

**Consultation OHCHR Report:
"Human rights implications of over-incarceration and overcrowding"
Child Rights International Network (CRIN), 28 April 2015**

CRIN has collected worrying evidence that a growing number of States in all regions, far from fulfilling their legal obligations to respect the rights of all children, are moving backwards in their approach to juvenile justice and criminalising more and younger children.¹ Beyond contributing to over-incarceration and prison overcrowding, a system focused on punishment and retribution cannot fulfil for children the required aims of a juvenile justice system, which should focus exclusively on necessary rehabilitation and reintegration. The way forward is to separate the concept of responsibility from that of criminalisation – and stop criminalising children.²

States are locking up more children at younger ages

In contrast to positive progress in some children's rights arenas, recent reports suggest that penal systems for children in many States are becoming more punitive. The 2013 report by the Special Representative of the UN Secretary General on Violence against Children refers to us living in a time "when public opinion expresses concern at the perceived threat posed to society by juvenile delinquency, and states around the world contemplate reductions in the minimum age of criminal responsibility and longer sentences of imprisonment".³

Lowering minimum ages, as some States have done and more are considering, means stigmatising more and younger children as criminals and responding to them in a criminal law system which in every State is focused primarily on punishment and retribution, thereby contributing directly to over-incarceration and overcrowding of prisons.

The other related regression is the trend in some States to lock up more children and at younger ages. A recent report from UN agencies states: "It is estimated that at least one million children are deprived of their liberty worldwide, a figure that is probably underestimated. Research shows that the majority of detained children is awaiting trial, that a large proportion of these children are held for minor offences and are first-time offenders [*sic*]. Violence at home, poverty, structural violence and risky survival activities propel children into the juvenile justice system, and detention in the criminal justice system is often used as a substitute for referral to child care and protection institutions. There is a worrying trend for children to be placed in institutions, rather than minimising the risk of violence against children by ensuring

¹ Countries that have lowered: Denmark, Georgia, Hungary, Panama; Countries with proposals to lower: Argentina, Bolivia, Brazil, France, Republic of Korea, Mexico, Peru, Philippines, Russian Federation, Spain, Uruguay; see: CRIN, *States lowering age of criminal responsibility*, available at: <https://www.crin.org/en/home/what-we-do/policy/stop-making-children-criminals/states-lowering-age-criminal-responsibility>.

² For a longer version of CRIN's policy position on this issue, including a discussion of possible alternative proceedings for dealing with child offenders outside the criminal justice system, please refer to: <https://www.crin.org/en/home/what-we-do/policy/stop-making-children-criminals>.

³ *Promoting restorative justice for children*, Report of the Special Representative of the UN Secretary General on Violence against Children, New York, 2013, page 39.

effective prevention. Incidents of violence occur while in custody of police and security forces, in both pretrial and post-sentence detention, as well as a form of sentencing. Violence can be perpetrated by staff, adult detainees and other children, or be the result of self-harm”.⁴

Stop criminalising children

The Convention on the Rights of the Child asserts the rights of every human being below the age of 18 years. Criminalising children is in conflict with the Convention’s requirement that the child’s best interests must be a primary consideration (Article 3) and the child’s right to maximum possible development (Article 6). The Convention’s Article 40 requires a distinct approach: that States shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the law – not to some of them but to all of them up to 18. In particular, no child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty, as provided by Article 37 of the Convention.

Criminalising children causes persisting harm not only to the overall development of many children but also of human societies. It encourages a spiral downwards by children into further offending and increasingly violent offending which often extends into adulthood. It prevents societies moving on by upholding lingering beliefs in original sin and the need to beat the devil out of children.

It does not serve our purpose as advocates of children’s human rights to deny children’s immediate responsibility, or to belittle their evolving capacities. But we must also recognise, as the Convention does, that their developmental status requires a special approach.

Separating “responsibility” from criminalisation

We have to separate the need to identify, appropriately assess and respond constructively to children’s responsibility for crimes from the quite distinct urge to criminalise them. This is not an original proposal and there is authoritative support for this approach.

A significant indication of support for not criminalising children is in the Rome Statute establishing the International Criminal Court. The Statute excludes all persons under 18 from its jurisdiction: Article 26 states: “The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”

In 2003, the European Network of Ombudspersons for Children (ENOC) issued a position statement, adopted by member-institutions in 21 States who were “concerned at the tone of political and media debate and the direction of public policy

⁴ *Prevention of and responses to violence against children within the juvenile justice system*, Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system, 2012, page 7, available at: https://srsg.violenceagainstchildren.org/sites/default/files/publications_final/web_juvenile_justice_final.pdf.

and legal changes concerning juvenile offenders in many of our countries.” ENOC’s statement argues: “We believe that current trends to reduce the age of criminal responsibility and to lock up more children at younger ages must be reversed. The treatment of young people placed in penal institutions in many of our countries is a scandal – breaching their fundamental human rights. We believe that the concepts of ‘responsibility’ and of ‘criminalisation’ need to be separated. The [CRC] proposes a separate, distinct system of juvenile justice; it requires that this must be focused on respect for all the rights of the child and on the aims of rehabilitation and reintegration. This focus and these aims are not compatible with ‘criminalising’ child offenders”.⁵

In 2009, Thomas Hammarberg, the Council of Europe’s Commissioner for Human Rights from 2006 to 2012, concerned at proposals to lower minimum ages in some Member States, took up this call, issuing a viewpoint which quoted ENOC’s statement and concluded: “Yes, it is in all our interests to stop making children criminals. We should therefore treat them as children while they are still children and save the criminal justice system for adults”. Thomas Hammarberg wants “to move the debate on from fixing an arbitrary age for criminal responsibility. Governments should now look for a holistic solution to juvenile offending which does not criminalise children for their conduct”. He noted that the UN Guidelines for the Prevention of Juvenile Delinquency,⁶ still provide the right benchmark: “Labelling a young person as ‘deviant’ or ‘delinquent’ or ‘pre-delinquent’ often contributes to the development of a consistent pattern of undesirable behaviour by young people”.⁷

In 2011, a report on Juvenile Justice and Human Rights in the Americas, prepared by Paulo Pinheiro in his then role as Special Rapporteur on the rights of the child to the Inter-American Commission, highlighted the incompatibility of asserting an arbitrary age under 18 with “the right to non-discrimination enshrined in Article 2 [CRC] and the best interests principle in Article 3(1)”,⁸ arguing that “the element of retribution is not appropriate within juvenile justice systems if the objectives pursued are the reintegration and rehabilitation of the child”.⁹

Curbing over-incarceration by implementing standards

We believe that the Convention on the Rights of the Child implies that the only justification for locking up a child can be that they have been assessed as posing a serious risk to others’ or their own safety and the risk cannot be reduced to an acceptable level without their detention. And in these exceptional circumstances any

⁵ *Juvenile Justice: Europe’s Children’s Champions challenge governments to respect young offenders’ rights*, European Network of Ombudspersons for Children, 2003, available at: <https://www.crin.org/en/library/publications/juvenile-justice-europes-childrens-champions-challenge-governments-respect>.

⁶ *United Nations Guidelines for the Prevention of Juvenile Delinquency*, 1990, Annex para. 5(f), available at: <http://www.un.org/documents/ga/res/45/a45r112.htm>.

⁷ *Children should not be treated as criminals*, Viewpoint by Council of Europe Commissioner for Human Rights Thomas Hammarberg, 2009, available at: <https://www.crin.org/en/library/publications/viewpoint-children-should-not-be-treated-criminals-says-europe-commissioner>.

⁸ *Juvenile Justice and Human Rights in the Americas*, Inter-American Commission on Human Rights, 2011, para. 58, available at: <http://www.cidh.org/countryrep/JusticiaJuvenileng/jjtoc.eng.htm>.

⁹ *Ibid.*, para. 59.

necessary restriction of liberty must be authorised by a legal process with the child independently represented and must be frequently reviewed.

The World Report on Violence against Children urged governments to “ensure that detention is only used for child offenders who are assessed as posing a real danger to others, and then only as a last resort, for the shortest necessary time, and following judicial hearing, with greater resources invested in alternative family-and community-based rehabilitation and reintegration programmes”.¹⁰

Recommendations

We suggest that the High Commissioner considers the following recommendations for his report to the Human Rights Council:

To Governments:

- Stop lowering the age of criminal responsibility and thereby criminalising more and more children, and stop detaining children for minor and/or first-time offences;
- Amend laws and practices so that children are never detained as punishment, but only as a last resort for the shortest period possible, specifically only when they are assessed as being a serious risk to others' or for their own safety, and where that risk cannot be reduced to an acceptable level without detention;
- Never to detain children in penal settings;
- Ensure that any necessary restriction of liberty is authorised by a legal process with the child independently represented and that detention is frequently reviewed;
- Cooperate with and support the forthcoming UN Global Study on Children Deprived of Liberty.

To the Human Rights Council:

- Ensure that the issue of States lowering minimum ages of criminal responsibility is addressed by the Council;
- Ensure that the obligations enshrined in the Convention on the Rights of the Child are implemented with respect to detention of children and treatment of children in the criminal justice system;
- Urge the Secretary General to carry out the Global Study on Children Deprived of Liberty in the most effective way possible by appointing an independent expert to undertake the study.

¹⁰ *World Report on Violence against Children*, published by the United Nations Secretary General's Study on Violence against Children, 2006, page 218.