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**Written response of the International Commission of Jurists to
the Observations of the Czech Government on the merits of the
collective complaint**

ICJ v. the Czech Republic
No. 148/2017

1. Introduction

1. By its letter of 16 November 2017, the European Committee of Social Rights (*hereinafter* “the European Committee”) provided the Complainant organisation (*hereinafter* also “the ICJ”) with the Written Observations of the Czech Government (*hereinafter* “Government’s Observations”) on the merits of Complaint No. 148/2017 (*hereinafter* also “the collective complaint”), and invited the ICJ to submit written response in reply by 11 January 2018. The ICJ has reviewed the Government’s Observations and, with input and advice from FORUM hereby respectfully submits its comments.
2. In the present observations, the ICJ addresses the merits only to the extent that they need to be clarified, refined or expanded upon in light of the Government’s Observations. They have otherwise been set forth in the collective complaint, and this response should be read in conjunction with that complaint. The ICJ does not address all the issues raised and omits some of the questions because we consider that those issues were adequately addressed in the original complaint and the ICJ has nothing substantially new to add to that analysis. Hence, the ICJ asks the European Committee not to interpret their silence on any of the questions as agreement with the Government’s position.
3. As regards the costs, the ICJ will supply the Committee with detailed and itemized budget in a separate document.

2. Admissibility

4. At the outset, the ICJ would note that the subject matter of the present complaint concerns alleged violation of Article 17 of the European Social Charter (*hereinafter* “Social Charter”) as regards the State party’s failure to ensure the effective exercise of the right to social and economic protection by children below the age of criminal responsibility but who are recognised as having infringed the penal law. In other words, following the wording of Article 40 of the UN Convention on the Rights of the Child (*hereinafter* “the CRC”), the ICJ, relying on Article 17 of the Social Charter, raises complaints in relation to the State party’s failure to ensure that children below the age of criminal responsibility but recognised as having infringed the penal law are *treated* in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
5. The ICJ notes the European Committee’s decision on admissibility of 13 September 2017 that Article 17 of the 1961 Charter encompasses the situation of children in conflict with the law (Statement of Interpretation regarding Article 17, Conclusions XV-2 (2001), see most recently Conclusions XX-4 (2015), Article 17 (Denmark, Poland, and the United Kingdom). Referring fully to arguments on admissibility presented in the submission of 14 July 2017, the ICJ does not share the Government’s views in respect

of the inadmissibility of the collective complaint. In the ICJ's opinion, the Government's objection cannot be substantiated.

3. The Facts

6. The ICJ takes note of the Government's rejection of the statistical data used in the submitted complaint (para. 2 of the Government's Observations). First and foremost, the Government does not assert the basis on which they consider the statistics to be inaccurate. The ICJ relied on official data published by the Czech Ministry of Interior and the Czech Ministry of Justice and the accuracy of this data have not been doubted by the Government. Therefore, the collective complaint is based on undisputed official statistics.
7. In their Observations, the Government addressed the question of statistics in paras. 81-83. Their argument can be summarised as follows: the courts have been refraining from imposing sanctions in a similar percentage of cases against juveniles, compared to children below the age of criminal responsibility (*hereinafter* "BACR"), therefore children BACR have not been brought before these courts in unsubstantiated cases. First, the Government's position does not challenge the accuracy of submitted data. Second, as to the merits of their argument, the ICJ argued in the collective complaint that children BACR are *always* brought before the juvenile court, subjected to formal judicial proceedings and possibly traumatised, because there are no alternatives available or accessible (see especially paras. 80-81 of the collective complaint). Statistics support this argument (para. 77 of the collective complaint), as do concrete documented cases, e.g. the case of Patrik (para. 15 of the collective complaint). The law, despite being based on restorative justice principles, illogically prevents the application of restorative justice measures in cases of children BACR. The Government's simple reference to a number of juveniles who also stood trial, but without stating and comparing this with the number of juveniles who actually benefited from alternatives to formal trial, does not undermine this argument.

4. Description of the child protection system by the Government

8. Regarding the description of the child protection system as provided by the Government (paras. 9-24 of the Government's Observations), the ICJ notes, first, that the description concerns, as regards juvenile justice, predominantly the trial stage, i.e. the second stage of the proceedings. However, the subject matter of the collective complaint concerns the lack of protection and disrespectful treatment of children BACR during the **pre-trial stage** (pre-judicial), i.e. the first stage of the proceedings.
9. Second, the Government's description is somewhat misleading as it omits to clearly explain that there are two independent and separate systems of social protection of children: i) the juvenile justice system, which deals exclusively with children in conflict with the penal law, both children BACR and juveniles, and ii) the welfare system, dealing with broader categories of children, based especially on typical family law measures and governed by the Civil Code (Act no. 89/2012) and the Act on Social and Legal Protection of Children (Law no. 359/1999). These two systems are *de facto* and *de iure* independent, fully separate, and particular child may be engaged with both at the same time. They should not be, in any way, mixed (see paras. 20-22 of the Government's Observations).

10. Overall, the ICJ notes that Government's introductory remarks downplay the extent of the problem, despite the fact that statistics, particular accounts, as well as recommendations and positions of both international (see paras. 17 and 18 of the collective complaint) and domestic human rights bodies (see para. 25 of the Government's Observations) support the ICJ's position. The Government attempts to draw a picture that the ICJ has identified some minor and particular problems, which were taken out of the context (see para. 18 of the Government's Observations). The ICJ strongly disagrees. Issues raised in the collective complaint are serious, and concern the very notion of the social protection of children in conflict with the law and the obligation to treat them in a manner consistent with the promotion of the child's sense of dignity and worth; affect more than a thousand children yearly and are clearly serious in their nature and complexity being capable of significantly affecting a broad range of child's rights, including the right to liberty, and affect the child's whole life.
11. The Government appears to argue in their introductory part that any changes may endanger the consistency of the whole system of social protection in the Czech Republic. However, the ICJ sees no reason why, for example, providing a child BACR with legal aid from the same moment as in the case of a juvenile, or allowing children BACR to benefit from restorative justice measures before the trial, at least to the same extent as in cases of juveniles, would undermine the integrity of the systemic. Indeed, just the opposite would be true. Ensuring at least the same level of social protection of children BACR in conflict with the penal law (compared to juveniles) in the pre-trial stage would ensure that they are treated in a manner consistent with the promotion of the child's sense of dignity and worth. It would not affect either the trial stage in cases when the authorities consider it appropriate for a child BACR to stand trial or the welfare part of the social protection system which operates independently and separately.

5. The Government's Omission of relevant human rights standards

12. The ICJ underscores that the Government in their submission completely omitted reference to relevant universal standards, including the legal obligation of the Czech Republic under international human rights treaties. The Government is almost silent not only when it comes standards and jurisprudence of UN authorities, especially by the Committee on the Rights of the Child (CRC Committee), but especially in relation to concrete observations and recommendations adopted in respect of the discharge of the legal obligations of the Czech Republic. The ICJ, considering the importance of the UN CRC and its interpretative value for the European Committee's jurisprudence, takes this opportunity to again quote express recommendations made by the UN CRC Committee and the UN Human Rights Committee to the Czech Republic, in order to underline the seriousness and relevance of all raised complaints.
13. On 17 June 2011 the UN CRC Committee noted with concern in their concluding observations on Czechia that children under the age of 15 are not held criminally responsible, but can be placed, even for petty offences, in institutional care prior to legal proceedings, without the guarantees associated with standard criminal proceedings (para. 69(b)). The CRC Committee called on the Czech Republic to:

“Undertake the legislative amendments necessary for ensuring that children under the age of 15 years have at least the same level of legal guarantees associated with standard criminal proceedings.”¹

14. The UN Human Rights Committee in its concluding observations on the Czech Republic adopted on 24 July 2013² expressed its concern that although children under the age of 15 are not held criminally responsible, they are subject to standard pre-trial criminal proceedings when suspected of an unlawful act without the required legal assistance or the possibility of accessing their file. The UN Human Rights Committee called on the Czech Republic to:

“(a) Ensure, as a minimum, that children under the age of 15 suspected of an unlawful act enjoy the same standard criminal procedural safeguards at all stages of criminal or juvenile proceedings, in particular, the right to an appropriate defense;

(b) Consider, wherever appropriate, to deal with juveniles suspected of an unlawful act who are not held criminally responsible without resorting to formal trials or placing them in institutional care.”³

15. So far, none of these recommendations have been implemented and no concrete and targeted steps have been taken, despite concerns raised by existing domestic human rights bodies, as also noted by the Government (see para. 25 of the Government’s Observations).

6. On the justification of the current situation

16. The Government tried to justify the current treatment of children BACR by referring to the non-criminal nature of the proceedings before the court, as well as to the non-penal nature of applicable measures, including two specific sanctions, namely *institutional protective education* and *institutional protective treatment*. In a nutshell, the Government argued that the level of social protection of children BACR should not be on the same level as in cases of juveniles or adults, as the nature of the proceedings is different.

17. The ICJ contests this argument on two grounds. First, in principle, there is no other justification but antiquated notions of child development, informed by paternalism why children BACR in conflict with the law should not benefit from the same level of social protection as older children or even adults in the very same stage of the proceedings. Simple paternalism cannot be considered appropriate justification. Indeed, children’s rights have developed considerably in recent decades and it has become clear that children have unique needs which should be taken into account, in particular when they come into contact with the justice system. As the UN CRC Committee stated in relation to children below the age of criminal responsibility, their **treatment should be “as fair and just as that of children at or above MACR** [*minimum age of criminal*

¹ The UN Committee on the Rights of the Child, Concluding observations: Czech Republic, UN Doc. CRC/C/CZE/CO/3-4, (2011), para. 70(b).

² The UN Human Rights Committee, Concluding observations: Czech Republic, UN Doc. CCPR/C/CZE/CO/3 (2013).

³ Ibid, para. 20.

responsibility]”.⁴ Second, the treatment of children BACR in the Czech Republic concerns criminal matters and is hardly non-punitive in its nature. According to statistics, each year thousands of children BACR are affected by the criminal investigation. During the investigation, all relevant evidence against children is collected by the police and the result is crucial for the decision of the juvenile court. Being fully at the mercy of police officers and state prosecutors, children BACR are treated on the grounds of their status of being a delinquent, not on account of the act allegedly committed, even though each one of them run the risk of having sanctions imposed on them involving **deprivation of liberty for an indefinite time**. The level of social protection in the pre-trial stage is extremely low, regardless of the seriousness of issues at stake, and indeed is deficient compared to the protection enjoyed by juveniles and even adults.

18. The Government’s overall justification is not in conformity with the applicable law and standards on children’s rights, especially as formulated by the UN CRC Committee and in the most recent Council of Europe documents. Moreover, the Government’s position also contravenes the rationale of the recently adopted European Court of Human Rights Grand Chamber judgment in the case of *Blokhin v. Russia*.⁵ In that case, the European Court criticized the very same treatment of children BACR, as the Czech Government seeks to justify. In the paradigmatic part of the judgment, before addressing in detail the issue of access to legal aid, the European Court stated, as a matter of principle:

“196. In view of his status as a minor, when a child enters the criminal justice system his procedural rights must be guaranteed and his innocence or guilt established, in accordance with the requirements of due process and the principle of legality, with respect to the specific act which he has allegedly committed. On no account may a child be deprived of important procedural safeguards solely because the proceedings that may result in his deprivation of liberty are deemed under domestic law to be protective of his interests as a child and juvenile delinquent, rather than penal. Furthermore, particular care must be taken to ensure that the legal classification of a child as a juvenile delinquent does not lead to the focus being shifted to his status as such, while neglecting to examine the specific criminal act of which he has been accused and the need to adduce proof of his guilt in conditions of fairness. Processing a child offender through the criminal justice system on the sole basis of his status of being a juvenile delinquent, which lacks legal definition, cannot be considered compatible with due process and the principle of legality (see, mutatis mutandis, *Achour v. France* [GC], no. 67335/01, §§ 45-47, ECHR 2006IV, relating to the legal classification of recidivism). Discretionary treatment, on the basis of someone being a child, a juvenile, or a juvenile delinquent, is only acceptable where his interests and those of the State are not incompatible. Otherwise – and proportionately – substantive and procedural legal safeguards do apply.”

19. Turning to concrete circumstances of the Czech juvenile justice system, the ICJ submits that children BACR indeed enter the “criminal justice system”. In this regard, and apart from the description provided in the collective complaint (see especially paras. 11-15 of the collective complaint), the ICJ would stress certain elements which the Government

⁴ UN CRC General Comment no. 10 (2007) – Children’s rights in juvenile justice, CRC/C/GC/10, para. 33

⁵ *Blokhin v. Russia*, app. no. 47152/06, Grand Chamber judgment of 23 March 2016.

omitted in their submission and which point to the penal nature of proceedings against children BACR, especially that:

- the measures that may be imposed against children below the age of criminal responsibility *are* traditionally understood in Czech criminal law as penal law sanctions;
- some of these measures, namely institutional protective education and institutional protective treatment constitute a *deprivation of liberty* of the child for an *indeterminate period* of time;
- children imposed institutional protective education or institutional protective treatment are detained together with *criminally responsible juveniles*; and
- the otherwise criminal act *must fulfill the very same elements* as a criminal offence except for the element of the age of the perpetrator.

6.1. The issue of sanctions

20. The Government argues that measures including *institutional protective education* and *institutional protective treatment*, are not “sanctions” because they “seek to wield a positive influence on the child’s personality and on the integration of the child into society, and their objective is not to punish the child” (see para. 33 of the Government’s Observations). The ICJ must disagree with this characterization. The Government is right that the asserted **objective** of these measures is not to punish the child. However, the effect is necessarily punitive. The proceedings against children BACR **are quasi-criminal** and **both sanctions mentioned by the Government are typically criminal**. This was explained by the Constitutional Court its decision no. III. ÚS 916/13 of 17 February 2015, in which the Constitutional Court noted that:

“The proceedings against children below the age of fifteen are not criminal proceedings but a special form of civil proceedings which are subsidiary governed by the legal provision contained in the Code of Civil Proceedings (section 96 of the Juvenile Justice Act). Application of section 58 of the Juvenile Justice Act is nevertheless not excluded due to **their quasi-criminal nature**, which derives from the fact that the measures inflicted in these proceedings **have the nature of sanctions** as well. (...).” (para 37).⁶

21. The ICJ therefore submits that at least two measures, namely institutional protective education and institutional protective treatment, have the nature of typical criminal sanctions and result in the deprivation of the child’s liberty. Moreover, what is quite striking is that these two sanctions may be imposed for an **indeterminate period of time**.⁷ The *institutional protective education* is served in a closed educational facility, while the *institutional protective treatment* in a closed medical facility – psychiatric hospital.

⁶ All cited Czech judgments and authorities were unofficially translated by FORUM.

⁷ Both these measures should last until their objective is met; only in case of the institutional protective education the law limits its maximum duration by the fact that the child reaches 18 years of age.

22. Both sanctions are traditional penal measures and fall within the category of so-called protective measures.⁸ The objective of protective measures consists in “special prevention” and is not defined in the Juvenile Justice Act but in the Criminal Code (Act. no. 40/2009 Coll.). The explanatory report to the Criminal Code states that:

“**Protective measures are one form of penal sanctions**; they constitute an independent category of penal sanctions which may be inflicted not only on criminally responsible persons but also to persons that cannot be held criminally responsible (for insanity or for lack of age). This concept derives from the fact that protective measures have some common aspects with penalties even though this does not mean that the elementary differences between them should be ignored. (...) Protective measures are inflicted by a criminal, eventually a civil court (e. g. institutional protective treatment inflicted according to the special law on a child below the age of fifteen) and they are enforceable by state authority. Like penalties, they are governed by the “*nullum crimen, nulla poena sine lege*” principle. (...) Infliction and execution of protective measures have generally for their objective particularly the prevention and therefore prioritize the therapeutic, educational and security aspects. The final objective is to eliminate or at least mitigate the risk of further infringement or endangerment of interests protected by criminal law, but also to treat and isolate the persons who are insane or of reduced sanity; the objective of isolation is particularly important with respect to security detention. Contrary to the penalties, the protective measures do not contain in themselves a morally political condemnation of the act whose commission is a precondition for their infliction (criminal act or act which would be considered as a criminal regardless the person of the perpetrator – so-called otherwise criminal act). Protective measures are always a form of prejudice and restriction of personal liberty and of rights of the person on whom they are inflicted but the prejudice caused by the execution of protective measures is not their functional part, as it is in case of penalties, but only their inevitable effect. Considering the fact that the principle still applies, according to which the penalties, and even the more the protective measures, are viewed as a form of social measure with preventive effect to the future, their objective may be also the exclusion of the perpetrator from the society. (...) While considering the protective measures (including security detention) as an independent **category of criminal sanctions**, it is necessary to take as the starting point that criminal sanctions shall be inflicted with respect to the nature and seriousness of the committed crime, the person of the perpetrator and his/her conditions (section 38 para. 1), even though the need for infliction of a protective measure and their intensity is not primarily determined according to the nature and seriousness of the crime for the society, but according to the need of treatment, education and isolation (disposal).”

6.2. *The institutional protective education*

23. As mentioned above, both institutional protective education and institutional protective treatment may be considered as traditional measures in the Czech law. The **protective education** has been part of the Czech criminal law since 1931 when the Act on Criminal Justice upon the Youth was adopted. Since the reform of the penal law, till the present

⁸ The term penal sanction usually combines various forms of punishments and protective measures. Both institutional protective education and institutional protective treatment are considered as classical protective measures and penal sanctions.

day, the protective education may be served only while a child has been confined to an institution. According to the law governing the execution of the measure (Act no. 109/2002 Coll. on the execution of the institutional care or institutional protective education in educational facilities and on the preventive educational care in educational facilities) **a child under institutional protective education is not allowed to leave the institution without supervision or to be visited by persons other than his or her family or other close persons. Escape from the facility constitutes a crime of obstruction of justice and obstruction of a sentence of banishment (section 337 para. 1 (i) of the Criminal Code). Children under the age of criminal responsibility on whom this sanction has been imposed are not held separately from those who have been convicted and on whom such a measure has been imposed following criminal proceedings.**

24. Moreover, the same type of educational facilities may be used even for children who are in need of alternative care, usually due to some form of challenging behaviour, but who are not in conflict with the law.⁹ In this connection, the Constitutional Court explained the difference between the alternative care and the protective education as a penal sanction. The court noted in its decision Pl. ÚS 31/96 of 9 April 1997:

“A necessary condition for the infliction of institutional protective education on a juvenile is according to section 84 of the Criminal Act [note: Act no. 140/1961; from 1st January 2010 replaced by current Criminal Code] the condemnation of the juvenile for a criminal offence that he/she has committed. **Persons who are younger than 15 years of age may be ordered institutional protective education in civil proceedings, but again only if the condition that this person has committed an act which would be considered as a criminal regardless of his/her age is met** (section 86 of the Criminal Act). Institutional protective education is, therefore, as one of the protective measures (section 71 of the Criminal Act) whose objective is to serve the purpose of the Criminal Act, **a form of a penal sanction**. Institutional care is, on the contrary, a form of educational measure whose objective is to create the most favorable conditions for care for a minor child and is especially educative, not repressive.”

25. It is worth noting that the nature of the sanction - protective education - which may be imposed to any child BACR and regardless of the seriousness of the act – was also addressed in the explanatory report to the Act no. 383/2005 Coll., amending the above-cited Act no. 109/2002 Coll. The report states:

“**Institutional protective education has been and still is purely penal measure and as such, it may be inflicted only to a condemned perpetrator of a criminal offence.** The objective of this penal measure is particularly, according to section 9 of the Juvenile Justice Act, to create conditions for social and moral development of the juvenile with respect to the degree of his/her intellectual and moral development, he/she has already attained, personal characteristics, family care and environment of the juvenile from which he/she comes from, as well as to protect him/her from harmful influence and to prevent him/her for further committing criminal offences. It is therefore not only about re-education, but the aspect of the protection of the society from individuals with defective behavior is also important.

⁹ These children are imposed so called “institutional care” which is a form of an alternative care under the Civil Code (Act No. 89/2012 Coll).

On the contrary, the objective of institutional care, which is purely a civil law measure, is particularly to substitute insufficient or even absent family environment which deforms the development of the child by another environment, i. e. collective care. Contrary to institutional protective education, the institutional care is used in situations in which the child himself/herself has not initiated the imposition of the measure through which the court seeks to ensure appropriate care by his/her own behavior. Thus, it is not possible to view institutional care as a form of sanction but as a last resort solution of inappropriate care. Therefore, it may be imposed on children for instance due to the loss of the parents or due to social difficulties of the family.

(...)

For these reasons the section 22 (1) of the Juvenile Justice Act is not formulated appropriately since it makes the impression that both types of alternative care may be imposed as a certain form of sanction for a violation of criminal law and that they differ from each other only by the degree of restrictive elements during their execution.

That is a misunderstanding. Civil court may impose in care proceedings institutional care even as a reaction to committed offence, it shall, however, always determine, that the legal conditions supposed by section 46 of the Family Act [note: since 1st January 2014 replaced by the Civil Code] are fulfilled, i. e. that the development of the child is seriously jeopardised or disrupted.

On the contrary, the institutional protective education may in principle be imposed as a reaction to a violation of the criminal law even in cases in which the legal conditions for imposition of institutional care would not be otherwise met. Therefore, after the amendment, the institutional protective education will not be longer imposed if the institutional care seems not to be sufficient but only in cases in which insufficient is the imposition of educational measures according to the Juvenile Justice Act.”

6.3. *The institutional protective treatment*

26. As to ***institutional protective treatment***, this constitutes a traditional form of detention in a medical facility – a psychiatric hospital - following commission of a criminal offence. This sanction was expressly introduced as a possible measure against children BACR in 2011 by the Act no. 301/2011 Coll. The explanatory report to this Act states that:

“The proposed legislation aims to exclude the possibility that a person that endangers his/her environment could avoid medical treatment that he/she needs. The juvenile court decides, on basis of expert evidence, on the medical treatment **either in institutional or, in less severe cases, in ambulatory form**. Depending on the nature of the illness and the treatment options the court may decide on the transformation of institutional form of the treatment to the ambulatory one. This bill thus provides for several issues that relate to the imposition and execution of the protective treatment which needs to be currently solved regarding the requirement of more effective protection of the society from the criminally sanctionable behavior of persons who suffer from mental illness or substance abuse. (...) **Protective treatment, particularly in its institutional form, is an exceptionally serious form of restriction of personal liberty** of the treated person especially due to the **indeterminate term of its duration**. It is, therefore, necessary to determine extremely carefully the fulfillment of the legal conditions

for imposition of the protective treatment, particularly in its institutional form. Since the risk of danger deriving from the child younger than fifteen years of age will be the main factor which will justify such a serious intervention in his/her fundamental rights, it is obvious that certain proportionality between these two interests; i. e. the bigger the risk of danger deriving from the child, the wider possibility to restrict his/her personal liberty, must exist.”

27. The ICJ submits that both sanctions, which can be potentially imposed on any child BACR in the juvenile justice system, are of a very serious nature and do constitute a deprivation of liberty. Irrespective of their purpose on paper, the sanctions will be experienced as punitive. Moreover, it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation.¹⁰ Therefore, the paradigmatical approach to protection and treatment of children BACR in conflict with the law formulated in *Blokhin v. Russia*, even if read restrictively (see paras. 31-32 of the Government’s Observations), would be applicable to the situation in the Czech Republic.
28. Moreover, it seems appropriate to point out that in the context of the Czech juvenile justice system, the mere application of the criterion of the nature of the offence would suffice to conclude that the proceedings with children BACR are of criminal nature. This conclusion is based on the case-law of the Czech Supreme Court which stated in its decision no. 8 Tdo 514/2008 of 30 April 2008:
- “The basic precondition for the imposition of a measure according to section 93 para. 1 of the Juvenile Justice Act with respect to a child below the age of fifteen is the **finding that the child has committed an otherwise criminal act which cannot be in the concrete case prosecuted only due to the lack of age of the perpetrator**. Such an act shall have not only all the other formal attributes of a criminal offence but also the needed degree of dangerousness for the society.”¹¹

¹⁰ The ICJ recalls, at this point a methodology developed by the European Court. In *Blokhin v. Russia* (§ 179), the European Court summarised so called *Engel* test and applied it in the case of a child below the age of criminal responsibility. The European Court, when considering applicability of criminal limb of Article 6 stated that the concept of a “criminal charge” within the meaning of Article 6 § 1 is an autonomous one. The Court’s established case-law sets out three criteria, commonly known as the “Engel criteria” (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22), to be considered in determining whether or not there was a “criminal charge” within the meaning of Article 6 § 1 of the Convention. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative, and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge. In *Blokhin*, the European Court focused on the notion of a sanction and considered that deprivation of liberty creates a presumption that the proceedings against the applicant were “criminal”, a presumption which was rebuttable only in entirely exceptional circumstances and only if the deprivation of liberty could not be considered “appreciably detrimental” given its nature, duration or manner of execution. Moreover, it stressed that the need to look beyond appearances and the language used and to concentrate on the realities of the situation (§ 180). The European Court concluded that Article 6, its criminal limb, was applicable. In any case, the ICJ recalls that a nature of a sanction is not the only criterion. In this connection it is necessary to point out to cases concerning misdemeanours in which the European Court rejected the Government’s argument that Article 6 is not applicable because it did not concern deprivation of liberty (see *Lauko v. Slovakia*, § 58, and *Kadubec v. Slovakia*, § 52).

¹¹ The decision dates to the era before the new Criminal Code became effective (1st January 2010).

29. The ICJ submits that the Government has erroneously sought to shift the focus of this case to the ostensibly civil nature of the proceedings, which may, according to the Government, require a different level of social protection and different treatment. As demonstrated above, the subject matter of the proceedings against children BACR are purely criminal during the pre-trial stage, and in its entirety with the trial stage, quasi-criminal. In this context, it is important to recall that the UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”; A/RES/40/33), call upon States to undertake efforts “to extend the principles embodied in the Rules to *all* juveniles who are dealt with in welfare and care proceedings”. This rule makes it clear that whenever the main subject matter of the proceedings is to decide whether a child has infringed penal law, as is also the case of children BACR in the Czech Republic, procedural safeguards need to be applied, no matter the formal quality of the proceedings and its label under domestic law.
30. The Government has advanced no reasonable justification for guaranteeing and applying a different the standard of protection and treatment to juveniles as opposed to children BACR in the same type of the proceedings (ie, the pre-trial state or investigation). Therefore, the ICJ submits that it is unreasonable to exclude children below the age of criminal responsibility from the possibility to benefit from the same level of social protection as juveniles and from the same treatment. As shown in the collective complaint, international law and standards on children’s rights, including the jurisprudence of the European Court of Human Rights, have developed to the point where they call for recognition of children BACR as subjects of rights in the juvenile justice proceedings, regardless their age and procedural position. This approach does not, in any way, mean that the juvenile justice system would become more punitive. The recognition that a child BACR should be ensured at least the same level of protection and treatment would not negatively affect the protection afforded to children in the existing system. On the contrary, in practical terms the protection of children BACR would significantly improve, if they are guaranteed the same rights protections as juveniles. Such guarantees include the right to access to a lawyer from the first moment the child enters the criminal justice system; the right to consult the criminal file; the right to be served with the final decision of the investigation authority; and the right to challenge the decision by an appeal and to benefit from restorative justice measures. Moreover, guaranteeing these rights would be ensure that children are treated in a manner consistent with their dignity and worth, as equal holders of rights rather than simple objects of charity.

7. Ground no. 1: The need to ensure mandatory and effective access to a lawyer from the very beginning of the proceedings for children below the age of criminal responsibility

31. The ICJ noted that children BACR are not provided legal assistance from the very beginning of the proceedings, even though older children – juveniles – are provided such assistance. The Government did not dispute this fact.
32. However, the Government argued, *first*, that ICJ, when claiming a violation of Article 17 of the Social Charter, referred to a number of documents and judgments which were not relevant for children BACR (see paras. 38-48 of the Government’s Observations). The ICJ disagrees and notes that all authorities are fully relevant.

33. In relation to the Recommendation on the European rules for juvenile offenders subject to sanctions or measures CM/Rec(2008)11, the Government asserted that it only applied to proceedings in cases of criminally responsible juveniles against whom criminal proceedings were brought. Under B.21.1. “juvenile offender” means any person below the age of 18 who is alleged to have or who has committed an offence, whilst an “offence” (B.21.3) means any act or omission that infringes criminal law. For the purpose of these rules, it includes any such infringement dealt with by a criminal court or any other judicial or administrative authority. Contrary to what the Government claimed, there is nothing in the Recommendation suggesting an explicitly set age-limit on to whom the Recommendation applies; rather it suggests relevance to all persons below the age of 18 who come in contact with the criminal justice authorities due to having allegedly committed an act contrary to the criminal law. This is supported by the proclaimed aim of the Recommendation, which is to uphold the rights and safety of juvenile offenders subject to sanctions or measures and to promote their physical, mental and social well-being when subjected to community sanctions or measures, or any form of deprivation of liberty (p. 2); suggesting rather that the nature of proceedings and imposed sanctions is relevant for consideration of application of this Recommendation. Moreover, it is also expressly recognized under point 22 that they may also apply to the benefit of other persons held in the same institutions or settings as juvenile offenders.
34. The same applies to the Commentary to the European Rules for juvenile offenders subject to sanctions or measures, which is a document rather concerned with the nature of imposed sanction and/or a measure than setting an age limit. In fact, the Commentary discusses an age limit solely under the Rule 4 and in relation to the admission of a juvenile to a penitentiary institution, suggesting that even a criminally liable juvenile not be admitted to such institutions. Further, while it is true that the 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 defines a juvenile as a person who has reached the age of criminal responsibility but not the age of majority, it also expressly states that the Recommendation may also extend to those immediately below and above these ages.
35. There is also no support for the Government’s position that the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice discuss the age limit for criminal responsibility at the outset, and then follow to set rules only applying to formally criminally responsible juveniles. In fact, the Guidelines clearly provide in its Scope and purpose chapter (I.) that “(t)he guidelines should apply to all ways in which children are likely to be, for whatever reason and in whatever capacity, brought into contact with all competent bodies and services involved in implementing criminal, civil or administrative law.” These Guidelines are a general document addressing all, not only criminal or quasi-criminal, proceedings (including asylum or other administrative proceedings), in the course of which a child comes into contact with the justice system. Therefore there is no ground to argue that they are applicable only to criminally responsible juveniles.
36. The ICJ argues that the nature of the proceedings, including the nature of the offence and sanctions imposed in such proceedings, is the basis for consideration of the relevance of the cited soft-law documents. There is nothing in the documents that precludes their reading with regard to their aspired aim, which is the protection of

children in contact with the criminal justice system, and which therefore renders them irrelevant for the present complaint.

37. As regards the case-law, the ICJ notes that the jurisprudence has evolved into a principle of fundamental importance of an effective and early access to a lawyer when it concerns a minor. The principle was established in *Salduz v. Turkey*, where the European Court confirmed that “as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police”¹², and added that this rule is even more important when it concerns a minor. Since *Salduz*, the European Court has had several chances to apply this principle in similar situations, especially in cases of *Panovits v. Cyprus* and *Adamkiewicz v. Poland*. In both cases, the European Court demonstrated the fundamental importance of early and effective access to a lawyer and particular vulnerability of children.¹³ However, significantly, the European Court did apply the *Salduz* principle in the groundbreaking judgment *Blokhin v. Russia* and even underlined the importance the presence of a lawyer for a child’s protection (see paragraph 36 below). **The evolution of the European Court’s jurisprudence, as well as the Council of Europe and the UN standards over years, show a specific pattern with one common denominator, i.e. strengthening the protection of all children, regardless their age, when facing criminal justice authorities, including ensuring early and effective access to a lawyer.**

38. Further, it should be noted that the Government entirely omitted reference to UN standards despite their significance and relevance and failed to mention the judgment of the ECHR in the case of *Blokhin v. Russia* which dealt with an almost identical situation as the ICJ here complains of. In the part relevant, the European Court stated:

“198. As regards legal assistance at the pre-trial stages of the proceedings, **the Court has underlined the importance of the investigative stage** for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. **Therefore, the Court has held that the particular vulnerability of the accused at the initial stages of police questioning can only be properly compensated for by the assistance of a lawyer, whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself.** Indeed, this right presupposes that the prosecution in a criminal case seeks to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. **It is further important to protect the accused against coercion on the part of the authorities and contribute to the prevention of miscarriage of justice and ensure equality of arms.** Accordingly, in order for the right to a fair trial to remain sufficiently “practical and effective” Article 6 § 1 requires that, as a rule, **access to a lawyer should be provided as soon as a suspect is first questioned by the police**, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict that right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the

¹² *Salduz v. Turkey*, no. 36391/02, Grand Chamber judgment of 27 November 2008, § 55

¹³ The similar emphasis on legal assistance to children was applied in *Bouamar v. Belgium*, no. 9106/80, judgment of 29 February 1988, § 60 and CCPR decision in the case of *Anna Koreba v. Belarus*, Communication No. 1390/2005, Views of 25 October 2010, § 7.4.

accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced where incriminating statements made during police questioning without access to a lawyer are used to secure a conviction (see *Panovits*, cited above, §§ 64-66, and *Salduz v. Turkey* [GC], no. 36391/02, §§ 50-55, ECHR 2008).

199. **In view of the particular vulnerability of children and taking into account their level of maturity and intellectual and emotional capacities, the Court stresses in particular the fundamental importance of providing access to a lawyer where the person in custody is a minor** (see *Salduz*, cited above, § 60; see also the case-law cited in paragraph 195 above).”

39. *Second*, the Government argued that the nature of the pre-trial stage does not require that a child BACR would be provided with legal assistance (see paras. 50-56 of the Government’s Observations). The ICJ notes, at the outset, that the Government did not explain why juveniles benefit from this legal assistance and more vulnerable younger children do not.
40. In any case, the basis of the Government’s argument is that “the procedure before the bringing of prosecution in cases of otherwise criminal acts is carried out solely for the purpose of a ‘tentative’ finding, which is not binding on the juvenile court”, and that “the juvenile court subsequently conducting proceedings under civil law regulations is not bound by the evidence gathered by the police authority otherwise than as documentary evidence” (see para. 54 of the Government’s Observations). The Government admitted that during this phase, the police may interrogate the child (or “provide an explanation”, as stated in the law), but in their view this procedure should be understood as a form of practical implementation of State obligations deriving from the right of the child to be heard guaranteed in Article 12 of the UN Convention on the Rights of the Child. Moreover, the government argues that the child has the right to a lawyer’s assistance even while providing an explanation. In addition they state that the child is regularly assisted by a social worker of the Social and Legal Protection Authority as well as by his or her parents or legal guardian unless “the circumstances of the case at hand, such as a suspicion that the child’s parent is abetting the child in unlawful acting, prevent this” (see para. 55 of the Government’s Observations).
41. The ICJ disagrees. First, the interrogation (provision of explanation) under Section 158 § 5 of the Criminal Procedure Code (Act no. 141/1961) is certainly not conceived as an instrument to implement the right of the child to be heard under Article 12 of the UN Convention on the Rights of the Child. Interrogation (explanation) is a standard legal instrument that the police or the state prosecutor uses for their investigation whenever they have a suspicion that a crime has been committed. It is thus used whenever the police or the state prosecutor needs to obtain information from any person regardless his or her age and its primary purpose is to *investigate* and not to let the person who is asked to provide explanation expressing his or her views on the subject matter of the investigation. **In fact, that is the reason why the Czech law requires a juvenile suspect to be represented by a defense counsel even when providing an explanation so that his or her right to protection would be effectively guaranteed.** The same however does not apply to children BACR.

42. Moreover, in this context, the Government themselves use arguments that contradict one another. On one hand they claim that the interrogation (explanation) takes place only to let the child be heard on a subject-matter that directly concerns him or her. On the other hand they admit that the record of the explanation is used before the juvenile court as the evidence (arguing that the juvenile court is not bound by it) and they stress that in order to conclude the examination phase the unlawful act needs to be “clarified and documented” (see para. 52 of the Government’s Observations).
43. The Government is certainly right when arguing that the juvenile court is not bound by the evidence gathered by the police or the state prosecutor during the pre-trial stage of the proceedings. However, the Government fails to explain that there is a significant difference when using the statement obtained the pre-trial stage in the proceedings with juveniles or adults and children BACR. In proceedings with children BACR, this statement can be used irrespective of their consent, simply on the basis of the judge’s discretion. However, in cases of juveniles or adults, the record of the statement may be used as evidence only if the accused person, as well as the state prosecutor, give their consent (see section 211 § 6 of the Criminal Procedure Code). In other words, in cases of juveniles, the law, on one hand, requires mandatory legal representation – to protect them when interrogated and when giving an explanation before the police or the state prosecutor and to prevent any form of coercion, and at the same time provides for additional safeguards. In cases of children BACR, the law does not protect them by requiring legal assistance during their the pre-trial stage, including during their interrogation (explanation), and the record of such an explanation may be used and is regularly used as evidence against the child before the juvenile court regardless his or her disapproval. Clearly, protection of children BACR is enormously weak in comparison.
44. The Government also argues that a child can choose a lawyer who can represent him or her during the interrogation and during the pre-trial stage. It is true that the law provides for a possibility to choose a lawyer as a general right of every person who is to provide an explanation before the police or the state prosecutor. However, this should not be confused with the right to mandatory defense, which is guaranteed to juveniles.
45. In practical terms, a child providing explanation would at the outset be informed by the police that she may demand the presence of a lawyer. It would be required from the child to actively claim the need for a lawyer; the child would have to find a lawyer by herself and then she would have to ensure his or her presence. Moreover, a child would bear the costs of the lawyer. It is difficult to imagine that a young child, for example, 13 years of age, after being called to give an explanation or facing police officers at the police station during the interrogation would courageously ask for a defense counsel, refrain to answer any questions or, *ad absurdum*, pick up a phone, find a phone number and call to request a lawyer and if necessary pay the lawyer’s costs. In practice, the access to a lawyer is illusory and one can reasonably presume, despite the lack of relevant data, that children BACR are regularly interrogated and other measures are taken without the presence of a lawyer protecting the child’s interest.
46. Furthermore, it is not possible to ignore that the Government in their observations provide apparently misleading information when arguing that “it is usually possible for the child’s legal guardian or guardian to attend the provision of explanation”. This is simply not true. The law only requires that the child’s parents or guardian be informed

that the provision of explanation is taking place (see section 158 para. 5 Criminal Procedure Code). There is no right for the child's parents or guardian to claim their presence during the explanation (see section 158 of the Criminal Procedure Code *a contrario*). Whether the child's parents or guardian are allowed to be present during the explanation depends **fully on the discretion** of police or the state prosecutor.

47. **It can thus be concluded that the legal position of a child BACR when interrogated and providing an explanation before police or the state prosecutor is particularly weak.** In this regard, it is especially striking that children BACR do not benefit from the presence of a defense counsel, as a juvenile in the same situation would.

8. Ground no. 2: The need to ensure effective access to the child or his/her legal representatives and his/her lawyer to the investigation file concerning the child

48. The Government stated that it is not always the case that the child is denied access to the police file. They admitted that in certain cases, the child has no access to the police file in the phase of examination, but the child's rights are not curtailed in any manner even in such cases, because the collection of all evidence is concentrated in the proceedings before the juvenile court (see para. 69 of the Government's Observations).
49. The ICJ recalls that it argued in the collective complaint that neither children BACR, nor their parents, legal guardians or any other representatives are entitled to access the police file (see para. 62 of the collective complaint). The Government argued that "it is possible to accommodate the child's or his or her legal guardians' request for access to the file unless serious reasons for refusing this request are found. Such serious reasons would primarily include reasons of tactics in the pending examination or a conflict of interests of the persons requesting access to the file". The Government further noted that practically the same situation occurs with respect to persons who have been formally charged with a criminal offence and whose right to access the police file is not absolute either but may be in individual cases denied for serious reasons (see paras. 67-68 of the Government's Observations).
50. The ICJ notes, first, that Article 65 of the Criminal Procedure Code does not provide children BACR or other persons protecting their interests the right to access the police file. The law simply does not list children or their representatives, as if they do not exist. If the practice differs from the law, the Government should have provided the European Committee concrete examples. The experience of practitioners seems to be different (see para. 14 of the collective complaint). In any case, the crucial argument is that children BACR are again excluded due to their age. Even assuming that they may in certain cases be allowed to access the file, the standard is absent or unclear and, in any event, arbitrarily applied, as access depends on the discretion of police or state prosecutor. The comparison, suggested by the Government, with those of accused, who had been denied access to the file for serious reasons, is inappropriate, as the logic is reversed. Children BACR or their representatives have no right to access the file, but the authorities may – as the Government argues, but fail to prove – grant them access. However, persons charged, as well as victims of crime and persons whose property may be affected by the criminal proceedings, have the unconditioned right to access the file. It is true that their right to access the file is not absolute; if there are serious reasons, the police or the state prosecutor may deny access during the pretrial stage. However, this denial is construed as an **exception to the rule which must be justified**. The position of

children BACR or their representative would be, assuming the Government's claim is substantiated, still completely different. They have no right to access the police file during the pre-trial stage. They are excluded but can be, allegedly, allowed exemption and given access upon discretion. The possible arbitrariness is clear.¹⁴

51. The ICJ argued that early access to the file is essential for ensuring effective protection of the child during the whole proceedings, including against unnecessary appearance before the juvenile court and child's traumatising. The Government sought to undermine the significance of this aspect of the case in part by referring to the judicial stage of the proceedings and downplaying the relevance of the pre-trial stage (see para. 69 of the Government's Observations). The ICJ notes in this regard that the Government's position is rather inconsistent. In another part of their Observations, they stressed the significance of this pre-trial stage, highlighting the role of police and the state prosecutor who should, considering all the evidence gathered at this stage, including through interrogating a child, decide whether to pursue the case to the juvenile court (see paras. 74-75 of the Government's Observations). Despite this inconsistency, which is also apparent in other aspects (see e.g. para. 54 below), the ICJ considers that the pre-trial stage is crucial and it is exactly this stage of the proceedings, when the protection should be rather higher than lower and when vulnerable children should be treated specially with dignity and respect as equal subjects of all rights.
52. The ICJ notes that there is no dispute between the parties that children BACR or their representatives have no right to access the police file and information relevant to further decision and potentially judicial proceedings. Assuming the police or the state prosecutor can decide on access to a file, it still would depend on discretion and would be potentially arbitrary. Therefore, it can be concluded that children BACR and their representatives have no effective possibility to access relevant information and to avoid bringing the child before the juvenile court by arguing that the suspicion has not been sufficiently grounded or that the act does not have all the elements of a crime, or that the social harmfulness of the act does not reach the necessary degree to justify that a child would stand a trial. The child is severely hobbled in the capacity to play a role in his or defence, but remains largely at the mercy of police and the state prosecutor.

9. Ground no. 3: The failure to ensure that children below the age of criminal responsibility are served with the final decision of the police authority and have the right to appeal against this decision

53. The ICJ recalls that a principal point of complaint under this ground was that children BACR are not *served* with the final decision of the police authority and do not have the right to *challenge* this decision by any remedy (see para. 74 of the collective complaint). The Government argued that "the child's legal guardians should be notified of the decision", referring to recent Opinion 1 SL 705/2017 of the Analytical and Legislative Department of the Supreme Public Prosecutor's Office and Article 159a § 6 of the

¹⁴ This deficiency cannot be effectively compensated by the reference to the Police President Instruction no. 103/2013 of 28 May 2013 on certain tasks of the authorities of the Police of the Czech Republic in criminal proceedings as this is made by the government (para. 67 of the Government's Observations and footnote no. 18). The Police President Instructions are not sources of law and they are not publicly available and accessible. They are strictly internal documents for police and an individual has practically no mean to access it and use it to support his or her position.

Criminal Procedure Code (see para. 72 of the Government's Observations). The ICJ notes that there is a difference between *being notified* of a decision and *being served* with a decision. The Government does not contend that children BACR are not served with the decision. Second, the Opinion of the Analytical and Legislative Department was not presented by the Government and it is not publicly accessible. It is thus impossible for the ICJ to respond to questions of its authenticity and content and it would be indeed impossible for children BACR and their representatives to rely on this document (even if they want to be notified, let alone served). Third, the Article 159a § 6 of the Criminal Procedure Code provides that "A decision on discontinuation of the matter must be delivered to the injured party if she is known. The decision on discontinuation ... must be delivered within 48 hours to the state prosecutor. A person who announced a crime shall be notified about the discontinuation if she so requested under Article 158 § 2." In the ICJ opinion, the national law clearly does not provide for a possibility to be served with the decision, moreover, the possibility to be at least notified which is not however satisfactory, is also unclear.

54. The Government admitted that the applicable legislation does not allow children to lodge a remedy against the decision of the police authority to discontinue the proceedings (see para. 73 of the Government's Observations). On the other hand, they note that after the decision has been adopted "the question remains of what the inaccuracy of the decision could consist in other than an incorrect identification of the child's age." In other words, the Government is wondering why a child BACR or her representatives would seek to challenge a decision if the police authority and the state prosecutor assessed whether all elements of a crime has been met (see also paras. 74-75). The answer is rather straightforward. As the ICJ explained (see paras. 74 and 81 of the collective complaint) and the Government did not contest, under Article 90 § 1 of the Juvenile Justice Act, the state prosecutor has an *obligation* to file a motion and bring a child before the juvenile court. Not being served with the decision and having no right to appeal it, a child BACR and her representatives cannot seek a possibly more favourable outcome of the proceedings (see para. 75 of the collective complaint). Having the right to challenge the decision can thus be crucial for children to prevent unnecessary judicial proceedings and their possible traumatisation.
55. The Government also argued that the state prosecutor by himself, *ex officio*, can quash a decision of the police authority and thus prevent a child BACR being tried by a juvenile court. First, the Government did not establish this assertion by any statistics or relevant case studies (see para. 77 of the Government's Observations). Second, even assuming that this is a regular practice, which would, however, contravene statistics presented by the ICJ (see p. 33 of the collective complaint), it still does not mean that a child BACR should not enjoy appropriate level of protection by being guaranteed a right to challenge a decision that substantially affects his or her life. Without such a guarantee, the basis on which any decision is made lends itself to arbitrariness.

10. Ground no. 4: The failure to protect children below the age of criminal responsibility who are suspected of an unlawful act against unreasonable and unnecessary formal trials before juvenile courts

56. At the outset, the ICJ recalls that it complained that restorative justice measures, typically mediation or so-called "diversions", are not accessible to children BACR. This is despite the fact that the Juvenile Justice Act proclaims that the law is based on

restorative justice principles and that juveniles, as well adults, can benefit from restorative justice measures, while children BACR cannot. The ICJ concluded, relying on the logic of restorative justice (one of whose aims is to prevent judicial trials which can further traumatise children and community), that lack of restorative justice measures, again only affecting the most vulnerable children, lead to unnecessary trials.

57. The Government, omitting again universal standards¹⁵ and recent Council of Europe standards, disagreed. In this regard, the ICJ would again highlight the Council of Europe Guidelines on child-friendly justice which provides that “alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged whenever these may best serve the child’s best interests. The preliminary use of such alternatives should not be used as an obstacle to the child’s access to justice.” These Guidelines are indeed applicable to *all* children.¹⁶
58. Further, the Government contested the reference to two judgments of the European Court, namely *Boumar v. Belgium* and *D.G. v. Ireland* (see paras. 85-86 of the Government’s Observations). The ICJ considers that the Government misunderstood the argument. As explained in the collective complaint (see para. 86 of the collective complaint), both judgments concern failure of the State Party to comply with principles laid down in their own legislation. The logic, as the European Court addressed, is similar to the present situation. The Czech Juvenile Justice Act is based on restorative justice principles in relation to both age groups, children BACR and juveniles. The Czech state thus chose the system of juvenile justice with a view to applying restorative justice principles in relation to *all* children. However, it has failed to ensure that more vulnerable children BACR could access restorative justice measures. In *Boumar* and *D.G.* the European Court, in a different context but still in the sphere of juvenile justice, criticised this failure of the state to comply with its own principles of juvenile justice.
59. Finally, the Government argued that “the existence of diversions within the meaning of the Criminal Code ... would, on the contrary, constitute a lowering of the standard of protection currently afforded to children ...”. Further, the Government expressed its concern that “should diversions be allowed in the pre-trial phase called examination, the police authority would simultaneously *de facto* decide, in its decision on the diversion, that the child actually has committed the otherwise criminal act, but without any proceedings having been conducted before an independent court and ensuring the child’s procedural rights.”
60. The ICJ points out at the outset that the Government agreed that children BACR could not access any restorative justice measures. The Government presented no justification but rather argued that current “diversions”, as formulated in the criminal law, would mean lowering the standard of protection.

¹⁵ The ICJ recalls especially concrete recommendation of the UN Human Rights Committee vis-à-vis the Czech Republic: “Consider, wherever appropriate, to deal with juveniles suspected of an unlawful act who are not held criminally responsible without resorting to formal trials or placing them in institutional care”. Human Rights Committee, Concluding observations on the third periodic report of the Czech Republic, UN Doc. CCPR/C/CZE/CO/3, (2013), para. 20.

¹⁶ See para. 28 of the Guidelines and also the Council of Europe Strategy for the Rights of the Child (2016-2021), paras. 52-55.

61. In general, the ICJ does not understand how availability and accessibility of restorative justice measures in the pre-trial stage, typically mediation between a child and a victim (already available to juveniles and even adults in the pre-trial stage), would lower the standards of social protection and treatment of children BACR. Taking account of international child rights standards, it is up to the Government to ensure that *all* children in conflict with the penal law can benefit from restorative justice measures, and especially the most vulnerable children BACR at least at the same level as juveniles who are already adequately protected in the Czech law. The ICJ is persuaded that the Czech Government is indeed competent to fulfill this obligation. In any case, this particular Government's argument seems at odds with its opinion presented elsewhere that the police and state prosecutors are fully competent to decide in the pre-trial stage whether all elements of crime committed by a child BACR were fulfilled (see paras. 74-75 of the Government's Observations). The Government indeed refers to the competence of police and state prosecutors to further their argument as to why children BACR or their representatives do not need to be served with a final decision and do not necessarily need to be entitled to challenge this decision. And would the Government be worried that police would decide without ensuring the child's procedural rights, the ICJ notes that this is actually the current situation. And that is why it is necessary to ensure an appropriate level of protection of children BACR, at minimum brought to the same level as in case of juveniles.

11. Prohibition of discrimination

62. The ICJ notes that the Government contested, first, that the Social Charter in the Preamble prohibits discrimination on grounds of age (see paras. 95-97 of the Government's Observations). The ICJ is aware of the wording of the Preamble (see paras. 33-34 of the collective complaint). However, considering especially the importance given to the prohibition of discrimination in international human rights law and bearing in mind the recognition of international treaties as living instruments, including the provisions ensuring protection of children and other vulnerable groups, the ICJ, referring to its arguments presented in the collective complaint (see paras. 33-40 of the collective complaint) considers that the non-discrimination clause in the Preamble to the Social Charter applies to all the provisions of the Social Charter and thus covers also children.

63. The Government further argued that there is no difference of treatment between children BACR and juveniles (see para. 100 of the Government's Observations). The ICJ again recalls that the subject matter of the complaint is a failure to ensure an appropriate level of social protection and adequate treatment of children younger than 15 years of age in the pre-trial stage of the juvenile justice proceedings. This procedural stage is identical for both age groups when in conflict with the penal law. They are indeed in a comparable situation. Nevertheless, the level of protection and nature of the treatment of juveniles is notably higher. The ICJ acknowledges that the high level of protection of juveniles is appropriate and argues that children BACR should benefit, at least, from the same level of protection. From a legal perspective, the standards formulated by the UN CRC Committee are particularly applicable, indicating that states are expected to put in

place legal standards to ensure that treatment of children BACR is as fair and just as that of children at or above minimum age of criminal responsibility.¹⁷

64. The ICJ submits that children BACR are clearly subject to discrimination. The European Committee had a chance to address the interpretation of non-discrimination clause under the Social Charter in the case of *ERTF v. the Czech Republic*.¹⁸ The European Committee stated:

“112. In assessing whether the right to protection of health can be effectively exercised, the Committee pays particular attention to the situation of disadvantaged and vulnerable groups. Hence, it considers that any restrictions on this right must not be interpreted in such a way as to impede the effective exercise by these groups of the right to protection of health. This interpretation imposes itself because of the non-discrimination requirement (Article E of the Charter revise and Preamble of the 1961 Charter) in conjunction with the substantive rights of the Charter (Conclusions 2005, Statement of Interpretation on Article 11).”

65. Considering this progressive interpretation of the Social Charter by the European Committee, as well as the fact that children BACR should be considered a vulnerable group, the ICJ is of the opinion that facts of the collective complaint call for a strict scrutiny.

12. Conclusion

66. Article 17 of the Social Charter, similarly to Article 40 of the UN CRC, provides for an obligation to ensure that *all* children being recognised as having infringed the penal law are ensured appropriate level of social protection and *treated* in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. The provision of Article 17 of the Social Charter should be understood from the perspective of present-day conditions and reality and interpreted in the light of the current child rights approach and the consensus around the treatment of *all* children before judicial proceedings have been commenced.
67. The ICJ notes that the European Committee has consistently deployed evolutive or dynamic interpretation of the Social Charter providing the European Committee with the necessary degree of flexibility to ensure the realisation of rights guaranteed in the Social Charter, which are made practical and effective. In particular, the European Committee relied on doctrine of living instrument, stating that the Social Charter, as a living instrument, ought to be interpreted in accordance with developments in the national laws of the Council of Europe Member States as well as applicable international instruments (see *World Organisation against Torture v. Greece*, European Committee of Social Rights Complaint No. 17/2003, Decision on the merits of 7 December 2004, para. 31). A dynamic reading of the Social Charter, including Article 17 provides a necessary degree of flexibility in a rapidly changing and developing environment and societies. It can be hardly avoided if human rights authorities wish to maintain the effectiveness of

¹⁷ UN CRC General Comment no. 10 (2007) – Children's rights in juvenile justice, CRC/C/GC/10, para. 33.

¹⁸ European Roma and Travellers Forum (ERTF) v. Czech Republic, Complaint No.104/2014 of 17. 5. 2016.

human rights protection in Europe. Indeed, contemporary Europe, as well as juvenile justice standards, represents a different landscape when compared with almost 60 years ago.

68. In relation to children's rights, the European Committee has stated that the Social Charter should be interpreted in the light of the case-law developed under other international treaties as regards the protection of children and young persons, such as the UN Convention on the Rights of the Child and the European Convention on Human Rights. (General Introduction to ECSR Conclusions XV-2, 2001, Vol1, p. 26). Moreover, it has been acknowledged that children rights play an especially significant role and the Charter is the most significant treaty at the European level for children's human rights (see *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, decision on merits of 20 October 2009, para 26) and complements the European Convention on Human Rights in this area and reflects the United Nations Convention on the Rights of the Child (see *International Federation for Human Rights (FIDH) v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, para 36, and *World Organisation against Torture (OMCT) v. Greece*, Complaint No. 17/2003, decision on the merits of 7 December 2004, para 31). Indeed, as the European Committee explained "when ruling on situations where the interpretation of the Charter concerns the rights of a child, the Committee considers itself bound by the internationally recognised requirement to apply the best interests of the child principle (see *Defence for Children International (DCI) v. the Netherlands*, complaint no. 47/2008, decision on the merits of 20 October 2009, para 29).
69. This position mirrors a wide consensus that in assessing compliance with legal obligations, the child rights approach should be adopted, considering principles of participation, best interest, dignity, non-discrimination and rule of law,¹⁹ and bearing in mind that that the interpretation of Article 17 of the Social Charter should be based on the notion of an effective and practical human rights treaty, as the aim and purpose of the Social Charter, being a human rights instrument, is to protect rights not merely theoretically, but also in fact (see *International Commission of Jurists (ICJ) v. Portugal*, Complaint no. 1/1998, 10 September 1999, para 32).
70. The ICJ refers in this respect to judgment of the European Court of Human Rights in case *Blokhin v. Russia*, Grand Chamber judgment of 23 March 2016, where the Court stated: "In view of his status as a minor, when a child enters the criminal justice system his procedural rights must be guaranteed and his innocence or guilt established, in accordance with the requirements of due process and the principle of legality, with respect to the specific act which he has allegedly committed. On no account may a child be deprived of important procedural safeguards solely because the proceedings that may result in his deprivation of liberty are deemed under domestic law to be protective of his interests as a child and juvenile delinquent, rather than penal."
71. It also has regard especially to Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and especially the principle of Rule of Law which provides: "Elements of due process such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right

¹⁹ Council of Europe Guidelines on child friendly justice, p. 17-19.

to access to courts and the right to appeal, should be guaranteed for children as they are for adults and should not be minimised or denied under the pretext of the child's best interests. This applies to all judicial and nonjudicial and administrative proceedings." Further, it has regard to the General Comment 10 of the UN Committee on the Rights of the Child (2007): Children's Rights in Juvenile Justice which mentions that all children in conflict with the law shall be treated equally. Treatment of children below the age of criminal responsibility should be as fair and just as that of children at or above minimum age of criminal responsibility.

72. The ICJ notes that the legislation at issue, even though based on restorative justice principles, does not provide children below the age of criminal responsibility a defence counsel in the pre-trial stage, unlike in cases of juveniles and thus leaves them particularly vulnerable. Further, it does not provide them with a right to access information contained in the police file, nor allow them or their representatives to be served with a final decision of the police authority concerning their unlawful actions and nor provide them a possibility to appeal against such a decision. Moreover, the law does not make restorative alternatives accessible to children below the age of criminal responsibility who consequently risk unnecessary trials and traumatisations.
73. The ICJ submits the situation is in violation of Article 17 of the 1961 Charter on the grounds that children below the age of criminal responsibility in conflict with the criminal law are not ensured an adequate level of social protection and are not treated in accordance with their dignity and worth during the pre-trial stage of the proceedings.

Annex: Juvenile Justice Act (Act. no. 218/2003 Coll.)²⁰

§ 2

Definition of terms

(1) If the law does not state otherwise, it is understood that

- a) the term „youth“ includes both children and juveniles,
- b) a child below the age of fifteen is a person, who has not reached his or her fifteenth birthday at the time of the commission of an otherwise criminal act,
- c) a juvenile is a person, who has reached his or her fifteenth birthday, but has not reached his or her eighteenth birthday at the time of the commission of the act,

(2) According to this law, it is understood that

- a) an unlawful act is an offense, a crime or an otherwise criminal act,

(...)

§ 3

Basic principles

(1) No one may be penalized under this Act for an act which was not a criminal offense under the applicable law at the time when the act was committed and only this Act, following the provisions of the Criminal Code, determines which acts are offenses or acts otherwise criminal, the sanctions and method of imposition of such sanctions, which are primarily aimed to restore disturbed social relationships, include a child under the age of 15 or juvenile into the family and social environment and to prevent commission of unlawful acts.

(2) Criminal measures can only be imposed if special proceedings methods and measures, in particular, rehabilitation of disturbed social relations and measures contributing to the prevention of the commission of unlawful acts, are not likely to satisfy the purpose of this Act.

(3) Measures imposed under this Act shall take into account the personality of the person on whom they are imposed, including the age, rational and moral maturity, health condition, as well as personal, family and social circumstances and shall be proportionate to the nature and gravity of the offense. The political, national, social or religious beliefs of a juvenile or child under the age of 15, his/her family or family he/she lives in, or the way of bringing up a juvenile or a child under the age of 15, cannot be a reason for imposing measures under this Act.

(4) In proceedings under this Act, it is necessary to proceed with regard to the age, health condition, rational and moral maturity of the person, against whom the proceedings are conducted, in order to ensure that the danger posed to his or her future development is limited, and that the acts and causes, and the circumstances that have led to them, have been properly examined and explained and that a responsibility has been assumed under this Act. The proceedings must be conducted in such a way as to prevent further unlawful acts. The bodies acting in accordance with this Act shall cooperate with the respective Agency for Social and Legal Protection of Children.

(5) In the proceedings under this Act, it is necessary to protect the personal data of the person against whom the proceedings are conducted, and to protect his or her privacy, so that any such person is protected against harmful influences and the proceedings are conducted in compliance with the principle of presumption of innocence.

(6) Every child under the age of 15 or a juvenile, unless otherwise provided by this Act, has the right to have his or her act discussed without undue delay and within a reasonable time by a juvenile court.

²⁰ Unofficial translation of relevant parts of the Juvenile Justice Act provided by FORUM.

(7) Proceedings under this Act must be aimed at ensuring that the harmed party obtains compensation for the damage caused by the offense or has received other reasonable satisfaction.

(8) Judges, state prosecutors, police officers and officials of the Probation and Mediation Service involved in juvenile justice cases must be given special training for the treatment of youth.

§ 90

Initiation of proceedings

(1) A child below the age of fifteen, who committed an otherwise criminal act, can be imposed a measure at the proposal of the state prosecutor. The state prosecutor is obliged to file the motion proposing the measure as soon as he or she becomes aware of the impossibility of prosecution because it concerns a person who is not criminally responsible due to age.

§ 93

Measures

(1) If a child below the age of fifteen commits an otherwise criminal act, a juvenile court can usually on the basis of the result of a prior pedagogic-psychological examination, impose the following measures:

- a) educational obligation,
- b) educational restriction,
- c) warning,
- d) enrolment in a therapeutic, psychological or another suitable educational programme in a centre for educational care,
- e) supervision of a probationary officer,
- d) protective education,
- e) protective treatment.

(2) Protective education can be imposed by a juvenile court on a child, who committed an offense for which the Criminal Code allows the imposition of an exceptional penalty, and who, at the time of the commission, reached the age of twelve and did not reach the age of fifteen.

(3) Protective education can also be imposed on a child, who was younger than fifteen years at the commission of the offense, if it is reasonable considering the nature of the committed otherwise criminal act, and if it is necessary to ensure his or her proper education.

(4) Protective treatment can be imposed by a juvenile court on a child, who had not reached the age of fifteen, based on the result of prior examination of the mental state of the child (§ 58) if he or she committed an otherwise criminal act

- a) in the state caused by a mental illness, or
- b) under the influence of addictive substances or in relation to their abuse, if it concerns a child, who abuses such substances,

and remaining on liberty without the imposition of protective treatment poses danger.

(9) A child can be imposed more measures simultaneously if it is necessary to satisfy the purpose of this law (§ 1/2).

(10) The juvenile court can decide not to impose a measure if consideration of the matter by the state prosecutor or before the juvenile court is sufficient to satisfy the purpose of this law (§ 1/2).

§ 95a

Protective treatment

(1) Juvenile court orders the execution of a protective treatment in a medical facility, in which the protective treatment should be carried out. (...)