



**Doc.**

...May 2014

## **Child-friendly juvenile justice: from rhetoric to reality**

Report<sup>1</sup>

Committee on Social Affairs, Health and Sustainable Development

Rapporteur: Mr Stefan SCHENNACH, Austria, Socialist Group

### *Summary*

Despite the panoply of international and regional standards providing a well-established framework for modelling juvenile justice, there is a considerable and continuing dissonance between the rhetoric of human rights discourse and the reality of juvenile justice interventions, in particular juvenile detention, for many children. Indeed, both the United Nations and the Council of Europe's monitoring bodies have identified a rather unsatisfactory situation with respect to the enforcement of human rights standards in the area of juvenile justice and detention.

There is a need to focus on the implementation of the relevant standards in order to respect children's rights and improve juvenile justice practices across Europe. In this context, the Assembly considers that a number of factors are key in this respect: preventing juvenile delinquency, averting young people from the penal system through a high minimum age of criminal responsibility and diversion measures, favouring the implementation of alternative non-custodial measures, as well as reducing the number of children in detention. Such policies are also less costly, more likely to ensure public safety, and help young people to reach their potential.

---

<sup>1</sup> Reference to Committee: Doc.12672, Reference No. 3795 of 3 October 2011 and Doc.12907, Reference No. 3866 of 25 May 2012.

## A. Draft resolution<sup>2</sup>

1. Children's rights have developed considerably in the last three decades. During this process, it became clear that children have unique needs which should be taken into account, inter alia, when they encounter the justice system. This issue has been specifically addressed in a number of international and regional children's rights instruments, including the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted in 2010.

2. Children encounter the justice system in many ways, including when they are in conflict with the law. Finding the best way to deal with juvenile delinquency is a challenging task for all governments, who need to find the right balance between the protection of society and the best interest of the child, as a developing, learning human being, who is still open to positive socialising influences. However, pressure on politicians to "get tough on crime" has driven increasingly harsh responses to children in conflict with the law.

3. Moreover, despite the panoply of international and regional standards providing a well-established framework for modelling juvenile justice, there is a considerable and continuing dissonance between the rhetoric of human rights discourse and the reality of juvenile justice interventions, in particular juvenile detention, for many children. Both the United Nations and the Council of Europe's monitoring bodies have identified a rather unsatisfactory situation with respect to the enforcement of human rights standards in the area of juvenile justice and detention.

4. With a view to improving children's rights and juvenile justice practices across Europe, it is crucial to focus on the implementation of the relevant standards. Preventing juvenile delinquency, averting young people from getting into the penal system through a high minimum age of criminal responsibility and diversion, favouring the implementation of alternative non-custodial measures, as well as reducing the number of children in detention, are key factors to a successful system of juvenile justice. They are also less costly, more likely to ensure public safety, and help young people to reach their potential.

5. In view of the above, the Assembly urges the Council of Europe member States to put their law and practice into conformity with human rights' standards, modelling juvenile justice.

6. In particular, the Assembly calls on the Council of Europe member States to:

6.1. establish a specialised juvenile justice system by means of dedicated laws, procedures and institutions for children in conflict with the law;

6.2. set the minimum age of criminal responsibility at least at 14 years of age, while establishing a range of suitable alternatives to formal prosecution for younger offenders;

6.3. prohibit exceptions to the minimum age of criminal responsibility even for serious offences;

6.4. ensure that detention of juveniles is used as a measure of last resort and for the shortest possible period of time, in particular by:

6.4.1. determining an age limit below which it is not permitted to deprive a child of his or her liberty, preferably higher than the minimum age of criminal responsibility;

6.4.2. developing a broad range of alternative non-custodial measures and sanctions to pre-trial detention and post-trial incarceration;

6.4.3. abolishing life imprisonment of any kind for children;

6.4.4. establishing a reasonable maximum period to which a child may be sentenced;

6.4.5. providing regular reviews of custodial measures and/or sanctions a child is subjected to;

6.5. develop a broad range of diversion programmes, respective of human rights standards, with a view to dealing with juvenile offenders without resorting to judicial proceedings;

6.6. decriminalise status offences;

---

<sup>2</sup> Draft resolution adopted unanimously by the Committee on 12 May 2014.

6.7. ensure that all professionals involved in the administration of juvenile justice receive the appropriate training with a view to guaranteeing an effective implementation of children's rights in this context.

7. The Assembly calls on all member States to support the call for a global study on children deprived of liberty initiated by Defence for Children International, supported by several other civil society organisations and launched on 13 March 2014.

## **B. Explanatory memorandum by Mr Schennach, rapporteur**

### **1. Introduction**

1. Children's rights have developed considerably in the last three decades. During this process, it became clear that children have unique needs which should be taken into account, inter alia, when they encounter the justice system. That is why this issue has been specifically addressed in a number of international and regional children's rights instruments, thereby contributing to promote child-oriented justice systems.

2. Children may encounter the justice system in many ways: as parties to an administrative or a civil proceeding such as in custody arrangements, as victims or witnesses of a criminal offence, or because they are in conflict with the law, knowing that in this latter case, they may be deprived of their liberty.<sup>3</sup>

3. This report will focus only on juvenile justice,<sup>4</sup> as this seems to be the common denominator of the two merged motions it originates from ("Child-friendly justice" and "Children in detention"). Based on the assessment that there is an important gap between international and regional standards for modelling juvenile justice and the way children are being treated on a daily basis within the juvenile justice system, the report will explore ways to make children's rights a reality in the specific setting of juvenile delinquency.

### **2. Child-friendly juvenile justice: standards and implementation**

#### *2.1. International and regional standards*

4. A number of international and regional instruments establish standards in respect of juvenile justice and the deprivation of children from their liberty in this context. These include - but are not limited to - the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines on the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), and the United Nations Convention on the Rights of the Child (the CRC). The United Nations (UN) Committee on the Rights of the Child added significantly to this list by adopting its General Comment No.10 (2007) on children's rights in juvenile justice.

5. The United Nations instruments were further buttressed within the European context, by a movement towards child-friendly justice driven by the Council of Europe.<sup>5</sup> After having elaborated two instruments specifically dealing with juvenile justice (Recommendation (2003) 20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, and Recommendation (2008) 11 on the European Rules for juvenile offenders subject to sanctions or measures), the Committee of Ministers (CM) adopted in 2010, the Guidelines on child-friendly justice (the CM Guidelines).<sup>6</sup> The latter serves as a practical instrument to assist governments in adapting their judicial system to the specific needs of children in different judicial settings (including the criminal justice setting), at all stages of the proceedings and irrespective of their capacity, be it as a concerned party, a victim, an alleged offender or a witness.

6. Moreover, in February 2011, the European Commission adopted the European Union Agenda for the Rights of the Child, listing as a key priority, the aim of making justice systems more child-friendly in Europe. The EU Agenda also included a commitment to promote the use of the CM Guidelines, and to take them into account when proposing legal instruments in the field of civil and criminal justice. On 20 January 2014, negotiations began on a Commission proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings.

#### *2.2. Implementation of standards for modelling juvenile justice*

---

<sup>3</sup> Children may be deprived of their liberty in other circumstances as well, for example when they accompany a parent in detention or for immigration-related reasons (when seeking asylum in another country). This latter issue is being addressed by the Committee on Migration, Refugees and Displaced Persons in a separate report entitled "Immigration detention of children".

<sup>4</sup> Juvenile justice is understood as the area of criminal law applicable to children in conflict with the law. Accordingly, the report will neither address issues relating to the situation of children in civil and administrative proceedings, nor their status as victims and witnesses in criminal proceedings.

<sup>5</sup> Goldson, B. and Kilkelly, U. (2013) International human rights standards and child imprisonment: Potentialities and limitations. *International Journal of Children's Rights* vol 21 issue 2 pp 345-371.

<sup>6</sup> The oldest text in this field goes back to 1966 when the Ministers' Deputies (the current CM) adopted the Resolution (66) 25 on the short-term treatment of young offenders of less than 21 years.

7. Despite this panoply of international and regional standards providing a well-established “unifying framework” for modelling juvenile justice, there seems to be a considerable and continuing dissonance between the rhetoric of human rights discourse and the reality of juvenile justice interventions (especially juvenile detention) for many children. Indeed, the UN Committee on the Rights of the Child has observed that many countries still have a long way to go in achieving full compliance with the CRC, for example in the areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort.<sup>7</sup>

8. Similarly, the Council of Europe monitoring bodies have identified a rather unsatisfactory situation with respect to the enforcement of human rights standards in the area of juvenile justice and detention. The European Court of Human Rights (ECHR) found a violation of the Convention in a number of cases concerning detention of children (violations in relation to the use of detention and conditions of detention falling mainly under Articles 3 (prohibition of torture), 5 (right to liberty and security) and 8 (right to respect for private and family life)). The visit reports of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) have also revealed deficiencies with regard to the detention of children.

9. In 2009, the Commissioner for Human Rights of the Council of Europe (the Commissioner) noted that in several European countries, the age of criminal responsibility was very low, incarceration rates a cause of concern, with a disproportionate number of children from minority groups in prison. While alternative measures were being put in place for some cases, the overall trend appeared to be towards more punitive responses, especially in the case of older children and those involved in serious crime. However, in some countries the number of children being sent to prison was falling as more use was made of diversion programmes, both before and as an alternative to court proceedings, and as alternatives to custody.<sup>8</sup>

10. Against this backdrop, the core question in the area of juvenile justice seems to be the following: How can we move from standard-setting at the international/regional level to implementation of these standards in the local context with a view to improving children’s rights and juvenile justice practice across Europe? This certainly requires a strong political will, together with a number of key issues to be addressed, in my opinion, as a priority.

11. In this context, I would like to refer to a White Paper recently published by the International Juvenile Justice Observatory.<sup>9</sup> The latter identifies four key factors to a successful system of juvenile justice, and which moreover are likely to help countries save money, ensure public safety, and help young people reach their potential. These include investing early through prevention, averting young people from getting into the penal system through diversion, favouring the implementation of community sanctions and thereby reducing the probability of recidivism, and prioritising the reduction of the number of children in pre- and post- trial detention in order to minimise the negative psychological effects that detention has on children.

12. On the basis of this analysis, to which I fully adhere, I propose to focus on the following issues which I consider crucial for the realisation of a child-friendly juvenile justice system: a high minimum age of criminal responsibility, the use of detention as a measure of last resort, and the use of diversion from judicial proceedings. I would also like to briefly address the impact of the “tough on crime” stand on the juvenile justice systems.<sup>10</sup>

### **3. Minimum age of criminal responsibility**

13. The minimum age of criminal responsibility (MACR) is the minimum age where a child who commits an offence can be formally charged and held responsible in a criminal procedure. The significance of the MACR is that it recognises that a child has attained the emotional, mental and intellectual maturity to understand his/her actions and its consequences, and to be held responsible for them. There is much controversy about what should be the most appropriate MACR and there are no categorical international standards in this regard. Indeed, Article 40.3 of the CRC left decisions on the MACR open and flexible. The

---

<sup>7</sup> See footnote 3.

<sup>8</sup> Children and juvenile justice: proposals for improvements, by Thomas Hammarberg, Commissioner for Human Rights, Issue Paper, October 2009.

<sup>9</sup> White Paper “Save money, protect society and realise youth potential - Improving youth justice practice in a time of economic crisis”, 2012.

<sup>10</sup> The issue of prevention, though a key element for a successful child-friendly juvenile justice system, will not be addressed in this report, as this has already been done in the Parliamentary Assembly Resolution 1796 (2011) “Young offenders: social measures, education and rehabilitation”.

Beijing Rules as well as the CM Guidelines recommend that this minimum age should not be too low. The UN Committee on the Rights of the Child considered that an MACR below the age of 12 years was not acceptable. For those countries where the MACR was already higher, the Committee urged them not to lower it.

14. In Europe, the absolute lower age limit below which children can be held criminally responsible varies from 8 (Scotland) to 18 (Belgium).<sup>11</sup> However, these figures are slightly misleading. In Scotland for example, no child under the age of 8 can be found guilty of any criminal offence, but no person under the age of 12 may be prosecuted for an offence. Hence, there is a gap between the MACR and the minimum age of prosecution, which means that criminal offences committed between the age of 8 and 12 may be included on a child's criminal record, though a prosecution may not take place.<sup>12</sup> Similarly, in Belgium, the law on the protection of children provides that offenders under 18 must be dealt with by the youth courts, where measures taken are aimed at protection, prevention and education. However, for serious crimes, children can be directed to the adult courts and subject to adult penalties from the age of 16. This kind of "exception" to MACR for serious crimes also exists in Hungary, Ireland, Lithuania, Luxembourg and Poland. The UN Committee on the Rights of the Child has expressed its concern about this practice and strongly recommended the setting of a MACR that does not allow, by way of exception, the use of a lower age.

15. In 2010, the Child Rights International Network collected worrying evidence that a growing number of States in all regions were moving backwards in their approach to juvenile justice and seeking to criminalise more and younger children by lowering the MACR.<sup>13</sup> Such policies too often arise when exceptional cases involving children who have committed heinous offences are given prominent coverage by the media. In England and Wales for example, children have become fully accountable for offending at the age of 10 only since the murder of two-year-old James Bulger by two young boys (both 10), in 1993.<sup>14</sup> This MACR is amongst the lowest in the world. Suggestions to lower the MACR to 12 years old have also been made in France.

16. Personally, I believe that a child does not reach the emotional, mental and intellectual maturity to participate in criminal proceedings before the age of 14. Hence, MACR should not be set below this age.<sup>15</sup> In particular, it should not be forgotten that a high MACR contributes to a system which deals with juvenile offenders without resorting to judicial proceedings, the promotion of which is required by Article 40.3(b) of CRC (see below, point 5).

17. Because criminal proceedings may involve deprivation of liberty (pre-trial detention and/or imprisonment), the MACR is closely linked with the minimum age for deprivation of liberty. However, the two do not necessarily go hand in hand. For example, in Switzerland where the MACR is 10, children cannot be sentenced to imprisonment before the age of 15. The Havana Rules require that laws determine the age limit below which it should not be permitted to deprive a child of his or her liberty, which can be different from MACR. In my opinion, given the devastating consequences of detention on children, this age threshold should preferably be higher than the MACR, in particular in those countries where the MACR is too low (that is below 14). This would also contribute to the use of detention as a measure of last resort, as required by the CRC.

#### **4. The use of detention as a measure of last resort**

18. The principle of detention as a measure of last resort for children in conflict with the law is a quasi-universal norm on international law. First set out in Article 13 of the Beijing Rules relating to detention pending trial, it was then reiterated and its scope broadened in Article 37 of the CRC which stipulates that the arrest, detention or imprisonment of a child may be used only as a measure of last resort and for the shortest appropriate period of time.

19. Recent studies show however that deprivation of liberty tends to become a preferred solution, rather than a measure of last resort. It is estimated that more than a million children are deprived of their liberty across the world. The vast majority of those children are charged with minor or petty crimes, and are first-

---

<sup>11</sup> The majority of States within the European Union have settled on 14 years as the MACR.

<sup>12</sup> Children between the age of 8 and 12 committing offences are referred to the Children's Hearings System, which follows a welfare approach (Life imprisonment of children in the European Union, Child Rights International Network).

<sup>13</sup> For details see: <http://www.crin.org/en/library/publications/juvenile-justice-states-lowering-minimum-age-criminal-responsibility>.

<sup>14</sup> Weijers, I., & Grisso, T. (2009). Criminal responsibility of adolescents: Youth as junior citizenship. In J. Junger-Tas & F. Dunkel (eds.), *Reforming juvenile justice*, (pp. 45-67), Springer Publishing Company.

<sup>15</sup> The European Network of Children's Ombudspersons (ENOC) advocates for the MACR to be raised to 18.

time offenders.<sup>16</sup> Moreover, the UN Committee on the Rights of the Child noted with concern that, in many countries, children languished in pre-trial detention for months or even years. The over-representation of vulnerable children in detention has also been considered alarming.

20. With regard to the situation in Europe, relevant Council of Europe monitoring bodies such as the CPT and the ECHR reveal a rather unsatisfactory situation. While the CPT has expressed concerns about the extent to which the principle of detention as a last resort was implemented in practice in many states, the ECHR found a violation of the Convention in a number of cases involving children in detention, because the member State concerned had failed to convincingly demonstrate the need for placing the applicant (minor) in detention for long periods of time.<sup>17</sup> Similarly, the Commissioner observed an overuse of child detention (including custody), sometimes to the extent that juveniles ended up serving their sentence under pre-trial detention due to delayed proceedings in court.<sup>18</sup>

21. It should be noted that the use of custodial measures has devastating consequences for children. In addition to the negative impact of confinement on child development as such, custody invariably leads to problems of violence, anxiety, lack of self-esteem and depression. In the most extreme, yet most common cases, different types of peer and staff violence become systematic, breaches of rights are common, access to quality health, education and legal services is limited or denied and the ultimate objective of reintegration is rarely met. Even in the European Union, suicide rates among adolescents in detention illustrate the suffering and the extreme risk to which custody exposes children.<sup>19</sup>

22. It should also be noted that systematic recourse to use of detention for children in conflict with the law is counterproductive in terms of crime prevention and community safety. It is also the most expensive method of dealing with those children. According to research conducted at the juvenile court system in Chicago, Illinois (USA), children who ended up incarcerated were 13% less likely to graduate from high school and 22% more likely to end up back in prison as adults than the children who went to court but were placed under, for example, home monitoring instead. Indeed, many people ending up behind the bars make friends with other offenders and build "criminal capital". Thus, prison turns out to be excellent training for a life of crime.<sup>20</sup>

23. In view of the above and with a view to implementing the requirement that detention of children is used as a measure of last resort, it is crucial to adopt alternative non-custodial measures to pre-trial detention and post-trial incarceration, such as warnings or reprimands, educational measures with the aim to improve the educational impact on the one hand and to reduce the impact of risk factors on the other (such as educational directives e.g. in Austria, Germany, France or Lithuania), fining, supervision orders, community sanctions through which the offender can offer "a payback to the community via unpaid work", electronic monitoring, in-home detention (house arrest), training programmes (where the juveniles can learn to deal with their aggressive potential, like for instance the social training courses in Germany or so called labour and learning projects in the Netherlands), probation, and placement in foster care.

24. In addition to benefiting children receiving these measures, such alternative measures allow improvement in remaining custodial options, not only in terms of conditions, but also in terms of approaches. Intensive security and support measures should be concentrated on, and tailored to, only a limited number of high-risk offenders whose best interest and needs it is to be sentenced and cared for in a structured residential setting. Since it has been repeatedly demonstrated that prisons are damaging, costly and do not prevent re-offending, it is only by limiting the number of children in custody and making juvenile detention centres evolve towards rights-based environments fully dedicated to the aim of individualised care and reintegration that we may be able to witness a change in the use and impact of detention for juvenile offenders.<sup>21</sup>

25. Where pre-trial detention is unavoidable, the legislation should keep its length to a minimum and impose regular reviews with a view to making a decision as to whether continuing detention is necessary. It goes without saying that life imprisonment of children, of any type, is not compatible with the objective of

<sup>16</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, June 2012.

<sup>17</sup> See for example the case of *Selçuk v. Turkey*, 21768/02, 10 January 2006.

<sup>18</sup> Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Albania from 23 to 27 September 2013. See also, Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visits to the United Kingdom (5-8 February and 31 March-2 April 2008).

<sup>19</sup> International Juvenile Justice Observatory, Green Paper on Child-Friendly Justice, NGO Section, November 2011.

<sup>20</sup> <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/15/throwing-children-in-prison-turns-out-to-be-a-really-bad-idea/>.

<sup>21</sup> See footnote 17.

juvenile justice and should be prohibited. A recent study shows that in 22 of the 28 European Union member States, life imprisonment has now been explicitly abolished for children. While certainly something to celebrate, this statistic masks the extremely long maximum sentences that remain legal for crimes committed by juveniles and the disparity in sentencing across Europe.<sup>22</sup> Hence, States should also establish a reasonable maximum period to which a child may be sentenced.

26. Finally, the Assembly should support the call for a global study on children deprived of liberty initiated by Defence for Children International, and supported by several other civil society organisations. This global study would, *inter alia*, collect data and statistics on children deprived of their liberty, addressing gender, age, vulnerable groups, and disparities, describe the situation of children in detention facilities, and analyse the effective application of prevention and alternative measures that ensure that detention is used only as a last resort (privileging diversion and restorative justice, *inter alia*), with a view to formulating recommendations and good practices to implement standards, as well as to reduce the number of children deprived of their liberty.<sup>23</sup>

## 5. Diversion from judicial proceedings

27. One of the distinct features of juvenile justice is the rule that State Parties, whenever appropriate and desirable, should deal with juvenile offenders without resorting to judicial proceedings (Article 40.3 (b) of the CRC). Indeed, judicial proceedings are not, and should not be, the only way to deal with juvenile offenders. On the contrary, diversion from judicial proceedings should be a core objective of every juvenile justice system.

28. Diversion is a process which seeks to avoid a first or early contact with the criminal justice system by directing children away from the formal justice system and prosecution towards community support and appropriate services or interventions.<sup>24</sup> Diversion is based on the theory that while a child may have carried out actions that are against the law, it is more damaging to them, and they are more likely to reoffend if they are put through the formal criminal justice system.<sup>25</sup> In this context, it should be noted that diversion avoids, among other things, pre-trial detention.

29. Diversion can be applied at various stages of proceedings and can take place at the police, prosecutor or court level. The police are the first point of contact between children and the justice system and, as such, are the key actors in “diverting” children from that system at the earliest possible stage. If they feel that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims, they may divert a child from the formal court process. In the Netherlands, it is reported that about 40% of all cases of juvenile delinquency registered with the police and two thirds of the cases considered by the prosecutor’s office are diverted by these authorities.<sup>26</sup> In Austria, only the State prosecutor or a judge can decide on diversion.

30. Different forms of diversion exist in the Council of Europe member States and have proved that they produce good results for children and the public alike, as well as being cost effective. They include non-intervention (that is diversion from the system without any sanctions, in particular for petty offences and where the child is unlikely to reoffend - for example in Austria and Germany), caution or formal warnings (under the French system, the prosecutor can divert the child from formal proceedings by asking police to carry out a “*rappel à la loi*” where a police officer informs the young person and his parents of the sentence that he or she would have been likely to incur for the offence with which he or she is accused), referral to support services (including counselling, treatment for substance abuse, or classes in either education or in developing skills to deal with their offending behaviour, such as anger management), victim-offender mediation, community service, as well as family conferencing which involves the young person and his or her family in finding a solution to the problems underlying the offending behaviour.

31. Article 40 of the CRC requires States to establish clear criteria and rules for the practice of diversion with a view to avoiding arbitrary applications and ensuring that the right to non-discrimination is fully respected. Moreover, diversion should only be used if there is convincing evidence that the child has committed the offence (protection of the presumption of innocence) and freely acknowledged responsibility

---

<sup>22</sup> See footnote 10.

<sup>23</sup> The launch of the Call for a Global Study took place on March 13th, 2014 at the United Nations Office in Geneva and was hosted by Defence for Children International, in collaboration with partner NGOs.

<sup>24</sup> Commentary to the Beijing Rules, Section 11.

<sup>25</sup> Protecting children’s rights in criminal justice systems, A training manual and reference point for professionals and policymakers, Penal Reform International, 2013.

<sup>26</sup> Jaap E. Doek “Juvenile Justice: International Rights and Standards” in “Tomorrow’s Criminals: The Development of Child Delinquency and Effective Interventions”, Rolf Loeber, Peter H van der Laan, N Wim Slot, Machteld Hoevepp.



for it, and consented to the proposed measure. The child must always be aware that he or she may be acquitted if the case goes to court. Last but not least, the completion of the diversionary measure should result in a definite closure of the case without any criminal records.

## 6. Impact of the “tough on crime” stand on the juvenile justice systems

32. The 2006 United Nations Study on Violence against Children observed that although the majority of offences committed by children are non-violent, pressure on politicians to “get tough on crime” has driven increasingly harsh responses to children in conflict with the law. First of all, this gave rise to a strong tendency to skirt the legal regulations on the MACR as an absolute bar to prosecution. An example of this tendency is the “exceptions” to MACR for serious crimes which has been addressed above (see paragraph 14).

33. Another example is from the United Kingdom where, since the adoption of the Crime and Disorder Act of 1998, the magistrates’ court can impose a Child Safety Order on a child under 10 (which is the MACR for the UK), which implies punitive interventions both for the child and for the parents. The child can be placed under the supervision of a social worker or member of the local youth offending team for a period between 3 and 12 months and must participate in any intervention deemed necessary to prevent the behaviour recurring. The child safety order is founded in civil law as the child is under the MACR. The behaviour of the child which may prompt an order is an antisocial behaviour, so it is clear, according to various commentators, that the order represents an attempt to circumvent the MACR.

34. Similarly, in the Netherlands, an intervention called *Stop* for children under the MACR has been created according to which children can carry out up to 20 hours of work, training and/or restorative activities. This intervention has nothing to do with child protection and does not address specific problems of the child or the family. It is inadequate as an education intervention and explicitly not meant as such. It is a variation of *Halt*, the very popular light punishment for first offenders. Such practices imply a conflict with Article 40.3 (a) of the CRC concerning the establishment of a MACR.<sup>27</sup>

35. Moreover, an increasing number of children are being deprived of their liberty at a younger age, as the experience with the antisocial behaviour orders (ASBO) in the United Kingdom shows. The ASBO was not originally promoted as a measure aimed at youth offending, or at children at all, but rather a means of addressing persistent offending by adults, especially where this caused suffering to others in their neighbourhood. Yet by 2005, just under half of all ASBOs were being made against under-18-years old and of these some 40% were followed by a prosecution for breach, leading in some 15% of cases to a custodial sentence.<sup>28</sup> The biggest problem concerning the study of anti-social behaviour is the absence of a settled definition of what constitutes anti-social behaviour. The Commissioner has stated that “the ease of obtaining such orders, the broad range of prohibited behaviour, the publicity surrounding their imposition and the serious consequences of breach all give rise to concern”.

36. Finally, a recent study conducted in the CEE/CIS region observed that the majority of children in conflict with the law in the region do not represent a threat: they are accused of petty or non-violent offences, many have committed “status offences” - which refer to acts classified as offences only when committed by children – such as truancy, alcohol or substance use and “being beyond parental control” (running away), whilst others are engaged in survival behaviours (such as begging or prostitution).<sup>29</sup>

37. These policies, whereby governments seek to regulate the behaviour of children, draw more and more of them into the criminal justice system, instead of addressing the root causes of their social problems which require social welfare solutions.

## 7. Conclusions

38. Finding the best way to deal with juvenile delinquency is a challenging task for all governments, who need to find the right balance between the protection of society and the best interest of the child, as a developing, learning human being, who is still open to positive socialising influences. As Rapporteur, I firmly believe that juvenile offenders are children first and foremost and that the purpose of the juvenile justice system should be to make a free citizen out of a child, and to ensure his or her rehabilitation and reintegration into society.

<sup>27</sup> See footnote 12.

<sup>28</sup> Child Law for Social Work, Jane Williams, 2008.

<sup>29</sup> Juvenile justice in the CEE/CIS region: progress, challenges, obstacles, and opportunities, UNICEF, 2013.

*Doc.*

39. Experience has shown that criminalisation, and in particular imprisonment, tends to undermine efforts to assist juveniles in reintegrating positively into the community. Politicians, policy-makers and courts of law are not obliged to treat children as criminals and lock them up. Rather, they choose to do so, even though this approach, in particular detention, is not only deleterious to the well-being of children, but also profoundly irrational and counter-productive when measured in terms of crime prevention and community safety.<sup>30</sup>

40. The State's approach to juvenile crime must involve the prevention of delinquency and must stress the importance of diverting children altogether from the criminal justice system. The current financial crisis provides a positive incentive to reduce incarceration and allocate resources to invest in diversion, reintegration and restorative justice. Furthermore, for those young offenders who slip through the prevention and diversion nets, successful reintegration and rehabilitation should be the key objective. As rightly put by the former deputy Secretary General of the Council of Europe, Ms Maud de Boer-Buquicchio: "if children are our future, they are first and foremost entitled to have a future".

---

<sup>30</sup> See footnote 3.