The courts or the guardianship and trusteeship authorities shall, where stipulated in the Family Code, make decision only by consent of the 10 year old child". Under article 145.3 of the Family Code, a child's views on the matter must be heard before he is placed with a foster family. However, according to article 104.5.2 of the civil procedure code, children have the rights to refuse to testify against his or her parents.

Article 51 of the Family Code stipulates that a child is entitled to protect his/her rights and to apply to relevant state authorities not depending on his/her age, and to apply to courts from the age of 14. Pursuant to Article 28 of the Civil Code, a minor who has reached the age of 16 may acquire full action capacity (through the parent's or other legal representative's consent) if he/she works based on employment agreement or is involved in entrepreneurship. Emancipation may be granted by the guardianship and trusteeship authority where both parents or the trustee, or the adopters of the child give consent for emancipation. Where no such consent is provided, emancipation may be granted by resolution of the court.

Under domestic legislation, the rights and interests of a child, who has acquired full action capacity by way of emancipation, can independently exercise rights and freedoms

envisaged in law (article 49.2 of the Civil Procedure Code) Where a child does not have full action capacity, his/her rights and interests are protected, in cases determined by law, by legal representatives, guardianship and trusteeship authorities or the courts. Pursuant to paragraph (8) of Article 5 of the Regulation on Commissions on Minors' Affairs and Protection of Minor's Rights, such commissions have power to receive the minors in person and review their application and complaints.

However, as far as matrimonial suit and dispute over the custody of the child is concerned according to article 22 of the Family Code, the child is obviously not party of the proceedings, although the court takes a decision affecting his//her rights and can be detrimental to his or her interests. The child status in these legal actions is not regulated in a satisfactory manner, even as mentioned above he or she can be heard. Specific normative solutions should be introduced in this regard to strengthen the status of children in matrimonial suit and dispute and in all proceedings in which his/her rights are decided upon.

In general, the right of the child to express his/her views before the courts and administrative authorities is satisfactorily set out in the legislation of the Republic of Azerbaijan. However, problems arise when it comes to the enforcement of those provisions. Enforcement of the child's right to apply to judicial and executive authorities is much dependent on the functioning of local guardianship and trusteeship commissions as well as the commissions o minor's affairs and protection of minors' rights, and as mentioned before, there are significant problems in the functioning of those commissions. For example, where the law requires that a minor exercise certain right or freedom through his/her parents and parents are neglectful in respect of such right of the minor, then local guardianship commissions and minors' commissions should get involved. Nevertheless, due to the problems in the operation of such commissions, they do not perform their duties appropriately, *that might ultimately infringe the minors' rights*.

While there is no similar obligation in the CRC to provide legal aid in civil cases, a party to a civil case has a right to legal assistance free of charge in civil cases where the interests of justice so require. There is no requirement in international norms that the Government actually deliver legal aid itself, but there is a general requirement that the Government enable parties to a civil case to access such legal assistance.

At national level, according to article 110.1 of the civil procedure Code, minors shall be granted relief from payment of state duty for petitions filed for protection of their rights. However, there is no permanent government-sponsored center for legal aid to children in civil cases, except for the Children's Legal Clinic established by UNICEF and only few other non-governmental based legal assistance programs. Lack of legal assistance to minors may seriously harm their rights and interests guaranteed by law. This problem is particularly outstanding in regions of Azerbaijan where minors do not have access neither to information about their rights, nor to free legal assistance.

### **3) Right of the child to an effective remedy**

Access to justice requires that provision is made for the raising of awareness of children's rights, awareness of the different mechanisms by which they might seek redress for violation of their rights and awareness of how to seek necessary assistance to access those rights. Without an understanding of their rights or entitlements in law, children are unlikely to know when a right has been violated or that they could seek a remedy.

The Universal Declaration of Human Rights provides that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. This applies just as much to children as it does to adult. The Universal Declaration does not specify what form of national tribunals children shall have access to. However, whatever system the State chooses to put in place, children must be able to access it, and the system must provide an adequate remedy and redress for the violation of their rights.

Although article 68 of the Constitution provides to all persons, including children, the right to a remedy in the event that their rights are violated, the Civil Procedure Code requires that children seeking to institute proceedings for redress must do so through a representative. In case of the child cannot be represented, tutorship and guardianship agencies may be requested as legal representative. However, provisions should be more specific in addressing the representation of the child in all civil proceedings when there is evident or latent conflict of interest between the child and his/her legal representative and the possibility for the court to call other representatives.

### *Recommendations*

*Taking the aforementioned into consideration, it is proposed that:*

- *Necessary amendments are made to Family Code and the Code of Civil Procedure, clearly providing that best interests of the child be taken as primary consideration and also providing mechanisms for the identification of best interests of the child in each case;*
- *The status of the child in all proceedings in which his/her rights are decided upon shall be recognized in civil code and family code;*
- *Legislation should address the representation of the child in the situations when there is evident or latent conflict of interest between the child and his/her legal representative or when the child is not adequately represented for other reasons;*
- *The problems related to the functioning of commissions dealing with the problems of minors should be regulated in detail by legislation to avoid any omissions in protection of minors' rights and interests;*
- *Specialized mechanisms, including special court rooms, participation of psychologists during testimony and other detailed procedures for court hearings concerning minors shall be adopted, and judges handling cases with the participation of minors should receive special trainings;*

- *Legal clinics should be established for providing legal assistance to minors. The Government should also develop special programs in collaboration with non-governmental bodies to inform minors about their rights and freedoms and ways of enforcement.*

## **Conclusion**

International and domestic legislations regulating the access of juveniles to justice system have been comprehensively analyzed within the research and in most cases not all legal norms but only those, which are inconsistent have been explained and problems have been emphasized. *In general, the research conducted on this report reveals that the legislation of the Republic of Azerbaijan is compliant with legal norms and standards provided in international instruments.* However, in some cases the legal norms and standards stipulated in international instruments are either not provided in *national* legislation or if so provided, certain problems arise in their implementation.

Nevertheless, the Republic of Azerbaijan has still room for further improvement of its legislation and practice governing the access to justice for children. In this report, we have made several suggestions that would be useful as basis of legislative reform and system's modification to eliminate *inconsistencies and gaps in legislation, ensure supervision of the enforcement of the norms and standards and to strengthen the rights of children and their access to justice system in Azerbaijan.,. In our opinion, application of these suggestions will ensure and develop the system of minors' rights in criminal, administrative, civil and other fields of law regarding access to justice system and particularly to juvenile justice as its main constituent part.*

## LIST OF MAIN LEGAL DOCUMENTS REVIEWED:

### **International conventions and standards:**

- 1) The 1989 United Nations Convention on Rights of the Child
- 2) United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The **Beijing Rules**")
- 3) The UN Rules for the Protection of Juveniles Deprived of their Liberty
- 4) United Nations Guidelines for the Prevention of Juvenile Delinquency
- 5) The 1953 European Convention on Human Rights and Fundamental Freedoms
- 6) The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
- 7) The UN Convention Against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
- 8) The 1930 Convention Concerning Forced or Compulsory Labor of International Labor Organization
- 9) The 1951 UN Convention Relating to the Status of Refugees
- 10) The 1993 Hague Convention on Protection of Children And Co-Operation in Respect of Intercountry Adoption
- 11) The 2006 Convention on the Rights of Persons with Disabilities

### **Legislation of the Republic of Azerbaijan**

- 1) The Civil Code of the Republic of Azerbaijan
- 2) The Code of Civil Procedure of the Republic of Azerbaijan
- 3) The Criminal Code of the Republic of Azerbaijan
- 4) The Code of Criminal Procedure of the Republic of Azerbaijan
- 5) The Code of Administrative Offences of the Republic of Azerbaijan
- 6) The Family Code of the Republic of Azerbaijan
- 7) The Penalties Execution Code of the Republic of Azerbaijan
- 8) The Law of the Republic of Azerbaijan on the Regulation of Commissions on Minors' Affairs and Protection of Minors' Rights
- 9) The Law of the Republic of Azerbaijan on the Rights of the Child
- 10) The Law of the Republic of Azerbaijan on Juvenile Homelessness and Delinquency Prevention
- 11) The Law of the Republic of Azerbaijan on Targeted Social Assistance
- 12) The Law of the Republic of Azerbaijan on Social Protection of Children without Parents and Deprived of Parental Care
- 13) The Law of the Republic of Azerbaijan on Compulsory Medical Surveillance of Children
- 14) The Law of the Republic of Azerbaijan on Prevention of Disabilities and Limited Health Conditions of Children and Rehabilitation and Social Protection of Children with Disabilities and Limited Health Conditions
- 15) The Law of the Republic of Azerbaijan on Courts and Judges
- 16) The Law of the Republic of Azerbaijan on the Police