



UNODC

United Nations Office on Drugs and Crime

COMMITTEE ON THE RIGHTS OF THE CHILD
DRAFT GENERAL COMMENT NO. 24 REPLACING GENERAL COMMENT
NO. 10 (2007) ON CHILDREN'S RIGHTS IN JUVENILE JUSTICE

**Submission of Comments by the Justice Section, Division for Operations of
the United Nations Office on Drugs and Crime (UNODC)**

Initial Remarks

On behalf of the Justice Section, Division for Operations of UNODC (JS/DO/UNODC), we commend the excellent work done by the Committee on the Rights of the Child (the Committee) in the development of, and revision of, General Comment No. 10 on Children's Rights in Juvenile Justice. We also extend our thanks to the Committee for providing the opportunity to comment on the revised General Comment. It is our hope that the comments provided below, and those provided by various stakeholders, will strengthen the revised General Comment and, accordingly, strengthen the provision of children's rights across the world.

General Observations

1. The revision of the General Comment provides a valuable opportunity for the Committee to provide authoritative guidance, at the international level, about the importance of ensuring that the terminology used to describe children in conflict with the law does not bear harmful or pejorative effects.

1.1. While a commonly used descriptor, JS/DO/UNODC cautions against the use of the term 'juvenile', which has the potential to be both infantilizing and paternalistic. We also discourage use of the term 'delinquency' as this is a term commonly used to refer to challenging, but developmentally expected, childhood behaviors. Care should be taken to prevent the conflation of developmentally appropriate behaviors and actions that breach penal law. Furthermore, the terms 'delinquency' and 'delinquent' name the child, rather than the behavior, in a manner that is inconsistent with both the scholarship on the adverse impacts of labelling children who have breached the law, and the potential for positive behavioral change that is underscored by evidence about childhood and early adulthood as a time of profound neurobiological development. Accordingly, we recommended that terms such as 'justice for children' or 'child justice' be used in place of 'juvenile justice', and 'unlawful actions or behavior' be used in place of 'delinquency'.

1.2. We recommend that the term 'interrogation' be avoided in view of the international legal requirement for non-coercive interviewing methods by law enforcement officials. We welcome the use, in the revised General Comment, of the terms 'interviewing' or 'questioning'.

1.3. We commend the use of more positive terms such as 'non-custodial measures', 'community-based sanctions and measures' or 'diversionary measures' in place of 'alternative measures'. We note that the (now discontinued) term 'alternative measures' unintentionally reinforces the

centrality of custodial or formal criminal justice sanctions.

2. We welcome the inclusion of the section focused on children recruited and exploited by non-State armed groups, terrorist or violent extremist groups. In this regard, the revised General Comment adopts a comprehensive understanding of the phenomenon and holds: *i)* the recognition of the status of children as victims; *ii)* that no justification exists to lower the level of compliance required by international law related to the rights of children in the justice system; and *iii)* crucially calls on States to refrain from charging and prosecuting children on merely on the basis of “association.”

2.1. These paragraphs may be more effective if they include clear reference to the legal basis for recognizing these children as victims (notably international norms regulating the prohibition of recruitment). Furthermore, we recommend that the Committee clarifies the dual role of specialized child justice systems in pursuing the mutually supportive aims of ensuring both public safety, and the fulfillment of children’s rights. Such a statement would strongly advocate for the legitimacy of specialized child justice systems in processing cases of children alleged as, accused of, or recognized as having committed terrorism-related offences. The Committee’s authoritative guidance on this issue is important to mitigate the risk that children recruited or exploited by terrorist or violent extremist groups be subjected to the jurisdiction of military or specialized counter-terrorism courts.

2.2. It is also recommended to replace ‘terrorist and violent extremist organizations,’ which is referenced throughout paragraphs 109-112, with the term designated by the UN Security Council, ‘terrorist and violent extremist groups.’

Specific Comments

3. Paragraphs 2 and 16 address the role of the justice system’s, and the specialized child justice system in preserving public safety. This is extremely relevant, as the perceived conflict between public safety and the best interests of the child is often a justification for interference with children’s rights, especially in cases where children are alleged as having committed serious offences. Accordingly, it would be of vital importance for the present General Comment to include an explicit reference to the *dual role of the child justice system*, to ensure that public safety requirements are met and to ensure the best interests of the child are guaranteed. This would serve as counter-argument to those who defend the idea that there is a dichotomy between the two interests and would provide stronger legitimacy to the child justice system’s role in processing all cases of child alleged offenders, regardless of gravity of charges.

3.1. Therefore, it is suggested that the sentence ‘*However, it is of the opinion that this aim is best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in CRC*’ is replaced with the following sentence: ‘*In addition, the Committee recognizes that the primary role of the specialized child justice system is to protect, respect and fulfill the rights of the child as enshrined in the CRC. Therefore, the Committee emphasizes the mutual compatibility of the interest to preserve public safety and the overarching principles of specialized child justice.*’

4. Paragraphs 8-11, describe the grounds for non-discrimination, expanding on Article 2 of the CRC, namely ‘race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’ It would be helpful if the General Comment could expand on ‘other status’ to expressly include LGBTI children, who are particularly vulnerable to physical, mental, sexual and other forms of abuse within the justice

system, especially when deprived of their liberty at both the pre- and post-trial stages, as well as in terms of the applicability of diversionary measures. We would also recommend the inclusion of ‘children recruited and exploited by terrorist and violent extremist groups’ as a category of children who routinely experience discrimination within the child justice system and during reintegration.

4.1 It is therefore recommended to consider expanding on the meaning of ‘other status’ to expressly include the discrimination faced by LGBTI children and ‘children recruited and exploited by terrorist and violent extremist groups’.

5. Paragraph 10, on the recommendation to abolish Status Offences, makes reference to article 56 of the Riyadh Guidelines. It is recommended that reference also be made to the *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice* (adopted by the General Assembly in 2014 with resolution 69/194), and in particular to measure No. 29 which highlights the importance of “*avoiding the unnecessary criminalization and penalization of children, [Member States are urged, as appropriate and while taking into consideration relevant international human rights instruments,] to ensure that any conduct not considered a criminal offence or not penalized if committed by an adult is also not considered a criminal offence and not penalized if committed by a child, in order to prevent the child’s stigmatization, victimization and criminalization.*”

6. In respect of Paragraph 12-16, we suggest that it is questionable that ‘repression/retribution’ persist as the dominant objectives of justice systems. In many countries, judicial practice involves a more complex practice of balancing various sentencing aims, including deterrence, and ensuring public safety. In addition to an extensive body of case law on the complex considerations of sentencing, scholarship in the disciplines of criminology and law elaborate the complexities of sentencing aims. Further, it could be argued that treating a child in a way that focuses on rehabilitation and restorative justice objectives can not only be done ‘in concert with attention to effective public safety’ but that it actually reinforces public safety by addressing and responding to the causes of a child’s offending behavior.

6.1. It is therefore recommended to include language that emphasizes the mutually supportive function of these principles. For example, *‘The Committee urges that States parties recognize that rehabilitation and restorative justice are complementary to the objective of ensuring effective public safety, and that measures that promote child wellbeing and social reintegration hold strong potential with respect to social cohesion, and sustainable and long-term peace and security.’*

7. It is recommended that Paragraph 13 also provide clear guidance on protecting children from the various forms of harm that could arise during justice proceedings; for example, keeping child defendants safe from retribution by protecting their identity and developing rehabilitation and reintegration plans that take into account safety concerns such as fear of reprisals. With respect to this issue, we encourage the Committee to consider that the global accessibility of online commercial and social media has the potential to powerfully undermine a child’s prospects for reintegration in instances where a child is publicly identified. The provisions (of Article 40 (2) (vii) of the CRC), to safeguard the privacy of children in conflict with the law, are of particular importance in the digital age.

8. Paragraph 19, on prevention of child offending, refers to the Riyadh Guidelines (1990). It is

recommended that reference also be made, in this paragraph, to the *United Nations Model Strategies and Practical Measures on the Elimination of Violence Against Children in the Field of Crime Prevention and Criminal Justice*, which is a more recent set of international standards and norms adopted by the General Assembly in 2014 with resolution A/RES 69/194, and contains useful guidance to Member States on the prevention of child offending.

9. Paragraph 24 provides the opportunity to clarify that diversion can, in practice, be used as an effective way of responding to all offences where appropriate. The language at present implies that it should only be applied in the context of serious offences ‘where appropriate’.

9.1. It is therefore recommended that Paragraph 24 be re-phrased to read: *‘Diversion from formal justice processes, to a range of appropriate programmes, should be the preferred manner of dealing with all children in conflict with the law, including for serious offences.’*

10. It is recommended that Paragraph 27, on diversion, be amended to restore the point presented in bullet point three of General Comment 10 (2007), about the right to freedom from discrimination in respect of the availability and accessibility of diversionary measures.

10.1. It is therefore recommended that the revised General Comment emphasizes the need to ensure that children will not be discriminated against any grounds in the determination of the applicability of diversionary measures. Further, we recommend that the revised General Comment emphasizes the important role that can be played by parents or legal guardians in supporting a child’s assuming a constructive role into society.

11. Paragraphs 30-37 are welcomed for their attention to the importance of the international legal standards requiring that State parties set a minimum age of criminal responsibility (MACR), and that this not be set at too low an age. We welcome, in particular: the affirmation that exceptions to the MACR are impermissible, and we encourage the Committee to strengthen this guidance, by expressly prohibiting anomalies in law and practice that allow children of 16 or 17 to be processed by the adult criminal justice system. Accordingly, we commend the Committee for stating that all persons under the age of 18 years are always to be treated as children and, furthermore, for articulating that there are instance in which persons over the age of 18 could benefit from child specific safeguards.

11.1 We also welcome the Committee’s statement that under no circumstances should State parties reduce the MACR. To avoid confusion, we recommend that the Committee determines a clear minimum age of criminal responsibility, rather than an acceptable range (14-16). We recommend that the authoritative guidance of the Committee should be that State parties set the MACR at no lower than 16 years of age, and that the Committee explicates the evidence base that underpins this advice.

11.2 We also welcome the attention to fair and just treatment for children below the MACR, and recommend that the Committee adds, to paragraph 34, guidance that State parties should ensure that such children (and their families) receive holistic and evidence-based supports that neither stigmatize nor criminalise the child.

12. Paragraph 45 outlines more clearly the practice of some State parties to assess the age of children in the absence of a birth certificate or other documentation to verify a child’s age. The use of the term ‘comprehensive’ is of concern in the context of assessments based on physical and psychological development of the child. Given their highly invasive nature, these assessments should only be used as a measure of last resort and in accordance with international human rights

law standards, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).²

12.1. It is therefore recommended to replace the term ‘comprehensive assessment’ with the *‘the least invasive method of assessment, used as a measure of last resort, of the...’*

13. Paragraph 49 which outlines the guarantees for a fair trial does not provide sufficient detail on the treatment of children at the pre-charge and arrest stage, including: whilst in the custody of the police/law enforcement agencies; during transfer between various custodial sites; during questioning; and during non-/intimate searches of the child, including the taking of non-/intimate samples from the child. Specific guidance on these matters should also emphasize the importance of accurate and detailed record keeping on the condition and location of the child in all phases of these processes. It would also be useful if this section were to reiterate the prohibition against discrimination on any grounds.

14. It is recommended that Paragraph 53 reiterate the importance of the presumption of innocence, even in relation to allegations of involvement with serious offences, such as terrorism. This is an important safeguard to mitigate the risk that children are presumed to be guilty in instances where the alleged offence is of a particularly serious or sensitive nature.

15. In relation to Paragraphs 54-56, it is important to note that a child also has the right to not participate in trial proceedings if they so choose, and this should not be viewed as an admission of guilt, or otherwise compromise the presumption of innocence. It is therefore recommended to include that *‘A child may also choose not to participate in judicial proceedings without any negative inferences being drawn regarding the presumption of innocence.’*

16. Paragraph 57 on the right to effective participation should also outline practical measures that can be adopted to allow children to participate fully in the process. These measures can include, the removal of intimidating legal dress, such as wigs and gowns; the use of child-friendly language to explain court-procedures and the layout of the court prior to trial; having appropriate adults present to provide support; and, adapting trial procedures to ensure that the child’s well-being during proceedings.

17. Paragraphs 58-59 on prompt and direct information of the charges should also include the presence of an appropriate adult to explain and support the child, their parents/legal guardians during the process of charging which can be a daunting and intimidating experience for children and their families/guardians/communities. An appropriate adult with knowledge of the child’s cultural, social, educational context will help translate to the child the legal context in which they find themselves. It is therefore recommended to include ‘appropriate adult’ as a key person to support the child and their families/legal guardians during the process of charging and thereafter.

18. Paragraph 60-64 covers a range of issues associated with access to legal representation, and there are two issues relating to access to a lawyer that should be addressed. First, there is a need to acknowledge the risks associated with a child waiving their right to a lawyer. This happens in practice as a result of undue pressure placed on them particularly at the police station, and in general as a result of a lack of adequate legal guidance regarding safeguards and due process of law. The Committee may wish to consider establishing that a waiver cannot be signed unless agreed to by the child under quality and impartial judicial supervision.

18.1. It is therefore recommended to add a statement that *‘A child should not be allowed to waive their right to a lawyer unless they consent to this voluntarily under quality and impartial judicial*

supervision’.

19. Paragraphs 84-89 make brief mention of mandatory minimum sentences, in the context of combating negative perceptions of children (paragraph 122). We encourage the Committee to give this issue further emphasis, in the General Comment, as mandatory minimum sentences are incompatible with the principle of proportionate sentencing in view of both the child’s circumstances and the offence. It is recommended that the following text be added to Paragraph 85: *‘Mandatory minimum sentences are incompatible with the principle that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the personal circumstances of the child as well as to the long term needs of the society. Mandatory minimum sentences are also incompatible with the requirement that detention be used as a measure of last resort, and for the shortest appropriate period of time. Accordingly, the Committee urges States parties to review and repeal all forms of mandatory sentencing for children.’*

20. Paragraph 92 should strengthen the abolition of life sentences. The United Nations Human Rights Council has called on States repeatedly to prohibit all forms of life imprisonment of children in law and practice.³ The UN Special Rapporteur on Torture has also stated that “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 cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment.”⁴ It is therefore recommended to add the following at the end of paragraph 92, *‘The Committee urges States parties to abolish all forms of life imprisonment, including indeterminate sentences, for all offences committed by persons who were under the age of 18 at the time of commission of the offence, regardless of the seriousness of the offence.’*

21. In relation to Section F. on Deprivation of liberty, including pre-trial detention and post-trial incarceration, it is recommended to make reference to the *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice* (General Assembly Resolution 69/194), and in particular to its Part three on Preventing and responding to violence against children within the justice system.

22. Regarding bail, referred to in Paragraph 99, it is recommended to expand in order to explain that bail requirements are likely to impact disproportionately on the most vulnerable and marginalized children, whose parents may have deceased, incarcerated, missing, estranged from the child, or unable or unwilling to pay bail. It should be noted that many children are excluded from the formal economy on the basis of their age. Children are, therefore, extremely unlikely to have sufficient means to pay bail themselves, and subjecting children to the same bail conditions imposed on adults therefore amounts to discrimination. The practice of requiring a bail payment discriminates against poor children, in particular, and results in the unnecessary deprivation of their liberty. Authoritative guidance is required, from the Committee, to guide States parties in eliminating any structural mechanisms (such as bail requirements) that perpetuate the overrepresentation of the most vulnerable and marginalized children in the criminal justice system. Accordingly, we recommend that the revised General Comment prohibits the use of bail and all surety systems in respect of children in conflict with the law.

23. Consistent with references already made in this submission, we recommend that Paragraphs 104-107 on treatment and conditions in detention, highlight the necessity of non-discrimination against children on any grounds, including on the basis of gender, minority or Indigenous status, or LGBTI status. This is due to the discriminatory assumptions and practices that heighten the risk that individuals from these groups be disproportionately subjected to various forms of violence and deprivation whilst in custody. It is recommended, therefore, that the Committee urges States parties to ensure that laws, policies and procedures governing conditions of detention comply with the prohibition against discrimination on all grounds, as stipulated in Article 2 of the CRC.

24. Paragraphs 109-110 provide a clear overview of the phenomenon of children recruited and exploited by non-State armed groups, terrorist and violent extremist organizations, keenly identifying the victim status of children that are exploited in this way. These paragraphs clarify that recruitment and exploitation of children is perpetrated by different 'categories' of non-State armed groups, not exclusively by terrorist and violent extremist organizations. Furthermore, the revised General Comment clarifies that, regardless of the group's designation, children are exposed an array of grave human rights violations and, as such, the phenomenon must be addressed in a holistic sense, rather than simply within the framework of a counter-terrorism agenda. These paragraphs also associate the situation of children who are recruited in a conflict context and those who are recruited in non-conflict areas. This is crucial, to counteract the incorrect assumption that victim status should only be afforded to children recruited in conflict areas, and not to children who are recruited and exploited by terrorist or violent extremist groups in non-conflict areas. This is particularly important, given that confrontations with terrorist and violent extremist groups are sometimes not recognized as amounting to armed conflict. The Committee's explication of the need for holistic and child-sensitive and victim-sensitive responses to children recruited and exploited by terrorist or violent extremist groups, is particularly welcome, constituting authoritative international guidance on the protection of children's rights with respect to this complex global phenomenon.

25. Paragraph 111 emphasizes the long-term risk of adopting punitive approaches towards these children, focusing on the role of public authorities. It is necessary to note that re-victimization of children can also occur beyond contact with public authorities, especially in the context of terrorism and violent extremism, where the mere fact of being associated with entities that are publicly stigmatized can expose children to rejection by families, communities and society. In addition, it is recommended that the Committee highlights that the deprivation of liberty of these children does not occur only within the context of criminal proceedings. Indeed, the escalation of such cases to military or administrative detention is particularly concerning when it comes to this phenomenon.

26. Paragraph 112 calls for the recognition of the victim status of children recruited and exploited by terrorist and violent extremist groups. Yet, given the context outlined in paragraph 110, it appears that children should be recognized as victims because of the violence they have experienced while physically co-located with adult members of such groups. While overt violence against children is a relevant factor, this should not preclude a nuanced understanding of the various forms of violence, coercion and manipulation endured by children that are recruited outside of active conflict zones, or for children who have not endured physical or sexual violence at the hands of adult members of violent or terrorist extremist organizations, but who have been nonetheless been manipulated to undertake tasks for such groups.

26.1. It is therefore recommended that the General Comment clarifies that children shall be

recognized as victims from the moment they are recruited, since recruitment is broadly prohibited by the international legal framework, regardless of whether it may appear as voluntary, and that States also have the primary responsibility to prevent it, including through criminalization (references to the prohibition of child recruitment – to different degrees- Art. article 8, para. 2 (b) (xxvi) and (e) (vii) of the Rome Statute; Art.4.3 Additional protocol II to the Geneva Conventions; in Art. 38 of the CRC; art. 4 Optional protocol to CRC on children in armed conflict; Art. 1 and 3 ILO Convention no.182; Art.3 and 5 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; S/RES/1373 (2001); A/RES/70/291; United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice A/RES/69/194, as well as Security Council resolutions on children and armed conflict).

26.2. It is further recommended that paragraph 112, which relates to the promotion of both preventive and rehabilitate measures, also references the Operative Paragraph 18 of the Sixth Review of the Global Counter-terrorism Strategy (A/RES/70/291), which calls for an emphasis on reintegration for children alleged as having committed terrorism-related offences.

27. In addition, we recommend that the Committee reconsiders the statement made in Paragraph 112 which asserts that criminal charges, in this context, are ‘by their nature very serious ones.’ In fact, the range of terrorist-related offences that children are charged with has expanded rapidly in recent years, to include a range of preparatory and support acts such as inciting others to commit terrorist acts, or acts that justify, encourage, praise or glorify terrorist acts that may incite further terrorist acts. These are often proscribed by law using vague terms, such as “glorifying” or “promoting” terrorism. We encourage the Committee to recognize that these offence categories can impact disproportionately on children because evidence of acts of this kind can be easily collected from online platforms and, it should be noted, children are the main consumers and generators of online content globally. In light of their evolving capacities, children may not always have a clear understanding of the consequences of the views they are expressing and may make impulsive statements online that do not represent fixed or entrenched ideas or beliefs about violent ideology, but rather are designed to shock and provoke. It is therefore recommended that the offences not be characterized, uniformly, as ‘serious’, and that the following be added to Paragraph 112: *‘Children should not be unnecessarily criminalized for expressing opinions, often online, that are viewed as glorifying or inciting terrorism.’*

28. Also in relation to Paragraph 112, we encourage the Committee to recognize the incorrect assumption that specialized child justice systems are too lenient for children alleged as having committed a terrorism-related offence, and the conventional criminal justice system is often considered to be the only effective forum for dealing with cases of this kind. However, children’s rights can be severely compromised when they are investigated, prosecuted and adjudicated in conventional criminal justice systems, especially when adult courts, special counter- terrorism courts or military courts have been granted jurisdiction over terrorism offences. It is a matter of urgency that State parties be reminded that a specialized child justice system is founded on responses to offending that ensure public security, help the child assume a constructive role in society, and address their offending behavior in a manner that is appropriate to their age, maturity and development, and encourage a process of behavioral change by helping the child or young person to assume accountability for his or her actions.

28.1. It is therefore recommended to add in Paragraph 112, after the sentence ‘... are dealt with in accordance with articles 37 and 40 of the CRC, and in line with this general comment’, the following sentence: *‘State parties should ensure that criminal proceedings against children within the military justice system are not permitted and that children are not transferred to adult*

courts or treated in any way as adult offenders, even when charged alongside adults.'

29. Paragraph 114 helpfully introduces the use of customary justice and, while it cautions against potential tensions arising from the lack of harmony with the national laws and state justice, it does not mention the fact that the customary justice systems need to also abide by the principle of non-discrimination. This is especially pertinent in the context of, inter alia, gender-, age-, caste/class-, based discrimination which often come into conflict with cultural and religious rights.

29.1. It is recommended to highlight the need to ensure non-discrimination in the administration of customary justice, especially with regard to cultural and religious rights.

30. It is recommended to add in the Annex, the most recent normative framework regarding child justice, namely the *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice*, adopted by A/RES 69/194.

31. It is also recommended that the reference to the United Nations Standard Minimum Rules for the Treatment of Prisoners (the “Mandela Rules”) be deleted from the Annex due to the fact that this normative instrument applies exclusively to adults. Serious child rights violations may arise if State Parties treat children in accordance with minimum standards designed for adult prisoners.

32. Finally, given the inclusion of the specific issue on “ Children recruited and used by non-State armed groups, terrorist and violent extremist groups”, it is recommended to include in the Annex reference to the UNODC Handbook on *Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*,¹ which provides guidance to Member States, based on international law, on how to address this concerning phenomenon in both conflict and non-conflict settings globally.

Concluding Remarks

The Justice Section, Division for Operation of UNODC commends the Committee on the Rights of the Child for their sustained attention to ensuring the protection of the rights of children in conflict with the law. The Justice Section, Division for Operations of UNODC, extends the offer to remain at the Committee’s disposal for further advice as needed.

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¹https://www.unodc.org/documents/terrorism/Publications/HB%20Children/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf