



**International Commission of Jurists, JUSTICE and Nederlands Juristen Comité
voor de Mensenrechten**

**Briefing Paper on the Proposal for a Directive on Procedural Safeguards for
Children Suspected or Accused in Criminal Proceedings
COM(2013) 822 final**

September 2014

SUMMARY OF RECOMMENDATIONS

The following is a summary of the recommendations set out in full on pages 23 to 25. The rationale for these recommendations is set out on pages 3 to 22.

- The Directive should apply to persons under the age of 18 years at the time of the alleged commission of an offence.
- The protection of the Directive should not be excluded for children in 'minor' proceedings.
- The Directive should require that information is provided in simple, child-friendly language and competent authorities verify that the child understands their rights and the charges against them.
- Mandatory representation should be required for all children without exception.
- The purpose of individual assessment should be to identify the modifications to proceedings necessary to ensure the effective participation of the child. The assessment must take place at the earliest opportunity, so as to be taken into account by all relevant authorities in the investigation and trial. Derogation should only be permitted only where necessary in the best interests of the child, in the circumstances of the case.
- Children should have prompt access to a medical examination upon deprivation of liberty. Examinations should not be denied.
- Audio-visual recording should be provided in all cases, without a proportionality review or other exception.
- Every child arrested and deprived of liberty should be brought before a court within 24 hours and subject to review at least every two weeks. The right to challenge the legality of the deprivation of liberty and to receive a prompt decision should also be available.
- Children should not be detained with adults except where an individual attains majority while in detention and their continued detention remains necessary and proportionate and it is in the best interests of this individual and the other children concerned.
- Children should be treated in a manner appropriate to their age and needs as currently proposed in article 13(2).
- The privacy and identity of children during criminal proceedings should be protected in all circumstances.
- The right of children to effectively participate at their trial should be protected by the Directive, not simply the right to be present.
- Where children were not present at their trial they should have the right to a retrial in accordance with Council Framework Decision 2009/299/JHA.
- No reimbursement of costs by children should be required for the assessments and procedures guaranteed under the Directive.
- A new article should be included, to respect and ensure the rights provided by the Directive without discrimination of any kind and to promote training of professionals administering juvenile justice, particularly in relation to vulnerable groups of children.

1. INTRODUCTION

This briefing considers the proposed Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings¹ (hereafter “proposed Directive”). The proposal was published by the European Commission on 27 November 2013, as part of a package of measures on criminal procedural rights, which also includes the proposed Directive on the presumption of innocence and the right to be present², and the proposed Directive on the right to (provisional) legal aid.³ The package of proposals complements EU Directives on the right to interpretation⁴, the right to information,⁵ and on the right of access to a lawyer,⁶ enacted between 2010 and 2014, in the context of the “Roadmap” aimed at strengthening rights in criminal proceedings and promoting fair trial standards.⁷

The International Commission of Jurists (ICJ), JUSTICE and Nederlands Juristen Comité voor de Mensenrechten (NJCM) welcome the many elements of the draft Directive that aim to strengthen guarantees of children’s rights in criminal proceedings, in light of the particular vulnerabilities of children in the criminal justice process. Suspected and accused children require special assistance and specially adapted and amended proceedings to enable them to fully and effectively participate in the criminal justice process and to understand their rights, charges against them and the conduct of the trial. In particular, the Directive contains important safeguards and standards on the right to information; mandatory access to a lawyer; medical examination; audio-visual recording of interviews; detention of children and measures alternative to detention.

Despite these positive elements, **the ICJ, JUSTICE and NJCM consider that there remain aspects of the Commission’s proposal that require strengthening, in**

¹ *Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings*, COM(2013)822, 27 November 2013 (Hereafter “European Commission Proposed Directive Children’s Rights”).

² *Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings*, COM(2013) 821, 27 November 2013.

³ *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*, COM(2013)824, 27 November 2013.

⁴ *Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings*, OJ L 280/1, 26 October 2010.

⁵ *Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings*, OJ L 142/1, 1 June 2012.

⁶ *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and 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*, OJ L 294/1, 6 November 2013

⁷ *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (1)*, 2009/C 295/01, OJ C 295/1, 4 December 2009, adopted under the “Stockholm Programme” of Commission work in the area of Freedom, Security and Justice between 2009 – 2014. For more information see http://ec.europa.eu/justice/criminal/criminal-rights/index_en.html.

order to adequately protect rights guaranteed under the EU Charter of Fundamental Rights (CFR), as well as international human rights law, including the Convention on the Rights of the Child (CRC), as well as the European Convention on Human Rights (ECHR). In particular, protection of **the principle of effective participation of children in criminal proceedings** in which they are suspected or accused, an essential element of the right to fair trial under international human rights law, needs to be strengthened through the introduction of further safeguards. It is essential that all provisions of the Directive be designed to uphold the principle that **the best interests of the child should be a primary consideration** in all actions that concern the child.⁸

The briefing also raises serious concerns regarding several amendments proposed by the Council.⁹ While the Council has suggested some measures that would improve the effectiveness of procedural safeguards for children, it has also put forward a number of proposals that would seriously weaken the protection offered by the Directive. In particular, the ICJ, JUSTICE and NJCM are concerned at:

- Restrictions on the scope of application of the directive, dis-applying its protection to persons who commit a crime while under the age of 18 but come of age in the course of the criminal process;
- Removal of mandatory access to a lawyer;
- Restrictions on the right to a medical examination for a child in detention (Article 8);
- Restrictions on the use of audio-video recording of interviews of children;
- Provision to detain children alongside young adults in certain circumstances;
- Recovery of costs from accused children (if convicted) in certain circumstances for their individual assessments, medical examination and the audio-visual recording of their questioning.

2. RELEVANT INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS

Children suspected or accused in criminal proceedings, like adults, have, amongst other human rights, the right to fair trial¹⁰, the right to liberty¹¹, and the freedom from torture and other ill-treatment.¹² International human rights law binding on all EU Member States, recognizes that children require special measures of protection,

⁸ Article 3.1 of the UN Convention on the Rights of the Child (CRC) states that: “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.” See also *Neulinger and Shuruk v Switzerland*, ECtHR, Application No. 41615/07, Judgment of 6 July 2010, para.135.

⁹ Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings – General Approach*, 10065/14; 9547/14 DROIPEN 67 COPEN 141 CODEC 1214, 22 May 2014.

¹⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 14; 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, ETS 5, Article 6.

¹¹ ICCPR, supra note 10, Article 9; ECHR, supra note 10, Article 5.

¹² ICCPR, supra note 10, Article 7; ECHR, supra note 10, Article 3.

including in the criminal justice system, that take account of their particular vulnerability and needs.¹³ Such special standards are set out in the Convention on the Rights of the Child (CRC)¹⁴ as well as other authoritative UN standards,¹⁵ and are elaborated in jurisprudence of international human rights courts and tribunals, including the European Court of Human Rights (ECtHR).

A central principle of international human rights law as it applies to children, including in the criminal justice system, is that the best interests of the child must be a primary consideration in all matters that concern the child.¹⁶ Furthermore there are positive obligations on states to protect the child's right to have his or her views heard, including at all stages in criminal proceedings.¹⁷

Of particular importance for children is **the principle of effective participation in criminal proceedings**, an element of the right to a fair trial.¹⁸

The principle, which is guaranteed under the CRC,¹⁹ and has been elaborated on by the ECtHR in *T. and V. v. the UK*²⁰ (see box) requires that the criminal process be adapted to take account of the age and level of maturity of the child.

The UN Committee on the Rights of the Child has elaborated on this principle pursuant to Article 40(2)(b)(iv), explaining that it requires the child to comprehend the charges, possible consequences and penalties, in order to direct their legal representation, challenge witnesses, to provide account of events, and to make appropriate decisions about evidence.²¹ Furthermore, Article 14(2) of the Beijing Rules provides that proceedings should be conducted in an atmosphere of understanding to allow the child to participate or to express himself/herself freely, where taking into account the child's age and maturity may also require modified courtroom proceedings and practice.

As noted by the European Commission in the Impact Assessment accompanying the Proposed Directive, the principle of effective participation means that, "in the case of a

¹³ ICCPR, supra note 10, Article 24.

¹⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, Articles 3, 12, 37, 40; UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, UN Doc. CRC/C/GC/10 (2007)

¹⁵ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*: resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/33, UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* : resolution / adopted by the General Assembly., 2 April 1991, A/RES/45/113.

¹⁶ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 24(2); CRC Article 3.

¹⁷ CFR Article 24(1); CRC, Article 12.

¹⁸ *Stanford v. the United Kingdom*, ECtHR, Application No. 16757/90, 23 February 1994, para.26; UN CRC, General Comment 10, para.46; Beijing Rules, Article 14.

¹⁹ CRC Article 12(2), Article 40, and CRC General Comment 10, supra note 16.

²⁰ *T. v. the United Kingdom*, ECtHR, Application No. 24724/94, Judgment of 16 December 1999.

²¹ UN CRC, General Comment 10, supra note 16, para. 46.

child, it is essential that he/she will be dealt with in a manner which takes full account of his/her age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his/her ability to understand and participate in the proceedings, including conducting the hearing in such a way as to reduce as far as possible his feelings of intimidation and inhibition".²²

T. v. the UK (1999): The Right to Effective Participation for Children

The application of the principle of effective participation to children in criminal proceedings was for the first time considered in *T. v. the UK*.²³ This case concerned two eleven-year-old boys convicted of the abduction and murder of a two-year-old boy. Their trial took place in public in the adult Crown Court, and attracted extensive media coverage. The Court highlighted that Article 6(1) ECHR requires that "a child charged with an offence is dealt with in a manner which takes full account of his age/level of maturity and intellectual and emotional capacities and that steps are taken to promote his ability to understand and participate in the proceeding".²⁴ Additionally, "in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition".²⁵

The Court concluded that "the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public".²⁶

The principle of effective participation was reiterated in *S.C. v. the UK*: "[It] presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence".²⁷

²² *S.C. v. the United Kingdom*, ECtHR, Application No. 60958/00, Judgment of 15 June 2004; European Commission, *Impact Assessment Accompanying the document Proposal for a directive of the European Parliament and of the Council Proposal for a on procedural safeguards for children suspected or accused in criminal proceedings*, 27 November 2013, SWD(2013) 480 final, p. 13.

²³ *T v. the United Kingdom*, ECtHR, Application No. 24724/94, Judgment of 16 December 1999.

²⁴ *Ibid.*, para. 84.

²⁵ *Ibid.*, para 85.

²⁶ *Ibid.*, para 86.

²⁷ *S.C. v. the United Kingdom*, ECtHR, Application No. 60958/00, Judgment of 15 June 2004, para. 29.

3. COMMENTARY ON THE PROPOSED DIRECTIVE

ARTICLE 2: SCOPE OF APPLICATION OF THE DIRECTIVE

Article 2 of the proposed Directive sets out the scope of application. Under Article 2(1), the Directive applies to children subject to criminal proceedings, and under Article 2(2), to children subject to European Arrest Warrant (EAW) proceedings. Article 2(3) clarifies that the Directive applies to suspects or accused persons within the above two categories, who were children when the proceedings commenced, but have since come of age.²⁸ The UN Committee on the Rights of the Child, in its General Comment 10, has stressed that, under the CRC, “every person under the age of 18 years *at the time of the alleged commission of an offence* must be treated in accordance with the rules of juvenile justice”.²⁹ **The ICJ, JUSTICE and NJCM therefore recommend that Article 2.1 and 2.2 be amended to state that the Directive applies to persons under the age of 18 years at the time of the alleged commission of an offence.**

Moreover, the Council has proposed amendments to Article 2.3 in its General Approach, rendering its application optional. Article 2.3 would state only that Member States “may” provide that rights under the Directive apply to persons who have come of age in the course of criminal proceedings against them. In accordance with the standards outlined above, **the ICJ, JUSTICE and NJCM recommend that Article 2(3) should not be amended to remove the protection of the Directive from children who come of age in the course of criminal proceedings.**

Under the Council’s proposals, as set out in its General Approach, the application of the Directive would be excluded in respect of certain **minor offences** where the suspect or accused person is not deprived of liberty. In particular, under proposed Article 2.5a, read with Recitals 11a to 11d, the Directive would not apply where such proceedings are dealt with by an authority other than a court, and where the applicable penalties do not include deprivation of liberty. In such cases, provided there is provision for an appeal or other judicial review before a court of criminal jurisdiction, the protections of the Directive would apply only in those court proceedings. The range of offences which would in practice be excluded from the protection of the Directive under these proposals is unclear, but is likely to be significant in some jurisdictions. **The ICJ, JUSTICE and NJCM are concerned that these proposals may exclude children from the Directive’s protection in criminal proceedings, which, even if they do not result in deprivation of liberty, may have serious consequences for the child, including in regard to juvenile criminal records. We therefore recommend that the Council’s proposed Article 2.5a, and proposed Recitals 11a to 11d, should not be accepted.**

²⁸ Under Article 3 of the draft Directive, a child is defined as anyone below the age of eighteen.

²⁹ UN CRC, General Comment 10, *supra* note 16, para.37. Emphasis added.

ARTICLE 4: RIGHT TO INFORMATION

Article 4 of the proposed Directive prescribes the right to information, stating that “Member States shall ensure that children are informed promptly about their rights in accordance with Directive 2012/13/EU” on the right to information in criminal proceedings.

Directive 2012/13/EU on the right to information in criminal proceedings provides in Article 3(2) that information on procedural rights should be “given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons”. Article 4 and recital 22 of this Directive also refer specifically to a Letter of Rights, which is to be provided to the suspected or accused person when he or she is deprived of liberty.

Article 4(2) Recital 13, and the Explanatory Memorandum of the proposed Directive on procedural safeguards for children also require that the Letter of Rights given to children contains the rights under the Directive.³⁰

However, the proposed Directive currently contains no provision on how a child should be informed of the charges brought against him or her. The principle of effective participation as prescribed by the ECtHR, the CRC, and the Beijing Rules, requires the child to understand the proceedings in order to exercise his or her defence. Directive 2012/13/EU Article 6 confers the right to information about the accusation, stating that the information “shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of defence”.³¹

Article 40(2)(b)(ii) CRC guarantees the right to prompt and direct information on the charges, and the UN Committee on the Rights of the Child elaborates on this in General Comment 10, stressing that a child should be informed in a language he or she understands, which can also mean a “translation” of the formal legal jargon often used in criminal or juvenile charges and that providing the child with an official document is not enough; an oral explanation may often be necessary.³² The Committee makes it clear that it is the responsibility of the authorities to make sure that the child understands each charge brought against him or her and this responsibility cannot be left solely to the parents or legal guardians or other assistance.

Since the proposed Directive does not regulate the minimum age of criminal responsibility, which varies widely within the EU from 10 to 15 years,³³ the proposed

³⁰ European Commission Proposed Directive Children’s Rights, Explanatory Memorandum, paras. 18 – 20.

³¹ 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, Article 6.

³² UN CRC, General Comment 10, *supra* note 16, paras. 47 – 48.

³³ The Council of the European Union in its Press Release on its referred to different ages of criminal responsibility, including England: 10, Ireland: 12, Netherlands: 12, France: 13, Germany: 14, Denmark: 15. See

Directive potentially applies to very young children. Such children may require an oral explanation to fully understand their rights, in simple, plain language. Likewise, the Letter of Rights may need to be adapted for children, with pictorial representations of the right being expressed,³⁴ to realise the protection of Directive 2012/13/EU.

The ICJ, JUSTICE and NJCM therefore recommend that Article 4(2) be amended as follows:

- 1. Member States shall ensure that, where children are deprived of liberty they shall be provided with a Letter of Rights pursuant to Directive 2012/12/EU, which includes their rights under this Directive as well as information on the charges against them in simple, child-friendly language.**
- 2. Member States shall require that all steps are taken to ensure the child understands his or her rights and the nature of the charges, through verification and additional oral explanation as necessary.**

Furthermore, recital 12, as well as the Explanatory Memorandum to the proposed Directive provide that the right to information applies “with the exception of minor offences as provided for by Article 2(2) of Directive 2012/13/EU” on the right to information in criminal proceedings.³⁵ Article 2(2) that Directive reads: “where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court, following such an appeal.”³⁶ Recital 17 of that Directive also clarifies that the exception is intended for administrative cases where it would be unreasonable to require competent authorities to ensure all the rights under the directive. The exception referred to in Recital 12 raises similar concerns to those described in regard to the Council’s proposals for the exclusion of minor offences from the Directive’s protection under Article 2. The range of minor offences in which the right to information would be excluded is not clear, but could include proceedings with significant consequences for the child. **Given the particular importance of the right to information for suspected or accused children, the ICJ, JUSTICE and NJCM recommend that Article 4 should not be subject to an exception for minor offences.**

<http://www.government-world.com/children-in-criminal-proceedings-european-commission-proposal-to-increase-protection-makes-a-decisive-step-forward/?print=pdf>

³⁴ England and Wales has an easy read version of its letter of rights, available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321616/ERDraft3_07-01-14.pdf

³⁵ European Commission Proposed Directive Children’s Rights, Recital 12 and Explanatory Memorandum, para. 18,

³⁶ EU Directive on the Right of Access to a Lawyer, Article 2,

ARTICLE 6: ACCESS TO A LAWYER

Prompt, regular and confidential access to a lawyer for persons held in detention and during interrogation is recognized in international human rights law as an essential safeguard against arbitrary detention and torture and other ill-treatment. Furthermore, access to legal representation for defendants in criminal proceedings is a necessary element of the right to a fair trial.³⁷ In EU law, the right of access to a lawyer is guaranteed in Articles 47 and 48 CFR and Directive 2013/48/EU on access to a lawyer provides important safeguards to facilitate access to such representation. The ECtHR has stated that the accused person is particularly vulnerable during police custody, given the stage of proceedings and complexity of the law. In most cases this can only be compensated by a lawyer whose task, amongst other things, is to ensure respect of the right not to incriminate oneself. The court has stressed the fundamental importance of providing a lawyer where the person in custody is a minor.³⁸

The ICJ, JUSTICE and NJCM welcome the Directive's protection of the principle of mandatory access to a lawyer for children suspected or accused in criminal proceedings, in Article 6. The justification is that the presence of a lawyer from the earliest stages of the proceedings, and especially during questioning is an important safeguard for children, and that providing children with the option to waive their representation holds grave risks for their right to defend themselves. Children may not know what it means to waive their right to legal representation, or the implications of such waiver.³⁹

However, we note that Recitals 17 and 18 state that the right of mandatory access to a lawyer should not apply to certain minor offences.⁴⁰ These include minor offences which do not lead to a deprivation of liberty, or where a penalty is imposed by an authority other than a court or prosecutor. In such cases, according to recitals 17 and 18, where there is a right of appeal to a court, mandatory access to a lawyer should apply only at the appeal stage. **The ICJ, JUSTICE and NJCM reiterate their concern at exclusion of rights under the Directive for categories of minor offences, the scope of which in the legal systems of the different Member States is unclear, but which may include offences with significant consequences for the child concerned. We therefore propose that recitals 17 and 18 should be deleted..**

We are also concerned that the Council, in its General Approach, has proposed significant amendments to Article 6 and the relevant recitals, which weaken the protection it offers. Under the Council proposals, mandatory defence is limited to two situations in which a Member State would be required to ensure that children are

³⁷ ECHR, supra note 10, Article 6(3)(c); ICCPR, supra note 10, Article 14(3)(d); CRC, supra note 14, Article 40(2)(b)(ii).

³⁸ *Salduz v Turkey* ECtHR, Application No. 36391/02, Judgment of 27 November 2008, paras 54 and 60; *Panovits v Cyprus*, Application No 4268/04, Judgment of 11 December 2008, paras. 71-74

³⁹ European Commission Proposed Directive Children's Rights, Explanatory Memorandum, Recital 16; *Adamkiewicz v. Poland*, ECtHR, Application No.54729/00, Judgment of 2 March 2010; *Panovits v Cyprus*, ECtHR, Application No. 4268/04, Judgment of 11 December 2008, para.68.

⁴⁰ European Commission Proposed Directive Children's Rights, Recitals 17, 18 and Explanatory Memorandum, para. 29.

assisted by a lawyer. These are (1) during questioning of a child, but only “unless this is not proportionate”, taking account of the complexity of the case, the seriousness of the offence, or the maximum penalty that can be imposed, and (2) when a child is deprived of liberty, unless the deprivation of liberty “is supposed to last only for a short period of time”.⁴¹ A new Recital 17a would state that “a lawyer does not have to be mandatorily present during each investigative or evidence-gathering act”.⁴² The Council proposals would also omit the current provision in Article 6(2) for the right of access to a lawyer in proceedings which may be dismissed by the prosecutor. This omission would be likely to undermine the right of access to a lawyer in cases of minor offences in some jurisdictions.

Moreover, under the Council proposals, where the lawyer should be present, but has not yet arrived, the right to have a lawyer present can be denied: “in exceptional circumstances and only during the pre-trial stage” the authorities may proceed with questioning if there is “an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person” or where “immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings”.⁴³

The ICJ, JUSTICE and NJCM are alarmed by these proposed amendments. Should they be accepted, then the effectiveness of the proposed Directive would be significantly undermined. The amendments would severely weaken the Directive’s protection of childrens’ rights to liberty, fair trial and freedom from ill-treatment. They would also undermine the application of the Directive on the right of access to a lawyer since children may be more likely to waive their right to legal representation than adults. This is because they have less understanding of the significance of legal representation, the seriousness of the proceedings against them and the longer term impact of their decisions, than their immediate desire to leave detention.⁴⁴ **We therefore strongly urge against adoption of the Council proposal for amendments to Article 6 and Recitals 15 – 17. Member States should strive to put in place schemes to ensure the prompt arrival of suitably qualified lawyers so as to avoid the need to deny children vital legal representation.**

ARTICLE 7: INDIVIDUAL ASSESSMENT

Article 7 of the proposed Directive requires Member States to ensure that the specific needs of children are taken into account during the criminal proceedings, by way of

⁴¹ Council, General Approach Proposed Directive Children’s Rights, supra note 9, Article 6a.

⁴² Ibid., Recital 17a.

⁴³ Ibid., Article 6a.

⁴⁴ See for example Kemp, *Transforming Legal Aid: Access to criminal defence services*, (Legal Services Commission: 2010), available at: http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/TransformingCrimDefenceServices_29092010.pdf and *Inside Police Custody*, op. cit. with regard to the importance of assistance from parents or appropriate adults, pp. 243-246.

individual assessment that would take particular account of the personality and maturity of the child and their economic and social background.”

Recital 19 states that the individual assessment aims to “determine if and to what extent they would need special measures during the criminal proceedings”. The explanatory memorandum⁴⁵ also identifies that the personal characteristics of a child, his or her maturity and economic and social background may vary significantly”,⁴⁶ making the child’s experience of the criminal process, and ability to defend themselves, dependent upon a number of factors outside of their control.

We are concerned that the lack of clarity in this article and the relevant recital could limit its effectiveness in protecting the rights of children, and in particular in ensuring that proceedings are adapted so as to allow for the child’s effective participation. This is because the article does not clarify how an assessment should be conducted. Furthermore, the proposed Directive contains no requirements as to how the results of the assessment should be utilised in providing special measures for the child. The assessment would no doubt reveal that for children it would be easier for them to give their evidence during proceedings in a different way to adults, for example audio-visually recorded in advance, on a live link, or from behind a screen. Courts may need to be reorganised, as indicated in *T and V*, to ensure that they do not intimidate children. Intermediaries or appropriate adults may be required to assist the child in understanding the case, in addition to a parent or guardian and lawyer, should they have particular vulnerabilities. **We therefore recommend that Article 7 be amended to specify that individual assessment will identify particular measures or modifications to procedures which may be necessary to ensure the effective participation of the child in the proceedings, and that the assessment must be taken into account by all relevant authorities in the conduct of the investigation and trial.**

The ICJ, JUSTICE and NJCM support the proposal of the Council in its general approach that Article 7(3) should be amended to provide that the assessment take place at the “earliest appropriate stage.” However the Council’s suggestion other suggestion in Article 7(3), that the assessment take place only “in due time for it to be taken into account by the court when sentencing” is misplaced. Such a delay would deprive the individual assessment of any utility in ensuring the adaption of the trial proceedings to meet the needs of the child, as is intended by the Article, and indicated in Recital 19, which the Council has not amended. **We therefore recommend that Article 7(3) should be amended to incorporate only the first proposal of the Council so as to read: “The individual assessment shall take place at the earliest appropriate stage, and in any event, before indictment”.**

⁴⁵ The Memorandum provides that the individual assessment is needed to “determine if any and to what extent he or she would need special measures during the criminal proceedings. The personal characteristics of a child, his or her maturity and economic and social background may vary significantly”. European Commission Proposed Directive Children’s Rights, Explanatory Memorandum, para. 30.

⁴⁶ *Ibid.*, Explanatory Memorandum, paragraph 30.

The derogations provided in Article 7(7) are a further cause for concern. These provide that Member States can derogate from the obligation in Article 7(1) if it is not proportionate to carry out an individual assessment, having regard to the circumstances of the case, or to whether or not the child is already known to the Member State authorities. **The ICJ, JUSTICE and NJCM consider that the criteria for dispensing with the individual assessment in Article 7(1) are too vaguely worded, which risks widespread disregard for the individual assessment procedure. Moreover, the fact that the child may be known to the authorities does not mean that an individual assessment has previously taken place, or that it has done so recently. We propose that Article 7(7) should be amended to provide that derogation from the obligation of individual assessment is permitted only where it is necessary in the best interests of the child, taking into account the circumstances of the case.**

ARTICLE 8: THE RIGHT TO MEDICAL EXAMINATION

Article 8 of the proposed Directive guarantees the right to a medical examination for a child deprived of liberty, at the request of the child, the holder of parental responsibility for the child, or the child's lawyer.

However, in accordance with international human rights law, access to a doctor in detention should be prompt; the UN Committee on the Rights of the Child has stipulated that a child should be examined by a doctor "upon admission" to a detention facility.⁴⁷ **We therefore recommend that Article 8.1 be amended to state that "...Member States shall ensure that the child has prompt access to a medical examination..."**

Article 8(1) of the proposed directive refers to the aim of the medical examination as being, in particular, to assess "the general mental and physical condition of the child with the aim to determine the capacity of the child to face questioning or other investigative or evidence gathering acts or any measures taken or envisaged against the child."⁴⁸ We are concerned that this wording may not be fully consistent with the United Nations 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, which stipulate that "it is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of *which is not solely to evaluate, protect or improve their physical and mental health*".⁴⁹

⁴⁷ UN CRC, General Comment 10, supra note 16, para.89.

⁴⁸ European Commission Proposed Directive Children's Rights, Recital 12, Article 8.1.

⁴⁹ 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*, General Assembly resolution 37/194, 18 December 1982, Principle 3. Principle 4 also

Therefore, whilst the ICJ, JUSTICE and NJCM welcome that provision is made in the Directive for medical assessment, we consider that, in accordance with international standards, the Directive should make clear that the purpose of the medical assessment should be to safeguard the child's right to health, and to protect against ill-treatment in detention, rather than to test fitness for interrogation. The assessment of whether questioning of a child should take place, and how the investigation should be adapted to the particular needs of the child should fall within the remit of the individual assessment at article 7. **The ICJ, JUSTICE and NJCM therefore recommend that Article 8(1) be amended to read "In case of deprivation of liberty of a child, Member States shall ensure that the child has access to a medical examination to evaluate, protect and improve their physical and mental health and ensure that they receive appropriate treatment".**

We are further concerned by the proposed Council amendment to Article 8(2), which would allow the request for an examination to be refused where "it is obvious that such request has been made with the sole purpose of delaying the criminal proceedings." **This provision could lead to arbitrary denial of a medical examination, contrary to the best interests of the child, and we therefore recommend that the amendment should be rejected.**

ARTICLE 9: AUDIO-VISUAL RECORDING

Article 9 provides for the audio-visual recording of questioning of children by police, law enforcement or judicial authorities, Any questioning of children deprived of liberty must be audio-visually recorded.

However, Article 9 provides an exception in those cases where "it is not proportionate, taking into account the complexity of the case, the seriousness of the alleged offence and the potential penalty that can be incurred". These three factors are repeated in the recitals and the Explanatory Memorandum, but without any further elaboration. Audio-visual recording of questioning is widely recognized in international human rights standards as an important safeguard against violations of human rights in detention.⁵⁰ The European Committee for the Prevention of Torture (CPT) has noted, "[s]uch a

provides specifically that "it is a contravention of medical ethics for health personnel, particularly physicians (a) to apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments; (b) to certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments".⁴⁹

⁵⁰ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *12th General Report*, CPT/Inf (2002) 15, para.36; UN Committee against Torture, *Concluding Observations on France*, CAT/C/FRA/CO/4-6 (2010) para.23; See also, International Criminal Court Rules of Procedure and Evidence, Rule 112.

facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure.”⁵¹ A lack of clarity on conditions that determine disproportionality leads to a large margin of appreciation for Member States, and runs the risk of the application of different standards or, in certain cases, abuse. **The ICJ, JUSTICE and NJCM therefore recommend that the proportionality exception to Article 9 be removed, or that at a minimum further clarity on the factors to determine proportionality is provided.**

Moreover, the ICJ, JUSTICE and NJCM are concerned at amendments to this Article proposed by the EU Council in the general approach document, which would significantly dilute the protection afforded by Article 9. The Council proposes significant amendments to Article 9 as well as Recitals 21 – 23.

Firstly, whereas the Commission proposal makes it the rule that all questioning is recorded, unless this is not proportionate, the Council makes this optional by proposing that questioning only “may be” audio-visually recorded. Secondly, the Council proposal would remove the absolute requirement to record questioning of children who are deprived of liberty. It would require in Article 9(2) that questioning “shall be” audio-visually recorded, only where it is proportionate to do so, taking into account the complexity of the case, the seriousness of the alleged offence and the maximum penalty that could be imposed. Thirdly, a new Article 9(3) would provide that audio-visual recording may be dispensed with for detained children where there is an “unforeseen technical problem” and there is an urgent need to proceed with questioning to protect the rights of others, or to prevent substantial jeopardy to criminal proceedings. We find this final dilution of the right entirely unacceptable. If there are technical problems, attempts should be made to remedy these rather than abandon the right.

Under Article 9.3 of the proposed Directive, mandatory audio-visual recording does not apply to questioning for the purposes of identification of the child.⁵² However, the Council has suggested amending Recital 21, to add an exception to mandatory audio-visual recording when questioning is designed “*to determine whether an investigation should be started*”.⁵³ The ICJ, JUSTICE and NJCM consider that such a determination involves asking more than perfunctory questions and is likely to involve enquiry about the child’s involvement in the alleged offence; as such it should not be excepted from the obligation to record.

The ICJ, JUSTICE and NJCM therefore recommend that the amendments

⁵¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 12th General Report, CPT/Inf (2002) 15, para.36.

⁵² European Commission Proposed Directive Children’s Rights, Recital 21.

⁵³ Council General Approach on Proposed Directive Children’s Rights, Recital 21.

proposed by the Council to Article 9 and Recital 21 are not adopted, since they would significantly weaken the protection of the Article to children being questioned.

ARTICLE 10: DEPRIVATION OF LIBERTY

The ICJ welcomes the stipulation in Article 10(1) that children should be deprived of their liberty only as a measure of last resort and for the shortest appropriate period of time. This reflects international human rights standards, including under Article 37(b) of the CRC.⁵⁴

Article 10(2) of the proposed Directive also provides that Member States shall ensure that any deprivation of liberty of children before their conviction is subject to periodic review by a court. This reflects Article 5(3) ECHR and Article 9(3) ICCPR. However, a number of essential guarantees regarding judicial review of detention, which Member States have obligations to uphold under international human rights law, are missing from Article 10.

Firstly, Article 10 makes no mention of the period within which initial judicial review of detention should be carried out. In the case of detained adults, the UN Human Rights Committee has considered that the period prior to which a detainee is brought before a judge “must not exceed a few days”.⁵⁵ The Committee on the Rights of the Child stipulates that that this should take place within 24 hours.⁵⁶ Furthermore, the ECtHR has attached “great importance to the fact that the applicants were minors at the time of their arrest,” when criticising the lack of prompt judicial review of detention.⁵⁷

Secondly, the CRC Committee has recommended that States ensure through strict legal provisions that the legality of pre-trial detention of a child is reviewed regularly, preferably every two weeks.⁵⁸

Thirdly, children in detention, like other detainees, have the right to bring proceedings of their own initiative to challenge the legality of their detention (with the assistance of a lawyer if necessary).⁵⁹ The CRC Committee, interpreting the guarantee of such

⁵⁴ See also the Council of Europe Committee of Ministers, *Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice*, 16 March 2005, para. 15, which states that juveniles “ should not be detained in police custody for longer than forty-eight hours in total and for younger offenders every effort should be made to reduce this time further. The detention of juveniles in police custody should be supervised by the competent authorities.”

⁵⁵ Human Rights Committee, *General Comment 8 on Article 9*, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994), para.2

⁵⁶ UN CRC, *General Comment 10*, supra note 16, para.83.

⁵⁷ *Ipek and Others v. Turkey*, ECtHR, Application Nos. 17019/02 and 30070/02, Judgment of 3 February 2009, para. 36, *CRC General Comment No. 10*, supra, para. 83.

⁵⁹ See in general ECHR, supra note 10, Article 5(4); ICCPR, supra note 10, Article 9(4).

review in Article 37(d) CRC⁶⁰ has emphasized the right to prompt decisions in such proceedings, at least within two weeks of the challenge being brought.⁶¹

The ICJ, JUSTICE and NJCM therefore recommend that Article 10(2) be amended to read: **“Every child arrested and deprived of his/her liberty should be brought before a competent court to examine the legality of their deprivation of liberty within 24 hours. Member States shall ensure that any deprivation of liberty of children before their conviction is subject to a periodic review by a court, at least every two weeks. Every child deprived of liberty has the right to challenge the legality of the deprivation of liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action, at least within two weeks. ”**

ARTICLE 12: DETENTION OF CHILDREN WITH YOUNG ADULTS

The current text of Article 12 of the proposed Directive requires Member States to ensure that children are detained separately from adults, unless it is considered in the child’s best interest not to do so. This reflects international human rights law, including Articles 10(2)(b) and 10(3) ICCPR and Article 37(c) CRC. The Committee on the Rights of the Child has emphasized, however, that the permitted exception should be interpreted narrowly; the child’s “best interests” do not mean what is convenient for State parties.⁶² The Committee has also acknowledged that a child who turns 18 years of age while detained does not have to be removed to an adult detention facility immediately, if remaining in the current facility is in his or her best interests and the best interests of the other children concerned.⁶³

Amendments proposed by the Council to Article 12 would provide that “children may be detained with young adults unless these persons are not suited for joint accommodation with children.” Although it is welcome that this provision remains subject to the principle of the best interests of the child, we are concerned that the amendment appears to envisage a more widespread accommodation of children with young adults than is permitted by international standards, which allow detention with adults only in the exceptional circumstances described above. It is difficult to conceive of when otherwise it would be in the interests of the child to be detained with adults. **The ICJ, JUSTICE and NJCM consider that this exception, if it is to be retained, should be limited to the permissibility of children being detained with an individual who attains majority while in detention, subject to the best**

⁶⁰ CRC, supra note 14, Article 37(3)(d) provides “every child deprived of his/her liberty has ...the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”.

⁶¹ UN CRC, General Comment 10, supra note 16, para.84.

⁶² Ibid., para.85.

⁶³ Ibid., para. 86

interests of both the individual who has obtained majority and the children concerned.

ARTICLE 13: TIMELY AND DILIGENT TREATMENT OF CASES

Article 13 lays down important safeguards for children in the criminal justice system, prescribing that cases involving children should be dealt with as a matter of urgency and with due diligence (Article 13(1)) and that children are treated “in a manner appropriate to their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulties they may have” (Article 13(2)).

However, in the Council’s proposed amendments, Article 13(2) is omitted, removing the requirement to treat children according to their particular characteristics. Such a provision is central to protecting the best interests of the child,⁶⁴ to ensuring that children can access their rights and to ensuring that they are able to participate effectively in proceedings.⁶⁵ Furthermore the requirement to take into account any communication difficulties that a child may have is an important safeguard for the protection of the child’s right to be heard.⁶⁶ Moreover, as currently drafted, deletion of this article would render the individual assessment provided in Article 7 redundant since there would be no mechanism to give effect to the assessed needs. **The ICJ, JUSTICE and NJCM therefore consider it essential that Article 13(2) of the proposed Directive be retained.**

ARTICLE 14: RIGHT TO PROTECTION OF PRIVACY

Important safeguards which reflect international human rights law concerning children in criminal proceedings are also contained in Article 14 of the proposed Directive and relevant recitals on privacy rights. Article 14(1) prescribes that in principle criminal proceedings should take place in the absence of the public, unless, “after due consideration of the best interests of the child, exceptional circumstances justify a derogation”. It requires Member States to take appropriate measures to protect the privacy of the child, including to ensure that children’s’ names, images, and information that could lead to their identification are not publicly disseminated (Article 14(2)). It also stipulates that audio-visual recordings in children’s cases should not be publicly disseminated (Article 14 (3)).

⁶⁴ CRC, Article 3(1); *Neulinger and Shuruk v Switzerland*, ECtHR, Application No. 41615/07, Judgment of 6 July 2010, para.135.

⁶⁵ As established in *T. v. the United Kingdom*; CRC, supra note 14, Article 40(1).

⁶⁶ CRC, supra note 14, Article 12. See CRC General Comment 12, The Right of the Child to be Heard, CRC/C/GC/12, 1 July 2009, para.34: “A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.”

These safeguards reflect Article 40(2)(b)(vii) CRC which requires that children should have their privacy fully respected at all stages of criminal proceedings.⁶⁷ Similarly, Rule 8 of the Beijing Rules states that “the juvenile's privacy shall be respected at all stages” of the criminal process and that “in principle, no information that may lead to the identification of a juvenile offender shall be published”. The UN Committee on the Rights of the Child has recommended that court and other hearings involving a child in conflict with the law should be conducted in private and that “exceptions to this rule should be very limited and clearly stated in the law. The verdict/sentence should be pronounced in public at a court session in such a way that the identity of the child is not revealed.”⁶⁸

The ICJ, JUSTICE and NJCM are concerned that the Council’s proposed amendments to Article 14 considerably weaken the protection it offers, and conflict with Member States’ obligations under the CRC and ECHR. The amendments would remove the requirement that proceedings involving children take place in private, and require that audio-visual recordings merely be protected and that their “inappropriate use” be avoided. They would also allow the dissemination of information that could lead to the identification of the child “when this is strictly necessary in the interests of the criminal proceedings.” This last provision is in our view directly contrary to the principle that the best interests of the child must be a determining factor in all proceedings involving children. **The ICJ, JUSTICE and NJCM therefore recommend that the Council’s proposed amendments to Article 14 be rejected.**

ARTICLE 16: RIGHT TO APPEAR AND RIGHT TO BE HEARD

Article 16 provides for the child’s right to be present at his or her trial. This again reflects rights guaranteed in international human rights law, including under the ICCPR (Article 14(3)(d) and the jurisprudence of the ECtHR. However, in particular in the case of a child, mere presence at the trial is not sufficient to ensure effective participation in the proceedings; if presence at trial is to be any more than a formality, additional provision is needed to ensure that the child understands what is happening, and is able to exercise the right to make his or her views heard.⁶⁹ General Comment 10 of the Committee on the Rights of the Child elaborates on the right to be heard as protected under Article 12 CRC, stating that the right of the child to express his/her views freely should be fully respected and implemented throughout every stage of the process of juvenile justice.⁷⁰ Moreover, the Committee states that it is obvious that the right to be heard is fundamental for a fair trial and that the child has the “right to be

⁶⁷ See also, *T. v. the United Kingdom*, op cit, para.74; UN Committee on the Rights of the Child (CRC), *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para.61 and Beijing Rules, Rule 8.

⁶⁸ UN CRC, General Comment 10, supra note 16, para.66. The Committee has further stressed that professionals must preserve the confidentiality of information concerning the child.

⁶⁹ *Ibid.*, paras. 12 and 44.; *T and V v UK*, op cit.

⁷⁰ *Ibid.*, para. 12.

heard directly and not through a representative or an appropriate body if it is in her/his best interests".⁷¹

The ICJ, JUSTICE and NJCM therefore consider that Article 16 should be amended as follows: "Member States shall ensure that children are present at the trial, able to understand and participate in the proceedings, and that they have the right to be heard, either through a representative or directly if it is in their best interests."

The ICJ, JUSTICE and NJCM are further concerned at the provision made for retrial following a trial *in absentia*. Although international human rights tribunals have held that trial *in absentia* may be permissible in certain exceptional circumstances, where the accused has been notified of the trial but fails to appear, in such circumstances they have found that there is a right to a retrial, which must encompass a re-hearing of the evidence. As the ECtHR has established in its case-law, a "person should, once he becomes aware of the proceedings, be able to obtain from a court which has heard him, a fresh determination of the merits of the charge."⁷²

The Commission's proposal for Article 16.2 would require a "procedure" that allows a fresh determination of the merits and may lead to the reversal of the original verdict. It is not clear from the text that such a procedure would amount to a full retrial before an independent and impartial tribunal as required by Article 47 CFR and Article 6 ECHR.

The Council proposal for Article 16.2 further weakens protection in this regard by allowing the Member States to determine the conditions under which a re-trial could take place.

The ICJ, JUSTICE and NJCM are concerned that these provisions provide insufficient guarantees of a fair and thorough judicial procedure that would adequately protect a child's right to a fair trial, where he or she has already been tried *in absentia*. Council Framework Decision 2009/299/JHA⁷³ lays down agreed conditions between the Member States as to when the right to a re-trial will arise. These conditions should be applied in the proposed Directive to ensure certainty as to the application of the procedure.⁷⁴

⁷¹ Ibid., para. 44.

⁷² *Colozza v. Italy*, ECtHR, Application No. 9024/80, Judgment of 12 February 1985, para. 29, *Krombach v. France*, ECtHR, Application No. 29731/96, Judgment of 13 February 2001, para. 85. The Court also ruled in *Sejdovic v. Italy* that "although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself", Application No. 56581/00, Judgment of 1 March 2006, para. 82.

⁷³ *Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedure rights of persons and fostering the application of the principle of mutual recognition to decision rendered in the absence of the person concerned at the trial*, OJ (27.03.2009) L 81/24.

⁷⁴ The European Court of Justice has also provided guidance as to the right to a re-trial in accordance with the Framework decision, see Case C-399/11 *Melloni*, CJEU (Grand Chamber), 26 February 2013.

The ICJ, JUSTICE and NJCM therefore recommend that Article 16.2 should be amended to state: "Member States shall ensure that where children were not present at the trial resulting in a decision on their guilt, they shall have the right to a retrial in accordance with Council Framework Decision 2009/299/JHA, in which they have the right to participate and which allows a fresh determination of the merits of the case, including examination of all evidence, and which may lead to the original decision to be reversed."

ARTICLE 21: COUNCIL AMENDMENT ON REIMBURSEMENT OF COSTS UNDER ARTICLES 6, 7 and 8

Article 21 of the proposed Directive provides that Member States shall meet the costs resulting from procedures under the Directive (pertaining to individual assessment (Article 7), medical examination (Article 8) and audio-visual recording (Article 9), irrespective of the outcome of a case. This is welcome, given the responsibilities of states to protect the rights of the child, and the lack of means of most children.

For these reasons it is alarming that the Council has proposed amendments the effect of which would be that a child may be required to reimburse those costs where the child has been convicted and the reimbursement will not jeopardise the child's further development.⁷⁵

The ICJ, JUSTICE and NCJM consider that these proposed amendments are unacceptable as they would be extremely difficult to implement without undermining access to justice, and jeopardizing protection against ill-treatment in detention. It should be recalled that medical examination, audio-visual recording and the individual assessment of the child are safeguards to be taken by the authorities that may in many circumstances be essential to protect the human rights of the child. Such necessary safeguards should not be put at risk by the fear of financial burden on the child or his or her family. Where a child or his or her representatives are made aware that he or she may be required to reimburse costs of the one of these measures, there may be a strong incentive to refuse it. Moreover, although the proposed text contains the proviso that reimbursement must not jeopardise the development of the child, such limitation is insufficiently precise to protect against excessive or arbitrary application of this rule, nor is it possible to measure in practice.

⁷⁵ Which is expanded upon in proposed Recital 32 as follows: "An individual assessment, medical examination and audio-visual recording provided for by this Directive should be carried out free of charge for the child. The Member States will assume the relevant costs, unless they are covered in any other way, e.g. through a medical insurance. However, without prejudice to national rules concerning the bearing of costs of criminal proceedings and without prejudice to national rules on legal aid, Member States may provide case-by-case assessments on the fairness of reimbursement of those costs by the convicted child. To that end, the potential consequences on the child's general mental and physical development including education and professional future, should be taken into account".

The ICJ, JUSTICE and NJCM therefore recommend that the Council’s proposed amendments to Article 21 and its relevant recitals, should be rejected, as they seriously inhibit the protection of the rights of the child afforded by the Directive.

NEW ARTICLE: NON-DISCRIMINATION

The Convention on the Rights of Child guarantees the freedom of children from discrimination of any kind in Article 2.⁷⁶ Moreover, the Committee on the Rights of the Child has emphasised that particular attention must be paid in criminal proceedings to *de facto* discrimination and disparities, which may be the result of a lack of consistent policy and affect vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girls, children with disabilities and children who are repeatedly in conflict with the law.⁷⁷ Training of all professionals involved in the administration of juvenile justice is therefore important, paying special attention to the situation of girls and children belonging to minorities or indigenous peoples.⁷⁸

In light of these standards, the ICJ considers it essential that the principle of non-discrimination is included in the Directive. There should also be specific reference to particularly vulnerable groups of children, such as migrant children.

The ICJ, JUSTICE and NJCM therefore propose the addition of a new article in the Directive, to read:

- 1. Member States shall respect and ensure the rights set forth in the this Directive to each child within their jurisdiction without discrimination of any kind, and irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, property, disability, birth or other status.**
- 2. Member States shall promote training of all professionals involved in the administration of juvenile justice, specifically in light of particularly vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, migrant children, indigenous children, girls, children with disabilities and children who are repeatedly in conflict with the law, who may be victims of a lack of consistent policy and *de facto* discrimination. Their effective access to justice will be ensured.**

⁷⁶ CRC, supra note 14, Article 2.

⁷⁷ UN CRC, General Comment 10, supra note 16, paras. 6 and 7.

⁷⁸ Ibid., paras. 6 and 97.

5. RECOMMENDATIONS

The ICJ, JUSTICE, and NJCM make the following recommendations on the proposed directive:

Article 2: Scope

Article 2.1 and 2.2 should be amended to state that the Directive applies to persons under the age of 18 years at the time of the alleged commission of an offence.

Article 2(3) should not be amended to remove the protection of the Directive from children who come of age in the course of criminal proceedings.

The Council's proposed Article 2(5)(a), and proposed Recitals 11a to 11d should not be accepted.

Article 4: Right to Information

Article 4(2) should be amended as follows:

- 1. Member States shall ensure that, where children are deprived of liberty they shall be provided with a Letter of Rights pursuant to Directive 2012/12/EU, which includes their rights under this Directive as well as information on the charges against them in simple, child-friendly language.**
- 2. Member States shall require that all necessary steps are taken to ensure the child understands his or her rights and the nature of the charges, through verification and additional oral explanation as necessary.**

Given the particular importance of the right to information for suspected or accused children, Article 4 should not be subject to an exception for minor offences.

Article 6: Access to a Lawyer

Since the right of mandatory access to a lawyer should not be excluded for minor offences that may have significant consequences for the child concerned, recitals 17 and 18 should be deleted.

The Council proposal for amendments to Article 6 and Recitals 15 – 17 should not be accepted. Member States should strive to put in place schemes to ensure the prompt arrival of suitably qualified lawyers so as to avoid the need to deny children vital legal representation.

Article 7: Individual Assessment

Article 7 should be amended to specify that individual assessment will identify particular measures or modifications to procedures which may be necessary

to ensure the effective participation of the child in the proceedings, and that the assessment must be taken into account by all relevant authorities in the conduct of the investigation and trial.

Article 7(3) should be amended to read: "The individual assessment shall take place at the earliest appropriate stage, and in any event, before indictment".

Article 7(7) should be amended to provide that derogation from the obligation of individual assessment is permitted only where it is necessary in the best interests of the child, taking into account the circumstances of the case.

Article 8: Medical Examination

Article 8(1) should be amended to read "In case of deprivation of liberty of a child, Member States shall ensure that the child has prompt access to a medical examination to evaluate, protect and improve their physical and mental health and ensure that they receive appropriate treatment"

The Council's proposed amendment to Article 8(2) which could lead to arbitrary denial of a medical examination, contrary to the best interests of the child, should not be accepted

Article 9: Audio-Visual Recording

The proportionality exception to Article 9 should be removed, or at a minimum further clarity on the factors to determine proportionality should be provided.

The amendments proposed by the Council to Article 9 and Recital 21 should not be adopted since they would significantly weaken the protection of the Article to children being questioned.

Article 10: Deprivation of Liberty

Article 10(2) should be amended to read: "Every child arrested and deprived of his/her liberty should be brought before a competent court to examine the legality of their deprivation of liberty within 24 hours. Member States shall ensure that any deprivation of liberty of children before their conviction is subject to a periodic review by a court, at least every two weeks. Every child deprived of liberty has the right to challenge the legality of the deprivation of liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action, at least within two weeks. "

Article 12: Detention

Should the Council's proposed amendments to this article be adopted, the exception to the prohibition on detention of children with adults should be limited to the permissibility of children being detained with an individual who attains majority while in detention, subject to the best interests of both the individual who has obtained majority and the children concerned.

Article 13: Timely and Diligent Treatment of Cases

Article 13(2) should not be deleted, as has been proposed by the Council.

Article 14: protection of privacy

The Council's proposed amendments to article 14 should be rejected.

Article 16: Right to be Present

Article 16 should be amended to read: "Member States shall ensure that children are present at the trial, able to understand and participate in the proceedings, and that they have the right to be heard, either through a representative or directly if it is in their best interests."

Article 16.2 should be amended to state: "Member States shall ensure that where children were not present at the trial resulting in a decision on their guilt, they shall have the right to a retrial in accordance with Council Framework Decision 2009/299/JHA, in which they have the right to participate and which allows a fresh determination of the merits of the case, including examination of all evidence, and which may lead to the original decision to be reversed."

Article 21: Reimbursement of Costs

The Council's proposed amendments to Article 21 and its relevant recitals should be rejected, as they seriously inhibit the protection of the rights of the child afforded by the Directive.

Non-Discrimination

A new article should be included in the Directive, to read:

1. Member States shall respect and ensure the rights set forth in the this Directive to each child within their jurisdiction without discrimination of any kind, and irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, property, disability, birth or other status.
2. Member States shall promote training of all professionals involved in the administration of juvenile justice, specifically in light of particularly vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, migrant children, indigenous children, girls, children with disabilities and children who are repeatedly in conflict with the law, who may be victims of a lack of consistent policy and de facto discrimination. Their effective access to justice will be ensured.