

Recommendations on the Main Principles Governing the Individual Assessment of Children in Conflict with the Law

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I. Aim and purpose of these Recommendations

These Recommendations are made with a view to assisting States to effectively implement the requirement of individual assessments of children in conflict with the law,¹ as required by Article 7 of [Directive \(EU\) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings \(hereinafter "the Directive"\)](#), as well as to establish an EU-wide interpretation of Article 7 in light of international human rights law. The Recommendations are directed towards lawyers, judges, public prosecutors, social workers, the police and other actors in the child justice systems linked to the individual assessment.

The Directive recognizes the '**right to individual assessment**' as one of the elements of the rights of children in conflict with the law.² Based on article 7(4), the individual assessment serves the purpose of determining whether any specific measures to the benefit of the child are to be taken; assessing the appropriateness and effectiveness of any preliminary measures; and assisting in taking any decisions in criminal proceedings, including sentencing. The assessment can thus be used for determining if and to what extent the child would need procedural accommodations during the criminal proceedings, the extent of their criminal responsibility and the appropriateness of a particular penalty or educative measure.³

Individual assessment is not a new concept. It has existed in several child justice⁴ systems for at least a century and initially it was not predicated on a "rights-based" approach. The rights-based approach to assessments has developed within international human rights law relating to the rights of the child, most clearly under the UN Convention on the Rights of the Child (1989, hereinafter CRC) and its General Comments, as well as jurisprudence under other international human rights instruments, such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).

An essential principle of child justice proceedings is that children in conflict with the law must be provided with at least the same **procedural rights** and safeguards as adults in order to guarantee their right to a fair trial, right to liberty and other human rights at issue in a case or situation.⁵ Given that children are in a specific situation of vulnerability and considering the impact of judicial proceedings and the outcomes on children's lives, it is essential to carry out an accurate assessment of a child's circumstances, in order to meet their particular needs and protect their procedural rights.

When the assessment is carried out in a non-biased manner, it is an important safeguard for the child's human rights. Such an assessment can help to ensure children's **effective participation** in the child justice proceedings,⁶ determine their **best interests** and protect them against **discrimination**. This last aspect is especially important for children from marginalized communities. The individual assessment is a key element in whether the child has a positive experience of the judicial proceedings. It protects the child's rights and safety, allows for the selection of interventions that are appropriate for the child, and facilitates the child's reintegration into society.

Children below the age of criminal responsibility are also covered by these Recommendations. Even though children below the age of criminal responsibility cannot under law be held criminally liable, they often are partially subjected to some form of pretrial criminal or quasi-criminal proceedings resulting in sanctions imposed by a child justice court, which may be punitive in effect. These sanctions may even include deprivation of liberty in "educational correction centres", "children's homes with schools" or "psychiatric hospitals." Such children may be granted an even lower level of protection by national child justice laws, than children above the age of criminal responsibility.

¹ A 'child' means any person below the age of 18 years (see Article 1 *UN Convention on the Rights of the Child* (CRC)). 'Children in conflict with the law' are all children that are suspects or accused persons in criminal proceedings and children below the age of criminal responsibility who are subjected to formal proceedings and measures for suspicion of having infringed the penal law.

² Valsamis Mitsilegas, 'The European Union and the Rights of Individuals in Criminal Proceedings' in: Darryl K. Brown, Jenia Iontcheva Turner, and Bettina Weisser (eds.), *The Oxford Handbook of Criminal Process* (New York: Oxford University Press, 2019), p. 125. See also Dorris de Vocht, Michele Panzavolta, Miet Vanderhallen, and Marc van Oosterhout, 'Procedural Safeguards for Juvenile Suspects in Interrogations: A Look at the Commission's Proposal in Light of an EU Comparative Study', *New Journal of European Criminal Law* 5, no. 4 (2014), p. 500.

³ Directive (EU) 2016/800, Recital 35.

⁴ 'Child justice' is understood as the set of standards that recognise the child in conflict with the law as a human being with the right to a fair trial, but also with a special status requiring child specific treatment. This approach is recognised in Article 40 of the CRC, the core juvenile justice provision, the term "child justice" rather than "juvenile justice" is used by the CRC Committee since the publication of its General Comment No 24 on child justice systems.

⁵ Stephanie Rap and Ido Weijers, *The Effective Youth Court. Juvenile Justice Procedures in Europe* (The Hague: Eleven, 2014), p. 56.

⁶ Fair Trials, *Advancing the Defence Rights of Children Manual for Practitioners*, 2018; *S.C. v. United Kingdom*, ECtHR, Application no. 60958/00, Judgment of 15 June 2004, paras. 28-29.

These Recommendations have been developed as part of an EU-funded pilot project “*PRACTICE* (Procedural Rights of All Children in justICE)” implemented by the International Commission of Jurists (ICJ) and Forum for Human Rights in 2020-2021. Drawing on the research and comparative exchanges during workshops for practitioners from Slovakia and the Czech Republic, these final recommendations of the project put together the main elements and principles to be adhered to when carrying out an individual assessment of the child during child justice proceedings.

Children with specific **vulnerabilities** such as disability, membership of a minority group or disadvantaged socio-economic background are expected to particularly benefit from these Recommendations.

Although primarily directed at challenges in the two focus countries of the PRACTICE project, Slovakia and the Czech Republic, the Recommendations are also relevant and adaptable to **all Member States of the EU**, drawing on the lessons that can be learned from the Czech and Slovak experiences.⁷

II. Children’s rights standards and principles

1. International legal framework

States have an obligation to fully comply with international human rights treaties they have signed and ratified, and to respect, protect and fulfil the rights identified therein. The CRC protects a wide range of civil, cultural, economic, political and social rights.

Children, like all persons, are rights holders. They are entitled to fair procedures, to claim their rights and have access to an effective remedy if their rights under national and international law have been violated.

Under international law, children are entitled to a broad range of rights and safeguards. These includes rights that are enjoyed by all persons, and additional ones specifically applicable to children. Yet, they experience an array of barriers to accessing their rights, from being unaware of their rights to not knowing where and how to seek advice and assistance, to facing paternalistic⁸ attitudes by adults. The justice system can be intimidating for children and may not respect their autonomy, and they may lack financial means or support needed in order to secure a fair trial or access justice.

Children in conflict with the law

The UN Convention on the Rights of the Child (CRC), to which all EU States are party, provides that every child in conflict with the law is entitled to be treated fairly, with respect for their **human dignity**, in a **child-friendly way**, while ensuring their right to a fair trial. Moreover, the aim should be to promote reintegration of the child into society and allow them to take a constructive role therein.⁹ Individual assessment should be beneficial to reaching these aims, but only if it is carried out in compliance with the child rights-based approach.

Rights-based approach

The rights-based approach therefore is not a mere policy option, but a legal obligation of all States. It plays a crucial role in ensuring that the individual assessment serves to **promote the child’s rights and the child’s position as a rights holder** and not as a mere object of care and protection or of punishment. The UN Committee on the Rights of the Child (*hereinafter* CRC Committee) founded this rights-based approach to the child’s dignity in its General Comment no. 13 on the right of the child to freedom from all forms of violence. The CRC Committee emphasized the need for “a paradigm shift away from child protection approaches in which children are **perceived and treated as “objects” in need of assistance rather than as rights holders entitled to non-negotiable rights to protection**”.¹⁰ A rights-based approach thus requires respect, protection and fulfilment of all rights of the child as guaranteed under the CRC and its core principles are to develop the capacity of duty bearers, in particular State officials, to meet their obligations deriving from these rights as well as to develop the capacity of children to claim their rights.¹¹

⁷ In parallel with these Recommendations, the baseline study for the PRACTICE project is published, which provides a snapshot of the situation in Finland, Belgium, the Netherlands and England and Wales.

⁸ The meaning of paternalistic (of people in authority): making decisions for other people rather than letting them take responsibility for their own lives. See Cambridge dictionary <https://dictionary.cambridge.org/dictionary/english/paternalistic>

⁹ Article 40 CRC.

¹⁰ CRC Committee, *General Comment No. 13 on the right of the child to freedom from all forms of violence*, UN Doc. CRC/C/GC/13 (2011), para. 59.

¹¹ *Ibid.*, para. 59.

The rights-based approach was further developed in the CRC Committee's General Comment no. 21 on children in street situations.¹² It clarifies that under the CRC, a rights-based approach must be used, whereby the child¹³ is respected as a rights holder and decisions are often made with the child. "(I)n a child rights approach, the process of realizing children's rights is as important as the result."¹⁴

The rights-based approach precludes the interpretation and application of measures that would approach the child as a mere object of the intervention, based on an adult's understanding of their rights or interests.¹⁵

Every child is **entitled to a set of rights** as embedded in the CRC and other international human rights standards and EU law, including their right to life, right to liberty and security, right to privacy, private and family life, right to education, an array of economic, social and cultural rights, and also procedural rights and guarantees, and states have the obligation to ensure the access of children to their rights. The aspects of these rights most relevant to children in conflict with the law, and the guiding principles that govern them, are set out below.

2. The rights of every child in international law

2.1 Guiding principles on the rights of the child

The guiding principles on children's rights are underlying requirements for the realization of all the rights of a child set out in the Convention of the Rights of the Child (CRC). These guiding principles include:

1. The best interests of the child;
2. The right to participate and to be heard;
3. Non-discrimination; and
4. The right to life, survival and development.

2.1.1. Best interests of the child

The best interests of the child principle must be a primary consideration in all actions concerning children undertaken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies", according to Article 3 of the CRC.¹⁶ It is also enshrined in Article 24.2 of the EU Charter on Fundamental Rights. The best interests of the child is a substantive right, a fundamental interpretative legal principle, as well as a rule of procedure which must be based on an assessment of all elements of a child's or children's interests in a specific situation.¹⁷

The CRC Committee has stated that: "[t]he principle requires active measures throughout government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions (...)."¹⁸

The CRC Committee in its General Comment No 14 identified several elements to be considered when assessing the child's best interests:¹⁹

¹² CRC Committee, *General Comment No. 21 on children in street situations*, UN Doc. CRC/C/GC/21 (2017), paras. 5, 10 and 11.

¹³ *Ibid.*, para. 5.

¹⁴ *Ibid.*, para. 10.

¹⁵ CRC Committee, *General Comment No. 13 on the right of the child to freedom from all forms of violence*, UN Doc. CRC/C/GC/13 (2011), para. 59: "(...) This rights-based approach is holistic and places emphasis on supporting the strengths and resources of the child him/herself and all social systems of which the child is a part: family, school, community, institutions, religious and cultural systems."

¹⁶ Article 3 *Convention on the Rights of the Child* (CRC): 1. 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.

2. States Parties undertake to ensure the child such protection and care as is necessary for their well-being, taking into account the rights and duties of their parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

¹⁷ CRC Committee, *General Comment No. 14 on the right of the child to have their best interests taken as a primary consideration* (art. 3, para. 1), UN Doc. CRC/C/GC/14 (2013), paras. 1 and 6.

¹⁸ CRC Committee, *General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), UN Doc. CRC/GC/2003/5, para.12.

¹⁹ CRC Committee, *General Comment No. 14 on the right of the child to have their best interests taken as a primary consideration* (art. 3, para. 1), UN Doc. CRC/C/GC/14 (2013), para. 52.

- a. The child's views [...]
- b. The child's identity [...]
- c. Preservation of the family environment and maintaining relations [...]
- d. Care, protection and safety of the child [...]
- e. Situation of vulnerability [...]
- f. The child's right to health [...]
- g. The child's right to education [...]

Best interests include the right to be heard

Assessment of a child's best interests must include respect for the child's right to express their views freely and due weight must be given to these views in all matters affecting the child. The more the child knows, has experienced and understands, the more their views become determinative of their best interests, children in conflict with the law included.²⁰

Child justice context

It is especially important in the child justice context to give weight to the "child's best interests as a primary consideration, as well as to the need to promote the child's reintegration into society."²¹ In its General Comment No. 24, the CRC emphasizes that "the reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances (age, lesser culpability, circumstances and needs, including, if appropriate, the mental health needs of the child), as well as to the various and particularly the long-term needs of the society."²³ An adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention."²⁴

Situations of vulnerability

According to UN CRC, "(t)he best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision-makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness. An individualized assessment of each child's history from birth should be carried out, with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process."²⁵

> The best interests of the child and all the elements that need to be assessed in connection with it must be a primary consideration when the individual assessment is undertaken by practitioners. In other words, the rights of the child must be given priority when adopting a decision affecting the child.

2.1.2. The right to be heard and to participate

States have an obligation under article 12 of the CRC²⁶ to respect and protect a child's right to be heard. This means that a child must be given the opportunity and means to present his or their views and have those views given due weight when decisions are being made which will have an effect on them. This right is also set out in the EU Charter on Fundamental Rights.²⁷

The CRC Committee has elaborated on the obligation of States to ensure the child's right to express their views freely in "all matters affecting the child" and give due weight to those views. The Committee has indicated that "[t]his principle, which highlights the role of the child as an active participant in the promotion, protection and monitoring of their rights, applies equally to all measures adopted

²⁰ *Ibid.*, paras. 43 and 44.

²¹ CRC Committee, [General Comment No. 24 on children's rights in the child justice system](#), UN Doc. CRC/C/GC/24 (2019), para. 76.

²³ *Ibid.*

²⁴ CRC Committee, [General Comment no. 13 on the right of the child to freedom from all forms of violence](#), UN Doc. CRC/C/GC/ (2011), para. 61.; CRC Committee, [General Comment No. 14 on the right of the child to have their best interests taken as a primary consideration](#) (art. 3, para. 1), UN Doc. CRC/C/GC/14 (2013), para. 4.

²⁵ CRC Committee, [General Comment No. 14 on the right of the child to have their best interests taken as a primary consideration](#) (art. 3, para. 1), UN Doc. CRC/C/GC/14 (2013), paras. 1 and 76.

²⁶ Article 12 CRC: 1. States Parties shall assure to the child who is capable of forming their own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

²⁷ Charter of Fundamental Rights of the European Union (EU Charter), Article 24.1.

by States to implement the Convention.”²⁸

Paragraph 1 of Article 12 of the Convention ensures to every child capable of forming their own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity. Paragraph 2 provides, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting them.²⁹

These standards are equally reflected in the *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (17 Nov 2010).³⁰ The Guidelines provide that “[c]hildren should be provided with all necessary information on how effectively to use the right to be heard. However, it should be explained to them that their right to be heard and to have their views taken into consideration may not necessarily determine the final decision.”³¹ In addition, “[j]udgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child’s views and opinions have not been followed.”³²

In the context of child justice, children have the right to be heard directly, and not only through a representative, at all stages of the process, starting from the moment of contact. The child has the right to remain silent and no adverse inference should be drawn when children elect not to make statements.³³

The CRC Committee affirmed in its General Comment no. 12 that “(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.”³⁴

The CRC Committee emphasized “that article 12 imposes no age limit on the right of the child to express her or his views.” It underlined that:

- “First... full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences;
- Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he **has sufficient understanding to be capable of appropriately forming her or his own views** on the matter;
- Third, States parties are also under the obligation to ensure the implementation of this right for children **experiencing difficulties** in making their views heard. For instance, **children with disabilities** should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language;
- Lastly, States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child.”³⁵

The concept of **evolving capacities means a child’s capacities are not static and this dynamism must be taken into account in determining the child’s best interests**. This principle is crucial for the exercise of the child’s rights to be heard, including what weight should be given to their views. The CRC Committee emphasized that “evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children’s autonomy and self-expression and which have traditionally been justified by pointing to children’s relative immaturity and their need for socialization. Parents (and others) should be encouraged to offer ‘direction

²⁸ CRC Committee, *General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), UN Doc. CRC/GC/2003/5, para. 12.

²⁹ CRC Committee, *General Comment No. 12 on the right of the child to be heard*, UN Doc. CRC/C/GC/5 (2009), para. 1.

³⁰ *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, adopted on 17 November 2010.

³¹ *Ibid.*, para. 48.

³² *Ibid.*, para. 49.

³³ CRC Committee, *General Comment No. 24 on children’s rights in the child justice system*, UN Doc. CRC/C/GC/24 (2019), para. 45.

³⁴ CRC Committee, *General Comment No. 12 on the right of the child to be heard*, UN Doc. CRC/C/GC/5 (2009), para. 34.

³⁵ *Ibid.*, para. 21.

and guidance' in a child-centred way, through dialogue and example, in ways that enhance young children's capacities to exercise their rights, including their right to participation (art. 12) and their right to freedom of thought, conscience and religion (art. 14)."³⁶

In respect of children with disabilities, the right to be provided "procedural and age-appropriate accommodations" is also explicitly provided for by the Convention on the Rights of Persons with Disabilities in its Article 13 as the right to access to justice.

Convention on the Rights of Persons with Disabilities

Article 13 – Access to Justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Children with difficulties in making their views heard

The CRC Committee has made clear that in ensuring the child's right to be heard, States Parties are also under the obligation to ensure the implementation of this right for **children experiencing difficulties** in making their views heard.³⁷ In this regard the Committee refers expressly to children with **disabilities** and children belonging to a **minority, indigenous and migrant background**. Furthermore, the views of the child must be given due weight depending on the child's age and maturity. For this, the child's capacities need to be assessed and it should be communicated to the child how those views have influenced the outcome of the process.³⁸

In order to effectively exercise the right to be heard, children have the right to access to lawyer, to information, and to interpretation when needed.

> The right to be heard and to participate is crucial for the individual assessment of children in conflict with the law. All experts and practitioners involved in the process of individual assessment of the child, have the obligation to ensure that the child has effective access to their right to be heard and to participate meaningfully in the proceedings. The child must be given the voice, the space, the audience and the influence in order to effectively exercise their right to be heard according to Article 12 CRC.³⁹

2.1.3. Non-discrimination

In accordance with international law, including the CRC,⁴⁰ the rights of children must be secured without discrimination on any grounds. Children can face multiple and intersecting forms of discrimination, "for example on the basis of gender, sexual orientation and gender identity/expression, disability, race, ethnicity, indigenous status, immigration status and other minority status."⁴¹

General Comment No 25 on children in the digital environment further states that States should "take proactive measures to prevent discrimination on the basis of sex, disability, socioeconomic background, ethnic or national origin, language or any other grounds, and discrimination against minority and indigenous children, asylum seeking, refugee and migrant children, lesbian, gay, bisexual, transgender and intersex children, children who are victims and survivors of trafficking for sexual exploitation, children in alternative care, children deprived of liberty and children in other vulnerable situations."⁴²

³⁶ CRC Committee, [General Comment no. 7 on implementing child rights in early childhood](#), UN Doc. CRC/C/GC/7/Rev.1 (2005), para.17.

³⁷ CRC Committee, [General Comment No. 12 on the right of the child to be heard](#), UN Doc. CRC/C/GC/5 (2009), para. 21.

³⁸ *Ibid.*, para.28.

³⁹ According to the [Lundy model of child participation](#), the child must be given the voice, the space, the audience and the influence in order to effectively exercise their right to be heard under Article 12 CRC.

⁴⁰ Article 2 CRC.

⁴¹ CRC Committee, [General Comment No. 21 on children in street situations](#), UN Doc. CRC/C/GC/21 (2017), para. 26.

⁴² CRC Committee, [General Comment No. 25 on children's rights in relation to the digital environment](#), UN Doc. CRC/C/GC/25 (2021), para. 11.

Specifically related to the justice system, General Comment No 24 says: “[s]afeguards against discrimination are needed from the earliest contact with the criminal justice system and throughout the trial, and discrimination against any group of children requires active redress. In particular, gender-sensitive attention should be paid to girls and to children who are discriminated against on the basis of sexual orientation or gender identity. Accommodation should be made for children with disabilities, which may include physical access to court and other buildings, support for children with psychosocial disabilities, assistance with communication and the reading of documents, and procedural adjustments for testimony.”⁴³

States must ensure that children are treated with equality both *de facto* and *de jure* and must eliminate both direct and indirect discrimination against children.⁴⁴

The obligation of States is to respect and ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind. This non-discrimination obligation requires States to actively identify individual children and groups of children, the recognition and realization of whose rights may demand special measures.⁴⁵ The CRC Committee has emphasized that the child’s right to non-discrimination is not only a passive obligation but “also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the CRC. This may require positive measures aimed at redressing a situation of real inequality.”⁴⁶

The concept of **inclusive equality**, formulated in the area of the rights of persons with disabilities by the UN Committee on the Rights of Persons with Disabilities, is instructive as to how to structure the necessary proactive, positive measures to tackle discrimination against children in vulnerable situations, including systemic discrimination.⁴⁷

The concept of inclusive equality seeks to express the multidimensional nature of substantive equality. It thus formulates four dimensions of equality:

- 1) **a fair redistributive dimension** to address socioeconomic disadvantages;
- 2) **a recognition dimension** to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality;
- 3) **a participative dimension** to reaffirm the social nature of people as members of social groups and full recognition of humanity through inclusion in society; and
- 4) **an accommodating dimension** to make space for difference as a matter of human dignity.⁴⁸

As the General Comment no. 6 of the UN Committee on the Rights of Persons with Disabilities on equality and non-discrimination shows, the implementation of inclusive equality can rely on the rights to accessibility and to provision of reasonable accommodation, procedural accommodations and specific measures.

⁴³ CRC Committee, [General Comment No. 24 on children’s rights in the child justice system](#), UN Doc. CRC/C/GC/24 (2019), para. 40.

⁴⁴ Discrimination is prohibited under a number of international legal instruments: Articles 2 and 10 International Covenant on Economic, Social and Cultural Rights (ICESCR); Articles 2, 24, 26 International Covenant on Civil and Political Rights (ICCPR); Article 2 CRC, Article 1 International Convention for the Elimination of All Forms of Racial Discrimination (ICERD); Article 1 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 5 Convention on the Rights of Persons with Disabilities; Article 14 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); Part V Article E European Social Charter (Revised).

⁴⁵ CRC Committee, [General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child](#) (arts. 4, 42 and 44: para. 6), UN Doc. CRC/GC/2003/5, para. 12.

⁴⁶ CRC Committee, [General Comment No. 14 on the right of the child to have their best interests taken as a primary consideration](#) (art. 3, para. 1), UN Doc. CRC/C/GC/14 (2013), para. 41. In its *General Comment No. 21*, the CRC Committee used with the reference to the quoted paragraph of the *General Comment No. 14*, the notion of “substantive inequality” instead of “real inequality”. CRC Committee, [General Comment No. 21 on children in street situations](#), UN Doc. CRC/C/GC/21 (2017), para. 26.

⁴⁷ The definition of systemic discrimination was formulated by the UN Committee on Economic, Social and Cultural Rights, [General Comment No. 20 on non-discrimination in economic, social and cultural rights](#), UN Doc. E/C.12/GC/20 (2009), para. 12: “The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups and privileges for other groups.” See also CRC Committee, [General Comment No. 21 on children in street situations](#), UN Doc. CRC/C/GC/21 (2017), para. 12. The CRC Committee in its [General Comment No. 11 on indigenous children and their rights under the Convention](#), UN Doc. CRC/C/GC/11 (2009), paras. 58-59 set out that Article 28 of the CRC states that States parties shall ensure that primary education is compulsory and available to all children on the basis of equal opportunity. “In order to ensure that the aims of education are in line with the Convention, States parties are responsible for protecting children from all forms of discrimination as set out in article 2 of the Convention and for actively combating racism.”

⁴⁸ UN Committee on the Rights of Persons with Disabilities, [General Comment no. 6 on equality and non-discrimination](#), UN Doc. CRPD/C/GC/6 (2018), para. 11.

Accessibility is an *ex ante*, proactive, systemic duty concerning systems and processes. Accessibility requires that the built environment, public transport, as well as information and communication services are available and usable for all persons with disabilities on an equal basis. Accessibility in the context of communication services includes the provision of social and communication support. Accessibility duties relate to groups and must be implemented gradually and unconditionally.⁴⁹

Reasonable accommodation is an *ex nunc*, reactive duty which relates to individuals. It consists in the obligation to adopt a "modification or adjustment which is necessary and appropriate where it is required in a particular case to ensure that a person with a disability can enjoy or exercise her or his rights" on an equal basis with others. It should be formulated in the dialogue with the concerned person and what reasonableness should be understood as referring to the accommodation's "relevance, appropriateness and effectiveness for the person with a disability". The reasonable accommodation may not be provided only if it results in a disproportionate or undue burden for the duty bearer.⁵⁰

Procedural accommodations refer to the context of access to justice. Procedural accommodations should not be confused with reasonable accommodation since they are not limited by the concept of disproportionality. "An illustration of a procedural accommodation is the recognition of diverse communication methods of persons with disabilities standing in courts and tribunals. Age-appropriate accommodations may consist of disseminating information about available mechanisms to bring complaints forward and access to justice using age-appropriate and plain language."⁵¹

Specific measures are positive, affirmative measures that refer to "a preferential treatment of persons with disabilities over others to address historic and/or systematic/systemic exclusion from the benefits of exercising rights. They aim to "accelerate or achieve de facto equality of persons with disabilities". "They are usually temporary in nature, although in some instances permanent specific measures are required, depending on context and circumstances."⁵²

Although all of these rights were explicitly formulated in the area of the rights of persons with disabilities, they may be understood more widely as an integral part of the right to equality and non-discrimination, no matter its grounds. For instance, in its General Comment no. 21, the CRC Committee has called for specific measures⁵³ and accessible environment in terms of attitudes.⁵⁴ The UN Human Rights Committee has concluded that specific measures (affirmative actions) are sometimes necessary to "diminish or eliminate conditions, which cause or help to perpetuate discrimination prohibited by the Covenant," while "as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."⁵⁵ And similarly, the UN Committee on Economic, Social and Cultural Rights recognized the need to adopt specific special measures "to attenuate or suppress conditions that perpetuate discrimination". The special measures are considered legitimate as long as "they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved."⁵⁶

Other relevant international standards stress the importance of procedural accommodations for children that would take into account the child's particular vulnerability and their special needs, including in the context of child justice. For instance, the *Council of Europe Guidelines*⁵⁷ reiterate the protection from discrimination in their Article D.1, and add in Article D.2 that "Specific protection and assistance may need to be granted to more vulnerable children, such as migrant children, refugee and asylum seeking children, unaccompanied children, children with disabilities, homeless and street children, Roma children, and children in residential institutions."

The **Special Rapporteur on the independence of judges and lawyers** stated that "[t]he princi-

⁴⁹ *Ibid.*, para. 24 (a) and paras. 40-42.

⁵⁰ *Ibid.*, paras. 23, 24 and 25 (a) – (b).

⁵¹ *Ibid.*, paras. 25 (d) and 51.

⁵² *Ibid.*, para. 25 (c) and paras. 28-29.

⁵³ „Temporary special measures". See CRC Committee, [General Comment No. 21 on children in street situations](#), UN Doc. CRC/C/GC/21 (2017), para. 27.

⁵⁴ "States should also sensitize professionals, the private sector and the public to the experiences and rights of children in street situations with the aim of positively transforming attitudes. States should support creative, artistic, cultural and/or sports programmes led by, or involving children in street situations that help to address misconceptions and break down barriers with professionals, communities – including other children – and wider society through visible mutual dialogue and interaction." - *Ibid.*, para. 27.

⁵⁵ UN, Human Rights Committee, [General Comment no. 18 on non-discrimination](#), UN Doc. CCPR/C/21/Rev.1/Add.1 (1989), para. 10.

⁵⁶ UN, Committee on Economic, Social and Cultural Rights, [General Comment No. 20 on non-discrimination in economic, social and cultural rights](#), UN Doc. E/C.12/GC/20 (2009), para. 9.

⁵⁷ [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#), adopted on 17 November 2010.

ple of non-discrimination is especially relevant when justice systems are dealing with **particularly vulnerable groups of children**, such as street children, children belonging to minorities, migrant children or asylum seekers, children with disabilities, or child soldiers, who may require particular attention, protection and skills from the professionals interacting with them, especially **lawyers, prosecutors and judges**.⁵⁸

Moreover, contact with the justice system should not result in stigmatisation of the child, which leads to further harm. The CRC Committee has stated that diversion should be available from the earliest stages of the justice process and children's human rights and legal safeguards should be fully respected and protected.⁵⁹

- > **All actors involved in the child justice process and in the elaboration and preparation of the individual assessment must ensure that children are treated without discrimination on any status grounds. Specific safeguards against discrimination must be put in place from the earliest contact of the child with the child justice system or child protection authorities.**
- > **Lawyers, social workers, judges, and others involved in the child justice process must take active steps to identify individual children and groups of children the recognition and realization of whose rights may demand the provision of reasonable accommodation and procedural accommodation.**
- > **Specific protection and assistance may need to be granted to more vulnerable children, such as migrant children, refugees, and asylum-seeking children, unaccompanied children, children who are discriminated against on the basis of sexual orientation or gender identity, children with disabilities, homeless and street children, Roma children, and children in residential institutions.**

2.1.4. Right to life, survival and development

Article 6 of the CRC provides for the State obligation to recognize the child's inherent right to life and States Parties' obligation to ensure to the maximum extent possible the survival and development of the child. The Committee has indicated that States must interpret "development" in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological, and social development. Implementation measures should be aimed at achieving the optimal development for all children.⁶⁰

The Human Rights Committee has emphasized that the right to life "concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity."⁶¹ It further defined the duty to protect life as a duty to "take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity."⁶²

Similarly, the CRC Committee has underlined that the right to life also encompasses the right to a life in dignity. In the context of children in street situations the Committee has recalled that the duty to fulfil the children's right to life, survival and development requires the State to design and implement holistic long-term strategies based on a rights-based approach to secure the child's development to their fullest potential. Absolute poverty should also be addressed under the child's right to life, survival and development since it "threatens children's survival and their health and undermines their basic quality of life."⁶³ The right to life, survival and development is thus much broader than simply preserving a child's life, but it also includes the right to a certain quality of life – to basic living conditions, including material conditions of decent living.

The implementation of the child's right to life, survival and development must respect the child's uniqueness and the reality of their life. The Committee has stressed that "States' obligations under article 6 necessitate careful attention being given to the behaviours and lifestyles of children, even if they do not conform to what specific communities or societies determine to be acceptable, under prevailing cultural norms for a particular age group."⁶⁴

⁵⁸ Gabriela Knaut, UN Special Rapporteur on the independence of judges and lawyers, Protecting children's rights in the justice system, UN Doc. A/HRC/29/26, 1 April 2015, para.24.

⁵⁹ CRC Committee, [General Comment No. 24 on children's rights in the child justice system](#), UN Doc. CRC/C/GC/24 (2019), paras. 14, 15 and 16.

⁶⁰ CRC Committee, [General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child](#) (arts. 4, 42 and 44, para. 6), UN Doc. CRC/GC/2003/5 (2003), para. 12.

⁶¹ UN, Human Rights Committee, [General Comment no. 36 on the right to life](#), UN Doc. CCPR/C/GC/36 (2019), para. 3.

⁶² *Ibid.*, para. 26.

⁶³ CRC Committee, [General Comment No. 21 on children in street situations](#), UN Doc. CRC/C/GC/21 (2017), paras. 30 and 32.

⁶⁴ *Ibid.*, para. 31.

This broad understanding of the right to life seems to be very close to the concept of the “right to a life project” developed in the case-law of the Inter-American Court of Human Rights, initially in the context of the right to remedies. The Committee itself referred to the case law of the Inter-American Court of Human Rights, in concrete to its judgment in the case “Street Children” (Villigran-Morales et al. v. Guatemala) in which the Inter-American Court ruled that “every child has the right to harbour a project of life that should be tended and encouraged by the public authorities so that it may develop this project for its personal benefit and that of the society to which it belongs.”⁶⁵ In the Committee’s views “this conception of the right to life extends not only to civil and political rights but also to economic, social and cultural rights. The need to protect the most vulnerable people – as in the case of street children – definitely requires an interpretation of the right to life that encompasses the minimum conditions for a life with dignity.”⁶⁶

2.2. Children in conflict with the law

Article 40(1) CRC recognizes “the right of every child alleged as, accused of, or recognized as having infringed the penal law to be 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”. According to the CRC Committee, “[e]vidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles.”⁶⁷

Article 40 CRC

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be 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.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through their parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of their defence;
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account their age or situation, their parents or legal guardians;
 - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on their behalf under conditions of equality;
 - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have their privacy fully respected at all stages of the proceedings.

⁶⁵ “Street Children” (Villigran-Morales et al.) v. Guatemala, Judgment of the Inter-American Court of Human Rights on the merits of 19 November 1999, para. 191.

⁶⁶ CRC Committee, [General Comment No. 21](#) on children in street situations, UN Doc. CRC/C/GC/21 (2017), para. 29.

⁶⁷ CRC Committee, [General Comment No. 24](#) on children’s rights in the child justice system, UN Doc. CRC/C/GC/24 (2019), para. 3.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
 - (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

As the CRC Committee pointed out, a “child who is above the minimum age of criminal responsibility should be considered competent to participate throughout the child justice process. To effectively participate, a child needs to be supported by all practitioners to comprehend the charges and possible consequences and options in order to direct the legal representative, challenge witnesses, provide an account of events and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed.”⁶⁸

“Upholding the child’s dignity and rights throughout the **child justice system** includes that we need to understand each child in a holistic manner, understand what interests them and each element that has impacted them. A child’s behaviour often reflects how he or she was treated by adults. It is an opportunity for society to make an intervention in that child’s life and develop one’s own personality and abilities and give them the chance to grow up in love and respect.

What the child learns through the justice process is crucial to their life and how they see society, knowing that they have rights as a human being. For all professionals in the child justice system it is key to be actively involving the child in the process and in the individual assessment, administrative justice and the judicial proceedings. The common and ultimate objective for all the professionals should be one – **to support the child as a human being to develop their potential.**”⁶⁹

The situation of **children below the age of criminal responsibility** in apparent conflict with the law may be rather precarious. Although not held formally liable for a criminal offence, they may still be subjected to formal proceedings which engage their responsibility (albeit not formally marked as criminal) and to specific measures. In practice of certain States, including the Czech Republic and Slovakia, these measures may include deprivation of the child’s liberty in a closed facility (educational or psychiatric). These children thus may face formal proceedings which are effectively punitive in nature, but without the traditional procedural safeguards that are available only the formal criminal proceedings.

As early as in its 2007 General Comment No. 10 dedicated to the child justice system, the CRC Committee highlighted that children below the age of criminal responsibility should be ensured the same fair and just treatment as children at or above the minimum age of criminal responsibility.⁷⁰ In other words, the fact that the child has not yet reached the minimum age of criminal responsibility and thus cannot be subjected to formal criminal proceedings must not serve to deprive the child of the safeguards that are guaranteed to all children alleged as, accused of, or recognized as having infringed the penal law.

The same position has also been held by Council of Europe institutions.

***Blokhin v. Russia*, European Court of Human Rights (Grand Chamber) of 23 March 2016, Application no. 47152/06**

In the case of *Blokhin v. Russia* the European Court of Human Rights considered the situation of a boy below the age of criminal responsibility who was suspected of having infringed the penal

⁶⁸ *Ibid.*, para.46.

⁶⁹ Mikiko Otani, *Chair of the CRC Committee and Commissioner of the ICJ, seminar for Czech and Slovak lawyers and social workers*, 16 February 2021, <https://www.icj.org/czech-republic-and-slovakia-training-on-the-rights-of-children-suspected-or-accused-of-violating-the-law/>.

⁷⁰ CRC Committee, *General Comment no. 10 on children’s rights in juvenile justice*, UN Doc. CRC/C/GC/10 (2007), para. 33.

law. The boy was subjected to police interrogation without any special procedural safeguard reflecting his particular vulnerability as a child, especially the obligatory assistance of a lawyer, and then subjected to civil proceedings which did not provide him with the right to question the witnesses. As a result of the proceedings, he was sent to a temporary detention facility for juvenile offenders with a strict regime for a month to 'correct his behaviour' and prevent him from committing further delinquent acts.

Both the Chamber⁷¹ and Grand Chamber of the ECtHR ruled that the civil classification of the proceedings against the applicant under the domestic law of the country was not decisive in terms of applicability of the criminal branch of Article 6 of the European Convention.⁷² The Court applied the so-called "Engel criteria" – 1) the legal classification of the offence under national law; 2) the very nature of the offence; and 3) the nature and degree of severity of the penalty that the person concerned risks incurring.⁷³ The Court concentrated on the third criterion and held that there was "a close link, both in law and fact, between the criminal pre-investigation inquiry and the placement proceedings. Indeed, the wording of the applicable legal provisions and of the judicial decisions (...) clearly shows that the applicant's placement in the temporary detention centre for juvenile offenders was a direct consequence of the local department of the interior's finding that his actions had contained elements of the criminal offence of extortion."⁷⁴

The Court further found that the placement in the temporary detention centre resulted in the applicant's deprivation of liberty⁷⁵ and did not pursue the purpose of educational supervision⁷⁶ and thus concluded that "in view of the nature, duration and manner of execution of the deprivation of liberty [...] imposed on the applicant, the Court finds no exceptional circumstances capable of rebutting the presumption that the proceedings against the applicant were "criminal" within the meaning of Article 6." The proceedings were therefore found to be criminal in nature, and criminal procedural rights under Article 6 applied to the case.⁷⁷

The Grand Chamber upheld this position and made it clear that the national classification of the proceedings must not result in depriving the child below the age of criminal responsibility who is in conflict with the law of traditional criminal justice safeguards if the child faces the risk of having severe sanctions imposed on them, including deprivation of their liberty.

These issues have also been addressed by the European Social Charter, which is a Council of Europe treaty that guarantees social and economic rights, covering human rights related to employment, housing, health, education, social protection and welfare. The European Committee of Social Rights monitors compliance with the Charter through collective complaints lodged by social partners or non-governmental organizations and through national reports drawn up by Contracting Parties reporting on their implementation of the Charter.

International Commission of Jurists (ICJ) v. the Czech Republic, decision on the merits of the European Committee of Social Rights of 20 October 2020, complaint no. 148/2017

The European Committee of Social Rights has also had the opportunity to make a determination on the situation of children below the age of criminal responsibility in its decision on merits of the collective complaint submitted by the International Commission of Jurists (ICJ) with the support of the Forum for Human Rights against the Czech Republic. The collective complaint concerned the situation of children below the age of criminal responsibility in the Czech Republic who were subjected to formal proceedings following the suspicion of having committed an unlawful act, but without appropriate safeguards in the pretrial stage of the proceedings, especially the access to a lawyer from the very first contact with law enforcement authorities, and without any available alternative to court proceedings before the juvenile court.

⁷¹ Judgment of 14 November 2013.

⁷² These include the procedural safeguards guaranteed under Article 6 (3): Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

⁷³ The criteria are alternative, and not necessarily cumulative. See [the Chamber's Judgment](#) of 14 November 2013, para. 139.

⁷⁴ *Ibid.*, para. 144.

⁷⁵ *Ibid.*, para. 145.

⁷⁶ *Ibid.*, para. 146.

⁷⁷ *Ibid.*, paras. 148-149.

In its decision on the merits, the European Committee of Social Rights held that “noting the Government’s argument that proceedings in cases of children under the age of 15⁷⁸ suspected of having committed an unlawful act have the nature of civil proceedings, the Committee considers that under Article 17 of the 1961 Charter⁷⁹ children must benefit from an adequate level of protection, irrespective of the formal designation and nature of the proceedings (criminal or civil) in national law. The Committee emphasizes that the adoption of measures in light of the intention of the State to create a more protective system for children below the age of criminal responsibility should not result in children being provided with less and/or weaker legal procedural protection than adults.”⁸⁰

Diversions

Article 40(3)(b) CRC further requires States to promote the establishment of measures for dealing with children without resorting to judicial proceedings, whenever appropriate. The CRC Committee highlighted⁸¹ that States parties, in applying measures under both categories of intervention, should take the utmost care to ensure that the child’s human rights and legal safeguards are fully respected and protected.

Diversions should be available to children in child justice systems and when judicial proceedings are initiated by the competent authority, the principles of a fair and just trial are applicable.⁸² The child justice system should provide ample opportunities to apply social and educational measures, and to strictly limit the use of deprivation of liberty. Access to diversions should not be limited to only minor offences but diversions should also be available for serious offences where appropriate.⁸³

Article 17 of the 1961 European Social Charter embeds the need to ensure protection of economic and social rights and access to social and economic protection for children, and obliges Contracting States to take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services.

International Commission of Jurists (ICJ) v. the Czech Republic, decision on the merits of the European Committee of Social Rights of 20 October 2020, complaint no. 148/2017

In its decision on the merits on the collective complaint submitted by the International Commission of Jurists (ICJ) with the support of the Forum for Human Rights against the Czech Republic, the Committee found that the unavailability of any alternatives to court proceedings for children below the age of criminal responsibility is in breach of Article 17 of the 1961 European Social Charter.

The Committee noted “that according to the Committee on the Rights of the Child, **exposure to the criminal justice system has been demonstrated to cause harm** to children, limiting their chances of becoming responsible adults.”⁸⁴ The Committee therefore concluded that the right of the child to social protection under Article 17 of the European Social Charter included “the obligation to develop and take measures to **reduce the especially harmful effects of contact with the justice system** and to ensure that the danger posed to the child’s wellbeing and development by such contact is limited. One of the primary ways in which this can be achieved is through the diversion of children away from formal processes and into effective diversionary programmes in line with international standards on the rights of the child.”⁸⁵

The European Committee on Social Rights also held that since children below the age of criminal responsibility “are not always able to understand and follow pre-trial proceedings”, “it cannot (...) be assumed that they are able to defend themselves in this context. The Committee stresses that **children below the age of criminal responsibility should be assisted by a lawyer in order to understand their rights and the procedure applied to them**, so as to prepare their defence. Moreover, they should in all cases be able to **obtain legal assistance from the outset of the proceedings** and especially during questioning by the police. States should

⁷⁸ The minimum age of criminal responsibility in the Czech Republic.

⁷⁹ The right of mothers and children to economic and social protection.

⁸⁰ International Commission of Jurists (ICJ) v. the Czech Republic, Decision of the European Committee of Social Rights on the merits, Complaint no. 148/2017, 20 October 2020, para. 85.

⁸¹ CRC Committee, [General Comment No. 24 on children’s rights in the child justice system](#), UN Doc. CRC/C/GC/24 (2019), para. 14.

⁸² *Ibid.*, paras. 13 and 19.

⁸³ *Ibid.*, para. 16.

⁸⁴ [International Commission of Jurists \(ICJ\) v. the Czech Republic](#), Decision of the European Committee of Social Rights on the merits, Complaint no. 148/2017, 20 October 2020, para. 116.

⁸⁵ *Ibid.*, para. 120.

arrange for the child to be assisted by a lawyer where the child or the legal guardian has not arranged such assistance. (...) The Committee considers that **legal assistance is necessary** in order for children to avoid self-incrimination and fundamental to ensuring that a child is not compelled to give testimony or to confess or acknowledge guilt.”⁸⁶ (emphasis added)

- > **Children in conflict with the law must be treated in a manner consistent with the promotion of the child’s sense of dignity and worth.**
- > **Children below the age of criminal responsibility should be ensured the same fair and just treatment as children at or above the minimum age of criminal responsibility.**
- > **Public authorities should promote the establishment of measures for dealing with children without resorting to judicial proceedings, whenever appropriate. Diversions should be available to children in child justice systems, both children below and above the age of criminal responsibility.**
- > **Access to diversions should not be limited to only minor offences but diversions should be available also for serious offences where appropriate.**

2.3 Procedural rights and guarantees

The birth of a separate criminal justice system for children in the late nineteenth and early twentieth centuries in many countries, led by undeniably humanistic motives, was unfortunately accompanied by denial of procedural safeguards available to adults and necessary to the fair administration of justice.⁸⁷ These were viewed as unimportant in a system which aims to protect children instead of punishing them. The emergence of the modern human rights paradigm in the second half of the 20th century, however, gradually led to intensified criticism of these welfare juvenile justice systems, and human rights law eventually required that children in conflict with the law be provided with appropriate procedural safeguards and guarantees. Children in conflict with the law should have additional guarantees beyond the traditional criminal justice safeguards that are available to adults. The inherent situation of children means that enhanced procedural protections are required during the whole proceedings.⁸⁸

The UN High Commissioner for Human Rights has emphasised that “[h]uman rights norms and standards relevant to ensuring access to justice for children are set out in a series of legally binding and non-binding international and regional human rights instruments. [...] Elements of access to justice for children in particular include the rights to relevant information, an effective remedy, a fair trial, to be heard, as well as to enjoy these rights without discrimination.”⁸⁸

Appropriate procedural safeguards for children in all decision-making affecting them are also an integral part of the child’s right to have their best interests taken as a primary consideration. The CRC Committee has emphasized that “[t]o ensure the correct implementation of the child’s right to have their best interests taken as a primary consideration, some child-friendly procedural safeguards must be put in place and followed. As such, the concept of the child’s best interests is a rule of procedure [...]”.⁸⁹

The procedural rights guaranteed under international human rights law have specific application in cases involving children and should be adapted to them. For instance, what are not unduly prolonged

⁸⁶ Ibid., paras. 93 and 99. See also CRC Committee, *General Comment No. 24 on children’s rights in the child justice system*, UN Doc. CRC/C/GC/24 (2019), para. 58.

See the amicus curiae of the League of Human Rights submitted to the European Court of Human Rights in the case of *Blokhin v. Russia* (see above), as summarised by the Grand Chamber. *Blokhin v. Russia*, ECtHR, GC, Application No. 47152/06, Judgment of 23 March 2016, para. 192.

⁸⁷ Report of the UN High Commissioner for Human Rights on Access to justice for children, UN Doc. A/HRC/25/35, 16 December 2013, para.8.

⁸⁸ CRC Committee, *General Comment No. 14 on the right of the child to have their best interests taken as a primary consideration* (art. 3, para. 1), para. 85.

⁸⁹ In its *General Comment No. 14*, the CRC Committee has emphasised that: “The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible. The timing of the decision should, as far as possible, correspond to the child’s perception of how it can benefit him or her, and the decisions taken should be reviewed at reasonable intervals as the child develops and their capacity to express their views evolves.” - CRC Committee, *General Comment No. 14 on the right of the child to have their best interests taken as a primary consideration* (art. 3, para. 1), UN Doc. CRC/C/GC/14 (2013), para. 93.

proceedings for an adult, might be too long for a child.⁹⁰ What is not cruel, inhuman or degrading treatment or punishment for an adult, might be for a child.⁹¹

According to the Council of Europe Guidelines, “child-friendly justice” refers to justice systems which guarantee the respect and the effective implementation of all children’s rights, giving due consideration to the child’s level of maturity and understanding and to the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.⁹²

The CRC Committee highlights in its General Comment no. 24, that in order to effectively participate in the proceedings, a child needs to be supported by all those involved in the administration of the justice system. “Proceedings should be conducted in a language the child fully understands or an interpreter is to be provided free of charge. Proceedings should be conducted in an atmosphere of understanding to allow children to fully participate. Developments in child-friendly justice provide an impetus towards child-friendly language at all stages, child-friendly layouts of interviewing spaces and courts, support by appropriate adults, removal of intimidating legal attire and adaptation of proceedings, including accommodation for children with disabilities.”⁹³

Below we list and explain some of the most important procedural safeguards. The list should not be considered as exhaustive.

2.3.1 Access to legal assistance

Lawyers play a crucial role in ensuring respect, protection and access to rights of all persons, including, necessarily, children. Availability of effective legal assistance often determines whether or not a person can fully access the relevant proceedings or participate in them in a meaningful way. It is typically a requisite for the right to a fair hearing, and is always necessary for criminal trials or those proceedings which may entail a deprivation of rights.

A lawyer representing a child should explain to the child their rights, the relevant procedures, and ensures that their views are heard and taken due account of. Therefore, lawyers need to be specifically informed and trained on children’s rights and on working with children.

In its General Comment no. 24 the CRC Committee underlined the importance of legal assistance for children in conflict with the law and expressed clearly that “other appropriate assistance” should only remain reserved for diversions and for systems that do not result in convictions, criminal records or deprivation of liberty. In all other contexts, children in conflict with the law should be provided with legal assistance.⁹⁴ The Committee further emphasized that legal assistance should be guaranteed to

⁹⁰ In its *General Comment no. 14*, the CRC Committee has emphasised that: “The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible. The timing of the decision should, as far as possible, correspond to the child’s perception of how it can benefit him or her, and the decisions taken should be reviewed at reasonable intervals as the child develops and their capacity to express their views evolves.” - CRC Committee, *General Comment No. 14 on the right of the child to have their best interests taken as a primary consideration* (art. 3, para. 1), UN Doc. CRC/C/GC/14 (2013), para. 93.

⁹¹ According to the case-law of the European Court of Human Rights the assessment of the minimum level of severity in terms of Article 3 (absolute right to freedom from torture or inhuman or degrading treatment or punishment) “is a relative one, depending on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.” – cited according to *Blokhin v. Russia*. In the case of *Blokhin v. Russia* the European Court of Human Rights stressed the applicant’s young age and disability when assessing if there was a violation of Article 3 of the European Convention on Human Rights and Fundamental Freedoms. – *Blokhin v. Russia*, ECtHR, GC, Application No. 47152/06, Judgment of 23 March 2016, para. 148.

The CRC has given examples of torture and inhuman or degrading treatment or punishment in its *General Comment no. 13 on the right of the child to freedom from all forms of violence*: “This [torture and inhuman or degrading treatment or punishment] includes violence in all its forms against children in order to extract a confession, to extrajudicially punish children for unlawful or unwanted behaviours, or to force children to engage in activities against their will, typically applied by police and law-enforcement officers, staff of residential and other institutions and persons who have power over children, including non-State armed actors. Victims are often children who are marginalized, disadvantaged and discriminated against and who lack the protection of adults responsible for defending their rights and best interests. This includes children in conflict with the law, children in street situations, minorities and indigenous children, and unaccompanied children. The brutality of such acts often results in life-long physical and psychological harm and social stress.” – UN Committee on the Rights of the Child, *General Comment no. 13 on the right of the child to freedom from all forms of violence*, CRC/C/GC/13, (2011), para. 26.

⁹² *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, adopted on 17 November 2010, II. (c).

⁹³ CRC Committee, *General Comment No. 24 on children’s rights in the child justice system*, UN Doc. CRC/C/GC/24 (2019), para. 46.

⁹⁴ *Ibid.*, paras. 51 - 52. See also, Catalina Devandas Aguilar, UN Special Rapporteur on the rights of persons with disabilities, *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, August 2020, Principle 6, p. 20, para.6.1. These principles and guidelines were also endorsed by the International Commission of Jurists, p. 5.

the child “from the outset of the proceedings, in the preparation and presentation of the defence, and until all appeals and/or reviews are exhausted.”⁹⁵ That includes children facing criminal charges before judicial, administrative or other public authorities and being deprived of liberty.⁹⁶

Similar standards have been enunciated by the European Court of Human Rights in its case law regarding State obligations under the ECHR. The Court held that children in conflict with the law find themselves in a particularly vulnerable position in criminal investigation and, in particular, during any questioning by the police. Thus, “the authorities must take steps to reduce, as far as possible, the child’s feelings of intimidation and inhibition and ensure that he has a broad understanding of the nature of the investigation, of what is at stake for him, including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent.”⁹⁷

An essential step in this regard is the provision of assistance by a lawyer from the initial stages of police questioning, while the task of the lawyer 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 seek 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 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 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.”⁹⁸

The right to be provided with an assistance by a lawyer during police questioning applies not only to children with the capacity for criminal responsibility, but also to children below the age of criminal responsibility if they are subjected to formal proceedings and may be inflicted severe measures following the suspicion of having committed an unlawful act. The European Court of Human Rights emphasised that “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.”⁹⁹

The assistance by a lawyer should be ensured for children, since children in conflict with the law should not be expected to know their right to seek legal counsel or understand the consequences of failing to do so.¹⁰⁰ Furthermore, the assistance of a lawyer must not be only formal. In one case, the European Court of Human Rights found that the “manifest failure” of a child’s lawyer to represent him properly, coupled with factors such as the child’s age and the seriousness of the charges, should have led the trial court to consider that the applicant urgently required adequate legal representation.¹⁰¹

Both the CRC and the ECHR standards show that to ensure fair trial for children in conflict with the law it is necessary to provide them with legal assistance from the very first contact with the child justice system. This is also the position of the European Committee of Social Rights as set out in its decision on the merits of the collective complaint of *International Commission of Jurists (ICJ) v. the Czech Republic* (see, above).

International Commission of Jurists (ICJ) v. the Czech Republic, decision on the merits of the European Committee of Social Rights of 20 October 2020, complaint no. 148/2017

The Committee found a violation of the right of the child to social protection on two grounds: i) the State’s failure to provide these children with obligatory legal assistance from the very first contact with law enforcement authorities, especially during the police questioning; and ii) the State’s failure to provide these children with diversions and restorative justice measures.

The Committee reiterated that the vulnerability of children below the age of criminal responsibil-

⁹⁵ CRC Committee, *General Comment No. 24 on children’s rights in the child justice system*, UN Doc. CRC/C/GC/24 (2019), para. 50.

⁹⁶ *Ibid.*, para. 49.

⁹⁷ *Blokhin v. Russia*, para. 195; See also, *Panovits v. Cyprus*, ECtHR, Application no. 4268/04, Judgment of 11 December 2008, para.67; *Martin v. Estonia*, ECtHR, Application no.35985/09, Judgment of 30 May 2013, para. 92; *S.C. v. the United Kingdom*, ECtHR, Application no. 60958/00, Judgment of 15 June 2004, para. 9.

⁹⁸ *Blokhin v. Russia*, para. 198; See also, *Panovits v. Cyprus*, paras. 64-66.; *Salduz v. Turkey*, ECtHR, GC, Application no. 36391/02, Judgement of 27 November 2008, paras. 50-55.

⁹⁹ *Blokhin v. Russia*, paras. 50-55.

¹⁰⁰ *Panovits v. Cyprus*, para. 84; *Salduz v. Turkey*, para. 60 and para. 63.

¹⁰¹ *Güveç v. Turkey*, ECtHR, Application no. 70337/01, Judgment of 20 January 2009, para. 131.

ity must not be considered as a legitimate reason to deprive them of meaningful participation in the proceedings or subject them to less beneficial treatment than criminally responsible children and adults. On the contrary, States must take effective measures to compensate for this vulnerability and enable the child to practically and effectively participate in the proceedings as well as to access the non-judicial options of dealing with the consequences of an unlawful act.

Female lawyers should be available to represent girls if they so request or if the case or subject matter is of a nature to make such representation important.¹⁰²

- > **From the earliest contact of the child with the child justice system, including from the stage of questioning by the police and including children below the age of criminal responsibility, every child should have access to legal assistance.**
- > **In order for a lawyer to explain their rights and the relevant procedures to the child, and to ensure that their views are heard and taken due account of, lawyers need to be specifically informed and trained on children's rights and on working with them.**
- > **Female lawyers should be available to represent girls, if so requested or if the case or subject matter is of a nature to make such representation important.**

2.3.2 Access to legal aid

Children should have access to legal aid so that they can access legal assistance at no cost. The best interests of the child should be a primary consideration in all legal aid decisions affecting children. Children who are detained should be given legal aid. "The Committee recommends that States provide effective legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities."¹⁰³

This principle has also been affirmed in Principle 11 of the United Nations [Principles and Guidelines on Access to Legal Aid](#) in Criminal Justice Systems.¹⁰⁴

The Global Study on Children Deprived of Liberty of 2019 also recommended free legal aid for children in criminal procedure.¹⁰⁵

- > **Legal aid should be available to all children from the earliest contact with the justice system.**

2.3.3 Access to information

As mentioned above in the context of the right to legal assistance, the child's right to a fair trial must be not only formal but practical and effective. To this end, children need to be provided with adequate information in an understandable format for the child relating to: 1) the subject matter of the proceedings (suspicion or charges against them); 2) the course of the proceedings and their procedural rights in them; and 3) the possible outcomes of the proceedings and their rights in the field.

Article 40 (2) (b) (ii) of the CRC explicitly only guarantees the child the right to be informed promptly and directly of the charges against them, and, if appropriate, through their parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of their defence. However, this is not exhaustive of the State's obligation to provide the child with adequate and understandable information about other above-mentioned aspects of the criminal proceedings

¹⁰² [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#), June 2013, Guideline 9 — Implementation of the right of women to access legal aid.

¹⁰³ CRC Committee, [General Comment No. 24](#) on children's rights in the child justice system, UN Doc. CRC/C/GC/24 (2019), para. 51.

¹⁰⁴ [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#), Guideline 11.

¹⁰⁵ [Final summary report on the UN Global Study on Children Deprived of Liberty](#), A/74/136, 11 July 2019, para. 107. The Global Study was conducted by Professor [Manfred Nowak, who has been appointed as Independent Expert](#) to lead the Study. He submitted the final summary report to the UN General Assembly and presented it on 8 October, 2019 ([Resolution 72/245](#), § 37). He and his team presented a comprehensive version of the [Global Study](#) to the UN in Geneva on 19 November 2019. The ICJ was part of the non-governmental organization panel for the study, led by Defence for Children International and Human Rights Watch, together with 170 other non-governmental organizations working directly or indirectly on children's deprivation of liberty. The Study consists of six thematic areas in which children live deprived of liberty: juvenile justice, detention with their primary caregivers, for migration-related reasons, in institutions, in the context of armed conflict or on national security grounds. The Study recommended that States establish child justice systems with specialized structures and mechanisms offering free legal aid to all children regardless of age and family income, effective procedural safeguards, adequate, accessible and high-quality diversion and non-custodial solutions at all stages of the proceedings.

and their possible outcomes.

Provision of adequate and understandable information is an integral part of the child's participation.¹⁰⁶ As the CRC Committee explained, "[t]he realization of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child's parents or guardian. The child must also be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the precondition of the child's clarified decisions."¹⁰⁷ It is obvious that the decisions may have both a procedural or a substantive nature.

Children thus should be adequately informed, in language that they understand, about the process of the individual assessment, to have an effective and practical opportunity to really participate in it. Children should know for what purposes the individual assessment is carried out, what is their role in the process of individual assessment and how they can participate in it. Children should have access to information gathered in relation to them and to their situation and have the opportunity to comment on it. The individual assessment report should be therefore available to the child and there should be space for the child to provide their views.

All the information provided to children should be age-appropriate and adapted to the needs of children. It should be presented in formats, manners and language that children understand. The right to translation is an important element of the right to information.

- > Children and their parents/legal guardians should be promptly and directly informed about the charges against them, about their rights and remedies. They should have access to information in an accessible format gathered on them in the individual assessment and have the opportunity to comment on it. These comments should be taken into consideration.**

2.3.4 Right to interpretation

The right to interpretation is safeguarded by several international instruments, including by Article 14.3.f ICCPR and Article 6.3.e ECHR. The CRC in Article 40(2)(b)(vi) embeds the right to free assistance of an interpreter. The Committee has further identified the scope of this right as including "a child who cannot understand or speak the language used in the child justice system ha[ving] the right to the free assistance of an interpreter at all stages of the process. Such interpreters should be trained to work with children".¹⁰⁸ Further, "States parties should provide adequate and effective assistance by well-trained professionals to children who experience communication barriers".¹⁰⁹ The Committee thus adopted a wide approach to the right to interpretation enabling it to cover not only children speaking foreign or minority languages, but also children who face barriers in communication due to other reasons. This establishes a basis for all children to be provided with the necessary procedural accommodations to understand the criminal proceedings and be understood in them.

It is important that interpretation is not only available to children during meetings with the authorities but also for meetings between the child and their legal representative and other relevant professionals participating in the criminal proceedings.

- > Every child in conflict with the law has, from the earliest moment of contact with the justice system, a right to a free interpreter for communication with the authorities, with their lawyer or guardian. The right to interpretation should be understood broadly to cover not only children speaking foreign or minority languages but also children who face communication barriers due to other reasons and need support of another person to understand and be understood.**

2.4 Taking wider account of the rights of the child

In addition to the procedural safeguards described above, the rights-based approach has other important consequences for treating children in conflict with the law. It requires assessing the situation of the child from the perspective of their rights. That does not mean that the child justice system may

¹⁰⁶ In its General Comment No. 12, the CRC Committee has stressed that „a widespread practice has emerged in recent years, which has been broadly conceptualized as “participation”, although this term itself does not appear in the text of article 12. This term has evolved and now is widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.” – CRC Committee, [General Comment No. 12 on the right of the child to be heard](#), UN Doc. CRC/C/GC/5 (2009), para. 3.

¹⁰⁷ *Ibid.*, para. 25.

¹⁰⁸ CRC Committee, [General Comment No. 24 on children's rights in the child justice system](#), UN Doc. CRC/C/GC/24 (2019), para. 64.

¹⁰⁹ *Ibid.*, para. 65.

never intervene in the child's life, even without the child's consent, but the intervention should not exacerbate any violations of rights the child has already experienced, in accordance with the principles of interdependence and indivisibility of human rights.¹¹⁰ The violations may have a structural nature and relate to the State's failure to provide the child with basic conditions of a decent life (see above part 2.1.4), underlying and social determinants of health,¹¹¹ and comply with its other obligations deriving from the child's rights.

The CRC Committee has highlighted the need in certain situations for structural action affecting the child's environment, especially in its General Comment no. 21 on children in street situations. The Committee **calls for structural actions that will provide children with opportunities to exercise their rights on an equal basis with others** even if they remain in street situations. That means, for instance, searching for new – non-standard – education options that could make education available to children in street situations¹¹² or eliminating barriers these children may face in the access to health services.¹¹³ The Committee underscores the obligation that a child's rights should be ensured by adaptation of their environment (see above the concept of inclusive equality) and not by the "adaptation" of the child.

The potential of the child justice system for structural actions may be limited, since it concerns cases of individual children and usually does not have the power to impose obligations on anyone by the defendant and, in some national jurisdictions, their parents or caregivers. Nevertheless, **the understanding of the structural dimensions of the child's case is important since it prevents an action against the child that would exacerbate the structural human rights violations the child has been already facing.**

Deprivation of liberty

Under the ICCPR and the ECHR, every person, including children, has the right to liberty and security of person¹¹⁴ and must not be subjected to arbitrary arrest or detention, or deprived of their liberty except on grounds and in accordance with procedures established by law.¹¹⁵ Anyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.¹¹⁶

Everyone who is arrested shall be informed promptly, in a language which they understand, of the reasons for his arrest and of any charge against them.¹¹⁷

Additional safeguards against arbitrary detention apply to children and other individuals with specific vulnerabilities, who, to be able to benefit from such protection, should have access to an assessment of their vulnerability and be informed about respective procedures.¹¹⁸ Lack of active steps and delays in conducting the vulnerability assessment may be a factor in raising serious doubts as to the authorities' good faith.¹¹⁹

Detention of persons rendered vulnerable by their age, state of health or past experiences may, depending on the individual circumstances of the case, amount to cruel, inhuman or degrading treatment.¹²⁰ Children in particular may be among such persons in vulnerable situations.¹²¹

All persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person.¹²² Accused children must be separated from adults and brought as speedily as possible for adjudication.¹²³ Children should be accorded treatment appropriate to their

¹¹⁰ CRC Committee, *General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), UN Doc. CRC/GC/2003/5, para. 6.

¹¹¹ UN Committee on Economic, Social and Cultural Rights has given these examples of the underlying determinants of health: "access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health." – UN, Committee on Economic, Social and Cultural Rights, *General Comment no. 14 on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4 (2000), para. 11.

¹¹² CRC Committee, *General Comment No. 21 on children in street situations*, UN Doc. CRC/C/GC/21 (2017), para. 54.

¹¹³ *Ibid.*, para. 53.

¹¹⁴ Article 5 ECHR; Article 9 ICCPR; Article 6 EU Charter.

¹¹⁵ Article 9.1 ICCPR.

¹¹⁶ Article 9.4 ICCPR.

¹¹⁷ Article 5.2 ECHR.

¹¹⁸ See *Thimothawes v. Belgium*, ECtHR, Application No. 39061/11, Judgment of 18 September 2017.

¹¹⁹ See *Abdullahi Elmi and Aweys Abubakar v. Malta*, ECtHR, Applications Nos. 25794/13 and 28151/13, Judgment of 22 November 2016.

¹²⁰ This is a violation of Article 3 ECHR; Article 7 ICCPR, UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

¹²¹ *Rahimi v. Greece*, ECtHR, Application No. 8687/08, Judgment of 5 April 2011; *Popov v. France*, ECtHR, Applications Nos. 39472/07 and 39474/07, Judgment of 19 January 2012.

¹²² Article 10.1 ICCPR.

¹²³ Article 10.2.b ICCPR.

age and legal status.¹²⁴

Article 37 of the CRC contains important principles on deprivation of liberty, the procedural rights of every child deprived of liberty and provisions concerning the treatment of and conditions for children deprived of their liberty. The correct application of this provision depends on the right understanding of deprivation of liberty. Especially in the context of child justice system it is necessary to note that the deprivation of the child's liberty may take various forms and pursue various objectives. The deprivation of the child's liberty should not be understood narrowly to cover only the child's detention for punitive reasons, but also the situations when the child is placed in a specific environment for "protective" or "educational" reasons. This conclusion is in line with the recent UN Global Study on children deprived of liberty which has relied on the definition formulated by the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment¹²⁵ and the UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules):¹²⁶

"The term "deprivation of liberty" signifies any form of detention or imprisonment or the placement of a child in a public or private custodial setting which that child is not permitted to leave at will, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence, (...)."

This definition is broad enough to cover the child's placement for both penal as well as welfare reasons. The same position on the scope of deprivation of liberty has been taken by the UN Human Rights Committee and the European Court of Human Rights.¹²⁷

In its General Comment 24 the CRC Committee has drawn the attention of States parties to the 2018 report of the UN Special Rapporteur on the right to health, on deprivation of liberty and the right to health. The Special Rapporteur adopted a broad definition of deprivation of liberty on mental health grounds.¹²⁸ In addition, he defined confinement as "a term widely used in health and social welfare settings to indicate the restriction of an individual within a limited area, following medical or social-welfare advice".¹²⁹ Referring to the UN Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court,¹³⁰ the Special Rapporteur stressed that some forms of confinement, including retention in hospitals and in psychiatric and other medical facilities, might constitute de facto deprivation of liberty.¹³¹

In this context, the Special Rapporteur refuted the notion that deprivation of liberty or confinement could ever serve a therapeutic purpose: "Overall, centres of detention or confinement are not therapeutic environments. In a previous report, the Special Rapporteur identified the underlying determinants of the right to mental health, including the creation and maintenance of non-violent, respectful and healthy relationships in families, communities and society at large.¹³² In detention or confinement, where the person is surrounded by staff tasked with restricting freedom, it is difficult to establish these type of relationships, which hinder the full and effective realization of the right to mental health.¹³³ Even with good faith efforts to establish a strong culture of respect and care, violence and humiliation usually prevails, adversely affecting the development of health relationships."¹³⁴

The recent UN Global Study on children deprived of liberty¹³⁵ held a very similar position when designating the deprivation of the child's liberty as "deprivation of childhood".¹³⁶ Also, the UN Global Study

¹²⁴ Article 10.3 ICCPR.

¹²⁵ Optional protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) Article 4.2.

¹²⁶ UN *Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)*, Adopted by General Assembly resolution 45/113 of 14 December 1990, Article 11 (b).

¹²⁷ UN Human Rights Committee, *General Comment no. 35 on Article 9 (Liberty and security of person)*, CCPR/C/GC/35 (2014), paras. 5 and 6.

¹²⁸ "Deprivation of liberty is a legally grounded term, and involves severe restriction of motion within a space that is narrower than that of other forms of interference with liberty of movement. It should be based on a judicial sentence, and is imposed without free consent. It is not prohibited per se, but such detention must be lawful and not arbitrary. Deprivation of liberty takes many forms, including police custody, remand detention, imprisonment after conviction, house arrest and administrative detention, as well as both involuntary hospitalization and institutional custody of children resulting from legal proceedings." - Dainius Pūras, UN Special Rapporteur on the right to health, *Deprivation of liberty and the right to health*, UN Doc. A/HRC/38/36, 10 April 2018, para. 4.

¹²⁹ *Ibid.*, para. 5.

¹³⁰ UN Working Group on Arbitrary Detention (WGAD), *Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, UN Doc. A/HRC/30/37, 29 April 2015, para. 9.

¹³¹ Dainius Pūras, UN Special Rapporteur on the right to health, *Deprivation of liberty and the right to health*, UN Doc. A/HRC/38/36, 10 April 2018, para. 6.

¹³² Dainius Pūras, UN Special Rapporteur on the right to health, *Right to mental health*, UN Doc. A/HRC/35/21, 28 March 2017.

¹³³ Peter Stastny, "Involuntary psychiatric interventions: a breach of the Hippocratic oath?" *Ethical Human Sciences and Services*, vol. 2, No. 1 (spring, 2000).

¹³⁴ Dainius Pūras, UN Special Rapporteur on the right to health, *Deprivation of liberty and the right to health*, UN Doc. A/HRC/38/36, 10 April 2018, para. 33.

¹³⁵ *Final summary report on the UN Global Study on Children Deprived of Liberty*, A/74/136, 11 July 2019.

¹³⁶ *Ibid.*, para. 3.

disagreed that deprivation of liberty could serve a therapeutic or welfare purpose: "Research for the study and the Independent Expert's first-hand experience, as a former Special Rapporteur on torture, clearly indicate that children should not be institutionalized to receive care, protection, education, rehabilitation or treatment, as it cannot substitute for the benefits of growing up in a family or in a family-type setting within the community."¹³⁷ The study's recommendation were for States to respect and protect the rights of children by drastically reducing the number of children deprived of liberty. It recommended diversion, de-institutionalisation, eradicating migration related detention and applying other non-custodial solutions instead of detaining children.

Also, the CRC Committee recommended that no child be deprived of liberty, unless there were genuine public safety or public health concerns, and encouraged State parties to fix an age limit below which children might not legally be deprived of their liberty, such as 16 years of age. The Committee further emphasized that "[e]very child deprived of their liberty has the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of their liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."¹³⁸

¹³⁷ *Ibid.*, para. 65.

¹³⁸ CRC Committee, [General Comment No. 24](#) on children's rights in the child justice system, UN Doc. CRC/C/GC/24 (2019), para. 89.

III. The right of the child to individual assessment

As indicated above, when in contact with the child justice system, children must have all their rights respected and have access to all their rights including procedural rights. The best interests of the child, non-discrimination and the right to be heard are crucial guiding principles that must govern all actions concerning children throughout the child justice system.

At the same time, every child is different, has varying needs and vulnerabilities and these have to be taken into consideration as well, on an individual basis. Therefore, a prompt individual assessment **mapping the child's specific needs** for protection, education, training and social integration¹³⁹ has to be undertaken in order to best adapt the proceedings to the child's specificities and needs. **The active involvement of the child in the individual assessment** is also an indispensable precondition of their practical and effective participation in the whole proceedings.

1. EU law and Individual assessment in the Directive 2016/800

For States of the European Union, the EU Charter on Fundamental Rights provides among other things that children have the right to protection and care, to express their views freely and their best interests should be a primary consideration in all actions by public authorities and private institutions.¹⁴⁰ All EU legislation should be in conformity with the Charter.

In May 2016, the European Parliament and the Council of the European Union adopted the [*Directive \(EU\) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings*](#) (hereinafter the Directive). The Directive is part of the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings across Europe¹⁴¹ and is one of six directives to have come into force since 2010. It is legally binding on European Union member States and since June 2019 it should have been transposed into national laws and regulations.¹⁴²

The aim of the Directive is to ensure effective protection throughout the EU of the rights of children who are suspected or accused of having violated the law.¹⁴³ Important underpinnings of the Directive are the recognition of children's (procedural) rights and safeguards and encouraging trust among member States in that regard.¹⁴⁴

The Directive explicitly guarantees the 'right to an individual assessment'. Under Article 7, children who are suspects or accused in criminal proceedings should be subject to an individual assessment that allows a comprehensive view of the child's needs, maturity and circumstances.¹⁴⁵

The assessment should be carried out in a timely manner and at the earliest appropriate stage of the proceedings,¹⁴⁶ preferably upon arrest and before the child appears in court, and with the close involvement with the child of qualified personnel, if possible, based on a multidisciplinary approach.¹⁴⁷ The assessment and its report should be the responsibility of trained professionals, such as social workers, psychologists, police and probation officers. Lawyers, parents and legal representatives can also be involved in the procedure.

In the preamble to the Directive, it is noted that the individual assessment should, in particular, take into account the personality and maturity of the child, the economic, social and family background of the child, and any specific vulnerabilities they might have, such as learning disabilities and communication difficulties.¹⁴⁸ In cases where the assessment is derogated from, it must be proven that this is in accordance with the best interests of the child.¹⁴⁹

The individual assessment should be adapted according to the circumstances of the case, such as the

¹³⁹ Directive 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, EU, Official Journal L 132/1, 21/05/2016, Article 7, para. 1.

¹⁴⁰ Article 24.1-2 EU Charter.

¹⁴¹ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01.

¹⁴² With the exception of the UK, Ireland and Denmark which did not take part in the adoption of the Directive and are not bound by it or subject to its application. See Directive (EU) 2016/800/EU, recitals 69-70.

¹⁴³ The Directive also applies to persons who have subsequently reached the age of 18 during the proceedings and to whom the application of the Directive or certain provisions thereof, in the light of all circumstances of the case, is appropriate. When the person concerned has reached the age of 21, Member States may decide not to apply the Directive. (Directive (EU) 2016/800, Article 2.3).

¹⁴⁴ Proposal for a directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, 2013/0408 (COD), 27/11/2013; Directive (EU) 2016/800, recital 67.

¹⁴⁵ Directive (EU) 2016/800, Article 7.1 and 7.2.

¹⁴⁶ Directive (EU) 2016/800, Article 7.5.

¹⁴⁷ Directive (EU) 2016/800, Article 7.7.

¹⁴⁸ Directive (EU) 2016/800, recital 36.

¹⁴⁹ Directive (EU) 2016/800, Article 7.9.

seriousness of the alleged offence and the measures that could be taken, and a recently conducted individual assessment may be used if it is updated.¹⁵⁰

Article 7(4) of the Directive outlines that the individual assessment serves the purpose of:

- determining whether any specific measures to the benefit of the child is to be taken;
- assessing the appropriateness and effectiveness of any preliminary measures;
- assisting in taking any decisions in criminal proceedings, including sentencing.

The assessment can thus be used for evaluating if and to what extent children would need special measures during the criminal proceedings, the extent of their criminal responsibility and the appropriateness of a particular penalty or educative measure.¹⁵¹

2. Individual assessment in International human rights standards

The right of children in conflict with the law to an individual assessment is enshrined in several other international instruments as well. First, the **International Covenant on Civil and Political Rights** (ICCPR) provides that in the case of juvenile persons, procedures should consider the age of the child and the desirability for their reintegration.¹⁵² In the particular case of children, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), recommend **considering the background and circumstances in which the child is living** before a competent authority provides a final disposition. To this end, adequate social services should be available to deliver reports. Moreover, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty ('The Havana Rules') emphasise that the child needs to be interviewed as soon as possible after the admission to a place where they are detained, and a psychological and social report must be prepared identifying any factors relevant to the specific type and level of care and programmes that are required.¹⁵⁴ According to the CRC Committee,¹⁵⁵ "individual assessments of children (...) are encouraged."

At the level of the Council of Europe, the acknowledgement of individual assessment and adapted procedures started with a series of judgments of the European Court of Human Rights (ECtHR) relating to the right to a fair trial for minors.¹⁵⁶ As part of this right, the Court evaluated whether the guarantees of the right of an accused to participate effectively were sufficiently safeguarded. In the specific cases of minors, in *T. and V. v. the United Kingdom* and *S.C. v. United Kingdom*, the Court established that procedures for the individual assessment are required steps to promote children's **understanding and effective participation during their criminal trial**. For this purpose, the child charged with an offence needs to be dealt with in a way that takes into account their age, level of maturity and intellectual and emotional capacities.¹⁵⁷ Furthermore, in the case of *Blokhin v. Russia*, the Court established that authorities must deal with full consideration of the age, level of maturity and intellectual and emotional capacities of the child from the first stage of their involvement in a criminal investigation.¹⁵⁸

The Council of Europe Recommendation CM/Rec (2008)11 requires individual assessment during the implementation of community sanctions and measures¹⁵⁹ and deprivation of liberty. In the latter case, institutions must implement an assessment system to place juveniles according to their educational, developmental and safety needs.¹⁶⁰

However, it should be noted that the cited Council of Europe Recommendation may not be fully compatible with the CRC and the UN Convention on the Rights of Persons with Disabilities. It is built on a medical model of disability rather than a human rights model with a disability rights perspective. This is well documented for instance by rule no. 57 stipulating that "juveniles who are suffering from mental illness and who are to be deprived of their liberty shall be held in mental health institutions" which contravenes Article 14 of the UN Convention on the Rights of Persons with Disabilities. From the CRC perspective even the requirement to establish a system of different institutions for children

¹⁵⁰ Directive (EU) 2016/800, recital 37.

¹⁵¹ Directive (EU) 2016/800, recital 35.

¹⁵² Article 14.4 ICCPR.

¹⁵³ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing rules)*, adopted by the General Assembly resolution 40/33 of 29 November 1985, A/RES/40/33, Article 16.1.

¹⁵⁴ *UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)*, adopted by General Assembly resolution 45/113 of 14 December 1990, Article 27.

¹⁵⁵ CRC Committee, *General Comment No. 24 on children's rights in the child justice system*, UN Doc. CRC/C/GC/24 (2019), para. 109.

¹⁵⁶ Article 6 ECHR.

¹⁵⁷ *T. v. the United Kingdom*, ECtHR, GC, Application No. 24724/94, Judgment of 16 December 1999, paras. 84-85; *V. v. the United Kingdom*, ECtHR, GC, Application No. 24888/94, Judgment of 16 December 1999, paras. 85-86; *S.C. v. United Kingdom*, ECtHR, Application No. 60958/00, Judgment of 15 June 2004, paras. 28-29.

¹⁵⁸ *Blokhin v. Russia*, para. 195.

¹⁵⁹ Rule 39.1, *Recommendation CM/Rec (2008)11*.

¹⁶⁰ *Ibid.*, Rule 61.

in order that children may be placed according to their educational, developmental and safety needs, may be problematic. The use of deprivation of liberty should be, according to the CRC, strictly limited and used only as a measure of last resort.¹⁶¹

States should therefore concentrate on strategies for how to reduce reliance on deprivation of liberty as a reaction to the unlawful behaviour of children rather than on establishing a system of specialized institutions in which children could be deprived of liberty “according to their needs”.¹⁶² For those children, who are, in compliance with the last resort rule, deprived of their liberty, it is necessary to concentrate on building the capacity of the facilities in which children are detained to accommodate the individual needs of every child who is placed therein.

The 2010 Council of Europe Guidelines on Child-friendly Justice also incorporated individual assessment as part of the general elements of child-friendly justice. The assessment is important for obtaining a comprehensive understanding of the child and information about the legal, psychological, social, emotional, physical and cognitive situation of the child.¹⁶³ Likewise, a common assessment framework should be established for a range of professionals working for and with children throughout all the proceedings that involve and affect the child.¹⁶⁴ As mentioned above, the crucial point about this framework is that it corresponds to the principles of the child rights-based approach.

Although not related exclusively to child justice, the Recommendation CM/Rec(2018) 8 concerning restorative justice in criminal matters should be mentioned as well, since the child justice systems compliant with the CRC should promote restorative justice as one of its fundamental principles.¹⁶⁵ The recommendation mentions “risk assessment” in the context of preparation for the use of restorative justice measures.¹⁶⁶ This risk assessment is then related to the requirement to ensure impartiality, dignity of the parties and their effective participation.¹⁶⁷

3. Individual assessment in the Czech Republic and Slovakia

3.1. Historical roots of individual assessment

In the Czech Republic and Slovakia, a form of individual assessment has been an integral part of child justice systems from their very birth at the turn of the 19th and 20th centuries. The Czech and Slovak juvenile justice systems have common roots and formed a single country prior to 1992.

¹⁶¹ CRC Committee, [General Comment No. 24 on children's rights in the child justice system](#), UN Doc. CRC/C/GC/24 (2019), paras. 19, 73, 77 and 82.

¹⁶² The CRC Committee has reminded in its General Comment no. 24 the report of the UN Special Rapporteur on the right to health, Dainius Pūras, on deprivation of liberty and the right to health. - CRC Committee, [General Comment No. 24 on children's rights in the child justice system](#), UN Doc. CRC/C/GC/24 (2019), para. 82. In the report, the UN Special Rapporteur has emphasized that “The scale and magnitude of children's suffering in detention and confinement call for a global commitment to the abolition of child prisons and large care institutions alongside scaled-up investment in community-based services. (...) The impact of penal institutions stretches far beyond the curtailment of children's physical freedom; their mental well-being and potential for psychological and cognitive growth are all deeply and negatively affected. Research evidence shows that immigration detention aggravates pre-existing trauma in children. For some it is the worst experience of their lives. (...) The solitary confinement of children and the degrading and humiliating conditions in detention have been described as mental violence. Many other daily forms of “organized hurt” are perpetrated through no less pernicious means. Children's creativity, communication, sleeping, waking, playing, learning, resting, socializing and relationships are compulsively controlled in detention and transgressions punished, while those administering the punishment enjoy impunity. Daily deprivations are often complemented by behavioural interventions in order to “treat” and “reform”. Such “treatment” approaches further entrench the idea of a troubled child “in need of repair”, ignoring that changes are needed to address right-to-health determinants, such as inequalities, poverty, violence and discrimination, especially among groups in vulnerable situations. This, in turn, leads to children living in forced confinement and fuels their struggles. Such oversimplified strategies are not in conformity with the right to health. Coping mechanisms employed by stressed and desperate children, which include assaults against themselves and others, are perceived by society and judicial and welfare systems as acts that are self-harming, anti-social and/or violent. The harm inflicted by institutions themselves too often goes unacknowledged. There can be no hesitation in concluding that the act of detaining children is a form of violence. The Convention on the Rights of the Child prohibits the use of detention as a default strategy. Looking forward, a child rights-based strategy must strengthen even further the presumption against detention of children with a view to abolition.” – Dainius Pūras, UN Special Rapporteur on the right to health, [Deprivation of liberty and the right to health](#), UN Doc. A/HRC/38/36, 10 April 2018, paras. 53, 62, 66 – 69.

¹⁶³ [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#), adopted on 17 November 2010, IV. A. 5. 16.

¹⁶⁴ *Ibid.*, IV. A. 5. 17.

¹⁶⁵ CRC Committee, [General Comment No. 24 on children's rights in the child justice system](#), UN Doc. CRC/C/GC/24 (2019), para. 74. The CRC Committee's General Comment no. 10 (2007) on children's rights in juvenile justice was even more explicit when it mentioned restorative justice as an integral part of the best interests of the child – See CRC Committee, [General Comment no. 10 on children's rights in juvenile justice](#), UN Doc. CRC/C/GC/10 (2007), para. 10.

¹⁶⁶ Rule 29, [Recommendation CM/Rec\(2018\) 8](#).

¹⁶⁷ See especially Rules 46 and 47, Recommendation CM/Rec(2018) 8: „Restorative justice should be performed in an impartial manner, based on the facts of the case and on the needs and interests of the parties. The facilitator should always respect the dignity of the parties and ensure that they act with respect towards each other. Domination of the process by one party or by the facilitator should be avoided; the process should be delivered with equal concern for all parties. Restorative justice services are responsible for providing a safe and comfortable environment for the restorative justice process. The facilitator should take sufficient time to prepare the parties for their participation, be sensitive to any of the parties' vulnerabilities and, if necessary to ensure the safety of one or more parties, discontinue restorative justice.”

The foundations of the specific systems for children and juveniles who were suspected of, charged with or found guilty of an unlawful act, defined by the criminal law, were laid by the Act no. 48/1931 Coll., on Criminal Justice for Children [o trestním soudnictví nad mládeží], adopted in and effective since 1931.

Taking into account the individual circumstances of the child was one of the principles of the contemporary systems of criminal law designated specifically for children. The purported aim was to find the most suitable measure for the child that would contribute to their re-education. In the initial iterations of child justice systems in the country, the individual assessment was directly connected with positivism and encouraging the development of positivist sciences focused on the individual – medicine, including psychiatry, psychology, pedagogy, etc.

The requirement of individual assessment was set forth already by the Act no. 48/1931 Coll. The Act specifically stipulated that:

“(1) In criminal proceedings all the personal, family and property circumstances of the juvenile as well as all other circumstances relevant to the court’s consideration on what measure should be inflicted (§ 5, section 3) need to be assessed in a timely way and as thoroughly as possible. The court has to demand the report on these circumstances particularly from the guardianship court as well as to ask whether it is informed about the cases in which the court refrained from punishing the juvenile or from prosecuting him or her. (2) In order to find out the circumstances of the juvenile, the court may interrogate persons whose interrogation it considers as desirable either informatively or as witnesses. Persons who are entitled to reject the testimony due to their relation to the accused, are not allowed to do so if only personal, family and property circumstances of the juvenile are to be determined.”¹⁶⁹

The Act further set forth that:

“If there are justified doubts about full mental or physical health of the juvenile or about their normal development, the court has to ask for the medical examination of the juvenile by one or two doctors, if needed and possible experts on psychiatric illnesses of children.”¹⁷⁰

As in many other European countries, these provisions adopted in the early 1930s were influenced especially by a particular social welfare philosophy, rather than a rights-based approach. They therefore did not consider the child as a rights holder, as an independent human being with inherent human dignity and capacity to take individual responsibility for their acts and their life. They perceived the child rather as an object in need of educational or other care and formation by adults. This is apparent especially from the fact that the Act did not presume that the child would participate in the process of their individual assessment or that the individual assessment could have an impact in the form of adoption of procedural accommodations for the child in order to ensure that their right to participate in the proceedings is practical and effective. The assessment was carried out only in order to determine what measure is the most suitable for the child while this determination was made for the child but not with the child.

The explanatory report to the Act is very clear on this approach in respect of its requirement to gather information from public authorities and public institutions, including registry offices, guardianship courts, schools, facilities caring for children, criminal record offices, municipalities. The process of gathering the necessary information should be led by “the authorities that are the most competent in this regard, i.e. auxiliary bodies for judicial care for children.” These auxiliary bodies were, following the legislative reforms in the late 1940s and early 1950s, replaced by administrative authorities responsible for the care for children that still exist as local authorities responsible for the public protection of the child. (In both the Czech Republic and in Slovakia, these are called “Authorities for social and legal protection of children” [orgány sociálně-právní ochrany dětí (Czech); orgány sociálno-právnej ochrany detí (Slovak)]).

The Act no. 64/1956 Coll., the Criminal Procedure Code, that replaced the Act no. 87/1950 Coll. elaborated the requirement of individual assessment in the form that remains substantially applicable today in the legal systems of both the Czech Republic and Slovakia. The Act no. 64/1956 Coll. required to assess in criminal proceedings against juvenile “as thoroughly as possible”:

- the level of intellectual and moral development of the juvenile;
- their character;
- their past;
- the circumstances and environment where they have lived and been brought up;
- their behaviour after the criminal offence and
- other relevant circumstances to determine whether the juvenile should be subjected to protective educational treatment.

¹⁶⁹ § 38 of the Act no. 48/1931 Coll. Unofficial translation.

¹⁷⁰ § 39 of the Act no. 48/1931 Coll. Unofficial translation.

The competence to carry out this assessment was conferred to the authorities responsible for child protection, although the court may decide to accept the assessment from different sources.¹⁷¹ The explanatory report did not comment on the requirement of individual assessment of juveniles in any way.

The Act no. 141/1961 Coll., the Criminal Procedure Code, contained practically the same provision as the requirement of individual assessment of the juvenile accused of a criminal offence. There were only two differences from the Act no. 64/1956 Coll.: 1) the scope of the individual assessment was widened by the requirement to assess the behaviour of the juvenile not only after engaging in the purportedly criminal conduct, but before do so as well; and 2) the Act no. 141/1961 Coll. assumed that the juvenile must be subjected to individual assessment not only in order to determine whether protective educational treatment should be imposed on them, but also to consider other potential measures that might be applicable to the juvenile.¹⁷² The explanatory note practically repeated the legal provision and added no further explanation of its content and aim.

The above-cited provision on individual assessment of juveniles set forth by the Act no. 141/1961 Coll. remained valid in the Czech Republic until the adoption of the Juvenile Justice Act, effective since 1 January 2004, and in Slovakia until the adoption of the Act no. 301/2005 Coll., the Criminal Procedure Code, effective since 1 January 2006. As mentioned above, both of the Acts were inspired by the provisions of the Act no. 141/1961 Coll., given that the wording of their currently valid provisions regulating individual assessment of juveniles in criminal proceedings is very close to that of the 1956 and 1961 Acts. This is very important since it shows that the philosophy behind the individual assessment in the Czech and Slovak context might not have changed significantly since the adoption of the Act no. 48/1931 Coll. and the individual assessment and the way it is applied in practice may be still strongly governed by the child welfare-based approach established under that Act. This may, however, fail to uphold the human rights of the child and the principles of the CRC.

3.2 Individual assessment in the Czech Republic and Slovakia

3.2.1 The law: The Czech Republic

The Czech juvenile justice system is built on the model of a separate system of criminal justice for children. This system is governed by the Juvenile Justice Act (Act no. 218/2003 Coll.) that is a *lex specialist* to the Criminal Code¹⁷³ and the Criminal Procedure Code.¹⁷⁴

The Czech juvenile justice system covers both children below the age of criminal responsibility (age of 15) as well as juveniles (15-18 years of age) and enables both categories of children to be held responsible for their unlawful acts. The responsibility of children below the age of criminal responsibility is not called “criminal responsibility” but “responsibility for an unlawful act that would be otherwise criminal” and it is stipulated that it has civil rather than criminal nature. However, the Juvenile Justice Act assumes certain quasi-punitive measures that are imposed on these children if they breach penal law. Such measures significantly overlap with those that may be imposed on criminally responsible juveniles, including deprivation of the child’s liberty either in closed educational or medical institutions. Furthermore, the measures are imposed by a juvenile court. It is therefore arguably the case that this approach effectively makes children below the age of criminal responsibility criminally liable in a *de facto* sense.¹⁷⁵

The criminal responsibility of juveniles is then built on a model of relative responsibility enabling juveniles to prove that they were not, at the moment of committing the act, mature enough, either intellectually or morally, to be responsible for the act. In such a case either a protective measure is imposed on the juvenile in criminal proceedings or they are held liable in the same way as a child below the age of criminal responsibility.¹⁷⁶

The Juvenile Justice Act of 2003 contains two provisions regulating the process of the individual assessment of the juvenile. However, all the professionals that were interviewed for the purpose of the preparation of these recommendations, regardless of whether they were judges, public prosecutors or attorneys, confirmed that the practice does not differentiate between these provisions.

According to the legal provisions, the authorities responsible for the proceedings need to assess the juvenile’s circumstances in every type of proceedings. The Juvenile Justice Act requires in any case

¹⁷¹ § 311 of the Act no. 64/1956 Coll.

¹⁷² § 292 of the Act no. 141/1961 Coll.

¹⁷³ Act no. 40/2009 Coll., the Criminal Code.

¹⁷⁴ Act no. 141/1961 Coll., the Criminal Procedure Code.

¹⁷⁵ It should be noted that certain aspects the Czech juvenile justice system for children below the age of criminal responsibility are contrary to Article 17 of the 1961 European Social Charter. See *International Commission of Jurists (ICJ) v. the Czech Republic*, Decision of the European Committee of Social Rights, Complaint no. 148/2017, Decision of 20 October 2020.

¹⁷⁶ See the Amendment to the Juvenile Justice Act no. 41/2009 Coll. and its explanatory report.

that the authorities clarify and prove “with particular thoroughness”:¹⁷⁷

- the reasons of the juvenile’s unlawful acts and
- facts relevant especially for assessing their personal, family and other circumstances.

To this end all the authorities responsible for the criminal proceedings need to undertake all necessary investigations to recognize:

- the personality of the juvenile;
- their way of life before the proceedings have taken place; and
- measures appropriate to their resocialisation and to ensure that the juvenile will not reoffend.

The law further requires a determination as thoroughly as possible:

- the level of intellectual and moral development of the juvenile;
- their character;
- circumstances and environment, where they have lived and have been brought up;
- their behaviour before and after committing the unlawful act; and
- other circumstances relevant to determination of what measure would be suitable for their rehabilitation, including whether and to what extent it is necessary to impose an educational measure, a protective measure or a punitive measure.

The legal provisions further assume that the authorities responsible for the criminal proceedings may, when necessary, require the preparation of a report on the circumstances of the juvenile.¹⁷⁸ (The report according to the law is called: “the report on personal, family and social circumstances of the juvenile and of the current life situation of the juvenile”; *hereinafter* “the report on the circumstances of the juvenile”). Contrary to the “regular assessment” described above, the report, according to the law, must be elaborated in writing. The law requires that the report contains especially:

- the age of the juvenile;
- the level of their maturity;
- their attitude to the unlawful act and their willingness to repair the damage caused and to remedy other impacts of their act;
- family relations of the juvenile, including the relation of the juvenile to their parents;
- the level of influence of the juvenile’s parents on the juvenile;
- the relation of the juvenile to the members of their wider family and close social environment;
- the records of the school attendance of the juvenile, their behaviour at school or at work if they are employed;
- other facts relevant to assess their behaviour in employment;
- the list of previous unlawful acts committed by the juvenile and measures that were imposed on them, including the description of their execution and the behaviour of the juvenile.

Furthermore and contrary to the “regular assessment,” the report on the circumstances of the juvenile should serve, according to the legal provisions, not only to determine the measures that should be imposed on the juvenile but also “to determine further steps in the proceedings”. However, the explanatory report to the Juvenile Justice Act well documents that this reference is not connected with the idea of fair trial and the need to ensure that the participation of the juvenile in the proceedings is practical and effective, but rather with the idea of applying a diversion. In other words, the function of the report on the circumstances of the juvenile, as the function of the “regular assessment”, is understood only on the level of determining the reaction to the unlawful act of the child and not on the level of the child’s responsibility or of ensuring fair trial by adopting procedural accommodations the child may need.¹⁷⁹

3.2.1.1 The implementation of the Directive into the Czech legislation

The implementation of the Directive into Czech law failed to bring significant changes in the provisions regulating individual assessment of the juvenile (and implicitly the child below the age of criminal responsibility) that have been described above. The legislation implementing the Directive took the form of the Amendment to the Juvenile Justice Act no. 203/2019 Coll., that became effective on 1 September 2019. The amendment added to the provisions regulating individual assessment of the juvenile (child below the age of criminal responsibility) has the following aspects:

- the explicit requirement that the individual assessment needs to be carried out not only thoroughly but “without any unreasonable delay” (§ 55/1);
- the requirement to involve the legal representatives of the juvenile or their guardian into the process of the assessment if it is appropriate (§ 55/3 and § 56/2); the involvement of the child was not mentioned explicitly, since the legislator assumed it was a natural part of the

¹⁷⁷ § 55 of the Act no. 218/2003 Coll.

¹⁷⁸ § 56 of the Act no. 218/2003 Coll.

¹⁷⁹ This is documented also by The Analysis of reports on the juvenile required according to the Act no. 218/2003 Coll., the Juvenile Justice Act, prepared for the Ministry of Interior by the researchers of the Institute of Criminology and Social Prevention. The Analysis is available in Czech at: <https://www.mvcr.cz/clanek/clanek/analiza-zprav-o-mladistvem-vyzadovanych-podle-zakona-c-218-2003-sb-o-soudnictvi-nad-mladezi.aspx>.

assessment as it is carried out predominantly by local authorities responsible for the public protection of the child that always interviewed the child;

- the requirement to carry out the individual assessment repeatedly if there is a reasonable presumption that the circumstances of the juvenile have significantly changed (§ 55/4 and § 56/4).

The explanatory report to the Amendment documents well that all these changes were considered by the legislator to be cosmetic rather than really conceptual. Without any deeper analysis, the legislator states in the explanatory report that the right of the child to individual assessment guaranteed in Article 7 of the Directive corresponds to the legal provisions regulating “the regular assessment” and “the report on the circumstances of the juvenile”. The scope of application of the right of the child to the individual assessment according to the Directive is much broader, foreseeing its role not only in helping to find a suitable reaction to the allegedly unlawful act of the child but also in providing the child with fair trial¹⁸⁰ and in deciding on the extent of the child’s criminal responsibility.¹⁸¹ Nonetheless, the explanatory report, again without any further explication, mentions only the first of these roles.¹⁸² All the cited changes are commented on by the explanatory report only as a clarification of what had been already applied and not as an enactment of a new rule. It is worth noting that this text of the explanatory report corresponds to the practical application of individual assessment that has not changed in any way after the implementation of the Directive.

There has been no official EU report evaluating national implementation of the Directive, since according to Article 25 the Commission must submit a report to the European Parliament and to the Council assessing the extent to which the Member States has taken the necessary measures to comply with this Directive by 11 June 2022.

Regardless of the absence of EU evaluation of the Czech implementation of the Directive, it is evident that:

- the scope of Article 7 has been understood by the Czech legislator too narrowly, i.e. as only relating to the question of what measure would be the most suitable for the child;
- the content of Article 7 has been understood by the Czech legislator in the spirit of the traditional social welfare approach, and it has been assumed that the right of the child to individual assessment had already existed under the Czech legislation in the form of “regular assessment” or “the report on the circumstances of the juvenile”.¹⁸³ This approach to the right of the child to individual assessment deprives the child of their ability in practice to protect the child’s substantive and procedural rights in compliance with the child rights-based approach; the individual assessment is rather used as part of the evidence both in favour as well as to the detriment of the child in a way that corresponds, in practice, to the social welfare approach to children;
- the participation of the child in the process of their assessment has not been elaborated in any regard, which also corresponds, in practice, to the social welfare approach to children under which the child is treated as an object in need of care and guidance rather than as a rights holder (subject of rights).

3.2.2 The law: Slovakia

Slovakia does not apply the concept of a separate system of criminal justice for juveniles. The domestic law sets forth several specific provisions addressing juvenile justice both in the substantive criminal law¹⁸⁴ as well as in the procedural criminal law.¹⁸⁵ In practice, this system differs from the

¹⁸⁰ Art. 7(4) of the Directive statutes that individual assessment shall serve when: „(...) c) taking any decision or course of action in the criminal proceedings, including when sentencing.”

¹⁸¹ See Recital (35): „(...) to determine of and to what extent they would need special measures during the criminal proceedings, the extent of their criminal responsibility and the appropriateness of a particular penalty or educative measure.

¹⁸² „Clarifying the reasons that led the juvenile to having committed an unlawful act, as well as his personal and family circumstances can significantly influence settling the case by a form of diversions, as well as the imposition of an appropriate sanction.”

¹⁸³ This is supported, for instance, by an article on the Directive by one of the authors of the Juvenile Justice Act and former president of the Supreme Court, Pavel Šámal, in which he writes as follows: „We should also note Czech legislation which is built on fundamental principles set forth in section 3 of the Juvenile Justice Act and provides for especially two types of reports and that in section 55 of the Juvenile Justice Act the report on finding out on the circumstances of the juvenile [note: this report is called in this study as “regular assessment”] and in section 56 of the Juvenile Justice Act the report on personal, family and social circumstances and current life situation of the juvenile. Here it would be useful to consider the need for amendments, especially in the sense of setting forth the latest moment by which the reports have to be prepared what should happen before the court hearing. Further, the persons with parental responsibility or other suitable persons as well as experts should take part in the preparation of the report. Also, the possibility to reconsider the suitability and effectiveness of measures adopted before the individual assessment in case of submitting the charges to the court without individual assessment.” – See Šámal, P. K nové směrnici o procesních zárukách pro děti, které jsou podezřelými nebo obviněnými osobami v trestním řízení [On the New Directive on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings] [online]. Právní prostor, 28/6/2017 [cited 19/6/2020]. Available in Czech at: <https://www.pravniprostor.cz/clanky/mezinarodni-a-evropske-pravo/k-nove-smernici-o-procesnich-zarukach-pro-deti-ktere-jsou-podezrelymi-nebo-obvinenymi-osobami-v-trestnim-rizeni>.

¹⁸⁴ §§ 94 – 121 of the Act no. 300/2005 Coll., the Criminal Code.

¹⁸⁵ §§ 336 – 347 of the Act no. 301/2005 Coll., the Criminal Procedure Code.

Czech one only marginally, especially as regards the legislation governing the individual assessment of juveniles and its practical application.

The most important differences between the two systems are:

- **The age of criminal responsibility:** In Slovakia children may be held criminally liable from the age of 14, whereas in the Czech Republic the age is 15.¹⁸⁶
- **The concept of the liability of juveniles:** In Slovakia the concept of relative criminal liability, which enables juveniles not to incur liability if they lack the maturity, either intellectually or morally, to understand the unlawfulness of or to control their conduct, applies only with respect to children between 14 and 15.¹⁸⁷ In the Czech Republic this concept applies for the whole category of juveniles up to the age of 18. However, in the Slovak Republic this intellectual and moral maturity of a juvenile between 14 and 15 must be assessed obligatorily¹⁸⁸ through psychological and psychiatric expert examination,¹⁸⁹ while in the Czech Republic the psychological and psychiatric expert examination of the juvenile is carried out only in case of reasonable doubts about their intellectual and moral maturity.
- **The concept and scope of "crime":** Under the Slovak domestic law an act may be found not to be criminal if it corresponds to the acts described in the Criminal Code but does not attain a specific level of seriousness.¹⁹⁰ The Criminal Code expressly stipulates that an act falling into the category of minor offences¹⁹¹ will not incur criminal liability if committed by a juvenile and if its seriousness is low. (It should be noted that a similar rule applies even in case of adults as a general rule of the Slovak criminal law¹⁹²); and
- **The absence of a specific system of "quasi-criminal" liability for children below the age of criminal responsibility, except for the cases in which protective educational treatment is imposed on the child.**¹⁹³ Children falling within this category may be subject to restrictive measures, including institutionalisation in a closed facility under the system of public protection of the child.¹⁹⁴

The process of the individual assessment of the juvenile is provided for in the Slovak domestic law practically in the same wording as in the Czechoslovak Criminal Procedural Codes of 1956 and 1961 (see above). The current Criminal Procedure Code requires that in criminal proceedings against the juvenile a determination is made as to:

- the level of the intellectual and moral development of the juvenile;
- the juvenile's character;
- their circumstances including the environment where they have lived and have been brought up;
- their behaviour before and after having committed the unlawful act of which they are accused;
- other circumstances relevant to the determination of suitable measures for the rehabilitation of the juvenile, including the assessment of whether protective educational treatment should be imposed on the juvenile.¹⁹⁵

Contrary to the Czech domestic law, the Slovak domestic law does not provide that the assessment may be carried out alternatively either by the administrative authority responsible for the public protection of the child¹⁹⁶ or the Probation and Mediation Service, but it sets forth very clearly that the assessment must be carried out by the authorities responsible for the public protection of the child as well as by the municipality.¹⁹⁷

In its response to our inquiry, the Ministry of Justice of the Slovak Republic mentioned that the in-

¹⁸⁶ § 94 (1) of the Act no. 300/2005 Coll., the Criminal Code.

¹⁸⁷ *Ibid.*, § 95 (1).

¹⁸⁸ § 338 of the Act no. 301/2005 Coll., the Criminal Procedure Code.

¹⁸⁹ See the explanatory report to the Act no. 300/2005 Coll., the Criminal Code.

¹⁹⁰ § 95 (2) of the Act no. 300/2005 Coll., the Criminal Code.

¹⁹¹ *Ibid.*, § 10 (1). These offences are defined as: a) a criminal offence of negligence; b) a criminal offence of intent that may not be punished according to the law by imprisonment exceeding 5 years.

¹⁹² *Ibid.*, § 10 (2): „The act is not criminal if its seriousness, regarding the way of commitment and the impacts of the act, the circumstances under which the act has been committed, the level of culpability and the motives of the perpetrator, is low.”

¹⁹³ § 105 of the Act no. 300/2005 Coll., the Criminal Code, empowers and in certain cases even requires the public prosecutor to submit to the court a proposal for imposing the child the protective educational treatment. It is therefore not inappropriate to say that even in Slovakia there exist a juvenile justice system for children below the age of criminal responsibility with the difference, compared to the Czech juvenile justice system, that it empowers to impose the child only one measure – the protective educational treatment. However, since the protective educational treatment should be the most severe sanction, we may suppose that the majority of children below the age of criminal responsibility is not brought to the court. Nevertheless, that does not unfortunately mean that they may not be brought before the court to be imposed measures according to the Act no. 36/2005 Coll., on Family, including the institutional care.

¹⁹⁴ Act no. 305/2005 Coll. on the Social and Legal protection of the Child and on the Social Curatorship, and Act no. 36/2005 Coll. on Family.

¹⁹⁵ § 337 of the Act no. 301/2005 Coll., the Criminal Procedural Code.

¹⁹⁶ In Slovakia these authorities are the offices of labour, social affairs and family.

¹⁹⁷ § 337 of the Act no. 301/2005 Coll. the Criminal Procedural Code.

dividual assessment regularly took the form of a report of the authority responsible for the public protection of the child, but that other information may be gathered by other appropriate means. These include for instance by:

- interviews of the child's parents;
- an expert examination of the child by a child psychiatrist, or child psychologist;
- a report from the school.

The Ministry further stressed that "the authorities responsible for the criminal proceedings would proceed in the closest cooperation with care facilities for children (children's homes, crisis centres, child diagnostic facilities etc.), and, where relevant, with facilities for psychological care, authorities responsible for the protection of the child during the whole proceedings. If any aspects of the individual assessment were to change significantly during the proceedings, the assessment would be updated."

This statement by the Ministry highlighted the mutual cooperation in the criminal proceedings against the child, but failed to indicate any active role of the children themselves, or other available resources describing individual assessment of the child or dealing with the criminality of children in general.¹⁹⁸ This suggests that the philosophy that governs the Slovak approach to children in conflict with the law is similar to the Czech approach. It could be characterised as a social welfare approach, which is in contravention to international legal obligations and standards, as outlined above.

3.2.2.1 The implementation of the Directive in the Slovak legislation

Article 7 of the EU Directive has not been implemented into the Slovak legislation in any specific way.¹⁹⁹ The Ministry of Justice of the Slovak Republic commented on that question as follows:

"(...) the concerned Article of the Directive was assessed by the Ministry of Justice of the Slovak Republic and the currently valid national legislation in the area of individual assessment was evaluated as sufficient and compliant for the purposes of the Directive."

Even with respect to Slovakia there has not yet been any official EU evaluation of the implementation of the Directive, since according to Article 25 of the Directive the report should be submitted by the European Commission by 11 June 2022.

The implementation of the Directive on the part of Slovakia raises similar concerns to those outlined above with respect to the Czech Republic. However, there is one important difference from the Czech legislation related to the material concept of the crime applied to juveniles under the Slovak law. Under Slovak law, the role of the individual assessment is understood not only for the purpose of deciding on the most suitable measure that should be imposed on the child, but also for the purpose of determining the extent of criminal liability.²⁰⁰ Nevertheless, a child who is not found criminally responsible, may still have quite a severe measure imposed on them, in the form of institutionalisation in a closed facility²⁰¹ in the child protection system.

Even under the Slovak legislation the individual assessment is understood as a part of the evidence and investigation, rather than as a tool serving the child for the protection of their substantive and procedural rights.

The wording of Slovak legislation in the area of individual assessment of juveniles, which dates back to the 1960s, remains very vague. The Criminal Procedure Code does not set forth any stage in the proceedings by which the individual assessment of the juvenile has to be carried out at the latest.²⁰² Nor does it guarantee that holders of parental responsibility or an appropriate adult is involved in the assessment process, where appropriate.²⁰³ As regards the involvement of professionals, the legislation refers only to the above mentioned obligation of the authorities responsible for the criminal proceedings to proceed in the closest cooperation with care facilities for children, and if necessary with facilities for psychological care.²⁰⁴

As in the case of the Czech Republic, the involvement of the child in the assessment process²⁰⁵ has

¹⁹⁸ See, *inter alia*, Vráblová, M. *Trestné súdnictvo nad mladistvými v Slovenskej republike – výsledky empirického skúmania* [Juvenile Justice system in Slovak Republic – Empirical Research Results]. Available at: <https://www.law.muni.cz/sborniky/Days-of-public-law/files/pdf/trest/Vrablova.pdf>.

¹⁹⁹ See the Table of Compliance of the Slovak legislation with the Directive that is available in Slovak at: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=449360>.

²⁰⁰ The Directive (EU), Recital 35.

²⁰¹ So-called special educational facilities provided for in the Act no. 245/2008 Coll., on Education, § 120 et seq., and the ministerial decree no. 323/2008 Coll., on Special Educational Facilities.

²⁰² In Slovakia these authorities are the offices of labour, social affairs and family.

²⁰³ The Directive (EU), Article 7.7.

²⁰⁴ § 347(1) of the Act no. 301/2005 Coll., Criminal Procedure Code.

²⁰⁵ The Directive (EU), Article 7.7.

not been elaborated on in any way in Slovakia following the adoption of the Directive.

3.2.3 The practice of individual assessment

The individual assessment in the Czech Republic and Slovakia is still deeply rooted in the social welfare approach to children. The individual assessment is understood as a tool that helps the criminal law authorities to objectify the child's personality, family, and social circumstances as well as other relevant circumstances to find a suitable sanction for their unlawful act.²⁰⁶ Unfortunately, the effort to objectify the child's situation typically results in objectifying the child and denying them rights and agency (see below).

In both countries, the individual assessment of the child is carried out by the administrative authority responsible for the public protection of children (so-called "social and legal protection authorities").²⁰⁷ In the Czech Republic, it may also be carried out also by the Probation and Mediation Service,²⁰⁸ but this is much less common.²⁰⁹ In Slovakia, the practice may be less formalised than in the Czech Republic since the national legislation is more general.²¹⁰

The whole process is understood as an **elaboration of an expert report** on the child's personality and personal, family, and social circumstances. The assessing authority tries to collect all the necessary information from the child and their environment. The child is therefore not the direct and most important participant of the process, but rather a source of information, which is complemented by and evaluated in the light of the information from the child's school, doctors, psychologists, and the own experience of the administrative authority compiling the report.²¹¹ The child **is often not given the opportunity to comment on the report's findings and conclusions and does not learn them** until the court hearing when they are already part of the child's criminal file.²¹²

The typical process of individual assessment of both juveniles and children below the age of criminal responsibility in practice is conducted in a particular way. The local authority-responsible for the public protection of the child - the "social and legal protection authority" prepares a report that is then submitted to the authorities responsible for the criminal proceedings. To compile the report the authority uses especially four main instruments:

- active visit to the child's household (often previously unannounced);
- reports from other institutions and other relevant persons that are in contact with the child (typically the school and the doctor);
- interview with the child, which is not always conducted in a manner which engages the full participation of the child, and is sometimes referred to as an "interrogation" by judicial process actors;
- interview with the child's parents.

There is no binding methodology for the local authorities responsible for the protection of the child on compiling the report and the information contained in the report often lacks concrete evidence to substantiate its findings.²¹³ Often it consists of subjective evaluations of the personality of the child and their personal, family and social situation that are included in the report by the local authorities without clearly designating the author of the evaluations, which may in some instances be a teacher of the child. In the proceedings this inevitably has the effect of multiplying the information that initially comes from only one source, which may be subjective.

²⁰⁶ See for the Czech Republic the Act no. 218/2003 Coll., Juvenile Justice Act, §§ 55 – 56; for Slovakia the Act no. 301/2005 Coll., Criminal Procedure Code, § 337.

²⁰⁷ *Ibid.*

²⁰⁸ Act no. 218/2003 Coll., the Juvenile Justice Act, § 55 (3) and § 56 (2).

²⁰⁹ Information obtained by research implemented as part of the project from Probation and Mediation Service and attorneys representing children in conflict with the law. See also Večerka, K., Hulmáková, J., Štěchová, M. *Mladiství v procesu poruchové socializace* [Juveniles in the Process of Disordered Socialisation; online]. Prague: Institute of Criminology and Social Prevention, 2019 [accessed 20/7/2021], p. 60. Available in Czech at: <http://www.ok.cz/iksp/docs/458.pdf>.

²¹⁰ Act no. 301/2005 Coll., Criminal Procedure Code, § 337.

²¹¹ See, inter alia, Hrušáková, M., Žatecká, E. *Zákon o soudnictví ve věcech mládeže: Komentář* [Juvenile Justice Act: Commentary] [ASPI System]. Wolters Kluwer [accessed 20/7/2021], §§ 55 and 56. ASPI_ID KO218_2003CZ. Available at: www.aspi.cz.

²¹² In the Czech Republic, this is not a case for reports prepared by the Probation and Mediation Service, but the Probation and Mediation Service is usually not responsible for the individual assessment as understood by the Act no. 218/2003 Coll., Juvenile Justice Act. They prepare report in case they have been already working with the child during the pre-trial stage of the proceedings and in such a case they familiarize the child with its content before they submit the report to the court (information obtained by research). In Slovakia, a similar involvement of probation and mediation officers in the pre-trial stage does not exist.

²¹³ The proposal to prepare a uniform methodology is one of the outcomes of the research undertaken by the researchers of the Institute of Criminology and Social Prevention and focused on juveniles in the process of disorder socialization. However, the authors of the research focus in their proposal only on the scope of the report and do not question directly the principles that govern the process of individual assessment and that may be, in our view, problematic. The report of the research including the recommendation is available in Czech at: http://www.ok.cz/iksp/docs/mladistvi_sablona.pdf.

"With a child, there is often only one interview, asking questions such as: 'Where do you study, what grades do you have ...?'"²¹⁴

Attorney representing children in conflict with the law,
The Czech Republic

The process thus takes on the nature of the expert evaluation of the child's personality and circumstances in which the child has only a **passive role – the role of the assessed object. The child's needs are formulated for the child irrespective of the extent of their participation, instead of with the child**, and the individual assessment serves as a **risk assessment tool instead of an instrument to further the rights of the child**. This is the prevailing position of Czech and Slovak criminal law authorities that understand the individual assessment as an opportunity for a comprehensive expert insight into a child's personality and circumstances. For instance, the authors of a recent research conducted in the Czech Republic by the Institute of Criminology and Social Prevention have described the objective of the individual assessment as "a deeper dive into the social-psychological situation of the child"²¹⁶ and connected it directly with the evaluation of the risk and protective factors, i.e. with a form of risk assessment.²¹⁷

The understanding of the individual assessment as a form of risk assessment has several negative consequences. One of these consequences is reinforcing **the asymmetry in power between the assessing authority and the child** where the authority has the dominant, evaluating role and the child the dominated, evaluated position. Consequently, the authority is the one that typically evaluates the gathered information through different sources and how it will be interpreted.

The asymmetry in power creates a space for **professional failures and abuses**. A common phenomenon is that the assessing authorities fail to identify the source and present the information from other institutions like the child's school and doctors as their own, even without any direct intention to distort the reality. That causes the duplication of the information in the child's criminal file, which is particularly damaging to the child's position and chances in the criminal proceedings if the information indicates negative circumstances in the child's life.

"Reports are often based on one source, but by doubling down, it creates the impression that this is a fact that everyone has discovered. It gives the impression that the child is so awful, and everyone found out."²¹⁸

Attorney representing children in conflict with the law,
the Czech Republic

"Multiplying of resources happens. Workers of the assessing authorities are unaware of the consequences."²¹⁹

Attorney representing children in conflict with the law,
Slovakia

The negative impact of the asymmetry on the situation of the child is further exacerbated by often **uncritical institutional trust of one public authority to another and distrust of public authorities towards individuals** which is typical in the Czech and Slovak context. The report's interpretations are likely to be paid much more attention than the child's views since they are automatically considered as objective, contrary to the child's and their family's views, which are seen as subjective by nature. However, even the information from official institutions still captures the view of specific representatives of these institutions and cannot be considered objective and should therefore be subjected to critical scrutiny. Unfortunately, there is a low awareness on this.

"I used to think the institutions were terribly trustworthy, now I think I should have sometimes trusted those attorneys more."²²⁰

Former public prosecutor, currently an attorney,
the Czech Republic

"The juvenile court relies on these reports, taking the view that if the author is a public authority, it must be objective."²²¹

Attorney representing children in conflict with the law
the Czech Republic

²¹⁴ Statement obtained by research conducted for the purpose of the project.

²¹⁵ Research organisation, administered by the Ministry of Justice. For more information see: http://www.ok.cz/iksp/en/e_aboutus.html.

²¹⁶ Večerka, K., Hulmáková, J., Štěchová, M. *Mladiství v procesu poruchové socializace* [Juveniles in the Process of Disordered Socialisation; online]. Prague: Institute of Criminology and Social Prevention, 2019 [accessed 20/7/2021], pp. 9 and 59. Available in Czech at: <http://www.ok.cz/iksp/docs/458.pdf>.

²¹⁷ *Ibid.*, p. 60.

²¹⁸⁻²¹⁹⁻²²⁰⁻²²¹ Statement obtained by research conducted for the purpose of the project.

Another consequence of understanding the individual assessment as a risk assessment is the dual phenomena of **stereotyping and over-rationalisation**. The identification of the present risks and prediction of the future ones may only be based on two interconnected and interdependent roots: the past experience and general assumptions (stereotypes). The past experience enables an observation of the most often repeating patterns and presents them as regularities. This reinforces the idea that the most common past experience are the norm and creates stereotypes which then give a framework to assess a specific individual and their circumstances. Information about a specific child is interpreted within this framework which may lead to a **wrong cause-and-effect connection** that fits more of a stereotype than a specific child's life reality. Virtually every deviation from the idea of "normality," including in relation to the child's development, behaviour, and family situation is likely to be interpreted as a sign of the child's pre-delinquency once the child comes into conflict with the law. This easily creates and enhances **the idea of a "started criminal career"** concerning those children who show any "abnormality," although their conduct could be an isolated instance. The whole process thus results in stigmatisation and reinforcing social stereotypes.

*"The individual assessment maps if the child is disordered or if it is only an excess."*²²²

Public prosecutor specialised in child justice,
the Czech Republic

Furthermore, since the framework enables a wide connection between causes and effects, whether true or not, it is usually accompanied by an **excessive and uncontrolled gathering and sharing** of information about the child and their family.

*"A worker of the assessing authority got some information from the child's mother. The worker made frequent phone calls to the child's mother, the mother wanted to explain and confide in someone. But some of that information that might not even have been obtained for the individual assessment was then passed on to the Police who handled the case."*²²³

Attorney having an experience with representing a child in conflict with the law,
the Czech Republic

The purpose of the individual assessment is understood in the Czech and Slovak **contexts to inform the criminal law authorities only on measures** that should be imposed on the child following a determination of unlawful conduct. These measures always take the form of **authoritative obligations imposed on the child**. Neither Czech nor Slovak child justice systems are used to going beyond the individual dimension of the intervention to a more structural one and tend, therefore, to address structural problems, if identified, through children's responsibilities. **The more structural deficiencies** like social exclusion, poverty, inadequate housing, structural discrimination, including racial discrimination (often against Roma) the child and their family face, **the more intensive the forced reaction of the criminal justice system against the child**. The reaction may result in the child's placement in a closed regime institution or, rarely, even in prison. The reasoning is that it is necessary to protect the child from an inappropriate and damaging environment. It is not uncommon for the child's case to be also referred, in parallel, to a family court which also has the power to decide on the child's placement in a closed regime institution without the need to comply with all the criminal justice procedural safeguards. For instance, a report by the Czech School Inspectorate of 2017 showed that the criminal activity of the child is indicated as the reason for the child's placement in a closed educational facility in 1000 cases (25,1 % of the total number of cases) and was the second most common reason for such placement.²²⁴ These placements have to be mainly ordered by family courts since the number of criminal law placements remains constantly very low, as mentioned in the report.²²⁵ The decisions of the Slovak family courts show that the child's criminal activity also becomes a reason for the family law placement in a closed regime facility, potentially in connection with other negative circumstances in the child's life.²²⁶

²²² Statement obtained by research conducted for the purpose of the project.

²²³ Statement obtained by research conducted for the purpose of the project.

²²⁴ See Czech School Inspectorate. Kvalita výchovně-vzdělávací činnosti v zařízeních pro výkon ústavní nebo ochranné výchovy. Tematická zpráva. [Quality of the upbringing-educative effort of the facilities for institutional and protective upbringing. Thematic report; online]. Prague: Czech School Inspectorate, 2017 [accessed 21/7/2021], p. 5. Available in Czech at: https://www.csicr.cz/Csicr/media/Prilohy/PDF_el._publikace/Tematick%C3%A9%20zpr%C3%A1vy/01-F_TZ-Kvalita-vychovne-vzdelavaci-cinnosti-v-za%C5%99izenich-pro-vykon-UV-OV_FINAL-2-5.pdf.

²²⁵ *Ibid.*, p. 6.

²²⁶ See, for instance, from the recent decisions – decision of the District Court Bratislava III of 27/6/2018, no. 39P/171/2018 (available in Slovak at: <https://obcan.justice.sk/infosud/-/infosud/i-detail/rozhodnutie/fdb27f3c-8743-4a76-a5b8-36e1599931b6%3Ab435e126-e4e3-468b-8b64-1ce2df5a38e>); or decision of the District Court Prešov of 21/1/2019, no. 27P/222/2018 (available in Slovak at: <https://obcan.justice.sk/infosud/-/infosud/i-detail/rozhodnutie/8567e130-d01c-4eb3-9a8f-31d220718695%3A47112745-bda4-49ce-aa1b-5ec23ecd6c71>).

"When I see that the child has poor guidance in their family, I ask the child protection authority to initiate care proceedings. It usually works, the child protection authority is active and usually prepares a motion to the family court. The public prosecution then enters into the proceedings."

Public prosecutor specialised in child justice,
the Czech Republic

The role of the individual assessment for the practical and effective participation of the child in the proceedings remains very marginal.

"The Regional Court held the hearing on the appeal of the juvenile defendant N. E. in his absence. Although he was delivered the summons to the hearing, according to the attached receipt the delivery did not respect the time for preparation as determined by the legislation. However, what is important is that the defence counsel who filed the appeal on the defendant's behalf explicitly proposed to hold the hearing in the juvenile defendant's absence and if the time for preparation had not been respected, she explicitly stated that she did not insist on it. She argued in that regard that the juvenile's circumstances, particularly his financial situation, did not allow him to participate in person in any future hearing before the Regional Court in Banská Bystrica."

The decision of the Regional Court of Banská Bystrica of 5/5/2021,
no. 3 To 42/2021, Slovakia²²⁷

"The procedural aspect is not reflected in these reports."

A former public prosecutor specialised in child justice,
the Czech Republic

Summary:

- The individual assessment is inappropriately understood as risk assessment. It is supposed to bring the information about the risk and protective factors and its findings thus may be either for the child's benefit or to their detriment.
- The role of the child in the process of the individual assessment is generally passive. They have a role as a mere source of information. Often, they do not know the findings of the individual assessment until the court hearing.
- The process of the individual assessment is often marked by professional failures and abuses. The most common is the insufficient identification of the original source of the information, which causes its duplication and sometimes further replication.
- The impact of these failures and abuses is aggravated by a mutual intuitive trust of public authorities in each other. The information contained in reports of public authorities and institutions is usually automatically considered trustworthy and objective.
- The concept of the individual assessment as a risk assessment causes over-rationalisation of the findings which are, however, often drawn from social stereotypes and general experience rather than from the individual child's experience. It easily leads to reinforcement of those stereotypes and stigmatisation.
- The concept of the individual assessment as a risk assessment further makes the assessing authorities gather and share the information excessively and without proper controls.
- The individual assessment is used exclusively to inform the authorities about the "suitable intervention" against the child. One of the most important limits in the use of the individual assessment in the field of sentencing is that none of the criminal justice systems go beyond the individual interventions to a more structural perspective. And this is true also for the child protection systems of both the Czech Republic and Slovakia.

²²⁷ The decision is available in Slovak at: <https://obcan.justice.sk/infosud/-/infosud/i-detail/rozhodnutie/3c8cc9bf-1974-4928-a80b-341b7fb2c7d1%3Aba7c0288-73db-4575-9898-89f7988b120e> [accessed 21/7/2021].

IV. How to work with information in the framework of individual assessment

1. International legal framework

The right to respect for private and family life are protected in a number of international human rights instruments (Article 16 CRC, Article 17 ICCPR, Article 8 ECHR).

According to the Council of Europe Guidelines, “child-friendly justice” refers to justice systems which guarantee, among other things, the respect for private and family life.²²⁸

Sharing information about the child among professionals without consent will amount to interference with the right to privacy / respect for private life. Such interference can only be justified where it is adequately prescribed by law and is necessary and proportionate to the pursuit of a legitimate aim, and non-discriminatory.²²⁹

The right of a child to have their privacy fully respected during all stages of the proceedings, is set out in article 40 (2) (b) (vii) CRC. “States parties should respect the rule that child justice hearings are to be conducted behind closed doors. Exceptions should be very limited and clearly stated in the law. If the verdict and/or sentence is pronounced in public at a court session, the identity of the child should not be revealed. Furthermore, the right to privacy also means that the court files and records of children should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case.”²³⁰

2. EU legal framework

The right to respect for private and family life is provided for in article 7 of the EU Charter on fundamental rights.

Further, the rules on personal data processing in the criminal justice context are enshrined in the Directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

The Directive sets rules for processing personal data of all persons including children, by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties (Article 1 Directive). The personal data protected by the Directive includes any information relating to an identified or identifiable natural person and also factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person (Article 3.1).

According to the Directive (Article 4), personal data should be:

- (a) processed lawfully and fairly;
- (b) collected for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes;
- (c) adequate, relevant and not excessive in relation to the purposes for which they are processed;
- (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay;
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which they are processed;
- (f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

Article 14 further provides for a right of the data subject to information whether information is collected about them and they have the right to access the data, unless specific limitations apply (Article 15).

²²⁸ [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#), adopted 17 November 2010, II. (c).

²²⁹ See, Report of the United Nations High Commissioner for Human Rights, [The right to privacy in the digital age](#), UN Doc. A/HRC/48/31, 13 September 2021, para.9-10.

²³⁰ CRC Committee, [General Comment No. 24 on children's rights in the child justice system](#), UN Doc. CRC/C/GC/24 (2019), para. 67.

3. Practical considerations

3.1 Problems in the presentation of information concerning the child

It is a common phenomenon that the assessing authorities fail to identify the sources in their reports and present information from other institutions such as the child's school and doctors as their own. Irrespective of any bad faith intent, this kind of omission is distortive in effect and may result in the duplication or multiplication of the information in the child's criminal file which is particularly damaging to the child's position and chances in the criminal proceedings if the information indicates negative circumstances in the child's life.

The multiplication of information related to the personality of the child and their situation in the criminal file of the child, either as to its sources or as to its appearance before the authorities responsible for the criminal proceedings, has the strong potential to significantly distort the image of the child and their situation. It may result in the stigmatizing labelling the child, which may, in the end, seriously compromise the substantive as well as procedural rights of the child.

3.2 Subjectivity of the information

The described problem of the multiplication of the information is then exacerbated by the fact that the information contained in the final report on the individual assessment of the child, is highly subjective and may be based on personal antagonism of the person that gave the information against the child (for instance a teacher who has a bad relationship with the child).

An interviewed attorney pointed out that local authorities responsible for the public protection of the child are not used to require evidence when demanding reports by other entities and persons. They assume that the information given to them, is true, especially if it comes from official places such as school or alternative care institution (see below).

3.3 Uncritical trust in truthfulness of the information submitted by public authorities and official institutions

Both the Czech and the Slovak juvenile justice systems are characterised by a seemingly reflexive mutual trust of official institutions and bodies in each other. The strength of this mutual trust is so intensive that it seems to preclude critical questioning. Taking into account the frequent subjectivity of the information on the child as well as the fact that the information is often obtained from only one source, even if it is replicated in several reports, the general uncritical nature of mutual trust in the truthfulness of the information issued by public authorities and other official institutions (such as, typically, the school) makes the child particularly vulnerable to being easily subjected to labelling.

The potentially adverse consequences for the human rights of the child under these processes is evident. The whole system, in line with the social welfare approach, gives disproportionate weight to the point of view of a representative of a public authority or an official institution, which is considered more persuasive than the viewpoint of the child.

3.4 Lack of determination of the scope of the information that may be gathered

Another deficiency directly related to the social welfare approach is the fact that neither the Czech nor the Slovak juvenile justice systems define concretely the scope of information that should be gathered in order to carry out the individual assessment of the child. Whenever a child is suspected of or accused of an unlawful act, both systems operate to ensure that as much information on the child as possible should be gathered. An interviewed attorney expressed this by mentioning that the local authorities responsible for the public protection of the child very often already know the child and have some information about them, since at least they had engaged in care proceedings related to the child's parents' divorce.²³¹ It shows that when dealing with the suspicion or a charge against a child the information that has been collected on them in the past is used without any determined limits and without a clear connection to the current suspicion or charge.

Even though it may not always be directly apparent, this broad approach to gathering and sharing the information about the child may be connected with the serious risk of stigmatisation and stereotyping of the child. Any information about a negative experience of the child or with the child in the past may sometimes be understood as their "pre-delinquent behaviour" and the situation of the child

²³¹ In the Czech Republic the care proceedings are an obligatory precondition of divorce of marriage while the local authority responsible for the protection of the child is regularly engaged in the proceedings in the guardianship ad litem of the child.

as a whole is perceived as if the child were on the road to a “criminal career”.²³² The same may be said for any negative information about the current situation of the child. The relationship between negative information about the child and the fact they are suspected of or accused of an unlawful act is not really investigated.

3.5 Conclusions / Recommendations

Based on the current practice in the Czech Republic and Slovakia, the work with information needs to be improved.

It is therefore crucial that basic standards on work with information are put in place.

- > **Data and information should be processed lawfully and fairly**
- > **Only adequate and relevant data and information for a specified and legitimate purpose can be collected**
- > **Sources in the individual assessment and other official reports must always be cited**
- > **Professionals should be transparent and responsible for what sources and information are being passed on. Information should not be shared among the different actors unless it is strictly necessary within the procedure (the purpose limitation principle)**
- > **The child and their parents / legal guardians should have access to the data and information collected about them and to the individual assessment**

²³² This statement is, inter alia, contained in the analyses of the reports on the individual assessment of the juvenile prepared by the Institute of Criminology and Social Prevention for the Ministry of Interior. The Analysis is available in Czech at: <https://www.mvcr.cz/clanek/clanek/analiza-zprav-o-mladistvem-vyzadovanych-podle-zakona-c-218-2003-sb-o-soudnictvi-nad-mlade-zi.aspx>.

V. Key principles and recommendations

Application of the human rights framework to the individual assessment

The individual assessment was not originally connected with the idea of the child as the holder of human rights. The original philosophical idea behind it perceived the child to be an object or a victim who needed decisions to be made for them without serious consideration of their views.²³³

As an essential principle of juvenile justice proceedings, children in conflict with the law should be provided with at least the same procedural rights and safeguards as adults in order to guarantee their right to a fair trial.²³⁴ Given the specific vulnerabilities of children and the impact of judicial proceedings and the outcomes on a child's life, it is therefore required to carry out an accurate assessment of a child's characteristics and circumstances, in order to meet their particular needs and protect their procedural rights.

When the assessment is carried out in a non-biased manner it is an essential step to safeguard accused children's effective participation in the juvenile justice proceedings,²³⁵ determine their best interests and protect them against discrimination, especially for the most marginalised groups of children. It is a key element to ensure as far as possible a positive experience for the child throughout the judicial proceedings,²³⁶ protect the child's rights and safety, evaluate possible risks of harm²³⁷ and select interventions that match the needs of the child and facilitate its reintegration into society.

The right of children to be provided with procedural accommodations should mean that the process of the individual assessment itself should be adapted to individual needs of the child and no child should be excluded from the opportunity to take an active part in it due to their specific vulnerability.

The individual assessment provides an opportunity to uncover any discrimination influencing the child's life and to take this unfavourable background of the child into consideration in order to adapt the proceedings and suggest measures that can help the child in the future.

More awareness of the individual needs and circumstances of the child in the procedure would benefit the effective participation of children in these often highly complex and intimidating procedures.

Several international and European instruments have established principles and practical elements regarding the procedures to assess the individual circumstances of a child in conflict with the law (see details above).

Key principles

The principles to be followed when conducting individual assessment:

- Non-discrimination
- Child participation and child-sensitivity
- Done in a timely manner
- Multidisciplinary
- Involving quality professional training
- Give primacy to the best interests of the child
- In accordance with this principle, ensure that any specific vulnerabilities of the child are reflected in the assessment

Recommendations

Recommendations for the actors in the preparation, elaboration and implementation/impact of the individual assessment:

1. Recommendations to those who **compile the individual assessment report** on the child's situation (social workers, probation officers, maybe schools or doctors if there is no central authority which gathers all the information)

²³³ See, *mutatis mutandis*, CRC Committee, [General Comment No. 21 on children in street situations](#), UN Doc. CRC/C/GC/21 (2017), para. 5.

²³⁴ Stephanie Rap and Ido Weijers, *The Effective Youth Court. Juvenile Justice Procedures in Europe* (The Hague: Eleven, 2014), p. 56.

²³⁵ *S.C. v. United Kingdom*, ECtHR, Application No. 60958/00, Judgment of 15 June 2004, paras. 28-29.

²³⁶ Fair Trials, *Advancing the Defence Rights of Children Manual for Practitioners*, 2018, p. 52.

²³⁷ Penal Reform International, *Protecting children's rights in criminal justice systems: A training manual and reference point for professionals and policymakers* (London: Penal Reform International, 2013), p. 41, available at: <https://cdn.penalreform.org/wp-content/uploads/2013/11/Childrens-rights-training-manual-Final%C2%ADHR.pdf> (accessed on 28 March 2020).

- 1.1 Social workers, probation officers and other concerned professionals must keep in mind that the **best interests** of the child and their **right to be heard** and participate are the key principles to guide the elaboration of the individual assessment. The child has a right to be heard directly by the practitioners working on the individual assessment, and to meaningfully participate on its elaboration. The best interests of the child must be interpreted taking into account the child's own views and must be assessed and determined on basis of the child's rights guaranteed under the CRC.
- 1.2 Social workers, probation officers and other responsible professionals must ensure that children are treated without **discrimination on any grounds, including those identified in section 2.1.3 above**. Specific safeguards against discrimination must be put in place from the earliest contact of the child with the child justice system or child protection authorities. Social workers, probation officers and other responsible professionals must be aware of possible discrimination patterns, stigmatization and stereotyping by the society and must make sure that the child is not impacted by the discrimination within the proceedings or at their end.
- 1.3 Social workers, probation officers and other responsible professionals must be required to **actively identify** individual children and groups of children the recognition and realization of whose rights may demand procedural accommodations. Children belonging to the most vulnerable groups, such as migrant children, LGBTI children, refugee and asylum-seeking children, unaccompanied children, children with disabilities, homeless and street children, Roma children, and children in residential institutions should be paid particular attention.
- 1.4 Social workers, probation officers and other responsible professionals should strive to establish a **positive relationship** with the child, based on respect of the child's **rights and dignity**. They should treat the child as the key to determining their needs in dialogue with the child. They should **listen carefully** to what the child is saying with as much respect for the authentic views of the child as possible. The child should be encouraged to participate in the elaboration of the individual assessment.
- 1.5 **Data and information** should be processed lawfully and fairly, without prejudices. Their interpretation of causes and consequences should not incorporate stereotypes.
- 1.6 Only relevant data and information for a specified and legitimate purpose can be collected.
- 1.7 Sources in the individual assessment and other official reports must always be cited and information marked as taken from the given source.
- 1.8 Social workers, probation officers and other relevant professionals should be transparent about and are responsible for what sources and information are being passed on. Information should not be shared among the different actors unless it is strictly necessary within the procedure (the purpose limitation principle)
- 1.9 The individual assessment report must **be made available** to the child and their parents / legal guardians and social workers, probation officers and other responsible professionals must ensure they have a **meaningful opportunity to comment** on it and that their **comments are duly recorded**.

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| <p>2. Recommendations to those who have the power to adopt decisions based on the gathered information (the police, public prosecutor, judge - depending on the stage of the proceedings)</p> |
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- 2.1 From the earliest contact of the child with the child justice system, including from the stage of questioning by the police and including children below the age of criminal responsibility, every child should have **access to free legal assistance**.
- 2.2 **Legal aid** should be available to all children from the earliest contact with the justice system.
- 2.3 Judges, public prosecutors, and the police involved must ensure that every child in conflict with the law has, from the earliest moment of contact with the justice system, a right to a **free interpreter** for communication with the authorities, and with their lawyer. The interpretation should be understood in the broadest sense of the term to cover necessary communication support not only for children who speak a foreign or minority language, but also for children who have other special communications needs, including children with disabilities. It should include interpretation in sign language and the use of alternative communication for persons with mental disabilities.
- 2.4 The police, public prosecutors and judges must at all stages fully respect the **best interests** of the child and treat them with respect of their rights and **human dignity**. They must respect the

child rights based approach to the best interests and avoid any paternalistic interpretation of its meaning.

- 2.5 The child has the **right to be heard** and to meaningfully participate in the proceedings. The child must be given the voice, the space, the audience and the influence in order to effectively exercise their right to be heard according to Article 12 CRC.
- 2.6 The police, public prosecutors and judges must ensure that children are treated **without discrimination**. Specific safeguards against discrimination must be put in place from the earliest contact of the child with the child justice system.
- 2.7 **Children with disabilities** should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views.
- 2.8 The police, public prosecutors and judges must verify that all information in the individual assessment is **duly resourced**. In cases of doubt, they have the obligation to verify with the sources directly.
- 2.9 The police, public prosecutors and judges must make sure that information contained in the individual assessment **has impact on the procedure**, in the form of procedural accommodations. They must ensure that the individual plans and wishes as well as challenges faced by the children concerned are taken into consideration and help ensure that the proceedings take place in a child-friendly manner.
- 2.10 Public prosecutors and judges should ensure that children have **access to diversions** in the proceedings. Diversions should be available to children in child justice systems, both children below and above the age of criminal responsibility. Access to diversions should not be limited to only minor offences but diversions should also be available for serious offences where appropriate.

3. Recommendations for those whose task is to **defend the child** (lawyers)

These recommendations may also be largely applicable to others representing the interests of the child (such as other child's representatives or social workers).

- 3.1 Lawyers must ensure that the **best interests** of the child are a primary consideration when the individual assessment is undertaken. Lawyers must treat the child with respect of their **human dignity**. Lawyers must consult the child on the way in which they will represent them and respect the child's views in accordance with their evolving capacities.
- 3.2 Lawyers must ensure the **right to be heard and to participate** is respected at all moments when the individual assessment is elaborated and used. The child has a right to be heard directly by the practitioners working on the individual assessment, and to meaningfully participate on its elaboration.
- 3.3 Lawyers must make sure that the child has the **right to read** the individual assessment report and to **comment on it**, and that their comments are recorded accordingly.
- 3.4 Lawyers must ensure that the child is not **discriminated against**. Lawyers must be aware of possible discrimination patterns, stigmatization and stereotyping and must make sure that the child is not impacted by the discrimination within the proceedings.
- 3.5 Lawyers must consider whether the child might need any procedural accommodation based on their individual rights and needs. Particular attention must be paid to the most vulnerable children, such as migrant children, refugee and asylum-seeking children, unaccompanied children, children with disabilities, homeless and street children, Roma children, and children in residential institutions.
- 3.6 Lawyers should promote **access to diversions** for children. Diversions should be available to children in child justice systems, both children below and above the age of criminal responsibility. Access to diversions should not be limited to only minor offences but diversions should also be available for serious offences where appropriate.
- 3.7 Lawyers must ensure that there is a **professional interpreter** in all meetings with the lawyer and other practitioners and authorities, should that be needed by the child. The interpretation should be understood in the broadest sense of the term to cover necessary communication support not only for children who speak a foreign or minority language, but also for children who have other special communication needs, including children with disabilities. It should include interpretation in sign language and the use of alternative communication for persons with mental disabilities.

Annex – Child-friendly version of the Recommendations

RIGHTS OF CHILDREN*

in contact with criminal justice and mainly
in relation to individual assessment

*those below the age of 18

Children's rights in criminal proceedings

Official proceedings are always full of concepts that may be new to you. That is why we have tried to explain to you in this leaflet in simple terms what you are entitled to. But don't be afraid to ask questions if you don't understand something.

▶ **Everyone has rights,
no matter how old they are.**

These rights therefore apply both to people aged 15-18, who are criminally liable and to those under the 15 years of age who are not yet criminally liable.

You can exercise your rights even if someone from the police, a public prosecutor, a judge, or even a social worker or probation officer speaks to you.



SOME OF THE RIGHTS YOU MIGHT WANT TO EXERCISE ARE:

- ▶ **YOU HAVE THE RIGHT** to be heard and to take an active part in the proceedings, you have the right to express your views and your views should be taken seriously into account.
- ▶ **YOU HAVE THE RIGHT** not to testify (that is, you don't have to talk about things you don't want to talk about - for example, when it's too difficult for you or you feel like endangering someone close to you - mom, dad, siblings, etc.).
- ▶ **YOU HAVE THE RIGHT** to information about criminal proceedings / proceedings on an allegedly illegal act [*in Czech: čín jinak trestný*]- that is, about what to expect. Feel free to ask anything you would like to know about the proceedings.

► **YOU HAVE THE RIGHT** to be represented by a lawyer (attorney) from the first contact with the police.

- **A lawyer is very important during the questioning by the police:** the lawyer can advise and assist you throughout the investigation of whether you have committed a criminal offense in order to protect your rights.
- **If you are under 15,** you must remind the police officers of your right to have a lawyer. Your parents or other close relatives can help you choose one.
- **If you are over 15,** the police must provide you with a lawyer. You can choose one yourself. If you don't, it's chosen by the court (so if you don't know one, don't have one of your own, or don't know which one to choose, you can leave it to the court).



DON'T BE AFRAID TO SPEAK UP - you can ask about anything you don't understand. Don't worry, you can't ask a stupid question... On the contrary, your voice and your involvement are important, and neither the prosecutor nor the court can decide without you. In addition, you can influence how the whole procedure turns out. So it's not good to just wait for the result of the proceedings. Of course, you can choose to do this, but if you are not active, the decision will be made without you and you will not influence how it is finally decided and what measure will be imposed on you.



It is clear that you may not have an exact idea of how to get involved, but who can help you are:

- a lawyer
- your parents
- someone from your surroundings whom you trust
- a social worker

Individual assessment

- During the proceedings, most often at the very beginning, the so-called individual assessment is prepared - it is most often drawn up by a social worker.
- Individual assessment helps those who will decide about your case (prosecutor, judge) to get to know you. If they come to the conclusion that you have actually committed an illegal act/a crime, then they can come up with measures as "tailor-made" as possible

(that is, to make them as comfortable as possible for you). However, this is still a measure, so the final decision may not be as you imagine. However, it may be such that it prevents you as little as possible from what you like to do, for example, from the studies you would be interested in.

- ▶ The purpose of an individual assessment is not to investigate or punish, but rather to help you and give you space to talk about how you see it. It's not so much about what happened - the police are investigating. You don't have to be afraid to talk openly with the social worker about:

- What are your plans for the future, e.g. if you plan to go somewhere to school and where. Your other expectations and dreams are also important.
- What you enjoy and are interested in. It does not have to be an official hobby, for example, that you go to a club. What matters is what makes you happy.
- What you have problems with, what annoys you, or what you are worried about.

- ▶ It is also important to pay attention to what you would need when contacting the police, the public prosecutor or the judge. Don't be afraid to talk about what you are worried about or what you don't understand and what you would need to feel better about it all. You can say this to the social worker, or directly to the police, the prosecutor, or the judge. The police, the prosecutor or the court may not be able to accommodate everything, but it is always a good idea to ask. Maybe it will be something that will not be a problem at all and it can help you feel at least a little better in a difficult situation. For example, you may need to ensure that someone close to you accompanies you. The police, the public prosecutor or the court may be able to accommodate your wishes and needs, at least to some extent. However, this does not mean that you have to talk about anything you would prefer not to. Don't feel compelled to talk about anything that you feel uncomfortable about revealing.

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- ▶ The social worker will usually also look for other news about you, e.g. from school or from a doctor. They need to report to the court as accurately as possible about how you are doing, so that they can make the right decision. When you are involved in the whole process, they will not have to look for information as much as if you do not cooperate.

Of course, you have the right to read the report (even if you do not cooperate) and you have the right to comment on what is written in it. What you say about the report should be recorded by the social worker in the report. If the social worker does not do so, you can give your opinion to the police, the public prosecutor or the court - a lawyer, parent, or even another social worker will help you with that.

Glossary

CRIMINAL LIABILITY: is from the age of 15 in the Czech Republic and Slovakia and it means that for illegal things that a person commits, they can be tried and sent to prison. Even children under the age of 15 are responsible for their illegal acts and can be brought to justice for them. However, they cannot be sent to prison.

CRIMINAL PROCEEDINGS: is a procedure for solving a criminal offense, ie from the investigation of the fact that it was committed to the judgment of the court. For children under the age of 15, court proceedings are called «otherwise criminal proceedings».

LAWYER (OR ATTORNEY): in this text, it means the person who represents the suspect of having committed a crime. He knows the law and his role is to protect the rights of the person he represents.

PUBLIC PROSECUTOR: represents the State because crimes are generally considered to be offences against the public and therefore against the State. They oversee whether the police are doing the right thing, in some cases deciding not to go to court, otherwise they are proposing to the court what action should be imposed on a suspect.

SOCIAL WORKER: worker of the so-called «social worker», ie the body of social and legal protection of children. The social worker from the office is usually present, for example, at your interrogation, other acts in which you participate in the police, or at court proceedings. Usually it is he / she who prepares a report on you for the public prosecutor or the court. For this reason, he will want to meet you on his own and talk. His / her task is not to investigate what happened, he is more interested in how you live, what you enjoy, what you need, etc.

PROBATION OFFICER (PROBATION AND MEDIATION SERVICE OFFICER): His / her role is different before and after the court decision. Before the court decides, they can try to contact you with an offer of cooperation, or you can also try to contact him / her (your parents can help you with that, or maybe a lawyer, or a social worker from «low threshold», etc.). If you really do commit a crime and regret it, it can help you find ways to fix what happened. Sometimes there may be an encounter with the victim, but only if you and the victim agree (so-called mediation). Or there may be a discussion of what to do next, in a joint meeting with your parents, etc. (so-called restorative group conferences). Following

a court decision, the probation officer is often the one who is to supervise how you are doing to meet the obligations or restrictions imposed. At the same time, the officer can help and advise you with what you are currently dealing with, eg at school, in the family, when looking for a job, etc.

MEASURE - a measure is a collective term for obligations or restrictions that a court may impose on you if it finds that you have actually committed an illegal act. The measures may be varied - for example, you may be required to live with your parents, pay a reasonable amount of money at once or in installments, submit to a program for children and young people, visit a probation officer on a regular basis (so-called probation supervision), or for example, the obligation to remain in a children's home with a school or educational institution, or in prison (in the case of children over 15 years of age). Some measures can be imposed on children above the age of 15 before a court decision, but only if they themselves agree. These are measures that do not involve placement in an institution or in prison. Otherwise, the measure must always be decided by a court. There is always an option to appeal against such a decision of a court. A lawyer or someone you trust can help you write the appeal.

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As part of the PRACTICE project, a child-friendly version of the Recommendations has been elaborated, in order to inform children in the most suitable way about their rights in relation to the individual assessment. Videos for children in conflict with the law have been done as well. There are two versions of the child-friendly version, one in Czech, drawing on the Czech legal system, and one in Slovak, drawing on the Slovak legal system. The first one has been translated into English and can be found in this Annex.

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December 2021 (for an updated list, please visit www.icj.org/commission)

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