CHILDREN IN CONFLICT AND IN CONTACT WITH THE LAW

INTRODUCTION

To open the Internet links, click on texts in blue.

GENERAL INFORMATION

The field of Juvenile Justice or of systems of Justice specialized for minors in conflict with the law, is the field of children’s rights where the international community has been drafting the larger amount of legislation. It is obviously a very sensitive field where child rights violations are numerous, where violence in institutions must be deplored, and where the response is not always child-friendly, and does not always favour individual child development. It is moreover a domain where State exerts force in response to child behaviour contrary to the criminal law; and where State interference also represses non-criminal behaviour (running away, breaking disciplinary rules, breaking curfews, rude behaviour…), all of these actions would not come under law if committed by an adult (status offence). And, alas this field of Juvenile Justice sometimes accounts for violations of children’s rights at the hands of States themselves: in the arrest phase, in administrative detention, in the execution of judiciary sentences, but also in institutional care.

In many countries, the system of juvenile criminal justice substitutes itself to the protection and welfare system for children in difficulties, as well as for poor, orphaned, or abandoned children. In a high number of countries, millions of girls and boys spend their childhood not under the care of parents, but under the supervision of facilities related to the criminal Justice system, and yet they belong in welfare
institutions, or should be taken up in non-institutional care. For manifold and various reasons, many children are detained in administrative detention, finding themselves in closed facilities unlikely to ensure reintegration and rehabilitation for them. Such environment induces the repetition of the offense rather than fighting it\(^1\).

That is why, those past 25 years, the international community has been continuously drafting law instruments. As early as 1985, the UN adopted the Beijing Rules on the administration of Juvenile Justice. In 1989, the Convention on the Rights of the Child specifically granted a whole range of rights to children in conflict with the law in its articles 37 and 40. In 1990, both the Riyadh Rules\(^2\) for prevention of juvenile delinquency and the said “La Havana Rules” on the protection of minors deprived of their liberty, arose. And recently, in 2005, the UN broadened the scope of application of Juvenile Justice to include victims and witnesses, thanks to the Guidelines in the matter of Justice for Child Victims and Witnesses of Crime. The Committee on the Rights of the Child, very focused on violations of the rights of children in conflict with the law, issued a General Comment in 2007 on child rights in Juvenile Justice\(^3\).

And yet, this issue cannot be said the central theme as far as youth is concerned, since it does not encompass, and by far, every young girl and boy, unlike nutrition, housing, education or health. However, due to recurrent violations of the rights of children in conflict with the law, and due to the demand from some States for more severe security policies, the international community prompted the UN bodies (as well as regional instances like the Council of Europe) to provide principles in this field to protect the child’s best interests, all the while granting public security. Raising awareness in State instances on problems arising in forced detention, in long-term confinement, or following abusive or disproportionate interventions, is essential; it has also been necessary to remind that the child is a person, subject of rights; criminal accountability evolves according to the child’s age, he/she depends on adults in many ways, and cannot be treated as an adult. This requires from the States specific procedure norms, a range of particular responses and specialised judiciary instances.

### Typology and Definitions\(^4\)\(^5\)

In alphabetical order

**Administrative detention:** A child is in administrative detention when deprived of liberty, waiting for a competent authority to give a final decision on his/her case.

**Alternative:** Alternative designs any kind of judiciary intervention avoiding deprivation of liberty (prison or closed facility). Alternative can lead to a penal system or response (sentence or measure).

**Conflict with the law:** A child is considered in conflict with the law when he/she has committed or has been accused of committing an offense. According to local contexts, a child can also be in conflict with the law when it is taken up by the justice system for minors or for adults, due to alleged dangers faced by the child in view of behaviour or environment.

**Deprivation of liberty:** A child is “deprived of liberty” when submitted to some form of detention or imprisonment in a public or private facility, by order from a competent authority. The child is not allowed to leave the facility to his/her liking.

**Diversion:** The aim of diversion is to grant minors, at every stage of the procedure, the opportunity of an alternative way, separate from the formal justice system. The general goal is to make the best out of restorative justice experiences, involving community, and addressing efficiently the root causes of behaviour, while identifying strategies to avoid repetition.

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2. For references and links, See chapter *International Legal protection of children in conflict with the law* (below p5 ff)
3. CRC/C/GC/10, February 9th, 2007
4. See *Beijing Rules*.
5. See *Interagency Panel on Juvenile Justice*. 
Diversion form Court: Alternatives to trial: measures dealing with children under suspicion, accused or convicted of infringing the criminal law without resorting to judiciary process. In Juvenile Justice, diversion form court is a key element of a performing system. It spares the child a criminal record and stigma from youth on; it spares the child delinquent contamination. On the contrary, the child can benefit from the educational programmes and acquire a sense of social responsibility by carrying out Community Service Orders (CSO), or by giving reparation to the victim. All of that contributes to prevent repetition of the offense.

Diversion from Custody: Measure involving no deprivation of liberty, to which a child can be sentenced by a competent authority.

Juvenile Justice: Refers to legislation, norms and standards, procedures, mechanisms, institutions and groups specifically devised for dealing with juveniles perpetrators of criminal offence.

Juvenile Offender: A child or a youth, accused or convicted to commit an offense.

Minor: Child or youth who, with regard to the law system concerned, can be made accountable for an offense, according to modalities different from those applied to an adult case.

Offence: Designs any behaviour (deed or omission) punishable in virtue of the judicial system considered.

Prevention: It aims first and foremost at keeping children away from conflict with the law, and if such a conflict has occurred, at keeping them away from the formal criminal justice system.

Probation: Measure implying no privation of liberty, but focused on monitoring and supervision of the child authorized to remain in the community. Probation is usually supervised by a competent authority: prosecutor’s office, social welfare service, or probation service agent. Probation can be used as an independent measure, or following the expiry of a sentence of confinement.

Protection: The goal of protection is to shield children in conflict with the law from human rights violations. Protection takes into account their personal evolution, in order to deter them from repeating the offence, to encourage rehabilitation, and to make their return to society easier.

Restorative Justice: Its aim is to restore balance in the damaged link (between the victim, the perpetrator, and community). This approach of justice promotes solutions likely to make up for the damage, to reconcile opposed parties, and to restore harmony in the community. It applies to people of any age, but turns out particularly important for juvenile offenders, since it can impact in a sustainable and positive way on their moral and emotional development: it can give a halt to the processes leading from youth to adult crime. It includes prevention, diversion measures, rehabilitation, alternatives to detention (detention being used as a last resort only, for the shortest time possible, capital and corporal punishment being banned).

Status offence: Deed or behaviour that is not reprehensible if the person who commits it is or seems to be over 18.

**The main reasons of the conflicts of children with the law**

The reasons engendering conflicts between children and the law are varied and complex. They encompass poverty, family breakdown, single parent families, reconstructed families, peer pressure, lack of education, unemployment, or absence of vocational perspectives, flawed guidance from parents, neglect...

Numerous children in conflict with the law are victim of socio-economic hardship. This deprives them of the right to education, to health, to shelter, care and protection. Many children missed an education or only attended a few years, many of them had to start working at an early age.

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Part of these children ran away from home, preferring the streets to domestic violence. Others were forced to take to the streets and make them their living place, in the hope to survive. These abandoned, neglected or poverty-stricken children become the targets of criminal organisations, which exposes them to sexual exploitation, child trafficking, and involvement in the drug trade.

Global, social and economic intervention are necessary to eliminate those root causes: they include programmes fighting poverty, educational, vocational, and parent counselling programmes.

In parallel, it is urgent to reach out to children already in the justice system, in order to deter them from pursuing their crime career, and to favour their rehabilitation and inclusion (back) into society. Programmes and projects must aim at child protection in general, and set the following specific objectives:

- Promote legislative reforms to make national legislations conform to international standards and to the rules on Juvenile Justice
- Raise awareness among government officials, magistrates and civil society representatives and train them on Juvenile Justice issues
- Promote alternatives to prevent children from getting involved in the criminal proceedings, and look for community-based solutions to sort out misdemeanours
- Ensure strict implementation of international (and if pertinent, national) standards, to grant fair treatment, protection and reininsertion to children in contact with the criminal justice system.

A good example of the complexity of root causes, is institutional care order: the World Report on Violence Against Children indicates as main reasons for the resort to institutional care:

- Poverty
- Family violence
- Disability
- Family hardship, including HIV/AIDS
- Absence of choice (no future...)

**The Main Issues Related to Children in Conflict with the Law**

- An overwhelming majority of the children involved in the system of criminal justice should not be there
- A large majority of minors deprived of liberty has not been found guilty and/or is still in wait for trial
- Abusive and inadequate use of confinement, and the lack of alternative, expose many boys and girls to violence
- Detaining children for minor offenses jeopardizes their future and social integration
- The majority of children in conflict with the law are boys; nevertheless boys to the same extent as girls are victim of serious violations of their rights.

**The Expected Responses**

- Conduct a prevention policy, through assistance and protection measures adapted to the difficulties faced by youths, to avoid infringement and conflict with the law.
- Be careful to implement gender-sensitive prevention strategies, as well as diversion and protection measures: boys being overrepresented in the judiciary systems, specific problems arise concerning girls.

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7 Save the Children UK, Juvenile Justice, *Modern Concept of Working with Children in Conflicts with the law*, 2004, pp. 11-12.
8 Paulo Sérgio Pinheiro, *op.cit.*, pp. 185ss
9 See Interagency Panel on Juvenile Justice.
• Not criminalize: status-offences (truancy, vagrancy, alcohol consumption, etc.) and survival behavior (begging); the fact of being victim of abuse and exploitation, antisocial behavior.

• Value priority resort to alternative sanctions as a response to offense and limit resorting to the formal criminal justice system for child perpetrators of serious offenses or those involving violence.

• Develop restorative justice systems both inclusive, focused on the child’s best interests, and conform to international standards.

• Establish responsibility and put an end to adult impunity (perpetrators of violence, abuse, trafficking, economic, sexual exploitation, kidnapping, pornography...) towards children thanks to efficient and transparent inquiry, complaint, control and redress mechanisms.

• Implement international instruments, notably the UN Rules and the rules of regional organisations, relevant as far as Juvenile justice is concerned.

**Girls in detention**

Girls are clearly under-represented in the figures of children in conflict with the law. They make up grossly the 15% of all cases of minors involved in the penal system. Urgent question accordingly arise: the availability of care facilities destined to them; specific (and prominently sexual) violence they are exposed to; the lack of concerned attention when they face judiciary instances as witnesses or victims; the lack of consideration for their personal development.

“Administrative detention” is disproportionately applied to girls, even in cases where they are victims of sexual exploitation and abuse. Protective detention of girls victim of sexual violence is commonplace in countries where “honor crimes” are rampant; the victims are not reunited with their families, for fear that they be murdered to preserve family honor, or forcibly married to the rapist.

As girls in detention are generally in inferior number compared to boys, few specialised institutions are open to them. In 2002, a report on minors and law showed that “the number of minor girls in the systems is limited, consequently they simply join the mainstream system, without real acknowledgment of the fact that their needs are different separate from the ones of older women. This also means that they attract less resources...”

Detained girls face a real danger of physical and sexual violence, especially when they are detained in mixed facilities, or placed in grown-up facilities due to inexistent adapted structures. Male staff indulges in “sanctioned sexual harassment”, involving indecent body search, watching the girls dress, make their washing or use the bathroom. Due to its position of force, the staff can negotiate sexual favours, or even assault and rape girls.

**Media and public opinion**:

• Children in conflict with the law are often the victims of negative stereotypes, a factor that strongly influences their treatment within the justice system: it does not respect the principle of individualization of boys and girls, and leads to ready-made and inappropriate response.

• False ideas about children in conflict with the law are often based on the absence of objective and precise statistics on youth crime. This lack of data is to blame on faulty infrastructures, lack of systematized data collection methods, incoherent categorisation of offences, and political manipulation of statistics. Moreover, statistics rarely take into account the gravity of the offense.

• Medias can nourish public fear and stigma towards children in conflict with the law, by inaccurate, little representative and sensational reporting. This public fear directly impacts local and national policies, engendering discriminatory, repressive and punitive practices.

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10 Paulo Sérgio Pinheiro, _op. cit_., pp. 193ss.
12 See Interagency Panel on Juvenile Justice.
The reform of the judiciary system must aim to change negative, generalised and stereotyped attitudes towards children in conflict with the law through awareness-raising, public teaching and child participation in decision-making.

INTERNATIONAL LEGAL PROTECTION OF CHILDREN IN CONFLICT WITH THE LAW

CHILD SPECIFIC INSTRUMENTS

• Minimum Rules for the administration of Juvenile Justice (Beijing Rules - 1985)
  These rules provide guidelines for States on how to take into account child rights protection and respect for their needs when setting up specialised justice systems for minors. The rules are non-binding, but fill a gap on Juvenile Justice, since no anterior text was hinting at it. They preceded the Convention on the Rights of the child. As a matter of fact, the Convention re-introduced the main Beijing provisions to give them constraining force. This text is important since it clearly defines the way Juvenile Justice must be conducted during the three phases of instruction, trial and execution.

• UN Convention on the Rights of the Child (CRC)
  November 20th, 1989: The major legal instrument, legally binding for all State parties (193 out of 195 UN members). Juvenile Justice is addressed in articles 37 and 40.

• UN Guidelines for the Prevention of Juvenile Justice (Riyadh Guidelines - 1990)
  Adopted after the CRC, it hints to this basic text and to child status as a human being owner of rights. These guidelines are non-binding, except for particular issues already formulated in the Convention. Chapter 6 deals with legislation and administration of Juvenile Justice. The prevention of juvenile delinquency cannot be reduce to the field of criminal juvenile justice, but must include all childhood and adolescence related fields; there is no such thing as prevention exclusively targeting criminal behaviour. Prevention must gather all the forces contained in society. “Prevention is everybody’s business”, and not only a few specialists. The contribution of community, school, organisations, and media is pointed out in the text. Not as models to follow, but as means helping youths to make clever choices.

• UN Rules for the Protection of Minors Deprived of Liberty (La Havana Rules - 1990)
  The objective is clearly to enhance protection of minors deprived of liberty, i.e. any person under 18 deprived of their liberty following an order by a judicial authority. The harmful effects of the deprivation of liberty must be anticipated to grant respect for child rights. The basic underlying principles of these rules are: minors cannot be deprived of their liberty without objective legal justification; the creation of small size open facilities must be favoured, contact with the family must be maintained, staff must be trained, minors deprived of liberty must be prepared for release (educational programmes). Particular attention is paid to pre-trial detention, rules concerning custody or other stays in police offices. This is of paramount importance, since this stage of the procedure accounts for the most important violations of children’s rights.

• The Administration of Juvenile Justice
  1995 Recommendations by the Committee on the Rights of the Child, introduced as minimum rules to observe by States, and reference

• Guidelines for Action on Children in the Juvenile Justice System
  (1997) ECOSOC Resolution 1997/30

• Basic principles on the use of restorative justice programmes in criminal matters
  (2000) ECOSOC Resolution 2000/14

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Children’s Rights in Juvenile Justice
Committee on the Rights of the Child, General Comment N°10 (2007)

INSTRUMENTS NON-SPECIFIC TO CHILDREN:

- International Covenant on Civil and Political Rights (1966), in particular articles 6, 9, 10, 14
- Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984)
- UN, Minimum Rules of the Treatment of Prisoners (1977)
- European Convention on Human Rights (1950)

THE CRC SYSTEM AND CHILDREN IN CONFLICT/CONTACT WITH THE LAW

Two CRC articles directly refer to Justice for minors (37 and 40). However, they are based on CRC general principles: non-discrimination (art.2), best interests of the child (art.3), right to life, survival and development (art.6), and right to express views (art.12). Those articles establish necessary steps to respect in order to issue decisions in accordance with the CRC.\[15\]

The express reference made by the CRC to the principle of dignity as the basis of the whole human rights system and mentioned in article 40 § 1 of the Convention must be noted: \textit{States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.}

THE MODELS

Judiciary systems set up by States have wavered between protection and repression. As a matter of fact, some states preferred to establish their system on child protection, while others clearly turned to the repression model, by punishing the minor perpetrator. Between those two conceptions, a third way emerges, taking particular features of both models, and involving a forgotten actor: the victim. Those three models are:

THE WELFARE MODEL\[16\]

- The underlying consideration of this model is that the criminal behaviour is clearly linked to the unfavourable social, economic, and family situation. Any intervention must aim to address the root causes of this behaviour, more than to punish the perpetrator. The child is considered as a \textit{victim of his/her environment}. The basic criterion is the well-being of the child.
- Examples: Portugal, Poland, Brazil, France, Scotland.


• It can be qualified a "child’s interest" model.
• Critique: although the living surroundings clearly influence behaviour, it is far-fetched to put down crime and deviancy in an absolute and necessary dependence relationship with the child’s environment.

**The Justice Model**
• This model turns the minor into a responsible being, that must not necessary be cured, but that can be sanctioned. Delinquency and deviancy are no pathological state, but result from a personal choice. The minor is accordingly held responsible of his/her deeds, and must assume their price. Punishment takes a large place in this model, and the intensity of social reaction will vary due to the type, number, and seriousness of the offence.
• Examples: Germany, Thailand, Bolivia.
• It can be qualified severe and procedural.
• Critique: it is objectionable to declare the child absolutely free to lead his/her fate, to master existence and to make choices in a way respectful of the interests of others and of community life: the child must learn this responsibility.

**The third way: Restorative Justice**
• Restorative Justice has been mainstreamed in criminal law. It tries to integrate the three heads of the triangle: perpetrator – victim – society. This model is based on the idea that the protection system is not enough focused on the offence, and does not give enough importance to the notion of turning the minor into a responsible being. The model reintroduces the victim in the juvenile justice trial. The whole intervention is thus oriented towards making the youth aware of the harm engendered by the deed. It also ensues an awareness of the necessity to make up for the damage, and to take a clear stand towards the value a community wants to share.
• Examples: Austria, Spain and the United Kingdom have introduced elements of Restorative Justice in their legislation.
• Critique: the confrontation between the perpetrator and the victim is submitted to the necessary agreement of the latter to face the minor: victims quite often refuse, especially in cases of sexual assault. For very dangerous offenders whom the victim refuses to meet, the system is confronted to its limit.
• We shall refer ourselves to the Declaration of Lima (2009) for a better approach of this type of justice.17

**Some worries**18

• More than 1 million children worldwide are deprived of liberty by public force representatives.
• Most children in detention have not committed serious offenses. A large number of them have even committed no criminal offence. They are deprived of liberty for status-offences, such as vagrancy, begging, school drop-out, tobacco or alcohol consumption...
• In many cases, children are placed in detention because they come together with a parent to the detention facility, or because the apply for asylum in another country.
• Some children are detained for motives such as ethnic origin, religion, nationality, or political opinions.
• An important proportion of professionals dealing with children in detention facilities acknowledges that many (if not most) of them should not be incarcerated.

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18 V. UNICEF, Children and Justice.
You are invited to visit our Documentation Centre.

Switzerland:

REGIONAL
- European Convention on Human Rights (and five Protocols -1950)
- Resolution (66) 25 of the Council of Europe on the short-term treatment of young offenders of less than 21 years
- Resolution 78 of the Council of Europe on Juvenile Delinquency and Social Change
- Recommendation (87) 20 of the Council of Europe on social reactions to juvenile delinquency among young people coming from migrant families
- Recommendation (88) 6 of the Council of Europe on social reactions to juvenile delinquency among young people coming from migrant families
- Recommendation (2003) 20 of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice

INTERNATIONAL
See. pp. 5-6.

NATIONAL INSTANCES
In Switzerland arrests of the Federal Tribunal (supreme instance)
- ATF 92 IV 81: The Federal Tribunal clearly states that the age at the time of the offense, and not at the time of the trial, is relevant to conduct an ordinary criminal procedure or a juvenile justice procedure.
- ATF 133 IV 267: Article 41 al. of the Federal law on the Penal condition of minors, pledges cantons to provide an appeal procedure, among others against decisions of confinement in juvenile justice procedures. An inmate under the terms of juvenile justice legislation can accordingly lodge an appeal against a decision ordering or extending his/her detention.
- ATF 133 I 286: Separation of minors from adults in administrative detention: Federal law on the Penal condition of minors does not set forth a transitory deadline to implement separation of minors from adults.

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19 RS 311.1
20 ATF: Arrêt du Tribunal federal (Supreme Court Arrest)
**REGIONAL COURTS**

**JURISPRUDENCE FROM THE EUROPEAN COURT OF HUMAN RIGHTS**

**Nortier vs Netherlands case 24/08/1993**
The attorney of a minor opposes a magistrate’s decision, invoking the fact that the latter had taken part in the preparatory phase of the trial, concluding on lack of impartiality. The criminal procedure applicable to children, with the aim to protect and educate them, must differ from the one applicable to adults, which is meant to be repressive. “Minors can claim the same protection of their basic rights as adults, but the unachieved state of their personality and their diminished social accountability must be taken into account due to article 6 of the Convention. The right of any defendant to be judged by an impartial court must not be incompatible with the protection treatment of minor delinquents. It seems reasonable and adequate to organize the procedure in a way such as one Judge knows about the case from the beginning of the preparatory instruction, by adopting adequate provisory measures, till the execution of the sentence, where it will be the task of the Judge to monitor the implementation of the protection measures set forth by the Judgment, in order to develop a trusting relationship between the juvenile Judge on the one hand, and the minor, his/her parents or guardian, on the other hand.”

No violation of article 6 ECHR

**Aydin vs Turkey case, 25/09/1997**
Abusive treatment on a minor girl by police and security forces during arrest in Turkey. Violation of articles 3 and 13 ECHR

**Bocos-Cuestas vs Netherlands case, 10/11/2005**
Equity of the procedure about accusations of sexual abuse on children in Netherlands. Violation of article 3 ECHR.

**Okkali vs Turkey case, 17/10 2006**
Impunity of policemen for mistreatment of a 12-year old minor in Turkey. Violation of article 3 ECHR.

**T. vs United Kingdom case 16/12/1999**
Conviction of a child for murder, by a court for adults in the United Kingdom. Violation of articles 6§1 and 5§4 ECHR, but no violation of 5§1 ECHR.

**COMMITTEE ON THE RIGHTS OF THE CHILD**

The Committee on the Rights of the Child monitors implementation of the Convention and of its optional protocols by its State parties. It evaluates the progress achieved by the latter in the implementation of the CRC, remaining obstacles and problems faced by children to enjoy their full rights. This work is being carried out by reviewing periodic reports given in by the 193 CRC State parties...

1. **Introduction**
   
The Committee notes with appreciation the many efforts to establish an administration of juvenile justice in compliance with CRC. However, it is also clear that many States parties still have a long way to go in achieving full compliance with CRC, e.g. in the areas of procedural rights, the use of deprivation of liberty only as a measure of last resort, etc.

21 Approving opinion by Judge Morenilla.
2. The objectives

The objectives of this general comment are:

- To encourage States parties to develop and implement a comprehensive juvenile policy to prevent and address juvenile based on and in compliance with CRC
- To provide States parties with guidance and recommendations
- To promote the integration, in a national and comprehensive juvenile justice policy, of other international standards, in particular the Beijing Rules, the Havana Rules, the Riyadh Guidelines.

3. Juvenile Justice: the leading principles of a comprehensive policy

- Non-discrimination (art.2)
- Best interests of the child (art.3)
- The right to life, survival and development (art.6)
- The right to be heard (art.12)
- Dignity (art.40 I)

4. Juvenile Justice: the core elements of a comprehensive policy

I. Prevention of juvenile delinquency

Emphasis should be placed on prevention policies that facilitate the successful socialization and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and the world of work, as well as through voluntary organizations.

The States parties should also develop community-based services and programmes that respond to the special needs, problems, concerns and interests of children, in particular of children repeatedly in conflict with the law, and that provide appropriate counselling and guidance to their families.

II. Interventions/diversion

Children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child’s assuming a constructive role in society. In the opinion of the Committee, the obligation of States parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies, but is certainly not limited to children who commit minor offences, such as shoplifting or other property offences with limited damage, and first-time child offenders.

III. Age and children in conflict with the law

a) The minimum age of criminal responsibility

The reports submitted by States parties show the existence of a wide range of minimum ages of criminal responsibility. They range from a very low level of age 7 or 8 to the commendable high level of age 14 or 16. Quite a few States parties use two minimum ages of criminal responsibility.

Article 40 (3) of CRC requires States parties to seek to promote, inter alia, the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law, but does not mention a specific minimum age in this regard. The committee understands this provision as an obligation for States parties to set a minimum age of criminal responsibility (MACR). This minimum age means the following:

- Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. That's an irrefutable assumption.
- Children at or above the MACR at the time of the commission of an offence (or: infringement of the penal law) but younger than 18 years can be formally charged and subject to penal law procedures. But these procedures, including the final outcome, must be in full compliance with the principles and provisions of CRC.

It can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are
encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.

b) The upper age-limit for juvenile justice

This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice. Every child shall be registered immediately after birth. A child without a provable date of birth is extremely vulnerable. Every child must be provided with a birth certificate free of charge whenever he/she needs it to prove his/her age. If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.

IV. The guarantees for a fair trial

Article 40 (2) of CRC contains an important list of rights and guarantees that are all meant to ensure that every child alleged as or accused of having infringed the penal law receives fair treatment and trial.

Most of these guarantees can also be found in article 14 of the International Covenant on Civil and Political Rights (ICCPR).

All these guarantees are minimum standards, meaning that States parties can and should try to establish and observe higher standards, e.g. in the areas of legal assistance and the involvement of the child and her/his parents in the judicial process.

V. Measures

The Committee wishes to emphasize that the competent authorities should continuously explore the possibilities of alternatives to a court conviction. The laws must provide the court/judge, or other competent, independent and impartial authority or judicial body, with a wide variety of possible alternatives to institutional care and deprivation of liberty, which are listed in a non-exhaustive manner in article 40 (4) of CRC, to assure that deprivation of liberty be used only as a measure of last resort and for the shortest possible period of time.

Committee recommends the few States parties that have not done so yet to abolish the death penalty for all offences committed by persons below the age of 18 years. The imposed death penalty should be changed to a sanction that is in full conformity with CRC.

An Amnesty International report mentions that Iran, Saudi Arabia, Nigeria, the Democratic Republic of Congo, Yemen, Pakistan, China and the United States, have condemned children to death penalty in the 1990-2004 period.

VI. Deprivation of liberty, including pre-trial detention and post-trial incarceration

The Committee notes with concern that, in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC. The Committee also recommends that the States parties ensure by strict legal provisions that the legality of a pre-trial detention is reviewed regularly.

Every child deprived of liberty shall be separated from adults. Ignoring this rule compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility.

The Committee wishes to emphasize that, inter alia, the following principles and rules need to be observed in all cases of deprivation of liberty:

- Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement.
- 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.

- Every child has the right to be examined by a physician upon admission to the detention/correctional facility.
- Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care.

5. The organization of juvenile justice
States parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the penal law.

A comprehensive juvenile justice system further requires the establishment of specialized units within the police, the judiciary, the court system, the prosecutor’s office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child.

It is clear from many States parties’ reports that non-governmental organizations can and do play an important role not only in the prevention of juvenile delinquency as such, but also in the administration of juvenile justice.

6. Awareness-raising and training
To create a positive environment for a better understanding of the root causes of juvenile delinquency and a rights-based approach to this social problem, the States parties should conduct, promote and/or support educational and other campaigns to raise awareness of the need and the obligation to deal with children alleged of violating the penal law in accordance with the spirit and the letter of CRC.

It is essential that all the professionals involved receive appropriate training on the content and meaning of the provisions of CRC.

7. Data collection, evaluation and research
The Committee is deeply concerned about the lack of even basic and disaggregated data on, inter alia, the number and nature of offences committed by children, the use and the average duration of pre-trial detention, the number of children dealt with by resorting to measures other than judicial proceedings the number of convicted children and the nature of the sanctions imposed on them. The failure in collecting data on Juvenile Justice and in the strategic use of these data contributes to the inability to grant protection to children in conflict with the law.

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24 See Interagency Panel on Juvenile Justice
A few examples:

1. **Death penalty: executions still carried out**
   Although they have all ratified the CRC, five countries still apply death penalty to minors: Iran, Pakistan, Saudi-Arabia, Yemen and the Democratic Republic of Congo. The ban on death penalty is based on article 6 CRC, that endows every child with the right to life and survival: it is stated more specifically for the children who commit offenses in art. 37 a): ban on death penalty for people under 18. Notwithstanding the nature and gravity of the offense. The principle is clear: no death penalty. And no exception to this principle. May 2008, Human Rights Watch issued a report on the situations in the concerned countries, indicating that the global number of known executions since 2002 was 29.

   As well the Committee on the Rights of the Child, the Human rights Council as the Committee Against Torture firmly condemn death penalty as judiciary sanction. The delay spent in the death row, extradition to a country practicing it and some modes of execution are considered an act of torture and an inhumane and degrading treatment.

   On March 1st, 2005, the US Supreme Court declared in connection with the Roper, Superintendent, Potosi Correctional Centre v. Siommons case, that death penalty pronounced against minor offenders is unconstitutional.

2. **Life sentence and corporal punishment**
   About twelve countries authorize life imprisonment for minors without possibility of release, and numerous countries inflict corporal punishment (whip, beating with sticks, etc...) as penal sanction. In its General Comment n°8 on the right of the child to protection against corporal punishment and other form of cruel or degrading punishment, the Committee has reminded that “corporal punishment”.

3. **Switzerland: a new legislation on juvenile law**
   On November 20th, 2003, Switzerland adopted a new Federal law on the Penal condition of minors, entered into force on January 1st, 2007. Before this adoption, provisions applicable to minor delinquents made up a special section of the Swiss Criminal Code. This new legislation was needed both to address n aggravating of youth delinquency and to meet the security requirement of the population. This double challenge resulted from major social change like: loosening of social norms, shift from the traditional family to single-parent, restructured family, migration, unemployment or “no future” outlook. This law follows 5 aims: education, youth protection, prevention, social adaptation and rehabilitation and public security.

   This is no revolutionary law, but a law keeping its confidence in a welfare system, all the while including elements of restorative and shifting to a tougher stand towards perpetrators of very serious offenses. It is also a law text conforming to international standards and vowing to see minimal procedure rules applied to the entire country. A shortcoming, however, is to set the age of penal interventional 10 years, which is contrary to the recommendations of the committee on the Rights of the child. Nevertheless, fine and deprivation of liberty can be pronounced only towards minors aged 15 at the time of the offense.

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25 Zermatten J., La peine capitale et les obligations des Etats, Press Conference, July 8th, 2008
26 Human Rights Watch, Enforcing the International Prohibition of the Juvenile Death Penalty, May 30th
27 R.S 311.1
This issue has arisen recently in the scope of Juvenile Justice, traditionally more focused on the perpetrator. Various international standards are relevant here, including the CRC, the Optional Protocol on the sale of Children, Child Prostitution and Child Pornography (2000), the Guidelines in the Matter of Justice for Children Victims and Witnesses of Crime (ECOSOC 2005), and the Council of Europe Convention for the Protection of Children Against Sexual Exploitation and Abuse (2007).

Thanks to the CRC, the child acquires a new status. He becomes part of the procedure, has the right to be heard, to express views in any procedure concerning him/her. Yet, the CRC is not very explicit on children victims and witnesses. The notion of victim appears in article 8, §1, 2 and 3 of the 2000 Optional Protocol. At each step of the procedure, States must adopt measures to protect the rights and interests of child victims. The Protocol fills a gap, prompts legislative re-drafting, provide guidance for professionals and protects children and their rights.

The ECOSOC Guidelines enounce the five principles, namely the four CRC principles, plus the principle of dignity, give a definition of victims and witnesses, and list the rights to respect.

The Council of Europe Convention (not yet in force)28 follows the objective to prevent and combat abuse and exploitation, protect the rights of victim children, and promote international cooperation.

In 1991, Switzerland adopted a Federal Law on “Aid to Victims of Crime”29, that especially defends the interests of the victim.

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Picture by Gilbert Vogt Togo 1996 Lomé Young girl released by police superintendent.

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