

GUIDANCE FOR LEGISLATIVE REFORM ON JUVENILE JUSTICE

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Carolyn Hamilton

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The Children's Legal Centre carries out research and analysis of systems, legislation, policy and practice and implements reform programmes, undertakes consultancies and delivers training in child rights for a range of United Nations and other international bodies. It also provides free and accessible legal information on a range of children's rights topics, which are available on its websites.

In the United Kingdom, the Children's Legal Centre offers legal information, advice and representation to children and young people, their parents, carers and professionals working with them.

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Abbreviations

American Convention Banjul Charter	American Convention on Human Rights African Charter on Human and Peoples' Rights
Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
Body of Principles	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Convention against Torture	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	United Nations Convention on the Rights of the Child
ECHR	European Court of Human Rights
Havana Rules	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
ICCPR	International Covenant on Civil and Political Rights
NGOs	Non-governmental organisations
OHCHR	Office of the High Commissioner for Human Rights
Riyadh Guidelines	United Nations Guidelines for the Prevention of Juvenile Delinquency
Standards and Norms	United Nations Minimum Standards and Norms on Juvenile Justice
UDHR	Universal Declaration of Human Rights
UNODC	United Nations Office on Drugs and Crime

Introduction

This document is intended as a guide for parliamentarians and governmental authorities involved in drafting or reviewing juvenile justice laws or juvenile justice chapters or sections in general laws, as well as for non-governmental organisations (NGOs), United Nations entities and other national and international partners providing assistance in the process.¹ It sets principles, standards and norms that States need to consider when amending or drafting legislation and illustrates those issues with some examples of good practice and research. These examples are intended to give the reader ideas for possible legislative change, rather than being provisions that can be simply adopted into new legislation in other States.

This guidance paper adopts a rights-based approach. It uses international and regional human rights instruments, and particularly the United Nations Convention on the Rights of the Child (CRC),² the International Covenant on Civil and Political Rights (ICCPR),³ the United Nations Minimum Standards and Norms on Juvenile Justice (Standards and Norms)⁴ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁵ as the basic framework within which a juvenile justice system should be developed.⁶

Juvenile justice is complex area in which to work, with juvenile justice systems across the world taking a variety of forms. The many differences and complexities of juvenile justice and the variations in practice have not been always easy to capture and reflect in this guidance. It is important not to consider this guidance as final and “carved in stone” but, rather, as an evolving guide, shaped by country experiences and by a growing understanding of what works and what does not. When using this guidance, we would be grateful for your feedback with regard both to its content and form. We would also appreciate if you could keep sharing your good practices with us. In this way, we will be able to amend this document and maintain it as a “living” guide that reflects the complexities of implementing juvenile justice standards at the country level.

¹ See also the Model Law on Juvenile Justice, United Nations Office on Drugs and Crime, 2011. Hereinafter the Model Law on Juvenile Justice.

² Convention on the Rights of the Child, adopted by United Nations General Assembly Resolution 44/25 of 20 November 1989 and entered into force 2 September 1990. Hereinafter the CRC.

³ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

⁴ United Nations Guidelines for the Prevention of Juvenile Delinquency: Resolution adopted by the General Assembly, 14 December 1990, UN GAOR A/RES/45/112 [Hereinafter the Riyadh Guidelines.]; United Nations Standard Minimum Rules for the Administration of Juvenile Justice: Resolution adopted by the General Assembly, 29 November 1985, UN GAOR A/RES/40/33 [Hereinafter the Beijing Rules.]; United Nations Rules for the Protection of Juveniles Deprived of their Liberty: Resolution adopted by the General Assembly, UN GAOR A/RES/45/113, Annex 45, UN GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990) [Hereinafter the Havana Rules.]. The Havana Rules provide detailed minimum standards for the care and treatment of juveniles deprived of their liberty. See also Guidelines for Action on Children in the Criminal Justice System, United Nations Economic and Social Council, 21 July 1997, Resolution 1997/30. Hereinafter the Vienna Guidelines.

⁵ Convention on the Elimination of All Forms of Discrimination against Women: Resolution adopted by the General Assembly, 18 December 1979, UN GAOR A/RES/34/180. Hereinafter the CEDAW.

⁶ See also the Model Law on Juvenile Justice for further help and assistance on juvenile justice legislation.

Feedback and comments can be sent to: justiceforchildren@unicef.org or clc@essex.ac.uk, or by visiting the Children's Legal Centre website <www.childrenslegalcentre.com>.

The guidance is divided into sections dealing with the juvenile justice framework, general underpinning principles of the CRC, general principles of the juvenile justice system, minimum guarantees and rights pre-trial, alternatives to criminal proceedings (diversion), pre-trial detention, the right to a fair trial, sentencing (and alternatives to custodial sentences) and standards of detention.

A checklist of the main points to be included in a juvenile justice law is contained in the text at the end of each section.

Definitions

To assist in the reading of this guidance paper, some of the most frequently used terms in the international instruments are defined in this section. The law relating to juvenile justice has seen significant development in the last 30 or so years, during which time language usage has changed. Terms used in some of the older international instruments are not always compatible with the CRC. When drafting legislation, the terminology contained in the CRC should be used.

Child: Article 1 of the CRC states that a child is a person under the age of 18 years, unless majority is attained earlier.

Children in conflict with the law: Those children who are alleged as, accused of or recognised as having infringed penal law. The Committee on the Rights of the Child has stated that every person who is under 18 years of age at the time of the alleged commission of offence must be treated in accordance with the rules of juvenile justice.⁷ Therefore, the phrase "children in conflict with the law" relates to under-18s regardless of the age of majority in a State.

Child "accused of infringing the penal law": A term used to refer to children who have been charged with a criminal offence but have not yet been tried before a court.

Child "alleged to have infringed the penal law": A child who is under investigation on suspicion of having committed a criminal offence.

Convicted child: A child who has been found guilty of a criminal offence by a court exercising criminal jurisdiction.

Criminal law: The body of law that defines criminal offences, regulates the apprehension, charging and trial of suspected persons, and fixes penalties and modes of treatment applicable to convicted offenders.

Criminal justice system: The term used to describe the policies, strategies, law, procedures and practices applied to persons alleged to, accused of or recognised as having infringed the penal law. The criminal justice system includes the juvenile justice system as one of its constituent parts, and the safeguards offered to those in the criminal justice system also apply to children in the juvenile justice system, even if the provisions are not specific to juvenile justice.

Delinquency: Criminal or antisocial behaviour or acts committed by children. The term has a negative connotation and as with juvenile is a term that is now generally avoided as being stigmatising for the child.

⁷ United Nations Committee on the Rights of the Child, General Comment No. 10 (2007), Children's Rights in Juvenile Justice, U.N. Doc. CRC/C/GC/10, para. 37.

Deprivation of liberty: Any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

Juvenile: A term used to describe a child under the age of majority. This term has, over time, come to have criminal connotations. In some instruments, children in conflict with the law are referred to as juvenile offenders or juvenile delinquents. This paper uses the term preferred by the Committee on the Rights of the Child, which is “children in conflict with the law” and uses “child” rather than “juvenile”.

Juvenile justice system: A general term used to describe the policies, strategies, laws, procedures and practices applied to children over the age of criminal responsibility.

“Last resort”: Where non-custodial measures have been considered but have been determined not to be appropriate and where there is no other way of giving the child the protection needed.

Minimum age of criminal responsibility: The age below which a child is presumed in law not to have the capacity to commit a crime.

Penal law: Another term for criminal law used in some jurisdictions.

Pre-trial diversion: An alternative to charge and judicial proceedings, used in cases where a child admits guilt. The child is “diverted”, before the case is taken before the court, generally into a programme to address offending behaviour.

Status offence: An action that can be committed only by a person occupying a particular status. It is most often applied to offences that can be committed only by a child (for example, truancy from school).⁸

Juvenile justice legislative reform

In its narrowest sense, legislative reform applies purely to the amending of an existing law or the drafting of a new law. However, in practice, “legislative reform” is more far-reaching than this and goes beyond simply reviewing and amending the legal framework.

Legislative reform includes:

- consideration of policy, budgetary and human resources;
- institutional capacity;
- professional practice;
- implementation planning; and
- transitional arrangements.

To be effective, reform should ideally be a participatory process, which takes into account not just political ideology but also the views of professionals working within the system, as well as those of the children who find themselves at the receiving end of the juvenile justice system.

Any new law related to the juvenile justice system should be preceded by a comprehensive policy paper setting out the reasons for reform and the outcomes that the new law intends to achieve. States can be assisted in drafting such a policy by the Committee on the Rights of the Child General Comment No. 10, which sets out the leading principles and the core elements that should be contained in such a policy.⁹

⁸ See Guideline 56 of Riyadh Guidelines.

⁹ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 4.

Ideally, any policy paper that might result in substantive changes to the law should be issued first as a consultation paper to enable stakeholders in the field of juvenile justice to respond. The final policy paper should also clearly set out the intended aims and objectives of the new law and what action will need to be taken to implement the new law fully. This may require institutional and organisational development or change, training and capacity development of personnel working within these existing or new bodies, professional and practice development and the allocation of resources to ensure that legislative change is effective.

Any State embarking on the introduction or amendment of a juvenile justice system for children should ensure that any proposed policies, legislation and practices comply with the provisions of the CRC, the Standards and Norms, other relevant international human rights instruments and regional human rights instruments to which the State is a party.

As a matter of good practice, juvenile justice legislation should contain, in the body of the law:

- its aims and objectives;
- the general principles applicable to all children who fall within the system; and
- detailed procedural safeguards and guarantees.

There is also a need to ensure that implementation measures are contained within the law or in any accompanying laws, statutes or codes. The Committee on the Rights of the Child in General Comment No. 5 noted that “[e]nsuring that all domestic legislation is fully compatible with the Convention and that the Convention’s principles and provisions can be directly applied and appropriately enforced is fundamental. In addition, a wide range of measures ... are needed for effective implementation, including the development of special structures and monitoring, training and other activities in Government, parliament and the judiciary at all levels.”¹⁰

Box 1: Sierra Leone: Strategies to implement international standards

Sierra Leone developed a National Child Justice Strategy in 2006 following consultation with community leaders, juvenile justice practitioners, children and other stakeholders. The strategy, which was developed as a framework for implementing the country’s new Child Right Act (2007), takes specific account of the CRC and other international juvenile justice standards.

Sources: The Child Right Act was adopted into law in 2007 (supplement to the Sierra Leone Gazette Extraordinary Vol. CXXXVIII, No. 43 dated 3 September 2007); Ministry of Social Welfare, Gender and Children’s Affairs, National Child Justice Strategy for Sierra Leone, July 2006.

Budgeting and implementation planning

Drafting a new juvenile justice law can only be regarded as one part of any systemic reform. It is essential that States have a clear understanding of the costs of the changes that the legislative reform will bring, as well as commitment to these changes from all relevant ministries. “In order for legislation to be effective, the costs of implementation should be calculated and the appropriate legislative, executive and judicial authorities should make commitments to establish, strengthen or expand the coverage of the institutions and programmes necessary for implementation. Legislation that fully conforms to international standards, but is impossible to

¹⁰ Committee on the Rights of the Child, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/5, para. 1.

implement because the necessary infrastructure does not exist, does little and may even be counter-productive in some respects.”¹¹

Box 2: South Africa: The Child Justice Bill

An inter-sectoral committee for child justice was established in South Africa in January 1997 to steer a budgeting and implementation planning process in relation to the Child Justice Bill, and produce a budget and implementation plan.

A consultative process took place with governmental and non-governmental practitioners and members of the public throughout the country. Children from a range of socio-economic backgrounds were also consulted. All the child participants had been accused of criminal activity, except for a control group of children who had never been in contact with the criminal justice system.

A key priority of the committee was to create a child justice bill that would be “implementable”. It therefore decided early in its deliberations to commission a cost-effectiveness investigation of the proposed juvenile justice system and develop a strategy for implementation. This work, performed by the Applied Fiscal Research Centre at the University of Cape Town during 1998 and 1999, involved collaboration between economists and lawyers.

The cost-effectiveness analysis explored and compared the way children were then processed by the criminal justice system with the system described in the Child Justice Bill. A spreadsheet model – referred to as the Child Justice Model – was built to map the flow of children through the stages of the current and proposed systems. The model estimated costs associated with processing, transporting and detaining children arriving at each stage of the system during the course of a year, taking into consideration the different levels of criminal activity in metropolitan, urban and rural areas. The economists prepared a template for each department to develop its budget. Relevant staff attended training sessions to learn how to budget according to the model.

The process showed the importance of analysing the cost-effectiveness of legislation during the drafting process rather than after the passing of the law, as this allowed for adjustments along the way. It also demonstrated the importance of working across all relevant sectors as savings in some sectors (e.g. justice) could compensate additional spending in others (e.g. social development).

The Child Justice Bill was the first bill placed before the democratically elected Parliament in South Africa that provided detailed projections of expenditure. It was passed in 2008. According to child rights advocates in South Africa, the budget and implementation planning exercise has proven instrumental in convincing parliamentarians of the feasibility of implementing a separate juvenile justice system in a developing country.

Sources: Intersectoral Committee for Child Justice, established by Section 94 of the Child Justice Act 75 of 2008; for more information, see United Nations Children’s Fund Innocenti Research Centre, ‘Reforming Child Law in South Africa: Budgeting and Implementation Planning’, 2007: <www.unicef-irc.org/cgi-bin/unicef/Lunga.sql?ProductID=487> [accessed 2 May 2011].

The financial implications of reform should be contained in the policy paper that represents the start of the reform process. It will prove virtually impossible to implement any new law if it has not been costed and resources allocated. The content of the law may well depend upon the level of financial resources available. For instance, whether or not to establish new juvenile courts or to create a juvenile court room within an existing court may depend upon available financial resources. Where the budget for juvenile justice cannot be increased, this does not necessarily mean that juvenile justice reform cannot take place. States should, in all cases, assess the costs of the present system and whether the budget could be re-allocated in a way that implements the CRC to a greater extent. For instance, if funding is allocated to pre-trial diversion programmes,

¹¹ Inter-Parliamentary Union and United Nations Children’s Fund, ‘Child Protection: A handbook for Parliamentarians, Inter-Parliamentary Union, No. 7’, Geneva, 2004, p. 26–27.

this is likely to reduce expenditure on the courts and court personnel, as well as reducing the number of children held in custody, with a consequent saving of costs on detention centres and prisons.

A new law or amendments to existing instruments?

All States in the world have a system of criminal law, although the form that these laws take may vary. States, particularly those in the civil law system, generally have a code of criminal law and/or a code of criminal procedure, while others, generally common law States, tend to have a number of separate statutes (acts or laws). In both systems, these codes and statutes will be accompanied by large amounts of secondary legislation containing detailed rules on different aspects of juvenile justice.

In amending criminal law provisions and introducing a juvenile justice law or in undertaking amendments to existing juvenile justice laws, reformers should decide whether a separate juvenile justice code or statute will be introduced or whether the existing codes and statutes should be amended, perhaps by adding a new section or part. In many civil law systems, a code has a higher status than a law. The difference, however, for juvenile justice, is unlikely to be significant. The important issue is the extent to which the juvenile justice provisions, whether in a separate law or forming part of a general criminal law, comply with and incorporate the relevant provisions of the CRC, the Standards and Norms and other relevant human rights instruments both in terms of substance and procedure.

Having a separate code or statute on juvenile justice can make the law more accessible. It is much easier for both professionals and the general public to find, to read and to understand one comprehensive piece of legislation rather than a number of pieces of different legislation. In some States, though, this may not be politically possible for a range of reasons. In such instances, amendments to existing legislation may be the best that can be achieved.

Generally juvenile justice legislation does not include sections or chapters on the criminal offences that can be committed by a child. These can usually be found instead in the criminal code or in statutes. The juvenile justice law should, however, set out:

- the extent of its jurisdiction;
- the extent to which provisions of other criminal laws are to apply to children;
- the procedures to be followed from the moment of first contact with the police right through to the end of the trial process;
- the due process guarantees for children;
- diversionary measures;
- measures that may be applied to a child who is convicted of a criminal offence;
- the limited circumstances in which deprivation of liberty may be ordered; and
- after-care to assist reintegration into the community.

Primary and secondary legislation

A code or statute is regarded as “primary” legislation because it has been placed before the legislature and passed by that body. Primary legislation is generally limited in length and does not contain much of the fine detail covering the procedures and processes relating to juvenile justice. This is normally to be found in “secondary” legislation. Secondary legislation includes

regulations, rules, decrees, guidelines, etc. Commonly, secondary legislation will include codes of conduct for the police, operational rules for the prosecutors, rules of procedure for the courts and operational rules for any educational or residential institution, including detention centres. Secondary legislation is no less important than primary legislation and places equal duties and obligations on the subject of the legislation as primary legislation.

Normally, secondary legislation does not get discussed or voted on by the legislature, but is drafted and implemented by the ministry with responsibility for the subject matter. Secondary legislation is more “flexible” than primary legislation in that it can be changed by executive decision of the relevant Ministry to meet changing needs.

Legislation: Summary checklist

- Legislation should contain clear definitions of the terms used, including the definition of a child and the minimum age of criminal responsibility. This assists professionals in the juvenile justice system to interpret the law and allows the public to have a better understanding of the law.
- A clear, comprehensive policy paper should be produced setting out the law and its intended outcomes. The policy paper should comply with the provisions of the CRC and other relevant international instruments.
- The policy paper should contain a child impact assessment.
- The policy paper should be widely distributed and a consultation process undertaken.
- Once consultation responses are received, the policy should be reviewed and a revised version published to take account of desirable changes.
- The policy paper should include an assessment of the costs of the existing justice system as it relates to children and the costs of the proposed reforms as well as a budgeted implementation plan.
- Implementation measures must be contained within the law or in any accompanying laws, statutes or codes.
- Legislative, executive and judicial authorities should make commitments during the legislative reform process to establish, strengthen or expand the coverage of the institutions and programmes necessary for implementation.
- The government should decide whether to amend existing law or to draft a new law or code.
- Any new law or code should contain sections or articles on jurisdiction, the extent to which other criminal laws apply to children, the procedures to be followed from the moment of first contact with the police right through to the end of the trial process, the due process guarantees for children, diversionary measures, measures that may be applied to a child who is convicted of a criminal offence, the circumstances in which deprivation of liberty may be ordered and after-care.
- Whether the decision is to amend the existing legislation or introduce a new law or code, the changes to laws should be widely publicised among professionals, the public and children.
- The new juvenile justice law, together with an explanation on how it should be interpreted and applied, should be produced for professionals in the juvenile justice system.
- A child-friendly version of the law should be published and made widely available to children.

1. Juvenile justice framework

1.1. Standards and norms of juvenile justice

The most important international instruments for the administration of juvenile justice are the CRC and the ICCPR. The CRC sets out the basic principles that should be included in a juvenile justice system as well as specific due process guarantees.¹² Apart from these international treaties, there are four main supporting juvenile justice instruments: United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines);¹³ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);¹⁴ United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules);¹⁵ and the Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines).

These four instruments do not have the same status as the CRC. They are not regarded as treaties, which States ratify and by which they consent to be bound. Rather, the four instruments are internationally accepted minimum standards to which States should have regard when setting up or amending their existing juvenile justice system. Setting policies and drafting legislation that incorporates the minimum standards will assist States to comply with the obligations imposed upon them by the CRC.

Regard also needs to be paid to regional instruments, which include: the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention);¹⁶ the African Charter on Human and Peoples' Rights (Banjul Charter);¹⁷ the African Charter on the Rights and Welfare of the Child;¹⁸ the Arab Charter on Human Rights (Arab Charter);¹⁹ the

¹² See Articles 37 and 40.

¹³ The Riyadh Guidelines set standards aimed at preventing juvenile delinquency.

¹⁴ The Beijing Rules provide guidelines on how juveniles should be treated while part of the justice system addressing issues such as privacy, special training for the police and due process guarantees. In addition, the Rules set out guidelines for the diversion of juveniles from judicial proceedings.

¹⁵ The Havana Rules provide detailed minimum standards for the care and treatment of juveniles deprived of their liberty.

¹⁶ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5. Hereinafter the European Convention. See also Recommendation CM/Rec (2008) 11 on the European Rules for juvenile offenders subject to sanctions or measures (5 November 2008).

¹⁷ African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Hereinafter the Banjul Charter.

¹⁸ Organization of African Unity, African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

¹⁹ League of Arab States, Arab Charter on Human Rights, 15 September 1994, entered into force 15 March 2008. Hereinafter the Arab Charter. This Charter should not be regarded as complying fully with the CRC as Article 10 permits the imposition of the death penalty for serious crimes and does not specifically exempt children, even though this is a sentence which is prohibited by the CRC.

American Convention on Human Rights (American Convention);²⁰ and the American Declaration on the Rights and Duties of Man²¹ as well as the jurisprudence developed by the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights. In addition, there are a number of detailed international and regional standards and norms governing criminal justice generally²² but also applicable to juvenile justice. None of the international instruments sets out *exactly* how a system should operate, nor do they provide draft legal provisions. Instead, the CRC, other international treaties, standards, norms and general comments of treaty bodies provide a framework for developing a rights-based juvenile justice system. Assistance on interpreting the CRC and the Standards and Norms has been provided by the Committee on the Rights of the Child in General Comment No. 10.²³

1.1.1 What is a juvenile justice system?

A juvenile justice system encompasses legislation, norms, standards, guidelines, policies, procedures, mechanisms, provisions, institutions and bodies specifically applicable to children in conflict with the law who are over the age of criminal responsibility.

This means that the juvenile justice system does not include primary (i.e. universal) or secondary (i.e. targeted) prevention programmes to reduce offending by children, but does include tertiary prevention, i.e. the interventions throughout the process (from arrest onwards) that aim at avoiding repeat offending. State policy to reduce offending by children should, of course, provide for primary and secondary prevention, but this is generally regarded as forming part of a social welfare provision, and not part of a juvenile justice system.

²⁰ Organization of American States, American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, OAS, Treaty Series, No. 36, entered into force 18 July 1978. Hereinafter the American Convention.

²¹ Organization of American States), American Declaration of the Rights and Duties of Man, 2 May 1948, OAS Resolution XXX, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

²² Universal Declaration of Human Rights, adopted by United Nations General Assembly on 10 December 1948 in Paris [Hereinafter the UDHR.]; International Covenant on Civil and Political Rights, adopted by United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976 [Hereinafter the ICCPR.]; United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 [Hereinafter the Standard Minimum Rules for the Treatment of Prisoners.]; Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, UN GAOR A/RES/43/173, 9 December 1988, which sets out a comprehensive list of protections for persons who are subject to administrative detention [Hereinafter the Body of Principles.]; United Nations Declaration of Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly, UN GAOR 40/32 (29 November 1985) and UN GAOR 40/146 (13 December 1985); United Nations Standard Minimum Rules for Non-Custodial Measures, adopted by the United Nations General Assembly 14 December 1990, UN GAOR A/RES/45/110 [Hereinafter the Tokyo Rules.]; United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 7 September 1990, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1.

²³ Committee on the Rights of the Child, General Comment No. 10 (2007).

By nature, a juvenile justice system is complex, involving a variety of government bodies, agencies, departments, organisations and institutions, such as the police, prosecutors, lawyers, the judiciary, social welfare bodies, education bodies, probation services, detention facilities, after-care bodies and community-based non-governmental organisations.

Comprehensive juvenile justice systems as described above do not exist in every country. Despite the commitments made by States through ratification of the CRC, many States continue to subject children to the provisions and rigours of the adult criminal justice system, which either make no, or very limited, allowances for children's ages, vulnerabilities or their right to special protection. The implementation of the provisions of the CRC relating to juvenile justice has presented many States with difficulty and the Committee on the Rights of the Child has frequently commented in their concluding observations about the need to ensure better implementation. In both its concluding observations to State Party reports²⁴ and in General Comment No. 10,²⁵ the Committee has emphasised that all children under the age of eighteen who are in conflict with the law must be provided with the protection of the CRC and the Standards and Norms.

1.1.2 Prevention as part of a comprehensive juvenile justice policy

Prevention strategies do not fall under the mandate and responsibility of the (juvenile) justice system and are therefore not covered in this guidance. They should however form an integral part of a comprehensive juvenile justice policy, as stated in General Comment No. 10 (“a juvenile justice policy without a set of measures aimed at preventing juveniles coming into conflict with the law suffers from serious shortcomings”). The Committee on the Rights of the Child requires that States fully integrate the Riyadh Guidelines in their comprehensive national policy for juvenile justice,²⁶ while both the Economic and Social Council Guidelines for the Prevention of Crime²⁷ and its Resolution 2005/22, Action to Promote Effective Crime Prevention, recommend that States put in place a sustainable prevention strategy.

Prevention programmes are often referred to as operating at primary, secondary and tertiary levels. While only tertiary programmes (those aimed at preventing recidivism for children who have admitted or have been convicted of an offence) are regarded as falling within the juvenile justice system, it is nevertheless essential that primary (i.e. universal) and secondary (i.e.

²⁴ See, e.g., Committee on the Rights of the Child, Concluding Observations: Andorra (2002), U.N. Doc. CRC/C/15/Add.176, para. 45; The Bahamas (2005), U.N. Doc. CRC/C/15/Add.253, para. 59; Belarus (2002), U.N. Doc. CRC/C/15/Add.180, para. 54(c); Benin (1999), U.N. Doc. CRC/C/15/Add.106, para. 9; Bolivia (2005), U.N. Doc. CRC/C/15/Add.256, para. 68; Democratic Republic of the Congo (2001), U.N. Doc. CRC/C/15/Add.153, paras. 21, 75; Denmark (1995), U.N. Doc. CRC/C/15/Add.33, para. 31; Ethiopia (2001), U.N. Doc. CRC/C/15/Add.144, para. 77; Greece (2002), U.N. Doc. CRC/C/15/Add.170, para. 79; Democratic People's Republic of Korea (2004), U.N. Doc. CRC/C/15/Add.239, para. 65; Malta (2000), U.N. Doc. CRC/C/15/Add.129, para. 50; Mozambique (2002), U.N. Doc. CRC/C/15/Add.172, para. 73; The Kingdom of the Netherlands (Netherlands and Aruba) (2004), U.N. Doc. CRC/C/15/Add.227, para. 59; Sudan (2002), U.N. Doc. CRC/C/15/Add.190, para. 70; and Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: Concluding Observations: Eritrea (2003) U.N. Doc. CRC/C/15/Add.204, para. 60.

²⁵ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 37.

²⁶ *Ibid.*, para. 17.

²⁷ Economic and Social Council Resolution 2002/13. See also United Nations Office on Drugs and Crime and UN-Habitat, ‘Crime Prevention Assessment Tool’, United Nations, New York, 2009.

targeted) prevention programmes are developed as part of social protection. Legal provisions related to primary and secondary prevention should be included in social protection and child protection legislation, rather than in juvenile justice legislation.

The Riyadh Guidelines require that emphasis be placed on prevention policies that facilitate the successful socialisation and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and work, as well as through voluntary organisations. Prevention programmes should include support for particularly vulnerable families and the involvement of schools in teaching basic values, including information about the rights and responsibilities of children and parents under the law. The measures of assistance to families should not only focus on the prevention of negative situations but also, and even more, on the promotion of the social potential of parents.²⁸

Box 3: Effective preventive programmes

Research carried out in the United Kingdom and the United States concluded that prevention programmes are most effective when targeted at children in the 8 to 12 age range. The Youth Justice Board of England showed that young people start committing crime (usually non-serious and petty offences) and expressing anti-social behaviour when they are between 10 and 12 years old and that the peak offending age for juveniles is 14 years old. However, on average, children who have been excluded from school start to commit crimes a few years earlier than children attending school. The United States study concluded that gang prevention and substance abuse prevention works better when children are slightly older, at 12 to 14 years old.

A National Crime Prevention Council (*Det Kriminalpræventive Råd* or DKR) was established in Denmark in 1971. This was the first such body in the world. The Council is made up of local crime prevention committees (SSPs), which bring together representatives of schools, the police and social services. The SSP system works in nearly every municipality in the country. Each SSP has a management committee comprised of the local heads of education, police and social services.

In England and Wales, Youth Offending Teams (YOTs) are located in each local authority. The inter-disciplinary teams are made up of representatives from the police, probation service, social services, health, education, housing and drug and alcohol support services. The multi-agency approach enables the YOT to identify suitable programmes to address the needs of the young person with the intention of preventing further offending. The YOTs implement a range of targeted prevention programmes for “at risk” groups aged 8 to 17 years. The programmes include early intervention schemes, youth inclusion programmes, safer school partnerships and parenting programmes.

Sources: The Child Right Act was adopted into law in 2007 (supplement to the Sierra Leone Gazette Extraordinary Vol. CXXXVIII, No. 43 dated 3 September 2007); Ministry of Social Welfare, Gender and Children’s Affairs, National Child Justice Strategy for Sierra Leone, July 2006.

1.2. Separate system for juveniles

Article 40(3) of the CRC requires States to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of or recognised as having infringed the criminal law. This requirement applies to the entirety of the juvenile justice system from the initial contact with the juvenile justice system until all involvement with the system ends.

In order to implement this article, States need to take a systemic approach to juvenile justice and to establish a comprehensive juvenile justice system. In addition to specific juvenile justice legal

²⁸ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 19.

provisions, States need to develop procedures, codes of practice, regulations and guidelines. These should address:

- the manner in which a child is treated when he or she is apprehended by the law enforcement authority;
- when the child is questioned and detained;
- when a decision is made on whether to divert or to charge the child;
- the provision and nature of diversion programmes;
- the procedures to be applied during any hearing or trial involving the child;
- the manner in which decisions on measures are to be made if a child is found guilty of an offence;
- the appropriateness of different forms of community based sentences;
- the criteria to be applied before a custodial sentence can be passed on a child;
- the treatment of the child during any sentence; and
- support for the child post-sentence.

In addition, a juvenile justice system requires child-specific institutional structures. Specialised units for children need to be established within the police, the prosecution, the judiciary, the court administration and social services.²⁹ Juvenile courts also need to be established (either as separate units or as part of existing regional or district courts), as do specialised services such as legal aid, probation, counselling or supervision and, where necessary, facilities for residential care and treatment of children in conflict with the law.

The Committee on the Rights of the Child recommends that all these specialised units, services and facilities should effectively and continuously co-ordinate their interventions.³⁰ This is often best done by establishing juvenile justice co-ordination committees at national, regional and/or local level.

Specialised training

Establishing specialised juvenile units in the police and prosecutor's office or within the judiciary, social services and the probation service is unlikely to contribute significantly to the establishment of an effective juvenile justice system unless it is accompanied by on-going, effective training. Both legislation and professional codes of conduct should require personnel in these specialised units to undergo regular, relevant training.

In addition, defence lawyers who represent children involved in criminal proceedings should also be required to undergo training in juvenile justice, as all juvenile justice systems require an adequate pool of well-trained and skilled defence lawyers for children. The bar associations of States, or other relevant professional bodies, should ensure that such training is available. The Committee on the Rights of the Child has taken the issue of training further and requires that training should be extended and made available for people who provide "other assistance" to children in the juvenile justice system.³¹ Where possible, specific modules on child rights and

²⁹ Committee on the Rights of the Child, General Comment No. 10 (2007), paras. 92, 93, 94.

³⁰ Ibid., para. 94.

³¹ Ibid.

juvenile justice should be integrated into professional training curriculum for judges and lawyers, the police, the probation service, prison service and social services.

1.2.1 Juvenile courts

The Committee on the Rights of the Child has recommended, in General Comment No.10, that States should establish juvenile courts.³² Courts could be either in a separate court building or in a courtroom in an existing building. If this is not feasible, the existing court should be used as a juvenile court on certain days of the week to prevent children having to mix with adults accused of offences.

There are clear advantages to having a specially designed juvenile court, which provides a “child-sensitive” environment.³³ States should plan for their introduction over a fixed time frame if such courts do not already exist.³⁴ Where it is not practically possible to establish new juvenile courts or to designate a particular court as a juvenile court, a child-sensitive environment can still be created without too great an expense or disruption to the court system. In order to achieve a child-sensitive environment, States need to pay attention to the physical layout of the court and the seating arrangements. Parents (or another appropriate person, such as a social worker where the child is without parental support) should be seated with their child, and the child should be next to his or her lawyer. This form of seating arrangement promotes communication and helps draw the child into the process as an active participant. Judges should be seated on the same level as the child, and not on raised benches, so that they can speak to the child more easily. This can, in turn, help the child to participate in the proceedings more effectively. In most courts, it is possible to make these changes, on at least a temporary basis, for a juvenile hearing or trial.

Legislation should also provide that only judges who have undergone specialised juvenile justice training should be able to try a case that falls within the juvenile justice system. Where it is not possible to introduce juvenile courts immediately and, for practical reasons, such courts need to be introduced over a period of time, the Committee on the Rights of the Child has recommended that the State should appoint specialised judges or magistrates to deal with juvenile cases.³⁵

States should recognise that NGOs and civil society can play a very important role both in the prevention of juvenile offending and in providing community-based services for children in conflict with the law, including prevention and reintegration programmes and diversion and restorative justice programmes and facilities. The State should ensure that their role and their ability to provide services are recognised in legislation. NGOs should be encouraged to participate in the development and implementation of a State’s comprehensive juvenile justice policy and the State should provide them with the necessary resources for such involvement.³⁶

³² Ibid., para. 93.

³³ See Section 7.7 of this guidance paper. Guidelines on Child Friendly Justice were prepared by the Council of Europe and were adopted in 2010.

³⁴ For more details on this, see Section 7.7.

³⁵ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 93.

³⁶ Ibid., para. 95.

1.3. Monitoring and evaluation of the juvenile justice system

Once a State has passed legislation bringing a juvenile justice system into being, and once all the professionals working in the system have been trained, issues of implementation may still remain. The Committee on the Rights of the Child recommends that States should undertake regular evaluations of their juvenile justice system, and particularly the effectiveness of measures taken, including those concerning discrimination, reintegration and recidivism.³⁷

It is important that States collect and manage accurate, disaggregated data on the practice and administration of juvenile justice. This also enables States to recognise juvenile offending trends and the effectiveness of measures and programmes. Effective monitoring and evaluation enables States to target resources and develop and refine initiatives. All States should ensure that their legislation requires national statistical bodies to collect and collate such data from the police, prosecutors and the courts.³⁸

1.4. Who should fall within a juvenile justice system?

In order to comply with the CRC, a juvenile justice system should cover all children who are alleged as, accused of or recognised as having infringed the penal law who are over the age of criminal responsibility, but under the age of 18.³⁹ When drafting or considering legislation, States should ensure that:

- a) Juvenile justice legislation covers all children who are over the minimum age of criminal responsibility but under the age of 18;
- b) Legislation contains a minimum age of criminal responsibility; and
- c) The age of criminal responsibility is not lowered for serious offences, and is not dependent upon an assessment of the child's maturity by the court.
- d) The juvenile justice system covers only those children who are alleged to, accused of, or recognised as having infringed the criminal law and not children in need of care and protection as a result of abuse, exploitation or neglect.

1.4.1 Juvenile justice legislation covers all children who are over the minimum age of criminal responsibility but under the age of 18

While many States have implemented a juvenile justice system (in full or partially) since ratifying the CRC, these systems sometimes set an upper age limit below the age of 18. Some States set the age as low as 15 after which the child will be tried as an adult, rather than in the juvenile justice system. This conflicts with the provisions of the CRC that clearly require that all children under the age of 18 who are in conflict with the law should receive specialised treatment. Legislation which allows under-18s to be treated as adults should be amended to bring it into line with the CRC.

³⁷ Ibid., para. 99.

³⁸ A useful resource in this respect is the Manual for the Measurement of Juvenile Justice Indicators, United Nations Children's Fund/United Nations Office on Drugs and Crime, 2007.

³⁹ Article 1 of the CRC defines a child as a person below the age of 18 years but recognises that majority can be attained earlier under certain jurisdictions. Regardless of the age of majority, Article 37(a) of the CRC maintains the prohibition on capital punishment and life imprisonment without possibility of release for offences committed by persons under the age of 18.

Further, in some States, while children who commit minor offences remain within the jurisdiction of a juvenile court up to the age of 18, those who commit serious offences are tried before an adult criminal court, subject to adult procedures and/or sanctions.⁴⁰ The Committee has expressed concern at this practice on numerous occasions⁴¹ as such a practice conflicts with the Articles 1, 37 and 40 of the CRC. Legislation should make it absolutely clear that all children over the age of criminal responsibility should be tried according to juvenile procedures and subject only to juvenile measures. This also applies in cases where the child is charged with an adult. The cases should be split and the child tried in the juvenile court.

1.4.2 Legislation contains a minimum age of criminal responsibility

The age of criminal responsibility is the minimum age below which the child shall be presumed not to have the capacity to infringe the penal law. A child under the minimum age of criminal responsibility cannot be formally charged with an offence or subjected to any criminal law procedures or measures. Neither the CRC nor other international instruments set a minimum age of criminal responsibility. Article 40(3) of the CRC merely requires that States “shall seek to promote the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”. A little more assistance is provided by Rule 4 of the Beijing Rules, which states that “in those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.” The age of criminal responsibility varies considerably from State to State. In some States the age of criminal responsibility is as low as 7 years of age,⁴² while in a few States it is as high as 16 years of age.⁴³ The most common minimum age of criminal responsibility appears to be 14 years of age.⁴⁴

The age of criminal responsibility has been a matter of serious debate for a number of years. From the time of its establishment until February 2009, the Committee on the Rights of the Child recommended on no less than 65 occasions that a State Party either increase the minimum age of criminal responsibility or institute a minimum age of criminal responsibility where one did not exist.⁴⁵

In General Comment No. 10, the Committee on the Rights of the Child concluded that States parties should be encouraged to increase their minimum age of criminal responsibility. The

⁴⁰ See for instance, the United Kingdom.

⁴¹ For example, in its Concluding Observations to Canada in 2003, the Committee expressed its concern at the ‘expanded use of adult sentences for children as young as 14’ (Committee on the Rights of the Child, Concluding Observations: Canada (2003), U.N Doc. CRC/C/15/Add.215, para. 56). In regards to Antigua and Barbuda, the Committee expressed concern that a person under 16 in can be tried as an adult if he or she is charged with an adult for a homicide (Committee on the Rights of the Child, Concluding Observations: Antigua and Barbuda (2004), U.N. Doc. CRC/C/15/Add.247, para. 68(a)).

⁴² For instance, United Arab Emirates (Children’s Code, 1996, Art. 94); Yemen (Republican Decree for Law No. 12 for the Year 1994, Concerning Crimes and Penalties, 1994, Art. 31).

⁴³ See Cipriani, D., ‘Children’s Rights and the Minimum Age of Criminal Responsibility: A Global Perspective’, Ashgate, 2009.

⁴⁴ See the very helpful chart of minimum ages of criminal responsibility set out in Cipriani, *op. cit.*

⁴⁵ Author’s review of all Committee on the Rights of the Child Concluding Observations, current as of February 2009.

Committee regarded 12 years as the absolute minimum age, and recommended that States continue to increase it to an even higher age level.⁴⁶

In making this recommendation on the minimum age, the Committee on the Rights of the Child urged States Parties not to lower their minimum age of criminal responsibility to the age of 12.⁴⁷ It also strongly encouraged States to introduce a higher minimum age of criminal responsibility, for instance, 14 or 16 years of age.⁴⁸ Where the age of criminal responsibility in a State is under the age of 12, States should amend their law to raise the age.

There will be cases where a child has not been registered at birth or does not have identity papers and it is difficult to determine the exact age of a child. If there is no proof of age and it cannot be established that the child is at or above the minimum age of criminal responsibility, the Committee on the Rights of the Child recommends that the child should not be held criminally responsible.⁴⁹ Legislation needs to make it clear that in such cases, the child should be given the benefit of the doubt and that the burden of proving the child is over the age of criminal responsibility lies on the State.

Children under the age of criminal responsibility do not fall within the mandate of the juvenile justice system. However, in some States, children may find themselves subject to civil or administrative proceedings as a result of an act which, but for their age, would have been a criminal act. If a State intends to subject a child to any civil sanctions or to place the child in administrative detention as a result of the act, the child should be granted the full process guarantees contained in the CRC. The protection of underage children should be regulated in legislation.

1.4.3 Age of criminal responsibility is not lowered for serious offences, and is not dependent upon an assessment of the child's maturity by the court

In a number of States, the minimum age of criminal responsibility depends upon the maturity of the child. Thus, a child who is over the age of criminal responsibility, but under a specified age, can only be prosecuted if he or she is deemed to understand that the action is not merely naughty or mischievous but seriously wrong. This approach is sometimes referred to as "*doli incapax*" (incapable of doing harm) and sometimes as based on "discernment".⁵⁰ Many British Commonwealth countries have or had this system.⁵¹

⁴⁶ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 32.

⁴⁷ *Ibid.*, para. 33.

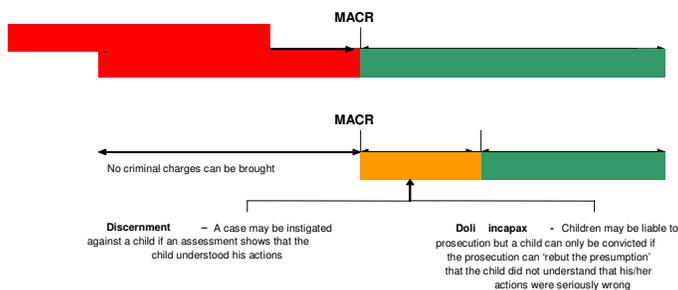
⁴⁸ *Ibid.*

⁴⁹ See *ibid.*, para. 35

⁵⁰ As defined in Section 3 of the Juvenile Offenders Ordinance (Cap 226) 2003 (Hong Kong).

⁵¹ In Australia, the law sets 10 years as the minimum age of criminal responsibility, with a rebuttable presumption of *doli incapax* up to 14 years (Commonwealth Crimes Act 1914 (Sec. 4N) and Criminal Code Act 1995 (Sec. 7.2)). In 2003, Hong Kong raised the minimum age of criminal responsibility from 7 to 10 but retained the *doli incapax* presumption for children up to the age of 14 (Juvenile Offenders Ordinance (Cap 226) 2003). In Belize, the Criminal Code 2000, Chapter 101, exempts a child under 9 years of age from criminal liability (Sec. 25 (1)). A child between the ages of 9 and 12 years inclusive who is not mature enough to judge the nature and consequence of his actions is also exempted (Sec. 25 (2)). In Kenya, the Penal Code 1970, as amended (Cap 63), sets the age of criminal responsibility at 8 years (Art. 14(1)). "A person under the age of twelve years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had capacity to know that

Figure 1: Operation of *doli incapax* and discernment



Where either of these concepts are applied there is a presumption that, although the child is over the age of criminal responsibility (but below an age set in the legislation), the child does not have the requisite understanding. However, in systems which apply *doli incapax*, the prosecutor can rebut the presumption that the child was “incapable of crime” by providing evidence at trial that the child understood the consequences of his actions. Similarly, with discernment, the child will be exempted from criminal liability unless he or she is shown to have acted with discernment. In order to prove that the child had “discernment”, the police, prosecutors or courts are required to carry out an assessment of a child who falls within the set age range, prior to investigation or trial, to decide whether the child understood his or her actions and therefore whether to instigate proceedings.⁵²

The Committee on the Rights of the Child has expressed concern about the practice of *doli incapax* and “discernment” in its concluding observations on State Parties’ reports and in General Comment No. 10.⁵³ It takes the view that setting the minimum age of criminal responsibility according to the maturity of the child is not only confusing and unpredictable, but leaves much to the discretion of the court or the judge, who often makes this judgment without the input of trained psychologists. The Committee has found that this has led to the use of lower ages of criminal responsibility for more serious offences and leaves children vulnerable to discriminatory practices.⁵⁴ It does not offer a protective mantle, as some jurisdictions that retain this presumption, argue. In General Comment No. 10, “[t]he Committee strongly recommends

he ought not to do the act or make the omission” (Art. 14(2)). However, boys under 12 years cannot be held criminal liable for rape as is presumed to be incapable of having carnal knowledge (Art. 14(3)).

⁵² E.g., Juvenile Justice and Welfare Act 2006 Republic Act No. 9344, 28 April 2006, Sec. 6 (Philippines). In the Philippines this applies to children aged 15 to 18.

⁵³ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 34: “The Committee wishes to express its concern about the practice of allowing exceptions to a minimum age of criminal responsibility which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible.”

⁵⁴ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 30.

that States Parties set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age.”⁵⁵

Box 4: Removing the rebuttable presumption of *doli incapax*

In 2000, Sierra Leone was criticised by the Committee on the Rights of the Child for its low age of criminal responsibility. While children under the age of 10 could not be prosecuted, children between the age of 10 and 14 could be prosecuted if it could be shown that the child understood that what he was doing was wrong. The Committee recommended that the State review the relevant legislation and raise the age of criminal responsibility. The Sierra Leone delegation agreed that the age of criminal responsibility was low and said that the issue would certainly be taken into consideration when future legislation was drafted.

Sierra Leone subsequently raised the minimum age of criminal responsibility to 14 years through the adoption of the Child Rights Act 2007 that stated “[i]n any judicial proceeding in Sierra Leone, a child shall not be held to be criminally responsible for his actions if he is below the age of fourteen years.” In effect, therefore, Sierra Leone removed the possibility of a child aged 10 to 14 being tried in court due to the fact that the prosecution could show that he or she knew that the act was “wrong”.

Sources: Committee on the Rights of the Child, Concluding Observations: Sierra Leone (2000), U.N. Doc. CRC/C/15/Add.116, para. 29; Committee on the Rights of the Child, Second Periodic Report of States Parties due in 1997: Sierra Leone (2006), U.N. Doc. CRC/C/SLE/2, paras. 32, 35; Child Rights Act 2007, Supplement to the Sierra Leone Gazette Extraordinary Vol. CXXXVIII, No. 43 dated 3 September, 2007, Article 70.

1.5. Decriminalisation of status offences and exploitation

Status offences are offences that can only be committed by persons of a certain status, generally children. The most common examples of status offences are chronic or persistent truancy, running away, being unruly, incorrigible or simply badly behaved with parents or at school, violating curfew laws or possessing alcohol or tobacco.

These acts would not be criminalised if committed by an adult, but a child can be sanctioned for a status offence simply on the basis of age. Although status offenders are not criminal and their acts are not harmful to others, they may nevertheless be subject to arrest and detention. Children who commit status offences and find themselves within the juvenile justice system often have little parental or legal support. Most will grow out of such behaviour when provided with the right attention and support and when growing out of adolescence.

Status offence laws focus disproportionately on poor, disadvantaged or children who live or work on the streets, who are forced to spend more time outside the home.⁵⁶ The Riyadh Guidelines⁵⁷ call for the repeal of status offences, and the Committee on the Rights of the Child has recommended that such offences be abolished to ensure equality between children and adults. Status issues should be treated instead as a social welfare issue under the child protection system.⁵⁸

⁵⁵ Ibid., para. 34.

⁵⁶ See Child Rights Information Network Global Report on status offences for further information: <www.crin.org> [accessed 2 May 2011].

⁵⁷ Guideline 56 of Riyadh Guidelines.

⁵⁸ See Committee on the Rights of the Child, General Comment No. 10 (2007), paras. 8 and 9.

The Committee on the Rights of the Child has also frequently criticised the use of any form of detention for children who have not committed a crime, but have simply been abandoned or mistreated⁵⁹ or who are beyond parental control,⁶⁰ especially in cases where a child might be detained with convicted offenders. To prevent such children entering the juvenile justice system, legislation should impose a statutory duty on the State to provide protective services and family support.

Box 5: Prohibiting status offences

In the Philippines, the Juvenile Justice and Welfare Act 2006 (Sec.57) explicitly prohibits children from being prosecuted for status offences. The accompanying implementation rules cite the CRC as the basis for exempting children from prosecution for the specific acts of vagrancy, prostitution, begging and sniffing rubber cement. Rule 88 of the 2006 Act defines status offences as “[a]ny conduct not considered an offence or not penalised if committed by an adult, including but not limited to curfew violations, truancy, parental disobedience and the like, shall not be considered an offence and shall not be punished if committed by a child.”

According to Rule 89, if a child is detained for such conduct, the police have an obligation to release the child immediately into the care of the local social work department officer.

Source: Philippines Juvenile Justice and Welfare Act 2006 Rules and Regulations.

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to the Convention on the Rights of the Child states that child prostitution is the practice whereby a child is used by others for sexual activities in return for remuneration or any other form of consideration. The 142 countries who are parties to the Optional Protocol (as of February 2011) have all undertaken to prohibit the use of children in prostitution. Legislation should make it an offence for a person to engage in sexual activity with a child. At the same time, however, the legislation must exempt a child who is exploited for prostitution from being prosecuted as a party to the offence.

More generally, the Riyadh Guidelines note that most children tend to grow out of anti-social behaviour.⁶¹ Therefore, the Guidelines explicitly argue against “criminalising and penalising a child for behaviour that does not cause serious damage to the development of the child or harm to others.”⁶²

The juvenile justice system should also not be used against children who are alleged to have breached, or who have breached immigration laws. The Committee on the Rights of the Child has noted that “[i]n developing policies on unaccompanied or separated children, including those who are victims of trafficking and exploitation, States should ensure that such children are not criminalised solely for reasons of illegal entry or presence in the country”.⁶³ In addition, the

⁵⁹ Committee on the Rights of the Child, Summary meeting record of the 146th meeting: Chile, 19 April 1994, U.N. Doc. CRC/C/SR.148, see paras. 34, 35 (discussion of the State Party Report of Chile).

⁶⁰ Committee on the Rights of the Child: Concluding Observations: Nigeria (1996), U.N. Doc. CRC/C/15/Add.61, para. 21.

⁶¹ Article 5(e) of Riyadh Guidelines.

⁶² Article 5 of Riyadh Guidelines.

⁶³ Committee on the Rights of the Child, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside their Country of Origin, U.N. Doc. CRC/GC/2005/6, para. 61.

Committee has made it clear that “[d]etention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.”⁶⁴

The Council of Europe, in its recommendation on measures of detention of asylum seekers, reiterated that minors should only be detained as a matter of last resort.⁶⁵ The Council further stated the “[f]or unaccompanied minor asylum-seekers, alternative and non-custodial care arrangements, such as residential homes or foster placements, should be arranged and, where provided for by national legislation, legal guardians should be appointed, within the shortest possible time.”⁶⁶

Criminal codes and other relevant provisions should be amended accordingly.

⁶⁴ Ibid.

⁶⁵ Council of Europe, Recommendation Rec (2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers), adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers’ Deputies, para. 20.

⁶⁶ Ibid, para. 23.

Section 1: Juvenile justice framework: Summary checklist

- States should pass a juvenile justice law or code implementing the provisions of Articles 37, 39 and 40 of the CRC. This should cover treatment of the child from the moment the child is apprehended or detained by the police right through to post-sentencing after-care.
- The law should state clearly that all children over the age of criminal responsibility but under the age of 18 should fall within the juvenile justice system regardless of the nature of the offence.
- Legislation should provide that specialised children's units should be established in the police, prosecutor's office, court administration, social services and probation.
- Legislation should require that all administrative and other professional staff dealing with children in conflict with the law should receive training on children's rights.
- Professional codes of conduct for professionals should require them to undertake training on juvenile justice before working with children in conflict with the law. For example, only the judges and magistrates who have received such training should be able to hear criminal cases against children.
- Juvenile courts should be established and provide a child-sensitive environment; The Ministry of Justice or other relevant ministry should issue guidelines to court administrators on how to achieve this.
- Legislation should ensure court procedure in children's cases allow children to understand and participate in the hearing or trial.
- Legislation should provide for alternative dispute resolution mechanisms (For example, Children's Act 1998, Ghana, which establishes child panels), diversion and a range of community based sentences for children who are found to have committed a crime.
- Legislation should permit NGOs to provide services to children in conflict with the law and should also contain provisions allowing Ministries and other State bodies to commission and contract with NGOs to provide such services.
- The central state statistical body should prepare guidelines on the data that needs to be collected in relation to juvenile justice and issue these to the police, prosecutors and the courts. The data that needs to be collected is set out by the Committee on the Rights of the Child in their reporting guidelines (General guidelines regarding the form and content of periodic reports: (2005), U.N. Doc. CRC/C/58/Rev.1).
- Legislation should set a minimum age of criminal responsibility; this age should apply to all children, rather than differing ages for different offences or for different children. The minimum age of criminal responsibility should be no lower than 12 and preferably higher.
- Legislation should require police and prosecutors to prove the child is over the age of criminal responsibility where this is in doubt; where the doubt remains, the law should specify that the child should not be held criminally responsible.
- Any existing legislation that provides for the concepts of '*doli incapax*' or 'discernment' should be repealed and the age at which children are treated as having full criminal responsibility should be set as the minimum age of criminal responsibility.
- Legislation should state clearly that only children who are alleged as, accused of or recognised as having infringed the penal law can fall within the jurisdiction of the juvenile justice system.

- Legislation should make it unlawful to charge or try a child for a status offence. Any existing status offences should be repealed. If it is not possible to pass legislation repealing status offences immediately, secondary legislation or practice guidance should be passed by the Ministry of Justice or other relevant body to ensure that all the protections of the CRC and the Beijing Rules apply (Rule 3.1 of Beijing Rules).
- The criminal law relating to prostitution should exempt all children under the age of 18 from prosecution. It should also be an offence for a person to incite, encourage or engage in sexual activity with a child for any remuneration or any consideration.
- The juvenile justice law should be supported by legislation providing for effective prevention programmes and child protection measures for children at risk of abuse, neglect and exploitation.

2. General principles of the CRC

There are four principles that underpin the CRC and apply just as much to juvenile justice as to any other issue of children's rights. These four principles should all be reflected in a juvenile justice system. These principles are:

- Best interests (Article 3).
- Non-discrimination (Article 2).
- The right to life, survival and development (Article 6).
- The right to be heard (Article 12).

2.1. Best interests of the child

Article 3 of the CRC requires that “[i]n all actions concerning children whether undertaken by... courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁶⁷

The concept of best interests operates both in relation to children as a group and to each individual child who finds him or herself subject to juvenile justice proceedings.

In considering the best interests of children as a group, the Committee on the Rights of the Child has stated that the CRC and the Standards and Norms together “call for the adoption of a child-oriented system that recognises the child as a subject of fundamental rights and freedoms and stresses the need for all actions concerning children to be guided by the best interests of the child as a primary consideration”.⁶⁸

While “best interests” has not been precisely defined, the Committee on the Rights of the Child, in General Comment No. 10, notes that “[t]he protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.”⁶⁹

It would seem, therefore, that the “best interests” test requires that the juvenile justice system should not use repressive or retributive measures, but should promote the reintegration of children who have offended.⁷⁰

⁶⁷ This Article is not repeated in the European Convention, but the European Court of Human Rights has referred directly to this Article of the CRC and the need to consider the best interests of the child in reaching decisions on cases involving children, including criminal cases (See *T. and V. v. United Kingdom*, No. 24888/94; [1999] ECHR 2; No. 24724/94 (2000) 30 EHRR 121, Council of Europe: ECHR, 1999.).

⁶⁸ Committee on the Rights of the Child, Report of the Committee on the Rights of the Child, Ninth Session (1995), U. N. Doc. CRC/C/43, p. 64.

⁶⁹ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 10.

⁷⁰ Rule 5 of the Beijing Rules also provides that the juvenile justice system shall emphasise the well-being of the juvenile. However, in accordance with the concept that best interests or well-being are synonymous with the child

Juvenile justice legislation should contain a clear section or article stating that, in making any decision in relation to an individual child, the best interests principle applies. Further, the legislation should state that the best interests principle applies to all aspects and all operations of the juvenile justice system. This is clearly specified in the Ghanaian Juvenile Justice Act 2003, while the interpretation of best interests is helpfully set out in the Philippines Juvenile Justice and Welfare Act of 2006.

Box 6: Best interest of the child in court proceedings

Ghana: The Juvenile Justice Act (2003), Sec. 2, states the “the best interest of a juvenile shall be (a) paramount in any matter concerned with the juvenile; and (b) the primary consideration by a juvenile court, institution or other body in any matter concerned with a juvenile.”

Philippines: The Juvenile Justice and Welfare Act of 2006, Sec 4(b) states the “‘Best Interest of the Child’ refers to the totality of the circumstances and conditions which are most congenial to the survival, protection and feelings of security of the child and most encouraging to the child’s physical, psychological and emotional development. It also means the least detrimental available alternative for safeguarding the growth and development of the child.”

Source: Juvenile Justice and Welfare Act of 2006, Sec. 4(b).

The best interests principle applies to all decisions taken in the juvenile justice system: from the child’s first contact with a law enforcement authority right through to sentencing and post-sentence services, particularly after-care services for those who have been deprived of their liberty. In determining the child’s best interest, the decision-makers should consider his or her personality, wishes, circumstances, family situation, the effect that a sentence is likely to have on his/her development and well-being as well as any other relevant element. It is recommended that the decision-maker hears the views of the child as these will be key in determining the best interest. The child’s best interests must be a primary consideration in the decision-making process. Other interests at stake include public safety and the rights of the defendant(s).

2.2. Non-discrimination

Article 2 of the CRC provides 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 parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”⁷¹

Most States have legislation which prohibits discrimination. This can generally be found in a State’s constitution, criminal code, and criminal procedure code or in child-specific statutes.⁷² However, it needs to be recognised that a general provision on discrimination may not be sufficient to protect certain groups of children within the juvenile justice system who frequently

being dealt with in a system that implements the general principles and provisions of the Convention, the commentary to the Rules interprets this as meaning that the imposition of merely punitive sanctions shall be avoided.

⁷¹ This provision is repeated in Article 26 of the ICCPR and Article 14 of the ECHR in similar terms.

⁷² See, e.g., Constitution of the Republic of South Africa, No. 108 of 1996, commenced 4 February 2007, Art. 9(2). See also Article 2 of the CRC.

face discrimination. The discrimination they suffer can be direct or indirect. Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground, for instance, because the child comes from an ethnic minority or is born to unmarried parents. Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals or children from poor families who do not possess, or have been denied, such certificates.

Children who are likely to face discrimination include: children living and working on the streets; children belonging to ethnic, religious or linguistic minorities; indigenous children; girl children; children with disabilities; and children who are repeatedly in conflict with the law (recidivists). Children who are homeless, facing social problems, who are poor or whose parents are offenders themselves or drug and alcohol misusers and children with learning disabilities or mental health issues may also be treated more harshly by the juvenile justice system. Such children are more likely to be prosecuted, more likely to be held in pre-trial detention and more likely to receive a custodial sentence.

In order to eliminate discrimination, States Parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and can be discontinued when equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and special consideration for members of ethnic minority groups or for girls who are alleged to have committed or are accused of a criminal offence.⁷³

Children should not be deprived of liberty and placed in custody simply because they have no family care. Nor should the fact that a child or his family cannot pay a fine be a reason for the imposition of a harsher sentence.

Box 7: Ensuring that the imposition of a fine is not discriminatory

Under Section 30(2) of the Juvenile Justice Act 2003 in Ghana, the inability of a parent to pay a fine should not affect the treatment of the child: “The ability of the parent, guardian or close relative to pay a fine, damages or costs shall be taken into consideration by the court before the order is made and shall not be used as a basis for discrimination against the juvenile”.

Source: Juvenile Justice Act 2003, Act No. 653.

Certain ethnic groups may be over-represented in the juvenile justice system, including, for instance, Roma children in Eastern Europe and Central Asia,⁷⁴ the aboriginal population in

⁷³ See Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009), Non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights, 2 July 2009, U.N. Doc. E/C.12/GC/20, para. 9).

⁷⁴ United Nations Children’s Fund, ‘Lost in the Juvenile Justice System – Children in conflict with the law in Eastern Europe and Central Asia’, 2008, p. 40.

Canada⁷⁵ and Australia, and African-American children in the United States. Juvenile justice policy should give attention to the root causes of the reason why children belonging to certain ethnic groups are over-represented in the system. In addition, in order to eliminate existing discrimination, it may be necessary for legislation to require that special consideration be given to certain ethnic groups, as in the Canadian legislation.

Box 8: Responding to over-representation

In Canada, the Youth Criminal Justice Act 2002 notes the importance of implementing measures that “respond to the needs of aboriginal young persons” and states that when sentencing “all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons.”

In *R v. Gladue*, the Canadian Supreme Court recognized the importance of this approach: “Section 718.2(2) is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision’s remedial purpose real force”.

Sources: Canada Youth Criminal Justice Act, S.C., 2002, c.1, Art. 3(1), Art. 38(2)(d); *R v. Gladue*, 1 S.C.R. 688 [1999], 23 C.R. (5th) 197, 133 C.C.C. (3rd) 385, Canada: Supreme Court, 23 April 1999, para. 93.

Laws governing the actions of those involved in law enforcement can also play an important role in addressing discriminatory practices.

Box 9: Prohibiting discriminatory practices among law enforcement officials

In Albania, the Law on State Police places a direct duty on the police not to discriminate:

“An employee of the Police must treat persons equally and must carry out his duties without discrimination on any grounds such as sex, race, colour, language, religion, ethnicity, political, religious or philosophical beliefs, sexual inclination, economic condition, education, social status or ancestry, in accordance with Article 18 of the Constitution of the Republic of Albania.”

Source: Law on State Police, Law No. 9749, 4 June 2007, Art. 61.

2.3. Right to life, survival and development

Article 6 of the CRC requires States Parties to recognise that every child has the inherent right to life and to ensure to the maximum extent possible the survival and development of the child. This applies to children at all stages of their life and in all settings, including children who are in the juvenile justice system.

In addition to the inherent right to life, Article 37(a) of the CRC provides explicitly that neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons when below the age of 18.⁷⁶ The prohibition on imposition of the death penalty continues to apply when an adult is tried for an offence that was committed when

⁷⁵ In 2003–2004, 27 per cent of the Canadian youth population held in pre-trial detention or secure custody and 30 per cent of the population in open custody were of Aboriginal origin though Aboriginal youth made up only 5 per cent of the total population. See National Council of Welfare, ‘First Nations, Métis and Inuit Children and Youth: Time to Act’, 2007, p. 97.

⁷⁶ See also Article 6(5) of the ICCPR and Rule 17.2 of the Beijing Rules.

the person was under the age of 18. The domestic legislation of all States should contain clear provisions setting out these two prohibitions. Despite the clear statement contained in the CRC, Iran, Pakistan, Sudan, Saudi Arabia and Yemen, all of whom have ratified the CRC, have continued to execute juveniles.⁷⁷

Ensuring the right to harmonious development of children who are subject to the juvenile justice system, particularly for those who are deprived of liberty, is more challenging. “Development” in the context of the CRC is a holistic concept: it is about children being provided with optimal conditions that will enable them to access all their rights during childhood. Children who are detained by the juvenile justice system or the adult criminal justice system are often not provided with optimal conditions, and may be housed in poor facilities, with little educational or vocational opportunity, and of course, are separated from their families, often with little contact. Such children find it difficult to obtain education, accommodation or employment when released, and also experience difficulty reintegrating into the family and community.

Box 10: Providing the right to development

The Philippines Juvenile Justice and Welfare Act (2005) explicitly provides that the juvenile justice system should ensure “child-appropriate proceedings, including programs and services for prevention, diversion, rehabilitation, re-integration and aftercare to ensure their normal growth and development”.

Source: Republic Act No. 9344, 2005, Sec. 4.

However, legislation providing for the right to development is often, by itself, not sufficient: it should cover the manner in which institutions are to be operated and monitored, as this is the key to ensuring the child’s right to development and survival. The Havana Rules contain minimum standards on provision and conditions in custodial institutions (See Section 9.3: Conditions and treatment in detention.).

Box 11: Management of detention centres

Australia (Queensland) Juvenile Justice Act 1992, Section 263, Management of detention centres:

(3) In relation to each detention centre, the chief executive is responsible for:

(a) providing services that promote the health and wellbeing of children detained at the centre; and (b) promoting the social, cultural and educational development of children detained at the centre...

(4) The chief executive must monitor the operation of the detention centres and inspect each detention centre at least once every 3 months.

Source: Queensland Juvenile Justice Act 1992, Reprint No. 9, reprinted 15 March 2008.

2.4. Right to be heard

Article 12 of the CRC provides that all children who are capable of forming their own views have the right to express their views freely in all matters that affect them, and that these views should be given due weight in accordance with the age and maturity of the child. In addition to this general right, when a child is the subject of any administrative or judicial proceedings, he or

⁷⁷ Human Rights Watch, ‘The Last Holdouts: Ending the juvenile death penalty in Iran, Saudi Arabia, Sudan, Pakistan and Yemen’, September 2008.

she has the right to be heard directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.⁷⁸

The Committee on the Rights of the Child, in General Comment No. 12,⁷⁹ has placed great emphasis on the right of the child to be heard at every stage of the juvenile justice process and takes the view that the voices of children involved in the juvenile justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfilment of their rights.⁸⁰

Box 12: Right to be heard

The Committee on the Rights of the Child, in General Comment No. 12, sees implementation of the right to be heard as requiring five steps. States should include these steps in their juvenile justice legislation and Codes of Conduct for juvenile justice personnel:

Preparation: Those responsible for hearing the child have to ensure that the child is informed about his or her right to express an opinion and about the impact that his or her expressed views will have on the outcome. The child must also receive information about the option of either communicating directly or through a representative and be aware of the consequences of this choice. The decision maker should adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be, and has to take account of the views of the child in this regard.

The hearing: The context in which the child exercises his or her right to be heard has to be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has decided to communicate.

Assessment of the capacity of the child: if the child is capable of forming his or her own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in the settlement of issues.

Information about the weight given to the views of the child: the decision maker should inform the child of the outcome of the process and explain how his or her views were considered. This information may prompt the child to file an appeal or a complaint.

Complaints, remedies and redress: legislation is needed to provide children with a right of appeal or complaints procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated.

Article 40 also reflects the important principle that part of the right to be heard is the right to choose when to be heard and what to say. Children have a right to take an active role in legal proceedings but ‘must not be compelled to give testimony or to confess guilt’. They have a right not to exercise their right to be heard.⁸¹ This is also enshrined in Article 13 of the CRC, which protects the right to freedom of expression.

⁷⁸ See also Rule 14 (2) of the Beijing Rules.

⁷⁹ Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, U.N. Doc. CRC/C/GC/12.

⁸⁰ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 12. See also Committee on the Rights of the Child, Day of General Discussion on the Right of the Child to be Heard, Forty-third session, 11–29 September 2006, paras. 39–55.

⁸¹ See Committee on the Rights of the Child, General Comment No. 12 (2009), para. 16.

It is important, therefore, that the right to be heard is clearly set out in legislation. Indeed, States are asked by the Committee on the Rights of the Child not only to incorporate into legislation the right of the child to express his or her views freely and provisions for those views to be given due weight,⁸² but also to “indicate the opportunities provided for the child to be heard in judicial and administrative proceedings affecting him or her, as well as the situations in which the child can intervene directly or through a representative or an appropriate body”.⁸³

Box 13: Ensuring the right to be heard

The Law for the Protection of Children and Adolescents (1998) in Venezuela states:

“The personal and direct exercise of this right [to be heard] is guaranteed to all children and adolescents, especially in any administrative or judicial proceeding leading to a decision that affects their rights, safeguards and interests, without any limitation other than those resulting from their best interests.”

If it is not in the child’s best interests to express their opinions personally, this right may be exercised through their parents or guardians, or others who, by their profession or special relationship of trust can convey the child’s opinions objectively. The law notes particularly that children with special needs are entitled to receive the support of persons of their choice to help them to express their views. Children also have the right not to express their views, particularly in judicial and administrative proceedings.

Source: Articles 80, 80(2), 80(3), 80(4) of Ley Organica para la Protección de Niños y Adolescentes, 1998.

It is not enough for a State merely to provide in its law that the child has a right to be heard within the juvenile justice system. The State also needs to ensure that children are given the right to express their views “freely” in situations affecting them. This means that children should be able to express themselves without any form of coercion, pressure, influence or restraint. The criminal justice system as a whole can be very intimidating and police officers, prosecutors and judges should be trained to interact with children in ways that enable children to express themselves.

Children need assistance to exercise their right to be heard within the juvenile justice system. The CRC provides for the right to legal or other appropriate assistance in the preparation and presentation of his or her defence, a right that should also be contained in domestic legislation. It is difficult to expect that a child could be heard without the assistance of parents and/or a legal representative. The child’s ability to communicate effectively is often restricted both physically and psychologically. For example, the child is often placed out of reach of the lawyer or parent when in court, and is not able, physically, to communicate while the trial is taking place. In addition, if the child does not speak the same language as the lawyer, this will be a clear barrier to communication. Generally, the language used in court is complex and difficult for a lay person, including a child, to follow. Further, if the lawyer is not trained in juvenile law or is over-familiar with the enforcement officials and not approachable to the child, this could be a psychological restriction on the right to express views freely. In all these instances, the child’s rights under Article 12 of the CRC could potentially be violated.

The right of the child to express his or her views is crucial when a child appears before a court charged with or being tried for a criminal offence. The ability of the child to express views has

⁸² Committee on the Rights of the Child, General Comment No. 10 (2007), para. 44.

⁸³ Committee on the Rights of the Child, General Guidelines regarding the form and contents of periodic reports to be submitted by States Parties under article 44: paragraph 1(b) of the Convention (1996), U.N. Doc. CRC/C/58, adopted by the Committee on the Rights of the Child at its 343rd meeting (13th session), paras. 42–44.

been treated as being synonymous with the ability of the child to defend him or herself. Where a child is too young to understand the nature of the court proceedings or to instruct a lawyer and discuss his or her own defence case, the ECHR has held that the trial will not constitute a “fair” trial (See Section 7.).

Genuine child participation requires that professionals reach out to children who face additional obstacles in participating in a hearing, including children with disabilities and children speaking foreign languages. In accordance with the principle of non-discrimination above, these children should be helped to participate in the same way as all other children.

Legislation must contain specific provisions covering the right to be heard both pre-trial and at trial (For more details on this, see Sections 3 and 7.).

Section 2: General principles of the CRC: Summary checklist

- Legislation should state that the principle of the best interests of the child applies to all aspects and operations of the juvenile justice system.
- Legislation should state that that in making any decision in relation to an individual child, any decision-maker has to give a primary consideration to the best interests of the child.
- If discrimination exists in the State, legislation may need to set out special measures to eliminate it. Legislation should place a clear duty on all professionals working in the juvenile justice system to address discrimination against children coming into conflict with the law and take all necessary steps to prevent it. For instance, no child should be put at a disadvantage as a result of not having the financial means to pay a fine.
- Legislation should prohibit the use of the death sentence and life imprisonment without possibility of release for any offence committed by a person under the age of 18.
- Legislation should promote the development of children who are in the juvenile justice system, including programmes and services for rehabilitation and re-integration. Legislation should contain provisions which ensure that the child's right to development is recognised even when the child is detained.
- Rules and regulations on regime and management of juvenile detention centres should impose a duty on the institution to promote the health and well-being of the child as well as the social, cultural and educational development of the child.
- Legislation should provide that the child has the right to be heard at every stage of the juvenile justice process (during the preparation, hearing, assessment of the capacity of the child, and during the complaints/appeals procedure).
- Legislation should place a duty on the court to give children's views due weight in accordance with the age and maturity of the child.
- Legislation should contain special measures to enable all children to participate effectively at all stages of the juvenile justice process.
- Secondary legislation should require that all juvenile justice professionals should receive training on how to interact with children in ways that enable children to express themselves freely.
- Practice guidance or codes of conduct should ensure that the court environment is "child-friendly" and enables children to participate in the proceedings.

3. General principles of the juvenile justice system

3.1. Purpose of interventions

Article 40(1) of the CRC provides that every child alleged as, accused of or recognised as having infringed the criminal law shall be treated in a manner which takes into account the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. This article mirrors Article 14(4) of the ICCPR, which requires States to take account of the desirability of promoting the rehabilitation of children in conflict with the law.

It is important that juvenile justice legislation contains sections or articles which make it clear that the purpose of any action taken in relation to a child who is recognised as having committed a criminal offence is to be directed towards reintegration of the child.

This principle is further complemented by additional principles listed below that all also contribute to promoting the child's reintegration into society: respect for the child's sense of dignity and worth, prohibition of torture and cruel, inhuman and degrading treatment and punishment, diversion from judicial proceedings and deprivation of liberty as a measure of last resort and for the shortest appropriate period of time.

3.2. The child's sense of dignity and worth

Article 40(1) sets out the general principles of a juvenile justice system and requires 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."

The Committee on the Rights of the Child, in General Comment No. 10, highlighted "fundamental principles" for dealing with children in conflict with the law, namely:

- "Treatment that is consistent with the child's sense of dignity and worth. This principle reflects the fundamental human right enshrined in Article 1 of the Universal Declaration of Human Rights.... This inherent right to dignity and worth ... has to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies and all the way to the implementation of all measures for dealing with the child;
- Treatment that reinforces the child's respect for the human rights and freedoms of others. This ... means that, within the juvenile justice system, the treatment and education of children shall be directed to the development of respect for human rights and

fundamental freedoms⁸⁴ ... [and] requires [the juvenile justice system to give] full respect for and implementation of the guarantees for a fair trial recognized in Article 40 (2),⁸⁵

- Treatment that takes into account the child's age and promotes the child's reintegration and the child's assuming a constructive role in society. This principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child. It requires that all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being, and the pervasive forms of violence against children;
- Respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented...⁸⁶

One of the best ways to ensure that children's dignity and worth are respected is through continued training of all staff working within the juvenile justice system. Rule 12.1 of the Beijing Rules provides that 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. This requirement should be contained in legislation. As police are the first point of contact with the juvenile justice system, it is most important that they act in an informed and appropriate manner. In some State police forces, working with children is seen as a low status position and is poorly paid, leading to low motivation amongst officers. It is important that States address this issue and recognise the value of police officers who specialise in working with children. Although Rule 12.1 of the Beijing Rules focuses particularly on the police, all professionals working with children in contact with the law should be training on how to best ensure respect to the child's sense of dignity and worth.

3.3. Prohibition of torture, cruel, inhuman or degrading treatment or punishment

Article 37 of the CRC provides that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment".⁸⁷ The provision mirrors that of Article 3 of the European Convention, Article 5 of the American Convention, Article 5 of the Banjul Charter, Article 16 of the African Charter on the Rights and Welfare of the Child and Article 13 of the Arab Charter. A clear prohibition to this effect should be contained in every State's juvenile justice legislation.

⁸⁴ See Article 29 (1) (b) of the CRC and, generally, Committee on the Rights of the Child, General Comment No. 1 (2001), The Aims of Education, U.N. Doc. CRC/GC/2001/1.

⁸⁵ See Section 7.

⁸⁶ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 13. The Committee has urged States to take effective measures to prevent such violence and to make sure that the perpetrators are brought to justice and follow-up the recommendations made in the report on the United Nations Study on Violence Against Children presented to the General Assembly in August 2006 (United Nations General Assembly, Rights of the child: Note by the Secretary-General (2006), U.N. Doc. A/61/299).

⁸⁷ See also United Nations General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, Vol. 1465, p. 85, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987. Hereinafter the Convention against Torture.

The right not to be subject to torture or other cruel, inhuman or degrading treatment or punishment contained in both Article 37(d) CRC and Article 3 of the European Convention has been interpreted as an absolute, non-derogable right by the ECHR, and as a right that applies regardless of the conduct or circumstances of the person or the nature of the offence.⁸⁸ In other words, whatever offence a child has committed, even if it is reprehensible, it cannot justify the use of torture or inhuman and degrading treatment or punishment. The use of the death penalty is regarded as falling within the definition of “cruel, inhuman or degrading treatment or punishment” and is prohibited by Article 37(a) CRC. Imposition of the death penalty would also constitute a violation of the right to life under Article 6 CRC. Once again, this prohibition must be contained in juvenile justice legislation.

3.3.1 What actions constitute torture?

Article 1 of the Convention against Torture provides that the term “torture” means “[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”⁸⁹

This Article applies to children and adults alike.

The distinction between torture and the other forms of prohibited treatment or punishment in Article 37 of the CRC includes a criterion of degree and intensity. In deciding whether a particular act or course of behaviour constitutes torture, inhuman or degrading punishment or treatment, the court will examine and take into account the individual circumstances of the victim, including the fact that the victim is a child. It has been argued that treatment that constitutes ill treatment for an adult, such as prolonged solitary confinement, may be a terrifying ordeal for a young child and amount to torture.⁹⁰

3.3.2 What actions constitute cruel, inhuman or degrading treatment or punishment?

There is no precise definition of cruel, inhuman or degrading “treatment” or “punishment”. However, unlike torture, treatment or punishment may occur not only as a result of deliberate action, but also from a failure to take action. There has been little discussion of the terms by the Committee on the Rights of the Child but the case law of the ECHR distinguishes between “inhuman” and “degrading”.

“Inhuman” treatment or punishment is premeditated conduct applied for a considerable time and

⁸⁸ See *D. v. United Kingdom*, No. 30240/96, [1997] ECHR 25; (1978) 24 EHRR 423, Council of Europe: European Court of Human Rights, 6 May 1997.

⁸⁹ Article 1 of Convention against Torture.

⁹⁰ Mann, N., ‘Report on Children: Torture and Power’, World Organisation Against Torture (OMCT) and Save the Children, 2000, p. 14.

resulting either in actual bodily injury or intense physical or mental suffering.⁹¹ In determining whether there has been “degrading” treatment or punishment the court will look at whether the object was to humiliate or debase the person concerned and whether it was intended to arouse fear, anguish or acute feelings of inferiority.⁹²

Box 14: Jurisprudence on forms of punishment

In *Curtis Francis Doebbler v. Sudan*, the applicants were a group of students who were convicted of violating “public order” under the Criminal Law for not being properly dressed and acting in “an immoral manner”. The punishment for some of the students was lashes. The African Commission on Human and People’s Rights found that the punishment violated Article 5 of the African Charter, which prohibits cruel, inhuman or degrading punishment, stating that “[t]here is no right for individuals, and particularly the Government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State-sponsored torture under the Charter and contrary to the very nature of this human right treaty.”

The Namibia Supreme Court, in *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State*, concluded that judicial sentences involving corporal punishment violated the Constitution’s prohibition on torture and cruel, inhuman or degrading treatment or punishment. In determining that corporal punishment falls under the definition of cruel inhuman or degrading treatment, the Court focused on “the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs, of the people of Namibia”.

The ECHR held in the case of *Tyrer v. the United Kingdom* that a sentence imposed on a child that he be beaten by a police officer with a cane on his buttocks amounted to degrading punishment.

The High Court of Fiji referenced the Namibian case and *Tyrer v. United Kingdom* in *Naushad Ali v. State*, a case examining the constitutionality of corporal punishment. The Court noted that “the interpretation of a constitution must reflect changes in society” and that “punishment and treatment of persons by State institutions that may have been condoned in the past may be offensive for the present,” and added that it was bound to interpret the Constitution in light of international human rights standards. The Court ruled that the provisions in the Penal Code and Criminal Procedure Code on corporal punishment violated the constitution.

In more general terms, the Inter-American Court of Human Rights, *Villagrán-Morales et al. v. Guatemala*, stated that all the circumstances of the case, including the age of the victims, should be taken into consideration in deciding whether or not torture has been inflicted and the scope of the torture.

Sources: *Curtis Francis Doebbler v. Sudan*, African Commission on Human and People’s Rights, Communication No. 236/2000, 29 May 2003, para. 42; *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State*, 1991 (3) SA 76, Supreme Court of Namibia, 5 April 1991, p. 1, 2, 40; *Tyrer v. The United Kingdom*, 5856/72, Council of Europe: European Court of Human Rights, 15 March 1978, paras. 28–35; *Naushad Ali v. State*, Criminal Appeal No. HAA 0083 of 2001, High Court of Fiji, 21 March 2002. In this case, the Appellant was a man who pled guilty to ‘carnal knowledge against the order of nature’ and was sentenced to imprisonment and six strokes of corporal punishment, p. 9, 22; *Villagrán-Morales et al. v. Guatemala*, Inter-American Court of Human Rights (IACrHR), 19 November 1999, para. 74.

The provisions of the CRC do not explicitly state that corporal punishment amounts to inhuman or degrading treatment or punishment, and there is no mention of corporal punishment in the *travaux préparatoires* of the Convention. However, the Committee on the Rights of the Child has noted that corporal punishment clearly conflicts with children’s right to respect for their dignity and worth and amounts to cruel and degrading treatment and punishment.⁹³ The Committee has consistently called for prohibition of all forms of corporal punishment within the

⁹¹ *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977.

⁹² *Ibid.*

⁹³ Committee on the Rights of the Child, General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, para. 2; and 37, inter alia) (2007), U.N.Doc. CRC/C/GC/8, paras. 20, 21.

judicial system and, in particular, as a judicial sanction. Legislation should contain a clear and absolute prohibition on the use of corporal punishment within the juvenile justice system.

In order to constitute inhuman or degrading treatment, the treatment suffered must reach a “minimum level of severity”. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the age and state of health of the child. As with torture, an action that might not amount to inhuman or degrading for an adult may reach that threshold for a child, such as being denied contact with the family for a specified period of time.

A court should consider all relevant factors in determining whether the minimum level of severity has been met. It is likely that beatings by police officers, guardians of custodial facilities or other officials, or the use of pain techniques on children will amount to cruel, inhuman or degrading treatment.⁹⁴

Prohibited forms of treatment for children that could amount to torture, cruel, inhuman or degrading treatment or punishment should be set out in legislation. These should include the use of solitary confinement, the use of pain techniques to restrain children, corporal punishment, deprivation of food and deprivation of contact with the family.⁹⁵

3.4. Dealing with children who come into conflict with the law without resorting to judicial proceedings

Article 40(3) of the CRC requires States to promote measures for dealing with children alleged as, accused of or recognised as having infringed the criminal law without resorting to judicial proceedings, whenever appropriate and desirable. In the opinion of the Committee on the Rights of the Child, the obligation of State Parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies, but is not limited to children who commit minor offences, such as shoplifting, other property offences with limited damage and first-time child offenders, through a range of community-based family support, diversion schemes and restorative justice programmes.⁹⁶ The Committee points out that such approaches avoid stigmatisation, have good outcomes for children and society and are proven to be more cost-effective.⁹⁷

Juvenile justice legislation should give the police, prosecutors and judges power to divert children immediately after the first contact and up to the first hearing. Legislation should ensure that children’s rights and legal safeguards are fully respected and protected in the process.

Diversion is discussed in detail in Section 5.

⁹⁴ See for instance, *R. (C.) v. Ministry of Justice* [2008] EWCA Civ 882, United Kingdom: Court of Appeal (England and Wales) Civil Division, 28 July 2008.

⁹⁵ Rule 67 of Havana Rules. See also the section on sentencing.

⁹⁶ See Committee on the Rights of the Child, General Comment No. 10 (2007), para. 25.

⁹⁷ *Ibid.*

Box 15: Recognising the importance of diversion for prevention

In Serbia, the law explicitly recognises the link between diversion and prevention:

“The purpose of a diversion order is to avoid instituting criminal proceeding against a juvenile or to suspend proceeding and/or, by application of the diversion order, to influence proper development of a juvenile, enhance his personal responsibility in order to avoid a relapse into crime in future.”

Source: The Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles, published in *Official Gazette of the Republic of Serbia*, No. 85/05, 2005, Art. 6 (Purpose of Diversion Orders).

3.5. Detention as a last resort and for the shortest appropriate period of time

Article 37(b) of the CRC provides that detention shall only be used as a last resort and for the shortest possible time. In addition, Rule 17 of the Beijing Rules provides that detention “shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response”.

Rule 2 of the Havana Rules add that “deprivation of the liberty of a juvenile [...] should be limited to exceptional cases.” Judges and other law-enforcement officials have a duty derived from these provisions to order deprivation of liberty only exceptionally, and when the above mentioned conditions are fulfilled. These restrictions to deprivation of liberty need to be clearly established by law. In order to assist judges and other law enforcement officials in implementing the CRC, the government should plan, establish, develop and fund alternatives to detention both before and after sentencing. The judges’ code of conduct or practice guidance should require that consideration be given to the use of non-custodial alternatives that exist within their area before making an order for either pre-trial detention or a custodial sentence (For further details on this principle, see Section 8.2.).

Section 3: General principles of the juvenile justice system: Summary checklist

- Legislation should make it clear that the purpose of any action taken in relation to a child who is alleged as, accused of, or recognised as having committed a criminal offence is to be directed towards reintegration of the child.
- Legislation should contain a complete prohibition on the use of torture, cruel, inhuman or degrading treatment or punishment.
- Legislation should contain a clear and absolute prohibition on the use of corporal punishment within the juvenile justice system.
- Legislation should set out and prohibit forms of treatment such as the use of solitary confinement, the use of pain techniques to restrain children, deprivation of food and deprivation of contact with the family.
- Legislation should give the police, prosecutors and judges power to divert children who admit an offence, at an early stage and prior to trial, providing that human rights and legal safeguards are fully respected. Diversion should be possible from the apprehension of the child until the final disposition hearing.
- Legislation should place a duty on central and/or local government to ensure adequate provision of diversion programmes and alternatives to deprivation of liberty in each local government area.
- Central and local government should also be given the power in law to contract with NGOs and other providers to deliver alternatives to deprivation of liberty and restorative justice programmes.
- Legislation should contain a provision stating that detention shall only be used as a measure of last resort and for the shortest appropriate time. More specifically, it should state that deprivation of personal liberty shall not be imposed unless the juvenile is convicted of a serious act involving violence against another person or is a persistent offender and there is no other appropriate response.

4. Minimum guarantees and rights during the pre-trial stage

This section sets out the minimum guarantees or protections provided to children by the juvenile justice system in the pre-trial phase. These basic guarantees and safeguards can be found in the CRC, the ICCPR, the European Convention, the Banjul Charter, the African Charter on the Rights and Welfare of the Child, the Arab Charter and the American Convention. They are applicable from the moment a juvenile is suspected of committing a crime.

The minimum guarantees in the CRC are amplified and given greater content in the Beijing Rules, which set out minimum standards of practice for all stages of the juvenile justice process, starting with the apprehension of the child.

4.1. Presumption of innocence

Article 40(2)(b)(i) of the CRC provides that every child “shall be presumed innocent until proven guilty according to law”. The presumption of innocence is a fundamental principle in human rights law and can be found both in the Universal Declaration of Human Rights (UDHR)⁹⁸ and in Article 40(2)(b) of the CRC.⁹⁹ The Committee on the Rights of the Child pointed out in General Comment No. 10 that “the presumption of innocence is fundamental to the protection of the human rights of children in conflict with the law”.¹⁰⁰ It means that the burden of proving that the child committed an offence lies with the prosecution.

Box 16: Innocent until proven guilty

Kenya: “Every person who is charged with a criminal offence - shall be presumed to be innocent until he is proved or has pleaded guilty.”

Canada: “Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”

Brazil: “No one shall be considered guilty before the issuing of a final and unappealable penal sentence.”

France: “Every person suspected or prosecuted is presumed innocent as long as his guilt has not been established. Attacks on his presumption of innocence are proscribed, compensated and punished in the circumstances laid down by statute.”

Sources: The Constitution of Kenya (revised edition 2001), Art. 77(2); Canadian Charter of Rights and Freedoms, schedule B to the Canada Act 1982 (UK), c. 11, Sec. 11(d); Constitution of the Federal Republic of Brazil, 1988, Art. 5; French Criminal Procedure Code, Preliminary Article.

“The child alleged as or accused of having infringed the penal law has the benefit of doubt and is only [to be found guilty] if these charges have been proven beyond reasonable doubt. The child

⁹⁸ Article 11(1) of UDHR.

⁹⁹ See also Article 14(2) of the ICCPR and Article 6(2) of the ECHR.

¹⁰⁰ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 42.

has the right to be treated in accordance with this presumption and it is the duty of all public authorities or others involved to refrain from prejudging the outcome of the trial.”¹⁰¹

In *R. v. Oakes*, the Supreme Court of Canada held that “[t]he presumption of innocence is crucial. It ensures that until the State proves an accused’s guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.”¹⁰²

4.2. Right to be informed of the reason for arrest and charges

International standards contain the fundamental right that those who are arrested and/or charged must be informed of the reason for that arrest or charge. Specifically, Article 9(2) of the ICCPR provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest.¹⁰³ This right applies equally to children and adults.

The CRC does not specifically address the right to be informed of the reasons for arrest. However, Article 40 of the CRC does require that every child shall be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians.¹⁰⁴

Box 17: Explaining the charges and reasons for arrest so that they are understood

Belize: Juvenile Offenders Act 8(1): “Where a child or young person is brought before a juvenile court for any offence, it shall be the duty of the court as soon as possible to explain to him in simple language the substance of the alleged offence.”

Philippines: Juvenile Justice and Welfare Act 2006 Sec. 21: Procedure for Taking the Child into Custody: “From the moment a child is taken into custody, the law enforcement officer shall: (a) Explain to the child in simple language and in a dialect that he/she can understand why he/she is being placed under custody and the offence that he/she allegedly committed; (b) Inform the child of the reason for such custody and advise the child of his/her constitutional rights in a language or dialect understood by him/her.”

Sources: Juvenile Offenders Act, Chapter 119, Revised Edition 2000; Juvenile Justice and Welfare Act 2006, Republic Act No. 9344.

The Committee on the Rights of the Child, in General Comment No. 10,¹⁰⁵ defines “promptly and directly” as meaning as soon as possible. The moment at which the child or his parents should be informed of the charges is when the police, the prosecutor or the judge initially takes procedural steps against the child. However, the need to inform “promptly and directly” also applies where the authorities decide to deal with the case without resorting to judicial proceedings.

¹⁰¹ Ibid.

¹⁰² *R. v. Oakes*, [1986] 1 S.C.R. 103, Supreme Court of Canada, 28 February 1986, p. 22.

¹⁰³ See also Article 5(2) of the ECHR; Article 17(2)(c)(ii) of the African Charter on the Rights and Welfare of the Child; and Article 7(4) of the American Convention.

¹⁰⁴ Article 40(2)(b)(ii) of CRC.

¹⁰⁵ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 47.

Requiring the child and, where appropriate, his/her parents, to be informed is part of the overall requirement contained in Article 40(2)(b)(ii) of the CRC that legal safeguards should be fully respected. The child should be informed in a language that he or she understands. This may mean using an interpreter and presenting the information in a foreign language. It also requires that the child be informed in a manner and form of language that the child can understand. Formal legal language and jargon should be avoided.

Providing the child with an official document is not enough and an oral explanation is generally necessary. The authorities should not leave this task to the parents or legal guardians or the child's legal or other assistance. Legislation should contain an article or section placing a duty on the relevant authorities (e.g. police, prosecutor, judge) to ensure that the child, parent or legal guardian understands each charge brought against the child and the possible consequences.¹⁰⁶

Box 18: Explaining the child's rights

In *R. v. L.T.H.*, the Supreme Court of Canada upheld an appeal that the child defendant had not fully understood his rights when he waived the right to have an attorney and to consult with an appropriate adult.

Under section 146 of the Youth Criminal Justice Act, a young person's statement is admissible only when:

- (a) the statement was voluntary;
- (b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that (i) the young person is under no obligation to make a statement, (ii) any statement made by the young person may be used as evidence in proceedings against him or her, (iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and (iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;
- (c) the young person has, before the statement was made, been given a reasonable opportunity to consult (i) with counsel, and (ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and
- (d) if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

Section 146(4) allows the child to waive the right to consult with counsel or an adult. In this case, the child declined access to counsel, his parents or another appropriate adult and signed a form waiving his rights. However, the Court held that for a waiver of rights and subsequent statement to be admissible, law enforcement officer must explain the child's rights "in language appropriate to the particular young person's age and understanding".

The Court also directed that police officer should "take into account the level of sophistication of the young detainee and other personal characteristics relevant to the young person's understanding" to ensure that the child fully understand the consequences of his decision to waive rights or give a statement.

Sources: *R. v. L.T.H.*, 2008 SCC 49, Supreme Court of Canada, 11 September 2008, p. 15, 18; Canadian Youth Criminal Justice Act, 2002, c. 1; Under Section 146(3) of the Youth Criminal Justice Act, 2002, "the requirements set out in paragraphs (2)(b) to (d) do not apply in respect of oral statements if they are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements".

¹⁰⁶ Ibid., para. 48.

4.3. Right to have parents or legal guardians immediately informed of arrest

The Committee on the Rights of the Child, in General Comment No. 10,¹⁰⁷ echoing Rule 10.1 of the Beijing Rules,¹⁰⁸ recommends that States explicitly provide in law for the maximum possible involvement of parents or legal guardians in the proceedings against the child. In order to promote parental involvement, parents should be notified of the apprehension of their child as soon as possible.

4.3.1 Should parents be present when a child is questioned as a suspect?

Rule 15.2 of the Beijing Rules provides that the parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend in the interest of the child. The parents or guardian may, however, be denied participation by the competent authority if such exclusion is necessary in the interest of the child.

Most States not only permit parents or a guardian to attend, but require that they, or another appropriate adult, be present during any questioning by police. In practice, the right to have a parent present is only meaningful if the parent is notified of the situation and if the parent is given enough time to get to the place of questioning. It is reasonable to give the parents a period of time to reach the police station, and questioning should not start until the parent has arrived.

If a parent cannot attend in a reasonable time, or cannot be contacted, or refuses to attend, or is charged with the same offence or it is inappropriate for the parent to be present, an alternative adult should be found for the child. Ideally, this should be a relative or a close family friend, but this is not always possible. In some States, NGOs provide a bank of trained people who are willing to fulfil this task, sometimes known as an “appropriate adult” or “responsible adult”. In the absence of such trained people, a teacher or social worker is acceptable.

Legislation should place a duty on the police to develop and keep under review either a practice protocol or a code of practice which should contain details of:

- when the parent must be phoned;
- how many times the police should phone;
- what to do when the parent cannot be contacted;
- how long it is “reasonable” to wait;
- how long a child should be detained before being questioned; and
- how to find and ensure the attendance of an appropriate person.

Legislation should also contain a provision covering who will be regarded as an appropriate person in the absence of a parent and any training that is required of them.

The presence of a parent will provide emotional support to the child and ensure that he or she does not have to face what is likely to be a very stressful situation on his or her own. In addition,

¹⁰⁷ Ibid., para. 54.

¹⁰⁸ Rule 15.2 provides that “upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.”

one of the purposes of having a parent present is to ensure that the child understands what is being said, both in terms of content and language, and that the child is enabled to express him or herself clearly. Although children are capable of providing reliable evidence, they are, because of their age, more susceptible to pressure from authority, and thus to providing information that may be unreliable, misleading or self-incriminating. To ensure that the evidence given by the child is voluntary and not coerced, a parent or other appropriate adult should always be present when a child is questioned about an offence.

The law should set out the role of the parent or other appropriate adult.¹⁰⁹ The police should also be placed under a duty to inform the parent of his or her role in the police interview. The parent or appropriate adult should be informed that he or she should not just act simply as an observer, but should:

- advise the child being questioned;
- observe whether or not the interview is being conducted properly and fairly; and
- facilitate communication with the child being interviewed.

Box 19: Right to parental presence at the police station

Uganda: The Uganda Children Act (1996) requires the presence of parents or guardians when children are interviewed by the police – unless it is not in the best interests of the child:

(3) As soon as possible after arrest, the child’s parents or guardians and the secretary for children’s affairs of the local government council for the area in which the child resides shall be informed of the arrest by the police.

(4) The police shall ensure that the parent or guardian of the child is present at the time of the police interview with the child except where it is not in the best interests of the child.” If the child’s parent or guardian cannot be contacted, the law requires that the police contact a probation officer, social welfare officer or other authorised person to attend the police interview.

Mauritania: The Law on the Penal Protection of the Child states: “If a child is placed in custody, the police must notify the parents, tutor or the person or service responsible for the child of the measures to which the child is subject as soon as possible.”

Turkmenistan: The Law on the Guarantees of the Rights of the Child requires the ‘immediate notification’ of a child’s parents or guardian when the child is detained.

Ghana: The Law on Juvenile Justice states that “[a]t least one parent, a guardian or a close relative of a juvenile shall be informed of the arrest of the juvenile by the police as soon as possible after the arrest.”

Sources: Uganda Children’s Act 1996, Sec. 89; Law on the Penal Protection of the Child (Ordonnance portant protection pénale de l’enfant), Decree No. 2005/015, Art. 101 (Mauritania); Law of Turkmenistan on the Guarantees of the Rights of the Child, adopted by the Parliament Session, on 5 July 2002), Art. 32(2); Law on Juvenile Justice, 2003 (ACT 653) Sec. 11(1)4.

In some countries, the law requires that, in addition to parents or guardians, social services also be informed of the child’s apprehension. This allows early intervention work to be undertaken and can facilitate cross-disciplinary approaches to offending behaviour by a child.

4.4. Right to legal or other appropriate assistance upon arrest and during questioning

The presence of parents alone may not be sufficient to ensure that children’s rights are protected at the police station. It is always in children’s best interests to ensure that a lawyer is present

¹⁰⁹ For more information about appropriate adult schemes for use during trial, see Section 7.3.

when a child is questioned about an alleged offence, and this right should be clearly contained within the legislation.

The right to legal and other appropriate assistance is found in a range of international instruments. These set out the rights of a child to assistance when he or she is being questioned as a suspect as well as when the child is charged or stands trial.¹¹⁰ Article 37 of the CRC provides that children shall have prompt access to legal and other appropriate assistance upon arrest. In addition, Article 40(2)(b)(ii) of the CRC 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”.

While international standards refer to the right to “legal *or* other appropriate assistance”,¹¹¹ 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.¹¹² The purpose of legal assistance when the child is first questioned by either the police or prosecutors is once again to ensure independent scrutiny of the methods of interrogation used and to ensure that the evidence is voluntary and not coerced.¹¹³ A legal representative can ensure that inappropriate questions are not asked and that the child is treated in a manner suitable and appropriate to the child’s age and maturity. The lawyer can also argue for diversionary measures to be applied where appropriate.

While the CRC does not address the issue of “free” legal aid, the ICCPR enshrines the right to free legal assistance for the child if he or she, or the parents, cannot pay for a lawyer. The extent to which States provide free legal aid varies significantly. Without some form of legal aid, however, it is difficult to ensure that effective legal representation will be available to the child throughout the legal process. In some States, local NGOs and organisations specialising in juvenile justice provide duty lawyers who will attend to represent the child when he or she is being questioned after being detained by the police. Children need to be supported by a lawyer who understands the juvenile justice system and the unique problems faced by children in conflict with the law.

In order to implement the right to legal or other appropriate assistance fully, legislation should contain provisions that ensure a child has:

- A right to legal advice at any time that he or she is in conflict with the law;
- A right to legal representation when the child is alleged to or is being accused or recognised as having committing a criminal offence.
- A right to consult with his or her lawyer before being questioned and at any other time when proceedings are on-going;
- A right not to be questioned until a lawyer is present;
- A right to free representation where the child cannot pay for representation.

¹¹⁰ See also Section 7.3.

¹¹¹ Article 40(2)(b)(ii) of CRC.

¹¹² See Article 40(2)(b)(vii) of the CRC.

¹¹³ See Committee on the Rights of the Child, General Comment No. 10 (2007), para. 58. See also Vienna Guidelines, para. 16.

The body responsible for providing legal representation should be clearly specified.

Legislation or a police protocol/prosecutor protocol or code of practice for either body should impose a duty on the police/prosecutor to assist the child in obtaining legal representation when the child or parents have been unable to find a lawyer or do not have the ability to pay for one. The legislation, protocol or code of practice should set out the circumstances and the time limit within which the police or prosecutor should undertake this task (for example, the child and parents should be asked on arrival at the police station whether they wish to be represented by a lawyer of their own choice. Where the child and/or parent do not wish to do so, a lawyer should be contacted to represent the child immediately). The bar association and other professional bodies should be encouraged to set minimum quality standards for lawyers representing children so that an effective service is provided.

4.4.1 Child-sensitive police questioning

Legislation needs to ensure that children are protected from oppressive and unfair questioning. There are certain ways of questioning that are particularly unacceptable when dealing with children, such as leading questions, which may confuse or intimidate a child. If such questions are put to the child, the lawyer (or parent or other appropriate adult) should consider intervening to help the child think clearly about his or her response.

Legislation should set out restrictions on the questioning of children, and should cover such issues as the number of hours for which a child can be questioned, the breaks that should be offered and the time of day when questioning should be permitted.

Box 20: Limiting the duration of questioning

The Criminal Procedure Code of Georgia provides that “the interrogation of a juvenile suspect and accused may not continue for more than 2 hours without recess, and for more than 4 hours during a day. If the juvenile shows obvious signs of fatigue, the interrogation shall be stayed before the term.”

Source: Criminal Procedure Code 2007, Art. 647 (Georgia).

Children have an increased susceptibility to interrogation techniques compared to adults. They are more likely to be manipulated and are more likely to believe a police officer who tells them “if you confess, you can go home.” They are also more likely to answer a question to please an adult, or to say what the police want to hear. As a result, police should avoid using suggestive techniques during interrogation and, in accordance with Rule 12 of the Beijing Rules, legislation should provide that only police who have been specially and regularly trained to work with children should undertake such questioning. Rule 12 of the Beijing Rules also provides that in large urban areas there should be a special unit of the police force to work specifically with children. This element is considered of the utmost importance as the police are the first point of contact with children in the juvenile justice system.

Questioning is particularly difficult if the child does not speak the questioner’s language or does not speak it well. The Committee on the Rights of the Child has noted in General Comment No. 10 how important it is that any interpreter used has been trained to work with children, because

the use and understanding of their mother tongue might be different from that of adults.¹¹⁴ Lack of knowledge or experience may impede the child's full understanding of the questions raised, and interfere with the right to a fair trial and to effective participation. The Committee also drew the attention of States Parties to children with speech impairment or other disabilities.¹¹⁵ In line with the spirit of Article 40(2)(vi) of the CRC, and in accordance with the special protection measures provided to children with disabilities in Article 23 of the CRC, the Committee recommended that such children are provided with adequate and effective assistance by well-trained professionals, e.g. in sign language.

4.4.2 Avoiding coercive questioning

Legislation should contain a provision stating that a child has the right not to be compelled to give testimony or to confess or acknowledge guilt.¹¹⁶

Where questioning has been oppressive and the child has been compelled, legislation should also make it clear that the admission or confession will not be admissible in court.¹¹⁷ "Compelled" should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The child's lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment, may lead the child to a confession that is not true. This may become even more likely if rewards are promised, such as "you can go home as soon as you have given us the true story" or lighter sanctions or release are promised.¹¹⁸

The court or other judicial body, when considering the voluntariness and reliability of an admission or confession by a child, must take into account the age of the child, the length of custody and interrogation, and the presence of legal or other counsel, parents or independent representatives for the child.¹¹⁹

4.5. Right to the prompt attention of a judge or another authorised officer

Article 9(3) of the ICCPR requires that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.¹²⁰ The Human Rights Committee has commented that the importance and the meaning of "promptness" under Article 9(3) is that it brings "the detention of a person charged with a criminal offence under judicial control".¹²¹

¹¹⁴ Criminal Procedure Code 2007, Art. 647 (Georgia), para. 62.

¹¹⁵ *Ibid.*, para. 63.

¹¹⁶ See Article 14(3)(g) of the ICCPR and Article 40(2)(b)(iv) of the CRC.

¹¹⁷ Article 15 of Convention against Torture.

¹¹⁸ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 57.

¹¹⁹ *Ibid.*, para. 58.

¹²⁰ See also Article 5(3) of the ECHR: "Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial".

¹²¹ *Kulomin v. Hungary*, Communication No. 521/1992, Human Rights Committee, 22 March 1996 in Report of the UN Human Rights Committee, 1997, General Assembly Official Records Fifty-first Session Supplement No. 40, A/51/40, (vol. II), p. 80, para. 11.2.

The safeguard contained in Article 9(3) of the ICCPR is reflected in Article 37(d) of the CRC, which gives every child deprived of his or her liberty the right to challenge the legality of that deprivation before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. Rule 10.2 of the Beijing Rules expands upon this right and requires that a judge or other competent official or body shall, without delay, consider the issue of release.¹²² Neither the CRC nor the Beijing Rules set out any time limits for detention before bringing the child before a court, but the Committee on the Rights of the Child has taken the view that, in such cases, the child should be brought before a competent authority to examine the legality of (the continuation of) deprivation of liberty within 24 hours.¹²³

Box 21: Length of time before bringing before a competent judicial body

A Model Law on Juvenile Justice drawn up by the Centre for International Crime Prevention (now known as the United Nations Office on Drugs and Crime (UNODC)) sets the time period for bringing a child before a competent judicial body at 24 hours.

This principle is reflected in the Kenya Children's Act 2001, "Where a child is apprehended with or without a warrant on suspicion of having committed a criminal offence he shall be brought before the court as soon as practicable; Provided that no child shall be held in custody for a period exceeding twenty four hours from the time of his apprehension, without the leave of the court".

Source: No. 8 of Kenya Children's Act 2001, Fifth Schedule, 4(1).

The Committee on the Rights of the Child points out that internationally there is a consensus that for children in conflict with the law "the time between the commission of the offence and the final response to this act should be as short as possible."¹²⁴ The longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatised. The Committee has recommended¹²⁵ that States Parties should set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body. These time limits should be much shorter than those set for adults. But, at the same time, decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected. Legislation should, therefore, contain time limits for each of these steps.

In a report for the case of *T. and V. v. United Kingdom*¹²⁶ in the ECHR, a professor of child psychiatry,¹²⁷ described the impact of delay on young defenders as follows "[o]ne serious consequence of the long time involved in trial means that there is an inevitable delay in providing the psychological care and therapeutic help that is needed. A child of ten has many years of psychological development still to come and it is most important that there is not a prolonged hiatus when this is impeded by the trial process. In particular, when children have

¹²² See also Article 5(3) of the ECHR: "Everyone arrested or detained ... shall be entitled to trial within a reasonable time or to release pending trial".

¹²³ See Committee on the Rights of the Child, General Comment No. 10 (2007), para. 83.

¹²⁴ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 51.

¹²⁵ *Ibid.*, para. 52.

¹²⁶ *T. and V. v. United Kingdom*, No. 24888/94; [1999] ECHR 2; No. 24724/94 (2000) 30 EHRR 121, Council of Europe: ECHR, 1999.

¹²⁷ Sir Michael Rutter, Institute of Psychiatry, University of London.

committed a serious act, [...] it is most important that they are able to come to terms with the reality of what they have done and with all that that means. That is not possible at a time when a trial is still underway and guilt has still to be decided by the court. Thus, I conclude, that the very prolonged nature of the trial process is bound to be deleterious for a child as young as ten or eleven (or even older).”¹²⁸ (For a more detailed discussion of the principle of undue delay, see Section 7.10.)

¹²⁸ *T. and V. v. United Kingdom*, No. 24888/94; [1999] ECHR 2; No. 24724/94 (2000) 30 EHRR 121, Council of Europe: ECHR, 1999, para. 19.

Section 4: Minimum guarantees and rights during the pre-trial stage: Summary checklist

- All the minimum guarantees should be clearly and fully set out in the legislation, using the language of the CRC and other international standards, as closely as possible.
- Legislation should contain an article or section stating that a child alleged as or accused of having committed an offence is to be regarded as innocent until proven guilty.
- Legislation should provide that any child who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest.
- Legislation should provide that the relevant authorities (police, prosecution and judge) have a duty to ensure that the child, parent or legal guardian understands each charge brought against the child and the possible consequences.
- Legislation should provide that the child has a right to an interpreter when being informed of the reasons for arrest if the child is unable to understand the language used. Legislation should also require interpreters to be provided for children who don't speak the native language or have speech and language impairments.
- Legislation should require that there should be an adequate pool of trained interpreters to work with children.
- Legislation should place clear duties on the police to notify the parents within a fixed time period and the steps that need to be taken to satisfy this duty of notification. These should include that:
 - Parents must be notified that the police have taken their child to the police station immediately on arrival.
 - The police must not question a child until parents have been given reasonable time to attend at the police station.
 - If the police cannot contact a parent, the parent cannot attend within a reasonable time or the parent refuses to attend, the police must try to contact a relative or family friend. The parent or child should be asked to name such a person.
 - Where it is not possible to contact a relative or family friend, or it is not possible for that person to attend, or he or she refuses to attend, the child should only be questioned in the presence of an appropriate person experienced in working with children.
- Legislation should also place a duty on the police to develop and keep under review either a practice protocol or a code of practice which should contain details of:
 - when the parent must be phoned;
 - how many times the police should phone;
 - what to do when the parent cannot be contacted;
 - how long it is "reasonable" to wait;
 - how long a child should be detained before being questioned; and
 - how to find and ensure the attendance of an appropriate person.
- Legislation should provide that a child can only be questioned about an alleged offence in the presence of a parent or other appropriate adult.
- The police or investigator's code of conduct or operational rules should require that an officer must inform the parent or other appropriate adult of his or her role.
- Legislation should contain provisions that ensure a child has:

- a right to legal advice at any time that he or she is in conflict with the law;
 - a right to legal representation when the child is alleged to or is being accused or recognised as having committed a criminal offence;
 - a right to consult with his or her lawyer before being questioned and at any other time when proceedings are on-going;
 - a right not to be questioned until a lawyer is present;
 - a right to free representation where the child cannot pay for representation; and
 - that the body responsible for providing legal representation should be clearly specified.
- Legislation or a police protocol/prosecutor protocol or code of practice for either body should impose a duty on the police/prosecutor to assist the child in obtaining legal representation when the child or parents have been unable to find a lawyer or do not have the ability to pay. The legislation, protocol or code of practice should set out the circumstances and the time limit within which the police or prosecutor should undertake this task.
 - The bar association and other professional bodies should be encouraged to set minimum quality standards for lawyers representing children so that an effective service is provided.
 - Legislation should provide for the establishment of a special child unit of the police force, at least in urban areas.
 - Legislation should require that only police who have received training should question children.
 - Legislation needs to ensure that children are protected from oppressive and unfair questioning.
 - Legislation should set out restrictions on the questioning of children, and should cover such issues as the number of hours for which a child can be questioned, the breaks that should be offered and the time of day when questioning should be permitted.
 - Legislation should contain a provision stating that a child has a right not to be compelled to give testimony or to confess or acknowledge guilt. Where questioning has been oppressive and the child has been compelled legislation should make it clear that the admission or confession will not be admissible in court.
 - A police protocol or code of practice on working with children in conflict with the law should contain information on how police can identify disabilities in children and the action that must be taken in relation to such a child, including cooperation with social services.
 - Legislation should provide that a child who is apprehended and held by the police shall be taken before a court no later than 24 hours from the time of apprehension.
 - Either primary or secondary legislation should also set out the time limits for the period between commission of the offence and completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child and the final adjudication and decision by the court.

5. Alternatives to judicial proceedings: Diversion

The CRC requires States to develop procedures that allow children to be dealt with without resorting to judicial proceedings or a trial (“diversion”), wherever appropriate and desirable, providing that human rights and legal safeguards are fully respected.¹²⁹ States should consider introducing a system of “stepped” responses for children who commit criminal offences, which include taking no further action, giving warning to children, pre-trial diversion and, as a last resort, trial.

The Committee on the Rights of the Child recommends that the law contains specific provisions indicating in which cases diversion is possible, and that the powers of the police, prosecutors and/or other agencies to make decisions in this regard be regulated and reviewed, in particular to protect the child from discrimination.¹³⁰

5.1. No intervention

Where the offence is of a non-serious nature, and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner,¹³¹ Rule 5(1) of the Tokyo Rules¹³² specifically provides that “where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender (drop the case) if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims.”

5.2. Warnings and cautions

A system of formal or informal warnings or “cautions” should also be available. Many children having been warned about criminal behaviour are unlikely to offend again.

¹²⁹ Article 40(3)(b) of CRC; see also Rules 6 and 11 of the Beijing Rules.

¹³⁰ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 27.

¹³¹ Rule 11, Commentary, of Beijing Rules.

¹³² Tokyo Rules.

Box 22: Police powers to issue formal warnings

Under the Youth Criminal Justice Act 2002, police in Canada “shall, before starting judicial proceedings or taking any other measures under this Act against a young person alleged to have committed an offence, consider whether it would be sufficient, having regard to the principles set out in section 4, to take no further action, warn the young person [or], administer a caution, if a program has been established [by the Prosecutors]....”

In England and Wales, to keep young offenders out of the youth justice system and provide them with support to stop offending, police can make use of pre-court measures, such as “reprimands” and “final warnings”. The police can impose these measures if:

- “(a) a constable has evidence that a child or young person (‘the offender’) has committed an offence;
- (b) the constable considers that the evidence is such that, if the offender were prosecuted for the offence, there would be a realistic prospect of his being convicted;
- (c) the offender admits to the constable that he committed the offence;
- (d) the offender has not previously been convicted of an offence; and
- (e) the constable is satisfied that it would not be in the public interest for the offender to be prosecuted.”

Reprimands are an oral warning that can be given for minor offences and in cases where the young person has not previously been warned. Final warnings are for more serious offences or where the young person has been reprimanded previously. The imposition of a final warning results in the young being referred to the Youth Offending Team (a multi-agency body set up to tackle juvenile offending at local level) which assesses the young person and develops programmes and interventions to prevent further offending.

5.3. Use of care/welfare procedures

Some States use “care” as a response to juvenile offending. Where a child is found to have committed a criminal offence, a court or welfare body can order that the child be removed from his or her parents into the care of another individual or institution. That individual may be a family member or a foster parent, but may also include a residential children’s home. Placements may be for a specified time, but are often until the child reaches majority or has finished compulsory schooling, and can thus be for a considerable period of the child’s life. It is imperative that where a welfare body hearing a criminal matter has the power to remove a child from the family, it is clear in the legislation that all the due process guarantees contained in the CRC are applicable, especially the requirement that the child be legally represented and that placement in a closed institution should only be a measure of last resort and for the shortest appropriate period of time. A welfare body should only impose a measure against the child in relation to the criminal matter if it is *proved* that the child has committed the alleged offence. In so finding, the welfare body should apply the same standard of proof that applies in a criminal court.

A child should only be removed from his or her family where it is necessary to do so to protect the child or to protect others from serious harm, and it is in the child’s best interests. A mere failure to prevent the child committing a criminal offence is not generally sufficient to meet the threshold for removal of the child nor is the fact that the child has committed an offence.

States that use care orders should consider leaving the child at home in the care of the parents but impose conditions that support the parents and the child, for instance, a requirement on the parents to work with the social worker on behaviour management.

5.4. Pre-trial diversion: Legal safeguards

Where the child's offending behaviour is such, that "no intervention" or an informal or formal warning are not appropriate responses, legislation should place a duty on the police, prosecutor or judge to consider diversion of the child into a range of measures to address offending behaviour rather than proceeding with the prosecution and charge or trial of the child.

Diverting the child does not mean that the offending behaviour of the child is ignored. Rather, it allows steps to be taken to identify the needs of the child and tackle the root causes of the child's behaviour in order to prevent further offending. The CRC provides that diversionary measures may include care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care.¹³³ Measures often include social welfare or community reintegration services and restorative justice programmes. Projects and programmes are often run by NGOs, civil society groups and community groups, as well as national and local state bodies.

Legislation should permit diversion at any point up to the time that the formal trial begins. In order for diversion to work effectively, the police, prosecutors and other agencies dealing with juvenile cases (including the court) need to have legal authority to dispose of cases without resorting to a formal hearing before the court.¹³⁴ Thus, juvenile justice legislation should contain specific provisions indicating in which cases diversion is possible.¹³⁵ It should also make it clear that diversion does not need to be limited to minor offences,¹³⁶ nor just to first time offenders,¹³⁷ but should be widely used when dealing with children. Legislation should also set out which bodies can decide on diversion and how these decisions are reviewed and regulated.¹³⁸

To ensure that human rights and legal safeguards are maintained, legislation should provide that:

- a) Diversionary measures should only be imposed where there is compelling evidence that the child actually committed the offence and he or she has freely admitted responsibility.¹³⁹ It is not sufficient that the bodies and agencies deciding on the diversionary measure only suspect that the child has committed an offence.
- b) When a child does make an admission of guilt, and is offered a diversionary measure, this must not be used against the child in any subsequent legal proceedings.¹⁴⁰
- c) The child must provide consent to the diversion measure freely, voluntarily and

¹³³ Article 40(4) of CRC.

¹³⁴ Rule 11.2 of Beijing Rules.

¹³⁵ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 27.

¹³⁶ Rule 11, Commentary, of Beijing Rules.

¹³⁷ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 25.

¹³⁸ *Ibid.*, para. 27.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

in writing.¹⁴¹

d) Prior to consenting to the diversion, the child must have an opportunity to seek legal or other appropriate assistance, to discuss the appropriateness and desirability of the diversion offered.¹⁴²

e) The child's failure to complete his or her diversionary measure may legitimately lead to the authorities restarting their case, but successful completion of the diversion measure by the child will result in a final and definite closure of the case.¹⁴³

Box 23: Legal safeguards in diversion

One of the aims of the Youth Criminal Justice Act 2002 was to reduce the use of trial for young people in Canada by the increased use of diversionary measures. The Act places an obligation on police to consider the use of diversion (extrajudicial sanctions) in every case and enshrines the legal safeguards that have to be upheld in imposing these measures:

(1) An extrajudicial sanction may be used to deal with a young person alleged to have committed an offence only if the young person cannot be adequately dealt with by a warning, caution or referral [...] because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances.

(2) An extrajudicial sanction may be used only if:

(a) it is part of a programme of sanctions that may be authorized by the Attorney General or authorized by a person, or a member of a class of persons, designated by the lieutenant governor in council of the province;

(b) the person who is considering whether to use the extrajudicial sanction is satisfied that it would be appropriate, having regard to the needs of the young person and the interests of society;

(c) the young person, having been informed of the extrajudicial sanction, fully and freely consents to be subject to it;

(d) the young person has, before consenting to be subject to the extrajudicial sanction, been advised of his or her right to be represented by counsel and been given a reasonable opportunity to consult with counsel;

(e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he or she is alleged to have committed;

(f) there is, in the opinion of the Attorney General, sufficient evidence to proceed with the prosecution of the offence; and

(g) the prosecution of the offence is not in any way barred at law.

(3) An extrajudicial sanction may not be used in respect of a young person who:

(a) denies participation or involvement in the commission of the offence; or

(b) expresses the wish to have the charge dealt with by a youth justice court.

(4) Any admission, confession or statement accepting responsibility for a given act or omission that is made by a young person as a condition of being dealt with by extrajudicial measures is inadmissible in evidence against any young person in civil or criminal proceedings.

Source: Canada Youth Criminal Justice Act 2002, Sec. 10.

The State must establish safeguards that minimise the potential for coercion and intimidation: children should not feel pressured into consenting to diversion programmes.¹⁴⁴ The child must be

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ The Committee on the Rights of the Child, in General Comment No. 10, para. 27, states that although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as 'criminal' records and a child who has been previously diverted should not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time e.g. for a maximum of one year to the competent authorities authorised to deal with children in conflict with the law.

¹⁴⁴ Rule 11.3, Commentary, of Beijing Rules.

provided with “adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out or complete the measure” prior to consenting to the diversion.¹⁴⁵ States should also consider requiring the parents or legal guardians of the child to consent to the diversion in particular when the child is under 16 years old.¹⁴⁶ In addition, children should be given the opportunity to express their views concerning the (alternative) measures that may be imposed, and those wishes should be given due weight.¹⁴⁷

5.5. Who can divert?

5.5.1 Police diversion

In many States, the police are given power to divert children rather than refer the case to the prosecutors. The power to divert at this stage is highly desirable as it limits the child’s contact with the justice system and is often sufficient to end the child’s offending behaviour. States should be encouraged to give the police the legal power to dispose of a case through the use of a warning or by diverting the child into an appropriate programme. When legislation gives the police this power, it should also impose a duty on the police to consider non-judicial options in every case. Guidelines should be developed in order to regulate the exercise of police discretion.

5.5.2 Prosecutor diversion

Legislation should not require the mandatory prosecution of children who are alleged to, are accused of or admit to having committed a crime. Any such provisions should be removed from the law.

Legislation should, instead, contain provisions giving prosecutors discretionary power to suspend, or not to initiate, prosecutions against children, even if there is sufficient evidence to secure a conviction (known as the principle of discretionary prosecution). Factors such as the child’s age, the circumstances of the offence and whether the prosecution is in the public interest, can be taken into account. In some countries, prosecutors have the power to impose measures on the child when suspending or dropping the prosecution. These measures generally include community service, mediation and an obligation to attend a rehabilitation programme. Guidelines need to be developed in order to regulate the exercise of discretion.

¹⁴⁵ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 27.

¹⁴⁶ Ibid.

¹⁴⁷ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 45 (relating to the child’s right to participate in the juvenile justice process, as enshrined in Article 12 of the CRC).

Box 24: Police diversion programmes

In New Zealand, since 1968, a police-led Police Youth Aid programme replaced a discretion to divert, with an obligation for police to “consider whether it would be sufficient to warn the child or young person, unless a warning is clearly inappropriate having regard to the seriousness of the offence and the nature and number of previous offences committed by the child or young person”. Frontline police officers can provide an on-the-spot warning or a warning in the police station followed up in writing for petty offences. More serious cases are referred to the youth aid officers specialising in dealing with young people and their families. The High Court deals with young people facing murder or manslaughter charges. Alleged offenders 17 years and older are dealt with in the adult court system. Police keep a record of the diversionary measure, and the young person does not have a criminal record.

In consultation with the child, the family and the victim, youth aid officers decide on a specified plan so that the young person has the opportunity to “put right” the damage done and prevent it from happening again. Diversionary options may include: verbal or written apologies to the victim; repairing or paying for stolen or damaged goods; working for the victim or for a community group; making a donation to charity; curfews; restriction from associating with co-offenders or other “bad influences”; counselling to address underlying causes of the offending behaviour; activities or increased hobbies; and writing an essay to show that the offender has understood what he/she has done wrong.

The police in the Netherlands have the discretion to offer children, who have committed vandalism, property damage, petty theft or anti-social behaviour, the opportunity of attending a programme run by the HALT (*HerALTeratief* or “the alternative” in Dutch) bureaus instead of charging them with the offence. Police can refer a young person if: the suspect is between 12 and 18 years old; the offence meets HALT criteria, which sets out the maximum value for the theft or the damage done; and the suspect admits the offence. Local authorities manage nearly two thirds of the HALT bureaus, one fifth are managed by independent voluntary organisations, and one fifth are located within other public sector or voluntary organisations. This programme has been highlighted as an example of good practice.

In the programme, children are provided with a written offer and reminded that they do not have to participate. The child must consent to being referred to the HALT bureau and, if the child is under age 16, his or her parents must also consent. In addition to consenting to the initial referral, children are given the choice of whether or not to consent to the specific programme that the HALT bureau develops for the child. This programme may include general work or work to repair the damage or a combination of the two for a maximum of 20 hours. If the child does not consent to or complete the programme, police proceed with his/her case as normal. If the child participates successfully, police will drop the case and the child will not have a criminal record.

A 2006 study showed that the programme was most effective for first-time offenders who did not have complex problems and did not generally display negative behaviour. For them, the process of being picked up by the police and apologising to the victim, as well as completing the learning assignments, had a positive effect on recidivism. However, for young people with more complex problems, participation in the programme had little or no effect in reducing re-offending. It was recommended that intensive support should be introduced into the programme and offered alongside the apology, learning and community service for this group of young people.

Since 2004, the Government of Tajikistan has been operating the Juvenile Justice Alternatives Projects (JJAPs), a model developed by the Children’s Legal Centre UK and UNICEF Tajikistan, a family-focused diversion scheme for 10- to 18-year-olds who have committed a criminal offence. Local community centre staff in five pilot areas work with the child and family to tackle root causes of the offending behaviour and meet practical, educational and psychosocial needs. This involves listening to the child and hearing the child’s experience of family life and their understanding of why they have got involved in offending behaviour; working with the family, often headed by a single mother or grandparent; holding family group conferences; providing education to the child to ensure that he or she is up to the same peer level; and providing one-to-one mentoring, attention and activities, such as sports, arts and crafts and drama. A lawyer is available to the child to represent him or her in any proceedings, handle any lack of papers (e.g. birth certificates), negotiate entry to school and ensure that the child and family receive any available benefits. A 2008 evaluation highlighted the effectiveness of this holistic approach. Out of the 250 children referred, only 6 were known to have re-offended over a four-year period. Children, their families and the referral bodies reported a high level of satisfaction. Children can be referred by the police or prosecutors as a diversionary measure or by the courts as an alternative sentence.

* For sources, see end of section.

Box 25: Guidelines on the role of prosecutors

International guidance provides that states should provide prosecutors with the discretion to drop cases and impose diversionary measures, “In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatisation of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.”

“In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special consideration shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.”

Source: Basic Principles on the Role of Lawyers, 7 September 1990, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1, paras. 18, 19.

5.5.3 Court-led diversion

In some countries, judges are provided with the discretion to impose diversion prior to the beginning of the main trial, usually at the preparatory hearing.

Box 26: Comprehensive diversion programme

Diversion was comprehensively introduced into domestic law in 2006 in the Philippines. Section 5 (i) of the Juvenile Justice and Welfare Act provides that children in conflict with the law have “the right to diversion if he/she is qualified and voluntarily avails of the same”.

“Diversion may be conducted at the Katarungang Pambarangay at the community level ... , the police investigation or the inquest or preliminary investigation stage and at all levels and phases [emphasis added] of the proceedings including judicial level” (Section 24). The Act therefore permits the local community to first try to resolve the case, where the offence is against another person and attracts a term of imprisonment of less than six years, through conferencing, mediation or conciliation (Section 25).

The Juvenile Justice and Welfare Act enshrines the manner in which the diversion process shall be conducted: “[t]he authority conducting the diversion proceedings shall:

- (1) Explain to the child and his/her family the objective of the diversion proceedings, the value of diversion and the consequence of not undergoing diversion.
- (2) Ask the child of the circumstances of the offence, the motives or purpose of the offence and the factors that led the child to commit the offence.
- (3) Ask the child of his/her personal circumstance including his/her parents and family, his/her peers and educational status.
- (4) Make the child in conflict with the law understand the consequences of his/her actions and the corresponding responsibilities.
- (5) Ensure that the child understands and realizes his/her accountability, be remorseful of his/her actions and takes on the responsibility in repairing the harm done in lieu of filing a formal case in the court.” (Rule 47a Implementing Rules).

In addition, “[t]he authority conducting the diversion proceedings shall ensure that the proceedings are child-friendly and sensitive to the needs, welfare and the protection of the rights of the child in conflict with the law. The authority shall use language that is simple and understandable to the child in conflict with the law.” (Rule 47(c)).

Source: The system of diversion is set out in Chapter 2 of the Act and comprehensively explained in Part VIII of the Rules and Regulations Implementing Republic Act No. 9344, or The “Juvenile Justice And Welfare Act Of 2006”.

5.6. Some types of diversion programmes

Diversion programmes can take a number of different forms. Some are based on restorative justice principles, some take a family-focused, welfare approach, and yet others use activity programmes to address offending behaviour.

5.6.1 Restorative justice

Restorative justice has been practiced in traditional communities for centuries.¹⁴⁸ It is widely believed to have first been incorporated into a formal legal system in Canada in 1974 through the Victim Offender Reconciliation Programme.¹⁴⁹ Since then, legislation introducing restorative justice, in a variety of forms, has been introduced in a number of countries, including New Zealand,¹⁵⁰ the United Kingdom,¹⁵¹ Thailand,¹⁵² Serbia¹⁵³ and Northern Ireland. Restorative justice is a process in which the victim and offender and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.¹⁵⁴ A range of different programmes can be used in this approach. The most common are victim-offender mediation, community and family group conferencing, peace-making circles and making reparation or restoration for any damage caused. Generally restorative justice programmes require children who are diverted to:

- acknowledge responsibility for the offence and understand the effects of the offence on the victim;
- express emotion (even remorse) about the offence;
- receive support to repair harm caused to the victim or oneself and family;
- make amends or restitution/reparation;
- apologise to victims;
- restore their relationship with the victim, when appropriate; and/or
- reach closure.¹⁵⁵

¹⁴⁸ Weitekamp, E. G. M., 'The history of restorative Justice', in Johnstone, G., *A Restorative Justice Reader: Texts, sources, context*, 2003, p. 111.

¹⁴⁹ Peachey, D., 'The Kitchener experiment', in Johnstone, G., *A Restorative Justice Reader: Texts, sources, context*, 2003, p.183; see also Johnstone, G., 'Restorative Justice: Ideas, Values, Debates', 2002, p. 2.

¹⁵⁰ Family Group Conferences were first introduced in New Zealand in the Children, Young Persons and Their Families Act 1989, No. 24, (Morris, A. and Maxwell, G., 'Restorative Justice in New Zealand: Family Group Conferences as a Case Study', *Western Criminology Review*, 1998, 1:1): <<http://wcr.sonoma.edu/v1n1/morris.html>> [accessed 2 May 2011].

¹⁵¹ For further information: <www.restorativejustice.org.uk/?Restorative_Justice:Regulating_RJ> [accessed 2 May 2011].

¹⁵² In Thailand, Family and Community Group Conferencing (FCGC) is used as a form of diversion for first offenders. See Wanchai Roujanavong, Director General Dept, of Juvenile Observation and Protection Thailand Ministry of Justice, *Restorative Justice Family and Community Group Conferencing in Thailand*, 2005.

¹⁵³ See, Law on Mediation, No. 85/05; Law on Juvenile Justice No. 85/05. See also, Liebmann, Marian, Introduction of the Restorative justice concept and Victim-offender mediation practice in Serbia and Montenegro within the "Children's Chance for Change" project – A juvenile justice reform initiative in Serbia and Montenegro: <www.unicef.org/ceecis/Serbia-Mont-Restorative-justice-brief_en.pdf> [accessed 2 May 2011].

¹⁵⁴ Basic Principles in the Use of Restorative Justice Programmes in Criminal Matters, paras 1.2 and 1.3.

¹⁵⁵ Economic and Social Council, Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 24 July 2002, 2002/12, para. 2.2.

These programmes can be run by the police themselves, social services, youth services or the probation service, but also, and commonly, by NGOs.

It should be noted that, while restorative approaches are particularly useful in the context of pre-trial diversion, they can also be used after the child has been found guilty, for example, in order to decide on the type of sentence.

5.6.2 Family-based/welfare diversion

Offending behaviour by children is sometimes viewed as a symptom of family dysfunction and caused by poor parenting, difficult family circumstances or a breakdown in family relationships. The family focused diversion programmes generally work with the child and his or her family to understand why a child is offending and how to address the child's needs to prevent further offending. There is no concept of punishment in this approach nor does reparation feature. Rather, this approach uses intensive social work, family group conferencing and individual work with children to re-integrate the child within his or her family, school and community and build up the child's self-esteem. It generally includes remedial education and, if necessary, access to mental health services.

5.6.3 Activity programmes

Yet other programmes focus on providing children with activity to give them an alternative to being on the streets, and allowing them to learn new skills and to become engaged in new interests. These programmes can be wide-ranging and depend upon the needs of the particular child and culture. For instance, a programme may teach a child general "life-skills" or more specific competencies such as basic motor mechanics, building skills or the essential skills that will help the child set up a small business.

All these approaches have their own validity and can be used together. Children should be allocated to programmes that meet their particular needs.

Sources for Box 24: Police diversion programmes: Bergeron, J., 'Justice for Children: Detention as a Last Resort: Innovative Initiatives in the East Asia and Pacific Region', UNICEF East Asia and Pacific Regional Office, 2004, p. 55; Children, Young Persons and Their Families Act 1989, Sections 209, 211, 212; for Youth Aid scheme impact see 'Final Report: Police Youth Diversion', prepared for the New Zealand Police Ministry of Justice by the Crime and Justice Research Centre, Victoria University of Wellington through Victoria Link, New Zealand, January 2002, Van Straaten, A., Counties Manukau Youth Crime Trend Analysis 1994–2001, New Zealand, 2002 and the New Zealand Police Annual Report for the year ended 30 June 2008; Criminal Code, Art. 77e (the Netherlands); Crime Concern, 'Effective Approaches to the Removal and Prevention of Vandalism and Graffiti on Public Transport - Final Report: The Case Studies and Emerging Issues Department for Transport UK', 2003; Interagency Panel on Juvenile Justice, a coordination platform including UN bodies and NGOs: <www.juvenilejusticepanel.org/resource/items/N/e/NetherlandsPoliceLevelDiversionHALTProgramme.pdf>; Ferwerda, H.B., et. al., 'Halt: the alternative? The effects of the Halt arrangement revisited', (Ministry of Justice (The Netherlands) Research and Documentation Centre (WODC), 2006); National Commission on Child Rights, 'Promoting children's rights in the juvenile justice system in the Republic of Tajikistan: Evaluation of the Juvenile Justice Alternatives Projects', UNICEF, 2008. Note that children aged 10 to 13 years can only be prosecuted for manslaughter and murder. Children aged 14 to 16 years who have committed more serious offence can be referred to a youth justice family group conference which will decide whether a charge should be brought and the child's case be sent to the Youth Court or whether a measure of combination of measures will be imposed such as an apology, counselling, reparation and rehabilitation schemes.

Section 5: Alternatives to judicial proceedings: Diversion: Summary checklist

Legislation should:

- Provide for a system of “stepped” responses for children who commit criminal offences, which includes taking no further action, giving warnings (formal and informal) to children, pre-trial diversion and trial (as a last resort);
- Give police, prosecutors and judges discretion to resolve cases through diversion at any point up the final disposition hearing;
- Should require the police, the prosecutor and the judge to consider diversion in every case;
- Place a duty on central and/or local government to ensure adequate provision of diversion programmes in each local government area;
- Contain specific provisions indicating in which cases diversion is possible, and should not be limited to petty cases or to first time offenders;
- Set out which bodies can decide on diversion and how these decisions are to be reviewed and regulated;
- Require that diversionary measures be imposed only where there is compelling evidence that the child actually committed the offence and he or she has freely admitted responsibility;
- Prohibit the child's admission of guilt to access a diversionary measure being used against the child in any subsequent legal proceedings;
- Require that the child must provide consent to the diversion measure freely, voluntarily and in writing;
- Give the child the opportunity to seek legal or other appropriate assistance, to discuss the appropriateness and desirability of the diversion offered;
- Require that the child be provided with adequate and specific information – prior to consenting to the proposed diversion measure – on the nature, content and duration of the measure and on the consequences of a failure to cooperate or complete it;
- Provide that the child’s failure to complete his or her diversionary measure may legitimately lead to the authorities restarting their case, but successful completion of the diversion measure by the child will result in a final and definite closure of the case;
- Contain provisions giving prosecutors discretionary power to suspend, or not to initiate, prosecutions against children, even if there is sufficient evidence to secure a conviction.

6. Pre-trial detention and alternatives to pre-trial detention

6.1. Release pending trial and bail

If it is decided not to divert a child, but for the child to stand trial, the court or other competent official or body should, without delay, consider the issue of release.¹⁵⁶ In order to ensure that judges actively consider the issue of release, legislation should contain a clear and unambiguous presumption that children will be released, pending trial.¹⁵⁷

In some States, the parents or child are required to deposit a sum of money (bail) before the child is released. If legislation contains such a requirement, it should also contain a clause permitting the requirement to be waived where the child or his or her parents are indigent and cannot pay, or to be reduced to a percentage of the child or parent's income. The legislation should also give the judge discretion not to require bail where the child does not have parents, or the parents cannot be found. If the legislation does not contain such provisions, the requirement of bail would potentially discriminate against poor children and those without parental care.

Box 27: The discriminatory impact of bail

In New South Wales, Australia, the Aboriginal Justice Advisory Council identified the disproportionate denial of bail to Aboriginal defendants (10 per cent of Aboriginal defendants were refused bail compared to just 4 per cent of non-Aboriginal defendants). Two suggested reasons for this were that the "acceptable person" who was permitted to produce bail for a defendant may struggle to prove access to sufficient funds for the bail surety or to actually provide those funds in a manner accepted in court.

In its factsheet on women and girls in detention accompanying Justice and Dignity for Detainees Week, the Office of the High Commissioner for Human Rights highlighted the discriminatory impact of bail conditions on women: "Women often find themselves without the financial resources to obtain bail as they are less likely to have secure work or property in their own name, and they are also less likely to have access to legal advice."

This applies to an even greater extent to children.

Sources: Aboriginal Justice Advisory Council, *Aboriginal People and Bail Courts in NSW*, 2001, p. 6: <[www.lawlink.nsw.gov.au/lawlink/ajac/ll_ajac.nsf/vwFiles/aboriginal_people_bail_courts_in_nsw_ajac_pre_2002.pdf](http://www.lawlink.nsw.gov.au/lawlink/ajac/ll_ajac.nsf/vwFiles/aboriginal_people_bail_courts_in_nsw_ajac_pre_2002.pdf/$file/aboriginal_people_bail_courts_in_nsw_ajac_pre_2002.pdf)>; Schwartz, M., 'The NSW Bail Act and Aboriginal Defendants,' *ILB*, 2005, 14; Office of the High Commissioner for Human Rights, *Dignity and Justice for Detainees Week: Information Note No. 5, Women and Girls*, 2008: <www.ohchr.org/EN/UDHR/Documents/60UDHR/detention_infonote_5.pdf> (citing, International Commission of Jurists, *Human rights of women in conflict with the criminal justice system: submission to the Committee on the Elimination of Discrimination against Women*, 2004) Hereinafter *Dignity and Justice for Detainees Week* [websites accessed 2 May 2011].

Where there is concern that the child may commit another offence while awaiting trial, rather than order bail or pre-trial detention, courts should be given the legal power to impose certain conditions upon the child. Legislation should provide that a court or tribunal may require a child not to go to certain places, not to mix with certain people, to attend school, or to be at home at a certain hour. Where there are serious concerns about the child, alternative measures could be

¹⁵⁶ Rule 10 of Beijing Rules.

¹⁵⁷ In the Philippines, the Justice and Welfare Act 2006 contains a presumption that a child should be released to the parents or another suitable person wherever possible. No. 9344 (Philippines).

considered by the court, including close supervision, intensive care or placement with a family or in an educational setting or home.¹⁵⁸

6.2. Pre-trial detention

International law severely 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.¹⁵⁹ Whenever possible, pre-trial detention should be avoided, and judges should consider alternative measures, such as close supervision, care or placement with a family or in an educational setting or home.¹⁶⁰

The Committee on the Rights of the Child has expressed concern about the over-use of pre-trial detention in many States and noted that in many countries children languish in pre-trial detention for months and even years, in violation of Article 37(b) of the CRC.

The Committee on the Rights of the Child, in General Comment No. 10, requires that States should set out the circumstances in which a judge may consider placing or keeping a child in pre-trial detention. The Committee on the Rights of the Child acknowledges that it might be considered where it is necessary to ensure his/her appearance at the court proceedings, or where the child is an immediate danger to himself or herself or others, but only where non-custodial alternatives are not sufficient.¹⁶¹ Any pre-trial detention should be subject to regular review. Pre-trial detention should never be used as a punishment as it violates the presumption of innocence.¹⁶²

Box 28: Imposing a time limit on pre-trial detention

In Ghana, a judge may remand a child to a remand home under the following time-limitations:

“(4) The maximum period of a remand warrant shall be seven days and no remand warrant shall be renewed without the appearance of the juvenile at the hearing.

(5) The total period of remand of a juvenile shall not exceed three months except in the case of an offence punishable by death where the period of remand shall not exceed six months”.*

In Honduras, the maximum time for detention is 30 days initially with a further 30 days available to complete investigation on the petition of the Public Ministry.

* It should be noted that under Section 32 of the Juvenile Justice Act 2003, children are no longer subject to the death penalty.

Sources: Juvenile Justice Act 2003, Art. 23 (Ghana); Child and Adolescents' Code 1996, Art. 237 (Honduras).

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”. This will depend upon a number of factors relating to the child and the particular juvenile justice system. However, the Committee on the Rights of the Child, in General

¹⁵⁸ Rule 13.2 of Beijing Rules.

¹⁵⁹ See Article 37(b) of the CRC; Rule 17 of the Beijing Rules; and Rule 2 of the Havana Rules.

¹⁶⁰ Rules 13.1, 13.2 of Beijing Rules.

¹⁶¹ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 80.

¹⁶² Ibid.

Comment No. 10, has recommended that the period of pre-trial detention before the child is charged (i.e. the period when the child is under investigation) should not exceed 30 days.¹⁶³

Article 10(2)(b) of the ICCPR requires that juveniles accused of criminal offences be brought as speedily as possible for adjudication. This is reflected in Rule 17 of the Havana Rules, which requires courts and investigative bodies to give the highest priority to expeditious processing of such cases to ensure the shortest possible period of detention. Legislation should state the maximum periods for which a child can be detained pre-trial.

6.2.1 Conditions of pre-trial detention

The conditions under which an untried juvenile is detained should be consistent with the Havana Rules and the presumption of innocence. A range of requirements are set down by the Havana Rules, most of which are discussed in Section 9. Among these are:

- A right to legal counsel and to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications;¹⁶⁴
- To “be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training”. They should however not be required to do so and work, education or training should not cause the continuation of the detention;¹⁶⁵
- “Juveniles should receive and retain materials for their leisure and recreation to the extent that this is compatible with the interests of the administration of justice.”¹⁶⁶

6.2.2 Children in pre-trial detention should be separated from convicted detainees and adult prisoners

In recognition of the presumption of innocence, Article 10(2) of the ICCPR, Article 37 of the CRC, Rule 85 of the Standard Minimum Rules for the Treatment of Prisoners, Rule 13.4 of the Beijing Rules and Rule 17 of the Havana Rules all require that children who are detained pre-trial should be kept separately from convicted children and from all adult prisoners. Boys and girls should also be detained separately. Article 37(c) of the CRC and Rule 29 of the Havana Rules do recognise, however, that in certain circumstances it may be in children’s best interests not to be separated from adults. Such a circumstance is explained in Rule 29 of the Havana Rules as being when family members are imprisoned together, or, where, under controlled conditions, juveniles are brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned. The mixing of juveniles and adults should, however, be regarded as exceptional.

The best way to ensure that children in pre-trial detention are kept separate from those in post-conviction detention is to refrain from ordering pre-trial detention. Where pre-trial detention is ordered, children should ideally be kept in completely separate institutions with a regime that meets their particular needs.

¹⁶³ Ibid., para. 83.

¹⁶⁴ Rule 18(a) of Havana Rules.

¹⁶⁵ Rule 18(b) of Havana Rules.

¹⁶⁶ Rule 18(c) of Havana Rules. For further conditions that apply see Section 9.

6.2.3 Right to maintain contact with family

Children deprived of their liberty pre-trial have the same rights to family contact as those serving a custodial sentence. The Standard Minimum Rules for the Treatment of Prisoners state that “an untried prisoner shall be allowed to inform his family immediately of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.”¹⁶⁷ These rights are discussed in detail in Section 9.

6.2.4 Right to review or appeal

Legislation should require that the pre-trial detention of children should be reviewed by the court every two weeks in the light of the recommendation to this effect contained in the Committee on the Rights of the Child General Comment No. 10.¹⁶⁸ This ensures that the Court considers whether the pre-trial detention continues to be justified on a regular basis.

Article 37(d) of the CRC provides that every child deprived of his or her liberty shall have the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.¹⁶⁹ The right of appeal applies just as much to pre-trial detention as it does to a custodial sentence. The right of appeal applies to both judicial proceedings and to administrative proceedings, and to children below the age of criminal responsibility who have been deprived of their liberty by being placed in an educational institution. This is dealt with in greater detail in Section 7.

¹⁶⁷ Rule 92 of Standard Minimum Rules for the Treatment of Prisoners. The Serbian Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles (No. 85/05, 2005) also sets out the rights to visitation, stating that those in pre-trial detention have the right to: 9) Weekly visit by a parent, adoptive parent, guardian, spouse, the common-law partner, adoptee, children and other lineal relatives and relatives in lateral line up to the fourth degree of sanguinity; 11) To have visits twice a month by other persons who do not interfere with enforcement of the educational measure, where the superintendent of the facility may ban visits of these persons. (Article 128).

¹⁶⁸ See Committee on the Rights of the Child, General Comment No. 10 (2007), para. 83.

¹⁶⁹ See also Rule 7(1) of the Beijing Rules (“Basic procedural safeguards such as ... the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.”).

Section 6: Pre-trial detention and alternatives to pre-trial detention: Summary checklist

Legislation should:

- Provide for a range of alternatives to pre-trial detention. The government should ensure that sufficient resources are made available to implement the legislation;
- Provide that a court may only make an order for pre-trial detention of a child as a measure of last resort and only in exceptional circumstances (where it is necessary to ensure the child's appearance at the court proceedings, or where the child is an immediate danger to himself/herself or others);
- Set out the maximum length of pre-trial detention: in the case of detention pending charge the maximum period should not be greater than 30 days;
- Ensure that in situations where bail can be ordered as an alternative to pre-trial detention, the requirement to make a payment shall be waived partly or entirely where the child or his or her parents are indigent and cannot pay, or the child does not have parents or they cannot be found;
- Provide that juvenile cases shall be expedited where the juvenile is detained pending trial;
- Provide that children in pre-trial detention have the right to:
 - Legal counsel, to apply for free legal aid (where available) and to communicate regularly with their legal advisers privately and in confidence;
 - Pursue remunerated work and education or training; which should not prolong their detention;
 - Have leisure and recreation materials.
- Provide that children who are detained pre-trial shall be kept separately from convicted children and from all adult prisoners (except in exceptional circumstances when detention with adults is in the child's best interests);
- Provide that children in pre-trial detention shall be allowed to communicate with family and friends and receive visits from them;
- Provide that children in pre-trial detention shall have their detention reviewed by the court every two weeks; and that children have the right to challenge the legality of the deprivation of liberty before a court or other competent, independent and impartial authority (and to a prompt decision on this challenge) and be provided to free legal representation to enable this to occur.

7. Right to a fair trial

Many of the elements that make up a fair trial apply to both children and adults. These include the right to be presumed innocent (See Section 4.1.), the right to be informed promptly of charges against him or her (See Section 4.2.), the right to have the charges determined without delay by a competent and impartial judicial body, the right to legal counsel or other appropriate assistance, the right not to be compelled to give testimony or to confess guilt, the right to confront witnesses and the right of appeal.

In addition to the rights shared by adults, children also have the right to support from an adult or guardian and the right to privacy. The treatment of children also differs in that the requirement that a case be heard in a public hearing does not apply in the same manner.

7.1. Decisions without delay¹⁷⁰

The ICCPR, the CRC, the European Convention, the Banjul Charter, the African Charter on the Rights and Welfare of the Child and the American Convention all require that an individual charged with a criminal offence shall be brought to trial within a “reasonable” period of time and that delay should be avoided.¹⁷¹ The various international instruments all use slightly different terms, but the essence of the provisions is that there should be no delay.

There is no standard definition of what constitutes delay, or what length of wait between charge and final trial is acceptable. However, it is generally accepted that “reasonable” delay when applied to a child is a shorter time than that which is reasonable for an adult. In order to determine whether there has been unreasonable delay, a court will need to look at all the circumstances.

The Committee on the Rights of the Child, in General Comment No 10, recommends that the States should set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body. These time limits should be much shorter than those set for adults. But at the same time, decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected.¹⁷² These time limits should be clearly specified in the juvenile justice legislation.

The need to ensure a decision without delay has ramifications for the entire juvenile justice system. Current thinking in many developed juvenile justice systems is that it is vital to

¹⁷⁰ See also Section 0.

¹⁷¹ See Article 40(2)(b)(iii) of the CRC; Article 14(3)(c) of the ICCPR; Article 6(1) of the ECHR; Article 7.1(d) of the Banjul Charter; Article 17(2)(c)(iv) of the African Charter on the Rights and Welfare of the Child; Article 8 of the American Convention; Rule 20:1 of the Beijing Rules; and the Vienna Guidelines, para. 23.

¹⁷² Committee on the Rights of the Child, General Comment No. 10 (2007), paras. 51, 52, 83.

demonstrate that every child accused of committing a crime will meet with a rapid response from the juvenile justice system. The reasoning behind this approach is that it confronts the young person with the consequences of their offending quickly, helps them to address their offending behaviour in a positive way and helps the child link the response to the offence.

7.2. Before a competent, independent and impartial body

Article 40(b)(iii) of the CRC requires that a child in conflict with the law is brought, before a competent, independent¹⁷³ and impartial authority or judicial body. The Committee on the Rights of the Child has not defined what constitutes “competence” in this context.¹⁷⁴ However, the provision on competent, impartial and independent judicial bodies mirrors the provision contained in Article 14 of the ICCPR. The Human Rights Committee has stated that “the notion of a ‘tribunal’ designates a body, regardless of what it is called, that is established by law, is independent of the executive and legislative branches of government or enjoys, in specific cases, judicial independence in deciding legal matters in proceedings that are judicial in nature.”¹⁷⁵ Indeed, the Human Rights Committee in General Comment No. 32 states that a conviction by anybody that does not have the characteristics necessary for a tribunal would be incompatible with the provisions of Article 14 of the ICCPR. Given that the ICCPR applies equally to children as it does to adults, it can be presumed that the same applies to tribunals hearing cases against children. Legislation should, therefore, provide for competent, independent and impartial juvenile courts or tribunals.

Impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, or act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.¹⁷⁶

Box 29: Body for hearing cases of children under the age of criminal responsibility

Under Soviet Union-era law, and still in a number of the ex-Soviet States today, the Commission of Minors is responsible for hearing cases against children who are aged 14 (and thus over the age of criminal responsibility) but under the age of 16, who commit minor offences. The Commission of Minors is often chaired by the mayor, deputy mayor or an employee of the local administrative body and includes in its membership a number of officials representing central government at local level. Given the very close links with the Executive and the lack of obvious independence, it is unlikely that the Commission of Minors would meet the requirements of Article 40(2)(b)(iii) of the CRC or Article 14 of the ICCPR.

¹⁷³ “Independence” has been defined by the Human Rights Committee in their General Comment No. 32 as referring in particular to the procedure and qualifications for the appointment of judges and guarantees relating to their security of tenure (Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial (2007), U.N. Doc. CCPR/C/GC/32).

¹⁷⁴ See also, Rule 14.1, Commentary, of the Beijing Rules, “It is difficult to formulate a definition of the competent body or person that would universally describe an adjudicating authority.” “Competent authority” is meant to include those who preside over courts or tribunals (composed of a single judge or of several members), including professional and lay magistrates as well as administrative boards (for example the Scottish and Scandinavian systems) or other more informal community and conflict resolution agencies of an adjudicatory nature.”

¹⁷⁵ Human Rights Committee, General Comment No. 32, Article 14, (2007), U.N. Doc. CCPR/C/GC/32, para. 19.

¹⁷⁶ *Ibid.*, para. 21.

7.3. Legal representation at trial¹⁷⁷

The right of a child to have legal or other appropriate assistance in the preparation and presentation of his or her defence at trial is a well-recognised right and should be clearly set out in juvenile justice legislation.¹⁷⁸

The Committee on the Rights of the Child recommends that this assistance be free of charge and acknowledges that it does not need to be legal under all circumstances. Other appropriate assistance is possible (for example, from social workers), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law. In addition, it is recommended that legislation makes it clear that where a child is facing a criminal trial, or indeed any hearing that has the potential to result in the child being removed from the family, deprived of liberty or subject to any form of sanction, the child should be represented by a lawyer. A failure to ensure that a child received legal representation in such instances could mean that the child is denied full access to the proceedings, and is not able to participate or defend him or herself in the proceedings in a meaningful way.

7.3.1 Provision of quality representation and legal aid

The Economic and Social Council Resolution 1997/30 (Guidelines for Action on Children in the Criminal Justice System) emphasises the importance of having a group of professionals, including lawyers, able to provide legal and other assistance to children: “Priority should be given to setting up agencies and programmes to provide legal and other assistance to children, if needed free of charge, ... and, in particular, to ensure that the right of every child to have access to such assistance from the moment that the child is detained is respected in practice.”¹⁷⁹

Legislation should set out who is responsible for setting the minimum quality standards for lawyers who represent children. This could be the Ministry of Justice or the bar association or other body representing the legal profession. The standards should address a range of relevant issues, including the necessary minimum level of legal experience in criminal work, the level of training to be completed in order to be appointed and the need for continuity of representation. In order to ensure that standards are implemented, legislation should also address the issue of how such training is to be financed and require proof of completion of training before a lawyer is allowed to represent a child in court.¹⁸⁰

Legal aid and representation should be provided free of charge, at least for those who cannot afford to pay legal fees. Some States only provide legal aid where the child and/or his or her parent cannot afford to pay for a lawyer. If this is the case, legislation should allow a child who is estranged from his or her parents, or does not live with them, to be assessed independently of

¹⁷⁷ See also Section 4.4.

¹⁷⁸ See Article 40(2)(b)(ii) CRC and also Article 14(3)(d) ICCPR. The CRC refers to the right to “legal or other appropriate assistance in the preparation and presentation of his or her defence”. Interestingly, the African Charter on the Rights and Welfare of the Child provides that the child shall be provided with legal and other appropriate assistance.

¹⁷⁹ Vienna Guidelines, para. 16.

¹⁸⁰ Ibid.

the parents. In practice, the extent to which children can be required to pay for legal assistance varies. For example, in Italy and Norway, legal aid assistance is entirely free,¹⁸¹ while other States, including Germany, reserve the right to charge for a defence lawyer if the child and his or her parents or guardians can afford to pay.¹⁸²

Box 30: Standards for lawyers

The Pakistan Juvenile Justice System Ordinance (2000) requires that lawyers who represent children in conflict with the law have “at least five years standing at the Bar”.

In Santa Clara County in the United States, public defenders and prosecutors are required to have the same pay grades. This ensures that there is no financial disincentive to representing a defendant and ensures that good quality lawyers are available to all children facing a criminal trial.

Sources: Sec. 3(2) of Pakistan Juvenile Justice System Ordinance (2000); County of Santa Clara Salary Ordinance NS-5.08A (2008), salary schedule.

Legal aid can be delivered in different ways: either through a State-run scheme, or through funding the bar association or NGOs to provide legal advice and representation to children directly. Sometimes where the State’s financial resources are very limited, each qualified lawyer can be required to take a set number of legal aid cases free of charge as a condition of their licence. This, while a much cheaper option for the State, does not ensure that the lawyers taking the case have experience in working with children or the time to give the case all the attention that is needed.

States should address how provision of legal assistance to children facing a criminal trial is to be funded and organised. Where lawyers are expected to act for free or receive only a small token payment, it is common to find children represented by student lawyers or very newly qualified lawyers, who may lack the experience of expertise to defend the child effectively.

Box 31: Legal aid schemes

In Cambodia, the legal aid department of the Bar Association is mandated by law to represent the poor in legal proceedings. In 2000, the Bar Association created a child protection unit to provide legal representation and assistance to children in conflict with the law and to child victims. The unit is staffed by lawyers and a judicial assistant, all of whom receive training in child rights, including working with children in conflict with the law and child victims.

In Hong Kong, the Duty Lawyer Scheme offers legal representation to children in conflict with the law with cases in the juvenile courts. This scheme is largely free of charge to those in juvenile courts but parents who can afford to are asked to pay a small handling fee. The Duty Lawyer Scheme is supported financially by the Government of Hong Kong and has a pool of 821 barristers and 728 solicitors.

In Ethiopia, the Children’s Legal Protection Centre, established in 2004 by the African Child Policy Forum, provides legal assistance and representation for children in conflict with the law. With the support of the Ministry of Justice, representatives from the Centre have been designated the representatives of choice for child rights cases, including for cases of children in conflict with the law.

Sources: United Nations Children’s Fund, ‘Justice for Children: Detention as a Last Resort, Innovative Initiatives in the East Asia and Pacific Region’, 2003; Duty Lawyer Service, Hong Kong Special Administrative Region, Juvenile Courts: <www.dutylawyer.org.hk/en/duty/juvenile.asp>; Y-CARE Youth Justice in Action, ‘Campaign Report’ (2007), 55; African Child Policy Forum, ‘Information about the Children’s Legal Protection Centre’: <www.africanchildforum.org/clpc/about.htm> [websites accessed 2 May 2011].

¹⁸¹ International Juvenile Justice Observatory, ‘Legal Assistance for Children in Conflict with the Law Campaign, Italy and Norway’: < www.oijj.org/legal/situation.php > [accessed 2 May 2011].

¹⁸² Ibid.

7.4. In the presence of parents

In Article 40(b)(iii), the CRC provides for the presence of a child's parents or guardians in judicial proceedings unless it is considered not to be in the best interests of the child, taking into account his or her age or situation.

The Beijing Rules elaborate on this right. Rule 15.2 states that “[t]he parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.”

The Committee on the Rights of the Child recommends that States Parties explicitly provide in law for the maximum possible involvement of parents or legal guardians in the proceedings.¹⁸³ According to the Committee, such involvement helps children who have committed a criminal offence to address their offending behaviour and at the same time provides important psychological and emotional assistance to the child. Parents should not, however, be punished for the offences committed by their children, a practice that the Committee “regrets”. Although the attendance of a parent is encouraged, it should not be regarded as essential in all cases. In some cases, the judge or competent authority may decide, at the request of the child or the legal representative, or because it is not in the best interests of the child, to limit, restrict or exclude the presence of the parents from the proceedings.¹⁸⁴

Box 32: Attendance of parents in court

In Fiji, the Juvenile Act states that “[w]here a juvenile is charged with an offence or is for any other reason brought before a court, his parent or guardian may in any case, and shall if he resides within a reasonable distance, be required to attend the court before which the case is heard or determined during all stages of the proceedings unless the court is satisfied that it would be unreasonable to require his attendance or he cannot be found.” Under the Act, the police officer who arrests a juvenile must warn the parents or guardian of the juvenile, if they can be located, to attend the court.

Malaysia's Child Act states that “[i]f a child is charged with any offence, the Court For Children shall require the child's parents or guardian to attend at the Court For Children before which the case is heard or determined during all the stages of the proceedings, unless the Court For Children is satisfied that it would be unreasonable to require the attendance of the parents or guardian.”

Both Myanmar and Papua New Guinea include parents amongst those who *may* be present in the court room – but do not require their presence.

Sources: Sec. 7(1) of Juveniles Act [Cap 56] of Fiji (1974); Sec. 88(1) of Child Act 2001 of Malaysia; Sec. 42 of Child Law (The State Law and Order Restoration Council Law No. 9/93) (1993) (Myanmar); Sec. 23 of Juvenile Courts Act 1991 of Papua New Guinea.

¹⁸³ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 54

¹⁸⁴ *Ibid.*, paras. 53, 54.

7.5. Right to privacy

Under international standards, children, unlike adults, have a right to have their privacy respected at all stages of the proceedings.¹⁸⁵

The Committee on the Rights of the Child held in General Comment No. 10 that “all stages of the proceedings” starts at the point of initial contact with law enforcement bodies (e.g. a request for information and identification) right up until release from supervision or custody.¹⁸⁶

The purpose of the right to privacy is to avoid the harm that can be caused to the child by undue publicity. Negative publicity can stigmatise the child and is likely to have a negative impact on the child’s ability to access education, work and housing and on their reintegration in general.¹⁸⁷ The Committee on the Rights of the Child has interpreted the right to privacy of children in conflict with the law widely. States should make it clear in their legislation that where a child is being tried for a criminal offence, the hearing should take place behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law.¹⁸⁸ Experts and other professionals should be allowed to attend the trial or hearing with the special permission of the court or tribunal.¹⁸⁹

Box 33: Effect of publicity

In the case of *T. and V. v. United Kingdom*, where two 10-year-old boys were tried for the murder of a two-year-old child, the European Court of Human Rights expressed concern at the extent of the publicity surrounding the children. The Court noted that “the trial generated extremely high levels of press and public interest, both inside and outside the courtroom, to the extent that the judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity.” The Court found that the increased intimidation caused by the press and publicity surrounding the trial made it harder for the two accused boys to participate effectively.

The Court also noted the “international tendency in favour of the protection of the privacy of juvenile defendants”. The Court held that allowing the media to be present in court contributed to the finding that there had been a violation of Article 6 (right to a fair trial) of the European Convention.

Sources: *T. and V. v. United Kingdom*, No. 24888/94; [1999] ECHR 2; No. 24724/94 (2000) 30 EHRR 121, Council of Europe: ECHR, 16 December 1999, para. 86.

Legislation should also prohibit public authorities, including the police, the prosecution service, courts, local government bodies and the Ministry of Justice, from issuing any information, such as press releases, that might enable children in conflict with the law to be identified.

In addition, it is important that legislation clearly prohibits the media, in all its forms, from reporting or broadcasting any information that could lead to identification of a child alleged to, accused of or recognised as having committed an offence. This should include a prohibition on the use of photographs or other images of the child and the parents, naming of the child and the

¹⁸⁵ Article 40(2)(b)(vii) of the CRC provides that a child has the right “To have his or her privacy fully respected at all stages of the proceedings”.

¹⁸⁶ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 64.

¹⁸⁷ Rule 8 of Beijing Rules. See also Committee on the Rights of the Child, General Comment No. 10 (2007), para. 64.

¹⁸⁸ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 66.

¹⁸⁹ *Ibid.*, para. 65.

parents, the school the child attends and the neighbourhood in which the child lives. Legislation needs to contain sanctions to be applied to journalists, newspapers and broadcasters who violate the right to privacy of a child in conflict with the law. Breach of confidentiality should be a criminal offence and should also be actionable in the civil courts.

Legislation should state that records of juvenile offenders are to be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case.¹⁹⁰

Box 34: Enshrining the right to privacy

In Ghana, the Juvenile Justice Act 2003 establishes a right to privacy that extends to a ban on the publication of information that would lead to the identification of the child involved.

In Kosovo, a guiding principle of the Juvenile Justice Code is that “[t]he child’s right to privacy shall be respected at all stages in order to avoid harm being caused to him or her by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of a minor offender shall be published.”

The principle and purpose of no publicity is made clear in the Uganda Children’s Act (1996) Article 102. Protection of privacy and restriction on publication:

1. The child’s right to privacy shall be respected throughout the court proceedings in order to avoid harm being caused to him or her by undue publicity; and no person shall, in respect of a child charged before a family and children court, publish any information that may lead to the identification of the child except with the permission of court.

Furthermore, any person who violates this protection and restriction by can be fined and punished.

Sources: Juvenile Justice Act 2003 (ACT 653) Sec. 3(2); Juvenile Justice Code of Kosovo (2004), Art. 1(7); Uganda Children’s Act 1996, Sec. 102.

7.6. Enabling the active participation of the child

7.6.1 Understanding the language

In order to be able to participate in the trial, the child must be able to understand what is taking place. International standards place a clear obligation on States parties to ensure that this happens.

An obvious barrier to understanding proceedings is the inability to speak the language being used in the court. The CRC obliges States to provide the free assistance of an interpreter “if the child cannot understand or speak the language used”.¹⁹¹ Regional human rights instruments have

¹⁹⁰ Committee on the Rights of the Child, General Comment No. 10 (2007), paras. 64–6.

¹⁹¹ Art. 40(b)(2)(vi) of CRC. Article 6 of the European Convention on Human Rights, which is identical to Article 40(2)(b)(vi), was the subject of interpretation in the ECHR case of *Cuscani v. UK*, in which it was ruled that the failure to provide a professionally qualified interpreter at the applicant’s trial breached Article 6. It further stated that the judge should have ensured that the applicant understood the trial proceedings. (*Cuscani v. UK*, Application No.3277/96, [2002] ECHR 625, (2003) 36 E.H.R.R. 2, Council of Europe: European Court of Human Rights, 24 September 2002).

virtually identical articles.¹⁹² A failure to provide a professionally qualified interpreter could amount to a violation of the right to a fair trial.¹⁹³

Box 35: Right to an interpreter free of charge

Article 17 Criminal Procedure Code 2007 of Georgia states:

- 1) Criminal proceedings shall be conducted in Georgian, and in Abkhazia - in Abkhazian, too.
- 2) A participant in proceedings who does not know the language of the criminal proceeding may make a statement, give evidence and explanations, raise motions and challenges, file an appeal, and speak in court in his or her native or any other language in which he is proficient. In such cases as well as in getting acquainted with the case materials, a participant in proceedings has the right to enjoy the services of an interpreter.
- 3) Investigation and court documents, which shall, in compliance with the provisions of law, be given to the accused or any other participant in proceedings, must be translated into his native language or in the language in which he is proficient.
- 4) The body in charge of proceedings shall inform participants of proceedings of their rights indicated in section 2–3 of this article.
- 5) The remuneration of an interpreter or translator participating in a criminal proceeding shall be charged to the State.

Sources: The Child Right Act was adopted into law in 2007 (supplement to the Sierra Leone Gazette Extraordinary Vol. CXXXVIII, No. 43 dated 3 September 2007); Ministry of Social Welfare, Gender and Children's Affairs, National Child Justice Strategy for Sierra Leone, July 2006.

Legislation should make it clear that the right to have the charges explained in a language that the child understands, and the right to an interpreter, applies to all children, including deaf or hearing and speech impaired children. However, providing interpreters for deaf children has presented a problem for many States. The standard of interpretation must be high enough to ensure that the child can fully understand what is happening. States should impose a duty on the Ministry of Justice or other relevant ministry in secondary legislation to ensure that sufficient training is available, if necessary, free of charge, so that an adequate number of professional sign language interpreters are available to interpret in criminal proceedings.

To ensure effective access to children with other disabilities, States should also set minimum standards of training for those working in the field of juvenile justice, including police and prison staff.¹⁹⁴

¹⁹² Article 6 of European Convention; Article 8(2)(a) of American Convention; Article 17(2)(c)(ii) of African Charter on the Rights and Welfare of the Child.

¹⁹³ See *Cuscani v. UK*, 2002, in which it was ruled that the failure to provide a professionally qualified interpreter at the applicant's trial breached Article 6. It further stated that the judge should have ensured that the applicant understood the trial proceedings.

¹⁹⁴ Convention on the Rights of Persons with Disabilities, adopted by a General Assembly resolution, 24 January 2007, UN GAOR A/RES/61/106, Article 13.

Box 36: Provision for deaf children

The current Law of Criminal Procedure of Indonesia 1981 enshrines the right of the accused who is deaf and/or mute to an interpreter:

- “1) If an accused or witness is dumb and/or deaf and is unable to write, the head judge shall assign a person as a translator who is skilled at communicating with the accused or witness.
- 2) If an accused or witness is dumb and/or deaf but is able to write, the judge at trial shall address all questions or admonitions to him in writing and said accused or witness shall be ordered to write his answers; after which all questions and answers must be read out.”

These rights shall apply in investigation stages as well as the trial stage.

In 2007, the Office for Criminal Justice Reform (England and Wales) published the National Agreement on Arrangements for the Use of Interpreters, Translators and Language Service Professionals in Investigations and Proceedings within the criminal justice system. It provides guidance on providing suitably qualified language and sign language interpreters in light of Articles 5 and 6 of the European Convention and the rulings of the ECHR. The guidance provides that interpreters on the approved register should be used. However, recognising that there is a shortage of registered interpreters, the guidance lists reputable organisations that can provide appropriately trained interpreters.

In the United States, the Federal Court Interpreters Act (1978) requires federal courts to appoint and pay for interpreters for deaf criminal defendants. State law provides more detailed guidance. For example, the New York State Judiciary Law (1992) provides “[w]henver any deaf person is a party to a legal proceeding of any nature, or a witness therein, the court in all instances shall appoint a qualified interpreter who is certified by a recognized national or New York State credentialing authority as approved by the chief administrator of the courts to interpret the proceeding to, and the testimony of, such deaf person.” There is a registry of interpreters for the deaf that is recognised as the certifying authority for interpreters. However, the law goes on to state that if obtaining an interpreter from the registry would cause unreasonable delay, then the court may temporarily appoint a qualified interpreter who is not certified.

Sources: Kitab Undang-Undang Hukum Acara Pidana, ‘KUHAP’ s.53 (2). As of January 2009 this Law was in force but the law is currently undergoing revision; National Agreement on Arrangements for the Use of Interpreters, Translators and Language Service Professionals in Investigations and Proceedings within the Criminal Justice System, Sections 3, 3.3, 3.4; Federal Court Interpreters Act 1978, 28 U.S.C § 1827; New York State Judiciary Law 1992, Section 390.

The requirement that children understand the language of the court also means that prosecutors, defence lawyers and judges all need to consider how to avoid over-complicated legal language and jargon. Language in courtrooms can be intimidating and confusing for child defendants and witnesses. A comprehensive study of criminal transcripts in Australia showed that children testifying as witnesses were confused by language styles,¹⁹⁵ while other studies into child testimony have shown that children lack understanding of legal terms.¹⁹⁶ Inappropriate use of language can limit a witness’s ability to respond to questions and can be harmful to a child defendant’s case if the child defendant is perceived to avoid difficult questions.¹⁹⁷

¹⁹⁵ Ellison, Louise, ‘Cross-examination and the intermediary: bridging the language divide?’, *Criminal Law Review*, 114, 118, 2002, citing J. Myers, K. Saywitz, G. Goodman, ‘Psychological research on children as witnesses: practical implications for forensic interviews and courtroom testimony’, *Pacific Law Journal*, 28: 3, 54, 1996. See also Saywitz, K., Children’s Conceptions of the Legal System: ‘Court is a Place to Play Basketball’ in (eds) S. J. Ceci, D. F. Ross, M. P. Toglia, *Perspectives on Children’s Testimony*, New York: Springer Verlag, 1989.

¹⁹⁶ Ibid, citing Brennan, M., Brennan, R. E., *Strange Language--Child Victims under Cross-examination*, Wagga Wagga, NSW: Riverina Murray Institute of Higher Education, 1988.

¹⁹⁷ Ellison, L., op. cit.

Box 37: Ensuring that the language of the trial is ‘child friendly’

In the United Kingdom, the Lord Chief Justice issued a practice direction to judges requiring that they “should remind those representing a young defendant of their continuing duty to explain each step of the trial to him and should ensure, so far as practicable, that the trial is conducted in language which the young defendant can understand”.

Source: Practice Direction by the Lord Chief Justice of England and Wales, Trial of Children and Young Persons in the Crown Court, 16 February 2000, para. 11.

7.6.2 Understanding the procedure

In order for a child to understand and to take part in proceedings in a meaningful manner, the child must be able to understand the trial procedure and take an active part in defending him or herself.

The Committee on the Rights of the Child stated in General Comment No. 10 that “[a] fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child’s age and maturity may also require modified courtroom procedures and practices.”¹⁹⁸

The ECHR has clarified that it is not necessary for a fair trial that the child being tried for a criminal offence should understand, or be capable of understanding, every point of law or evidential detail.¹⁹⁹ Given the sophistication of modern legal systems, many adults of normal intelligence are unable fully to comprehend all the intricacies and all the exchanges which take place in the courtroom: thus the emphasis on the importance of the right to legal representation. But in order for there to be effective participation in this context, the accused child must have a broad understanding of the nature of the trial process and of what is at stake for him or her.

Ultimately, the Court declared: The Court considers that, when the decision is taken to deal with a child who risks not being able to participate effectively because of his young age ... by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child’s best interests and those of the community, it is essential that he be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly.²⁰⁰

¹⁹⁸ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 46. See also Rule 14 of the Beijing Rules.

¹⁹⁹ *S.C. v. United Kingdom* [2004] ECHR 263, (2005) 40 EHRR 10, para. 29, Council of Europe, European Court of Human Rights, 10 December 2004.

²⁰⁰ *Ibid.*, para. 35.

7.7. Child-sensitive environment

Making a courtroom child-sensitive can enable a child to participate by reducing his or her distress and level of intimidation.

The ECHR in *T. and V. v. United Kingdom*²⁰¹ held that the physical layout of the courtroom was one element that gave rise to a breach of Article 6 of the European Convention (the right to a fair trial). The European Court held that the physical environment of the court alone would not itself have been sufficient for a finding of an unfair trial, but that it was a significant contributory element.

Making the court environment child-sensitive includes, for example, requiring judges not to wear their formal robes but to dress casually instead, having court staff sit at the same level as the child rather than on a raised bench or podium, allowing the child to sit next to a parent or other adult, etc.

Whether a State has established juvenile courts or uses an adult court to hear children's cases, the State body responsible for administration of the courts should draft a procedural protocol. This should set out how the seating in the court should be arranged and the dress code for judges to ensure a child-sensitive environment when hearing cases involving child defendants.

Box 38: Good practice for juvenile courts

As a result of the judgment of the ECHR, the United Kingdom produced a guide to good practice for juvenile courts in England and Wales:

4.1 The physical court environment - the type of furniture, layout and seating arrangements can directly promote or hinder communication. It can help draw parties into the process as active participants or tend to sideline them in a more passive role.

4.2 Sitting parents next to their children is a way of including them in the court process and encouraging their participation. Moving judges from a raised bench into the well of the court, so that they are at or near the same level as defendants, means that they can more easily maintain eye contact when speaking to them. This in turn helps the engagement process. (In some cultures it is not considered appropriate for a child to maintain eye contact with an adult. In such cases, it is still important that the judge and the child be on the same level.)

4.6 Existing architecture in courts around the country may restrict what can be achieved, and structural changes would need to be made within existing resources. However, in the areas in which these changes were piloted, they were achieved without additional resources and none of the changes had significant financial implications for the courts involved. It should therefore still be possible for all areas to achieve a more approachable court layout.

Source: United Kingdom Home Office, 'The Youth Court 2001: Changing the Culture of the Youth Court – Good Practice Guide', 2001.

7.8. Not to be compelled to give testimony or confess guilt

For a fair trial there must be a balance between encouraging a child to participate and not forcing the child to testify or to confess guilt. The ICCPR²⁰² provides that the accused shall not be compelled to testify against himself or herself or to confess to a crime. This right is also

²⁰¹ *T. and V. v. United Kingdom*, No. 24888/94; [1999] ECHR 2; No. 24724/94 (2000) 30 EHRR 121, Council of Europe: ECHR, 1999.

²⁰² Article 14(3)(g) of ICCPR.

contained in Article 40 of the CRC.²⁰³ Thus a child should be given the right in law, not to give evidence at his or her own trial at all, if that is what he or she chooses. The legislation should also make it clear that the child has a right to refuse to answer incriminating questions at the trial. In addition, the legislation should contain a section or article providing that the court should not be permitted to draw an adverse inference, or to treat the child as guilty, simply because the child chooses to exercise these rights.

In its General Comment No. 10, the Committee on the Rights of the Child has interpreted this right as meaning that a confession obtained as a result of torture or cruel, inhuman or degrading treatment would clearly infringe the right not to be compelled to give testimony, would be a grave violation of the rights of the child and would be wholly unacceptable.²⁰⁴ The Committee also recognised, however, that there are many other less violent ways to coerce or to lead the child to a confession or a self-incriminatory testimony. Legislation should provide that in deciding whether to admit a confession, the court shall take into account the age of the child, the child's development, the length of the interrogation, the child's lack of understanding and the fear of unknown consequences or of a suggested possibility of imprisonment that may have led the child to make a confession that is not true.²⁰⁵

7.9. Must the child be present in court?

While a child may choose not to give evidence at his or her trial, the child should nevertheless be present in court. Under Article 14(3)(d) of the ICCPR a defendant has the right 'to be tried in his presence'. In their General Comment No. 13, the Human Rights Committee²⁰⁶ suggests that trial *in absentia* should only happen "exceptionally" and that, when it does, "strict observance of the rights of the defence is all the more necessary."²⁰⁷ Some States take the view, however, that a child may be asked to leave the court or excused from attending the court where this is in the child's best interests. Neither the Human Rights Committee nor the Committee on the Rights of the Child has commented on this practice. But, as a matter of good practice, a child should have the right to remain in the court during his or her trial.

Box 39: Right to be present in court

Juvenile justice legislation from Croatia, Kosovo and Serbia prohibits the trial of a juvenile *in absentia*: "A juvenile may not be tried *in absentia*."

Sources: Serbia Law on Juvenile Justice 2005, No. 85/05, Art. 48. See also Kosovo Juvenile Justice Code, Art. 48; Croatia Juvenile Courts Act 1997, Official Gazette no. 111/1997, Art. 48.

²⁰³ Article 40(3)(iv) of CRC.

²⁰⁴ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 56. No such admission or confession can be admissible as evidence (Article 15 of Convention against Torture).

²⁰⁵ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 57.

²⁰⁶ Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (1984), para. 11.

²⁰⁷ *Ibid.*

7.10. Right to appeal

Article 14(5) of the ICCPR provides that everyone convicted of a crime has the right to have his conviction and sentence reviewed by a higher tribunal (the right of appeal). Article 40(2)(b)(v) of the CRC reflects this provision, but gives children a slightly wider right as it covers all children who are considered to have infringed the criminal law. This right, which can also be found in regional human rights instruments,²⁰⁸ should be contained in all juvenile justice and criminal procedure laws.

The Human Rights Committee in its General Comment No. 32²⁰⁹ has interpreted the right as applying to all offences, and not just to serious offences. Legislation should set out the right to appeal and the procedure for that appeal. The right to appeal should include appeals against the sufficiency of evidence and of the law, the conviction and the sentence.²¹⁰ A review that is limited to the formal or legal aspects of the conviction, without any consideration whatsoever of the facts, is not sufficient to satisfy the ICCPR.²¹¹

A right of appeal will only be meaningful if children are informed of their right to appeal in a language that they can understand and have a right to free legal representation to prepare the appeal. In addition, children must have access to a duly reasoned, written judgment of the trial and other documents, such as trial transcripts.²¹² These requirements should be written into a State's criminal procedure rules.

Box 40: Right to appeal

The Inter-American Commission on Human Rights has made clear that the right to appeal under Article 8(2)(h) of the American Convention (which reflects Article 14(5) of the ICCPR) is unqualified – it cannot be limited to certain crimes or punishments.

The Commission received a number of petitions from 1984 to 1989 against Costa Rica from defendants who claimed their right to appeal was violated by the Criminal Code, which did not allow appeals for cases involving sentences of less than two years imprisonment imposed by a trial court or sentences of less than six months' imprisonment imposed by a judge of a criminal court. The Commission found that the law violated the Convention. Sources: *Villalobos v. Costa Rica*, Case 9328, 9329, 9742, 9884, 10.131, 10.193, 10.230, 10.429, 10.469, Inter-American Commission on Human Rights (IACHR), 2 October 1992, para. 9; see Costa Rica Criminal Procedure Code (Código Procesal Penal) (1973), Art. 474, paras. 1 and 2. It is worth noting that the provision remains in Article 407 of the Code as amended in 1996 (Código Procesal Penal, Ley No. 7594 de 10 de abril de 1996, Publicado en Alcance No. 31 a La Gaceta No.106 de 4 de junio de 1996).

²⁰⁸ See Article 6 of the European Convention, Article 8 of the American Convention and Article 17(2)(c)(iv) of the African Charter on the Rights and Welfare of the Child.

²⁰⁹ Human Rights Committee, General Comment No. 32, Article 14 (2007), U.N. Doc. CCPR/C/GC/32.

²¹⁰ *Ibid.*, para. 45.

²¹¹ *Ibid.*, para. 48.

²¹² *Ibid.*, para. 49.

Section 7: Right to a fair trial: Summary checklist

- Legislation should clearly specify time limits between the commission of the offence and the final adjudication and decision by the court or other competent judicial body. Legislation should provide for competent, independent and impartial juvenile courts or tribunals.
- Legislation should make it clear that criminal trials of children should not be open to the public.
- Legislation should prohibit authorities from issuing any information, such as press releases, that would result in a child in conflict with the law being identified.
- Legislation must contain clear provisions prohibiting the media from reporting or broadcasting any information which could lead to the identification of any child alleged as, accused of or recognised as having committed a criminal offence and should set out sanctions for any breach.
- Legislation must guarantee the right of the child to have legal or other appropriate assistance in the preparation and presentation of his or her defence, free of charge.
- Legislation should set out how legal assistance will be provided and funded and make free legal representation available to all children in conflict with the law.
- The State should set out minimum quality standards for lawyers representing children, and should make training on representing children in the juvenile justice system available to lawyers. This duty could be delegated by the State to the bar association or other legal professional bodies.
- Secondary legislation or the legal code of conduct should place the same duty of care on lawyers whether a case is legally aided or privately paid.
- Legislation should provide that parents are permitted to attend proceedings unless the court decides that their presence is not in the best interests of the child.
- Legislation should contain a right to an interpreter if a child cannot understand the language, or has a speech or hearing impairment or cannot make him or herself understood in court.
- Legislation should require that all law enforcement and court personnel undergo training on ensuring effective access to justice for disabled children.
- Secondary legislation should impose a duty on the Ministry of Justice or other relevant Ministry to ensure adequate numbers of interpreters are available and that sufficient training is available for sign language interpreters, if necessary, free of charge.
- Codes of conduct for professionals should require that all professionals examining or cross-examining children use age-appropriate language.
- Legislation should cover the manner in which courts conduct their proceedings so as to ensure that children are tried in specialist tribunals (usually juvenile courts) and that the procedure used in the court is one that allows for effective participation by the child.
- Legislation should give the prosecution or the judge the power to terminate the criminal proceedings if they believe that the child is not able to understand the charges and the possible consequences or penalties that may arise from the offending behaviour.
- Whether a State has established juvenile courts or uses an adult court to hear children's cases, the State body responsible for administration of the courts should draft a Procedural Protocol. This should set out how the seating in the court should be arranged

and the dress code for judges to ensure a 'child-friendly' environment when hearing cases involving child defendants.

- Legislation should guarantee the child's right not to give evidence (if he or she so chooses) and to refuse to answer incriminating questions at his or her trial.
- Legislation should prohibit the court from drawing an adverse inference, or treating the child as guilty in such circumstances.
- Legislation should guarantee the child the right of appeal against conviction and sentence to a higher independent and impartial authority whenever the child is convicted or is found to have infringed the criminal law.
- Legislation should provide that the child shall be entitled to free legal representation when making an appeal.

8. Sentencing

The CRC does not seek to dictate the particular form of sentence that should be passed on a child, but requires that States should have a variety of 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 their age into account and is such as will promote their re-integration and the child's assuming a constructive role in society. In order to meet these principles, juvenile justice legislation should contain a range of sentences that may be ordered by the court when a child is convicted of an offence.

Measures that should be contained in the legislation are to be found in Article 40 of the CRC and include care, guidance and supervision orders, counselling, probation, foster care, educational and vocational training programmes and other alternatives to institutional care.²¹³

The CRC sets out the principles to be considered by the sentencing judge or tribunal in passing sentence (See below.). The Convention also makes it clear that capital punishment and the imposition of life sentences without possibility of release are forbidden (See Section 8.4.).²¹⁴

8.1. Principles to be applied in sentencing

Legislation should set out the general principles to be applied when deciding upon an appropriate sentence for a child convicted of a criminal offence. These are:

- The best interests of the child should be a primary consideration;²¹⁵
- The response should be proportionate to both the child's circumstances and the offence;²¹⁶
- A social inquiry report should be prepared to inform sentencing decisions;
- The purpose of sentencing should be re-integrative and constructive and not punitive;²¹⁷
- Non-custodial sentences should be ordered wherever possible; and
- Custodial sentences should only be used as a last resort and for the shortest appropriate period of time.²¹⁸

In addition to the principles that apply specifically to sentencing, the fundamental principles of the CRC continue to apply. These include the principles of non-discrimination, respect for the views of the child, the right to life, and survival and development to the maximum extent possible.

²¹³ Article 40(4) of CRC. See also Rule 18(1) of the Beijing Rules.

²¹⁴ Article 37(a) of CRC.

²¹⁵ Ibid., Article 3.

²¹⁶ Ibid., Article 40(4).

²¹⁷ Ibid., Article 40(1).

²¹⁸ Ibid., Article 37(b).

8.1.1 Best interests of the child

As seen above (See Section 2.), the CRC provides that the best interests of the child should be a primary consideration in all actions concerning children.²¹⁹ This principle applies just as much in deciding what sentence shall be imposed on a child as to any other decision.²²⁰

8.1.2 Proportionality

The principle of proportionality requires that the response to a juvenile offence should “always be in proportion not only to the circumstances and the gravity of the offence, but also to the age,

Box 41: Guidance on proportionality in sentencing

The United Kingdom provides guidance to judges on sentencing. Before determining the sentence the court should take into consideration the seriousness of the offence or offences and any mitigating factors associated with the offence or personal to the young person.

Mitigating factors may include:

- positive achievements or good behaviour unrelated to the offence;
- promising recent developments;
- previous good character;
- admission of the offence at an early stage and co-operation with the police;
- readiness to seek help with issues – e.g. drugs;
- social or educational disadvantage, including a poor upbringing.

To assess the seriousness of the offence all information available about the offence or offences associated with it should be taken into account. Any aggravating factors or mitigating factors must also be taken into consideration and may lead to a more lenient penalty.

A range of other factors, which might routinely impact upon determining the seriousness of a crime, are:

- Nature of the offence - amount of violence involved, use of weaponry, value of property lost, whether offence is committed by a group or individually, and whether it fits into the pattern of offending making previous convictions relevant;
- Impact upon the victim - whether targeted, level of vulnerability, whether a public servant, abuse of trust, extent and nature of loss and whether any property has been recovered, physical or psychological injury;
- Intention and motivation – whether the offence was premeditated or spontaneous, whether the offence was provoked or committed under provocation, the young person's awareness of the impact of his or behaviour upon the victim;
- Role in the offence - whether the young person was a ringleader or played a minor role; and
- Attitude to the offence - whether the young person exhibits remorse or concern for the victim, preparedness to make amends.

Source: Nacro, ‘The sentencing framework for children and young people’, 2003: <www.crimereduction.homeoffice.gov.uk/youth/youth59.htm> [accessed 2 May 2011].

²¹⁹ Ibid., Article 3.

²²⁰ See also the preamble to the Beijing Rules and Rules 5 and 17.1(d); and Vienna Guidelines, para. 8(a): “In the use of the Guidelines for Action at both the international and national levels, consideration should be given to the following: (a) respect for human dignity, compatible with the four general principles underlying the Convention, namely: ... upholding the best interests of the child.” Although there is no specific article in the European Convention that requires that judges take account of the best interests of the child in making sentencing decisions, the ECHR has treated Article 3 of the CRC as a principle to be applied (See *T. and V. v. United Kingdom*, No. 24888/94; [1999] ECHR 2; No. 24724/94 (2000) 30 EHRR 121, Council of Europe: ECHR, 1999.).

lesser culpability, circumstances and needs of the child, as well as to the various long-term needs of the society".²²¹ When looking at the effect on society, the court should not be influenced by media coverage or social opinion. In order to be proportionate to the circumstances of a child, a sentence must be individualised.

8.1.3 Using social inquiry reports to inform sentencing decisions

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.²²² Juvenile justice legislation should impose a clear duty on the court to order such reports. The legislation should also specify the information that should be provided within the social inquiry report. This 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.

Social inquiry reports assist the court to reach a decision on the appropriate sentence. Responsibility for producing reports varies. In some States it lies with the probation service, with officers attached to the court or with the child protection services or with inter-disciplinary children's services. The reports should not be written by the investigating officer, as there is an obvious conflict of interest. Whichever body is given responsibility in law (and this should be stated clearly in legislation), it is important that the writer is well trained and has experience of the criminal justice system as well as knowledge of child development. The reports are most useful when they contain information from a range of sources, including the child protection services, parents, the school, the child's doctor and from other professionals who have dealt with the child.

8.2. Non-custodial sentences

Legislation should reflect the provisions of the CRC and the Standards and Norms, which place States under an explicit obligation to develop a range of non-custodial measures, including both social and/or educational measures,²²³ as an alternative to deprivation of liberty, and ensure that these dispositions are available and effective. Alternatives to custody/detention include absolute or conditional discharges, suspended sentences, restorative justice or family focused programmes community services, attendance at designated day centres, supervision, mentoring, educational or vocational programmes, intermediate treatment, drug and alcohol treatment centres, etc. It is not possible to cover all of the various non-custodial sentences in this guidance paper, but examples are given of some of these measures. States need to ensure that legislation permits courts to order such sentences.

Deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will,

²²¹ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 25.

²²² Rule 16 of Beijing Rules.

²²³ Article 40(4) of CRC; Tokyo Rules.

by order of any judicial, administrative or other public authority.²²⁴ Thus, placement at a residential educational centre where a child cannot leave when he or she chooses must be considered as deprivation of liberty and therefore cannot be used as “non-custodial sentence”.

Box 42: Range of options at disposition

Brazil’s Statute of the Child and Adolescent, adopted in 1990, includes a wide range of potential sentencing options for children and adolescents. Adolescents (individuals aged 12–18) may be the subject of “socio-educational measures” (including a caution, reparation, community service, supervision and detention). Under Article 112(1), the measure applied “must give due consideration to [the juvenile’s] capacity to comply with it, the circumstances and the gravity of the infraction”.

The Honduras Child and Adolescents’ Code (1996) also contains a variety of sentencing options for juveniles including:

- Guidance and family-social support;
- Reprimand/warning;
- Imposition of rules of conduct (e.g. having to attend an educational institution) lasting no longer than 30 days;
- Social service in the community (cannot exceed six months);
- Requirement to repair the damage committed;
- Assisted liberty (allowing the child to remain at liberty but with an obligation to attend educative programmes, monitored in specific centres under the care of specific persons, who must be assisted by specialists).

Sources: Statute of the Child and Adolescent, Law No. 8,069 (13 July 1990), Art. 112 (Brazil); Child and Adolescents’ Code 1996, Art. 188 (Honduras).

8.2.1 Guidance and supervision

One option open to the Court is to order that the child be subject to guidance or supervision. This allows children to stay with their family, to remain part of their community and to continue with their education and work. Under this order, a child will generally be allocated a social worker or a probation officer. Either the court, the social worker or the probation officer will normally set the conditions of supervision. The conditions can be wide. They may require that the child meets with the supervisor at specified dates or that the child takes part in specified activities at specified places, including attendance at drug rehabilitation programmes. A condition may be made that requires the child to attend school regularly or to refrain from meeting with certain people or going to certain places. In some States it is also possible to attach a curfew condition as part of the supervision order.

Box 43: Guidance and supervision

The Juvenile Justice Code of Kosovo (2004) provides for three types of intensive supervision sentences: intensive supervision by a parent, adoptive parent or guardian, intensive supervision in another family and intensive supervision by the Guardianship Authority. In the latter cases, the duties of the Guardianship Authority are defined by the court and include:

- 1) Overseeing the child’s education;
- 2) Facilitating access to vocational training and employment;
- 3) Ensuring that the child is removed from any adverse influences;
- 4) Facilitating access to necessary medical care;
- 5) Providing possible solutions to any problems that might arise in the child’s life; and
- 6) Such other duties as the court determines would be in the best interest of the child.

Source: Juvenile Justice Code, Regulation No. 2004/8 of 20 April 2004, Articles 20, 21, 22, 22(3) (Kosovo).

²²⁴ Rule 11(b) of Havana Rules.

8.2.2 Restorative justice measures

The Committee on the Rights of the Child, in General Comment No. 10, recommends that States should focus on promoting the use of restorative justice,²²⁵ not only as a pre-trial measure, but also as a sentencing measure. Restorative justice programmes are widely regarded as an effective way of addressing offending behaviour and reducing recidivism. Legislation should give judges clear and explicit power to order a non-custodial, restorative justice sentence.

The purpose and nature of restorative justice programmes are discussed in Section 5. The term “restorative justice” has been defined in the Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters²²⁶ as a programme or process in which the victim, the offender and/or any other individuals or community members affected by a crime

Box 44: Restorative justice through youth conferences

In Northern Ireland, where a child has been convicted, youth conferences act as a form of restorative justice and bring together the offender, a police officer, an appropriate adult and, if he or she so chooses, the victim. Young defendants can be referred to youth conferencing at two points during the juvenile justice process: as a diversionary measure (i.e. pre-trial) and following a court order (post-trial). While prosecutors *may* refer children to diversionary youth conferences, courts *must* refer all juvenile offenders to youth conferences unless the offence warrants a life sentence, falls under the terrorism act or is triable on indictment only (i.e. is a serious offence, usually of violence). Almost all young persons will, therefore, be referred to a youth conference.

The offender will attend with an appropriate adult (a parent or other suitable representative) and a police officer. The victim’s attendance is voluntary and he or she may send a representative instead or contribute indirectly to the conference through a telephone link, remote conferencing or by sending a letter or recording a message.

The conference results in a youth conference plan, which, under the Justice (Northern Ireland) Act 2002 must require that the young offender do one or more of the following:

- a) Apologise to the victim of the offence or any person otherwise affected by it;
- b) Make reparation for the offence to the victim or to the community at large;
- c) Make a payment to the victim of the offence not exceeding the cost of replacing or repairing any property taken, destroyed or damaged by the child in committing the offence;
- d) Submit himself to the supervision of an adult;
- e) Perform unpaid work or service in or for the community;
- f) Participate in activities (such as activities designed to address offending behaviour, offering education or training or assisting with the rehabilitation of persons dependent on, or having a propensity to misuse, alcohol or drugs);
- g) Submit himself to restrictions on his conduct or whereabouts (including remaining at a particular place for particular periods); and
- h) Submit himself to treatment for a mental condition or for a dependency on alcohol or drugs.

Once a court is presented with a youth conference plan, it may adopt the plan as the young person’s sentence, accept the plan and add a sentence.

Sources: Criminal Justice (Children) (Northern Ireland) Order 1998, 1998 No. 1504 (N.I. 9), Articles 3A(2), 3(A)(6), 3C(1), Part 3(A); O’Mahony, D. and Campbell, C., ‘Mainstreaming Restorative Justice for Young Offenders through Youth Conferencing - the experience of Northern Ireland’, 2004, p.9; Youth Conference Rules (Northern Ireland) 2003, 2003 No. 473, Rule 6(A), Article 36J.

participate together actively in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative processes include mediation, family group conferencing and sentencing circles. Examples of restorative outcomes include

²²⁵ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 3.

²²⁶ Economic and Social Council, Basic principles on the use of restorative justice programme in criminal matters, 27 July 2000, U.N. Doc. E/2000/INF/2/Add.2.

restitution, community service and any other programme or response designed to achieve reparation for the victim and community, and reintegration of the victim and/or the offender.

8.2.3 Community service orders

These orders require that the child undertake unpaid work for a certain number of hours, generally for the benefit of the community. When applied to children, community service should consist of a constructive and interesting activity, preferably one that will enable the child to learn a skill, and allow him or her to feel that they have done something useful for the community. If community service can incorporate an element of mentoring at the same time, it is likely to be more effective. In some jurisdictions the community service undertaken is discussed with the victim of the offence or members of the community and may relate specifically to the nature of the offence (and can then be regarded as a restorative justice process). Community service can also be ordered by the court without a restorative process, simply as a form of non-custodial sentence which has a re-integrative purpose. The court should be given the power to order both forms of community service in legislation. Whatever form community service takes, in order for it to be effective in addressing offending, it needs to be carefully planned to meet the needs of the child.

Box 45: Types of community service

Brazil's Statute of the Child and Adolescent (1990) includes community service as one of the many sentences for adolescents (individuals aged 12 to 18). Under the law, "[t]he rendering of community services consists in the carrying out of gratuitous tasks of general interest for a period of not more than six months, at entities of assistance, hospitals, schools and other like institutions, as well as in community and governmental programs." The community service tasks are "designated according to the aptitudes of the adolescent and should be carried out during a maximum period of eight hours per week, on Saturdays, Sundays and holidays or on working days, in such a way as not to hamper attendance at school or normal working hours".

In Papua New Guinea, the Juvenile Courts Act (1991) states that if the court places the juvenile on probation, he/she may also be required to perform 'an appropriate community service, not to exceed a total period of 50 hours'.

The Youth Criminal Justice Act (2002) of Canada provides that the youth justice court, upon finding a young person guilty of an offence, can "order the young person to perform a community service at the time and on the terms that the court may fix, and to report to and be supervised by the provincial director or a person designated by the youth justice court".

Sources: Statute of the Child and Adolescent, Law No. 8,069 (13 July 1990), Articles 112,117, 117(1); Article 32(2), Juvenile Courts Act, No. 40 of 1991; Article 42(2)(i), Youth Criminal Justice Act, 2002, c. 1.

8.2.4 Probation

Probation is a non-custodial measure prescribed by a court, either as an alternative to a custodial sentence, or following partial completion of a custodial sentence: "Probation as a sentencing disposition is a method of dealing with specially selected offenders and consists of the conditional suspension of punishment while the offender is placed under personal supervision and is given individual guidance or 'treatment'."²²⁷

²²⁷ Klaus, J.F., Handbook on Probation Services: Guidelines for Probation Practitioners and Managers, United Nations Interregional Crime and Justice Research Institute, p. 9, citing European Seminar on Probation, London, 20–30 October 1952, United Nations, Doc. St/TAA/SER.C/.

Box 46: Purpose of probation

Philippines Probation Law (1976): Sec. 2. Purpose — This Decree shall be interpreted so as to:

- a) promote the correction and rehabilitation of an offender by providing him with individualised treatment;
- b) provide an opportunity for the reformation of a penitent offender which might be less probable if he were to serve a prison sentence; and
- c) prevent the commission of offences.

Source: Philippines Probation Law 1976 Presidential Decree No. 968.

When a probation order is imposed upon a juvenile, it will often contain conditions and requirements, such as the obligation to report to a probation officer on a regular basis or the prohibition of visiting specific places or people.²²⁸ Once a court has imposed a probation order, the probation period is supervised by a probation officer, who is responsible for helping the child comply with the order, and who will also report any violations of this order to the court.²²⁹

Box 47: Conditions of probation

Canada Youth Criminal Justice Act, 2002:

55. (1) The youth justice court shall prescribe, as conditions of an order made (for probation), that the young person:

- b) appear before the youth justice court when required by the court to do so.

Conditions that may appear in orders:

(2) A youth justice court may prescribe, as conditions of an order made under paragraph 42(2)(k) or (l), that a young person do one or more of the following that the youth justice court considers appropriate in the circumstances:

- a) report to and be supervised by the provincial director or a person designated by the youth justice court;
- b) notify the clerk of the youth justice court, the provincial director or the youth worker assigned to the case of any change of address or any change in the young person's place of employment, education or training;
- c) remain within the territorial jurisdiction of one or more courts named in the order;
- d) make reasonable efforts to obtain and maintain suitable employment;
- e) attend school or any other place of learning, training or recreation that is appropriate, if the youth justice court is satisfied that a suitable programme for the young person is available there;
- f) reside with a parent, or any other adult that the youth justice court considers appropriate, who is willing to provide for the care and maintenance of the young person;
- g) reside at a place that the provincial director may specify;
- h) comply with any other conditions set out in the order that the youth justice court considers appropriate, including conditions for securing the young person's good conduct and for preventing the young person from repeating the offence or committing other offences; and
- i) not own, possess or have the control of any weapon, ammunition, prohibited ammunition, prohibited device or explosive substance, except as authorized by the order.

Not all States have probation services, but an increasing number are developing such a service. The probation service is generally under the jurisdiction of the Ministry of Justice or the Ministry of Social Affairs, but in some States, where a Ministry of Prisons exists, it may fall within that ministry. In most probation services, the probation officers are social workers or people with experience of working in the prison service or the police. All probation officers working with children should have appropriate training.

²²⁸ See, e.g., Canada Youth Criminal Justice Act, 2002, Sec.55 et-seq and Philippines Probation Law 1976, No. 968, Sec. 10.

²²⁹ See, for instance, Philippines Probation Law 1976, Presidential Decree No. 968, Sec. 3(c) and Ghana Juvenile Justice Act 2003, Sec. 31(6).

When imposed either as an alternative to detention or following the partial completion of a custodial sentence, probation orders generally contain conditions that, if broken, result in the child's referral back to the courts. It is important therefore to ensure that the conditions of probation for a child are realistic. For instance, expecting a child to attend a probation office once a week may not be practical if the office is some distance away, unless the child is helped with the costs of transport.

8.2.5 Financial penalties

Juvenile justice legislation often provides for the imposition of fines as an alternative to a custodial sentence. While the use of fines as an alternative sentence can reduce the use of custodial sentences, fines have limited re-integrative purpose or effect. In addition, children usually have little chance of paying such fines, a sentiment emphasised in the Australian Law Review Commission's 1997 report 'Seen and Heard: Priority for Children in the Legal Process', which stated:

Although the provisions dealing with fines generally set monetary limits for juveniles there remain serious questions as to their appropriateness as a sentencing option for juvenile offenders. Many young offenders come from financially disadvantaged backgrounds and indeed poverty is often one of the root causes of their offending behaviour.²³⁰ They may encounter difficulty paying the fine on the terms set by the court. Default may then lead to further involvement in the criminal justice system. In addition, financial penalties have limited rehabilitative value for young offenders.²³¹

Indeed, given their primarily punitive nature and the lack of re-integrative purpose, the ordering and imposition of fines against children could be regarded as contrary to international standards. Rather than using fines as a measure, legislation could instead give judges the power to order that the child pay a small sum of compensation to the victim as a restorative measure. This must be a sum that the child will realistically be able to pay and can afford. Alternatively, the child should be able to perform community work in lieu of a fine.

A considerable number of States impose fines upon parents in cases where a child does not have the means to pay. This practice is generally regarded as not being in the best interests of the child as it might discourage parents' becoming active partners in the social reintegration of their child. The power to order such a fine should be removed from legislation. Emphasis should be placed instead on providing parents with support and assistance in addressing their child's offending behaviour through parenting classes, family group conferences or behaviour management training.

²³⁰ The relationship between poverty and juvenile offending is discussed in Cunneen, C. & White, R., *Juvenile Justice: An Australian Perspective*, Oxford University Press, Melbourne, 1995, p. 116–134. The question of monetary penalties for juvenile offenders is discussed further in Seymour, J., *Dealing with Young Offenders*, The Law Book Company, Sydney, 1988, p. 337–344.

²³¹ Australian Law Review Commission, 'Seen and Heard: Priority for Children in the Legal Process', 1997, para. 19.34.

Box 48: Alternative ‘payment’ for juveniles unable to afford fines

Canada Youth Criminal Justice Act 2002:

54. (1) The youth justice court shall, in imposing a fine ... have regard to the present and future means of the young person to pay.

Discharge of fine or surcharge (extra charge)

(2) A young person on whom a fine is imposed ..., including any percentage of a fine ..., or on whom a victim fine surcharge is imposed ..., may discharge the fine or surcharge in whole or in part by earning credits for work performed in a programme established for that purpose.

a) by the lieutenant governor in council of the province in which the fine or surcharge was imposed; and

b) by the lieutenant governor in council of the province in which the young person resides, if an appropriate agreement is in effect between the government of that province and the government of the province in which the fine or surcharge was imposed.

In some cases, where restorative justice processes are used and a restorative justice outcome reached, this may include a payment to repair damage. In such instances, provided that the purpose is one of making reparation and re-integrative, and it is agreed freely by the child and/or the parents as an appropriate payment, this is acceptable.

8.2.6 Educational and vocational measures

Such measures are often part of a community-based order. Children may be ordered to attend classes as part of a re-integration process. These measures are most useful when they are designed to meet the individual child’s specific needs. Children who are in conflict with the law have often missed periods of schooling or have learning difficulties. Education needs to be focused on ensuring children have basic literacy and numeracy skills and then on bringing children up to the same level as their peers to enable them to re-enter school. Vocational training should also take into account the child’s needs and assist the child to gain a skill that can help him or her obtain employment once education has finished.

8.2.7 Intermediate treatment

Intermediate treatment has been popular in Western States. It is defined as a sentence that involves neither custody nor punishment but one which provides opportunities to learn constructive patterns of behaviour to replace potentially offending ones. The concept of intermediate treatment is based on the assumption that children need to be encouraged to behave in a different manner through activities and experiences of a rewarding, enriching and enjoyable nature, which help them take control of their lives, re-integrate into the community and contribute towards helping their peers. Intermediate treatment is generally tailored to the individual child’s needs but places emphasis on group work. It frequently focuses on the child’s social skills and motivating the child to enable him or her to achieve at school and to make better use of leisure time.

Intermediate treatment can be very successful for children and the possibility of such an order should be contained in the legislation. However, intermediate treatment can also be costly, can be seen politically as “rewarding” children for bad behaviour, and if children are introduced to activities that they may not be able to continue after the period of intermediate treatment is finished, this can result in unfulfilled expectations and frustration for the child.

8.2.8 Other measures

Although the measures set out above are the most common forms of non-custodial sentences, there are a wide range of other measures that can be implemented to help the child assume a constructive role in society. Legislation should contain a section or article that gives power to the judge or court to sentence the child to such community programmes and interventions as may exist at any given time and are appropriate for the child. A general section or article of this nature will give judges flexibility to use new programmes as they are developed. Other alternatives include mentoring and befriending programmes where children are provided with an adult to support and befriend them. A mentor should act as a role model for the child and may be asked to undertake an activity with the child, to assist with homework or generally to meet and talk with the child on a regular basis.

Suspended sentences may also be used as a form of non-custodial sentencing. The court suspends the imposition of a custodial sentence on the child provided that he or she does not commit another offence within a specified time period, and attends probation or takes part in a restorative justice programme. If the child fails to meet the conditions set out by the court, the sentence will take effect. As the failure of the child to attend a programme or meet the conditions set out by the court could result in a custodial sentence being ordered, courts should, wherever possible, consider a pure community-based sentencing option instead. Also, suspended sentences should generally be accompanied by parallel supportive measures in order to assist the child to meet the set conditions.

8.3. Custodial sentences

Article 37(b) of the CRC states that children can only be deprived of their liberty and receive a custodial sentence, if this is done in conformity with the law, as a last resort and for the shortest appropriate period of time.

The CRC requires that detention must not be used as a punishment. Rather it should be used to work intensively and therapeutically with children in order to reintegrate them into society. Standards for conditions of detention are set out in detail in Section 9.

8.3.1 Conformity with the law

Article 37(b) of the CRC provides that “[n]o 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...”

Deprivation of liberty will only be lawful if it is permitted by domestic law. So, for instance, if a child is given a custodial sentence for a crime where the law only permits a fine to be levied, this would be “unlawful” detention.

The ban on “arbitrary” detention is fundamental and can be found in Article 9 of the UDHR and Articles 9 and 11 of the ICCPR as well as in the CRC. There is no clear definition of arbitrary detention in international law. However, the Working Group on Arbitrary Detention has defined

it as detention that is contrary to the human rights provisions of the major international human rights instruments.²³²

In order to “conform” with the law, it is not only necessary that the domestic law permits detention in the particular circumstances, but also that all necessary domestic legal procedures have been followed and that the use of detention is a last resort. For monist States (i.e. those States where ratification of an international Convention such as the CRC is sufficient for the provisions of that Convention to be considered as applicable law in the State) “conformity” also requires that the provisions of the CRC have been complied with.²³³

Although the CRC is automatically incorporated into domestic law in monist States on ratification, the provisions relating to sentencing should nevertheless be added to the State’s juvenile justice legislation. In dualist States (mainly common law States), the CRC will not be part of domestic law unless and until it has been presented to and passed by parliament. In these States unless the CRC has been incorporated into domestic law the sentencing provisions need to be specifically added into domestic legislation.²³⁴

Box 49: Sentencing in conformity with the law

In *D.G. v. Ireland* the ECHR examined whether a minor had been unlawfully and arbitrarily deprived of his liberty. The young boy, who required special care, had been sent to a penal institution, not because he had committed a criminal offence but because there was no appropriate placement for him. Although the Irish Government suggested that the child had been sent to the prison for educational purposes, the Court held that the boy’s detention in the prison was arbitrary and unlawful under Article 5(1)(d) of the European Convention.

Source: *D.G. v. Ireland*, Application No. 39474/98, Council of Europe: European Court of Human Rights 16 May 2002, paras. 66, 72–85.

8.3.2 As a last resort

Article 37(b) of the CRC provides that deprivation of liberty shall only be used as a measure of last resort. The Beijing Rules provide that restrictions on the personal liberty of a child shall be imposed only after careful consideration.²³⁵ In addition, the Rules provide that under-18s should not be deprived of their liberty unless they are guilty of committing a violent offence against a person or have been involved in persistent serious offending and that there is no other appropriate response.²³⁶ The phrase “no other appropriate response” should not be taken to refer to where there is an absence of alternative measures, but to situations in which other

²³² Commission on Human Rights, Report of the Working Group on Arbitrary Detention (1996), U.N.Doc. E/CN.4/1997/4, para. 87, citing E/CN.4/1992/20, Annex 1. See Children’s Legal Centre and United Nations Children’s Fund, ‘Administrative Detention of Children: A Global Report’, New York, 2011, Introduction.

²³³ In most monist states, there is a legislative provision that provides that where there is a conflict between an international treaty, which has been ratified by the State and domestic law, the international treaty has primacy.

²³⁴ Incorporation of a treaty is usually undertaken by presenting the treaty as a bill or by attaching the treaty as an annex to a bill. In dualist States where there has not been specific incorporation of the CRC into domestic law, the CRC cannot be relied upon as law in the courts.

²³⁵ Rule 17(1)(b) of Beijing Rules.

²³⁶ See Rule 17(1)(c) of the Beijing Rules. See also, Resolution 4 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which states: “A juvenile offender should not be incarcerated unless there is no other appropriate response” (Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders – Report on the Sixth Congress containing a summary of proceedings, conclusions and recommendations as adopted by the Congress – Report prepared by the Secretariat., U.N. Doc. A/CONF.87/14/Rev.1, 25 August–5 September 1980).

measures would not be suitable or beneficial to the child.²³⁷ This provision is extremely important. A custodial sentence should not be given to a child just because there is no other suitable placement.

In many States, children are detained for petty property offences, often involving thefts of small amounts of money or even food. Children who are mentally ill also find themselves locked up in prisons rather than being treated in medical facilities. In industrialised countries, children who are homeless or who have been in the care of the local authority are more likely to be given a custodial sentence, because of the lack of supervision and care by their families. In order to provide these children with the full protection contained in the CRC, legislation should explicitly provide not only that deprivation of liberty should be used as a last resort but also that it should be used only in the specific circumstances set out in Rule 17 of the Beijing Rules above.

8.3.3 Shortest appropriate period of time

Article 37(b) of the CRC does not define what constitutes the shortest appropriate period of time. The length of sentences handed down for under-18s needs to be directly linked with the length of time considered to be appropriate to reintegrate the child and help him or her assuming a constructive role in society. Legal provisions providing that a sentence for a child shall be a half of that of an adult, or some other proportion, do not fulfil this purpose. In all cases legislation should require a court to give direct consideration to whether a custodial sentence is the last resort and to determine the period of time needed to provide the child with the required intervention. The length of the sentence should not extend beyond this time period.

Some States have laid down fixed maximum sentences that can be given for different offences.

Box 50: Maximum custodial sentences for juveniles

The Uganda Children Act (1996) limits the length of a detention order the Family and Children Court can impose to “detention for a maximum of three months for a child under sixteen years of age and a maximum of twelve months for a child above sixteen years of age and in the case of an offence punishable by death, three years in respect of any child”.

Under the Statute on Children and Adolescents 1990 in Brazil, “[i]n no case can the maximum period of internment exceed three years.” Additionally, “custodial measures must be re-evaluated at least every six months.”

In England and Wales, the court can only impose a custodial sentence for serious offences. In most cases, this would be a Detention and Training Order, which cannot exceed 24 months and only half of which is served in custody.

Sources: Article 94(1)(g) of Uganda Children Act 1996; Articles 121(2), 121(3) of Estatuto do Crianca e do Adolescente 1990; Crime and Disorder Act 1998, Cap. 37, Sec. 73.

8.3.4 Why should custodial sentences be restricted?

It is extremely difficult to implement and respect all the rights of the child while he or she is deprived of liberty and placed in a detention centre or prison. Further, it has been recognised for some time that placing a child in a detention centres, a prison or any other closed institution can have adverse influences on a child, which “cannot be outbalanced by treatment efforts”.²³⁸ The

²³⁷ Rule 17(1)(c) of Beijing Rules. See also Rules 1 and 2 of the Havana Rules.

²³⁸ Commentary Rule 19 of the Beijing Rules states that “[m]oreover, the negative effects, not only of loss of liberty but also separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development.”

effects of institutionalisation, which include separation from family and community, are often compounded by poor conditions and limited or non-existent reintegration activities and programmes. Prison life can also expose vulnerable young offenders to a culture of violence. This experience leaves young people vulnerable to family breakdown, homelessness, difficulty in obtaining employment, mental health problems and re-offending on release.

As the commentary to Beijing Rules notes, progressive criminology advocates the use of non-institutional over institutional treatment. Indeed, modern research evidence seems to indicate clearly that institutionalisation of children is far more likely to lead to further offending than community-based sentences.²³⁹

8.4. Prohibited sentences

The CRC, the ICCPR, regional human rights instruments²⁴⁰ and the Standards and Norms all contain limitations on the sentences that may be imposed. On a broad level this means that judges or courts cannot order sentences that may involve torture or other cruel, inhuman or degrading treatment or punishment. Capital punishment and life imprisonment without possibility of release are specifically prohibited for children in all circumstances and would fall within the definition of cruel, inhuman or degrading treatment or punishment if ordered.

The Human Rights Committee General Comment No. 20²⁴¹ provides that the aim of Article 7 of the ICCPR that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, (a right restated in Article 37 of the CRC), “is to protect both the dignity and the physical and mental integrity of the individual”.²⁴² According to the Human Rights Committee, “the text of Article 7 allows for no derogation.” The Committee also reaffirms that “even in situations of public emergency... no derogation from the provisions of Article 7 is allowed and its provisions must remain in force.”²⁴³

8.4.1 Capital punishment and life imprisonment without the possibility of release

Article 37(a) of the CRC, Article 6(5) of the ICCPR and Rule 17.2 of the Beijing Rules all prohibit the use of capital punishment for crimes committed by persons below the age of 18 years. The standard does not only prohibit the imposition of capital punishment on under-18s but prohibits the use of capital punishment on persons who were under the age of 18 years when they

²³⁹ In 2008, the Northern Ireland Office, the government body with responsibility for constitutional and security issues, published an analysis of youth re-offending in Northern Ireland. The study, which reviewed re-offending patterns for young people released from custody in 2005 as against those sentenced to a non-custodial court order, found that young people receiving a custodial sentence were nearly twice as likely to re-offend within a year of release as those serving non-custodial sentences. According to the government statistics, 72.9 per cent of young people released from custody re-offended within a year, compared with only 37.5 per cent of young offenders receiving non-custodial sentences. (Northern Ireland Office, Statistics and Research Branch, ‘Northern Ireland Youth Re-offending: Results from the 2005 Cohort’, Research and Statistical Bulletin, 7/2008, 2008).

²⁴⁰ European Convention; Banjul Charter; African Charter on the Rights and Welfare of the Child; Arab Charter; American Convention.

²⁴¹ Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992), Art. 7 - Replaces Human Rights Committee, General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment) (1982).

²⁴² Human Rights Committee, General Comment No. 20 (1992), para. 2.

²⁴³ Ibid., para. 3.

committed the offence, regardless of the age of the person at the time of the trial or sentencing or of the imposition of the sanction.²⁴⁴

According to a 2008 Human Rights Watch report,²⁴⁵ only five States continued to execute juvenile offenders in 2008.²⁴⁶ These States, Iran, Saudi Arabia, Sudan, Pakistan and Yemen, are reported to have executed 32 juvenile offenders between January 2005 and August 2008, despite the prohibition of such executions in Sudan, Pakistan and Yemen.²⁴⁷

Obstacles to the implementation of legislation prohibiting execution of child offenders, and to the protection of such children from this fate include: insufficient birth registration processes which make it hard for children to prove they were under 18 when they committed an offence;²⁴⁸ a lack of juvenile courts resulting in children being tried before adult courts under adult law;²⁴⁹ and a lack of clarity in the legislation including a clear prohibition on capital punishment of children.²⁵⁰

Box 51: No capital punishment

In response to the Committee on the Rights of the Child's criticism and in order to comply with the CRC, several States have passed amendments to prohibit the death penalty for under-18s.

The Bangladesh Child Act 1974:

51. Restrictions on punishment of Child—(1) Notwithstanding anything to the contrary contained in any law, no child shall be sentenced to death, transportation or imprisonment.

Source: Bangladesh Child Act, Act. N. 39, 1974, Art. 51.

Article 37(a) of the CRC also prohibits the use of life imprisonment without any possibility of release for children. The Committee on the Rights of the Child has strongly recommended that all forms of life imprisonment for children should be abolished.²⁵¹

8.4.2 Corporal punishment

The Committee on the Rights of the Child 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

²⁴⁴ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 75.

²⁴⁵ Human Rights Watch, 'The Last Holdouts', 2008, p. 1.

²⁴⁶ Before this time, several countries, including the United States and China officially ceased to execute those convicted of capital crimes while under the age of 18. In the United States, this followed the landmark Supreme Court decision in *Roper v. Simmons*, 125 S.Ct. 1183 (2005); 543 U. S. (2005), United States Supreme Court, 1 March 2005, in which the Court held that the execution of those who committed offences while under the age of 18 violated the 8th Amendment, which prohibits cruel and unusual punishment. In China, amendments to the Criminal Code in 1997 outlawed executions of juvenile offenders, though it was reported that at least two executions had taken place between 1997 and 2005 (Human Rights Watch, 'The Last Holdouts', 2008, p. 1).

²⁴⁷ Human Rights Watch, 'The Last Holdouts', 2008, p. 2.

²⁴⁸ Ibid., p. 2, 10, 16.

²⁴⁹ Ibid., p. 10, 11, 13, 14.

²⁵⁰ Ibid., p. 10–13.

²⁵¹ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 77.

forbidden by States.²⁵² Juvenile justice legislation should, therefore, prohibit any form of corporal punishment.

Box 52: Strategies

Laws prohibiting corporal punishment: The Juveniles Act of Fiji (1974) provides a range of dispositions for courts in juvenile cases but specifically states “no juvenile shall be ordered to undergo corporal punishment.” Section 191(2) of The Children Act, 2001 in Kenya outlines the sentences available for juvenile offenders and states that “[n]o child offender shall be subjected to corporal punishment.” Trinidad and Tobago’s Miscellaneous Provisions (Children) Act No. 66 (2000), repealed laws enacted in 1941 that allowed courts to sentence under-18s to corporal punishment.

Sources: An Act to Make Provision for the Custody and Protection of Juveniles in Need of Care, Protection or Control, and for the Correction of Juvenile Delinquents and Young Offenders, Laws of Fiji, Cap. 56, 1974 (Revised Edition 1985), Sec. 32(1) and (2); Children Act, 2001 Law No. 8 of 2001 (Kenya); Miscellaneous Provisions (Children) Act 2000, Act No. 66 of 2000, Legal Supplement Part A to the “Trinidad and Tobago Gazette”, Vol. 39, No. 203, 20th October 2000, Sec. 7 (repealing Corporal Punishment Offenders Not Over Sixteen Act (1941)), Cap. 13:03, Secs. 8–11 (amending Corporal Punishment Offenders Over Sixteen Act, Chap. 13:04 to apply only to over 18s).

Using the courts to end corporal punishment: In 1995, the Constitutional Court of South Africa, in *S. v. Williams and Others*, reviewed the cases of six juveniles who were convicted and sentenced to receive a number of strokes with a light cane as a measure of “moderate correction”. The punishment, permitted under Article 294 of the Criminal Procedure Act No. 51 of 1977, was held to be unconstitutional by the Court. The Court emphasized that “the deliberate infliction of pain with a cane on a tender part of the body as well as the institutionalised nature of the procedure involves an element of cruelty in the system that sanctions it. The activity is planned beforehand, it is deliberate. ... The juvenile is, indeed, treated as an object and not as a human being.” Thus, the Abolition of Corporal Punishment Act (1997) was enacted. The Act states that “[a]ny law which authorises corporal punishment by a court of law, including a court of traditional leaders, is hereby repealed to the extent that it authorises such punishment.” The Act specifically identified the Criminal Procedure Act (1977) as one of the laws that it repealed.

Sources: *S. v. Williams and Others*, 1995 (2) SA 632 (CC); 1995 (7) BCLR 861 (CC), Constitutional Court of South Africa, 9 June 1995, paras. 1, 96 (The Court held that the provisions violated sections 10 and 11(2) of the Constitution, which enshrine the rights to human dignity and to protection from torture, cruel, inhuman or degrading treatment or punishment, respectively.), 90; Abolition of Corporal Punishment Act 1997, Act No. 33, 1997, Government Gazette No. 18256, 5 September 1997, Sections 1, 3.

Consensus in the regional mechanisms:

- **Europe:** In *Tyrer v. UK*, the ECHR reviewed the case of a 15-year-old boy sentenced to three strokes of the cane by a juvenile court in the Isle of Man. The Court found that “that the judicial corporal punishment inflicted on the applicant amounted to degrading punishment within the meaning of Article 3 of the Convention”, constituting “an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity”.

- **Americas:** The Inter-American Court of Human Rights, in *Caesar v. Trinidad and Tobago*, held that judicial corporal punishment by flogging violated Articles 5(1) and 5(2) of the American Convention, which enshrine an individual’s right to humane treatment. The Court considered the ECHR’s ruling in *Tyrer v. UK* in its decision and stated that “the Court considers that the very nature of this punishment reflects an institutionalisation of violence, which, although permitted by the law, ordered by the State’s judges and carried out by its prison authorities, is a sanction incompatible with the Convention. As such, corporal punishment by flogging constitutes a form of torture and, therefore, is a violation per se of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected. ... Accordingly, Trinidad and Tobago’s Corporal Punishment Act must be considered in contravention to ... the Convention.” Trinidad and Tobago denounced the Convention before the case was heard and has not changed the law as it pertains to adult male offenders.

- **Africa:** The African Commission on Human and People’s Rights, in *Curtis Francis Doebbler v. Sudan*, a case involving the imposition of “lashes” as a judicial sentence on students, found that the punishment violated Article 5 of the Banjul Charter, which prohibits cruel, inhuman or degrading punishment. It has also found that “there is no right for individuals, and particularly the Government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State-sponsored torture under the Charter and contrary to the very nature of this human right treaty.” Therefore, the Commission requested the Government of Sudan to amend the Criminal Law 1991.

Sources: *Tyrer v. The United Kingdom*, 5856/72, Council of Europe: European Court of Human Rights, 15 March 1978, paras. 33, 35; Case of *Caesar v. Trinidad and Tobago*, Series C No. 123, Inter-American Court of Human Rights, Judgment of 11 March 2005, paras. 6, 73; *Curtis Francis Doebbler v. Sudan*, Comm. No. 236/2000, African Commission on Human and People’s Rights, 29 May 2003, para. 42.

²⁵² Committee on the Rights of the Child, General Comment No. 10 (2007), para. 71 states that “The Committee reiterates that corporal punishment as a sanction is a violation of...Article 37 which prohibits all forms of cruel, inhuman and degrading treatment or punishment.” (See Committee on the Rights of the Child, General Comment No. 8 (2006), U.N. Doc. CRC/C/GC/8, Arts. 19; 28, para. 2; and 37, *inter alia*.)

Section 8: Sentencing: Summary checklist

- Legislation should contain a range of sentences that may be ordered by the court when a child is convicted of an offence.
- Legislation should require that social inquiry reports are prepared and considered prior to imposing sentence on a child. Legislation should set out what must be included in a social inquiry report and should specify the body responsible for producing these reports.
- Legislation should set out a range of possible non-custodial sentences that may be ordered by judges. These should include the use of guidance and supervision orders; counselling; probation; foster care; educational and vocational training programmes, intensive social work programmes, restorative justice programmes, intermediate treatment programmes, community service orders and other programmes thought suitable for children in the jurisdiction. The list of possible non-custodial measures should not be limited in the legislation to give judges the power to use new programmes as they become available.
- Legislation should provide that custodial sentences should only be passed on a child where the child is guilty of committing a violent offence against a person or has been involved in persistent serious offending and that there is no other appropriate response.
- Legislation should specify that a custodial sentence should be for the shortest possible period of time.
- Legislation should place a duty on the judge to give direct consideration to whether a custodial sentence is the last resort and to determine the period of time needed to provide the child with the required intervention. The length of the sentence should not extend beyond this time period.
- Any legislation that permits the use of corporal punishment should be repealed.

9. Standards of detention

The international framework on juvenile justice provides a very detailed set of standards that are applicable to children who are deprived of their liberty. Article 37(c) of the CRC states that “[e]very child deprived of liberty shall be treated with humanity and respect for inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.”²⁵³ They shall not for any reason be denied the civil, political, economic, social or cultural rights to which they are entitled under national and international law, which are compatible with the deprivation of liberty.²⁵⁴

The Havana Rules, which apply to all children in a “public or private custodial setting, from which a person is not permitted to leave at will, by order of any judicial, administrative or other public authority”,²⁵⁵ detail the treatment that juveniles should enjoy and the conditions of their detention. Further standards relating to the treatment of juveniles can be found in the Beijing Rules²⁵⁶ and the Standard Minimum Rules for the Treatment of Prisoners.²⁵⁷

The Havana Rules cover administrative issues, including the management of juvenile facilities, admission, registration, movement and transfer and classification and placement.²⁵⁸ They also cover physical environment and accommodation, the level of education and vocational training and work that should be offered to children, recreation, medical care, contact with the wider community, physical restraint and disciplinary measures, inspection and complaints, return to the community and personnel.²⁵⁹

The Committee on the Rights of the Child²⁶⁰ recommends that States incorporate these and other relevant international standards²⁶¹ directly into their legislation and make them available to all professionals and others involved in juvenile justice. However, it is unusual for a State to include all the necessary legislation on conditions of detention in their primary juvenile justice legislation, as this would make the legislation a very lengthy document, and one that might take up considerable parliamentary time when presented. As a result, conditions of detention are usually contained in secondary legislation, which may take the form of operating rules for all

²⁵³ Rule 28 of the Havana Rules states “[t]he detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations.”

²⁵⁴ Rule 13 of Havana Rules.

²⁵⁵ *Ibid.*, Rule 11(b).

²⁵⁶ “Efforts shall be made to implement the relevant principles laid down in the Standards Minimum Rules for the Treatment of Prisoners to the largest possible extent so as to meet the varying needs of juveniles specific to their age, sex and personality” (Rule 27.2 of Beijing Rules).

²⁵⁷ Standard Minimum Rules for the Treatment of Prisoners.

²⁵⁸ See Rules 19–31 of the Havana Rules.

²⁵⁹ For a comprehensive review of international standards applying to children deprived of liberty, see Cappelaere, G., Grandjean, A., Naqvi, Y., *Children Deprived of Liberty: Rights and Realities*, Editions Jeunesse et Droit, 2005.

²⁶⁰ See Committee on the Rights of the Child, General Comment No. 10 (2007), para. 88.

²⁶¹ See the Standard Minimum Rules for the Treatment of Prisoners. See also Rule 9 of the Beijing Rules.

juvenile detention facilities, or may be contained in the individual facility's rules or regulations. There are advantages to this approach, as a great amount of detail can be contained within operating rules or regulations.

9.1. Purpose of deprivation of liberty

According to international standards, the primary purpose of deprivation of liberty must be the reintegration of the child and his/her assuming a constructive role in society²⁶². In order to achieve this aim “[j]uveniles in institutions shall receive care, protection and all necessary assistance - social, educational, vocational, psychological, medical and physical - that they may require because of their age, sex, and personality and in the interest of their wholesome development.”²⁶³ All detention facilities holding children should operate a regime focused on re-integration of the child within his or her community. The child should be interviewed upon admission and a psychological and social report prepared. The report together with the medical report should be used by the institution to determine the most appropriate programme to be pursued.

9.2. Separation from adults

The CRC²⁶⁴ and the ICCPR²⁶⁵ both require that where children are deprived of their liberty, States shall ensure that they are separated from adults, unless it is considered in the child's best interest not to do so.²⁶⁶ The Committee on the Rights of the Child recommends in General Comment No. 10²⁶⁷ that the phrase “unless it is considered in the child's best interests not to do so”, should be interpreted narrowly; the child's best interests does not mean “for the convenience of the State”. Further, this exception does not absolve a State of its obligation to establish separate facilities for children, which include “distinct, child-centred staff, personnel, policies and practices”.²⁶⁸

The reason for separation of children and adults is explicitly set out by the Committee on the Rights of the Child: “There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate.”²⁶⁹

²⁶² “The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society” (Rule 26.1 of Beijing Rules).

²⁶³ Rule 26.2 of Beijing Rules.

²⁶⁴ Article 37(c).

²⁶⁵ Article 10(3).

²⁶⁶ See also, Rule 8(d) of the Standard Minimum Rules for the Treatment of Prisoners and Rule 26.3 of the Havana Rules.

²⁶⁷ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 28.

²⁶⁸ *Ibid.*, para. 85.

²⁶⁹ *Ibid.*

Box 53: Separated from adults: Inter-American Commission on Human Rights

In *Minors in Detention v. Honduras* before the Inter-American Commission on Human Rights, the Center for Justice and International Law and *Casa Alianza* alleged that the State was detaining children in central prison facilities with adults who subjected them to physical and sexual abuse. Although the detention of juveniles with adults was contrary to the Honduran Constitution, the Supreme Court of Honduras had allowed juvenile courts to order the detention of juveniles and adults “in separate areas of the Central Penitentiary” and, even though this permission was revoked in 1996, the practice of detaining juveniles alongside adults continued. It also alleged that children were detained arbitrarily and by judges without jurisdiction over juvenile cases.

The Commission held that Article 19 of the American Convention, Article 37(c) of the CRC and Article 122(2) of the Honduran Constitution “taken together, made it clear that the State of Honduras had an obligation to keep juveniles separate from adult inmates”. It also stated “the cohabitation of juvenile and adult inmates is a violation of the human dignity of these minors and has led to abuses of the juveniles’ ‘personal integrity’.”

In response to the Commission’s report, Honduras indicated that it had taken measures to ensure that no juveniles were detained alongside adults, which the Commission described as a very positive advance, but to which it also attached a measure of caution given that the State’s orders not to detain children with adults had previously been ignored by those involved in the administration of juvenile justice.

Sources: *Minors in Detention v. Honduras*, Case 11.491, Report No. 41/99, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 573 (1997), 16 October 1996, Inter-American Commission on Human Rights, 1998, paras. 1, 3; Article 122(2) of Honduran Constitution, paras. 4, 68, 75, 130, 172, 173.

The separation rule does not, however, require that a child should be moved from a juvenile facility into an adult setting once he or she turns 18. This is because a move to an adult facility is likely to mean the end of a re-integrative regime that should be in operation at the detention facility. Legislation should contain a provision that permits a child to stay in the juvenile facility after he or she reaches the age of majority, particularly if the sentence is near completion, provided that his or her presence is not contrary to the best interests of younger children in the same facility.

Box 54: Separated from adults: Legislation

Uganda Children Act 1996:

- (5) Before making a detention order, the court shall be satisfied that a suitable place is readily available.
- (6) No child shall be detained in an adult prison.

Turkey Juvenile Protection Law 2005 states:

Art. 40 (1) For the purposes of this Law, in order to protect the rights of juveniles, the following fundamental principles shall be observed:

- (k) Keeping juveniles separate from adults at the institutions where they are cared for and looked after and where the court decisions are implemented.

Sources: Uganda Children Act 1996 (Ch. 60); Law No. 5395, 2005 (Turkey).

9.3. Conditions and treatment in detention

Ideally, any detention facility should be small-scale to enable individualised work to be carried out with each child, and decentralised so that children can be easily visited by their families, as

well as integrated into the social, economic and cultural environment of the community.²⁷⁰ Open detention centres are preferable to closed facilities²⁷¹ and should be given priority.²⁷²

9.3.1 Physical environment

The Havana Rules provide that juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity.²⁷³ This requires States to have regard to the need of children in detention for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure activities.²⁷⁴ Sleeping accommodation should consist of small dormitories or individual rooms and should be unobtrusively supervised.²⁷⁵ There should be sufficient, clean bedding²⁷⁶ and adequate sanitary facilities should be installed.²⁷⁷ To the greatest extent possible, children should be allowed to wear their own clothes,²⁷⁸ and should be provided with storage facilities for their own personal items.²⁷⁹ Adequate food and drinking water should be made available.²⁸⁰

9.3.2 Disciplinary measures

In 2006, the United Nations Secretary General's Study on Violence against Children stated that "Children in detention are frequently subjected to violence by the staff, as a form of control or punishment, and often for minor infractions. Although 124 countries have fully prohibited corporal punishment in penal institutions, in at least 78 countries it remains legal as a disciplinary measure in these institutions. Violent practices are found in both industrialized and developing countries. Children may be confined to cramped cells for weeks or even months, subjected to painful restraints as a "disciplinary" measure, or forced to hold uncomfortable physical positions for hours at a time."²⁸¹

According to international standards, there must be written rules on measures of discipline in institutions²⁸². The Havana Rules require that any disciplinary measures applied to a child who is detained should be consistent with the upholding of the inherent dignity of the individual.²⁸³ As such, "[a]ll disciplinary measures constituting cruel, inhuman or degrading treatment [are] strictly prohibited, including corporal punishment,²⁸⁴ placement in a dark cell, closed or solitary

²⁷⁰ Rule 30 of Havana Rules.

²⁷¹ Ibid.

²⁷² Rule 19, Commentary, of Beijing Rules.

²⁷³ Rule 31 of Havana Rules.

²⁷⁴ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 89.

²⁷⁵ Rule 33 of Havana Rules.

²⁷⁶ Ibid. Also see Principle 19 of the Standard Minimum Rules for the Treatment of Prisoners: "Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure cleanliness".

²⁷⁷ Rule 34 of Havana Rules. Also see Principle 15 of the Standard Minimum Rules for the Treatment of Prisoners.

²⁷⁸ Rule 36 of Havana Rules.

²⁷⁹ Ibid., Rule 35.

²⁸⁰ Ibid., Rule 37.

²⁸¹ Pinheiro, Paulo Sérgio, 'World Report on Violence Against Children', 2006, p. 175, 197.

²⁸² Rule 68 of Havana Rules.

²⁸³ Ibid., Rule 66.

²⁸⁴ The Commission on Human Rights has held that "corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture": Commission on Human Rights, Resolution 2001/62, Torture and other cruel, inhuman or degrading treatment or punishment (2001), U.N. Doc. E/CN.4/RES/2001/62, para. 5. See also Rule 17.3 of the Beijing Rules and Guidelines 21(h) and 54 of the Riyadh Guidelines.

confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned.”²⁸⁵

The Committee on the Rights of the Child has recommended that, to ensure Article 19 (which protects children against all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse) is fully implemented, the use of flogging, corporal punishment or other violent measures as a punishment or a mode of discipline within the child justice system should be prohibited. Such measures must be regarded as amounting to cruel, inhuman or degrading treatment.²⁸⁶ Legislation should explicitly prohibit the use of any form of corporal punishment or physical violence by staff against a child who is in detention. It should also set severe sanctions for staff using violence against children in detention.

International standards also specifically prohibit certain non-violent disciplinary measures, including a reduction in the child’s diet, closed or solitary confinement, denial of contact with family, and labour.²⁸⁷ These prohibitions should also be included in domestic legislation.

9.3.3 Use of force or physical restraint

The Havana Rules permit the use of physical restraint of children in exceptional cases and where all other control methods have been exhausted and failed.²⁸⁸ The Committee on the Rights of the Child, in General Comment No. 10, stated that “[r]estraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment.²⁸⁹ Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violations of the rules and standards should be punished appropriately.”²⁹⁰

Legislation should also explicitly prohibit personnel from carrying and using weapons in any facility where juveniles are detained.²⁹¹

International standards provide that the use of physical restraint, the type of measures, circumstances and the procedures for use etc, must be clearly set out in laws and regulations²⁹². States must ensure that the permissible circumstances for, and types of, restraint do not extend beyond those set out in international standards, and in particular paragraph 64 of the Havana Rules.

²⁸⁵ Rule 67 of Havana Rules.

²⁸⁶ Committee on the Rights of the Child, Report on the twenty-fifth session, U.N. Doc. CRC/C/100, 2000. p. 131.

²⁸⁷ Rule 67 of Havana Rules. The Riyadh Guidelines also prohibit the imposition of harsh disciplinary measures in general (para. 54).

²⁸⁸ See para. 64. International standards also provide that the use of restraint must be authorised by the Director of the institution (Rule 64 of Havana Rules; Rule 33(c) of Standard Minimum Rules on the Treatment of Prisoners).

²⁸⁹ See Rule 33(a) of the Standard Minimum Rules on the Treatment of Prisoners.

²⁹⁰ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 89.

²⁹¹ Rule 65 of Havana Rules.

²⁹² Rule 64 of Havana Rules; Rule 34 of Standard Minimum Rules on the Treatment of Prisoners.

Box 55: Use of physical restraint in detention

In *R. (on the application of C.) v. Secretary of State for Justice* (2008), the English Court of Appeal considered whether the use of physical restraint and in particular, the use of pain techniques on a child in detention breached Articles 3 (inhuman and degrading treatment) and 8 (the right to private life) of the European Convention. The case followed the death of two children detained in Secure Training Centres, one, of whom who killed himself after a pain distraction technique was used on him, while the other died in the course of being restrained by Secure Training Centre staff.

The Court of Appeal held that the use of pain techniques aroused feelings of fear, anguish and inferiority capable of humiliating and debasing the child and constituted a breach of Articles 3 and 8. The Court found that the “system of physical intervention against another’s will that ... is, in any normal understanding of language, degrading and an infringement of human dignity”.

Source: [2008] EWCA Civ 882, Sections 10, 11, 64.

9.3.4 Contact with the family

One of the biggest concerns about placing children in detention is that they are taken away from their homes. In most cases, the family home is a centre of care and support for the child. It is essential that if a child is taken away from the family, he or she is given the right to maintain contact with the family from the detention centre.

Article 37(c) of the CRC specifically addresses this issue and provides that “[e]very child deprived of liberty...shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.” The Committee on the Rights of the Child recommends that States should set out clearly in law, the exceptional circumstances that may limit this contact, and not leave it to the discretion of the competent authorities.²⁹³

The Havana Rules require that every child should have the right to receive regular and frequent visits, in principle once a week and not less than once a month with their family,²⁹⁴ in circumstances that respect the need of the child for privacy, contact and unrestricted communication with the family.²⁹⁵ In order to make such visits a possibility, the child should be placed in a facility that is as close as possible to the place of residence of his or her family.²⁹⁶ States should also be encouraged to provide travel vouchers or payments to enable families to travel to the detention facility.

In addition to family visits, children should also have the right to communicate in writing or by telephone at least twice a week with the person of the child’s choice, unless legally restricted. Children should be assisted as necessary in order to effectively enjoy this right. In addition,

²⁹³ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 87.

²⁹⁴ Rule 61 of Standard Minimum Rules for the Treatment of Prisoners. Rule 92 states “an untried prisoner shall be allowed to inform his family immediately of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution”.

²⁹⁵ Rule 60 of Havana Rules.

²⁹⁶ See Committee on the Rights of the Child, General Comment No. 10 (2007), para. 87.

children have the right to receive correspondence,²⁹⁷ and should be able to leave detention facilities for a visit to their home and family.²⁹⁸

Box 56: Maintaining family contact in detention

Examples of visitation rights

Under Article 200 of the Bolivian Children's Code (*Ley del Código del Menor*), all children deprived of their liberty have the right to be detained in the closest institution to their parents or guardians, to receive visits and to maintain contact with their families and friends.

These provisions are echoed in the Brazilian Law on the Child and Adolescent in Article 124, which goes one step further than the Bolivian Code by providing that children in detention must have a right to be visited "at least once a week".

In the United Kingdom, the Youth Justice Board provides assisted family visits so that parents and families can visit their children in detention on a regular basis. The scheme covers institutions in which children are held and helps to pay the costs of one visit per week by up to two visitors. It will also pay for children under the age of 16 who need to accompany the adults. In addition, the scheme helps to pay childcare costs if families cannot bring young children with them. This programme means that children in conflict with the law will not lose the support of their parents.

Limitation of rights

Restriction of visits can be acceptable under exceptional circumstances. For example, under the Brazilian legislation, children's visits may be suspended by a judge if "there are serious and well-founded reasons why such visits would be prejudicial to the interests of the adolescent", a rule which would seem to limit visitation when in the best interests of the child.

Home visits

The Bahamas Children and Young Persons Act (1947) allows the superintendent of a detention centre to permit a resident to visit his or her home, as long as the approval of the visiting committee is obtained.

Sources: Law No. 1403, 18 December 1992, Articles 200(6), 200(7), 200(8); Law No. 8.069, 13 July 1990; for more information on the United Kingdom's Youth Justice Board programme visit <www.yjb.gov.uk/en-gb/yjs/Parents/Custody> [accessed 2 May 2011]; Committee on the Rights of the Child, General Comment No. 10 (2007), para. 87; Statute of the Child and Adolescent, Law N° 8.069, 13th July 1990, Art. 124 (XVI), para. 2; Sec. 31 of Children and Young Persons (Administration of Justice) Act (1947), with amendments.

9.3.5 Contact with the outside world

Rule 59 of the Havana Rules exhorts States to use every means to ensure that juveniles have adequate communication with the outside world, as this is both an integral part of the right to fair and humane treatment and also essential to the preparation of children for their return to society. In addition to being able to communicate with their families, children should be allowed to communicate with their friends and other persons or representatives of reputable outside organisations. Further, children should be able to receive special permission to leave the detention facility for educational, vocational or other important reasons.²⁹⁹

9.3.6 Medical care

Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated. All such medical care should, where possible, be provided to detained juveniles through the appropriate health facilities and services of the community in

²⁹⁷ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 89.

²⁹⁸ Rule 59 of Havana Rules.

²⁹⁹ Ibid.

which the detention facility is located, in order to prevent stigmatisation of the juvenile and promote self-respect and integration into the community.³⁰⁰ Legislation should set out what level of medical provision must be provided and how the child is to access necessary medical facilities. Regulations also need to cover release of the child for medical treatment.

9.3.7 Education, vocational training and work

Children in detention facilities who are of compulsory school age have exactly the same right to education as a child in the community.³⁰¹ National education laws should specifically cover children held in detention facilities and should ensure that the education provided must be suited to the child's needs and abilities. This includes providing special education to children who are illiterate and have cognitive or learning difficulties. The education should be designed to prepare the child for return to society.³⁰²

Rule 38 of the Havana Rules requires that education should be provided outside the detention facility in community schools wherever possible. Whether education is provided at a school, or inside the detention facilities, it should be delivered through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Legislation should also permit children who are above compulsory school age to continue their education. If a child is awarded a diploma or educational certificate it should not indicate in any way that the child received it while in a detention facility.³⁰³

Box 57: Education in detention

Regulations about the level of education to be provided can be contained in prison operating rules and in national curriculum/education rules, which should make it clear that a standard curriculum must be delivered to all children of compulsory school age, regardless of whether the child is at a community based school or provided with education in detention.

Prison Service Order No 4950 – Regime for Juveniles, England

Para. 6.13. The Prison Service and the Youth Justice Board vision is to provide high quality centres of learning where the young people are held in secure conditions – “Secure Learning Centres”. The core principle is that learning and skills provided at all stages of the Detention and Training Order should be the same standard as that provided in mainstream schools and colleges.

Apart from education, every child should have the right to receive vocational training in occupations likely to prepare him or her for future employment³⁰⁴ and, if possible, be given the opportunity to work in the local community to enhance the possibility of finding suitable employment after release. It is important that national labour laws explicitly apply to children in detention facilities in the same way as to other children in the community.³⁰⁵

³⁰⁰ Ibid., Rule 49.

³⁰¹ Articles 28, 29 of CRC.

³⁰² Rule 38 of Havana Rules.

³⁰³ Ibid., Rule 40.

³⁰⁴ Ibid., Rule 42.

³⁰⁵ Ibid., Rule 45.

9.3.8 Recreation

Operating rules or regulations should set out the right of every child to exercise and recreation. They should also set out the time to be given for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided.

Rule 47 of the Havana Rules require that detention facilities provide adequate space, installations and equipment for these activities.³⁰⁶ Every child should also be given additional time for daily leisure activities, part of which should be devoted, if the child so wishes, to arts and crafts skill development. The Havana Rules require that every detention facility should ensure that each child is physically able to participate in the available programmes of physical education. Remedial physical education and therapy should be offered, under medical supervision, to children needing it.

9.3.9 Review of placement

Article 25 of the CRC provides that States should periodically review the placement of a child. Although this article refers to children placed for the purposes of care, protection or treatment of a child for his or her physical or mental health, it is also good practice to review the placement of children who are deprived of their liberty. Ideally, this should be done by the body who will work with the child once he or she is released, and will generally be either the probation service or social services. However, in the absence of such bodies, the prison authorities or the court itself should undertake a periodic review to determine both whether the placement is appropriate and whether there is any continuing reason to deprive the child of his liberty.

9.4. Staffing in detention facilities

States should recognise the need for, and ensure, that only highly skilled and experienced staff are employed to work in juvenile detention facilities. The director of a facility should be adequately qualified for his or her task, with administrative ability and suitable training and experience, and should carry out his or her duties on a full-time basis.³⁰⁷

The staff should consist of qualified personnel and should include specialists such as educators, vocational instructors, counsellors, social workers, psychiatrists and psychologists. Staff need to be trained in order for them to carry out their responsibilities effectively; in particular, staff should receive training in child psychology, child welfare and international standards and norms of human rights and the rights of the child, including the Havana Rules. Staff also need to be trained in behaviour management techniques.

It is vitally important that staff is carefully selected and recruited.³⁰⁸ All members of staff should also be checked before they are employed to ensure that they do not have a record of violence or

³⁰⁶ The Standard Minimum Rules for the Treatment of Prisoners specifies that every prisoner shall have at least one hour of suitable exercise in the open air daily if the weather permits (Rule 21(1)). Further “[y]oung prisoners... shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided” (Rule 21(2)).

³⁰⁷ Rule 86 of Havana Rules.

³⁰⁸ See Rule 82 of the Havana Rules.

sexual misbehaviour and are suitable to work with children. Employment procedures and the requirement for training should be contained in operating rules or in another form of secondary legislation.

9.5. The situation of girls in detention

Women have always formed a small minority of most prison populations and girls make up a small percentage of young offenders. Female prisoners have different physical, psychological, dietary, social, and health needs than men and they should be treated differently from their male counterparts. Women's healthcare needs in prison are more varied and complex than men's. Menstruation, for example, can create particular problems for women prisoners.³⁰⁹ Bathing and washing facilities are more urgent to protect against infections and the lack of privacy when sharing ablutions can cause distress. It can also be particularly frightening and demeaning for women to use toilets which are open to view, especially when male officers are in attendance.

Women detainees suffer from "depression, anxiety, phobias, neuroses, self-mutilation and suicide" at a much higher rate than male detainees.³¹⁰ They are also considerably more vulnerable to both physical and sexual abuse.

The plight of girls in detention was highlighted during Dignity for Justice and Detainees Week from 6 to 12 October 2008 when the Office of the High Commissioner for Human Rights (OHCHR) called for special attention to be paid to the human rights of women and girls.³¹¹ The OHCHR identified areas of concern with regards to the detention of women and girls: "the disproportionate growth in the number of women detainees and the link to poverty; discriminatory laws; lack of enjoyment of economic, social and cultural rights; difficulties in access to justice; the impact on women and girls of detention in systems designed for men and the different needs of women in detention."³¹²

The Body of Principles recognises the need for different treatment and provides that where special measures are taken "solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles...[these] shall not be deemed to be discriminatory".³¹³ The Body of Principles set out specific standards for women:

"(1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.

(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

³⁰⁹ Office of the High Commissioner for Human Rights, Dignity and Justice for Detainees Week: Information Note No. 5, 'Women and Girls', 2008.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid.

³¹³ Principle 5 of Body of Principles.

(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women.”³¹⁴

Recognising that the situation for minor females is even more acute the Committee on the Rights of the Child stated that “[s]ince girls in the juvenile justice system may be easily overlooked because they represent only a small group, special attention must be paid to the particular needs of the girl child, e.g. in relation to prior abuse and special health needs.”³¹⁵

Due to the small number of girl offenders, the right of girls to be separated from women is frequently violated, as States argue that it is not economical to build and run separate facilities for the small number of girls involved. The Committee on the Rights of the Child does not accept this argument and has recommended that even where States have low rates of female juvenile offending, they should, nevertheless ensure that there are appropriate facilities.³¹⁶

Operating rules should recognise the particular needs of girls and should contain a separate section on girls detailing the provision to be made to meet their needs, and the relevant sections of the Body of Principles.

Box 58: Special provisions for girls in detention

The Juvenile Justice and Welfare Act of the Philippines (2006) includes special provisions for the protection of female children:

Sec. 47. Female children – Female children in conflict with the law placed in an institution shall be given special attention as to their personal needs and problems. They shall be handled by female doctors, correction officers and social workers, and shall be accommodated separately from male children in conflict with the law.

Sec. 48. Gender-sensitivity training – No personnel of rehabilitation and training facilities shall handle children in conflict with the law without having undergone gender sensitivity training.

Source: Juvenile Justice and Welfare Act 2006 Republic Act No. 9344, 28 April 2006 (Philippines).

9.6. Return to the community

Article 40(1) of the CRC requires States to take into account the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. In addition, Rule 79 of the Havana Rules requires States to ensure that all children in detention benefit from rules designed to assist them in returning to society, family life, education or employment after release.

To enable the child to re-integrate into the community, legislation should set out the child's right to be provided with accommodation, employment, clothing and sufficient means to maintain him or herself upon release. Legislation should also require that before children are released from detention they are prepared for release into the community. The task of preparing a child

³¹⁴ Rule 53 of Standard Minimum Rules for the Treatment of Prisoners.

³¹⁵ Committee on the Rights of the Child, General Comment No. 10 (2007), para. 40.

³¹⁶ See Committee on the Rights of the Child: States Parties Reports: Canada (1994), U.N. Doc. CRC/C/11/Add.3; Iceland (1995), U.N. Doc. CRC/C/11/Add.6; New Zealand (1995); United Kingdom (1994), U.N. Doc. CRC/C/11/Add.1; and Concluding Observations: Canada (1995), U.N. Doc. CRC/C/15/Add.37; Iceland (1996), U.N. Doc. CRC/C/15/Add.50; New Zealand (1997), U.N. Doc. CRC/C/15/Add.71, respectively.

for release from detention is generally undertaken by the probation service, social services, child protection services or by NGOs. However, in many States, services are inadequate or do not exist, leaving children vulnerable to further offending when they are released.

Legislation should require the relevant service or an NGO contracted to provide the service, to work with the family and child to draft a release plan, at least two to three months before the child's release. Both the child and the family should be encouraged to provide input. A plan allows the child to consider what life will be like on release and to know exactly what is going to happen to him or her on release.

9.7. Early release

If children are deprived of their liberty, legislation should provide that their placement should be reviewed regularly and a decision made as to whether continuing detention is necessary. Rule 28.1 of the Beijing Rules provides that “conditional release from an institution shall be used by the appropriate authority to the greatest possible extent, and shall be granted at the earliest possible time.” Rules 28.2 goes on to provide that “[j]uveniles released conditionally from an institution shall be assisted and supervised by an appropriate authority and shall receive full support by the community.”

The term “conditional” means that the detention centre or court may impose conditions on the child that he or she will have to adhere to for a set period of time. The child may be required to live in a certain place, such as a “half-way home” or attend community programmes. He or she may also be required to return home every night at a specified time and not to go to certain places. It is essential that the conditions placed on the child are realistic and that the child is fully supported, either by a probation officer or social worker. If plans are not made for the child's accommodation, financial support and either education, employment or attendance at a community based programme, before release, it will be difficult for the child to meet the conditions imposed. A breach of the conditions should not mean an immediate return to detention, but should be a trigger for reconsideration of the level of support being offered and the conditions being imposed.

9.8. Monitoring (internal and external) and complaints

One of the main concerns in relation to the detention of children within prisons and other detention facilities is the lack of protection and safeguarding of children.

In order to ensure that the rights of children are protected, and that standards set in line with international standards are maintained, every State should enact legislation which establishes an independent inspection service. The legislation relating to the independent inspection service should set out its role and function, ensuring that the legislation incorporates the requirements set out in Rules 72 to 74 of the Havana Rules. In particular: the independent inspection service should not belong, or be accountable, to the administration of the facility it is inspecting; inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; inspectors should have unrestricted access to all persons employed by or working in any facility where children are or may be deprived of their

liberty. Inspectors should be required to place special emphasis on holding conversations with children in the facilities, in a confidential setting.³¹⁷

In addition, every child should have a legal right to make requests or complaints about conditions, treatment and care, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay. Legislation must ensure that children know about and have easy access to these mechanisms.³¹⁸

³¹⁷ See Committee on the Rights of the Child, General Comment No. 10 (2007), para. 89.

³¹⁸ See Rules 31–37 and 72–79.

Section 9: Standards of detention: Summary checklist

- The re-integrative purpose of deprivation of liberty should be included as a fundamental principle in legislation governing detention.
- Legislation should provide that children deprived of their liberty are separated from adults, unless it is considered in their best interests not to do so.
- States should have well-developed rules and standards in either primary or secondary legislation on all issue relating to the physical environment in which children are detained, in line with the Rules for the Protection of Juveniles deprived of their Liberty.
- Legislation, usually in the form of rules, regulations or operating instructions should set out in detail the disciplinary measures and types of restraint that can be applied to children in detention and those that are prohibited. The legislation should set severe sanctions for those using forbidden disciplinary measures and restraint.
- Legislation should explicitly prohibit the use of any form of corporal punishment or physical violence by staff against a child who is in detention. It should set out severe sanctions for staff using violence against children in detention.
- The right of children to maintain contact with their families should be enshrined in either primary or secondary legislation, the latter normally taking the form of Operating rules or regulations of detention facilities generally or the individual detention facility.
- National education laws should specifically cover children held in detention facilities and should ensure that education provided is suited to children's needs and abilities
- Legislation should permit children who are above compulsory school age to continue their education.
- Operating rules or regulations should ensure the right of every child to exercise and recreation and set out the time to be given for daily free exercise.
- Operating rules or another form of secondary legislation should contain employment procedures and training requirements for staff at juvenile detention facilities.
- Legislation should ensure that girls are detained in facilities that meet their particular needs and separately from adult women. Detailed Operating Rules or Regulations for detention facilities for girls should include provisions for the special protection that should be afforded to girls, and identify who is responsible for ensuring that such protection measures are implemented.
- Legislation should require the probation service, social services or an NGO contracted to provide the service, to work with the family and child to draft a release plan, at least two to three months before the child's release. Both the child and the family should be encouraged to provide input. A plan allows the child to consider what life will be like on release and to know exactly what is going to happen to him or her on release.
- Legislation should set out the child's right to be provided with accommodation, employment, clothing and sufficient means to maintain him or herself upon release.
- Legislation should set out the nature of the conditions that may be attached on early release.
- Legislation should require the probation service, social services or an NGO contracted to provide the service, to work with the family and child to draft a release plan, at least two to three months before the child's release. Both the child and the family should be encouraged to provide input. A plan allows the child to consider what life will be

- like on release and to know exactly what is going to happen to him or her on release.
- Legislation should provide for supervision and support from either the probation service or social services.
 - Legislation should establish an independent inspection service and set out its role and function.
 - Legislation should require detention authorities or the court to review the child's detention at regular intervals and consider whether the child could be conditionally released before the sentence has been completed.
 - Legislation must ensure that children are aware of and have easy access to mechanisms where they can make requests or complaints such as the central administration, judicial authority or relevant independent authority.

Appendix 1. Sources

Note: Official United Nations documents are available online at <www.un.org/en/documents/ods/>.

African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Australian Law Review Commission, 'Seen and Heard: Priority for Children in the Legal Process', 1997.

Cappelaere, G., Grandjean, A., Naqvi, Y., *Children Deprived of Liberty: Rights and Realities*, Editions Jeunesse et Droit, 2005.

Children's Legal Centre and United Nations Children's Fund, 'Administrative Detention of Children: A Global Report', New York, 2011.

Cipriani, D., 'Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective', Ashgate, 2009.

Council of Europe

- European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.

- Recommendation Rec (2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers, adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies.

Cunneen, C. & White, R., *Juvenile Justice: An Australian Perspective*, Oxford University Press, Melbourne, 1995.

Ellison, Louise, 'Cross-examination and the intermediary: bridging the language divide?', *Criminal Law Review*, 114, 118, 2002.

Human Rights Watch, 'The Last Holdouts: Ending the juvenile death penalty in Iran, Saudi Arabia, Sudan, Pakistan and Yemen', September 2008.

International Juvenile Justice Observatory, 'Legal Assistance for Children in Conflict with the Law Campaign, Italy and Norway', (undated).

Inter-Parliamentary Union and United Nations Children's Fund, 'Child Protection: A handbook for Parliamentarians, Inter-Parliamentary Union, No. 7', Geneva, 2004.

Johnstone, G., 'Restorative Justice: Ideas, Values, Debates', 2002.

Klaus, J.F., *Handbook on Probation Services: Guidelines for Probation Practitioners and Managers*, United Nations Interregional Crime and Justice Research Institute, (undated).

League of Arab States, Arab Charter on Human Rights, 15 September 1994, entered into force 15 March 2008.

Liebmann, Marian, Introduction of the Restorative justice concept and Victim-offender mediation practice in Serbia and Montenegro within the "Children's Chance for Change" project – A juvenile justice reform initiative in Serbia and Montenegro, 2011.

Mann, N., 'Report on Children: Torture and Power', World Organisation Against Torture (OMCT) and Save the Children, 2000.

Morris, A. and Maxwell, G., 'Restorative Justice in New Zealand: Family Group Conferences as a Case Study', *Western Criminology Review*, 1998.

National Council of Welfare, 'First Nations, Métis and Inuit Children and Youth: Time to Act', 2007.

Office of the High Commissioner for Human Rights, Dignity and Justice for Detainees Week: Information Note No. 5, 'Women and Girls', 2008.

Organization of African Unity, African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

Organization of American States

- American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, OAS, Treaty Series, No. 36, entered into force 18 July 1978.

- American Declaration of the Rights and Duties of Man, 2 May 1948, OAS Resolution XXX, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

Peachey, D., 'The Kitchener experiment', in Johnstone, G., *A Restorative Justice Reader: Texts, sources, context*, 2003.

Pinheiro, Paulo Sérgio, 'World Report on Violence Against Children', 2006.

Saywitz, K., Children's Conceptions of the Legal System: 'Court is a Place to Play Basketball' in (eds) S. J. Ceci, D. F. Ross, M. P. Toglia, *Perspectives on Children's Testimony*, New York: Springer Verlag, 1989.

Seymour, J., *Dealing with Young Offenders*, The Law Book Company, Sydney, 1988.

United Nations

- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 7 September 1990, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1.

- Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, UN GAOR A/RES/43/173, 9 December 1988.

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, Vol. 1465, p. 85, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

- Convention on the Elimination of All Forms of Discrimination against Women: Resolution adopted by the General Assembly, 18 December 1979, UN GAOR A/RES/34/180.

- Convention on the Rights of Persons with Disabilities, adopted by a General Assembly resolution, 24 January 2007, UN GAOR A/RES/61/106.

- Convention on the Rights of the Child, adopted by United Nations General Assembly Resolution 44/25 of 20 November 1989 and entered into force 2 September 1990.

- Declaration of Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly, UN GAOR 40/32 (29 November 1985) and UN GAOR 40/146 (13 December 1985).

- Guidelines for Action on Children in the Criminal Justice System, United Nations Economic and Social Council, 21 July 1997, Resolution 1997/30.

- Guidelines for the Prevention of Juvenile Delinquency: Resolution adopted by the General Assembly, 14 December 1990, UN GAOR A/RES/45/112.

- International Covenant on Civil and Political Rights, adopted by United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976.

- International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

- Rules for the Protection of Juveniles Deprived of their Liberty: Resolution adopted by the General Assembly, UN GAOR A/RES/45/113, Annex 45, UN GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).
- Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders – Report on the Sixth Congress containing a summary of proceedings, conclusions and recommendations as adopted by the Congress – Report prepared by the Secretariat., U.N. Doc. A/CONF.87/14/Rev.1, 25 August–5 September 1980.
- Standard Minimum Rules for Non-Custodial Measures, adopted by the United Nations General Assembly 14 December 1990, UN GAOR A/RES/45/110.
- Standard Minimum Rules for the Administration of Juvenile Justice: Resolution adopted by the General Assembly, 29 November 1985, UN GAOR A/RES/40/33.
- Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.
- Universal Declaration of Human Rights, adopted by United Nations General Assembly on 10 December 1948 in Paris.

United Nations Children’s Fund, ‘Lost in the Juvenile Justice System – Children in conflict with the law in Eastern Europe and Central Asia’, 2008.

United Nations Children’s Fund/United Nations Office on Drugs and Crime, Manual for the Measurement of Juvenile Justice Indicators, 2007.

United Nations Commission on Human Rights

- Report of the Working Group on Arbitrary Detention (1996), U.N.Doc. E/CN.4/1997/4, para. 87, citing E/CN.4/1992/20.
- Resolution 2001/62, Torture and other cruel, inhuman or degrading treatment or punishment (2001), U.N. Doc. E/CN.4/RES/2001/62.

United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20 (2009), Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, U.N. Doc. E/C.12/GC/20.

United Nations Committee on the Rights of the Child

- Concluding Observations: Sudan (2002), U.N. Doc. CRC/C/15/Add.190; Andorra (2002), U.N. Doc. CRC/C/15/Add.176; Antigua and Barbuda (2004), U.N. Doc. CRC/C/15/Add.247; The Bahamas (2005), U.N. Doc. CRC/C/15/Add.253; Belarus (2002), U.N. Doc. CRC/C/15/Add.180; Benin (1999), U.N. Doc. CRC/C/15/Add.106; Bolivia (2005), U.N. Doc. CRC/C/15/Add.256; Canada (2003), U.N. Doc. CRC/C/15/Add.215; Democratic Republic of the Congo (2001), U.N. Doc. CRC/C/15/Add.153; Denmark (1995), U.N. Doc. CRC/C/15/Add.33; Ethiopia (2001), U.N. Doc. CRC/C/15/Add.144; Greece (2002), U.N. Doc. CRC/C/15/Add.170; Democratic People's Republic of Korea (2004), U.N. Doc. CRC/C/15/Add.239; Nigeria (1996), U.N. Doc. CRC/C/15/Add.61; Malta (2000), U.N. Doc. CRC/C/15/Add.129; Mozambique (2002), U.N. Doc. CRC/C/15/Add.172; The Kingdom of the Netherlands (Netherlands and Aruba) (2004), U.N. Doc. CRC/C/15/Add.227; Sudan (2002), U.N. Doc. CRC/C/15/Add.190.
- Consideration of reports submitted by States parties under article 44 of the Convention: Concluding Observations: Eritrea (2003) U.N. Doc. CRC/C/15/Add.204.
- Day of General Discussion on the Right of the Child to be Heard, Forty-third session, 11–29 September 2006.
- General Comment No. 1 (2001), The Aims of Education, U.N. Doc. CRC/GC/2001/1.
- General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (2003), U.N. Doc. CRC/GC/2003/5.
- General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside their Country of Origin (2005), U.N. Doc. CRC/GC/2005/6.
- General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, para. 2; and 37, inter alia) (2007), U.N.Doc. CRC/C/GC/8.
- General Comment No. 10 (2007), Children’s Rights in Juvenile Justice (2007), U.N. Doc. CRC/C/GC/10.
- General Comment No. 12 (2009), The right of the child to be heard, U.N. Doc. CRC/C/GC/12.

- General Guidelines regarding the form and contents of periodic reports to be submitted by States Parties under article 44: paragraph 1(b) of the Convention (1996), U.N. Doc. CRC/C/58, adopted by the Committee on the Rights of the Child at its 343rd meeting (13th session).
- Report of the Committee on the Rights of the Child, Ninth Session (1995), U. N. Doc. CRC/C/43.
- States Parties Reports: Canada (1994), U.N. Doc. CRC/C/11/Add.3; Iceland (1995), U.N. Doc. CRC/C/11/Add.6; New Zealand (1995); United Kingdom (1994), U.N. Doc. CRC/C/11/Add.1; and Concluding Observations: Canada (1995), U.N. Doc. CRC/C/15/Add.37; Iceland (1996), U.N. Doc. CRC/C/15/Add.50; New Zealand (1997), U.N. Doc. CRC/C/15/Add.71.
- Summary meeting record of the 146th meeting: Chile, 19 April 1994, U.N. Doc. CRC/C/SR.148.

United Nations Economic and Social Council

- Basic principles on the use of restorative justice programme in criminal matters, 27 July 2000, U.N. Doc. E/2000/INF/2/Add.2.
- Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 24 July 2002, 2002/12.

United Nations General Assembly, Rights of the child: Note by the Secretary-General (2006), U.N. Doc. A/61/299.

United Nations Human Rights Committee

- General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (1984).
- General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992), Art. 7 - Replaces Human Rights Committee, General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment) (1982).
- General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial (2007), U.N. Doc. CCPR/C/GC/32.

United Nations Office on Drugs and Crime, Model Law on Juvenile Justice, 2011.

United Nations Office on Drugs and Crime and UN-Habitat, 'Crime Prevention Assessment Tool', United Nations, New York, 2009.

Wanchai Roujanavong, Director General Dept, of Juvenile Observation and Protection Thailand Ministry of Justice, Restorative Justice Family and Community Group Conferencing in Thailand, 2005.

Weitekamp, E. G. M., 'The history of restorative Justice', Johnstone, G., *A Restorative Justice Reader: Texts, sources, context*, 2003.