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Juvenile justice from an international children’s rights perspective

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1. Introduction

1.1. Juvenile justice: A children’s rights issue

Since the adoption of the UN Convention on the Rights of the Child (CRC) in 1989 and its entry into force in 1990, juvenile justice1 can be considered an international children’s rights issue. The 195 countries that have endorsed the CRC are under the obligation to safeguard the rights of “every child alleged as, accused of, or recognized as having infringed the penal law” (art. 40 (1) CRC), which boils down to 1) fair treatment, with respect for children’s inherent dignity and the right to a fair trial, and 2) treatment in a manner that takes into account children’s age (child-specific treatment).

The CRC has served as a catalyst for additional standard setting at the international (UN) and regional level (note that there is no other human rights area that has resulted in so many standards at the international level; see below), for law reform in many domestic jurisdictions and for a growing body of jurisprudence, internationally and domestically. Yet, despite the increased attention for juvenile justice and almost universal endorsement of the CRC, the rights and freedoms of children in conflict with the law are often not adhered to, with devastating impact on their lives, development and future perspectives. There is, in other words, a significant gap between international and national human rights standards applicable to

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1 This chapter refers to juvenile justice as the system established to respond to children who (allegedly) committed criminal offences (i.e. everyone under the age of 18 when committing the (alleged) criminal offence; art. 1 CRC). A rough and simplified distinction can be made between systems that primarily have a welfare orientation, that is: focusing more on care and protection of children and less on the competence, accountability and rights of children, and systems with a justice orientation, in which the competence and accountability of children have a prominent position.
children (allegedly 2) in conflict with the law and the administration of juvenile justice in practice.

1.2. Complexity of juvenile justice and children’s rights implementation

The challenges concerning the implementation of children’s rights in the context of juvenile justice are related to the complexity of this particular area and its inherent tensions, ambiguities and controversies. A first important challenge relates to the objectives of juvenile justice, which are plural and serve different and potentially conflicting interests. In general, interventions towards juvenile delinquency are primarily designed to serve the interests of society, that is: to protect society against violent and dangerous offenders through incapacitation, deterrence and prevention, to restore legal order and/or to realize some level of retribution (accountability), restoration or reparation for victims3 and communities. At the same time, many juvenile justice systems are based on the assumption that juvenile offenders are different from adults and require special, pedagogically oriented interventions, which focus on the (short and long term) interests of the child offender and aim to prevent recidivism through education and reintegration. Balancing the different interests and related objectives is far from easy. Although one could defend that the interests of child offender and society are strongly connected, particularly in the long run, they are often perceived as conflicting opposites, which relates to a second challenge underscoring the particular complexity of juvenile justice.

Juvenile justice is an area that finds itself in the very heart of public interest and debate. It is significantly influenced by perceptions (true or false), (public) opinions and stigmas. As a consequence it is an easy prey for ‘tough on crime’ or ‘zero tolerance’ approaches (see e.g. Smith 2014; Cavadino and Dignan 2006), often at the cost of a nuanced, evidence- and rights-based imagery of juvenile offenders and offending. In general, children in and around the juvenile justice system belong to the most stigmatized children of society, together with children belonging to minorities, immigrant children, street children and children in need of (mental health or alternative) care. In addition, there are persistent misconceptions regarding the incidence and prevalence of juvenile delinquency, its impact on public safety and effective strategies to prevent or respond to juvenile offending.

The challenges concerning children’s rights implementation in the area of juvenile justice are furthermore related to the wide variety of juvenile justice practices throughout the world and within countries. Comparative and systematic analyses of juvenile justice systems reveal the absence of a universal notion of what a juvenile justice system should look like and what this means for critical juvenile justice issues, including, among others: accountability, proportionality, participation, prevention and sentencing (see e.g. Cavadino and Dignan 2006; Cipriani 2009; Dünkel et al. 2010; Rap 2013). One comes across stark differences in the way children in conflict with the law are dealt with; differences that can be explained by the historical background of systems, perceptions with regard to childhood, children’s capacity, punishment, protection, etc., the context of juvenile delinquency, including social factors such as poverty,

2 Children in the juvenile justice system are often referred to as ‘children in conflict with the law’. While using this terminology, one should not disregard that until a judicial body convicts the child of committing a criminal offence he or she is under the allegation of being in conflict with the law.

3 The position of victims has gained significant attention in many domestic jurisdictions as well as at the international level. This includes the position of child victims; see e.g. art. 39 CRC and the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, ECOSOC Res. 2005/20.
social exclusion and stigmatization, existing institutional structures and the availability of financial and human resources.

Finally, it is important to highlight that juvenile justice systems as such are rather complex systems, with different stages and related interests (from the initial arrest, police interrogations and pre-trial investigations to the trial in court and the enforcement of sentences), with different actors with different roles, and with different implications for the way children are and should be treated. When assessing the implementation of children’s rights, one cannot disregard the complexity of the juvenile justice system and its variety of stages and institutions.

1.3. Focus of the chapter

This non-exhaustive list of challenges underscoring the complexity of the area of juvenile justice and the implementation of children’s rights in this particular area raises the question to what extent international children’s rights provide authoritative guidance on how to approach the (legal) position of children in conflict with the law at the domestic level. International children’s rights standards relevant for juvenile justice and the way they have evolved since the 1980s are strongly interrelated with the (development of) domestic juvenile justice systems (see e.g. Trépanier 2007). Developments at the domestic level have also shaped the development of international standards. At the same time, international children’s rights are designed to set an international benchmark concerning the treatment of children in conflict with the law and the protection of their rights and freedoms (see also Goldson and Muncie 2012).

This chapter aims to clarify what this benchmark looks like, how clear and unambiguous it is (i.e. one of the requirements for providing authoritative guidance) and to what extent it can contribute to a common (or universal) understanding of a child rights oriented juvenile justice system. It focuses on the key issues of juvenile justice from an international children’s rights perspective, which can be divided into three categories. The first category revolves around the requirement to set up a specific justice system for children in conflict with the law and relates to the need for specificity and specialization, the objectives of the juvenile justice system and age limits (see section 3). The second category of key issues is about fair proceedings and the safeguarding of the right to a fair trial for children, including the right to effective participation and the broader and more recent notion of child-friendly justice (see section 4). The third category concerns dispositions in juvenile justice cases and includes diversion, non-custodial sentences (often referred to as alternative sentences), extreme sentences and deprivation of liberty (see section 5). This chapter starts with an overview of the development of the frame of international juvenile justice standards and related non-legal and domestic developments that have shaped the global juvenile justice agenda (see section 2).

2. Legal framework of international and regional juvenile justice standards

2.1. Child-specific standards at the international (UN) level

As highlighted in the introduction, the number of international and regional standards with regard to the administration of justice is relatively high. The first relevant set of international
juvenile justice standards was the UN Standard Minimum Rules for the Administration of
Juvenile Justice, also known as the Beijing Rules.\(^6\) Dating from 1985, this set of rules preceded
the CRC and provides detailed guidance on the administration of a special justice system for
children. Article 40 of the CRC has codified the Beijing Rules, obviously in a less detailed
manner, and it generated two additional UN resolutions: the UN Rules for the Protection of
Juveniles Deprived of their Liberty (unofficially known as the Havana Rules)\(^7\) and the UN
Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines).\(^8\) All three UN
resolutions are as such not legally binding, but they are to be used for the interpretation and
implementation of article 40 CRC and related CRC provisions, including article 37 CRC that
enshrines the prohibition of torture and other forms of cruel, inhuman or degrading treatment
or punishment, the prohibition of capital punishment and requirements with regard to depriv-
ation of liberty, including life imprisonment (see e.g. UN Committee on the Rights of the
Child 2007, para. 4 and 88). The CRC and the UN resolutions provide a comprehensive legal
framework concerning the rights of children subject to criminal justice proceedings and dispo-
sitions, including rules regarding the objectives of juvenile justice and strategies for prevention
and diversion (see section 5). Another significant document that has been developed at the
international level is the 10th General Comment of the UN Committee on the Rights of the
Child (hereafter: CRC Committee) on ‘Children’s rights in juvenile justice’, adopted in 2007
(CRC Committee 2007). This document provides States parties detailed guidance on how to
administer a juvenile justice system that is in conformity with international children’s rights.
The CRC Committee underscores that a national juvenile justice that is compliant with the
CRC and related international standards, both legally binding treaties and related soft law
instruments ‘will provide States parties with possibilities to respond to children in conflict with
the law in an effective manner serving not only the best interests of children, but also of the
short- and long-term interests of the society at large’ (CRC Committee 2007, para. 3). The
CRC Committee has not supported this claim with empirical evidence, but it represents the
Committee’s belief that a children’s rights-based approach contributes to a more effective juve-
nile justice system.

The UN’s general human rights instruments that preceded the CRC remain of relevance for
juvenile justice. The International Covenant on Civil and Political Rights (ICCPR), for exam-
ple, provides rules with regard to fair trial (art. 14 and 15), punishment (art. 6 and 7) and
deprivation of liberty (art. 9 and 10). In addition, the Convention against Torture (CAT), as well
as resolutions, such as the 1955 Standard Minimum Rules for the Treatment of Prisoners\(^9\) and
are relevant for children.\(^10\)

2.2. Child-specific standards at the regional level

There are many relevant instruments at the regional levels, although they more or less set simi-
lar standards. At the European level, for example, the Council of Europe has issued a number
of recommendations and guidelines that are relevant for the juvenile justice systems of its 47

\(^{6}\) GA Res. 40/33 of 29 November 1985.
\(^{7}\) GA Res. 45/113 of 14 December 1990.
\(^{8}\) GA Res. 45/112 of 14 December 1990. Prevention is of great significance, but will not be addressed
in this chapter.
\(^{9}\) See ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.
\(^{10}\) GA Res. 45/110 of 14 December 1990.
member states. The most important ones are the 2003 Recommendation concerning new ways of dealing with juvenile delinquency and the role of juvenile justice\textsuperscript{11} and the 2008 European Rules for juvenile offenders subject to sanctions or measures\textsuperscript{12} (hereafter: European Rules for juvenile offenders). The latter provides detailed guidance on how to enforce custodial and non-custodial sanctions and measures. A more recent development concerns the development of ‘Guidelines on child-friendly justice’ by the Council of Europe. These guidelines ‘aim to ensure that, in any [justice] proceedings all rights of children, among which the right to information, to representation, to participation and to protection, are fully respected with due consideration to the child’s level of maturity and understanding and to the circumstances of the case’ and without jeopardizing the rights of other parties involved (Guidelines, para. I.3). Justice for children in a broad sense, including juvenile justice, should be ‘accessible, age appropriate, speedy, diligent, adapted to and focuses on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity’ (Guidelines, para. II.c). The Guidelines on child-friendly justice have served as an example for the Guidelines on Action in the Justice System for Children in Africa, adopted in Kampala in 2011 together with The Munyonyo Declaration on Justice for Children in Africa.\textsuperscript{13} It is to be expected that the concept of child-friendly justice will be endorsed in other parts of the world as well.\textsuperscript{14}

Another important development at the regional levels concerns the case law of the treaty bodies in the European and Inter-American human rights systems. The European Court of Human Rights has issued significant case law, among others, on the participation of children in trial (see section 4.2), the right to legal counsel during police interrogations (see section 4.1) and the use of (pre-trial) detention.\textsuperscript{15} The European Court has included UN children’s rights standards, including soft international and regional standards, such as resolutions, recommendations and general comments, in its jurisprudence under the European Convention on Human Rights. In addition, it has drawn upon the standards and reports of the European Committee on the Prevention of Torture (CPT), which have been of significance for the position of children in detention and their protection under art. 3 ECHR.

The Inter-American Court of Human Rights and Inter-American Commission on Human Rights have also developed a growing body of judgements and decisions, respectively, with relevance for the administration of juvenile justice, including deprivation of liberty and arrest, detention and ill-treatment of children by the police (see Feria-Tinta 2014 and Rapporteurship on the Rights of the Child 2008).

2.3. Non-legal developments shaping the international juvenile justice agenda

The plethora of international and regional instruments regulating the administration of juvenile justice is complemented by numerous reports of bodies or representatives from

\textsuperscript{13} The declaration was adopted by representatives of governments, CSOs, INGOs, the African Committee of Experts on the Rights and Welfare of the Child, the UN Committee on the Rights of the Child, the African Union, UN agencies, UN experts and other experts, from all over Africa and other parts of the world. See www.kampalaconference.info (accessed 29 May 2014).
\textsuperscript{14} See furthermore UN High Commissioner for Human Rights, Access to justice for children, 16 December 2013, UN Doc. A/HRC/25/35.
\textsuperscript{15} See e.g. ECHR 20 January 2009, Appl. No. 70337/01 (Güveç v. Turkey) and ECHR 19 January 2012, Appl. No. 39884/03 (Korneykova v. Ukraine).
international organizations such as the UN (Human Rights Council, Office of the High Commissioner for Human Rights (OHCHR), UN Office on Drugs and Crime (UNODC), Special Representative on Violence against Children, UNICEF; see e.g. Joint Report 2012\(^{16}\)), the Inter-American Commission on Human Rights (see in particular the Rapporteurship on the Rights of the Child) or the Council of Europe (e.g. the Commissioner for Human Rights) and reports of (I)NGO-coalitions or individual NGOs, such as the Inter-Agency Panel on Juvenile Justice, International Juvenile Justice Observatory (IJJO), Defence for Children International or Penal Reform International (PRI) that provide guidance on how to safeguard the generally vulnerable position of children in conflict with the law. These reports or statements are also part of the international frame of reference affecting the interpretation of international standards and their implementation, and have shaped the global juvenile justice agenda.

3. Specific justice system for children

The first category of key issues of juvenile justice from an international children’s rights perspective revolves around the requirement to set up a specific justice system for children in conflict with the law. It enshrines the call upon States parties to safeguard specificity and specialization, the objectives of the juvenile justice system and the issue of age limits.

3.1. Separation, specificity and specialization

Article 40 (3) of the CRC stipulates that States parties promote the establishment of a juvenile justice system through laws, procedures, authorities and institutions specifically applicable to children. The CRC provides little guidance about what this should entail, unlike, for example, the American Convention on Human Rights, which explicitly calls for separate criminal proceedings for minors before specialized tribunals (art. 5 (5)). Under the CRC, it remains unclear what is precisely meant by the call for specificity. With regard to national law, it is questionable whether States should draw up separate legislation regulating the justice system for children, as for example done by a number of countries at the African continent, after ratification of the CRC (UNICEF Innocenti Research Centre 2007, p. 81ff). States will meet the requirements of art. 40 (3) CRC if they include special juvenile justice provisions in existing substantive and procedural legislation regulating the criminal procedure and penal law. The discretion for States is understandable in light of the global variety of criminal justice systems affecting children. At the same time, the absence of more guidance explains the prevalence of a wide variety of methods of incorporating children’s rights in domestic law. In Europe, for example, all countries have special arrangements for children in conflict with the law. There are countries that have special penal or procedural laws for children (e.g. Austria, France, Germany, Serbia and Switzerland), countries that have special regulations in the general criminal justice acts (e.g. the Netherlands, Romania and Lithuania) and countries that have special legal provisions for children concerning specific aspects of the criminal justice system, in addition to general criminal justice legislation (e.g. Estonia) (Pruin 2010, pp. 1523–1525). States’ efforts to adopt special acts on juvenile justice seem very much dependent on the (quality of the) already

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existing legal frameworks and the need to incorporate international law into domestic law in order to have legally binding effect (e.g. in dualistic systems).

Specificity seems to be more a matter of specialization rather than of separation, although article 37 (c) CRC does explicitly stipulate that children should be separated from adults if they are deprived of their liberty and article 40 (1) CRC proclaims that children should be treated in a fundamentally different way than adults (see below). The CRC Committee underscores that States Parties are required ‘to develop and implement a comprehensive juvenile justice policy’ (CRC Committee 2007, para. 4), which should not be limited to the implementation of the specific CRC provisions – articles 40 and 37 CRC – but also concern the proclaimed general principles of the CRC (art. 2, 3, 6 and 12) as well as other relevant provisions such as art. 39 CRC on the recovery and reintegration of victims and art. 4 CRC on general implementation measures. Based on art. 4 CRC, States Parties ought to consider the need to ‘undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the [CRC]’, as part of their comprehensive juvenile justice policy. Specialization of authorities and institutions, such as law enforcement authorities, judicial authorities, lawyers, probation services and institutions, clearly should be part of this policy as well (CRC Committee 2007, para. 92ff; see also e.g. rule 12.1 Beijing Rules).

States have much discretion when it comes to the establishment of a specific juvenile justice system. With some important exceptions, the CRC does not proclaim a system that is completely separated from the adult system. Separation has the advantage of sending out the clear message that the classical approach towards delinquent behaviour as generally applied to adults (i.e. a punitive response aiming at retribution and deterrence) is unfit for children. However, one could also argue that too much focus on separation runs the risk of disregarding that children are like adults entitled to be treated fairly (see section 4). If a State, for example, develops separate national legislation on juvenile justice (e.g. a separate juvenile justice Act), it has to consider the applicability of fair trial rights as well, either by incorporating these rights in the new legislation or by referring to general legislation or a constitutional framework. Even if a State does not have a specific justice system for children, but instead a child protection or welfare system meant to respond to juvenile offending, it should be concerned about the recognition of the right to be treated fairly. It might not be realistic to expect more guidance from the CRC on this: at the same time children’s rights implementation would undoubtedly have benefitted from it.

3.2. Objectives of juvenile justice

Article 40 (1) CRC stipulates that children subjected to criminal justice proceedings should be treated in a manner that takes into account the age of the child and that aims at the child’s reintegration in society, in which he or she can play a constructive role. This implies in the first place that the juvenile justice system recognizes that ‘children differ from adults in their physical and psychological development, and their emotional and educational needs’, which ‘constitute the basis for the lesser culpability of children in conflict with the law’ (CRC Committee 2007, para 10) and which requires that children should be treated differently from adults. In its landmark case on the abolition of the death penalty for minors (Roper v. Simmons17) the US Supreme Court noted that children are not only ‘categorically less culpable’, but also more likely to be open for reform than adults, which underscores the potential

of reformative approaches towards delinquent behaviour. According to the Supreme Court’s majority opinion ‘it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed’.

The call for age-specific treatment of children also means that one should take into account differences between children in terms of age and maturity (i.e. developmental stage; note that art. 40 (1) CRC does not refer to maturity; cf. art. 5 CRC) and differentiate accordingly. This is relevant for children’s assumed accountability, for their capacity to participate in proceedings and for the determination of an appropriate response to the child’s behaviour. In addition, it has implications for the way children are treated in the different stages of the juvenile justice system, which also affects the way parents are involved (art. 5 CRC), the age at which children should (or should not) be deprived of their liberty (see e.g. rule 11a Havana Rules, which calls for a minimum age of deprivation of liberty\(^\text{18}\)) and the way children are informed about the proceedings (incl. information on charges and the possible outcomes of the case, incl. sentences).

Second, article 40 (1) CRC stipulates that juvenile justice must aim at the child’s reintegration in society, in which he or she can play a constructive role. This represents the pedagogical objective of juvenile justice, placing the child offender’s individual interests and his future role in society at its core, and which makes the juvenile justice system fundamentally different from the adult criminal justice system. It rules out a purely repressive approach, aiming at retribution or deterrence, as this is considered not to be in the child’s best interests (and his reintegration), nor serving his or her right to development (art. 6 CRC). According to the CRC Committee, ‘the protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders’, which ‘can be done in concert with attention to effective public safety’ (CRC Committee 2007, para. 10).\(^\text{19}\) Article 40 (1) CRC’s reintegration objective furthermore implies that one should acknowledge the potential negative impact of the justice system on the child’s development and short- and long-term interests and use it only as a last resort. This means that one should develop and enforce diversion mechanisms (see section 5), scrutinize discrimination in the context of juvenile justice (art. 2 CRC)\(^\text{20}\) and prevent prosecution of status offences (CRC Committee 2007, para. 8; see also article 56 of the Riyadh Guidelines). Moreover, States should develop a comprehensive policy to prevent juvenile delinquency (CRC Committee 2007, para. 16ff).

The pedagogical objective of juvenile justice is furthermore substantiated by article 40 (1) CRC stipulating that juvenile justice aims at the reinforcement of the child’s respect for the human rights and fundamental freedoms of others, for example through education aiming at the development of respect for human rights and freedoms in general (cf. art. 29 (1) (b) CRC and General Comment No.1 on the aims of education). The CRC Committee notes that ‘[i]t

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18 See e.g. Switzerland; Commentary to the European Rules for juvenile offenders subject to sanctions or measures, CM(2008)128 addendum 1, p. 47.
19 The reintegration objective of art. 40 (1) has also been incorporated in the case law of the European Court of Human Rights under art. 8 ECHR’s protection of family life in case of expulsion. In the case Maslov v. Austria (23 June 2008, Appl. No. 1638/03) the Court found a violation because the reintegration objective as stipulated by art. 40 CRC was neglected by the Austrian authorities; para. 83.
20 For example of stigmatized groups of children, such as street children, girls, children with disabilities and children belonging to racial, ethnic, religious or linguistic minorities (CRC Committee 2007, para. 6ff).
is obvious that this principle of juvenile justice requires a full respect for and implementation of the guarantees for a fair trial recognized in article 40 (2) [CRC] (CRC Committee 2007, para. 13). It also observes that the juvenile justice system should respect the child’s inherent dignity and it raises the following question: ‘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?’ (CRC Committee 2007, para. 13.) Moreover, it can be argued that the pedagogical objective means that the child should be equipped with means and assistance to reintegrate constructively, which implies that the State should offer education and vocational training and forms of (medical) treatment, for example to address substance abuse or psychological or psychiatric problems.

It can be argued that article 40 CRC does not provide much substantive guidance on how to realize the objectives of juvenile justice. At the same time, article 40 CRC assumes a high reliance on state services in responding to juvenile offending. This certainly is problematic in many countries due to lack of financial and human resources. It can also be problematic because of the existence of a certain distrust in governmental services for citizens in general or children in particular. In addition, article 40 CRC does not clarify how far the State can go in offering or imposing interventions that aim at the child’s re–education and reintegration, which may open the door to an overly paternalistic approach towards juvenile delinquency. What if the State authorities, for example, consider it necessary for the prevention of recidivism and in the best interests of the particular child to impose a placement in a reform school, which can be prolonged until the child is regarded fit to reintegrate into society? What if the child can be subjected to (compulsory) medical treatment, if considered necessary for his reintegration? And what if a pedagogical intervention implies a whole range of non-custodial interventions, including intensive probation, counselling, restraining orders, etc., which may very well be perceived by the child as a disproportionate and even repressive sentence?

Article 40 CRC is clear, however, in excluding a purely repressive approach towards children in conflict with the law, even if they have committed heinous criminal offences. It is also clear in proclaiming that reintegration through education, and if needed through special care and assistance, should be at the core of any response to juvenile delinquent behaviour, without discrimination of any kind. It is furthermore clear in arguing that fair treatment should be at the core of the juvenile justice system, not only because this concerns a right of the child, but also because it is perceived to be conducive to the realization of the objectives of juvenile justice. This principle of fair treatment is also meant to prevent tipping of the scale towards an overly paternalistic approach by the State towards children in conflict with the law.

3.3. Age limits

The administration of a specific juvenile justice system implies a distinction between the juvenile justice system on the one hand and the adult criminal justice system on the other. This touches upon the upper age limit of juvenile justice, which is currently subject to debate and which will be addressed below. Another important, but highly controversial age limit, is the minimum age of criminal responsibility, also known as the MACR. The applicability of the juvenile justice system is determined by these two age limits.

Before looking into the details of both age limits, it is important to underscore that the setting of age limits to define the scope of the juvenile justice system is inherently artificial and to a certain extent arbitrary. However, legal constructions like this do serve relevant legal interests such as equality and legal certainty. At the same time, they require specific justification and
clarification in order to avoid unlawful treatment and to be able to respond adequately to the inevitable borderline cases.

3.3.1. Minimum Age of Criminal Responsibility (MACR)

According to Article 40 (3)(a) CRC ‘State Parties shall seek to promote … establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’. States parties should set a MACR, which is not so much about the capacity of a child to infringe the penal law (as the wording of article 40 (3) CRC suggests), but about the age at which a child who commits an offence can be held criminally accountable and at which he or she can be prosecuted for alleged criminal behaviour (Doek 2008, p. 236). Regarding children under the MACR there is an irrefutable assumption that they cannot be held criminally responsible for their behaviour and that they cannot be formally charged. Despite the weak wording of the provision (‘shall seek to promote’), the CRC Committee ‘understands this provision as an obligation for State parties to set a minimum age of criminal responsibility’ (CRC Committee 2007, para. 31).

The CRC does not indicate what an acceptable minimum age is, neither do other international instruments. According to rule 4.1 of the Beijing Rules, the MACR ‘shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity’. The reason for this lack of clarity lies in the highly controversial nature of the issue and the wide variety of MACRs throughout the world. At the international political level there was no consensus at the time of drafting of both the Beijing Rules and the CRC. According to the commentary to rule 4.1 of the Beijing Rules ‘the minimum age of criminal responsibility differs widely owing to history and culture’ and that ‘[t]he modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour’.

Despite its controversy and global variety (Cipriani 2009), the CRC Committee has argued that a MACR below the age of 12 years is considered not to be internationally acceptable, and it has encouraged States parties ‘to increase their lower MACR to the age of 12 years as the absolute minimum and to continue to increase it to a higher level’ (CRC Committee 2007, para. 32). In addition, the CRC Committee has urged States parties not to lower their MACR to the age of 12 (i.e. the world’s median MACR; Cipriani 2009), but to opt for a MACR of 14 or 16 instead.21 This final remark has proven to be important, because some States considered lowering it and some States have actually done so (CRIN 2013). It is furthermore important to highlight that the CRC Committee has strongly recommended against a flexible MACR, that is: lower than 12 in case of certain serious offences or if the child is considered mature enough to be held criminally responsible (doli (in)capax rule; CRC Committee 2007, para. 34). Finally, the CRC Committee noted that ‘[i]f there is no proof of age and it cannot be established that the child is at or above the MACR, the child shall not be held criminally responsible’ (CRC Committee 2007, para. 35).

Much can be said about the MACR (see Cipriani 2009, for a comprehensive analysis of the issue; see also Vandenhole, Chapter 2 in this Handbook), but it is clear that the position of the

21 In Europe, most of the countries have a MACR of 13 or 14; Commentary to the European Rules for juvenile offenders subject to sanctions or measures, CM(2008)128 addendum 1, p. 47.
CRC Committee has not made the issue less controversial. On the contrary, the MACR remains at the heart of political debate and ‘tough on crime’ approaches (see e.g. Downes and Morgan 2012). This is particularly true in times of elections, law reform (see the debate and compromise in the 2008 South African Child Justice Act; Gallinetti 2009, pp. 20–21) or when young children committed serious crimes (see e.g. the Bulger case in England in the 1990s). Some argue that the international minimum as proclaimed by the CRC Committee is too low and should be raised to at least 14, particularly because children under the age of 14 cannot be assumed competent to understand criminal proceedings or fit to stand trial (see Rap 2013; see also under section 4); others argue that one should not prosecute children at all (CRIN 2013; see also Inter-American Commission 2011, para. 59), a position that is often connected to the assumption that the criminal justice system is not an appropriate setting for addressing children’s responsibility. Such an approach implies that one does not set a MACR and that there actually is no specific justice system for children. This runs the risk of denying children’s agency and responsibility, which does not correspond with the imagery of childhood that can be derived from the CRC and that is built upon the concept of the child’s evolving capacities, and can have a negative impact on the recognition of children as rights holders in a broader sense (Cipriani 2009). Moreover, the absence of a MACR may very well imply that the State responds to juvenile delinquency in a purely welfare-oriented manner, without paying due regard to a fair and rights-based treatment. It has also been argued that one needs to move beyond the setting of the MACR and focus more on the way one addresses children’s responsibility, including the way children younger than the MACR are treated (Cipriani 2009; Hammarberg 2009, quoted in CRIN 2013). This way should be based on unconditional respect for the rights of the children involved with the aim of furthering their chances to reintegrate and play a constructive role in society, while installing their respect for the rights and freedoms of others.

The setting of a MACR serves important interests, including the recognition of the child’s evolving capacities and his evolving autonomy and accountability. At the same time, defining the appropriate age at the international level in legal standards turned out to be a bridge too far due to the lack of consensus and the wide variety of practices; it will probably always remain like that. It is therefore remarkable that the CRC Committee chose to define a minimum MACR in 2007, based on what it considered to be the internationally acceptable minimum. One could argue that by doing so the CRC Committee defined a universal MACR, which opens the door to prosecution. However, one could also argue that the CRC Committee has actually defined the age at which children can be considered (criminally) accountable to a certain but lesser extent, which on the one hand protects children underneath that age against prosecution and on the other hand sets the scene for a child-specific and fair system designed to respond appropriately to children in conflict with the law. By doing so, the CRC Committee has clarified one of the core minimum standards for juvenile justice.

3.3.2. Upper age limit

The upper age limit of the juvenile justice system is 18 years of age, which is connected to the definition of the child as provided in article 1 of the CRC. Even though the CRC does not

22 See e.g. the Special Issue of Youth Justice (Church et al., 2013). The Council of Europe’s Guidelines on Child-Friendly Justice, dating from 2010, do not provide a MACR, but provide that ‘[t]he minimum age of criminal responsibility should not be too low and should be determined by law’ (para. 23). In other words, the Council of Europe has not endorsed the recommendation of the CRC Committee.
explicitly provide so, it is safe to assume that article 40 CRC and related international children’s rights standards are applicable to individuals under the age of 18 at the time they committed the alleged offence (‘crime date criterion’; Liefaard 2008). Consequently, the upper age limit of juvenile justice is not so much defined by the transition from minority to majority (i.e. a child could attain majority before he or she reaches the age of 18 and if national law provided this, he or she is no longer considered a child under the CRC; see art. 1). The crime date criterion is related to the justification of a juvenile justice intervention based on the culpability of children and can also be found in article 37 (a) CRC which inter alia provides that ‘neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years of age’. This implies that the juvenile justice system is applicable to all children of the MACR or older, but younger than 18 at the time of the offence. It also means that these children remain entitled to a constructive response to their delinquent behaviour and to treatment, as stipulated by article 40 CRC as children, even if they turned 18 during prosecution or during the enforcement of sentences. Consequently, the requirements concerning deprivation of liberty remain applicable as well, that is: arrest, detention or imprisonment may only be used as a measure of last resort and for the shortest appropriate period of time (art. 37 (b) CRC) and that ‘a child placed in a facility for children [does not need] to be moved to a facility for adults immediately after he/she turns 18’ (CRC Committee 2007, para. 86). According to the CRC Committee ‘[c]ontinuation of his/her stay in the facility for children should be possible if that is in her/his best interest and not contrary to the best interests of the younger children in the facility’ (CRC Committee 2007, para. 86).

The question remains to what extent the actual age of the individual should be taken into account. The CRC is not clear on this point, but the actual age is, for example, relevant for the question to what extent the child’s parents or legal guardian remain involved, since from a legal perspective a young adult no longer falls under parental custody or guardianship. Furthermore, the actual age can be relevant in order to determine the appropriate response to the delinquent behaviour of the child, who may have become a young adult in the meantime. It is also relevant to differentiate between young people, for example within a custodial institution and to tailor the regime and, more importantly, the individual programme in order to achieve the objectives of the (juvenile) criminal justice intervention, which, with regard to former children, may not be merely repressive.

The upper age limit of 18 also implies that young adults (e.g. between 18 and 25) who commit criminal offences do not fall under the protection of the CRC. This can be problematic on a practical level, for example when an 18-year-old commits a criminal offence together with a 17-year-old. However, it is also a matter of justifying why you treat young adults just above the age of majority differently from children. This issue has become more apparent under the influence of recent scientific insights indicating that the cognitive development of adolescents continues roughly until the age of 25 years, which has implications for their involvement in criminal behaviour and their level of culpability. The assumption that young adults can be held fully accountable is no longer self-evident (Liefaard 2012). In many countries, the position of young adults has gained significant attention. Yet, the recognition of their position under international human rights laws remains marginal.

In the context of criminal justice, some references to young adults can be found in international standards. In 2003, the Council of Europe recommended 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’. In 2008, the Council of Europe took the concern for young adults further by recommending in the European Rules for juvenile offenders that ‘young adult offenders may, where appropriate, be regarded as juveniles and dealt with accordingly’ (rule 19). In addition, the Council recommends that ‘juveniles shall not be held in institutions for adults, but in institutions specially designed for them’, although it leaves room for exceptional circumstances in which a child has to be held in an institution for adults. In such an event, ‘they shall be accommodated separately unless in individual cases where it is in their best interest not to do so’ (rule 59.1). Furthermore, it recommends that ‘juveniles who reach the age of majority and young adults dealt with as if they were juveniles shall normally be held in institutions for juvenile offenders or in specialized institutions for young adults unless their social reintegration can be better effected in an institution for adults’ (rule 59.3). It is interesting that the Council of Europe calls upon its member states to pay particular attention to the special position of older children and young adults in order to avoid transitions taking place in a rigid manner. In light of this, the CRC Committee noted with appreciation ‘that some States parties allow for the application of the rules and regulation of juvenile justice to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception’ (CRC Committee 2007, para. 38).

Finally, there is one significant issue that concerns the practice of transfer or waiver of children (generally ages 16 or 17) to adult criminal courts (e.g. largely practised in the US), and the practice of sentencing children as adults, with subsequent confinement in adult facilities (e.g. in the Netherlands). Application of such a mandatory or discretionary waiver or transfer (hereinafter: transfer) goes against the point of departure that all persons below the age of 18 fall under the protection of the juvenile justice system as well as the CRC. In addition, transfers often result in (mandatory) long custodial sentences, which jeopardizes the requirement to use imprisonment regarding children only as a last resort and for the shortest appropriate period of time (art. 37 (b) CRC). The CRC Committee, therefore, recommends States parties ‘which limit applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or which allow by way of exception that 16- or 17-year-old children are treated as adult criminals, [to] change their rule to a full application of the rules and regulations of juvenile justice to persons aged 18 and younger’ (CRC Committee 2007, para. 38). Despite the strong (legal) arguments against the practice of transfers, it is important to recognize that this practice is often perceived as an inevitable tool to respond to older children who commit serious offences, sometimes with young adults, not only by politicians but also by legal professionals, including for example judges. At the same time, the application of transfer or waiver does not always result in much severer sentences (see e.g. Weijers 2006; in many countries transfer does result in severer sentences). In addition, it should be noted that legal systems that do not allow transfer or waiver might very well have higher maximum sentences for children (among others related to the absence of an ‘escape’ to the adult system; Killias et al. 2012, p. 315ff).

4. Fair trial with special focus on the right to effective participation

The second category of key issues concerns the fairness of juvenile justice proceedings and the safeguarding of the right of the child to a fair trial, including the right to effective participation.

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24 In addition, in the European Prison Rules meant for adult facilities, the Council recommends that young adults be kept separately from older prisoners (rules 18.8 and 18.9).
4.1. Fair trial in general

Article 40 (2) CRC stipulates that children are entitled to a fair trial and it provides a range of fair trial principles, which can also be found in other general human rights treaties; the children’s rights provision was founded on art. 14 and 15 ICCPR (Detrick 1999). The relevance of human rights for criminal justice has always revolved around the concept of fair trial and the treatment of the accused, prosecuted and sentenced individual with humanity and with respect for their inherent human dignity. In this regard, international human rights law does not distinguish between adults and children. Both ‘shall be equal before the courts and tribunals’ (art. 14 (1) ICCPR) and are entitled to the same rights and freedoms (see also art. 6 and 8 ECHR). General fair trial rights that are equally applicable to children concern: the principle of legality (art. 40 (2)(a) CRC; see also art. 15 (1) ICCPR with regard to the prohibition of retroactive sentencing); the presumption of innocence (art. 40 (2)(b)(i) CRC); the right not to incriminate oneself (art. 40 (2)(b)(iv) CRC); the right to prompt information on the charges in a language one understands (art. 40 (2)(b)(ii) CRC); the right to be tried before a competent, independent and impartial authority or judicial authority (art. 40 (2)(b)(iii) CRC; the right to (cross-)examine witnesses (art. 40 (2)(b)(iv) CRC) and the right to free assistance of an interpreter (art. 40 (2)(b)(iv) CRC).

Article 40 (2) CRC adds a number of fair trial principles specifically for children. A child is entitled to have the criminal trial determined ‘without delay by a competent, independent and impartial authority’ (art. 40 (2)(b)(iii) CRC). By using the wording without delay rather than ‘without undue delay’ (cf. art. 14 ICCPR), it assumes that children are entitled to a speedier trial (CRC Committee 2007 para. 51; see also para. 83 in which the committee recommends a maximum term of six months for a juvenile case in first instance, if the child is detained). This assumption is based on the ‘international consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as possible’ in order to prevent that the response loses its desired positive, pedagogical impact, and that the child will be stigmatized (CRC Committee 2007, para. 51).

Furthermore, a child must be ‘informed promptly and directly of the charges against him or her’ (i.e. ‘as soon as possible’; CRC Committee 2007, para. 47). If appropriate this must happen ‘through his or her parents or legal guardians’. The parents can also be present during the proceedings to provide general psychological and emotional assistance to the child. Article 40 CRC, thus, recognizes the special position of the child’s parents, which conforms to the general recognition of the child’s family and parents as primary caretakers under the CRC (arts. 18 and 5 CRC).

A child is also entitled to legal or other appropriate assistance (art. 40 (2)(b)(iii) CRC), which has received quite some attention at the European level, in relation to the position of the child during police interrogations. The European Court of Human Rights has developed case law implying that an arrested child has the right to legal counsel during the initial police interrogations, as part of his right to a fair trial under art. 6 of the European Court of Human Rights.25 In addition, the European Commission is currently developing specific EU law on procedural safeguards for children suspected or accused in criminal proceedings (Liefaard and Van den Brink 2014).

In general, international standards strongly focus on the legal protection of children, particularly in the earliest stages of the criminal justice process. Despite its significance, there may

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25 ECtHR, 27 November 2008, Appl. No. 36391/02 (Salduz v. Turkey); ECtHR 11 December 2008, Appl. No. 4268/04 (Panovits v. Cyprus).
very well be a tension between providing safeguards (e.g. legal assistance) and responding diligently and in pedagogically sound way. The latter might suffer from too much focus on legal safeguards, which for example slows down the process (and might even result in detention, because the lawyer cannot be present in time) or can be counterproductive in the sense that the child is assisted by a non-specialized lawyer, who is not aware of the possibilities of diversion (see e.g. Liefaard and Van den Brink 2014). At the same time, the initial stages of criminal justice proceedings are too critical to argue that the child should have no right to legal assistance or can waive his right to consult a lawyer (see also Liefaard and Van den Brink 2014). In light of this, it would have been better if art. 40 CRC stipulated that a child has the right to legal and other appropriate assistance (cf. art. 37 (d) CRC).

Another child-specific feature of article 40 (2) CRC is that the child’s privacy must be ‘fully respected at all stages of the proceedings’ (art. 40 (2) (b) (vii) CRC; art. 16 CRC). According to the CRC Committee this stretches out over the disposition phase as well and implies, among others, that criminal records should not be used in adult proceedings regarding the same offender. Preferably, criminal records should be erased (e.g. once the child reaches age 18; CRC Committee 2007, para. 67). Above all, the full respect of privacy implies, according to the CRC Committee, that a juvenile justice trial should ‘as a rule’ be held behind closed doors (in camera; cf. art. 6 (1) ECHR), which is also supported by the right of the child to participate effectively in justice proceedings. This requires some further elaboration.

4.2. Right to effective participation

According to the CRC Committee ‘[a] fair trial requires that the child (…) be able to effectively participate in the trial’ (CRC Committee 2007, para. 46), which makes effective participation, stemming from article 12 CRC and implied in article 40 CRC, a prerequisite for a fair trial. Obviously, this has implications for every stage of the juvenile justice process (CRC Committee 2007, para. 12). This position of the CRC Committee has been inspired by the European Court of Human Rights, which has developed significant case law connecting the right to a fair trial and the right to participate effectively during trial (Kilkelly 2014). The court ruled that ‘it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings’ (T v. UK, para 84).26 In this particular case (i.e. the Bulger case in which two 11-year-olds (T. and V.) were tried for the murder of toddler) the court held the young boy(s) was (were) unable to participate effectively because it was ‘highly unlikely’ that they would have felt ‘sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with [their] lawyers during the trial or, indeed, that, given [their] immaturity and [their] disturbed emotional state, [they] would have been capable outside the courtroom of cooperation with [their] lawyers and giving them information for the purposes of [their] defence’ (T v. UK, para. 88). In another case, S.C. v. the UK,27 the European Court held that article 6’s right to a fair trial does not require that a child on trial should ‘understand or be capable of understanding every point of law or evidential detail’ (para. 29). In this regard, the court underscores the significance of legal representation (see also art. 6 (3)(c) ECHR). According to the court “

26 ECtHR, 16 December 1999, Appl. No. 24724/94 (T. v. the United Kingdom); see also ECtHR, 16 December 1999, Appl. No. 24888/94 (V. v. the United Kingdom).
27 ECtHR, 15 June 2004, Appl. No. 60958/00 (S.C. v. the United Kingdom).
participation” in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed’ (para. 29). The European Court has, thus, defined critical steps that ought to be considered when assessing the possibilities of children to participate effectively in trial proceedings as part of their right to a fair trial. By doing so, it has incorporated article 40 CRC and related children’s rights standards in its case law under article 6 ECHR.

Inspired by this case law and with reference to rule 14 of the Beijing Rules providing that proceedings ‘shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely’, the CRC Committee has recognized the right to participate effectively in trial and that the 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’ (CRC Committee 2007, para. 46). The committee adds that ‘[t]aking into account the child’s age and maturity may also require modified courtroom procedures and practices’ (CRC Committee 2007, para. 46). The CRC Committee has also provided further guidance on the significance of article 12 CRC for criminal justice proceedings in its General Comment No. 12 on the child’s right to be heard. It observed that ‘a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age’ and that ‘[p]roceedings must both be accessible and child-appropriate’, which means that ‘[p]articular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers (…)’ (CRC Committee 2009, para. 34). It furthermore held with regard to the juvenile justice context that ‘[i]n order to effectively participate in the proceedings, every child must be informed promptly and directly about the charges against her or him in a language she or he understands, and also about the juvenile justice process and possible measures taken by the court’ (CRC Committee 2009, para. 60). In addition, ‘the proceedings should be conducted in an atmosphere enabling the child to participate and to express her/himself freely and, as mentioned earlier, ‘[t]he court and other hearings of a child in conflict with the law should be conducted behind closed doors’ (CRC Committee 2009, para. 60–61).

The above-mentioned developments have to a large extent set the scene for the development of the guidelines for child-friendly justice (see section 2), which provide detailed guidance on how to enforce child-friendly (or child-sensitive) proceedings. Recent interdisciplinary and comparative research conducted by Rap (2013) also provides concrete steps to safeguard the right to effective participation in youth court proceedings. In addition to what has been mentioned already, she underscores the need for specialized and active judges who are trained in conversational techniques suitable for communicating with adolescents and in avoiding jargon, active parental involvement that contributes to young people’s feelings being taken seriously, explanations and clarification of the order proceedings, the purpose of the hearings and the persons present in the court room, as well as of the decisions made (e.g. the imposition of a sentence) in a concrete manner and in way that the child can determine how his views have been taken into account (Rap 2013, pp. 321–322). Rap recommends investing in the specialization and training of other professionals in the juvenile justice system as well (prosecutors, lawyers, probation officers etc.) (Rap 2013, p. 355). She also questions the MACR standard set at 12 by the CRC Committee in relation to the assumption that from this age children cannot only be considered accountable but also capable of participating effectively in trial (CRC Committee 2007, para. 45). Rap strongly recommends against prosecuting children
younger than 14 years of age. Only children of 14 and older can in general be considered fit to stand trial. Children younger than 14 should not be subjected to formal proceedings since her study reveals that in general children cannot rely on adequate assistance, which becomes more problematic when younger children are concerned (Rap 2013, pp. 356–357).

As mentioned earlier there might be a tension between safeguarding the right to a fair trial and the pedagogical objectives of juvenile justice or, more broadly, the call for child specificity, and much more can be said about it (see e.g. section 5); neither the CRC nor the CRC Committee touch upon it. At the same time, there are areas, such as the area of effective participation, in which the striking of the balance between fair trial and child-specific arrangements has developed quite well, among others stimulated by the use of interdisciplinary insights on children’s needs and capacities, which helped to interpret the implications of international standards. This shows that the tension is not so much a fundamental problem. It seems more a matter of implementation, enforcement and time, which underscores the need for the development of interdisciplinary strategies to acquire knowledge of and insight in how to merge a fair trial into the specific features of the juvenile justice system.

5. Disposition in juvenile justice

The third and final category of key issues that will be addressed in this chapter concerns the disposition of juvenile justice cases. This category can roughly be distinguished into diversion (and restorative justice), non-custodial sentences (often referred to as alternative sentences, although one could argue that deprivation of liberty as a sentence should be regarded as an alternative28), extreme sentences and deprivation of liberty.

5.1. Diversion and restorative justice

Both article 40 and 37 CRC have implications for the disposition of juvenile justice cases, which should be understood in light of the objectives of juvenile justice (see para. 3). Article 40 (3)(b) CRC advocates that States parties should promote measures for dealing with children in conflict with the law without resorting to judicial proceedings, also known as diversion, ‘[w]henever appropriate and desirable’. Diversion aims to avoid exposing children to the negative impact of formal judicial proceedings, such as stigmatization, that could jeopardize their reintegration, and to enable a quick response to criminal behaviour, which is considered important for the effectiveness of justice interventions (CRC Committee 2007, para. 25; diversion is generally also considered to be more cost-effective; see Dünkel et al. 2010, pp. 1626–1628). States parties have much discretion in how to establish diversion mechanisms. Diversion can take place at the different levels and in different phases of the criminal justice proceedings. It can be used by the public prosecutor, but also by the police and even by (pre-trial) judges. In practice, there is a wide variety of diversion mechanisms, including warnings, conditional dismissal of cases, supervision orders, including forms of community service, forms of restorative justice, including restoration of damage, victim compensation, victim-offender mediation or family group conferences. There are many differences between countries in how they operationalize diversion, and different studies indicate that diversion can have a positive impact on

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children’s behaviour as well as the prevention of recidivism (Dünkel 2009, pp. 155–160; see also Doek 2008, p. 238).

Restorative justice is often mentioned as a form of diversion as well (CRC Committee 2007, para. 10). The Special Representative on Violence Against Children considers restorative justice relevant for the prevention of violence against children in the justice system and underscores the growing importance of it for the realization of the objectives of juvenile justice, including taking responsibility and changing behaviour, respecting the right of the child to be heard, the avoidance of the harmful effects of deprivation of liberty and the prevention of stigmatization, including the tackling of the negative imagery of child offenders (Special Representative on VAC 2013, pp. 3ff and 27ff).

The CRC Committee draws attention to the protection of human rights, including procedural safeguards, when using diversion (CRC Committee 2007, para. 22; see also some critical remarks in section 4). It underscores that diversion should only be used if there is ‘compelling evidence that the child has committed the alleged offence’ and that the child admits responsibility freely and voluntarily without pressure. In addition, the child should give informed consent to the diversion and he or she should be entitled to consult legal or other appropriate assistance (it is suggested that parents of younger children should consent as well; see Council of Europe, Recommendation 2003(20), para. 8 and rule 11.3 Beijing Rules). Another important point made by the CRC Committee concerns the need to formally close the case if the child has successfully completed the programme and the need to avoid unnecessary stigmatization through registration of the diversion programme in criminal records (CRC Committee 2007, para. 27). The CRC Committee highlights that diversion should not be reserved for first offenders only; recidivist and even serious offenders should also benefit from appropriate diversion programmes (CRC Committee 2007, paras. 23 and 25).

5.2. Sentences: Non-custodial sentences and extreme sentences

States parties must ensure, if formal charges have been lodged and the child is tried in court, that the court has a variety of dispositions at its disposal, including ‘care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care’ (art. 40 (4) CRC; see also rule 18 Beijing Rules and Part II of the European Rules for juvenile offenders). This non-exhaustive list underscores the pedagogical objective of the juvenile justice system and is meant to stimulate the use of non-custodial sentences over forms of deprivation of liberty, such as imprisonment (see below). It can be argued that article 40 (4) confirms that a strictly punitive approach is not in conformity with the CRC, in particular with article 40 (1) (Doek 2008, p. 241). It furthermore is important to note that the principle of proportionality is explicitly referred to in article 40 (4) CRC, which means the intervention should always be proportionate to the seriousness of the criminal offence and the circumstances of the case, including the age of the child, his or her assumed lesser culpability, his or her special needs and circumstances and the interests of society, particularly on the long run (CRC Committee 2007, para. 71). In light of this, it is important to reiterate that children could experience non-custodial sentences, due to their intensity, as disproportionate and even repressive. This should also be taken into account when defining a proportionate sentence.

Article 37 CRC provides further guidance on sentencing, particularly on the imposition of extreme or the most severe sentences. Art. 37 (a) CRC clearly prohibits capital punishment for persons below 18 years when committing the offence (cf. art. 6 (5) ICCPR). Despite this
prohibition, there are a number of States parties to the CRC that still execute children. As mentioned earlier, in 2005, the US Supreme Court ruled the death penalty for minors unconstitutional with reference, among others, to international standards, including this one.

Article 37 (a) also prohibits life imprisonment without the possibility of release. This rather weakly formulated provision (i.e. the result of a political compromise included in the final stages of the drafting; Detrick 1992) leaves room for the imposition of life with the possibility of parole. In essence, the article 37 (a) CRC provision with regard to life imprisonment has led to an inconsistency within article 37 CRC, since paragraph (b) stipulates that imprisonment may only be used as a measure of last resort and for the shortest appropriate period of time (see below) and also with the overall objectives of juvenile justice as enshrined in article 40 (1) CRC. The CRC Committee underscores that despite this room for discretion in favour of the use of life imprisonment, States Parties are under the obligation to safeguard the realization of the objectives of article 40 (1) CRC, in particular the child's reintegration. According to the CRC Committee this means that a child sentenced to imprisonment 'should receive education, treatment, and care aiming at his/her release, reintegration and ability to assume a constructive role in society' and it 'strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by person under the age of 18', because it is very likely that 'a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release' (CRC Committee 2007, para. 77).

Finally, article 37 (a) CRC prohibits torture or other forms of cruel, inhuman or degrading treatment or punishment. This prohibition concerns all children, including those within the juvenile justice system. In terms of sentencing, the CRC Committee has stipulated that States parties should prohibit all forms of corporal punishment as a sentence (CRC Committee 2007, para. 71; see also CRC Committee 2006), a position which has gained global support.

5.3. Special focus: Deprivation of liberty of children

A highly topical and global issue is the use of deprivation of liberty with regard to children under the juvenile justice system, including arrest, pre-trial detention and imprisonment after disposition (i.e. custodial sentences). It is estimated that at least one million children are deprived of their liberty (United Nations Violence Study 2006, p. 191), although this estimation arguably is too modest. Research shows that children deprived of their liberty are at serious risk and confronted with gross violations of their rights and freedoms, including denial of family contact, lack of access to basic services including medical care and lack of protection against various forms of violence by other inmates or staff (see e.g. United Nations Violence Study 2006; Joint Report 2012; Council of Europe 2014). In light of this 'manifest tension between international human rights standards and the practical realities of child imprisonment' (Goldson and Kilkelly 2013), it is fair to conclude that children deprived of their liberty belong to the most disadvantaged groups of children and that gap between human rights standards and the reality of child imprisonment arguably is too big to be closed. As Goldson and Kilkelly observe that '[i]rrespective of reform efforts and no matter how the practices of penal detention are ‘dressed up’ in human rights and/or penal reform ‘talk’, … to punish a child by way of

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imprisonment ultimately amounts to the deliberate imposition of ‘organised hurt’ (Goldson and Kilkelly 2013, p. 370). Despite all this, it is worthwhile to look into the features of international children’s rights standards on this issue, since it provides a significant benchmark that has found its way to regional as well as domestic standard-setting.

Article 37 CRC’s primary focus concerns deprivation of liberty of children, not limited to the context of juvenile justice (Liefaard 2008). It recognizes the impact of deprivation of liberty on children, as well as the need for a child-specific human rights approach for children deprived of their liberty. Article 37 CRC contains legal requirements regarding deprivation of liberty on the one hand and provisions concerning the treatment of children deprived of liberty and their (procedural and substantive) legal status, on the other. Article 37 (b) CRC prohibits unlawful or arbitrary deprivation of liberty and introduces two additional requirements for children by stipulating that ‘the arrest, detention or imprisonment … shall be used only as a measure of last resort and for the shortest appropriate period of time’. Both requirements have no precedent in international treaty law (cf. rules 13, 17 and 19 Beijing Rules) and their introduction can be considered as ‘among the most notable improvements and innovations which the [CRC] sets out’ (Cantwell 1992, pp. 28–29). States parties, thus, are under the obligation to use deprivation of liberty regarding children with the utmost restraint and only after careful consideration, that is: based upon an individual assessment regarding the appropriateness and duration of the deprivation of liberty while giving due weight to the best interests of the child, including inter alia his age and maturity (Liefaard 2008; Schabas and Sax 2006). The implications of article 37 (b) CRC differ for the different forms of deprivation of liberty in the context of juvenile justice (such as arrest, police custody pre-trial detention and custodial sentences). As far as sentencing is concerned, it rules out, among others, minimum or mandatory sentences (see furthermore Liefaard 2008), which has been confirmed by the South African Constitutional Court that has ruled the minimum sentencing legislation for 16- or 17-year-olds unconstitutional since it would make imprisonment a first resort rather than a last resort.

Particularly with regard to the requirements of last resort and shortest appropriate period of time, the CRC does not give much guidance (nor does the CRC Committee) and many question remain unanswered. It is up to the States to develop their legislation, create alternatives and to foster the incorporation of the requirements in the actual decision-making (see Liefaard 2008 for detailed recommendations). Moreover, article 37 (b) CRC’s requirement of the shortest appropriate period of time is not unambiguous, since appropriateness is not necessarily short and therefore leaves room for longer forms of detention if regarded appropriate (see Liefaard 2008, p. 195ff).

In light of the legality of the deprivation of liberty, article 37 (d) CRC provides a number of procedural safeguards for children who are (at the risk of) being deprived of their liberty, such as the right to challenge the legality of the deprivation of liberty (habeas corpus) and the right to prompt access to legal and other appropriate assistance. The latter right is not so much related to the criminal justice proceedings (cf. art. 40 (2)(b)(ii) and (iii) CRC as mentioned earlier), but to the status of the child (i.e. deprived of his liberty).

If a child is deprived of his liberty, he must be treated with ‘humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age’. This ‘right to be treated with humanity’ as stipulated by article 37

32 Centre for Child Law v Minister of Justice, 2009 (6) SA 632 (CC). See art. 28(1)(g) of the South African Constitution.
(c) CRC, can be considered the core article regarding the treatment of children deprived of liberty. It embodies a positive obligation for States parties to ensure minimum guarantees for the humane treatment of detained children and stipulates that children cannot be detained with adults and have the right to maintain contact with their family, which implies that the family will be informed about the detention of the child (art. 37 (c) CRC; see also art. 9 (3) CRC). In general, it implies that each child deprived of his liberty must be recognized as entitled to all rights under the CRC and that limitations of the enjoyment of the rights may only take place if necessary in light of the objectives of the deprivation of liberty, while taking into account the best interests of the child as well as the views of the child (arts. 3 (1) and 12 CRC). In addition, a child should have effective remedies available (such as the right to lodge complaints) to address (alleged) unlawful or arbitrary treatment (for a more detailed analysis of the legal status of the child deprived of his liberty, see Liefaard 2008). While bearing in mind the objectives of juvenile justice, article 40 (3) CRC furthers the creation of special institutions for children, which include ‘distinct, child-centred staff, personnel, policies and practices’ (cf. rule 10.3 Beijing Rules; CRC Committee 2007, para. 85). The minimum conditions of detention have been worked out in detail in the 1990 Havana Rules, which should be implemented and incorporated into domestic law (CRC Committee 2007, para. 88–89).

Again there is quite some room for interpretation and diversity in implementation. However, it is important to note that there is an increasing level of sophistication in filling in the requirements for the treatment of children deprived of their liberty. For example, the European Committee for the Prevention of Torture has developed its CPT standards, which provide detailed guidance on the treatment of detainees and prisoners, including children and which have been endorsed by the European Court of Human Rights in its case law. Moreover, the Council of Europe has adopted the European Rules for juvenile offenders subject to sanctions or measures (i.e. the European Havana Rules), which provide a similar set of rules that enables states to safeguard the rights of children deprived of their liberty.

6. Conclusion

The CRC has generated a substantial number of standard-setting initiatives at the international and regional level, resulting in a growing recognition of juvenile justice as a children’s rights issue that revolves around fairness and child specificity. The CRC and related standards at the international and regional level undoubtedly provide an international benchmark for the treatment of children in conflict with the law. Despite the many open norms and its weaknesses, ambiguity or lack of clarity at certain points, the CRC does, supported by the CRC Committee, provide guidance on critical issues concerning the objectives of juvenile justice, the requirements of a fair trial, including the right to effective participation, and children deprived of their liberty. Many of the CRC provisions have been further developed in resolutions, recommendations, guidelines and case law, supported by interdisciplinary research. There clearly is an on-going effort to address the position of children in conflict with the law in a child-specific and fair manner within the particular complexity and diversity of the juvenile justice system throughout the world.

At the same time, there remains great discomfort concerning the (so far during the past 25–30 years) limited impact of these standards on the justice systems at the domestic level. Even if domestic law reform were initiated, often, significant challenges such as the absence of financial and human resources and lack of political will to implement domestic law and international legal standards, stand in the way of realizing a system that unconditionally respects the fundamental rights and fundamental freedoms of children, even if they have broken the law. Children
in conflict with the law do not receive the attention and respect they are entitled to under international law and this seriously jeopardizes the short- and long-term interests of both the children and society.

Questions for debate and discussion

- Does the CRC provide sufficient guidance on the implications of a specific justice system for children? What are the most important gaps, controversies and uncertainties?
- Is there a tension between the right of the child to be treated fairly and the right to be treated in a manner that takes into account the child’s age? And to what extent can both be accommodated in one justice system for children?
- What is the significance of (not) setting a MACR and is there common ground for a universal MACR? Should the CRC Committee reconsider its position? Why or why not?
- Should young adults (age 18–25) be protected under the CRC as well?
- Art. 37 (b) CRC requires that arrest, detention and imprisonment must only be used as a last resort and for the shortest appropriate period of time. What does shortest appropriate period of time mean and how does that relate to different objectives of juvenile justice?

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References


(CRC) UN Committee on the Rights of the Child (2006). General Comment No. 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Arts. 19; 28, para. 2; and 37, inter alia), UN Doc. CRC/C/GC/8, 2 March 2006.


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


