

# International and European legal framework for the Matra-programme ‘Child protection system strengthening for children in conflict with the law’

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Hart voor Kinderrechten

DEFENCE for  
**CHILDREN** 

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## 1. Introduction

The goal of the Matra-programme ‘Child protection system strengthening for children in conflict with the law’ is to improve the implementation of children’s rights in the child protection and justice systems to ensure that children in conflict with the law are better protected.

The term ‘children in conflict with the law’ refers to anyone under 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence.<sup>1</sup>

The term ‘child protection system’ in the programme’s title refers to *child protection* in the broad sense. The goal of *child protection* is to promote, protect and fulfil children’s rights to protection as laid down in the Convention on the Rights of the Child. See further section 2 below.

The programme’s activities must align with international and European standards on the rights of children in conflict with the law, as laid down in the Convention on the Rights of the Child and other relevant instruments.

This paper provides a general and concise description of the international and European legal framework for the programme. More elaborate descriptions of the frameworks concerning some of the specific focus areas of the country projects will be directly shared with the relevant partners.

Chapter 2 explains key concepts relating to the rights to protection of children in conflict with the law. Chapter 3 describes the programme’s legal framework, with focus on: the leading principles and core elements of a comprehensive juvenile justice policy for the full implementation of the rights to protection of children in conflict with the law; and, the organization of the juvenile justice system, within an integrated system for child protection. Chapter 4 contains a more elaborate description of the framework concerning children below the age of criminal responsibility Appendix 1 contains an overview of key international and European documents.

## 2. Protection of children in conflict with the law

### 2.1 Child protection

The programme follows Save the Children’s perspective on child protection.<sup>2</sup> ‘Child protection’ is defined as “measures and structures to prevent and respond to abuse, neglect, exploitation and violence affecting children”.<sup>3</sup> The goal of child protection is to promote, protect and fulfil children’s rights to protection as laid down in the Convention on the Rights of the Child (CRC) and other human rights, humanitarian and refugee treaties, as well as national law. The CRC contains nineteen key child protection articles, amongst which articles 37 and 40 that specifically deal with children in conflict with the law.<sup>4</sup> Article 40 of the CRC deals with the administration of juvenile justice. Article 37 of the CRC deals with children deprived of their liberty, including any form of detention, imprisonment or placement in custodial settings, and the prohibition of capital punishment and life imprisonment. Other key child protection articles are articles 19 and 39 of the CRC. Article 19 of the CRC deals with the right to protection from all forms of ‘violence’, i.e. all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.<sup>5</sup> It is also important in this regard to mention article 4 of the Lanzarote Convention,

<sup>1</sup> See e.g. UNICEF, Child Protection Information Sheet Children in Conflict with the Law, at: [https://www.unicef.org/chinese/protection/files/Conflict\\_with\\_the\\_Law.pdf](https://www.unicef.org/chinese/protection/files/Conflict_with_the_Law.pdf); Save the Children, Children in conflict with the law, at: <https://resourcecentre.savethechildren.net/keyword/children-conflict-law>

<sup>2</sup> Save the Children, Save the Children and Child Protection, 2007, at <https://resourcecentre.savethechildren.net/library/save-childrens-definition-child-protection>

<sup>3</sup> Ibid.

<sup>4</sup> “Key child protection articles in the CRC are: Article 9 (family separation), 10 (family reunification across borders), 11 (illicit transfer of children), 16 (right to privacy), 19 (protection from violence), 20 (alternative care), 21 (adoption), 22 (refugee children), 23 (disabled children), 24 (harmful practices), 25 (periodic review of alternative care), 32 (economic exploitation), 34 (sexual abuse and exploitation), 35 (abduction, sale or trafficking of children), 36 (other forms of exploitation), 37 (juvenile justice and protection from torture or other cruel, inhuman or degrading treatment or punishment), 38 (protection in armed conflict), 39 (recovery and reintegration) and 40 (children in conflict with the law)”, in: Save the Children, Save the Children and Child Protection, at

[https://resourcecentre.savethechildren.net/sites/default/files/documents/sc\\_child\\_protection\\_definition\\_20071.pdf](https://resourcecentre.savethechildren.net/sites/default/files/documents/sc_child_protection_definition_20071.pdf)

<sup>5</sup> The European Union Agency for Fundamental Rights (FRA) conducted research on national child protection systems in the 28 EU Member States, aimed at understanding how these systems work and identifying common challenges and promising practices. It collected data on the following main components: National legislative and regulatory framework, including child

which deals with the obligation of States to take the necessary measures to prevent all forms of sexual exploitation and sexual abuse of children and to protect children.<sup>6</sup> Article 39 of the CRC deals with the right of child victims to physical and psychological recovery and social reintegration.

An ‘integrated system’ for child protection:

- places the child at the system’s centre;
- places the child’s best interests at the system’s core;
- works to promote, protect and fulfil children’s rights to protection as laid down in the Convention on the Rights of the Child;
- gives special attention to the rights to protection of vulnerable groups like children deprived of liberty and children in conflict with the law; and
- ensures that all essential actors and systems - education, health, social welfare, justice, civil society, community and family - work in concert to protect and assist children.<sup>7</sup>

“‘Children in conflict with the law’ is defined as anyone under 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence. In some cases, children who engage in criminal behaviour [are victims and] have been used or coerced by adults. Most children in conflict with the law have committed petty crimes, some of which are not considered criminal when committed by adults. Children are arrested and detained by police and sent to institutions, including prisons, under systems of justice which in many cases are set up for adults. Save the Children advocates for child-friendly juvenile justice measures that place children’s best interests at their core.

Very often when a child comes into conflict with the law it represents a fundamental failure to fulfil that child’s rights to adequate care and protection at an earlier point in their lives. Large numbers of children in conflict with the law are socio-economic victims, denied their rights to education, health, shelter, care and protection. Many of them have had little or no access to education. Many are working children and some have left their homes and taken to the streets to escape from violence and abuse at the hands of their families. Once having entered the justice system children are often held in detention for long periods awaiting trial. This makes them vulnerable to further violence and abuse.”

Source: Save the Children, Children in conflict with the law, at:  
<https://resourcecentre.savethechildren.net/keyword/children-conflict-law>

## 2.2 Family

Parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child (art. 18(1) of the CRC).

States must respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights in the CRC (art. 5 of the CRC). For example, regarding children in conflict with the law, the Committee of the Rights of the Child recommends that States explicitly provide by law for the maximum possible involvement of parents or legal guardians in the proceedings against the child. The Committee believes that this involvement shall in general contribute

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protection policies; National authorities responsible for child protection and service providers; Human and financial resources, focusing on qualification and training of personnel (financial resources and budget allocation, certification and accreditation procedures for professionals, vetting of foster families and residential care personnel); Identification and reporting procedure for children in need of protection and procedures for placing children in alternative care (reporting, complaints mechanisms, etc. See European Union Agency for Fundamental Rights, *Mapping child protection systems in the EU*, at <http://fra.europa.eu/en/publication/2015/mapping-child-protection-systems-eu>

<sup>6</sup> See further articles 5-9 of the Lanzarote Convention. See also Appendix 1, section 4, below.

<sup>7</sup> See e.g. Council of Europe, Integrated strategy against violence, at <https://rm.coe.int/168046d3a0>; European Union Agency for Fundamental Rights, Child protection systems, at <http://fra.europa.eu/en/publication/2015/mapping-child-protection-systems-eu/background-info>

to an effective response to the child's infringement of the penal law. To promote parental involvement, parents must be notified of the apprehension of their child as soon as possible.<sup>8</sup>

The State has the responsibility to assist parents who need support. States are obliged to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities (art. 18(2) of the CRC).

States are obliged to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for the child. To this end, States must take all appropriate legislative and administrative measures (art. 3(2) of the CRC). States are obliged to ensure the development of institutions, facilities and services for the care or protection of children (art. 18(2) of the CRC), and to ensure that such institutions, facilities and services conform with standards in the areas of safety, health, number of staff, suitability of staff, and competent supervision (art. 3(3) of the CRC).

When parents or other persons legally responsible for the child are not able to (sufficiently) take care of the child, the State has the responsibility to step in. Separation of a child from his or her parents is always a measure of last resort.<sup>9</sup> States are obliged to ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child (art. 9(1) of the CRC).<sup>10</sup> A child who is separated from one or both parents has the right to maintain personal contact with both parents on a regular basis (art. 9(3) of the CRC). A family is the natural environment for the growth, well-being and protection of children. Therefore, efforts must primarily be directed to enabling the child to remain in or return to the care of his/her parents or, when appropriate, other close family members.<sup>11</sup>

A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, has the right to special protection and assistance provided by the State (art. 20(1) of the CRC). States are obliged to ensure alternative care for such a child (art. 20(2) of the CRC). Such alternative care may include foster placement, kafalah of Islamic law, adoption, or – but only when necessary and as a measure of last resort - placement in suitable institutions for the care of children (art. 20(3) of the CRC).

## 2.3 Juvenile justice

The term 'juvenile justice' in documents of international and European law refers to the legislation, norms, standards, procedures, mechanisms and institutions specifically designed for children in conflict with the law, including efforts for the prevention of children coming into conflict with the law. According to Rule 5 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules'), the juvenile justice system must emphasize the well-being of the juvenile and ensure that any reaction to juvenile offenders is always in proportion to the circumstances of both the offenders and the offence.<sup>12</sup> Under article 40(3) of the CRC, States are obliged to establish laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.

## 2.4 Comprehensive juvenile justice policy

States are obliged to ensure that their administration of juvenile justice and juvenile justice systems fully comply with the CRC's provisions on the rights to protection of children in conflict with the law, particularly article 40 (Administration of juvenile justice), article 37 (Prohibition of capital punishment and life imprisonment; Children deprived of liberty). To that end, States are required to develop and implement a **comprehensive** policy for juvenile justice, with a multidisciplinary approach to children in conflict with the law. States must ensure that every child alleged as, accused of, or recognized as having infringed the penal is 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

<sup>8</sup> Committee on the Rights of the Child, General Comment No. 10 (2007) Children's rights in juvenile justice, UN Doc. CRC/C/GC/No.10, 25 April 2007, para. 54. See Appendix 1 below.

<sup>9</sup> UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142 of 24 February 2010, para. 14.

<sup>10</sup> Compare article 8 of the European Convention on Human Rights; UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142 of 24 February 2010, para. 3.

<sup>11</sup> UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142 of 24 February 2010, para. 3.

<sup>12</sup> General Assembly resolution 40/33 of 29 November 1989. See also Appendix 1 below.

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 (art. 40(1) of the CRC). This requires that all professionals involved be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being, and all forms of violence against children.<sup>13</sup> But it also requires that professionals are aware of children's rights and fully respect them throughout the entire process of dealing with the child. As children are the future of society, it is important to bear in mind that children in conflict with the law can learn a great deal from a positive and child rights based attitude of professionals. These contacts can be crucial for a child to assume a constructive role in society later in life.

Other important protection rights include the obligations of States:

- To establish measures for dealing with children in conflict with the law without resorting to judicial proceedings (diversion) (art. 40(3)(b) of the CRC);
- To ensure the availability of a variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes (art. 40(4) of the CRC);
- To ensure that the arrest, detention or imprisonment of a child may only be used as a measure of last resort (and for the shortest appropriate period of time) (art. 37(b) of the CRC);
- To abolish status offences, such as vagrancy, truancy, runaways and other acts which often are the result of psychological or socio-economic problems, and to deal with such behaviour through measures like the provision of effective support for parents and/or other caregivers.<sup>14</sup>

Throughout the entire process of dealing with the child - from the first contact with law enforcement agencies to the imposition of measures/interventions - professionals must take into account the child's age and context. This requires that all involved professionals are knowledgeable about children's rights, child development, the dynamic and continuing growth of children, what is appropriate for their well-being, all forms of violence against children, referral, available measures including (child) protection measures, etc.<sup>15</sup>

Children who commit an offence at an age below the set minimum age of criminal responsibility (MACR) cannot be formally charged and held responsible in a penal law procedure. States are required to establish legal safeguards ensuring that their treatment is as just and fair as children at or above the MACR. According to the Committee on the Rights of the Child, “[f]or these children special protective measures can be taken if necessary in their best interests” (see further section 3.2.2 and section 4 below).<sup>16</sup>

### **3. A comprehensive juvenile justice policy within an integrated system for child protection**

#### **3.1 Leading principles**

The leading principles of a comprehensive juvenile justice policy are the general principles contained in articles 2, 3, 6 and 12 of the CRC, and the fundamental principles of juvenile justice laid down in articles 37 and 40 of the CRC.<sup>17</sup>

##### **3.1.1 Best interests of the child (art. 3 of the CRC)**

Article 3(1) of the CRC provides that, “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” In other words, regarding every decision that has an impact on a child or a group of children, the best interests of the child must be a primary consideration.

Regarding children in conflict with the law, this means that the best interests of the child must be a primary consideration throughout the entire process and in all decisions taken. Children differ from adults in their physical and psychological development and their emotional and educational needs. Such differences

<sup>13</sup> Committee on the Rights of the Child, General Comment No. 10 Children's rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 13.

<sup>14</sup> Ibid., para. 9. See also Appendix 1 below.

<sup>15</sup> Ibid., para. 97.

<sup>16</sup> Ibid., para. 31.

<sup>17</sup> Ibid., para. 5.

constitute the basis for the lesser culpability of children in conflict with the law, and the reasons for a separate juvenile justice system and a different treatment for children. The protection of the best interests of the child means that concepts of repression and retribution must give way to rehabilitation and restorative justice objectives in dealing with child offenders.<sup>18</sup> The protection of the best interests of the child also means that the child's background, context and possible needs for child protection or assistance measures need to be assessed, at an early stage in the process.<sup>19</sup> A child who has suffered trauma, for example, should receive proper treatment. States are obliged to take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts (art. 39 of the CRC). The Committee on the Rights of the Child has noted that, '[t]he right of children to have their best interests be a primary consideration in all matters involving or affecting them must be respected, especially when they are victims of violence, as well as in all measures of prevention'.<sup>20</sup>

### 3.1.2 Multidisciplinary approach to assess and determine the best interests of the child

Various documents of international and European law refer to the multidisciplinary approach regarding assessments on the best interests of the child, including the UN Guidelines for the Alternative Care of Children (paras. 57, 70),<sup>21</sup> the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (para. 43),<sup>22</sup> General Comment No. 13 (2011) The right of the child to freedom from all forms of violence (paras. 50, 56, 71),<sup>23</sup> General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (paras. 47, 64, 76, 94, 95),<sup>24</sup> (EU) Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (art. 7),<sup>25</sup> the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of the Council of Europe (arts. 10-12, 14, 31, 34),<sup>26</sup> and the Guidelines on Child Friendly Justice of the Council of Europe (paras. 16-18, 70-72).<sup>27</sup>

The Committee on the Rights of the Child recommends that as far as possible a multidisciplinary team of professionals should be involved in assessing and determining the best interests of the child. This also requires the participation of the child and parents or other persons legally responsible for the child, taking into account the evolving capacities of the child (see section 2.2 above).<sup>28</sup>

The Guidelines on child-friendly justice of the Council of Europe provide that, "while the judicial authorities have the ultimate competence and responsibility for making the final decisions, member states should make, where necessary, concerted efforts to establish multidisciplinary approaches with the objective of assessing the best interests of the child."<sup>29</sup> The explanatory memorandum asserts that the Guidelines as a whole encourage member states to strengthen the interdisciplinary approach when working with children (para. 70). In cases involving children, professionals should benefit from the support and advice of other professionals of different disciplines when taking decisions which will impact directly or indirectly on the present or future wellbeing of the child (para. 71). A multidisciplinary approach is particularly necessary when dealing with children in conflict with the law. The existing and growing understanding of children's psychology, needs, behaviour and development is not always sufficiently shared with professionals in the law enforcement areas (para. 72).

<sup>18</sup> Ibid., para. 10.

<sup>19</sup> Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, 29 May 2013, para. 76.

<sup>20</sup> Committee on the Rights of the Child, General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13, 18 April 2011, para. 3

<sup>21</sup> General Assembly resolution 64/142 of 24 February 2010.

<sup>22</sup> ECOSOC resolution 2005/20 of 22 July 2005. See also Appendix 1 below.

<sup>23</sup> Committee on the Rights of the Child, General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13, 18 April 2011.

<sup>24</sup> Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, 29 May 2013.

<sup>25</sup> Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. See also Appendix 1 below.

<sup>26</sup> CETS No. 201. See also Appendix 1 below.

<sup>27</sup> Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice of 17 November 2010.

<sup>28</sup> Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, 29 May 2013, para. 47.

<sup>29</sup> Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, p. 18. See also Appendix 1.

Assessing the best interests of the child who is in conflict with the law includes the assessment of the child's history and child protection needs.<sup>30</sup> The Committee on the Rights of the Child has noted that:

"The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision-makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness. An individualized assessment of each child's history from birth should be carried out, with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process".<sup>31</sup>

A child (in conflict with the law) who has suffered trauma, for example, should receive proper treatment (see section 3.1.1 above). The obligation to protect children from violence (article 19(2) of the CRC) includes an effective inter-sectoral referral procedure. To this end, professionals working within the child protection system need to be trained in inter-agency cooperation and protocols for collaboration. The process involves: "(a) a participatory, multi-disciplinary assessment of the short- and long-term needs of the child, caregivers and family, which invites and gives due weight to the child's views as well as those of the caregivers and family; (b) sharing of the assessment results with the child, caregivers and family; (c) referral of the child and family to a range of services to meet those needs; and (d) follow-up and evaluation of the adequateness of the intervention."<sup>32</sup>

The Guidelines on child-friendly justice provide that:

"16. With the full respect of the child's right to private and family life, close co-operation between different professionals should be encouraged between different professionals should be encouraged in order to obtain a comprehensive understanding of the child, and an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation.

17. A common assessment framework should be established for professionals working with or for children (such as lawyers, psychologists, physicians, police, immigration officials, social workers and mediators) in proceedings or interventions that involve or affect children to provide any necessary support to those taking decisions, enabling them to best serve children's interests in a given case.

18. While implementing a multidisciplinary approach, professional rules on confidentiality should be respected."<sup>33</sup>

#### Individual assessment to identify specific needs

Article 7 of Directive 2016/800/EU of the European Parliament and of the Council on procedural safeguards for children who are suspects or accused persons in criminal proceedings deals with the right to an individual assessment of children who are suspects or accused persons in criminal proceedings. This individual assessment should identify their specific needs in terms of protection, education, training and social integration, determine if and to what extent they would need special measures during the criminal proceedings, the extent of their criminal responsibility, and the appropriateness of a particular penalty or educative measure.<sup>34</sup>

The individual assessment shall, in particular, take into account the child's personality and maturity, the child's economic, social and family background, and any specific vulnerabilities that the child may have.<sup>35</sup> The individual assessment shall serve to establish and to note such information about the individual characteristics and circumstances of the child as might be of use to the competent authorities when: (a) determining whether any specific measure to the benefit of the child is to be taken; (b) assessing the appropriateness and effectiveness of any precautionary measures in respect of the child; (c) taking any

<sup>30</sup> Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, 29 May 2013, para. 76.

<sup>31</sup> Ibid., para. 76.

<sup>32</sup> Committee on the Rights of the Child, General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13, 18 April 2011, para. 50.

<sup>33</sup> Ibid., para. 23.

<sup>34</sup> Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons. See also Appendix 1 below.

<sup>35</sup> Article 7 (2) Directive 2016/800/EU.

decision or course of action in the criminal proceedings, including when sentencing.<sup>36</sup> The individual assessment shall be carried out at the earliest appropriate stage of the proceedings and before indictment. In the absence of an individual assessment, an indictment may nevertheless be presented provided that this is in the child's best interests and that individual assessment is in any event available at the beginning of the trial hearings before a court.<sup>37</sup> The individual assessment shall be carried out with the close involvement of the child, and by qualified personnel, following, as far as possible, a multidisciplinary approach and involving, where appropriate, the holder of parental responsibility, or another appropriate adult and/or a specialised professional.<sup>38</sup>

### 3.1.3. Respect for the views of the child (art. 12 of the CRC)

The right of children to be heard and to have their views given due weight must be respected systematically in all decision-making processes, and their empowerment and participation should be central to child caregiving and protection strategies and programmes.<sup>39</sup> To assess the best interests of the child, it is important to include the child's view. Children have the right to information (art. 17 of the CRC) and the right to express their views and have them given due weight (art. 12(1) of the CRC). This includes the right to be heard in all judicial proceedings affecting them, which must be respected and implemented throughout every stage of the process (art. 12(2) of the CRC).<sup>40</sup> If the child chooses to be heard, he or she can decide to be heard either directly, or through a representative or appropriate body. It is recommended that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings.<sup>41</sup>

Under article 5 of the CRC, States are obliged to respect the responsibilities, rights and duties of parents, legal guardians, or members of the extended family or community to give direction and guidance to the child in her or his exercise of her or his rights (see section 2.2 above). Consequently, children have the right to direction and guidance. Article 5 of the CRC is closely linked to article 12 of the CRC. The direction and guidance has to compensate for the lack of knowledge, experience and understanding of the child, and is restricted by his or her evolving capacities. As the child's knowledge and understanding steadily increases, the direction and guidance of the parent, or other persons legally responsible for the child, will need to transform into reminders and advice and later to an exchange on an equal footing.<sup>42</sup>

In its General Comment No. 12 (2009) The right of the child to be heard, the Committee on the Rights of the Child offers practical guidance regarding implementation and provides five steps to be taken in order to effectively realize the right of the child to be heard:

1. The child must be informed about:
  - a) his or her right to express his or her opinion in all matters affecting children, in particular in any judicial and administrative decision-making processes;
  - b) the impact that his or her expressed views will have on the outcome;
  - c) the option of either communicating directly or through a representative;
  - d) possible consequences of this choice;
  - e) what to expect during the hearing (how, when and where the hearing takes place, with who) and what choices the child can make in this regard.
2. The child must be heard in a context that is enabling and encouraging, so that the child can be sure that the adult is willing to listen and seriously consider what the child has decided to communicate. Preferably the child is not heard in open court, but under conditions of confidentiality.
3. The child's views must be given due weight. If the child is capable of forming her or his own views in a reasonable and independent manner, the views of the child must be considered a significant factor in the settlement of the issue.
4. The decision-maker has to inform the child of the outcome of the process and explain how her or his views were considered.

<sup>36</sup> Article 7 (4) Directive 2016/800/EU.

<sup>37</sup> Article 7 (5, 6) Directive 2016/800/EU.

<sup>38</sup> Article 7 (7) Directive 2016/800/EU.

<sup>39</sup> Committee on the Rights of the Child, General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13, para. 13.

<sup>40</sup> Ibid., para. 12.

<sup>41</sup> Committee on the Rights of the Child, General Comment No. 12 (2009) The right of the child to be heard, UN Doc. CRC/C/GC/12, 20 July 2009, para. 35.

<sup>42</sup> Ibid., para. 84.

- The child must be enabled to respond to the decision and must be provided with complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated.<sup>43</sup>

The child has the right to be heard directly and not only through a representative or an appropriate body if it is in her/his best interests. A child in conflict with the law must be informed not only of the charges, but also of the juvenile justice process as such and the possible measures. A fair trial requires that the child alleged as or accused of having infringed the penal law is able to effectively participate in the trial, and therefore he or she 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 (see *Right to a fair trial* (art. 40(2)(b) of the CRC) below in section 3.2.6). Rule 14 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (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.<sup>44</sup> Taking into account the child’s age and maturity may also require modified courtroom procedures and practices.<sup>45</sup>

### **3.1.4 Non-discrimination (art. 2 of the CRC)**

States are required to take all necessary measures to ensure that all children in conflict with the law are treated equally and without discrimination, including the training of professionals and establishing rules, regulations and protocols on equal treatment and redress, remedies and compensation. Particular care must be taken over treatment of vulnerable groups of children, including street children, children belonging to racial, ethnic, religious or linguistic minorities, children who are indigenous, girls, children with disabilities, and recidivist children repeatedly in conflict with the law. Measures must be taken to protect former child offenders against discrimination, e.g. in accessing education and work, including the provision of appropriate support and assistance in their efforts to reintegrate in society, and conducting public campaigns emphasizing their right to assume a constructive role in society. Status Offences for acts like vagrancy, truancy and running away must be abolished. Article 56 of the Riyadh Guidelines provides that: “In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.”<sup>46</sup>

### **3.1.5 Right to life, survival and development (art. 6 of the CRC)**

The right to life, survival and development should inspire the development of effective policies and programmes for the prevention of children coming into conflict with the law. Furthermore, this right should result in a juvenile justice policy of responding to children in conflict with the law in ways that support the child’s development. Article 37(a) of the CRC prohibits the death penalty and a life sentence without parole. Article 37(b) provides that deprivation of liberty, including arrest, detention and imprisonment, must only be used as a measure of last resort and for the shortest appropriate period of time.<sup>47</sup>

### **3.1.6 Dignity (art. 40(1) of the CRC)**

The inherent right to dignity must be respected and protected throughout the entire process. Treatment must reinforce the child’s respect for the human rights and freedoms of others and take account of the child’s age and promote the child’s reintegration, assuming a constructive role in society. All forms of violence against children in conflict with the law must be prohibited and prevented.<sup>48</sup>

## **3.2 Core elements of a comprehensive juvenile justice policy**

### **3.2.1 Prevention of children coming into conflict with the law**

States are required to take measures for the prevention of children coming into conflict with the law. These measures must take into account the principles and rights laid down in the CRC, in particular the best

<sup>43</sup> Ibid., paras. 40-47.

<sup>44</sup> General Assembly resolution 40/33 of 29 November 1989. See also Appendix 1 below.

<sup>45</sup> Committee on the Rights of the Child, General Comment No. 10 (2007) Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, paras. 12, 43-46. See also Appendix 1 below.

<sup>46</sup> Ibid., paras. 6-9.

<sup>47</sup> Ibid., para. 11.

<sup>48</sup> Ibid., para. 13-14.

interests of the child (art. 3) and the rights to an adequate standard of living (art. 27), health (art. 24), education (arts. 28-29), protection from all forms of violence, injury or abuse (art. 19), protection from economic exploitation (art. 32) and from sexual exploitation (art. 34). These measures must integrate the standards laid down in the United Nations Guidelines for the Prevention of Juvenile Delinquency (the ‘Riyadh Guidelines’). Emphasis must be placed on prevention policies that facilitate the successful socialization and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and work.<sup>49</sup>

### 3.2.2 Minimum age of criminal responsibility (art. 40(3)(a) of the CRC)

States are required to set a minimum age of criminal responsibility (MACR) below which children cannot be held responsible in a penal law procedure (art. 40(3)(a) of the CRC). Setting the MACR at below age 12 is not internationally acceptable. States may set the MACR at age 12. But age 12 is the absolute minimum and a low level and States should increase the MACR to a higher age, “for instance 14 or 16 years of age”.<sup>50</sup> No exceptions to the MACR are allowed, e.g. in cases of serious offences.<sup>51</sup>

Children below the MACR may not be taken through the criminal justice system, they cannot be formally charged and held responsible in a penal law procedure. For these children, “special protective measures can be taken if necessary in their best interests”, such as educational measures and supervision by social workers. Placement in care or protection institutions may only be used as a measure of last resort (art.20(3) of the CRC) (Compare section 3.2.7 below). See also the *UNICEF Guidance Note for CEE/CIS on responses to children who have infringed the law but are under the minimum age for prosecution as a juvenile offender* (2010),<sup>52</sup> and the United Nations Guidelines for the Alternative Care of Children.<sup>53</sup> See further section 4 below.

### 3.2.3 Upper age limit for juvenile justice (art. 40 of the CRC)

The rules of juvenile justice must apply, starting at the MACR, for all persons who - at the time of their alleged commission of an offence - have not yet reached the age of 18. States may not by way of exception allow persons under the age of 18 to be treated as adults. Some States allow for the application of their juvenile justice rules to persons aged 18-21. Such application is not in contravention with the CRC. On the contrary, it is considered as a provision which is more conducive to the realization of the rights of young persons in conflict with the law.<sup>54</sup>

### 3.2.4 Interventions: measures for dealing with children in conflict with the law without resorting to judicial proceedings (art. 40(3)(b) of the CRC)

States are obliged to establish measures for dealing with children in conflict with the law without resorting to judicial proceedings (i.e. diversion), and to ensure that the child’s human rights and legal safeguards are fully respected in the application of diversion. Diversion should be applied to, but not be limited to, all minor and first-time offenders. Diversion avoids stigmatization and has good outcomes for children and public safety, as well as being cost-effective. Forms of diversion include community-based programmes, such as community service, supervision and guidance by social workers or probation officers, family conferences and other forms of restorative justice including restitution to/compensation of victims. The law must contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard must be regulated and reviewed. Legal safeguards must be in place ensuring that diversion is used only when there is compelling evidence that the child committed the alleged offence, the child freely and voluntarily has given his/her consent, etc. Where judicial proceedings are initiated by the competent authority (see below), public prosecutors or other responsible officials should continuously explore the possibility of alternatives to a court conviction.<sup>55</sup>

<sup>49</sup> Ibid., paras. 15-21.

<sup>50</sup> Committee on the Rights of the Child, General Comment No. 10 (2007) Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 31. See also Appendix 1 below.

<sup>51</sup> Ibid., paras. 31-34.

<sup>52</sup> UNICEF Regional Office for CEE/CIS, UNICEF Guidance Note for CEE/CIS on responses to children who have infringed the law but are under the minimum age for prosecution as a juvenile offender, March 2010. See also section 4 below.

<sup>53</sup> General Assembly resolution 64/142 of 24 February 2010.

<sup>54</sup> Committee on the Rights of the Child, General Comment No. 10 (2007) Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007 paras. 36-39. See also Appendix 1 below.

<sup>55</sup> Ibid., paras. 24-27, 68-69.

### **3.2.5 Interventions: measures for dealing with children in conflict with the law involving judicial proceedings (art. 40(4) of the CRC)**

Where judicial proceedings are initiated by the competent authority, the principles of a fair and just trial must be applied (see section 3.2.6 below).

States are obliged to provide for the availability of a variety of social and educational measures, including care, guidance and supervision orders, counselling, probation, foster care, education and vocational training. The law must provide the court/judge with a wide variety of dispositions constituting alternatives to institutional care. The need to safeguard the well-being and best interests of the child and promote his/her reintegration must outweigh other considerations. Deprivation of liberty may only be used as a measure of last resort and, if used, for the shortest appropriate period of time (art. 37(b) of the CRC) (see section 3.2.7 below).<sup>56</sup>

The European Rules for juvenile offenders subject to sanctions or measures aim to uphold the safety and rights of juvenile offenders subject to sanctions or measures and to promote their physical, mental and social well-being when subjected to community sanctions or measures, or any form of deprivation of liberty.<sup>57</sup>

In its General Comment 13 (2011) The right of the child to freedom of all forms of violence, the Committee on the Rights of the Child states that:

“Services and treatment for perpetrators of violence, especially child perpetrators, are also needed. Children who are aggressive towards other children have often been deprived of a caring family and community environment. They must be regarded as victims of their child-rearing conditions, which imbue them with frustration, hatred and aggression. Educational measures must have priority and be directed to improve their pro-social attitudes, competencies and behaviours. Simultaneously, the life conditions of these children must be examined in order to promote their care and support and that of other children in the family and neighbourhood.”<sup>58</sup>

### **3.2.6 Right to a fair trial (art. 40(2)(b) of the CRC)**

Article 40(2)(b) of the CRC lists guarantees aiming to ensure a fair trial and provides that:

- (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
- (i) To be presumed innocent until proven guilty according to law;
  - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
  - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
  - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
  - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

<sup>56</sup> Ibid., paras. 28-29.

<sup>57</sup> Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states for juvenile offenders subject to sanctions or measures. See also Appendix 1 below.

<sup>58</sup> Committee on the Rights of the Child, General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13, 18 April 2011, para. 52.

- (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
- (vii) To have his or her privacy fully respected at all stages of the proceedings.

General Comment No. 10 contains detailed guidance. With reference to article 40(2)(b)(vii) of the CRC, the Committee emphasizes the obligation to protect the child's privacy throughout the whole juvenile justice process, ensuring no information is published that could lead to the identification of the child. Children's records must be kept strictly confidential and must not be used in subsequent adult proceedings. Mention should also be made here of Directive 2016/800/EU of the European Parliament and of the Council on procedural safeguards for children who are suspects or accused persons in criminal proceedings (see Appendix 1).

### **3.2.7 Deprivation of liberty (art. 37(b)-(d) of the CRC)**

Article 37 of CRC contains the leading principles for the use of deprivation of liberty, the procedural rights of every child deprived of liberty, and provisions concerning the treatment of and conditions for children deprived of their liberty. Under article 37(b)-(d), deprivation of liberty includes arrest and any form of detention, imprisonment and placement in custodial settings. The definition of deprivation of liberty under the CRC follows that of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the 'Havana Rules'): any forms of detention or imprisonment or the placement of 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.<sup>59</sup>

The arrest, detention or imprisonment of a child must be in conformity with the law and must be used only as a measure of last resort and for the shortest appropriate period of time. No child may be deprived of his/her liberty unlawfully or arbitrarily (art. 37 (b) of the CRC).

States must take adequate legislative and other measures to reduce the use of pre-trial detention. The law must clearly state the conditions that are required to determine whether to place or keep a child in pre-trial detention. The duration of pre-trial detention must be limited by law and be subject to regular review. Decisions regarding pre-trial detention must be made by a competent, independent and impartial authority or a judicial body. The child must be provided with legal or other appropriate assistance.

Article 37(d) of the CRC contains the following procedural rights: "Every child deprived of his/her liberty has the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action." Every child arrested and deprived of his/her liberty must be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours. The right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is an administrative decision, e.g. the police, the prosecutor and other competent authority. The right to a prompt decision means that a decision must be rendered as soon as possible, e.g. within or not later than two weeks after the challenge is made.

Every child deprived of liberty shall be separated from adults (art. 37(c) of the CRC). A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. The permitted exception to the separation of children from adults stated in article 37 (c) of CRC, "unless it is considered in the child's best interests not to do so", must be interpreted narrowly. States must establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices. Every child deprived of liberty has the right to maintain contact with his/her family through correspondence and visits. In order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family.

States must fully implement the United Nations Rules for the Protection of Juveniles Deprived of their Liberty adopted by the General Assembly in its resolution 45/113 of 14 December 1990, and take into account the

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<sup>59</sup> General Assembly resolution 45/113 of 14 December 1990. See also Appendix 1 below.

Standard Minimum Rules for the Treatment of Prisoners. The following principles and rules must be observed in all cases of deprivation of liberty:

- Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;
- Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment;
- Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community;
- The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations, and the opportunity to visit his/her home and family;
- Restraint 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. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;
- Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned;
- Every child should have the right to make requests or complaints, 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; children need to know about and have easy access to these mechanisms;
- Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting.<sup>60</sup>

### **3.3 Organization of juvenile justice**

States are obliged to establish an effective organization of the administration of juvenile justice and a comprehensive juvenile justice system. Article 40(3) of the CRC states that, “States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of or recognized as having infringed the penal law.” What the basic provisions of these laws and procedures are required to be, is described above. According to the Committee, a comprehensive juvenile justice system includes:

- a) Specialized units within the police, the judiciary, the court system, the prosecutor’s office
- b) Juvenile courts either as separate units or as part of existing regional/district courts. Where that is not immediately feasible for practical reasons, States should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice

<sup>60</sup> Committee on the Rights of the Child, General Comment No. 10 Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, paras. 78-89. See also Appendix 1 below.

- c) Specialized defenders or other representatives who provide legal or other appropriate assistance to the child.
- d) Specialized services, such as probation, counselling or supervision, together with specialized facilities, including day treatment centres and facilities for residential care and treatment of child offenders
- e) Effective coordination of the activities of all these specialized units, services and facilities.
- f) Appropriate and systematic training of all the professionals involved, including in law enforcement and the judiciary. Training should include information on the CRC, the social and other causes of juvenile delinquency, psychological and other aspects of the development of children, with special attention to girls and children belonging to minorities or indigenous peoples, the culture and the trends in the world of young people, the dynamics of group activities, and the available measures dealing with children in conflict with penal law, in particular measures without resorting to judicial proceedings
- g) Systematic collecting of disaggregated data and regular evaluations on the practice of the administration of juvenile justice.

## **4. Children below the minimum age of criminal responsibility who come into conflict with the law**

### **4.1. Introduction**

This chapter offers a more in-depth description of the rights to protection of children below the minimum age of criminal responsibility (MACR) who come into conflict with the law. Children who commit an offence at an age below the set MACR cannot be formally charged and held responsible in a penal law procedure. States are required to establish legal safeguards ensuring that their treatment is as just and fair as children at or above the MACR.<sup>61</sup> According to the Committee on the Rights of the Child, “[f]or these children special protective measures can be taken if necessary in their best interests.”<sup>62</sup>

In documents of international and European law, there are very few provisions explicitly dealing with children below the minimum age of criminal responsibility who come into conflict with the law. One of the most important provisions is article 40(3)(a) of the Convention on the Rights of the Child (CRC), which contains the obligation of States to establish a minimum age “below which children shall be presumed not to have the capacity to infringe the penal law”. This obligation is discussed in section 4.2 below. Section 4.3 deals with the response in practice to children below the MACR who come into conflict with the law. Followed by section 4.4 on State obligations and section 4.5 on protection and care for children below the MACR who come into conflict with the law. The chapter concludes with some key principles to be observed in the approach to children below the MACR who come into conflict with the law.

### **4.2 Set a minimum age of criminal responsibility (art. 40(3)(a) CRC)**

States are required to set a minimum age of criminal responsibility (MACR) below which children cannot be held responsible in a penal law procedure (art. 40(3)(a) of the CRC). Setting the MACR at below age 12 is not internationally acceptable. States may set the MACR at age 12. But age 12 is the absolute minimum and a low level and States should increase the MACR to a higher age, “for instance 14 or 16 years of age”.<sup>63</sup> No exceptions to the MACR are allowed, e.g. in cases of serious offences.<sup>64</sup> Children below the MACR may not be taken through the criminal justice system, they cannot be formally charged and held responsible in a penal law procedure. For these children, “special protective measures can be taken if necessary in their best interests”, such as educational measures and supervision by social workers. Placement in care or protection institutions may only be used as a measure of last resort (art.20(3) of the CRC) (compare section 3.2.7 above). See also the 2010 *UNICEF Guidance Note for CEE/CIS on responses to children who have infringed*

<sup>61</sup> Committee on the Rights of the Child, General Comment No. 10 (2007) Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 33.

<sup>62</sup> Ibid., para. 31.

<sup>63</sup> Ibid. See also Appendix 1 below.

<sup>64</sup> Ibid., paras. 31-34.

*the law but are under the minimum age for prosecution as a juvenile offender* (see section 4.5 below),<sup>65</sup> and the United Nations Guidelines for the Alternative Care of Children.<sup>66</sup> The Committee on the Rights of the Child provides guidance on the interpretation to be given to article 40(3)(a) of the CRC in paragraphs 30-35 of its General Comment No. 10 (2007) Children's rights in juvenile justice.<sup>67</sup> Article 40(3)(a) of the CRC provides that "States parties shall seek to promote ... [t]he establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law". It does not contain a specific age.

### **Age**

The Committee notes that setting the MACR at below age 12 is not internationally acceptable. States may set the MACR at age 12. But age 12 is the absolute minimum and a low level and States should increase the MACR to a higher age, "for instance 14 or 16 years of age".<sup>68</sup> The MACR is set at age 14 in the four countries involved in the Matra-programme 'Child protection system strengthening for children in conflict in the law'. This age is in conformity with the CRC.

The Committee refers to Rule 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules'). Rule 4 prescribes that States may not set the MACR "at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."<sup>69</sup> The commentary on rule 4 reads as follows:

"The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of his or her individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent behaviour or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.). Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally."<sup>70</sup>

### **Meaning of the MACR**

The Committee explains that the minimum age under article 40(3)(a) of the CRC has the following meaning:

- Children at or above the MACR at the time of the commission of an offence but younger than age 18 can be formally charged and subject to penal law procedures. These procedures including the final outcome for the child must be in full compliance with the principles and relevant provisions of the CRC, as elaborated in General Comment General Comment No. 10 (2007) Children's rights in juvenile justice.
- Children who commit an offence at an age below the MACR cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but, if they commit an offence when below MACR, the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure.

The Committee adds as regards children who commit an offence at an age below the MACR, "[f]or these children special protective measures can be taken if necessary in their best interests".<sup>71</sup> The Committee does not further elaborate on the content of this State obligation. The Committee continues by requesting States parties to provide detailed information in their reports about the treatment of children below the

<sup>65</sup> UNICEF Regional Office for CEE/CIS, UNICEF Guidance Note for CEE/CIS on responses to children who have infringed the law but are under the minimum age for prosecution as a juvenile offender, March 2010.

<sup>66</sup> General Assembly resolution 64/142 of 24 February 2010.

<sup>67</sup> Committee on the Rights of the Child, General Comment No. 10 (2007) Children's rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007.

<sup>68</sup> Ibid., paras. 32-33.

<sup>69</sup> General Assembly resolution 40/33 of 20 November 1989. See also Appendix 1, section 1.2.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

MACR who come into conflict with the law, including the legal safeguards in place to ensure that their treatment is as fair and just as that of children at or above MACR:

"A higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40(3)(b) of CRC [on diversion], deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected. In this regard, States parties should inform the Committee in their reports in specific detail how children below the MACR set in their laws are treated when they are recognized as having infringed the penal law, or are alleged as or accused of having done so, and what kinds of legal safeguards are in place to ensure that their treatment is as fair and just as that of children at or above MACR."<sup>72</sup>

### 4.3 Response in practice to children below the MACR who come into conflict with the law

According to research, offences committed by children aged 12 and younger make up a small proportion of overall offending and, generally, these offences are not serious or violent. But children who begin to commit delinquent acts between the ages of 7 and 12 are two to three times as likely to become serious, violent and chronic offenders versus children who begin to offend at older ages.<sup>73</sup> This underlines the importance of a suitable response which serves the best interests of these children, and the short- and long-term interest of the society at large as well.<sup>74</sup> Hence, child protection and justice systems need to be inclusive to all children in conflict with the law including those below the age of criminal responsibility (see section 2.1 above).

As mentioned in sections 4.1 and 4.2 above, (very) young children aged below the set MACR who commit an offence cannot be formally charged and held responsible in a penal law procedure. For these children, special protective measures can be taken if necessary in their best interests.<sup>75</sup> States are required to establish legal safeguards ensuring that their treatment is as just and fair as children at or above the MACR.<sup>76</sup> The response to children below the MACR who come into conflict with the law is problematic in many countries and, furthermore, "the most common outcome worldwide seems to be no systematic response at all to such children."<sup>77</sup> In some countries, the main response is retribution-oriented deprivation of liberty. Such response is legally categorized under civil law procedures as welfare, care, protection or education measures. These procedures lack due process safeguards, and administrative authorities like Commissions on Minors and Commissions on Minors' Affairs may order the deprivation of liberty in special correction schools, special education institutions, re-education institutions, etc.<sup>78</sup>

In some countries, the view is held that the State has few or no grounds for intervening in cases since the children concerned are not responsible for their infringement of the penal law. Their response varies from "resigned recognition of the inability to act" to "dismissal with an admonition or police caution".<sup>79</sup>

Main problems identified by UNICEF Regional Office for CEE/CIS include: lack of systematic response; lack of access to due process or an equivalent guarantee; prevalence of removal from parental care and placement in a residential facility based on an administrative decision, and for a potentially lengthy period as well.<sup>80</sup>

#### Good practices

A large body of research shows that good practices in the area of (systematic) response to children below the

<sup>72</sup> Ibid.

<sup>73</sup> Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*, Ashgate Publishing, Farnham, 2009, Chapter 6.

<sup>74</sup> Committee on the Rights of the Child, General Comment No. 10 (2007) Children's rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 3.

<sup>75</sup> Ibid., para. 31.

<sup>76</sup> Ibid., para. 33.

<sup>77</sup> Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*, Ashgate Publishing, Farnham, 2009, p. 269.

<sup>78</sup> Ibid., p. 261.

<sup>79</sup> UNICEF Regional Office for CEE/CIS, UNICEF Guidance Note for CEE/CIS on responses to children who have infringed the law but are under the minimum age for prosecution as a juvenile offender, March 2010, p. 5.

<sup>80</sup>Ibid..

MACR who come into conflict with the law consist of certain model universal juvenile delinquency prevention programmes for all children, and early identification and (non-punitive and non-custodial) intervention programmes for individual responses to children below the MACR who commit an offence. Interventions focusing on parents and in the home and school have proven to be the most effective. Techniques include day care and pre-school programs, home visiting programs, parent training, treatment foster care, multi-systemic therapy, cognitive-behavioural skills training, social competence promotion programs, interventions changing schools' social contexts.<sup>81</sup>

## 4.4 Protection and care for children below the MACR who come into conflict with the law

In the section below, the information provided above in chapters 2 and 3 is viewed specifically from the perspective of the rights of children below the MACR who come into conflict with the law.

### 4.4.1 State obligations

As explained above in section 4.2, under the CRC, States have the obligation to ensure that:

- a) Children below the MACR who come into conflict with the law are not taken through the juvenile justice/criminal justice system, they may not be formally charged and held responsible in a penal law procedure.
- b) Legal safeguards including due process are in place to ensure that the treatment of children below the MACR who come into conflict with the law is as fair and just as that of children at or above MACR.
- c) Children who commit an offence at an age below the MACR receive, if necessary in their best interests, appropriate interventions that address their behaviour. Such interventions can include educational measures, supervision by social workers and other alternatives to institutional care. Placement in institutions may only be used as a measure of last resort (arts. 37(b) and 20(3) of the CRC).

### 4.4.2 Child at the centre

An integrated system for child protection:

- places the child at the system's centre;
- places the child's best interests at the system's core;
- works to promote, protect and fulfil children's rights to protection as laid down in the Convention on the Rights of the Child;
- gives special attention to the rights to protection of vulnerable groups like children deprived of liberty and children in conflict with the law; and
- ensures that all essential actors and systems - education, health, social welfare, justice, civil society, community and family - work in concert to protect and assist children (see section 2.1 above).

An integrated system for child protection pays particular attention to the protection of vulnerable groups like children below the MACR who come into conflict with the law.<sup>82</sup>

States are obliged to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for the child. To this end, States must take all appropriate legislative and administrative measures including to protect children in conflict with the law who are below the MACR (art. 3(2) of the CRC).

States are required to take measures for the prevention of (young) children coming into conflict with the law. These measures must take into account the principles and rights laid down in the CRC, in particular the best interests of the child (art. 3) and the rights to an adequate standard of living (art. 27), health (art. 24),

<sup>81</sup> Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*, Ashgate Publishing, Farnham, 2009, Chapter 6. See also the United Nations Guidelines for the Prevention of Juvenile Delinquency (the 'Riyadh Guidelines').

<sup>82</sup> Council of Europe, Integrated strategy against violence, at <https://rm.coe.int/168046d3a0>

education (arts. 28-29), protection from all forms of violence, injury or abuse (art. 19), protection from economic exploitation (art. 32) and from sexual exploitation (art. 34). These measures must integrate the standards laid down in the United Nations Guidelines for the Prevention of Juvenile Delinquency (the ‘Riyadh Guidelines’). Emphasis must be placed on prevention policies that facilitate the successful socialization and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and work.

#### 4.4.3 Family

As described above in section 2.2, parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child (art. 18(1) of the CRC). States must respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights in the CRC (art. 5 of the CRC). The State has the responsibility to assist parents who need support. States are obliged to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities (art. 18(2) of the CRC).

The prevalence of removal from parental care and placement in a residential facility based on an administrative decision, and for a potentially lengthy period, has been identified by UNICEF Regional Office for CEE/CIS as one of the main problems in the response to children below the MACR who come into conflict with the law (see section 4.3 above). When parents or other persons legally responsible for the child are not able to (sufficiently) take care of the child, the State has the responsibility to step in. Separation of a child from his or her parents is always a measure of last resort.<sup>83</sup> States are obliged to ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child (art. 9(1) of the CRC).<sup>84</sup> A family is the natural environment for the growth, well-being and protection of children. Therefore, efforts must primarily be directed to enabling the child to remain in or return to the care of his/her parents or, when appropriate, other close family members.<sup>85</sup> A family is seen as the natural environment for the growth, well-being and protection of children. Therefore, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members.<sup>86</sup> (see section 2.2 above). The role of parents, or other persons legally responsible for the child, is very important especially when dealing with young children who show problematic behaviour. Parents and the child should therefore be involved in the decision making of the response to the committed offence (see section 4.6 below).

#### 4.4.4 Multidisciplinary approach to assess and determine the best interests of the child

Regarding every decision that has an impact on a child - in this case a child aged below the MACR who has committed an offence - the best interests of the child must be a primary consideration (article 3(1) of the CRC). The protection of the best interests of the child also means that the child’s background, context and possible needs for child protection or assistance measures need to be assessed, by means of an individual assessment.<sup>87</sup> A child who has suffered trauma, for example, should receive proper treatment. States are obliged to take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts (art. 39 of the CRC) (see section 3.1.1 above).

The Committee on the Rights of the Child recommends that as far as possible a multidisciplinary team of professionals should be involved in assessing and determining the best interests of the child (see section

<sup>83</sup> UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142 of 24 February 2010, para. 14.

<sup>84</sup> Compare article 8 of the European Convention on Human Rights; UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142 of 24 February 2010, para. 3.

<sup>85</sup> UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142 of 24 February 2010, para. 3.

<sup>86</sup>Ibid. 3.

<sup>87</sup> Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. UN/CRC/GC/14, 29 May 2013, para. 76.

3.1.2 above.) This also requires the participation of the child and parents or other persons legally responsible for the child, taking into account the evolving capacities of the child.<sup>88</sup> The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision-makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness – and in this case (very) young children who have committed an offence.

#### 4.4.5 Respect for the views of the child

The right of children to be heard and to have their views given due weight must be respected systematically in all decision-making processes, and their empowerment and participation should be central to child caregiving and protection strategies and programmes.<sup>89</sup> To assess the best interests of the child, it is important to include the child's view. Children have the right to information (art. 17 of the CRC) and the right to express their views and have them given due weight (art. 12(1) of the CRC). This includes the right to be heard in all judicial proceedings affecting them, which must be respected and implemented throughout every stage of the process (art. 12(2) of the CRC).<sup>90</sup> If the child chooses to be heard, he or she can decide to be heard either directly, or through a representative or appropriate body. It is recommended that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings (see section 3.1.3 above).<sup>91</sup>

### 4.5 Principles to be observed

UNICEF Guidance Note for CEE/CIS on responses to children who have infringed the law but are under the minimum age for prosecution as a juvenile offender, March 2010, pp. 5-7

#### “Principles to be observed

- 1. Responsibilities for dealing with underage children** from the moment of apprehension must be clearly established, known and accepted by all concerned. Ideally, this will involve developing criteria and a transparent oversight procedure for the transfer process applied by police; and establishing legally binding cooperation between the police and social services sector, whereby the latter takes immediate responsibility for underage children who come into contact with law enforcement officials.
- 2. Any law enforcement official, not just specially trained youth police, may come into contact with underage children** who have infringed the law. All law enforcement officials must therefore be trained in how to deal with children on apprehension and fully informed of the procedures to follow for the transfer of responsibility.
- 3. Systematic consideration must be given to the most appropriate response by the social services sector to each and every case.** Inaction in the face of behaviour that infringes the law is never useful to the child.
- 4. The response must be constructive.** While prompted by the child's transgression of the law, the response should not be conceived as a punishment but rather as an opportunity to help the child understand the unacceptable nature of his or her behaviour and its consequences. The response should also address those issues that will help the child to refrain from similar acts in the future and must be proportionate and individualized. If the child's family situation is unknown or gives cause for concern, or if the nature and circumstances of the child's behaviour suggest that special measures may be required, determination of the response should be based upon a social enquiry

<sup>88</sup> Ibid., paras. 47, 94.

<sup>89</sup> Committee on the Rights of the Child, General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13, 18 April 2011, para. 3.

<sup>90</sup> Ibid., para. 12.

<sup>91</sup> Committee on the Rights of the Child, General Comment No. 12 (2009) The right of the child to be heard, UN Doc. CRC/C/GC/12, 20 July 2009, para. 35.

report. This must take account of the motivation for committing the offence and the familial and social circumstances of the child as well as his or her particular characteristics and needs. In such cases, the enquiry should be carried out expeditiously by the social services sector and appropriate interim support measures put in place pending its outcome.

**5. The range of appropriate responses** includes family support; the offer of appropriate treatment for substance abuse in the family or serious behavioural problems exhibited by the child; enhancement of parenting skills; structured recreational and cultural activities; supplementary educational tutoring; day centres; life skills courses; individual or family group counselling; mediation; and mentoring.

**6. The decision-making process must respect the human rights of the child concerned** and, in particular, must provide the child a full opportunity to be heard and to contest any or all of the allegations in regard to his/her behaviour. Among other things, the process should involve exchanges between the child and specially prepared persons in a child-friendly setting, and interviews of his/her primary caregivers, teachers, etc. All reasonable efforts should be made to verify the grounds for any allegations that the child denies.

**7. If the child and/or the parents refuse to cooperate with, or give consent to, duly decided support measures** directed towards them or requiring their involvement, the grounds for and feasibility of the measures should be reviewed and, if appropriate, modified by the decision-making body. The competent authority may consider measures that are more constraining if these are deemed necessary to protect the best interests and other rights of the child.

**8. The response must take full account of Convention on the Rights of the Child obligations** to enable the child to be brought up by his or her parents as far as possible (Article 7) and to ensure that deprivation of liberty is used only a last resort and for the shortest appropriate period of time (Article 37). Deprivation of liberty occurs when a child is placed in any kind of facility, including for educational or protective purposes, from which he or she is not allowed to leave at will (Havana Rules).

**9. Any decision involving measures that deprive the child of his or her liberty must be open to appeal before a court.** Nota bene, the involvement of the court in such instances is, of course, to determine only the admissibility of the decision and in no way negates the child's immunity from prosecution.

**10. Schemes** (e.g., life skills courses, mediation) **and placements** (e.g., foster care, residential placements) **for underage offenders should, in principle, be conceived and implemented specifically for this group.** In particular, such schemes should in no way be designed or perceived as punitive in nature. Consequently, they should not be run by juvenile justice bodies or involve programmes or accommodation used by offenders above the minimum age for prosecution.

**11. Special care should be taken when considering the participation in a scheme by, or placement of, an underage offender alongside children who are in need of care and protection but have not contravened the law.** No hard and fast rule can be applied here: decisions must be made on a case-by-case basis and should consider the best interests and needs of all children involved.

**12. Many underage offenders, while no less in need of care and protection than abused or neglected children, may need such care to be provided in a specialized setting** that reflects their particular experience, even trauma. For example, those underage offenders who have been used instrumentally in criminal activities, involved with older groups or gangs, or committed violent acts. Equally, **many underage offenders can be suitably cared for in the company of children who have not exhibited, or been induced into, behaviour that infringes the law.**

**13.** Any placement made, whatever the setting, must be subject to regular review in regard to its continuing necessity and suitability, in compliance with Convention on the Rights of the Child (Article 25).

**14.** Decisions and reviews should involve consultation with the child and his or her family as well as with all professionals who possess direct knowledge of the child, including teachers, doctors and social workers.”

# **Appendix 1: An overview of key international and European documents**

This section gives an overview of the key international and European documents which deal specifically with the rights of children in conflict with the law.

## **1 United Nations**

### **1.1 International human rights treaties (hard law)**

The International Covenant on Civil and Political Rights and the Convention on the Rights of the Child mentioned here below are treaties and therefore legally binding for States that have ratified them. Each State party has the obligation to take steps to ensure that everyone in the State can enjoy the rights set out in the treaty.

#### **International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly on 16 December 1966 and entered into force on 23 March 1976.<sup>92</sup> Article 14 of the ICCPR deals with procedural guarantees in civil and criminal trials. Article 14(4) of the ICCPR specifically provides that: “In the case of juvenile persons, the procedure shall be such as will take into account of their age and the desirability of promoting their rehabilitation.” The implementation of the ICCPR by its States parties is monitored by the Human Rights Committee.<sup>93</sup>

#### **Convention on the Rights of the Child**

The Convention on the Rights of the Child (CRC) was adopted by the UN General Assembly on 20 November 1989 and entered into force on 2 September 1990.<sup>94</sup> The CRC has been ratified by 196 States. Articles 37 and 40 of the CRC contain specific provisions on the rights of children in conflict in conflict with the law. Article 40 deals with the administration of juvenile justice. Article 37(b)-(d) deals with children deprived of their liberty, including any form of detention, imprisonment or placement in custodial settings. Article 37(a) deals with the prohibition of capital punishment and life imprisonment. Other relevant provisions include article 39 (Physical and psychological recovery and social reintegration), and the general principles laid down in article 2 (Non-discrimination), article 3 (Best interests of the child), article 6 (The right to life, survival and development) and article 12 (Respect for the views of the child). The implementation of the CRC by its States parties is monitored by the Committee on the Rights of the Child.<sup>95</sup> Like the Human Rights Committee and the other human rights treaty bodies, the Committee on the Rights of the Child publishes its interpretation of the provisions of the CRC in the form of ‘general comments’. General Comment No. 10 (2007) of the Committee on the Rights of the Child deals with children’s rights in juvenile justice.<sup>96</sup> Other relevant general comments - and which have been referred to in sections 2-4 above - include General Comment No. 12 (2009) The right of the child to be heard, General Comment No. 13 (2011) The right of children to freedom from all forms of violence, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). See section 1.2 below for a brief description of General Comments No. 10 and No. 13.(.)

### **1.2 Non-binding international documents (soft law)**

The international documents adopted within the context of the UN mentioned here below are not legally binding. However, they do represent a moral commitment by States and provide important guidance and recommendations for the implementation of standards contained in legally binding documents.

<sup>92</sup> General Assembly resolution 2200A (XXI) of 16 December 1966.

<sup>93</sup> For information on the ICCPR, see the webpage of the Human Rights Committee at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRAIndex.aspx>

<sup>94</sup> General Assembly resolution 44/25 of 20 November 1989.

<sup>95</sup> The Committee on the Rights of the Child also monitors implementation of two Optional Protocols to the CRC: on involvement of children in armed conflict; and, on sale of children, child prostitution and child pornography. On 19 December 2011, the UN General Assembly approved a third Optional Protocol on a communications procedure, which entered into force in April 2014. This optional protocol allows individual children to submit complaints regarding specific violations of their rights under the CRC and its first two Optional Protocols. For information on the CRC, see the webpage of the Committee on the Rights of the Child at <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>

<sup>96</sup> UN Doc. CRC/C/GC/10, 25 April 2007. The text of General Comment No. 10 of the Committee on the Rights of the Child can be downloaded at

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f10&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f10&Lang=en)

### **United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the ‘Beijing Rules’)**

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’) were adopted by the UN General Assembly on 29 November 1985.<sup>97</sup> The Beijing Rules represent internationally accepted minimum standards. Rule 5 (Aims of juvenile justice) of the Beijing Rules states that the juvenile justice system must emphasize and promote the well-being of the juvenile and ensure that any reaction to juvenile offenders is always in proportion to the circumstances of both the offenders and the offence. The Beijing Rules contain six parts dealing with: General principles; Investigation and prosecution; Adjudication and disposition; Non-institutional treatment; Institutional treatment; Research, planning, policy formulation and evaluation. According to General Comment No. 10 (2007) Children’s rights in juvenile justice of the Committee on the Rights of the Child, the required comprehensive policy for juvenile justice must take into account and integrate the standards laid down in the Beijing Rules (see below).<sup>98</sup>

### **United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the ‘Havana Rules’)**

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty were adopted by the UN General Assembly on 14 December 1990.<sup>99</sup> These Rules represent internationally accepted minimum standards, including its fundamental rule that the deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases (I. Fundamental Perspectives, rule 2). For the purposes of these Rules, the ‘deprivation of liberty’ means any forms of detention or imprisonment or the placement of 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 (II. Scope and Application of the Rules, rule 11(b)). The United Nations Rules for the Protection of Juveniles Deprived of their Liberty contain five parts dealing with: Fundamental perspectives; Scope and application of the rules; Juveniles under arrest or awaiting trial; The management of juvenile facilities; and, Personnel. According to the above-mentioned General Comment No. 10 of the Committee on the Rights of the Child, the required comprehensive policy for juvenile justice must take into account and integrate the standards laid down in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.<sup>100</sup>

### **United Nations Guidelines for the Prevention of Juvenile Delinquency (the ‘Riyadh Guidelines’)**

The United Nations Guidelines for the Prevention of Juvenile Delinquency (the ‘Riyadh Guidelines’) were adopted by the UN General Assembly on 14 December 1990.<sup>101</sup> The Riyadh Guidelines represent internationally accepted minimum standards and stress the need for and importance of progressive delinquency prevention policies. These policies should avoid criminalizing and penalizing a child for behaviour that does not cause serious damage to the development of the child or harm to others (I. Fundamental Perspectives, rule 5). The Riyadh Guidelines contain five parts dealing with: Fundamental principles; Scope of the guidelines; General prevention; Socialization processes; Social policy; Legislation and juvenile justice administration; and, Research, policy development and co-ordination. According to the above-mentioned General Comment No. 10 of the Committee on the Rights of the Child, the required comprehensive policy for juvenile justice must take into account and integrate the standards laid down in the Riyadh Guidelines.<sup>102</sup>

### **United Nations Guidelines for Action on Children in the Criminal Justice System**

The United Nations Guidelines for Action on Children in the Criminal Justice System were adopted by the UN Economic and Social Council on 21 July 1997.<sup>103</sup> These guidelines provide general guidance and recommendations on the necessary action for the effective implementation of the standards laid down in the CRC concerning the rights of children in conflict with the law.

### **General Comment No. 10 (2007) Children’s rights in juvenile justice**

In General Comment No. 10 (2007) Children’s rights in juvenile justice, the Committee on the Rights of the Child acknowledges the efforts by States parties to establish an administration of juvenile justice in compliance with the Convention on the Rights of the Child (CRC). However, the Committee also notes with

<sup>97</sup> General Assembly resolution 40/33 of 29 November 1989.

<sup>98</sup> Committee on the Rights of the Child, General Comment No. 10 (2007) Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, p. 4.

<sup>99</sup> General Assembly resolution 45/113 of 14 December 1990.

<sup>100</sup> Committee on the Rights of the Child, General Comment No. 10 (2007) Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, p. 4.

<sup>101</sup> General Assembly resolution 45/112 of 14 December 1990.

<sup>102</sup> UN Doc. CRC/C/GC/10, 25 April 2007, para. 4.

<sup>103</sup> ECOSOC resolution 1997/30 of 21 July 1997.

concern that many States parties still have a long way to go to achieve full compliance, e.g. in the areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, the use of deprivation of liberty only as a measure of last resort, and prevention of children coming into conflict with the law. The Committee states that this may be the result of a lack of the necessary comprehensive juvenile justice policy and system, the latter to include specialized and trained units within the police, the judiciary, court system and prosecutor's office, and specialized representatives to provide legal aid and other assistance to the child.

The Committee underscores that the CRC requires States parties to develop and implement a comprehensive juvenile justice policy. The aim of General Comment No. 10 is to provide States parties with guidance and recommendations for the content of this policy, allowing and enabling States parties to respond to children in conflict with the law in a manner which serves the best interests not only of children but of the whole society. The Committee notes that the required comprehensive policy must take into account and integrate other international standards, in particular the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules'), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the 'Havana Rules') and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the 'Riyadh Guidelines').<sup>104</sup>

#### **General Comment No. 13 (2011) The right of the child to freedom from all forms of violence**

In its General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, the Committee on the Rights of the Child provides guidance on overcoming isolated, fragmented and reactive initiatives to address child protection, and developing a coordinating framework for eliminating violence through comprehensive child rights-based protection measures. The objectives of General Comment No. 13 are:

- a) To guide States parties in understanding their obligations under article 19 of the Convention on the Rights of the Child (CRC) to prohibit, prevent and respond to all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation of children, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child, including State actors;
- b) To outline the legislative, judicial, administrative, social and educational measures that States parties must take;
- c) To overcome isolated, fragmented and reactive initiatives to address child caregiving and protection which have had limited impact on the prevention and elimination of all forms of violence;
- d) To promote a holistic approach to implementing article 19 based on the CRC's overall perspective on securing children's rights to survival, dignity, well-being, health, development, participation and non-discrimination – the fulfilment of which are threatened by violence;
- e) To provide States parties and other stakeholders with a basis on which to develop a coordinating framework for eliminating violence through comprehensive child rights-based caregiving and protection measures;
- f) To highlight the need for all States parties to move quickly to fulfil their obligations under article 19.

<sup>105</sup>

## **2 Council of Europe**

### **2.1 European treaties (hard law)**

The European Convention on Human Rights and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse mentioned here below are treaties and therefore legally binding for States that have ratified them. Each State party has the obligation to take steps to ensure that everyone in the State can enjoy the rights set out in the treaty.

#### **European Convention on Human Rights**

The European Convention on Human Rights (ECHR) was adopted on 4 November 1950. The ECHR has 14 Optional Protocols. Relevant articles of the ECHR include article 3 (The right to physical integrity), article 5 (The right to liberty and security of person), article 6 (The right to a fair hearing) and article 8 (Right to respect for private and family life, home and correspondence). The Explanatory Memorandum to the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice contains an

<sup>104</sup> UN Doc. CRC/C/GC/10, 25 April 2007, para. 4.

<sup>105</sup> UN Doc. CRC/C/GC/13, 18 April 2011, para. 11.

excellent overview of relevant jurisprudence of the European Court of Human Rights. These Guidelines are mentioned in section 3.2.2 below.

## 2.2 Recommendations and guidelines (soft law)

Recommendations and guidelines adopted by the Committee of Ministers of the Council of Europe are not legally binding. However, they do represent legal instruments of significance.

### Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures

The European Rules for juvenile offenders subject to sanctions or measures were adopted by Committee of Ministers on 5 November 2008.<sup>106</sup> These Rules aim to uphold the safety and rights of juvenile offenders subject to sanctions or measures and to promote their physical, mental and social well-being when subjected to community sanctions or measures, or any form of deprivation of liberty.

Other relevant recommendations include The third chapter provides an overview of key international and European documents providing standards on the protection of children in conflict with the law.,

*Recommendation Rec(2005)5 on the rights of children living in residential institutions*, and  
*Recommendation Rec(2006)2 on the European Prison Rules*.<sup>107</sup>

### Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice

The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice were adopted by the Committee of Ministers of the Council of Europe on 17 November 2010. These Guidelines apply to criminal, civil and administrative law. They aim to ensure that, in any such proceedings (and in alternatives to such proceedings), all rights of children, among which the right to information, to representation, to participation and to protection, are fully respected with due consideration to the child's level and maturity and understanding and to the circumstances of the case. According to the Guidelines, 'child-friendly justice' is justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and understand the proceedings, to respect for private and family life and to integrity and dignity.

### Recommendation CM/Rec(2009)10 of the Committee of Ministers: Council of Europe Policy guidelines on integrated national strategies for the protection of children from violence

The Council of Europe 'Policy guidelines on integrated national strategies for the protection of children from violence' aim to promote the development and implementation of a holistic national framework to safeguard the rights of the child and to eradicate violence against children. The Guidelines propose a multidisciplinary and systematic national framework to prevent and respond to all acts of violence against children. The Guidelines stress that fragmented child protection responses may deal with a single problem but fail to provide a comprehensive solution for the diverse needs of children. Focusing on selected issues alone, or on particular groups of children, is neither sustainable nor effective. An integrated child protection system places the child at the system's centre and endorses and promotes the Convention on the Rights of the Child. It ensures that all essential actors and systems - education, health, welfare, justice, civil society, community and family - work in concert to prevent abuse, exploitation, neglect and other forms of violence against children and to protect and assist children in these situations. An integrated child protection system puts emphasis on prevention and adopts a child rights, not a welfare, approach. The Committee of Ministers of the Council of Europe has adopted several recommendations aimed at protecting children from violence. These recommendations are listed in Appendix 3 to Recommendation CM/Rec(2009)10.

## 3 European Union

### 3.1 Directives (hard law)

Directives adopted by the European Parliament and Council of the EU are legally binding for EU countries. A directive is a flexible instrument mainly used to harmonize national laws. Once adopted at EU level, it is then

<sup>106</sup> Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states for juvenile offenders subject to sanctions or measures.

<sup>107</sup> Recommendation Rec(2003)20 of the Committee of Ministers to Member States concerning new ways of dealing with juvenile delinquency and the role of juvenile justice adopted by Committee of Ministers on 24 September 2003; Recommendation Rec(2005)5 of the Committee of Ministers to Member States on the rights of children living in residential institutions adopted by the Committee of Ministers on 16 March 2005; Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules.

transposed by EU countries into their internal law for application. It requires EU countries to achieve a certain result but leaves them free to choose how to do so.<sup>108</sup>

### **Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings**

The purpose of Directive 2016/800/EU of the European Parliament and of the Council on procedural safeguards for children who are suspects or accused persons in criminal proceedings is to establish procedural safeguards to ensure that children, meaning persons under the age of 18, who are suspects or accused persons in criminal proceedings are able to understand and follow those proceedings and to exercise their right to a fair trial, and to prevent children from re-offending and foster their social integration. The Directive provides that children who are suspects or accused persons in criminal proceedings should have the right to an individual assessment to identify their specific needs in terms of protection, education, training and social integration, to determine if and to what extent they would need special measures during the criminal proceedings, the extent of their criminal responsibility and the appropriateness of a particular penalty or educative measure.<sup>109</sup> The Directive deals with: the right to information; the right of the child to have the holder of parental responsibility informed; assistance by a lawyer; right to an individual assessment; right to a medical examination; audio-visual recording of questioning; limitation of deprivation of liberty; alternative measures; specific treatment in the case of deprivation of liberty; timely and diligent treatment of cases; right to protection of privacy; right of the child to be accompanied by the holder of parental responsibility during the proceedings; right of children to appear in person at, and participate in, their trial; European arrest warrant proceedings; right to legal aid; remedies; training.

#### **3.2 Recommendations (soft law)**

A recommendation of the European Commission is not legally binding. A recommendation allows the institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed.

#### **European Commission recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (C(2013) 8178/2)**

The aim of this Recommendation is to encourage Member States to strengthen the procedural rights of all suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities ('vulnerable persons').

### **4 Child victims and witnesses of crimes**

Relevant provisions of the *Convention on the Rights of the Child* include article 3, article 12 (Respect for the views of the child), article 19 (Protection from violence), article 34 (Sexual exploitation and sexual abuse) and article 39 (Recovery and social reintegration of child victims). Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography also specifically deals with child victims.

The legally non-binding *Guidelines on Justice in Matters involving Child Victims and Witnesses* were adopted by the UN Economic and Social Council (ECOSOC) on 22 July 2005.<sup>110</sup> The Guidelines were adopted by ECOSOC to reflect good practice and as a model for national implementation. The Guidelines stress that children who are victims and witnesses are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs, in order to prevent further hardship and trauma that may result from their participation in the criminal justice process. They also point out the serious physical, psychological and emotional consequences of crime and victimization for child victims and witnesses, in particular in cases involving sexual abuse and sexual exploitation. The Guidelines state that professionals should be trained to effectively protect and meet the needs of these children, including in interview and assessment techniques that minimize any trauma to the child.

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<sup>108</sup> The European Court of Justice considers that a directive that is not transposed can produce direct effect when: the transposition into national law has not taken place or has been done incorrectly; the provisions of the directive are unconditional and sufficiently clear and precise; and, the provisions of the directive give rights to individuals.

<sup>109</sup> The right to an individual assessment is also contained in Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. See section 4 below.

<sup>110</sup> ECOSOC resolution 2005/20 of 22 July 2005.

Mention should also be made of *Directive 2012/29/EU of the European Parliament and of the Council of Europe of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/22/JHA*. The purpose of this Directive is to establish minimum standards in regard to victims of crime to improve legislation and practical support measures for the protection of victims, with particular attention paid to support for and recognition of all victims. The Directive stresses that where the victim is a child, the child's best interests shall be a primary consideration and shall be assessed on an individual basis. A child-sensitive approach, taking due account of the child's age, maturity, views, needs and concerns, shall prevail. The child and the holder of parental responsibility or other legal representative, if any, shall be informed of any measures or rights specifically focused on the child.<sup>111</sup> Child victims should be considered and treated as the full bearers of rights set out in this Directive and should be entitled to exercise those rights in a manner that takes into account their capacity to form their own views. The Directive also contains specific provisions for child-victims.

The *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the 'Lanzarote Convention')* was adopted on 25 October 2007.<sup>112</sup> This Convention is related to the Guidelines on Justice in Matters involving Child Victims and Witnesses mentioned above. It contains provisions on the protection of child victims during judicial proceedings, for example with regard to their identity and privacy. It is the first instrument to establish the various forms of sexual abuse of children as criminal offences, including such abuse committed in the home or family, with the use of force, coercion or threats.

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<sup>111</sup> Article 1 (2) Directive 2012/29/EU.

<sup>112</sup> CETS No. 201.