

# Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice



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# Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice

adopted by the Committee of Ministers  
of the Council of Europe  
on 17 November 2010  
and explanatory memorandum

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First part

**Guidelines of the  
Committee of Ministers  
of the Council of Europe  
on child-friendly justice**

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# Guidelines

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*(Adopted by the Committee of Ministers on 17 November 2010  
at the 1098th meeting of the Ministers' Deputies)*

## Preamble

The Committee of Ministers,

Considering that the aim of the Council of Europe is to achieve a greater unity between the member states, in particular by promoting the adoption of common rules in legal matters;

Considering the necessity of ensuring the effective implementation of existing binding universal and European standards protecting and promoting children's rights, including in particular:

- ▶ the 1951 United Nations Convention Relating to the Status of Refugees;
- ▶ the 1966 International Covenant on Civil and Political Rights;
- ▶ the 1966 International Covenant on Economic, Social and Cultural Rights;
- ▶ the 1989 United Nations Convention on the Rights of the Child;
- ▶ the 2006 United Nations Convention on the Rights of Persons with Disabilities;
- ▶ the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5) (hereafter the "ECHR");
- ▶ the European Convention on the Exercise of Children's Rights (1996, ETS No. 160);
- ▶ the revised European Social Charter (1996, ETS No. 163);
- ▶ the Council of Europe Convention on Contact concerning Children (2003, ETS No. 192);
- ▶ the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007, CETS No. 201);
- ▶ the European Convention on the Adoption of Children (Revised) (2008, CETS No. 202);

Considering that, as guaranteed under the ECHR and in line with the case law of the European Court of Human Rights, the right of any person to have access to justice and to a fair trial – in all its components (including in particular the right to be informed, the right to be heard, the right to a legal defence, and the right to be represented) – is necessary in a democratic society and equally applies to children, taking however into account their capacity to form their own views;

Recalling relevant case law of the European Court of Human Rights, decisions, reports or other documents of other Council of Europe institutions and bodies including recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), and statements and opinions

of the Council of Europe Commissioner for Human Rights and various recommendations of the Parliamentary Assembly of the Council of Europe;

Noting various recommendations of the Committee of Ministers to member states in the area of children's rights, including Recommendation Rec(2003)5 on measures of detention of asylum seekers, Recommendation Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Recommendation Rec(2005)5 on the rights of children living in residential institutions, Recommendation Rec(2006)2 on the European Prison Rules, Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures and Recommendation CM/Rec(2009)10 on integrated national strategies for the protection of children from violence;

Recalling Resolution No. 2 on child-friendly justice, adopted at the 28th Conference of European Ministers of Justice (Lanzarote, October 2007);

Considering the importance of safeguarding children's rights by United Nations instruments such as:

- ▶ the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules", 1985);
- ▶ the United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("The Havana Rules", 1990);
- ▶ the United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines", 1990);
- ▶ the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Res 2005/20, 2005);
- ▶ the Guidance Note of the United Nations Secretary-General: United Nations Approach to Justice for Children (2008);
- ▶ the United Nations Guidelines for the Appropriate Use and Conditions of Alternative Care for Children (2009);
- ▶ the Principles relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights ("The Paris Principles");

Recalling the need to guarantee the effective implementation of existing binding norms concerning children's rights, without preventing member states from introducing or applying higher standards or more favourable measures;

Referring to the Council of Europe Programme "Building a Europe for and with children";

Acknowledging the progress made in member states towards implementing child-friendly justice;

Noting, nonetheless, existing obstacles for children within the justice system such as, among others, the non-existing, partial or conditional legal right to access to justice, the diversity in and complexity of procedures, possible discrimination on various grounds;

Recalling the need to prevent possible secondary victimisation of children by the judicial system in procedures involving or affecting them;

Inviting member states to investigate existing lacunae and problems and identify areas where child-friendly justice principles and practices could be introduced;

Acknowledging the views and opinions of consulted children throughout the member states of the Council of Europe;

Noting that the guidelines aim to contribute to the identification of practical remedies to existing shortcomings in law and in practice;

Adopts the following guidelines to serve as a practical tool for member states in adapting their judicial and non-judicial systems to the specific rights, interests and needs of children and invites member states to ensure that they are widely disseminated among all authorities responsible for or otherwise involved with children's rights in justice.

## I. Scope and purpose

1. The guidelines deal with the issue of the place and role, and the views, rights and needs of the child in judicial proceedings and in alternatives to such proceedings.
2. The guidelines should apply to all ways in which children are likely to be, for whatever reason and in whatever capacity, brought into contact with all competent bodies and services involved in implementing criminal, civil or administrative law.
3. The guidelines aim to ensure that, in any such proceedings, all rights of children, among which the right to information, to representation, to participation and to protection, are fully respected with due consideration to the child's level of maturity and understanding and to the circumstances of the case. Respecting children's rights should not jeopardise the rights of other parties involved.

## II. Definitions

For the purposes of these guidelines on child-friendly justice (hereafter "the guidelines"):

- a. a "child" means any person under the age of 18 years;
- b. a "parent" refers to the person(s) with parental responsibility, according to national law. In case the parent(s) is/are absent or no longer holding parental responsibility, this can be a guardian or an appointed legal representative;
- c. "child-friendly justice" refers to justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and 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.

### III. Fundamental principles

1. The guidelines build on the existing principles enshrined in the instruments referred to in the preamble and the case law of the European Court of Human Rights.
2. These principles are further developed in the following sections and should apply to all chapters of these guidelines.

#### A. Participation

1. The right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them should be respected. This includes giving due weight to the children's views bearing in mind their maturity and any communication difficulties they may have in order to make this participation meaningful.
2. Children should be considered and treated as full bearers of rights and should be entitled to exercise all their rights in a manner that takes into account their capacity to form their own views and the circumstances of the case.

#### B. Best interests of the child

1. Member states should guarantee the effective implementation of the right of children to have their best interests be a primary consideration in all matters involving or affecting them.
2. In assessing the best interests of the involved or affected children:
  - a. their views and opinions should be given due weight;
  - b. all other rights of the child, such as the right to dignity, liberty and equal treatment should be respected at all times;
  - c. a comprehensive approach should be adopted by all relevant authorities so as to take due account of all interests at stake, including psychological and physical well-being and legal, social and economic interests of the child.
3. The best interests of all children involved in the same procedure or case should be separately assessed and balanced with a view to reconciling possible conflicting interests of the children.
4. While the judicial authorities have the ultimate competence and responsibility for making the final decisions, member states should make, where necessary, concerted efforts to establish multidisciplinary approaches with the objective of assessing the best interests of children in procedures involving them.

#### C. Dignity

1. Children should be treated with care, sensitivity, fairness and respect throughout any procedure or case, with special attention for their personal situation, well-being and specific needs, and with full respect for their physical and psychological integrity. This treatment should be given to them, in whichever way they have come into contact with judicial or non-judicial proceedings or other interventions, and regardless of their legal status and capacity in any procedure or case.

2. Children shall not be subjected to torture or inhuman or degrading treatment or punishment.

## **D. Protection from discrimination**

1. The rights of children shall be secured without discrimination on any grounds such as sex, race, colour or ethnic background, age, language, religion, political or other opinion, national or social origin, socio-economic background, status of their parent(s), association with a national minority, property, birth, sexual orientation, gender identity or other status.
2. 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.

## **E. Rule of law**

1. The rule of law principle should apply fully to children as it does to adults.
2. Elements of due process such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, should be guaranteed for children as they are for adults and should not be minimised or denied under the pretext of the child's best interests. This applies to all judicial and non-judicial and administrative proceedings.
3. Children should have the right to access appropriate independent and effective complaints mechanisms.

# **IV. Child-friendly justice before, during and after judicial proceedings**

## **A. General elements of child-friendly justice**

### **1. Information and advice**

1. From their first involvement with the justice system or other competent authorities (such as the police, immigration, educational, social or health care services) and throughout that process, children and their parents should be promptly and adequately informed of, *inter alia*:
  - a. their rights, in particular the specific rights children have with regard to judicial or non-judicial proceedings in which they are or might be involved, and the instruments available to remedy possible violations of their rights including the opportunity to have recourse to either a judicial or non-judicial proceeding or other interventions. This may include information on the likely duration of proceedings, possible access to appeals and independent complaints mechanisms;
  - b. the system and procedures involved, taking into consideration the particular place the child will have and the role he or she may play in it and the different procedural steps;

- c. the existing support mechanisms for the child when participating in the judicial or non-judicial procedures;
  - d. the appropriateness and possible consequences of given in-court or out-of-court proceedings;
  - e. where applicable, the charges or the follow-up given to their complaint;
  - f. the time and place of court proceedings and other relevant events, such as hearings, if the child is personally affected;
  - g. the general progress and outcome of the proceedings or intervention;
  - h. the availability of protective measures;
  - i. the existing mechanisms for review of decisions affecting the child;
  - j. the existing opportunities to obtain reparation from the offender or from the state through the justice process, through alternative civil proceedings or through other processes;
  - k. the availability of the services (health, psychological, social, interpretation and translation, and other) or organisations which can provide support and the means of accessing such services along with emergency financial support, where applicable;
  - l. any special arrangements available in order to protect as far as possible their best interests if they are resident in another state.
2. The information and advice should be provided to children in a manner adapted to their age and maturity, in a language which they can understand and which is gender and culture sensitive.
  3. As a rule, both the child and parents or legal representatives should directly receive the information. Provision of the information to the parents should not be an alternative to communicating the information to the child.
  4. Child-friendly materials containing relevant legal information should be made available and widely distributed, and special information services for children such as specialised websites and helplines established.
  5. Information on any charges against the child must be given promptly and directly after the charges are brought. This information should be given to both the child and the parents in such a way that they understand the exact charge and the possible consequences.

## 2. Protection of private and family life

6. The privacy and personal data of children who are or have been involved in judicial or non-judicial proceedings and other interventions should be protected in accordance with national law. This generally implies that no information or personal data may be made available or published, particularly in the media, which could reveal or indirectly enable the disclosure of the child's identity, including images, detailed descriptions of the child or the child's family, names or addresses, audio and video records, etc.
7. Member states should prevent violations of the privacy rights as mentioned under guideline 6 above by the media through legislative measures or monitoring self-regulation by the media.

8. Member states should stipulate limited access to all records or documents containing personal and sensitive data of children, in particular in proceedings involving them. If the transfer of personal and sensitive data is necessary, while taking into account the best interests of the child, member states should regulate this transfer in line with relevant data protection legislation.

9. Whenever children are being heard or giving evidence in judicial or non-judicial proceedings or other interventions, where appropriate, this should preferably take place in camera. As a rule, only those directly involved should be present, provided that they do not obstruct children in giving evidence.

10. Professionals working with and for children should abide by the strict rules of confidentiality, except where there is a risk of harm to the child.

### **3. Safety (special preventive measures)**

11. In all judicial and non-judicial proceedings or other interventions, children should be protected from harm, including intimidation, reprisals and secondary victimisation.

12. Professionals working with and for children should, where necessary, be subject to regular vetting, according to national law and without prejudice to the independence of the judiciary, to ensure their suitability to work with children.

13. Special precautionary measures should apply to children when the alleged perpetrator is a parent, a member of the family or a primary caregiver.

### **4. Training of professionals**

14. All professionals working with and for children should receive necessary interdisciplinary training on the rights and needs of children of different age groups, and on proceedings that are adapted to them.

15. Professionals having direct contact with children should also be trained in communicating with them at all ages and stages of development, and with children in situations of particular vulnerability.

### **5. Multidisciplinary approach**

16. With full respect of the child's right to private and family life, close co-operation between different professionals should be encouraged in order to obtain a comprehensive understanding of the child, and an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation.

17. A common assessment framework should be established for professionals working with or for children (such as lawyers, psychologists, physicians, police, immigration officials, social workers and mediators) in proceedings or interventions that involve or affect children to provide any necessary support to those taking decisions, enabling them to best serve children's interests in a given case.

18. While implementing a multidisciplinary approach, professional rules on confidentiality should be respected.

## 6. Deprivation of liberty

19. Any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time.
20. When deprivation of liberty is imposed, children should, as a rule, be held separately from adults. When children are detained with adults, this should be for exceptional reasons and based solely on the best interests of the child. In all circumstances, children should be detained in premises suited to their needs.
21. Given the vulnerability of children deprived of liberty, the importance of family ties and promoting the reintegration into society, competent authorities should ensure respect and actively support the fulfilment of the rights of the child as set out in universal and European instruments. In addition to other rights, children in particular should have the right to:
  - a. maintain regular and meaningful contact with parents, family and friends through visits and correspondence, except when restrictions are required in the interests of justice and the interests of the child. Restrictions on this right should never be used as a punishment;
  - b. receive appropriate education, vocational guidance and training, medical care, and enjoy freedom of thought, conscience and religion and access to leisure, including physical education and sport;
  - c. access programmes that prepare children in advance for their return to their communities, with full attention given to them in respect of their emotional and physical needs, their family relationships, housing, schooling and employment possibilities and socio-economic status.
22. The deprivation of liberty of unaccompanied minors, including those seeking asylum, and separated children should never be motivated or based solely on the absence of residence status.

## B. Child-friendly justice before judicial proceedings

23. The minimum age of criminal responsibility should not be too low and should be determined by law.
24. Alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged whenever these may best serve the child's best interests. The preliminary use of such alternatives should not be used as an obstacle to the child's access to justice.
25. Children should be thoroughly informed and consulted on the opportunity to have recourse to either a court proceeding or alternatives outside court settings. This information should also explain the possible consequences of each option. Based on adequate information, both legal and otherwise, a choice should be available to use either court procedures or alternatives for these proceedings whenever they exist. Children should be given the opportunity to obtain legal advice and other assistance in determining the appropriateness and desirability of the proposed alternatives. In making this decision, the views of the child should be taken into account.

26. Alternatives to court proceedings should guarantee an equivalent level of legal safeguards. Respect for children's rights as described in these guidelines and in all relevant legal instruments on the rights of the child should be guaranteed to the same extent in both in-court and out-of-court proceedings.

## **C. Children and the police**

27. Police should respect the personal rights and dignity of all children and have regard to their vulnerability, that is, take account of their age and maturity and any special needs of those who may be under a physical or mental disability or have communication difficulties.

28. Whenever a child is apprehended by the police, the child should be informed in a manner and in language that is appropriate to his or her age and level of understanding of the reason for which he or she has been taken into custody. Children should be provided with access to a lawyer and be given the opportunity to contact their parents or a person whom they trust.

29. Save in exceptional circumstances, the parent(s) should be informed of the child's presence in the police station, given details of the reason why the child has been taken into custody and be asked to come to the station.

30. A child who has been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer or one of the child's parents or, if no parent is available, another person whom the child trusts. The parent or this person may be excluded if suspected of involvement in the criminal behaviour or if engaging in conduct which amounts to an obstruction of justice.

31. Police should ensure that, as far as possible, no child in their custody is detained together with adults.

32. Authorities should ensure that children in police custody are kept in conditions that are safe and appropriate to their needs.

33. In member states where this falls under their mandate, prosecutors should ensure that child-friendly approaches are used throughout the investigation process.

## **D. Child-friendly justice during judicial proceedings**

### **1. Access to court and to the judicial process**

34. As bearers of rights, children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights. The domestic law should facilitate where appropriate the possibility of access to court for children who have sufficient understanding of their rights and of the use of remedies to protect these rights, based on adequately given legal advice.

35. Any obstacles to access to court, such as the cost of the proceedings or the lack of legal counsel, should be removed.

36. In cases of certain specific crimes committed against children, or certain aspects of civil or family law, access to court should be granted for a period of time

after the child has reached the age of majority where necessary. Member states are encouraged to review their statutes of limitations.

## 2. Legal counsel and representation

37. Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.

38. Children should have access to free legal aid, under the same or more lenient conditions as adults.

39. Lawyers representing children should be trained in and knowledgeable on children's rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding.

40. Children should be considered as fully fledged clients with their own rights and lawyers representing children should bring forward the opinion of the child.

41. Lawyers should provide the child with all necessary information and explanations concerning the possible consequences of the child's views and/or opinions.

42. In cases where there are conflicting interests between parents and children, the competent authority should appoint either a guardian *ad litem* or another independent representative to represent the views and interests of the child.

43. Adequate representation and the right to be represented independently from the parents should be guaranteed, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders.

## 3. Right to be heard and to express views

44. Judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Means used for this purpose should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard.

45. Due weight should be given to the child's views and opinion in accordance with his or her age and maturity.

46. The right to be heard is a right of the child, not a duty of the child.

47. A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case.

48. Children 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.

49. Judgments 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.

#### **4. Avoiding undue delay**

50. In all proceedings involving children, the urgency principle should be applied to provide a speedy response and protect the best interests of the child, while respecting the rule of law.

51. In family law cases (for example parentage, custody, parental abduction), courts should exercise exceptional diligence to avoid any risk of adverse consequences on the family relations.

52. When necessary, judicial authorities should consider the possibility of taking provisional decisions or making preliminary judgments to be monitored for a certain period of time in order to be reviewed later.

53. In accordance with the law, judicial authorities should have the possibility to take decisions which are immediately enforceable in cases where this would be in the best interests of the child.

#### **5. Organisation of the proceedings, child-friendly environment and child-friendly language**

54. In all proceedings, children should be treated with respect for their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulties they may have. Cases involving children should be dealt with in non-intimidating and child-sensitive settings.

55. Before proceedings begin, children should be familiarised with the layout of the court or other facilities and the roles and identities of the officials involved.

56. Language appropriate to children's age and level of understanding should be used.

57. When children are heard or interviewed in judicial and non-judicial proceedings and during other interventions, judges and other professionals should interact with them with respect and sensitivity.

58. Children should be allowed to be accompanied by their parents or, where appropriate, an adult of their choice, unless a reasoned decision has been made to the contrary in respect of that person.

59. Interview methods, such as video or audio-recording or pre-trial hearings in camera, should be used and considered as admissible evidence.

60. Children should be protected, as far as possible, against images or information that could be harmful to their welfare. In deciding on disclosure of possibly harmful images or information to the child, the judge should seek advice from other professionals, such as psychologists and social workers.

61. Court sessions involving children should be adapted to the child's pace and attention span: regular breaks should be planned and hearings should not last too

long. To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.

62. As far as appropriate and possible, interviewing and waiting rooms should be arranged for children in a child-friendly environment.

63. As far as possible, specialist courts (or court chambers), procedures and institutions should be established for children in conflict with the law. This could include the establishment of specialised units within the police, the judiciary, the court system and the prosecutor's office.

## 6. Evidence/statements by children

64. Interviews of and the gathering of statements from children should, as far as possible, be carried out by trained professionals. Every effort should be made for children to give evidence in the most favourable settings and under the most suitable conditions, having regard to their age, maturity and level of understanding and any communication difficulties they may have.

65. Audiovisual statements from children who are victims or witnesses should be encouraged, while respecting the right of other parties to contest the content of such statements.

66. When more than one interview is necessary, they should preferably be carried out by the same person, in order to ensure coherence of approach in the best interests of the child.

67. The number of interviews should be as limited as possible and their length should be adapted to the child's age and attention span.

68. Direct contact, confrontation or interaction between a child victim or witness with alleged perpetrators should, as far as possible, be avoided unless at the request of the child victim.

69. Children should have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator.

70. The existence of less strict rules on giving evidence such as absence of the requirement for oath or other similar declarations, or other child-friendly procedural measures, should not in itself diminish the value given to a child's testimony or evidence.

71. Interview protocols that take into account different stages of the child's development should be designed and implemented to underpin the validity of children's evidence. These should avoid leading questions and thereby enhance reliability.

72. With regard to the best interests and well-being of children, it should be possible for a judge to allow a child not to testify.

73. A child's statements and evidence should never be presumed invalid or untrustworthy by reason only of the child's age.

74. The possibility of taking statements of child victims and witnesses in specially designed child-friendly facilities and a child-friendly environment should be examined.

## **E. Child-friendly justice after judicial proceedings**

75. The child's lawyer, guardian *ad litem* or legal representative should communicate and explain the given decision or judgment to the child in a language adapted to the child's level of understanding and should give the necessary information on possible measures that could be taken, such as appeal or independent complaint mechanisms.

76. National authorities should take all necessary steps to facilitate the execution of judicial decisions/rulings involving and affecting children without delay.

77. When a decision has not been enforced, children should be informed, possibly through their lawyer, guardian *ad litem* or legal representative, of available remedies either through non-judicial mechanisms or access to justice.

78. Implementation of judgments by force should be a measure of last resort in family cases when children are involved.

79. After judgments in highly conflictual proceedings, guidance and support should be offered, ideally free of charge, to children and their families by specialised services.

80. Particular health care and appropriate social and therapeutic intervention programmes or measures for victims of neglect, violence, abuse or other crimes should be provided, ideally free of charge, and children and their caregivers should be promptly and adequately informed of the availability of such services.

81. The child's lawyer, guardian or legal representative should have a mandate to take all necessary steps to claim for damages during or after criminal proceedings in which the child was a victim. Where appropriate, the costs could be covered by the state and recovered from the perpetrator.

82. Measures and sanctions for children in conflict with the law should always be constructive and individualised responses to the committed acts, bearing in mind the principle of proportionality, the child's age, physical and mental well-being and development and the circumstances of the case. The right to education, vocational training, employment, rehabilitation and reintegration should be guaranteed.

83. In order to promote the reintegration within society, and in accordance with the national law, criminal records of children should be non-disclosable outside the justice system on reaching the age of majority. Exceptions for the disclosure of such information can be permitted in cases of serious offences, *inter alia* for reasons of public safety or when employment with children is concerned.

## V. Promoting other child-friendly actions

Member states are encouraged to:

- a. promote research into all aspects of child-friendly justice, including child-sensitive interviewing techniques and dissemination of information and training on such techniques;
- b. exchange practice and promote co-operation in the field of child-friendly justice internationally;
- c. promote the publication and widest possible dissemination of child-friendly versions of relevant legal instruments;
- d. set up, or maintain and reinforce where necessary, information offices for children's rights, possibly linked to bar associations, welfare services, (children's) ombudsmen, Non-governmental Organisations (NGOs), etc.;
- e. facilitate children's access to courts and complaint mechanisms and further recognise and facilitate the role of NGOs and other independent bodies or institutions such as children's ombudsmen in supporting children's effective access to courts and independent complaint mechanisms, both on a national and international level;
- f. consider the establishment of a system of specialised judges and lawyers for children and further develop courts in which both legal and social measures can be taken in favour of children and their families;
- g. develop and facilitate the use by children and others acting on their behalf of universal and European human and children's rights protection mechanisms for the pursuit of justice and protection of rights when domestic remedies do not exist or have been exhausted;
- h. make human rights, including children's rights, a mandatory component in the school curricula and for professionals working with children;
- i. develop and support systems aimed at raising the awareness of parents on children's rights;
- j. set up child-friendly, multi-agency and interdisciplinary centres for child victims and witnesses where children could be interviewed and medically examined for forensic purposes, comprehensively assessed and receive all relevant therapeutic services from appropriate professionals;
- k. set up specialised and accessible support and information services, such as online consultation, help lines and local community services free of charge;
- l. ensure that all concerned professionals working in contact with children in justice systems receive appropriate support and training, and practical guidance in order to guarantee and implement adequately the rights of children, in particular while assessing children's best interests in all types of procedures involving or affecting them.

## **VI. Monitoring and assessment**

Member states are also encouraged to:

- a. review domestic legislation, policies and practices to ensure the necessary reforms to implement these guidelines;
- b. to speedily ratify, if not yet done so, relevant Council of Europe conventions concerning children's rights;
- c. periodically review and evaluate their working methods within the child-friendly justice setting;
- d. maintain or establish a framework, including one or more independent mechanisms, as appropriate, to promote and monitor implementation of the present guidelines, in accordance with their judicial and administrative systems;
- e. ensure that civil society, in particular organisations, institutions and bodies which aim to promote and to protect the rights of the child, participate fully in the monitoring process.



Second part

**Explanatory  
memorandum**

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# General comments

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## Why a new instrument?

1. For the Council of Europe, protecting children's rights and promoting child-friendly justice is a priority. The issue of protection of children was addressed by the Action Plan of the 3rd Summit of Heads of State and Government of the Council of Europe in Warsaw in 2005.
2. While a number of legal instruments exist at the international, European and national levels, gaps remain both in law and in practice, and governments and professionals working with children are requesting guidance to ensure the effective implementation of their standards. In the well-known cases opposing V. and T. and the United Kingdom, two 10-year-old boys who had kidnapped and battered to death a 2-year-old, were tried as adults, under massive press coverage. The European Court of Human Rights (hereinafter "the Court") later found that the trial had been incomprehensible and intimidating for the children who had thus been unable to participate effectively in the proceedings against them, and established a breach of Article 6 of the European Convention on Human Rights (hereinafter the "ECHR"), which guarantees the right to a fair trial. In the *Sahin v. Germany* case, the Court found that the substantive violation was the failure to hear the child's own views, and indicated that the national court had to take considerable steps to ensure direct contact with the child and that, by this means only, can the best interests of the child be ascertained.
3. These cases could have occurred in almost any Council of Europe member state. They illustrate the need to enhance access to justice and improve the treatment of children in judicial and non-judicial proceedings, the importance of raising the knowledge and awareness of professionals working with children in such proceedings and of providing them with adapted training in order to guarantee the best interests of the child, and the good administration of justice.

## Background

4. The following guidelines are the Council of Europe's direct response to Resolution No. 2 on child-friendly justice adopted at the 28th Conference of European Ministers of Justice (Lanzarote, 25-26 October 2007), which requested concrete guidance for the member states in this field. The Committee of Ministers thus instructed four Council of Europe bodies to prepare guidelines on child-friendly justice (hereafter "the guidelines") proposing solutions to assist member states in establishing judicial systems responding to the specific needs of children, with a view to ensuring children's effective and adequate access to and treatment in justice, in any sphere: civil, administrative or criminal.

## Working method

5. With that transversal perspective in mind, the Council of Europe adopted an innovative integrated approach bringing together three of its major intergovernmental committees dealing with civil and administrative law (the European Committee on Legal Co-operation – CDCJ), criminal law (the European Committee on Crime Problems – CDPC), general human rights (the Steering Committee for Human Rights – CDDH), and the European Commission for the Efficiency of Justice (CEPEJ). The guidelines were also drafted in close co-operation with the programme “Building a Europe for and with children”, which made child-friendly justice one of the core pillars of the Council of Europe’s strategy on children’s rights for 2009-11.

6. The Council of Europe started this work in 2008 with the preparation of four expert reports assessing the challenges and obstacles faced by children in accessing justice at national level in all sectors of the judicial system. These reports were presented and used as a basis for discussions at high-level Council of Europe conferences held under the auspices of the Swedish chairmanship of the Committee of Ministers, “Building a Europe for and with Children – Towards a strategy for 2009-2011”, (Stockholm, 8-10 September 2008), and Spanish chairmanship of the Committee of Ministers, “The protection of children in European justice systems”, (Toledo, 12-13 March 2009). The findings of the reports and the conclusions of the conferences paved the way for the drafting of the guidelines and provided valuable material for the Group of Specialists on child-friendly justice (CJ-S-CH) which was established to prepare the guidelines in 2009-10.

## Drafting process

7. This Group of Specialists was composed of 17 independent specialists selected by the Council of Europe in consultation with the CDCJ, CDPC and CDDH on the basis of their personal expertise in children’s rights, while respecting a specialisation balance (between civil and administrative, criminal and human rights law), as well as a geographical and a gender balance. The group had Mr Seamus Carroll (Ireland) – Chair of the CDCJ – as Chair, Ms Ksenija Turković (Croatia) – appointed by the CDPC – as Vice-Chair, and Ms Ankie Vandekerckhove, children’s rights specialist from Belgium, as scientific expert.

8. The group included judges, attorneys, prosecutors, academics, psychologists, police officers, social workers and representatives of the governments of the member states, and was therefore characterised by its multidisciplinary composition. A wide range of observers, including representatives of leading international intergovernmental and non-governmental organisations, also contributed to its work.

9. The draft guidelines and their explanatory memorandum were examined and approved by the CDCJ during its 85th plenary meeting held from 11 to 14 October 2010, before their transmission to the Committee of Ministers for adoption on 17 November 2010. Before that, the CDPC and the CDDH took note of the text and supported it at their plenary sessions (7-10 June and 15-18 June 2010 respectively).

## Consultation of stakeholders

10. The consultation of various stakeholders on the draft guidelines was ensured throughout the drafting process through continuous public consultation on the successive drafts of the text from October 2009 to May 2010. A hearing with leading international NGOs and other stakeholders specialised in children's rights was organised on 7 December 2009 in Strasbourg. The 4th draft of the guidelines was specifically submitted to the member states and focal points for comments, and to a number of internal and external partners, between January and May 2010. The comments were subsequently taken into consideration by the group when finalising the text, thus ensuring a transparent and inclusive process of adoption.

## Consultation of children and young people

11. In accordance with the terms of reference of this Group of Specialists, the Council of Europe also organised a direct consultation of children and young people on the topic of justice in 2010. Around 30 partners throughout Europe contributed to it, drafting, translating and disseminating a questionnaire in 11 languages and organising focus groups. Exactly 3 721 replies from 25 countries were analysed by Dr Ursula Kilkelly, an Irish children's rights expert, and taken into account by the CJ-S-CH in the finalisation of the guidelines. Key themes included family, (mis)trust of authority, need for respect and the importance for children and young people of being listened to.<sup>1</sup>

12. This consultation was the first attempt of the Council of Europe to directly involve children and young people when drafting a legal instrument and will be extended to further similar activities with a view to ensuring the meaningful participation of children and young people in the normative work of the Organisation. It was carried out with the generous financial support of the Government of Finland.

13. During the drafting process, numerous changes were made to ensure that the guidelines met the needs of children and responded to what children recounted about the justice system. Overall, a very genuine effort was made to ensure that these views were taken into account in the detail, scope and strength of the guidelines.

14. In particular, the views of children have been used to:

- ▶ support the extent and manner in which the guidelines recognise the right of children to be heard, to receive information about their rights, to enjoy independent representation and to participate effectively in decisions made about them. The wording in all relevant sections was strengthened in these respects. For example, the guidelines now require judges to respect the right of all children to be heard in all matters affecting them and require that the means used shall be adapted to the child's understanding and ability to communicate and take into account the circumstances of the case;
- ▶ ensure that adequate provision is made in the guidelines for children to understand and receive feedback on the weight attached to their views;

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1. The report is available on the website: [www.coe.int/childjustice](http://www.coe.int/childjustice).

- ▶ strengthen the provision in the guidelines for support to children before, during and after contact with the justice system. Particular consideration was given to the role of parents and those trusted by children (for example, section on children and the police);
- ▶ support provision for an unequivocal right to access independent and effective complaints mechanisms for all parts of the justice system, support specialisation among all professionals and demand appropriate training for all professionals who come into contact with children in the justice system. These issues were considered central to addressing the lack of trust in authority expressed by children during the consultation;
- ▶ strengthen provision with regard to confidentiality in professionals' dealings with children;
- ▶ promote consultation and partnership with children, where appropriate, with regard to the operation of children's justice systems, and the development and review of law, policy and practice.

## Structure and content

15. The guidelines are a non-binding instrument. While in these guidelines the conditional "should" is frequently used where the relevant principles are taken from a binding legal instrument, whether a Council of Europe instrument or other international instrument, the use of the conditional "should" must not be understood as reducing the legal effect of the binding instrument concerned.

16. The guidelines build on existing international, European and national standards. The best interests of the child are their guiding thread, as they take into account the basic principles set out in the ECHR and the related case law of the Court and the United Nations Convention on the Rights of the Child. The guidelines promote and protect, among other things, the rights to information, representation and participation of children in judicial and non-judicial proceedings, and give a place and voice to the child in justice at all stages of the procedures. As a practical tool, they also present good practices and propose practical solutions to remedy legal inconsistencies and lacunae. For instance, specific techniques for listening to the child (including in a courtroom environment) are addressed. The guidelines are not only a declaration of principles, but aspire to be a practical guide to the implementation and advancement of internationally agreed and binding standards.

17. In line with the terms of reference of the CJ-S-CH, the text of the guidelines is structured around various principles applicable before, during and after the proceedings.

18. The attention of those Council of Europe member states that are considering drafting legislation concerning children in judicial and non-judicial proceedings is drawn to the guidelines' relevant principles, standards and recognised good practices.<sup>2</sup>

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2. Information about the Council of Europe's work on child-friendly justice and its progress is available on the website: [www.coe.int/childjustice](http://www.coe.int/childjustice).

# Introduction

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19. Over the last few decades, many public and private organisations, ombudspersons, policy makers and others have been seeking to ensure that children<sup>3</sup> are aware of their rights and that these rights are reinforced in their daily lives. While we recently celebrated 60 years of the ECHR and 20 years of the United Nations Convention on the Rights of the Child, reality at national, regional and international levels demonstrates too often that children's rights are still violated.

20. Children may come into contact with judicial or non-judicial proceedings in many ways: when their parents get divorced or fight custody battles over them, when they commit offences, witness crimes or are victims of crimes, request asylum, etc. Children are bearers of rights and in this context it is necessary that procedures are made more child friendly in order to support them in the best possible way should they need to invoke judicial or non-judicial proceedings to have their rights protected.<sup>4</sup>

21. For children, there are many legal, social, cultural and economic obstacles to their access to court, the lack of legal capacity probably being the most important one. Very often, parents or guardians legally represent them. But when the legal representative does not want to act on their behalf, or is unable to do so, and when competent public authorities do not instigate a procedure, children often have no way to defend their rights or act against violations. In those cases, and if a special representative has not been appointed by the competent authority, they cannot enjoy the basic right to bring a matter to court, even though the ECHR contains several fundamental principles to this effect (see Article 6, which includes, *inter alia*, the right to a fair trial). And while the Convention includes human rights for "everyone", bringing a case to court is particularly difficult for children. Despite the fact that the Court has some case law on children's rights issues, courts, both national and international, are rarely accessible to children, and adults remain the ones who usually initiate proceedings on their behalf.<sup>5</sup> Therefore, children's access to justice needs to be addressed in the guidelines on child-friendly justice.<sup>6</sup>

22. The guidelines on child-friendly justice aim to deal with the status and position of children and the way in which they are treated in judicial and non-judicial proceedings. However, before bringing cases to court, it may be in the child's best interests to turn to methods of alternative dispute resolution, such as mediation. These guidelines cover proceedings both in and outside court.

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3. Persons up to 18 years of age.

4. U. Kilkelly, "Youth courts and children's rights: the Irish experience", in *Youth Justice*, p. 41: "The Convention of the Rights of the Child, adopted in 1989, strengthened this protection by providing for a range of due process standards that both recognised the child's right to a fair trial, but went further in recognising the need to adapt the trial process to the needs and rights of children."

5. F. Tulkens, "The European Convention on Human Rights and children's rights", *International justice for children*, Monograph No. 3, Council of Europe Publishing, 2009, p. 17-33.

6. This is all the more necessary given that the terms of reference of the Group of Specialists on child-friendly justice include looking for lacunae in these matters.

23. They are meant to stimulate discussion on children's rights in practice and encourage member states to take further steps in turning them into reality and filling in existing lacunae. They are not intended to affect issues of substantive law or substantive rights of children nor are they of a legally binding nature. Most of the guidelines will only necessitate a change in approach in addressing the views and needs of children.

24. They also aim to serve as a practical means for member states in adapting their judicial and non-judicial systems to specific needs of children in criminal, administrative and civil justice procedures, irrespective of their status or capacity. They should also be used in very specific areas of law, such as youth protection legislation existing in several member states.

25. In this context, the guidelines seek to facilitate the implementation of the guiding principles of the United Nations Convention on the Rights of the Child. Equally, all rights stipulated by the ECHR and confirmed by the Court shall apply with equal force to children as they do to adults.

26. As the gap between these provisions and children's actual rights is striking, the explanatory memorandum makes frequent references to good practices, factual and legal, found in member states and in the case law. They may serve as useful information and inspiration.

# Explanatory memorandum

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## Preamble

27. Major international organisations dealing with human rights, such as the United Nations and the Council of Europe, have already developed significant standards and guidelines referring to children’s rights. They will be considered in the appropriate place. The preamble mentions those standards which are particularly relevant in this area without preventing member states from introducing or applying higher standards or more favourable measures. It also calls upon member states to speedily ratify relevant Council of Europe conventions concerning children’s rights. This is a practical measure as several of these instruments have not been ratified by a high number of states.<sup>7</sup>

## I. Scope and purpose

28. The scope and the purpose of the instrument are dealt with in paragraphs 1 to 3. As already indicated, the guidelines apply to criminal, civil or administrative law, and aim to ensure that all of the rights of children in such proceedings are fully respected, while striking the right balance with the rights of other parties involved.

## II. Definitions

29. The definition of “child” is formulated in accordance with Article 1 of the United Nations Convention on the Rights of the Child, and Article 1.1 of the European Convention on the Exercise of Children’s Rights (ETS No. 160). The ECHR grants rights to “everyone”, and does not exclude persons under the age of 18. There may be cases where a person under the age of 18 is not considered a child, for example in cases of emancipation, existing in several member states.

30. The definition of “parent” in paragraph b encompasses all persons with parental responsibilities, who may not always be the biological parents, but also other persons holding parental responsibilities, such as guardians or appointed legal representatives.

31. While “child-friendly” justice is defined in paragraph c, the text also insists that its scope is broader than the actual justice system and court proceedings. It is aimed at all professionals dealing with children in and outside judicial proceedings. Sectors such as police, social and mental health services are also responsible for making justice more child friendly. The guidelines strive to ensure that children’s rights are known and scrupulously respected by all these professionals.

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7. PACE document (AS/Jur (2009)40) “The specificity and added value of the *acquis* of the Council of Europe treaty law”.

### III. Fundamental principles

#### A. Participation<sup>8</sup>

32. The principle of participation, that is, that children have the right to speak their mind and give their views in all matters that affect them is one of the guiding principles of the United Nations Convention on the Rights of the Child.<sup>9</sup> While this does not mean that their opinion will always be adhered to, the guidelines require that their opinions be taken into account seriously and given due respect, according to their age, maturity and the circumstances of the case, subject to national procedural law.

33. The reference made to the term “capable of forming his or her own views”<sup>10</sup> should not be seen as a limitation, but rather a duty on the authorities to fully assess the child’s capacity as far as possible. Instead of assuming too easily that the child is unable to form an opinion, states should presume that a child has, in fact, this capacity. It is not up to the child to prove this. In line with children’s rights legislation, the text of Part III A.2 underlines the essential message that children are bearers of rights.

34. States are discouraged from introducing standardised age limits.<sup>11</sup> The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime also state that “age should not be a barrier to a child’s right to participate fully in the justice process.”<sup>12</sup>

35. In family cases, children should be included in the discussions prior to any decision which affects their present and/or future well-being. All measures to ensure that children are included in the judicial proceedings should be the responsibility of the judge, who should verify that children have been effectively included in the process and are absent only when children themselves have declined to participate or are of such maturity and understanding that their involvement is not possible. Voluntary organisations and ombudspersons for children should also

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8. For more information, see General Comment No. 12 on the Right of the Child to be heard (CRC/C/GC/12, 1 July 2009) and comments under IV, D, 3, the right to be heard. See also Committee of Ministers’ Recommendation No. R (98) 8 on children’s participation in family and social life, 18 September 1998, paragraph 4: “participation is a decisive factor for securing social cohesion and for living in a democracy in accordance with the values of a multicultural society and the principles of tolerance”; paragraph 5: “participation of children is crucial in influencing the conditions of their own lives, in that participation is not only involvement in institutions and decision-making but above all a general pattern of democracy relevant to all areas of family and social life”. See furthermore European Court of Human Rights (Grand Chamber) judgment of 16 December 1999, *T. v. UK*, No. 24724/94, paragraph 83, and judgment of 16 December 1999, *V. v. UK*, No. 24888/94, paragraph 85: “[...] Article 6, read as a whole, guarantees the right of an accused to participate effectively in his criminal trial”.

9. United Nations Convention on the Rights of the Child, Article 12.

10. *Ibid.*, Article 12.1.

11. General Comment No. 12 on the Right of the Child to be heard, paragraphs 20-21 (CRC/C/GC/12, 1 July 2009).

12. United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Res 2005/20, 22 July 2005), paragraph 18.

make all efforts to ensure that children are included in family law proceedings and are not faced with a *fait accompli*.<sup>13</sup>

In a case dealing with an accused minor with a low level of understanding, the Court found that “effective participation in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.”<sup>14</sup> Moreover, it is “essential that he be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly.”<sup>15</sup>

Similarly, in the case of *Sahin v. Germany*, the Court concluded in a custody case that “it would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.”<sup>16</sup>

Lastly, in another custody case, *Hokkannen v. Finland*, the Court judged a 12-year-old girl “sufficiently mature for her views to be taken into account and that access therefore should not be accorded against her wishes.”<sup>17</sup>

## B. Best interests of the child

36. The child’s best interests should be a primary consideration in all cases involving children. The assessment of the situation needs to be done accurately. These guidelines promote the development of multidisciplinary methods for assessing the best interests of the child acknowledging that this is a complex exercise. This assessment becomes even more difficult when these interests need to be balanced with the interests of other involved parties, such as other children, parents, victims, etc. This should be done professionally, on a case-by-case basis.

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13. Some member states penalise parents who fail to honour custody and access commitments notwithstanding the fact that it may be the child who refuses to comply. In other states, parents may receive custodial sentences for failing to adhere to a court decision while such eventuality could be avoided by including the child in any decision made on his or her behalf.

14. European Court of Human Rights (Fourth Section), judgment of 15 June 2004, *S.C. v. UK*, No. 60958/00, paragraph 29.

15. European Court of Human Rights, *ibid.*, paragraph 35.

16. European Court of Human Rights (Grand Chamber), judgment of 8 July 2003, *Sahin v. Germany*, No. 30943/96, paragraph 73.

17. European Court of Human Rights (Chamber), judgment of 23 September 1994, *Hokkanen v. Finland*, No. 19823/92, paragraph 61.

37. The best interests of the child must always be considered in combination with other children's rights, for example, the right to be heard, the right to be protected from violence, the right not to be separated from parents, etc.<sup>18</sup> A comprehensive approach must be the rule.

38. It is remarkable how little use is made of the "best interests" principle in cases of juvenile justice, contrary to family law matters. There is a worrying trend in many Council of Europe member states towards treating young offenders like adults.<sup>19</sup> It goes without saying that the rights of all children need to be respected, including the rights of those children who breach the law. A strictly punitive approach is not in accordance with the leading principles of juvenile justice as formulated in Article 40 of the United Nations Convention on the Rights of the Child.<sup>20</sup> Interventions of a more socio-educational nature are much more in line with this instrument and have proven to be more effective in practice as well.<sup>21</sup>

In several family law cases, the European Court of Human Rights has stated that domestic courts should assess the difficult question of the child's best interests on the basis of a reasoned, independent and up-to-date psychological report, and that the child, if possible and according to his or her maturity and age, should be heard by the psychologist and the court in access, residence and custody matters.<sup>22</sup>

In the case of *Bronda v. Italy*, the interests of the child were deemed to override that of other parties involved: "[...] while a fair balance has to be struck between S's interest in remaining with her foster parents and her natural family's interest in having her to live with them, the Court attaches special weight to the overriding interests of the child, who, now aged 14, has always firmly indicated that she does not wish to leave her foster home. In the present case, S's interest outweighs that of her grandparents."<sup>23</sup>

A similar statement was made by the Court in the already mentioned case of *Sahin v. Germany*: "Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under

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18. For practical suggestions see UNHCR Guidelines on Determining the Best Interests of the Child, 2008 ([www.unhcr.org/refworld/docid/148480c342.html](http://www.unhcr.org/refworld/docid/148480c342.html)).

19. See T. Hammarberg ([www.coe.int/t/commissioner/Viewpoints](http://www.coe.int/t/commissioner/Viewpoints))(2009).

20. General Comment No. 10 on Children's Rights in Juvenile Justice (CRC/C/GC/10, 25 April 2007), paragraph 71. Also see Committee of Ministers Recommendation No. R (87) 20 on social reactions to juvenile delinquency.

21. General Comment No. 10 on Children's Rights in Juvenile Justice (CRC/C/GC/10, 25 April 2007).

22. Cf. particularly European Court of Human Rights (Grand Chamber), judgment of 13 July 2000, *Elsholz v. Germany*, No. 25735/94, paragraph 53, and judgment of 8 July 2003, *Sommerfeld v. Germany*, No. 31871/96, paragraphs 67-72. See also the partly dissenting opinion of Judge Ress joined by Judges Pastor Ridurejo and Türmen in *Sommerfeld v. Germany* (ibid.), paragraph 2.

23. European Court of Human Rights (Chamber), judgment of 9 June 1998, *Bronda v. Italy*, No. 22430/93, paragraph 62.

Article 8 to have such measures taken as would harm the child's health and development."<sup>24</sup>

In the adoption case of *Pini and Others v. Romania*, the Court ruled with regard to the child's refusal to be adopted by a foreign family: "In such matters [...] the child's interests may, depending on their nature and seriousness, override those of the parent."<sup>25</sup>

## C. Dignity

39. Respecting dignity is a basic human rights requirement, underlying many existing legal instruments.<sup>26</sup> Although various provisions of the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime are relevant in this context, particular attention should be paid to its statement that "every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected"<sup>27</sup>

40. The text of C.2 repeats the provision of Article 3 of the ECHR.

## D. Protection from discrimination

41. The prohibition of discrimination is also a well-established principle in international human rights law. Article 2 of the United Nations Convention on the Rights of the Child is viewed as one of its guiding principles. The text of D.1 mentions several well-known grounds for discrimination.

42. On the specific question of "race", the Council of Europe's European Commission against Racism and Intolerance (ECRI) in its General Policy Recommendation No. 7 on national legislation to combat racism and discrimination, indicates: "Since all human beings belong to the same species, ECRI rejects theories based on the existence of different 'races'. However, in this recommendation, ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to 'another race' are not excluded from the protection provided for by the legislation."

43. Some categories of particularly vulnerable children may be in need of special protection in this respect. The text lists some of these categories; however, the list does not purport to be exhaustive, as other grounds for discrimination cannot be excluded.

44. Another important factor of discrimination in the area of children's rights is age and capacity. Very young children or children without full capacity to pursue

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24. European Court of Human Rights (Grand Chamber), judgment of 8 July 2003, *Sahin v. Germany*, No. 30943/96, paragraph 66

25. European Court of Human Rights (second section), judgment of 22 June 2004, *Pini and Others v. Romania*, Nos. 78028/01 and 78030/01, paragraph 155.

26. See, for example, the preamble to the International Covenant on Civil and Political Rights, and the preamble to and Article 40, paragraph 1 of the United Nations Convention on the Rights of the Child.

27. United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Res 2005/20, 22 July 2005), III.8.a and I.6.

their rights are also bearers of rights. For these children, alternative systems of representation need to be developed in order to avoid discrimination.

## E. Rule of law<sup>28</sup>

45. Without trying to define the concept of “the rule of law”,<sup>29</sup> several of its elements are pointed out in E.1 and E.2. The whole text has been influenced by the opinion of the Court that “the rule of law, one of the fundamental principles of a democratic society, is inherent in all the articles of the Convention”.<sup>30</sup> Therefore, its impact should be felt in all proceedings involving children.

46. The rule of law establishes, *inter alia*, the fundamental principle that everyone is accountable to clearly established and publicised laws and has enforceable rights. This principle applies irrespective of age so that member states are expected to respect and support fundamental rights for all, including children. The application of the rule of law with respect to children necessitates, *inter alia*, enforcement of the right to the presumption of innocence and the right to a fair trial, including independent legal assistance, effective access to a lawyer or other institution or entity which according to national law is responsible for defending children’s rights.

47. For children, the principles of *nullum crimen sine lege* and *nulla poena sine lege* are just as valid as they are for adults and are a cornerstone of a democracy’s criminal law system.<sup>31</sup> However, when dealing with anti-social – although not criminal – behaviour of children, there has been a trend in some member states to apply far-reaching interventions, including deprivation of liberty. Under the pretext of the protection of society from anti-social behaviour, children are drawn into intervention schemes in a manner that would not be tolerated if applied to adults. Standard legal guarantees, such as the burden of proof attributable to the state and the right to a fair trial, are not always present. In many countries, the basic principles of law in criminal matters are not applied as fully for children as they are for adults. Children are still punished for so-called “status” offences (acts that are not defined as crimes in law and would go unpunished when committed by an adult).<sup>32</sup>

48. In order for the rule of law to be effectively and adequately observed, particularly in relation to children, member states are required under E.3 to introduce and/or maintain independent and effective complaints mechanisms, bearing in mind their suitability to the age and understanding of the child.

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28. See also the report by the Registry of the European Court of Human Rights, “Access of children to justice – Specific focus on the access of children to the European Court of Human Rights” and its case law related to children’s access to national jurisdictions in the “Compilation of texts related to child-friendly justice”, Directorate General of Human Rights and Legal Affairs, 2009, p. 11-19.

29. Brian Z. Tamanaha traced the idea back to Aristotle: “It is better for the rule of law to rule than one of the citizens”, and continues: “so even the guardians of the laws are obeying the laws”. Cited from Tom Bingham, *The Rule of Law*, Allen Lane, Penguin Group, 2010, page 3.

30. *Ukraine-Tyumen v. Ukraine*, no. 22603/02, paragraph 49, 22 November 2007.

31. ECHR, Article 7; United Nations Convention on the Rights of the Child, Article 40, paragraph 2.a.

32. See CRIN “Report on Status Offences” on [http://www.crin.org/docs/Status\\_Offenses\\_doc\\_2\\_final.pdf](http://www.crin.org/docs/Status_Offenses_doc_2_final.pdf).

## IV. Child-friendly justice before, during and after judicial proceedings

### A. General elements of child-friendly justice

49. These elements of child-friendly justice are relevant for all possible actors in or outside court proceedings and apply irrespective of the child's status, and apply also to specific groups of particularly vulnerable children.

#### 1. Information and advice

50. In every individual case, from the very first contact with the justice system and on each and every step of the way, all relevant and necessary information should be given to the child.<sup>33</sup> This right applies equally to children as victims, alleged perpetrators of offences or as any involved or affected party.<sup>34</sup> Although it is not always practical to provide information at the beginning of the child's involvement with the competent authorities, this should be done as soon as possible. However, there might be situations where information should not be provided to children (when contrary to their best interests).

51. Children need to be informed of their rights,<sup>35</sup> but also of instruments they can use to actually exercise their rights or defend them where necessary.<sup>36</sup> This is the first condition for protecting these rights. In Part IV.A.1., Guideline 1 provides a detailed, but not exhaustive, list of information that children and their parents should receive.

52. Children may experience a lack of objective and complete information. Parents may not always share all pertinent information, and what they give may be biased. In this context, the role of children's lawyers, ombudspersons and legal services for children is very important.

53. Guideline 2 reaffirms the right of the child to receive the information and advice in understandable language, adapted to age, maturity and abilities.

54. Information on the procedural system includes the need for detailed information on how the procedure will take place, what the standing and role of the child will be, how the questioning will be carried out, what the expected timing will be, the importance and impact of any given testimony, the consequences of a certain act, etc. Children need to understand what is happening, how things could or would move forward, what options they have and what the consequences of these options are. They need to be informed of possible alternatives to proceedings.

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33. This is an important task of children's ombudspersons and children's rights organisations.

34. This right is also covered in a variety of instruments such as the United Nations Convention on the Rights of the Child, (Articles 13, paragraph 1; 37, paragraph d; 40, paragraph 2.b(ii), 42), the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Res. 2005/20, 22 July 2005, VII) and the European Convention on the Exercise of Children's Rights (ETS No. 160, Article 3).

35. Article 42, United Nations Convention on the Rights of the Child.

36. This should not be limited to legal information, but should also, for example, include information on the existence of an ombudsperson or other services for children.

In some cases, mediation instead of court intervention may be more appropriate, while in other circumstances recourse to a court may offer more guarantees to a child. The different consequences of such a choice need to be clearly explained to the child, so that a well-informed decision can be made, although the child may not necessarily be the decision maker in each case. This information could also be provided via a variety of child-friendly material containing relevant legal information (Guideline 4).

55. Guideline 5 imposes the obligation to provide information on all charges against the child, promptly and directly, both to the child and to the parents, and the rights the child shall enjoy in such cases. The child also needs to be given information about prosecutorial decisions, relevant post-trial developments and on how the outcome of the case will be determined. Information should also be given regarding possible complaints mechanisms, available systems of legal aid, representation or other possible advice they may be entitled to. When a judgment is delivered, the motivation ought to be provided in a way that the child can fully understand. This becomes even more important for children with special educational needs or low levels of literacy.<sup>37</sup>

56. In the case of cross-border civil law and family disputes, depending on maturity and understanding, the child should be provided with professional information relating to access to justice in the various jurisdictions and the implications of the proceedings on his or her life. Children face particular challenges where there is a history of family conflict and/or abuse.

In the cases of both V. and T. against the United Kingdom, the Court noted that effective participation in the courtroom presupposes that the accused has a broad understanding of the nature of the trial process, including the significance of any penalty which may be imposed. Therefore, juvenile defendants must be, in any case, represented by skilled lawyers experienced in dealing with children.<sup>38</sup>

In some Council of Europe member states, private or subsidised services are available for children and young people where they can get information on children's rights in general or basic information on the legal issues of their own case or situation. In certain member states, such as Belgium and the Netherlands, there are "children's rights shops",<sup>39</sup> which can refer them to a lawyer, provide them with assistance in exercising their rights (for example, writing to a judge to be heard in a case), etc.

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37. The information may have to be translated in a language the child understands (a foreign language, Braille or other) as is the case for adults, and the formal legal terminology will have to be explained so that the child can fully understand its meaning.

38. European Court of Human Rights (Grand Chamber), judgment of 16 December 1999, *T. v. UK*, No. 24724/94, paragraph 88, and judgment of 16 December 1999, *V. v. UK*, No. 24888/94, paragraph 90.

39. The "Kinderrechtswinkel" in Ghent and Bruges and the "Service droit des jeunes" in most major cities in the French-speaking community in Belgium.

## 2. Protection of private and family life

57. Anonymity and protection of personal data in relation to the mass media may be necessary for the child, as stipulated by several instruments.<sup>40</sup> In this respect, special mention should be made of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108),<sup>41</sup> which lists the set of commonly accepted standards concerning in particular the collection and processing of data and data quality. As in the case of the ECHR, children enjoy all rights under this convention even though it does not explicitly refer to children's rights. Additionally, its Article 6 provides for special safeguards when it comes to sensitive data, such as personal data related to criminal convictions. Other categories of data could be defined as sensitive by domestic law or treated as such by public authorities allowing for the better protection of children's privacy. By way of example, one instrument<sup>42</sup> lists the following categories: disciplinary proceedings, recording cases of violence, medical treatment in school, school orientation, special education for disabled people and social aid to pupils from poor families.

58. In its General Comment No. 10 on Children's Rights in Juvenile Justice,<sup>43</sup> the United Nations Committee on the Rights of the Child recommends, among others, proceedings in camera, preserving confidentiality of records, delivering judgment which will not reveal the child's identity, etc. The Court includes the possibility of having cases tried behind closed doors when the interests of the child or his or her privacy require it,<sup>44</sup> and Guideline 9 reminds member states of this good practice. This principle should, however, be reconciled with the principle of free access to judicial proceedings, which exists in many member states.

59. Other possible ways to protect the privacy in the media are, *inter alia*, granting anonymity or a pseudonym, using screens or disguising voices, deletion of names and other elements that can lead to the identification of a child from all documents, prohibiting any form of recording (photo, audio, video), etc.

60. Member states have positive obligations in this respect. Guideline 7 reiterates that monitoring on either legally binding or professional codes of conduct for the

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40. By way of example, Article 11.3 of the Convention on Action against Trafficking in Human Beings (CETS No. 197) deals with privacy and protects personal data while urging states to set up regulatory measures for the press. The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Res 2005/20, 22 July 2005), paragraph X, 27, states: "Information related to a child's involvement in the justice process should be protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is a victim or a witness in the justice process." This is also described in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, 1985, Article 8): "The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of a juvenile offender shall be published."

41. This instrument has a global vocation as it is open to the accession of non-member states of the Council of Europe, if their legislation meets the convention's requirements.

42. Opinion 2/2009 of the EU Data Protection Working Party on the Protection of Children's Personal Data (General guidelines and the special case of schools).

43. General Comment No. 10 on Children's Rights in Juvenile Justice (CRC/C/GC/10, 25 April 2007).

44. Rules of the European Court of Human Rights, Article 63.

press is essential, given the fact that any damage made after publication of names and/or photos is often irreparable.

61. Although the principle of keeping identifiable information inaccessible to the general public and the press remains the guiding one, there might be cases where exceptionally the child may benefit if the case is revealed or even publicised widely, for example, where a child has been abducted. Equally, the issue at stake may benefit from public exposure to stimulate advocacy or awareness raising.

62. The issue of privacy is particularly relevant in some measures intended to tackle anti-social behaviour of children. More specifically, the implementation of so-called Anti-Social Behaviour Orders (ASBOs) in the United Kingdom, including the policy of “naming and shaming”, shows that in such cases personal data is not always kept away from the general public. Guideline 10 imposes a strict obligation in this respect on all professionals working with children except where there is a risk of harm to the child (see Article 12 of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, CETS No. 201).

In the case of *B. and P. v. the United Kingdom*, the Court decided that proceedings concerning the residence of children after divorce or separation are prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and other parties and to avoid prejudicing the interests of justice.<sup>45</sup>

Furthermore, in the case of *V. v. the United Kingdom* the Court stated: “It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition.”<sup>46</sup>

In the above-mentioned cases of *V.* and *T.* against the United Kingdom, of criminal proceedings against two young boys who murdered a toddler, the court stated, *inter alia*: “[...] it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.”<sup>47</sup> Furthermore, “it follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition.”<sup>48</sup>

45. European Court of Human Rights *B. and P. v. UK*, judgment of 24 April 2001, Nos. 36337/97 et 35974/97, paragraph 38.

46. European Court of Human Rights (Grand Chamber), judgment of 16 December 1999, *V. v. UK*, No. 24888/94, paragraph 87.

47. European Court of Human Rights (Grand Chamber), judgments of 16 December 1999, *T. v. UK*, No. 24724/94, paragraph 84, and *V. v. UK*, No. 24888/94, paragraph 86.

48. European Court of Human Rights (Grand Chamber), judgments of 16 December 1999, *T. v. UK*, No. 24724/94, paragraph 85, and *V. v. UK*, No. 24888/94, paragraph 87.

### 3. Safety (special preventive measures)

63. Concerning children as victims, these guidelines are inspired by the principles of the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime,<sup>49</sup> and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which calls for providing for the safety of children, their families and witnesses on their behalf from intimidation, retaliation and repeated victimisation.<sup>50</sup>

64. Guideline 11 recalls that children, particularly vulnerable ones, should be protected from harm, whatever form it takes. It is inspired by many existing provisions to this effect.

65. Vetting of personnel in children's services for child protection, as recommended by Guideline 12 has been introduced in certain member states, involving a check of criminal records and preliminary measures to be taken when a person has allegedly committed criminal offences against children. This exercise should obviously respect the presumption of innocence and the independence of the judicial system.

66. Guideline 13 recalls the fundamental principle of the special need for protection when the alleged perpetrator is a parent, another member of the family or a primary caregiver.

### 4. Training of professionals

67. Training in communication skills, in using child-friendly language and developing knowledge on child psychology, is necessary for all professionals working with children (police, lawyers, judges, mediators, social workers and other experts), as stipulated by Guideline 14. However, few of them have knowledge of children's rights and procedural matters in this context.

68. Children's rights could and should be part of the curriculum, in schools and in specific fields of higher education (law, psychology, social work, police training, etc.). This should cover the specifics of children's rights and legislation pertaining to children's issues, such as family law, juvenile justice, asylum and immigration law, etc. Member states are encouraged to set up specific training courses.

69. The aforementioned conference in Toledo (see paragraph 6 above) concluded: "All professionals – in particular judges, psychologists and lawyers – dealing with children in justice should receive appropriate information, awareness raising and training on appropriate interviewing techniques."<sup>51</sup>

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49. United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Res 2005/20, 22 July 2005).

50. Article 31. 1. f.

51. [www.coe.int/t/dghl/standardsetting/children/Toledoconference\\_en.asp](http://www.coe.int/t/dghl/standardsetting/children/Toledoconference_en.asp)

For several years now, the Flemish Bar Association and its Youth Lawyer Commission has been offering its members a two-year course on children's rights. The legal information is complemented with basic training in child psychology and development and practical training such as communicating with children. Attendance of all modules is obligatory in order to obtain a certificate as a "youth lawyer". In 2010, some 400 youth lawyers were trained.<sup>52</sup>

## 5. Multidisciplinary approach

70. The text of the guidelines as a whole, and in particular Guidelines 16 to 18, encourage member states to strengthen the interdisciplinary approach when working with children.

71. In cases involving children, judges and other legal professionals should benefit from support and advice from other professionals of different disciplines when taking decisions which will impact directly or indirectly on the present or future well-being of the child, for example, assessment of the best interests of the child, possible harmful effects of the procedure on the child, etc.

72. A multidisciplinary approach to children in conflict with the law is particularly necessary. The existing and growing understanding of children's psychology, needs, behaviour and development is not always sufficiently shared with professionals in the law enforcement fields.

In Iceland, Norway and Sweden, cases of abuse and violence can be dealt with in so-called "children's houses". Professionals from social services, forensic medical experts, paediatricians, the police and prosecutors' offices work together, primarily in the initial stages of a police or social services investigation. They organise and allocate the different tasks to be carried out. Interviews with the children concerned take place in these houses, with the possibility of a third party listening in by video link in an adjacent room. There are also rooms for medical examination and counselling.

## 6. Deprivation of liberty

73. Particular attention should be paid to the way detained children are treated given their inherent vulnerability. Practical measures for detention of children are suggested in many Council of Europe instruments, for example, Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, or the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>53</sup> As indicated in the former instrument, special efforts must be undertaken to avoid pre-trial detention. International children's rights bodies are very critical about its use and are seeking

52. More information (in Flemish) at [www.jeugdadvocaat.be](http://www.jeugdadvocaat.be).

53. CPT standards (CPT/inf/E (2002) 1, Rev 2009 on [www.cpt.coe.int/en/docsstandards.htm](http://www.cpt.coe.int/en/docsstandards.htm)).

to reduce it.<sup>54</sup> However, pre-trial detention might in certain cases still be necessary, for example, to avoid the risk of tampering with evidence, influencing witnesses, or when there is a risk of collusion or flight, etc.

74. Since there are already numerous standards on the rights of juveniles deprived of their liberty,<sup>55</sup> the guidelines do not need to repeat them. The main principle is that no other children's right shall be restricted except the right to liberty, as a consequence of the deprivation of liberty. As Guidelines 19 and 20 clearly stipulate, remedies that involve detention, in whatever form, need to be avoided as much as possible and should only be a measure of last resort, used for the shortest time possible and restricted to serious cases.<sup>56</sup> This is a vital legal obligation. In addition, it is common knowledge that detention does not diminish the risk of recidivism.

75. As already indicated, the sections on the deprivation of liberty and the police do not purport to compile an exhaustive list of rights and safeguards, but represent an absolute minimum of rights children should enjoy. Guideline 21 should be read in this sense.

76. The issue of whether or not to detain children with adults is not a new one. In some cases, such as those involving infants, it can be in their best interests not to be separated from a detained parent, or in the case of children of immigration detainees who should not be separated from their family. Several Council of Europe member states believe that in large, sparsely populated areas, it may exceptionally be in the best interests of the child to be detained in adult facilities (facilitating visits from parents who may reside hundreds of kilometres away, for example). However, such cases require particular vigilance on the part of detaining authorities, in order to prevent the abuse of children by adults.

77. However, the United Nations Committee on the Rights of the Child has been very clear on this issue, based on Article 37.c, of the United Nations Convention on the Rights of the Child. The above-mentioned Recommendation CM/Rec(2008)11 also states that juveniles shall not be detained in institutions for adults, but in institutions specially designed for them.

78. Several references recall that the guidelines do apply to children seeking asylum and that specific attention should be given to this particularly vulnerable group; unaccompanied minors, whether or not they are asylum seekers, should not be deprived of their liberty solely as a result of the absence of residence status (Guideline 22).

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54. See, for example, the Concluding Observations for Belgium: "The Committee recommends that the state party: [...] (c) [...] ensure, in accordance with Article 37 of the Convention, that the deprivation of liberty is only used as a measure of last resort, for the shortest possible time, that guarantees of due process are fully respected and that persons under 18 are not detained with adults." (CRC/C/15/Add. 178, paragraph 32, c, 13 June 2002),

55. United Nations Convention on the Rights of the Child, Articles 37 and 40.

56. Recommendation of the Committee of Ministers, CM/Rec(2008) 11, paragraph 59.1.

In the case of *Guvec v. Turkey*, the Court reiterated its comments on excessive periods of detention. It expressly stated: "In at least three judgments concerning Turkey, the Court has expressed its misgivings about the practice of detaining children in pre-trial detention (see *Selçuk v. Turkey*, No. 21768/02, paragraph 35, 10 January 2006; *Koşti and Others v. Turkey*, No. 74321/01, paragraph 30, 3 May 2007; the aforementioned case of *Nart v. Turkey*, 20817/04, paragraph 34) and found violations of Article 5, paragraph 3 of the Convention for considerably shorter periods than that spent by the applicant in the present case. For example, in *Selçuk* the applicant had spent some four months in pre-trial detention when he was 16 years old and in *Nart* the applicant had spent 48 days in detention when he was 17 years old. In the present case, the applicant was detained from the age of 15 and was kept in pre-trial detention for a period in excess of four and a half years. In the light of the foregoing, the Court considers that the length of the applicant's detention on remand was excessive and in violation of Article 5, paragraph 3 of the Convention."<sup>57</sup>

## B. Child-friendly justice before judicial proceedings

79. A complex but important issue is that of the minimum age of criminal responsibility. This age ranges among the member states of the Council of Europe from as young as 8 to the age of majority. The text of Guideline 23 was inspired by Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures. The United Nations Convention of the Rights of the Child does not set any age, but General Comment No. 10 on Children's Rights in Juvenile Justice advises member states not to set this minimum age too low. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice conveys a similar message. The European Network of Children's Ombudspersons (ENOC) advocates that the age be raised to 18 and recommends the development of innovative systems to respond to all offenders under the age of majority that genuinely focus on their (re)education, reintegration and rehabilitation.

80. In general, a preventive and reintegrating approach should be promoted and implemented in matters of juvenile justice. The criminal law system should not automatically be set in motion by minor offences committed by children, when more constructive and educational measures can be more successful. Moreover, member states should react to offences in proportion not only to the circumstances and gravity of an offence, but also to age, lesser culpability and needs of the child, and the needs of society.

81. Guidelines 24 to 26 recall that in several member states attention has been focused on the settlement of conflicts outside courts, *inter alia* by family mediation, diversion and restorative justice. This is a positive development and member states are encouraged to ensure that children can benefit from these procedures, providing that they are not used as an obstacle to the child's access to justice.

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57. European Court of Human Rights (Second Section), judgment of 20 January 2009, *Guvec v. Turkey*, No. 70337/01, paragraphs 109-110.

82. Such practices already exist in many Council of Europe member states and may refer to practices before, during and after judicial proceedings. They become particularly relevant in the area of juvenile justice. These guidelines do not give preference to any non-judicial alternatives, and should also be implemented within them, in particular in family conflicts, which involve not only strictly legal issues. The law has its limitations in this area and may have harmful effects in the long run. Mediated arrangements are reported to be more respected because the concerned parties are actively involved. Children may be able to play a role in them as well. Mandatory referral to mediation services, prior to court procedures, could also be considered: this is not to force people to mediate (which would be contradictory to the whole idea of mediation), but to give everyone the opportunity to be aware of such a possibility.

83. While there is a certain belief that children should be kept out of courts as much as possible, court procedure is not necessarily worse than an outside court alternative, as long as it is in line with the principles of child-friendly justice. Just like court settings, alternatives can also involve risks with regard to children's rights, such as the risk of diminished respect for fundamental principles like the presumption of innocence, the right to legal counsel, etc. Any choice made should therefore look into the distinct quality of a given system.

84. In General Comment No. 12, the United Nations Committee on the Rights of the Child recommended that:<sup>58</sup> "In case of diversion, including mediation, a child must have the opportunity to give free and voluntary consent and must be given the opportunity to obtain legal and other advice and assistance in determining the appropriateness and desirability of the diversion proposed." Guideline 26, however, requires that children should be guaranteed equivalent levels of safeguards in both judicial and out-of-court proceedings.

85. To sum up, the text of the guidelines encourages access to national courts for children as bearers of rights, in accordance with the jurisprudence of the Court, to which they have access if they so wish. However, such access is balanced and reconciled with alternatives to judicial proceedings.

In the canton of Fribourg, Switzerland, a mediation scheme has been worked out for children in conflict with the law. Searching for a balance between restoration and retribution, mediation considers the rights and interests of the victim and of the offender. In cases where certain criteria are met, the judge can refer the case to the mediator. While the mediator is in charge of the mediation as such, it is the judge who remains in charge of the criminal case. Whether or not an agreement is found between the parties, the outcome of the mediation would be communicated to the judge, who can either pronounce the agreement (in writing) or continue the proceedings, in case no agreement was reached.

In Norway, couples filing for a divorce with children under 16 must attempt mediation before being able to start a court procedure. The purpose is to help parents to reach an amicable agreement regarding where children should live, concerning the exercise of parental responsibilities and visiting rights, to ensure that the children's best interests are taken into account.

58. General Comment No. 12 on the right of the child to be heard (CRC/C/GC/12, 1 July 2009), paragraph 59.

## C. Children and the police

86. The police should also apply the guidelines on child-friendly justice. This applies to all situations where children might come in contact with the police, and it is, as stipulated by Guideline 27, of particular importance when dealing with vulnerable children.

87. It is obvious that a child-friendly attitude should also be present in potentially risky situations, such as the arrest or questioning of children, covered by Guidelines 28 and 29. Save in exceptional cases, parents need to be promptly notified of the arrest of their child, and the child should always have access to a lawyer or any other entity which according to national law is responsible for defending children's rights, and the right to notify parents or a person whom they trust. Contact with youth protection services should be granted as from the moment of arrest.<sup>59</sup> Only if the parents are not available should another person whom the child trusts be contacted (for example, his or her grandparents).

88. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has developed a series of standards which apply to detention of children by the police. In addition, in its comments on the European draft rules for juvenile offenders,<sup>60</sup> it has pointed out that these rules should expressly stipulate that children detained by the police should not be required to make any statement or sign any document related to the offence of which they are suspected without a lawyer or trusted person being present to assist them. These standards are supported by Guideline 30. States might usefully consider introducing special police units that have been trained for these tasks.

In *Okkali v. Turkey*, the Court reviewed the case of a 12-year-old boy under police arrest, who claimed he had suffered ill-treatment. The Court considered that he should have enjoyed greater protection as a minor and that the authorities had failed to take account of his particular vulnerability. The Court added that in cases like this, a lawyer should be assigned to assist the child and the parents (or legal representatives) need to be informed of the detention.<sup>61</sup>

In the case of *Salduz v. Turkey*, the Court considered Article 6, paragraph 1, of the ECHR to have been violated since a 17-year-old suspect did not have access to a lawyer during five days in police custody. The Court found that, "in order for the right to a fair trial under Article 6, paragraph 1, to remain sufficiently 'practical and effective', access to a lawyer should be provided, as a rule, from the first interrogation of a suspect by the police [...]".<sup>62</sup> The Court also noted that one of the specific elements of this case was the applicant's age.

59. A recent judgment by a Belgian juvenile court (Antwerp, 15 February 2010) acquitted a juvenile offender because the judge found that his defence rights had been violated since he had not received legal counsel at the police hearing, where he claimed to have been forced to admit to the said offences. The judge concluded that Article 6 of the ECHR had been violated.

60. CPT, 18th General Report (2007-2008), paragraph 24.

61. European Court of Human Rights (Second Section), judgment of 17 October 2006, *Okkali v. Turkey*, No. 52067/99, paragraph 69 *et seq.*

62. European Court of Human Rights (Grand Chamber), judgment of 27 November 2008, *Salduz v. Turkey*, No. 36391/02, paragraph 55.

Having regard to a significant number of relevant international legal instruments concerning legal assistance to minors in police custody, the Court stressed the fundamental importance of providing access to a lawyer where the person in police custody was a minor.<sup>63</sup>

## D. Child-friendly justice during judicial proceedings

89. These elements of child-friendly justice should be applied in all proceedings: civil, criminal and administrative.

### 1. Access to court and to the judicial process

90. Although children are legally considered to be bearers of rights, as stipulated by Guideline 34, they are often not capable of exercising them effectively. In 1990, the Parliamentary Assembly of the Council of Europe underlined in its Recommendation 1121 (1990) on the rights of children that “children have rights they may independently exercise themselves even against opposing adults.”<sup>64</sup> The United Nations Convention on the Rights of the Child contains a certain right of initiative for court action by the child in Article 37.d, where a child can challenge the legality of his or her deprivation of liberty. At present, there is strong support for the establishment of a complaints procedure under this convention.<sup>65</sup> This will hopefully give children the same kind of remedies to fight violations of their rights as granted to adults under several other universal human rights conventions.

91. In the same context, the ECHR gives “everyone” whose human rights are violated, the right to “an effective remedy before a national authority.”<sup>66</sup> This wording clearly includes children. The result is that children can bring their cases to the Court, although they are often not entitled to bring legal proceedings under their domestic law.<sup>67</sup>

92. Given the fact that most legislation on legal incapacity of children is drafted with a view to protecting the children, it is nevertheless essential that this lack of capacity is not used against them when their rights are being violated or when no one else defends these rights.

93. Guideline 34 also recommends that member states’ legislation facilitate, where appropriate, access to court for children with sufficient understanding of their rights. It also recommends the use of remedies to protect these rights, upon receiving adequate legal advice.

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63. *Ibid.*, paragraphs 56-62.

64. Recommendation 1121 (1990) on the rights of children, paragraph 6.

65. The campaign for a complaints mechanisms for the United Nations Convention on the Rights of the Child.

66. Article 13.

67. See report by the Court’s Registry, *op. cit.*, p. 5: “Children may thus apply to the Court even when they are not entitled, in domestic law, to bring legal proceedings.”

94. Attention must be given to the strong link between issues of access to justice, proper legal counselling<sup>68</sup> and the right to voice an opinion in court procedures. It is not the aim of these guidelines to encourage children to address the courts for no apparent reason or legal ground. It goes without saying that children, like adults, should have a solid legal basis to bring a case to court. Where the child's rights have been violated or need defending and whenever the legal representative does not do so on behalf of the child, there should be the possibility to have the case reviewed by a judicial authority. Access to court for children may also be necessary in cases where there can be a conflict of interests between the child and the legal representative.

95. Access to court can be based on a set age limit or on the notion of a certain discernment, maturity or level of understanding. Both systems have advantages and disadvantages. A clear age limit has the advantage of objectivity for all children and guarantees legal certainty. However, granting children access based on their own individual discernment gives the opportunity for adaptation to every single child, according to their levels of maturity. This system can pose risks due to the wide margin of appreciation left to the judge in question. A third possibility is a combination of both: a set legal age limit with a possibility for a child under this age to challenge this.<sup>69</sup> This may, however, raise the additional problem that the burden of proof of capacity or discernment lies with the child.

96. No age limit is set in these guidelines, as it tends to be too rigid and arbitrary and can have truly unjust consequences. It also cannot fully take into account the diversity in capacities and levels of understanding between children. These can vary greatly depending on the individual child's development capacities, life experiences, cognitive and other skills. A 15-year-old can be less mature than a 12-year-old, while very young children may be intelligent enough to assess and understand their own specific situation. The capability, maturity and level of understanding are more representative of the child's real capacities than his or her age.

97. While recognising that all children, regardless of age or capacities, are bearers of rights, age is in fact a major issue in practice, as very young children, or children with certain disabilities, will not be able to effectively protect their rights on their own. Member states should therefore set up systems in which designated adults are able to act on behalf of the child: they can be either parents, lawyers, or other institutions or entities which, according to national law, would be responsible for defending children's rights. These persons or institutions should not only become involved or recognised when procedures are already pending, but they should also have the mandate to actively initiate cases whenever a child's right has been violated or is in danger of being violated.

98. Guideline 35 recommends that member states remove all obstacles for children's access to court. It gives examples such as the cost of proceedings and the lack of legal counsel, but recommends that other obstacles also be removed. Such obstacles

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68. This also serves to convince the child not to start a procedure where there is in fact no legal ground or chance of succeeding.

69. By way of example, Belgian legislation sometimes uses an age limit, and sometimes the level of discernment.

may be of a different nature. In case of a possible conflict of interests between children and their parents, the requirement of parental consent should be avoided. A system needs to be developed whereby the undue refusal of a parent cannot keep a child from having recourse to justice. Other obstacles to access to justice may be of a financial or psychological nature. Procedural requirements should be limited as far as possible.<sup>70</sup>

99. In some cases, a child cannot challenge certain acts or decisions during his or her childhood due to trauma in cases of, for example, sexual abuse or highly conflictual family matters.

100. In such cases, Guideline 36 recommends that access to court should be granted for a period of time after the child has reached the age of majority. It therefore encourages member states to review their statutes of limitations. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) could usefully serve as an inspiration in this regard.<sup>71</sup>

The Court, in the case of *Stubbings and Others v. the United Kingdom*,<sup>72</sup> considered that “there has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in member states of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future.”<sup>73</sup>

## 2. Legal counsel and representation<sup>74</sup>

101. If children are to have access to justice which is genuinely child friendly, member states should facilitate access to a lawyer or other institution or entity which according to national law is responsible for defending children’s rights, and be represented in their own name where there is, or could be, a conflict of interest between the child and the parents or other involved parties. This is the main message of the Guideline 37. The European Convention on the Exercise of Children’s Rights (ETS No. 160)<sup>75</sup> states: “Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular [...] a separate representative [...] a lawyer.”<sup>76</sup>

102. Guideline 38 recommends providing children with access to free legal aid. This should not necessarily require a completely separate system of legal aid. It might be

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70. A too restrictive or purely technical approach on representation should be avoided. See I. Berro-Lefèvre, “Improving children’s access to the European Court of Human Rights”, *International justice for children*, Monograph No. 3, Strasbourg, Council of Europe Publishing, 2008, p. 69-78.

71. Article 33.

72. European Court of Human Rights (Chamber), judgment of 22 October 1996, *Stubbings and Others v. UK*, Nos. 22083/93; 22095/93, paragraph 56. <http://www.coe.int/t/dghl/>.

73. Paragraph 56.

74. See ChildONEurope, *Survey on the national systems of children’s legal representation*, March 2008 ([www.childoneurope.org](http://www.childoneurope.org)). Several models are illustrated in this survey.

75. ETS No. 160.

76. Article 5.b.

provided in the same way as legal aid for adults, or under more lenient conditions, and be dependent on the financial means of the holder of the parental responsibility or the child him or herself. In any case, the legal aid system has to be effective in practice.

103. Guideline 39 describes the professional requirements for the lawyers representing children. It is also important that the legal fees of the child's lawyer are not charged to his or her parents, either directly or indirectly. If a lawyer is paid by the parents, in particular in cases with conflicting interests, there is no guarantee that he or she will be able to independently defend the child's views.

104. A system of specialised youth lawyers is recommended, while respecting the child's free choice of a lawyer. It is important to clarify the exact role of the child's lawyer. The lawyer does not have to bring forward what he or she considers to be in the best interests of the child (as does a guardian or a public defender), but should determine and defend the child's views and opinions, as in the case of an adult client. The lawyer should seek the child's informed consent on the best strategy to use. If the lawyer disagrees with the child's opinion, he or she should try to convince the child, as he or she would with any other client.

105. The lawyer's role is different from the guardian *ad litem*, introduced by Guideline 42, as the latter is appointed by the court, not by "a client" as such, and should help the court in defining what is in the best interests of the child. However, combining the functions of a lawyer and a guardian *ad litem* in one person should be avoided, because of the potential conflict of interests that may arise. The competent authority should in certain cases appoint either a guardian *ad litem* or another independent representative to represent the views of the child. This could be done on the request of the child or another relevant party.

In Georgia, the right to legal aid for persons under the age of 18 in criminal cases is granted *ex officio*, since they are considered to be "socially vulnerable". No other condition is required for those children to benefit from this service.

### 3. Right to be heard and to express views

106. General Comment No. 12 of the United Nations Committee on the Rights of the Child interprets the right of the child to be heard, which is one of the four guiding principles of the United Nations Convention on the Rights of the Child, using the words "shall assure" which is a legal term of special strength which leaves no leeway for states parties' discretion.<sup>77</sup> This comment elaborates on the fact that age alone cannot determine the significance of a child's views.<sup>78</sup> In its General Comment No. 5, the committee rightly notes that "appearing to listen to children is relatively unchallenging; giving due weight to their views requires real change".<sup>79</sup>

77. General Comment No. 12 on the right of the child to be heard (CRC/C/GC/12, 1 July 2009), paragraph 19.

78. *Ibid.*, paragraph 28-31.

79. General Comment No. 5 on General measures of implementation of the United Nations Convention on the Rights of the Child (CRC/GC/2003/5), Article 12.

107. Article 3 of the European Convention on the Exercise of Children's Rights (ETS No. 160) combines the right to be heard with the right to be informed: in judicial proceedings, children should receive all relevant information, be consulted and express their views and be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

108. In these guidelines, reference is made to concepts such as "age and maturity" and "sufficient understanding", which implies a certain level of comprehension, but does not go as far as to demand from the child a full comprehensive knowledge of all aspects of the matter at hand.<sup>80</sup> Children have the right to give their views freely, without any pressure and without manipulation.<sup>81</sup>

109. The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime use the wording "child sensitive" as "an approach that balances the child's right to protection and that takes into account the child's individual needs and views".<sup>82</sup>

110. Laws should be clearly formulated in order to ensure legal equality for all children. Irrespective of age, in particular when a child takes the initiative to be heard, a sufficient level of understanding should be presumed. Age, however, still plays a major role in "granting" children their basic right to be heard in matters that affect them (Guideline 45). However, it must be pointed out that, in some circumstances, it is the child's duty to be heard (that is, to give evidence).

111. Children need to know precisely what will happen and what the status of their given opinion or statement will be.<sup>83</sup> The judge should not refuse to hear the child without good reasons unless this is in the best interests of the child (Guideline 47). They should be clearly informed that if a judge does hear them, this does not mean they will "win" the case. In order to gain or obtain the trust and respect for the given judgment, particular effort should be made by the child's lawyer to explain why the child's opinion has not been followed or why the given decision has been made, as is done for adults (Guideline 48).

112. Furthermore, children have the right to express their views and opinion on any issue or case that involves or affects them. They should be able to do so regardless of their age, in a safe environment, respectful of their person. They have to feel at ease when they talk to a judge or other officials. This may require the judge to omit certain formalities, such as wearing a wig and gown or hearing the child in the courtroom itself; by way of example, it can be helpful to hear a child in the judge's chambers.

113. It is important that the child can speak freely and that there is no disruption. This may in practice mean that no other people should be allowed in the room (for example, the parents or the alleged perpetrator), and that the atmosphere is not

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80. For more information, see CRIN Review: "Measuring maturity. Understanding children's evolving capacities", 2009.

81. General Comment No. 12 on the right of the child to be heard (CRC/C/GC/12, 1 July 2009), paragraph 22.

82. United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Res 2005/20, 22 July 2005).

83. European Convention on the Exercise of Children's Rights, Article 3. c.

disturbed by unwarranted interruption, unruly behaviour or transit of people in and out of the room.

114. Judges are often untrained in communicating with children and specialised professionals are seldom called upon to support them in this task. As already indicated (paragraph 96 above), even young children can state their views clearly, if they are assisted and supported correctly. Judges and other professionals should actually look for the child's own views, opinions and perspective on a case.

115. Depending on the wishes and the interests of the child, serious consideration should be given to who will listen to the child, presumably either the judge or an appointed expert.<sup>84</sup> Some children may prefer to be heard by a "specialist" who would then convey his or her point of view to the judge. Others, however, make it clear that they prefer to talk to the judge himself or herself, since he or she is the one who will make the decision.

116. While it is true that there is a risk of children being manipulated when they are heard and express their views (for example, by one parent against the other), all efforts should be made not to let this risk undermine this fundamental right.

117. The United Nations Committee on the Rights of the Child warns against a tokenistic approach and unethical practices,<sup>85</sup> and lists the basic requirements for effective and meaningful implementation of the right to be heard.<sup>86</sup> Processes for hearing children should be transparent and informative, voluntary, respectful, relevant, child friendly, inclusive, carried out by trained staff, safe and sensitive to risk and, finally, accountable.

In a case of inter-country adoption with Italian adopters of Romanian children (case of *Pini and Others v. Romania*), the Court was very clear on the right of the children to be heard and that their views be taken seriously: "It must be pointed out that in the instant case the children rejected the idea of joining their adoptive parents in Italy once they had reached an age at which it could be reasonably considered that their personality was sufficiently formed and they had attained the necessary maturity to express their opinion as to the surroundings in which they wished to be brought up."<sup>87</sup> "The children's interests dictated that their opinions on the subject should have been taken into account once they had attained the necessary maturity to express them. The children's constant refusal,

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84. The United Nations Committee on the Rights of the Child recommends that children are heard directly. General Comment No. 12 on the Right of the Child to be heard (CRC/C/GC/12, 1 July 2009), paragraph 35.

85. General Comment No. 12 on the Right of the Child to be heard (CRC/C/GC/12, 1 July 2009), paragraph 132: "The Committee urges States parties to avoid tokenistic approaches, which limit children's expression of views, or which allow children to be heard, but fail to give their views due weight. It emphasizes that adult manipulation of children, placing children in situations where they are told what they can say, or exposing children to risk of harm through participation are not ethical practices and cannot be understood as implementing Article 12."

86. General Comment No. 12 on the Right of the Child to be heard (CRC/C/GC/12, 1 July 2009), paragraph 133-134.

87. European Court of Human Rights (Second Section), judgment of 22 June 2004, *Pini and Others v. Romania*, Nos. 78028/01 and 78030/01, paragraph 157.

after they had reached the age of 10, to travel to Italy and join their adoptive parents carries a certain weight in this regard.”<sup>88</sup>

In the case of *Hokkanen v. Finland*, a father claimed custody of his daughter who had been living with her grandparents for years. The child did not want to live with her father and the Court agreed that “the child had become sufficiently mature for her views to be taken into account and that access should therefore not be accorded against her wishes.”<sup>89</sup>

#### 4. Avoiding undue delay

118. Cases in which children are involved need to be dealt with expeditiously and a system of prioritising them could be considered.<sup>90</sup> The urgency principle is set out in Guideline 50. It should be borne in mind that children have a different perception of time from adults and that the time element is very important for them: for example, one year of proceedings in a custody case may seem much longer to a 10-year-old than to an adult. The rules of court should allow for such a system of prioritising in serious and urgent cases, or when possibly irreversible consequences could arise if no immediate action is taken (Guideline 51 covering family law cases).

119. Other examples of this principle can be found in relevant Council of Europe instruments. One of them demands that states ensure that the investigations and criminal proceedings are treated as a priority and carried out without any unjustified delays.<sup>91</sup> This is also very important to allow victims to be able to start their recovery. Another instrument specifically recommends “ensuring that minors are treated more rapidly, avoiding undue delay, so as to ensure effective educational action.”<sup>92</sup>

120. Respecting the best interests of the child might require flexibility on the part of judicial authorities, while enforcing certain decisions, in accordance with the national law, as indicated by Guideline 53.

In two cases against Germany, the time element was discussed by the Court, which found that in cases of parent–child relationships there is a duty to exercise exceptional diligence in view of the fact that the risk of passage of time may result in a *de facto* determination of the matter and that the relation of a child with one of his or her parents might be curtailed.<sup>93</sup>

In the case of *Paulsen-Medalen and Svensson v. Sweden*, the Court found that Article 6, paragraph 1 of the ECHR had been violated since the authorities had

88. *Ibid.*, paragraph 164.

89. (Chamber), judgment of 23 September 1994, *Hokkanen v. Finland*, No. 19823/92; paragraph 61.

90. Cf. Art 41 of the Rules of the European Court of Human Rights. This should be used more frequently according to I. Berro-Lefevre, *op.cit.*, p. 76.

91. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, (CETS No. 201, Article 30, paragraph 3).

92. Council of Europe Committee of Ministers Recommendation No. R (87) 20 on social reactions to juvenile delinquency, paragraph 4.

93. See European Court of Human Rights (Grand Chamber), judgment of 13 July 2000, *Elsholz v. Germany*, No. 25735/94, paragraph 49, and judgment of 8 July 2003, *Sommerfeld v. Germany*, No. 31871/96, paragraph 63.

not acted with the required exceptional diligence when handling a dispute on access.<sup>94</sup>

Avoiding undue delay is also important in criminal cases. In the case of *Bouamar v. Belgium*, an especially speedy judicial review was demanded in cases of detention of minors. Unjustified lapses of time were hardly considered to be compatible with the speed required by the terms of Article 5, paragraph 4 of the ECHR.<sup>95</sup>

## 5. Organisation of the proceedings, child-friendly environment and child-friendly language

121. Child-friendly working methods<sup>96</sup> should enable children to feel safe. Being accompanied by a person whom they can trust can make them feel more comfortable in the proceedings. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)<sup>97</sup> stipulates that a child may be accompanied by his or her legal representative or an adult of his or her choice, but that the person should be considered to be suitable. A reasoned decision can be taken against the presence of a given accompanying person.

122. The architectural surroundings can make children very uncomfortable. Court officials should familiarise children, *inter alia*, with the layout of the court, and identities of the officials involved (Guideline 55). Even for adults, courthouses can be rather oppressive or intimidating (Guideline 62). While this is difficult to change, at least for existing court facilities, there are ways in which treatment of children in these courthouses can be improved by working with children in a more child-sensitive way.

123. Court facilities may include, where possible, special interview rooms, which take the best interests of the child into account. Equally, child-friendly court settings may mean that no wigs or gowns or other official uniforms and clothing are worn. This can be implemented in view of the child's age or the function of the official. Depending on the circumstances and on the views of the child, it may well be that, for example, uniforms make it clear to the child that he or she is talking to a police officer and not to a social worker, which has its relevance. This could also add to the feeling of the child that matters affecting him or her are taken seriously by the competent authority. To sum up, the setting may be relatively formal, but the behaviour of officials should be less formal and, in any case, should be child friendly.

124. More importantly, child-friendly justice also implies that children understand the nature and scope of the decision taken, and its effects. While the judgment and the motivation thereof cannot always be recorded and explained in child-friendly

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94. European Court of Human Rights (Chamber), judgment of 19 February 1998, *Paulsen-Medalen and Svensson v. Sweden*, No. 16817/90, paragraph 42.

95. European Court of Human Rights (Chamber), judgment of 29 February 1988, *Bouamar v. Belgium*, No. 9106/80, paragraph 63.

96. See W. McCarney, "The principles of child-friendly justice at international level", *International justice for children*, Monograph No. 3, Council of Europe Publishing, 2008, pp. 119-127.

97. Article 35. 1. f.

wording, due to legal requirements, children should have those decisions explained to them, either by their lawyer or another appropriate person (parent, social worker, etc.).

125. Specific youth courts, or at least youth chambers, could be set up for offences committed by children.<sup>98</sup> As far as possible, any referral of children to adult courts, adult procedures or adult sentencing should not be allowed.<sup>99</sup> In line with the requirement of the specialisation in this area, specialised units could be established within law enforcement authorities (Guideline 63).

In several cases against the United Kingdom involving juvenile offenders, the Court stressed that special measures have to be taken to modify the adult courts' procedure in order to attenuate the rigours of an adult trial in view of the defendant's young age. For example, the legal professionals should not wear wigs and gowns and the juvenile defendant should not be seated in a raised dock, but instead be allowed to sit next to his legal representative or social worker. Hearings should be conducted in a way that their feelings of intimidation and inhibition could be reduced as far as possible.

Following the cases of *T. v. the United Kingdom* and *V. v. the United Kingdom*, where the national court settings were considered to be intimidating for a child, a Practice Direction for Trial of Children and Young Persons in the Crown Court was drafted. The aim is to avoid intimidation, humiliation or distress for the child on trial. Elements of this practice direction are, *inter alia*: the possibility for the child to visit the courtroom before the trial to become familiarised with it, the possibility of police support to avoid intimidation or abuse by the press, no wigs or gowns to be worn, the explanation of the procedure in terms the child can understand, restricted attendance of court's hearings, etc.

The Polish Ministry of Justice promotes and implements the concept of child-friendly interview rooms in co-operation with an NGO. The main goal is to protect child witnesses and victims of crime, especially crimes involving sexual and domestic violence, through putting into practice principles of interviewing children in child-friendly conditions and by competent staff. The procedure ensures that children are interviewed by a judge in the presence of a psychologist. Other persons involved (prosecutor, lawyer, the accused, the private complainant) are present in a separate room and have the possibility to participate in the interview thanks to communication systems between rooms, one-way mirrors and/or live broadcasting. Important details to make children feel more comfortable include, *inter alia*: guaranteed privacy (soundproof door between interviewing room and other rooms/premises); rooms equipped in accordance with the child's needs in order to ensure physical and mental safety of the child during the interview, in the use of neutral colours and furnishings in the room which ensure that children can spend time comfortably (two sizes of tables and chairs, a sofa or armchair, soft carpet); rooms equipped with materials and other items useful in gathering information from a child (coloured pencils, paper, dolls, etc.).

98. United Nations Convention on the Rights of the Child, Article 40.3.

99. Council of Europe Committee of Ministers Recommendation No. R (87) 20 on social reactions to juvenile delinquency, proceedings against minors, paragraph 5.

## 6. Evidence/statements by children

126. The issue of collecting evidence/statements from children is far from being simple. As standards are rare in this area (such as the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime),<sup>100</sup> the need was felt to address these issues, as the conduct of such interviews with regard to evidence/statements requires practical guidance.

127. As stipulated by Guideline 64, this should as far as possible be carried out by trained professionals. In the same context, Guideline 66 recommends that when more than one interview is needed, they should be carried out preferably by the same person for reasons of consistency and mutual trust, but that the number of interviews should be as limited as possible (Guideline 67).

128. For obvious reasons, specific arrangements should be made for gathering evidence, especially from child victims, in the most favourable conditions. Allowing evidence to be given via audio, video or TV link are examples of these practices, as is providing testimony to experts prior to the trial, and avoiding visual or other contact between the victim and the alleged perpetrator (Guideline 68), or giving evidence without the presence of the alleged perpetrator (Guideline 69). However, in particular cases, such as sexual exploitation, video recordings for interviews may be traumatic for victims. The possible harm or secondary victimisation resulting from such recordings therefore needs to be carefully assessed and other methods, such as audio recording, will need to be considered to avoid revictimisation and secondary trauma.

129. Member states' procedural laws and legislation in this domain vary considerably, and there might be less strict rules on giving evidence by the children. In any case, member states should give priority to the child's best interests in the application of legislation regarding evidence. Examples provided by Guideline 70 include the absence of the requirement for the child to take an oath or other similar declarations. These guidelines do not intend to affect the guarantees of the right to a defence in the different legal systems; however, they do invite member states to adapt, where necessary, some elements of the rules on evidence so as to avoid additional trauma for children. In the end, it will always be the judge who will consider the seriousness and validity of any given testimony or evidence.

130. Guideline 70 also indicates that these adaptations for children should not in themselves diminish the value of a given testimony. However, preparing a child witness to testify should be avoided because of the risk of influencing the child too much. Establishing model interview protocols (Guideline 71) should not necessarily be the task of the judges, but more that of national judicial authorities.

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100. United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Res 2005/20, 22 July 2005), paragraph XI, 30, *d.*: "Use child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated in the same location, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an appropriate notification system to ensure the child goes to court only when necessary and other appropriate measures to facilitate the child's testimony." It should be borne in mind that these guidelines are about giving testimony in general, and not only criminal proceedings.

131. Although using audio or video recording of children's statements has some advantages, as it serves to avoid repetition of often traumatic experiences, direct testimony in front of an interrogating judge may be more appropriate for children who are not victims, but alleged perpetrators of crimes.

132. As already indicated, age should not be a barrier for the child's right to fully participate in the judicial process.<sup>101</sup> Their testimonies should not be presumed to be invalid or untrustworthy simply on the basis of their age, according to Guideline 73.

133. Where children are to be asked or they express the wish to give evidence in family proceedings, due regard should be given to their vulnerable position in that family and to the effect such testimony may have on present and future relationships. All possible efforts should be made to ensure that the child is made aware of the consequences of the testimony and supported in giving evidence by any of the means already referred to.

The Court has recognised the specific features of proceedings concerning sexual offences. In the case of *S.N. v. Sweden*, the Court found that: "Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question of whether or not in such proceedings an accused has received a fair trial, account must be taken of the right of respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence."<sup>102</sup>

In the same case, attention was also given to the possibly leading nature of some questions. To avoid the negative effects thereof, forensic psychology experts, with specific training and knowledge, could be called upon.<sup>103</sup>

In the case of *W.S. v. Poland*, the Court suggested possible ways to test the reliability of a young child victim and pointed out that this could be done in a less invasive manner than via direct questioning. Several sophisticated methods might be applied, such as having the child interviewed in the presence of a psychologist with questions being put in writing by the defence, or in a studio enabling the applicant or his lawyer to be present at such an interview, via video-link or one-way mirror.<sup>104</sup>

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101. *Ibid.*, paragraph VI, 18.

102. European Court of Human Rights (First Section), judgment of 2 July 2002, *S.N. v. Sweden*, No. 34209/96, paragraph 47.

103. *Ibid.*, paragraph 53.

104. European Court of Human Rights (Fourth Section), judgment of 19 June 2007, *W.S. v. Poland*, No. 21508/02, paragraph 61.

## E. Child-friendly justice after judicial proceedings

134. There are many measures which may be taken to make justice child friendly after judicial proceedings have taken place. This starts with the communication and explanation of the given decision or judgment to the child (Guideline 75). This information should be supplemented with an explanation of possible measures to be taken, including an appeal or address to an independent complaint mechanism. This should be done by the child's representative, that is, the lawyer, guardian *ad litem* or legal representative, depending on the legal system. Guidelines 75, 77 and 81 refer to those representatives.

135. Guideline 76 recommends that steps be taken without delay to facilitate the execution of decisions/rulings involving and affecting children.

136. In many cases, and in particular in civil cases, the judgment does not necessarily mean that the conflict or problem is definitely settled: family matters are a good example, and they are dealt with by Guidelines 78 and 79. In this sensitive area, there should be clear rules on avoiding force, coercion or violence in the implementation of decisions, for example, visitation arrangements, to avoid further traumatising. Therefore, parents should rather be referred to mediating services or neutral visitation centres to end their disputes instead of having court decisions executed by police. The only exception is when there is a risk to the well-being of the child. Other services, such as family support services, also have a role to play in the follow-up of family conflicts, to ensure the best interests of the child.

In cases of enforcement of decisions on family law issues, such as access and custody rights, the Court held on several occasions that what is decisive is the question of whether national authorities have taken all necessary steps to facilitate the execution as can reasonably be demanded in the special circumstances of each case.

In Austria, the "Besuchsaft" offers children the possibility to stay in touch with both parents after a divorce or separation in a safe and supportive setting. The right of access can be provided in special premises under the supervision of trained staff, to avoid conflicts between the parents, whenever a visitation right is exercised. This kind of accompanied visitation can be ordered by the court or requested by one or both parents. The central issue is the well-being of the child and avoiding a situation where the child is caught in the middle of a conflict between the parents.

137. Guidelines 82 and 83 deal with children in conflict with the law. Particular attention is paid to successful reintegration into society, the importance of non-disclosure of criminal records outside the justice system, and legitimate exceptions to this important principle. Exceptions could be made for serious offences, *inter alia*, for reasons of public safety, and, when employment of people for jobs working with children is concerned, if a person has a history of committing child abuse, for example. Guideline 83 aims at protecting all categories of children, not only the particularly vulnerable ones.

138. In the case of *Bouamar v. Belgium*, the Court reviewed the issue of a juvenile offender who was put in and out of an adult prison nine times. Although detaining minors in adult prisons was at the time allowed under the youth protection law, the European Court of Human Rights concluded that: “The nine placement orders, taken together, were not compatible with under sub-paragraph *d*, Article 5.1. The repeated incarceration had the effect of making each placement order less and less ‘lawful’ under sub-paragraph *d*, Article 5.1, especially as the Crown Counsel never instituted criminal proceedings against the applicant in respect of the offences alleged against him.”<sup>105</sup>

The British foundation Barnardo’s developed the Children’s Advocacy Service for young people in several institutions for young offenders throughout the United Kingdom, providing them with independent advocacy, assisting them with issues relating to welfare, care, treatment and planning for resettlement while they are detained. Besides face-to-face meetings within one week of incarceration, young people can contact the service or rely on a free helpline. The advocacy service helps young people to understand the system and get in contact with the relevant professionals to help them solve their problems.

## V. Promoting other child-friendly actions

139. It goes without saying that a real improvement in the area of children’s rights and child-friendly justice requires a proactive approach by the Council of Europe member states, which are being encouraged to carry out a number of different measures.

140. Sub-paragraphs *a* to *d* encourage research into this area, exchange of practices, co-operation and awareness-raising activities in particular by creating child-friendly versions of legal instruments. They also express support for well-functioning information offices for children’s rights.

141. Investing in children’s rights education and the dissemination of children’s rights information is not only an obligation under the United Nations Convention on the Rights of the Child,<sup>106</sup> but is also a preventive measure against violations of children’s rights. Knowing one’s rights is the first prerequisite of “living” one’s rights and being able to recognise their violation or potential violation.<sup>107</sup>

Many organisations have been making child-friendly versions of the United Nations Convention on the Rights of the Child and other relevant documents on children’s rights. One example is the child-friendly version of the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, by UNICEF and the United Nations Office on Drugs and Crime.

105. European Court of Human Rights (Chamber), judgment of 29 February 1988, *Bouamar v. Belgium*, No. 9106/80, paragraphs 52-53.

106. Article 42: “States parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.”

107. See also Berro-Lefèvre, op.cit., pp. 74-75.

142. Measures envisaged under sub-paragraphs *e* to *g* aim to facilitate children's access to courts and complaints mechanisms, and consider a number of possible measures in this respect (establishment of specialised judges and lawyers, facilitation of the role of civil society and independent bodies at national, regional and universal level). In this domain, states should envisage the use of collective complaints. A good example of the collective complaints mechanism of the revised European Social Charter (ETS No. 163) is that it is accessible, no individual victim is needed and not all domestic remedies need to be exhausted. Children's ombudspersons, children's rights NGOs, social services, etc. should be able to lodge complaints or start procedures in the name of a specific child.

143. It is worth noting that new strategies are also promoted at international level, such as the aforementioned campaign in favour of a complaints procedure under the United Nations Convention on the Rights of the Child.

144. Sub-paragraphs *h* to *i* focus attention on the need for appropriate education, training and awareness-raising measures, while sub-paragraphs *j* to *k* express support for appropriate specialised structures and services.

## **VI. Monitoring and assessment**

145. Member states are encouraged to carry out a number of measures to implement these guidelines. They should ensure their wide dissemination among all authorities responsible for or otherwise involved with the defence of children's rights. One possibility would be the dissemination of the guidelines in its child-friendly versions.

146. Member states should also ensure a review of domestic legislation, policies and practice in keeping with these guidelines, and a periodic review of working methods in this area. They are also invited to prescribe specific measures for complying with the letter and spirit of these guidelines.

147. In this respect, the maintenance or establishment of a framework, including one or more independent mechanisms (such as ombudspersons or children's ombudspersons) is of paramount importance for the promotion and monitoring of the implementation of these guidelines.

148. Lastly, it is plain that the civil society organisations, institutions and bodies promoting and protecting the right of the child should be given an active role in the monitoring process.



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The guidelines on child-friendly justice, and their explanatory memorandum, were adopted by the Council of Europe in 2010. Based on existing international and European standards, in particular the United Nations Convention on the Rights of the Child and the European Convention on Human Rights, the guidelines are designed to guarantee children's effective access to and adequate treatment in justice. They apply to all the circumstances in which children are likely, on any ground and in any capacity, to be in contact with the criminal, civil or administrative justice system. They recall and promote the principles of the best interests of the child, care and respect, participation, equal treatment and the rule of law. The guidelines address issues such as information, representation and participation rights, protection of privacy, safety, a multidisciplinary approach and training, safeguards at all stages of proceedings and deprivation of liberty.

The 46 Council of Europe member states are encouraged to adapt their legal systems to the specific needs of children, bridging the gap between internationally agreed principles and reality. To that end, the explanatory memorandum offers examples of good practices and proposes solutions to address and remedy legal and practical gaps in justice for children.

These guidelines form an integral part of the Council of Europe's Strategy for the rights of the child and its programme "Building a Europe for and with children". A series of promotion, co-operation and monitoring activities are planned in member states in view of ensuring effective implementation of the guidelines for the benefit of all children.

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The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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