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„Too little too vague?
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safeguards for children who are suspects or accused
persons in criminal proceedings”

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Acronyms

CFREU	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman and Degrading Treatment
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
ECtHR	European Court of Human Rights
EU	European Union
EUMS	European Member States
GC	General Comment
ICCPR	International Covenant on Civil and Political Rights
OJ	Official Journal of the European Union
TEU	The Treaty on the European Union
TFEU	The Treaty on the Functioning of the European Union
UN	United Nations
UNCAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCRC	United Nations Convention on the Rights of the Child
UNCommRC	United Nations Committee on the Rights of the Child
UNHRCComm	United Nations Human Rights Committee

“We are prepared to impose responsibility on children, including criminal responsibility, often long before we are disposed to confer rights on them.”

Michael Freeman¹

¹ M. Freeman, ‘Why it remains important to take children’s rights seriously’ in *Children’s rights: progress and perspectives*, ed. Freeman, M., pp. 5-25, Leiden, Boston, Martinus Nijhof Publishers, 2011, p.12, §3.

1. Introduction

The precise role of the European Union (EU) in the field of criminal law might be unknown to many residents and visitors of the European continent; however, the Union's activities in this matter have been numerous and have become more and more relevant.

In theory, judicial cooperation in criminal matters between EU Member States (EUMS) is based on mutual trust, assumes that all EUMS respect and protect human rights equally, as they all signed the European Convention on Human Rights (ECHR) and fall under the scrutiny of the European Court of Human Rights (ECtHR).

However, over the years it became clear that this so called trust is not always present and that human rights are not always protected equally throughout the Union. Gradually, the EU became aware of this and started to deal with the problem by introducing accompanying measures. Currently, several important Directives that prescribe procedural safeguards are in place in order to ensure that all EUMS postulate a minimum of human rights protection in the field of criminal matters.

Similarly, the EU also became more active in the field of children's rights, including them with the Lisbon Treaty² in the list of the Union's objectives. In 2011, the *EU Agenda for the Rights of the child* followed this milestone.

In this dual context, the European Commission proposed in 2013 a Directive on procedural safeguards for children who are suspected or accused persons in criminal proceedings, which came into force on the 10th of June 2016.³

This new piece of EU legislation is seen as an important step in order to ensure that all children in the EUMS receive at least the same minimum protection, extensively prescribed

² European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, OJ 2007 C 306/01 (hereinafter: Lisbon Treaty).

³ European Commission, *Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings*, 27 November 2013, COM/2013/0822 final - 2013/0408 (COD) (hereinafter: Procedural Safeguards Directive for Children, COM proposal); European Parliament and the Council of the European Union, *Directive 2016/800/EU of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings*, 21 May 2016, OJ 2016 L 132/1 (hereinafter: Procedural Safeguards Directive for Children, final).

by the already existing international standards (including binding and non-binding documents). However, several questions remain.

As this Directive is based on those standards, it is interesting to examine whether it actually attains the same level of protection and whether it enhances this framework. Where does the Directive follow the international standards, and where does it fall short? Will the Directive enhance the implementation of the required procedural safeguards in the EUMS? In order to give a comprehensive analysis of the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings, the context in which this document was born and developed shall be outlined in the first two chapters (*infra*)⁴. As it is the case for all legislative proposals, it is necessary to examine the context in which this proposal for a Procedural Safeguards Directive for Children was introduced. This starts with an introduction on EU judicial cooperation in criminal matters, followed by a short overview of the developments in the Rights of the Child policy of the EU⁵.

This will be followed by an extensive discussion of the existing international standards on safeguards for children in the juvenile justice system (*infra*)⁶. These standards can be found in the framework of the United Nations (UN), the Council of Europe (CoE), and the European Union (EU).

Thirdly, the Procedural Safeguards Directive for Children will be critically analysed in detail, based on these international standards, the relevant EU documents and the opinion of several NGOs specialised in the topic (*infra*)⁷. Finally, the need for legally binding and enforceable EU safeguards will be shortly emphasised (*infra*)⁸. For the purpose of this dissertation, children are considered to be persons under the age of 18, following the international standards.

⁴ Chapters 2 & 3, pp.4-19.

⁵ Recitals 1-8, Procedural Safeguards Directive for Children, final.

⁶ Chapter 4, pp.20-55.

⁷ Chapter 5, pp.56-99.

⁸ Chapter 6, pp.100-105.

2. EU judicial cooperation in criminal matters

‘Judicial cooperation’ forms a key component of the ‘Area of Freedom, Security and Justice’, as it was created by the Treaty of Amsterdam. Although this is one of the key political priorities of the EU⁹, it is seen as a politically sensitive issue, since it touches upon “*key areas of national sovereignty*”¹⁰. Nevertheless, the EU has become more active in regulating it.¹¹

Criminal cooperation in the Union of today is a product of a long and complicated process, evolving from a classical and pure intergovernmental approach to a more integrated and supranational one, based on the concept of ‘mutual trust’. On the other hand, it also instigated the process of improving the procedural safeguards of the suspected and the accused.

2.1. EU’s path to Mutual Recognition and Mutual Trust

Before the European Union created its criminal cooperation framework, a classical judicial cooperation system was in place. This type of cooperation is characterised by principles as: sovereignty of States, reciprocity, double criminality and speciality, and mainly entails cooperation between the governments and is based on diplomatic contacts. However, due to the time consuming nature of this method, States often switched to specific bilateral and multilateral Treaties.¹²

Up until 1995 it was mainly the Council of Europe and the United Nations who for pushed for such Treaties, more specifically on extradition and mutual assistance. In the 80s the

⁹ R. Deruiter, G. Vermeulen, ‘Balancing between human rights assumptions an actual fundamental human rights safeguards in building an area of freedom, security and justice: a cosmopolitan perspective’, *European Journal on Criminal Policy and Research*, February 2016 (hereinafter: Deruiter, Vermeulen 2016), p.1, §1 & p.4, §1.

¹⁰ Deruiter, Vermeulen 2016, p.2, §1; see also: R.A., Valdés, ‘The mutual recognition principle in criminal matters: a review’, *ERA Forum*, vol. 16, no.3, 2015 (hereinafter: Valdés 2015), p.292, §3 & p.293 §1; see also: K. Lenaerts, J.A. Gutiérrez-Fons, ‘The European Court of Justice and fundamental rights in the field of criminal law’ in *Research handbook on EU criminal law*, Mitsilegas, V., Bergström, M., Konstadinides, T., pp. 7-26, Cheltenham, Northampton, Edward Elgar, 2016, p. 7, §1.

¹¹ A. Klip, *European Criminal Law: An Integrative Approach*, Antwerp, Intersentia, 2009 (hereinafter: Klip 2009), p. 307, §3; Deruiter, Vermeulen 2016, p.2, §1 & p.4, §1.

¹² H.G., Nilson, ‘From classical judicial cooperation to mutual recognition’, *Revue internationale de droit penal*, vol.77, no.1, 2006 (hereinafter: Nilson 2006), p.53, §3 & p.54, §1.

existing CoE Conventions constituted the first real network in which the European States could cooperate in judicial matters, covering the different stages of criminal proceedings¹³. However, it did not make the situation less complicated for the Member States, as many different layers of legislation (bilateral, multilateral and regional) had to be taken into account.¹⁴

In the second half of the 90s of the previous century the EU further developed the Council of Europe's provisions by adopting its own treaties on extradition and mutual legal assistance, and by introducing other intergovernmental measures to improve the cooperation within the EU.¹⁵ Unfortunately, the EU Member States were not always willing to correctly ratify¹⁶ these measures, which made the system unworkable.¹⁷

It was by the beginning of this century that the European Union started to follow a new approach (leaving the inter-governmental method behind) based on mutual trust and integration, and this to tackle better the criminality in a borderless Union.¹⁸ The Treaty of Amsterdam¹⁹ introduced many changes and transferred a part of the judicial cooperation under the EU's supranational competences, while Police and judicial cooperation in criminal matters were still part of the third (intergovernmental) pillar. Furthermore, it also introduced framework decisions to approximate and harmonise many aspects of criminal law and, more importantly, it launched the idea of an 'Area of freedom, security and Justice'. 'Mutual recognition', which entails that national judicial decisions should be recognised and enforceable (without exequatur procedure) in any other Member

¹³ Klip 2009, p.309, §1.

¹⁴ Nilson 2006, p.54, §§1-4.

¹⁵ Nilson 2006, p.54, §5 & p.55, §§1-2; A. Klip, *European Criminal Law: An Integrative Approach*, Antwerp, Intersentia, 2009, p. 309, §2 & p. 310, §§2-3.

¹⁶ Klip 2009, p.310, §2.

¹⁷ G. Vermeulen, 'De Mythe Van Wederzijds Vertrouwen En Wederzijdse Erkenning in De EU.' in *Update in De Criminologie VII: Actuele Ontwikkelingen Inzake EU-justitiebeleid, Misdaad En Straf, Cannabisbeleid, Jongeren En Jeugdzorg, Internationale Vrede, Veiligheid En Gerechtigheid, Gewelddadig Extremisme & Private Veiligheid En Zelfregulering*, ed. Pauwels, L. and Vermeulen, G., pp. 17-44. Antwerp, Belgium, Maklu, 2014

¹⁸ Nilson 2006, p.55, §5 & p.56, §§1-2.

¹⁹ European Union, *Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, 2 October 1997, 1997 OJ C 340/1.

States and this on the basis of ‘mutual trust’ and equivalence²⁰, was already at that point in time the underlying principle.²¹ It was inspired by the EU’s internal market²² and in sum “...obliges the Member States to accept judicial decisions handed down in another Member State and to attach to these foreign judicial decisions the same legal effects as similar national judicial decisions”²³.

This principle was and is supported by two main considerations. On the one hand, it is duly noted that all Member States were (and still are) parties to the ECHR and have (or should have) trust in each other’s criminal justice systems²⁴, ‘believing’ “they comply with the principles of legality, subsidiarity and proportionality”²⁵. On the other hand, it is an efficient way to fight cross-border criminality in a borderless Union.²⁶

In October 1999 the European Council in Tampere (Finland) explicitly adopted (*de facto*) this principle of Mutual recognition (currently imbedded in Art. 82.1 of the Treaty on the Functioning of the European Union (TFEU)²⁷) as a cornerstone of (criminal and civil) judicial cooperation in the EU.²⁸

²⁰ Klip 2009, p. 331, §2; Deruiter, Vermeulen 2016, p.6, §2.

²¹ Nilson 2006, p.56, §1; H., Satzger, *International and European Criminal Law*, München, C.H. Beck, Hart, Nomos, 2012 (hereinafter: Satzger 2012), p.45, §§1-2; C., Morgan, ‘The EU procedural Rights Roadmap: Background, importance, overview and state of affairs’ in *Defence Rights: International and European Developments*, ed. Vermeulen, G., pp. 73-80, Antwerp, Belgium, Maklu, 2012 (hereinafter: Morgan 2012), p.74, §3.

²² Klip 2009, p.330, §2.

²³ J. Ouwerkerk, ‘Mutual trust in the area of Criminal law’ in *The Principle of Mutual Trust in European Asylum, Migration, and Criminal law: Reconciling Trust and Fundamental Rights*, Battjes, H., Brouwer, E., De Morree, P. and Ouwerkerk, J., pp. 38-54, Utrecht, the Netherlands, FORUM, 2011 (hereinafter: Ouwerkerk 2011), p. 39, §1.

²⁴ Council of the European Union, *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters*, 15 January 2001, OJ 2001 C 12/02; V. Mitsilegas, ‘Mutual recognition, mutual trust and fundamental rights after Lisbon’ in *Research handbook on EU criminal law*, Mitsilegas, V., Bergström, M., Konstadinides, T., pp. 148-167, Cheltenham, Northampton, Edward Elgar, 2016 (hereinafter: Mitsilegas 2016), p.150, §1.

²⁵ Valdés 2015, p.292, §2.

²⁶ Nilson 2006, p.56, §1; Ouwerkerk 2011, p.40, §3; Satzger 2012, p.45, §§1-2.

²⁷ European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, OJ 2008 C 115/47 (hereinafter: TFEU).

²⁸ European Council, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999; Nilson 2006, p.56, §1; Satzger 2012, p.117, §1.

This idea was further developed and explained in 2000, when the Council adopted a programme of 24 measures, in which it is argued that it would strengthen cooperation, improve human rights, create legal certainty, and speed up proceedings.²⁹

Finally, in 2009 the Treaty of Lisbon³⁰ came into force, introducing major changes in the field of criminal law and policy. It eradicated the pillar structure (making it one institutional structure with legal acts - Regulations and Directives - and a majority voting system)³¹ and strengthened the EU's competence in the area of criminal matters.³² Furthermore, the European Legislator imbedded the principle of mutual recognition in Article 82.1 TFEU, making it part of Primary European Law.³³

The EU's 'crown instrument' based on the principle of 'Mutual Recognition' is the European Arrest Warrant (EAW), which was decided by the European Council after the attacks of 9/11 and which came into force in 2004. It introduced the 'surrender' procedure within the EU, replacing the classical extradition between EUMS. The main idea was to make the procedure less time consuming and complex (while setting aside important safeguards)^{34, 35}.

While the classical procedure entailed legality and double criminality -tests, was dealt with on a case-by-case basis, was carried out by judicial, political and other public officials, and varied from country to country, the 'Surrender procedure' is strictly regulated and the same for all EU countries. First, the 'Surrender Procedure' is based on the direct contact between the judicial authorities.³⁶ Secondly, it exclusively charges the judiciary with the control

²⁹ Council of the European Union, *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters*, 15 January 2001, 2001 OJ C 12/02; Nilson 2006, p.57, §1; Mitsilegas 2016, p.150, §2.

³⁰ Lisbon Treaty.

³¹ T. Spronken, 'Effective defence: The letter of Rights and the Salduz-Directive' in *Defence Rights: International and European Developments*, ed. Vermeulen, G., pp. 81-104, Antwerp, Belgium, Maklu, 2012 (hereinafter: Spronken 2012), p.87, §3.

³² Satzger 2012, p.46, §1; Spronken 2012, p.87, §4.

³³ Satzger 2012, p.125, §4.

³⁴ Morgan 2012, p. 74, §3.

³⁵ Council of the European Union, *Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States*, 13 June 2002, 002/584/JHA; Nilson 2006, p.57, §2; Satzger 2012, p.118, §3, & p.119, §§1-3; Mitsilegas 2016, p.151, §2.

³⁶ Morgan 2012, p.74, §3.

over the procedure and proscribes a strict and short timeframe (60 days maximum, but generally within 30). Furthermore, it abolishes the double criminality requirement for a list of 32 criminal offences. It only prescribes very limited (3 mandatory and some optional) grounds for non-execution, and excludes the political exception.³⁷

After the EAW, other framework decisions followed, further developing a comprehensive system of mutual recognition, based on speed, automaticity and low formality, and included e.g. a ‘European Supervision Order’, a ‘European Evidence Warrant’, and a ‘European Enforcement Order’.³⁸

2.2. Approximation of Criminal Procedural law as a complement or accessory

2.2.1. EU Competence

Based on the principle of ‘mutual recognition’ in Article 82.1 TFEU, the European legislator introduces legislative acts (Directives on the basis of Art. 67.3, 82.1, 82.2 and 83 TFEU) to approximate national laws and regulations. Their main aim is to make the principle of ‘mutual recognition’ (and its implementation) more effective, in a complementary or accessory manner.³⁹

However, the room for such action depends on the type of approximation, as the TFEU prescribes distinct requirements. Article 82.2 TFEU gives the legal basis for accessory legal acts, while Article 83 TFEU works broader and foresees in the possibility of complementary legislation. The latter focuses on serious crime with a cross-border dimension, and on situations where minimum rules (on criminal definitions and sanctions)

³⁷ Council of the European Union, *Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States*, 13 June 2002, 002/584/JHA; Nilson 2006, p.57, §2; Satzger 2012, p.118, §3, & p.119, §§1-3; Mitsilegas 2016, p.151, §2.

³⁸ Council of the European Union, *Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention*, 23 October 2009, 829/JHA; Council of the European Union, *Framework Decision 2003/577/JHA on freezing property or evidence*; Council of the European Union, *Framework Decision on European Enforcement Order*; Satzger 2012, p.123, §§1&3, p.125, §2; Mitsilegas 2016, p.150, §2 & p.151, §1.

³⁹ Satzger 2012, p.128, §1; R. Sicurella, ‘EU competence in criminal matters’ in *Research handbook on EU criminal law*, Mitsilegas, V., Bergström, M., Konstadinides, T., pp. 49-77, Cheltenham, Northampton, Edward Elgar, 2016 (hereinafter: Sicurella 2016), p.59, §3.

are necessary for the implementation of EU policy in areas already subject to harmonisation.⁴⁰

As the subject of this paper concerns individuals (*in casu* children) in criminal proceedings only Art.82.2 TFEU is applicable and will be shortly outlined. In this context approximation is limited to the following areas: “(a) *mutual admissibility of evidence between Member States*; (b) *the rights of individuals in criminal procedure*; (c) *the rights of victims of crime*; (d) *any other specific aspects of criminal procedure which the Council has identified in advance by a decision*; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.”

Moreover, they can only be introduced “to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension (...)”⁴¹.

Hence, the rights of individuals in criminal proceedings can only be regulated by EU minimum rules if it is necessary for the (smooth) implementation of mutual recognition. These standards have to be seen as functional and do (or should) not form a goal *per se*.⁴²

2.2.2. Procedural rights of suspects and accused in criminal proceedings

Although effective judicial cooperation is an important EU objective, fundamental rights cannot be forgotten. As previously mentioned, the system aims at swiftness and automaticity, and can clearly challenge the human rights standards.⁴³ The European Commission put effort in improving fair trial rights for the suspects accused in the EU, in order to correct this imbalance between swift judicial cooperation (based on the principle of ‘mutual recognition’) and respect for the fundamental rights of the persons subject⁴⁴ to it.⁴⁵

⁴⁰ Sicurella 2016, p.59, §4, p.60, §1, p. 61, §2 & p.62, §3.

⁴¹ Art. 82.2, §1, TFEU.

⁴² Sicurella 2016, p.60, §§2-3 & p.163, §1.

⁴³ Mitsilegas 2016, p.151, §1.

⁴⁴ However, it is important to note that the Commission expanded this idea more and more to all persons subject to criminal proceedings in the EU Member States. (all Directives prescribe minimum standards for all accused and suspects)

⁴⁵ Morgan 2012, p. 74, §2

Given the increasing borderless travel (together with cross-border crime), and the EU's choice for mutual recognition, the ECHR cannot provide for enough protection.⁴⁶ First, there is no assurance that all EU Member States consistently respect, protect and fulfil the human rights imbedded in the ECHR. The case law and research shows that the required provisions for a fair trial are not fully imbedded in the national legislation of all Member States.⁴⁷

Second, Persons subject to an EAW do not enjoy the protection of Article 6 ECHR, since it is a type of extradition and makes not part of criminal proceedings. Furthermore, the EAW does not include minimum safeguards and relies completely on the domestic standards.⁴⁸

The European Commission has been aware of this tension for a long time and (inter alia)⁴⁹ introduced in 2004 a proposal for a Framework decision addressing five main procedural safeguards.⁵⁰ However, at the time, Framework Decisions required unanimity in the Council. Hence, after three years of negotiations, the proposal failed (due to discussions on subsidiarity, the added value of and the legal basis for it)⁵¹ and the debate on fair trial rights was put on the back burner.⁵²

⁴⁶ Morgan 2012, p.74, §1.

⁴⁷ Ouwerkerk 2011, p.44, §1; Morgan 2012, p.76, §2.; Spronken 2012, p.85, §1; D. Sayers, 'Protecting fair trial rights in criminal cases in the European Union', *Human Rights Law Review*, vol. 14, 2014, p. 735, §1; Valdés 2015, p.293, §1.

⁴⁸ Morgan 2012, p.74, §1 & p.75, §1.

⁴⁹ To be complete, fundamental rights issues were also addressed via other legislation. First, the EU legislator adopted other Framework Decisions addressing some human rights concerns. Furthermore, several national systems implementing the EAW Framework Decision and the *Directive on the European investigation Order* foresee in a human rights ground for refusal. Thirdly, a proportionality check (considering the seriousness of the offence) was adopted by several EUMS and included in the *Directive on the European investigation Order* (European Parliament and the Council of the European Union, *Directive 2014/41/EU regarding the European Investigation Order in criminal matters*, 3 April 2014, OJ 2014 L130/1; Mitsilegas 2016, p.152, §2, p.153, §2).

⁵⁰ European Commission, *Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*, 28 April 2004, COM(2004) 328.

⁵¹ Spronken 2012, p.86, §2; J. Hodgson, 'Criminal procedure in Europe's Area of Freedom, Security and Justice: the rights of the suspect' in *Research handbook on EU criminal law*, Mitsilegas, V., Bergström, M., Konstadinides, T., pp. 168-188, Cheltenham, Northampton, Edward Elgar, 2016 (hereinafter: Hodgson 2016), p.170, §1.

⁵² Morgan 2012, §§3-4; D. Sayers, 'Protecting fair trial rights in criminal cases in the European Union', *Human Rights Law Review*, vol. 14, 2014, p. 735, §2; Mitsilegas 2016, p.163, §1.

In 2009 (the same year the Lisbon treaty came into force, bringing the procedural rights back on the agenda⁵³) the European Council adopted the Stockholm Programme, setting out the priorities of the EU in the ‘Area of justice, freedom and security for 2010-2014’.⁵⁴ The focus shifted from a merely functional and prosecutorial to a strengthened justice and police cooperation system that also protects the human rights of victims, suspects and accused in criminal proceedings.⁵⁵ In addition to other matters, it included a Roadmap to strengthen the procedural rights of suspected or accused persons in criminal proceedings⁵⁶. All was and is linked to, and thus justified by, the enhancement of ‘mutual trust’⁵⁷: in order to make mutual recognition work States should have confidence in the safeguards in each other’s judicial systems.⁵⁸

This document set out the road of actions, which had (some still have) to be taken by the EU to strengthen the procedural rights of suspected or accused persons where the ECHR standards fell short. The proposed legislative measures were mainly related to the rights to interpretation and translation, information about rights, legal advice (before and at the trial) and legal aid, communication (with family members, etc.), and safeguards for vulnerable suspects. Furthermore, a green paper on pre-trial detention was also proposed.⁵⁹ As a consequence, between 2010 and today, the green paper was launched and three Directives were adopted (step by step) based on a co-operation between the European Commission, the Council and the European Parliament.⁶⁰

⁵³ Lisbon Treaty; Moreover, it included the accession of the EU to the ECHR as an obligation in the TEU and made the CFREU legally binding; Spronken 2012, p.81, §1 & p.88, §§1-2.

⁵⁴ European Council, *The Stockholm Programme- An open and secure Europe serving and protecting citizens*, 4 May 2010, 2010 OJ C 115/01.

⁵⁵ Hodgson 2016, p.168, §1.

⁵⁶ Council of the European Union, *Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 30 November 2009, 2009 OJ 295/1.

⁵⁷ Mitsilegas 2016, p.163, §2.

⁵⁸ Hodgson 2016, p.170, §3.

⁵⁹ Satzger 2012, p.129, §4, & p. 130, §1; D. Sayers, ‘Protecting fair trial rights in criminal cases in the European Union’, *Human Rights Law Review*, vol. 14, 2014, p.736, §2.

⁶⁰ European Commission, *A Green Paper on Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, 14 June 2011, COM/2011/0327 final; European Parliament and the Council of the European Union, *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings*, 20 October 2010, OJ 2010 L 280/1 (hereinafter: Directive on the right to interpretation and translation); European Parliament and the Council of

In 2013 the European Commission started a second round of proposals to continue the progress, “to further strengthen procedural safeguards for citizens in criminal proceedings”⁶¹, and ensure fair trial rights across the EU. In addition to the proposals related to the presumption of innocence⁶² and provisional aid⁶³, and other communications, the Commission introduced a Recommendation on procedural safeguards for vulnerable persons⁶⁴ and a proposal for a Directive on special safeguards for children suspected or accused in criminal Proceedings (the principal issue of this paper).⁶⁵

the European Union, *Directive 2012/13/EU on the right to information in criminal proceedings*, 22 May 2012, OJ 2012 L 142/1 (hereinafter: Directive on the right to information) ; European Parliament and the Council of the European Union, *Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, 22 October 2013, OJ 2013 L 294/1 (hereinafter: Directive on the right to a lawyer and communication) ; http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm.; Hodgson 2016, p. 170, §3.

⁶¹ http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm, §8.

⁶² The Directive was adopted in 2016: European Parliament and the Council of the European Union, *Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*, 9 March 2016, OJ 2016 L 65/1 (hereinafter: Directive on the presumption of innocence and the right to be present).

⁶³ European Commission, *Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings*, 27 November 2013, COM/2013/0824 final - 2013/0409 (COD) (hereinafter: Directive on provisional legal aid, COM proposal).

⁶⁴ European Commission, *Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings*, 27 October 2013, OJ 2013 C 378/8.

⁶⁵ European Commission, *Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings*, 27 November 2013, COM/2013/0822 final - 2013/0408 (COD); http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm, §8; based on Article 82.2., point b, TFEU.

3. Promotion and protection of Children's rights in the EU: a short overview

While the Procedural Safeguards Directive for Children is mainly the result of developments in the area of criminal law and policy, the place of children's rights in EU law and policy cannot be underestimated.

A European Union for Children has been (and still is) a product of a very late, slow, difficult and on-going process, even so that "*children's rights have, until relatively recently, seemed anathema to EU law and policy*"⁶⁶.

While children were first seen as non-relevant, the EU gradually changed its view, first indirectly and later directly. It moved away from the child as "*the object of attention and protection*" and worked towards the idea of the child as a young "*subject of rights*".⁶⁷

Although some progress was made before the Lisbon Treaty, this explicit 'mentality change' seems to have occurred after and in conjunction with this milestone.

3.1. The Rights of the Child prior Lisbon

Before the coming into force of the Lisbon Treaty, the Treaties made no explicit reference, nor was important legislation available directly addressing the rights of the child.⁶⁸ The EU started off with a purely economic logic and slowly developed the concept of a common 'Area of freedom, security and justice'.⁶⁹

Generally speaking, the first relevant legal developments in this regard were mainly politically and economically driven, and had no clear link with a fundamental rights agenda

⁶⁶ H., Stalford, E., Drywood, 'Using the CRC to inform EU law and policy-making' in *Children's rights: progress and perspectives*, ed. Freeman, M., pp. 199-218, Leiden, Boston, Martinus Nijhof Publishers, 2011 (hereinafter: Stalford, Drywood 2011), p. 199, §1; Stalford 2012, p.223, §2.

⁶⁷ H. Stalford, *Children and the European Union: rights, welfare and accountability*, Oxford [a.o.]: Hart Publishing; 2012, (hereinafter: Stalford 2012) p. 5, §§1-2 & p.223, §2; F. Ippolito, S., Iglesias Sanchez, *Protecting vulnerable groups: The European Human Rights Framework*, Oxford and Portland, Hart Publishing, 2015 (hereinafter: Ippolito, Sanchez 2015), p.46, §1.

⁶⁸ Ippolito, Sanchez 2015, p.46, §3.

⁶⁹ Directorate-General for internal policies of the European parliament, Policy Department C: Citizens' rights and constitutional affairs, 'EU framework of law for children's rights', PE462.445, 2012, available from http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT%282012%29462445_EN.pdf, (accessed 7 June 2016) (hereinafter: EP IPOL, EU framework for children, 2012), p.13, §3; European Union, *Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, 2 October 1997, OJ 1997 C 340/1.

as such.⁷⁰ Most changes were instrumental, scattered and conditional, and only indirectly addressed the situation of the child, seeing them as objects, and making them completely dependent on their parents to exercise their rights.⁷¹

An example of this was the legislation related to the free movement of EU workers and family related issues (social rights, tax law, education, etc.) in the 60s, from which they were indirectly benefitting. Another example was the *employment equality legislation*, aiming at the reintegration of women in the labour market and providing the parents with certain financial security, better working conditions etc., favouring also the rights of the child. Hence, the emphasis did not lie on the child's perspectives and the legislation portrayed a child more as a burden than a potential participant in society.⁷²

Since the 80s the EU institutions, mainly the Commission and Parliament push for children's rights as such. The first progress can be found in the areas of youth and education, social participation, and work, varying from education initiatives, youth work programmes, participatory forums, to a White paper.⁷³ Hence, their main idea and concern was clear: ensuring the child's *capacity for future economic contributions*.⁷⁴

⁷⁰ Stalford, Drywood 2011, p.200, §4; Stalford 2012, p.17, §3 & p. 223, §2.

⁷¹ EURONET, 'What about us? Children's rights in the European Union. Next steps.', 2005, available from http://www.crin.org/en/docs/Ruxton%20Report_WhatAboutUs.pdf, (accessed 7 June 2016) (hereinafter: EURONET 2005), p. 19, §2; Stalford, Drywood 2011, p.202, §2; Stalford 2012, p.11, §3, p. 16, §2, p.17, §3 & p.27, §1; T. Cockburn, *Rethinking children's citizenship*, Basingstoke, Palgrave Macmillan, 2013 (hereinafter: Cockburn 2013), p. 174, §3; Ippolito, Sanchez 2015, p.46, §3; Fundamental Rights Agency of the European Union and Council of Europe, 'Handbook on European law relating to the rights of the child', 2015, available from <http://fra.europa.eu/en/publication/2015/handbook-european-law-child-rights>, (hereinafter: Law Handbook on children's rights in the EU), p.20, §1; I. Iusmen, H. Stalford, *The EU as a Children's Rights Actor: Law, Policy and Structural Dimensions*, Opladen, Berlin, Toronto, Barbara Budrich Publishers, 2016 (hereinafter: Iusman, Stalford 2016), p.11, §§3-4.

⁷² EURONET 2005, p.19, §3; C. Larkins, 'Can the EU live up to the expectations of its child citizens?', *International Journal of children's rights*, vol.19, no.3, 2011 (hereinafter: Larkins 2011), p. 453, §1; Stalford, Drywood 2011, p.201, §1; Stalford 2012, p.16, §§2-3.

⁷³ Larkins 2011, p. 454, §2; See for example: European Commission, *White paper – a new impetus for European youth*, 21 November 2001, COM/2001/0681 final; European Parliament and the Council of the European Union, *Recommendation on key competences for lifelong learning*, 18 December 2006, 2006/962/EC, OJ 2006 L 394/10; European Parliament and the Council of the European Union, *Decision No 1719/2006/EC establishing the 'youth in action' Programme for the period 2007 to 2013*, 15 November 2006, OJ 2006 L327/30.

⁷⁴ Larkins 2011, p.455, §2.

By the beginning of the 90s⁷⁵ EU law became more focussed on the child itself, related to protection and addressed television advertising and young people at work. With the Treaty of Amsterdam of 1997 and the enhancement of EU competence, some relevant children's rights provisions were adopted, including in the areas of migration and asylum, and *cross-national family justice*.⁷⁶

The discourse in the last years of the 20th century changed further. Participatory 'rights' came more to the forefront, resulting in a *EU Youth Strategy*.⁷⁷ In 2000 the European Council, the European Parliament and the European Commission adopted the Charter of Fundamental Rights of the European Union (CFREU)⁷⁸, including the Articles specifically targeting the rights of the child and imbedding several principles of the United Nations Charter on the Rights of the Child (UNCRC)⁷⁹.⁸⁰ Although the CFREU was and is only applicable on EU institutions and on EUMS when implementing EU law⁸¹, it was a vital development for the visibility of children's rights and activated more engagement.⁸² However, a 'Treaty-level'⁸³ Charter would only be a fact three years following the Lisbon Treaty.

⁷⁵ In 1992 the Maastricht Treaty also introduced the respect for fundamental rights as an EU obligation (European Union, *Treaty on European Union (Maastricht text)*, 7 February 1992, OJ 1992 C 325/5.).

⁷⁶ European Union, *Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, 2 October 1997, OJ 1997 C 340/1; EURONET 2005, p.20, §3 & p.21, §§1-3; Stalford, Drywood 2011, p.201, §§2-3; EP IPOL, EU framework for children, 2012, p.13, §5; Iusman, Stalford 2016, p.11, §4; see for example: Council of the European Union, *Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation*, 27 November 2003, OJ L 338/1; European Parliament and Council, *Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, 29 April 2004, OJ 2004 L 158/77; Council of the European Union, *Directive 2005/85/EC on minimum Standards on procedures in Member States for granting and withdrawing refugee status*, 1 December 2005, OJ L 326/13.

⁷⁷ Stalford, Drywood 2011, p.201, §3 & p.202, §1.

⁷⁸ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, OJ 2012 C 326/02 (hereinafter: CFREU).

⁷⁹ United Nations, General Assembly, *Convention on the Rights of the Child*, 20 November 1989 (hereinafter: UNCRC).

⁸⁰ EURONET 2005, p.21, §§4 & 6; Stalford, Drywood 2011, p.205, §2.

⁸¹ Meaning that it can't create new rights, freedoms or principles; Article 51, CFREU; De Hert 2016, p.107, §2 & p.110, §2; See for example: ECJ, *NS and others*, 21 December 2011, C-411/10 and C-493/10, §119.

⁸² EURONET 2005, p.21, §7; Stalford 2012, p.17, §3 & p.45, §§2-3.

⁸³ Stalford, Drywood 2011, p.206, §1

As the years passed, the European legislator gradually started referring explicitly to UNCRC's principles in its legislation. In addition to the previously mentioned legislation in the area of police and judicial cooperation in criminal matters, relevant provisions can also be found in other areas, as for example the Directives in relation to the reporting of missing children, and the safety of toys.⁸⁴

Besides the aforementioned legislative acts the first major step, surpassing the economic approach, was the '*Commission Communication: towards an EU Strategy on the Rights of the Child*' in 2006. This very ambitious document set forth a strategy, a policy plan to not only respect, but also to promote and safeguard the rights of the child in the EU's internal and external policies, and to support the EUMS in their efforts. In this document the European Commission made specific references to the provisions and principles in the UNCRC.⁸⁵ By adopting this document it acknowledged that all EU policies and legislation touch upon children's lives and that the rights of the child should be mainstreamed in all EU areas.⁸⁶

In the same line⁸⁷ the Council of the European Union adopted in 2007 '*guidelines for the promotion and protection of the rights of the child*'⁸⁸ and the European Commission called for '*A special place for children in EU external action*' in its 2008 Communication, in order to mainstream children's rights also in the EU's external actions.⁸⁹

⁸⁴ EURONET 2005, p.21, §3; Stalford, Drywood 2011, p.200, §3; EP IPOL, EU framework for children, 2012, p.13, §5 & p.14, §§1-4; see for example: European Parliament and the Council of the European Union, *Directive 2002/22/EC on universal service and users's rights relating to electronic communications networks and services*, 7 March 2002, OJ 2002 L108/51; European Parliament and the Council of the European Union, *Directive 2009/48/EC on the safety of toys*, 18 June 2009, OJ 2009 L 170/1.

⁸⁵ European Commission, *Towards an EU Strategy on the Rights of the Child: Communication from the Commission to the Council, the European Parliament, the European Economic And Social Committee and the Committee of the Regions*, Brussels, 4 July 2006, Com(2006) 376 final; EP IPOL, EU framework for children, 2012, p.15, §1.

⁸⁶ Larkins 2011, p.455, §3.

⁸⁷ Iusman, Stalford 2016, p.12, §1.

⁸⁸ Council of the European Union, *EU Guidelines for the promotion and protection of the rights of the child*, Brussels, 10 December 2007; EP IPOL, EU framework for children, 2012, p.17, §3.

⁸⁹ European Commission, *A special place for children in EU external action: Communication from the Commission to the Council, the European Parliament, the European Economic And Social Committee and the Committee of the Regions*, Brussels, 5 February 2008, COM (2008) 55 final; EP IPOL, EU framework for children, 2012, p.13, §5 & p.14, §5; Law Handbook on children's rights in the EU, p.22, §1.

Similarly, the European Parliament, often seen as the driving force behind the children's rights achievements⁹⁰, used several tools at its disposal in order to combat child trafficking, child exploitation, to address parental child abduction, and to further promote and protect children's rights in several other areas. In 2008 it adopted a Resolution on EU Strategy for the rights of the child, setting EU priorities.⁹¹

3.2. The Lisbon Treaty and further developments: Promotion and protection of Children's rights as an EU objective

The coming into force of the Lisbon Treaty was an important and symbolic milestone for children's rights in the EU. Although children's rights were already acknowledged as part of the general principles of the European Union, the Treaty (with the explicit inclusion in the Treaties, binding nature of the CFREU, and the obligation of EU accession to the ECHR)⁹² created a *"more visible benchmark by which to monitor the development and application of EU provision vis-à-vis children in the future"*⁹³. Previously, former Article 29 of the Treaty on the European Union (TEU)⁹⁴ was the only provision referring to the rights of the child, namely in relation to criminal cooperation and offences against children.⁹⁵

⁹⁰ Stalford 2012, p.12, §2.

⁹¹ EP IPOL, EU framework for children, 2012, p.15, §4 & p. 16, §§1-4; European Parliament, *Resolution 'towards an EU Strategy on the rights of the child'*, 16 January 2008, 2007/2093(INI); see for example: European Parliament, *Resolution on trafficking in children and child soldiers*, 3 July 2003, 2003/0334; European Parliament, *Resolution on the exploitation of children in developing countries, with a special focus on child labour*, 5 July 2005, 2005/2004 (INI); European Parliament Mediator for international Parental Child Abduction, information available from <http://www.europarl.europa.eu/atyourservice/en/20150201PVL00040/Child-abduction-mediator>, (accessed on 15 June 2016).

⁹² Amendment of Articles 3 and 6, Lisbon Treaty.

⁹³ H. Stalford, M. Schuurman, 'Are we there yet?: the impact of the Lisbon treaty on the EU Children's Rights Agenda', *International Journal of Children's Rights*, vol. 19, 2011 (hereinafter: Stalford, Schuurman 2011), p.397, §3; R. O'Donnell, 'The role of the EU legal and policy framework in strengthening child friendly justice', *ERA Forum*, vol. 14, no. 4, 2013, p.512 (hereinafter O'Donnell 2013), §3.

⁹⁴ European Union, *Consolidated Version of the Treaty on European Union*, OJ 2010 C 83/01 (hereinafter: TEU).

⁹⁵ Stalford, Drywood 2011, p.205, footnote 18; Stalford, Schuurman 2011, p.382, §1; De Hert 2016, p.108, §2.

With Lisbon, the TEU lays down the protection and promotion of the rights of the child explicitly as EU objective, requiring two dimensions (internal and external): “*The Union shall (...) promote (...) protection of the rights of the child. (...) In its relations with the wider world, the Union (...) shall contribute to (...) the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*”⁹⁶.

These provisions are vital, because they aim at mainstreaming children’s rights in the complete EU law and policy framework. This entails that their rights must always be considered and developed, irrespective of the policy area.⁹⁷

Furthermore, the Lisbon Treaty also made important changes by introducing provisions in the TFEU specifically referring to children (for example, the possibility to introduce legislation to combat sexual exploitation and human trafficking).⁹⁸

Based on this new *EU acquis* (revised TEU, TFEU, and CFREU)⁹⁹ important legislation and policy documents were adopted, as for example the Directives on combatting sexual exploitation and human trafficking, and on victims of crime (also specifically addressing the situation of children).¹⁰⁰

On policy level, *The Stockholm Programme*, adopted in 2009, called upon the Commission to introduce a new communication on the Rights of the child.¹⁰¹ Based on this call the

⁹⁶ Art. 3(3), §2 & Art.3(5), TEU.

⁹⁷ Stalford, Schuurman 2011, p.400, §2; EP IPOL, EU framework for children, 2012, p.19, §4.

⁹⁸ Art. 79 (2)(d), 83 (1), TFEU; Law Handbook on children’s rights in the EU, p.221, §2.

⁹⁹ Law Handbook on children’s rights in the EU, p.20, §1; As mentioned previously, the CFREU is of great importance, because it contains many Articles specifically addressing to the rights of the child and important UNCRC principles (for example: the right to free education, the prohibition of discrimination on the ground of age, the prohibition of child labour, the best interests of the child, etc.).

¹⁰⁰ European Parliament and the Council of the European Union, *Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 5 April 2011; European Parliament and the Council of the European Union, *Directive 2011/92/EU on combating sexual abuse and sexual exploitation of children, and child pornography, replacing the Council Framework- Decision 2004/68/JHA*, 13 December 2011; European Parliament and the Council of the European Union, *Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 25 October 2012; O’Donnell 2013, p.513, §2; Law Handbook on children’s rights in the EU, p.21, §3.

¹⁰¹ European Council, *The Stockholm Programme- An open and secure Europe serving and protecting citizens*, 4 May 2010, OJ 2010 C 115/01;http://ec.europa.eu/justice/fundamental-rights/rights-child/eu-agenda/index_en.htm.

European Commission adopted the (non-binding) *EU Agenda for the Rights of the Child* in 2011, guiding the current and future legislative acts and policies. The ‘Agenda’, specifically referring to the CFREU and UNCRC,¹⁰² prescribes the main priorities and 11 actions (of which the Procedural Safeguards Directive for Children is one) with regard to children’s rights law and policy in the EU¹⁰³. However, it does not contain any guidance on how the rights of the child should be mainstreamed across all EU law and policy areas, nor on what a child rights perspective entails.¹⁰⁴ In relation to this, in 2013 it adopted a (non-binding) Strategy to tackle poverty and social exclusion.¹⁰⁵

As the previous overview made clear, the rights of the child touch upon many different aspects and are entangled with many different law and policy fields of the Union. Nevertheless, as the EU’s legislative competence (regulated by Articles 2 until 4 TEU) in the area of children’s rights is rather limited, action is determined on a case-by-case basis.¹⁰⁶ More precisely, the nature and scope of the necessary action will always depend on the principles of subsidiarity (if EU action is more appropriate and effective than national efforts) and proportionality (within the limits of necessity to achieve the EU objectives).¹⁰⁷ Thus far, the EU has been mainly focussing on the protection of the child and regulating in the fields of migration, trafficking, data and consumer protection and, extremely relevant for this paper: cooperation in civil and criminal matters.¹⁰⁸

¹⁰² Larkins 2011, p.455, §3; Stalford 2012, p.32, §2; Law Handbook on children’s rights in the EU, p.27, §4.

¹⁰³ European Commission, *An EU agenda for the rights of the child: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2011) 0060 final, Brussels, 15 February 2011 (hereinafter: EU Agenda for the rights of the child); EP IPOL, EU framework for children, 2012, p.21, §2; Law Handbook on children’s rights in the EU, p.22, §1.

¹⁰⁴ Stalford, Schuurman 2011, p.401, §2; Stalford 2012, p.28, §1.

¹⁰⁵ European Commission, *Investing in children: breaking the cycle of disadvantage*, Recommendation 2013/112/EU, Brussels; Law Handbook on children’s rights in the EU, p.22, §2.

¹⁰⁶ Law Handbook on children’s rights in the EU, p.22, §3.

¹⁰⁷ Stalford 2012, p.20, §2 & p.44, §4 & p.45, §1.

¹⁰⁸ EP IPOL, EU framework for children, 2012, p.21, §4; Stalford 2012, p.43, §2; Cockburn 2013, p.172, §3; Law Handbook on children’s rights in the EU, p.22, §3.

4. International Standards on safeguards in a comprehensive juvenile justice system

Before a critical analysis of the Procedural Safeguards Directive for Children can be conducted (*infra*)¹⁰⁹, the existing international standards must be thoroughly outlined. First, a short overview of the different UN, CoE, and EU sources will be given, including their relevant provisions. Then, the fundamental principles and the main objectives of those documents will be outlined. Finally, a detailed description of the necessary safeguards will round out this chapter.

4.1. The international framework: an overview

The Procedural Safeguards Directive for Children is solely applicable in the EUMS. However, on the international level many other provisions address safeguards for children in criminal proceedings. The following paragraphs shall provide the reader with a brief overview of these relevant sources, binding and non-binding, subdivided into the UN, CoE and EU framework, respectively.

4.1.1. The United Nations

In 1989 the United Nations Convention on the Rights of the Child (UNCRC)¹¹⁰, which forms the most exhaustive and most ratified human rights document, was adopted in order to provide the child with special safeguards and rights.¹¹¹ Likewise, the International Covenant on Civil and Political Rights (ICCPR)¹¹² should also be mentioned.

The UNCRC and the ICCPR must be complemented with General Comment 32 (on the right to a fair trial) of the United Nations Human Rights Committee (UNHRC).¹¹³ Additionally, General Comments 10, 12 and 14 of the United Nations Committee on the

¹⁰⁹ Chapter 5, pp.56-98.

¹¹⁰ UN General Assembly, Convention on the Rights of the Child, 20 November 1989 (hereinafter: UNCRC).

¹¹¹ Stalford 2012, p.32, §1; Iusmen, Stalford 2016, p.9, §1.

¹¹² United Nations, General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966 (hereinafter: ICCPR).

¹¹³ United Nations, Human Rights Committee, *General Comment No. 32 on Article 14, Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007 (hereinafter: UNHRC GC 32).

Rights of the Child (UNCommRC) on *Children's rights in juvenile Justice, the right of the child to be heard and the right of the child to have his or her best interests taken as a primary consideration*, respectively, are of equal importance.¹¹⁴

Finally, all documents must be read together with the relevant provisions of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)¹¹⁵, and the principles included in the (all non-binding) *Beijing rules*¹¹⁶ (administration of Juvenile Justice), *Riyadh Guidelines*¹¹⁷ (Prevention), and *Havana Rules*¹¹⁸ (juveniles deprived of their liberty).

4.1.2. The Council of Europe

While the famous European Convention on Human Rights¹¹⁹ (ECHR) contains several important provisions, it does not touch upon the specific situation of children. On the contrary, the European Court of Human Rights (ECtHR) made several very relevant judgments, in which it carefully interprets the ECHR in the specific context of suspected or accused minors.¹²⁰

¹¹⁴ UN, Committee on the Rights of the Child, *General Comment No. 10 on Children's rights in juvenile Justice*, CRC/C/GC/07, 25 April 2007 (hereinafter: UNCommRC GC 10); UN, Committee on the Rights of the Child, *General Comment No 12 on the right of the child to be heard*, CRC/C/GC/12, 1 July 2009 (hereinafter: UNCommRC GC 12); UN, Committee on the Rights of the Child, *General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, 23 May 2013 (hereinafter: UNCommRC GC 14).

¹¹⁵ United Nations, General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 (hereinafter: UNCAT).

¹¹⁶ UN, General Assembly, *UN Standard Minimum Rules for the Administration of Juvenile Justice*, UN Doc. GA Res. 40/33, 19 November 1985. (hereinafter: Beijing Rules)

¹¹⁷ UN, General Assembly, *UN Guidelines for the Prevention of Juvenile Delinquency*, UN Doc. GA Res. 45/112, 14 December 1990. (hereinafter: Riyadh Guidelines)

¹¹⁸ UN, General Assembly, *UN Rules for the Protection of Juveniles Deprived of their Liberty*, UN Doc. GA Res. 45/113, 14 December 1990. (hereinafter: Havana Rules)

¹¹⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950 (hereinafter: ECHR).

¹²⁰ See, for example: ECtHR, *T. v. UK* (24724/94), 16 December 1999; ECtHR, *V. v. UK* (24888/949), 16 December 1999; ECtHR, *Kosti a.o. v. Turkey* (74321/01), 3 May 2007; ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008; ECtHR, *Nart v. Turkey* (20817/04), 06 May 2008; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013; etc.

In 2010 the Committee of Ministers adopted the *CoE Guidelines on Child-friendly Justice*¹²¹, which further clarify and meticulously describe the necessary safeguards, in order to make them practically achievable. Although these Guidelines are non-binding, it does further explain and apply the already existing binding norms of the ECHR, interpreted by the ECtHR, and other relevant international standards.¹²²

Before these guidelines came into place the (non-binding) *European Rules for juvenile offenders subject to Sanctions or measures*¹²³ were already in place for two years. Although these rules clearly focus on sanctions and measures, they also contain important provisions with great relevance for the subject at hand.

Finally, the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment set out criteria (CPT Standards)¹²⁴, which are particularly important for children deprived of their liberty.

4.1.3. The European Union

In comparison to the series of documents in the UN and the CoE, the EU has a rather poor record on this. The Charter of Fundamental Rights of the EU¹²⁵ (CFREU) is the EU's main human rights document, including its child specific Article 24.

The aforementioned Directives (*supra*)¹²⁶ on certain procedural rights¹²⁷ for all suspects or accused in criminal proceedings are useful for the general picture of procedural rights of

¹²¹ Council of Europe, Committee of Ministers, *Guidelines on child friendly justice*, 17 November 2010 (hereinafter: CoE Guidelines on child-friendly justice)

¹²² CoE Guidelines on child-friendly justice, Fundamental principles, §1 & structure and content, §§15-7.

¹²³ Council of Europe, Committee of Ministers, *Recommendation on the European Rules for juvenile offenders subject to sanctions or measures*, 5 November 2008, CM/Rec (2008) 11 (hereinafter: European rules Juvenile offenders); Council of Europe, Committee of Ministers, *Commentary to the European Rules for Juvenile offenders subject to sanctions or measures*, 2008, CM (2008) 128 addendum 1 (hereinafter: Commentary European Rules Juvenile Offenders).

¹²⁴ Council of Europe, European Committee for the prevention of torture and inhuman or degrading treatment or punishment, *CPT Standards*, CPT/Inf/E (2002) 1 – Rev. 2015 (hereinafter: CPT Standards).

¹²⁵ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, OJ 2012 C 326/02 (hereinafter: CFREU).

¹²⁶ Footnotes. 58 & 60, pp. 11-12.

¹²⁷ Directive on the right to interpretation and translation; Directive on the right to information; Directive on the right to a lawyer and communication; Directive on the presumption of innocence and the right to be present.

suspects and accused persons, but only one, the Directive on the right to a lawyer and communication, mentions the specific situation of the child.¹²⁸

Naturally, this picture should be complemented with judgments of the Court of Justice of the EU (ECJ). However, as it stands the Court has not made any decisions or judgments in relation to accused or suspected minors and, in other words, the ECJ did not make use (yet) of Article 24 CFREU in interpreting the existing Directives on procedural rights.

Besides this and as mentioned before, there are other important documents as the *EU Agenda for the Rights of the Child*¹²⁹, prescribing the procedural safeguards for children as a priority, but they do not in any way set a specific standard or safeguard, on the basis of which the Procedural Safeguards Directive for Children could be scrutinised.

4.2. Fundamental principles and main objectives

To fully understand the international standards, the underlying principles and the main objectives should always be taken into account. They clarify, contribute and explain the specific safeguards prescribed.

4.2.1. Fundamental principles

As already mentioned, the UNCRC and several other documents¹³⁰ enshrine the vital principles, which can be summarised as follows: non-discrimination, best Interests of the child, right to life, the right to be heard and to participate, human dignity, legality and proportionality.

Non-discrimination

¹²⁸ Art. 5.2 & Recitals 52, 55, Directive on the right to a lawyer and communication; Law Handbook on children's rights in the EU, p.198, §1.

¹²⁹ EU Agenda for the Rights of the child.

¹³⁰ Examples: Beijing Rules, §§5.1. & 14.2. ; Havana Rules, §§ 3 & 31; UNCommRC GC 10, §§5-14; European rules Juvenile offenders, §§5, 11, 13 & 63.1, UNCommRC GC 12, §§3, 70 & 75; CoE Guidelines on child-friendly justice, III.A-E; EU Agenda for the Rights of the child, 2.1.; Parliamentary Assembly of the Council of Europe, Report 2010 (2014), "*Child-friendly justice: from rhetoric to reality*" (hereinafter: PA Report child-friendly justice); Council of Europe, Committee of Ministers, *Council of Europe Strategy for the Rights of the Child (2016-2021)*, CM (2015)175 final, 3 March 2016 (hereinafter: CoE Strategy Rights of the Child).

The principle of non-discrimination, common to all human rights frameworks,¹³¹ is imbedded in Article 2 of the UNCRC and prescribes that States: “*shall respect and ensure the rights (...) to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*” and must “*take appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members*”.¹³²

In the case of suspected or accused children, this concept entails that all must be treated equally. In this context the UNCommRC stresses that States should equally address, with specific protection and assistance, *de facto* discrimination of vulnerable children (for example: girls, children with a disability, underage recidivists, etc.).¹³³ Furthermore, it draws attention to discrimination that occurs when accessing (or trying to) education and or the labour market, and to the situation of status offences (resulting from psychological or socio-economic problems).¹³⁴

Best interests of the child

As prescribed by several international documents¹³⁵ and enshrined in Article 3.1 of the UNCRC, “*in all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*”¹³⁶.

This principle that is vital for suspected and accused children, requires the State Parties to adapt their traditional judicial systems to the specific situation of children and to treat them

¹³¹ See: Art. 2 ICCPR; Art. 14 ECHR and Art. 21 CFREU.

¹³² Art. 2, UNCRC; see also: CoE Guidelines on child-friendly justice, III.D.1.

¹³³ UNCommRC GC 10, §6; UNCommRC GC 14; see also: CoE Guidelines on child-friendly justice, III.D.2.

¹³⁴ UNCommRC GC 10, §7.

¹³⁵ ICCPR; Art. 24, CFREU; CoE Guidelines on child-friendly justice, III.B; UNCommRC GC 14, §28.

¹³⁶ Art. 3.1, UNCRC.

with a focus on rehabilitation and restorative justice objectives instead of repression or retribution.¹³⁷

In addition, the *CoE guidelines on Child-friendly justice* prescribe that all children's rights must be respected (including giving due weight to their views and opinions) and that the authorities must adopt a comprehensive and case-by-case approach to ensure that all interests, including the child's well-being, and social and economic interests, are taken in to account.¹³⁸

The right to life

The right to life principle is inherent to every person (including children), and is enshrined in all human rights treaties.¹³⁹ Article 6.2 of the UNCRC complements it with the obligation of the States to “*ensure to the maximum extent possible the survival and development of the child*”¹⁴⁰.

This principle plays a vital role in the situation of suspected or accused children, because it unequivocally states that delinquency (including its consequences) hampers a child's development.¹⁴¹

The right to be heard and to participate

Article 12 of the UNCRC clearly states that it must be assured “*(.) to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views (...) being given due weight in accordance with the age and maturity (...)*” and that the child has in particular “*the opportunity to be heard in any judicial (...) proceedings affecting the child, either directly, or through a representative or an appropriate body (...)*”.¹⁴²

¹³⁷ UNCommRC GC 10, §10.

¹³⁸ CoE Guidelines on child-friendly justice, III.B.2; see also: UNCommRC GC 14, §32.

¹³⁹ Art. 2, ECHR; Art. 6, ICCPR; Art. 6.1, UNCRC; Art. 2 CFREU.

¹⁴⁰ Art. 6.2, UNCRC.

¹⁴¹ UNCommRC GC 10, §11.

¹⁴² Art. 12, UNCRC.

The right to heard unmistakably forms another fundamental element of a child-friendly justice system for suspected or accused children, and must be respected during the complete process.¹⁴³

Moreover, it is directly linked to the principle of participation, which entails: “*information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes*”¹⁴⁴. Further elements will be discussed below (*infra*)¹⁴⁵, including the right to be informed, appropriate access to justice and due weight for the child’s views, and the stresses the fact that children are *full bearers of rights* and that they are entitled to exercise them.¹⁴⁶

Human dignity

Human dignity lays at the basis of and forms the heart of any human rights legislation. Its importance is stressed in nearly all international standards¹⁴⁷. Article 40.1 of the UNCRC enshrines this principle in relation to suspected or accused children and prescribes their right “*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*”¹⁴⁸.

It is unequivocal that this core principle must be respected and protected at all times and in any given situation, including when implementing measures. Furthermore, it underlines the importance of the context (personal situation) in which a child is brought up and how it

¹⁴³ UNCommRC GC 10, §12.

¹⁴⁴ UNCommRC GC 12, §3.

¹⁴⁵ 4.3.5, p. 34.

¹⁴⁶ CoE Guidelines on child-friendly justice, III.A.

¹⁴⁷ Art. 1, UDHR; §1, Protocol No.13 to the ECHR; §§1-2 of the Preamble & Art. 10.1, ICCPR; §2 of the Preamble, Art. 1, CFREU.

¹⁴⁸ Art. 40.1, UNCRC.

influences its own ideals and convictions. This is, and must be, linked to their reintegration in society. Finally, it clearly requires the prohibition and prevention of ill treatment.¹⁴⁹

Legality

The principle of legality means that everyone is only “accountable to clearly established and publicised laws”¹⁵⁰. Hence, ‘*Nullum crimen, nulla poena sine lege*’ are principles that also apply on children.¹⁵¹ Evidently, it includes the rule of non-retroactive Justice,¹⁵² reiterated in Article 40 UNCRC¹⁵³, which entails that no one, including children, can be found guilty of a crime that did not constitute a crime (an act or omission, which was not prohibited under any national or international law) at the time it was committed.¹⁵⁴

Although this might seem evident, EUMS often endanger this principle in relation to terrorism or by punishing children for ‘status offences’, even though these offences are not legally defined as crimes.¹⁵⁵

Proportionality

As the *Beijing Rules* reiterate, a juvenile justice system should emphasise the well-being of the child, and must therefore “ensure that the reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence”.¹⁵⁶ The treatment, conditions, decisions, and safeguards should never be black or white, but should always be adapted to the child’s personal situation (for example his or her social status, family situation, etc.) and needs, on the one hand, and the offence, on the other.¹⁵⁷ In other words, a case-by-case approach is always necessary.

¹⁴⁹ UNCommRC GC 10, §13; CoE Guidelines on child-friendly justice, III.C.

¹⁵⁰ CoE Guidelines on child-friendly justice, Commentary, §46.

¹⁵¹ CoE Guidelines on child-friendly justice, Commentary, §46; see also: Art. 7.1, ECHR; Art. 15.1, ICCPR; Art. 49.1, CFREU.

¹⁵² See also: Art. 7, ECHR; Art. 15, ICCPR; Art. 49.1, CFREU.

¹⁵³ Art. 40.2.a, UNCRC.

¹⁵⁴ UNCommRC GC 10, §41; If new legislation prescribes (for an already existing offence) a lighter sanction than at the time of the infringement, the child must benefit from it, but if it introduces a heavier penalty this cannot be applicable (UNCommRC GC 10, §41).

¹⁵⁵ UNCommRC GC 10, §41; CoE Guidelines on child-friendly justice, Commentary, §47.

¹⁵⁶ Beijing Rules, §5.1; see also: Art. 49.3, CFREU.

¹⁵⁷ Beijing Rules, Commentary to §5.1.

4.2.2. Scope and main objectives

Along with the leading Principles, the scope and main objectives of the International documents deserve brief attention.

The standards aim, first and foremost, at the promotion of the child's well-being, the prevention of juvenile delinquency and the reintegration of the child.¹⁵⁸ In other words, the ultimate goal should be '*a Comprehensive policy for juvenile justice*'.¹⁵⁹

In addition, several documents cover more than criminal matters alone, and are applicable on all children in judicial proceedings (including persons who were children at the time of the offence, reaching the age of 18 during proceedings).¹⁶⁰ Furthermore, the standards do not only address the child's situation during those proceedings, but also before and after.¹⁶¹

4.3. Safeguards for children in criminal proceedings

Based on the complete aforementioned framework (including the fundamental principles), several safeguards can be deducted, from which the content varies from hard (more general) to soft (detailed) law.

It must be noted that all safeguards are linked to each other and are interdependent. Although most of these guarantees should be in place for all suspects and accused, there are additional aspects linked to the specific situation of children.¹⁶²

4.3.1. The place of parents or legal guardians

A first additional safeguard is the presence of the child's parents or legal guardians during the complete process, in order to give the child *general psychological and emotional*

¹⁵⁸ Havana Rules, §§ 1 & 3; Riyadh Guidelines; UNCommRC GC 10, §§2, 4,15 & 16; European rules Juvenile offenders, §52.1, 54 & 55 ; CoE Guidelines on child-friendly justice, §83.

¹⁵⁹ UNCommRC GC 10, §4.

¹⁶⁰ UNCommRC GC 10, §37.

¹⁶¹ Beijing Rules, §1.1 & 17.1.; Havana Rules; UNCommRC GC 10, §§3 & 22; European rules Juvenile offenders; CoE Guidelines on child-friendly justice, §24; for example: choosing for alternatives to criminal proceedings; addressing the situation after the decision on a sentence or sanction, relating to the conditions, treatment, etc.

¹⁶² UNCommRC GC 10, §40; It should be mentioned that the presumption of innocence and the examination of witnesses, albeit vital principles, shall not be outlined, because it would be a simple reiteration of what counts for adults, and because it is less relevant for the discussion below (*infra*).

*assistance*¹⁶³.¹⁶⁴ Therefore, the competent authorities should, as soon as possible, encourage their involvement by at least notifying the parents or legal guardians of the apprehension of their child and the reasons thereto.¹⁶⁵

However, that does not mean that a parent or legal guardian can take over the role of the child's defence, nor does this right to be present entail that they will be involved in a decision-making process. The presence of the parents or legal guardians can be limited, restricted, or even refused by a competent authority, based on the request of the child and or assistant, or more importantly when their presence is not in the best interests of the child.¹⁶⁶ In addition, EU law requires the notification of another appropriate adult, which can be a lawyer or an entrusted person, to be notified.¹⁶⁷

Moreover, the UNCommRC recommends national legislation that prescribes explicitly the maximum involvement of the parents or legal guardian's in criminal proceedings.¹⁶⁸

In the same spirit, the same Committee expresses great concerns about laws punishing parents for the child's offences. This is maybe, acceptable in civil proceedings (under very strict circumstances), but not in criminal proceedings as it would do more damage than good for the reintegration of the child.¹⁶⁹

4.3.2. The right to information and interpretation

In order to effectively participate in proceedings¹⁷⁰(*infra*)¹⁷¹, a child and their parents must be promptly, precisely and directly informed of their rights (particularly, the rights to be

¹⁶³ UNCommRC GC 10, §53.

¹⁶⁴ See also: Beijing Rules, §7.1.

¹⁶⁵ Beijing Rules, §10.1; UNCommRC GC 10, §54; CoE Guidelines on child-friendly justice, IV.A.1, §1 & C., §§28-29; see also: Art. 24.3, CFREU; European rules Juvenile offenders, §14; ECtHR, *Okkali v. Turkey* (52067/99), 17 October 2006, §69; ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008, §74; ECtHR, *Adamkiewicz v. Poland* (54729/00), 2 March 2011, §70; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §205; Art.5.2, Directive on the right to a lawyer and communication.

¹⁶⁶ Beijing Rules, §15.2; UNCommRC GC 10, §53; CoE Guidelines on child-friendly justice, IV.D.2, §§37 & 42.

¹⁶⁷ Art.5.2, Directive on the right to a lawyer and communication.

¹⁶⁸ UNCommRC GC 10, §54.

¹⁶⁹ UNCommRC GC 10, §55.

¹⁷⁰ UNCommRC GC 10, §§46 & 62.

¹⁷¹ 4.3.5, p.34.

silent and not to incriminate one self, and the right to legal assistance)¹⁷², the charges¹⁷³, the process and criminal proceedings, and the possible measures.¹⁷⁴ ‘Prompt’ implies that they have to inform the child as soon as possible, meaning the moment they decide to start procedural steps (and even when they decide not to take the judicial path¹⁷⁵).¹⁷⁶

Moreover, he or she must also receive information on his or her options (including the available remedies)¹⁷⁷, the possible decisions and consequences, and the conditions under which he or she will be interviewed.¹⁷⁸

Furthermore, this principle also prescribes the way in which the information should be given and who is responsible to do so. Evidently, the authorities must ensure that the child actually understands the charges, by providing free assistance of a qualified interpreter (at all stages of the process, including the trial) when the child does not understand the working language, and by providing a written translation of all essential documents.¹⁷⁹ The same counts for children with speech impairments or other disabilities, the UNCommRC recommends “*adequate and effective assistance by well-trained professionals e.g. sign language*”¹⁸⁰.¹⁸¹ If this right to interpretation and translation has been provided, it must be noted down.¹⁸²

¹⁷² Beijing Rules, §7.1; ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008, §§65 & 73-74; ECtHR, *Adamkiewicz v. Poland* (54729/00), 2 March 2011, §88; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §205; Art. 3.1, Directive on the right to information.

¹⁷³ See also: Art.6 & 7, Directive on the right to information.

¹⁷⁴ Art. 2.b.ii, UNCRC; UNCommRC GC 12, §60; CoE Guidelines on child-friendly justice, IV.A.1, §§1, 3 & 5; see also: Art. 6.3.a, ECHR; Art. 14.3.d, & 9.2, ICCPR; Beijing Rules, §7.1; UNHRC, GC 32, §42; ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008, §67; ECtHR, *Adamkiewicz v. Poland* (54729/00), 2 March 2011, §70; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §§195; In case of detention: CPT Standards, §98.

¹⁷⁵ Art. 40.3.b, UNCRC.

¹⁷⁶ UNCommRC GC 10, §47; CoE Guidelines on child-friendly justice, IV.A.1, §1.

¹⁷⁷ Beijing Rules, §7.1.

¹⁷⁸ UNCommRC GC 12, §§25 & 41.

¹⁷⁹ Art. 40 2 vi, UNCRC; UNCommRC GC 10, §§47 & 62; CoE Guidelines on child-friendly justice, IV.A.1, §2 & C., §28; see also: Art. 6.3.e, ECHR; Art. 14.3.f, ICCPR; Art. 2.1, 2.4, 3.1 & 5.1, Directive on the right to interpretation and translation.

¹⁸⁰ UNCommRC GC 10, §63.

¹⁸¹ Art. 23 UNCRC; Art. 2.3, Directive on the right to interpretation and translation; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §195.

¹⁸² Art. 7, Directive on the right to interpretation and translation.

This principle also means that the child must be informed in a child-friendly language (adapted to their age and maturity), which transforms the purely legal jargon.¹⁸³ Therefore, the interpreter must be trained and have sufficient knowledge of and experience with the work with children.¹⁸⁴ The information should not only be communicated in writing, since it often requires oral explanation.¹⁸⁵ In addition, upon arrest the EU prescribes a letter of rights in simple and accessible language.¹⁸⁶

Furthermore, it is not sufficient to simply inform the parents or legal guardians and let them take care of the rest. Both the child and parents or legal guardians should be informed in a comprehensible manner¹⁸⁷ and this throughout the whole process.¹⁸⁸

Finally, these obligations and responsibilities to inform the child, making sure that he or she understands the charges and consequences, lies with the competent authorities.¹⁸⁹

4.3.3. The right to be heard

In criminal proceedings the accused or suspected child must have the opportunity to be heard in order to effectively participate (*infra*)^{190, 191}. As mentioned before, this prerequisite is embedded in Article 12 UNCRC¹⁹² and entails that the child can express his or her views, has the right to do so directly, not only via a representative or another appropriate body (when this is in the child's best interests), and that their views must be *given due weight in accordance with their age and maturity*.¹⁹³ Thus, 'simply' listening to the child is not

¹⁸³ UNCommRC GC 10, §47; UNCommRC GC 12, §34; CoE Guidelines on child-friendly justice, IV.A.1, §2 & C., §28.

¹⁸⁴ UNCommRC GC 10, §62.

¹⁸⁵ UNCommRC GC 10, §48.

¹⁸⁶ Art. 4. & 5, Directive on the right to information.

¹⁸⁷ UNCommRC GC 10, §48; CoE Guidelines on child-friendly justice, IV.A.1, §1.

¹⁸⁸ CoE Guidelines on child-friendly justice, IV.A.1, §1.

¹⁸⁹ UNCommRC GC 10, §48; CoE Guidelines on child-friendly justice, IV.A.1, §1.

¹⁹⁰ 4.3.5, p.34.

¹⁹¹ See also: UNCommRC GC 12, §3; *Kuptsov and kuptsova v. Russia* (6110/03), 3 March 2011, §100; UNCommRC GC 14, §89.

¹⁹² See also: Beijing Rules, §14.2; UNCommRC GC 14, §89.

¹⁹³ UNCommRC GC 10, §44; CoE Guidelines on child-friendly justice, IV.D.3, §§44-45; see also: Art. 24.1, CFREU.

sufficient in order to ensure this right; they should consider his or her views as a significant factor.¹⁹⁴

However, to effectively realise this right, it must be ensured that the child is well informed about all matters and the conditions under which he or she is being heard, as extensively discussed before.¹⁹⁵

It goes without saying that this right must be ensured during the complete process (including the pre-trial stage, questioning by the police, prosecutor and investigative judge, and the sentencing and implementation of the sentence). The child should also have this opportunity in relation to possible (alternative) measures, and must never be treated as an object.¹⁹⁶

There can be no misinterpretation: it remains a right and not an obligation. The child should never be pressured to express his or her views or other's views. In the same spirit, the responsible authorities must be aware of the risks of a conflict of interest between the child and his or her representative. This representative should have sufficient knowledge and understanding of all aspects at hand and should always act exclusively in the interests of the child and not of others. The UNCommRC even recommends the State Parties to adopt codes of Conduct in this respect.¹⁹⁷

The child should not be interviewed or heard for more and/or longer than necessary, because the hearing is “*a difficult process that can have traumatic impact on the child*”¹⁹⁸. If multiple interviews do occur, because it is necessary, (preferably) the same person should carry it out. In addition, it must take place in an adapted environment (preferably via video or audio-recording)¹⁹⁹ and under good conditions (*infra*)²⁰⁰ that enable and encourage the

¹⁹⁴ UNCommRC GC 12, §28 & 44;

¹⁹⁵ UNCommRC GC 10, §44; UNCommRC GC 12, §§25 & 82; CoE Guidelines on child-friendly justice, IV.D.3, §48.

¹⁹⁶ UNCommRC GC 10, §45; UNCommRC GC 12, §§57 & 58.

¹⁹⁷ UNCommRC GC 10, §§ 43-45; UNCommRC GC 12, §§22-23, 36; CoE Guidelines on child-friendly justice, IV.D.3, §46.

¹⁹⁸ UNCommRC GC 12, §24; see also: UNCommRC GC 14, §93.

¹⁹⁹ CoE Guidelines on child-friendly justice, IV.D.5, §59.

²⁰⁰ 4.3.7, p.37.

child.²⁰¹ The person carrying out the hearing must be willing to listen and seriously consider his or her views.²⁰² This should be confirmed by informing the child in which way the views were considered in a certain decision.²⁰³

Finally, questioning of the child must be conducted in the presence of the parents, with possible exception or legal guardians (*supra*)²⁰⁴, and with access to legal assistance (*infra*)^{205 206}.

4.3.4. Assessment of the child's best interests

Since all decisions related to the child must take into account the best interests of the child as a primary consideration, it is vital that those interests are assessed. The international standards are clear on this point and require adequate, trained, and experienced professionals (preferably a multidisciplinary team) to consider the child's individual information objectively, in order to determine the child's best interests.²⁰⁷

It also entails that a child's best interests can only be assessed on a case-by-case basis, adapted to their specific situation (including their social and cultural context, individual characteristics, specific needs). In this respect, the UNCommRC advises the States to create a non-exhaustive list of elements which should be included in the determination. The child's view, identity, family environment and relations, care, protection, and safety, vulnerability, health, and education are all vital elements that must be considered. The weight given to these elements will depend on their relevance and on other factors.²⁰⁸

Finally, the *Beijing Rules* require the competent authorities (before the trial) to make a social inquiry report (on the child's background, circumstances, living conditions,

²⁰¹ UNCommRC GC 12, §§23-24 & 34; CoE Guidelines on child-friendly justice, IV.D.6, §§64, 66-67.

²⁰² UNCommRC GC 12, §42.

²⁰³ UNCommRC GC 12, §45; CoE Guidelines on child-friendly justice, IV.D.3, §49.

²⁰⁴ 4.3.1, p.28.

²⁰⁵ 4.3.6, p.35.

²⁰⁶ UNCommRC GC 10, §58; CoE Guidelines on child-friendly justice, IV.C, §30; ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008, §65; ECtHR, *Salduz v. Turkey* (36391/02), 17 November 2008, §54.

²⁰⁷ UNCommRC GC 14, §§36 & 94.

²⁰⁸ UNCommRC GC 14, §§32, 43-45, 52-80.

conditions of the offence, etc.) in order to enable the Court to make a reasoned adjudication of the case.²⁰⁹

4.3.5. Effective participation

The fact that a child is subject to criminal proceedings, and thus can be held criminally responsible (including sentenced), clearly implies that the authorities find him or her competent to actively participate. Moreover, in order to ensure a fair trial, the child must be able to do so.²¹⁰

This right is enshrined (e.g.)²¹¹ in Article 40 UNCRC²¹² and requires many different prerequisites and is linked to all necessary safeguards.²¹³ It does not suffice that the child is present during the hearings and trial, but it requires him or her to be heard and to be able to follow the proceedings.²¹⁴

First, this means that the child must understand the charges brought against him or her and also be aware of the possible consequences and sanctions.²¹⁵ The child should be able “*to direct his or her legal representative, to challenge witnesses, to provide an account of events, make appropriate decisions about evidence, testimony and measures to be imposed*”²¹⁶. This is only possible when the right to interpretation and information (*supra*)²¹⁷ on these matters and the right to legal representation (*infra*)²¹⁸ are effectively fulfilled.

Secondly, the atmosphere, procedures and physical surroundings in which the child is being heard (pre- and during trial) must be child-friendly (*infra*)²¹⁹ and adapted in accordance to

²⁰⁹ Beijing Rules, §16.1.

²¹⁰ European rules Juvenile offenders, §13; UNCommRC GC 10, §§45-46; ECtHR, *T. v. UK* (24724/94), 16 December 1999, §§83; ECtHR, *V. v. UK* (24888/94), 16 December 1999, §85.

²¹¹ See also: Beijing Rules, §14.2.

²¹² Art. 40, 2.b.iv, UNCRC.

²¹³ See: Beijing Rules, Commentary to §14.

²¹⁴ ECtHR, *S.C. v. UK* (60958/00), 15 June 2004, §28.

²¹⁵ UNCommRC GC 10, §46.

²¹⁶ UNCommRC GC 10, §46.

²¹⁷ 4.3.2, p.29.

²¹⁸ 4.3.6, p.35.

²¹⁹ 4.3.7, p.37.

the child's age, maturity and emotional and intellectual capacities.²²⁰ In the same spirit, Article 6.1 ECHR the ECtHR prescribes and confirms these requirements.²²¹

4.3.6. Free legal and other appropriate assistance

At a very early stage, meaning the moment the competent authorities interrogate the child, he or she has the right to free legal or other appropriate assistance. This assistance must be present during all stages of the process, and not only during the trial.²²² The right to legal assistance is imbedded in several Conventions, EU law and soft-law documents.²²³

Although this right is crucial for the preparation of the child's defence, Article 40²²⁴ prescribes a rather lenient obligation for the State. The UNCommRC recommends trained legal assistance, referring to expert lawyers or paralegals, but it does not oblige the States to always provide for this kind of assistance. It leaves it up to the State to decide which kind of assistance (for instance by a social worker) is suitable for the case at hand. However, it does stress the importance of a certain level of legal knowledge and profound training in order to assist suspected or accused children.²²⁵ The *Beijing rules* and other documents²²⁶ prescribe that the juvenile has "*the right to be represented by a legal adviser or to apply for free legal aid*"²²⁷. In any case, during trial a lawyer must assist the child.²²⁸

²²⁰ UNCommRC GC 10, §46; ECtHR, *S.C. v. UK* (60958/00), 15 June 2004, §28.

²²¹ ECtHR, *T. v. UK* (24724/94), 16 December 1999, §§83 & 85-89; ECtHR, *V. v. UK* (24888/94), 16 December 1999, §§85, 87-91; ECtHR, *S.C. v. UK* (60958/00), 15 June 2004, §§28-35; ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008, §67; *Güvec v. Turkey* (70337/01), 20 January 2009, §§123-124 & 132; *Kuptsov and kuptsova v. Russia* (6110/03), 3 March 2011, §§100-101; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §§195.

²²² UNCommRC GC 10, §52; CoE Guidelines on child-friendly justice, IV.C, §28 & D.2, §§37-38; see also: Beijing Rules, §7.1.

²²³ Art. 6.3.b, ECHR; Art. 14 3.b., ICCPR; UNCommRC GC 10, §50; Art. 47, CFREU; CoE Guidelines on child-friendly justice, IV.D.2, §41; UNCommRC GC 14, §96.; Art. 3, Directive on the right to a lawyer and communication.

²²⁴ Art. 40, 2.b.ii, UNCRC.

²²⁵ UNCommRC GC 10, §49.

²²⁶ Art. 6.3.c, ECHR; Art. 14.3.d, ICCPR; Art. 47, CFREU.

²²⁷ Beijing Rules, §15.1.

²²⁸ UNHRCComm, GC 32, §42; Directive on the right to a lawyer and communication.

In order to guarantee the right to legal assistance States must take measures in order to ensure “*accessible, age-appropriate, effective and responsive*”²²⁹ legal aid, taking into account the legal and social needs of children, and with the exclusion of a means test.²³⁰

The child and his or her assistant must have sufficient time and appropriate facilities in order to provide him or her with all necessary information, and to effectively prepare the child’s defence.²³¹ Where necessary, interpretation must be available for the communication between the child and his or her lawyer.²³² Furthermore, it is essential for States to ensure that the written and oral communications between the child and his or her assistant stay completely confidential.²³³ This includes the obligation to respect and protect the child’s right to privacy²³⁴ (*infra*)²³⁵.

In addition, the juvenile might need also other assistance (in relation to education, employment, etc.) and the States must take efforts in order to deliver this practical and helpful information, because it is vital for their rehabilitative process.²³⁶

Finally, on the European level the right to free legal assistance and the presence of a lawyer has been extensively addressed by the Directive on the right to a lawyer and communication and the ECtHR in cases concerning child suspects and accused. In fact the ECtHR is of the opinion that: a juvenile has the right to free legal assistance; the legal assistant must be present from the initial stage of interrogation and during all stages of the procedure, and must be able to participate in the hearings before the investigative judge and the court.²³⁷ This presence of legal assistance is necessary in order for the juvenile to be

²²⁹ Amnesty International & Save the Children, joint paper, p.8, §1.

²³⁰ United Nations, General Assembly, *Resolution on UN Principles and Guidelines on access to legal aid in criminal justice systems*, 20 December 2012, UN Doc. GA Res. 67/187, principle 10;

²³¹ Art. 6.3.b, ECHR; Art. 14 3.b., ICCPR; UNCommRC GC 10, §50; Art. 47, CFREU; UNHRCComm, GC 32, §§32-34; CoE Guidelines on child-friendly justice, IV.D.2, §41; see also: Art.3.3.a, Directive on the right to a lawyer and communication.

²³² Art. 2.2, Directive on the right to interpretation and translation.

²³³ UNCommRC GC 10, §50; see also: Art.4, Directive on the right to a lawyer and communication.

²³⁴ Art. 16, UNCRC; UNCommRC GC 10, §50.

²³⁵ 4.3.11, p.41.

²³⁶ Beijing Rules, §24.

²³⁷ ECtHR, *Quaranta v. Switzerland* (12744/87), 24 May 1991, §§27, 30 & 33-36; ECtHR, *Nortier v. the Netherlands* (13924/88), 24 August 1993, §36; ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008, §§66, 70 & 77; ECtHR, *Salduz v. Turkey* (36391/02), 17 November 2008, §§52, 54 & 56; ECtHR, *Güvec v.*

informed of his or her rights and to prepare (in confidentiality) and present his or her case *in an adequate manner*.²³⁸ Based on the vulnerability of a suspected or accused child and the power imbalance in these kinds of proceedings, the ECtHR does not easily accept a waiver of this right, and only accepts it when “*it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct.*”²³⁹

4.3.7. Child-friendly environment

The atmosphere in which the (complete) criminal proceedings take place must be adapted to the child’s capacities, and enable the child to express him or herself, and to fully and effectively participate in the proceedings.²⁴⁰

First and foremost the hearing and interview of a child, before and during the trial, both in front of the competent authorities and the court, must always be conducted under conditions that take into account the child’s situation and in an environment that ensures the child’s feeling of security and in which it feels respected and is able to freely express his or her views.²⁴¹ Hence, the hearing of a child should be conducted in confidentiality and the court and other hearings must take place behind closed doors, except when it is clearly not in the best interests of the child.²⁴²

Turkey (70337/01), 20 January 2009, §§123-124 & 132; ECtHR, *Adamkiewicz v. Poland* (54729/00), 2 March 2011, §§82, 84, 87-89; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §§197-199, 203, 205, 207 & 209.

²³⁸ ECtHR, *Quaranta v. Switzerland* (12744/87), 24 May 1991, §36; ECtHR, *Okkali v. Turkey* (52067/99), 17 October 2006, §69; ECtHR, *Güvec v. Turkey* (70337/01), 20 January 2009, §§123-124 & 132; ECtHR, *Adamkiewicz v. Poland* (54729/00), 2 March 2011, §86; *Kuptsov and kuptsova v. Russia* (6110/03), 3 March 2011, §101; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §§197-199, 203, 205, 207 & 209.

²³⁹ ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008, §68; ECtHR, *Salduz v. Turkey* (36391/02), 17 November 2008, §§59-60.

²⁴⁰ UNCommRC GC 12, §§60 & 134.e.

²⁴¹ UNCommRC GC 12, §23; CoE Guidelines on child-friendly justice, IV.D.5, §§ 54, 57 & D.6, §64; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §§195 & 208.

²⁴² Art. 6.1, ECHR; Art. 14.1, ICCPR; UNCommRC GC 12, §§43 & 61.

Furthermore, the environment cannot be hostile, insensitive or inappropriate for the child's age, and the proceedings must be child accessible and appropriate. As previously mentioned, this also requires that all information is provided in a child-friendly language.²⁴³ In addition, self-advocacy must be adequately supported, the staff must be appropriately trained (*infra*)²⁴⁴, the design of the Court should be appropriate (including sight screens), the clothing of judges and lawyers should not be intimidating, and there should be separate waiting rooms for children.²⁴⁵

Finally, the Court sessions must be adapted to the child's needs and requires regular breaks. The hearings should be concise and disruptions and distractions should be kept to a minimum. Before these sessions the child must be familiarised with the Court's layout and other facilities, the roles of all the officials that will be involved, etc.²⁴⁶

On the European level, the ECtHR is of the opinion that child un-friendly environment in which the trial against a child takes place, cannot amount to a violation of Article 3 ECHR, it does find, under certain circumstance, a violation of Article 6.1 ECHR (the right to a fair trial). It has also stated that the following circumstances should be avoided: the high level of media and public interest, lengthy trial, incomprehensible, formal and intimidating Court proceedings and structure, etc.²⁴⁷

4.3.8. Statements made by the child

As previously mentioned, children have the right to be heard and to make statements. As a principle, it can never be presumed that the child's statements are invalid or untrustworthy solely on the basis of his or her age.²⁴⁸ On the other hand, it is possible for the Court to

²⁴³ UNCommRC GC 12, §34; CoE Guidelines on child-friendly justice, IV.C, §33 & D.5, §§54 & 56; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §§195 & 208.

²⁴⁴ 4.3.13, p.51.

²⁴⁵ UNCommRC GC 12, §34.

²⁴⁶ CoE Guidelines on child-friendly justice, IV.D.5, §§55 & 61; Moreover, specialised youth courts or chambers with child-friendly procedures and institutions should be in place (CoE Guidelines on child-friendly justice, IV.D.5, §63).

²⁴⁷ ECtHR, *T. v. UK* (24724/94), 16 December 1999, §§76-78 & 85-89; ECtHR, *V. v. UK* (24888/94), 16 December 1999, §§78-80 & 87-91; ECtHR, *S.C. v. UK* (60958/00), 15 June 2004, §§28-30; ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008, §67.

²⁴⁸ CoE Guidelines on child-friendly justice, IV.D.6, §73.

refuse certain statements or testimonies made by a child, based on the best interest of the child and the right of all persons “*not to be compelled to testify against himself or to confess guilt*”²⁴⁹ ²⁵⁰.

Evidently, a child can and must never be tortured or be subject to inhuman or degrading treatment in order to make he or she confess or admit an act or omission.²⁵¹ Admissions or confessions that result from this kind of treatment can never be used as evidence.²⁵²

This is not only the case when a child’s testimony or confession is the result of physical force or other human rights violations. A child could also confess something untrue due to the child’s age and maturity, her or his development, the length of the interrogations and custody, the lack of understanding, fear of unknown consequences or of possible deprivation of liberty, or promises made by the competent authorities.²⁵³ Therefore, the aforementioned access to a legal or other assistant (*supra*)²⁵⁴ and the presence of the parents or legal guardians (*supra*)²⁵⁵ during questioning, are vital.²⁵⁶ If Confessions are made without properly informing them, or without advice and or guidance, it violates Article 6 ECHR (due process and defence rights) and should not be seen as voluntary.²⁵⁷

Thus, the interrogating authorities must be well trained (*infra*)²⁵⁸ and the interrogation techniques must be independently scrutinised in order to prove that the evidence was given voluntary and that the circumstances in which it took place were acceptable. In determining the reliability of an admission or confession Courts must take into account the complete (aforementioned) list of elements and requirements.²⁵⁹

²⁴⁹ 14.3.g, ICCPR.

²⁵⁰ UNCommRC GC 10, §56; CoE Guidelines on child-friendly justice, IV.D.6, §72.

²⁵¹ Art. 37, UNCRC.

²⁵² Art. 15, UNCAT.

²⁵³ UNCommRC GC 10, §57; ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008, §65.

²⁵⁴ 4.3.6, p.35.

²⁵⁵ 4.3.1, p.28.

²⁵⁶ UNCommRC GC 10, §58; CoE Guidelines on child-friendly justice, IV.C, §30; ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008, §65; ECtHR, *Salduz v. Turkey* (36391/02), 17 November 2008, §54.

²⁵⁷ ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008, §§ 75, 83 & 86; ECtHR, *Salduz v. Turkey* (36391/02), 17 November 2008, §§54 & 57; ECtHR, *Adamkiewicz v. Poland* (54729/00), 2 March 2011, §§83 & 85; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §208.

²⁵⁸ 4.3.13, p.51.

²⁵⁹ UNCommRC GC 10, §58.

4.3.9. Decisions without undue delay

Every person suspected or accused of a crime has the right to be tried by a competent, independent and impartial Court or Tribunal²⁶⁰ “without (undue)²⁶¹ delay”,²⁶² meaning that the time between the criminal offence and the final decision “should be as short as possible”.²⁶³ This is paramount for children, because the longer this process takes place the more it could lose its desired impact, which should be mainly pedagogical. Furthermore, it increases the child’s risk of stigmatisation.²⁶⁴

To fulfil this obligation the UNCommRC recommends to “set and implement time limits for the period between the Commission of the offence 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 decision by the court or other competent judicial body”,²⁶⁵.

Adjacently, it requires the States to make them much shorter than the limits they apply for adults, without undermining the child’s human rights and the necessary safeguards.²⁶⁶ In other words, the shorter time limit can never be (ab)used to justify the lack of safeguards and or the violation of human rights.

On the European level, the ECtHR has assessed the reasonable time of criminal proceedings by taking into account several elements, for example: the complexity of the case, number of suspected or accused, levels of jurisdiction, the principle of proper administration, evidence gathering, the age of the children, etc.²⁶⁷

In the same spirit, the Courts must motivate, justify, and explain the Judgements made, and must explicitly include the reasoning, all specific circumstances, the considered elements,

²⁶⁰ Art. 6.1, ECHR; Art. 14.1, ICCPR; Art. 47,§2, CFREU; ECtHR, *Nortier v. the Netherlands* (13924/88), 24 August 1993, §30; ECtHR, *Adamkiewicz v. Poland* (54729/00), 2 March 2011, §99.

²⁶¹ for a child Art.40.2.b.iii, UNCRC prescribes ‘without delay’.

²⁶² Art.14.3.C, ICCPR; see also: (reasonable time) Art. 6.1, ECHR; (reasonable time) Art. 47, CFREU.

²⁶³ UNCommRC GC 10, §51.

²⁶⁴ Beijing Rules, §20; UNCommRC GC 10, §51.

²⁶⁵ UNCommRC GC 10, §52.

²⁶⁶ UNCommRC GC 10, §52; CoE Guidelines on child-friendly justice, IV.D.4, §50.

²⁶⁷ ECtHR, *Kosti a.o. v. Turkey* (74321/01), 3 May 2007, §36; *Kuptsov and kuptsova v. Russia* (6110/03), 3 March 2011, §§92 & 94.

and the balance made between them. If the best interests of the child were outweighed by other elements, this must be explained in detail.²⁶⁸

Finally, Court decisions or judgements should be communicated and explained to the child by his or her lawyer, legal guardian or representative, including the possible measures, sanctions or possibilities to appeal.²⁶⁹ Decisions should be enforced and implemented without delay. Implementation by force is solely acceptable as a last resort.²⁷⁰

4.3.10. The right to appeal

The aforementioned right to appeal is another crucial element of the fair trial principle that is imbedded in all relevant human rights documents.²⁷¹ It implies that every adjudicated child has the right to appeal against the decision finding him or her guilty and against the imposed measure, regardless of the seriousness of the offence.²⁷² Evidently, the higher body or authority deciding on the appeal must be *competent, independent and impartial*.²⁷³ In the same spirit, children must have access to appeal or another complaint procedure, when their rights are violated, including the right to be heard.²⁷⁴

4.3.11. Respect for and protection of Privacy and family life

Based on Article 16 UNCRC, and all aforementioned documents, the child's right to privacy, including his or her correspondence, must be respected and protected during the complete juvenile process.²⁷⁵

This rule is mainly driven by the prevention of harm and adverse effects, which can be caused by undue publicity or by stigmatisation. Hence, no information possibly leading to the identification of the child can be published, because of the aforementioned

²⁶⁸ UNCommRC, GC 14, §97.

²⁶⁹ CoE Guidelines on child-friendly justice, IV.E, §75.

²⁷⁰ European rules Juvenile offenders, §9; CoE Guidelines on child-friendly justice, IV.E, §§76 & 78.

²⁷¹ Beijing Rules, §7.1.; ECHR; 14.5, ICCPR; 40 2 b.v., UNCRC; Art. 47.1, CFREU.

²⁷² UNCommRC GC 10, §§60-61; CoE Guidelines on child-friendly justice, IV.D.1, §34; UNCommRC, GC 14, §98.

²⁷³ UNCommRC GC 10, §60; see also: ECtHR, *Nortier v. the Netherlands* (13924/88), 24 August 1993, §36; UNHRCComm, GC, §45.

²⁷⁴ UNCommRC GC 12, §47.

²⁷⁵ Beijing Rules, §8; Art. 16 & 40 2.b.vii, UNCRC; European rules Juvenile offenders, §16; UNCommRC GC 10, §§50 & 64; CoE Guidelines on child-friendly justice, IV.A.2, p.22, §§6-10.

stigmatisation and because of the negative impacts it could have on the child's life, including education, work, housing, etc.²⁷⁶ This implies that authorities must be very careful with press releases, and should only use this outlet in very exceptional cases, making sure that the child cannot be identified. In order to prevent the media from violating the child's rights, States should take legislative measure. If journalists do violate this right, the authorities must sanction them.²⁷⁷

In addition, the right to privacy also means that no one should interfere with the child's privacy and correspondence, including the confidential communications with his or her (legal) assistant (*supra*).²⁷⁸ All hearings, including those in front of a court, should be held behind closed doors and exceptions to this rule should be very limited, well-defined, clearly stated in the law and decided upon by a Court in writing (and open for appeal).²⁷⁹ In the same spirit, the *CoE Guidelines on Child-friendly Justice* proposes that hearings and interviews take place on camera, in the sole presence of people directly involved.²⁸⁰

Also the pronouncement of the verdict in public should be done in a way that does not reveal the child's identity. The same discretion is required of all professionals involved in the implementation of the measures. They must keep all revealing information confidential in their external contacts.²⁸¹

Complementary, the child's records should also be kept confidential in relation to third parties, with the exception of persons directly involved in one of the procedural stages. Those records should not be used to enhance sentencing of the same person in the future, nor should they be utilised in future cases in which he or she is involved as an adult.²⁸² In this regard the UNCommRC recommends the States to adopt rules that make it possible to

²⁷⁶ UNCommRC GC 10, §64; CoE Guidelines on child-friendly justice, IV.A.2, §6; see also: Beijing Rules, commentary to §8.

²⁷⁷ UNCommRC GC 10, §64; CoE Guidelines on child-friendly justice, IV.A.2, §7; see also: Beijing Rules, commentary to §8.

²⁷⁸ UNCommRC GC 10, §50; 4.3.6, p.34.

²⁷⁹ UNCommRC GC 10, §§65-66; see also: Art. 6.1, ECHR; 14.1, ICCPR; UNHRCComm, GC 32, §29.

²⁸⁰ CoE Guidelines on child-friendly justice, IV.A.2, §9 & D.5, §59.

²⁸¹ UNCommRC GC 10, §66; CoE Guidelines on child-friendly justice, IV.A.2, §10; see also: Art. 6.1, ECHR; Art 14.1, ICCPR.

²⁸² Beijing Rules, §§21.1-21.2; Havana Rules, §19; UNCommRC GC 10, §66; European rules Juvenile offenders, §16; CoE Guidelines on child-friendly justice, IV.A.2, §8 & E, §83.

automatically remove the child's offences, committed until the age of 18, from his or her criminal record.²⁸³

4.3.12. Deprivation of liberty and its alternatives: protecting the child's human dignity prior, pending and post trial

The leading principles and rules for the use of deprivation of liberty are, inter alia, enshrined in Article 37 UNCRC. It addresses the requirements for the deprivation of a child's liberty to be lawful and not arbitrary. Subsequently, it contains provisions dealing with the conditions and treatment of children deprived of their liberty. Finally, it provides for procedural rights of children deprived of their liberty. The following discussion will follow the same order and will be complemented with other international provisions.²⁸⁴

4.3.12.1. Deprivation of liberty as a last resort and for the shortest necessary period of time

Since the deprivation of a child's liberty can have devastating consequences, Article 37.b of the UNCRC prescribes that "*no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time*".²⁸⁵

More specifically, the use of pre-trial detention that endangers the aforementioned principle of presumption of innocence must be avoided to the maximum and cannot be used as punishment. Therefore, States must adopt laws (prescribing clear conditions and requirements to hold a child in pre-detention, including a clear time limitation) in order to reduce and avoid the practice. This measure is only possible in exceptional

²⁸³ UNCommRC GC 10, §67.

²⁸⁴ Furthermore, it is important to mention that the *UN Standard minimum rules for the treatment of prisoners* are also applicable when relevant, but in manner taking into account the needs, age, sex and personality. (Beijing Rules, §27); Havana Rules.

²⁸⁵ See also: UNHRC Comm, GC 32, §42; CoE Guidelines on child-friendly justice, IV.A.6, §19; PA Report child-friendly justice, §§18, 21 & 25; CoE Strategy Rights of the Child, §54; ECtHR, *Nart v. Turkey* (20817/04), 06 May 2008, §31; ECtHR, *Güvec v. Turkey* (70337/01), 20 January 2009, §108; ECtHR, *Korneykova v. Ukraine* (39884/05), 19 January 2012, §§33, 43-44.

circumstances²⁸⁶, can only be taken by a competent, independent, and impartial authority, and must be subject to regular review. Children deprived of their liberty before or pending trial should be released as soon as possible, but if necessary the Court can decide so under certain conditions.²⁸⁷

In relation to the concept of “*shortest appropriate period of time*”, on European level, the ECtHR is of the opinion that cannot trespass a reasonable time, depending on “*all the facts arguing for or against the existence of a genuine requirement of public interest*”²⁸⁸ and taking into account the child’s age and his or her presumption of innocence. Thus, the reasonable suspicion that the detained child committed the offence, and the severity of the offence will not be sufficient to justify the length of the measure and can lead to the violation of Article 5.3 ECHR.²⁸⁹

In the same spirit, the ECtHR is of the opinion that if the deprivation of liberty concerns an interim measure of detention, preliminary (for example) to a regime of educational supervision, this detention must be as short as possible. This also entails that the states must prepare this alternative regime well and should put in place sufficient and appropriate facilities to achieve this.²⁹⁰

Once the child has been found guilty of the alleged offences, a competent, independent and impartial Court²⁹¹ must decide on the most suitable measure(s). The law on the basis of

²⁸⁶ See also: Havana Rules, §17; ECtHR, *Dinc and cakir v. Turkey* (66066/09), 9 July 2013, §42.

²⁸⁷ Beijing Rules, §13.2; European rules Juvenile offenders, §§10, 108, 109 & 111; UNCommRC GC 10, §§80-81; see also: Art. 9.3, ICCPR; *Kuptsov and kuptsova v. Russia* (6110/03), 3 March 2011, §§81-82; ECtHR, *J.M. v. Denmark* (34421/09), 13 November 2012, §54; see also: CPT Standards, §99.

²⁸⁸ ECtHR, *Selcuk v. Turkey* (21768/02), 10 January 2006, §30.

²⁸⁹ ECtHR, *Selcuk v. Turkey* (21768/02), 10 January 2006, §30, 31 & 34-36; ECtHR, *Kosti a.o. v. Turkey* (74321/01), 3 May 2007, §30; ECtHR, *Nart v. Turkey* (20817/04), 06 May 2008, §§29 & 32-33; ECtHR, *Güvec v. Turkey* (70337/01), 20 January 2009, §110; ECtHR, *Korneykova v. Ukraine* (39884/05), 19 January 2012, §§43-44 & 47-48; ECtHR, *Kuptsov and kuptsova v. Russia* (6110/03), 3 March 2011, §§78-80 & 89-90; ECtHR, *J.M. v. Denmark* (34421/09), 13 November 2012, §§54, 59, & 62-63; ECtHR, *Dinc and cakir v. Turkey* (66066/09), 9 July 2013, §§ 58-59 & 64.

²⁹⁰ ECtHR, *Bouamar v. Belgium* (9106/80), 29 February 1988, §§50, 52 & 53; ECtHR, *D.G. v. Ireland* (39474/98), 16 May 2002, §§76, 79-85; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §§167-169.

²⁹¹ See for example: ECtHR, *T. v. UK* (24724/94), 16 December 1999, §§111-113; ECtHR, *V. v. UK* (24888/949, 16 December 1999, §§112-114; ECtHR, *Kuptsov and kuptsova v. Russia* (6110/03), 3 March 2011, §§113-114.

which the Court has to decide, must give a variety of alternatives (corporal punishment and death penalty evidently excluded)²⁹² to institutionalisation and deprivation of liberty.²⁹³ As children always have the right to be treated in a way that promotes their reintegration and that makes them capable of assuming a constructive role in society, a wide range of alternative measures, appropriate to the child's well-being and proportionate to the child's specific circumstances and the offence, should be available.²⁹⁴ Article 40.4. UNCRC and other documents mention several preferred dispositions and alternative measures: “*care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes (...)*”.²⁹⁵ Via this way, States must ensure the rule of deprivation of liberty as a last resort.

Evidently, while deciding, the Court should always look for a measure which is proportionate²⁹⁶, in other words that takes into account²⁹⁶ the circumstance and gravity of the crime, the child's age and maturity, the child's needs and circumstances and the long-term needs of society. In the case of a child a strictly punitive approach is unacceptable²⁹⁷, because it would be contrary to the fundamental principles of comprehensive juvenile justice. The Court should always consider the well-being and the best interests of the child, and the promotion of his or her integration.²⁹⁸

Within this realm, it goes without saying that a child should never be sentenced to life imprisonment without parole or possibility to release. Based on Article 25 UNCRC there must be a periodic review of measures depriving the child's liberty. Even if such possibility

²⁹² Beijing Rules, §§ 17.2 & 3; Article 37 a, UNCRC; UNCommRC GC 10, §71.

²⁹³ UNCommRC GC 10, §70; see also: European rules Juvenile offenders, §§10 & 23.2; Beijing Rules, §17.1.b. & c; PA Report child-friendly justice, §23.

²⁹⁴ Art.40.1 & 40.4, UNCRC; UNCommRC GC 10, §§ 23 & 28-29; CoE Strategy Rights of the Child, §52; ECtHR, *Güvec v. Turkey* (70337/01), 20 January 2009, §108.

²⁹⁵ See also: Beijing Rules, §17.1.b. & c, §18; PA Report child-friendly justice, §23; UNCommRC GC 10, §70; European rules Juvenile offenders, §§10 & 23.2; European rules Juvenile offenders, §§5 & 10; UNCommRC GC 10, §71; CoE Guidelines on child-friendly justice, IV.E, §82; see also: Beijing Rules, §17.1.d.

²⁹⁶ See also: Beijing Rules, §17.1.a.

²⁹⁷ See also: Beijing Rules, Commentary to §17.

²⁹⁸ European rules Juvenile offenders, §§5 & 10; UNCommRC GC 10, §71; CoE Guidelines on child-friendly justice, IV.E, §82; see also: Beijing Rules, §17.1.d.

to release exists, the UNCommRC recommends abolishing all kinds of life imprisonment for children.²⁹⁹

4.3.12.2. Adapted treatment and conditions

When children are deprived of their liberty they must be treated with respect for their human dignity, including their health requirements.³⁰⁰ This includes treatment and conditions according to their needs and that take into account their particular vulnerability (even more so in the case of pre-trial detention), age and maturity and that ensure the respect of their human rights.³⁰¹ They “*should receive education, treatment and care aiming at his or her release, reintegration and ability to assume a constructive role in society*”^{302 303}.

First and foremost, the child is separated from adults, because it would be contrary to their basic safety, their well-being, and their future ability to reintegrate into society. This means also they cannot be held in a prison or facility for adults. Only in exceptional circumstances, namely when it is in the best interests of the child, he or she should not be separated,³⁰⁴ but this exception requires a very strict interpretation and does not translate itself in “*the convenience of the State Parties*”.³⁰⁵

On the contrary, the States have the obligation to create separate (preferably open³⁰⁶) facilities for children that have child-focused trained staff, policies and practices.³⁰⁷ When the child reaches the age of 18, the continuation of these circumstances is recommended when this is in the best interests of the child and not contrary to those of younger children

²⁹⁹ Art. 37 a, UNCRC; European rules Juvenile offenders, §49.2.; UNCommRC GC 10, §77.

³⁰⁰ CoE Guidelines on child-friendly justice, IV.A.6, §20; See also: Havana Rules, §31, European rules Juvenile offenders, §1.

³⁰¹ Art. 37 c., UNCRC; European rules Juvenile offenders, §109.

³⁰² UNCommRC GC 10, §§77;

³⁰³ Based on the principles in Art. 40 1., UNCRC.

³⁰⁴ Art. 10.2.b & 10.3, ICCPR; Beijing Rules, §13.4; European rules Juvenile offenders, §28; UNCommRC GC 10, §85; European rules Juvenile offenders, §59.1; CoE Guidelines on child-friendly justice, IV.A.6, §20 & C.31; ECtHR, *Nart v. Turkey* (20817/04), 06 May 2008, §31; ECtHR, *Güvec v. Turkey* (70337/01), 20 January 2009, §98; ECtHR, *Coselav v. Turkey* (1413/07), 9 October 2012, §§ 58-61; see also: Havana Rules, §§17 & 29. As an exception the Havana Rules find it acceptable that children would be detained together with members of the family.

³⁰⁵ UNCommRC GC 10, §85.

³⁰⁶ Havana Rules, §30.

³⁰⁷ UNCommRC GC 10, §85; CPT Standards, §99 & 102.

residing in the same facility.³⁰⁸ A case-by-case approach is necessary to determine whether this is appropriate.³⁰⁹

Subsequently, the right to adequate medical (including psychological) care is vital, and must be guaranteed throughout the whole stay. It also implies that he or she has the right to be examined by a physician upon arrival in the facility.³¹⁰ However, the ‘*UN Principles of medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment*’ stress that medical examinations can only be carried out in order to protect and improve the health of prisoners and not for any other purpose.³¹¹ Evidently, the physical environment and conditions must be safe and adapted to the child, meaning also that it takes into account their needs, status, and requirements linked to their age, sex, personality, (mental and physical) health and (if possible) privacy.³¹²

States should also enable the children to maintain contact with family and friends, and this through visits and correspondence³¹³. Only in exceptional cases, prescribed by the law, can this contact be limited. Therefore, they must be placed in a facility closest (as possible) to their families’ residence.³¹⁴ In order to prepare children for the return into society further and more frequent communications with family, friends and wider community should also be promoted.³¹⁵ In this context the opportunity to visit the family and home should also be,

³⁰⁸ UNCommRC GC 10, §86; European rules Juvenile offenders, §59.3.

³⁰⁹ CPT Standards, §103.

³¹⁰ Beijing Rules, §13.5; UNCommRC GC 10, §89; European rules Juvenile offenders, §§28, 69.1-69.2 & 71; ECtHR, *Güvec v. Turkey* (70337/01), 20 January 2009, 95; ECtHR, *Coselav v. Turkey* (1413/07), 9 October 2012, §69; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §§ 137-138; CPT Standards, §114.

³¹¹ United Nations, General Assembly, *Principles of medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment*, 18 December 1982, UN Doc. GA Res. 37/194, principles 3 & 4.

³¹² UNCommRC GC 10, §89; Havana Rules, §28; European rules Juvenile offenders, §§52.1 & 63.1; CoE Guidelines on child-friendly justice, IV.A.6, §20 & C., §32; ECtHR, *Coselav v. Turkey* (1413/07), 9 October 2012, §§53, 54 & 62; CPT Standards, §104.

³¹³ See also: Art.6, Directive on the right to a lawyer and communication.

³¹⁴ UNCommRC GC 10, §87; European rules Juvenile offenders, §§55 & 83-84; ECtHR, *Güvec v. Turkey* (70337/01), 20 January 2009, §98.

³¹⁵ CoE Guidelines on child-friendly justice, IV.A.6, §21.a; See also: Havana Rules, §§59, 60 & 61; CPT Standards, §§122 & 124.

under certain circumstances, made available.³¹⁶ Furthermore, they should be able to keep themselves regularly informed of news via several media outlets.³¹⁷

As previously mentioned, while in custody, the child has the right to education when he or she is of compulsory school age, adapted to his or her needs. If it is appropriate a child should also pursue work, and receive vocational training in order to prepare him or her for future employment (which is again vital for successful future reintegration).³¹⁸ Additionally, they “*should also receive and retain materials for their leisure and recreation*”³¹⁹.

Last but not least, the use of force or restraint (physical, mechanical or medical) is only acceptable, when the child poses an imminent threat to others or oneself and only as a last resort (meaning when the alternatives haven been exhausted). Moreover, this can never be used as a punishment, and it can only be done under the control of a medical and or psychological professional. Thus, it is important that clear rules, policies and standards are in place and that training is provided on this issue, including the punishment of those who do not abide by the rules.³²⁰

Disciplinary measures for children deprived of their liberty must be proportionate, clearly consistent with their human dignity and in accordance with the objectives of juvenile justice and the well-being of the child. Hence, corporal punishment, solitary confinement, placement in dark cells, or any kind of treatment or punishment that could compromise the

³¹⁶ UNCommRC GC 10, §89; European rules Juvenile offenders, §86.1; CoE Guidelines on child-friendly justice, IV.A.6, §21.c; CPT Standards, §123.

³¹⁷ Havana Rules, §62.

³¹⁸ Beijing Rules, §13.5; Havana Rules, §§18.b & 38.; European rules Juvenile offenders, §§28 & 77; UNCommRC GC 10, §89; CoE Guidelines on child-friendly justice, IV.A.6,§21b & E, §82; ECtHR, *Kuptsov and kuptsova v. Russia* (6110/03), 3 March 2011, §91; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §§167 & 170; CPT Standards, §107.

³¹⁹ Havana Rules, §18.c.

³²⁰ UNCommRC GC 10, §89; European rules Juvenile offenders, §§90.1 & 90.4; ECtHR, *Okkali v. Turkey* (52067/99), 17 October 2006, §78.

well-being of the child, are clearly prohibited and violates Article 37 of the UNCRC and many other standards.³²¹

Moreover, on European level, the treatment of a juvenile deprived from his or her liberty can be qualified as torture, inhuman or degrading treatment or punishment, prohibited by Article 3 of the ECHR (often in combination with Art. 5.3 and 5.4), if the specific circumstances (the physical and mental well-being of the child, the age, length of detention, the failure to address psychological or physical problems, no family contact, etc.) reach a certain level of severity.³²²

4.3.12.3. Necessary procedural rights and inspections

Article 37.d UNCRC includes the core procedural rights of any child deprived of his or her liberty. Self-evidently, the child must be promptly informed of the reasons for the arrest, have prompt access to free legal and other appropriate assistance.³²³ Similarly, the competent authorities must also notify the child's parents, or another appropriate adult trusted by the child, of his or her detention.³²⁴ The child must be brought before the competent authority that must examine the legality within 24 hours, regardless of the type of decision.³²⁵

The child always has the right to challenge the legality of his or her detention and the conditions and treatment, regardless of the authority that took the initial decision. Since this concerns a serious interference of the rights of the child, the body responsible for the appeal must deliver a prompt decision, “*within or not later than two weeks after the challenge was*

³²¹ UNCommRC GC 10, §89; European rules Juvenile offenders, §§94.1, 49.2, 95.2 & 95.3; see also: Art. 10.1, ICCPR; Beijing Rules; Havana Rules, §§66-67; CPT standards accept solitary confinement under strict conditions (CPT Standards, §§128-129).

³²² No violation: ECtHR, *D.G. v. Ireland* (39474/98), 16 May 2002, §§95-100; Violation: ECtHR, *Okkali v. Turkey* (52067/99), 17 October 2006, §§67, 76 & 78; ECtHR, *Güvec v. Turkey* (70337/01), 20 January 2009, §§82 & 98; ECtHR, *Kuptsov and kuptsova v. Russia* (6110/03), 3 March 2011, §§69-72; It can sometimes even amount to a violation of Art. 2 ECHR: ECtHR, *Coselav v. Turkey* (1413/07), 9 October 2012, §§53, 54, 62 & 70; ECtHR, *Blokhin v. Russia* (47152/06), 14 November 2013, §§135-137, 139 & 148.

³²³ European rules Juvenile offenders, §120; See also: 5.2, ECHR; Havana Rules, §18, a; ECtHR, *Adamkiewicz v. Poland* (54729/00), 2 March 2011, §84; CPT Standards, §98.

³²⁴ Art. 5.2 & Recital 55, Directive on the right to a lawyer and communication; CPT Standards, § 98.

³²⁵ Beijing Rules, §10.2; UNCommRC GC 10, §§82-83; see also: Art. 5.3, ECHR; Art. 9.3, & 10.2.b, ICCPR.

made”.³²⁶ In its decision the Court or independent body must consider all relevant elements, including the suspect’s or accused’s age.³²⁷

As previously mentioned, pre-trial (or before the implementation of a measure) detention particularly deserves most expeditious processing³²⁸ and must be subject to regular review. The UNCommRC proposes this to happen every two weeks. If the authorities do not want to release the child under certain conditions since it is seen as impossible, they should formally charge the child with the offence and bring him or her before a competent body, within 30 days of the initial detention. This body should be able to decide 6 months after the issue was brought before it.³²⁹

In relation to requests or complaints regarding the conditions and treatment, the child must have access to (and be informed about) effective complaint mechanisms and procedures, which are simple and child-friendly. When they make a complaint or request, the independent body must deliver a response without delay.³³⁰

Similarly, on the European level, the ECtHR requires that the aforementioned procedures have a judicial character, and provide the appropriate safeguards, including the presence of the juvenile, the effective assistance of a lawyer and decisions rendered with speed.³³¹

Finally, in order to ensure that the treatment and conditions during the child’s deprivation of liberty are in accordance with the abovementioned standards, the States should set up a system to conduct independent and qualified inspections on a regular and unannounced basis, which should include confidential conversations with the concerned children.³³²

³²⁶ UNCommRC GC 10, §§ 51, 82 & 84; see also: Art. 5.4, ECHR; Art. 9.4, ICCPR; ECtHR, *Kuptsov and kuptsova v. Russia* (6110/03), 3 March 2011, §107.

³²⁷ UNCommRC GC 10, §51.

³²⁸ See also: Havana Rules, §17.

³²⁹ UNCommRC GC 10, §83; see also: ECtHR, *Bouamar v. Belgium* (9106/80), 29 February 1988, §53.

³³⁰ UNCommRC GC 10, §89; CPT Standards, §131.

³³¹ ECtHR, *Bouamar v. Belgium* (9106/80), 29 February 1988, §§57, 60 & 63; ECtHR, *Nart v. Turkey* (20817/04), 06 May 2008, §§37-39; ECtHR, *Güvec v. Turkey* (70337/01), 20 January 2009, §§112-113.

³³² Havana Rules, §14; UNCommRC GC 10, §89; CPT Standards, §132.

4.3.13. Training, professionalism and a multi-disciplinary approach

In order to effectively guarantee the complete set of safeguards, it is essential that the professionals involved in the juvenile justice system, particularly those in law enforcement and the judiciary, receive an appropriate and interdisciplinary training³³³. It should certainly address the children's needs, the improvement of their skills and the provisions (including their meaning) of the UNCRC and the other relevant documents, and their skills. The focus should lie on those provisions directly relevant for the daily practice.³³⁴

This kind of training should be systematic and is an on-going process, and should not only focus on the national and international legal provisions. For example, information on the development of children, on the causes of juvenile delinquency, on the psychological aspects, on vulnerable children, and on the variety of measures (including extra-judicial possibilities), is equally important.³³⁵ Base on the same philosophy, it is recommended that the police in large cities have special police units that deal with juvenile delinquency.³³⁶

Both the *CoE Guidelines on Child-friendly Justice*, as the *Havana Rules*, prescribe that well-trained personnel must also include sufficient specialists in several domains (education, psychology, etc.) to ensure a necessary, appropriate and multi-disciplinary assistance (*supra*).³³⁷ In addition, the *Beijing Rules* require that personnel working or involved in the juvenile justice system must reflect the diversity of those juveniles, so that women and other minorities are duly represented.³³⁸

Finally, in order to communicate with their clients, it is recommended that the lawyers representing children receive on-going and in-depth training in all child-related issues, primarily the rights of the child.³³⁹

³³³ General training on providing information, see also: Art. 9, Directive on the right to information.

³³⁴ UNCommRC GC 10, §97; UNCommRC GC 12, § 134.g.; CoE Guidelines on child-friendly justice, IV.A.4, §14 & D.6, §64; See also: Beijing Rules, §22.1; Havana Rules, §§81 & 85; European rules Juvenile offenders, §§129.1-129.3; CPT Standards, §120.

³³⁵ UNCommRC GC 10, §97.

³³⁶ Beijing Rules, §12.1.

³³⁷ Havana Rules, §81; CoE Guidelines on child-friendly justice, IV.A.5, §16; see also: European rules Juvenile offenders, §15; 4.3.6, p.34.

³³⁸ Beijing Rules, §22.2.

³³⁹ CoE Guidelines on child-friendly justice, IV.D.2, §39.

4.4. Important aspects of substantial criminal law

Although the Procedural Safeguards Directive does not touch upon all the aspects of the juvenile justice system, it is the author's opinion that it is impossible not to have a brief look at it.

The following overview will give a concise description of other important elements surrounding the criminal process of children: (1) Prevention of juvenile delinquency; (2) the alternative measures to criminal proceedings; and (3) the minimum age of criminal responsibility and corresponding age limits for juvenile justice (3).

4.4.1. Prevention

Since one of the fundamental goals of the UNCRC is the promotion of the child's development, including his or her personality, talents and (mental and physical) abilities, the child should be prepared for a constructive and responsible role in society and this with full respect for human rights. This means that the juvenile justice policy must include measures in order to prevent delinquency.³⁴⁰

Therefore it is vital that the parents or legal guardians provide the child with sufficient and appropriate direction and guidance. It is equally important that the child grows up in circumstances without serious risk of involvement in criminal activities. States should therefore take measures in order to ensure (for all children): an adequate standard of living the highest attainable standard of health (including access to health care), the right to education and the protection from any form of violence, injury or abuse and economic or sexual exploitation.³⁴¹

In addition, the aforementioned *Riyadh Guidelines* contain several guiding principles and provisions in order to effectively prevent juvenile delinquency. They emphasise: the socialisation and integration of all children, the support for vulnerable families, the involvement of schools, the special care and attention for children at risk, the support of community-based services and programmes in order to tackle the needs and problems of

³⁴⁰ UNCommRC GC 10, §§16-17; See also: *Riyadh Guidelines*.

³⁴¹ Art. 19, 24, 27, 28, 29, 32 & 34, UNCRC; UNCommRC GC 10, §16.

children, etc.³⁴² Effective prevention programmes, developed and implemented with the involvement of children, are the key to success.³⁴³

4.4.2. The importance of alternative measures outside the justice system

For children suspected or accused of having committed a crime several alternative measures to criminal proceedings could be appropriate.³⁴⁴ As the UNCommRC stresses in its General Comment 10 the juvenile justice system should promote the use of these alternative measures, integrate them in their justice system and inform the children about the possibilities,³⁴⁵ because they can promote their reintegration in society.³⁴⁶ Moreover, these alternative measures avoid stigmatisation, are more cost-effective than resorting to the justice system and are in the interests of the public safety.³⁴⁷

Even if not limited to them, alternative measures are far and foremost appropriate when it concerns minor offences (for example, shoplifting). Naturally, it belongs to the discretion of the States to decide on the nature and the content of the measures and on how they will be implemented. In this context, a whole variety of community-based programmes (community service, supervision, guidance, restitution and compensation of the victims, treatment, mediation, etc.) have already been developed.³⁴⁸

The UNCommRC recommends diversion (*“measures for dealing with suspected or accused children without resorting to judicial proceedings”*)³⁴⁹ if appropriate (compelling evidence and child’s admission without intimidation or pressure), and if the child gives his or her free consent in writing on all relevant aspects of the measure. Evidently, everything has to be regulated in the law, the child has to have access to legal or other assistance and he or she has to enjoy the same level of safeguards as in judicial proceedings. Finally, it

³⁴² UNCommRC GC 10, §18; *Riyadh Guidelines*.

³⁴³ UNCommRC GC 10, §§19-21.

³⁴⁴ UNCommRC GC 10, §§3-4, 22; CoE Guidelines on child-friendly justice, IV.B, §§24-25; PA Report child-friendly justice, §27.

³⁴⁵ UNCommRC GC 10, §§26; see also: CoE Strategy Rights of the Child, §54.

³⁴⁶ UNCommRC GC 10, §§3-4, 22.

³⁴⁷ UNCommRC GC 10, §§25 & 68; PA Report child-friendly justice, §28 & 30.

³⁴⁸ UNCommRC GC 10, §§24-25 & 27; PA Report child-friendly justice, §30.

³⁴⁹ UNCommRC GC 10, §27; see also: Beijing Rules, §11.1; UNHRC Comm, GC 32, §44.

should be clear that after the completion of the diversion the case should be completely closed.³⁵⁰

4.4.3. Minimum age of criminal responsibility and the corresponding age limits for juvenile justice

Finally, the age of criminal responsibilities is important, because it “*recognises that a child has attained the emotional, mental and intellectual maturity to understand his or her actions and its consequences, and to be held responsible for them*”³⁵¹.

Currently, the States apply a different minimum³⁵² and many use even two minimum ages (age at the time of commission above the first minimum, but lower the second one, is only responsible if the child’s maturity is developed enough).³⁵³ Therefore, the UNCommRC and *the Beijing Rules* have formulated the following recommendations:

- States should set a (not too low) minimum age,³⁵⁴ below which they cannot be held responsible, and thus cannot be formally charged (but need protective measures). Preferably, a higher minimum, 14/16 years of age, should be set and exceptions to the minimum rule should be avoided.³⁵⁵
- If the children, at the time of the offence, are older than this minimum, but younger than 18 they can be held responsible, and thus be formally charged. These judicial proceedings must be in compliance with the UNCRC and hence, with the aforementioned set of safeguards.³⁵⁶

³⁵⁰ UNCommRC GC 10, §§27 & 68-69; CoE Guidelines on child-friendly justice, IV .B, §26; PA Report child-friendly justice, §31; Plus: they should not be shown in the criminal records.

³⁵¹ PA Report child-friendly justice, §13.

³⁵² CRIN, ‘Minimum ages of criminal responsibility’, available from <https://www.crin.org/en/home/ages/europe>, (accessed 4 June 2016).

³⁵³ UNCommRC GC 10, §30.

³⁵⁴ European rules Juvenile offenders, §4; CoE Guidelines on child-friendly justice, IV.B, §23; That takes into account the emotional, mental and intellectual maturity of a child at that age. (Beijing Rules, §4); From an international perspective the age of 12 is acceptable, but not a lower age (UNCommRC GC 10, §32).

³⁵⁵ UNCommRC GC 10, §§31 & 33-34; Beijing Rules, §4.

³⁵⁶ UNCommRC GC 10, §§31 & 33.

- If the child's age cannot be determined and proven, the “*child shall have the right to the rule of the benefit of the doubt*”³⁵⁷ and cannot be held criminally responsible.³⁵⁸

In sum, suspected or accused children under the age of 18 must fall under a special juvenile system, or at least a system consistent with Article 40 UNCRC.

4.5. Conclusion

As the overview makes clear, the international standards as a whole provide for a detailed set of safeguards. While the binding Conventions (UNCRC, ICCPR, ECHR, and CFREU) are rather broadly formulated, several competent bodies gave a precise meaning to these vital provisions. In their General Comments and/or cases the UNHRCComm, the UNCommRC, and the ECtHR meticulously deducted clear safeguards for children who are suspects or accused persons in criminal proceedings, in order to ensure their right to a fair trial. In some of these documents and cases they try to develop a comprehensive juvenile justice system by addressing elements falling outside the scope of procedural safeguards.

Although the detailed interpretations of these competent bodies are not binding (with the exception of the parties involved), they form an authoritative guidance and interpretation of legally binding treaties and documents that require the States to consider seriously, as these bodies were specifically created as to interpret, monitor, and or supervise the obligations imbedded in the treaties or charters.³⁵⁹

Therefore, the author takes those documents very earnestly and will utilise them in order to scrutinise the Procedural Safeguards Directive for Children (*infra*)³⁶⁰.

³⁵⁷ UNCommRC GC 10, §39.

³⁵⁸ UNCommRC GC 10, §35-38; PA Report child-friendly justice, §14.

³⁵⁹ Art. 38.1.D, United Nations, *Statute of the International Court of Justice*, 18 April 1946; ICJ, *Republic of Guinea v. DRC (Diallo case)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, 30 November 2010, §§66-67.

³⁶⁰ Chapter 5, pp.56-98.

5. The Procedural Safeguards Directive for children who are suspects or accused persons in Criminal Proceedings

5.1. Introduction

On 27 November 2013 the European Commission introduced its proposal for a Procedural Safeguards Directive for Children,³⁶¹ based on its commitment in the EU Agenda for the rights of the child and on the Council's Roadmap of 2009. This proposal is build on the international standards in order to enable children, persons under the age of 18, suspected or accused of a crime, to effectively exercise their right to a fair trial (including the ability to understand and follow the criminal proceedings), and to prevent them from re-offending, as well as promote their reintegration in society.³⁶²

After extensive consultation, debates and voting, the text was adopted by the European Parliament and the Council on the 11th of May 2016. On the 21th of May the Directive was published in the Official Journal of the European Union (OJ) and went into force on June 10th of this year.³⁶³

This chapter will outline the Directive's main objectives, followed by its scope, and precise content. The provisions (Articles and Recitals) will be scrutinised, safeguard-by-safeguard, on the basis of the aforementioned international standards, opinions of NGOs' and other relevant documents³⁶⁴. Which positive aspects can be identified and where does the Directive fall short.

³⁶¹ European Commission, *Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings*, 27 November 2013, COM/2013/0822 final - 2013/0408 (COD) (hereinafter: Procedural Safeguards Directive for children, COM Proposal).

³⁶² Procedural Safeguards Directive for Children, COM Proposal, Recital 4; European Commission, *An EU Agenda for the Rights of the Child*, 15 February 2011, COM (2011) 0060 final, Brussels, p.7, §§2-3 & p.8, Action 2; Council of the European Union, *Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 30 November 2009, OJ 2009 295/1, §1 & Annex, measure E; see also: M. Tuite, 'The way forward: the implementation of the EU Agenda for the rights of the child', *ERA Forum*, Vol.14, no.4, December 2013, p.544, §§1-2 & p. p.547, §1 & 2.2.3.

³⁶³ European Parliament and the Council of the European Union, *Directive 2016/800/EU of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings*, 21 May 2016, OJ 2016 L 132/1 (hereinafter: Procedural Safeguards Directive for children, final).

³⁶⁴ Procedural Safeguards Directive for children, COM Proposal; Council of the European Union, *General approach on the proposal for a Directive on procedural safeguards for children suspected or accused in*

5.2. Critical analysis: safeguard by safeguard

5.2.1. Main objectives

Although the Directive mainly aims at establishing minimum rules on procedural safeguards to achieve an effective fair trial for children, it also pursues more general objectives.

One of these is the enhancement of ‘mutual trust’ between the EUMS in each other’s criminal justice system. This objective is important to secure the well functioning of ‘mutual recognition’ principle. Unfortunately, although the EUMS are parties to the main international human rights documents, this presupposed ‘mutual trust’ is not present today.³⁶⁵

Other important objectives are the enhancement of prevention and even more so, the social reintegration of juvenile offenders.³⁶⁶

Finally, it is important to note that Recital 67 allows EUMS to provide stronger human rights protection, but that this should never constitute an obstacle to the effective implementation of the ‘mutual recognition’ principle.³⁶⁷

Critique

While these objectives of the Directive might sound like music in our ears, two remarks can be made.

First, the Directive aims to improve the situation of children suspected or accused in criminal proceedings and also to tackle cross-border crimes within the EU. However, this reveals two problems. On the one hand, as Article 17 depicts, children in EAW proceedings (*the example of cross-border cases*) will only benefit from a limited amount of rights and not from the Directive as a whole. On the other hand, there are no exact figures on how

criminal proceedings, 22 May 2014, 2013/0408 (COD), ST 10065/14 (hereinafter: General approach of the Council).

³⁶⁵ Recitals 2-3, Procedural Safeguards Directive for children, final.

³⁶⁶ Recitals 1 & 9, *ibid.*

³⁶⁷ Recital 67, *ibid.*

many children are actually involved in criminal offences with a cross-border dimension.³⁶⁸ Some critics even wonder if there are children involved in many criminal offences committed abroad, considering that to commit such crimes you need money, accommodation, transport, etc.³⁶⁹

Secondly, the Recitals of the Directive and the European Commission's Impact assessment of the Directive reveal that the cross-border character cannot be the sole objective and that in fact, these minimum safeguards should be protected for every child subject to criminal proceedings, also in the purely domestic cases.³⁷⁰ Whether the EU has competence to introduce such harmonising measures, will not be touched upon, given the limited scope of this paper.³⁷¹

Lastly, as the following discussion will show, the rights provided by the Directive do not always attain the desired level of protection, required by the international standards. Therefore, it is unclear whether the Directive will produce effective guarantees for children subject to criminal proceedings.

5.2.2. Subject and scope

Ratione loci

The Directive is applicable within all EUMS, with the exception of Ireland, UK or Denmark, since these States chose not to participate. Romania and Poland made reservations.³⁷²

Ratione personae

³⁶⁸ European Commission, *Impact assessment accompanying the document proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings* of 27 November 2013, SWD (2013) 480 final (hereinafter: Com Impact Assessment).

³⁶⁹ M. Meysman, 'Quo vadis with vulnerable defendants in the EU?', *European Criminal Law Review*, vol. 4, no. 2, 2014, p. 183, §2 & 184, §1.

³⁷⁰ Com Impact Assessment, p. 31, 4.5.1, §2.

³⁷¹ See: M. Meysman, 'Quo vadis with vulnerable defendants in the EU?', *European Criminal Law Review*, vol. 4, no. 2, 2014, p.179-194; it could also be asked whether minimum rules actually contribute to mutual trust, and if the need for minimum rules in itself point out the unworkable of mutual recognition principle?

³⁷² Recitals 69-70, Procedural Safeguards Directive for children, final; Romania on Art.2.3 & Art.9.1, *ibid*; Poland on Art. 6.8.b, *ibid*.

The persons, on who the Directive's minimum rules are applicable, are prescribed in Articles 1 and 2. It concerns on the one hand, children (under the age of 18) who are suspects or accused persons in criminal proceedings and children subject to EAW proceedings, on the other. Children in criminal proceedings fall under these provisions until the final determination of his or her guilt, including the sentencing and appeal. For children in EAW proceedings are entitled to the minimal safeguards, from the moment of his or her arrest.³⁷³ Evidently, the provisions are also applicable to children, who become a suspected or accused person in the course of (police) interrogation.³⁷⁴

Finally, the Directive is similarly³⁷⁵ applicable to persons, who were younger than 18 when becoming subject to the criminal proceedings, but who in the meantime have come of age, if appropriate in that specific case and taking into account all circumstances, such as maturity and vulnerability. In the same spirit, Recital 12 *encourages* the EUMS to apply the safeguards on persons who were children at the time of the offence, but who have reached the age of 18 when becoming subject to criminal proceedings and this until he or she has reached the age of 21.³⁷⁶

Ratione materiae

The Directive is applicable to all types of criminal proceedings, particularly those adapted to children and potentially leading to "*protective, corrective or educative measures*".³⁷⁷

In relation to minor offences, the Directive is only applicable to Criminal Court proceedings and not when another authority other than a Court has the competence to decide on the sanction and if possible appeal or referral to a Court is available and if the deprivation of liberty is not an imposable sanction.³⁷⁸

Finally, it goes without saying that when a child is deprived of his or her liberty, the Directive fully applies at all stages.³⁷⁹

³⁷³ Art. 1, 2.1., Art. 2.2. & Recitals 1, 10-11, Procedural Safeguards Directive for children, final.

³⁷⁴ Art. 2.4. & Recital 12, *ibid.*

³⁷⁵ With the exception of Art. 5.2.b., Art. 8.3 & Art.15, *ibid.*

³⁷⁶ Art. 2.3. & Recital 12, *ibid.*

³⁷⁷ Recital 17, *ibid.*

³⁷⁸ Art. 2.6. & Recitals 14-16, *ibid.*

³⁷⁹ Art. 2.6. & Recitals 14-16, *ibid.*

It is important to note that the Directive does not in any way determine the age of criminal responsibility. If there is uncertainty about the person's age, he or she must be presumed to be a child.³⁸⁰ Recital 13 of the Directive describes how a child's age should be determined: “*on the basis of the child's own statements, a check of the child's civil status, documentary research, other evidence and, if such evidence is inconclusive, a medical examination (as a last resort and in compliance with child's rights, physical integrity and human dignity)*”³⁸¹.

Critique

It is positive that the Directive applies on suspected or accused persons who are under the age of 18 at the start of criminal proceedings, including those who were initially not considered as suspects or were not accused, but who become it during interrogation.³⁸²

Similarly, it is noteworthy that the Directive is also applicable on the sentencing and resolution of an appeal. The same positive assessment can be made about the “*rule of the benefit of the doubt*”, which is also prescribed by the international standards, (*supra*)³⁸³ and this in relation to the child's age.³⁸⁴

However, several critical issues remain.

Point of applicability

Initially, the proposal of the European Commission, the General approach of the Council and the draft amendments of LIBE Committee of the European Parliament clearly stated the moment from which the Directive is applicable in the case of children who are suspects

³⁸⁰ Art. 2.5., Art.3 & Recital 13, *ibid*.

³⁸¹ Recital 13, *ibid*.

³⁸² Council of Bars and Law Societies of Europe, ‘Commentary on the proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings’, 4 April 2014, available from http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_04042014_CCBE_Res1_1399542070.pdf, (accessed 28 June 2016) (hereinafter: CCBE, Commentary), p. 1, §14.

³⁸³ 4.4.3, p.54.

³⁸⁴ Amnesty International & Save the Children, joint paper, p.4, §6; Art.3, LIBE Committee of the European Parliament, *Draft amendments on the proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings*, DS 1098/15 (hereinafter: Draft amendments LIBE); Both NGOs and the LIBE Committee recommended this inclusion in the proposal for a Procedural Safeguards Directive for Children.

or accused persons, namely “*from the time when they become suspected or accused*”³⁸⁵ or “*from the time when they are made aware (...) that they are suspected or accused*”³⁸⁶.

It is worrisome that this provision was deleted during the further negotiations between the Council and European Parliament. Consequently, the final provisions are silent on this crucial point. Contrary to the children in EAW proceedings, the Directive does not in any way clarify when exactly minor suspects or accused persons enjoy the protection of its provisions. This ambiguity is problematic, as children are consigned into the hands of the authorities. Depending on the interpretation of the EUMS children will receive protection at an early or later stage. Moreover, given that children in EAW proceedings are entitled to protection from the moment of their arrest, it is more than likely that EUMS will utilise the same point in time as reference in other proceedings.

To postpone the protection to the moment of their arrest eliminates the necessary protection earlier. This is problematic, as children stay vulnerable, also when they are not arrested, and therefore deserve the same level of protection as arrested children receive. For example, a child who is considered to be a suspect can be questioned without a prior arrest. If his or her rights are disregarded at that stage the consequences can be as harmful as for arrested children lacking protection. Another example, if a child does not receive the necessary assistance or required information it could make statements that can negatively determine the outcome of the criminal proceedings. Thus, there is no justification, whatsoever, to treat differently arrested children from children who are ‘simply’ interrogated.

The age

What is also disappointing is that the Directive does not take into account the age of the person at the time when the criminal offence was committed. Instead the age of reference is the age at the beginning of criminal proceedings, and this in contradiction with the prescription of the UNCommRC in its General comment 10 (*supra*)³⁸⁷.³⁸⁸ This is certainly a

³⁸⁵ Art.2, Procedural Safeguards Directive for children, COM Proposal; Art.2, Draft amendments LIBE.

³⁸⁶ Art.2, General approach of the Council.

³⁸⁷ 4.2.2, p.28.

³⁸⁸ International Commission of Jurists, JUSTICE, and NJCM, ‘Briefing Paper on the proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings’, September 2014,

problem in the EU, where in many EUMS the justice systems can be slow, long and limp. Therefore, it can take a while until a person is officially suspected or accused of a criminal offence, and this means that during that timeframe the child committing an offence could have turned 18 when he or she becomes subject to criminal proceedings. It is true that Recital 12 ‘encourages’ EUMS to still apply the Directive’s provisions in such cases (until the young adult turns 21), but the weak wording and the inclusion of the advice in a non-binding recital make it very unlikely that it will be applied.³⁸⁹

Furthermore, if the person, a child when becoming subject of the criminal proceedings, reaches the age of 18 during that proceeding, the Directive is only applicable when ‘appropriate’. Also this provision is vague and weak, giving to the EUMS a large margin of appreciation and making it utterly easy for the authorities to circumvent the required safeguards. In addition, as it is the case with all Directives, it can cause (again) diverse interpretation and application by the EUMS, which shall not enhance consistency and mutual trust in the EU.³⁹⁰

In fact, the Directive should have applied to all those persons in any case and the Directive should have been unequivocal on this point.³⁹¹

Criminal proceedings

As previously mentioned the international standards go beyond the protection during criminal proceedings, and try to address other aspects, falling outside the scope of these

available from <http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/Read-the-briefing-19-Sep-2014-1.pdf>, (accessed 28 June 2016) (hereinafter: ICJ, JUSTICE & NJCM, Briefing paper), p.7, §1; Amnesty International and Save the Children, ‘Joint paper on the proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings.’, December 2014, available from <http://www.amnesty.eu/en/news/statements-reports/eu/human-rights-in-the-eu/joint-paper-on-proposal-for-directive-of-the-european-parliament-council-on-procedural-safeguar-0776/#.Vw9ZDUZ2Bv0>, (accessed 14 April 2016) (hereinafter: Amnesty International & Save the Children, joint paper), p.4, §1; Sayers, D., ‘Standing up for children? The Directive on procedural safeguards for children suspected or accused in criminal proceedings.’, *EU law analysis blog spot*, [web blog], 22 December 2015, <http://eulawanalysis.blogspot.co.at/2015/12/standing-up-for-children-directive-on.html>, (accessed 14 April 2016) (hereinafter: Sayers 2015), §7.

³⁸⁹ Sayers 2015, §7.

³⁹⁰ Sayers 2015, §7.

³⁹¹ ICJ, JUSTICE & NJCM, Briefing paper, p.7, §2.

proceedings. The Directive, on the contrary, does not apply to other kinds than the criminal proceedings.

And this is questionable, as children below the age of criminal responsibility are often subject to proceedings outside the criminal justice sphere. The consequence is that these children do not receive the same safeguards, while they are subject to proceedings that also can result in deprivation of their liberty due to, for example their placement in educational or psychiatric facilities.³⁹²

Moreover, given the rise of this kind of alternative proceedings involving children, this limitation is unfortunate, as children (and their offences) will be more often addressed by this kind of proceedings than the classic criminal type.

This is in contradiction with the international Standards, as mainly the UNCommRC requires States to provide the same level of protection to these children as they prescribe for children in criminal proceedings.³⁹³

Minor offences

It is shocking that the Directive tries to limit its application in the case of minor offences, for which it does not provide a definition or penalty threshold.³⁹⁴ While the original proposal of the European Commission did not entirely exclude minor offences (but solely in relation to specific rights),³⁹⁵ the final Directive indirectly does. Following the example

³⁹² Justicia European Rights Network, 'Interim position paper on vulnerable suspected and accused persons in criminal proceedings reform presented by the European Commission on 27 November 2013', December 2013, available from <http://eujusticia.net/index.php/proceduralrights/category/vulnerable-accused-and-suspected-persons-measure-e/submissions-publications4>, (accessed 14 April 2016) (hereinafter: Justicia, Position paper), p.7, §2; example: United Nations Human Rights Committee, *Concluding observations on the third periodic report of the Czech Republic*, 22 August 2013, section 20, CCPR/C/CZE/CO/3 .

³⁹³ UNCommRC GC 10, §§31, 33 & 34; Eurochild and International Juvenile observatory, 'Position on the Commission proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings', 16 January 2015, available from [http://eurochild.org/news/news-details/article/position-on-the-commission-proposal-for-a-directive-on-procedural-safeguards-for-children-suspected/?tx_news_pi1\[controller\]=News&tx_news_pi1\[action\]=detail&cHash=d08226b89d11954260922f2b367c4bea](http://eurochild.org/news/news-details/article/position-on-the-commission-proposal-for-a-directive-on-procedural-safeguards-for-children-suspected/?tx_news_pi1[controller]=News&tx_news_pi1[action]=detail&cHash=d08226b89d11954260922f2b367c4bea), (accessed 14 April 2016) (hereinafter: Eurochild & IJO, position paper), §6.

³⁹⁴ Sayers 2015, §10.

³⁹⁵ Art. 2, 4 & 6, Procedural Safeguards Directive for children, COM Proposal.

of the other Directives on certain procedural safeguards³⁹⁶, it was the Council who proposed this limitation in its General approach.³⁹⁷

Moreover, the aforementioned description of the Directive's scope makes clear, the provisions are solely applicable in very limited cases of minor offences, making this dependent on the kind of sanction and competent authority. This limitation is a shame, because the rights of the suspected or accused child now depend purely on the gravity of the criminal offence and the national procedures in place. In these national systems the scope of minor offences is often unclear and very different from each other.³⁹⁸ Although it is not yet clear how many offences will be excluded from the Directive's protection, it is very likely that the number will be very high.³⁹⁹ Given the minor character of the offence, it is indeed less likely that a Court will decide in those cases or that the deprivation of liberty is a possible penalty. Therefore, the Directive might exclude *de facto* all minor offences. In addition, the Directive does not even provide for a definition of minor offences or a penalty threshold.

Differentiating between minor and serious offences is critical, as, irrespective of the seriousness of the alleged offences, they all may have negative consequences and may have a damaging impact on children, also in relation to their criminal records. Furthermore, minor offences in an adult context will not always be minor in the case of children.⁴⁰⁰ This limitation to major offences is even more reprehensible when considering that children are probably more often suspected or accused of minor offences.⁴⁰¹ Hence, this limitation undermines seriously the whole idea behind the Directive, namely guaranteeing the procedural rights of children subject to criminal proceedings in general.⁴⁰²

³⁹⁶ Art. 1.3, Directive on translation and interpretation; Art. 2.2, Directive on the right to information; Art.2.4, Directive on the right to a lawyer and communication.

³⁹⁷ Art.2.5a & Art.2.6, General Approach of the Council.

³⁹⁸ ICJ, JUSTICE & NJCM, Briefing paper, p.10, §3.

³⁹⁹ ICJ, JUSTICE & NJCM, Briefing paper, p. 7, §3.

⁴⁰⁰ CCBE, Commentary, p. 1, §29.

⁴⁰¹ UNCommRC GC 10, §24; PA Report Child-friendly justice, §36; CCBE, Commentary, p.2, §17; ICJ, JUSTICE & NJCM, Briefing paper, p.7, §3 & p.10, §3; Amnesty International & Save the Children, joint paper, p.4, §§3-4; Sayers 2015, §11.

⁴⁰² Amnesty International & Save the Children, joint paper, p.4, §4.

Hence, this is not in line with the aforementioned international standards that prescribe safeguards applicable on all suspected or accused children (without distinction), regardless of the severity of the crime.⁴⁰³

5.2.3. The right to information

Article 4 requires that the child is fully informed about: the fact that he or she is suspected or accused, the rights he or she has pursuant Directive 2012/13/EU⁴⁰⁴ and the proceedings in general (including the procedural steps and role of the authorities involved).⁴⁰⁵ The precise information required depends on the specific circumstances of the case.⁴⁰⁶

At which moment in time they have to receive this information depends on the nature of the information. Children must be informed ‘promptly’ of the rights, to have the holder of parental responsibility informed, to be assisted by a lawyer, to privacy protection, to be accompanied by the holder of parental responsibility, and to legal aid, and this together with their status as a suspect or accused person.⁴⁰⁷

On the other hand, concerning the rights, to an individual assessment, to a medical examination, to limitation of deprivation of liberty (including the use of alternative measures) and the right to periodic review, to be accompanied by the holder of parental responsibility during Court hearings, to appear in person at the trial, and to effective remedies, the child must be informed not ‘promptly’, but at the earliest stage in the proceedings. The moment a child is being deprived from his or her liberty, a child must be informed about his or her right to a specific treatment.⁴⁰⁸

⁴⁰³ Children’s Rights Alliance for England, Fair Trials International and Legal Experts Advisory Panel, ‘Joint position paper on the proposed directive on procedural safeguards for children suspected or accused in criminal proceedings’, September 2014, available from <https://www.fairtrials.org/publications/fair-trials-publishes-position-paper-on-proposed-eu-directive-on-childrens-directive/>, (accessed 14 April 2016) (hereinafter: CRAE, Fair Trials & LEAP, Position paper), §15.d; Amnesty International & Save the Children, joint paper, p.4, §3; Sayers 2015, §§11; see also: ECtHR, *Engel a.o. v. The Netherlands*, 8 June 1976, 5100/71, §§80-82; ECJ, *Balaz*, 14 November 2013, C-60/12, §§ 36 & 42.

⁴⁰⁴ Directive on the right to information.

⁴⁰⁵ Art. 4 & Recital 19, Procedural Safeguards Directive for children, final.

⁴⁰⁶ Recital 19, *ibid.*

⁴⁰⁷ Art. 4.1.a., *ibid.*

⁴⁰⁸ Art. 4.1.b., 4.1.c. & Recital 20, *ibid.*

Finally, the information must be communicated (written, orally, or both) in a language that is simple and accessible, and this communication must be noted down. If the child receives a Letter of Rights, based on Directive 2012/13/EU,⁴⁰⁹ all aforementioned information must be included.⁴¹⁰

Critique

Since national rules and guidelines on how to inform children subject to criminal proceedings are lacking,⁴¹¹ the inclusion of the child's right to information in the Directive is more than welcome.⁴¹² Informing a child in a correct manner is vital, because it must ensure the child's thorough understanding of his or her rights and the charges. This is necessary to fulfil the child's right to participate in the proceedings.

Nevertheless, some important aspects of this right are missing or are not regulated precisely enough and this in contrast with the international standards (*supra*)⁴¹³ which require that the information is communicated promptly, in a child-friendly language (adapted to age and maturity), in a language that the child understands (which might require free assistance of an interpreter), in the presence of the child's parents or lawyer and with free assistance of a trained professional if the child has an impairment or disability.⁴¹⁴

That these requirements are not mentioned in the Directive creates a serious problem, because the sole mentioning of 'simple and accessible' language will not do the trick.⁴¹⁵ It is again too broad and open for different kinds of interpretation. Moreover, it does not emphasise the importance of oral explanations. Hence, due to the great variation of the

⁴⁰⁹ Art. 4, Directive on the right to information.

⁴¹⁰ Art. 4.2., 4.3 & Recital 21., Procedural Safeguards Directive for Children, final.

⁴¹¹ Fundamental Rights Agency of the EU, *non-paper, summary of the intervention at the DROIPEN working party on the 21th of February 2014*, Annex II to Note from Presidency to Delegations on outcome of proceedings of the meeting of the DROIPEN Working Party on 21th of February, and follow up on the proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, 27 February 2014, 2013/0408 (COD) (hereinafter: FRA, non-paper on Procedural Safeguards Directive for children).

⁴¹² CCBE, Commentary, p.1, §18.

⁴¹³ 4.3.2, pp.29-31.

⁴¹⁴ CRAE, Fair Trials & LEAP, Position paper, §17; Amnesty International & Save the Children, joint paper, p.5, §§6-7; Sayers 2015, §13.

⁴¹⁵ CRAE, Fair Trials & LEAP, Position paper, §17; ICJ, JUSTICE & NJCM, Briefing paper, p.8, §§4-5; Amnesty International & Save the Children, joint paper, p.5, §§6-7; Sayers 2015, §13.

minimum age of criminal responsibility in the EUMS, and since the Directive does not set this minimum, very young children fall under the protection of the Directive. This is another reason why all conditions and requirements, prescribed by the international standards, must be met.⁴¹⁶

Second, it is not clear why certain information should be delivered later than other and why this would be justified, as the international standards clearly state that all information must be delivered promptly without distinction. That Children should be informed promptly of all their rights was prescribed in the proposal of the European Commission,⁴¹⁷ the General Approach of the Council⁴¹⁸ and the Draft amendments of the LIBE Committee of the European Parliament⁴¹⁹, because they are equally important.⁴²⁰

Similarly, the Directive falls short in relation to the information's content. It does not draw enough attention to information on: the child's options and their consequences, the conditions under which they will be questioned, the possibility to adapt the course of the Court proceedings, possible support services, and complaint mechanisms regarding their treatment during the proceedings.⁴²¹

5.2.4. Assistance by a lawyer and the right to legal aid

The right to have access to a lawyer, imbedded in the Directive 2013/48/EU⁴²², equally counts for children who are suspects or accused persons in criminal proceedings. The EUMS must ensure that they fully enjoy this right.⁴²³ In addition, the Procedural Safeguards Directive for Children prescribes the following.

Article 6.3 of the Procedural Safeguards Directive for children prescribes that, from the moment they are made aware of their status as a suspect or accused person, they must be

⁴¹⁶ ICJ, JUSTICE & NJCM, Briefing paper, p.8, §6 & P;9, §1.

⁴¹⁷ Art. 4, Procedural Safeguards Directive for children, COM Proposal.

⁴¹⁸ Art. 4, General approach of the Council.

⁴¹⁹ Art. 4, Draft amendments LIBE.

⁴²⁰ Sayers 2015, §13.

⁴²¹ CRAE, Fair Trials & LEAP, Position paper, §18; Amnesty International & Save the Children, joint paper, p.6, §1.

⁴²² Directive on the right to a lawyer and communication.

⁴²³ Art. 6.1 & 6.2, Procedural Safeguards Directive for Children, final.

assisted by a lawyer without undue delay.⁴²⁴ It also lays down that they shall be assisted immediately by a lawyer in the following situations: (1) before questioning, (2) when authorities carry out investigative or other evidence-gathering acts, (3) without undue delay after depriving the child of his or her liberty and (4) in due time before appearing before a Court with criminal competence (when the child is summoned to do so).⁴²⁵

In addition paragraph 4 of that same Article states that EUMS must respect and fulfil the right to assistance by a lawyer by ensuring that: (1) children can meet and communicate in private with their lawyer, also before (police) questioning; (2) children are assisted during questioning; their lawyer can effectively participate, based on national procedures that do not prejudice this effective participation (and this participation shall be recorded); (3) children are (as a minimum) assisted by their lawyer during identity parades, confrontations, and reconstruction of the crime scene (when provided under national law) if the attendance of the child is required or permitted.⁴²⁶

The communications between the child and his or her lawyer shall be confidential (entailing a positive and negative obligation on the EUMS)⁴²⁷, and includes meetings, correspondence, telephone conversations, and other communication forms.⁴²⁸

Article 6.6 allows for a derogation from 6.3 if the assistance by the lawyer is disproportionate based on the circumstances of the case, the seriousness of the allegations and the complexity of the case and possible measures, and this taking into account the best interests of the child as a primary consideration. This derogation does not apply when the child is being brought before a Court to decide on a possible detention, and during the

⁴²⁴ Recital 27, *ibid*: “assistance by a lawyer means legal support and representation during criminal proceedings”.

⁴²⁵ Art. 6.3, *ibid*.

⁴²⁶ Art. 6.4, *ibid*.

⁴²⁷ Recital 33, *ibid*; The positive obligation entails that arrangements are made for a child deprived from his or her liberty that enable them communicate in confidentiality.

⁴²⁸ Art. 6.5, *ibid*; exceptions: they suspect the lawyer, based on objective and factual circumstances, of involvement in the criminal offence (Recital 33, *ibid*); an incidental breach due to a lawful surveillance operation (Recital 34, *ibid*).

child's detention. On the other hand, detention cannot be imposed on a child as a criminal sentence, without the assistance by a lawyer.⁴²⁹

In exceptional circumstances, and only during the pre-trial stage, Article 6.8 also foresees in a temporarily derogation (justified on the basis of the circumstances of the case) when serious adverse consequences for a person's life, liberty or physical integrity urgently need to be averted, or if immediate action by the authorities is vital to prevent the jeopardy of the criminal proceedings regarding a serious crime. Also in this context the best interests of the child must be taken into account. Decisions to question a child without the presence of a lawyer can only be taken by a judicial authority or another competent authority if subject to judicial review, and this on a case-by-case basis.⁴³⁰

If no lawyer is present, at the aforementioned moments, the authorities must postpone the questioning of the child or other investigative acts and this for a reasonable period of time. If the child did not nominate a lawyer, the authorities must arrange one.⁴³¹

To ensure the right to assistance by a lawyer, legal aid should be regulated in national law.⁴³² Recital 26 mentions that this Directive should not limit the assistance of a lawyer based on Directive 2013/48/EU and vice versa.⁴³³

In the case of children, who are initially not suspects or accused persons, but become one, Recital 29 stresses the right to be silent and not to incriminate oneself. The questioning should be suspended until he or she is made aware of his or her status as a suspect or accused person so a lawyer can assist him or her.⁴³⁴

⁴²⁹ Art. 6.6 & Recital 30, *ibid*.

⁴³⁰ Art. 6.8, *ibid*; Recitals 31-32 add: they should be informed of their rights to be silent and not to incriminate oneself; the grounds and criteria for a temporary derogation must be clearly outlined in national law; the derogation should be proportionate, limited in time, and not only based on the seriousness of the crime (Recital 31-32, *ibid*).

⁴³¹ Art. 6.7, *ibid*.

⁴³² Art.18 and Recital 25, *ibid*.

⁴³³ Recital 26, *ibid*.

⁴³⁴ Recital 29, *ibid*.

Finally, on legal aid the Directive is rather silent and only prescribes that EUMS should ensure that their national laws guarantee effective implementation of the right to assistance by a lawyer. How they should precisely fulfil this obligation is not clear.⁴³⁵

Critique

Assistance by a lawyer

Prima facie the enshrinement of the right to access to a lawyer and legal aid in the Directive is a good and necessary development. Since the Directive 2013/48/EU prescribes prompt access to a lawyer for all suspects and accused upon arrest (including at the police station and during interrogations), the Directive under discussion should at least (or you would hope) provide for the same protection. As children find themselves in a more vulnerable position, they should actually enjoy greater protection, including mandatory access to a lawyer and this without a possibility to waive.⁴³⁶

That was the original proposal of the European Commission and was reiterated in the Draft amendments of LIBE Committee of the European Parliament, based on a recommendation by the European Criminal Bar Association.⁴³⁷ The provision should be equally applicable to criminal proceedings potentially leading to the dismissal of the case by the prosecutor.⁴³⁸ These provisions were deleted in the final negotiations and the content was mainly replaced with the weaker provision of the Council⁴³⁹.

This is unfortunate, since children might not understand what it means to waive this essential safeguard, or what it precisely implicates, and thus, they might be more likely to do so.⁴⁴⁰ Moreover, the Directive does not in any way address the further details of such a

⁴³⁵ CRAE, Fair Trials & LEAP, Position paper, §32.

⁴³⁶ Amnesty International & Save the Children, joint paper, p.6, §2.

⁴³⁷ Art. 6.1, Procedural safeguards Directive for children, COM proposal; CCBE, Commentary, p.2, §16 & p.3, §6; Art. 6.1, Draft amendments LIBE; European Criminal Bar Association, 'recommendations to the European Commission on appropriate rights and treatment of vulnerable suspects', Annex II to the impact assessment of the European Commission accompanying the document proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings of 27 November 2013, SWD (2013) 480 final, p.76, §13 & p.78, §22.

⁴³⁸ Art. 6.2, Procedural safeguards Directive for children, COM proposal; Art. 6.2, Draft amendments LIBE.

⁴³⁹ Art. 6.1, General approach of the Council.

⁴⁴⁰ Fair Trials Europe & Legal Experts Advisory Panel, International Commission of Jurists & JUSTICE, Children's Rights Alliance for England, and International Juvenile Justice Observatory, 'Joint civil society

waiver, making this safeguard even weaker than ensured by the Directive on the right to a lawyer and communication (prescribes several requirements).⁴⁴¹ In sum, this possibility “holds grave risks for their right to defend themselves”⁴⁴².

On top of these weak provisions, the Directive includes 2 types of derogations on the basis of which EUMS do not have to fulfil this obligation.

The first, the proportionality exception, is not only problematic, because it lowers the protection standard for vulnerable suspects and accused⁴⁴³, but also because it consists of vague wording which leaves a broad discretion to the EUMS. Together with the aforementioned limitation regarding minor offences, the Directive lowers its protection dramatically and might contribute to considerable differences between the EUMS.⁴⁴⁴

The second, (undefined) temporary derogation is cut from the same cloth. Also this derogation remains very broad in its wording, by giving two general situations (in the pre-trial stage) in which this is acceptable. Adjacent to the ‘taking the best interests of the child into account’ principle, the derogation provision does not define a (maximum) period of time, nor does it include the prohibition of questioning the person during that period of delay. It gives even less safeguards than, for example the Directive on the right to a lawyer and communication, which prescribes all specific requirements for such derogations to be acceptable (proportionality, strictly limited in time, not solely based on the seriousness of the offence, no prejudice of a fair trial, case-by-case basis, etc.).⁴⁴⁵ All of this goes against the international Standards (*supra*)⁴⁴⁶.⁴⁴⁷ Furthermore, only in the case of questioning in the

position on the draft report of Caterina Chinnici on the proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings’, 26 January 2014, available from <http://www.oijj.org/en/docs/general/joint-civil-society-position-on-the-draft-report-of-caterina-chinnici-on-the-proposal-f>, (accessed 28 June 2016) (hereinafter: FTE, LEAP, ICJ, JUSTICE, CRAE & IJJO, Joint position), p.2, §§4-5; ICJ, JUSTICE & NJCM, Briefing paper, p.10, §2 & p.11, §3.

⁴⁴¹ Art.9, Directive on the right to a lawyer and communication.

⁴⁴² ICJ, JUSTICE & NJCM, Briefing paper, p.10, §2.

⁴⁴³ This exception is not included in the Directive on the right to a lawyer and communication.

⁴⁴⁴ FTE, LEAP, ICJ, JUSTICE, CRAE & IJJO, Joint position, p.2, §§4-6; CCBE, Commentary, p.2, §§ 17-18; CRAE, Fair Trials & LEAP, Position paper, §26; ICJ, JUSTICE & NJCM, Briefing paper, p.10, §3; Amnesty International & Save the Children, joint paper, p.7, §4; Eurochild & IJO, position paper, §8; Sayers 2015, §21.

⁴⁴⁵ Art. 3.5, 3.6 & 8, Directive on the right to a lawyer and communication.

⁴⁴⁶ 4.3.6, pp.35-37.

absence of a lawyer the Directive prescribes that a judicial authority should decide on this far-reaching limitation.

Summarising, while Recital 26 reminds the EUMS of the fact that this Directive does not limit the rights foreseen in Directive 2013/48/EU and vice versa, you could wonder why all the contradictory exceptions and derogations, providing less protection to suspected or accused children, were included?⁴⁴⁸

Children should always have (free and mandatory) access to a lawyer, at any stage of the criminal proceedings (including proceedings potentially resulting in the final dismissal of the case by the prosecutor)⁴⁴⁹ and irrespective of a proportionality test or ‘threat’. Ultimately, the Directive should have obliged the EUMS to set up schemes as to ensure prompt assistance of suspected or accused children by trained and qualified lawyers.⁴⁵⁰

Legal aid

It is disappointing that the Directive does not address this issue in depth (considering the diverse rules and practices at national level)⁴⁵¹ and that the requirements prescribed by the international standards (*supra*)⁴⁵² (*accessible, age-appropriate, effective, and responsive legal aid with a priority for children and without a means test*)⁴⁵³ were not included. On this point, the Directive will only further promote the inconsistency and variability between the EUMS.⁴⁵⁴ Currently, an additional Directive on legal aid is being drafted, but given the many differences between the EUMS the question is if an agreement will be found.⁴⁵⁵

Other appropriate assistance

⁴⁴⁷ FTE, LEAP, ICJ, JUSTICE, CRAE & IJJO, Joint position, p.2, §§4-6; CRAE, Fair Trials & LEAP, Position paper, §26.

⁴⁴⁸ CRAE, Fair Trials & LEAP, Position paper, §26; Amnesty International & Save the Children, joint paper, p.6, §3 & p.7, §§3-7.; Sayers 2015, §§20-22.

⁴⁴⁹ Art. 6.2, Draft amendments LIBE.

⁴⁵⁰ ICJ, JUSTICE & NJCM, Briefing paper, p.11, §3; Amnesty International & Save the Children, joint paper, p.6, §4 & p.7, §§6-7; Sayers 2015, §22.

⁴⁵¹ Com Impact Assessment, p.6.

⁴⁵² 4.3.6, p.35.

⁴⁵³ Amnesty International & Save the Children, joint paper, p.8, §1; United Nations, General Assembly, *Resolution on UN Principles and Guidelines on access to legal aid in criminal justice systems*, 20 December 2012, UN Doc. GA Res. 67/187, principle 10.

⁴⁵⁴ Amnesty International & Save the Children, joint paper, p.8, §§1 & 4; Sayers 2015, §42.

⁴⁵⁵ Directive on provisional legal aid, COM proposal.

Finally, the Directive is also silent on other necessary assistance, for example the support of a social worker, which is included in the international standards (*supra*)⁴⁵⁶.

5.2.5. The rights related to the holder of parental responsibility

As soon as possible the holder of parental responsibility must be provided with the aforementioned information. If this would be contrary to the best interests of the child, or not possible (the person cannot be reached after reasonable efforts of the authorities), or if it can prejudice the criminal proceedings (e.g. destroying evidence, witness interference, or involvement in the offence),⁴⁵⁷ the information can also be communicated to another appropriate adult, nominated by the child and accepted by the authorities. If the adult is not nominated or accepted, the authorities can choose another person (which may be the representative of a certain authority or institution dealing with child welfare), and this taking into account the child's best interest.⁴⁵⁸

Following Article 15, the child has the right to be accompanied by his or her Holder of parental responsibility⁴⁵⁹ during Court Proceedings. Similar to the aforementioned provision, the child shall be accompanied by another, nominated person than the holder of parental responsibility, if one of the three previously described situations occurs.⁴⁶⁰

Furthermore, children should also be accompanied by their holder of parental responsibility or another appropriate adult during the other stages of the criminal proceeding if it is in the best interests of the child and if the person's presence will not jeopardise the criminal proceedings.⁴⁶¹

Critique

⁴⁵⁶ 4.3.6, pp.35-37

⁴⁵⁷ Recital 23, Procedural Safeguards Directive for children, final; If these problematic circumstances cease to exist, the (still relevant) information should be provided to the child's holder of parental responsibility (Art. 5.3 & Recital 24, *ibid.*)

⁴⁵⁸ Art. 5 & Recitals 22-24, *ibid.*

⁴⁵⁹ Recital 57 includes this right for all holders, not just 1, unless practically impossible (Recital 57, *ibid.*)

⁴⁶⁰ Art. 15.1-3 & Recital 58, *ibid.*; Furthermore, Recital 57 requires the EUMS do introduce rules on practical arrangements, and the conditions for excluding a Holder of parental responsibility (Recital 57, *ibid.*)

⁴⁶¹ Art. 15.4. & Recital 59, *ibid.*

The involvement of a child's holder of parental responsibility is of great importance for the child as he or she can give moral and psychological support and guidance. Therefore, it is positive that the EU Legislator included and emphasised the right to have his or her holder of parental responsibility informed and the right of the child to be accompanied by this person during Court Proceedings. With the inclusion of this provision in the Directive, EUMS are obliged to implement this requirement without a possibility to derogate, what is on the contrary allowed in the 2013/48/EU⁴⁶², as in any case an adult shall be informed.

On this point, the Directive is also more detailed and stronger than the original provision proposed by the European Commission, which simply required the parent (or other appropriate adult) to have access.⁴⁶³ Nevertheless, also this provision seems to be lacking several important elements.

On informing the parents

The Directive requires that the authorities to inform the parents as soon as possible and immediately foresees in several situations where the information should be communicated to another adult instead of the parents. These situations are phrased very broadly and are open for interpretation and abuse.⁴⁶⁴

The Directive should have followed the international standards (*supra*)⁴⁶⁵ that are more precise and require the competent authorities to inform the parents 'promptly', meaning the moment they decided to (or not to) start criminal proceedings against the child and notify them immediately when the child has been apprehended. Moreover, in the international standards it is clearly stated that parents must be informed of the child's arrest, why the child is there, and ask the parents to join the child at the station in order to encourage their involvement.⁴⁶⁶

On the parents' presence

⁴⁶² Art.5.3, Directive on the right to a lawyer and communication.

⁴⁶³ Art. 15, Procedural Safeguards Directive for children, COM Proposal.

⁴⁶⁴ CRAE, Fair Trials & LEAP, Position paper, §§20-21 & 23.

⁴⁶⁵ 4.3.1, pp.28-29.

⁴⁶⁶ CRAE, Fair Trials & LEAP, Position paper, §20.

The Directive gives the child the right to be accompanied by his or her holder of parental responsibility during Court proceedings, but, and this in contradiction with the international standards, is reluctant in relation to other stages of the proceedings. It makes it dependent on the best interests of the child and if it does not jeopardise the proceedings, which does not clarify and enhances the discretion of the EUMS.⁴⁶⁷

Such exceptions, while possible, must be phrased strictly. A prompt meeting between the child and holder of parental responsibility (after the arrest), and the parents' presence during questioning and Court proceedings should have been the rule, while only in exceptional circumstances (as the best interests of the child and jeopardy of the proceedings) derogations should be allowed.⁴⁶⁸

Finally, it is dangerous that the EU legislator readily gives EUMS the right to easily appoint another appropriate adult in the previously mentioned cases.⁴⁶⁹

5.2.6. The right to an individual assessment

Article 7 requires the EUMS considers the child's needs in relation to protection, education, training and social reintegration. To make this possible, suspected or accused children must be individually assessed, taking into account particularly their personality and maturity, economic, social and familial background, and specific vulnerabilities. The detail and extent of this assessment can vary, following the specific circumstances of the case, the measures needed for the future, and also depending on an individual assessment made in the recent past. When the basis of the assessment changes significantly, the individual assessment must be updated during the criminal proceedings.⁴⁷⁰

The close involvement of the child is a prerequisite and the assessment must be carried out by qualified personnel, applying a multidisciplinary approach, and if appropriate, involving

⁴⁶⁷ Sayers 2015, §40.

⁴⁶⁸ CRAE, Fair Trials & LEAP, Position paper, §§20 & 23.

⁴⁶⁹ Sayers 2015, §16.

⁴⁷⁰ Art. 7.1-3. , 7.8. & Recitals 36-37, Procedural Safeguards Directive for children, final.

the holder of parental responsibility (or another appropriate adult, as mentioned in Articles 5 and 15) and/or a specialised professional.⁴⁷¹

The individual assessment must be used by the competent authorities when deciding on measures that should be taken in the interests of the child, or when assessing if a precautionary measure would be appropriate, or when undertaking a line of action (including the sentencing).⁴⁷²

The assessment must find place during the earliest appropriate stage of the proceedings, but before the indictment. If there is no individual assessment available, an indictment can still be presented if in the best interests of the child and if available at the beginning of the Court hearings.⁴⁷³

Lastly, EUMS can derogate from this Article if this is warranted based on the circumstances of the case (for example, the seriousness of the crime and possible measures) and if in accordance with the best interests of the child.⁴⁷⁴

Critique

The right to an individual assessment is one of the most noticeable and important provisions of the Directive, resulting from great efforts produced by the LIBE Committee of the European Parliament.⁴⁷⁵ Not only because it is enshrined in a separate Article, but also as it makes this soft law principle, prescribed by the UNCommRC and the *Beijing Rules (supra)*⁴⁷⁶, binding for the first time.

An individual assessment of the child is of great importance, as it allows the authorities to adapt the proceedings to the child's needs in order to enable them to effectively participate and to ensure the child's safety and protection.⁴⁷⁷ It is noteworthy that Article 7 specifically specifies how the information will be used and for what it will serve.

⁴⁷¹ Art. 7.7., *ibid.*

⁴⁷² Art. 7.4. & Recitals 35, 37-38 *ibid.*

⁴⁷³ Art. 7.5.-6. & Recital 39, *ibid.*

⁴⁷⁴ Art. 7.9., *ibid.*

⁴⁷⁵ Art. 7, Draft amendments LIBE.

⁴⁷⁶ 4.3.4, p.33.

⁴⁷⁷ CRAE, Fair Trials & LEAP, Position paper, §33.

It mentions also the person or entity (including its multi-disciplinary formation) responsible for the individual assessment, prescribes which standards or requirements the responsible person should fulfil (e.g. Professionalism, expertise, training, etc.) and foresees the presence of the child's holder of parental responsibilities, all this in line with the international standards.

It is positive that the assessment must be carried out *at the earliest appropriate stage of the proceedings and before indictment*, but, as the LIBE Committee of the European Parliament proposed, the assessment is also necessary before "*the ordering of measures, involving deprivation of liberty*"⁴⁷⁸. Given the serious consequences of such measures, these decisions should and cannot be taken without individually assessing a child.

Negative is that the details on the scope of the assessment are only mentioned in Recitals 36 and 37 and not in the Article itself.⁴⁷⁹ The same is true for the use of this information, which is mainly explained in Recital 38 and not in the Article. Complementary, it should have stressed that the information should only be used to ensure and protect the best interests of the child and not as evidence against the child.⁴⁸⁰

As in other Articles, the derogation (if warranted) and postponement possibilities are the main worrisome provisions in Article 7.⁴⁸¹ An indictment can still be presented without the assessment in accordance with a vague exception. The inclusion of 'best interests of the child' in both derogations is absurd, because the individual assessment should in itself serve as a tool to identify the best interests of the child. The child's interests cannot be the instrument for and the outcome of the assessment, at the same time. Moreover, the 'best interests of the child' principle is already used as a parameter to set the detail and extent of an individual assessment.⁴⁸²

⁴⁷⁸ Art. 7.3, Draft amendments LIBE.

⁴⁷⁹ CRAE, Fair Trials & LEAP, Position paper, §34, b; Amnesty International & Save the Children, joint paper, p.8, §6.

⁴⁸⁰ CRAE, Fair Trials & LEAP, Position paper, §34, c; ICJ, JUSTICE & NJCM, Briefing paper, p.12, §3; Amnesty International & Save the Children, joint paper, p.8, §6; Eurochild & IJO, position paper, §9.

⁴⁸¹ CRAE, Fair Trials & LEAP, Position paper, §35-36; Amnesty International & Save the Children, joint paper, p.8, §8; Eurochild & IJO, position paper, §9.

⁴⁸² FTE, LEAP, ICJ, JUSTICE, CRAE & IJO, Joint position, p.1, §6 & p.2, §1; CRAE, Fair Trials & LEAP, Position paper, §36; Amnesty International & Save the Children, joint paper, p.8, §8.

Hence, the Directive leaves a broad discretion to the EUMS and will probably not decrease the inconsistency between the them.⁴⁸³

5.2.7. The right to a medical examination

If children are deprived of their liberty the Directive obliges the EUMS to ensure that they receive a medical examination without undue delay to assess their mental and physical condition. This examination must be non-invasive as possible and must be conducted by a physician or another eligible professional. The examination's conclusion must be recorded in writing and medical assistance must be provided if this is required.⁴⁸⁴

The outcome of the examination must be considered when the child's capacity to be questioned is being determined, as for investigative or evidence-gathering acts, or other envisaged measures in relation to the child.⁴⁸⁵

The medical examination must be conducted, either on the competent authorities' initiative, mainly when specific health indications urge for it, or on the request of the child, the child's holder of parental responsibility, or the child's lawyer. If the circumstances require a second medical examination it must be provided.⁴⁸⁶

Critique

While the Directive does not provide for a definition, it is nevertheless positive that, similar to the international standards (*supra*)⁴⁸⁷, the Directive prescribes a medical examination.

It is unfortunate that it will only be conducted on the initiative of the authority, the child, or his or her lawyer. It would have been a stronger provision if the medical examination takes place automatically upon admission to the facility, unless the child or lawyer refuses it.⁴⁸⁸

Additionally, it should have been possible to have "*access to medical treatment if directed by a doctor*".⁴⁸⁹

⁴⁸³ Sayers 2015, §24.

⁴⁸⁴ Art. 8.1, 8.4. & Recital 41, Procedural Safeguards Directive for children, final.

⁴⁸⁵ Art. 8.2., *ibid*.

⁴⁸⁶ Art. 8.3., 8.5. & Recital 41, *ibid*.

⁴⁸⁷ 4.3.12.2, p.46.

⁴⁸⁸ CRAE, Fair Trials & LEAP, Position paper, §37; ICJ, JUSTICE & NJCM, Briefing paper, p.13, §3; Amnesty International & Save the Children, joint paper, p.9, §§1 & 4.

⁴⁸⁹ Sayers 2015, §27.

Some critics find that this provision should also be applicable on children who are not deprived of their liberty, because the medical examination can be important for every child subject to criminal proceedings.⁴⁹⁰

They emphasise also that the examination should be carried out solely to evaluate, protect or improve the mental and physical condition of the child, and not to assess his or her capacity to be questioned, or to be involved in other investigative acts. For that, they base themselves on the *UN Principles of Medical Ethics and the role of physicians in their professional relationship with prisoners (supra)*⁴⁹¹. They regret that Article 8 does not prescribe that the examination should only be carried out in order to ensure the right to health and to protect the child against ill treatment.⁴⁹²

Finally, in the benefit of the child, the Directive should have obliged the competent authorities to take all necessary steps without delay in order to protect the child's health, as had been proposed by the LIBE Committee of the European Parliament.⁴⁹³

5.2.8. Audio-visual recording

Article 9 requires the questioning of suspected or accused children during criminal proceedings is audio-visually recorded, if it is proportionate to the circumstances of the case. The proportionality depends on the presence or absence of a lawyer, whether the child is deprived of his or her liberty or not, and taking into account the best interest of the child as a primary consideration.⁴⁹⁴

If the recording is not available, due to insurmountable technical problem⁴⁹⁵, the questioning must be recorded via other appropriate means, for example by writing. Questions with the sole purpose to identify the child do not have to be recorded audio-

⁴⁹⁰ Sayers 2015, §28.

⁴⁹¹ 4.3.12.2, p.47.

⁴⁹² FTE, LEAP, ICJ, JUSTICE, CRAE & IJJO, Joint position, p.2, §7 & p.3, §1; ICJ, JUSTICE & NJCM, Briefing paper, p.13, §4 & p.14, §1.

⁴⁹³ Art. 8.3, Draft amendments LIBE.

⁴⁹⁴ Art. 9.1. & Recital 42, *ibid*; This Article is not applicable on the questioning by a judge or a Court (Recital 42, *ibid*).

⁴⁹⁵ Recital 43, Procedural Safeguards Directive for children, final.

visually.⁴⁹⁶ Recital 44 adds that the questioning of a child should always be conducted in a way that is in accordance with the child's age and maturity.⁴⁹⁷

Critique

As audio-visual recording of questioning makes part of the non-binding '*CoE Guidelines on child-friendly justice*' (*supra*)⁴⁹⁸, the inclusion of this obligation is a welcome step as to effectively protect and ensure the child's right to a fair trial.⁴⁹⁹ In addition, this kind of authentic record is also beneficial for the EUMS, because it can facilitate the investigations and help to deny potential unfounded allegations of ill treatment.⁵⁰⁰

Nonetheless, due to the resistance of the Council⁵⁰¹, during the final negotiations the Article has been phrased in a lenient and soft way. Its content is undermined by a proportionality test, even when the child is deprived of his or her liberty. This means that the provision leaves room for broad State discretion and opens the door for excessive (ab)use of the derogation.⁵⁰² Because of their vulnerable position, children should always be audio-visually recorded during questioning with a view to ensure their rights, including their protection against rights infringements by the authorities and against a lawyer's inadequate advice.⁵⁰³ It is very unlikely that a situation would make this safeguards suddenly disproportionate, certainly when taking into account the current and future technological developments.⁵⁰⁴

⁴⁹⁶ Art. 9.2. & Art. 9.3, *ibid*.

⁴⁹⁷ Recital 44, *ibid*.

⁴⁹⁸ 4.3.3, p.32.

⁴⁹⁹ Amnesty International & Save the Children, joint paper, p.10, §4.

⁵⁰⁰ ICJ, JUSTICE & NJCM, Briefing paper, p.15, §1; Amnesty International & Save the Children, joint paper, p.10, §4.

⁵⁰¹ Art. 9, General approach of the Council.

⁵⁰² CCBE, Commentary, p.2, §22 & p.3, §9.1; ICJ, JUSTICE & NJCM, Briefing paper, p.14, §4 & p.15, §§1 & 3; Amnesty International & Save the Children, joint paper, p.10, §1; Eurochild & IJO, position paper, §10; Sayers 2015, §29.

⁵⁰³ FTE, LEAP, ICJ, JUSTICE, CRAE & IJJO, Joint position, p.2, §2; CRAE, Fair Trials & LEAP, Position paper, §44, c.

⁵⁰⁴ CCBE, Commentary, pp.1-2, §41. CRAE, Fair Trials & LEAP, Position paper, §41.

Even if the competent authorities consider the recording proportionate, EUMS can still circumvent this obligation by using the open and vague ‘insurmountable-technical-problem-excuse’.⁵⁰⁵

Other critics are of the opinion that the audio-recording obligation should have been expanded to questions relating to the child’s identity, and discussions with the authorities before and after the actual questioning, because also those conversations and actions “*may influence the child’s behaviour during the questioning*”.⁵⁰⁶ Both expansions are necessary.⁵⁰⁷

Furthermore, the Directive is very vague on how the questioning of a child should be conducted. The LIBE Committee of the European Parliament had integrated some details in the draft amendments,⁵⁰⁸ but they were not included in the final version of the Directive.⁵⁰⁹ As the international standards (*supra*)⁵¹⁰ lay down, a child should be heard in a child-friendly environment that is appropriate and secure, in a child-friendly language, preferably in the presence of the holder of responsibility, also in the presence of a lawyer, in a respectful and confidential atmosphere and he or she should not be questioned more than is necessary.

Recital 44⁵¹¹ mentions that questioning should be in accordance with the child’s age and maturity, and no further requirements or clarifications are given.⁵¹²

5.2.9. Timely and diligent treatment of cases

As suspected or accused children are involved, the cases must be treated as a matter of urgency and with due diligence. Furthermore, Article 13 lays down that children are treated in a way appropriate to their age, maturity, level of understanding, while protecting their

⁵⁰⁵ ICJ, JUSTICE & NJCM, Briefing paper, p.15, §3; Amnesty International & Save the Children, joint paper, p.10, §3.

⁵⁰⁶ FTE, LEAP, ICJ, JUSTICE, CRAE & IJJO, Joint position, p.2, §3; CRAE, Fair Trials & LEAP, Position paper, §42, a.

⁵⁰⁷ CRAE, Fair Trials & LEAP, Position paper, §42, a.

⁵⁰⁸ Art. 9.2a, Draft amendments LIBE.

⁵⁰⁹ Justicia, Position paper, p.6, §§1-2; Amnesty International & Save the Children, joint paper, p.11, §§1 & 3.

⁵¹⁰ 4.3.3. & 4.3.7, pp.31-33; p.37.

⁵¹¹ CRAE, Fair Trials & LEAP, Position paper, §42, b.

⁵¹² Amnesty International & Save the Children, joint paper, p.11, §2.

dignity and taking into account the child's specific needs (including the difficulties to communicate).⁵¹³

Critique

It is positive that the Directive demands a timely and diligent treatment of cases, as long proceedings could harm the child and is counterproductive to their reintegration in society. Similarly, it is positive that the Article reiterates the importance of appropriate treatment.⁵¹⁴

The only remark that can be made is that the Directive does not make a reference to Article 7 on the individual assessment, since an appropriate treatment will depend on those findings. The Directive requires timely treatment of cases, but does not prescribe a maximum duration as the international standards do, for example 6 months.⁵¹⁵

5.2.10. The right to protection of Privacy

In order to promote a child's social reintegration, the Directive requires the child's privacy during criminal proceedings. Therefore, Court hearings involving children should usually be held without public, or the EUMS should provide the Court with the possibility to decide so.⁵¹⁶

Moreover, the aforementioned records as prescribed in Article 9, must not be disseminated into the public. The media should be encouraged to have self-regulatory attitude in order to respect and protect the child's right to privacy.⁵¹⁷

Critique

The protection of the child's privacy is evidently vital. This is needed to prevent the child from stigmatisation resulting from undue publicity and to safeguard the child's rehabilitation. Although, the openness of justice is a basic principle of the rule of law and

⁵¹³ Art. 13, Procedural Safeguards Directive for children, final.

⁵¹⁴ ICJ, JUSTICE & NJCM, Briefing paper, p.18, §2; Sayers 2015, §37.

⁵¹⁵ CRAE, Fair Trials & LEAP, Position paper, §51; Amnesty International & Save the Children, joint paper, p.12, §§5-6.

⁵¹⁶ Art. 14.1, 14.2. & Recital 56, Procedural Safeguards Directive for children, final; without prejudice to the pronouncement of the judgment in public.

⁵¹⁷ Art. 14.3. & 14.4., *ibid.*

public integrity, the rights of vulnerable suspects, *in casu* the child's right to effectively participate, must also be ensured.⁵¹⁸

The inclusion of closed hearings as a rule, with the possibility to strict exceptions was initially proposed by the European Commission and supported by the LIBE Committee of the European Parliament.⁵¹⁹ Also the international Standards (*supra*)⁵²⁰ encourage the States to close the hearings in criminal proceedings involving children and require that the exceptions are limited, clearly defined in legislation and decided upon by a Court.

Unfortunately, the Directive is not so strict. It uses broad terms and leaves all of this open to the EUMS and their Courts. Depending on their legislation and the willingness of these Courts, it may well be that the international standards will be attained or not. What is also absent in the Directive is that this right to closed hearings should count at all stages of the proceedings.⁵²¹

Similarly, the Directive does not address the public pronouncement of the judgment and the protection of the child's identity. The Directive should have included the obligation to keep all revealing information confidential, as the European Commission and LIBE Committee of the European Parliament proposed⁵²². All personal data of the child (names, images, and other revealing information) must be protected throughout all stages. This should have obliged the EUMS to take action in relation to public authorities and non-states actors like media.⁵²³

Finally, the provisions of the Directive only tackle the video-recordings of the questioning. Normally, all records of the child must be kept confidential in relation to third parties, also to make sure that they cannot be used in future adult proceedings against the same person.

⁵¹⁸ CRAE, Fair Trials & LEAP, Position paper, §55.

⁵¹⁹ Art. 14.1, Procedural Safeguards Directive for children, COM Proposal; Art. 14.1, Draft amendments LIBE; CCBE, Commentary, p.4, §§14.1-14.2.

⁵²⁰ 3.3.11, p.41.

⁵²¹ Amnesty International & Save the Children, joint paper, p.13, §§3-4.

⁵²² Art.14.2, Procedural Safeguards Directive for children, COM Proposal; Art. 14.2, Draft amendments LIBE.

⁵²³ FTE, LEAP, ICJ, JUSTICE, CRAE & IJJO, Joint position, p.3, §5; CRAE, Fair Trials & LEAP, Position paper, §58; ICJ, JUSTICE & NJCM, Briefing paper, p.18, §3; Amnesty International & Save the Children, joint paper, p.13, §§5-6; Art. 14.2, Draft amendments LIBE.

The EU legislator equally missed the opportunity to include a rule on the automatic removal of a child's criminal records when he or she reaches the age of 18.⁵²⁴

5.2.11. The right to appear in person and to participate

Article 16 enshrines the vital right of a suspected or accused child to appear and participate in his or her trial. It entails that the child has the right to be present at his or her trial, and that EUMS must take the necessary measures to ensure his or her effective participation in the trial, including the right to be heard and express his or her views.

If children are not present at their trial, they should have the possibility to have another trial or another legal remedy, compatible with the requirements and conditions prescribed by Directive 2016/343^{525, 526}.

Critique

It is positive that the child is not forced to be present, contrary to what the European Commission proposed,⁵²⁷ and that measures should be taken to encourage him or her. The reiteration of the right to a new trial or remedy, if the trial was conducted in absentia, and the mentioning of the new Directive dealing with this issue can only be hailed.⁵²⁸

On the other hand, it is disappointing that further explanation of the 'encouraging' measures (e.g. summoning the child) is placed in the (non-operative) Recital 60 and that the Directive simply requires the EUMS to take "*necessary measures to enable them to participate effectively*". Also the wording of the obligations linked to the central principle of a fair trial could not be vaguer. Similar to the international standards (*supra*)⁵²⁹, it should have included or at least explained the necessary measures or requirements to achieve the effective participation of the child (for example, child's understanding of the charges,

⁵²⁴ Amnesty International & Save the Children, joint paper, p.13, §5; Eurochild & IJO, position paper, §12.

⁵²⁵ Directive on the presumption of innocence and the right to be present.

⁵²⁶ Art.16, Procedural Safeguards Directive for Children, final text; Furthermore, Recital 60 includes appropriate manners in order to encourage a child to attend his or her trial, e.g. *summoning them in person, and or sending a copy to the child's holder of parental responsibility*, and it requires EUMS to make practical arrangements in relation to their presence (Recital 60, *ibid*).

⁵²⁷ Art. 16.1, Procedural Safeguards Directive for children, COM Proposal.

⁵²⁸ CRAE, Fair Trials & LEAP, Position paper, §59; Eurochild & IJO, position paper, §13; Sayers 2015, §41.

⁵²⁹ 4.3.5, p.34.

possible consequences and sanctions, being able to make decisions and direct his or her lawyer, a child-friendly atmosphere, child-friendly language, child-friendly and non-intimidating settings and procedures, etc.).⁵³⁰

Moreover, Article 16 should have made more reference to other provisions of the Directive, as they are all interdependent and the absence of one could undermine the child's right to effective participation.⁵³¹

Following the proposal of the European Commission and of the LIBE Committee of the European Parliament⁵³², the EU legislator could have further specified which kind of retrial and conditions it envisages in case of a trial *in absentia* (for example, effective participation of the child, re-examination of evidence, redetermination of merits, possibility to reverse the original decision, etc.), instead of simply referring to the recently adopted Directive 2016/343 on the right to be present at one's trial.⁵³³

5.2.12. Deprivation of liberty

The Directive makes clear that the deprivation of a child's liberty, detention in particular, should be avoided as much as possible. Therefore, it prescribes several limitations, mentions alternative measures, and orders a specific treatment.⁵³⁴

5.2.12.1. Limitations

Article 10 clearly states that the deprivation of a child's liberty can only be imposed as a measure of last resort, and can only be based on a reasoned decision, subject to judicial and periodic review. This review must be conducted by a court, or *ex officio*, or at the request of

⁵³⁰ CRAE, Fair Trials & LEAP, Position paper, §§53-54; Amnesty International & Save the Children, joint paper, p.13, §§1-2.

⁵³¹ CRAE, Fair Trials & LEAP, Position paper, §51; Amnesty International & Save the Children, joint paper, p.14, §3.

⁵³² Art. 16.2, Procedural Safeguards Directive for children, COM Proposal; Art. 16.2, Draft amendments LIBE.

⁵³³ Content of Art.8-9, Directive on the presumption of innocence and the right to be present; ICJ, JUSTICE & NJCM, Briefing paper, p.21, §1.

⁵³⁴ See also: Recitals 45-55, Procedural Safeguards Directive for children, final.

the child, his or her lawyer, or another authority. These decisions must be taken *without undue delay*.⁵³⁵

At all stage of the proceedings, the deprivation of a child's liberty must be limited to the *shortest appropriate period of time* and the child's age, his or her individual situation, and the specific circumstance of the case must be taken into due account.⁵³⁶

5.2.12.2. Alternative measures

The Directive stresses the importance of measures alternative to detention and requires the EUMS to have such possible alternatives in place. The Directive's Recitals mention some examples: an obligation to reside in a certain place, a prohibition to go to certain places or meet certain people, reporting, educational programmes, therapeutic programmes, etc.⁵³⁷

5.2.12.3. Specific treatment

Article 12 requires, primarily, that the children must be detained separately from adults, except when it is not in the best interests of the child to do so. The same counts for police custody. However, in police custody they can be held together with adults in exceptional circumstances, when it is not possible in practice to detain them separately, and when this is done in a manner compatible with the best interests of the child.⁵³⁸

When the child has come of age while detained, the EUMS should still provide for the possibility to separate them from other adults if warranted. It might be acceptable to detain the child together with young adults, except when this is contrary to the best interests of the child.⁵³⁹

EUMS should also take appropriate (and proportionate to the detention duration) measures to ensure their health and physical and mental development⁵⁴⁰, their right to education and

⁵³⁵ Art.10.2, *ibid*; Recital 45 emphasises: avoid the deprivation of liberty (particularly pre-trial) as much as possible, but it is acceptable when it seems necessary e.g. in the case of a *flagrante delicto or immediately after a criminal offence has been committed* (Recital 45, *ibid*); Recital 47, *ibid*.

⁵³⁶ Art. 10.1, *ibid*.

⁵³⁷ Art. 11 and Recital 46, *ibid*.

⁵³⁸ Art.12.1., 12.2. & Recitals 48-49, *ibid*; for example in less populated areas.

⁵³⁹ Art. 12.3. & 12.4, *ibid*; Recital 50 encourages the EUMS to perceive only persons up until 24 years old as young adults (Recital 50, *ibid*)

⁵⁴⁰ Also applicable on other kinds of deprivation of liberty than detention (Art. 12.5, §3).

training (taking into account their possible disabilities)⁵⁴¹, the effective and regular exercise of the right to family life⁵⁴², the access to development and social reintegration programmes⁵⁴³, and the respect for their freedom of religion or belief^{544 545}.

Finally, a meeting with the child and his or her holder of parental responsibility should be ensured as soon as possible, in compatibility with investigative and operational requirements.⁵⁴⁶

Critique

It can be praised that by prescribing that the deprivation of a child's liberty can only be used as a measure of last resort, and only for the shortest appropriate period of time, the Directive reiterates the international standards (*supra*)⁵⁴⁷.

This applies also to the alternative sanctions, but it is regrettable that they are only mentioned in Recital 46 and not in the operative Articles, as it was the case in the original proposal of the European Commission and the draft amendments of the LIBE Committee of the European Parliament.⁵⁴⁸ Equally, the Directive only requires EUMS to provide or apply alternative sanctions where 'possible'.⁵⁴⁹

It must be underlined that other elements do not always attain the same level of the international standards (*supra*)⁵⁵⁰. They go only half-way.

For example, the Directive does not reiterate the basic requirements for a lawful and non-arbitrary detention. Similarly, she does not provide for a definition of 'deprivation of liberty'. Based on the explanatory memorandum of the European Commission's proposal it

⁵⁴¹ Only applicable on other kinds of deprivation of liberty when appropriate and proportionate, taking into account the nature and duration of those situations (Art. 12.5, §4).

⁵⁴² Only applicable on other kinds of deprivation of liberty when appropriate and proportionate, taking into account the nature and duration of those situations (Art. 12.5, §4).

⁵⁴³ Only applicable on other kinds of deprivation of liberty when appropriate and proportionate, taking into account the nature and duration of those situations (Art. 12.5, §4).

⁵⁴⁴ Also applicable on other kinds of deprivation of liberty than detention (Art. 12.5, §3).

⁵⁴⁵ Art. 12.5. & Recitals 51-52, Procedural Safeguards Directive for Children, final.

⁵⁴⁶ Art. 12.6., *ibid.*

⁵⁴⁷ 4.3.12.1, pp.43-45; CRAE, Fair Trials & LEAP, Position paper, §45; Amnesty International & Save the Children, joint paper, p.11, §4.

⁵⁴⁸ Art. 11.2, Procedural Safeguards Directive for children, COM Proposal; Art. 11.2, Draft amendments LIBE.

⁵⁴⁹ Sayers 2015, §32.

⁵⁵⁰ 4.3.12.2 & 4.3.12.3, pp.46-50.

is clear that the main target is detention and not other forms of deprivation of liberty.⁵⁵¹ On the other hand, Article 12.5 adds requirements concerning the treatment of children in deprived of their liberty other than detention, which is as such a very positive development. More worrisome however is the absence of safeguards for a child to effectively challenge his or her detention or his or her treatment throughout the whole detention period (*supra*)⁵⁵², by means of an accessible, child-friendly, timely and effective complaints mechanism.⁵⁵³ The LIBE Committee of the European Parliament had proposed such vital guarantee.⁵⁵⁴ Unfortunately, it was not taken into consideration in the final text of the Directive.⁵⁵⁵

Furthermore, what is also absent in the Directive is a requirement that the initial judicial review takes place within a mandatory timeframe of, for example 24 hours after the arrest or not exceeding a few days, as laid down in the international standards. In the same spirit, the specific timeframe of, for example 2 weeks, for further review of pre-trial detention is also absent in the Directive.

Likewise, provisions are missing that lay the burden of proof in relation to the necessity and proportionality of the detention with the competent authorities.⁵⁵⁶

While it is positive that Article 12 lays down that children should be detained separate from adults, except when it is not in the best interests of the child or when it is not possible in practice, it is regrettable that the EU legislator did not clarify that the exception must be interpreted narrowly and cannot be utilised in the convenience of a State.⁵⁵⁷

⁵⁵¹ Sayers 2015, §31.

⁵⁵² 4.3.12.3, pp.49-50.

⁵⁵³ FTE, LEAP, ICJ, JUSTICE, CRAE & IJJO, Joint position, p.3, §4; CRAE, Fair Trials & LEAP, Position paper, §47, e.; ICJ, JUSTICE & NJCM, Briefing paper, p.16, §§4-6 & p.17, §1; Amnesty International & Save the Children, joint paper, p.11, §6; Eurochild & IJO, position paper, §11.

⁵⁵⁴ Art. 10.2 & 12.1, Draft amendments LIBE.

⁵⁵⁵ Art. 10.2, General approach of the Council.

⁵⁵⁶ FTE, LEAP, ICJ, JUSTICE, CRAE & IJJO, Joint position, p.3, §4; CRAE, Fair Trials & LEAP, Position paper, §47, e.; ICJ, JUSTICE & NJCM, Briefing paper, p.16, §§4-6 & p.17, §1; Amnesty International & Save the Children, joint paper, p.11, §6; Eurochild & IJO, position paper, §11.

⁵⁵⁷ CRAE, Fair Trials & LEAP, Position paper, §46; ICJ, JUSTICE & NJCM, Briefing paper, p.17, §§3-4; Amnesty International & Save the Children, joint paper, p.12, §3; Eurochild & IJO, position paper, §11; Sayers 2015, §33.

Furthermore, in the case of police custody, exceptions based on the practical impossibility are not acceptable, because it is easy to argue this point.⁵⁵⁸

It would have been better if the Directive had followed the amendments of the LIBE Committee of the European Parliament, which required the full separation of children from adults and convicted children in the case of provisional detention.⁵⁵⁹ In fact, the opposite, can be seen as contrary to the principle of ‘presumption of innocence’.

The same applies for the detention of a child with young adults. In this case, most critics are of the opinion that a child can only be detained together with a young adult, if the latter obtained majority during his or her detention, and if it is in the best interests of both.⁵⁶⁰

While it is welcome that EUMS must take appropriate measure to ensure and promote the child’s health, development, education and training, family life, social reintegration, and freedom of religion or belief, it is regrettable that the child’s right to play and specific provision for children with disabilities are missing.⁵⁶¹

Moreover, the prescribed conditions under which a child should be deprived of his or her liberty do not fully address those imbedded in the international standards. These standards foresee, *inter alia*, a facility close to the family’s home, restricted use of force or restraint, disciplinary measures consistent with human dignity and the prevention of violence and ill treatment.⁵⁶² In addition, it is a shame that the Directive places “*operational demands above the child’s right to see his or her parents*”.⁵⁶³ It would have been better that the Directive followed the proposal of the LIBE Committee of the European Parliament, which

⁵⁵⁸ CRAE, Fair Trials & LEAP, Position paper, §46; ICJ, JUSTICE & NJCM, Briefing paper, p.17, §§3-4; Amnesty International & Save the Children, joint paper, p.12, §3; Eurochild & IJO, position paper, §11; Sayers 2015, §33.

⁵⁵⁹ Art. 10a, Draft amendments LIBE.

⁵⁶⁰ CRAE, Fair Trials & LEAP, Position paper, §46; ICJ, JUSTICE & NJCM, Briefing paper, p.17, §§3-4; Amnesty International & Save the Children, joint paper, p.12, §3; Eurochild & IJO, position paper, §11; Sayers 2015, §33.

⁵⁶¹ CRAE, Fair Trials & LEAP, Position paper, §49, b; Art. 12.2.da, Draft amendments LIBE.

⁵⁶² CRAE, Fair Trials & LEAP, Position paper, §47, a-d; Eurochild & IJO, position paper, §11; Sayers 2015, §34.

⁵⁶³ Sayers 2015, §35.

prescribed that the child must be able to meet his or her holder of parental responsibilities and in any event before questioning.⁵⁶⁴

Finally, the Directive is also silent on independent inspections of the detention facilities, a condition proposed by the international standards and also included in the proposal of the LIBE Committee of the European Parliament. The lack of this safeguard is regretful, because it is vital to control the quality of the facilities and the treatment of the detained children.⁵⁶⁵

5.2.13. Children subject to European Arrest Warrant Proceedings

In case of children, subject to European Arrest Warrant Proceedings, only the Articles 4 (Right to information), 5 (informing the holder of parental responsibility), 6 (assistance by a lawyer), 8 (right to a medical examination), 18 (right to an effective remedy) and 10 to 15 (deprivation of liberty limitations, conditions and alternatives; timely and due diligent treatment of cases; right to privacy; holder of parental responsibility's company) apply. These provisions are applicable from the moment of their arrest.⁵⁶⁶

Critique

The limited applicability of the Directive in the case of EAW proceedings is in contradiction with one of the Directive's main objectives, namely to remove the barriers to an effective implementation of the principle of mutual recognition by establishing more trust in reciprocal judicial systems by establishing minimum rules on safeguards in criminal proceedings.⁵⁶⁷ The EAW procedure is exactly the kind of cross-border instruments that requires minimum rules on safeguards.

This limitation for children in an EAW proceeding is extremely troublesome, because children in such proceedings *are particularly vulnerable due to the threat of removal to another country*.⁵⁶⁸

⁵⁶⁴ Art. 12.1a, Draft amendments LIBE.

⁵⁶⁵ Art. 12.2a, Draft amendments LIBE.

⁵⁶⁶ Art. 17, Procedural Safeguards Directive for children, final; Recital 62 stresses the importance of the time-limits EAW proceedings, and should always be complied with (Recital 62, *ibid*).

⁵⁶⁷ CRAE, Fair Trials & LEAP, Position paper, §61.

⁵⁶⁸ CRAE, Fair Trials & LEAP, Position paper, §61.

Especially for that reason, Article 3 of the EAW Framework Decision prescribes a mandatory non-execution ground of the EAW if the person in question is under the age of criminal responsibility. In other words, young children will be partially protected by this EAW provision.⁵⁶⁹

Finally, the Directive does not explicitly require from the EUMS to limit the duration of the deprivation of liberty in relation to EAW proceedings, as this was proposed by the European Commission and supported by the LIBE Committee of the European Parliament.⁵⁷⁰ It is another example of the Council's recurring resistance to give consistent safeguards to young children suspected or accused in criminal proceedings.⁵⁷¹

5.2.14. Non-discrimination

Recital 65 reiterates the principle of non-discrimination and states that EUMS “*should respect and guarantee the rights set out in the Directive, without any discrimination based on any ground such as race, colour, sex, sexual orientation, language, religion, political or other opinion, nationality, ethnic or social origin, property, disability or birth*”.

Critique

It is clear that in order to fully ensure all the necessary safeguards, every child who is a suspect or accused person in criminal proceedings must be free from *de lege* and *de facto* discrimination. EUMS must pay specific attention to avoid all kinds of discrimination in criminal proceedings, including those resulting from inconsistent policies. In this context training of the involved professionals is crucial, specifically to address the situation of vulnerable children.⁵⁷²

This principle of non-discrimination was in the end included in the Recitals of the Directive, as it has not found his way in the original proposal of the European Commission.⁵⁷³ It is regrettable that the EU legislator placed this core principle in a non-

⁵⁶⁹ Sayers 2015, §9.

⁵⁷⁰ Art. 17.2, Procedural safeguards Directive for children, COM Proposal; CCBE, Commentary, p.4, §17.2; Art. 17.2, Draft amendments LIBE.

⁵⁷¹ Art. 17.2 is deleted in the General approach of the Council.

⁵⁷² ICJ, JUSTICE & NJCM, Briefing paper, p.22, §§2-4.

⁵⁷³ ICJ, JUSTICE & NJCM, Briefing paper, p.22, §3.

operative Recital. Moreover, it does not tackle directly *de facto* discrimination, the situation of vulnerable children and the training of professionals in this regard.⁵⁷⁴

5.2.15. Remedies

It is evident that suspected or accused children in criminal proceedings and requested persons in European Arrest Warrant proceedings, have a right to an effective remedy if their basic rights provided by this specific Directive are violated.⁵⁷⁵

Critique

The provision dealing with these remedies is the result of amendments proposed by the LIBE Committee of the European Parliament, since neither the proposal of the European Commission neither the Council's General approach guaranteed this safeguard.⁵⁷⁶ While the inclusion is a welcome development, the EU legislator should have been slightly more precise in its wording considering the variety of different rights. Ideally, the provision should have prescribed the types of remedies, the availability and accessibility for children and the timely manner, and this before and during trial.⁵⁷⁷

Last but not least, it should have addressed the status of evidence, including statements made by the child, obtained in breach of the Directive's provisions,⁵⁷⁸ because as the international standards made clear (*supra*)⁵⁷⁹, these materials or statements cannot be used as evidence.

5.2.16. Training

All staff of law enforcement authorities and detention facilities, handling cases in which children are involved, must receive specific training (adapted to the level of their contact with children) on children's rights, appropriate questioning techniques, child psychology and communication in child-friendly language. Judges and prosecutors dealing with

⁵⁷⁴ Art. 19a.2, Draft amendments LIBE.

⁵⁷⁵ Art. 18, *ibid*.

⁵⁷⁶ Art. 18a, Draft amendments LIBE; The proposal of the Commission and the General approach of the Council did not include this provision.

⁵⁷⁷ CRAE, Fair Trials & LEAP, Position paper, §§69-70; Eurochild & IJO, position paper, §15.

⁵⁷⁸ CRAE, Fair Trials & LEAP, Position paper, §§69-70; Eurochild & IJO, position paper, §15.

⁵⁷⁹ 4.3.8, p.38.

criminal proceedings in which children are involved must be competent in this field and or have access to specific training. Apart from the legal independence of lawyers, EUMS must promote specific training to lawyers dealing with criminal proceedings involving children.⁵⁸⁰

Similarly, EUMS must empower persons providing children with support and restorative justice. These persons must also receive appropriate and adequate training (depending on the level of their contact with children) and they must maintain professional standards in order to ensure the impartiality, high level of respect and professionalism of these tasks.⁵⁸¹

Critique

By including a provision on training and emphasising that all targeted professionals should be specialists in dealing with cases involving children, the Directive follows the ideas and standards of the international documents (*supra*)^{582, 583}.

On the other hand, it is disappointing that the level of training of enforcement authorities and detention facilities should only be appropriate to his or her contact with children.⁵⁸⁴

It is positive, that the final text includes training directed to judges and prosecutors, which was missing in the original proposal.⁵⁸⁵

In contradiction to that, concerning the training of lawyers defending children, the Directive is missing strong language. Instead of the obligation for EUMS to ensure training, as was proposed by the European Commission and the LIBE Committee of the European Parliament,⁵⁸⁶ the Directive requires only an obligation to ‘promote’ training.

By doing this, the Directive gives less in-depth guidance on training than provided by the international standards. In these standards systematic training and specific communication techniques are required to ensure that the child’s individual characteristics *are assessed and*

⁵⁸⁰ Art. 20.1-20.3 & Recital 54, Procedural Safeguards Directive for children, final.

⁵⁸¹ Art. 20.4. & Recital 63, *ibid*.

⁵⁸² 4.3.13, pp.51-52.

⁵⁸³ CRAE, Fair Trials & LEAP, Position paper, §64.

⁵⁸⁴ CRAE, Fair Trials & LEAP, Position paper, §; Amnesty International & Save the Children, joint paper, p.14, §5.

⁵⁸⁵ Art. 19, Procedural Safeguards Directive for children, COM Proposal.

⁵⁸⁶ Art. 19.2, Procedural Safeguards Directive for children, COM Proposal; Art. 19.2, Draft amendments LIBE.

taken into account, and this with a special focus on the most vulnerable children (for example, street children, migrant children, indigenous children, girls, etc) and persons with a disability. Further EU guidance in this field is certainly required.⁵⁸⁷

5.2.17. Transposition, data and non-regression

The EUMS must comply with the Directive by introducing all necessary laws, regulations and administrative provisions.⁵⁸⁸ In order to be compliant, EUMS must collect available data (5 years after the Directive's entry into force and subsequently every 3 years) showing the implementation of the rights prescribed in this Directive.⁵⁸⁹

Article 23 states that the provisions do not limit or derogate from the existing international standards or domestic legislation were they provide higher protection.⁵⁹⁰

Critique

It is very disappointing that the Directive only obliges EUMS to collect 'available data', and not all data that is necessary to prove that rights of the Directive have been correctly implemented, as the European Commission and LIBE Committee of the European Parliament proposed⁵⁹¹.⁵⁹² Furthermore, the specific types of data that must be (at least) collected, prescribed in the original proposal,⁵⁹³ are lacking in the final text.

The fact that a domestic norm providing higher protection than this Directive cannot form an obstacle to the effective implementation of the principle of mutual recognition emphasises again the sad reality in the EU that the swift cooperation in criminal matters is more important than the protection and fulfilment of fundamental rights in the EU.

⁵⁸⁷ Justicia, Position paper, p.6, §5 & p.7, §1; ICJ, JUSTICE & NJCM, Briefing paper, p.22, §5; Amnesty International & Save the Children, joint paper, p.14, §4; Eurochild & IJO, position paper, §14; Sayers 2015, §43.

⁵⁸⁸ Art. 24., Procedural Safeguards Directive for children, final.

⁵⁸⁹ Art. 21, *ibid*; Recital 64 mentions data, recorded by, for example enforcement authorities, social welfare services, etc (Recital 64, *ibid*).

⁵⁹⁰ Art.23 & Recital 66, *ibid*.

⁵⁹¹ Art.20.1, Procedural Safeguards Directive for children, COM Proposal; Art. 20.1, Draft amendments LIBE.

⁵⁹² CRAE, Fair Trials & LEAP, Position paper, §66.

⁵⁹³ Art. 20.2, Procedural Safeguards Directive for children, COM Proposal; Art. 20.2, Draft amendments LIBE.

5.3. General critique

Aside from the specific critiques above, also more general critiques can be made. First, several aspects of substantive criminal law are not addressed. Secondly, the lack of precise phrasing and wording will be discussed. Finally, the abundant use of Recitals will be addressed.

5.3.1. Missing provisions

Considering the main objectives of a good working juvenile justice system, it is unfortunate that the Directive does not include several important provisions, as to safeguard the rights of the child during the complete duration of the proceedings.

Although not considered as procedural rights *sensu stricto*, at least three vital safeguards, as prescribed by the international standards (*supra*)⁵⁹⁴ are missing.

The prevention of juvenile delinquency

Although the prevention of juvenile delinquency is mentioned in Recital 1 as one of the objectives, this topic is not further addressed in one of the Articles.

Diversion from justice systems and alternative dispute resolutions

It is regrettable that the Directive does not address the diversion as an alternative to judicial proceedings, nor refer to mediation or to alternative dispute resolution and this in contradiction to the international standards that request the States to take measures in that regard.⁵⁹⁵ It is clear that diversion and alternative dispute resolutions form very good responses to minor offences committed by children, even when it can also be used in more serious offences and also in the case of re-offenders. Such alternative responses can enhance social reintegration, can avoid stigmatisation, is more cost-effective, and for all these reasons in the interests of society.⁵⁹⁶

What is also missing, is that the Directive does not encourage the use of mediation and alternative dispute resolutions if the best interests of the child require so.⁵⁹⁷ Restorative

⁵⁹⁴ 4.4, pp.52-54.

⁵⁹⁵ Justicia, Position paper, p.8, §3.

⁵⁹⁶ Justicia, Position paper, p.8, §4.

⁵⁹⁷ Justicia, Position paper, p.9, §1.

justice measures for example, are only mentioned in the Article concerning the training of professionals, which does not in any way boost the use of this option.⁵⁹⁸ Mediation is another example. It enhances the important role the child and society play in the prevention of crime and the solution for conflicts and is missing in the Directive.⁵⁹⁹

Although the effective participation of the victim is addressed by another Directive, the Directive on victims of crime⁶⁰⁰, the Directive under scrutiny should have explicitly reiterated this important element, in order to enhance the rehabilitation of the victim, and at the same time the reintegration of the child offender.⁶⁰¹

On the other hand, it is true that some critics are less thrilled by non-judicial measures. While they see the benefit of it, they are of the opinion that judicial proceedings are in most cases not more damaging than the alternatives. In any case, even if you follow this reasoning, it is clear that children should always receive information on all options, including their consequences.⁶⁰²

Age of criminal responsibility

As previously mentioned, the age of criminal responsibility varies considerably between the EUMS. However, the EU legislator refrained from addressing this issue, clearly because of a lack of consensus.⁶⁰³

Given the subsidiarity and proportionality principles it could be warranted not to set a specific minimum age of criminal responsibility. Moreover, it is a question that goes beyond the measures legally possible under Article 82.2.b TFEU, the basis for this Directive.⁶⁰⁴

⁵⁹⁸ Justicia, Position paper, p.12, §3.

⁵⁹⁹ Justicia, Position paper, p.12, §4.

⁶⁰⁰ European Parliament and the Council of the European Union, *Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 14 November 2012, OJ 2012 L 315.

⁶⁰¹ Justicia, Position paper, p.13, §3.

⁶⁰² A.Vandekerckhove, K. O'Brien, 'Child-friendly justice: Turning law into reality', *Era Forum*, vol. 14, no. 4, 2013, p.535, §2.

⁶⁰³ Com Impact Assessment, p. 34, §5 & p. 35, §1.

⁶⁰⁴ Com Impact Assessment, p.35, §1.

However, it would have been possible to include recommendations in the Directive, based on the international standards, that promote for a higher minimum age.

Experts are not convinced that a higher minimum age would solve the problem. In fact, the age of criminal responsibility only determines when a person can be held accountable for his or her acts. It has no influence, whatsoever, on the enjoyment of his or her children's rights derived from the human rights documents, nor does it entail that children can be treated as an adult.⁶⁰⁵

5.3.2. Broad and lenient wording

Broad and lenient wording is a recurring practice in this Directive. The consequence of this is that many provisions leave a broad discretion to the EUMS.

This can lead to variations and inconsistencies the moment the EUMS implement the Directive.⁶⁰⁶

The European Commission and the LIBE Committee of the European Parliament have tried to oppose this practice by pushing for stronger and detailed safeguards, but the Council countered their efforts. It proves that national authorities are not very eager to provide more protection to suspected or accused children and are, in any case, reluctant to accept EU interference in this field.

5.3.3. Abundant use of non-operative Recitals

Generally speaking, many important aspects are outlined in the Recitals, instead of integrating them in the operative Articles of the Directive. This is disappointing, because, as for the broad and lenient wording, it gives the EUMS more room to escape, because the Recitals are not 'provisions', nor 'recommendations', but simple considerations.

⁶⁰⁵ A.Vandekerckhove, K. O'Brien 2013, p. 535, §1.

⁶⁰⁶ Sayers 2015, §45.

5.4. Conclusion

The introduction of a legally binding document to provide children, who are accused or suspected persons in criminal proceedings with procedural safeguards, is needed. However, this long and very complex Directive falls short.

First, the Directive does not go far enough and moreover, the rights of the children are not strictly phrased, leaving too much discretion to the EUMS.

Secondly, the Directive is missing several important safeguards, as required by the international standards. If the lion's share of the Recitals had been incorporated in the operative Articles, this problem would not have occurred (or at least partially).

Thirdly, the Directive focuses more on the concept of 'mutual recognition' and repression than on rehabilitation and prevention.

Furthermore, the scope is too limited, by de facto excluding minor offences, excluding other types of proceedings and by limiting the Directive's application on children in EAW proceedings.

Finally, it must be underlined that, given the limited competences of the EU, the Directive is a laudable effort of the Union, and particularly of the European Commission and the European Parliament, to improve the safeguards and protection of children who are suspects or accused persons in criminal proceedings.

6. Importance of the Directive

Although our critical analysis of the Directive's content revealed a number of important shortcomings, the Directive's importance cannot be underestimated. The Directive will certainly strengthen the protection of fair trial rights for children in the EU and by doing so, also enhance the 'mutual trust' between the EUMS.⁶⁰⁷

6.1. Today's reality

Today, the guarantees provided by the EUMS differ significantly, which is not in the benefit of children in conflict with the law, nor does it improve the 'mutual trust' between the EUMS.⁶⁰⁸

In the Impact assessment of the European Commission it is stated that every year more than 1.000.000 children face criminal proceedings in the EU and this at a time where the necessary safeguards are still not in place.⁶⁰⁹

The Fundamental Rights Agency of the European Union (FRA) starts research to identify how children are treated in judicial proceedings (criminal and civil) and to what extent the aforementioned *CoE Guidelines on child-friendly Justice* are followed or not. This research is based on interviews with judicial professionals⁶¹⁰ and with children who have been involved in judicial proceedings. The main findings of the professionals' interviews revealed that EUMS apply very different practices. Also the professionals themselves rely more on the national legislation than on the existing international standards.⁶¹¹

The Agency mainly identified serious shortcomings in relation to five Safeguards: (1) the right to information, (2) the right to have his or her holder of parental responsibility

⁶⁰⁷ Com Impact Assessment, p.6, §1; Amnesty International & Save the Children, joint paper; CRAE, Fair Trials & LEAP, Position paper, p.3, §2.

⁶⁰⁸ CRAE, Fair Trials & LEAP, Position paper, p.3, §3 & p.5, §5.

⁶⁰⁹ Com Impact Assessment, pp. 12-17, and Annex VI, p. 103, Table A1.1; CRAE, Fair Trials & LEAP, Position paper, p.5, §5.

⁶¹⁰ Part of this project has been published in 2015: Fundamental Rights Agency of the European Union, 'Child-friendly justice: Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States', 2015, available from <http://fra.europa.eu/en/publication/2015/child-friendly-justice-perspectives-and-experiences-professionals-childrens>, (accessed 14 April 2016) (hereinafter: FRA, Child-friendly justice 2015).

⁶¹¹ FRA, non-paper on Procedural Safeguards Directive for children, 7047/14, p.29, §3 & p.30, §1.

informed (3) the questioning of the child, (4) the right to protection of privacy and (5) training of professionals.⁶¹² These shortcomings are confirmed by the case law of the ECtHR.⁶¹³ Moreover, the lack of protection and the persistent differences between the EUMS endanger the ‘mutual trust’ between them and hamper the so needed judicial cooperation in criminal matters.

6.2. Insufficient protection by the current framework

Irrespective of the enormous quantity of international instruments, binding and non-binding, prescribing procedural safeguards for children who are suspects or accused persons in criminal proceedings, the reality shows that many EUMS do not attain these standards, not in law and not in practice.⁶¹⁴

While these instruments (*supra*)⁶¹⁵, on international level, contain very detailed descriptions and form in fact one body of standards,⁶¹⁶ many problems remain.

One, several documents, for example the different UN rules, the General Comments, and the CoE Guidelines, do not have binding force, and are not enforceable.⁶¹⁷

Two, the UNCRC is binding and also widely ratified, but the provisions are persistently violated. While this is the case, the relevant provisions are rather limited, and are phrased in very general terms. The States that have a legal system in which Conventions have direct effect are rare.⁶¹⁸

⁶¹² FRA, Child-friendly justice 2015, pp. 115-116; FRA, non-paper on Procedural Safeguards Directive for children, p.30-35.

⁶¹³ For example: ECtHR, *S.C. v. UK* (60958/00), 15 June 2004; ECtHR, *Panovits v. Cyprus* (4268/04), 11 December 2008; ECtHR, *Adamkiewicz v. Poland* (54729/00), 2 March 2011; ECtHR, *J.M. v. Denmark* (34421/09), 13 November 2012; A.Vandekerckhove, K. O’Brien 2013, p.524, §2.

⁶¹⁴ Morgan 2012, p.85, §2; A.Vandekerckhove, K. O’Brien 2013, p.524, §1; Com Impact Assessment, p.12, §7.

⁶¹⁵ Chapter 4, pp.20-55.

⁶¹⁶ Goldson, B., Muncie, J., ‘Towards a global child-friendly juvenile justice?’, *International Journal of Law, Crime and Justice*, vol. 40, 2012 (hereinafter: Goldson, Muncie 2012), p.50, §3.

⁶¹⁷ Com Impact Assessment, p.13, §2.

⁶¹⁸ B. Goldson, J. Muncie, ‘Rethinking youth justice: comparative analysis, international human rights and research evidence’, *Youth Justice*, vol.6, no.2, 2006, p.97, §2; Goldson, Muncie 2012, p.51, §3; Com Impact Assessment, p.13, §1; CRAE, Fair Trials & LEAP, Position paper, p.7, §10.

Three, while the presence of monitoring bodies (UNCommRC, the HRCComm, CPT, etc.) is important, they have not been able to change the practices of the States.⁶¹⁹

In sum, this means that children continue to be completely dependent on the national interpretation and implementation of those principles, which often does not happen.⁶²⁰

On European level, the ECtHR, even with its many relevant judgments, has not fundamentally changed the practices in the European States. Since there is no enforcement mechanism available, the Member States do not always implement the judgments. The high number of repetitive cases is proof of this problem and points out that Member States do not execute the Court's judgments properly.⁶²¹

Moreover, also individuals cannot sufficiently rely on the ECtHR as such, and this for several reasons.⁶²²

First and foremost, the access for individuals is limited. An individual must first exhaust domestic remedies and apply within a short period of 6 months.⁶²³

Furthermore, individuals are discouraged from bringing a case before this Court, due to the recently introduced and very strict filtering system.⁶²⁴

On top of this, in light of the heavy caseload and the high amount of repetitive cases, makes it that the Court takes a very long time to make a decision. Moreover, the ECtHR rarely labels practices and laws as generally incompatible with the ECHR. Finally, it does not

⁶¹⁹ Com Impact Assessment, p.13, §1; CRAE, Fair Trials & LEAP, Position paper, p.7, §10.

⁶²⁰ Goldson, Muncie 2012, p.51, §3; Com Impact Assessment, p.13, §1; CRAE, Fair Trials & LEAP, Position paper, p.3, §2.

⁶²¹ C Morgan 2012, p.76, §§2-3, p.77, §§1-4 & p.83, §§1-2; Com Impact Assessment, p.14, §§1-3; CRAE, Fair Trials & LEAP, Position paper, p.7, §12.

⁶²² L. Van Puyenbroeck, G. Vermeulen, 'Towards minimum procedural guarantees for the defence in criminal proceedings in the EU', *International and Comparative Law Quarterly*, vol. 60, October 2011 (hereinafter: Van Puyenbroeck, Vermeulen 2011), p. 1018, §4; C. Morgan, 'The EU procedural Rights Roadmap: Background, importance, overview and state of affairs' in *Defence Rights: International and European Developments*, ed. Vermeulen, G., pp. 73-80, Antwerp, Maklu, 2012 (hereinafter: Morgan 2012), p.76, §§2-3, p.77, §§1-4 & p.83, §§1-2;

⁶²³ Morgan 2012, p.76, §§2-3, p.77, §§1-4 & p.83, §§1-2.

⁶²⁴ Morgan 2012, p.76, §§2-3, p.77, §§1-4 & p.83, §§1-2.

provide the States with practical and effective guidelines in order to implement the safeguards.⁶²⁵

The other relevant Directives (on the right to interpretation and translation, on the right to information, on the right to a lawyer and communication, and on the right to be present, respectively) do address several important procedural rights in order to safeguard the right to a fair trial of suspects or accused persons. These rights assume that the suspect or accused person is able to understand and participate in criminal proceedings and only address the specific situation of children in one case, Article 5.2 of the Directive on the right to a lawyer and communication.⁶²⁶

As the European Commission's Impact assessment, the research of the FRA, the international standards and the Directive's Recitals have made clear: the existing procedural safeguards for adults are not sufficient for children. They need additional safeguards, particularly focussing on the ability to follow and participate in the proceedings.⁶²⁷

Furthermore, a comprehensive juvenile justice system (*supra*)⁶²⁸ should particularly focus on prevention, on the well-being of the child, and on the social reintegration rather than on the penalisation.

While the European Court of Justice (ECJ) plays a particularly important role in the development and promotion of fundamental rights, including the rights of the child,⁶²⁹ its role in defining the procedural safeguards for children is limited (*supra*)⁶³⁰.

After the adoption of the CFREU, the ECJ started to make explicit reference to CFREU and the UNCRC or its principles, when interpreting EU legislation⁶³¹ and currently acknowledges both as being primary reference points.⁶³²

⁶²⁵ Morgan 2012, p.76, §§2-3, p.77, §§1-4, p.83, §§1-2 & P.85, §3; Van Puyenbroeck, Vermeulen 2011, p.1018, §4.

⁶²⁶ Com Impact Assessment, p.8, §3 & p.15, §1; Art.5.2, Art.5.2, Directive on the right to a lawyer and communication.

⁶²⁷ Com Impact Assessment, p.6, p.14, §§4-5 & p.15, §§1-2; Recital 18, Procedural Safeguards Directive for children, final; Justicia, Position paper, p.3, §§3-4; ICJ, JUSTICE & NJCM, Briefing paper, p.3, §2; ADD!

⁶²⁸ 4.2.2 & 4.4, pp.27 & pp.52-54.

⁶²⁹ Stalford, Drywood 2011, p.210, §3; O'Donnell 2013, p. 512, §2.

⁶³⁰ 4.1.3, p.23.

On the other hand, it must be noted that the ECJ is not always that consistent and predictable when it refers to relevant children's rights provisions. It will always depend of the Court's conviction and its willingness to decide which Articles of the UNCRC it finds relevant.⁶³³

Although the ECJ could have, in principle, interpreted the aforementioned Directives on specific procedural rights together with Article 24 CFREU in order to provide children with specific procedural safeguards, it did not do so (yet). The case law makes clear that the ECJ interprets fundamental rights in a very restrictive manner and even more so when it conflicts with the effective implementation of EU criminal law. Only if the EU legislator regulated the issue, the ECJ will verify the compliance of national legislation by balancing the principle of 'mutual recognition' against fundamental rights. If the EU legislator set a "*uniform standard of fundamental rights protection*"⁶³⁴ the ECJ will decide that the national differences must be set aside. However, if the EU legislator did not provide for specific protection, the ECJ does not find itself competent to decide whether the diverse national legislations should attain a certain (unified) level of protection. In other words, it is up to the EU legislator to decide when an united form of human rights protection is necessary.⁶³⁵

⁶³¹ EURONET 2005, p.22, §1; Stalford, Drywood 2011, p.200, §3 & p.210, §§4-5; EP IPOL, EU framework for children, 2012, p.17, §4; De Hert 2016, p.107, §2; see: ECJ, *Baumbast and R*, 17 September 2002, C-413/99, §§63 & 75; ECJ, *Parliament v. Council*, 27 June 2006, C-540/03, §37; ECJ, *Unibet v. Justitiekanslern*, 13 March 2007, C-432/05, §37; ECJ, *Dynamic Medien Vertriebs GmbH*, 14 February 2008, C-244/06, §§39-42; ECJ, *Deticek*, 23 December 2009, C-403/09, §59.

⁶³² Stalford 2012, p.35, §3.

⁶³³ Stalford, Drywood 2011, p.212, §3 & p.213, §2.

⁶³⁴ K. Lenaerts, J.A. Gutiérrez-Fons, 'The European Court of Justice and fundamental rights in the field of criminal law' in *Research handbook on EU criminal law*, ed. Mitsilegas, V., Bergström, M., Konstadinides, T., Cheltenham, Northampton, Edward Elgar, 2016 (hereinafter: Lenaerts, Gutiérrez-Fons 2016), p.26, §1.

⁶³⁵ De Hert 2016, p.111, §2; R. Deruiter, G. Vermeulen, 'Balancing between human rights assumptions an actual fundamental human rights safeguards in building an area of freedom, security and justice: a cosmopolitan perspective', *European Journal on Criminal Policy and Research*, February 2016, p.11, §§2-3; see for example: ECJ, *Ciprian Vasile Radu*, 29 January 2013, C-396/11, §§41-43; ECJ, *Stefano Melloni*, 26 February 2013, C-399/11, §60; ECJ, *Jeremy F*, 30 May 2013, C-168/13PPU, p.; Lenaerts, Gutiérrez-Fons 2016, p.22, §3, p.23, §§3-4, p.24, §4, p.25 & p.26

6.3. Could the Directive bring more protection?

It is clear that a binding Directive in the EU was necessary, even if its provisions are not perfect.

First, the minimum standards set by the Directive can bring the rules within each EUMS closer together.

Secondly, the coming into force of the Directive will give a clear legal basis for the ECJ to deal with the procedural safeguards for minor suspects or accused persons and to specifically apply and interpret this Directive in conjunction with the CFREU and other international standards.

Moreover, individuals can also bring possible violations of the rights imbedded in the Directive before a domestic Court, if a Member State fails to implement the provisions within the mandatory timeframe. This makes individuals less dependent on the lengthy and insecure procedures before the ECtHR.⁶³⁶

While it does reiterate a good part of the already existing international standards⁶³⁷, the Directive can make those standards more effective by requiring the EUMS to implement them. By referring to the EU, UN and CoE standards the Directive increases dramatically the weight of the international standards that it contains. This is even more the case for the non-binding comments and Guidelines.⁶³⁸ Nevertheless, it would have been better if the Directive had simply made the complete set of standards binding and enforceable within the EU.⁶³⁹

⁶³⁶ Morgan 2012, p.77, §3.

⁶³⁷ Sayers 2015, §45.

⁶³⁸ O'Donnell 2013, p.509, §1; Com Impact Assessment, p.13, §1; Amnesty International & Save the Children, joint paper, p.2.

⁶³⁹ Com Impact Assessment, p.13, §3.

7. Conclusion

More than seventeen years ago the EU proudly announced that the principles of ‘mutual trust’ and ‘mutual recognition’ are the new cornerstones of its cooperation in criminal matters. Given the disappearance of the borders, the unification of the market, the free movement of people and under the pressure of dramatic events, like the terrorist attacks of 9/11, the Union wished to enhance its mutual cooperation by introducing more flexible and fluent instruments like the EAW. This was seen as logical, as all EUMS are parties to the ECHR, presupposing that the human rights are respected and protected equally across the EU.

However, the reality shows that this was and is not always the case. The principle of ‘mutual trust’ and ‘mutual recognition’ became more and more criticised, as the legal systems and judicial practices of the EUMS continue to differ. Therefore, in order to maintain the ‘Area of freedom, Security and Justice in EU’, the Union was forced to introduce minimum rules. With this objective the European Commission introduced several proposals for Directives (on the right to interpretation and translation, the right to information, access to a lawyer and the right to information, presumption of innocence and the right to be present during trial and legal aid).

Together with those proposals, and in line with increasing concerns in the field of children’s rights, the European Commission pushed also for a Directive prescribing minimum safeguards for children who are suspects or accused persons in criminal proceedings. The final, lengthy and complicated text, containing two times more Recitals than Articles, was signed on 11 May 2016 and went into force on the 10th of June of this year. As it stands, the EUMS have almost three years to implement the Directive’s provisions.

As our critical analysis points out, the Directive secured several vital rights and principles, as prescribed by the international standards. It makes a lot of these safeguards, previously labelled as soft law, binding. Furthermore, the Directive enhances the implementation in the EUMS of the international standards, which are not always well implemented.

Unfortunately, the Directive does not go far enough.

First, the Directive *de facto* excludes minor offences, while children often just commit such offences. Also the limitation of the scope of the Directive to criminal proceedings is disappointing. Children need safeguards in all proceedings, not only in criminal ones. In the same spirit, the Directive should have been applicable on persons who were children at the time of the offence and not only on persons who are children at the start of criminal proceedings.

Secondly, the Directive utilises lenient wording, vague provisions and contains numerous exceptions. This makes State abuse more plausible and lowers the significantly the level of protection.

Three, the Directive will not eradicate the existing inconsistencies between the EUMS. It might provide for some basic protection, but there is no guarantee, as the EUMS will ultimately decide how much protection they want to provide and how they will interpret the series of potential safeguards. We could hope that the ECJ will deliver more clarity in this by interpreting the provisions in compliance with the existing international standards.

We can conclude that the Directive is unequivocally a vital step in the right direction, even more so, when considering the limited competence of the EU in this field. However, due to the ‘classic’ resistance from the Council, the potential for a broader protection, included in the initial proposal of the European Commission, was not fully used.

Finally, it is true that law might be “*an important symbol of legitimacy, an accomplished fact, which is difficult to resist*”⁶⁴⁰, but it is equally important that the law not only creates safeguards on paper, but also in practice. Unfortunately, whether this will be the case, depends solely on the willingness of the EUMS. Therefore, a Regulation would have been a better way forward than a Directive.

⁶⁴⁰ M. Freeman, ‘Why it remains important to take children’s rights seriously’ in *Children’s rights: progress and perspectives*, ed. Freeman, M., Leiden, Boston, Martinus Nijhof Publishers, 2011, p.20, §1.

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Abstract

In 2013 the European Commission put forward a proposal for a Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings. After more than two years, on 11 May 2016, the European Parliament and the Council adopted the Directive. This piece of EU legislation aims at enhancing the level of protection provided to children who are suspects or accused persons in criminal proceedings within the EU. It introduces minimum rules in order to strengthen the fair trial rights of children and by taking the body of international standards as a starting point. Ultimately, the Directive should boost the mutual trust between the EU Member States, including their judicial authorities.

Considering these objectives the author critically examines the Directive in light of the extensive body of international standards imbedded in the systems of the United Nations, Council of Europe and European Union. Based on a detailed overview of the given standards, literature, NGOs' opinions, and preparatory documents the author assesses where the Directive attains the standards and where it falls short. In addition, the research focuses on those aspects that can potentially enhance the international framework.

The analysis reveals that the Directive does not follow the standards entirely, due to its limited scope (*ratione loci* and *materiae*), missing elements, vague wording and a broad range of exceptions. On the other hand, it also discloses that the Directive is vital as to effectively improve the procedural safeguards of children who are suspects or accused persons in criminal proceedings within the EU.

Keywords:

children – procedural safeguards – criminal proceedings – fair trial – Directive – European Union

Zusammenfassung (German abstract)

Im Jahr 2013 initiierte die Europäische Kommission eine Richtlinie über Verfahrensgarantien in Strafverfahren für verdächtige oder beschuldigte Kinder. Nach mehr als zwei Jahren haben das Europäische Parlament und der Rat der Europäischen Union die Richtlinie am 11. Mai 2016 verabschiedet. Das EU-Gesetz zielt darauf ab, den Schutz für verdächtige oder beschuldigte Kinder in Strafverfahren innerhalb der Europäischen Union zu verbessern und auszuweiten. Basierend auf dem entsprechenden internationalen Normenwerk, schreibt die Richtlinie Mindestgrundsätze vor, welche das Recht auf ein faires Verfahren für Kinder stärken soll. Schlussendlich soll die Richtlinie zudem das gegenseitige Vertrauen zwischen EU-Mitgliedsstaaten, einschließlich ihrer Justizbehörden, verbessern.

Bezüglich dieser Zielsetzung und im Lichte eines umfangreichen internationalen Normenwerks, welches in den Rechtsinstrumenten der Vereinten Nationen, des Europarats und der Europäischen Union eingebettet ist, unterzieht die Autorin die Richtlinie einer kritischen Untersuchung. Basierend auf einem detaillierten Überblick der gegebenen Normen, der Fachliteratur, den Einschätzungen von zivilgesellschaftlichen Organisationen und vorbereitenden Dokumenten, bewertet die Autorin inwieweit die Richtlinie dem Normenwerk genügt.

Die Analyse offenbart, dass die Richtlinie aufgrund ihres limitierten Anwendungsbereiches (*ratione loci* und *materiae*), fehlender Elemente, vager Formulierungen und einer breiten Palette an Ausnahmen, dem Normenwerk nicht in Gänze gerecht wird. Andererseits zeigt die Analyse auch, dass die Richtlinie unerlässlich ist, um die Verfahrensgarantien in Strafverfahren für verdächtige oder beschuldigte Kinder in der EU effektiv zu verbessern.

Stichwörter:

Kinder - Verfahrensgarantien - Strafverfahren - faires Gerichtsverfahren - EU Richtlinie - Europäische Union