EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

27 March 2018

Case Document No. 6

International Commission of Jurists (ICJ) v. Czech Republic
Complaint No.148/2017

FURTHER RESPONSE OF THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 15 March 2018

THE CZECH REPUBLIC

ADDITIONAL OBSERVATIONS OF THE GOVERNMENT
ON THE MERITS OF THE COLLECTIVE COMPLAINT

INTERNATIONAL COMMISSION OF JURISTS
v. the CZECH REPUBLIC
(no. 148/2017)

PRAGUE

15 MARCH 2018

1. In response to the letter of 18 January 2018 regarding the above mentioned collective complaint lodged with the European Committee of Social Rights ("the Committee") by the International Commission of Jurists ("the complainant organisation"), in which the Committee transmitted to the Government of the Czech Republic the complainant organisation's written response to the observations of the Government on the merits of the collective complaint ("observations of the complainant organisation" or "its observations"), the Government, maintaining their position expressed in their initial observations of 15 November 2017, wish to submit the following additional comments.

2. The Government recall that the complainant organisation complains about a violation of Article 17 of the European Social Charter as regards the State party's failure to ensure the effective exercise of the right to social and economic protection by children below the age of criminal responsibility but who are recognised as having infringed the penal law.

ON THE ADMISSIBILITY

3. First, the Government refer fully to their arguments on the admissibility presented in their initial observations of 23 June 2017 and remain convinced that the complaint should be declared inadmissible *ratione materiae*, as the subject matter of the complaint does not fall within the scope of any article of the Charter.

4. The Government are of the view that the examination of the collective complaint under any of the articles of the Charter would significantly and rather arbitrarily expand the scope of the Charter. As already argued in § 8 of the Government observations on the admissibility, nothing in the Committee's decision-making suggests that Article 17 is applicable to the case at hand.

ON THE MERITS

(i) Introductory remark

5. In its observations, the complainant organisation mainly reiterated the allegations already expressed in the collective complaint. Hence, the Government do not deem it necessary to further respond to those and are going to address in these additional observations solely issues newly raised in the observations of the complainant organisation.

(ii) On statistical data

6. The Government reiterate that statistical data related to the percentage of cases against juveniles in which courts refrained from imposing sanctions are relevant for the comparison with the percentage of cases concerning under-15 children in which no sanction was imposed. The data clearly indicate that it is

quite usual that an objective of the trial might be met even if a court decides to refrain from imposing a punishment or other measure.

7. However, as requested by the complainant organisation the Government provide data related to criminal prosecution of the juveniles. From the table in Enclosure 1 it is possible to conclude that in 2017 the prosecutor filed an indictment or a motion for the imposition of punishment in 74% of cases in which juveniles were either criminally prosecuted or examination was started in their cases (1,728 cases). On the other hand, the prosecutor decided to use a form of diversion and not to lodge an indictment or a motion for punishment in 19% of cases (436). In the rest of the cases, the criminal prosecution was discontinued based on other legal grounds.

8. It is possible to conclude from these date that in cases of the juveniles, the diversions in pre-trial phase are used rather sporadically, merely in less than one fifth of the cases, and the majority of cases are heard by an independent court. The court is in a position to apply a restorative approach and to decide to refrain from imposing a punishment or to impose the most suitable one.

(iii) On the description of the child protection system

9. The Government disagree with the allegation of the complainant organisation contained in § 8 of its observations that the juvenile justice system which deals exclusively with children in conflict with law is fully separated from and independent of the welfare system, dealing with broader categories of children governed by Act no. 89/2012, the Civil Code, and Act no. 359/1999, on Social and Legal Protection of Children.

10. The Government admit that the welfare system deals with endangered children, which is a broader category than just children in conflict with law. However, as the collective complaint alleges a violation of Article 17 of the Charter as regards the failure to ensure the effective exercise of the right to social and economic protection by children below the age of criminal responsibility, the protection and measures provided on the basis of the Act on Social and Legal Protection are in the Government's view highly relevant.

11. The explanatory report to the Juvenile Justice Act ("ZSVM") foresees intensive engagement of the authority for social and legal protection of children in the proceedings and stipulates that the juvenile court might impose on the under-15 children a measure regulated either by the ZSVM or by the Civil Code in conjunction with the Act on Social and Legal Protection.[1] Therefore, the Government are of the opinion that the description of the system of social protection of under-15 children who are in conflict with law is fully appropriate.

12. Furthermore, also the relevant case law of the Czech Supreme Court confirms the relationship between ZSVM and other welfare system regulations. The Supreme Court stated in its decision under no. 8 Tdo 514/2008 of 30 April

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[1] Explanatory report on the ZSVM, Parliament paper no. 210, the 2002–2006 term, p. 44, http://www.psp.cz/sqw/text/tiskt.sqw?o=4&ct=210&ct1=0.

2008 the principle that a protective treatment should be used subsidiarily to other measures or to institutional treatment which might be imposed under other civil law regulation.

13. To sum up, the Government recall that juvenile justice system and welfare system are strongly interrelated and interdependent and the description of the welfare system is therefore important and relevant for the examination of the alleged deficiencies in social protection of under-15 children who committed an otherwise criminal act.

(iv) On the educational character of the measures

14. The Government strongly disagree with the conclusion of the complainant organisation in § 22 of its observations that measures are a form of penal sanction. The argumentation of the complainant organisation is based solely on the explanatory report of Act no. 40/2009, the Criminal Code, which is inappropriate.

15. In the Government's opinion, this argumentation is systematically incorrect since the Criminal Code is not applicable to the cases of under-15 children. The Juvenile Justice Act is a specific regulation instead of the Criminal Code, because of the lack of criminal responsibility of under-15 children.

16. The Juvenile Justice Act regulates measures which are, with the exception of the protective treatment, different from the protective measures laid down in the Criminal Code.[2] The explanatory report of the Juvenile Justice Act states:

> "A child, who has not reached 15 years of age at the moment of the committing the crime, is not criminally responsible under the proposal of the Juvenile Justice Act. Nevertheless, because a reaction to these acts is needed, it is possible to impose on the child a suitable measure in order to rehabilitate, protect and educate him or her. These measures are imposed by a juvenile court in the civil proceedings under this Act or under the Act on Family in conjunction with the Act on Social and Legal Protection of Children, not in criminal proceedings."

17. In the light of the above mentioned, it is clear that the measures imposed by the juvenile court are not of penal character as alleged by the complainant organisation, but of rehabilitative, protective and educational character. The explanatory report to the Criminal Act is simply not applicable to the Juvenile Justice Act which regulates different measures.

(v) On the execution and the duration of the protective educational and protective treatment

18. The complainant organisation further argues in §§ 17 and 26 of its observations that the institutional protective education and institutional protective

[2] Under Article 93 § 1 of Juvenile Justice Act a juvenile court might impose the following measures: an educational duty, an educational restriction, a warning alert, inclusion in a therapeutic, psychological or another suitable upbringing programme at an educational care centre, supervision by a probation officer, protective institutional education or protective institutional treatment.

treatment might be imposed for an indeterminate period. The Government submit that this allegation is incomplete. The mere fact that the juvenile court does not determine explicitly the length of the measure in its judgment does not mean that the duration of the measure is indeterminate. As the complainant organisation admits in footnote no. 7 these measures last until their objective is met. In other words, as soon as the objective is met, the court is obliged to repeal the imposition of the treatment. Moreover, the duration of the institutional protective education is also limited by the moment when a child reaches 18 years of age.

19. Further, the complainant organisation does not mention that under Article 95a of the Juvenile Justice Act, the juvenile court is obliged to oversee the execution of the institutional protective treatment at least once every 12 months. The juvenile court is obliged to review, based on relevant reports, whether the reasons for its imposition persist. On the proposal of the medical facility, prosecutor, child, legal guardian, guardian of the child or authority for social and legal protection of children or even without such a proposal the juvenile court is obliged to decide whether the institutional protective treatment is to continue or not.

20. The complainant organisation further argued in § 19 of its observations that children on whom institutional protective education or institutional protective treatment was imposed are detained with criminally responsible juveniles.

21. The Government maintain that this statement is inaccurate. The institutional protective education is executed in three different types of facilities. The facilities are generally, with the exception of children older than 12 years who suffer from a serious behaviour disorder and might be placed into a facility for older children,[3] intended only either for children under 15 years of age or only for children above that age. The system of the facilities presume that a child is first placed for 8 weeks into a diagnostic facility[4] and after the diagnostic stay the most appropriate facility is chosen with regard to the child's needs.

22. For the sake of completeness, the Government state that under Article 2 § 2 of Act no. 109/2002, on Execution of Institutional or Protective Education, the children on whom a measure of protective education is imposed are placed into a facility where also institutional education is provided. Therefore, despite the fact that children in protective education might be subjected to more restrictions than children in institutional education, the overall setting and atmosphere of the facility where both forms of education are executed is of educational and not of penal character.

23. The system of institutional protective treatment is ensured by a medical psychiatric facility. The criminal responsibility or lack of criminal responsibility is therefore not a decisive criterion for the placement of a child into a specific department within the medical facility. The appropriate department for a child or a

[3] Article 14 § 3 of Act no. 109/2002.
[4] Article 5 § 6 of Act no. 109/2002.

juvenile is determined exclusively depending on his or her psychiatric diagnosis in order to ensure specialized and the most suitable care for each child.

(vi) On the nature of proceedings in cases of under-15 children on otherwise criminal acts

24. The Government do not share the view of the complainant organisation mentioned in § 28 that the mere application of the criterion of the nature of the offence would suffice to conclude that under the so-called Engel test the proceedings with under-15 children are of criminal nature. The cited decision of the Czech Supreme Court no. 8 Tdo 514/2008 of 30 April 2008 solely declares that the children under the age of criminal responsibility are not prosecuted for criminal act due to the lack of their age. The quotation does not state in any way that the proceedings in cases of under-15 children on acts that otherwise are criminal are proceedings of criminal nature.

25. Moreover, the Government submit that the fact that the nature of the offence is not and cannot by itself be a decisive criterion stems also from the case law of the European Court of Human Rights ("Court"). In the case of *Blokhin v. Russia* (no. 47152/06, judgment [GC] of 23 March 2016) the Court decided to refrain from examining this aspect although it could have taken a clear stance on this issue. It stated in § 179:

> "It is, however, not necessary to decide whether, despite the indisputably criminal nature of the imputed offence, the fact that criminal prosecution of the applicant was legally impossible because of his age removed the proceedings against him from the ambit of the criminal limb of Article 6. The Court will instead concentrate on the third criterion: the nature and degree of severity of the penalty that the applicant risked incurring."

26. Therefore, it is possible to sum up that only the nature and seriousness of the measures applied to the perpetrator of the act is regarded by the Court as a decisive criterion. In other words, it is necessary to examine carefully the specific nature and characteristics of each measure, which is applied in a reaction to the unlawful act committed by an under-15 child. The Government further refer to their argumentation presented in § 33 of their initial observations where they described that none of the measures which can be imposed on children under the age of 15 in proceedings on otherwise criminal act is a sanction by its nature.

(vii) On ensuring mandatory defence from the moment measures under the Juvenile Justice Act were used or actions under the Code of Criminal Procedure were taken against under-15 children

27. The complainant organisation challenges in §§ 33–35 of its observations the Government's conclusions on inapplicability of the soft law documents cited in the complaint to the situation of under-15 children. The Government point out that the complainant organisation does not disprove unambiguously the fact that the Recommendation on the European rules for juvenile offenders subject to sanctions or measures (CM/Rec(2008) 11) is not relevant to children who are not

criminally responsible. Regarding point 22 of the Recommendation referred to by the complainant organisation it is important to note that it stipulates:

> "These rules may also apply to the benefit of other persons held in the same institutions or settings as juvenile offenders."

28. From the wording of the point, it follows that the provision merely suggests that the Recommendation *might* be applicable to under-15 children. The provision is formulated in a different way than the rest of the Recommendation, which generally stipulate that certain rules or safeguards *should* be applied by a Member State.

29. The same applies to Recommendation Rec (2003)20 of the Committee of Ministers to Member States concerning new ways of dealing with juvenile delinquency and the role of juvenile justice. Article 1 states that: "the recommendation may also extend to those immediately below and above these ages." Therefore, the Government are convinced that the document also solely suggests the option that it might be applicable to under-15 children but does not require it.

30. With regard to the abovementioned, the Government therefore recall that the complainant organisation interprets the cited soft law in a very extensive way in order to argue that it is applicable to under-15 children. On the contrary, the Government are of the view that the cited documents were published to define standards for juvenile justice systems for criminally responsible juveniles and therefore their applicability to children under the minimum age of criminal responsibility totally depends on whether the States decide to accept the principles contained therein.

31. Furthermore, the Government do not dispute a principle of fundamental importance of an effective and early access to a lawyer when it concerns a minor. Nonetheless, the Government reiterate that the quoted jurisprudence of the Court (i.e. *Salduz v. Turkey*, no. 36391/02, judgment of 27 November 2008; *Panovitz v. Cyprus*, no. 4268/04, judgment of 11 December 2008; and *Adamkiewicz v. Poland*, no. 54729/00, judgment of 2 March 2010) does not set up the obligation of the State to ensure legal aid to a child who is not criminally responsible contrary to the view of the complainant organisation. Firstly, as already mentioned in the initial observations of the Government (§§ 43–45), the cited case law concerns merely juveniles who are criminally responsible and not children under the age of criminal responsibility. Secondly, the cited case law solely establishes violations of the right to a fair trial under Article 6 § 3 with respect to the fact that the applicants were not provided access to their defence lawyer. It is to be stressed that the case law did not find a violation of Article 6 § 3 based on the failure to ensure a defence lawyer to the applicants. The Government consider this aspect essential for the assessment of the complaint.

32. In § 45 the complainant organisation explains why the access to a lawyer is allegedly illusory under current regulation. The Government stress that the complainant organisation argues that a child providing explanation is unable to claim actively itself the need for a lawyer. The complainant organisation omits in its argumentation that under Article 158 § 5 of the Code of Criminal Procedure if

an explanation is requested from a minor, the minor's legal guardian or appointed guardian shall be notified of this step in advance. It means that the legal guardian or guardian of the child is aware of the fact that the child is going to provide an explanation and therefore he or she is in a position to ensure legal aid for the child. In conclusion, in the Government's view, it is not possible to consider the access to a lawyer illusory.

(viii) On access to the police file during the pre-trial stage (examination phase)

33. The Government respond to § 51 of the complainant organisation's observations that they do not see any inconsistency in their argumentation concerning the importance of the pre-trial stage of proceedings. It is true that the purpose of the pre-trial stage is solely to gather evidence which is later duly examined by a juvenile court deciding on the imposition of the measure. At the same time, the police and the prosecutor are obliged to assess the evidence and make a conclusion whether the uncovered facts can be reasonably believed to indicate that the under-15 child committed an otherwise criminal act. In this case, the prosecutor lodges a motion for imposing a measure. The last mentioned does not cast doubt on the fact that the pre-trial stage of the proceedings is just preparatory and the final decision on the imposition of the measure is fully up to the juvenile court.

(ix) On failure to ensure that children are served with the final decision of the police authority in the examination phase and have the right to appeal against this decision

34. In response to § 53 of the complainant organisation's observations, the Government submit in Enclosure 2 the recent Opinion no. 1 SL 705/2017 of the Analytical and Legislative Department of the Supreme Public Prosecutor's Office which clearly stipulates that parents of the child suspected of committing an otherwise criminal act shall be notified of the final decision of the police authority.

35. The notification of the decisions not to proceed with the matter due to the impermissibility of prosecution because of age of the suspected child includes information on gathered evidence in the case. Therefore, the parents of the child are informed of the evidentiary situation at the latest at this moment, still before the initiation of the trial stage.

(x) On the need to conduct proceedings on the imposition of a measure before juvenile courts

36. The Government disagree with the opinion of the complainant organisation addressed in § 58 of its observations that the alleged deficiency of the Czech regulation is similar to the logic addressed by the Court in the cases of *Bouamar v. Belgium* (no. 9106/80, judgment of 29 February 1988) and *D.G. v. Ireland* (no. 39474/98, judgment of 16 May 2002). In the former case the Court found a violation of Article 5 § 1 (d) of the Convention because of the failure of the State to put in place appropriate institutional facilities which met the demands of securi-

ty and the educational objectives of the applicable Act, in order to be able to satisfy the requirements of Article 5 § 1 (d) of the Convention. The Government highlight that the Court found a breach of the provision of the Convention because the State placed the applicant to a prison facility instead of a facility suitable for educational supervision in the sense of Article 5 § 1 (d) of the Convention. The situation and the violation of Article 5 § 1 (d) in the latter case (*D.G. v. Ireland*) is analogous.

37. Having regard to the abovementioned, the Government deem it erroneous to allege that they fail to fulfil their obligation under the Charter because they do not implement the restorative system of juvenile justice despite having declared that they adopted this system. The Government reiterate that the Court found a violation of the Convention in above cases as regards the non-compliance of the State with the Convention and not the non-compliance of the national regulation and practice with the declared system of corrective measures. First, it must be recalled that the Juvenile Justice Act fully applies elements of restorative justice and the mere fact that diversions are not available in the pre-trial stage of proceedings does not mean that the system is not of restorative nature as a whole. Second, neither the *Bouamar* nor the *D.G.* case dealt with by the Court relate in any way to the principles of restorative justice. Both cases merely concern the deprivation of liberty for the purpose of an educational supervision. The argumentation of the complainant organisation is therefore incorrect and misleading on this point.

38. The complainant organisation argues that the Government agreed that under-15 children could not access any restorative justice measures. This allegation, however, is excessively simplifying. In the view of the Government, all measures which might be imposed under the Juvenile Justice Act are of restorative character. Indeed, it is not possible to allege that the absence of diversion in the pre-trial phase of the proceedings means that the system of juvenile justice does not respect the principles of restorative justice.

39. The Government recall their position that the existence of diversions within the meaning of the Criminal Code in cases of under-15 children would constitute a lowering of the standard of protection currently afforded to children suspected of an otherwise criminal act. The Government's argument that the police authority or the prosecutor should not be responsible for the decision on diversion is not in contradiction with the statement that the police authority and the prosecutors are competent to decide in the pre-trial stage whether all elements of crime were fulfilled. If the prosecutor ascertains whether all elements of crime were fulfilled in order to lodge an indictment or a motion for imposing a measure, it remains to be the responsibility of the court to decide on the guilt or imposition of a measure in the each case. On the other hand, if the prosecutor decided to use a diversion in the pre-trial stage of the proceedings, as suggested by the complainant organisation, he would *de facto* confirm the guilt of the suspect.

40. In the light of the above, the Government maintain that the usage of diversions in pre-trial stage is not suitable in cases of under-15 children since it is in

the best interest of the children to leave such an essential assessment up to an independent court.

OVERAL CONCLUSION

41. As to the admissibility and merits of the collective complaint at hand, the Government refer to their observations on the admissibility of the complaint of 23 June 2017 and to their initial observations on the merits of 15 November 2017.

Vít A. S c h o r m
Agent of the Government
(*signed electronically*)

ENCLOSURES

1. Prosecution of juveniles: outcomes from proceedings – a table
2. Opinion no. 1 SL 705/2017 of the Analytical and Legislative Department of the Supreme Public Prosecutor's Office