



**UNODC**

United Nations Office on Drugs and Crime



# Justice in Matters Involving Children in Conflict with the Law

Model Law on Juvenile Justice  
and Related Commentary



UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

# **Justice in Matters Involving Children in Conflict with the Law**

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Following the expert group meeting, the Model Law was further elaborated and revised by Alexandra Martins, Mario Hemmerling and Sonya Rahaman, under the supervision of Valérie Lebaux, Chief of the UNODC Justice Section. Invaluable input was provided by Marie Grandjouan and Anna Giudice Saget.

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# INTRODUCTION

This Model Law and the related Commentary are designed to provide legal guidance to States in the process of juvenile justice reform and assist them in drafting juvenile justice legislation. It translates compelling international juvenile justice standards and norms into a national context and aims at harmonizing national legislation with international requirements. International standards and norms in the area of juvenile justice are detailed. They can be found primarily in the Convention on the Rights of the Child (CRC), the only international legally binding instrument with regard to juvenile justice.<sup>1</sup> Further international juvenile justice standards and norms are contained in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules),<sup>2</sup> the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the Havana Rules),<sup>3</sup> the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),<sup>4</sup> the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules),<sup>5</sup> the Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines),<sup>6</sup> the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters,<sup>7</sup> the Standard Minimum Rules for the Treatment of Prisoners,<sup>8</sup> the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules),<sup>9</sup> and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>10, 11</sup> The General Comments of the Committee on the Rights of the Child (CRC Committee), in particular General Comment No. 10,<sup>12</sup> must also be mentioned as sources of guidance and recommendations to States parties in their efforts to establish an administration of juvenile justice in compliance with the CRC.

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<sup>1</sup> Other applicable legally binding human rights instruments that are not particularly tailored for children are: the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples' Rights (the Banjul Charter). On the regional level, the African Charter on the Rights and Welfare of the Child (ACRWC) and the African Youth Charter (AYU) need to be mentioned as legally binding instruments. The International Labour Organization (ILO) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention 182) of 1999 also forms part of the international legal framework.

<sup>2</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33).

<sup>3</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113).

<sup>4</sup> United Nations General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency* (the Riyadh Guidelines), adopted by the General Assembly on 14 December 1990 (A/RES/45/112).

<sup>5</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for Non-custodial Measures* (the Tokyo Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/110).

<sup>6</sup> Economic and Social Council Resolution 1997/30, *Guidelines for Action on Children in the Criminal Justice System* (the Vienna Guidelines), adopted by the Economic and Social Council on 21 July 1997.

<sup>7</sup> Economic and Social Council Resolution 2002/12, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, adopted by the Economic and Social Council on 24 July 2002.

<sup>8</sup> *United Nations Standard Minimum Rules for the Treatment of Prisoners* (SMR); Economic and Social Council Resolutions 663c (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>9</sup> United Nations General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules), adopted by the General Assembly on 16 March 2011 (A/RES/65/229).

<sup>10</sup> United Nations General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, adopted by the General Assembly on 28 March 2013 (A/RES/67/187).

<sup>11</sup> Another non-binding international instrument that needs to be mentioned, but is not particularly related to juvenile justice, is the Universal Declaration of Human Rights (UDHR).

<sup>12</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10). Further assistance is also provided by the Human Rights Committee in their General Comments.

This Model Law is based on core juvenile justice principles that need to be taken into consideration by States when drafting juvenile justice legislation and establishes due process guarantees for any child in conflict with the law. Furthermore, this Model Law contains provisions on the minimum age of criminal responsibility, including guidance on how to conduct age and personality assessments. Following the suggestion of the CRC Committee,<sup>13</sup> this Model Law proposes the abolition of status offences.<sup>14</sup> Due to the different legal systems in operation around the world, great challenges were faced during the drawing-up of this Model Law with regard to the competencies of authorities and other bodies involved in the juvenile justice process. This held true particularly where aspects of procedural law were concerned. In accordance with international standards and norms, the Model Law proposes the establishment of children’s courts [juvenile courts] [youth courts] where independent, specially trained judges have exclusive jurisdiction over children in conflict with the law. Due account was taken of the fact that legislative competencies and the legislative process involved in the establishment of courts or judicial bodies vary from State to State. It is indeed for that reason that this Model Law does not provide details concerning how the children’s courts [juvenile courts] [youth courts] should be established. It may be necessary for States to draft secondary legislation in this regard. The same holds true for the establishment of specialized prosecution offices, police units and social services.

The Model Law further covers all phases of the juvenile justice process, starting with the pre-trial phase, including the crucial moment of the apprehension and arrest of the child, as well as his or her treatment in police custody and pre-trial detention. It then contains provisions regarding the trial phase, custodial and non-custodial sentences, and conditions of detention and institutional treatment, as well as provisions relating to aftercare and reintegration. Alternatives to judicial proceedings [diversion] and, in particular, restorative justice are recognized in this Model Law as key requirements<sup>15</sup> to keep children away from the formal justice system. The principle that deprivation of liberty should be a last resort and only for the shortest appropriate period of time is frequently stressed in the text of this Model Law.

It is important to note that this Model Law does not follow or suggest that States should adopt any particular model for their juvenile justice system. Indeed, with juvenile justice systems varying significantly from State to State, it is impossible to identify one single, comprehensive and all-encompassing juvenile justice system with common features for all States.<sup>16</sup> The theoretical foundation of juvenile justice systems is diverse, building from the classical typology of the so-called “welfare model” and the “justice model”<sup>17</sup> to more recent typologies including the “participatory

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<sup>13</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 8, suggests abolishing status offences “in order to establish an equal treatment under the law for children and adults”; see also United Nations General Assembly, United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), adopted by the General Assembly on 14 December 1990 (A/RES/45/112), Guideline 56.

<sup>14</sup> For a definition of the term “status offence” see Article 10 of this Law.

<sup>15</sup> See Article 18 of this Law.

<sup>16</sup> See Cappelaere, G., Grandjean, A. and Naqvi, Y., *Children Deprived of Liberty – Rights and Realities* (Éditions Jeunesse et Droit: Liège, 2005), p. 48.

<sup>17</sup> For further information on both models see: Cipriani, D., *Children’s Rights and the Minimum Age of Criminal Responsibility – A Global Perspective* (Ashgate: Surrey, 2009), p. 1; Pratt, J., “Welfare and justice: incompatible philosophies”, in: Gale, F., Naffine, N. and Wundersitz, J. (eds.), *Juvenile Justice: Debating the Issues* (Allen & Unwin: Sydney, 1993), p. 38; and Junger-Tas, J., “Trends in international juvenile justice: what conclusions can be drawn?”, in: Junger-Tas, J. and Decker, S. (eds.), *International Handbook of Juvenile Justice* (Springer: New York, 2008), p. 505.

model”, the “modified justice model”, the “crime control model”, the “corporatist model”, the “minimum intervention model”, the “restorative justice model” and the “neo-correctionalist model”.<sup>18</sup> These typological changes through the years show that a clear categorization of juvenile justice systems is nearly impossible. Even if only the “welfare model” and the “justice model” are taken as the classical models for distinction, in practice these two models have to a great extent become mixed over the years in many countries around the world due to developmental processes, making it almost impossible to identify either a pure welfare model or a pure justice model in any one State.<sup>19</sup>

The provisions proposed under this Model Law comply fully with the requirements set out by the CRC and other legal instruments in the area of juvenile justice, and it has been taken into account that neither the CRC nor other non-legally-binding instruments on juvenile justice make explicit reference to which juvenile justice model a country should follow.<sup>20</sup> The CRC requires States “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”.<sup>21</sup> This provision is regarded as imposing a progressive requirement upon States to establish a juvenile justice system which takes into account the child’s age and provides human rights and legal safeguards as well as establishing alternatives to judicial proceedings. The CRC requires States to establish a juvenile justice system with due-process guarantees to be applied to all children under the age of 18 who are in conflict with the law. In addition, Article 40(1) sets out the purpose of a juvenile justice system, which should be reintegrative and should help the child assume a constructive role in society. The purpose of the juvenile justice system should not be retributive or punitive, but should be to foster the well-being of children and address offending behaviour in a manner appropriate to children’s development.

It is important to stress that, although laws and regulations constitute a key component of a juvenile justice system, and are essential in defining boundaries and giving legal force to the protection of children in conflict with the law, they are not the only requirement for promoting comprehensive juvenile justice reforms.<sup>22</sup> States should ensure that other interrelated components are in place and in line with the relevant international legal framework. For example, it is essential that States

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<sup>18</sup> Pruin, I., “The scope of juvenile justice in Europe”, in: Dünkel, F., Grzywa, J., Horsfield, P. and Pruin, I. (eds.), *Juvenile Justice Systems in Europe*, Vol. 4, 2nd ed. (Forum Verlag Godesberg: Mönchengladbach, 2011), pp. 1546-1547, gives a detailed description of the different theoretical models of juvenile justice and their proponents.

<sup>19</sup> *Ibid.*, p. 1545.

<sup>20</sup> See also: Zermatten, J., “The Swiss Federal Statute on Juvenile Criminal Law”, in: Junger-Tas, J. and Decker, S. (eds.), *International Handbook of Juvenile Justice* (Springer: New York, 2008), p. 300. Don Cipriani states in his book *Children’s Rights and the Minimum Age of Criminal Responsibility – A Global Perspective* (Ashgate: Surrey, 2009), with regard to this issue: “The CRC addresses juvenile justice at length, while an array of non-binding international instruments offer even greater detail on how rights should apply to all people under the age of 18 involved in the justice system. The CRC and related instruments compose international juvenile justice standards whose framework addresses systematic flaws in both the welfare and justice approaches.” (p. 19). He is further of the opinion that “this vision brings important advantages, including greater transparency, international legitimacy, a coherent moral framework and basis, and a corresponding set of principles that guide societies’ understanding of children” (p. 38).

<sup>21</sup> Article 40(3) CRC.

<sup>22</sup> The Committee on the Rights of the Child emphasizes the need for States parties to adopt a comprehensive approach to juvenile justice and to commit themselves to the necessary broad reforms of their criminal justice and social responses to children in conflict with the law. See: Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10).

develop and implement a juvenile justice policy with a set of measures aimed at preventing youth crime. It is also indispensable to establish a clear framework for child-sensitive services and service delivery mechanisms with competent human resources, sufficient financial resources, and adequate physical resources to protect the rights and respond to the needs of children in conflict with the law. The mechanisms of juvenile justice systems are heavily influenced by cultural and societal norms. Therefore communication and advocacy measures aimed at promoting the engagement of media and civil society in the child protection process are essential in advancing positive change.

The process of reforming juvenile justice systems must be shaped by a human rights approach, which is directed not only at building the capacity of duty-bearers to meet their obligations to respect, protect and fulfil children's rights but also at strengthening the capacity of rights-holders to claim and exercise their rights. Therefore, children must be considered key agents in their own protection through their personal knowledge of their rights and of effective methods of avoiding and responding to risks. Accordingly, mechanisms should be instituted for children to participate in the development and implementation of laws, policies and programmes aimed at promoting their rights.

The target audience of this Model Law is broad. It is focused towards key roleplayers involved in the juvenile justice process, such as legislators who are involved in drafting or revising juvenile justice laws. Policymakers are also targeted by this Model Law as they play a fundamental role in establishing or reforming juvenile justice systems through programming activities. A third group that this Model Law focuses on are practitioners, i.e. judges, prosecutors, detention facility personnel, staff of social services and lawyers. This Model Law will help those of these roleplayers who are practically involved in the juvenile justice process to broaden their understanding of the application of international standards and norms in the area of juvenile justice in a national context. Finally, this Model Law can help technical assistance providers and law students around the world to familiarize themselves with the international legal framework on juvenile justice and the process of its implementation into domestic law.

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# MODEL LAW

## PREAMBLE [optional]

TAKING INTO ACCOUNT the four key principles of the Convention on the Rights of the Child: the principle of non-discrimination, irrespective of a child's or his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status (Article 2); the best interests of the child as primary consideration in all matters affecting the child (Article 3); the right of the child to survival and development (Article 6); and the right of the child to participate in decisions affecting him or her, and in particular, to be given the opportunity to be heard in any judicial or administrative proceedings affecting him or her (Article 12);

RECOGNIZING that [insert State] is a party to the Convention on the Rights of the Child [and regional instruments] and is desirous of implementing its provisions and establishing a juvenile justice system;

RECALLING the international legal framework of juvenile justice, in particular the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), 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 Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines), as well as the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters;

RECOGNIZING that [insert State] has a responsibility to address the developmental challenges and needs of children;

ACKNOWLEDGING that the present system of juvenile justice does not protect children fully;

DESIRING that children in conflict with the law must be treated with a sense of their dignity and worth;

BEARING in mind the need to reduce over-reliance on the use of detention;

TAKING into account the child's age and evolving capacities;

BEARING in mind the need to reinforce society's respect for the human rights and fundamental freedoms of children;

CONSIDERING that the purpose of the juvenile justice law is to promote reintegration of the child and the child's assuming a constructive role in society;

RECALLING the need to protect the rights of the child, including his or her right to privacy;

AND BEARING in mind the need for a law that commands respect, is expeditious, fair and proportionate, prohibits violence against children, and uses deprivation of liberty as a measure of last resort and for the shortest appropriate period of time;

[insert enacting words]

*PART [TITLE] 1:*

**GENERAL PROVISIONS**



# Chapter I: Preliminary provisions

## *Article 1 – Title*

This Law shall be called the Juvenile Justice Law [insert date].

## *Article 2 – Purpose*

The purpose of this Law is to establish a legal framework on juvenile justice that is in compliance with the Convention on the Rights of the Child and other international standards and norms aiming at safeguarding children’s rights and promoting the reintegration of the child and the child’s assuming a constructive role in society.

## *Article 3 – Definitions*

For the purposes of the present Law the following definitions shall apply:

“Charged” – A child is charged with an offence when the police, a law enforcement authority or a prosecutor formally accuses him or her of having committed a criminal offence;

“Child” – Any person over the age of criminal responsibility and under the age of 18 years;

“Child in conflict with the law” – A child alleged as, accused of, or recognized as having infringed the criminal law;

“Competent authority” – The competent authority is the part of the juvenile justice system that is dealing with the matter at hand;

“Convicted” – A child is convicted when he or she is found guilty by the decision of a court of having committed a criminal offence;

“*Curator ad litem*” [*“guardian ad litem”*] – A person appointed by a court to act on behalf of and in the best interests of a child if a parent or legal guardian is not available;

“Deprivation of liberty” – Any form of detention or custody, in a public or private setting or institution, from which the child is not permitted to leave at will, by order of any judicial, administrative or other competent public authority;

“Detention” – An alternative term for deprivation of liberty;

“Intimate sample” – Any dental impression or sample of blood, any tissue fluid, urine, or pubic hair, or any swab taken from any part of the genitals or from any bodily orifice other than the mouth;

“Legal aid” – For the purposes of this Law, the term “legal aid” means legal advice, assistance and representation for children in conflict with the law;

“Legal guardian” – A person who, by law or court decision, has parental responsibility for a child.

## *Article 4 – Scope*

(1) This Law shall extend throughout [insert State].

(2) This Law shall apply to all children over the age of criminal responsibility and under the age of 18 resident or present in [insert State] who are in conflict with the law.

(3) This Law shall come into force on [insert date].

**Variant**

(3) This Law shall come into force on such date as prescribed by [insert competent authority] [per Decree adopted by [insert competent authority]].

(4) Provisions of the general criminal law shall apply only if not in contravention of this Act.

## Chapter II: Competencies

### *Article 5 – Children’s [juvenile] [youth] court*

- (1) A children’s [juvenile] [youth] court shall be established by law in each court district [area] [administrative area].
- (2) The children’s [juvenile] [youth] court shall have exclusive jurisdiction to try children charged with criminal offences.
- (3) Only designated [certified] [appointed] [specially trained] juvenile judges shall sit in the children’s [juvenile] [youth] court.
- (4) Where a child has committed a criminal offence jointly with an adult, the child shall be tried in the children’s [juvenile] [youth] court and be sentenced according to this Law.
- (5) A person over the age of 18 who is alleged to have committed an offence while a child shall be tried by the children’s [juvenile] [youth] court.
- (6) An appeals court [chamber] shall be established at the children’s [juvenile] [youth] court composed of [insert number of judges] designated [certified] [appointed] juvenile judges with jurisdiction over any appeal provided for in this Law.

### *Article 6 – Specialized child [juvenile] prosecutors*

- (1) Specialized child [juvenile] prosecution offices shall be established by law in each court district [area] [administrative area].
- (2) Where there is no specialized child prosecution office, a specialized child prosecutor shall be nominated to deal exclusively with child offenders.

### *Article 7 – Specialized police units [offices]*

- (1) Specialized police units [offices] shall be established in each police station, where only designated [certified] [appointed] and specially trained child [juvenile] police officers shall work.
- (2) Where there are no specialized police units [offices] for children [juveniles], specialized police officers shall be nominated to deal exclusively with child offenders.

### *Article 8 – Welfare agencies*

Specially trained personnel of welfare agencies shall assist the children’s [juvenile] [youth] court, the child [juvenile] prosecution offices and the specialized police units [offices] and work in conjunction with the child.



## Chapter III: Criminal responsibility

### *Article 9 – Minimum age of criminal responsibility*

(1) No child shall be held criminally responsible below the age of [insert minimum age of criminal responsibility].

#### **Variant**

(1) It shall be conclusively presumed that no child under the age of [insert minimum age of criminal responsibility] years can commit a criminal offence.

#### **Variant**

(1) There shall be an irrebuttable presumption that a child under the age of [insert minimum age of criminal responsibility] years cannot commit a criminal offence.

(2) A child over the age of [insert minimum age of criminal responsibility] shall not be prosecuted for an offence that he or she is alleged to have committed while under the minimum age of criminal responsibility.

### *Article 10 – Prohibition of status offences*

No child shall be arrested, [investigated] prosecuted or held criminally responsible for the commission of an act or behaviour that is not considered a criminal offence if committed by an adult [status offence].

### *Article 11 – Age assessment*

(1) Where there is uncertainty about the age of the child, the children’s [juvenile] [youth] court shall order age assessment as soon as possible.

(2) The children’s [juvenile] [youth] court shall make considered age determinations based on a full assessment of all available information, giving due weight to any official documentation that is available such as birth certificates, school records, health records, a statement as to age from the parent or child, and an estimate by a registered medical practitioner.

(3) If after age assessment uncertainty about the age of the alleged offender persists regarding his or her being below or above [insert minimum age of criminal responsibility], he or she shall be considered below [insert minimum age of criminal responsibility]. Where uncertainty persists about whether the alleged offender is a child or an adult, he or she shall be considered a child and fall within the scope of this Juvenile Justice Law.

### *Article 12 – Personality assessment*

(1) The children’s [juvenile] [youth] court shall have experts [insert appropriate welfare agency] assess the personal, familial, social and environmental conditions of the child in order to understand

his or her personality and the extent of his or her criminal responsibility before passing any judgement on the child.

(2) If the children's [juvenile] [youth] court after concluding its personality assessment finds that a child is suffering from a mental illness preventing him or her from being criminally responsible, the child shall be discharged and, if necessary, transferred to a specialized institution under independent medical management.

*PART [TITLE] 2:*

**JUVENILE JUSTICE PROCEEDINGS**



# Chapter I: Juvenile justice principles

## *Article 13 – General principles*

The principles contained in this Article shall apply to all chapters of this Law.

### **(1) Non-discrimination**

A child in conflict with the law shall be treated without discrimination of any kind, irrespective of the child's, or his or her parents' or legal guardian's, race, colour, gender, language, religion, political or other opinions, national, ethnic or social origin or descent, property, disability, medical situation, birth or other status.

### **(2) Best interests of the child**

The best interests of the child shall be the paramount consideration when any action is taken or any decision is made under this Law.

### **(3) Proportionality**

All measures taken in relation to a child in conflict with the law shall be in proportion to the circumstances and gravity of the offence and to the circumstances and educational, social and other needs of the child.

### **(4) Primacy of alternative measures to judicial proceedings [diversionary measures]**

Whenever appropriate, alternative measures to judicial proceedings [diversionary measures] for dealing with a child in conflict with the law shall be considered. Any non-judicial measures or actions used as alternative measures to judicial proceedings [diversionary measures] shall ensure that the human rights of the child and legal safeguards are fully respected.

### **Variant (4)**

Whenever appropriate, measures for dealing with a child in conflict with the law shall not involve judicial proceedings. Any non-judicial measures or actions used as alternative measures to judicial proceedings shall ensure that the human rights of the child and legal safeguards are fully respected.

### **(5) Participation**

Every child in conflict with the law has the right to participate in decisions affecting him or her, and in particular, to be given the opportunity to be heard in any judicial or administrative proceedings. He or she shall have the right to be heard either directly or through a legal [or other] representative [or appropriate body] and for his or her views to be taken into account in accordance with his or her age and maturity.

### **(6) Proceedings without delay**

Actions taken under this Law in relation to a child in conflict with the law shall be taken expeditiously from the outset and without any unnecessary delay.

### **(7) Presumption of innocence**

Every child in conflict with the law has the right to be presumed innocent until proved guilty in accordance with the law.

**Variant (7)**

Every child in conflict with the law has the right to be presumed innocent until proved guilty by the children's [juvenile] court.

**(8) Detention as a measure of last resort**

Deprivation of liberty shall be imposed on a child in conflict with the law only as a measure of last resort, shall be limited to the shortest appropriate period of time and shall be subject to regular review.

*Article 14 – Application of procedural rights*

(1) Children in conflict with the law shall not have fewer legal rights and safeguards than those provided for adult offenders. They are entitled to special protections and proceedings at all stages of the juvenile justice process.

(2) The following rights of the child shall apply throughout the proceedings:

- (a) the right to legal assistance;
- (b) the right to information;
- (c) the right to an interpreter;
- (d) the right to have the parents present; and
- (e) the right to consular assistance.

## Chapter II: Alternative measures to judicial proceedings [diversionary measures]

### *Article 15 – Purpose of alternative measures to judicial proceedings [diversionary measures]*

The purpose of alternative measures to judicial proceedings [diversionary measures] is to avoid instituting judicial proceedings against a child in conflict with the law or to suspend judicial proceedings, and to influence proper development of the child, enhancing his or her personal responsibility in order to promote the child's reintegration and the child's assuming a constructive role in society.

### *Article 16 – Application of alternative measures to judicial proceedings [diversionary measures]*

(1) Whenever it is appropriate and desirable, the competent authority [police] [prosecutor] [children's [juvenile] [youth] court] dealing with the child's criminal case shall consider whether alternative measures to judicial proceedings [diversionary measures] would better serve the reintegration and protection of the child, the rights of the victim, crime prevention and/or the protection of society rather than judicial proceedings.

(2) The competent authority [police] [prosecutor] [children's [juvenile] [youth] court] shall take into account the seriousness of the offence, the age of the child, the circumstances of the case and any previous offending behaviour when considering alternative measures to judicial proceedings [diversionary measures].

### *Article 17 – Conditions for alternative measures to judicial proceedings [diversionary measures]*

(1) Alternative measures to judicial proceedings [diversionary measures] shall be imposed on a child only when:

- (a) there is compelling evidence that the child has committed the alleged offence; and
- (b) the child freely and voluntarily admits responsibility.

(2) Alternative measures to judicial proceedings [diversionary measures] shall not be imposed without the legal consent of the child and, where appropriate, his or her parents or legal guardian.

(3) Where the child has no parents or legal guardian, or the parents or legal guardian cannot be found, or the child is estranged from his or her parents or the legal guardian, or there is a conflict of interest between the parents and the child or the legal guardian and the child, the children's [juvenile] [youth] court shall appoint a *curator ad litem* [guardian ad litem] who can consent to alternative measures to judicial proceedings [diversionary measures].

(4) Prior to consenting:

(a) the child and the parent or legal guardian shall be provided with adequate and specific information on the nature, content and duration of the alternative measures to judicial proceedings [diversionary measures] and on the consequences of failure to complete the diversionary measures; and

(b) the child shall be given the opportunity to seek legal aid and to discuss the appropriateness and desirability of the alternative measures to judicial proceedings [diversionary measures] offered.

*Article 18 – Possible alternative measures to judicial proceedings  
[diversionary measures]*

(1) Alternative measures to judicial proceedings [diversionary measures] may include:

(a) restorative justice programmes, such as victim-offender mediation, family group conferencing and social work intervention;

(b) verbal warning;

(c) formal written warning; and

(d) counselling for the child and family.

(2) The competent authority [police] [prosecutor] [children's [juvenile] [youth] court] shall have the power to make a restorative justice order. The purpose of such an order shall be to enable the child to make reparation for his or her offence to the victim, the community and/or society.

(a) No such order shall be made unless:

(i) the child and the parent freely consent to the making of such an order; and

(ii) any agreement on the reparation to be made by the child is reasonable and proportionate.

Where the child has no parents, or there is a conflict of interest between the parents and the child, the legal guardian [*curator ad litem*] [*guardian ad litem*] may provide such consent.

(b) Such an order may require the child to:

(i) acknowledge responsibility for the offence and show understanding of the impact of the offence on the victim;

(ii) repair the harm caused to the victim, the community and/or society;

(iii) make an apology to the victim; and

(iv) undertake such activities as may be agreed with the victim or the community.

(3) Alternative measures to judicial proceedings [diversionary measures] shall be reasonable and proportionate to the offence.

*Article 19 – Completion of alternative measures to judicial proceedings  
[diversionary measures]*

(1) No charges may be laid in relation to a criminal offence for which an alternative measure to judicial proceedings [a diversionary measure] has been imposed and has been completed by the child.

(2) A child who has completed an alternative measure to judicial proceedings [a diversionary measure] shall not be regarded as having been convicted of a criminal offence and shall not be treated as having a criminal record.

*Article 20 – Non-compliance with alternative measures to judicial proceedings  
[diversionary measures]*

(1) Where a child breaches a condition attached to an alternative measure to judicial proceedings [a diversionary measure] the competent authority [police] [prosecutor] [children’s [juvenile] [youth] court] may decide to resume proceedings against the child, taking into consideration the part of the measure already completed by the child when sentencing.

(2) Admission of responsibility for the alleged offence made for the purpose of applying an alternative measure to judicial proceedings [a diversionary measure] shall not be used against the child in court.



## Chapter III: Pre-trial proceedings

### *Article 21 – Right to information upon apprehension or arrest*

(1) Every child who is apprehended or arrested shall be informed immediately of the reason(s) for such apprehension or arrest, and of his or her rights, in a manner which is consistent with the age of the child and his or her level of understanding [child-friendly manner].

(2) The police officer [law enforcement officer] [investigating officer] concerned shall immediately notify the parents or legal guardian of the child of the apprehension or arrest, providing information on:

- (a) why the child is being held; and
- (b) where the child is being held.

**Variante** [applicable to States where the child must be taken to court immediately]

(2) The police officer [law enforcement officer] [investigating officer] concerned shall immediately notify the parents or legal guardian of the child, providing information on the reason(s) for the apprehension or arrest and where the child is being held. Where such notification has not taken place, the nominated [appointed] court official shall immediately, upon the child's arrival at the court, notify the child's parents or legal guardian of:

- (a) why the child is being held; and
- (b) where the child is being held.

(3) Where it has not been possible to contact the parents or legal guardian, the police officer [law enforcement officer] [investigating officer] concerned shall seek information from the child, or from other persons involved, about who can be notified instead, as well as further information to enable the parents or legal guardian to be contacted.

(4) Where no such other person can be contacted, the police officer [law enforcement officer] [investigating officer] concerned shall immediately inform the [insert appropriate welfare agency].

### *Article 22 – Prohibition of the use of force and instruments of restraint*

(1) The use of force and of instruments of restraint is prohibited during apprehension or arrest by the police and in police custody except in the circumstances set out in this Article.

(2) Force and instruments of restraint may be used by police officers [law enforcement officers] [investigating officers] only:

- (a) in exceptional circumstances; and
- (b) where all other methods of control have been exhausted and have failed.

(3) For the purpose of this Article, exceptional circumstances are defined as situations in which action is required to prevent a child from imminently inflicting self-injury or injuries on others, or to prevent an attempted escape.

- (4) Force and instruments of restraint shall:
- (a) be used for only the shortest appropriate period of time;
  - (b) be proportionate to the circumstances; and
  - (c) not be used in a manner likely to cause humiliation or degradation.
- (5) The following instruments of restraint shall not be used on a child:
- (a) guns or knives;
  - (b) handcuffs, chains, irons or shackles;
  - (c) straitjackets;
  - (d) tasers or other similar instruments;
  - (e) pepper spray, Mace or any similar substance or spray; and
  - (f) pain techniques.
- (6) Force and instruments of restraint shall not be used at any time on a pregnant girl.
- (7) Any use of force and/or instruments of restraint shall be recorded in an official record book and be made available for inspection by an authorized body.
- (8) The carrying and use of weapons by personnel in any place where a child is apprehended or arrested is prohibited.

*Article 23 – Right to have the parents or legal guardian present*

- (1) Every child who is apprehended or arrested shall:
- (a) have the right to have his or her parents or legal guardian present at the place where he or she is being held in custody; and
  - (b) be questioned about the alleged offence[s] only in the presence of his or her parents or legal guardian.
- (2) Where:
- (a) it is not possible to contact the parents or legal guardian within one hour [two hours] of the child's arrival at the police station; or
  - (b) the parents or legal guardian refuse to attend the police station; or
  - (c) the child does not live with the parents or legal guardian and does not wish the parents or legal guardian to be contacted; or
  - (d) the parents or legal guardian are suspected of involvement in the same alleged offence;
- the police officer [law enforcement officer] [investigating officer] [prosecutor] concerned shall ensure that [insert appropriate welfare agency] is contacted and assists the child at the police station.

*Article 24 – Right to legal aid*

A child who is apprehended or arrested shall:

- (a) be provided with free legal aid;
- (b) be permitted to consult with his or her legal representative before being questioned by the police [prosecutor]; and
- (c) be questioned about the alleged offence[s] only in the presence of his or her legal representative.

**Variant**

A child who is apprehended or arrested must be informed that he or she has the right to free legal aid.

*Article 25 – Right to an interpreter*

(1) A child who is apprehended or arrested shall have the free assistance of an interpreter if the child cannot understand or speak the language used.

(2) Where an interpreter is needed for a child who has been apprehended or arrested:

- (a) the interpreter shall be present on all occasions when questioning of the child takes place; and
- (b) any evidence obtained in the absence of the interpreter shall be inadmissible in any court proceedings.

(3) The child shall have the right to meet the interpreter before questioning to ensure that he or she can understand the interpreter.

*Article 26 – Right to consular assistance*

(1) A child who is a foreign national and is apprehended or arrested shall have the right to consult immediately, and in any case before questioning, with the diplomatic and consular representatives of the State to which he or she belongs.

(2) A child who is a national of a State without diplomatic or consular representation in the country concerned and refugees or stateless children shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such children.

*Article 27 – Police custody [pre-charge detention]*

(1) Where the child is brought to the police station after being apprehended or arrested, or is apprehended or arrested at the police station after attending voluntarily, the details of the child shall be registered by the police officer [law enforcement officer] [investigating officer] concerned.

(2) The child shall not be placed in a locked cell or secure area, unless he or she poses a danger to himself or herself or others.

*Article 28 – Questioning by the police [prosecutor]*

- (1) Only police officers [law enforcement officers] [investigating officers] [prosecutors] who have received specialized training in working with children shall question a child about an alleged offence.
- (2) No child shall be subjected to coercive questioning or interrogation.
- (3) No child shall be compelled to confess or acknowledge guilt. Any confession obtained in this way shall not be considered admissible evidence against the child by the children’s [juvenile] [youth] court.
- (4) In determining whether a child has been compelled to confess or acknowledge guilt, the court shall take into account the age and development of the child, any use of force, the length of questioning, any inducements offered and such other circumstances as the court thinks relevant.
- (5) The police officer [law enforcement officer] [investigating officer] [prosecutor] shall take the age, maturity and personal conditions of the child into consideration when questioning the child and determining adequate breaks.
- (6) A child shall not be questioned before 8 a.m. or after 10 p.m.
- (7) The child shall be provided with adequate food and drink at recognized meal times [and no less often than every four hours during the day].
- (8) The child shall be provided with toilet and washing facilities and any necessary hygiene necessities.

*Article 29 – Non-intimate search of a child*

- (1) A child who is apprehended or arrested shall be searched only by a police officer [law enforcement officer] [investigating officer] of the same gender as that of the child.
- (2) Before the child is searched, he or she shall be informed of:
  - (a) the purpose of the search; and
  - (b) the grounds on which the relevant authority for the search has been given.
- (3) Any search or examination which involves more than an examination of the exterior of the child’s body, including his or her mouth and hair, or the removal of more than the child’s outer clothing, shall be conducted in accordance with Article 30.

*Article 30 – Intimate search of a child*

- (1) Where the police officer [law enforcement officer] [investigating officer] [prosecutor] wishes to conduct an intimate search as defined in Article 29(3), a warrant shall be obtained from the children’s [juvenile] [youth] court. The warrant shall contain the following information:
  - (a) the name of the issuing court and the signature of the judge issuing the warrant;

- (b) the name and details of the person to whom the warrant is addressed and the title or rank of the person(s) authorized to execute the warrant;
  - (c) the purpose of the search;
  - (d) the criminal offence allegedly committed;
  - (e) a description of the evidence of the criminal offence; and
  - (f) the expiration date of the warrant.
- (2) An intimate search shall be authorized only where:
- (a) the examination is strictly necessary to determine facts important to the investigation of a criminal offence; or
  - (b) where it has been established that specific evidence of a criminal offence may be found on or in the child's body; and, in either case,
  - (c) where the physical examination will not be detrimental to the health of the child.
- (3) An intimate search of a child shall be carried out only by a registered medical practitioner or a registered nurse of the same gender as that of the child.
- (4) An intimate search shall be carried out only at
- (a) a specially designated area in a police station;
  - (b) a hospital;
  - (c) a registered medical practitioner's surgery; or
  - (d) some other certified place used for medical purposes.
- (5) An intimate search of a child shall be carried out only in the presence of the child's parents or legal guardian.
- (6) Where a child does not consent to the parents' or legal guardian's being present, or the parents or legal guardian are not available, [insert appropriate welfare agency] of the same gender as that of the child shall be present.

### *Article 31 – Taking a non-intimate sample from a child*

A non-intimate sample of a child shall be taken only:

- (a) at the police station or such other place as may be named in regulations; and
- (b) by a police officer [law enforcement officer] [investigating officer] of the same gender as that of the child.

### *Article 32 – Taking an intimate sample from a child*

(1) An intimate sample from a child shall be taken only:

- (a) where the examination is strictly necessary to determine facts important to the investigation of a criminal offence; or

- (b) where it has been established that specific evidence of a criminal offence may be found on or in the child's body; and, in either case,
  - (c) where the physical examination will not be detrimental to the health of the child.
- (2) Authorization for the taking of an intimate sample must be obtained from the children's [juvenile] [youth] court.
- (3) An intimate sample from a child shall be obtained only at:
- (a) a hospital;
  - (b) a registered medical practitioner's surgery; or
  - (c) any other place used for medical purposes.
- (4) An intimate sample from a child shall be taken only by a registered medical practitioner or a registered nurse of the same gender as that of the child.
- (5) An intimate sample from a child shall be obtained only in the presence of the child's parents or legal guardian unless the child expressly requests the parents or legal guardian not to be present.
- (6) Where the parents or legal guardian are not available, [insert appropriate welfare agency] of the same gender as that of the child shall be present.

### *Article 33 – Release of the child from police custody*

- (1) Where a police officer [law enforcement officer] [investigating officer] [prosecutor] has charged a child with an offence, the child shall be released without delay and handed over to his or her parents or legal guardian on condition that he or she may have to return to the police station or appear before [competent] court on a specified date.
- (2) Where the police officer [law enforcement officer] [investigating officer] [prosecutor] believes that the child may, if released:
- (a) commit a serious offence [or is a persistent offender];
  - (b) pose a danger to himself or herself or to other persons;
  - (c) seek to obstruct the course of justice or interfere with witnesses; and/or
  - (d) avoid further judicial proceedings;

an application must be made to the children's [juvenile] [youth] court for an order for pre-trial detention [remand] in accordance with Article 35

- (3) A child who is detained by the police after being apprehended or arrested shall be brought promptly before the children's [juvenile] [youth] court authorized by law to exercise judicial power, and in any event no later than 24 hours after the child's apprehension or arrest.

*Article 34 – Application of alternative measures to pre-trial detention*

- (1) A child brought before the children’s [juvenile] [youth] court shall be released pending charge and trial, subject to the exceptions outlined in Article 35.
- (2) The child shall not be required to pay a sum of money [submit to bail] as a condition of release.
- (3) The children’s [juvenile] [youth] court may impose conditions on the release, which may include:
  - (a) attendance at a named place at certain times of day;
  - (b) periods of curfew;
  - (c) a requirement not to associate with or contact certain persons;
  - (d) close supervision;
  - (e) intensive care; and/or
  - (f) placement with a family or foster parents.
- (4) The child may be given notice in the presence of his or her parents or the legal guardian and his or her legal representative to return to the court at a specified time.

*Article 35 – Pre-trial detention*

- (1) In exceptional cases, the children’s [juvenile] [youth] court may order pre-trial detention if:
  - (a) the child is being investigated for [has been charged with] a serious offence [or is a persistent offender]; and
  - (b) such detention is a measure of last resort; and
  - (c) it is necessary:
    - (i) where the child poses a danger to himself or herself or to other persons; or
    - (ii) to prevent interference with a witness or other obstruction of the course of justice; or
    - (iii) to ensure that the child will not avoid further judicial proceedings.
- (2) Pre-trial detention shall be for the shortest appropriate period of time.
- (3) No child shall be held in pre-trial detention for a period exceeding three months. This period can be extended only once, for a further three months.
- (4) Pre-trial detention shall not be ordered as a substitute for child protection measures or mental health treatment or because of homelessness.
- (5) Any period of pre-trial detention imposed on a child shall count towards and be deducted from a later sentence of deprivation of liberty.

*Article 36 – Conditions of pre-trial detention*

A child held in pre-trial detention shall:

- (a) be entitled to all rights and guarantees under Part [Title] 2, Chapter VI;
- (b) have the right to appeal against the order of detention; and
- (c) be provided with access to a lawyer free of charge to enable them to prepare for their case or to appeal against detention.

*Article 37 – Review of pre-trial detention*

- (1) Where a child is held in pre-trial detention, his or her deprivation of liberty should be reviewed by the children's [juvenile] [youth] court every two weeks.
- (2) The child shall be present in court at each review of the pre-trial detention.
- (3) The child shall be legally represented at the review.
- (4) The children's [juvenile] [youth] court shall order continued detention only where the prosecution satisfies the court that it has reasonable grounds to believe that the criteria in Article 35 continue to apply. Where the criteria have ceased to apply, the child shall be released immediately.
- (5) The children's [juvenile] [youth] court shall ensure that the child is not being detained with adults and convicted children and is being detained in suitable conditions in accordance with Chapter VI below. Where the conditions of detention are not suitable, the child shall be released or moved to a suitable alternative place.

## Chapter IV: Trial

### *Article 38 – Right to fair and speedy trial*

- (1) Every child is entitled to a fair trial before a children’s [juvenile] [youth] court.
- (2) Every child shall have the matter tried without delay, and in any event no later than six months from the date of charge.

### *Article 39 – Right to information prior to trial*

The children’s [juvenile] [youth] court shall, before commencing proceedings, ensure that the child understands:

- (a) the nature of the charges and the matters that must be established before the child can be found guilty;
- (b) the role of the judge;
- (c) the procedures of the court and the consequences of a finding of guilt; and
- (d) the language of the court. Where the child does not understand the language within the meaning of Article 42(1), the children’s [juvenile] [youth] court shall appoint an interpreter for the child suitable to his or her needs.

### *Article 40 – Restrictions on the use of handcuffs and other restraints*

Handcuffs or other restraints are not permitted while the child is in court or in transit to or from the court, unless he or she poses a danger to himself or herself or others.

### *Article 41 – Right to presence of parents or legal guardian during trial*

- (1) The parents or legal guardian shall have the right to be present at the trial [any hearing] of the child unless their presence is considered not to be in the best interests of the child.
- (2) If a parent or legal guardian does not attend the trial [proceedings] [any hearing] relating to the child, the children’s [juvenile] [youth] court shall nominate a *curator ad litem* [guardian ad litem].

### *Article 42 – Right to legal aid and consular assistance during trial*

- (1) Every child shall be entitled to free legal aid during the trial.
- (2) Where a child appears in court and is not legally represented, the court shall direct that he or she be legally represented free of charge.
- (3) The child shall have the right to dismiss his or her legal representative and to appoint a replacement [request appointment of a replacement].

(4) Every foreign child has the right to consular assistance during his or her trial.

*Article 43 – Right to an interpreter during trial*

(1) A child who cannot understand or speak the language used by the court, or a child who is deaf or has no speech or has a speech impairment or other disability that reduces his or her ability to communicate, shall be provided free and without charge with an interpreter qualified to assist him or her.

(2) The child shall have the right to meet the interpreter before the trial to ensure that he or she can understand the interpreter.

*Article 44 – Right to privacy during trial*

(1) The general rule that a trial is to be held in public shall not apply to court proceedings involving a child or to an appeal against any conviction or order of the court within the proceedings.

(2) No person may be present at a sitting of the children’s [juvenile] [youth] court unless his or her presence is necessary to the proceedings of the court or the children’s [juvenile] [youth] court has given permission for him or her to attend.

(3) Information that may lead to the identification of the child shall not be published in any oral, written, visual or virtual form.

*Article 45 – Right to participation during trial*

The children’s [juvenile] [youth] court shall:

- (a) permit the child to communicate with his or her lawyer at any point during the trial;
- (b) ensure that the language used during the trial is suitable to the child’s age and understanding; and
- (c) ensure that the child is given breaks from the proceedings appropriate to his or her age, health and understanding.

*Article 46 – Right to hear evidence during trial*

(1) No child shall be tried in absentia.

(2) The child shall be entitled to hear all the evidence in the case and to remain in court at all times unless the court decides that his or her presence is detrimental to his or her best interests.

(3) The child shall have the right to examine or have examined the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as the witnesses against him or her.

*Article 47 – Right not to be compelled to give testimony or confess guilt*

- (1) Every child shall have the right during his or her trial:
  - (a) not to be compelled to give testimony; and
  - (b) to refuse to answer incriminating questions.

**Variant**

- (1) Every child shall have the right to remain silent at his or her trial.
- (2) No adverse inference shall be drawn by the children’s [juvenile] [youth] court nor shall a child be treated as guilty, as a result of exercising this [these] right[s] .
- (3) In deciding whether to admit a confession made by a child, the children’s [juvenile] [youth] court shall take into account the age of the child, the child’s development, the length of the interrogation, the child’s understanding, the fear of unknown consequences or of a suggested possibility of detention, any inducements offered, the presence of parents or the legal guardian [appropriate or responsible adult] and whether the child had a legal representative present.

*Article 48 – Right to appeal*

- (1) Every convicted child shall have the right to have the decision and any measures imposed reviewed by the appeals court [chamber] at the children’s [juvenile] [youth] court according to Article 5(6).
- (2) Every child shall be informed, in a language that he or she can understand, of the right to appeal.
- (3) Every child shall be entitled to free legal representation when making an appeal.

*Article 49 – Discontinuance of proceedings*

- (1) The children’s [juvenile] [youth] court shall have the power to discontinue the proceedings at any time and discharge the child prior to conviction.
- (2) The children’s [juvenile] [youth] court shall ascertain when a child appears before the court for the first time after being charged with an offence whether the police [prosecutor] have [has] considered the use of diversionary measures rather than proceeding to trial.
- (3) If the children’s [juvenile] [youth] court considers that the police [prosecutor] have [has] not given any or sufficient consideration to the use of alternative measures to judicial proceedings [diversionary measures] during the pre-trial phase, the children’s [juvenile] [youth] court may apply such measures according to Part [Title] 2, Chapter II [refer the case back to the police [prosecutor] for further consideration].
- (4) The children’s [juvenile] [youth] court may at any stage of the proceedings refer the child to [insert appropriate welfare agency] for assessment to determine whether he or she is in need of protective services.



## Chapter V: Sentencing

### *Article 50 – Purpose of sentencing*

The purpose of a sentence imposed on a child by the children’s [juvenile] [youth] court shall be to promote the rehabilitation and reintegration of the child into society.

### *Article 51 – Principles of sentencing*

Every children’s [juvenile] [youth] court that imposes a sentence on a child found guilty of a criminal offence shall take into account the following principles.

- (a) that the child is to be dealt with in a manner appropriate to his or her well-being;
- (b) that any sentence given to the child must be proportionate not only to the circumstances and the gravity of the offence but also to his or her age, individual circumstances and needs;
- (c) that any sentence must promote the reintegration of the child and his or her assumption of a constructive role in society;
- (d) that the sentence imposed must be the one most likely to enable the child to address his or her offending behaviour;
- (e) that the sentence must be the least restrictive one possible;
- (f) that detention is a measure of last resort and must not be imposed unless all available sentences other than a custodial sentence have been considered and adjudged inappropriate to meet the needs of the child and provide for the protection of society; and
- (g) that following every conviction, an individual sentencing plan must be elaborated.

### *Article 52 – Social enquiry report [pre-sentence report]*

- (1) In all cases, the children’s [juvenile] [youth] court shall obtain a social enquiry report [pre-sentence report] before passing a sentence [pronouncing a decision] on a child.
- (2) The social enquiry report [pre-sentence report] shall be undertaken by [insert appropriate welfare agency].
- (3) The social enquiry report [pre-sentence report] shall provide possible alternatives to sentencing the child and include details of the family background of the child, the child’s current circumstances, including where he or she is living and with whom, the child’s educational background and health status, previous offences, the circumstances surrounding the commission of the offence and the likely impact on the child of any sentence.

### *Article 53 – Non-custodial sentences*

- (1) Where a child is convicted of a criminal offence, the children’s [juvenile] [youth] court shall consider, having regard to the circumstances of the case, alternatives to detention including but not limited to:

- (a) attendance at a community-based programme to help the child address his or her offending behaviour;
- (b) intermediate treatment and other treatment orders;
- (c) probation;
- (d) a restorative justice order;
- (e) a drug or alcohol treatment order;
- (f) attendance at counselling;
- (g) a community service order;
- (h) an education order;
- (i) an exclusion order;
- (j) a curfew order;
- (k) a prohibited activity order;
- (l) a supervision order;
- (m) an intensive supervision order;
- (n) a short-term fostering order;
- (o) a residence order;
- (p) a care order; and
- (q) a suspended sentence.

(2) The children's [juvenile] [youth] court shall have the power to order more than one non-custodial measure and to determine whether such sentences should run concurrently or consecutively.

#### *Article 54 – Implementation of non-custodial sentences*

(1) Within the framework of a given non-custodial measure, the most suitable type of supervision and treatment shall be determined for each individual case, considering the needs of the child. Any supervision and treatment shall be periodically reviewed and adjusted as necessary.

(2) When considering the conditions to be attached to a non-custodial measure, the children's [juvenile] [youth] court shall take into account the needs and rights of the sentenced child, the needs of the victim and the needs of society.

(3) At the beginning of the application of a non-custodial measure, the child shall receive an explanation appropriate to his or her age and level of understanding, both orally and in writing, of the conditions governing the application of the measure, including the child's rights and obligations.

(4) The children's [juvenile] [youth] court may involve the community and social support systems in the application of non-custodial measures.

(5) The child shall be provided, as needed, with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate his or her reintegration into his or her family and/or society.

- (6) The duration of a non-custodial measure shall be proportionate and shall not exceed the period established by the children's [juvenile] [youth] court in accordance with the law.
- (7) Provision may be made for early termination of the measure if the child has responded favourably to it.
- (8) If a non-custodial measure entails supervision, this measure shall be carried out by [insert appropriate body or competent authority] under the specific conditions prescribed by this Law [or secondary legislation to be adopted].
- (9) When it is decided that treatment is necessary, efforts should be made to understand the child's background, personality, aptitudes, intelligence and values and, especially, the circumstances leading to the commission of the offence.
- (10) Treatment should be conducted by professionals who have suitable training and practical experience and in accordance with standards and regulations.
- (11) Where a breach of the conditions attached to a non-custodial measure results in the modification or revocation of the non-custodial measure, this shall be done only after a careful examination of the facts adduced by both the supervising officer [probation officer] and the child.
- (12) The possibility of arresting and detaining a child where there is a breach of the conditions of a non-custodial order shall be prescribed by law.
- (13) A breach of the conditions attached to a non-custodial measure shall not automatically lead to the imposition of a custodial measure.
- (14) In the event of a modification or revocation of a non-custodial measure, the children's [juvenile] [youth] court shall attempt to establish a suitable alternative non-custodial measure.
- (15) Upon modification or revocation of a non-custodial measure, the child shall have the right to appeal to the appeals court [chamber] at the children's [juvenile] [youth] court according to Article 5(6) of this Law.

#### *Article 55 – Custodial sentences*

- (1) Deprivation of liberty as a sentence shall be imposed only after careful consideration, only as a measure of last resort and only for the shortest appropriate period of time.
- (2) The children's [juvenile] [youth] court shall not impose a custodial sentence on a child unless he or she is convicted of a serious offence [is a persistent offender] and there is no other appropriate response.
- (3) The child shall serve the custodial sentence in a detention facility, as close as possible to the area in which his or her parents or legal guardian reside.

*Article 56 – Prohibited sentences*

- (1) No child shall be subjected to either capital punishment [a sentence of death] or life imprisonment for a crime committed when he or she was under the age of 18.
- (2) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
- (3) No child shall be subjected to corporal punishment as a sentence.
- (4) No child shall be subjected to forced labour as a sentence.

*Article 57 – Criminal record*

- (1) In case of conviction, the criminal record of a child's offence(s) shall be kept strictly confidential and closed to third parties.
- (2) The record shall not be used in adult proceedings involving the same child.

## Chapter VI: Children under custodial sentence

### *Article 58 – The purpose of detention [deprivation of liberty]*

The purpose of detention [deprivation of liberty] shall be to contribute to the rehabilitation and reintegration of the child into society by:

- (a) ensuring that the child serves his or her custodial sentence in a fair and humane environment that promotes the welfare of the child and upholds his or her rights and dignity; and
- (b) providing effective programmes aimed at the rehabilitation and reintegration of the child.

### *Article 59 – Principles of detention [deprivation of liberty]*

In addition to the principles contained in Article 13 the following principles shall apply, in order to promote the protection, rehabilitation and reintegration of a child deprived of liberty:

- (a) every child deprived of liberty must be treated with humanity and respect for the inherent dignity of the human person;
- (b) every child deprived of liberty must be protected from all forms of abuse and ill-treatment including neglect, exploitation and physical, sexual and emotional abuse;
- (c) no child deprived of liberty may be denied his or her rights, except to the extent that these are necessarily removed or restricted in order to implement a custodial sentence; and
- (d) early release schemes must be used to the greatest extent possible and linked with the child's rehabilitation.

### *Article 60 – Admission to a detention facility*

(1) A child deprived of liberty shall not be admitted to a detention facility without an order of the children's [juvenile] [youth] court.

(2) Upon admission:

- (a) the details of the child shall be recorded immediately;
- (b) the child shall be medically examined as soon as possible; and
- (c) the child shall be given:
  - (i) a copy of the rules that apply in the detention facility;
  - (ii) a document which sets out the child's rights and obligations in a form and language that he or she can understand;
  - (iii) information on how to make a complaint; and
  - (iv) access to free legal aid and consular assistance.

(3) The child's parents or legal guardian shall be notified of his or her admission to the detention facility.

*Article 61 – Separation from adults, between age groups and by type of offence*

- (1) A child deprived of liberty shall be held separately [in separate facilities] from adult detainees.
- (2) A detainee who reaches the age of 18 years while serving a sentence shall serve the remainder of his or her sentence in a child detention facility, provided that his or her sentence will be completed before his or her 21st [25th] birthday, unless this is deemed not to be in his or her best interests or in the best interests of other child detainees.
- (3) The decision to retain or transfer the detainee to an adult institution shall be made by the [insert competent authority] on the basis of a full assessment of the case.
- (4) A detainee who has attained 18 years and remains in a child custody facility shall not be regarded as an adult and shall enjoy the rights and entitlements as set out in Part [Title] 2, Chapter I of this Law.
- (5) A detainee shall not remain in a child custody facility once he or she reaches the age of 21 [25] years, unless leaving such a facility is deemed not to be in his or her best interests.
- (6) A child deprived of liberty shall be held only with other children who are of the same age group and whose offences are commensurate to the offence(s) committed by the child in question.

*Article 62 – Girls and children with special needs*

- (1) A girl deprived of liberty shall be held separately [in separate facilities] from male children.
- (2) Detention facilities shall put in place measures to meet the specific needs of female children and children with special needs to protect them from all forms of abuse.

*Article 63 – Right of access to health-care services*

- (1) A child deprived of liberty shall be provided with medical attention and treatment as required, including but not limited to:
  - (a) psychiatric/psychological and mental health services;
  - (b) drug and alcohol rehabilitation services;
  - (c) dental and ophthalmological care and treatment;
  - (d) reproductive health services;
  - (e) treatment for HIV/AIDS;
  - (f) pre-natal services for pregnant girls; and
  - (g) regular medical reviews.
- (2) Where the required medical care cannot be provided within the detention facility, the child shall be permitted leave of absence [and, in an emergency, granted immediate leave] to undergo medical examination and to receive any necessary medical treatment.

- (3) The child's informed consent must be sought for any medical treatment provided.
- (4) Where the child is at risk of suffering death or permanent damage to his or her health, and he or she refuses to consent to medical treatment, such consent may be sought:
- (a) from the parents or legal guardian; or
  - (b) in the absence of the parents or legal guardian, from the court.
- (5) Where a registered medical practitioner determines that immediate treatment is necessary to preserve the child's health or life and the health of others, treatment may be commenced without the child's or parents' or legal guardian's informed consent.
- (6) The child shall have the right to request that he or she be examined and treated by a registered doctor of the same gender as that of the child.
- (7) Any period of absence for medical attention or treatment shall be treated as part of the child's period of detention.
- (8) Where a medical examination reveals that the child has been subjected to physical or sexual abuse prior to admission to or during detention in the detention facility:
- (a) a report shall be made to the competent authorities; and
  - (b) the child shall be provided with free legal advice to support him or her in making any appropriate claim.
- (9) Medical reports and details of any treatment received shall be recorded and kept in the child's file. Such records shall be transferred to any other child detention facility in which the child is placed. Upon release of the child, the records shall be sealed, and, at an appropriate time, expunged.

#### *Article 64 – Physical environment, accommodation and nutrition*

- (1) A child deprived of liberty shall have the right to facilities and services that meet all requirements of health and human dignity. Facilities and services shall be properly maintained and include:
- (a) sleeping accommodation consisting of a separate bed in an individual bedroom, except where it is considered necessary for the child to share sleeping accommodation, which can be unobtrusively supervised;
  - (b) sufficient and clean bedding which is appropriate for the climate;
  - (c) storage facilities for personal items; and
  - (d) adequate sanitary facilities that are hygienic and respect the child's privacy and particular gender needs.
- (2) A child deprived of liberty shall be allowed to wear his or her own clothes provided that they are suitable. Where the child has obtained permission to leave the detention facility, he or she shall not wear any clothing that identifies him or her as a detainee.
- (3) A child deprived of liberty shall have the right to sufficient food of adequate nutritional value and access to clean drinking water.

*Article 65 – Education and vocational training*

(1) A child deprived of liberty [of compulsory school age] shall receive education and vocational training while detained [in accordance with national curriculum requirements].

**Variant**

(1) A child deprived of liberty [of compulsory school age] shall receive education equal to that provided to children in the community.

(2) A child above compulsory school age who wishes to continue his or her education shall be permitted to do so and shall have access to appropriate educational and vocational training opportunities.

(3) Educational and vocational training programmes shall [be relevant and shall] promote skills that will support the reintegration of the child into society and prepare him or her for future employment. Where possible, the child should be able to select programmes in which he or she has an interest.

(4) Special education programmes shall be provided for a child with cognitive or learning difficulties and a child who has missed schooling.

(5) Diplomas or educational certificates shall not indicate that the child was deprived of liberty [detained] when they were awarded.

(6) The detention facility shall promote [and provide] opportunities for the child to undertake education and/or vocational training outside the institution in which he or she is deprived of liberty [detained].

*Article 66 – Work opportunities*

(1) A child deprived of liberty shall have the opportunity to perform remunerated work.

(2) Work shall not interfere with a child's education and/or vocational training, shall serve as a meaningful complement to vocational training, shall enhance the possibility of finding suitable employment, and shall benefit the child following his or her release.

(3) Work shall be equitably remunerated.

(4) The child shall be protected by [national labour laws], and from all forms of hazardous, harmful and/or exploitative work.

(5) The detention facility shall facilitate opportunities for work outside the facility.

(6) The child shall not be made to engage in work as a form of punishment.

(7) Any money earned by the child as a result of remunerated work while placed in the detention facility shall be distributed by [insert competent authority] to the child either while he or she is in detention or upon release.

*Article 67 – Recreation*

- (1) Every detention facility shall provide a child deprived of liberty with time for daily exercise and leisure activities, such exercise taking place in the open air when weather permits.
- (2) Appropriate recreational and physical activities shall be provided to all children, including children with special needs.
- (3) Adequate space, installations and equipment shall be made available within the detention facility to enable children to take part in appropriate recreational and physical activities.
- (4) Remedial physical education and therapy shall be offered under medical supervision to children according to need.
- (5) Children shall be given additional leisure time for, and shall have the opportunity to participate in, arts and crafts activities.

*Article 68 – Freedom of religion, conscience and thought*

- (1) A child deprived of liberty shall be allowed to satisfy the needs of his or her religious and spiritual life and shall thus be enabled to attend or conduct religious services and be provided with the necessary books or items of religious observance. Representatives of religions shall be allowed to hold services and pay visits.
- (2) The child shall have the right not to participate in religious services.
- (3) The child's freedom of conscience and thought shall be respected.

*Article 69 – Contact with family and the outside world*

- (1) A child deprived of liberty shall have the right to maintain contact with his or her parents, the legal guardian and other significant persons.
- (2) The child shall be permitted to inform his or her parents, the legal guardian or other significant persons within 24 hours of his or her admission or transfer to or placement in any place where he or she is deprived of liberty [detained]. The institution in which the child is detained shall provide the child with a telephone or other means of communication to enable such information to be given.
- (3) The management of the detention facility shall promote measures aimed to facilitate contact between children and their relatives, the legal guardian and other significant persons, including through correspondence and visits.
- (4) Communication with and visits by relatives, the legal guardian and other significant persons shall be permitted unless:
  - (a) an order of the children's [juvenile] [youth] court exists restricting communication or visits by specific individuals; or

(b) the management of the detention facility determines that communication or visits by specific individuals will have a serious detrimental impact on the child.

(5) Any decision to restrict communications or visits must be reviewed periodically and must be subject to challenge by the child.

(6) The management of the detention facility shall promote measures aimed at facilitating the child's contact with the community, which shall include granting leave of absence.

### *Article 70 – Staffing*

In order to promote the development, rehabilitation and reintegration of children, detention facilities shall be staffed by a sufficient number of qualified and trained personnel, including paediatricians, doctors, nurses, child specialist educators, vocational instructors, psychologists, psychiatrists, social workers and welfare staff.

### *Article 71 – Disciplinary measures*

(1) Disciplinary measures must be consistent with upholding the inherent dignity of the child and must be used only as a measure of last resort. A child deprived of his or her liberty shall not be subjected to disciplinary measures that amount to cruel, inhuman or degrading punishment, including but not limited to:

- (a) corporal punishment; and
- (b) placement in an isolation unit or solitary confinement.

(2) The child shall not be subjected to disciplinary measures that may compromise his or her physical or mental health, including:

- (a) denial or reduction of food;
- (b) denial of necessary health care; and
- (c) denial or reduction of family visits or family contact.

(3) Work shall not be imposed as a disciplinary measure.

(4) Any disciplinary measure imposed on a child shall be recorded in writing in an official record book and shall be made available for inspection by an authorized body.

(5) The rules on discipline and the procedures for applying permitted measures shall be made available and made known to all children serving a custodial sentence, in a language that they can understand.

### *Article 72 – Use of force and/or physical restraint*

Article 22 of this Law applies *mutatis mutandis* where a child is sentenced to deprivation of liberty in a detention facility.

*Article 73 – Non-intimate and intimate searches in detention*

Articles 29 and 30 of this Law apply *mutatis mutandis* where a child is sentenced to deprivation of liberty in a detention facility.

*Article 74 – Regular and independent system of inspection*

(1) [Insert relevant independent body for monitoring] shall monitor all child detention facilities to ensure that provisions regarding conditions of detention and the treatment of children deprived of their liberty are fully implemented.

(2) Inspectors shall:

(a) undertake an annual inspection of each child custody facility at any time and shall have the right to make unannounced visits to any facility or place in which children are detained;

(b) on each inspection, meet with children, either individually or in groups, without the presence of detention personnel, and no inspection shall be deemed complete without children being interviewed and their views on the implementation of standards sought;

(c) have unrestricted access to the children, the staff of the detention facility and the facilities; and

(d) have unrestricted access to any records, incident books or any other records or files relating to the running of the facility, conditions of treatment, staff and children.

(3) During the inspection, children shall have the right to make complaints or requests directly to the inspector in private meetings.

*Article 75 – Complaints and requests*

(1) A child deprived of liberty shall have the right to submit complaints and requests on matters that affect him or her to:

(a) the management of the detention facility;

(b) any supervisory bodies; and/or

(c) the independent monitoring body [insert relevant body].

(2) Complaints and requests shall be dealt with in a fair and expeditious manner. In particular:

(a) children shall be able to seek support from family members, legal representatives, non-governmental organizations and other appropriate organizations and individuals in order to make a complaint and/or request;

(b) a complaint and/or request shall not be censored before it is considered by the appropriate body;

(c) children shall be told of the outcome of their complaints and/or requests in a manner that they can understand; and

(d) children shall not be subject to any negative consequences as a result of submitting a complaint and/or request.

*Article 76 – Transferring a detained child to another detention facility*

- (1) A child deprived of liberty shall be transferred to another detention facility only when his or her rehabilitation and reintegration into society can be addressed more effectively in another detention facility or when serious security and safety risks make such a transfer necessary.
- (2) Any transfer of a child deprived of liberty to another detention facility must be ordered by the children's [juvenile] [youth] court.
- (3) All relevant information and data relating to the child shall be transferred in order to ensure continuity of care.
- (4) The conditions under which the child is transported shall meet the requirements of humanity and respect for the inherent dignity of the child.

## Chapter VII: Aftercare and reintegration

### *Article 77 – Preparation for release*

(1) The rehabilitative activities in a detention facility shall focus on preparation for the release of the child.

(2) As early as possible after two thirds of the time served in detention, and at least three months before a child's release date, the management of the detention facility shall:

- (a) inform the child, the family and other significant persons of the child's forthcoming release date;
- (b) cooperate with the services and agencies responsible for the child's supervision after release and develop a reintegration plan together with the child and the child's family;
- (c) ensure that the child fully understands the reintegration plan;
- (d) provide educational and psychosocial support to prepare the child for release;
- (e) consider permitting the child to make short visits home;
- (f) permit the child to be placed in a semi-open institution in preparation for release; and
- (g) provide information to the child in a manner which they can understand on how they can gain access to support and assistance upon their release.

(3) The management of the detention facility shall collaborate with [insert appropriate welfare agency] in the district [local authority area] to which the child is planning to return to prepare his or her reintegration plan. The plan shall be prepared as soon as the release date is known and no later than three months before the anticipated release date.

### *Article 78 – Early release*

(1) A sentence of detention imposed on a child [execution of a sentence passed on a child] shall be reviewed by [insert competent authority with regard to release schemes] no less than once every six months, to determine whether release is appropriate.

(2) The periodic review shall:

- (a) include a full assessment of the child's rehabilitative progress and whether he or she is ready to be released;
- (b) consider the views of the child and the child custody facility during the review; and
- (c) include a written recommendation on the release or continuing detention of the child.

(3) Where the decision of the [insert competent authority with regard to release schemes] is not to release the child, the reasons for this and a statement of the steps that will need to be taken by the child and by the detention facility for release to be considered shall be provided.

(4) The management of a detention facility may at any time, where there are grounds to believe that

it is no longer appropriate to detain the child, request the [insert competent authority with regard to release schemes] to undertake a review of the continued detention of the child.

(5) The child shall be informed of the outcome of the periodic review and the outcome of the review of the [insert competent authority] in a manner that he or she can understand and as soon as possible.

### *Article 79 – Conditional release*

(1) The [insert competent authority with regard to release schemes] may impose conditions when a decision is made to grant early release to a child subject to a sentence of detention.

(2) The purpose of any conditions imposed shall be primarily supporting the child in reintegration following his or her release.

(3) The child shall be helped to comply with the conditions imposed by the [insert competent authority with regard to release schemes].

(4) If a child breaches [a] condition[s] attached to early release, this should not result in an automatic order by the [insert competent authority with regard to release schemes] for the child to be placed back in detention. An order for a child to be placed back in detention shall be made only if he or she has significantly breached [a] condition[s] attached to early release and attempts have been made to help him or her to comply with the condition[s].

(5) Where an order is made to place a child back in detention following a breach of the conditions attached to early release:

(a) the child shall have the right to challenge the order;

(b) the child shall have the right to legal representation for the duration of any proceedings to do with such a challenge; and

(c) the [insert competent authority with regard to release schemes] shall make an order that the child be placed back in detention only if the child has broken the conditions attached to the early release and either:

(i) the child poses a risk to himself or herself or others that cannot be managed in the community; or

(ii) the child has been convicted of further offences.

### *Article 80 – Release on compassionate grounds*

(1) The [insert competent authority with regard to release schemes] may at any time release a child if satisfied that exceptional circumstances exist which justify the release of the child on compassionate grounds.

(2) In making a decision to order such a release, the [insert competent authority with regard to release schemes] shall, if it considers it necessary, impose conditions upon the release.

*Article 81 – Support and supervision after release*

- (1) Upon release, the child shall be delivered to his or her parents or legal guardian.
- (2) Upon release, the child shall have the right to get practical and psychosocial support from [insert appropriate welfare agency] to promote his or her successful reintegration.
- (3) As a minimum, the child shall be provided with:
  - (a) a suitable residence if the child cannot return to the family or such return is not in his or her best interests;
  - (b) support in gaining access to education and/or vocational training and/or securing employment;
  - (c) adequate clothing suitable to the climate;
  - (d) psychosocial support, to assist with the reintegration of the child into his or her family and community;
  - (e) transport to his or her home or the place where he or she is to live; and
  - (f) financial support until he or she has finished his or her education and/or training or obtained employment, unless the child is financially supported by his or her family.
- (4) To facilitate the reintegration process:
  - (a) local authorities [provinces] [districts] shall provide appropriate accommodation and other services to assist the reintegration of the child into society; and
  - (b) [Insert appropriate child protection body] shall coordinate the implementation of the reintegration plan and the provision of support services for the child and his or her family for a minimum of six months after release.



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# COMMENTARY

## PREAMBLE [optional]

The Preamble, while not legally enforceable, contains significant statements about the values on which the legislation is based. These statements can be used to implement the legislation and to help the courts interpret it. The practice of including a preamble in laws varies across States. A preamble has been included here, but its content is also reflected in a slightly different form in the Juvenile Justice Principles outlined in Article 13 of this Law.



*PART [TITLE] 1:*

**GENERAL PROVISIONS**



# Chapter I: Preliminary provisions

## *Article 1 – Title*

In certain States, provisions relating to juvenile justice can be found in a number of different laws, such as criminal laws, criminal procedure codes, juvenile laws, children’s acts or laws relating to welfare agencies. In order to avoid problems related to having several pieces of legislation concerning children in conflict with the law and with regard to already existing consolidated juvenile justice laws in many parts of the world, this Law serves as a comprehensive model of a single juvenile justice law. This simplifies matters by enabling all roleplayers involved in the juvenile justice process, such as the police, prosecution services, courts, legal aid providers, professionals working with children, and the general public, to find, read and understand one comprehensive piece of legislation rather than a number of different pieces of various laws. In some States, this may not be possible for a range of reasons. In such instances, amendments to existing legislation may be the best that can be achieved. This Article will be redundant where States are amending existing legislation, as the title of the law will already be established.

## *Article 2 – Purpose*

In line with Article 40(1) of the Convention on the Rights of the Child (CRC), this provision must emphasize and clarify the purpose of the juvenile justice law, which is the promotion of the reintegration of the child and the child’s assuming a constructive role in society. A juvenile justice law should therefore ensure that a child in conflict with the law is treated in a manner consistent with his or her sense of dignity and worth. This includes the reinforcement of the child’s respect for the human rights and fundamental freedoms of others.

## *Article 3 – Definitions*

“Charged” – In order to understand the implications of post-charge criminal procedures involving a child in conflict with the law, such as the application of alternative measures to judicial proceedings [diversionary measures] or pre-trial detention, it is of the utmost importance to have a clear definition of the exact moment at which a child is charged with a criminal offence.

“Child” – The definition of “child” in this Law is taken from Article 1 CRC. In some States, children in conflict with the law who are over the minimum age of criminal responsibility but under the age of 18 are referred to as “juveniles.” However, over time this term has come to have negative and stigmatizing connotations. This Law therefore uses the term preferred by the CRC Committee, which is “child”, rather than “juvenile” wherever possible. For the sake of consistency each State should choose one term and use it throughout its national legislation.

“Child in conflict with the law” – The Committee on the Rights of the Child (CRC Committee), in General Comment No. 10, has stated that, in accordance with Article 40 CRC, every person who is under 18 years of age at the time of the alleged commission of offence must be treated in accordance

with the rules of child [or juvenile] justice.<sup>1</sup> In some States, juvenile justice laws apply only to children under the age of 15, 16 or 17.

“Competent authority” – Throughout the Model Law, the term “competent authority” is used in order to facilitate national legislation. States must decide which authority is competent to exercise power in each phase of the juvenile justice process.

“Convicted” – Only a child convicted of a criminal offence can be subject to the range of sentences with their respective safeguards established by this Law.

“*Curator ad litem*” / “*guardian ad litem*” – Since a child must never be without parental representation during judicial proceedings, the court concerned must appoint a person who will exercise the parental representation where the parents or legal guardian cannot participate in the judicial proceedings against the child.<sup>2</sup>

“Deprivation of liberty” and “Detention” – Terms used in international standards and norms to describe any form of physical restriction of a child’s liberty.

“Intimate sample” – Although there is no definition of an “intimate sample” in international law, it is essential to define the kind of samples that can be collected and the circumstances of the collection in order to ensure the child’s dignity and uphold his or her right to privacy throughout the justice process.

“Legal aid” – According to Article 37(d) CRC, every child deprived of his or her liberty has the right to prompt access to legal and other appropriate assistance.<sup>3</sup> Similarly, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) requires free legal assistance for the child if he or she, or the parents, cannot pay for a lawyer. On the regional level, the right to legal aid is also enshrined in Article 17(2)(c)(iii) of the African Charter on the Rights and Welfare of the Child (ACRWC), Article 18(2)(f) of the African Youth Charter (AYC), Article 7(1)(c) of the African Charter on Human and Peoples’ Rights (the Banjul Charter), Article 6(3)(c) of the European Convention on Human Rights (ECHR), Article (8)(2)(d) of the American Convention on Human Rights (ACHR), and Article 13(1) of the Arab Charter on Human Rights (the Arab Charter). In addition, the newly adopted United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems envisage legal aid for children in conflict with the law.<sup>4</sup> Beijing Rule 7.1<sup>5</sup> provides for a child’s “right to counsel” and Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (SMR)<sup>6</sup> requires, in relation to both adults and children in conflict with the law, that “an untried prisoner shall be allowed

<sup>1</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 37.

<sup>2</sup> Guideline IV.E.75, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010, also recognizes the existence of the *guardian ad litem* as a parental representative by law for the child.

<sup>3</sup> See also: Human Rights Council Res. 7/29, *Rights of the Child*, 28 March 2008, para. 32.

<sup>4</sup> United Nations General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, 28 March 2013 (A/67/187), Guideline 10, para. 52(d); see also Principle 3, para. 22 on “more lenient conditions” for children.

<sup>5</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33).

<sup>6</sup> *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4).

to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions”.<sup>7</sup>

“Legal guardian” – Where the child has no parents or both parents are unable to fulfil their parental responsibility because they are hindered by law or court order, a legal guardian must be appointed and take over parental responsibility according to the relevant national law.

#### Article 4 – Scope

(1) This provision clarifies the applicability of the Law *ratione loci*.

(2) With this provision the Law constitutes its applicability *ratione personae*. It must apply to all children over the age of criminal responsibility and under the age of 18 years resident in the State concerned. It further needs to be mentioned that there should be no distinction between different groups of children. Foreign national children, asylum-seeking children and children who are temporarily present in the jurisdiction should all be subject to juvenile justice legislation. To treat any group of children as being outside the juvenile justice system constitutes discrimination contrary to Article 2 CRC.

States should note that a majority of European States have extended the applicability *ratione personae* of their juvenile justice laws to the age of 21 as neuro-scientific evidence and brain development studies have indicated that it is difficult to distinguish between the brain of an older child and that of a young adult.<sup>8</sup> This view is supported by the Council of Europe’s suggestion that “young adult offenders may, where appropriate, be regarded as juveniles and dealt with accordingly”.<sup>9</sup> In an earlier Recommendation, the Council of Europe stated that “reflecting the extended transition to adulthood, it should be possible for young adults under the age of 21 to be treated in a way comparable to juveniles and to be subject to the same interventions, when the judge is of the opinion that they are not as mature and responsible for their actions as full adults”.<sup>10</sup>

Where States wish to follow the extended applicability *ratione personae* for their juvenile justice laws, an alternative provision to Article 4(2) could read:

(2) This Law shall apply to all children over the age of criminal responsibility and all young adults under the age of 21 resident or present in [insert State] who are in conflict with the law.

States should note that if the above-mentioned alternative provision is preferred, the whole text of the Model Law needs to be adjusted for language consistency. People between 18 and 21 are no longer regarded as children by the CRC. The State would therefore need to create a definition of a

<sup>7</sup> Ibid., Rule 93. Similarly, CM/Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952<sup>nd</sup> meeting of the Ministers’ Deputies, stipulates that “where there is a recognized scheme of free legal aid the authorities shall bring it to the attention of all prisoners” (para. 23.3).

<sup>8</sup> On the topic of the brain development of children, see: Bonnie, R., Johnson, R., Chemers, B. and Schuck, J. (eds.), *Reforming Juvenile Justice: A Developmental Approach* (The National Academies Press: Washington).

<sup>9</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, para. 17.

<sup>10</sup> CM/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 the Committee of Ministers on 24 September 2003 at the 853<sup>rd</sup> meeting of the Ministers’ Deputies, para. 11.

“young adult” (i.e., a person between the ages of 18 and 21) in Article 3 and also to refer to this term throughout the law together with the term “child”.

**(3 and Variant 3)**

Both provisions determine the applicability of the Law *ratione temporis*. When referring to the “competent authority” in the variant, this provision acknowledges the differences between the legislative processes in different States. The competent authority has to be identified by the State applying this Law.

(4) This provision clarifies that this Law should apply as *lex specialis* to the general criminal law of the State. Thus, the general criminal and criminal procedural law can be applied only where this Law does not provide any regulations.<sup>11</sup>

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<sup>11</sup> See, for example, Article 4 of the Serbian Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles. Similarly, Section 4 of the German Youth Courts law states that “the provisions of general criminal law shall only apply to classify an unlawful act by a youth as a serious criminal offence or a less serious criminal offence and in assessing when the act shall be barred by statute”.

# Chapter II: Competencies

## *Article 5 – Children’s [juvenile] [youth] court*

(1-2) Both Article 40(b)(iii) CRC and Article 14 ICCPR require that a child charged with a criminal offence be tried by a competent, independent and impartial authority, tribunal or judicial body.<sup>12</sup> The Human Rights Committee, in General Comment No. 32, requires that the body that tries a criminal case be established by law and be independent of the executive and legislative branches of government or enjoy “in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature”.<sup>13</sup> An executive administrative body would not constitute an “independent and impartial tribunal” within the meaning of Article 14 ICCPR. Article 40(3) CRC places a duty on States to “seek to promote” the establishment of institutions specifically applicable to children. However, the CRC Committee recommends that States establish separate courts to try children charged with a criminal offence.<sup>14</sup> While some States have established separate juvenile courts, inadequate resources may prevent such a development in others. In such cases, the CRC Committee has recommended that a juvenile court be established within existing regional or district courts.<sup>15</sup> If this is not feasible, it is possible to designate one of the courtrooms in the court building as a juvenile court. The CRC Committee has further stated in General Comment No. 10 that where it is not possible to establish juvenile courts, a State should nevertheless ensure the appointment of specialized judges or magistrates to deal with cases of juvenile justice.<sup>16</sup> The composition of the juvenile courts varies from country to country.<sup>17</sup> As regards the court environment, the State should establish rules on the environment of a children’s [juvenile] [youth] court. Such rules must set out the type of furniture, layout and seating arrangements for the court, provide that the parents or the legal guardian or, in the absence of either, the *curator ad litem* [guardian ad litem] shall sit with the child, permit the child to communicate with his or her legal representative during the course of the

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<sup>12</sup> In Europe the following countries have established specialized youth courts, youth judges or similar institutions: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, England and Wales, France, Germany, Greece, Hungary, Ireland, Italy, Kosovo, Netherlands, Northern Ireland, Poland, Portugal, Scotland, Serbia, Slovenia, Spain and Turkey: Gensing, A., “Jurisdiction and characteristics of juvenile criminal procedure in Europe”, in: Dünkler, F., Grzywa, J., Horsfield, P. and Pruin, I. (eds.), *Juvenile Justice Systems in Europe*, Vol. 4, 2nd ed. (Forum Verlag Godesberg: Mönchengladbach, 2011), p. 1614. In South Asia, separate juvenile courts, youth judges or similar institutions can be found in inter alia Afghanistan [Afghanistan Juvenile Code 2005, Section 9], India [India Juvenile Justice (Care and Protection) Act 2000, Sections 4 and 29], and Maldives [Law on the Protection of the Rights of the Child and Rules Relating to the Conduct of Judicial Proceedings (No. 6), 2003, Section 298(7), (10), (12)]: UNICEF Report, *Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law*, 2006, p. 8. In Africa, specialized youth courts, youth judges or similar institutions can be found for example in Ghana [Juvenile Justice Act, 2003 (ACT 653), Part II], Kenya [The Children Act 2001, No. 8 of 2001, Part VI], and South Africa [Child Justice Act 2008, Chapter 9, Sections 63-67]. In Canada, Quebec has established a specialized youth court focusing on children: Bala, N. and Roberts, J., “Canada’s Juvenile Justice System”, in: Junger-Tas, J. and Decker, S. (eds.), *International Handbook of Juvenile Justice* (Springer: New York, 2008), p. 44.

<sup>13</sup> United Nations Human Rights Committee, General Comment No. 32, Article 14, *Right to equality before courts and tribunals and to a fair trial*, 23 August 2007 (CCPR/C/GC/32), para.18.

<sup>14</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 93.

<sup>15</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 93.

<sup>16</sup> *Ibid.*, para. 93.

<sup>17</sup> For instance, Article 121 of the Egyptian Child Law No. 126/2008 provides that: “The Child Court shall be formed of three magistrates, and shall be assisted by two specialized experts of whom at least one shall be a woman. The two experts shall submit their report to the court after studying the conditions of the child in all respects before the court pronounces its ruling. The said two experts shall be appointed by a decree of the Minister of Justice in agreement with the Minister concerned with social affairs. The conditions to be fulfilled by those who will be appointed as experts shall be determined by a decree of the Minister concerned with social affairs.”

proceedings, provide that the judge[s] shall sit on the same level as the child, and set out the court dress to be worn by the judge[s] and other officers of the court, including the prosecutor and the defendant's legal representative.

(3) Specialized juvenile judges should be appointed to deal with children in conflict with the law.<sup>18</sup> To satisfy the requirements in Article 40(b)(iii) CRC and Article 14 ICCPR, they must be independent and free from interference by the executive. Juvenile judges should receive special training on the CRC, on the social and other causes of juvenile offending, "psychological and other aspects of the development of children, with special attention to girls and children belonging to minorities or indigenous peoples, ... the dynamics of group activities, and the available measures for dealing with children in conflict with the ... law".<sup>19</sup> The training should further include anti-racist and multicultural training.<sup>20</sup> Some countries may wish to consider establishing regulations governing the training of juvenile justice court officers and personnel and [such] other professionals working within the juvenile justice system [as appropriate].

(4) Where an adult and a child have jointly committed a criminal offence, the child must not be tried together with the adult, but must be tried in a children's [juvenile] [youth] court. The child must be sanctioned not according to the criminal law of the State but exclusively according to this Law.

(5) Where a criminal offence was committed by a child, but judicial proceedings are initiated only after the child has turned 18, he or she shall be tried not in an adult criminal court but in a children's [juvenile] [youth] court. The rationale behind this norm is that the criminal action took place at a time when the offender was still a child, and thus he or she must also be tried taking that into account.

(6) In order to implement the right to appeal [Article 14(5) ICCPR] effectively in juvenile justice legislation, this Law establishes an appeals court or chamber that is competent to exercise judicial review. States may wish to introduce secondary regulations in this regard.

### *Article 6 – Specialized child [juvenile] prosecutors*

(1) The CRC Committee is of the view that "a comprehensive juvenile justice system ... requires the establishment of [a]<sup>21</sup> specialized ... prosecutor's office".<sup>22</sup> The rationale for this view is explained in General Comment No. 10: "If the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and fundamental freedom of others?"<sup>23</sup> It is therefore essential also to establish specialized child [juvenile] prosecutors' offices in each court district with specially trained personnel.<sup>24</sup>

<sup>18</sup> See Human Rights Council Res. 10/2, *Human rights in the administration of justice, in particular juvenile justice*, 24 March 2009, para. 6.

<sup>19</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 97.

<sup>20</sup> Human Rights Council Res. 10/2, *Human rights in the administration of justice, in particular juvenile justice*, 24 March 2009, para. 6. In this regard, see also: General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 45; and General Assembly Res. A/RES/67/166, *Human rights in the administration of justice*, 20 December 2012, para. 22.

<sup>21</sup> Not in the original quotation.

<sup>22</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 92.

<sup>23</sup> *Ibid.*, para. 13, subpara. 2.

<sup>24</sup> On the training requirement see: General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 45; Human Rights Council Res. 10/2, *Human rights in the administration of justice, in particular juvenile justice*, 24 March 2009, para. 6; and General Assembly Res. A/RES/67/166, *Human rights in the administration of justice*, 20 December 2012, para. 22.

(2) If it is not feasible for the State to establish specialized child prosecution offices in every court district, adult prosecutors working in the prosecution office of the court district must be nominated to deal with child-related matters after receiving special training.

### *Article 7 – Specialized police units [offices]*

(1) The CRC Committee recommends in General Comment No. 10 the establishment of specialized police units dealing with children in conflict with the law.<sup>25</sup> Similarly, Recommendation 7(85) of the joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system calls for the establishment of “specialization within the police”.<sup>26</sup> Police officers dealing with children should receive special training<sup>27</sup> with emphasis on communication and child development methods and be nominated by the competent authority in accordance with the police law of the State concerned.

(2) Where no specialized police units can be created, a minimum requirement should be the nomination of police officer[s] working in other units to ensure compliance with the recommendations of the CRC Committee.

### *Article 8 – Welfare agencies*

In juvenile justice matters it is of great value for the court, the prosecution office, the police and also the child involved to be able to rely on the support of welfare agencies assisting throughout the juvenile justice process, particularly when it comes to obtaining information on the living conditions of the child and the social circumstances he or she is facing.<sup>28</sup> The State should therefore ensure that it establishes welfare agencies in local communities and provides for the training of their personnel.<sup>29</sup> Across States the meaning of the term “welfare agency” will vary due to the unique nature of each State’s legal system,<sup>30</sup> which is why this Law uses the broad term “welfare agency”.

<sup>25</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 92.

<sup>26</sup> Recommendation 7 of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25), para. 85; see also General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 27(d).

<sup>27</sup> See General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 45; Human Rights Council Res. 10/2, *Human rights in the administration of justice, in particular juvenile justice*, 24 March 2009, para. 6; and General Assembly Res. A/RES/67/166, *Human rights in the administration of justice*, 20 December 2012, para. 22.

<sup>28</sup> See the comparative analysis for Europe on the important role of social welfare institutions in the juvenile justice process in: Gensing, A., “Jurisdiction and characteristics of juvenile criminal procedure in Europe”, in: Dünkel, F., Grzywa, J., Horsfield, P. and Pruin, I. (eds.), *Juvenile Justice Systems in Europe*, Vol. 4, 2nd ed. (Forum Verlag Godesberg: Mönchengladbach, 2011), p. 1631.

<sup>29</sup> On the training requirement see Human Rights Council Res. 10/2, *Human rights in the administration of justice, in particular juvenile justice*, 24 March 2009, para. 6, and General Assembly Res. A/RES/67/166, *Human rights in the administration of justice*, 20 December 2012, para. 22.

<sup>30</sup> For further information on the different terms for “welfare agency” in Europe, see: Gensing, A., “Jurisdiction and characteristics of juvenile criminal procedure in Europe”, in: Dünkel, F., Grzywa, J., Horsfield, P. and Pruin, I. (eds.), *Juvenile Justice Systems in Europe*, Vol. 4, 2nd ed. (Forum Verlag Godesberg: Mönchengladbach, 2011), p. 1633.



## Chapter III: Criminal responsibility

### *Article 9 – Minimum age of criminal responsibility*

(1) The age of criminal responsibility is the minimum age at which a child is able, in law [de jure], to commit a criminal offence. The age may also be treated as the minimum age at which a child may be prosecuted for the commission of an offence. However, it is possible for these two ages to differ and for the State to set a higher age as the age at which a child may be prosecuted within the juvenile justice system. The same applies to the age at which a child can actually be sentenced to deprivation of liberty.<sup>31</sup> Under Article 40(3) CRC, States shall seek to promote the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law. Beijing Rule 4 recommends that any minimum age of criminal responsibility (MACR) “shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity”.<sup>32</sup> In General Comment No. 10, the CRC Committee also recommends that States “shall increase the existing low MACR to an internationally acceptable level”, concluding that “a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable”.<sup>33</sup> It strongly encourages States to introduce a higher minimum age of criminal responsibility, for instance 14 or 16 years of age.<sup>34</sup> The CRC Committee also notes that the General Comment should not be used as a reason to lower the minimum age of criminal responsibility in countries where it has already been set at an age higher than 12,<sup>35</sup> and “wishes to express concern about the practice of allowing exceptions to a minimum age of criminal responsibility which permit the use of a lower minimum age of criminal responsibility where the child, for example, is accused of committing a serious offence, where the child is considered mature enough to be held criminally responsible”.<sup>36</sup> The definition of what constitutes such a “serious offence” varies from State to State. However, it must be borne in mind that “serious” implies considerable gravity in the offence committed. In this context Beijing Rule 17.1(c) restricts the application of pre-trial detention to only “a serious act involving violence against another person”. In this connection it must be mentioned that the majority of European countries have established the minimum age of criminal responsibility at 14 or 15.<sup>37</sup> Having regard to General Comment No. 10 and the European examples, States are strongly encouraged to establish a minimum age of criminal responsibility which is higher than 12.

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<sup>31</sup> See for example Switzerland, where according to the *Bundesgesetz über das Jugendstrafrecht* of 20 June 2003, the minimum age of criminal responsibility is established at 10 years of age (Article 3), but deprivation of liberty as a sentence can be imposed only at 15 years of age (Article 25).

<sup>32</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 4; see also CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040th meeting of the Ministers’ Deputies, para. 4.

<sup>33</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 32.

<sup>34</sup> *Ibid.*, para. 33.

<sup>35</sup> *Ibid.*, para. 33.

<sup>36</sup> *Ibid.*, para. 34.

<sup>37</sup> See the exhaustive study for Europe: Dünkel, F., Grzywa, J., Horsfield, P. and Pruin, I. (eds.), *Juvenile Justice Systems in Europe*, Vols. 1-4, 2nd ed. (Forum Verlag Godesberg: Mönchengladbach, 2011). An exhaustive overview of worldwide minimum age of criminal responsibility provisions can be found in: Cipriani, D., *Children’s Rights and the Minimum Age of Criminal Responsibility – A Global Perspective* (Ashgate: Surrey, 2009), p. 98. States such as Chile, China, Colombia, the Democratic People’s Republic of Korea, Kazakhstan, Kyrgyzstan, Mongolia, Paraguay, Peru, the Republic of Korea, Rwanda, Sierra Leone, Tajikistan and Turkmenistan set the minimum age of criminal responsibility at 14. The minimum age of criminal responsibility for Iceland, the Lao People’s Democratic Republic and the Philippines is 15, while for Argentina, Cape Verde, Equatorial Guinea, Guinea-Bissau and Sao Tome and Principe it is 16.

### Variants to (1)

Both variants included in the Model Law are particularly tailored for countries of common-law tradition in order to clarify that the *doli incapax* rule applies. There must be a presumption of a lack of criminal responsibility that cannot be rebutted by the prosecution under any circumstances.

(2) While paragraph (1) [Variants to (1)] establish[es] that a child cannot be held criminally responsible until a certain age determined by the State, paragraph (2) prohibits any prosecution of a child above that age for criminal offences committed when he or she was still below the age of criminal responsibility.

### *Article 10 – Prohibition of status offences*

The term “status offence” is used to describe acts, conduct and omissions that are not considered criminal offences if committed by an adult, but are criminal offences when committed by a child. For example, a law that makes truancy from school a criminal offence concerns an offence that can be committed only by a child and that is thus treated as a status offence. Further examples of status offences could be the following: “curfew violations, school truancy, running away, begging, anti-social behaviour, gang association, and even simple disobedience or bad behaviour”.<sup>38</sup> United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)<sup>39</sup> require that “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>40</sup> This is regarded as necessary to prevent “further stigmatization, victimization and criminalization of young persons”.<sup>41</sup> The CRC Committee in General Comment No. 10 goes further and recommends that all States parties abolish provisions on status offences to establish equal treatment of adults and children under the law.<sup>42</sup>

### *Article 11 – Age assessment*

(1) Particularly in States with low birth registration, the determination of the correct age of an alleged child offender poses a challenge to the prosecution and the court. Therefore it is crucial to include a provision on age assessment in any juvenile justice law. In order to understand whether the alleged child offender can be held criminally responsible, the court needs to know if the alleged child offender has already reached the minimum age of criminal responsibility. This is also the case when there are doubts about whether the alleged child offender is over 18 years of age and whether the case thus needs to be transferred to an adult court for further consideration. Countries that have adopted age assessment in their juvenile justice laws include India<sup>43</sup> Italy,<sup>44</sup> Kenya<sup>45</sup> and South Africa.<sup>46</sup>

(2) When assessing the age of the child, the court must take into consideration all the information available. Age assessment should be used as a measure of last resort where there is reason to doubt

<sup>38</sup> *Global Report on Status Offences*, Child Rights Information Network (first published 2009, Child Rights Information Network 2009), p. 3.

<sup>39</sup> United Nations General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency*, (the Riyadh Guidelines) adopted by the General Assembly on 14 December 1990 (A/RES/45/112).

<sup>40</sup> *Ibid.*, Guideline 56.

<sup>41</sup> *Ibid.*, Guideline 56.

<sup>42</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 8.

<sup>43</sup> [India Juvenile Justice (Care and Protection) Act 2000], Article 49.

<sup>44</sup> Article 8 D.P.R., n. 488/1988.

<sup>45</sup> Kenya [The Children Act 2001, No. 8 of 2001], Article 143.

<sup>46</sup> South Africa [Child Justice Act 2008], Articles 12-16.

the age of the child and where other approaches, including, but not consisting solely of, interviews and attempts to gather documentary evidence, have failed to establish his or her age.<sup>47</sup> The dignity of the child must be respected at all times<sup>48</sup> and the least invasive method of age assessment must be used in order to comply with international human rights standards, particularly the CRC and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>49</sup> States must bear in mind that any age-assessment procedure should be gender- appropriate, multidisciplinary and carried out by independent professionals with appropriate expertise in and familiarity with the child's ethnic and cultural background.<sup>50</sup> Physical, developmental, psychological, environmental and cultural factors must also be considered.<sup>51</sup> "It is important to recognize that the assessment of age is not an exact science. It is a process within which there will always be an inherent margin of error and a child's exact age cannot be established through medical or other physical examinations."<sup>52</sup> The procedure, outcome and consequences of the age assessment must be explained to the child in a language that he or she can understand, and a written record must be kept, a copy of which must be made available to the alleged child offender.<sup>53</sup>

(3) Where an age assessment fails to give certainty beyond reasonable doubt on the age of the alleged child offender, he or she must be regarded as a child. This means that in cases where it is unclear whether an alleged child offender is below or above the minimum age of criminal responsibility, he or she must be considered to be below it. In cases where there is doubt whether the alleged offender is a child or an adult – i.e., below or above the age of 18 – he or she must be considered a child and fall within the scope of the juvenile justice law.

### *Article 12 – Personality assessment*

(1) It is mandatory that the court take into account the opinions of experts for the assessment of the personality of the child before passing judgement. This obligation ensures that the sentence passed on the child is fair and takes into consideration the special circumstances and needs of the child and his or her development. In this context, a key role is played by the welfare agency that supports the court by doing the personality assessment. It is within the court's discretion to consider whether it is necessary to consult third parties such as the parents, the legal guardian, teachers or peers to determine the child's personality.

(2) Children suffering from mental illness should not be in the juvenile justice system. Therefore the court has the obligation to terminate judicial proceedings against a mentally challenged child and if necessary refer him or her to a specialized institution. This complies with Havana Rule 53, which states that "a juvenile who is suffering from mental illness should be treated in a specialized institution under independent medical management. Steps should be taken, by arrangement with appropriate agencies, to ensure any necessary continuation of mental health care after release."

<sup>47</sup> Smith, T. and Brownlees, L., *United Nations Children's Fund working paper, Age assessment: A technical note* (UNICEF: New York, 2012), p. 10.

<sup>48</sup> See General Assembly Res. A/RES/67/166, *Human rights in the administration of justice*, 20 December 2012, para. 14.

<sup>49</sup> Smith, T. and Brownlees, L., *United Nations Children's Fund working paper, Age assessment: A technical note* (UNICEF: New York, 2012), p. 11.

<sup>50</sup> Smith, T. and Brownlees, L., *United Nations Children's Fund discussion paper, Age assessment: a literature review & annotated bibliography* (UNICEF: New York, 2011), p. 12.

<sup>51</sup> *Ibid.*, p. 12.

<sup>52</sup> Smith, T. and Brownlees, L., *United Nations Children's Fund working paper, Age assessment: A technical note* (UNICEF: New York, 2012), p. 18.

<sup>53</sup> Smith, T. and Brownlees, L., *United Nations Children's Fund discussion paper, Age assessment: a literature review & annotated bibliography* (UNICEF: New York, 2011), p. 32.



*PART [TITLE] 2:*

**JUVENILE JUSTICE PROCEEDINGS**



# Chapter I: Juvenile justice principles

## *Article 13 – General principles*

### **(1) Non-discrimination**

This Law mirrors the wording of Article 2 CRC, which requires that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parents’ or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.<sup>54</sup>

The CRC Committee requires States to take all necessary measures to ensure that children in conflict with the law are treated equally.<sup>55</sup> Children who are likely to face discrimination include: girls, children belonging to ethnic, religious or linguistic minorities, indigenous children, street children, children with disabilities, trafficked or migrant children and children who are repeatedly in conflict with the law (recidivists). Children who are homeless, face social problems or are poor or whose parents are offenders themselves or drug and alcohol misusers and children with learning disabilities or mental health problems may also be treated more harshly by the juvenile justice system. Such children are more likely to be prosecuted, to be held in pre-trial detention and to receive a custodial sentence. In order to eliminate discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportionate means to redress de facto discrimination and can be discontinued when equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and special consideration given to members of ethnic minority groups who are alleged to have committed or are accused of a criminal offence.<sup>56</sup>

### **(2) Best interests of the child**

Article 3(1) CRC provides that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.<sup>57</sup> The concept of the best interests of the child is also to be found in regional treaties, such as Article 4 ACRWC.<sup>58</sup> This principle is also recognized in the Inter-American system of human rights.<sup>59</sup> However, existing juvenile justice laws

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<sup>54</sup> See also Guideline III.D.1, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

<sup>55</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 6.

<sup>56</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 20, *Non-discrimination in economic, social and cultural rights*, 2 July 2009 (E/C.12/GC/20), para. 9.

<sup>57</sup> See also Guideline III.B, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

<sup>58</sup> Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>59</sup> The principle of the best interests of the child can be found in, among others: Inter-American Court of Human Rights, *Judicial Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, para. 59; Inter-American Court of Human Rights, *Preliminary objection, Merits, Reparations and Costs*, Judgement of September 8, 2005, Series C No. 130, para. 134; Inter-American Court of Human Rights, *Judicial Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paras. 53 and 137; and Inter-American Commission of Human Rights, *Report on Corporal Punishment and Human Rights of Children and Adolescents*, OEA/Ser.L/V/II.135, August 5, 2009, para. 25.

do not always define exactly what it means to apply the “best interests” principle within the context of juvenile justice proceedings. The CRC Committee has implied in General Comment No. 10 that the best interests of the child are served when the child is dealt with by a juvenile justice system that complies with the provisions of the CRC and the international standards and norms in the area of juvenile justice.<sup>60</sup> It seems, therefore, that the “best interests” test requires the juvenile justice system to take the least punitive measures possible and to promote the reintegration of children who have offended.<sup>61</sup> The “best interests” principle applies both in relation to children as a group and in relation to an individual child who finds himself or herself subject to juvenile justice proceedings. Thus it applies to sentencing decisions following the conviction of a child, as much as to any other decision. In this context, the “best interests” test requires the judge to consider the effect that a sentence is likely to have on the child, and to impose a sentence that, while proportionate, has the least detrimental impact on the child’s development and well-being. The determination of the best interests of the child in individual cases is a complex process. It is recommended that States issue guidelines or secondary legislation to address this issue.<sup>62</sup>

### **(3) Proportionality**

The principle of proportionality contained in this Law is present in many international and regional human rights treaties. Beijing Rule 5 provides that “any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence”. Furthermore, Beijing Rule 17.1(a) states that “the reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society”. This requires the response to a young offender to be based not only on the objective gravity of the criminal offence, but also on the personal circumstances of the child.

### **(4 and Variant) Primacy of alternative measures to judicial proceedings [diversionary measures]**

Article 40(3) CRC requires States to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings, whenever appropriate and desirable.<sup>63</sup> In the opinion of the CRC Committee, the obligation of States to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings should not be limited to children who commit minor offences, such as shoplifting or other property offences with limited damage, or to first-time child offenders.<sup>64</sup> The appropriate approach is rather to consider whether a child’s offending could be more appropriately dealt with without resorting to judicial proceedings. This requires the juvenile justice system to have in place a range of community-based family support

<sup>60</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 10.

<sup>61</sup> Rule 5 of the United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), also provides that the juvenile justice system shall emphasize the well-being of the juvenile. However, in accordance with the concept that best interests or well-being are synonymous with the child’s being dealt with in a system that implements the general principles and provisions of the Convention, the commentary to the Rules interprets this as meaning that the imposition of merely punitive sanctions shall be avoided.

<sup>62</sup> For further information, see: *Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime*, United Nations Office on Drugs and Crime (UNODC) and United Nations Children’s Fund (UNICEF), Criminal Justice Handbook Series (United Nations: New York, 2009).

<sup>63</sup> See also Recommendation 3 of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25); General Assembly Res. A/RES/67/166, *Human rights in the administration of justice*, 20 December 2012, para. 15; and

<sup>64</sup> General Assembly Res. 63/241, Rights of the Child, 13 March 2009, para. 44. Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 25.

and restorative justice programmes,<sup>65</sup> such as victim-offender mediation, to which children can be referred in order to address their offending behaviour.<sup>66</sup> The CRC Committee believes non-judicial approaches avoid stigmatization, have good outcomes for children and society, and have proved to be more cost-effective.<sup>67</sup>

### **(5) Participation**

Article 12 CRC provides that all children who are capable of forming their own views (which will probably include all children over the age of criminal responsibility) have the right to express those views in all matters that affect them, and that these views should be given due weight in accordance with the child's age and maturity.<sup>68</sup> In addition to this general right, when a child is the subject of administrative or judicial proceedings, he or she has the right to be heard directly or through a representative or an appropriate body. It will be up to each State to determine the mechanism by which a child may be heard, though the CRC Committee recommends that, wherever possible, the child be given the right to be heard directly.<sup>69</sup>

### **(6) Proceedings without delay**

All children's cases must be handled expeditiously throughout and without any unnecessary delay. This is reflective of Article 40(2)(b)(ii) CRC, Article 9(3) ICCPR, Article 7(1)(d) Banjul Charter, Article 8(1) ACHR, Article 6(1) ECHR and Article 17(2)(c)(iv) ARCWC. In addition, Article 40(2)(b)(iii) CRC gives the child the right to have the matter (i.e. the allegation or charge) determined without delay by a competent, independent and impartial authority or judicial body.<sup>70</sup> Each State must specify time limits for the various procedural steps to be taken, but as a matter of good practice delay should be reduced as much as possible to permit early intervention to tackle offending behaviour and to prevent further offending.

### **(7 and Variant) Presumption of innocence**

The principle that every child in conflict with the law has the right to be presumed innocent until proved guilty is a fundamental principle of criminal justice and is found in a number of international and regional instruments including Article 11(1) of the Universal Declaration of Human Rights (UDHR), Article 40(2)(b)(i) CRC, Article 14(2) ICCPR, Article 8(2) ACHR, Article 6(2) ECHR and Article 7(1)(b) Banjul Charter. An important component of the presumption of innocence is the burden of proof. In General Comment No. 10, the CRC Committee explains that "the child alleged as or accused of having infringed the criminal law has the benefit of doubt and is only guilty if these charges have been proven beyond reasonable doubt ... the authorities must not assume that the child is guilty without proof of guilt beyond reasonable doubt".<sup>71</sup>

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<sup>65</sup> See Commentary to Article 18 of this Law.

<sup>66</sup> See: Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para.27; CM/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 the Committee of Ministers on 24 September 2003 at the 853<sup>rd</sup> meeting of the Ministers' Deputies, para. 8; and CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, para. 23.2.

<sup>67</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 25.

<sup>68</sup> See also Guideline III.A, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

<sup>69</sup> Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, 20 July 2009 (CRC/C/GC/12), paras. 35-37.

<sup>70</sup> See also Article 9(3) ICCPR.

<sup>71</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 42.

### **(8) Detention as a measure of last resort**

This Law follows Article 37(b) CRC and Beijing Rule 17.1(c), which provide that restrictions on the personal liberty of the child shall be imposed only after careful consideration and shall be limited to the shortest appropriate period of time.<sup>72</sup> The CRC does not define how long the shortest appropriate period of time should be. However, legislation should require the court to give direct consideration to whether a custodial sentence is the last resort and to determine the period of time needed to provide the child with the required intervention. The length of the sentence should not exceed this period.

### *Article 14 – Application of procedural rights*

(1) The first part of this paragraph states that a child in conflict with the law shall enjoy the full range of fundamental procedural rights that adults enjoy in the justice system.<sup>73</sup> This imposes a duty on States to secure for children in conflict with the law fundamental procedural rights as outlined in Articles 37 and 40 CRC. Apart from the provisions of the CRC, binding fundamental justice procedures regulations can also be found in the ICCPR, particularly in Article 14, which establishes the right to a fair trial.<sup>74</sup> Essential guarantees outlined in Article 14(1) to (3) are the following: equality before the court; a fair and public hearing by a competent, independent and impartial tribunal established by law; exclusion of the media where the interests of morals, public order, national security or privacy demand it; the presumption of innocence; for the accused to be informed of the criminal charge in a language which he or she understands; for the accused to have adequate time to prepare his or her defence with counsel of his or her choosing; for the accused to be tried without undue delay and in his or her presence, with the choice to represent himself or herself and with free legal assistance if necessary; for the accused to examine and cross-examine witnesses; for the accused to have free access to an interpreter; and for the accused not to be compelled to testify to or confess his or her guilt. Further, Article 14(5) to (7) also states the right of appeal to a higher tribunal of law, the right to compensation for miscarriage of justice, and the right not to be tried or punished twice for the same offence (*ne bis in idem*). Article 15 ICCPR adds that no-one shall be found guilty of a criminal offence if at the time of commission of the offence it was not established as a criminal offence by law (*nullum crimen sine lege*). The second part of paragraph (1) clarifies that there are special protections and procedures for a child at all stages of the criminal process. Article 14(4) ICCPR states that “in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation”. With regard to regional human-rights protection mechanisms for children in conflict with the law, the Inter-American Court of Human Rights has stated in a landmark decision that in judicial proceedings “where decisions are adopted on the rights of children, the principles and rules of due process must be respected. This includes rules regarding competent, independent, and impartial courts previously established by law, courts of review, presumption of innocence, the presence of both parties to an action, the right to a

<sup>72</sup> See also the report on justice and human rights in the Americas by the Inter-American Commission on Human Rights, Rapporteurship on the Rights of the Child, *Juvenile justice and human rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, 13 July 2011, paras. 75-80, and Guideline IV.A.6.19, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

<sup>73</sup> See in this regard Guideline III.E, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010, which states that “the rule of law principle should fully apply to children as it does to adults”; see also CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040th meeting of the Ministers’ Deputies, para. 13.

<sup>74</sup> On the international level, fair-trial guarantees are contained in Articles 6 and 7 ECHR, Articles 8 and 25 ACHR, Article 13 Arab Charter, Article 17 ACRWC, Article 7 Banjul Charter and Article 10 UDHR.

hearing and to defense, taking into account the particularities derived from the specific situation of children and those that are reasonably projected, among other matters, on personal intervention in said proceedings and protective measures indispensable during such proceedings.”<sup>75</sup>

(2) There are specific procedural rights according to international norms and standards that a child enjoys throughout the proceedings. All the rights mentioned in this Article, i.e. the right to legal assistance, the right to information, the right to an interpreter, the right to have the parents present and the right to consular assistance, appear throughout this Law and are further elaborated in the commentary to the provisions concerned.

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<sup>75</sup> Inter-American Court of Human Rights, Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, opinion No. 10.



## Chapter II: Alternative measures to judicial proceedings [diversionary measures]

### *Article 15 – Purpose of alternative measures to judicial proceedings [diversionary measures]*

Article 40(3)(b) CRC requires States to promote laws and procedures for dealing with children in conflict with the law without resorting to judicial proceedings. In order to avoid stigmatization and the negative effects of criminal proceedings that might result in the conviction of the child, the Beijing Rules consider non-intervention to be “the best response”<sup>76</sup> in many cases, especially where the criminal act is of a “non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner”.<sup>77</sup> It is at the discretion of each State to determine which offences should be considered for alternative measures to judicial proceedings. The CRC Committee provides in General Comment No. 10 that minor offences should be considered for alternative measures to judicial proceedings, but that these alternative measures can be considered for more serious offences as well.<sup>78</sup> Various States are using alternative measures to judicial proceedings in order to avoid instituting criminal proceedings against children.<sup>79</sup>

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<sup>76</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Commentary to Rule 11.

<sup>77</sup> *Ibid.* In this regard, the South African Child Justice Act of 2008 (Act No. 75, 2008) provides an excellent example of what the application of alternative measures to judicial proceedings should seek to accomplish: “Section 51. The objectives of diversion are to – (a) deal with a child outside the formal criminal justice system in appropriate cases; (b) encourage the child to be accountable for the harm caused by him or her; (c) meet the particular needs of the individual child; (d) promote the reintegration of the child into his or her family and community; (e) provide an opportunity to those affected by the harm to express their views on its impact on them; (f) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm; (g) promote reconciliation between the child and the person or community affected by the harm caused by the child; (h) prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system; (i) reduce the potential for re-offending; (j) prevent the child from having a criminal record; and (k) promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.”

<sup>78</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 24.

<sup>79</sup> For example, in Europe: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Kosovo, Latvia, Lithuania, Netherlands, Northern Ireland, Poland, Portugal, Romania, Russia, Scotland, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and Ukraine: Gensing, A., “Jurisdiction and characteristics of juvenile criminal procedure in Europe”, in: Dünkel, F., Grzywa, J., Horsfield, P. and Pruin, I. (eds.), *Juvenile Justice Systems in Europe*, Vol. 4, 2nd ed. (Forum Verlag Godesberg: Mönchengladbach, 2011), p. 1622. In South Asia, the concept of diversion has been fully embraced only by the Maldives, but Afghanistan, Nepal and Bangladesh resolve minor offences informally: UNICEF Report, *Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law*, 2006, p.17. In Cape Verde, the prosecutor has the discretion to divert cases [Cape Verde Law Decree 2/2006, Articles 54, 60 and 63]. In South Africa, alternative measures to judicial proceedings are dealt with in Chapter 6 of the Child Justice Act of 2008. In the Americas, Belize and Barbados have introduced diversionary measures, while some States like El Salvador and Guatemala have made it a requirement for the application of diversionary measures to have an agreement between the child in conflict with the law and the victim: Inter-American Commission on Human Rights, Rapporteurship on the Rights of the Child, *Juvenile justice and human rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, 13 July 2011, para. 243. Further, Canada utilizes the concept of “pre-court diversion: extrajudicial measures”: see Bala, N. and Roberts, J., “Canada’s Juvenile Justice System”, in: Junger-Tas, J. and Decker, S. (eds.), *International Handbook of Juvenile Justice* (Springer: New York, 2008), p. 46.

*Article 16 – Application of alternative measures to judicial proceedings  
[diversionary measures]*

(1) This paragraph deals with two matters. First, it states when alternative measures to judicial proceedings can be applied, and secondly, it states who the competent authority should be. On the question of when alternatives could be applied, this paragraph establishes that such measures should be considered “whenever it is appropriate and desirable”. Similarly, the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)<sup>80</sup> provide that, where it is appropriate, enforcement agencies should be empowered to cease proceedings against a child if they consider it is unnecessary to proceed with the case “for the protection of society, crime prevention or the promotion of respect for the law and the rights of the victim”.<sup>81</sup> While Rule 11(1) of the Beijing Rules states that “consideration shall be given, whenever appropriate, to dealing with juvenile offenders without resorting to formal trial”, this norm also takes into consideration the situation of many States where the court can decide at any time to divert the case. In this sense, not limiting the application of diversionary measures to the pre-trial phase constitutes an additional safeguard for the child. The competent authority must have a discretionary power to suspend, or not to initiate, a prosecution against a child, even if there is sufficient evidence to secure a conviction. Prosecution guidelines should include conditions for not charging, but diverting, children in conflict with the law. Where it is decided that alternative measures are not an appropriate response, the competent authority must set out the reasons for the decision in writing. Also, regulations [rules] should be created governing the establishment and use of community-based diversion programmes in local authority areas [provinces], a system for referral of children to such programmes and the monitoring of children’s progress while in such programmes. Diversion programmes can take a number of forms, but generally include victim-offender mediation, family-focused programmes, supervision, restorative justice programmes etc.<sup>82</sup> Secondary legislation will also be required in most States to set out the referral mechanisms, requirements on the programmes to be offered, and the geographical location and nature and content of such programmes. The competent authority to decide on diversionary measures varies in the different legal systems. Whereas in certain States a police officer can decide on diversionary measures, in other States this competency belongs to the prosecutor and/or court.<sup>83</sup> Therefore it is for the State to decide which option[s] is [are] to be preferred for the national juvenile justice law, and this Law suggests certain roleplayers which could be considered competent authorities. The use of diversionary measures by the police and prosecution service should be reviewed on a regular basis, in particular to ensure that alternative measures [diversionary measures] are being used effectively and not in a discriminatory manner.

(2) Article 40(3)(b) CRC requires that human rights and safeguards be fully respected when non-judicial measures such as diversion are used. Therefore, when considering alternative measures, the competent authority must comprehensively consider all relevant aspects related to the child and the offence committed, in order to find a just alternative measure. Factors like the child’s age and character, the circumstances of the offence, whether the court is likely to impose a nominal penalty and whether the prosecution is in the public interest should all be taken into account.

<sup>80</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for Non-custodial Measures* (the Tokyo Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/110).

<sup>81</sup> *Ibid.*, Rule 5.

<sup>82</sup> See *Handbook on Restorative Justice Programmes*, United Nations Office on Drugs and Crime, Criminal Justice Handbook Series (United Nations: New York, 2006), and Hamilton, C., *Guidance for Legislative Reform on Juvenile Justice*, Children’s Legal Centre and United Nations Children’s Fund (UNICEF), Child Protection Section, New York, 2011.

<sup>83</sup> For a comprehensive overview of the competence to apply alternative measures to judicial proceedings in Europe, see Gensing, A., “Jurisdiction and characteristics of juvenile criminal procedure in Europe”, in: Dünkler, F., Grzywa, J., Horsfield, P. and Pruin, I. (eds.), *Juvenile Justice Systems in Europe*, Vol. 4, 2<sup>nd</sup> ed. (Forum Verlag Godesberg: Mönchengladbach, 2011), p. 1622.

*Article 17 – Conditions for alternative measures to judicial proceedings  
[diversionary measures]*

(1) The CRC Committee recommends in General Comment No. 10 that alternative measures to judicial proceedings should be possible and used where there is compelling evidence that the child has committed the offence, the child has made an admission of responsibility, the admission has been made freely and voluntarily, and the admission will not be used against him or her in any subsequent legal proceedings.<sup>84</sup>

(2) In General Comment No. 10 the CRC Committee highlights the need for a child to give consent to the diversionary measure.<sup>85</sup> The consent has to be informed and given freely and voluntarily by the child, free from the influence of the authorities involved or of third parties. In this context “where appropriate” shall mean when the child is below the age of 16 years.<sup>86</sup>

(3) As stated above in Article 3 [Definitions], a child must never be without parental representation during judicial proceedings. Therefore the court concerned has the obligation to nominate a person who will exercise parental representation where the parents or legal guardian cannot participate in the judicial proceedings against the child. This could be a qualified employee of the welfare agency concerned. Where the legal system envisages the institution of an “appropriate adult [responsible adult]”,<sup>87</sup> the court may consider him or her as a *curator ad litem* [guardian ad litem].

(4) Adequate and specific information on the nature, content and duration of the diversionary measure, and on the consequences of a failure to cooperate in, carry out and complete the measure, must be given to the child so that his or her consent can be both informed and freely given.<sup>88</sup> States should also consider whether the consent of the child’s parents or guardian should be obtained, especially when the child is under 16 years of age.<sup>89</sup> Without these safeguards children may feel pressured into consenting to diversion programmes even where there is inadequate evidence to secure a conviction.<sup>90</sup> The child must also have the right to legal aid before consenting to any diversionary measure.

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<sup>84</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 27.

<sup>85</sup> *Ibid.*, para. 27.

<sup>86</sup> *Ibid.*, para.27.

<sup>87</sup> The phrase “appropriate adult” [“responsible adult”] is a legal term used in some States which refers to a trained person who supports and assists a child in conflict with the law at all stages of the juvenile justice proceedings where a parent or legal guardian is not available or, for whatever reason, is not present to support the child. Appropriate adults are particularly necessary for children who are not living with or who are estranged from their parents. They can also be useful where the child has a conflict of interest with a parent or the parent is applying pressure on the child to obtain a confession. In Chapter 1 of the South African Child Justice Act of 2008, an “appropriate adult” is defined as “any member of a child’s family, including a sibling who is 16 years or older, or care-giver”. In England and Wales, according to the Police and Criminal Evidence Act of 1984, Code C 1.7 of the Code of Practice for the detention, treatment and questioning of persons by police officers, an “appropriate adult” means “(i) the parent, guardian or, if the juvenile is in the care of a local authority or voluntary organization, a person representing that authority or organization; (ii) a social worker of a local authority; (iii) failing these, some other responsible adult aged 18 or over who is not a police officer or employed by the police”.

<sup>88</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 27.

<sup>89</sup> *Ibid.*, para. 27.

<sup>90</sup> *Ibid.*, para. 27. See also United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Commentary to Rule 11.

*Article 18 – Possible alternative measures to judicial proceedings  
[diversionary measures]*

(1) This paragraph contains a non-exhaustive list of diversionary measures that can be applied. Some of these measures are contained in Beijing Rule 11.4, while others stem from comparative research on juvenile justice laws. Priority should be given to restorative justice programmes.<sup>91</sup> States may also wish to consider a system of stepped responses for children who commit criminal offences. This could include formal and informal warnings and cautions, which allow the competent authority to avoid resorting to judicial proceedings. A warning may be given for a first or a subsequent offence as appropriate. In England and Wales, for example, under the Crime and Disorder Act of 1998,<sup>92</sup> police can give reprimands and final warnings to children. Similarly, under the Canadian Youth Criminal Justice Act of 2002,<sup>93</sup> before starting judicial proceedings, police must consider whether it would be sufficient to take no further action beyond warning the young person or administering a caution. Many children who have been warned about criminal behaviour are unlikely to offend again.

(2) Paragraph 1.3 of the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters<sup>94</sup> explains restorative justice as the process “in which the victim and offender, and where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator”.<sup>95</sup> The application of restorative justice programmes for children helps to reduce the burden of the criminal justice system<sup>96</sup> by offering real and effective alternatives to formal and often stigmatizing juvenile justice measures, and contributes to a great extent to the reintegration and rehabilitation of children in conflict with the law.<sup>97</sup> For children in conflict with the law, it is sometimes difficult to comprehend the impact of their actions and the importance of acting in conformity with the law.<sup>98</sup> Restorative justice programmes can improve this by enabling them to understand why their actions have caused distress to the victim and society at large.<sup>99</sup> Children in conflict with the law are given an opportunity, through restorative justice programmes, to be considered responsible members of society, subject to its laws and regulations.<sup>100</sup> In this regard, restorative justice programmes for children recognize the protagonist role of the victim of the crime,

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<sup>91</sup> As an example, see the South African Child Justice Act of 2008, which provides thus: “Section 55 (2) – Diversion programmes must, where reasonably possible – (a) impart useful skills; (b) include a restorative justice element which aims at healing relationships, including the relationship with the victim; (c) include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution; (d) be presented in a location reasonably accessible to the child; (e) be structured in a way that they are suitable to be used in a variety of circumstances and for a variety of offences; (f) be structured in a way that their effectiveness can be measured; (g) be promoted and developed with a view to equal application and access throughout the country, bearing in mind the special needs and circumstances of children in rural areas and vulnerable groups; and (h) involve parents, appropriate adults or guardians, if applicable.”

<sup>92</sup> Crime and Disorder Act 1998, [United Kingdom of Great Britain and Northern Ireland] 31 July 1998, Chapter 37.

<sup>93</sup> Youth Criminal Justice Act 2002, [Canada] assented to February 19th, 2002, Chapter 1.

<sup>94</sup> Economic and Social Council Resolution, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 24 July 2002 (ECOSOC Resolution 2002/12).

<sup>95</sup> *Ibid.*, para. 2.

<sup>96</sup> *Handbook on Restorative Justice Programmes*, United Nations Office on Drugs and Crime (UNODC), Criminal Justice Handbook Series (United Nations: New York, 2006), p. 2.

<sup>97</sup> *Ibid.*, p. 26.

<sup>98</sup> Vásquez Bermejo, O., *Qué es la justicia juvenil restaurativa?* Available at Justicia Restaurativa en Línea: <http://www.justiciarestaurativa.org/news/bfque-es-la-justicia-juvenil-restaurativa>.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

restore social peace within the community and encourage the offender to take responsibility for his or her actions and make compensation for the damage caused.<sup>101</sup> They also reduce the risk of reoffending by reintegrating the child into the community and by the identification of the risk factors that led to the commission of the offence.<sup>102</sup> These programmes are designed to reduce the need of resorting to formal judicial proceedings and to inculcate a culture of lawfulness and justice.<sup>103</sup>

In the application of restorative justice programmes, priority should be given to victim-offender mediation, the most prominent form of restorative justice. Victim-offender mediation is “designed to address the needs of crime victims while ensuring that offenders are held accountable for their offending”.<sup>104</sup> When victim-offender mediation schemes are applied, the outcome of the mediation should be brought to the attention of the prosecution or the competent court for consideration.<sup>105</sup> Further restorative justice programmes could include reparative probation, peacemaking circles,<sup>106</sup> and other restorative justice initiatives, such as restorative reunions which involve the community affected by the offender’s behaviour, and community and family group conferencing, as well as so-called “sentencing circles”, where “all of the participants, including the judge, defence counsel, prosecutor, police officer, the victim and the offender and their respective families, and community residents, sit facing one another in a circle. ... Discussions among those in the circle are designed to reach a consensus about the best way to resolve the conflict and dispose of the case, taking into account the need to protect the community, the needs of the victims, and the rehabilitation and punishment of the offender. The sentencing circle process is typically conducted within the criminal justice process, includes justice professionals and supports the sentencing process.”<sup>107</sup> Paragraph 2 of the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters further states that a restorative outcome means an agreement reached as the result of a restorative process. Examples of restorative outcomes given in that paragraph include restitution, community service and any other programme or response designed to accomplish reparation for the victim and community and reintegration of the victim and/or the offender.<sup>108</sup> It is important that restorative processes are used only with the free and voluntary consent of the parties involved.<sup>109</sup> The parties should be able to withdraw such consent at any time during the process.<sup>110</sup> “Agreements should be arrived at voluntarily by the parties and contain only reasonable and proportionate obligations.”<sup>111</sup> Restorative justice programmes can be managed by government bodies, such as the welfare agency involved, or by NGOs, which play a crucial role in this regard. The competent authority to refer a case for a restorative justice programme could be, subject to national legislation, the police, the prosecution or the court.

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<sup>101</sup> Tiffer Sotomayor, C., “La desjudicialización penal juvenil como un camino hacia la justicia restaurativa”, in: Tiffer Sotomayor, C. and Deniel, Ann-Julie, *Justicia Penal Juvenil: entre la justicia retributiva y la justicia restaurativa* (ILANUD: San José, Costa Rica, 2012), p. 53.

<sup>102</sup> Tiffer Sotomayor, C., “La desjudicialización penal juvenil como un camino hacia la justicia restaurativa”, in: Tiffer Sotomayor, C. and Deniel, Ann-Julie, *Justicia Penal Juvenil: entre la justicia retributiva y la justicia restaurativa* (ILANUD: San José, Costa Rica, 2012), p. 53.

<sup>103</sup> *Ibid.*, p. 53.

<sup>104</sup> *Handbook on Restorative Justice Programmes*, United Nations Office on Drugs and Crime (UNODC), Criminal Justice Handbook Series (United Nations: New York, 2006), p. 17.

<sup>105</sup> *Ibid.*, p. 17.

<sup>106</sup> *Ibid.*, p. 14.

<sup>107</sup> *Ibid.*, p. 22.

<sup>108</sup> Further information on the use of restorative justice and different forms of restorative programme can be found in the *Handbook on Restorative Justice Programmes*, United Nations Office on Drugs and Crime (UNODC), Criminal Justice Handbook Series (United Nations: New York, 2006).

<sup>109</sup> Economic and Social Council Resolution, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, 24 July 2002 (ECOSOC Resolution 2002/12), para. 7.

<sup>110</sup> *Ibid.*, para. 7.

<sup>111</sup> *Ibid.*, para. 7.

(3) The general principle of proportionality must apply also to the application of diversionary measures. Like any other measure, the diversionary measure needs to be reasonable.

*Article 19 – Completion of alternative measures to judicial proceedings  
[diversionary measures]*

(1) Where a diversionary measure has been completed successfully by the child, no further charges can be made. The CRC Committee requires in this regard in General Comment No. 10 that “the completion of the diversion by the child should result in a definite and final closure of the case”.<sup>112</sup>

(2) It must be ensured that the child will not have a criminal record or be regarded as a convicted offender after successfully completing a diversionary measure. With regard to data protection the CRC Committee makes it clear that “although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as ‘criminal records’ and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law.”<sup>113</sup>

*Article 20 – Non-compliance with alternative measures to judicial proceedings  
[diversionary measures]*

(1) A child’s failure to complete his or her diversionary measure may legitimately lead to the competent authority’s resuming his or her case. However, the deciding authority has to take the part of the measure already completed into consideration when sentencing the child, which will lead to a lighter sentence than initially presumed.

(2) Any admission of responsibility made by the child for the purpose of being considered for a diversionary measure cannot be used against the child in subsequent criminal proceedings.

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<sup>112</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 27.

<sup>113</sup> *Ibid.*, para. 27.

## Chapter III: Pre-trial proceedings

### *Article 21 – Right to information upon apprehension or arrest*

(1) Under Article 9 UDHR, Articles 9 and 11 ICCPR, Article 37(c) CRC, Article 5(1) ECHR, Article 7(3) ACHR, Article 14(1) Arab Charter and Article 6 Banjul Charter, no-one shall be subject to arbitrary detention. Principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>114</sup> also holds that arrest, detention or imprisonment shall be carried out only strictly in accordance with the provisions of the law and only by competent officials or persons authorized for that purpose. The term “arrest” is not used uniformly across States or across different legal systems. In some States it refers to a child who is temporarily detained, while in others it refers to a child against whom there is enough evidence to lay a criminal charge, or against whom a charge has been laid. Because of the varying use of terms, this Law uses the terms “apprehension” and “arrest” (as do the Beijing Rules) to denote any deprivation of liberty (or detention) of a child, even for the shortest space of time, by the police or other administrative authority. The CRC does not specifically address the right to be informed of the reasons for apprehension or arrest. However, Article 9(2) ICCPR, which applies equally to children as it does to adults, provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest.<sup>115</sup> The Inter-American Court of Human Rights has stated in this regard that the right to be informed of the reasons for apprehension or arrest “constitutes a mechanism to avoid illegal or arbitrary detentions from the very moment of imprisonment and, at the same time, ensures the individual’s right to defense”.<sup>116</sup> Since in this Law it is a child who is being apprehended or arrested, the apprehending or arresting authority needs to explain the reasons for the apprehension or arrest to the child in a child-friendly manner. In this context it needs to be reiterated that police officers and other law enforcement officers have to receive special training when concerned with matters related to juvenile justice.

(2) Most often, the parents or legal guardian are not present when the child is apprehended or arrested. Rule 10.1 of the Beijing Rules provides that a child’s parents or guardian shall be notified immediately when their child is being apprehended.<sup>117</sup> The CRC Committee recommends in General Comment No. 10 that “States parties explicitly provide by law for the maximum possible involvement of parents or legal guardians in the proceedings against the child. This involvement shall in general contribute to an effective response to the child’s infringement of the criminal law. To promote parental involvement, parents must be notified of the apprehension of their child as soon as possible.”<sup>118</sup> The Inter-American Court of Human Rights has found in a case where a child was detained that “the right to contact a relative becomes especially important when detainees are

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<sup>114</sup> United Nations General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*: resolution adopted by the General Assembly on 9 December 1988 (A/RES/43/173).

<sup>115</sup> See also Article 5(2) ECHR, Article 7(4) ACHR and Article 17(2)(c)(ii) ACRWC. CM/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 the Committee of Ministers on 24 September 2003 at the 853<sup>rd</sup> meeting of the Ministers’ Deputies, para. 15, suggests that children who are detained “should be promptly informed of their rights and safeguards in a manner that ensures their full understanding”.

<sup>116</sup> Inter-American Court of Human Rights, Judgement of June 7, (Ser. C) No. 99 (2003), para. 82.

<sup>117</sup> See also Guideline IV.C.29, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

<sup>118</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 54.

minors. In this scenario, the authority carrying out the detention and in charge of the detention place for the minor must immediately notify the next of kin or, otherwise, their representatives for the minor to receive timely assistance from the person notified.”<sup>119</sup>

### Variant

(2) The commentary to Article 21(2) applies to Variant (2) *mutatis mutandis*.

(3) Under some circumstances it proves difficult to reach the child’s parents or the legal guardian immediately. In this case, the officer concerned needs to ask the child or other persons involved whom to contact and notify instead, or how to get into contact with the parents or legal guardian. In States where an appropriate [responsible adult] exists, he or she can serve as a contact person.

(4) If it is impossible to reach any of the persons mentioned above, the officer concerned has the duty to involve the appropriate welfare agency, to ensure that the child is not left alone. This agency may be social services, the “appropriate adult” [“responsible adult”] where this institution exists, the duty lawyer scheme, or the Bar Association etc.

### Article 22 – Prohibition of the use of force and instruments of restraint

(1) International standards such as the Havana Rules<sup>120</sup> and the SMR<sup>121</sup> restrict the use of restraints and of force in all forms of detention.<sup>122</sup> These provisions on detention should apply not only while the child is held in police custody or pre-trial detention or after receiving a custodial sentence, but also during the apprehension or arrest phase, as the apprehending or arresting authority is dealing not with an adult but with a child, who is particularly vulnerable to violence.

(2-3) The Havana Rules define “exceptional circumstances” as the following: “to prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property”.<sup>123</sup> However, in its General Comment No. 10 the CRC Committee further narrows the circumstances in which restraint and force may be used to “only when the child poses an imminent threat of injury to himself or herself or others”,<sup>124</sup> thus eliminating the use of restraint for preventing serious destruction of property. The CRC Committee is clear that “[restraint or force]<sup>125</sup> must never be used as a means of punishment.”<sup>126</sup> Furthermore, the “exceptional circumstances” in which force or restraint may be used do not extend to situations in which disciplinary measures need to be applied.<sup>127</sup> The Havana Rules provide that measures of restraint and the use of force

<sup>119</sup> Inter-American Court of Human Rights, Judgement of September 18, (Ser. C) No. 100 (2003), para. 130.

<sup>120</sup> In particular, Havana Rule 62.

<sup>121</sup> *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), Rule 33.

<sup>122</sup> For Europe, see also CM/Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952<sup>nd</sup> meeting of the Ministers’ Deputies, paras. 64.1-70.7.

<sup>123</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 64.

<sup>124</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 89.

<sup>125</sup> Not in the original quote.

<sup>126</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 89.

<sup>127</sup> *Ibid.*, para. 89.

should be prohibited in all but exceptional circumstances<sup>128</sup> and used only “when all other means of control have been exhausted”.<sup>129</sup> The CRC Committee suggests training for staff on the rules and standards governing the use of force and restraint. Where staff violate these rules, they should be subject to disciplinary measures.<sup>130</sup>

(4) Only under the conditions that are mentioned in this Article may a measure of restraint be used. International standards provide that the use of physical restraint, the type of measures, the circumstances and the procedures for use etc. must be explicitly set out in laws and regulations.<sup>131</sup> Paragraph (4) thus considerably narrows the possibility of the use of force on a child, thereby safeguarding the child’s physical and psychological integrity.

(5) The SMR provide that “instruments of restraint, such as handcuffs, chains, irons and straitjacket, shall never be applied as a punishment”.<sup>132</sup> This Law incorporates this international provision and amends it, including further possible measures of restraint that must never be applied. This is deemed necessary since the SMR date back to 1955 and new instruments of restraint have been introduced and used by police forces since then.

(6) In order not to jeopardize the health of an unborn baby, the use of force or any measure of restraint is strictly prohibited on a female child where the police have positive knowledge of her pregnancy or believe that she may be pregnant.

(7) An important safeguard to protect the child from the abuse of force and physical restraints is keeping records when such a measure has been used. This will give the child the possibility of challenging any misuse and make the apprehending or arresting authority accountable. The fact that a written record documents any use of force and physical restraints will lead to a lower application of such measures as the police officer concerned has to fear severe legal consequences in cases of misuse.

(8) The carrying of weapons in any facility where a child is deprived of liberty should be prohibited, as well as their use in all circumstances involving a child.<sup>133</sup>

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<sup>128</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rules 63-65.

<sup>129</sup> *Ibid.*, Rule 64; Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 89.

<sup>130</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 89.

<sup>131</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 64; *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), Rule 34.

<sup>132</sup> *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), Rule 33; see also CM/Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies, para. 60.6.

<sup>133</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 65.

### Article 23 – Right to have the parents or legal guardian present

(1) Beijing Rule 15.2 provides that the parents or legal guardians shall be entitled to participate in proceedings<sup>134</sup> and may be required by the competent authority to attend them in the interests of the child. Recommendation 7(86) of the joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system uses even stronger language in stating that “police interviews with children must be conducted in the presence of a parent or guardian”.<sup>135</sup> The purpose of having a parent or legal guardian present particularly during questioning is to ensure that the child understands what is being said, that he or she does not feel intimidated and that he or she can express himself or herself clearly. The presence of a parent or legal guardian can also provide the child with emotional support.

(2) The parents or the legal guardian should be given a reasonable time to reach the police station where questioning will take place. The parents or legal guardian may be denied participation by the competent authority if such exclusion is necessary in the interests of the child. The requirement to have a parent or legal guardian present during questioning is meaningful only if the parent or legal guardian is notified of the situation and is given enough time to get to the place of questioning. If the parent or legal guardian will not be able to attend in a reasonable time, or cannot be contacted, or refuses to attend, or is charged with the same offence, or for some other reason it is inappropriate for the parent or legal guardian to be present, the welfare agency concerned must attend at the police station to support the child. The appropriate welfare agency may vary from State to State. In some States, even NGOs may provide a bank of trained people willing to act in this capacity, while in others, social workers or teachers perform the role. In States where the institution of an “appropriate adult” [“responsible adult”] exists, this person should be given an opportunity to meet the child before the child is questioned in order to introduce themselves and to explain their role.

### Article 24 – Right to legal aid

As mentioned above in Article 3 [Definitions], a child in conflict with the law must be provided with legal aid throughout the juvenile justice process<sup>136</sup> from the moment of apprehension or arrest. It is at this early stage of the juvenile justice process that children are at particular risk of ill-treatment and arbitrary detention.<sup>137</sup> Apprehended or arrested children may also be forced to confess

<sup>134</sup> Guideline IV.C.30, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010, states that “a child who has been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of ... one of the child’s parents or, if no parent is available, another person whom the child trusts”.

<sup>135</sup> Recommendation 7 of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25), para. 86; in this regard see also CM/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 the Committee of Ministers on 24 September 2003 at the 853<sup>rd</sup> meeting of the Ministers’ Deputies, para. 15.

<sup>136</sup> See also: CM/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 the Committee of Ministers on 24 September 2003 at the 853<sup>rd</sup> meeting of the Ministers’ Deputies, para. 15; and *Guideline IV.D.2, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

<sup>137</sup> See Open Society Foundation, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (Open Society Foundations: New York, 2011), pp. 5 and 11.

guilt or asked to pay a bribe in order to be released. Where the child does not choose a particular legal representative [legal aid provider], the police officer [law enforcement officer] [investigating officer] [prosecutor] concerned shall ensure that legal aid is provided for the child. The police officer [law enforcement officer] [investigating officer] [prosecutor] must then contact the appropriate body [legal aid board] [duty lawyer scheme] [Bar Association] for the most appropriate representation. The body responsible for providing legal aid should be clearly specified in law. In order to fully safeguard the rights of the child during juvenile justice proceedings, it is strongly advised that “legal aid providers representing children should be specially trained and their performance regularly appraised to ensure their suitability to work with children. Likewise, legal aid representatives working with children should work in close cooperation with other professionals such as social workers and diversion service providers.”<sup>138</sup> The monitoring body of the ICCPR, the United Nations Human Rights Committee, has considered it a violation of the Covenant if a child is arrested without being provided with “appropriate assistance in the preparation and presentation of their defence”.<sup>139</sup> The European Court of Human Rights has found in a case concerning a child in police custody that “the absence of a lawyer while he was in police custody irretrievably affected his defence rights” and was thus a violation of Article 6 of the Convention.<sup>140</sup>

A child must not be questioned until he or she has had the opportunity to receive legal advice.<sup>141</sup> General Comment No. 10 of the CRC Committee states that the purpose of legal assistance when the child is first questioned by either the police or prosecutors is to ensure independent scrutiny of the methods of interrogation used and to ensure that the evidence is voluntary and not coerced.<sup>142</sup> Children should be granted time alone with their legal representative to allow the legal representative to discuss the allegations with the child, and for the child to ask questions and generally understand the situation he or she is in before any questioning commences. The SMR state that “interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official”.<sup>143</sup>

### *Article 25 – Right to an interpreter*

(1) Article 40(2)(vi) CRC provides that States should ensure that children in conflict with the law have the free assistance of an interpreter if the child cannot understand or speak the language used.

<sup>138</sup> Recommendation 8 of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25); see also General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 45, and Human Rights Council Res. 10/2, *Human rights in the administration of justice, in particular juvenile justice*, 24 March 2009, para. 6.

<sup>139</sup> United Nations Doc. CCPR/C/92/D/1209,1231/2003 & 1241/2004, para. 6.6.

<sup>140</sup> ECHR judgement (Application No. 36391/02), para. 62.

<sup>141</sup> See also Recommendation 7 of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25), para. 86.

<sup>142</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 58.

<sup>143</sup> *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), Rule 93; see also CM/Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952<sup>nd</sup> meeting of the Ministers' Deputies, para. 23.4, which states that “consultations and other communications including correspondence about legal matters between prisoners and their legal advisers shall be confidential”.

General Comment No. 10 of the CRC Committee recommends that this assistance should not be limited to the trial but should also be available at all stages of the child justice process,<sup>144</sup> which includes a child's being questioned by the police. The CRC Committee further notes that "it is also important that the interpreter has been trained to work with children, because the use and understanding of their mother tongue might be different from that of adults".<sup>145</sup> The CRC Committee explains that a lack of knowledge and/or experience in that regard may impede the child's full understanding of the questions raised.<sup>146</sup> It is important to note that the phrase "cannot understand or speak the language used" refers not only to foreign or minority children but also to children with disabilities, such as deaf children and those who are mute, children with speech impairments and children with mental disabilities. The CRC Committee in its General Comment No. 10 states that, in line with the spirit of Article 40 (2)(vi), and in accordance with the special protection measures provided to children with disabilities in Article 23 CRC, States should ensure that such children are provided with adequate and effective assistance by well-trained professionals.<sup>147</sup>

(2) Where a child is in need of an interpreter, an interpreter must be physically present for the child whenever he or she is being interrogated by the police or the prosecutor. It is important to stress that the presence of this interpreter is mandatory and that his or her absence during questioning will lead to inadmissibility of evidence regarding the answers the child gives during the absence of his or her interpreter.

(3) In order to ensure that the interpreter is able to understand the child and that the child is also able to understand and communicate with the interpreter, it is necessary for them to meet before any questioning of the child takes place.

### *Article 26 – Right to consular assistance*

(1) According to Article 36 of the Vienna Convention on Consular Relations<sup>148</sup> and Rule 38 of the SMR, detained persons of foreign nationality have the right to consular assistance when taken into custody. This norm is also crucial for children of foreign nationality. In particular, children who have been forced to migrate due to war, famine or natural catastrophes need to be protected by consular rights. The Inter-American Court of Human Rights has mentioned in this regard that a consul "may assist the detainee with various defense measures, such as providing or retaining legal representation, obtaining evidence in the country of origin, verifying the conditions under which the accused is being held in prison".<sup>149</sup>

<sup>144</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 62.

<sup>145</sup> *Ibid.*, para. 62.

<sup>146</sup> *Ibid.*, para. 62.

<sup>147</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 63.

<sup>148</sup> The Convention has been ratified by more than 170 countries. On the question whether Article 36 of the Convention grants individual rights to detained persons, the International Court of Justice (ICJ) ruled in its judgement of 27 June 2001, *Judgement, I.C.J. Reports 2001*, p. 466, para. 77, that "Article 36, paragraph 1(b), spells out the obligations the receiving State has towards the detained person and the sending State. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual's detention 'without delay'. It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State 'without delay'.... The clarity of these provisions, viewed in their context, admits of no doubt. ... Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person."

<sup>149</sup> Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99, of October 1, 1999, Series A No. 16, para. 86.

(2) Similarly, paragraph (2) of this provision focuses on refugee and stateless children as well as children who are nationals of States without representation in the country they are living in. These children have the same consular rights with regard to the diplomatic representation of the State in charge of their interests. Also, any national or international authority whose task it is to protect children can give consular assistance if requested by the child. Such international authorities include the International Committee of the Red Cross (ICRC), the United Nations Refugee Agency (UNHCR) and the United Nations Children's Fund (UNICEF).

### *Article 27 – Police custody [pre-charge detention]*

(1) What at first sight appears to be an organizational provision is really a safeguard for the child protecting him or her from literal disappearance, as this provision enables the authorities involved and also the parents or legal guardian of the child to keep track of the child's physical whereabouts. The Inter-American Court of Human Rights has stated in this regard that the record "requires entry, among other data, of: identification of the detainees, cause for detention, notification to the competent authority, and to those representing them, exercising custody or acting as defense counsel, if applicable, and the visits they have paid to the detainee, the date and time of entry and release, information given to the minor and to other persons regarding the rights and guarantees of the detainee, record of signs of beating or mental illness, transfers of the detainee, and meal schedule. The detainee must also sign and, if he or she does not, there must be an explanation of the reason. The defense counsel must have access to this file and, in general, to actions pertaining to the charges and the detention."<sup>150</sup> In the context of data registration, the authorities involved should share information, "but always in accordance with the requirements of data protection legislation".<sup>151</sup>

(2) Children should not feel frightened when detained at the police station. In order to avoid trauma, the detained child must not be placed in a locked cell or secure area. Only in very exceptional circumstances, when the child poses a danger to himself or herself or exhibits violent behaviour, may he or she be placed in a locked cell. Even in this case, however, constant supervision and care must be guaranteed.

### *Article 28 – Questioning by the police [prosecutor]*

(1) Children are recognized as being more susceptible to interrogation techniques than adults are, and they need a higher level of protection against oppressive and unfair questioning. That protection can be provided in a number of different ways. The use of well-trained interrogators, whether police officers, other law enforcement officers or prosecutors, is considered of the utmost importance, as this will be the first point of contact with the child justice system for most children. Training should cover the physical, mental and social development of children as well as the special needs of the most vulnerable children, such as girls, disabled children, street children and children belonging to a religious, linguistic or other minority.<sup>152</sup>

<sup>150</sup> Inter-American Court of Human Rights, Judgement of September 18, (Ser. C) No. 100 (2003), para. 132.

<sup>151</sup> CM/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 the Committee of Ministers on 24 September 2003 at the 853rd meeting of the Ministers' Deputies, para. 13.

<sup>152</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 40.

(2) When a child is questioned it has to be ensured that he or she is treated respectfully and with dignity according to international human rights standards.<sup>153</sup> The police officer[s] and prosecutor[s] involved must not at any time shout at the child or threaten him or her physically or psychologically. The questioning authorities must use child-friendly language when interrogating.

(3-4) In General Comment No. 10, the CRC Committee requires that “there must be independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable”.<sup>154</sup> Where a confession has been compelled, Article 15 CAT states that legislation should contain a clear provision that this confession shall not be invoked as evidence in any proceedings. The CRC Committee requires in General Comment No. 10 that “the term ‘compelled’ should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The age of the child, the child’s development, the length of the interrogation, the child’s lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead the child to make a confession that is not true. That may become even more likely if rewards are promised such as: ‘You can go home as soon as you have given us the true story’, or lighter sanctions or release are promised.”<sup>155</sup> The CRC Committee recommends that when considering the voluntary nature and reliability of an admission or confession by a child, a court or judicial body must take into account the age of the child, the length of custody and interrogation, and the presence of legal or other counsel, parent(s), or independent representatives of the child.<sup>156</sup>

(5) In the questioning of a child who has been apprehended or arrested, certain minimum guarantees for the interrogation process have to be heeded by the investigating authorities. It is crucial that the child be provided with adequate breaks appropriate to his or her age, maturity and personal conditions such as health, emotional development and social upbringing. Due respect has to be paid to the child’s gender and racial, social, cultural, ethnic, religious and linguistic heritage and environment. Paragraph (5) of this Article reflects in full the principles set out in Article 13 of this Law.

(6) In order to ensure that a child is fully rested when being questioned, and is never arbitrarily deprived of sleep, he or she shall not be questioned after 10 p.m. However, where a child is apprehended after 10 p.m., he or she should be informed that his or her presence is required the following day after 8 a.m. for initial questioning. Only where the child is alleged to have committed a serious offence and it is feared that he or she may abscond will he or she be remanded to the police station, to be held there for no longer than 24 hours before being brought before a judge.

(7-8) As children are still developing towards maturity and nutrition is vital to concentration, it is essential to ensure that a child is provided with adequate food and drink while being questioned on the alleged offence. Furthermore, regular access to toilet and washing facilities needs to be granted at any time during the questioning period in order to ensure that the child is comfortable during the interrogation process.

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<sup>153</sup> See in this regard General Assembly Res. A/RES/67/166, *Human rights in the administration of justice*, 20 December 2012, para. 14.

<sup>154</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 58.

<sup>155</sup> *Ibid.*, para. 57.

<sup>156</sup> *Ibid.*, para. 58.

*Article 29 – Non-intimate search of a child*

(1) Children are more vulnerable than adults and can often feel intimidated by searches. Therefore their privacy and dignity must be particularly protected when any non-intimate search is conducted.<sup>157</sup> To minimize the risks related to searches and protect the child's safety, non-intimate searches of a child must be carried out by a police officer or other law enforcement officer of the same gender as that of the child. The reason and grounds for the search must also be explained to the child, before the search commences, in a way that the child understands. Transgender children should be provided with a choice regarding the gender of the person conducting the search.<sup>158</sup>

(2) The child has to be informed by the law enforcement officer [police officer] why he or she is being searched. The law enforcement officer [police officer] has also the duty to inform the child of the legal grounds for the search and by whom the search warrant was issued.

(3) This paragraph stresses that this Article applies only to non-intimate searches and has to be read in conjunction with the following one. Where the law enforcement officer [police officer] wishes to carry out any search that goes beyond the examination of the exterior of the child's body, the conditions and safeguards set out in Article 30 must apply.

*Article 30 – Intimate search of a child*

(1) An intimate search consists of the physical examination of the child's body orifices other than the mouth. Due to the intrusive nature of such searches, they should be carried out only in limited circumstances and where safeguards are in place to protect the child. Under Article 40(1) CRC, every child alleged as, accused of, or recognized as having infringed the criminal law should be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Rule 10.3 of the Beijing Rules also states that contact between the law enforcement agencies and a child shall be managed in such a way as to respect the legal status of the child, promote his or her well-being and avoid causing harm to him or her, with due regard to the circumstances of the case. An intimate search must not be carried out unless it has been authorized by a competent court. The authorizing court must carefully review all the relevant factors before authorizing an intimate search. In particular, the court must consider whether the grounds for believing that an article may be being concealed are reasonable. In this context it needs to be stressed that the general provision of some countries that a senior police officer or a senior prosecutor has the power to order such a search warrant is not sufficient for this Law and therefore should not be applied when it comes to intimately searching children. The rationale behind this is that children in the juvenile justice system are particularly vulnerable and more exposed to violence than adults. The power to order an intimate search of a child can easily be misused by police officers or other law enforcement officers, which makes a judicial order necessary in order to safeguard children's rights within the administration of justice. The search warrant needs to contain the name of the issuing court and that of the addressee of the warrant. It needs to state why the child is being intimately searched and to specify the alleged criminal offence committed, including the corresponding norm of criminal law. It also needs to contain information on the evidence against the child and the expiration date of the warrant.

<sup>157</sup> See Recommendation 7 of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25), para. 86.

<sup>158</sup> See Handbook on prisoners with special needs, United Nations Office on Drugs and Crime (UNODC), Criminal Justice Handbook Series (United Nations: New York, 2009), p. 118.

(2) Only in exceptional cases may an intimate search be carried out. “Strictly necessary” in paragraph (2)(a) means that there are no other means available to determine facts important to the investigation of the criminal offence. Furthermore, there have to be reasonable grounds for believing that an item that needs to be found cannot be found without the child’s being intimately searched. In any case, paramount consideration must be given to the health of the child. This means that any action which puts the child’s health at risk, for example forcing the child to swallow laxatives or emetics in order to prove that he or she has swallowed drugs or other items relevant to the alleged criminal offence, is strictly prohibited.<sup>159</sup>

(3-6) In order to minimize any embarrassment felt by a child, ensure that he or she does not feel intimidated and protect his or her safety and health, an intimate search should be carried out only by a registered medical practitioner or registered nurse of the same gender as that of the child and should be conducted only when the child’s parent or legal guardian or staff of the welfare agency concerned or the “appropriate adult” [“responsible adult”] is present. Transgender children should be provided with a choice regarding the gender of the person conducting the intimate search.<sup>160</sup> No intimate search may be carried out except at a hospital or registered medical practitioner’s surgery, or at some other licensed place used for medical purposes.

### *Article 31 – Taking a non-intimate sample from a child*

Non-intimate samples are samples that are not attached to the intimate parts of the child’s body. This includes hair (but not pubic hair), fingerprints, saliva, skin impressions, samples from a nail or from under a nail, and swabs taken from the mouth or from any other part of the child’s body that is not intimate. Before any non-intimate samples are taken the child must be informed of the reason for which they are to be taken. Regulations must specify how samples are to be labelled and stored.

### *Article 32 – Taking an intimate sample from a child*

(1) An intimate sample is generally a dental impression or sample of blood, any tissue fluid, urine, or pubic hair, or a swab taken from any part of the genitals or from a body orifice other than the mouth. As with intimate searches, because of the intrusive nature of the taking of such samples, they should be taken only in limited circumstances and with appropriate safeguards. The commentary to Article 30(2) applies to this paragraph *mutatis mutandis*.

(2) An intimate sample should be taken only where the competent court has reasonable grounds to believe that such a sample will tend to prove or disprove the child’s involvement in a criminal offence under the law. Such an approach should ensure that children are not subjected to intrusive measures unnecessarily.

<sup>159</sup> The European Court of Human Rights found in its judgement of 11 July 2006 (Application No. 54810/00, para. 83) that to administer emetics to an adult alleged offender in order to obtain evidence was a violation of Article 3 of the European Convention on Human Rights prohibiting torture and any inhuman or degrading treatment or punishment. Further, the Court found (paragraph 75) that “any interference with a person’s physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny, with the following factors being of particular importance: the extent to which forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the manner in which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available and the effects on the suspect’s health”.

<sup>160</sup> See *Handbook on prisoners with special needs*, United Nations Office on Drugs and Crime (UNODC), Criminal Justice Handbook Series (United Nations: New York, 2009), p. 118.

(3-4) If authority is given for an intimate sample to be taken, only a registered medical practitioner or a registered nurse of the same gender as that of the child must take the sample, which must be done at a hospital or registered medical practitioner's surgery, or at some other certified place used for medical purposes. Where an intimate sample is to be taken from a transgender child, he or she should be provided with a choice regarding the gender of the medical practitioner or nurse.<sup>161</sup>

(5) The child's parents should also be present when any such sample is taken, to ensure that the child is safe and provide him or her with emotional support.

(6) In order to safeguard the child's privacy and dignity and to protect him or her from any harm at the hands of State officials, this Law provides that where the child's parents or legal guardian are absent, the appropriate personnel of the welfare agency should be present. The "appropriate adult" ["responsible adult"] could replace the parents or legal guardian in States where this institution exists.

### *Article 33 – Release of the child from police custody*

(1) It should go without saying that an apprehended or arrested child who is brought to a police station and remains uncharged has to be released and handed over to his or her parents immediately. Where the child is charged, he or she should also generally be released post-charge after the police officer has consulted the competent prosecutor. In any case, the child needs to be handed over to the parents with the proviso that he or she may have to return to the police station or appear before the court if subsequent formal proceedings are initiated. Where [a] pre-trial diversionary measure[s] terminate[s] the juvenile justice proceedings, the child may not even have to appear again anywhere. The rationale behind this paragraph is that the vast majority of crimes committed by children are minor property crimes. Such crimes rarely pose a danger to the public and there is little reason for children in these cases to be detained for as long as 24 hours. If further questioning is felt to be necessary, then rather than being detained, the child should be given notice to return to the police station at a stated place, date and time. States will need to give consideration to what sanctions should be put in place for children who fail to return on their due date.

(2) Article 37(b) CRC requires that States should deprive a child of his or her liberty only as a measure of last resort and for the shortest appropriate period of time. Only in exceptional cases and only if the conditions listed in this paragraph apply, can the police officer concerned make an application to the competent court to order pre-trial detention. Under no circumstances may the police officer have the power to decide on pre-trial detention, since due process requires an independent and impartial judicial body to decide on the deprivation of liberty.

(3) The joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system observes that "detaining a child in a police cell for even a few hours presents a risk of violence. Where there is no law requiring him or her to be brought before a court or other body within a limited period of time, or if such law is flouted, children are at grave risk as the courts are unaware of the child's detention. Children who do not have parents or families who will raise

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<sup>161</sup> Ibid., p. 118.

concerns can get ‘lost’ in the system under these circumstances.”<sup>162</sup> Therefore, every child deprived of his or her liberty on a criminal charge must be brought promptly before a judge for the exercise of judicial power and is entitled to be tried within a reasonable time or else to be released.<sup>163</sup> Beijing Rule 10.2 provides in this regard that “a judge or other competent official or body shall, without delay, consider the issue of release”. Article 9 ICCPR also asserts that it shall not be the general rule that persons awaiting trial be detained in custody. The commentary to Rule 10.2 of the Beijing Rules further states that “the question of release ... shall be considered without delay by a judge or other competent official”. The Inter-American Court of Human Rights calls for “immediate judicial control”.<sup>164</sup> Similarly, Article 40(2)(b)(iii) CRC establishes that every child alleged as or accused of having infringed the criminal law has the right to have the matter determined without delay.<sup>165</sup> The CRC Committee has recommended that the maximum time that a child may be held in pre-charge police detention before being taken before a court should be set at 24 hours.<sup>166</sup>

### *Article 34 – Application of alternative measures to pre-trial detention*

(1) Both the CRC and the Beijing Rules emphasize that depriving a child of liberty should be a measure of last resort and used only for the shortest appropriate period of time.<sup>167</sup> The Beijing Rules require courts to give “careful consideration” before restricting a child’s liberty,<sup>168</sup> while Rule 2 of the Havana Rules provides that deprivation of liberty “should be limited to exceptional cases”. Pre-trial detention should not be used as a punishment as this would violate the presumption of innocence.<sup>169</sup> The Beijing Rules also recommend the application of alternative measures to pre-trial deprivation of liberty<sup>170</sup> but recognize that there will be instances where deprivation of liberty may be necessary.

(2) Requiring the payment of bail is likely to impact disproportionately on the most vulnerable and marginalized children, whose parents may not have the financial means to pay bail, or may be unwilling to pay due to estrangement between the child and themselves, or may be impossible to find. Children are unlikely to have either sufficient income or sufficient capital to pay bail themselves. The practice of requiring a bail payment or a sum of money to be paid into court as security is likely to discriminate against poor children and result in their being unnecessarily deprived of their liberty. In order to avoid discrimination, it is therefore prohibited to require such payments.

(3) The court can impose conditions on a child when releasing him or her, such as the requirement to attend at a particular place during the day, which could include attendance at school, and curfews

<sup>162</sup> Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system, 27 June 2012 (A/HRC/21/25), para. 29.

<sup>163</sup> This is in line with the human rights treaties mentioned in the commentary to Article 13(6) of this Law.

<sup>164</sup> Inter-American Court of Human Rights, Judgement of September 18, (Ser. C) No. 100 (2003), para. 129.

<sup>165</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 10.

<sup>166</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 83.

<sup>167</sup> Article 37(b) CRC and United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 17.1(b).

<sup>168</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 17.1(b).

<sup>169</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 80.

<sup>170</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 13.2.

requiring the child to remain in the home between certain hours. The court may also as a stronger measure impose close supervision of the child, intensive care or placement with a foster family in order to avoid any form of pre-trial detention.

(4) Where a child is released, the court may direct him or her to return to court for further proceedings, such as the trial, or in order to decide on pre-trial diversionary measures. The notice directing the child to return to court must be given in writing in order to prevent misunderstandings that might lead to severe legal consequences for him or her.

### *Article 35 – Pre-trial detention*

(1) A guiding principle of this Law is the principle that detention is a measure of last resort, which is in line with international standards and norms.<sup>171</sup> Therefore, a pre-trial detention order may be made only in exceptional cases. Such an exceptional case exists when the child has allegedly committed a serious offence [or is a persistent offender], where he or she poses a danger to himself or herself or others, where he or she may tamper with a witness or obstruct the course of justice, or where it is believed that he or she may avoid further judicial proceedings by physically escaping. Article 35(1) mirrors Article 33(2) of this Law.

(2-3) Any pre-trial detention has to be for the shortest appropriate period of time. There is no international rule on how long pre-trial detention may last. However, the CRC Committee recommends in General Comment No. 10 that the period of pre-charge detention should be no longer than 30 days.<sup>172</sup> In order to safeguard the rights of children deprived of their liberty, this Law sets the limit of three months as a maximum time for pre-trial detention, which in exceptional cases can be renewed once only for an additional period of three months.<sup>173</sup> After this time, the child has to be released. This is in line with General Comment No. 10 of the CRC Committee, which requires that a final decision on the charges shall be made not “later than six months after they have been presented”<sup>174</sup> and has proved very influential in some States.

(4) This paragraph obliges the State to put in place proper child protection mechanisms in order to prevent pre-trial detention for children who should not be in the juvenile justice system. Pre-trial detention should never be an alternative for dealing with children who have mental health problems and/or are homeless.

(5) Bearing in mind the general principle that deprivation of liberty should be a measure of last resort and for the shortest appropriate period of time, the court is required to ensure that the time a child has to spend in pre-trial detention counts towards and is deducted from the final sentence if the sentence contains deprivation of liberty.

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<sup>171</sup> Article 37(b) CRC and United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 17.1(c). See also Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 79.

<sup>172</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 83.

<sup>173</sup> CM/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 the Committee of Ministers on 24 September 2003 at the 853<sup>rd</sup> meeting of the Ministers’ Deputies, para. 16, states that “when, as a last resort, juvenile suspects are remanded in custody, this should not be for longer than six months before the commencement of the trial”.

<sup>174</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 83.

### *Article 36 – Conditions of pre-trial detention*

All children deprived of their liberty enjoy as a minimum all the rights that already convicted children enjoy. Therefore all the rights and guarantees of Part 2 [Title] 2, Chapter VI of this Law find full application. In particular, children placed in pre-trial detention must always be held separately from adults,<sup>175</sup> as “there is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate”.<sup>176</sup> In addition, Beijing Rule 13.5 requires that children be provided with “care, protection and all necessary individual social, educational, vocational, psychological, medical and physical assistance ... that they may require in view of their age, sex and personality”. Different forms of assistance that address the particular needs of young detainees should be available to take into account gender needs, possible addiction-related issues and other traumas to do with the juvenile justice process, such as arrest. Any decision regarding pre-trial detention and the conditions attached to pre-trial detention can be challenged by the child at the appeals court [chamber] of the children’s [juvenile] [youth] court according to Article 5(6) of this Law. In this case the principle of legal representation throughout judicial proceedings applies, so the child has the right to consult a lawyer free of charge.

### *Article 37 – Review of pre-trial detention*

(1) In order to ensure that children are detained only as a measure of last resort and for the shortest appropriate period of time, a regular review of detention should be undertaken by the court with jurisdiction over the case. The CRC Committee recommends that the legality of any pre-trial deprivation of liberty should be reviewed regularly, preferably every two weeks.<sup>177</sup>

(2-3) To ensure that the review is meaningful, safeguards should be put in place, including a requirement that the child be present and legally represented.

(4) As stated above in Article 35, pre-trial detention should be used only as a measure of last resort and under the conditions mentioned therein. The burden of proof for continued pre-trial detention lies with the prosecution.

(5) The competent court has the obligation to check regularly that the child is not being detained with adults and also that the pre-trial conditions are in compliance with this Law. If the court is not satisfied with the conditions of detention, it must order the child’s release or transferral to another pre-trial detention facility.

<sup>175</sup> Article 37(c) CRC, Article 10(2)(b) and (3) ICCPR, and Beijing Rule 13.4. See also: Guideline IV.A.6.20, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

<sup>176</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 85.

<sup>177</sup> *Ibid.*, para. 83

## Chapter IV: Trial

### *Article 38 – Right to fair and speedy trial*

(1) On the international level, the right to a fair trial is stipulated in Article 50 CRC, Article 14 ICCPR, Article 10 UDHR, Articles 6 and 7 ECHR, Articles 8 and 25 ACHR, Article 13 Arab Charter, Article 7 Banjul Charter and Article 17 ACRWC. The right to a fair and speedy trial is a cornerstone of the rule of law in any democratic constitutional State.<sup>178</sup> This Law establishes that only a competent, independent and impartial court can try a child according to Article 5 of this Law.

(2) Article 40(2)(b)(iii) CRC states that every child in conflict with the law has the right to have the matter determined without delay.<sup>179</sup> Lengthy delays are likely to impact significantly on a child's welfare and education. At the same time, a shorter length of proceedings should be the result of a process in which the human rights of the child and legal safeguards are fully respected. Although there is no standard definition of what constitutes unreasonable delay or what length of time between charge and final trial is acceptable, the CRC Committee in General Comment No. 10 states that for children in conflict with the law the time between the commission of the offence and the decision by the court should be as short as possible.<sup>180</sup> The CRC Committee further recommends that States set and implement time limits for the period between the decision of the prosecutor (or other competent body) to bring charges against the child and the final adjudication and decision by the court.<sup>181</sup> These time limits should be much shorter than those set for adults, to reflect the fact that children's time frames are different from those of adults. Therefore the CRC Committee recommends that a final decision on the charges be made no later than six months after they have been presented.<sup>182</sup>

### *Article 39 – Right to information prior to trial*

Prior to starting the trial of a child, the court has the duty to inform him or her in a child-friendly manner why he or she is being tried and what needs to be established before a sentence can be passed upon him or her. The court has further to tell the child about his or her own role during the trial and introduce the other participants. It then has to tell the child about the court procedures and also the legal consequences for him or her if found guilty.

### *Article 40 – Restrictions on the use of handcuffs and other restraints*

The commentary to Article 22 of this Law applies *mutatis mutandis* to this norm. According to Havana Rule 63 the use of handcuffs or other restraints against children should be prohibited. Havana

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<sup>178</sup> For the Americas and the obligation of the application of the principle of legality by the American Convention on Human Rights, see: Inter-American Commission on Human Rights, Rapporteurship on the Rights of the Child, *Juvenile justice and human rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, 13 July 2011, paras. 61-74. See further Guideline IV.D.4, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

<sup>179</sup> See also Article 14(3)(c) of the ICCPR, which states that “everyone shall be entitled ... to be tried without undue delay”.

<sup>180</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 84.

<sup>181</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 83.

<sup>182</sup> *Ibid.*, para. 83.

Rule 64 further states that “instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time.”

### *Article 41 – Right to presence of parents or legal guardian during trial*

(1) Article 40(2)(b)(iii) CRC provides that children have the right to have the matter determined in the presence of their parents or legal guardian unless it is considered not to be in the best interests of the child. The Beijing Rules take this further and provide that the parents or legal guardian may be required by the competent authority to attend the proceedings in the interests of the child.<sup>183</sup> It is generally recognized that the presence of the child’s parents or legal guardian at judicial proceedings can help to reassure him or her and provide emotional support.

(2) In some cases it may be impossible to reach the parents or legal guardian and have them attend the trial, while in other cases the parents or legal guardian simply do not want to attend the trial of the child. It may also sometimes not be in the best interests of the child to have the parents or the legal guardian present during trial. The CRC Committee does not provide any examples of occasions when such attendance may not be in the best interests of the child, but clearly where the parents were involved in the criminal offence themselves, or there are concerns about the parents’ failure to care for the child adequately or appropriately, or there are concerns about action that the parents may take against the child as a result of evidence given at the trial, it may be deemed not to be in the best interests of the child for the parents to attend. But since it is a child who is being tried, someone needs to exercise parental responsibility. Therefore the court needs to nominate a curator ad litem [guardian ad litem] to guide the child as a parent would throughout the trial and act on his or her behalf by law. The *curator ad litem* [guardian ad litem] could be the “appropriate adult” [“responsible adult”], in the form of a relative, a family friend or a professional “appropriate adult” [“responsible adult”] in States where this institution exists, or a member of staff of the appropriate welfare agency.

### *Article 42 – Right to legal aid and consular assistance during trial*

(1) The right of a child to have legal or other appropriate assistance in the preparation and presentation of his or her defence at trial is a well-recognized one.<sup>184</sup> Article 40(2)(b)(ii) CRC refers to “legal or other appropriate assistance in the preparation and presentation of his or her defence”.<sup>185</sup> While the CRC refers to “other” appropriate assistance (for example, from social workers) the CRC Committee recommends that “States provide, as much as possible, for adequate trained legal professionals, such as expert lawyers or paralegal professionals”.<sup>186</sup> The CRC Committee recommends that legal assistance and representation should be provided free of charge to children,<sup>187</sup> a recommendation also supported by the Council of Europe.<sup>188</sup> Failure to provide legal representation for a child

<sup>183</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 15.2.

<sup>184</sup> See above in Article 3 [Definitions].

<sup>185</sup> See also Article 14(3)(d) ICCPR.

<sup>186</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 49.

<sup>187</sup> *Ibid.*, para. 49.

<sup>188</sup> See Guideline VI.D.2.38, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

facing trial means that the child is denied full access to the judicial proceedings, and is not able to participate or defend himself or herself in the proceedings in a meaningful way.

(2) Every child who is being tried must have legal representation throughout the court proceedings. Depending on the legal system concerned, legal representation must be provided only by certified and qualified persons according to national legislation.

(3) Where a child does not feel himself or herself legally well represented, he or she can dismiss his or her legal representative and – depending on the legal system of the State concerned – either appoint a new legal representative or request the court to appoint a new legal representative. This right can also be exercised by the parents where the child is not capable of overseeing and judging the quality of the work provided by the legal representative. This will mainly be the case where the child is very young.

(4) The commentary to Article 26 of this Law applies *mutatis mutandis*.

### *Article 43 – Right to an interpreter during trial*

(1-2) Where the child does not speak or understand the language of the court, the court has the duty to appoint an interpreter. It has to be ensured that there are sufficient interpreters available to meet the needs of a child who cannot communicate in the language of the court, and that training is available, free of charge if necessary, to ensure an adequate supply of interpreters for linguistically disabled children. In order to promote access to and participation in judicial proceedings, States should further ensure that there is appropriate training available to those working in the field of juvenile justice. States also need to recognize the needs of children with disabilities, including children with hearing and speech impairments. Finally, it has to be ensured that sufficient training is available, if necessary free of charge, so that enough specially trained professionals, such as professional sign-language interpreters, are available to help children with disabilities during judicial proceedings.

### *Article 44 – Right to privacy during trial*

(1-2) Article 40(2)(b)(vii) of the CRC provides that a child has the right “to have his or her privacy fully respected at all stages of the proceedings”.<sup>189</sup> The CRC Committee states in General Comment No. 10, paragraph 64, that the phrase “all stages of the proceedings” denotes the sequence that starts at the point of initial contact with law enforcement bodies and continues up to the final decision by a competent authority, or release from supervision or custody.<sup>190</sup> While it is a fundamental precept that trials must be public and open, both the ICCPR and the CRC make an exception for children’s cases.<sup>191</sup> The ICCPR expressly permits cases to be heard in closed court if the private lives of the parties involved so require, and permits the exclusion of the press and public from the trial.<sup>192</sup>

<sup>189</sup> See also Article 10 ACRWC, Article 7 AYC, and Recommendation 7 of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25), para. 87.

<sup>190</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 64.

<sup>191</sup> For a comparative European perspective on this matter, see: Gensing, A., “Jurisdiction and characteristics of juvenile criminal procedure in Europe”, in: Dünkel, F., Grzywa, J., Horsfield, P. and Pruin, I. (eds.), *Juvenile Justice Systems in Europe*, Vol. 4, 2nd ed. (Forum Verlag Godesberg: Mönchengladbach, 2011), p. 1640.

<sup>192</sup> See Article 14(1) ICCPR and Article 40(2)(b)(vii) CRC.

(3) In order to ensure that children are given the privacy to which they have a right under the CRC,<sup>193</sup> it is essential that there be a specific prohibition on the publication of any information that would tend to identify the child. This can be quite wide-ranging and may need to cover people closely related to the child; for instance, naming the parents is likely to lead to identification of the child. So, too, may naming the child's school. In order to enforce the privacy provisions, it is generally necessary to impose significant sanctions that will attach to individuals and corporate bodies who breach the provisions. Any publication in breach of subsection (1) above shall constitute contempt of court [shall be a criminal offence – to be specified by each State].

#### *Article 45 – Right to participation during trial*

This Article reflects Beijing Rule 14.2. To enable children to participate fully in the proceedings, these must be conducted in language that the child understands. Language used in judicial proceedings can often be confusing and intimidating to children. Judges, prosecutors and the child's legal representative all need to consider how to avoid over-complicated legal language and jargon. Effective and meaningful participation also requires that children must be able to understand the judicial procedure and to take an active part in defending themselves. General Comment No. 10 states that a child needs to “comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure[s] to be imposed. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself or herself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices.”<sup>194</sup> It is unlikely that a child, or even an adult, will understand all the intricacies and all the exchanges which take place in the courtroom. However, the child should have a broad understanding of the nature of the process and of what is at stake for him or her. Legislation should allow a judge to terminate judicial proceedings if he or she believes that the child is not able to understand the charges and the possible consequences or penalties that may arise from the offending behaviour in question. Consideration should also be given to the fact that a child's attention span is likely to be less than that of an adult, and that as a result the child will need frequent breaks from proceedings. The same holds true for children who suffer from poor health.

#### *Article 46 – Right to hear evidence during trial*

(1) Article 14(3)(d) ICCPR provides that a defendant has “the right to be tried in his presence”.<sup>195</sup> This right is one of the few due-process rights not repeated in the CRC.

(2) The right of the child to be present at the trial, the right to know the evidence against him or her and the right to defend himself or herself are all fundamental principles of a fair trial. The court shall be given the power to ask for the removal of the child from the court during the course of a trial where the court takes the view that it is in the best interests of the child. If a child is not allowed to

<sup>193</sup> Article 40(2)(b)(vii) CRC.

<sup>194</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 46.

<sup>195</sup> See also Article 6(3)(c) ECHR, Article 8(2)(d) ACHR and Article 16(3) Arab Charter. This right is not repeated in the CRC. There is a practice in some States of asking the child to leave the court where the judge takes the view that it is in the best interests of the child.

stay in court to hear the evidence, his or her ability to defend himself or herself and instruct his or her legal representative will be significantly diminished, and the trial is unlikely to be a fair trial.

(3) Depending on the legal system of the State concerned, be it adversarial, inquisitorial or hybrid, the child must have the right to either examine witnesses – mostly in common-law and hybrid systems [“cross-examination”] – or have examined – mostly in countries with a civil-law tradition by the court or the prosecutor – the [adverse]<sup>196</sup> witnesses [and obtain the participation and examination of witnesses on his or her behalf]<sup>197</sup> as a fundamental right during the trial.<sup>198</sup>

### *Article 47 – Right not to be compelled to give testimony or confess guilt*

(1 and Variant 1) For a trial to be fair there must be a balance between encouraging a child to participate and not forcing the child to testify or to confess guilt. Article 14(3)(g) ICCPR and Article 40(3)(iv) CRC provide that the accused shall not be compelled to testify against himself or herself or be forced to confess to a crime.<sup>199</sup> Therefore a child should be given the right in law not to give evidence at his or her own trial at all, if that is what he or she chooses. In General Comment No. 10, the CRC Committee has interpreted this right contained in Article 40 as meaning that a confession obtained as a result of torture or cruel, inhuman or degrading treatment would clearly infringe the right not to be compelled to give testimony, would be a grave violation of the rights of the child and would be wholly unacceptable.<sup>200</sup> The Committee also recognizes that there are many other, less violent ways to coerce or to lead the child to a confession or a self-incriminatory testimony.

(2) If the child chooses to exercise his or her right to remain silent during trial, the court must not regard this as a confession of guilt.

(3) To ensure that the child’s confession was voluntarily given, the CRC Committee recommends that the court takes into account “the age of the child, the child’s development, the length of the interrogation, the child’s lack of understanding and the fear of unknown consequences or of a suggested possibility of detention that may have led the child to make a confession that is not true”.<sup>201</sup>

### *Article 48 – Right to appeal*

(1) Article 14(5) ICCPR provides that everyone convicted of a criminal offence shall have the right to have the conviction and sentence reviewed by a higher tribunal.<sup>202</sup> This applies without exception to children as well. Article 40(2)(b)(v) CRC contains this right to appeal for children but extends

<sup>196</sup> This is the language of the CRC in Article 40(2)(b)(iv). However, in an inquisitorial system there are only witnesses, but not adverse witnesses as the trial is not adversarial.

<sup>197</sup> This is the language of the CRC in Article 40(2)(b)(iv). However, the court decides upon application by the defendant or prosecutor whether to hear a witness or not.

<sup>198</sup> Article 14(3)(e) ICCPR, Article 40(2)(b)(iv) CRC, Article 6(3)(d) ECHR and Article 8(2)(f) ACHR.

<sup>199</sup> See also Article 8(2)(g) ACHR and Article 16(6) Arab Charter. Further, the European Court of Human Rights in one case [(App.19187/91), 17 December 1996, (1997) 23 EHRR 313, ECHR 1996-VI] found that the right not to confess guilt or incriminate oneself is a key element of the right to a fair trial, as enshrined in Article 6(1) ECHR. See for further discussion on this issue: Jacobs, F., White, R. and Ovey, C., *The European Convention on Human Rights*, 5th ed. (Oxford University Press: Oxford, 2009), p. 281.

<sup>200</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 56. No such admission or confession can be admissible as evidence: see Article 15 CAT.

<sup>201</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 57.

<sup>202</sup> Article 16(7) Arab Charter, Article 7(a) Banjul Charter, Article 17(2)(c)(iv) ACRWC and Article 8(2)(h) ACHR; Article 2 Protocol No. 7 to the ECHR.

the right to cover all children who are considered to have infringed the criminal law, thus covering children who have been diverted as well as those who have been convicted of an offence. The Human Rights Committee in its General Comment No. 32 makes it very clear that the right is not confined just to serious offences, but applies to all offences.<sup>203</sup> It is also interpreted as a broad right of appeal. The Human Rights Committee has interpreted the right as including a right to appeal against the sufficiency of evidence, the law and the conviction itself. Any appeal must allow for due consideration of the nature of the case and must not be limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts.<sup>204</sup> With regard to this Law, the child shall have the right to appeal against the decision at the appeals court [chamber] at the children's [juvenile] [youth] court established under Article 5(2) of this Law. If after exhausting domestic remedies, it is believed that the final decision of the highest court in the State concerned and/or the laws and/or policies of that State are in contravention of its treaty obligations, a complaint may be lodged to the relevant regional body, provided that it meets the necessary criteria for admissibility. For children in member States of the Council of Europe and by extension States parties to the ECHR, the complaint could be taken to the European Court of Human Rights. For member States of the Organization of American States<sup>205</sup> and States parties to the ACHR, the complaint can be lodged with the Inter-American Commission on Human Rights and if found admissible is sent to the Inter-American Court of Human Rights. For members of the African Union and by virtue thereof States parties to the Banjul Charter, complaints can be lodged with the African Commission on Human and Peoples' Rights.

(2) A right to appeal is meaningful only if children are informed thereof in a language they understand and provided with legal assistance to prepare an appeal. As with the original trial, this assistance should be provided free of charge. A child is unlikely to have the money to pay for legal representation and requiring a child's parents to pay can discriminate against poorer families. Further, the Human Rights Committee in General Comment No. 32<sup>206</sup> has recognized that the right to appeal can be exercised effectively only if access is given to a duly reasoned, written judgement of the court and other documents such as the trial transcripts. Secondary legislation or Rules of Court should cover the documents to be disclosed, timescales for appeal and other relevant information, such as how evidence presented at the trial and any transcript of the trial should be preserved by the court and for how long.

(3) In order to lodge an effective appeal it is also necessary that the child is legally represented. The commentary to Article 24 therefore applies *mutatis mutandis*.

### *Article 49 – Discontinuance of proceedings*

(1) The court should have the power to discontinue judicial proceedings at any stage and discharge the child if it considers that it is not necessary to proceed with the case for the protection of society, the prevention of crime or the promotion of respect for the law and the rights of victims,<sup>207</sup> or if continuance is not in the best interests of the child. This last must be where there is evidence

<sup>203</sup> Human Rights Committee, General Comment No. 32, Article 14: *Right to equality before courts and tribunals and to a fair trial*, 23 August 2007 (CCPR/C/GC/32), para. 45.

<sup>204</sup> *Ibid.*, para. 48.

<sup>205</sup> With the exception of the United States of America.

<sup>206</sup> Human Rights Committee, General Comment No. 32, Article 14: *Right to equality before courts and tribunals and to a fair trial*, 23 August 2007 (CCPR/C/GC/32), para. 49.

<sup>207</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for Non-custodial Measures* (the Tokyo Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/110), Rule 5.

that the child is suffering from mental illness or where the impact of continuance would have a disproportionate effect on the child's well-being. The court should also be able to order a conditional discharge. This allows a child to avoid a sentence on condition that he or she does not commit another offence in a set period of time, which must be proportionate. If the child does commit such a further offence then he or she will go back before the court.

(2) Prior to the commencement of court proceedings against the child, the court must satisfy itself that alternative measures to judicial proceedings [diversionary measures] have been fully considered by the police or the prosecutor's office.

(3) Where the police or prosecutor have failed to consider the use of alternative measures to judicial proceedings, the court should have the power – depending on the legal system of the State concerned – either to decide itself on applying measures alternative to judicial proceedings or to refer the case back and require the relevant authority to reconsider its original decision to take the case to trial.

(4) The appropriate welfare agency could be social services, children's services, child welfare agency etc., depending on national legislation in this regard.



## Chapter V: Sentencing

### *Article 50 – Purpose of sentencing*

This provision emphasizes the importance of the rehabilitation and reintegration of the child into society as the purpose of any juvenile justice proceedings, in particular with regard to the sentencing of the child. Restating the purpose of sentencing at the beginning of the chapter should raise the awareness of all parties involved in the juvenile justice process that the well-being of the child and his or her best interests must be the paramount consideration before a sentence is passed according to the principles set out in Article 51.

### *Article 51 – Principles of sentencing*

Children should be dealt with in a manner that is appropriate to their well-being, is proportionate to both their circumstances and the offence, takes into account their age, and is such as will promote their reintegration and the child's assuming a constructive role in society rather than seeking to punish the child.<sup>208</sup> The stated principles of this Article should make it clear that custodial sentences are to be passed only when there is no other viable form of sentence.<sup>209</sup> This requires courts to consider all possible non-custodial alternatives. In case of conviction, an individual sentencing plan is necessary to ensure that the child is prepared to form a valuable part of society after serving his or her sentence. The sentencing court should include all stakeholders in the elaboration of the sentencing plan, in particular the competent welfare agency. An individual sentencing plan is of particular importance in the imposition of a custodial measure as it structures the child's time served in a detention facility in a rehabilitative manner through meaningful activities.

### *Article 52 – Social enquiry report [pre-sentence report]*

(1) In all cases, there should be a social enquiry report before a sentence is passed on a child. The responsibility for producing this report varies across States, sometimes lying with the probation service, where one exists, or with the appropriate welfare agency. In some States, such as the United Kingdom of Great Britain and Northern Ireland, it lies with the Youth Offending Team, a multidisciplinary team of trained professionals who focus both on preventive work and on assisting the court by producing a pre-sentence report.

(2) The appropriate welfare agency, which may vary from State to State, has the responsibility of writing the social enquiry report. In this context it needs to be ensured that this is not the investigating officer, who would clearly have a conflict of interest. The author of the report should be well trained, with experience of the criminal justice system as well as knowledge of child development. The State should make regulations specifying the training and qualifications of children's [juvenile] probation officers [social workers] or any other appropriate body, and also as regards the contents of social enquiry [pre-sentence] reports.

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<sup>208</sup> Article 40(4) CRC. See also United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rules 5 and 17.1 and the accompanying commentary to both rules.

<sup>209</sup> Article 37(b) CRC. See also: Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 28.

(3) The purpose of the social enquiry or pre-sentence report is to assist the court in determining what would be the most effective sentence for the rehabilitation and reintegration of the child into the community. It should cover the family background of the child, the child's current circumstances, including where he or she is living and with whom, the child's educational background and health status, and previous offences, as well as the circumstances surrounding the commission of the offence and the likely impact of any sentence on the child. It is also important that the report contain a suggestion regarding the decision of the court upon the child, thereby enabling the court to identify also the applicability of diversionary measures pending trial rather than convicting the child.

### *Article 53 – Non-custodial sentences*

(1) Article 40(3)(b) CRC and Rules 17 and 18 of the Beijing Rules place a specific obligation on States to develop a range of non-custodial measures including both social and educational measures.<sup>210</sup> This Law provides examples of the types of non-custodial sentence that can be included in child justice legislation, rather than providing a final list of non-custodial sentencing options or dictating the particular form of sentence that should be passed on a child. The non-custodial sentence options given in this Law largely follow the list given in Rule 18 of the Beijing Rules, but include also some recently developed community-based forms of sentencing. The options reflect the forms of sentencing that have been successfully practised in a number of States. Some of the options overlap each other, but are included to give States a greater variety of options.

States should provide a range of alternative measures to detention that can help the child to address his or her offending behaviour. Such measures (referred to in the Beijing Rules as intermediate treatment and other treatment orders) may focus on the functioning of the child's family and use family group conferencing or, alternatively, may assist the child with his or her education to enable the child to re-enter school, as well as providing social skills training, anger-management training, activities for children, victim-offender mediation etc. The overall purpose of the alternative measures is to give opportunities to children who commit offences to learn constructive patterns of behaviour to replace potentially offending ones instead of depriving them of their liberty. These measures should be tailored to the child's needs and should allow the child to participate in enjoyable and interesting activities which allow them to take control of their lives and reintegrate into the community. Several such measures have been used across a wide range of States, often focusing on the child's family functioning, education and social skills, and on motivating the child to make better use of leisure time.

For example, community-based programmes and orders to participate in group counselling and similar activities provide a good opportunity for children in conflict with the law to learn positive patterns of behaviour. Group counselling allows the children to be reintegrated into the community and contribute towards helping their peers.

In many cases the underlying problems contributing to the child's offending behaviour need to be addressed. A considerable proportion of offenders in western States are known to have drug and alcohol problems, and specific counselling orders to meet these underlying causes of offending

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<sup>210</sup> See also: General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 47(a); *Human Rights Council Res. 10/2, Human rights in the administration of justice, in particular juvenile justice*, 24 March 2009, para. 13; and CM/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 the Committee of Ministers on 24 September 2003 at the 853<sup>rd</sup> meeting of the Ministers' Deputies, para. 17.

should be available. Anger management programmes and anti-aggression training should also be considered as alternative measures to deprivation of liberty. Courts should make counselling orders only where a social enquiry report has identified problems such as those just mentioned as contributing factors in the offending behaviour and this requirement is necessary to address these issues.

Probation as an alternative to custody for children is provided for in a number of States, including Canada in its Youth Justice Act 2002<sup>211</sup> and the Philippines in the Philippines Probation Law 1972.<sup>212</sup> Probation orders generally contain conditions such as an obligation to report to a particular person, often a probation officer, at a particular time or to attend a particular place such as school. If the child breaks the condition then he or she will be referred back to the court. Any probation order must contain realistic and proportionate conditions that do not set the child up for failure. For instance, requiring a child to travel long distances regularly in order to meet with a probation officer, without ensuring that the child can pay for his or her travel, is likely to lead to the child's breaching the order.

Community service orders require a child to undertake unpaid work for a certain number of hours, generally for the benefit of the community. Community service orders should require children to carry out constructive and interesting activities and not hard labour. Community service orders have proved to be more effective when children are able to learn new skills and feel that they have made a positive and useful contribution to their community. Community service orders can be linked with restorative justice processes, as the order can be discussed with the victim of the crime or with the community and relate specifically to the nature of the offence, or it can simply be a form of non-custodial sentence which has a reintegrative purpose.

Educational responses to children found guilty of committing a criminal offence are often used in conjunction with another community-based order. As children who are in conflict with the law have frequently missed periods of schooling or have learning difficulties, educational measures are useful and can require a child to attend classes as part of his or her reintegration process ("agreement to attend school and/or vocational skills training").<sup>213</sup> These measures are most helpful when they are tailored to the individual needs of the child and help the child to attain the same level of education as his or her peers so that he or she can re-enter school. Any order must take account of the child's needs and should help the child to gain skills that will help him or her in the future.

A further group of orders, such as exclusion orders, prohibited activity orders, curfew orders and electronic tagging orders, all focus on keeping children away from people and situations which are likely to cause further offending. Such orders are appropriate where a child's offending is linked to a particular activity or particular persons. Prohibited activity can include a prohibition on contacting certain people with whom the child has committed offences or who are generally regarded as contributing to the child's offending behaviour. This is particularly useful where a child is a member of a gang.

A curfew order should be considered where there is a clearly identified time-based pattern of offending behaviour by the child and a curfew would prevent further offending. Curfews should

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<sup>211</sup> Youth Criminal Justice Act 2002, [Canada], Chapter 1, assented to February 19<sup>th</sup>, 2002.

<sup>212</sup> Philippines Probation Law 1972, Presidential Decree No. 968 as amended, 1972.

<sup>213</sup> UNICEF Toolkit on Diversion and Alternatives to Detention:

[http://www.unicef.org/tdad/index\\_56368.html](http://www.unicef.org/tdad/index_56368.html).

not be so long that they effectively amount to house arrest, nor should they prevent children from attending school or taking part in other regular activities, but they could cover either a specific time of day during which the child is known to engage in offending behaviour, or the evening and night, from perhaps 7 p.m. until 7 a.m. An exclusion requirement orders a child to stay away from a particular place or area, and is useful where there is an identifiable geographic or physical pattern to the offending.

Electronic tagging is a recently introduced measure and could be used to encourage compliance with other orders, such as a curfew. Electronic tagging ensures that the child stays at an agreed address during an agreed time. The tag is attached to the wrist or ankle. However, the use of this form of order is likely to be limited as it requires considerable technological and human input. It also carries the danger of stigmatizing the child.

Supervision orders or guidance orders allow children to stay with their family, to remain part of their community and to continue with their education and work. Supervision orders generally contain conditions that the child must comply with, often involving meeting with a supervisor at a specified time or participating in a specified activity, including attendance at drug rehabilitation programmes. A condition may be made that requires the child to attend school regularly, or to refrain from meeting certain people or going to certain places. It is usually helpful for a child to be allocated to a specific social worker or probation officer in order to help the child to comply with an order.

Short-term fostering orders, residence orders and care orders all involve removal of children from the home and the care of the parents. A child should be removed from his or her parents or family only where this is really needed in order to rehabilitate and reintegrate him or her and to address offending behaviour. The threshold for removal of a child will not generally be met simply by the child's parents' failing to prevent the child from committing a criminal offence, nor is the fact that the child has committed an offence enough of itself to warrant removal. It is also important that any court or welfare body making a fostering, care or residence order ensures that the procedural safeguards laid down in the CRC are applied and that the child is legally represented.

Short-term fostering orders have been used successfully in a number of States, but require well-trained and experienced foster parents who can focus on the child's offending behaviour.<sup>214</sup> They are appropriate where the parents are experiencing difficulty in managing the child or the parents have problems of their own that they need to address in order to parent effectively, such as drug or alcohol misuse. Short-term fostering can be particularly effective if it also involves work with the family to address the underlying causes of the offending.

A residence order can be used to ensure that the child stays in a particular place for a period of time. Such an order will be appropriate where the child's living arrangements are thought to have contributed to his or her offending. The order should be short-term and should not exceed a period of about six months, as anything longer than this may hinder the child's reintegration into the family or community. Such an order may be particularly effective where the child is estranged from the parents and is living without parental care. A residence order can be combined with drug or mental health treatment.

Care orders allow a court to order a child who has committed an offence to be removed from his or her parents into the care of another individual. Usually this will be another family member or a foster parent, or an institution such as a residential children's home.

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<sup>214</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 18.2.

A further alternative to deprivation of liberty is a suspended sentence. This is a custodial sentence the implementation of which is suspended for a period of time. Provided that the child does not commit a further offence and complies with any conditions attached to the suspended sentence, the custodial part of the sentence will not take effect. However, if there is a breach of the conditions or the child commits a further offence, the custodial part of the sentence will then be activated. Conditions attached to a suspended sentence may include a requirement that the child comply with curfew provisions or take part in specified activities. Any conditions imposed must be proportionate. As failure by the child to meet the conditions of the suspended sentence could result in a custodial penalty, courts should, wherever possible, consider a pure community-based sentence instead.

(2) It is not mandatory that only one restorative justice order be issued by the court at a time. If the court deems it necessary, it must rather issue more than one restorative justice order to achieve the child's full reintegration and rehabilitation into society.

#### *Article 54 – Implementation of non-custodial sentences*

(1) This Law follows the Rules set out in Chapter V of the Tokyo Rules, which tackle the implementation of non-custodial measures. The purpose of any non-custodial measure imposed on a child should be to reintegrate the child into society in a way that minimizes the likelihood of his or her committing a further offence. The implementation of any non-custodial measure should always be in line with this principle, follow the general principles in Article 40 CRC and be in accordance with the law of the State. The paramount consideration for any non-custodial measure should be the needs of the child. This requires the careful consideration and assessment of every individual case. Therefore it is also necessary to review the imposed measure on a regular basis and adjust it accordingly if it is not meeting the needs of the child. The review of the measure should be undertaken by the competent court.

(2) When deciding on a non-custodial measure, the court's considerations must be threefold. It needs to bear in mind not only the rights and the needs of the child who is being sentenced, but also the interests of the victim, and in addition the needs of society, such as protection from crime. All three of these aspects form part of a comprehensive restorative justice approach.

(3) If a restorative justice measure has been imposed, it is essential for the child and all the other parties involved, such as the court and other competent authorities or appropriate bodies as well as the victim, to know when the non-custodial measure in question needs to be applied. The conditions attached to the non-custodial measure must be explained to the child orally and subsequently in writing, as must his or her rights and obligations.

(4) Involving the community and social support systems in the application of non-custodial measures is crucial for the successful application of a non-custodial sentence. This holds true in particular for restorative justice orders as "community participation and community building are two of the intended overarching goals of restorative justice".<sup>215</sup> This involvement ensures viability and sustainability in the long term for such programmes.<sup>216</sup>

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<sup>215</sup> *Handbook on Restorative Justice Programmes*, United Nations Office on Drugs and Crime (UNODC), Criminal Justice Handbook Series (United Nations: New York, 2006), p. 56.

<sup>216</sup> *Ibid.*, p. 56.

(5) If required, the child must receive whatever kind of assistance he or she needs to support his or her successful completion of a non-custodial measure with the goal of fully promoting his or her rehabilitation and reintegration into society.

(6) The principle of proportionality is reflected in paragraph (6) of this provision, which also requires that a time limit is set by the court for the completion of the non-custodial measure.

(7) Early termination of a non-custodial measure is possible where a child has shown a particularly strong effort to comply with the non-custodial sentence. The competent court must rule upon such an early termination.

(8) Where a non-custodial measure is applied involving supervision, this supervision should be carried out by the appropriate body mentioned in paragraph (8) of this provision. The Model Law leaves it to the States to decide who should be the monitoring body. Ideally, this would be the welfare agency concerned or any other appropriate body empowered by law to do the supervision.

(9) Prior to the passing of any treatment as a non-custodial measure on a child, a full assessment of the child's personality needs to be undertaken as required by Article 12 of this Law. In addition the circumstances that help to explain why the child committed the criminal offence need to be considered.

(10) Where a treatment is imposed upon a child the court has the duty to assign only trained professionals to supervise and assist the child. This includes in particular registered medical practitioners and nurses in case a drug or alcohol treatment is ordered.

(11-13) The articles regulating the breach of a non-custodial sentence are particularly important as a breach of the conditions attached to a non-custodial measure can result in a custodial sentence's being imposed on the child. States should take into account the Tokyo Rules and ensure that the same legal safeguards guaranteed when the child is initially sentenced are also applied when a non-custodial measure is modified or revoked.

(14-15) Where a non-custodial measure is modified or revoked, the court must seek a more appropriate form of non-custodial measure for the child concerned. The revocation or modification of such a measure can be challenged at any time by the child.

### *Article 55 – Custodial sentences*

(1) Article 37(b) CRC provides that the detention of a child shall be in conformity with the law and shall be used only as a measure of last resort. In addition, the Beijing Rules require that "careful consideration" be given before the passing of a sentence that restricts the child's personal liberty and that such a sentence be imposed only when the child is found to have committed a serious act involving violence against another person or has persisted in committing other serious offences, and only if there is no other appropriate response.<sup>217</sup> This is echoed in the Havana Rules, which state that sentences involving deprivation of liberty should be limited to exceptional cases.<sup>218</sup>

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<sup>217</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 17.1(b) and (c).

<sup>218</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 2.

(2) The phrase “no other appropriate response” does not mean that a custodial sentence should be given to a child just because there is no other suitable placement, but instead should be taken to refer to situations in which other measures would not be suitable or in the best interests of the child. Courts must give direct consideration to whether a custodial sentence is the last resort and what period of time is needed to provide the child with the required intervention. The length of the sentence should not extend beyond this time period.

(3) The CRC Committee has recommended that in order to promote visits by the child’s family, the child should be placed in a facility that is as close as possible to the place of residence of his or her family.<sup>219</sup> To ensure that children are able to be placed near their families, the Havana Rules encourage States to decentralize institutions. Where this is not possible, States should be encouraged to provide travel vouchers or payments to enable families to travel to the detention facility, especially where institutions are centralized and children are placed in detention centres far from their families. Close relatives should include parents, legal guardians and other significant persons in the child’s life. Without assistance with travel, the right to family contact may be meaningless for the child as the parents may be unable to afford to visit him or her. Allowing children to visit their home and family prior to their release should be an integral part of the preparations, for them and their family, for their leaving the institution.<sup>220</sup>

### *Article 56 – Prohibited sentences*

(1) Under Article 37(a) CRC, the use of the death penalty<sup>221</sup> and of life imprisonment for children without the possibility of release is regarded as falling within the definition of cruel, inhuman or degrading treatment or punishment.<sup>222</sup> Article 6(5) ICCPR also prohibits the use of capital punishment for crimes committed by persons below the age of 18 years. The CRC Committee recognizes in General Comment No. 10, paragraph 75, that “the explicit and decisive criteria [sic]

<sup>219</sup> United Nations Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 87; see also CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, para. 55

<sup>220</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 59.

<sup>221</sup> Binding international law prohibiting the death penalty is Optional Protocol 2 of the ICCPR, Protocol No. 6 ECHR and Protocol A-53 ACHR.

<sup>222</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 17.2, also provides that capital punishment shall not be imposed for any crime committed by children; see also General Assembly Res. A/RES/67/166, *Human rights in the administration of justice*, 20 December 2012, para. 18, urging “States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release ... is imposed for offences committed by persons under 18 years of age”. Human Rights Council Res. 7/29, *Rights of the Child*, 28 March 2008, para. 30(a) and General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 43(a) also call for the abolition of the death penalty for children and of life imprisonment without possibility of release. Similarly, Human Rights Council Res. 10/2, *Human rights in the administration of justice, in particular juvenile justice*, 24 March 2009, para. 11, urges “States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release is imposed for offences committed by persons under 18 years of age”. In this regard see also the decisions *Graham v. Florida*, 130 S. Ct. 2011, 2018, 2030 (2011) and *Sullivan v. Florida*, 130 S. Ct. 2059 (2010), where it was found that a sentence of life imprisonment without parole for non-homicide crimes committed by a person below the age of 18 years is a constitutional violation, in: *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25), para. 60.

is the age at the time of the commission of the offence. It means that a death penalty may not be imposed for a crime committed by a person under 18 regardless of his/her age at the time of the trial or sentencing or of the execution of the sanction.” Imposition of the death penalty would also infringe the right to life under Article 6 CRC, Article 2 ECHR, Article 6(1) ICCPR, Article 4(1) ACHR, Article 5(1) Arab Charter, Article 4 Banjul Charter and Article 3 UDHR.

(2) Article 37(a) CRC explicitly states that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”,<sup>223</sup> while Article 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) stipulates that “each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.<sup>224</sup> Article 7 ICCPR states that “no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Paragraph 2 of the Human Rights Committee General Comment No. 20<sup>225</sup> provides that the aim of Article 7 “is to protect both the dignity and the physical and mental integrity of the individual”. According to the Human Rights Committee, “the text of Article 7 allows for no derogation”. The Committee also reaffirms in paragraph 3 that “even in situations of public emergency ... no derogation from the provisions of Article 7 is allowed and its provisions must remain in force”. The European Court of Human Rights held in a case in this regard that the guarantees of Article 3 apply irrespective of the reprehensible nature of the conduct of the person in question.<sup>226</sup>

(3) While there is no specific provision in the CRC that defines corporal punishment as amounting to inhuman or degrading punishment, the CRC Committee states in General Comment No. 10 that “the Committee reiterates that corporal punishment as a sanction is a violation of ... Article 37 which prohibits all forms of cruel, inhuman and degrading treatment or punishment”.<sup>227</sup> The CRC Committee has stated that the use of any form of corporal punishment as a sentence would be contrary to Article 37 CRC and should be strictly forbidden by States.

(4) This provision recognizes that the practice of sentencing children to forced labour is used in certain States. However, it has to be noted that both the United Nations General Assembly and the Human Rights Council have called upon “all States” to ensure that no child in detention is sentenced to forced labour.<sup>228</sup>

### *Article 57 – Criminal record*

(1) Bearing in mind the child’s right to privacy and data protection as well as the aim of full rehabilitation and reintegration, Beijing Rule 21.1 requires strict confidentiality regarding the criminal record of the child in order to enable the child to begin his or her adult life with a clean

<sup>223</sup> See also Human Rights Council Res. 7/29, *Rights of the Child*, 28 March 2008, para. 32, and General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 46.

<sup>224</sup> See Article 5 UDHR, Article 7 ICCPR, Article 3 ECHR, Article 5 Banjul Charter, Article 16 ACRWC and Article 13 Arab Charter.

<sup>225</sup> United Nations Human Rights Committee, *CCPR General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment*, 10 March 1992.

<sup>226</sup> ECHR judgement (Application No. 30240/96), para. 47.

<sup>227</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 71. Also, Human Rights Council Res. 7/29, *Rights of the Child*, 28 March 2008, para. 32, “calls upon all States ... to ensure that ... no child in detention is sentenced to corporal punishment”.

<sup>228</sup> General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 46; Human Rights Council Res. 7/29, *Rights of the Child*, 28 March 2008, para. 32.

criminal record.<sup>229</sup> Third parties, such as future employers or other authorities the child will eventually have to deal with, must not be allowed to know about the existence of such records.

(2) Where a person commits a criminal offence after turning 18, neither the police nor the prosecutor concerned nor the competent court may refer to or make any use of recorded criminal offences that were committed by the same person when a child. This is in line with Beijing Rule 21.2.

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<sup>229</sup> In this regard see also CM/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 the Committee of Ministers on 24 September 2003 at the 853<sup>rd</sup> meeting of the Ministers' Deputies, para. 12.



## Chapter VI: Children under custodial sentence

### *Article 58 – The purpose of detention [deprivation of liberty]*

The provision on the purpose of detention reflects international standards, which state that the primary purpose of any action taken against children in conflict with the law, including the deprivation of liberty, must be the rehabilitation and reintegration of the child rather than punishment or the protection of society.<sup>230</sup> International standards promote a holistic approach to rehabilitation and reintegration, addressing both the practical and the emotional needs of the child. Bearing in mind Havana Rule 12, whereby “juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society”, the management of the detention facility must encourage the involvement of the public, the community and NGOs that can contribute to the rehabilitation and reintegration of children serving custodial sentences.

### *Article 59 – Principles of detention [deprivation of liberty]*

(a) Article 37(c) CRC requires that “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person”.<sup>231</sup> Also, Rule 12 of the Havana Rules provides that “deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles”. Bearing these provisions in mind and also the fact that detention facilities serve as indicators for the level of implementation of the rule of law, international law imposes an obligation upon States to secure a detained child’s human dignity and worth regarding both his or her treatment in detention and the conditions of detention.<sup>232</sup>

(b) Article 19 CRC places a duty on States to take all appropriate legislative, administrative and educational measures to protect children from all forms of physical or mental violence, injury or abuse, and neglect or negligent treatment or exploitation, including sexual abuse, while in the care of any person who has care of the child. It is particularly important that child protection is given a high priority in child detention facilities, as children in detention are particularly vulnerable to ill-treatment and abuse.<sup>233</sup> In this regard it is advisable that the number of children deprived of liberty

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<sup>230</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 26: “The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.”

<sup>231</sup> See also Article 10(1) ICCPR. The Inter-American Court of Human Rights has highlighted this on numerous occasions: see: Inter-American Court of Human Rights, Judgement of September 18, (Ser. C) No. 100 (2003), para. 126; Judgement of December 3, (Ser. C) No. 88 (2001), para. 87; Judgement of August 16, (Ser. C) No. 68 (2000), para. 78; and Judgement of May 30, (Ser. C) No. 52 (1999), para. 105. The Court sees the State as the “guarantor” of the rights of the detainees: Inter-American Court of Human Rights, Judgement of September 18, (Ser. C) No. 100 (2003), para. 126.

<sup>232</sup> See, in this regard, the Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, Recommendations, paras. 259-265.

<sup>233</sup> See Pinheiro, P. S., *World Report on Violence Against Children*, 2006, Chapter V: “In care and justice institutions”, page 191: “Violence against children while in justice institutions ... is more common than violence against children placed in institutions solely for provision of care.” See also *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25).

in a detention facility be small enough to make individual care possible.<sup>234</sup> Clear child protection policies, and procedures ensuring that children and staff are aware of these policies, mitigate the risk and reduce the incidence of abuse. Article 37(c) CRC states: “Every child deprived of liberty shall be treated with humanity and respect for inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.”<sup>235</sup> The international framework on child justice, and particularly the Beijing Rules and the Havana Rules, provide a very detailed set of standards on what this treatment should include. The Beijing Rules set out fundamental guarantees for children under the age of 18 who are deprived of their liberty, while the Havana Rules, which apply to all children in a “public or private custodial setting, from which a person is not permitted to leave at will, by order of any judicial, administrative or other public authority”,<sup>236</sup> detail the treatment that children should be provided with and the conditions of their detention. The standards were developed “with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society”<sup>237</sup> and are reinforced by the Beijing Rules.<sup>238</sup> Tackling one of the major problems when it comes to children in detention, the Havana Rules explicitly provide that the use of force and methods of restraint cause humiliation and degradation and should therefore be applied for only the shortest possible period of time.<sup>239</sup> In addition, the Havana Rules require that the director of the administration shall be the one to order the use of force and restraint,<sup>240</sup> while the CRC recommends in General Comment No. 10 that the use of force or restraint “should be under the direct and close control of a medical and/or a psychological professional”.<sup>241</sup>

(c) Article 2 CRC provides that States shall respect and ensure the rights in the Convention without discrimination of any kind on the basis of status. However, the Convention does permit restrictions on a small number of rights [such as the right to freedom of association (Article 15 CRC)] where these restrictions are in conformity with the law or prescribed by law and in the interests of public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

(d) Article 37(b) CRC requires deprivation of liberty to be for the shortest appropriate period of time and the Beijing Rules promote frequent recourse to conditional release at the earliest possible time. The Commentary to Rule 28.1 of the Beijing Rules states that “upon evidence of satisfactory progress towards rehabilitation, even offenders who had been deemed dangerous at the time of their

<sup>234</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, para. 53.4.

<sup>235</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 28, states that “the detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations”.

<sup>236</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 11(b).

<sup>237</sup> *Ibid.*, Rule 3.

<sup>238</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 27.2: “Efforts shall be made to implement the relevant principles laid down in the Standard Minimum Rules for the Treatment of Prisoners to the largest possible extent so as to meet the varying needs of juveniles specific to their age, sex and personality.”

<sup>239</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 64.

<sup>240</sup> *Ibid.*, Rule 64.

<sup>241</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 89.

institutionalization can be conditionally released whenever feasible". Children should not be held longer in detention for the purpose of completing their education or vocational training.

### *Article 60 – Admission to a detention facility*

(1) A child can be admitted to a detention facility only by court order. This includes pre-trial detention according to Article 35 of this Law as well as post-trial deprivation of liberty as a sentence [conviction].

(2)(a) This subparagraph reflects Havana Rules 21-23 and also the Council of Europe Recommendation on the European Rules for juvenile offenders subject to sanctions or measures.<sup>242</sup> According to this Recommendation the following details of the child should be recorded upon admission to the detention facility: "a. information concerning the identity of the juvenile and his or her parents or legal guardians; b. the reasons for commitment and the authority responsible for it; c. the date and time of admission; d. an inventory of the personal property of the juvenile that is to be held in safekeeping; e. any visible injuries and allegations of prior ill-treatment; f. any information and any report about the juvenile's past and his or her educational and welfare needs; and g. subject to the requirements of medical confidentiality, any information about the juvenile's risk of self-harm or a health condition that is relevant to the physical and mental well-being of the juvenile or to that of others".

(2)(b) Every child deprived of his or her liberty has to undergo a mandatory medical examination upon admission,<sup>243</sup> including an examination of his or her mental state in order to prevent potential suicide and/or self-harm.<sup>244</sup> Any medical examination must be carried out only by a registered medical practitioner or nurse of the same gender as that of the child. Transgender children must have the choice with regard to the gender of the medical practitioner or nurse. The examination results have to be recorded and added to the file of the child and be kept strictly confidential. Drawing on the 9th General Report of the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,<sup>245</sup> the Inter-American Court of Human Rights directs that the "results of any medical examination ordered by the authorities ... must be delivered to the judge, the detainee and his attorney, or to him and whoever exercises custody or representation of the minor according to the rule of law".<sup>246</sup> Recording the state of health of the child will not only lead to appropriate medical treatment during his or her deprivation of liberty, but also serve as potential evidence to document violence against the child if his or her health suddenly worsens while in detention. However, according to the European Court of Human Rights there are boundaries regarding the examination upon admission. In one case the Court did not agree with a general gynaecological examination of female prisoners upon admission to the detention facility, done only to prevent later

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<sup>242</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, para. 62.2.

<sup>243</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 50; CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, para. 62.5.

<sup>244</sup> See *Handbook on prisoners with special needs*, United Nations Office on Drugs and Crime (UNODC), Criminal Justice Handbook Series (United Nations: New York, 2009), p. 28; see also Inter-American Court of Human Rights, Judgement of September 18, (Ser. C) No. 100 (2003), para. 131.

<sup>245</sup> Council of Europe, Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 9<sup>th</sup> General Report [CPT/Inf (99), 12], paras. 37-41.

<sup>246</sup> Inter-American Court of Human Rights, Judgement of September 18, (Ser. C) No. 100 (2003), para. 131.

false accusations against law enforcement officials, because such an examination neither took the interests of the detained women into consideration nor was a medical necessity.<sup>247</sup>

(2)(c) As children may sometimes not be able to read the standard rules of a detention facility or may not be able to read well enough to comprehend formal rules, the State has the “obligation to explain what happens to persons who are under custody”.<sup>248</sup> It is therefore recommended that a document which is accessible to all children should be produced, covering their rights and responsibilities and the rules and routines of the detention facility. Access to legal aid must be provided. A child who is a foreign national must also be informed that he or she has the right to consular assistance.

(3) As the role of the parents and the legal guardian is crucial for the child’s well-being throughout judicial proceedings, it is necessary that they be notified by the court when it decides to deprive the child of his or her liberty. The notification needs to be done in writing in order to ensure that the parents are indeed notified of the detention order against their child.

### *Article 61 – Separation from adults, between age groups and by type of offence*

(1) International standards, including Article 37(c) CRC, Article 10(2)(b) and (3) ICCPR and Beijing Rule 13.4, are clear that children must be separated from adults when deprived of their liberty.<sup>249</sup> The CRC Committee recommends in General Comment No. 10 that the clause from the CRC “unless it is considered in the child’s best interests not to do so” should be interpreted narrowly, to ensure that “in the child’s best interests” does not mean “for the convenience of the State”.<sup>250</sup> Furthermore, this exception does not absolve a State of its obligation to establish separate facilities for children, which must include “distinct, child-centred staff, personnel, policies and practices”.<sup>251</sup> The reason for separation of children and adults is explicitly set out by the CRC Committee: “there is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate.”<sup>252</sup> Because of the paucity of girl offenders, the right of girls to be separated from women is frequently violated, as States argue

<sup>247</sup> ECHR decision of 1 May 2011 (app. 36369/06), para. 48: “*Par conséquent, la Cour ne peut être d'accord avec une pratique généralisée consistant à soumettre automatiquement des femmes détenues à un examen gynécologique, au seul motif que cet examen est nécessaire pour éviter que de fausses accusations de violences sexuelles ne soient portées contre les membres des forces de l'ordre. En effet, cette pratique ne tient aucunement compte des intérêts des femmes détenues et ne se réfère à aucune nécessité médicale (comparer Y.F., précité, § 43). A cet égard, il convient également de souligner que la requérante ne s'était jamais plainte d'un viol perpétré lors de sa garde à vue. Ses allégations de harcèlements sexuel ne pouvaient en aucun cas être réfutées par un examen d'hymen, dont l'objet est une indication sur la virginité de la personne.*”

<sup>248</sup> Inter-American Court of Human Rights, Judgement of September 18, (Ser. C) No. 100 (2003), para. 26.

<sup>249</sup> See also: United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 13.4; Recommendation 5 of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25), para. 80; CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, para. 59.1; CM/Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952<sup>nd</sup> meeting of the Ministers’ Deputies, para. 35.4; and Inter-American Court of Human Rights, Judgement of September 18, (Ser. C) No. 100 (2003), para. 136.

<sup>250</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 85.

<sup>251</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 85.

<sup>252</sup> *Ibid.*, para. 85.

that it is not economical to build and run separate facilities for the small number of girls involved. The CRC Committee does not accept this argument and has recommended that even where States have low rates of female child offending, they should nevertheless ensure that there are appropriate facilities separate from those for adults.<sup>253</sup> Along with providing the appropriate facilities, States need to ensure that all personnel of these facilities undertake training on gender-based sensitivity and gender-based violence. Detention facilities for female children must be supervised exclusively by women officers and/or staff-members. Any secondary regulations should take account of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).<sup>254</sup>

(2) Although Article 37(c) CRC provides that adults and children should be separated in detention, the Committee on the Rights of the Child has stated that this does not mean that when the child reaches the age of 18 he or she must immediately and automatically be transferred to an adult facility. “Continuation of his/her stay in the facility should be possible if that is in his/her best interests and not contrary to the best interests of the young children in the facility.”<sup>255</sup> This is because a move to an adult facility is likely to mean the end of the reintegrative regime that should be in operation at the detention facility and exposure to the harmful or negative influences of older detainees.

(3) It is important that the decision to transfer the 18-year-old is based on a full assessment of his or her needs. If the 18-year-old still has more than three years to serve of his or her sentence, then retaining them at the detention facility, when they would have to move to an adult institution at 21 [25] years old, would be less appropriate.

(4) Young adults who remain at the child detention centre should not be entitled to fewer rights or be subject to different rules because of their age.

(5) In order to protect detained children from the negative influences of young adult detainees, it seems appropriate that once a detainee reaches the age of 21 [25] years he or she is transferred from the child facility. An alternative solution could be to separate the young adult from the children in the detention facility and relocate him or her within the child detention facility, as a transfer to an adult prison might expose the young adult to violence.

(6) To prevent violence between detained children, States should ensure that children held in detention facilities are divided by appropriate age grouping and, where possible, by the type of offence committed.

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<sup>253</sup> See: CRC Committee, *Committee on the Rights of the Child: State Party Report: Canada, 12 March 2003, CRC/C/83/Add.6*; CRC Committee, *Committee on the Rights of the Child: State Party Report: Iceland, 15 March 1995, CRC/C/11/Add.6*; CRC Committee, *Committee on the Rights of the Child: State Party Report: New Zealand, 12 October 1995, CRC/C/28/Add.3*; CRC Committee, *Committee on the Rights of the Child: State Party Report: United Kingdom of Great Britain and Northern Ireland, 15 March 1994, CRC/C/11/Add.1*; CRC Committee, *Committee on the Rights of the Child: Concluding Observations: Canada, 27 October 2003, CRC/C/15/Add.215*; CRC Committee, *Committee on the Rights of the Child: Concluding Observations: Iceland, 13 February 1996, CRC/C/15/Add.50*; CRC Committee, *Committee on the Rights of the Child: Concluding Observations: New Zealand, 24 January 1997, CRC/C/15/Add.71*; and *Committee on the Rights of the Child: Concluding Observations: United Kingdom of Great Britain and Northern Ireland, 15 January 1995, CRC/C/15/Add.34*. In this regard, note, for example, Lebanon, where a small institution exclusively for female children has been successfully set up.

<sup>254</sup> United Nations General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules), 16 March 2011 (A/RES/65/229).

<sup>255</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 86.

### Article 62 – Girls and children with special needs

(1) In all detention facilities girls must be held separately from boys.<sup>256</sup> This provision addresses the gender dimension of violence against children, as requested by the United Nations General Assembly in its Resolution 63/241 on the Rights of the Child,<sup>257</sup> and answers the call by the Human Rights Council in its Resolution 10/2 to address gender-specific aspects and challenges related to girls in detention.<sup>258</sup> The provision further reflects the SMR,<sup>259</sup> which also set out the following specific standards for women detainees:

“(1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.

(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women.”<sup>260</sup>

Bearing in mind the special gender needs of girls, it should for pedagogical and child-developmental reasons be possible to ensure that, although held separately, girls and boys are still able to engage together in meaningful and organized activities supervised by detention personnel.

(2) Girls have different physical, psychological, dietary, social and health needs from those of boys and thus should be treated differently from their male counterparts.<sup>261</sup> They are also considerably more vulnerable to both physical and sexual abuse and require special attention in this regard. According to the findings in 2008 of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, violence against girls deprived of their liberty “very often includes rape and other forms of sexual violence such as threats of rape, touching, ‘virginity testing’, being stripped naked, invasive body searches, insults and humiliations of a sexual nature”.<sup>262</sup> International standards, including the Bangkok Rules, emphasize in this regard

<sup>256</sup> Recommendation 5 of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25), para. 80; CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, para. 60.

<sup>257</sup> General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 27(k).

<sup>258</sup> Human Rights Council Res. 10/2, *Human rights in the administration of justice, in particular juvenile justice*, 24 March 2009, para. 13.

<sup>259</sup> See also CM/Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952<sup>nd</sup> meeting of the Ministers’ Deputies, paras. 34.1-34.3.

<sup>260</sup> *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), Rule 53.

<sup>261</sup> See Beijing Rule 26.4 and United Nations General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules), 16 March 2011 (A/RES/65/229), Rules 36-39.

<sup>262</sup> *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak* (A/HRC/7/3), 15 January 2008, para. 34, cited after: *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25), para. 46.

how damaging detention can be for girls and recognize the need for different treatment, provided that measures applied under the law that are taken “solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles ... shall not be deemed to be discriminatory”.<sup>263</sup> Detention authorities must put in place measures to meet the protection needs of girls. Furthermore, girls must have equal access to the education and vocational training available to boys. Access to age- and gender-specific programmes and services, such as counselling for sexual abuse or violence, has to be given to girls. They must also receive education on women’s health care and have regular access to gynaecologists, similar to that of adult female prisoners. Pregnant girls must receive support and medical care equivalent to that provided for adult female prisoners. Their health must be monitored by a medical specialist, taking account of the fact that they may be at greater risk of health complications during pregnancy due to their age. According to international standards and norms, detainees with mental-health care needs and disabilities also need special protection.<sup>264</sup> Furthermore, measures have to be put in place to protect the needs of members of ethnic and racial minorities and indigenous peoples as well as foreign national detainees.<sup>265</sup> As LGBT detainees are extremely vulnerable to sexual violence in detention, the formulation of policies to meet the special needs of this group as well as the development and implementation of strategies ensuring that they are not victimized in detention is crucial, while at the same time provision must be made for their particular social reintegration requirements.<sup>266</sup>

### *Article 63 – Right of access to health-care services*

(1) Article 24 CRC provides that children have the right to enjoy the highest attainable standards of health and to have access to facilities for the treatment of illness and for rehabilitation.<sup>267</sup> The same Article obliges States to ensure that no child is deprived of his or her right of access to such health-care services.<sup>268</sup> This includes children in detention.<sup>269</sup> Both the SMR<sup>270</sup> and the Havana Rules<sup>271</sup> lay down detailed standards for access to health care in child detention facilities. In this regard, the

<sup>263</sup> *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, adopted by General Assembly Resolution 43/173 on 9 December 1988, Principle 5(2).

<sup>264</sup> *Handbook on prisoners with special needs*, United Nations Office on Drugs and Crime (UNODC), Criminal Justice Handbook Series (United Nations: New York, 2009), p 4.

<sup>265</sup> *Handbook on prisoners with special needs*, United Nations Office on Drugs and Crime (UNODC), Criminal Justice Handbook Series (United Nations: New York, 2009), p.4. Detailed recommendations on how foreign nationals and members of ethnic and linguistic minorities as well as children with disabilities should be treated when deprived of their liberty can be found in CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, paras. 104.1-107.2.

<sup>266</sup> *Handbook on prisoners with special needs*, United Nations Office on Drugs and Crime (UNODC), Criminal Justice Handbook Series (United Nations: New York, 2009), p.104.

<sup>267</sup> See also Human Rights Council Res. 7/29, *Rights of the Child*, 28 March 2008, para. 32, and Guideline IV.A.6.21.b, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010.

<sup>268</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, paras. 69.1-82.4.

<sup>269</sup> See also United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 26.2.

<sup>270</sup> *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), Rules 22-26; see also CM/Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952<sup>nd</sup> meeting of the Ministers’ Deputies, paras. 39-48.2.

<sup>271</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rules 49-55.

European Court of Human Rights has indicated that the State has “the obligation ... to protect the health of persons who have been deprived of their liberty”.<sup>272</sup> The Court also noted that “in the context of Article 2, the obligation to protect the life of individuals in custody also implies an obligation for the authorities to provide them with the medical care necessary to safeguard their life ... . A failure to provide adequate medical care may constitute treatment in breach of the Convention”.<sup>273</sup> Children have the right of access to medical treatment and psychiatric services and preferably to receive these services in the community in which the child custody facility is located in order to prevent stigmatization of the child, promote self-respect and encourage reintegration. However, every facility should be able to provide immediate access to medical facilities and equipment in emergencies and have staff who are trained to deal with medical emergencies.<sup>274</sup> Rule 26 of the Beijing Rules provides that children in detention must receive all necessary psychological care. The commentary to the Rule states that “medical and psychological assistance, in particular, are extremely important for institutionalized drug addicts, violent or mentally ill young persons”.<sup>275</sup> The Havana Rules recognize that children may be suffering from mental health problems which may be exacerbated by being deprived of their liberty, and provide that children suffering from a mental illness should be treated in a specialized institution under independent medical management.<sup>276</sup> The Havana Rules also provide that “the medical services provided to juveniles should seek to detect and should treat any ... substance abuse ... that may hinder the integration of the juvenile into society”.<sup>277</sup> Specifically, “juvenile detention facilities should adopt specialized drug abuse prevention and rehabilitation programmes administered by qualified personnel. These programmes should be adapted to the age, sex and other requirements of the juveniles concerned, and detoxification facilities and services staffed by trained personnel should be available to drug- or alcohol-dependent juveniles.”<sup>278</sup> In addition, the Havana Rules specifically provide that every child shall receive both preventive and remedial medical care, including dental and ophthalmological care.<sup>279</sup> Secondary legislation should set out the medical, psychiatric and psychological services to be provided in a child detention facility, the level of medical staffing and the steps to be taken to ensure that the medical care provided in each is of the same standard as that available to children in the community.

(2) If the detention facility does not have the capacity to provide adequately for medical care, the child must be transferred to the appropriate medical practitioner or hospital outside the detention facility. This is particularly important in emergencies. In such a case the child must be brought immediately to the nearest hospital. A child must never be taken to an adult detention facility to receive health care.

(3) In contrast to the provisions on intimate searches and intimate samples, the child’s informed consent needs to be sought if he or she falls sick in detention. Generally, as set out by Havana Rule 55, the child cannot be forced to undergo medical treatment. According to this rule, “medicines should

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<sup>272</sup> ECHR judgement (Application No. 45744/08), para. 60.

<sup>273</sup> *Ibid.*, para. 60.

<sup>274</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 51.

<sup>275</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Commentary to Rule 26.

<sup>276</sup> *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rules 52 and 53.

<sup>277</sup> *Ibid.*, Rule 51.

<sup>278</sup> *Ibid.*, Rule 54.

<sup>279</sup> *Ibid.*, Rule 49.

be administered only ... after having obtained the informed consent of the juvenile concerned". The European Court of Human Rights decided in one case that it was a violation of Article 3 ECHR and thus a violation of the prohibition of torture and inhuman or degrading treatment or punishment when a 16-year-old girl was forced to undergo a gynaecological examination in pre-trial detention without her or her legal guardian's informed consent.<sup>280</sup>

(4-5) Only in exceptional cases may a child's refusal to give consent to a medical treatment be overruled by either the parents or a court order. This may happen when the child is at risk of suffering severe health damage or even death as well as endangering the health of other detainees and the staff of the detention facility. In this context the European Court of Human Rights, in a case where a detainee was forcibly administered food and neuroleptics during a hunger strike, found that this treatment did not constitute a violation of Article 3 of the European Convention on Human Rights as it saved his life.<sup>281</sup>

(6) This paragraph reiterates what has been stated before in Article 30(3) and (5) of the Model Law. The commentary to those provisions applies here *mutatis mutandis*.

(7) The absence of the child from the detention facility in order to receive medical attention or treatment must be considered part of lawful custody and not lead to a longer detention period afterwards.

(8) Detention facilities very often harbour violence.<sup>282</sup> Contributing factors are overcrowding and a low staff-to-child ratio. Violence can occur "at the hands of staff working in the institutions, adult detainees where children are not separated, other child detainees, and also in the form of self-harm".<sup>283</sup> In order to respond adequately to such violence, it is important to document any physical violence, and in particular sexual abuse, to enable the child and his or her parents or legal guardian to undertake the legal steps needed to make the perpetrators accountable. Any legal assistance should be free of charge.<sup>284</sup>

(9) According to Havana Rule 19, "all reports, including legal records, medical records and records of disciplinary proceedings, and all other documents relating to the form, content and details of treatment, should be placed in a confidential individual file, which should be kept up to date, accessible only to authorized persons and classified in such a way as to be easily understood". Where a child is transferred from one detention facility to another, the entire file needs to be handed over. The same applies where a child is released.

### *Article 64 – Physical environment, accommodation and nutrition*

(1) Article 64 lays down the fundamental standards for the physical environment, accommodation and nutrition in detention facilities as stipulated in Havana Rules 31-37 and the Council of Europe

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<sup>280</sup> ECHR judgement (Application No. 36369/06), para. 54.

<sup>281</sup> ECHR judgement (Application No. 10533/83), para. 79.

<sup>282</sup> See item IV.I (paras. 35-49) of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25).

<sup>283</sup> *Ibid.*, item IV.I (para. 35).

<sup>284</sup> See United Nations General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, 28 March 2013 (A/67/187).

Recommendation on the European Rules for juvenile offenders subject to sanctions or measures.<sup>285</sup> Children deprived of their liberty must feel safe at all times when in the detention facility. In order to prevent violence from peers in detention facilities, detained children should ideally be kept in single accommodation during the night. Regular and unobtrusive supervision by detention personnel, particularly during the night, is required to ensure the child's safety.<sup>286</sup> Where it is preferable for the child to share accommodation, he or she must be consulted and indicate with whom he or she wishes to share.<sup>287</sup> The detention personnel must ensure that the bedding is changed regularly. Special attention must also be paid to the climatic conditions of the State concerned. The cubic content of air and lighting, heating and ventilation have to be adjusted accordingly.<sup>288</sup> A fire-alarm system should be in place.<sup>289</sup> In order to comply with the child's right to privacy, he or she must be allowed to store his or her personal items in adequate storage facilities that must be fully respected and recognized by detention personnel and the child's peers.<sup>290</sup> Children in detention must be given access to clean sanitary facilities according to their particular gender needs.<sup>291</sup> They must have the opportunity to clean themselves, preferably by being able to take a daily shower at a temperature suitable to the local climate.<sup>292</sup>

(2) While in detention children should be allowed to wear their own clothes.<sup>293</sup> Where a child does not have sufficient clothing, the detention facility needs to ensure that he or she is provided with adequate clothes that suit the climate of that State. Where a child is allowed to leave the detention facility, it must be ensured that he or she cannot be identified and as a consequence be stigmatized as a detainee. This means that States should provide adequate clothing and must refrain from carrying out acts which could lead the child to be identified as a child deprived of his or her liberty, such as branding, tattooing or head-shaving, as these acts constitute a form of violence against children.

(3) Adequate food and drinking water must be made available to all children who are deprived of their liberty.<sup>294</sup> Consideration must be given to cultural and religious norms and requirements and to any special diets required for medical reasons. The manner in which food is to be provided, the types of food, the times of day, the minimum calorific content etc. should all be set out in secondary

<sup>285</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, paras. 63.1-68.4.

<sup>286</sup> *Ibid.*, para. 64.

<sup>287</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, para. 63.2.

<sup>288</sup> *Ibid.*, para. 63.1.

<sup>289</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 32.

<sup>290</sup> *Ibid.*, Rule 35.

<sup>291</sup> See Human Rights Council Res. 7/29, *Rights of the Child*, 28 March 2008, para. 32.

<sup>292</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, para. 65.3.

<sup>293</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 36; CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, para. 66.1.

<sup>294</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 37; see also CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, para. 68.1-4.

legislation. Paragraph 68.2 of the Council of Europe Recommendation to member States on the European Rules for juvenile offenders subject to sanctions or measures requires that “food shall be prepared and served hygienically in three meals a day with reasonable intervals between them”,<sup>295</sup> while paragraph 68.3 requires clean drinking water to be available to children in detention at all times.

### *Article 65 – Education and vocational training*

(1 and Variant 1) Provision of education and vocational training is vital for enhancing a child’s life chances, facilitating his or her reintegration and reducing the rate of recidivism. Article 28 CRC lays down the right of children to education on the basis of equal opportunity.<sup>296</sup> Article 2 CRC also obliges States to respect and ensure the application of all the rights contained in the Convention to each child within their jurisdiction without discrimination of any kind. As can be seen, the right to education continues to apply to children even when they are deprived of their liberty, and the CRC requires that children in detention should receive the same standards of, and access to, education as are enjoyed by all other children. The CRC Committee also rules that “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”.<sup>297</sup> Detailed standards for the education to be provided to children in detention can be found in the Havana Rules.<sup>298</sup> The Rules require national education laws to specifically cover children held in detention facilities and to ensure that the education provided there is suited to the child’s needs and abilities and is offered by qualified teachers.

(2) The Havana Rules specifically provide that access to education should not be limited to children of compulsory school age,<sup>299</sup> and lay down the child’s right to receive vocational training “in occupations likely to prepare him or her for future employment”.<sup>300</sup> Again, this is not limited to children of compulsory school age.

(3) States should promote courses and programmes which will equip children with skills and qualifications appropriate to securing future employment, but the options available to them should not unnecessarily limit the range of industries in which they could secure jobs. Article 5 CRC recognizes that, given the evolving capacities of children to exercise their rights and their right to express

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<sup>295</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, para. 68.2.

<sup>296</sup> See also Guideline IV.A.6.21.b, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

<sup>297</sup> United Nations Committee on the Rights of the Child, *General Comment No. 10*, CRC/C/GC/10, 25 April 2007, para. 89; similarly, CM/Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952<sup>nd</sup> meeting of the Ministers’ Deputies, para. 35.2.

<sup>298</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rules 38-40; see also, in this regard, Human Rights Council Res. 7/29, *Rights of the Child*, 28 March 2008, para. 32, and CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, para. 77, which suggests “regime activities” aiming at “education, personal and social development, vocational training, rehabilitation and preparation for release”.

<sup>299</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 39.

<sup>300</sup> *Ibid.*, Rule 42.

their opinions in all decisions affecting them, children should have a right to select educational and vocational training options, as far as that is feasible.<sup>301</sup>

(4) Children placed in detention facilities are frequently behind in their studies, or are illiterate, or have learning difficulties. Child detention facilities should therefore provide remedial and special education to assist children who have cognitive or learning difficulties.<sup>302</sup>

(5) In order not to stigmatize children and to support them in finding work after being released from the child detention facility, diplomas or educational certificates awarded to children while in detention should not indicate in any way that the recipient was formerly institutionalized.<sup>303</sup>

(6) Programmes should be “integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty”.<sup>304</sup> The Havana Rules recommend that such education should be provided outside the child custody facility wherever possible. It is recognized, however, that if detention is really being used as a last resort this may not be possible, and thus the sub-article about attendance at a school or vocational training centre in the community is added as an option.

### *Article 66 – Work opportunities*

(1-5) The words “labour” and “work” have essentially the same meaning. However, the term “child labour” suggests forced work, whereas the term “work opportunities” implies remunerated work. In order to protect children from performing forced labour in detention it is important that national labour laws explicitly apply to children in custodial facilities in the same way as to other children in the community and that any work that children undertake complies with the international standards set out in Article 32 CRC<sup>305</sup> and the International Labour Organization Convention on the Worst Forms of Child Labour.<sup>306</sup> This means in particular that children should “be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development”.<sup>307</sup> In addition, work should be viewed primarily as a complement to vocational training that enhances the possibility of finding suitable employment when children return to their communities. The Havana Rules require that “the type of work should be such as to provide appropriate training that will be of benefit to the juveniles following release”<sup>308</sup> and that “the interests of the juveniles and of their vocational training should not be subordinated to the purpose of making a profit for the detention facility or a third party”.<sup>309</sup> Children should not be expected to work gratis and should be equitably remunerated.<sup>310</sup> Where possible, children should have the opportunity to work in the local community. Where work is carried out in the child

<sup>301</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 43.

<sup>302</sup> *Ibid.*, Rule 38.

<sup>303</sup> *Ibid.*, Rule 4.

<sup>304</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 38.

<sup>305</sup> *Ibid.*, Rule 44.

<sup>306</sup> International Labour Organization, *Worst Forms of Child Labour Convention*, C182, 17 June 1999.

<sup>307</sup> Article 32(1) CRC.

<sup>308</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 45.

<sup>309</sup> *Ibid.*, Rule 46.

<sup>310</sup> *Ibid.*, Rule 46.<sup>311</sup> *Ibid.*, Rule 45

custody facility, the Havana Rules provide that the organization and methods of work should resemble as closely as possible those of similar work in the community to help prepare children for normal occupational work.<sup>311</sup> The State must issue secondary regulations covering the work that children may undertake while deprived of their liberty, the conditions that are applicable and the safeguards to be applied.

(6) According to Havana Rule 67, work “should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction”.

(7) The management of the detention facility has the choice to distribute the earned money to the child either while he or she is in detention or all at once upon release. Both options have advantages and disadvantages. Where the money is distributed while the child is detained, he or she can enjoy a higher standard of living due to the possibility of buying additional food and clothing or other personal items allowed in the detention facility. On the other hand, the child may be in danger of suffering extortion from other detained children or even staff. Wherever there is circulation of money within a detention facility, the management of the detention facility therefore has the duty to monitor and take adequate action to respond to and prevent such extortionate behaviour. Distributing the money all at once upon release, on the other hand, prevents extortion and may help the child to restart his or her life in freedom with some financial means. At the same time it may lead to a lower overall living standard for detained children.

### *Article 67 – Recreation*

(1) The Havana Rules set out the requirements for exercise and recreational activities. The Rules provide that every child has the right to a suitable amount of time for daily free exercise. This should take place in the open air whenever the weather permits. During this time, appropriate recreational and physical training should be provided.<sup>312</sup> There is no international rule for the period of time that children must spend out of cells or being provided with recreational activities. However, Rule 21(1) SMR specifies that “every prisoner ... shall have at least one hour of suitable exercise in the open air daily if the weather permits”.<sup>313</sup> This should be significantly increased for children, given their particular needs.

(2-4) The Havana Rules require child custody facilities to provide adequate space, installations and equipment for recreational, physical and leisure activities, and to ensure that each child is physically able to participate in the available programmes of physical education.<sup>314</sup> Remedial physical education and therapy should be offered, under medical supervision, to children needing it.<sup>315</sup>

<sup>311</sup> *Ibid.*, Rule 45

<sup>312</sup> *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), Rule 21.1. See also United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 47.

<sup>313</sup> *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), Rule 21; see also CM/Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952<sup>nd</sup> meeting of the Ministers’ Deputies, para. 27.1.

<sup>314</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 47.

<sup>315</sup> *Ibid.*, Rule 47.

(5) The Havana Rules do not limit recreation to sporting activities but provide that children “should have additional time for daily leisure activities, part of which should be devoted, if the child so wishes, to arts and crafts skill development”.<sup>316</sup>

### *Article 68 – Freedom of religion, conscience and thought*

(1-2) This provision mirrors Articles 14(1) and 30 of the CRC and Rules 41 and 42 of the SMR as well as Havana Rules 4 and 48. In this context it must be noted that detention facilities should provide a prayer room for children so that they can exercise their religious rights.

(3) The duty to respect the child’s freedom of conscience and thought is explicitly mentioned in paragraph 87.1 of the Council of Europe Recommendation to member States on the European Rules for juvenile offenders subject to sanctions or measures.<sup>317</sup>

### *Article 69 – Contact with family and the outside world*

(1) Article 37(c) of the CRC provides that “every child deprived of liberty ... shall have the right to maintain contact with his or her family through correspondence and visits”,<sup>318</sup> while the Beijing Rules provide that parents or guardians shall have a right of access “in the interest and well-being of the institutionalized juvenile”.<sup>319</sup> Similarly, Rule 37 of the SMR allows communication with “family and reputable friends at regular intervals, both by correspondence and by receiving visits”.<sup>320</sup> The importance of the role of the family for the well-being of the child and his or her rehabilitation and reintegration is also recognized by the CRC Committee in General Comment No. 10<sup>321</sup> and by the Havana Rules.<sup>322</sup> The Havana Rules provide standards on the minimum level of contact that should be allowed, ruling that children have the right to communicate by telephone at least twice a week with whomever they choose<sup>323</sup> and that every detained child should have the right to be visited regularly and frequently by his or her family, in principle once a week and not less than once a month.<sup>324</sup> The Havana Rules do not limit the persons with whom children should be allowed to

<sup>316</sup> Ibid., Rule 47.

<sup>317</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, para. 87.1.

<sup>318</sup> See also: United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 47, and Rule 61, which provides that “every juvenile should have the right to receive correspondence”; Human Rights Council Res. 7/29, *Rights of the Child*, 28 March 2008, para. 32; CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, paras. 85.1-86.2; and Guideline IV.A.6.21.a, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

<sup>319</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 26.5.

<sup>320</sup> See also CM/Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952<sup>nd</sup> meeting of the Ministers’ Deputies, paras. 24.1-24.12.

<sup>321</sup> United Nations Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), paras. 87 and 89.

<sup>322</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rules 59-62.

<sup>323</sup> Ibid., Rule 61.

<sup>324</sup> Ibid., Rule 60.

maintain contact to relatives and legal guardians but specifically include “friends and other persons or representatives of reputable outside organizations”.<sup>325</sup> These persons are considered “significant persons” with a view to this Law. It is highly recommendable to allow the detained child to receive unlimited letters, e-mails and parcels, and be visited by his or her family not less than [option 1: once a week] [option 2: once a month]. In addition, children with insufficient funds to pay for telephone calls and/or to send letters must be helped by the detention facility to maintain regular contact with their relatives, legal guardians and other significant persons. Article 16 of the CRC enshrines the child’s right to be protected from arbitrary or unlawful interference with his or her privacy. Children do not cease to be entitled to this right when they are deprived of their liberty. The Havana Rules emphasize that personnel involved with children deprived of their liberty “should respect the right of the juvenile to privacy”.<sup>326</sup> Visits must take place in circumstances that respect the need of the child for privacy and for contact and unrestricted communication with his or her family.<sup>327</sup> The same applies to correspondence with relatives, legal guardians and other significant persons. In order to exercise their rights fully, children need to have the appropriate facilities to maintain contact with relatives and significant others. Children may also need additional assistance to be able to enjoy this right. The Havana Rules provide that children should be assisted as necessary in order to effectively enjoy their right to communicate in writing or by telephone.<sup>328</sup> The Rules do not spell out what is meant by “assisted as necessary”, but it is reasonable that children have access to phones, a certain number of free phone calls, writing materials and free postage. Detention centres need to maintain rules on visiting and communication in order to ensure the effective running of the institutions. However, these rules must not result in children and families being unable to maintain frequent contact or in unnecessarily reduced contact. While family visits need to be regulated in order to ensure the effective running of the institutions, family visits and contact should not be withheld or granted as a measure of discipline or encouragement. Contact with families is an integral component of rehabilitation and reintegration and a fundamental right. The CRC Committee recommends in General Comment No. 10 that States should set out clearly in law the exceptional circumstances that may limit this contact, and should not leave it to the discretion of the competent authorities. The term “exceptional circumstances” relates to situations where preventing contact is in the child’s best interests, and does not include a lack of access to means of communication in the detention centre or the placement of the child at a distance from his or her parents or legal guardians that makes visiting difficult or impossible.

(2) This paragraph is a safeguard for the detained child. His or her parents or legal guardian must be informed where the child is being detained as soon as possible and not later than 24 hours after admission to the detention facility. To prevent the disappearance of a detained child, his or her parents or the legal guardian must also be informed if the child is transferred to another detention facility. The detention facility has the obligation to provide the child with a telephone or other means of communication to contact his or her parents or legal guardian to inform them of his or her arrival at the detention facility. Means of communication may include e-mails, letters and faxes.

(3) The Havana Rules encourage States to use every means to ensure that children have adequate communication with the outside world, as this is both “an integral part of the right to fair and humane treatment and ... essential to the preparation of juveniles for their return to society”.<sup>329</sup> In

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<sup>325</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 59.

<sup>326</sup> *Ibid.*, Rule 87(e).

<sup>327</sup> *Ibid.*, Rule 60.

<sup>328</sup> *Ibid.*, Rule 61.

<sup>329</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 59.

order to facilitate contact with the outside world, the Havana Rules provide that children should be able to receive special permission to leave the detention facility for educational, vocational or other important reasons. Any time spent outside the detention facility should be counted as part of the period of sentence.<sup>330</sup> Detention facilities should also set up a special scheme for temporary leave. States should therefore adopt secondary legislation to implement such a scheme. In this context, legislation should provide that leave may be granted only for a specified period, for a specified purpose and with conditions necessary to safeguard the welfare of the child. Thus a leave of absence may be granted for a child to visit his or her family or other significant persons, to attend a funeral, for educational or vocational training purposes, to take part in approved education, sport, recreation or entertainment, or for any other purpose that the management of the detention facility considers will assist the child's reintegration and rehabilitation. Where a child is granted a leave of absence he or she must be considered to be in lawful custody during the period of leave and any period of leave must count as part of the child's period of detention. Where the child breaches a condition imposed in relation to the leave of absence, the management of the detention facility in which the child is deprived of liberty may vary the conditions of leave or cancel the leave of absence. The child should have the right to challenge such a decision in the children's [juvenile] [youth] court according to Article 5(6) of this Law.

(4) The communication of detained children with their relatives, legal guardian or other significant persons can be restricted only by court order or by the management of the detention facility. While this Law does not restrict the court on the conditions of such an order, the management may limit the child's communication only when there is evidence that contact with certain relatives, the legal guardian or any other significant person(s) would have "a serious detrimental impact" on the child. In this regard this Law thus sets the bar high for the management of the detention facility in order to prevent arbitrariness in its decision. The management of the detention facility needs to explain its decision in writing.

(5) As restrictions on communication with people close to the child affect him or her gravely, any such decision – whether a court order or a decision by the management of the detention facility – must be subject to judicial scrutiny. The child must be allowed to challenge any court decision and any decision by the management of the detention facility at the competent children's [juvenile] [youth] court.

(6) International standards recognize that the wider community and non-governmental organizations have an important role to play in the rehabilitation and reintegration of children in general.<sup>331</sup> Rule 59 of the Havana Rules stresses that the community and "reputable" organizations can contribute to the rehabilitation of children in detention. This is in line with General Comment No. 10 by the CRC Committee, which states that "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".<sup>332</sup> The involvement of outside organizations can help to expand the range of activities and support to which the child can gain access while detained, supporting his or her development and encouraging his or her reintegration into society.<sup>333</sup> It is up to the individual

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<sup>330</sup> Ibid., Rule 59.

<sup>331</sup> See United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 25.1.

<sup>332</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 89.

<sup>333</sup> Ibid., para. 89.

State to decide whether regulations should be issued covering the type of such organizations, whether approval should be obtained for the organization to work with children in custodial settings, the extent to which staff of the organization should be police-checked, the range of activities that may be undertaken, supervision and accountability. However, the management of child detention facilities must encourage and permit regular visits by lawful organizations and clubs, including but not limited to those providing educational, sporting, musical, artistic and cultural activities and information and advice on healthy living.

### *Article 70 – Staffing*

In accordance with Havana Rules 81-85, this Law lays down the fundamental standards for staffing detention facilities for children. However, this provision could be expanded to include additional standards or secondary legislation in the form of regulations or operating rules, rules setting out staffing requirements and employment procedures as well as recruitment and vetting procedures for staff employed to work in a child detention facility, levels and ratios of staffing, gender balance of staff in each type of institution, requirements for training and forms of training. Only highly skilled and experienced staff should be employed to work in child detention facilities. In particular, the director of a facility should be adequately qualified for his or her task, with administrative ability and suitable training and experience, and should carry out his or her duties on a full-time basis.<sup>334</sup> The staff should consist of qualified personnel and should include specialists such as doctors, nurses, teachers, vocational instructors, counsellors, social workers, psychiatrists and psychologists. Rule 85 of the Havana Rules highlights the importance of training, including ongoing and in-service training, for personnel working in detention centres, including training on children's rights.<sup>335</sup> Capacity-building has also been recommended by the Independent Expert for the United Nations Study on violence against children.<sup>336</sup> Staff should receive training in child psychology, child welfare and international standards and norms of human rights and the rights of the child, including the Havana Rules. Staff also need to be trained in behaviour-management techniques. It is vitally important that staff are carefully selected and recruited.<sup>337</sup> All members of staff should also be checked before they are employed to ensure that they do not have a record of violence or sexual offences and are suitable to work with children. It is also crucial that detention facility personnel are adequately remunerated.<sup>338</sup>

### *Article 71 – Disciplinary measures*

(1-2) The Committee of Ministers of the Council of Europe states in its Recommendation on the European Rules for juvenile offenders subject to sanctions or measures that “disciplinary

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<sup>334</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 86.

<sup>335</sup> See also: Human Rights Council Res. 10/2, *Human rights in the administration of justice, in particular juvenile justice*, 24 March 2009, para. 6; and Inter-American Court of Human Rights, Judgement of September 18, (Ser. C) No. 100 (2003), para. 136.

<sup>336</sup> United Nations General Assembly, *Report of the independent expert for the United Nations study on violence against children*, 19 August 2005 (A/60/282); see in this regard also Part IV, CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040th meeting of the Ministers' Deputies.

<sup>337</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 82.

<sup>338</sup> Recommendation 10 of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 27 June 2012 (A/HRC/21/25).

procedures shall be mechanisms of last resort” and that “restorative conflict resolution and educational interaction with the aim of norm validation shall be given priority over formal disciplinary hearings and punishments”.<sup>339</sup> If disciplinary measures are, however, applied, the Havana Rules provide that “any disciplinary measures and procedure should . . . be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person”.<sup>340</sup> The Havana Rules also state that “all disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose.”<sup>341</sup> While family visits need to be regulated in order to ensure the effective running of the institution, family visits and contact should not be withheld or granted as a measure of discipline or encouragement. Contact with families is an integral component of rehabilitation and reintegration and a fundamental right.

(3) With regard to the prohibition on forcing a child to work as a consequence of non-compliance with the rules of the detention facility, Rule 67 of the Havana Rules states that “labour should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction”. Therefore it is strictly prohibited to force a child to do any kind of labour as a sanction for breaking the rules of the detention facility.

(4) This paragraph enables the authorities involved, such as the independent inspection authority, and also the parents or legal guardian of the child to trace any ill-treatment of the detained child by detention personnel and at the same time to provide documentary evidence in court if a child has been mistreated.

(5) International standards require that there be written rules on measures of discipline in institutions.<sup>342</sup> These rules must be published in a child-friendly manner and must also be explained orally to the child upon admission to ensure that every child fully understands what kind of behaviour is tolerated and what kind of behaviour inside the detention facility will be sanctioned. The oral explanation of the rules on measures of discipline is particularly important where a child cannot write or read.

### *Article 72 – Use of force and/or physical restraint*

The commentary to Article 22 of this Law applies *mutatis mutandis* to Article 71, with the additional proviso that only staff who have received training in the use of physical restraint may be authorized

<sup>339</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, para. 94.1.

<sup>340</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 66.

<sup>341</sup> *Ibid.*, Rule 67. See also: Committee on the Rights of the Child, General Comment No. 10, Children’s Rights in Juvenile Justice, 25 April 2007 (CRC/C/GC/10), para. 89, which states that “disciplinary measures in violation of Article 37 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”; CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, para. 95.6; and General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 27(g).

<sup>342</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 68.

to use force or instruments of restraint against a child. The State must make additional regulations detailing the type of restraint measures that may be used, the circumstances in which restraint may be used, who may use such measures, the training to be given to staff and the procedures for ordering and recording the use of restraint or force.

### *Article 73 – Non-intimate and intimate searches in detention*

The commentary to Articles 29 and 30 of this Law applies *mutatis mutandis* to Article 72. Strip searches must never be ordered as a disciplinary measure or any form of punishment.

### *Article 74 – Regular and independent system of inspection*

(1) One of the main concerns in relation to children deprived of liberty is the lack of external monitoring of conditions, care and treatment. In order to ensure that the rights of a detained child are fully protected, an independent inspection service needs to be established.<sup>343</sup> Detention facilities should be inspected regularly by a government agency which the State concerned has to appoint in order to assess the compliance of the detention facilities with national and international standards and norms.<sup>344</sup> In this regard it needs to be mentioned that access to the detention facilities should be granted to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the ICRC and the Committee against Torture monitoring the implementation of the CAT. On the European continent, access should be granted to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

(2) The independent inspection service should not belong, or be accountable, to the administration of the facility it is inspecting. Furthermore, the inspectors “should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative”.<sup>345</sup> Inspectors should have unrestricted access to all persons employed by or working in any facility where children are or may be deprived of their liberty and “should be required to place special emphasis on meeting, speaking and listening to children in detention facilities, in a confidential setting”.<sup>346</sup> Where the inspector[s] identify[ies] violations of the rights of children or legal provisions, the case should be referred to the competent authorities for investigation.<sup>347</sup> States are encouraged to establish not only an independent inspection body but also an independent ombudsman who can receive and investigate such complaints.<sup>348</sup>

(3) The success of an independent monitoring mechanism depends on its effectiveness. Therefore any child in the inspected detention facility must have the right to complain directly to the inspector.

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<sup>343</sup> This is in line with CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers’ Deputies, paras. 125-126.4.

<sup>344</sup> *Ibid.*, para. 125.

<sup>345</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 89.

<sup>346</sup> *Ibid.*, para.89. See also *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), Rules 35 and 36.

<sup>347</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 74.

<sup>348</sup> *Ibid.*, Rule 77.

In order for the child not to fear any negative consequences or be influenced by detention personnel, the child must have the opportunity to speak with the inspector in private. The inspector must enquire about the conditions of detention and the child's treatment in a child-friendly way so as to enable him- or herself to understand fully the needs of the child, since children may not express themselves as accurately and sophisticatedly as adults.

### *Article 75 – Complaints and requests*

(1) Children should have the right to make requests or complaints to the management of the detention facility,<sup>349</sup> the central administration, judicial authorities and other independent authorities about any matter that affects them while in detention.<sup>350</sup> Such complaints should not be censored either in content or in substance.<sup>351</sup> The complaint procedure should be “confidential, age-appropriate, gender-sensitive and accessible” to children deprived of liberty.<sup>352</sup> While responsibility for child protection should lie with the director of each detention facility, it is good practice for a “delegated person” also to have responsibility for the implementation of the policy and procedure, in order to ensure that children (and staff) can easily gain access to the reporting mechanism and also to ensure that complaints against the director can be appropriately addressed.

(2) In order to exercise their right to make complaints effectively, children clearly have to be aware of their rights and the complaints procedure.<sup>353</sup> Rule 35(1) of the SMR provides that every prisoner on admission shall be provided with written information on the authorized methods of seeking information and making complaints and on his or her rights and obligations. Children must be given this information in a child-friendly manner which also takes into consideration any learning difficulties, illiteracy, language barriers etc. In order to ensure that the complaints mechanism is effective, this Law incorporates a number of fundamental principles drawn from international standards and good practice. The Havana Rules emphasize that the complaint should be dealt with and the child informed of the response without delay.<sup>354</sup> Children will be discouraged from making

<sup>349</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 75. See also Rule 36(1) of the *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), which provides that detainees should have this opportunity each weekday.

<sup>350</sup> See: Rule 36(3) of the *Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4); Recommendation 6 of the *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system, 27 June 2012, (A/HRC/21/25)*; and CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, para. 121.

<sup>351</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 76.

<sup>352</sup> General Assembly Res. 63/241, *Rights of the Child*, 13 March 2009, para. 27(e). In para. 27(j), States are urged to “establish and develop safe, well-publicized, confidential and accessible mechanisms to enable children, their representatives and others to report violence against children as well as to file complaints in cases of violence against children, and to ensure that all victims of violence have access to appropriate confidential, child-sensitive health and social services, paying special attention to the gender-specific needs of girls and boys who are victims of violence”.

<sup>353</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 89.

<sup>354</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113).

complaints where the procedure is complex. It is the duty of the administration of the detention facility to ensure that children can make complaints easily. The need for accessibility is highlighted by the CRC Committee in paragraph 89 of General Comment No. 10. The Havana Rules emphasize the child's right to assistance in making complaints. In particular, "illiterate juveniles should be provided with assistance should they need to use the services of public or private agencies and organizations which provide legal counsel or which are competent to receive complaints".<sup>355</sup>

### *Article 76 – Transferring a detained child to another detention facility*

(1) This provision mirrors paragraph 96 of the Council of Europe Recommendation on the European Rules for juvenile offenders subject to sanctions or measures.<sup>356</sup> A transfer of a detained child to another detention facility must be allowed only in exceptional cases. Transferring a child must be allowed only where it better promotes the reintegration and rehabilitation of the child into society or where it is imperative to remove the child from the detention environment because of serious security and safety risks.

(2) To prevent arbitrary transfers of a detained child from one detention facility to another, a child may be transferred only by court order. This measure reflects paragraph 98 of the Council of Europe Recommendation on the European Rules for juvenile offenders subject to sanctions or measures<sup>357</sup> and guarantees judicial review while limiting the power of detention personnel to decide on the placing of the child.

(3) The wording of paragraph 99.1 of the Council of Europe Recommendation on the European Rules for juvenile offenders subject to sanctions or measures<sup>358</sup> has been used to guide the phrasing of this paragraph. To ensure that the child receives the same level of care, all relevant documents must be transferred to the receiving detention facility in a confidential manner in order to protect the personal data of the child.

(4) Paragraph 99.2 of the Council of Europe Recommendation on the European Rules for juvenile offenders subject to sanctions or measures has been replicated in this provision.<sup>359</sup> The child's human dignity and worth must be respected during a transfer from one detention facility to the other. This means that the personal protection of the child en route must be guaranteed at all times. The transfer has to be executed in a child-friendly manner and by trained personnel. Adequate breaks and clean drinking water and food must be provided. The use of force and of instruments of restraint during the transfer is prohibited, but is allowed if and only if the child poses a danger to himself or herself or others. The child's privacy must be respected during the transfer.

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<sup>355</sup> Ibid., Rule 78.

<sup>356</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, para. 96.

<sup>357</sup> CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, para. 98.

<sup>358</sup> Ibid., para. 99.1.

<sup>359</sup> Ibid., para. 99.2. <sup>359</sup> Ibid., para. 99.2.



## Chapter VII: Aftercare and reintegration

### *Article 77 – Preparation for release*

(1) Many children who are released from custody are left to fend for themselves, with no arrangements for housing, employment, education, counselling or support, despite the fact that the Havana Rules require States to ensure that all children leaving detention benefit from such arrangements.<sup>360</sup> Failure to make such arrangements is likely to lead the child very quickly to re-engage in offending behaviour. Making arrangements for children who are leaving detention can require considerable amounts of coordination and planning. That planning process should be started on the first day of the sentence and a plan focusing on the reintegration and rehabilitation of the child into society should be elaborated.<sup>361</sup>

(2) Prior to a child's release from the detention facility the management of the detention facility needs to prepare accordingly and take, as early as possible, all necessary steps listed in (a)-(g) of this paragraph to facilitate the child's release.<sup>362</sup> According to the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, "access programmes that prepare children in advance for their return to their communities, with full attention given to them in respect of their emotional and physical needs, their family relationships, housing, schooling and employment possibilities and socio-economic status",<sup>363</sup> should be elaborated.

(3) In order to facilitate the reintegration process the persons in charge of the reintegration of the child at the child detention facility should work with the responsible agency in the area to which the child is due to return, as well as with the child and the family, on a discharge plan. At the least, the plan should cover accommodation arrangements, the transport to be provided to enable the child to travel home or to the place where he or she will live, education or vocational training or employment arrangements, counselling and psychosocial support, any necessary medical support and, most important of all, the financial support to be provided.<sup>364</sup> The plan must be developed with the child and, where appropriate, with the child's family and community, and must take into account the child's views and wishes. Furthermore, it must contain the name and contact details of the allocated probation officer [social worker] who will work with the child on release. The child custody facility should ensure appropriate educational and psychosocial support for the child in the

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<sup>360</sup> See for example United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rules 38 and 59; see also CM/Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952<sup>nd</sup> meeting of the Ministers' Deputies, para. 35.3.

<sup>361</sup> CM/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 the Committee of Ministers on 24 September 2003 at the 853<sup>rd</sup> meeting of the Ministers' Deputies, para. 19.

<sup>362</sup> In this regard see also CM/Rec (2008)11 of the Committee of Ministers to member States on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008 at the 1040<sup>th</sup> meeting of the Ministers' Deputies, para. 15.

<sup>363</sup> Guideline IV.A.6.21.c, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*, 17 November 2010.

<sup>364</sup> See also CM/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 the Committee of Ministers on 24 September 2003 at the 853<sup>rd</sup> meeting of the Ministers' Deputies, para. 19.

United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 59.

months preceding his or her release, preferably in the form of pre-release courses, so that the child understands the contents of and the reasons for the plan. Prior to release, the child should make home visits to his or her family. These are important for the child's reintegration and also give the persons in charge of the reintegration of the child at the child detention facility an opportunity to assess how successful placement back in the family is likely to be for him or her.<sup>365</sup> It is good practice for a core group of staff in the detention facility, who have had appropriate training, to form a Rehabilitation and Reintegration Unit and to be responsible for working with the child and the appropriate agencies in the area in which he or she is going to live. In this way staff will develop a specialism in preparing children for their release. In many countries the probation service undertakes the task of supporting released detainees, but where a probation service has not been established this task often falls to NGOs. Where possible, the child detention facility and the probation service should try to place a child back into the family home, with extra support if needed. Living within a family network usually increases the chances of successful reintegration. For some children, however, a return home is not in their best interests, or not possible. An assessment should be carried out by the probation service or appropriate body to determine whether placement with their family is in the child's best interests. This assessment should be carried out well in advance of the release date to ensure that there is time either to work with the family to prepare them for the child's release or to make alternative arrangements.

### *Article 78 – Early release*

(1) Article 37(b) CRC states that deprivation of liberty shall be for the shortest appropriate period of time. In order to implement this provision, any custodial sentence should be reviewed on a regular basis and a decision should be made as to whether continuing detention is necessary.<sup>366</sup> The commentary to Rule 28 of the Beijing Rules states that “upon evidence of satisfactory progress towards rehabilitation, even offenders who had been deemed dangerous at the time of their institutionalization can be conditionally released whenever feasible”. This periodic review of placement is supported by Article 25 CRC.

(2) Depending on national legislation, the review should be undertaken by a court or, where it exists, by a specialized Children's Review Board established by law or other equivalent body. These authorities must determine both whether the placement is appropriate and whether there is any continuing reason to deprive the child of his or her liberty. The recommendations of the review should be made in writing. Where the court that originally sentenced the child is also the competent court deciding on the release, this court must within 15 working days make a decision on whether to release the child and on any conditions to be attached to that release. Where the Children's Review Board or other appropriate authority is reviewing the case, it must within 15 working days make a decision on whether to release the child and on any conditions to be attached to that release.

(3) If after a formal review of early release possibilities the decision is not to release the child early, reasons for this should be given in writing, together with a statement of the steps that need to be taken by the child, and by the child custody facility, to permit early release to be considered again in the future.

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<sup>365</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the Havana Rules), adopted by the General Assembly on 14 December 1990 (A/RES/45/113), Rule 59.

<sup>366</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 28.

(4) The management of the detention facility can actively participate in the early release process of the child. Whenever there are grounds to believe that early release is appropriate, it can put a request for early release to the competent authority mentioned in paragraph (2) above. This allows for a broader use of early release schemes as the child does not necessarily have to take action or actively lodge a request.

(5) The child should have a right of appeal against the decision at the appeals court [chamber] at the children's [juvenile] [youth] court according to Article 5(6) of this Law.

### *Article 79 – Conditional release*

(1-3) Conditional release, sometimes referred to as release on licence, refers to the situation in which specific conditions are attached to a decision to permit a child to be released early from a sentence of detention. Such conditions are usually set by the body that has the power to order early release and they can be wide-ranging. The child may be required to live in a certain place, such as a “half-way house”, or to attend specified community programmes. He or she may also be required to return home every night at a specified time and not to go to certain places or associate with certain people. The child may also be asked to submit to regular drug testing or to visit a mental health facility or take medication on a regular basis. Commonly, a child will also have to register with the probation service (or appropriate authority) as a condition of release. The probation service will generally be responsible for ensuring that the child meets the conditions of release. Where a State does not have a probation service, a decision will need to be made as to which body has responsibility for monitoring that the child is adhering to the conditions set.

(4) It is essential that the conditions placed on the child are realistic and that the child is fully supported in meeting them.<sup>367</sup> Without support the child is likely to breach the conditions of release very quickly. A breach of the conditions should not mean an immediate application to return the child to detention, but rather, the breach should be a trigger for reconsideration of the level of support being offered and the conditions being imposed.

(5) If the probation service [or other appropriate body] decides that there has been a breach of the conditions and that the child is committing further offences or that the child poses a risk to others, and that an application should be made to return the child to the child detention facility to serve the rest of his or her custodial sentence, it is important that the child is fully informed of the fact that such an application will be made and of the reasons for the application. In addition, in accordance with Article 37(d) CRC, every child who is at risk of being deprived of his or her liberty should have the right of access to legal and other appropriate assistance and the right to challenge the legality of the detention before a court or competent, independent and impartial authority. This right applies to an application to return the child to a custodial facility just as much as it applies to a child facing an initial trial for an offence. States will need to decide which body will have responsibility for making the application to the court to place the child back in detention when the conditions of release have been broken.

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<sup>367</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 28.

*Article 80 – Release on compassionate grounds*

(1) A child deprived of liberty can be released on compassionate grounds (including medical grounds) by either the competent court or the authorities mentioned in the commentary to Article 76(2) of this Law. Compassionate grounds generally include the serious illness or imminent death of a parent or other close family member, the serious illness of the child, and serious effects on the child's physical and/or mental health being caused by his or her detention.

(2) The deciding authority has the right to attach conditions to the release on compassionate grounds, if it deems this necessary. In this regard, the commentary to Article 77(1-2) applies *mutatis mutandis*.

*Article 81 – Support and supervision after release*

(1) Unless adequate support is given to the child following a period of detention, there is a high risk that any rehabilitative gains that have been made during the child's detention will be lost. The commentary to the Beijing Rules<sup>368</sup> and Rule 80 of the Havana Rules emphasize the importance of care and support following a period of detention. When it comes to the actual day of the release, the child detention facility has a positive obligation to ensure that the child is handed over to his or her parents or legal guardian. Where the parents or legal guardian are not available to collect the child at the detention facility, the management of the detention facility has to put in place mechanisms to deliver the child safely to his or her home. The parents or legal guardian must sign a form presented by the officer concerned upon delivery of the child stating that the child has been handed over.

(2) This paragraph imposes a positive obligation upon States. The State has the duty to put in place legislation to facilitate the child's reintegration and rehabilitation after his or her release from the detention facility. Close cooperation between different State agencies and welfare agencies or any other body concerned with the child's reintegration and rehabilitation is to be sought.

(3-4) The support listed in this Law is the minimum to be provided. The Beijing Rules provide that the State should also provide "half-way houses, educational homes, day-time training centres and other such appropriate arrangements that may assist juveniles in their proper reintegration into society".<sup>369</sup> States should have in place a well-trained probation service to allow for the maximum and effective use of early release, conditional release and release on licence. The service should work with both the child and the child's family.





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United Nations Office on Drugs and Crime

Vienna International Centre, PO Box 500, 1400 Vienna, Austria  
Tel.: (+43-1) 26060-0, Fax: (+43-1) 26060-5866, [www.unodc.org](http://www.unodc.org)