

CRIN Briefing on the review of General Comment No. 10 of the Committee on the Rights of the Child (June 2018)

This briefing is intended to highlight areas of General Comment No. 10 that could be usefully updated to address emerging human rights issues affecting children in conflict with the law, recognise developing international human rights standards and to clarify issues within the original text that have been misinterpreted or misapplied by States.

A note on language

Some of the language used in the general comment has become outdated within the field of juvenile justice. In particular, the terms “juvenile delinquency” and “recidivist” are widely considered to be stigmatising for children in conflict with the law. We would recommend using the terms “children in conflict with the law” or “children accused of criminal offences” to replace references to “juvenile delinquency” and “children who reoffend” in place of “recidivists”.

The term “radicalisation” is also highly controversial. Though the term has been used in some international standards, such as the Council of Europe’s guidelines for prison and probation services regarding radicalisation and violent extremism, it is largely ill-defined nationally and internationally and its use is often considered stigmatising and alienating in the way it is applied to minority groups. The lack of clarity about the meaning of the term means that it can feed of and be used to justify unspoken prejudices about what is radical. CRIN would recommend avoiding the term, and in its place, specifically identify the types of activity being addressed, whether that is the recruitment of children by violent groups or the teaching of children in a way that justifies political violence.

Minimum age of criminal responsibility (MACR)

The recommendation for States to “increase their lower MACR to the age of 12 years as the absolute minimum age and continue to increase it to a higher age level” has been the most misinterpreted and controversial aspect of General Comment No. 10. Though the Committee clearly stated that 12 was to be an absolute minimum and States should continue to raise their MACRs past this level, this recommendation has been misused to suggest that 12 is an acceptable international level. CRIN has frequently seen this recommendation used to justify law reforms that would lower the MACR nationally and decrease the protection of children within justice systems.¹

The definition of the MACR is also used inconsistently across different jurisdictions, leading to misunderstandings about the recommendations made by the Committee. General Comment No. 10 currently addresses some of the issues that complicate the setting of the MACR (paras. 30 to 25), but does not address the full range of factors involved that may undermine attempts to provide clear guidance to States.

¹ For details of States that have considered proposals to lower the minimum age of criminal responsibility, see CRIN, *States Lowering the Age of Criminal Responsibility*. Available at: www.crin.org/node/227.

While the definition of the MACR is quite simple - the age at which a person can be charged with a criminal offence and processed within the criminal justice system - the way it is used nationally can make it more difficult to determine. A number of features of the law will be relevant here (for example, at what age can a child be subjected to penalties of a criminal nature? At what age can a child obtain a criminal record? Does the age vary according to the type of offence? Are capacity based tests imposed? At what age can a child be prosecuted?). These ages will not necessarily line up in any given State² and there is a risk that recommendations will be misunderstood if too much emphasis is placed on the age set nationally, without scrutiny of the elements that make up this age.

With this in mind the review presents an ideal opportunity to clarify these aspects of the General Comment.

Recommendation: CRIN recommends that in revising the sections of the General Comment that relate to the minimum age of criminal responsibility, the Committee clarify the meaning of the term and avoid recommending a specific age, but encourage States to progressively raise the minimum age of criminal responsibility towards 18.³

Life imprisonment and lengthy sentencing

General Comment No. 10 currently addresses the life imprisonment of children at paragraphs 11 and 77, stating that life imprisonment without the possibility of parole is prohibited by the Convention for anyone under the age of 18 at the time of the offence and recommending that other forms of life imprisonment be abolished.

Since the Committee released this General Comment, international standards have developed around the sentencing of life imprisonment, particularly with regards to the relationship between life imprisonment for children and the prohibition on cruel, inhuman and degrading punishment. In 2015, the UN Special Rapporteur on torture labelled all forms of life sentences for children as cruel, inhuman or degrading punishment. This shift amounts to a recognition that life imprisonment is prohibited in all forms under international human rights law when applied for an offence committed when under the age of 18.

Recommendation: We urge the Committee adopt the language of the Special Rapporteur on torture in addressing life imprisonment of children:

“Life imprisonment and lengthy sentences, such as consecutive sentencing, are grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child. Life sentences or sentences of an extreme length have a disproportionate impact on children and

² For discussion and examples, see CRIN, *Inhuman Sentencing: Life imprisonment of children around the world*, p. 17. Available at: www.crin.org/node/41239.

³ For more information on CRIN's policy work on the minimum age of criminal responsibility, see CRIN, *Stop Making Children Criminals*, Jan 2013. Available at: www.crin.org/node/31378.

cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment”⁴

Deprivation of liberty

The General Comment sections addressing deprivation of liberty rely heavily on the core provision of the Convention, that “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”. While a vital standard in this setting, stated alone it risks giving insufficient guidance to States and understating the application of other rights within the Convention in the context of deprivation of liberty.

The way that the Committee has addressed other forms of deprivation of liberty since the publication of General Comment 10 shows a development of the Committee’s stance on the issue of deprivation of liberty that could be adopted in this regard to give clearer guidance. For example, the Committee’s recommendations on the prohibition of immigration detention for children is based on a reading of detention standards under Article 37 as well as the best interests principle under article 3. We urge the Committee to interpret the detention standards within the Convention holistically within the General Comment to clarify when it is a “last resort” and “for the shortest appropriate period” within the criminal justice system.

Article 37 requires deprivation of liberty to be used “only as a measure of last resort and for the shortest appropriate time”. It also requires that any child deprived of liberty has the right to prompt access to legal and other assistance, and the right to challenge the legality of the deprivation of liberty before a court or other authority. Article 9 requires that no child is separated from their parents against their will, unless such separation is “necessary for the best interests of the child”. These articles must be read together with the insistence that the rights guaranteed by the Convention must be respected without discrimination; that the best interests of the child must be a primary consideration in all actions concerning children and that states must ensure the maximum survival and development of the child.⁵

Recommendation: We urge the Committee to set out that, read holistically, the Convention requires that the only justification for locking up a child is that they have been assessed as posing a serious risk to others’ or their own safety and that risk cannot be reduced to an acceptable level without their detention. In these exceptional circumstances, any necessary restriction of liberty must be authorised by a legal process with the child independently represented, must be frequently reviewed and must not be in a penal setting.

Health care

⁴ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/28/68, 5 March 2015, para. 74.

⁵ For a more detailed analysis of the relevant international standards in this area see Ratledge, “End detention of children as punishment” in *Protecting Children Against Torture in Detention: Global solutions for a global problem*, pp. 181-193. Available at: http://antitorture.org/wp-content/uploads/2017/03/Protecting_Children_From_Torture_in_Detention.pdf

The current General Comment briefly addresses the right of the child to access medical care while in detention at paragraph 89, recommending that every child be examined by a physician upon admission to a detention facility and receive adequate medical care through detention, where possible by health facilities and services in the community. While the General Comment addresses this important aspect of the healthcare of children who are detained, it does not address the disproportionate prevalence of mental health problems among children within the criminal justice system or the necessity of addressing this phenomenon as a health issue.

Recommendation: We urge the Committee to highlight the disproportionate prevalence of mental ill-health among children within the justice system and recommend that States address this need through diversion measures to ensure that children whose offending is linked to their unmet health needs are directed away from the justice system and by ensuring that health care, including mental health care, of the same quality is available to children in detention as in the community.

Counter-Terrorism legislation affecting children

The application of counter-terrorism laws to children is raising new challenges to the realisation of children's rights in the context of the criminal justice system. These laws risk creating lacunae in the protections guaranteed to children within national justice systems. At the most extreme end of the spectrum, anti-terrorism laws have been used to legalise the death penalty for child offenders in contravention of general prohibitions within the juvenile justice system.⁶ Rules permitting secrecy around evidence related to terrorism offences can also undermine due process rights for children accused of these offences.

In addressing this issue, it should also be noted that where terrorism legislation allows for the prosecution of children who may have been recruited by armed terrorist groups, international standards on the juvenile justice system overlap with international humanitarian law.

Recommendation: We urge the Committee to recognise that children have the same rights and protections under the Convention on the Rights of the Child when accused of any offence, including those established under counter-terrorism legislation and to recommend that States address these offences within the regular civilian justice system applicable for all other offences. Where children have been recruited by terrorist armed groups, the situation is analogous to the recruitment of children to be child soldiers and these children should be treated as victims and subject to rehabilitative care rather than punishment to ensure their physical and psychological recover and social reintegration in line with Article 39.

⁶ For example, the Anti-Terrorism Act in Pakistan overrides the Juvenile Justice System Ordinance in providing for the death penalty for certain terrorism offences. For full discussion, see CRIN, Inhuman sentencing of children in Pakistan, March 2017. Available at: www.crin.org/node/23982.