

COMMENTARY

Protecting the Child's Right to Participate in Criminal Justice Proceedings

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ABSTRACT

The general aim of Article 40 the UN Convention on the Rights of the Child (CRC) is to uphold the rights, and ensure the safety, of all juveniles in conflict with the law who fall within the remit of the criminal juvenile justice system. Besides enumerating procedural guarantees to the right of a fair trial, Article 40 enshrines new provisions compared to other relevant human rights instruments, such as treatment that is consistent with the child's sense of dignity and worth; treatment that reinforces the child's respect for the human rights and freedom of others; and treatment that takes into account the child's age and promotes the child's reintegration into and assumption of a constructive role in society. The aims of this article are to draw out the complexity and richness of the Article 40 CRC paragraphs (1) and (2), which provide the procedural safeguards to be guaranteed at all stages of proceedings concerning a child alleged as, or accused of, having infringed the penal law. Based on the comments, the author presents a reflection about the role of the police in the juvenile justice system and elements of making a court child-friendly while dealing with a child in conflict with the law.

Introduction

Article 40 of the UN Convention on the Rights of the Child (CRC) provides an integrated framework regulating the treatment of children in the criminal justice system. In four paragraphs, Article 40 introduces a number of basic principles upon which child criminal justice should be built. The general aim of Article 40 is to uphold the rights, and ensure the safety, of all juveniles in conflict with the law, who fall within the remit of the juvenile justice system. Besides enumerating procedural guarantees to the right of a fair trial, Article 40 enshrines new provisions compared to other relevant human rights instruments. Article 40 CRC paragraphs (1) and (2) reads:

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

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2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

- (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
- (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.

The aim of this article is to explore in detail the normative aspects addressing the legal protection for children's right to participate in criminal justice proceedings. Consequently the comments would address only paragraph (1) and (2) of the Article 40 CRC.¹ At the beginning, a drafting history is introduced to understand the extensive list of child's participation rights addressed by Article 40 paragraph (1) and (2) of the CRC. Due to the specific safeguards provided by (1) and (2), the article is presented into three sections.

Paragraph (1) of Article 40 provides a set of fundamental principles for the treatment to be accorded to "every child alleged as, accused of, or recognized as having infringed the penal law". The aim of the first section is to separately address the set of principles enshrined in the paragraph. Therefore, the paragraph considers treatment that is consistent with the child's sense of dignity and worth; treatment that reinforces the child's respect for the human rights and freedom of others; and treatment that takes into account the child's age and promotes the child's reintegration into and assumption of a constructive role in society.

The length of the second section corresponds to the extensive text of Article 40(2). Article 40 paragraph 2 of CRC sets out the basic procedural safeguards to be guaranteed at all stages of proceedings concerning a child alleged as, or accused of, having infringed the penal law. The section starts by providing a brief discussion of some additional principles, which, directly or indirectly, are taken into consideration when dealing with children accused of infringing the criminal law. Equality before the courts and the principle of proportionality are widely considered in international human rights law. However, this paragraph highlights their relevance to juvenile justice. The best interests of the child and the right to be heard are contained in the CRC. The

¹ Paragraph (3) of the Article 40 CRC requires State Parties to establish a system specifically applicable to children in conflict with the law and set up the diversion as a way of channelling children away from the formal justice system through alternative procedures to institutionalisation and programme. Paragraph (4) of the Article 40 CRC focuses on alternative measures to institutional care.

section continues by discussing the guarantees to a fair trial and to a hearing according to the list contained in Article 40(2). In addition to the text of the article and General Comment No.10, other international instruments related to the guarantees of a fair trial and hearing, such as ICCPR and ECHR, are used as sources of interpretation.

Section three finalises the comments on paragraph (1) and (2) by providing a reflection on the role of the police in line with requirements of Article 40 paragraphs (1) and (2) and elements of making a court child-friendly while dealing with a child in conflict with the law.

I. Drafting History

No provisions on administration of juvenile justice were contained in the very first proposal for the Draft Convention in 1978.² It was not until the final stages of the drafting process of the CRC that issues of fair trial and criminal justice matters were considered. The development was in response to parallel activities at the time in the area of juvenile justice (Beijing Rules).³

Elements of administration of juvenile justice were considered within a draft article encompassing a wide range of guarantees, which was introduced in the 1986 Working Group by Canada, as a revised text of Article 19 of the 1986's draft.⁴ Each issue considered in the draft was based upon a provision taken directly from other international human rights treaties.⁵ Yet the proposal generated sufficient debate to require the establishment of an informal working party to "redraft a proposal that attempted to consolidate many delegations' view."⁶ The importance of this draft proposal lies within paragraph 1, which sets the tone of Article 19 by referring to children within the penal system only, and requires states to recognise the right of this category of children to be treated in a child-friendly manner.⁷ In addition, the provision expelled a new child-friendly element, namely "the promotion of the child's sense of dignity and worth". However, criminal justice matters addressed by paragraph 2 were limited. States were required to recognise in a child "... the same legal rights as an adult accused or found guilty of infringing the penal law" and to provide legal assistance "in the preparation of the child's defence".⁸ After a debate on the expression adopted, agreement was reached to replace the words "found guilty of infringing" by the words "recognised as having infringed".⁹ Thus, at the end of the debate, paragraph 1 read as follows: "States Parties to the present Convention recognize the right of children who are accused or recognized as having infringed the penal law to be treated in a manner which is consistent with promoting their sense of dignity and worth, and intensifying their respect for the human rights and fundamental freedoms of others, and which takes into account their age and the desirability of promoting their rehabilitation."¹⁰

² U.N. ESCOR, 34th Sess., Supp. No. 4, U.N. Doc. E/1978/34 (1978), reprinted in Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires*, Dordrecht: Nijhoff, 1992 (Detrick 1992)

³ As Van Bueren notes, in the early 1980s, an international community increased the efforts to provide a complete 'framework within which a national juvenile justice system should operate and a model for States of a fair and human response to juveniles' who are in conflict with the law. (Geraldine Van Bueren, *Article 40: Child Criminal Justice in A Commentary on the United Nations Convention on the Rights of the Child*, Leiden: MartinusNijhoff, 2006, p.4) Detrick expressed in similar terms commenting Article 40. (Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, M. Nijhoff Publishers, The Hague, 1999, (Detrick 1999) p.681.

⁴ UN Doc. E/CN.4/1986/39, para. 90 reprinted in Detrick 1992

⁵ Ibid

⁶ Ibid para. 92

⁷ Ibid para. 93

⁸ Ibid

⁹ Ibid para.94

¹⁰ Ibid

While the 1988 Working Group adopted the draft text as agreed by the 1986 Working Group Session, the 1989 Working Group session undertook a significant revision of Article 19. In the 1989 Working Group, beside the Working Group text, two other lengthy versions of Article 19 were proposed, one by the Crime, Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs, United Nations Office at Vienna, and the other by a Venezuelan delegation. Faced with “a total lack of consensus”, the Chairman of the 1989 Working Group appointed an open-ended drafting group¹¹ that split the draft article 19 into two separate provisions.¹² Members of the drafting group explained that such a split was necessary to accommodate, on the one hand, the comments formulated by the Human Rights Committee regarding the deprivation of liberty and “to show the respect due to human dignity, recognition of the needs of the children and the concern to assure them legal and other assistance” and, on the other hand, “some ideas” in the area of juvenile justice, which were the result of initiatives taken in the United Nations.¹³ By adopting such an approach, Article 19bis (later Article 40) got a clearer profile in providing procedural guarantees to the right of fair trial.

Paragraph 1 of previous article 19 would serve as the chapeau for the new Article 19bis. The other three paragraphs set out the obligation of states deriving from the recognition that children “alleged as, accused of, or recognised as having infringed the penal law” should be treated in a child-adequate manner. Thus, paragraph 2 of the proposed text spelled out the principle of *nullum crimen sine lege* and minimum procedural safeguards to be guaranteed at all stages of penal proceedings. Paragraph 3 of the Article 19bis considered the necessity of establishing “laws, procedures, authorities, and institutions in each national jurisdiction”. In addition, the proposed paragraph (3) incorporated the concept of the age of criminal responsibility for juveniles and the desirability of diverting children from formal aspects of the criminal justice system. Finally, paragraph 4 of the Article 19bis considered the adjudication and dispositions in the administration of juvenile justice.

The text of the provision was based on Articles 14 and 15 of the ICCPR, and considerably influenced by the Beijing Rules.¹⁴ However, the drafters decided to ‘deliberately’ write certain sentences in ‘non-imperative language’.¹⁵ On the one hand, the use of such language would weaken the sentences and build up ‘an inherent tension’ within the provision itself. While the provision sought to establish a child-oriented criminal justice system focusing on the child’s well-being, it built ‘tension’ with the option given to states “to achieve a balance between the desirability and the advisability of introducing these measures into their legal system.”¹⁶ The result of this ‘tension’ was manifested in shortfalls among the juvenile justice systems of many state parties present in the areas of procedural rights, development and implementation of diversionary measures, and an over reliance in the use of deprivation of liberty.¹⁷ On the other hand, drafters considered the use of non-imperative language as an option of facilitating a discussion focused on the proposal per se. Indeed, because of such an option, much of the discussion around the draft would be centred on editorial changes to improve and clarify the meaning of phrases.¹⁸ Thus, compared to the initial provision, paragraph 1 of the new draft was improved in form, by expanding its scope to ‘every child’. The concept of ‘rehabilitation’ was dropped and replaced

¹¹ UN Doc. E/CN.4/1989/48, para. 536 reprinted in Detrick 1992

¹² UN Doc. E/CN.4/1989/WG.1/WP.67/Rev.1

¹³ UN Doc. E/CN.4/1989/48, para. 537

¹⁴ Detrick 1999, p.681

¹⁵ UN Doc. E/CN.4/1989/48, para.537 and 565

¹⁶ Ibid

¹⁷ UN Committee on the Rights of Child, *General Comment No. 10: Children’s rights in Juvenile Justice*, CRC/C/GC/10, 2 February 2007 <http://www2.ohchr.org/english/bodies/crc/comments.htm> (General Comment No.10) para.1

¹⁸ Such affirmation is based upon reading through paragraphs 566-599 of the UN Doc. E/CN.4/1989/48.

with “the desirability of the child’s assuming a constructive role in society”.¹⁹ Upon remarks made over the concept of ‘rehabilitation’, it was clarified that ‘rehabilitation’ covered “the desirability of promoting the child’s *reintegration* (emphasis added) and the child’s assuming a constructive role in society”.²⁰ Discussion of paragraph 2 of the draft was focused on the readjustment to the chapeau of subparagraph (b);²¹ two issues represented by the wording of point (ii), namely the child being directly informed of the charges brought against them and the type of legal assistance they would be provided with;²² and the terms ‘legal counsel’ and ‘judicial body’ as to point (iii).²³

II. Article 40(1): Fundamental Principles for the Treatment to be Accorded to Children in Conflict With the Law

Article 40(1) provides a set of fundamental principles for the treatment to be accorded to “every child alleged as, accused of, or recognized as having infringed the penal law”. The set contains three principles, especially important for “promoting the child’s sense of well-being”.²⁴ The principles consist of:

- Treatment that is consistent with the child’s sense of dignity and worth;
- Treatment that reinforces the child’s respect for the human rights and freedom of others;
- Treatment that takes into account the child’s age and promotes the child’s reintegration and the child’s assuming a constructive role in society.

Although the principles are ‘sliced’ into three and independently considered in order to facilitate discussion in this article, a multidimensional and holistic approach must be taken in reading them. The principles are interrelated and interdependent upon each other as well as being linked directly to the realisation of the child’s human dignity and rights, taking into account the child’s special developmental needs and diverse evolving capacities. Furthermore, the principles interrelate and interact with principles expressed in other articles of the CRC.²⁵

Treatment that is Consistent With the Child’s Sense of Dignity and Worth

In the principles’ commentary, the Committee places the right to inherent dignity and worth in the context of both Article 1 of the Universal Declaration of Human Rights and the preamble of the CRC. The Committee further observed that the State Parties have to respect and protect the right to dignity and worth throughout the entire process of dealing with the child. Two key elements derived from the Committee’s reading of the right to inherent dignity and worth. Firstly, the Committee’s approach to the right to dignity and worth is no other than an explicit reference to the most fundamental requirement of the CRC, according to which the child is recognized and fully respected as a human being with rights. Secondly, the Committee emphasises that the right to dignity and worth is premised on fundamental and inviolable standards, and consequently is universal and inalienable.

¹⁹ UN Doc. E/CN.4/1989/48, para.566

²⁰ Ibid para.567-569

²¹ Ibid para.571

²² Ibid para.573-579

²³ Ibid para.583-588

²⁴ Van Bueren 2006, p.12. As Van Bueren notes, both the CRC and the Beijing Rules emphasize the well-being of the child in the administration of child criminal justice. Such conclusion is drawn in reference to Article 40(4) of the CRC and Rule 5 of the Beijing Rules.

²⁵ The Committee, rather than dividing, considers in General Comment No.10 Section III interrelation and interdependence of principles of a comprehensive policy, without making particular reference to anyone in particular for juvenile justice.

Treatment that Reinforces the Child's Respect for the Human Rights and Freedom of Others

This principle was an explicit reference to one of the fundamental requirements expressed in CRC's preamble, according to which "a child should be brought up in the spirit of the ideals proclaimed in the Charter of the United Nations."²⁶ The Committee identifies two ways to achieve the reinforcement of the child's respect for the human rights and freedom of others. The first is to direct treatment and education of children "to the development of respect for human rights and freedoms."²⁷ The second implies "a full respect for and implementation" of human rights from the key actors in juvenile justice.²⁸ The two requirements interrelate and are interdependent upon each other. Read as one, they imply that the reinforcement of the child's respect for the human rights and freedom of others can only be accomplished through developing a sense of respecting the child as a right-holder.²⁹

Treatment that Takes Into Account the Child's Age and Promotes the Child's Reintegration and the Child Assuming a Constructive Role in Society

Similarly to the right to dignity and worth, the Committee, in recognition of the child as a rights holder, emphasises that the principle is premised on fundamental and inviolable standards, and consequently is universal and inalienable.³⁰ However, the language adopted "must be applied, observed and respected" and is harder (using a strong verb such as 'must') than in considering the right to dignity and worth. Perhaps this is because of the fact that the principle is an expression that recognises the evolving capacities of the child principle that underpins the CRC. The principle does not incorporate the concept of 'rehabilitation' introduced in Article 14(4) of the ICCPR.³¹ The incorporation of 'social reintegration' was as a consequence of evolution in the field of juvenile justice regarding the starting point.³² As the Committee does not develop further the notion of 'reintegration' in General Comment No.10, in shedding light about its meaning reference is made to other sources. Therefore, Van Bueren notes that "compared to 'rehabilitation', the notion of 'reintegration' rejects the old assumption that the difficulties faced by children are necessarily individual, and considers the social environment and the social relationships of the child."³³ In no circumstances should juvenile justice be perceived as compassion for children. Juvenile justice implies the establishment of "responsibility, and at the same time, to promote re-integration".³⁴ Hammamberg develops further the concept of

²⁶ General Comment No.10, para.4e

²⁷ Ibid. The Committee does not expand further the requirement. It prefers rather to direct the States parties to Article 29(1)(b) and General Comment No.1 on the aims of education, to elaborate

²⁸ Ibid. Once applying this principle to juvenile justice, the Committee emphasises 'the guarantees for a fair trial recognized in article 40(2) CRC'.

²⁹ The Committee expresses in a rhetoric way the implication at General Comment no.10 para.4e

³⁰ General Comment No.10, para. 34(e)

³¹ As Detrick notes, 'the obligation of states parties under article 14(4) of the ICCPR to ensure...' 'the desirability of promoting their rehabilitation' is based on the view that juveniles, should as far as possible, be protected against the detrimental effects of stigmatization and that offences by juveniles should not be responded to by punitive measures, but rather, by educational measures.' Detrick 1999, p.683

³² The starting point was forged in part from the criminological 'labelling theory', strain theory hypothesis and cultural and sociological studies, which all together coined the class and race bias in the detection, recording and treatment of juvenile offenders. The processes of penalization and adulteration of juveniles makes it more difficult for them to desist from crimes and disorder in the future. When dealing with this category of juveniles, rather than 'labelling' and stigmatising them as criminals, account should be taken both of the offence and the special needs of the young offender, thus 'reflecting a remarkable equilibrium between concerns that cannot be easily reconciled'. Trepanier 1999, p.320

³³ Van Bueren 2006, p.12

³⁴ Thomas Hammamberg, 'Juvenile Justice Approach Built on Human Rights Principles', *National Association for Youth Justice*, Vol. 8 Issue 3, 2008, pp.193-196 p.194

‘reintegration’, by considering the process by which “the young offender should learn the lesson and never repeat the wrongdoing”.³⁵ The principle takes into account the child’s age, which is an explicit facet of promoting the child’s sense of well-being. As Doek notes, the child’s sense of well-being “serves both individual and societal interests”.³⁶ Regarding the individual aspect, the child’s sense of well-being enables him/her “to live an individual life in society”.³⁷ Regarding the societal aspect, the child’s sense of well-being would allow and facilitate that they actively participate, and fully assume, their responsibilities and a constructive role within the community.³⁸ There is one important implication from the assumption ‘of a constructive role in society’ and ‘reintegration’, which is that children should not be isolated for treatment or stigmatised. On the contrary, “children should be assisted within the community to develop a sense of responsibility, which can only be accomplished if children are shown how to develop a sense of belonging.”³⁹

III. Article 40(2): Minimum Guarantees for the Child Alleged as or Accused of Having Infringed the Penal Law

Article 40 paragraph 2 of CRC sets out the basic procedural safeguards to be guaranteed at all stages of proceedings concerning a child alleged as, or accused of, having infringed the penal law. All of its respective rights and guarantees are meant to ensure that such children receive fair treatment and a fair trial. The list of rights and guarantees is basic for two reasons. Firstly, the chapeau of paragraph 2 clearly relates the provision to other ‘international instruments’. Van Bueren interprets the term ‘international instruments’ to include both international and regional human rights treaties which are also applicable to children.⁴⁰ Secondly, the basic list is drawn from a detailed catalogue of minimal procedural guarantees found in Articles 14(2) and 15 of the International Covenant on Civil and Political Rights (ICCPR),⁴¹ and at a regional level, Article 6 of the ECHR.

Within General Comment No.10, the Committee makes two important remarks regarding implementation of the guarantees to a fair trial. Firstly, the Committee notes that the State Parties have no authority to determine the implementation of ‘minimum standards’ as a full compliance with CRC. In clarifying the meaning of this remark, it expresses that states parties should make every effort “to establish and observe higher standards”.⁴² To this end, it acknowledges that children could benefit both on the national and international level from wider interpretation of the guarantees to a fair trial. In addition, the Committee’s remark should be read in conjunction with the Beijing Rules, which contain an interpretation of minimum guarantees to a fair trial as applied to children.⁴³ Secondly, the Committee notes explicitly from the beginning that achievement of a proper and effective implementation of the right to fair trial depends not only on juridical measures, but also on the conduct throughout the process of law enforcement officials toward respecting these rights or guarantees.⁴⁴ Therefore, high quality training should be given to all parties in the justice system, e.g. police officers, prosecutors, legal representatives of the child,

³⁵ Ibid p.194

³⁶ DoekJaap. Children's Rights fundamental to well-being, and under threat, *Keynote at the ACWA Conference August 14-17 2006 Sydney* (2006), available at <http://www.jaapedoek.nl/publications/keynote.php> (accessed 12/05/2011) Doek based this conclusion upon the basis of the preamble and various provisions of the CRC.

³⁷ Seventh preambular paragraph CRC, Article 29(d),

³⁸ Doek 2006. Aspects of actively participating in are expressed in Article 12-17 CRC.

³⁹ Van Bueren 2006, p.12

⁴⁰ Van Bueren, 1998, p.180

⁴¹ Detrick 1999, p.676-686. Similarly, the Committee refers to Article 14 ICCPR and the General Comments 13: Article 14 – Administration of Justice. General Comment No.10, para.23

⁴² General Comment No.10, para.23

⁴³ Rule 7 of the Beijing Rules entitled ‘Rights of juvenile’, addresses the basic procedural safeguards to be guaranteed at all stages of proceedings in juvenile cases.

⁴⁴ General Comment No.10, para.23

judges, probation officers, social workers, and other special professionals concerned, in a systematic and ongoing manner. The programme training informs professionals about a child's psychological, physical and developmental capacities, as well as about the special needs of the most vulnerable children.⁴⁵

III.1 Additional Principles Related to Children Accused of Infringing the Criminal Law

Beside the basic procedural safeguards to fair trial contained in other international human rights instruments, Article 40 of the CRC, spells some additional principles such as equality before the courts, the best interests of the child, principle of proportionality, and the right to be heard, which must be taken into account while dealing with children accused of infringing the criminal law.⁴⁶

Equality Before the Courts

As discussed, the chapeau of Article 40(2) of the CRC states that a child has “at least the following guarantees”. Although not expressed in Article 40(2) of the CRC, children, like adults, are entitled to benefit from the right of equality before the court.⁴⁷ The HRC interprets the term ‘the court’ to refer “(...) not only courts and tribunals, but also a judicial body empowered by domestic law to carry out a judicial task.”⁴⁸ This interpretation is of relevance to juvenile justice, as it clarifies the reasons of having an ‘authority’ and a ‘judiciary body’ incorporated by Article 40(2)(iii).⁴⁹ The HRC has interpreted the principle of equality before the court as being “to guarantee equal access and equality of arms”.⁵⁰ Furthermore, the HRC affirms that equality before the court “ensures the parties to the proceedings in question are treated without any discrimination”.⁵¹ It therefore holds the view that the equality before the court goes beyond the equality before the law, encompassing procedural equality, which impacts directly on the manner in which the law is applied by the judiciary.⁵² The procedural equality refers to “a reasonable opportunity given to a child in presenting his/her case to the court under conditions which do not place him at substantial disadvantage vis-à-vis his/her opponent.”⁵³ The element of the right of access to the court applies to criminal cases and in the determination of ‘civil rights and obligations’.⁵⁴ The right of access is interpreted not only as formal access by law, but also giving every person the possibility to functionally get the case to court, regardless of nationality or statelessness.⁵⁵ The right of access entails legal assistance and conditional imposition of fees on the parties to proceedings with insufficient means and under particular personal circumstances.⁵⁶ Both conditions of right to access are relevant to juvenile justice as they might jeopardize the access of a juvenile to the court, especially in proceedings manifesting a conflict of interest between the child's best interest and the parents or other involved parties. Extending the right of access to

⁴⁵ Ibid

⁴⁶ As earlier discussed the chapeau of paragraph 2 clearly relates the provision to other international instruments.

⁴⁷ Van Bueren 1998, p.180 Similarly Mason enumerates ‘clear recognition and implementation of the principle of equality before the law’ among the essential means to ensure respect for the rights of child in juvenile justice. UN Committee on the Rights of Child, *Report on the tenth session of the Committee on the Rights of the Child*, CRC/C/46, 18 December 1995,(accessed 26/04/2011) para.212

<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/24b13ed424177d4ec1256333004b0e0e?Opendocument>

⁴⁸ HRC General Comment No.32, para. 6

⁴⁹ The meaning of the phrase would be discussed in section of Article 40(2)(b)(iii).

⁵⁰ HRC General Comment No.32, para. 8

⁵¹ Ibid

⁵² Nowak 2005, Article 14, para.6, pp.308

⁵³ Harris et al.2009, p. 251

⁵⁴ Term adopted by Harris et al. 2009, p. 235

⁵⁵ General Comment No.32, para. 9, Harris et al. 2009, p. 236

⁵⁶ General Comment No32, para 9-10. The condition on the fees is presented as a formulation deriving from the jurisprudence of ECtHR. Harris et al. 2009, p. 238

legal assistance aims to address the situation where member States do not have provisions to provide pro bono legal services to children facing the juvenile justice system. The Committee indirectly undertakes steps to ensure that children accused of violating criminal laws are represented by counsel, even when the child's family or other involved parties are not in the position to provide such service.

The equality of arms strikes a fair balance between all parties in proceedings. In practical terms, a fair balance means – unless distinctions are based on law – ensuring that all the parties, are not at a substantial disadvantage against each other in terms of procedural rights.⁵⁷ Of principal importance to achieving a fair balance is the idea that both parties should equally stand and be accorded equal treatment during the whole course of proceedings.⁵⁸

The Best Interest Principle

This principle provides that in all procedures and justice systems affecting children “the best interests of the child shall be a primary consideration”.⁵⁹ As discussed earlier, ‘the best interests of the child’ is one of a small group of principles, which underpin all the other CRC rights.⁶⁰ Rules 5 and 17(1)(d) of the Beijing Rules emphasise that the best interest principle is as much a sentencing principle as any other. The Committee reinforces this by considering ‘best interests’ as one of the leading principles that decision-makers shall consider “in all decisions taken within the context of administration of justice”.⁶¹ However, there is no indication why the Committee limits the best interest principle to the ‘decision’ rather than ‘actions’ or ‘case’ as a whole.⁶² Extending the application of principle beyond the ‘decision’ would render the whole process child-friendly and place the child at the centre of all actions undertaken. The Committee’s limitation of the ‘best interest’ to the ‘decision’ is in contradiction with Rule 17(1) of the Beijing Rules. Rule 17(1) of the Beijing rules define the best interests of child-juvenile ‘well-being’ not merely ‘a primary consideration’ but rather a primary, if not might be said the paramount,⁶³ consideration that must be ‘ensured’. In addition, limitation to decision, contradicts the meaning given to ‘*paramount*’ in Article 3 of the CRC, which refers to the child’s best interests as determinative; they determine the course of action to be taken.⁶⁴ Therefore, the best interest principle demands to weigh what is consistent with the well-being and the future of the young person *before* decisions are taken. It strikes a balance of consistency between the decision and the best interests of the child, and implies that the background and circumstances in which the juvenile is living, and the conditions under which the crime has been committed must be properly investigated. As previously discussed, the overall aim of all actions must be to protect and promote children’s fundamental rights, and to give young people who are found guilty of a criminal offence the greatest possible chance of reintegrating into society and assuming a constructive role in society.⁶⁵

Secondly, as Freeman points out, ‘primary’ implies “that a child’s best interests should be the ‘first consideration’ [and] is an exhortation to consider specifically the best interests of the child and to give the child’s best interests greater weight than other considerations”.⁶⁶ This issue is particularly relevant as far as juvenile justice is concerned. The question that should be asked is how it is

⁵⁷ General Comment No.32, para. 13

⁵⁸ Harris et al. 2009, p. 251-254, Nowak 2005, Article 14, para.65-68 pp.341-342

⁵⁹ Article 3.1, CRC

⁶⁰ Please see more at literature review chapter section

⁶¹ General Comment No.10, para 4b

⁶² Term ‘action’ is adopted in Article 3, and ‘case’ in Rule 17(1)(d) of the Beijing Rules.

⁶³ Read in conjunction with Article. 40.4, CRC

⁶⁴ Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child: Article 3: The Best Interest of the child*, Leiden: MartinusNijhoff, 2007, p.60

⁶⁵ Article 40 (1), CRC

⁶⁶ Freeman 2007, p.61

possible to balance the best interests of the child/children with the protective and retributive needs of society. Implementation of the best interest principle in no circumstances implies that the protective and retributive needs of society are considered as second hand and that the preservation of public safety is in jeopardy. The Committee emphasises that the protection of the best interests of the child is balanced with attention to effective public safety, and with the interest of their victims.⁶⁷ In other words, whilst making to compensate for the wrongdoing, the retributive society's needs are viewed as being satisfied and balanced by integrating the child offender and making him/her assuming a constructive role in society.⁶⁸ Indeed, the best interests of the child are to be considered on a case-by-case basis, suggesting that the interests of a child in conflict with the law are subject to each unique circumstance.

Principle of Proportionality

The principle of proportionality is a fundamental principle of international law, which regulates all state conduct vis-à-vis the citizen. Christoffersen notes “the term proportionality derived from *pro portio*, in equal shares, and the term indicates that the principle of proportionality is concerned with the distribution of some kind of equal weight to various interests”.⁶⁹ Rivers considers the principle of proportionality as a structured approach to balancing fundamental rights with other rights and interests in the best possible way.⁷⁰ In addition, in the field of criminal law, the principle of proportionality has been conceived to restrain the power of state authorities to interfere with the rights of individual persons, and hence it should be regarded as a device for the protection of individual autonomy from the public interest.⁷¹ In the field of juvenile justice, the principle of proportionality is described “as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts in relation to the gravity of the offence”.⁷² To this end, when applied to juvenile justice the proportionality test contains three elements:⁷³

- *Suitability*: An administrative or legal power must be exercised in a way that is suitable to achieve the purpose intended and for which the power was conferred.⁷⁴ Applying this element in conjunction with the principle of best interests, the achievement of proportionality requires that the punishment measures designed by the legislator for the offences committed by juveniles should always be outweighed by the interest of

⁶⁷ General Comment No.10, para 4b

⁶⁸ Van Bueren 1998, p. 183

⁶⁹ Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*. Boston, Mass: Brill Academic Publishers, 2009, p.35, Similarly Trimadis summarizes the principle of proportionality as to require that action undertaken must be proportionate to its objectives. Takis Tridimas, Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny, in *The Principle of Proportionality in the Laws of Europe*, Hart Publishing, Oxford, 1999, p. 65

⁷⁰ Rivers Julian, ‘Proportionality and Variable Intensity of Review’, *The Cambridge Law Journal*, Vol. 65 Issue 1, 2006, p. 174-207, p. 176

⁷¹ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp: Intersentia, 2002, p. 2. Similarly, the ECtHR court stated the principle of proportionality requires ‘a search for a fair balance between the demands of general interest of the community and the requirement of protection of the individual’s fundamental rights.’ Harris et al. 2009, p.10

⁷² Commentary of Rule 5, Beijing Rules

⁷³ While Rivers structures the answer to the principle of proportionality by way of a fourfold test (Rivers 2006, p.181), Varuhas prefers to a threefold one (Jason N E Varuhas, Keeping Things in Proportion: The Judiciary, Executive Action and Human Rights, *New Zealand Universities Law Review*, Vol 22, Issue 2, 2006, p. 301). There is nothing wrong with this approach. As Rivers and Christoffersen acknowledge the general impression from both judicial and practitioner exposition is that there is essentially one doctrine of proportionality offering a range of tests directed towards the same end. Although the assessment leads to different results in different contexts, the language used to identify the various stages of the test is very similar, indeed interchangeable. Rivers 2006 p.178, Christoffersen 2009 p.32

⁷⁴ Varuhas 2006, p. 301

safeguarding the well-being and the future of the young person. Whereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in juvenile cases the strictly punitive approaches are not appropriate.⁷⁵

- *Fair Balance*: The exercise of the power must not impose burdens or cause harm to other legitimate interests, which are unbalanced to the object to be achieved.⁷⁶ In the context of juvenile justice, this means that both the internal conditions of the juvenile and the external conditions of the behaviour are taken into account. Only by constructing a full picture of the offence and offender will the judge be able to determine what sentence will be most appropriate to promote the child's reintegration and the child's assuming a constructive role in society. Beside the rehabilitative needs of the offender, and the protection of society, the judicial authority should take into consideration in making its decision even the interests of the victim, who should be consulted whenever it is appropriate.⁷⁷
- *Necessity*: The exercise of the power must be necessary to achieve the relevant purpose.⁷⁸ In the context of the juvenile justice, this principle requires that the sentence must not exceed a response that is appropriate to the seriousness of the offence and the degree of responsibility of the child. Juvenile justice is distinguished from adult criminal justice because it is founded on the idea that reactions to juvenile offenders should have a pedagogical task.⁷⁹ To this end, the sentence should be calling for no less and no more than a fair intervention than the minimum necessary to achieve the purpose of sentencing.⁸⁰ This requirement allows for the appropriate scope of discretion to be used at all stages of proceedings and implementation of a wide range of non-custodial sentences.

All the three elements must be taken into consideration in the final disposition.

The Right to be Heard

The Committee is of the view that the right to be heard is fundamental for a fair trial. The right to be heard initially was introduced by Rule 14(2), Beijing Rules. According to its provision, in order to safeguard the best interests of the juvenile, the proceedings shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate and to express himself or herself freely. Article 12(2) of CRC strengthens further the provision,⁸¹ by providing the child with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative, or an appropriate body in a manner consistent with the procedural rules of national law. It is not just a matter of the young person's right to be heard (although this is crucially important); it might also assist decision-makers in forming a view of the young person's understanding and comprehension.⁸² In other words, the child must be given the opportunity to express their views freely, and those views should be given due weight in accordance with the age and maturity of the child throughout the juvenile justice process.⁸³ It

⁷⁵ Rule 17 (1) of the Beijing Rules

⁷⁶ Varuhas 2006, pp. 301 Varuhas adopts the term 'proportionate', while Rivers 2006 refers as fair balance or proportionate.

⁷⁷ The Tokyo Rules, Rule 8.1

⁷⁸ Varuhas 2006, pp. 301

⁷⁹ IdoWeijers, Requirements for Communication in the Courtroom: A Comparative Perspective on the Youth Court in England/Wales and The Netherlands, *Youth Justice*, Vol. 4, Issue 1, 2004, pp. 22-31, pp. 24

⁸⁰ Commentary of Rule 5, Beijing Rules

⁸¹ Van Bueren 1998, pp.181

⁸² Weijers 2004, pp. 26

⁸³ Art. 12(1)

remains to the judge to make the final decision; an active engagement of the child in the decision and its implementation will, in most cases, contribute to positive result, as it might greatly influence juvenile's willingness to accept the sanction and to reflect on his/her offending behaviour.

III.2 The Guarantees of a Fair Trial

Article 40(2)(a): No Retroactive Juvenile Justice

Article 40(2)(a) CRC embodies the obligation to protect the right of freedom from *ex post facto* laws. Article 40(2)(a) pursuant to Article 15(1) ICCPR affirms that no child can be charged with or sentenced under the penal law for acts or omissions which at the time they were committed were not prohibited by national or international law. In the light of the article, states parties have an obligation to define precisely by law all the criminal offences in the interest of legal certainty, and to preclude the application of criminal laws from being extended by analogy.⁸⁴ The reference to 'international law' was to render States responsible in ensuring that any change or new international criminal law provisions do not retroactively change the legal consequences (or status) of actions committed by the juvenile, or relationships that existed, by such enactment at the domestic level.⁸⁵ Thus, the article not only prohibits the retroactive application of both national and international criminal law, but also embodies the principle of *nullum crimen sine lege*. In recent events, many State Parties have strengthened and/or expanded their criminal law provisions to prevent and combat terrorism. The Committee takes the view that these changes should not result in retroactive or unintended punishment of children.⁸⁶

Although Article 40(2)(a) does not expressly embody the principle of *nulla poena sine lege*, the Committee in the light of Article 41 CRC refers to Article 15 ICCPR and renders valid the rule that no heavier penalty shall be imposed than the one that was applicable at the time when the criminal offence was committed. However, the Committee accepts that the child may benefit from the change of law, if the act provides for a lighter penalty.

Article 40(2)(b)(i): The Presumption of Innocence

According to Article 40(2)(b)(i) CRC "every child alleged as or accused of having infringed the penal law shall be presumed innocent until proved guilty according to the law". The presumption of innocence, which is fundamental to the protection of human rights, extends beyond the domestic judicial system.⁸⁷ The significance of this principle with regard to proper administration of juvenile justice is apparent for children in conflict with the law. This is included in Rule 7.1 of the Beijing Rules, Rule 17 of JDLs, and re-enforced by Article 40(2)(b)(i) of CRC. The Committee recognises that the presumption of innocence acquires importance in the case of a juvenile offender as the child may behave in a suspicious manner because of the lack of understanding of the process, immaturity, and fear or for other reasons.⁸⁸ By imposing on the prosecution the burden of proving the charges, the principle of innocence refrains the judges and other public

⁸⁴ Detrick 1992, p.684

⁸⁵ Detrick 1992, p.685

⁸⁶ General Comment No.10, para.41

⁸⁷ The presumption of innocence is enshrined on Article 14(2) of the ICCPR, Article 7(1)(b) of the ACHPR, Article 8 of the ACHR and Article 6(2) of the ECHR, which underline the importance of it regarding protection of human rights.

⁸⁸ General Comment No. 10, para. 231

officials from prejudging any case “until the charge has been proved beyond reasonable doubt”.⁸⁹ From the accused’s perspective, the presumption of innocence provides effective safeguards by giving the accused the benefit of the doubt.⁹⁰ In practical terms, this means that public authorities, particularly prosecutors and police, should not make public statements affirming the guilt or innocence of an accused before the outcome of the trial. In particular, the public authority should abstain from issuing press releases if the accused person is a juvenile in order to prevent the harm that may be caused to the juvenile by undue publicity and labelling.⁹¹ The HRC adds in General Comment No.32 an element to the application of presumption of innocence which is of relevance to juvenile justice. Although not categorically imposing a prohibition, the HRC advises the public authorities to refrain from shackling the defendant or keeping them in cages during a trial, or otherwise presenting to the court in a manner indicating that they may be dangerous criminals.⁹² Complex human rights issues arise from the use of physical restraint on children and young people.⁹³ Therefore, this particular remark by the HRC demonstrates how the standards and principles under the CRC can be used to prevent the negative outcomes of subjecting juvenile defendants to public physical restraint.

Article 40(2)(b)(ii): Informed Promptly of the Charges

The child’s first right is information regarding charges. Every child alleged as, or accused of, having infringed the penal law has the right to be informed promptly and directly of the charges against them. Prompt and direct means ‘as soon as possible’. This means from when the prosecutor or judge initiates the very first steps of dealing against the child. In addition, when the authorities decide to deal with the case without resorting to judicial proceedings, the child must be informed of the charge(s) that may justify this approach.⁹⁴ The right of an accused person to be informed promptly and directly of the charges against them is also recognised in Article 14(3)(a) of the ICCPR, Article 8(2)(b) of the ACHR and Article 6(3)(a) of the ECHR. Thus, when it comes to interpreting this right, the recommendation and cases on the above articles are substantial. According to the HRC, the right to be informed of the charges “applies to all cases of criminal charges, including those of persons not in detention”.⁹⁵ However, the HRC, in commenting upon the right, excludes “criminal investigations preceding the laying of charges” from the scope of exercising the right.⁹⁶ Nowak comments that the duty to inform relates to the nature and cause of the charge and accusation.⁹⁷ The right to be informed is the subject of a two-fold test – ‘promptly’ and ‘in detail’. According to the HRC, the right of ‘prompt’ notification requires State Parties to give information as to whether the person concerned is formally charged with a criminal offence under domestic law or is publicly named as such. The specific requirements of prompt notification may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.⁹⁸ The ‘in detail’

⁸⁹ UN Human Rights Committee, *General Comment No.32: Article 14: Right to equality before the courts and tribunals and to a fair trial*. CCPR/C/GC/32, 23 August 2007(accessed 5.05.2011), para.30[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)

⁹⁰ Ibid

⁹¹ General Comment No.10, para. 231

⁹² HRC General Comment No.32, para.30

⁹³ Tobin enumerates at least four specific rights that are relevant to the use of physical restraints. They are: right to liberty, the right to privacy, the right not to be subject to torture or ill-treatment or punishment, and the right to be treated with humanity and respect for the inherent dignity of the human person. John William Tobin, ‘Time to remove the shackles: The legality of restraints on children deprived of their liberty under international law’ *International Journal of Children’s Rights*, Vol.9, Issue 3, 2001, pp. 213-239, p.217-218

⁹⁴ General Comment No.10, para. 23a

⁹⁵ HRC General Comment No.32, para. 31

⁹⁶ Ibid

⁹⁷ Nowak 2005, Article 14, para.46 p.331

⁹⁸ HRC General Comment No.32, para. 31

requirement means that, because of the nature and cause of a criminal charge, the information provides not only the exact legal description of the offence, but also the facts underlying it.⁹⁹ However, the Committee has deemed that providing the child with an official document is not enough.¹⁰⁰ Thus, the Committee defines the requirement ‘in detail’ as to include notification in a language they understand as well. This element implies often ‘translation’ of the formal legal language used to inform charges, into a wording that a child can understand.¹⁰¹ The Committee’s view is that it is the responsibility of the authorities (e.g. police, prosecutor, judge), rather than parents, legal guardians, or the child’s legal or other assistance, to make sure that the child understands each charge that is brought against them.¹⁰²

Article 40(2)(b)(ii): The Right To Have Parents or Guardian Notified

Upon the apprehension of a juvenile, their parents or guardian shall be immediately notified of such apprehension or, if this is not possible, within the shortest possible time.¹⁰³ The term ‘guardian’ is not restricted to legal guardians, but includes those who, de facto, have been responsible for the child.¹⁰⁴ However, Article 40(2)(b) of the CRC appears to have sacrificed the right of children to have their parents notified of their immediate apprehension, by placing a duty on the State Parties only to inform, ‘if appropriate’. Even Article 9(4) of CRC, which exclusively aims to prevent the absence, has not remedied the situation. As to Article 9(4) of CRC, the burden of notification of family members is a prerequisite to parents’ request on the whereabouts of the child, excluding situations when such information would be detrimental to the well-being of the child. Despite several violations highlighted by national and international non-governmental children’s rights organisations, this legal loophole has not yet drawn the necessary attention of the Committee to issue any general comment.

Article 40(2)(b)(ii): The Right of Silence

Similarly, the CRC is silent regarding the right to remain silent. However, Rule 7 of the Beijing Rules further extends the safeguards of children during apprehension by recommending that children should be entitled to the right of silence as a ‘basic safeguard’. The reasoning behind such a safeguard relates to the fact that a child who is questioned by the police has the same rights as an adult not to answer their questions. In practical terms, the right of silence means that the child must tell the police their name and address, but does not have to answer other questions if they have not received legal advice. The age of the child, the child’s development, the length of the interrogation, the child’s lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment, may lead them to a confession that is not true.¹⁰⁵ The right to silence helps to prevent such pressures.¹⁰⁶ Furthermore, police officers and other investigating authorities should be well-trained to avoid interrogation techniques and practices that result in coerced or unreliable confession or testimonies.¹⁰⁷ The child being questioned must have access to a legal and other appropriate representatives. In addition to legal representation, children must be able to request that their parent(s) be present during questioning.¹⁰⁸

Article 40(2)(b)(ii): The Right to Legal or Other Appropriate Assistance

⁹⁹ Nowak 2005, Article 14, para.46 p.331

¹⁰⁰ General Comment No.10, para. 23e

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ The Beijing Rules, Rule 10.1

¹⁰⁴ Van Bueren 1998, p.177

¹⁰⁵ General Comment No.10, para. 23h

¹⁰⁶ Van Bueren, 1995, pp.178

¹⁰⁷ General Comment No.10, para. 23h

¹⁰⁸ General Comment No.10, para. 23h

The right to legal assistance, which necessarily includes the right to communicate with counsel, is one of the most essential elements of a fair trial. Unfortunately, it is also one of the rights most often violated.¹⁰⁹ The second part of Article 42(2)(ii) of the CRC provides that “every child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence”. The right implies that, once arrested or detained, a child is to be advised immediately by the arresting officer, or the officers in charge, of their right to counsel. With regard to the notification, the police’s duty extends beyond enumerating the rights and includes passing detailed information to the child about the existence and availability of duty counsel, free preliminary legal advice, and legal aid.¹¹⁰ However, by listing duty counsel the provision leaves the discretion to state parties to provide the appropriate assistance, discretion which is not necessarily under all circumstances legal. This approach tries to accommodate the more informal approaches to juvenile justice that some states have adopted.¹¹¹ Thus, overemphasis should not necessarily be placed on legal or non-legal qualifications of the child’s representative; rather it is the quality of the representation that is important.¹¹²

Although Article 40(2)(ii) CRC omits any explicit reference to free legal assistance, this right is anchored in other international and regional human rights treaties. Thus, Rule 15.1 of the Beijing Rules provides that the juvenile shall have the right to apply for free legal aid where there is provision for such aid in the country. Furthermore, Rule 18(a) of the JDLs extends the right of legal counsel and free legal aid, where such aid is available, to all juveniles who are detained, under arrest or awaiting trial. Whatever the nature of provided assistance, State Parties are urged by the Vienna Guidelines to set up agencies and programmes to provide legal and other assistance to children – if needed – free of charge, including interpretation services.¹¹³ In particular, State Parties are required to ensure that the right of every child to have access to such assistance, from the moment the child is detained, is respected in practice.¹¹⁴ Being aware of the limited availability of lawyers, and the limited choice of lawyers available to children, the Committee considers the appropriate training of lawyers or paralegal professionals by State Parties as a high imperative issue.¹¹⁵ In practical terms ‘high imperative’ places an obligation upon State Parties to train all professionals involved about the relevant national and international legal provisions, including the social and psychological aspects of juvenile delinquency and development of children.¹¹⁶ When other appropriate assistance is offered to juveniles, the person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice, and must be trained to work with children in conflict with the law.¹¹⁷

The second part of Article 40(2)(b)(ii) CRC entitles the child not only to be assisted by a lawyer, but also to have adequate time and facilities for the preparation of their defence. The HRC considers that ‘adequate time’ depends on the nature of the proceedings and the factual

¹⁰⁹ A study on the ‘Situation of Children in Places of Detention’, published by the *Institute of Penal Reform* (PRI) and *UNICEF* in 2004 revealed that 85% of juveniles in pre-trial detention have never met a lawyer. The study was quoted in ‘Juvenile justice experts from 10 countries (Eastern and South-Eastern Europe) created a sub-regional network’, *UNICEF*, http://www.unicef.org/ceecis/media_2873.html (Accessed 11/07/2011)

¹¹⁰ ‘Juvenile Justice Training Manual’, *Penal Reform International/UNICEF*, 2007, (Accessed 11/07/2011) (PRI/UNICEF 2007), Module 4 <http://www.penalreform.org/publications/juvenile-justice-manual> (Accessed 11/07/2011) (PRI/UNICEF 2007), Module 4

¹¹¹ Van Bueren 1995, pp.180

¹¹² Van Bueren 1995, pp.180

¹¹³ Vienna Guidelines, Guideline 16

¹¹⁴ *Ibid*

¹¹⁵ General Comment No.10, para. 33

¹¹⁶ *Ibid*

¹¹⁷ General Comment No.10, para. 23f

circumstances of each case.¹¹⁸ The term ‘adequate facilities’ has, among other things, been interpreted to mean that the accused and defence counsel must be granted access to appropriate information, files, and documents necessary for the preparation of a defence, and that the defendant must be provided with facilities enabling communication, in confidence, with the defence counsel.¹¹⁹ The confidentiality of this communication is provided for in Article 40(2)(b)(vii) CRC, and the right of the child to be protected against interference with their privacy and correspondence in Article 16 CRC. Furthermore, the right to adequate time and facilities for the preparation of a defence applies not only to the defendant, but also to their defence counsel, and is to be observed at all stages of the proceedings.¹²⁰ This right is one important element to the principle of the equality of arms, which implies that, in relation to the prosecution, the defence must have an equal opportunity to prepare and present a case, and that both the prosecution and the defence must have an equal position throughout the proceedings. Furthermore, the counsel should be able to advise and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures, or undue interference from any quarter.¹²¹

Article 40(2)(b)(iii): The Right To Have the Matter Determined Without Delay by Competent, Independent and Impartial Authority or Judicial Body

Where a child’s case has not been diverted away from juvenile justice, the matter should be determined without delay by a competent, independent, and impartial authority or judicial body in a fair hearing according to the law.¹²² The reasoning behind such a long description relates to the difficulty in formulating a universal definition of an adjudicating authority. Thus, the commentary on Rule 14.1 of the Beijing Rules addresses the phrase ‘authority or judicial body’ as to encompass those who preside over courts or tribunals (composed of a single judge or of several members), including professional and lay magistrates, administrative boards (for example, the Scottish and Scandinavian systems), as well as more informal community and conflict resolution agencies of an adjudicatory nature. The emphasis on the ‘competent, impartial and independent’ follow the stream of elaborating the requirement of a ‘fair hearing’ in regard to criminal charges.¹²³ The meaning of the phrase ‘competent, impartial and independent’ is determined by the comments issued by the UN Human Rights Committee on Article 14(3) of the ICCPR and the case law of the European Court of Human Rights (the Court). Both Article 40(2)(b)(iii) of CRC and Article 6 of the ECHR are based on Article 14(3) of the ICCPR. The requirement that a tribunal be ‘established by law’ is intended to ensure that the judicial organisation in a democratic society should not depend upon the discretion of the executive, but should be regulated by law emanating from parliament setting out the basic framework concerning the organisation of the courts.¹²⁴ In the General Comment No.32 and jurisprudence of the HRC, there is no indication on the interpretation of the requirement ‘to be competent’ for the purposes of Article 14 paragraph 1 of the ICCPR. The only non-official definition is provided by Amnesty International, according to which “the requirement of a competent tribunal refers to power given by law to the tribunal to have the jurisdiction to hear the case, over the subject matter and the person, and to conduct the trial with any applicable time limit prescribed by law”.¹²⁵ In General Comment No.32, the HRC adopts the approach of the ECtHR jurisprudence in considering the requirement of independence and impartiality as closely linked. Thus, the requirement of

¹¹⁸ HRC General Comment No.32, para. 32

¹¹⁹ Detrick 1992, pp.689

¹²⁰ Detrick 1992, pp.689

¹²¹ HRC General Comment No.32, para. 34

¹²² Article 40 (2)(b)(iii), CRC

¹²³ Detrick 1992, pp. 691

¹²⁴ See HRC, General Comment No.32, para. 19, Harris et al. 2009, p.297

¹²⁵ Amnesty International Fair Trials Manual, *Amnesty International*, 1998, (accessed 31/05/2011) p.88<http://www.amnesty.org/en/library/info/POL30/002/1998>

independence refers to the procedure and rules regulating the institutional position of the judge and the guarantees to protect the judiciary from outside pressure, such as political interference by the executive and legislature.¹²⁶ To determine whether this requirement is met, due regard must be given to the manner of appointment of the judges, their term to office, the impartiality of the court, and the issue as to whether the body manifests independence.¹²⁷

It is well established by HRC and ECtHR jurisprudence that the requirement for an impartial judiciary embodies two aspects; subjective and objective appearance of impartiality. The HRC committee in General Comment No.32 reaffirms this position. Thus, the subjective test of impartiality asserts that a member of the judiciary hears the case before them with no personal prejudice or bias, no harboured preconceptions, and does not act in ways to improperly promote the interests of one of the parties to the detriment of the other.¹²⁸ In applying the test, there is a presumption that the court has acted impartially, which must be displaced by evidence to the contrary.¹²⁹ In terms of the objective test, the judiciary “must also appear to a reasonable observer to be impartial”.¹³⁰ In practical terms, the objective test requires the judiciary to offer sufficient guarantees to exclude any legitimate doubt in the respect.¹³¹

Article 40(2)(b)(iii) of CRC introduces stronger standards with the phrase ‘without delay’ compared to ‘without undue delay’ of Article 14(3) of the ICCPR. The HRC has pointed out that it relates to the time by which a trial should commence, but also the time by which it should end and judgment be rendered.¹³² The Committee interprets that the effective enforcement of the requirement ‘without delay’ is manifested by setting and implementing time limits for the period between the time that the offence comes to the attention of the authorities and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and disposition by the court or other competent judicial body.¹³³ However, the State Parties are advised to strike a balance between time limits being much shorter than the ones for adults, and the respect of human rights of the child and legal safeguards of the process.¹³⁴ In the circumstances of absence of such balance, the right to fair trial will be placed in jeopardy.¹³⁵ Normally, the domestic legislation sets a limit of 24 hours or, more rarely, between 48 hours and four days as the maximum period of remand before a child is brought before the authority or judicial body to examine the legality of (the continuation of) this deprivation of liberty.¹³⁶ An effective procedure must ensure, in practice, that the legality of a pre-trial detention is reviewed regularly, preferably every two weeks.¹³⁷ ‘Without delay’ imposes the duty on State Parties to bring the child before a court or other competent, independent, and impartial authority or judicial body, not later than thirty days after their pre-trial detention takes

¹²⁶ Harris et al. 2009, p.286, Nowak 2006 Article 14 para. 25, p.319

¹²⁷ See HRC, General Comment No.32 para. 19, Harris et al. 2009, p.287-290, Nowak 2006 Article 14 para. 25

¹²⁸ HRC, General Comment No.32 para. 21 Harris et al. 2009, p.290, Nowak 2006 Article 14 para.27

¹²⁹ Harris et al. 2009, p.290, Nowak 2006 Article 14 para.27

¹³⁰ HRC, General Comment No.32 para. 21

¹³¹ Harris et al. 2009, p.291 While discussing the objective test, Harris et al. enumerate as examples of it separation of powers: judges acted in different position, judges taking part in the proceeding in pre-trial stage, judges acting as investigating authority, judges sitting at more than one stage at hearing, judges making extra-judicial pronouncements in press or elsewhere, judges have a personal interest on the test, executive intervenes with a view to influence the outcome of certain policy when considered by the court. Harris et al. 2009 p.291-297

¹³² Detrick 1992, pp.692

¹³³ General Comment No.10, para. 23h

¹³⁴ Ibid

¹³⁵ Ibid

¹³⁶ ‘Innocenti Digest: Juvenile Justice’, *UNICEF International Child Development Centre Florence- Italy*, <http://www.unicef-irc.org/publications/105>, 1998 (accessed 11/07/2011), (Innocenti Digest No.3 1998), p. 9

¹³⁷ General Comment No.10, para. 28b

effect.¹³⁸ The child is entitled to challenge the legality of the deprivation of their liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.¹³⁹

Article 40(2)(b)(iii): Decision Without Delay and With Involvement of Parents

Both Article 40(2)(b)(iii) CRC and Beijing Rules, Rule 15(2) provide that parents or legal guardians should also be present at the proceedings. Beside the general psychological and emotional assistance to the juvenile, the presence of a parent or legal guardian(s) contributes to an effective response to the child's infringement of the penal law. Although such presence may extend throughout the proceeding, it is also considered important to have the parental involvement as soon as the child is apprehended. For this reason, the Committee strongly recommends State Parties notify parents as soon as possible of the apprehension of their child.¹⁴⁰ To this end, the Committee recommends State Parties to explicitly provide, by law, for the maximum possible involvement of parents or legal guardians in the proceedings against the child. However, in no circumstances should their presence be interpreted as a right to act in defence of the child or be involved in the decision-making process.¹⁴¹

Article 40(2)(b)(iv): Freedom From Compulsory Self-incrimination

The first part of Article 40(2)(b)(iv) provides that every child alleged as or accused of having infringed the penal law shall have the right "not to be compelled to give testimony or to confess guilt". This provision is based on Article 14(3)(g) of the ICCPR that provides that, in the determination of any criminal charge against them, everyone shall be entitled to "not to be compelled to testify against himself or to confess guilt". The right to silence and the right not to self-incriminate are generally recognised international standards, which lie at the heart of the notion of a fair procedure.¹⁴² While the right of silence protects a suspect or accused against 'indirect coercion' by the investigating authorities, the right not to self-incriminate protects them against 'direct coercion' into producing self-incriminating evidence.¹⁴³ In practical terms, the HRC emphasises that this safeguard excludes tangible evidence obtained from "any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused".¹⁴⁴ As Harris *et al.* note, three elements determine the relevance of the freedom from self-incrimination; the autonomy of the individual, the need to avoid miscarriages of justice, and the principle that the prosecution should prove the case without the assistance of the accused.¹⁴⁵ To comply with the safeguard, the statements or confessions obtained in violation of freedom from self-incrimination are not admissible as evidence. *A fortiori*, the burden is on the state to prove that statements made by the accused have been given of their own free will.¹⁴⁶ The Committee acknowledges that the term 'compelled' acquires a broader meaning, beyond direct or indirect physical force, once applied to children in conflict with the law. For example, it can extend to even less violent ways; a 'reward', such as 'you can go home as soon as you have given us the true story', or promises for lighter sanctions or release, which could compel the child to make a confession or a self-incriminatory testimony. In response to these situations, the Committee recommends that, when a child is questioned, they must have access to a legal or other

¹³⁸ Ibid

¹³⁹ Article 37(d), CRC

¹⁴⁰ General Comment No.10, para. 23g

¹⁴¹ Ibid

¹⁴² Harris 2009, p.259

¹⁴³ Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure*. London: Sweet & Maxwell, 2002, p. 18

¹⁴⁴ HRC, General Comment No.32, para. 41

¹⁴⁵ Harris 2009, p.259

¹⁴⁶ HRC, General Comment No.32, para. 41

appropriate representative, and must be able to request that their parent(s) be present during questioning. Furthermore, the State Parties must provide within the legal system for independent scrutiny the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable. States should equally ensure that those found responsible are duly sanctioned.¹⁴⁷ One way to achieve independent scrutiny is through the court or other judicial body. A judicial body is advised, when considering the voluntariness and reliability of an admission or confession by a child, to take into account the age of the child, the length of custody and interrogation, and the presence of legal or other counsel, parent(s), or independent representatives for the child. However, if police officers and other investigating authorities are well-trained, interrogation techniques and practices that are likely to elicit an incriminating response that result in coerced or unreliable confessions or testimonies should be avoided.

Article 40(2)(b)(iv): The Right to the Presence and Cross-Examination of Witnesses

When a child is alleged or accused of having infringed penal law, the child's right to examine or have examined adverse witnesses (by the child's legal representative), and to obtain the presence and examination of witnesses on their behalf under the same condition as for adverse witnesses, is an essential element of the principle of equality of arms. The ECtHR has interpreted the right as the examination of the witnesses, which "occur before the court who decide the case, so that if a judge is replaced after a witness has been heard, the witness must generally be recalled".¹⁴⁸ The Committee considers the use of the phrase 'to examine or to have examined' as accommodating the distinctions in the legal systems, particularly between the accusatorial and inquisitorial trials.¹⁴⁹ The HRC points out that the right is designed to guarantee to the accused the same legal power of compelling the attendance of witnesses, and of examination of the witnesses to the lawyer, as are available to the prosecutor. However, the Committee states that that, in the case of children, it remains important that the lawyer or other representative informs the child about the possibility of examining witnesses and to allow them to express their views in that regard. Their views should be given due weight in accordance with the age and maturity of the child.¹⁵⁰

Article 40(2)(b)(v): The Right to Appeal

The CRC provides that the child has the right to appeal against the conviction and sentence. The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher tribunal. A higher, competent, independent and impartial authority or judicial body should conduct the appeal. In other words, it should be a body that meets the same standards and requirements as the one that dealt with the case in the first instance.¹⁵¹ The right of appeal is applied to every child's case, with no limitation to only the most serious offences. This resulted in a number of State Parties to make a reservation regarding such a provision.¹⁵²

Article 40(2)(b)(vi): The Right to An Interpreter

¹⁴⁷ Vienna Guidelines, Guideline 25

¹⁴⁸ Harris et al. 2009, p. 322

¹⁴⁹ General Comment No.10, para. 23i

¹⁵⁰ Article.12 CRC, General Comment No.10, para. 23i

¹⁵¹ General Comment No.10, para. 23j

¹⁵² Belgium, Denmark, France, Liechtenstein, Monaco, Republic Federal of Germany, Switzerland (reservation later withdrawn), Republic of Korea, Tunisia For further more on reservation https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (available on 27/02/2016)

The CRC provides that if the child cannot understand or speak the language used by the juvenile justice system, they have the right to the free assistance of an interpreter. The assistance of an interpreter is essential, given that all rights to a fair trial are useless if the child does not have the linguistic capabilities to understand the charges brought against them, or if the child does not fully understand the proceedings and the outcomes of proceedings. The use of the term ‘if’ implies that a child of foreign or ethnic origin, for example, who understands and speaks the official language as well as their mother tongue, does not have to be provided with the free assistance of an interpreter.¹⁵³ The right applies not only to oral statements made during the trial, but also to the documentary materials and pre-trial stage of the case. It does not include, however, all the written translation of all items, because “the assistance should be such as to enable the defendant to have knowledge of the case against him and to defend himself”.¹⁵⁴ The Committee considered the training of interpreters to work with/for children as very important, as a lack of knowledge and/or experiences may impede the child’s full understanding of the questions raised, and interfere with the right to a fair trial and to effective participation¹⁵⁵. The right to free assistance of an interpreter is extended to children with speech impairments or other disabilities. The aim is to ensure that even when children with speech impairment or other disabilities are subject of judicial proceedings, they are guaranteed the right to fair trial through adequate and effective assistance by well-trained professionals, such as those fluent in sign language. As the Committee points the costs are covered by the state because of the importance of the assistance of an interpreter in criminal proceedings.¹⁵⁶

Article 40(2)(b)(vii): The Right to Privacy

The right to a public hearing is considered by international human rights treaties as one of the essential elements of the concept of a fair trial. The right to a public hearing means that the hearing should, as a rule, be conducted orally and publicly, and judgments should be made public. However, the public should be excluded from all stages of the proceedings and the judgment should not be made public if the case is against a juvenile offender. The use of the phrase ‘all stage of proceedings’ in both international provisions—Article 40(2)(b)(vii) CRC and Rule 8.1, Beijing Rules—covers not only those conducted on court premises, but also the stage from the initial contact with law enforcement (e.g. a request for information and identification) up until the final decision by a competent authority: release from supervision and custody, or deprivation of liberty. Furthermore, the right of the child to have their privacy fully respected in all stages of the proceedings complements the right to protection of privacy enshrined in Article 16 of the CRC. Used in the context of juvenile justice, it is meant to avoid harm caused by undue publicity or by the process of labelling.¹⁵⁷ In addition, both provisions prohibit the publication and broadcasting of any information that may lead to the identification of a child involved in proceedings, because of its effect of stigmatisation, and possible impact on their ability to obtain an education, work, and housing, or to be safe. Such provisions require the State Parties to not only take measures to guarantee that children are not identifiable via press releases, but also to provide disciplinary and penal sanctions in case journalists violate the right to privacy.¹⁵⁸ An additional safeguard could include the introduction of a special rule that court and other hearings of a child in conflict with the law should be conducted behind closed doors.¹⁵⁹ Moreover, Article 40(2)(b)(vii) foresees that the verdict/sentence should be pronounced in public at a session of the

¹⁵³ General Comment No.10, para. 23k

¹⁵⁴ Harris 299 et al. p.327

¹⁵⁵ General Comment No.10, para. 23k

¹⁵⁶ Ibid

¹⁵⁷ Beijing Rules, Rule Commentary on Rule 18.1

¹⁵⁸ General Comment No.10, para. 64

¹⁵⁹ General Comment No.10, para. 23l

court in such a way that the identity of the child is not revealed.¹⁶⁰ The right to privacy imposes an obligation upon all professionals involved in the implementation of the measures taken by the court, or another competent authority, to keep all information that may result in identification of the child confidential in all their external contacts. In addition, the Beijing Rules—Rules 21.1 and 21.2—imply that the records of child offenders shall be kept strictly confidential and closed to third parties except for those directly involved in the investigation, adjudication, and disposition of the case. Such records of child offenders shall not be used in adult proceedings in subsequent cases involving the same offender. The aim is to achieve a balance between conflicting interests connected with records or files; those of the police, prosecution, and other authorities in improving control versus the best interests of the juvenile offender (see also rule 8). It is not clear whether the ‘other duly authorized persons’ adopted by the above rules would generally include among others, researchers working to draw different aspects of a juvenile justice system(s).

III.3 What Role Do the Police Play in Juvenile Justice System?

One of the most important aspects of the juvenile justice system is the interaction between police and juvenile offenders. The police are usually the first point of contact within the formal criminal justice system for children coming into conflict with the law. The action taken by arresting police officers and any other involved police officers has the potential to change the child’s life in a positive direction. In practical terms, Figure No. 1 provides a summary of the role of police interaction with a juvenile in conflict with the law.

The police officer is often the individual who decides whether a particular juvenile offender will or will not continue further into the system. In other words, the police may be considered to be the gatekeepers of the system.¹⁶¹ However, this would largely depend on the attitudes, beliefs, knowledge, skills and resources of the police officer handling the case. Despite being an important relationship, little has been written about interaction between police officers and juveniles in conflict with the law from the international human rights law perspective. Therefore, in writing this section, heavy reliance is made upon the PRI/UNICEF (2007) Juvenile Justice Training Manual,¹⁶² which, in building the role of the police and interaction with the juvenile offender, relies upon the Articles of the CRC and especially the Beijing Rules. Inevitably, coverage will be selective, since all aspects of such interaction are enormous. When police officers are confronted with young people/minors engaged in criminal behaviour at the police station, they could become involved and play a role in:¹⁶³

- *Diversion* schemes by selecting young people to be involved in them. They can decide not to refer the case to the juvenile courts or prosecutor, if the juvenile/minor in question meets certain conditions, directing them instead towards community support, both formal and informal.
- *Resorting* to a formal trial. If a diversion is not deemed appropriate, the police can make official complaints or bring charges against young people/juveniles who have participated in illegal activities. An official complaint triggers the judicial procedure; therefore, it brings the minor into this procedure.
- *Detaining* young people in custody if they have been refused bail or other reprimand measures, and escorting young people to detention centres.

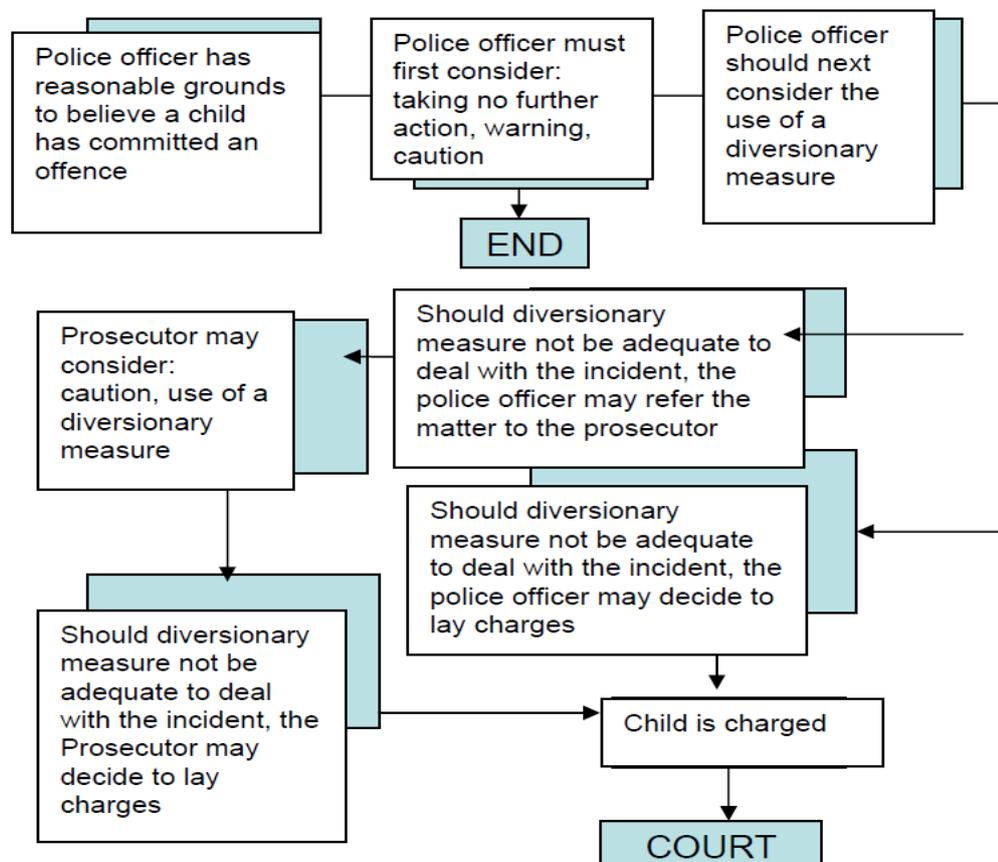
¹⁶⁰ Ibid

¹⁶¹ Gordon Bazemore, and Scott Senjo. ‘Police encounters with juveniles revisited: An exploratory study of themes and styles in community policing’, *Policing: International Journal of Police Strategies and Management*, Vol. 20, Issue 1, 1997, pp.60-82, (Bazemore&Senjo 1997) pp. 60

¹⁶² ‘Juvenile Justice Training Manual’, Penal Reform International/UNICEF, 2007, <http://www.penalreform.org/publications/juvenile-justice-manual> (Accessed 11/07/2011)

¹⁶³ PRI/UNICEF 2007, Module 4

Figure No. 1: Summary of Police Intervention¹⁶⁴



All the situations mentioned above are very delicate and need to be managed seriously and objectively. Police have to deal with such situations on a daily basis; they are the first actors within the judicial procedure and are often the only ones to establish the first contact between the juvenile and the 'official authority'. Therefore, such contact might profoundly influence the juvenile's attitude towards the state and society.¹⁶⁵ The interaction between police and young people should be based on respect for the law, for the rights of the minor, and avoid the use of harsh language, and physical violence.¹⁶⁶ The approach to the child must be constructive. It is in the cases of dealing with a child where police will need to have the necessary knowledge and skills to negotiate and mediate in order to ensure that the child's rights are upheld and that opportunities for diversion or non-custodial options are explored.¹⁶⁷

At this stage, it is important to keep in mind the minor's state of mind, whether they are a victim or in conflict with the law. This means that police officers must work towards paving the way to rehabilitation and reintegration of children, rather than emphasizing measures that are meant only to punish children in conflict with the law. Far from his environment, parents, and friends, the juvenile will feel fear and anxiety; they are lost and might be trying to hold on to something or someone in order to feel secure. Compassion and kind firmness are important in such situations.

¹⁶⁴ PRI/UNICEF 2007, Module 4

¹⁶⁵ Commentary on the Beijing Rules, Rule 10.3

¹⁶⁶ Beijing Rules, Rule 10.3

¹⁶⁷ Beijing Rules, Rule 11 and 12

When dealing with young people, police officers need to use not only their ordinary investigation techniques, but should also follow an approach that takes into consideration the juvenile's psychological and family background. They should have to be even more vigilant with regard to security issues and administrative matters.¹⁶⁸ Thus, police officers should try to monitor the situation of children and learn about conditions and experiences that cause children to be in conflict with the law.¹⁶⁹ These may be children that are referred to the police for the first time, or they may be repeat offenders. They may be referred individually, or as members of neighbourhood groups, or street gangs that act in groups. In some cases, children in conflict with the law may withhold information or hide evidence in order to protect persons that are close to them or persons they fear.

Historically, the interaction between police and young people has been described as an antagonistic one.¹⁷⁰ Thus, children may refuse to speak because they feel overwhelmed by what has taken place. However, they should not be seen as stubborn or exposed to different kinds of abuse by police officers. It is most important that police officers act in an informed and appropriate manner, whatever situation they are presented with. A police officer in contact with children must always introduce their name and explain tasks to children in a simple and understandable manner. Police officers should not assume that children know about the identity and the tasks of the police in relation to the case.¹⁷¹

In reality, children become particularly vulnerable in the hands of authorities that have power over them at the moment they are arrested. Their perception of the police and its role as well as its relationship with children coming into conflict with the law, was identified as mainly negative, and often violent.¹⁷² Violations range from ignoring standard operating procedures covering children's rights, to verbal, physical, and sexual abuse and the exploitation of children.¹⁷³ One of the striking and disturbing findings in analysing this interaction is the level of fear and distrusts that children experience in relation to the law enforcement agencies, the very bodies that are meant to protect them.¹⁷⁴ For the youth, the issues most frequently raised about their perception of the police are the lack of respect for the law, for their rights, communication problems, and violence. Youths may feel that police are not in a position to protect them, because police officers are 'all powerful' as far as such children are concerned.¹⁷⁵ Overall, it might be concluded that the imbalance of power is one major issue in police-youth relations.

In order to best fulfil their functions, police officers that frequently or exclusively deal with juveniles shall be specially instructed and trained.¹⁷⁶ Training needs to be provided to ensure that police are familiar with the CRC, international standards, national legislation, police policy, and the divergence between policy and actual practice on the ground; as a result, they will be properly

¹⁶⁸ PRI/UNICEF 2007, Module 4

¹⁶⁹ Ibid

¹⁷⁰ Bazemore&Senjo1997, p.61 & 77

¹⁷¹ PRI/UNICEF 2007, Module 4

¹⁷² Martin & Parry-Williams enumerates several examples of the violence exercised by police officers. The police abuse of power ranges from immediate violence upon arrest, attempted extortion in exchange for promises of release, torture to extract a confession, regular beatings and further violence, including sexual abuse, and abuse of power as an easy means of supplementing their meagre incomes. At one extreme, the police may even become actively involved in the elimination of 'undesirables', often children and young people accused of being gang members or deemed to be 'bad for business' because they live and work on the streets. Florence Martin, and John Parry-Williams, *The Right Not to Lose Hope*. London, Save the Children UK, 2005 pp. 30-32

¹⁷³ Ibid

¹⁷⁴ Martin & Parry-Williams, 2005, p.30

¹⁷⁵ Martin & Parry-Williams, 2005 p. 30

¹⁷⁶ The Beijing Rules, Rule 12

equipped with the knowledge and understanding to deal appropriately with children in conflict with the law.

Equally, in order to develop effective and appropriate mechanisms to respond to children's offending behaviours, police officers need to understand the complex reasons why children may enter into conflict with the law in the first place. As Amnesty International has stated, "most of the children coming into conflict with the law, commit minor, non-violent offences, such as theft, and in some cases their only 'crime' is that they are poor, homeless and disadvantaged"¹⁷⁷. It is the routine exposure to poverty that leads them into the path of delinquency, as they are forced into begging, petty crime, or prostitution in order to survive abuse.¹⁷⁸ The risks of coming into conflict with the law are often unforeseen by the children and they do not realise the consequences until they are already caught in a downward spiral. As girls are proportionately much less likely to come into contact with the law than boys, they are rarely treated with due regard for their gender-specific needs.¹⁷⁹ Thus, it is important that police clearly recognise the difficulties faced by all the categories of juveniles they deal with, from 'street children' up to juveniles engaged in 'gangs'. The juvenile justice system has to ensure fair, just, and humane treatment for youth through specialized institutions, procedures, and practices within a larger justice system. The question is: how? Increasing the education of police to deal more sensitively and effectively with youth, while very important, is not sufficient in itself. It is crucial to have educators, social workers, psychologists, and other professionals working closely together with police officers from the very beginning.

III.4. What Does Make a Court Child-Friendly While Dealing With a Child in Conflict With the Law?

The judicial body, or, as it is more familiarly known, the youth court, constitutes one of the most significant elements in the juvenile justice system. Its significance lies not only in the fact that it was the first institution which, in part, recognised the immaturity of youth, but it is also the institution which started the reforms that brought about juvenile justice.¹⁸⁰ Despite holding a significant authoritative position in being the ultimate decision-maker in both adjudication and disposition of a juvenile's case, relatively little analysis has been written about the role juvenile court judge should have. Most of the suggestions below might look to have already been included the commentaries above. However, this section is trying to briefly summarise the role of the judge. Reports about the juvenile justice systems around the world point the inconsistencies between Courts in the implementation of international and domestic provisions with regard to children in conflict with the law. It appears that cases involving child offenders would normally be held not in a suitable child (juvenile) environment, and when they are held in camera they tend to lack any child-friendly element. As in an orchestra, the primary duties of the judge/magistrate (conductor) are to unify performers, set the tempo, execute clear preparations and beats

¹⁷⁷ Children's Human Rights – The Future Starts Here, *Amnesty International Canada*, (Accessed 14/04/2016) <https://www.amnesty.org/en/documents/act76/014/1999/en/>, Similarly, Martin & Parry-Williams, 2005, p.10, UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment: the interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, submitted in accordance with Assembly resolution 63/166, A/64/215, 3 August 2009, para.63 <http://antitorture.org/wp-content/uploads/2012/07/V-Thematic-Report-Conditions-of-Detention-Children-in-Detention.pdf> (accessed 14/04/2016);

¹⁷⁸ Barry Goldson, 'Children in need or young offenders?', *Child and Family Social Work*, Vol.5, Issue 3, 2000 pp.255–265.

¹⁷⁹ Amnesty International Canada. A discussion related to this issue is provided in 'Children, Youth and Crime: Working Paper Prepared by the Secretariat' *Twelve United Nations Congress on Crime Prevention and Criminal Justice (12-19 April 2010, Salvador, Brazil)*, UN, 15 February 2010, www.unodc.org/unodc/en/crime-congress/crime-congresses.html (Accessed 09/09/11), para.20

¹⁸⁰ Weijer 1999, p.332, Trépanier 199, p.309, Feld 2002

(proceeding), and to listen critically and shape the sound of the ensemble.¹⁸¹ In the juvenile justice context, the extent to which international norms and child in conflict with the law rights are implemented or respected would be dependent on each particular Judge or Magistrate. This should be kept in mind when considering what makes the court child-friendly while dealing with a child in conflict with the law.

The juvenile court system emerged in response to two fundamental beliefs about young people in conflict with the law. One was based on the early nineteenth century belief that juvenile delinquents or other abandoned children lacked what at the time had become the accepted characteristics of children.¹⁸² The other factor considered juvenile offenders as ‘children in trouble’ who ought to be ‘saved’ rather than punished.¹⁸³ Whether involving a separate juvenile court, a juvenile judge, or a welfare board,¹⁸⁴ the juvenile court mission was to accomplish the rehabilitation of the juvenile in trouble and to prevent future criminal behaviour. Acting in its role as *parens patriae*, the juvenile judge’s functions were to identify the youth at risk to prevent them from becoming serious offenders.¹⁸⁵ In furtherance of this mission, hearings in the juvenile court were conducted less adversarially, focusing more on the social and moral needs of the child and how to assist them in order to reform the deviant behaviour. While having power to act in the best interest of the child, juvenile court judges had large discretionary powers, both in adjudicatory practices and in dispositional sanctions.¹⁸⁶ *Parens patriae*, on the basis of establishment of the juvenile court, may still persist in certain jurisdictions. Nowadays, the juvenile court exists between the very soft and the very hard end of the juvenile justice system.¹⁸⁷ What started as a court to which juveniles should be diverted, in soft terms, nowadays is a court from which juveniles are to be diverted. The soft version of the juvenile court respects the principles of proportionality and fair trial, notions of personal responsibility, and guilt. The judge exercises exceptional discretionary power to diffuse a mixture of institutional welfare and punishment at the soft court.¹⁸⁸ In these terms, the juvenile court judge is considered as a component element of a diversionary system, however, enjoying its own rights *per se* and governed by its own objectives, performance standards, ethos, and command structure.¹⁸⁹ What started as a court to which juveniles should be diverted to, in hard terms nowadays has a more juridical approach; diverting the juvenile to a criminal court. The juvenile court bears more conformity with adult criminal proceedings, and places more emphasis on proportionality, on responsibility, on guilt and on punishment. Although, the juvenile justice legislation does not sustain ‘a punitive turn’, it might be said that such approach is more a ‘political’ response to the public demands on reacting towards juvenile delinquency by more severe sanctioning.¹⁹⁰ In these terms, the juvenile court

¹⁸¹ Sentence constructed based on the ‘conductor’ definition on Michael Kennedy and Joyce Bourne Kennedy, Oxford Concise Dictionary of Music (Fifth ed.). Oxford University Press, Oxford 2007

¹⁸² Hugh Cunningham, *Children and Childhood in Western Society since 1500*. 2nd ed., London: Longman, 2005, p.148, Josine Junger-Tas, The juvenile justice system: Past and present trends in Western Society, In I. Weijers & A. Duff (eds) *Punishing juveniles: principle and critique*, Oxford: Hart, 2002, pp. 26

¹⁸³ Trépanier 1999, p.305, Weijer, Ido. ‘The double Paradox of Juvenile Justice’, *European Journal on Criminal Policy and Research*, Vol. 7, Issue 3, 1999, pp 329-351, pp. 329

¹⁸⁴ Junger Tass-2002, pp. 30

¹⁸⁵ Junger Tass-2002, pp. 30, Trepanier 1999, pp. 314, Singer, Simone. Juvenile court and its systems of juvenile justice, in *Handbook of Youth and Justice*, eds S. O. White New York: Kluwer Academic/Plenum Publishers, 2001, pp. 351

¹⁸⁶ Junger Tass-2002, pp. 30, Trepanier 1999, pp.314, Singer 2001, pp. 351

¹⁸⁷ Singer 2001, pp.359

¹⁸⁸ Weijers 1999, pp.339

¹⁸⁹ Bruce Abramson, 2005, p.5, ‘Violence Against Girls in Conflict with the Law’. Human Rights Watch, <https://www.hrw.org/legacy/english/docs/2007/02/20/global15345.htm> (accessed 20/10/2009)

¹⁹⁰ Sonja Snacken, ‘Conclusion: Why and How to Resist Punitiveness in Europe?’ in *Resisting Punitiveness in Europe? Welfare, human rights and democracy*, eds S Snacken & E Dumortiers, London, New York: Routledge, 2012 pp. 247–260; John Pratt, David Brown Mark, Brown, Simon Hallsworth and Wayne Morrison 2005, *The New Punitiveness. Trends, theories, perspectives*, (eds.) Cullompton: Willan Publishing, 2005; Michael Cavadino, and

judge is in charge of ‘tightening the web’ by holding the juvenile accountable for his or her actions but also incapacitating them for an extended period of time.¹⁹¹

Although no international standard goes as far as to require explicitly the establishment of a separate set of courts for children,¹⁹² there is an implicit presumption that youth offenders should be dealt with differently from adults.¹⁹³ While examining State Parties’ reports, the Committee has strongly recommended that they should undertake all necessary measures to ensure the establishment of juvenile courts and the appointment of juvenile judges in all regions of the States Parties. In cases where this is not immediately feasible, either for practical or financial reasons, States Parties are under an obligation to at least ensure the appointment of specialised judges or magistrates for dealing with such cases.¹⁹⁴ However, there are remarks about how the juvenile must be dealt with once they are present in the courtroom. Thus, Rule 14.2 of the Beijing Rules requires States Parties to provide an understanding environment, which permits the juvenile to participate therein and to express him or herself freely.

Why does the international community need to consider the importance of appointing a juvenile judge within the courtroom? The answer to this question lies within the terms of factors that might jeopardise the juvenile’s competence to stand trial. The key conditions for any criminal proceedings to meet the requirements of a fair trial are that the defendant should be brought to trial only if they are competent to be tried. The ‘competence’ implies that every child’s maturity, while their ability to understand and cope with the situation would need to be assessed. Weijers and Duff elaborate that in assessing the capability of juveniles to understand the process and fully participate in it, four key issues are important: (i) ability to grasp the meaning of the legal procedure, appreciate its significance and understand the outcomes it brings to their own situation; (ii) their basic cognitive and reasoning abilities; (iii) the ability to foresee the long-term consequences of their actions; and, the most important one, (iv) the less knowledgeable about the legal process and about matters related to their trials of the juveniles compared to adults.¹⁹⁵

In practical terms, the key issues mean assessment of every juvenile’s maturity, and their ability to understand and cope with the situation. Weijers considers that people who develop a ‘professional friendship’ with juveniles play an important role in enabling them to demonstrate their maximum competence in court.¹⁹⁶ Within this context, the judge plays a very important role. Furthermore, the judge will not only decide what would happen to the juvenile in the courtroom, but will also conduct all participants in the courtroom; attorneys, defence counsel, the juvenile’s family, the victim and the victim’s family. The aim of the judge is to provide to the juvenile the most supportive atmosphere possible in order for them to understand specific procedures, rituals, questions, and explanations delivered in the courtroom. Thus, the judge is seen as the key element of offering to the juvenile a child-friendly courtroom, which goes beyond ensuring the right of the child to be heard and to participate in the process. A child-friendly courtroom has tremendous psychological effects, as Chief Judge in the Banda Aceh State Court, Mas Hushender, states:

Jim Dignan, *Penal systems: A comparative approach*. London: SAGE, 2006; Ido Weijers, An Nuytiens, and Jenneke Christiaens, ‘Transfer of Minors to the Criminal Court in Europe: Belgium and the Netherlands’ in *Reforming Juvenile Justice*, eds J Junger- Tas & F Dünkkel, Doordrecht: Springer, 2009, pp.105–124

¹⁹¹ Trepanier 1999, pp. 321

¹⁹² Innocenti Digest 1998, pp. 10

¹⁹³ The Committee in several occasions has recommended to the state parties to establish juvenile courts either as separate units or as part of existing regional/district courts. General Comment No.10, para.31

¹⁹⁴ Ibid

¹⁹⁵ Ido Weijers, and Antony Duff, Introduction: Themes in Juvenile Justice, in *Punishing juveniles: principle and critique*, eds I. Weijers & A. Duff, Oxford: Hart, 2002, pp.11

¹⁹⁶ Ido Weijers, The Moral Dialogues: a Pedagogical Perspective on Juvenile Justice, in *Punishing juveniles: principle and critique*, eds I. Weijers & A. Duff, Oxford: Hart, 2002, (Weijers 2002a) pp.142

“(...) on the judge when handing out sentences, and influences the child as well. In the regular court the child feels he’s being treated as an adult, and it’s very scary for children. If you have a child-friendly court it feels warmer, with family members present.”¹⁹⁷

Beyond this, international standards imply that the juvenile judge is under a duty to be particularly active and assertive, especially in disposition, in understanding both the juvenile and programmes available to the juvenile justice system, and in individualising the juvenile court’s response. Stemming from Article 40(1) of the CRC, the promotion of the child’s reintegration, and their assuming of a constructive role in society should be the judge’s top priority. Whatever the case, the juvenile court continues to function as a society’s appointed instrument to punish the juveniles in conflict with the law and to prevent them from repeating the offence in the future. However, as international provisions imply, a child-friendly court needs to look beyond the traditional system of punishment, leaving room for more essential communication to take place. The courtroom process has to attempt to get the young person to realize the negative consequences of their actions for all involved, to function as a crucial moral reference point for the offender.¹⁹⁸ In order to ascertain what would be effective as a response to the juvenile offender, the juvenile court has to try to look beyond the criminal evidence of the offence. To this end, relevant facts about the juvenile, such as living and family background, school career and educational experiences, as well as the circumstances under which the offence was committed, would provide a more appropriate framework in regard to the juvenile and the offence.¹⁹⁹ This requires the establishment of adequate social services or personnel within the structure of the court or board and with specific training for dealing with this category of children and young people, aiming to deliver social inquiry reports of a qualified nature in cooperation with other juvenile services. However, putting just the services in place is not going to be considered as ‘adequate’. An ‘adequate’ service implies the allocation and effective utilization of human, organizational, technological, financial and information sources.²⁰⁰ The court dealing with children in conflict with law is among the most complex in any jurisdiction. Yet often it is considered the place for young social and legal practitioners to start off. For juvenile justice practitioners to deal with a child in conflict with the law, they need training and developed skills to be aware of, and responsive to the unique needs for this category of children. The juvenile judge is required to be more than just a leader of a ‘courtroom team’. The exercising of such function requires a deep knowledge of the roles played by all the team; the legislator, police, prosecutor, defence, corrections, probation, and community services.²⁰¹ Therefore, good collaboration and cooperation with all these actors in favour of the young offender contributes to ‘entering his/her world’, showing a personal interest in them and assisting the juvenile judge to formulate the most appropriate and feasible sentence for the young person.

Whether the proceedings are formal or informal, they should be conducted in a manner and atmosphere of understanding permitting the juvenile to participate therein. Communication in the courtroom comprises more than just words.²⁰² The use of a legal language affects a juvenile’s understanding of courtroom proceedings. The continued use of legal terms and definitions may mean that juveniles will often not understand what is happening in the court on a given day. For sure, the defence counsel can anticipate the legal words and phrases that might be used and explain them to the juvenile. The defence counsel’s explanations go beyond the ‘translation’ of words. It includes providing an explanation of the court process and procedure to the juvenile

¹⁹⁷ http://www.unicef.org/infobycountry/indonesia_42219.html (available on 22.12.2008)

¹⁹⁸ Weijers 2002a, pp.145

¹⁹⁹ Beijing Rule, Rule 16

²⁰⁰ UN Guidelines for Action on Children in the Criminal Justice System. ECOSOC Resolution 1997/30 (1997) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CriminalJusticeSystem.aspx> (available on 29/02/2016)

²⁰¹ Lucien A. Beaulieu, and Carla Cesaroni, 1999, The Changing Role of the Youth Court Judge, *European Journal on Criminal Policy and Research*, Vol. 7, Issue 3, 1999, pp.363-393, pp. 370

²⁰² Weijers 2004, pp.26

and their family, ensuring that the child's views are expressed to the court, and finally, in a majority of jurisdictions, ensuring that all relevant facts and laws are brought to the judge's attention. Clearly, the majority of the verbal exchange in the courtroom occurs between the judge, lawyer, and prosecutor. The juvenile judge is the person that presides over the dialogue occurring in the room by personally, actively, and professionally leading the proceedings. Thus, it remains for the judge to constantly ask the juvenile if they understand what is being said and what exactly happened and why.²⁰³

In addition to the communication in the courtroom, the physical environment, layout, and structure of the courtroom has a huge impact on the nature of the court experience for young people. Historically, criminal courts are not child-friendly. Having a courtroom, designated in being used exclusively for children's cases, where privacy, colour scheme, and furniture are appropriate to their size, and arranged to offer them a formal role in the process, as well as a direct visual line of communication with the prosecutor, the judge, and their defence counsel, maximises their participation in the process.

Rule 15.2 of the Beijing Rules refers to the right of the child to be tried in the presence of their family. The rule reflects the importance of having family present in court to support the young person. Engagement of the family in attending court together with their child trespasses the merely family's supporting of the child. Such requirement points to the fact that, apart from being a serious and significant event in the youth's life, enough to demand the parents' attention, the hearing aims to treat the family as a unit, not just the child.²⁰⁴ It is accepted that the term 'family' refers 'to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children's rights and best interests.'²⁰⁵ Therefore, research in best practices in the areas of prevention, intervention, and aftercare in juvenile justice identifies the need for parent engagement in the process whether those involved are biological parents, surrogates, foster parents, guardians, or parent designates.²⁰⁶ The engagement of the family into proceeding is subject to the best interest of the child and should not be interpreted as the right to act in defence of the child or involvement in the decision-making process.²⁰⁷ Current knowledge shows that the juvenile justice system(s) cannot independently tackle the juvenile behaviour without the active involvement of family, school workplace and the local community,²⁰⁸ and the sentences work far more effectively in approaching the issue in its totality. Besides rendering participation subject to the best interest of the child, the Committee acknowledges the authority of the judge or competent authority "to limit, restrict or exclude the presence of the parents from the proceeding" at the request of the child or of his/her legal or other appropriate assistance.²⁰⁹ The Committee comments might be interpreted as a way of limiting the negative influence that a family can actually exercise or has exercised on the child. If issues within and around the home may have contributed to delinquent behaviour, it remains to the appropriate authorities to determine the involvement of the family into the child's reintegration and the child's assuming a constructive role in society.

²⁰³ Weijers 2004, pp.28, General Comment No.10, para. 23e

²⁰⁴ Beaulieu, and Cesaroni, 1999, pp. 369

²⁰⁵ UN Committee on the Rights of the Child, *General Comment No. 7: Implementing child rights in early childhood* (2005), CRC/C/GC/7/Rev.1, 20 September 2006, <http://www2.ohchr.org/english/bodies/crc/comments.htm>, (accessed 24/08/2011)

²⁰⁶ Peter Greenwood, *Prevention and intervention programs for juvenile offenders*. Future of Children, 2008, Vol. 18, pp.185–198

²⁰⁷ General Comment no.10 para.53

²⁰⁸ Reference is made to restorative juvenile justice, where the family is involved to a great extent. Nowhere has the intensity of activity around restorative justice been greater than in juvenile justice and the response to youth crime.

²⁰⁹ Ibid

Although operating against a backdrop of social change and public pressures,²¹⁰ there is no conflict for the judge in delivering the sentence because the community's interests are not equal in importance to the child's best interests in court. In essence, a sentence taking into account the needs of the juvenile provides a measure to society's confidence in the viability of the family and significantly influences the manner in which others view children before the court.²¹¹ A society's interest and need for more appropriate sentencing, in recognition of consequences and demands for protection, are satisfied by juvenile courts through individualised decision-making, tailored around the offence and developmental needs of child, while holding the juvenile offender accountable for their offences. Summarised in a few words, an individualised sentence is translated to the juvenile offender as a punishment by a society, to whom it matters who the child is, of what and whom they care about and who they want to become.²¹²

The authorities involved in the courtroom may be persons with very different social and professional backgrounds. While their legal training and education are considered as an essential element in ensuring the impartial and effective administration of juvenile justice,²¹³ getting to know and understanding the child and, more particularly, an adolescent's physical, psychological, mental and social development, is arguably the most important aspect of their duties to the juvenile, regardless of the role assigned. It is essential that all authorities, especially judges, are equipped with a basic amount of knowledge and understanding of the special needs of the most vulnerable children – such as children with disabilities, displaced children, street children, refugee and asylum-seeking children, and children belonging to racial, ethnic, religious, linguistic, or other minorities – if they are to be seen to be administering justice fairly to people with whom they have little in common in terms of upbringing, culture, and experience.²¹⁴ To facilitate the involvement of young people in the judiciary process, it is necessary that the practitioners involved in judiciary systems develop the necessary skills to engage with young people.

Furthermore, for all these authorities, at least a part of education and training of law enforcement should be devoted to an understanding of international standards on juvenile justice, especially the content and meaning of provisions of the CRC in general and those directly relevant for their daily practice in particular.²¹⁵ In summary, the Committee's comments on juvenile justice, education, and training programmes should pay a particular focus on providing the necessary information about the measures used to deal with children in conflict with the law, without resorting to judicial proceeding; what types mechanisms for the informal resolution of disputes in cases involving a child offender are available; what range of support services is available to assist a young offender' what comprises the role or other systems of juvenile justice such as police, the court, the lawyers (the prosecutors and the defenders); the jails and prisons; the juvenile officers; and the rehabilitation, prevention, and diversion programmes, and how they interact with each other.

IV. Conclusion

Article 40 of the CRC addresses the rights of the child in the administration of the juvenile justice. More than a century ago, the juvenile court emerged to save rather than punish 'children in trouble'. Nowadays, the juvenile court has shifted from initial paternalistic approach toward a system that recognizes children as persons in their own right and possessing rights, which have to

²¹⁰ Beaulieu, and Cesaroni, 199, pp. 364

²¹¹ Beaulieu, and Cesaroni, 199, pp. 369

²¹² Weijers 2002a, pp.149

²¹³ Commentary of Rule 22, Beijing Rules

²¹⁴ Beaulieu, & Cesaroni, 1999, pp. 385

²¹⁵ General Comment No.10, para. 33

be considered and respected by both administrative and judicial authorities. A child-friendly justice system captures and tries to use the vulnerability of the child in conflict with the law, in the most effective way, to teach them something constructive, with meaningful consequences. A child-friendly justice system, while punishing the juvenile for the wrongdoing, takes into account who they are, of what and whom they care about and who they want to become. It is a system to which the best interests of children – juvenile ‘well-being’ – are not merely ‘a primary consideration’ but rather the paramount of consideration that must be ‘ensured’. It is a system under which respecting the children’s rights and the procedural safeguards related to a right of a fair trial takes an additional importance as it helps to reinforce the child’s respect for the human rights and fundamental freedoms of the others. The overwhelming impression of a comprehensive juvenile justice system is that of diversity, which is guided by the aim to limit the negative impact of the juvenile justice system on a young offender as far as possible. The system as a whole, by adopting principles and safeguards, ensures that, once constructive action is undertaken, it is possible to prevent re-offending without the effects of stigma or labelling, and to offer the opportunity to the young offender to take responsibility for their conduct and to make good for wrongful action.