



European  
Social  
Charter

Charte  
sociale  
européenne

COUNCIL OF EUROPE



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

12 April 2017

**Case Document No. 1**

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

**COMPLAINT**

**Registered at the Secretariat on 20 March 2017**



International Commission of Jurists  
Rue de Dinant 5  
1000 Brussels  
Belgium  
tel +32 2 734 84 46  
fax +32 2 734 84 46

Executive Secretary of the European Committee of Social Rights  
Department of the European Social Charter  
Directorate General of Human Rights and Rule of Law  
Council of Europe  
F-67075 Strasbourg Cedex

## Collective complaint

*International Commission of Jurists v. the Czech Republic*

For failure to ensure equal legal protection and participation of children below the age of criminal responsibility in the pre-trial stage of juvenile justice procedures

And for lack of restorative justice measures applicable to children below the age of criminal responsibility in juvenile justice system

---

Violation of Article 17 and equality principle of European Social Charter

# CONTENTS

PART I. Admissibility of the complaint and parties to the Case .....	3
1. The complainant organisation .....	3
2. The respondent state .....	3
3. Description of the problem and the vulnerable group concerned .....	4
PART II. Subject of the complaint .....	10
1. Fundamental rights referred to: .....	10
2. Summary of grounds: .....	10
PART III. Grounds of the complaint .....	12
1. Grounds of the complaint are covered by Article 17 of the Charter and prohibition of discrimination .....	12
(a) Article 17 of the Charter .....	12
(b) Prohibition of discrimination on the ground of age .....	14
2. Ground no. 1: The failure to ensure mandatory legal assistance from the moment measures under the Juvenile Justice Act have been used or actions under the Criminal Procedure Code have been taken (i.e. the same as in case of juveniles) .....	17
(a) The Council of Europe standards .....	18
(b) The case law of the European Court of Human Rights .....	20
(c) The UN standards .....	23
(d) Conclusions .....	25
3. Ground no. 2: The failure to ensure access to police file during the examination phase of the pre-trial stage of juvenile justice procedure .....	26
(a) The Council of Europe standards .....	26
(b) The case law of the European Court of Human Rights .....	27
(c) The UN standards .....	28
(d) Conclusion .....	30
4. Ground no. 3: The failure to ensure that children below the age of criminal responsibility are served with the final decision of the police authority and have the right to appeal against this decision .....	30
(a) Human rights standards .....	35
(b) Conclusion .....	32
5. Ground no. 4: The failure to protect children below the age of criminal responsibility who are suspected of an unlawful act against unreasonable and unnecessary formal trials before juvenile courts .....	35
(a) The Council of Europe standards .....	35
(b) The case law of the European Court of Human Rights .....	37
(c) The UN standards .....	37
(d) Conclusion .....	39
Conclusions – operative part .....	40

# PART I. Admissibility of the complaint and parties to the Case

## 1. The complainant organisation

1. The International Commission of Jurists (hereafter "ICJ") is a non-governmental organisation working to advance understanding and respect for Rule of Law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva (Switzerland). It is made up of some 60 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organisations. The ICJ maintains consultative status with the Council of Europe, and therefore enjoys the right to submit complaints under article 1 of the Additional Protocol to the European Social Charter providing for a system of Collective Complaints.
2. The ICJ works globally, and in particular in the Council of Europe region to uphold the protection of human rights in the criminal justice system, through legal research and analysis, third party interventions, and training of lawyers. It has worked with national lawyers and NGOs across the region to access to justice for vulnerable groups of children, such as migrant children. The ICJ has already submitted a collective complaint on the rights of children in connection with Article 7(1) of the European Social Charter (ICJ v. Portugal, no. 1/1998), which was declared admissible and decided on the merits by the Committee.
3. In ratifying the European Social Charter, the Czech Republic accepted the obligations in Article 17 of the Charter. This complaint is therefore admissible.
4. ICJ is supported in this collective complaint by the Central European non-governmental organization Forum for Human Rights (FORUM). FORUM works to ensure that human rights are respected, protected and fulfilled in accordance with relevant international human rights standards, using litigation and advocacy to promote human rights before national and international human rights bodies. It provides support to domestic NGOs and leads domestic and international litigation and advocacy activities.

## 2. The respondent State's European Social Charter obligations

5. This complaint is directed against the Czech Republic which ratified the European Social Charter on 3 November 1999, accepting 52 of the Charter's 72 paragraphs, including Article 17. On 25 March 2008 it denounced the provision of Article 8 paragraph 4 of the Charter. It ratified the 1988 Additional Protocol to the Charter on 17 November 1999, accepting all of the 4 articles. The Czech Republic ratified the Amending Protocol to the European Social Charter on 17 November 1999. It signed the Revised Charter on 4 November 2000, but has not yet ratified it. The Czech Republic ratified the 1995 Additional Protocol providing for a system of collective

complaints on 4 April 2012. Consequently, this complaint is also admissible in this respect.

### 3. Description of the problem and the vulnerable group concerned

6. This collective complaint has been lodged against the Czech Republic on the grounds of failure to discharge its obligations under article 17 of the European Social Charter to ensure the effective exercise of the right of mothers and children to social and economic protection. In particular, the Czech Republic has failed to ensure equal legal protection and participation of children below the age of criminal responsibility in the pre-trial stage of juvenile justice procedures, and to ensure access to effective restorative justice measures applicable to children below the age of criminal responsibility in the Czech juvenile justice system. The collective complaint concerns the rights of the group of children below the age of criminal responsibility in the juvenile justice system, i.e. children younger than 15 years.

#### (a) Juvenile justice system in the Czech Republic

7. In the Czech Republic, the main sources of criminal law are the Criminal Code (effective from 1<sup>st</sup> January 2010) and the Criminal Procedure Code (effective from 1<sup>st</sup> January 1962). However, in respect of offenders under 18 years of age, substantive conditions for criminal liability and specific procedural rules are governed by the special Act No. 218/2003 Coll. on Juvenile Liability for Unlawful Acts and on Juvenile Justice (*hereinafter* "Juvenile Justice Act").
8. The Juvenile Justice Act covers two age groups of youth: children below the age of criminal responsibility (under the age of 15) and juveniles (those who at the moment of committing a criminal act had reached 15 years of age but were younger than 18 years of age). Even though children below the age of criminal responsibility cannot not be held criminally liable, they may be partially subjected to standard pre-trial criminal proceedings (see below) and may be subject to concrete sanctions (called "measures") by the juvenile court. Such measures may include deprivation of liberty in an "educational correction centre", "children's homes with schools" or "psychiatric hospitals". In 2015, according to the statistics of the Ministry of Interior, there were 2 186 juveniles (comprising around 75 % of persons in the juvenile justice system) and 1 226 children below the age of criminal responsibility (25%) in the juvenile justice system (see Table no. 1). From statistics back to 2006 it follows that approximately one-third of all minors in the juvenile justice system are children below the age of criminal responsibility (see Table no. 2).
9. In the Czech Republic, the criminal procedure is divided into three stages: i) first phase of pre-trial stage (*examination*); ii) second phase of pre-trial stage (*investigation*); iii) trial stage. In the case of juveniles (15-18 years), the procedure is governed explicitly by the Juvenile Justice Act and partly by the Code of Criminal Procedure. In the two pre-trial stages, factual and legal circumstances of the action in question have to be duly clarified and the liability for committing it must be determined in line with the aforementioned law. Consequently, the state prosecutor has an option as to whether to bring an indictment against a juvenile before the juvenile court or rather to use one of the available alternatives (diversions). These include: i) settlement, ii) conditional termination of criminal proceedings, iii) withdrawal of criminal proceedings, iv) conditional withdrawal of a proposal to

punish the juvenile. By using of one of these diversions by the state prosecutor, the case of a juvenile can end already in the pre-trial stage.

Table no. 1:<sup>1</sup>

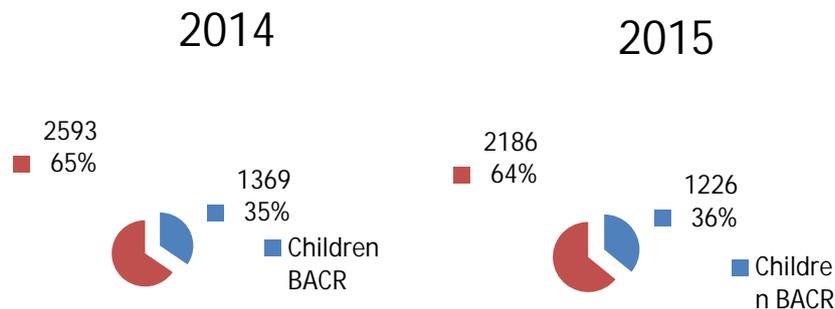
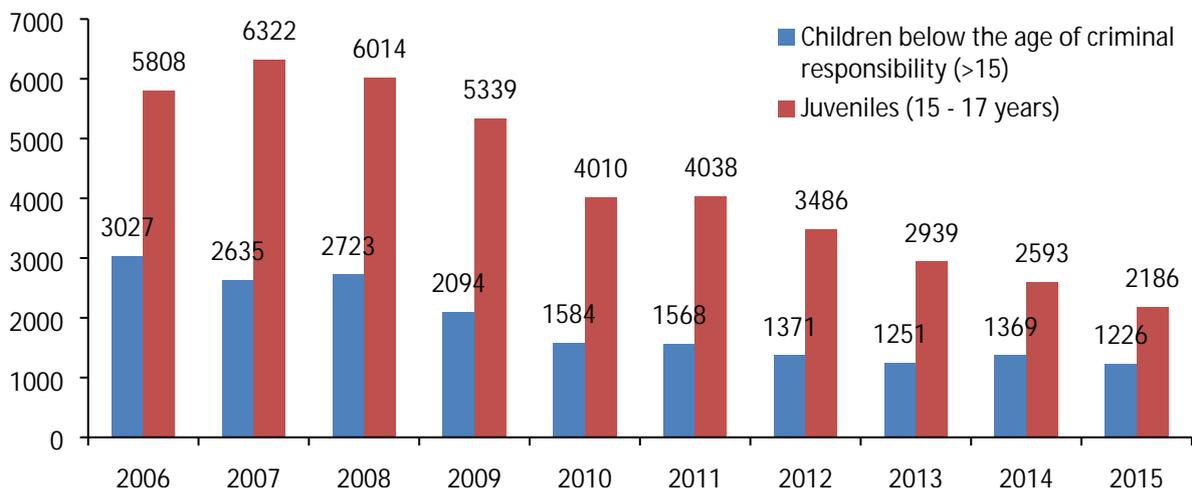


Table no. 2:



10. In the pre-trial stage, juveniles (15–18 years) benefit from a number of specific procedural rights, one of which is of especial importance - mandatory legal assistance. According to the Juvenile Justice Act, all juveniles must be represented by a lawyer of their choice or by a defence counsel (legal aid lawyer) who is assigned to the juvenile from the very beginning of the proceedings, including during the examination phase (which is the first phase of the pre-trial stage). The mandatory legal defence for juveniles is stipulated in article 42(2) Juvenile Justice Act, according to which the "juvenile has to be assigned lawyer from the moment measures under the Juvenile Justice Act have been used or actions under the Criminal Procedure Code have been taken". The national preparatory documents (the drafters' intention) explain that this broadly formulated right to legal aid mirrors a lack of ability of juveniles to defend themselves.<sup>2</sup>

<sup>1</sup> Source: Police statistics of the Ministry of Interior, available in Czech at: <http://www.mvcr.cz/clanek/statistiky-kriminality-dokumenty.aspx> (Accessed 3 March 2017)

<sup>2</sup> The preparatory document is available in Czech at: <https://www.epravo.cz/top/clanky/vladni-navrh-zakona-o-odpovednosti-mladeze-za-protipravni-ciny-a-o-soudnictvi-ve-vecech-mladeze-a-o-zmene-nekterych-zakonu-duvodova-zprava-20827.html>

- (b) Children below the age of criminal responsibility and the main problems they face
11. When it comes to children below the age of criminal responsibility (younger than 15), the pre-trial stage is limited only to its first examination phase. When the police authority reasonably believes that a child below the age of criminal responsibility committed an unlawful act (defined in substantive provisions of the Criminal Code), it sets aside the proceedings under article 159a(2) Criminal Procedure Code. Consequently, under article 90(1) Juvenile Justice Act, the state prosecutor has an obligation to bring a case of a child below the age of criminal responsibility before the juvenile court. There are no explicit alternatives - diversions - available and it is not unusual that children have to stand formal trial for petty offences (see case study no. 4 below). The juvenile court can impose one of the sanctions (measures) listed under article 93 Juvenile Justice Act, including measures of deprivation of liberty (institutional forensic treatment and institutional protective custody).
  12. The present complaint will focus particularly on the first phase of the pre-trial stage ("examination") and identify how these procedures - on their face and in their implementation - constitute a breach of the Czech Republic's obligations under the European Social Charter. This stage usually lasts several months, while the police carry out a number of measures, including interrogations, reconstructions of the crime scene, and DNA extractions. Evidence and other information gathered at this stage is crucial for imposing measures by the juvenile courts, since these courts rely primarily on evidence gathered by the police in the pre-trial stage.
  13. During the examination, children below the age of criminal responsibility do not benefit from specific procedural rights. The Juvenile Justice Act does not provide for mandatory legal representation for younger children, as it does for juveniles. Children below the age of criminal responsibility are not assigned a lawyer who can inform them about the specificities of the procedure and their procedural rights (especially the right to remain silent), help them to prepare their defence, counsel them during the interrogations and support them in the course of the pre-trial proceedings.

Case study no. 1 – Pavel<sup>3</sup>

Pavel has a serious intellectual disability and he is not able to distinguish life and death. When he was 13 years old, he was suspected of having caused the death of another boy while they were playing together. During the examination, in the pre-trial stage, Pavel was subjected to police interrogation which lasted five and a half hours. During the interrogation, he explicitly refused to testify. According to the official minutes of the interrogation, at one point he started to cry and to repeat: "*No, I don't want to, I don't want to, I don't want to ...*". Ignoring his determined refusal, the same day the police officers brought him to the scene of the incident and demanded that he describe what had happened and to demonstrate it on a mannequin. Pavel eventually "confessed" to the allegations and did what they asked. The interrogation and reconstruction were carried out by the police officers, in the presence of a social worker from the child welfare authority. The social worker had no legal education. The interrogation and reconstruction were carried out in the absence of a lawyer, because unlike in the case of juveniles, the law does not provide for mandatory legal representation for children below the age of criminal responsibility.

---

<sup>3</sup> Case no. ČTS: PSC-265/TČ-71-2007. The case was eventually adjudicated before the Kutná Hora District Court and Prague Regional Court. FORUM lawyers were involved as an advisory to counsel. The description of facts was provided by the FORUM and reflects the summary of the case and the actions taken in the pre-trial proceedings, as had been complained of before the domestic courts.

Case study no. 2 – Dominik<sup>4</sup>

At the time of interrogation Dominik was 14 years old. He suffers from ADHD syndrome. The police heard from local sources that he might take part in a group burglary of a small cabin in a nearby forest. In the afternoon, the police came to his home and took him to the police station to interrogate him. At that time he was alone, his mother was still at work. At the police station, he was interrogated for approximately four-and-a-half hours, in the presence only of several police officers and a child welfare officer, and without being provided with any legal or any other expert assistance. He initially refused to testify, but then he apparently succumbed to pressure from police officers and especially the child welfare officer who threatened him with a placement in a closed educational institution. There was no lawyer who could inform him properly about his right to remain silent and who could complain about the abusive manner of interrogation, and Dominik eventually confessed. The following morning he had a nervous breakdown at school. Despite this, in the afternoon, the police officers and the child welfare officer came for him again and took him to the police station for interrogation about the very same incident. However, this time, he was interrogated as a witness against his alleged adult accomplices. Dominik repeated what he had said the day before. Even though he was in completely different procedural position, this testimony was used as evidence against him.

14. Another problematic aspect is that children below the age of criminal responsibility, as well as their parents, are excluded from accessing the police file in their case. They are not typically aware as to what evidence has been collected against them and they cannot challenge the evidence contained in the file or propose new evidence in their favour. Moreover, when the police authority comes to a conclusion that it gathered enough evidence to set-aside the pre-trial proceedings on the basis that the unlawful act had been committed by a child below the age of criminal responsibility, the law does not provide for a possibility to serve this final decision on a child and his/her parents and for them to file an appeal against it. Thus, a child frequently has no way to prove his or her version of facts or to build any meaningful defence of his or her case and to avoid the following proceedings before the juvenile court. Also, no subordinate authority examines the decision of the police to set aside the case under article 159a(2) CPC which automatically leads to the trial before the juvenile court. In conjunction with the above-described absence of professional legal aid during the examination of the case, children below the age of criminal responsibility find themselves in an extremely vulnerable position and in fact fully at the mercy of the police authorities.

Case study no. 3 – Jakub<sup>5</sup>

Jakub was 14 years old when he allegedly committed an assault against his teacher at his school. Immediately after the incident, he was detained at the school director's office and then taken to the police station where he was held for approximately seven hours. During that time he was not allowed to contact anybody and was interrogated without being informed about the right to

---

<sup>4</sup> Case no. KRPH-32681/TČ-2012-051071-NO. The case was eventually adjudicated before the Trutnov District Court. FORUM lawyers were involved as an advisory to counsel. The description of facts was provided by the FORUM and reflects the summary of the case and the actions taken in the pre-trial proceedings, as had been complained of before the domestic courts.

<sup>5</sup> Case no. KRPS-379144/TČ-2012-010071. The case was eventually adjudicated before the Rakovník District Court and the Prague Regional Court. FORUM lawyers were involved as an advisory to counsel. The description of facts was provided by the FORUM and reflects the summary of the case and the actions taken in the pre-trial proceedings, as had been complained of before the domestic courts.

remain silent, in the absence of a lawyer or his parents. He was also subjected to fingerprinting and extracting DNA, again in the absence of a lawyer or his parents. In order to prepare his defence, Jakub and his parents requested the police authority to enable them to access the police file to see what evidence had been collected and to submit their own evidence. The police authorities refused because neither a child below the age of criminal responsibility nor his parents (legal representatives) are listed as entitled persons to access the file under article 65 Criminal Procedure Code. Therefore Jakub and his parents had no possibility to challenge the evidence against him and to propose evidence in his favour. Moreover, the law does not provide for a possibility to deliver Jakub and his parents final decision of the police authority on setting aside proceedings under article 159a(2) Criminal Procedure Code. Even though Jakub and his parents disagreed with the decision, they had no chance to appeal against it. Eventually, the case was brought by the state prosecutor before the juvenile court.

15. When the police authority reasonably believe that there is enough evidence that an unlawful act was committed by a child below the age of criminal responsibility, it has an obligation under article 159a(2) Criminal Procedure Code to suspend the examination and inform the state prosecutor about the results. Under article 90(1) Juvenile Justice Act the state prosecutor has an obligation to bring this case promptly before a juvenile court. There are no explicit alternatives to the formal trial (diversions) available and children end up before a judge for petty offences, even though such trial may be unreasonable, unnecessary and harmful to a child.

Case study no. 4 – Patrik<sup>6</sup>

Patrik is an 11-year-old boy. In September 2011, together with his friend they drew with a black marker several catchwords on the wall of their primary school, for example, “RHS, you smell like a death dog”, and “Pepsi is good only for dogs”. The total damage was 3,000 Czech korunas (approximately 120 Euros), and Patrik concretely was held liable for damage of 333 Czech korunas (approximately 12 Euros). After two months of examination, the police authority suspended the proceedings under article 159a(2) Criminal Procedure Code on the basis that offender was a child below the age of criminal responsibility. Although further proceedings were not warranted, the state prosecutor, following the legal obligation stipulated under 90(1) Juvenile Justice Act, filed a request with the juvenile court to impose specific measures, in this case the admonishment with a warning under article 93(1)(c) Juvenile Justice Act. The law does not provide for any explicit alternative (diversion) which could be used by the police or state prosecutor. Thus, the juvenile court had no other option than to hear the case and decide on its merits, even though it was completely unnecessary. Eventually, under article 93(10) Juvenile Justice Act, the juvenile court decided in January 2012 to refrain from imposing any specific measure on the basis that the proceeding before the court itself met its educational aim.

#### (c) Concluding remarks

16. Children below the age of criminal responsibility are clearly more vulnerable to abusive conduct in comparison to older juveniles, however they enjoy a significantly lower standard of procedural protections during the pre-trial stage of the juvenile justice procedure than do their older counterparts. This systemic impairment of rights concerns a significant number of young children per year, as shown above (see table no. 1), there were 1 226 children below the age of criminal responsibility in the juvenile justice system in 2015. In fact, one-third of all children in the juvenile justice systems are children below the age of criminal responsibility.
17. These breaches of rights obligations, especially as regards Article 40 CRC, have been criticised by the UN human rights bodies. In its concluding observations on the Czech Republic adopted on 17 June 2011, the UN CRC Committee noted with concern that

---

<sup>6</sup> District Court in Tabor, case no. 6 Rod 2/2012.

children under the age of 15 are not held criminally responsible, but can be placed, even for petty offences, in institutional care prior to legal proceedings, without the guarantees associated with standard criminal proceedings (para. 69(b)). The CRC Committee called on the Czech Republic in to:

“Undertake the legislative amendments necessary for ensuring that children under the age of 15 years have at least the same level of legal guarantees associated with standard criminal proceedings.”<sup>7</sup>

18. The UN Human Rights Committee in its concluding observations on the Czech Republic adopted on 24 July 2013 expressed its concern that although children under the age of 15 are not held criminally responsible, they are subject to standard pre-trial criminal proceedings when suspected of an unlawful act without the required legal assistance or the possibility of accessing their file. The UN Human Rights Committee explicitly called on the Czech Republic in to:

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

(b) Consider, wherever appropriate, to deal with juveniles suspected of an unlawful act who are not held criminally responsible without resorting to formal trials or placing them in institutional care.”<sup>8</sup>

19. Taking into account the above-described failure to ensure social protection of children below the age of criminal responsibility in juvenile justice system, the complainant argues that there is a violation of article 17 of the European Social Charter and a further violation of article 17 read in conjunction with the equality principle embodied in the Preamble of the Charter.

## PART II. Subject of the complaint

### 1. Rights referred to:

Under the European Social Charter

- Preamble of the European Social Charter (hereinafter “the Charter”)

*“Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin;”*

- Article 17 of the Charter

*“The right of mothers and children to social and economic protection*

---

<sup>7</sup> Committee on the Rights of the Child, Concluding observations: Czech Republic, UN Doc. CRC/C/CZE/CO/3-4, (2011), para. 70(b).

<sup>8</sup> Human Rights Committee, Concluding observations on the third periodic report of the Czech Republic, UN Doc. CCPR/C/CZE/CO/3, (2013), para. 20.

*With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services."*

The ICJ further relies especially on Article 40 UN CRC and relevant UN standards. Further, on Council of Europe standards, as listed below (see paragraphs 44-48, 63, 78, 82-85) and interpreted especially by the European Committee of Social Rights and relevant jurisprudence of the European Court of Human Rights.

## 2. Summary of grounds:

20. ICJ asks the European Committee of Social Rights (*hereinafter* "the Committee") to find that the Czech Republic does not comply with Article 17 of the Charter, read in isolation or in conjunction with the prohibition of discrimination embodied in the Charter, on the ground that children below the age of criminal responsibility are deprived of "social protection" in the pre-trial stage of juvenile justice procedure because the Czech Republic failed to take "all appropriate and necessary measures to that end" and that they are discriminated against because they do not enjoy the same standard criminal procedural safeguards as juveniles.
21. On its face, article 17 requires States Parties to "*take all appropriate and necessary measures*" to "*ensur[e] the right of mothers and children to effective social and economic protection.*" There can be no doubt that such protection includes that arising in the criminal justice system and that failure of a State to take measures as appropriate and necessary to secure adequate protection in the context of criminal justice engages the responsibility of the State under article 17 (see paragraphs 26-32 below).
22. The Czech Parliament secured in the Juvenile Justice Act a Charter-compliant level of social protection to juveniles (children 15-18 years old), but omitted to ensure at a minimum the same level of social protection to children below the age of criminal responsibility (children younger than 15). Thus, since 2004 when the Juvenile Justice Act came into force, thousands of children below the age of criminal responsibility have been deprived of enjoyment of a number of rights. These include the rights to legal assistance during the examination phase of the pre-trial stage; to access the police file in their case; and to be served with the decision to suspend the criminal proceedings, all of which have been recognised as minimum standards, especially under Article 6 (3) ECHR, Article 40 (2) CRC and Article 14 (3) ICCPR. In addition, these children have been subjected to formal trials without any possibility to use alternatives (diversions).
23. Due to these systemic flaws, children below the age of criminal responsibility have frequently been subjected to arbitrary conduct of police officers and child welfare authorities. Children below the age of criminal responsibility are not perceived and treated as rights holders and equal subjects of human rights, but rather solely as objects of care and moral education.
24. More specifically, the following forms of conduct by the State gives rise to a violation of Article 17 of the Charter, read in isolation or in conjunction with prohibition of discrimination:

1: The failure to ensure mandatory legal assistance from the moment measures under the Juvenile Justice Act have been applied or actions under the Criminal Procedure Code have been taken (i.e. the same as in case of juveniles) – Ground no. 1

2: The failure to ensure access to the police file during the examination phase of the pre-trial stage of juvenile justice procedure – Ground no. 2

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

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

## PART III. Grounds of the complaint

25. The ICJ considers that the failure to ensure appropriate social protection to children below the age of criminal responsibility in the juvenile justice procedure constitutes a violation of Article 17 of the Charter, read in isolation or in conjunction with the prohibition of discrimination.

1. Grounds of the complaint are covered by Article 17 of the Charter and prohibition of discrimination

(a) Article 17 of the Charter

26. The complainant argues that the grounds of the complaint are within the ambit of Article 17 of the Charter, as defined by the Committee. The General Introduction to the Committee's Conclusions XV-2 stipulates that issues pertaining to "*children and the law – Young Offenders*" shall be dealt with under Article 17 of the Charter.<sup>9</sup> It also sets forth the main principles of interpretation of Article 17 of the Charter with

---

<sup>9</sup> European Committee of Social Rights, Conclusions XV-2 Vol.1, (2001), p.26.

respect to 'young delinquents' stating that "*the procedure with respect to children and young persons must be suitable for them and that they must be afforded the same procedural guarantees as adults, although proceedings involving minors should be conducted rapidly*".<sup>10</sup> Further, in its General Observations, the Committee reiterates that it has also decided to deal with "*protection of children and young people from ill-treatment and abuse*"<sup>11</sup> under article 17 of the Charter.

27. The Committee has not yet had the opportunity to adjudicate a case on the specific subject matter of this collective complaint. It has however considered questions surrounding the treatment of children in conflict with the law in its conclusions, as it looks at the treatment of juvenile offenders within criminal justice systems in its periodic review of States' compliance with the Article 17 of the Charter.<sup>12</sup> This is also reflected in the factsheet on children rights, the Information Document prepared by the Secretariat of ESC (Children's rights under the European Social Charter), which carries a section entitled "Criminal liability and criminal law in respect of children" treating these questions as an Article 17 concern and citing to Committee's authority. It notes, among other things, that the Charter requires that the "*criminal procedure relating to children and young persons must be adapted to their age*."<sup>13</sup> Additionally, the Form for the reports to be submitted in pursuance of the 1961 ESC specifies that the scope of Article 17 of the Charter covers the "*establishment of criminal responsibility and criminal procedure adapted to young offenders as regards age of criminal responsibility, the length of procedure as well as length and conditions of detention*."<sup>14</sup> Therefore, Article 17 of the Charter clearly covers issues related to juvenile justice in general.
28. Furthermore, the Committee has noted in several conclusions<sup>15</sup> that Article 17 of the Revised Charter reflects the approach of the Committee under this provision of the 1961 Charter. It is logical to assume that the right to 'social and economic protection' provided under Article 17 of the Charter was meant to cover all social rights, including children's right to special protection, reference to which was subsequently made in Article 17 of the Revised Charter, which provides for the protection of social, legal and economic rights of children and young persons.
29. This collective complaint is aimed at specific rights of a very vulnerable group of children below the age of criminal responsibility within the meaning of Article 17 of the Charter. It provides in very clear wording that social and economic protection shall be granted to *all* children, regardless of their age. For example, the UN Convention on the Rights of the Child covers all individuals younger than 18 and uses the generic term 'children' to describe them. Moreover, the UN CRC Committee

---

<sup>10</sup> Ibid, p. 31.

<sup>11</sup> Ibid, p. 26.

<sup>12</sup> See *inter alia* European Committee of Social Rights, Conclusions XIX-4 – Czech Republic - Article 17, XIX-4/def/CZE/17 (2011).

<sup>13</sup> Secretariat of the European Social Charter, Information document, Children's rights under the European Social Charter, p. 5, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680474a4b> (Accessed 3 March 2017)

<sup>14</sup> Committee of Ministers of the Council of Europe, Form for the reports to be submitted in pursuance of the 1961 European Social Charter and the 1988 Additional Protocol, (2008), p. 34.

<sup>15</sup> See, e.g., Bulgaria 30/09/2003, at art.17, 64; France, 30/09/2003 at arts. 17, 173; Romania, 30/09/2003, at art. 17, 406, Slovenia 30/09/2003, at art. 17, 511.

underlined that *all* children enjoy *all* rights granted to the Convention<sup>16</sup> and *all* children in conflict with the law shall be treated equally.<sup>17</sup>

30. The ICJ further submits that basic guarantees of social protection of criminally responsible children (juveniles in the Czech system) should not be understood so as they apply exclusively to juveniles. According to the Council of Europe authority, these procedural guarantees should at a minimum also apply to younger children below the age of criminal responsibility. While the COE's recommendation 2003/20 defines juveniles as "*persons who have reached the age of criminal responsibility but not the age of majority*", it clarifies that "*this recommendation may also extend to those immediately below and above these ages*."<sup>18</sup> The COE's European Rules for Juvenile Offenders subject to Sanctions or Measures (Recommendation 2008/11) provide that juvenile offender "*means any person below the age of 18 who is alleged to have or who has committed an offence*."<sup>19</sup> The Commentary to the Rules further explains that it is "*possible to extend the protections of this Recommendation to the benefit of all other persons who are held in juvenile institutions or are dealt with in the setting of community sanctions and measures together with juvenile offenders*."<sup>20</sup> Thus, it would also include children below the age of criminal responsibility detained in such institutions because of their antisocial behaviour.
31. In addition, the Committee of Ministers Guidelines on child-friendly justice provide that "*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*."<sup>21</sup> In its general comments to the Guidelines, the European Committee on Legal Co-operation underscores that "*when dealing with anti-social - although not criminal – the 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 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*."<sup>22</sup> The Committee thus reminds the Member States that the principle of the

---

<sup>16</sup> Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6, (2005), para. 12.

<sup>17</sup> Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, UN Doc. CRC/C/GC/10, (2007), para. 6.

<sup>18</sup> Committee of Ministers of the Council of Europe, Recommendation concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Rec (2003) 20, (2003), P.I.

<sup>19</sup> Committee of Ministers of the Council of Europe, Recommendation on the European rules for juvenile offenders subject to sanctions or measures, CM/Rec(2008)11, (2008), para. 21.1.

<sup>20</sup> Committee of Ministers of the Council of Europe, Commentary to the European rules for juvenile offenders subject to sanctions or measures, CM(2008)128, (2008), p. 7.

<sup>21</sup> Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Council of Europe Publishing, ISBN 978-92-871-7274-7, 2011, p. 19, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9> (Accessed 3 March 2017)

<sup>22</sup> *Ibid.*, p. 57

rule of law “applies irrespective of age so that member states are expected to respect and support fundamental rights for all, including children”.<sup>23</sup>

32. Therefore, while some differences in approaches to disparate age groups of children in conflict with the law may be appropriate, any differential treatment should not affect the determination of their rights and a minimal level of social protection. All children, regardless of their age, are entitled to the benefit of the special protection prescribed by law. Denying, in law or practice, such rights to children below the age of criminal responsibility would be contrary to the very purpose of the Charter, in particular, and to international law principles of the universality of human rights, generally.

(b) Prohibition of discrimination on the ground of age

33. The ICJ further submits, relying on recent jurisprudence of the Committee, that grounds of the complaint are also covered by the non-discrimination requirement as formulated in the Preamble to the Charter and Article E of the revised Charter, and as defined by the Committee and general principles of human rights law, in conjunction with the substantive rights of the Charter.<sup>24</sup> The Preamble of the Charter states “considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin.” The Committee has defined discrimination as “a difference in treatment between persons in comparable situations where it does not pursue a legitimate aim, is not based on objective and reasonable grounds or is not proportionate to the aim pursued”<sup>25</sup> and has noted that “human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.”<sup>26</sup> Importantly, the Committee has affirmed that “the non-discrimination clause in the preamble to the Charter applies to all the provisions of the Charter.”<sup>27</sup>

34. Although discrimination on grounds of ‘other status’ is not explicitly prohibited by the Preamble to the Charter, Article E of the Revised Charter has addressed this gap.<sup>28</sup> Even though the Czech Republic is not a party to the Revised Charter, the Committee has stated in *ERTF v the Czech Republic* that as it “pays particular attention to the situation of disadvantaged and vulnerable groups”, it considers that “any restrictions on [a particular right] must not be interpreted in such a way as to impede the effective exercise by these groups of the right”. And this interpretation, as expressly considered by the Committee, “imposes itself because of the non-discrimination requirement”.<sup>29</sup> Therefore, ICJ argues that the non-discrimination

---

<sup>23</sup> Ibid.

<sup>24</sup> *European Roma and Travelers Forum (ERTF) v. the Czech Republic*, European Committee of Social Rights Complaint No. 104/2014, Decision on the merits of 17 May 2016, para. 112.

<sup>25</sup> *Syndicat national des professions du tourisme v. France*, European Committee of Social Rights Complaint No. 6/1999, Decision on the merits of 10 October 2000, paras. 24-25.

<sup>26</sup> *Association internationale Autisme-Europe (AIAE) v. France*, European Committee of Social Rights Complaint No. 13/2000, Decision on the merits of 4 November 2003, para. 52.

<sup>27</sup> Council of Europe, Explanatory report to the European Social Charter (revised), ETS 163, (1996), para. 135.

<sup>28</sup> See, e.g., *International Association Autisme-Europe (AIAE) v. France*, European Committee of Social Rights Complaint No. 13/2000, Decision on the merits of 4 November 2003.

<sup>29</sup> *European Roma and Travelers Forum (ERTF) v. the Czech Republic*, European Committee of Social Rights Complaint No. 104/2014, Decision on the merits of 17 May 2016, para. 112.

argument, as presented, is fully relevant and calls for strict scrutiny of the substantive elements of Article 17 of the Charter.

35. In this regard the ICJ further notes that it has been explained by the Committee that Article E clarifies the principle of non-discrimination set forth in the Preamble to the Social Charter and incorporates it into the main body of the Revised Charter.<sup>30</sup> The Committee has further noted the Article E draws its inspiration from Article 14 of the European Convention on Human Rights.<sup>31</sup> The Committee has previously admitted that *"the guarantee of non-discrimination contained in the Charter is in terms of content identical to Article 14 of the ECHR" and that it 'relies on the case law of the European Court in that respect.'*<sup>32</sup> The ECHR does not explicitly address discrimination on grounds of age. However, age discrimination may be prohibited as an 'other status' under Article 14. For example the European Commission of Human Rights found admissible claims based on age discrimination in at least two cases which concerned the treatment of children in the criminal justice system (see *V. v the United Kingdom*, application no. [24888/94](#), 4 December 1998, and *T. v the United Kingdom* (application no. 24724/94, 4 December 1998).
36. Likewise, most other international human rights treaties, including universal treaties to which the Czech Republic is a party, prohibit discrimination on grounds of 'other status.' The ICCPR provides in Article 2(1) that States shall ensure the rights recognised by the Covenant *"without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."* Article 26 of the ICCPR further provides: *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*<sup>33</sup> The ICESCR provides, at Article 2(2) that *"... the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status."* Article 2(1) of the CRC calls upon the states to guarantee that *all* children benefit from the rights in the convention without discrimination based on 'other status.'
37. Other regional human rights address the question in a similar manner. Article 2 of the African Charter on Human and Peoples Rights prohibits discrimination based on "other status". Article 1 of the American Convention on Human Rights prohibits discrimination on the basis of "any other social condition" do not explicitly address discrimination on grounds of age, but instead prohibit discrimination on grounds respectively of 'other status' and 'other social condition'.

---

<sup>30</sup> European Committee of Social Rights, Digest of the case law of the European Committee of Social Rights, (2008), p. 175.

<sup>31</sup> *International Association Autisme-Europe (AIAE) v. France*, European Committee of Social Rights Complaint No. 13/2000, Decision on the merits of 4 November 2003, para. 52.

<sup>32</sup> *International Association Autisme-Europe (AIAE) v. France*, European Committee of Social Rights Complaint No. 13/2000, Decision on the merits of 4 November 2003, para. 52.

<sup>33</sup> According to the UN HRC's General Comment No. 18, para. 12, article 26 ICCPR *"prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory."*

38. Moreover, according to the Council of Europe's Guidelines on child-friendly justice, „*The rights of children shall be secured without discrimination on any grounds such as [...] age [...].*“<sup>34</sup> The explanatory memorandum explains that „*[a]nother 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 their rights are also bearers of rights. For these children, alternative systems of their representation need to be developed to avoid discrimination.*“<sup>35</sup>
39. The lack of an express prohibition of discrimination on grounds of age is supplemented by general interpretative documents and jurisprudence issued by the UN treaty bodies in respect of the treaties to which the Czech Republic is a party. Thus, prohibition of discrimination based on age has been affirmed as implicit in both the ICCPR and the ICESCR. For instance, in its General Comment 20, on Non-Discrimination in the ICESCR, the UN CESCR has that age is a prohibited ground of discrimination „*in several contexts*“ under the 'other status' generic category.<sup>36</sup> As regards the ICCPR, in *Love et al. v. Australia* the Human Rights Committee clearly stated that age is a prohibited ground for discrimination although it is not expressly mentioned in Article 26 ICCPR.<sup>37</sup>
40. Recent universal human rights treaties expressly recognised age as prohibited ground of discrimination. For instance, the Convention on the Rights of Persons with Disabilities, to which the Czech Republic is a party, guarantees in article 5 „equal and effective legal protection against discrimination on all grounds“. These grounds are identified in the preamble (p) as including age. The International Convention on the Protection of the Rights of All Migrant Workers also in its article 7 contains an express prohibition of age as a category in its general non-discrimination clause. The prohibition is also contained in declaratory international standards. For instance, the UN Rules for the protection of juveniles deprived of their liberty, adopted by the UN General Assembly in 1999, expressly mention that its provisions should be applied impartially, without discrimination of any kind, including on grounds of age.<sup>38</sup>

2. Ground no. 1: The failure to ensure mandatory legal assistance from the moment measures under the Juvenile Justice Act have been used or actions under the Criminal Procedure Code have been taken (i.e. the same as in case of juveniles)

---

<sup>34</sup> Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Council of Europe Publishing, ISBN 978-92-871-7274-7, 2011, p. 19, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9> (Accessed 3 March 2017)

<sup>35</sup> *Ibid.*, p. 56.

<sup>36</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, (2009), para. 29.

<sup>37</sup> *Love et al. v. Australia*, Human Rights Committee Communication No. 983/2001, Views of 25 March 2003, UN Doc. CCPR/C/77/D/983/2001 (2003), para. 8.2.

<sup>38</sup> General Assembly, United Nations Rules for the protection of juveniles deprived of their liberty, UN Doc. A/RES/45/113, (1990), Annex, I(4): „These Rules should be applied impartially, without discrimination of any kinds as to ....age...“

41. As described above (see paragraph no. 0 above), the pre-trial stage of juvenile justice proceedings in cases of children below the age of criminal responsibility (younger than 15) is limited only to its first phase, called *examination*. When the police authority reasonably believe that a child below the age of criminal responsibility committed an unlawful act it sets aside the proceedings under article 159a(2) Criminal Procedure Code. This phase can last from weeks to years, usually, it lasts several months. During the examination, the child below the age of criminal responsibility is interrogated, usually just once. In addition, the police authority carries out numbers of other procedural steps, including reconstructions of the crime scene, DNA extractions, and soliciting expert opinions. Evidence and other information gathered at this stage are crucial for imposing measures by the juvenile court since this court rely primarily on evidence gathered at this stage.
42. Unlike in the case of juveniles, the Juvenile Justice Act is silent about the right of children below the age of criminal responsibility to legal aid in the pre-trial stage. The juveniles (15-18 years old) benefit from a broadly formulated right to mandatory legal assistance, in accordance with international standards. Under the Act, any juvenile must be represented by a lawyer of his or her choice or a compulsory defence (legal aid lawyer) is assigned from the beginning of the proceedings, already during the examination phase.<sup>39</sup> However, children below the age of criminal responsibility do not benefit from this right and they are left without appropriate legal assistance of a lawyer who can inform them about the specificities of the procedure and their procedural rights (especially the right to remain silent), help them to prepare their defence, counsel them during the interrogations and support them in the course of the pre-trial proceedings. As will be analysed below, this situation is not in conformity with international human rights law and standards, especially Article 17 of the Charter, Article 6(3) ECHR, Article 40 CRC, and Article 14 ICCPR, leading to violations of the right to a fair trial, the right to liberty and the right to social protection, both alone and in conjunction with the right to non-discrimination. This systemic flaw affects all children below the age of criminal responsibility, including children with disabilities and Roma children.
43. The Committee has not yet addressed in its jurisprudence these juvenile justice issues. Nonetheless, it has consistently stated that the Social Charter is a living instrument, which ought to be interpreted in accordance with developments in the national laws of the Council of Europe member states as well as relevant international instruments,<sup>40</sup> and also "*in the light of the case-law developed under other international treaties as regards the protection of children and young persons, such as the UN Convention on the Rights of the Child and the European Convention on Human Rights.*"<sup>41</sup> Therefore this complaint should be construed in the light of the Czech Republic's obligations under the Council of Europe and, UN treaties and interpretive declaratory instruments and case law, including the, case law of the European Court of Human Rights (*hereinafter* "European Court"). Account should also be taken broader context of human rights instruments which provide for special

---

<sup>39</sup> The mandatory legal defence for juveniles is stipulated in article 42(2) Juvenile Justice Act, according to which "*juvenile has to be assigned lawyer from the moment measures under the Juvenile Justice Act have been used or actions under the Criminal Procedure Code have been taken*"

<sup>40</sup> *World Organisation against Torture v. Greece*, European Committee of Social Rights Complaint No. 17/2003, Decision on the merits of 7 December 2004, para. 31.

<sup>41</sup> General Introduction to ECSR Conclusions XV-2, 2001, Vol1, p. 26.

protection in matters concerning children in conflict with the law. It is clearly and consistently established by international treaties and standards (set out below) that children shall be granted at least the same procedural rights as adults in similar situations. There should be no differentiation as to the application of this principle as between juveniles and children below the age of criminal responsibility.

(a) The Council of Europe standards

44. A number of instruments by the Council of Europe set forth standards for the treatment of children in the context of the ECSR and the administration of justice. The Committee provides a brief note as to the procedural standards in case of juvenile offenders in the General Introduction to the ECSR Conclusions XV-2, stating that *"the procedure with respect to children and young persons must be suitable for them and that they must be afforded the same procedural guarantees as adults."*<sup>42</sup> This is also reflected in Recommendation 2008/11 on the European Rules for juvenile offenders subject to sanctions or measures, which provides that *"Juveniles shall not have fewer legal rights and safeguards than those provided to adult offenders by the general rules of criminal procedure."*<sup>43</sup> Also, the Guidelines on child-friendly justice specify that *"children should have access to free legal aid, under the same or more lenient conditions as adults."*<sup>44</sup> Subsequent clarifications on the matter are provided by the explanatory paper on Children's rights under the ECSR, which enunciates that *"the criminal procedure relating to children and young persons must be adapted to their age."*<sup>45</sup> The Commentary on the Rules for juvenile offenders subject to sanctions or measures also emphasises that there is no justification for giving juveniles lesser rights than adults.<sup>46</sup>
45. The right of children to legal assistance is affirmed under Council of Europe standards in relation to children in conflict with the law. The Recommendation no. 1987/20 on social reactions to juvenile delinquency calls for the reinforcement of *"the legal position of minors throughout the proceedings, including the police investigation, by recognising, inter alia: the right to the assistance of a counsel who may, if necessary, be officially appointed and paid by the state [...] the right to the presence of parents or of another legal representative who should be informed from the beginning of the proceedings."*<sup>47</sup> Recommendation no. 2003/20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice stipulates that

---

<sup>42</sup> Ibid, p. 31.

<sup>43</sup> Committee of Ministers of the Council of Europe, Recommendation on the European rules for juvenile offenders subject to sanctions or measures, CM/Rec(2008)11, (2008), p. 13.

<sup>44</sup> Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Council of Europe Publishing, ISBN 978-92-871-7274-7, 2011, p. 27, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9> (Accessed 3 March 2017)

<sup>45</sup> Secretariat of the European Social Charter, Information document, Children's rights under the European Social Charter, p. 5, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680474a4b> (Accessed 3 March 2017), p. 5.

<sup>46</sup> Committee of Ministers of the Council of Europe, Commentary to the European rules for juvenile offenders subject to sanctions or measures, CM(2008)128, (2008), p. 5.

<sup>47</sup> Committee of Ministers of the Council of Europe, Recommendation on social reactions to juvenile delinquency, R(87)20, (1987), para. 8.

*"While being questioned by the police [the juveniles] should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer and a doctor."*<sup>48</sup> The Commentary on the Rules for juvenile offenders subject to sanctions or measures explains that child offenders have the right *"to be informed, to have access to legal remedies, to legal assistance, complaints procedures and other procedural rights and safeguards."*<sup>49</sup> The Guidelines on child-friendly justice mention that before judicial proceedings the *"children should be given the opportunity to obtain legal advice and other assistance in determining the appropriateness and desirability of the proposed alternatives."*<sup>50</sup>

46. It is worth mentioning that the provisions above provide for the right to legal assistance from the very outset of a procedure involving children, i.e. police interrogation stage. The Committee of Ministers has recommended that states *"reinforce the legal position of minors throughout the proceedings, including the police investigation, by recognising, inter alia [...] the right to the assistance of a counsel who may, if necessary, be officially appointed and paid by the state."*<sup>51</sup>
47. Generally, these regulations do not explicitly touch upon the nature of the procedure involving children in conflict with the law, but the wording indicates that special protection shall be granted in all cases with a potential to substantially affect a child's rights. This view is supported by the Commentary on the Rules for juvenile offenders subject to sanctions or measures which stress that *"the juveniles have the right to legal defence counsel also in purely welfare proceedings. In cases where deprivation of liberty is possible, legal defence counsel must be allocated to the juveniles from the outset of the procedure."*<sup>52</sup> Further up, Recommendation 2008/11 states that *"Juveniles and their parents or legal guardians are entitled to legal advice and assistance in all matters related to the imposition and implementation of sanctions or measure"* and that *"the state shall provide free legal aid to juveniles, their parents or legal guardians when the interests of justice so require."*<sup>53</sup>
48. Also the Commissioner for Human Rights of the Council of Europe has repeatedly underscored the need to enforce special protection of children in conflict with the law in proceedings, particularly in the context of country reports. Commenting on the juvenile justice system in Azerbaijan, the Commissioner noted that *"there should be psychological and legal assistance provided to children, who are in contact with law*

---

<sup>48</sup> Committee of Ministers of the Council of Europe, Recommendation concerning new ways of dealing juvenile delinquency and the role of juvenile justice, Rec (2003) 20, 2003, para. 15.

<sup>49</sup> Committee of Ministers of the Council of Europe, Commentary to the European rules for juvenile offenders subject to sanctions or measures, CM(2008)128, (2008), p.5.

<sup>50</sup> Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Council of Europe Publishing, ISBN 978-92-871-7274-7, 2011, p. 25, available at:<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9> (Accessed 3 March 2017)

<sup>51</sup> Committee of Ministers of the Council of Europe, Recommendation on social reactions to juvenile delinquency, R(87)20, (1987), para. 8.

<sup>52</sup> Committee of Ministers of the Council of Europe, Commentary to the European rules for juvenile offenders subject to sanctions or measures, CM(2008)128, (2008), p. 5.

<sup>53</sup> Committee of Ministers of the Council of Europe, Recommendation on the European rules for juvenile offenders subject to sanctions or measures, CM/Rec(2008)11, (2008), paras. 120.1, 120.3.

enforcement agencies.”<sup>54</sup> On the situation in the Netherlands the Commissioner noted that “*The police can arrest and interrogate children of any age, without the presence of parents, guardian or a lawyer, during the initial six hours period of detention*” and urged “*the authorities to ensure that the special needs of children are guaranteed during police detention, enabling them to immediately call their parents or a responsible adult, as well as to be accompanied by a lawyer during police interrogation.*”<sup>55</sup>

(b) The case law of the European Court of Human Rights

49. The European Court has repeatedly emphasised the obligation of States to ensure the availability and accessibility of legal assistance under Article 6 ECHR. In *Salduz v. Turkey*, the European Court found that “*in order for the right to a fair trial to remain sufficiently ‘practical and effective’, Article 6(1) ECHR requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police.*”<sup>56</sup> Turkey was therefore been found in breach of Article 6(3)(c) of the ECHR in conjunction with Article 6(1) ECHR, as the Court emphasised “*the fundamental importance of providing access to a lawyer where the person in custody is a minor.*”<sup>57</sup>
50. In *Panovits v. Cyprus*, the European Court held the State to be in breach of Article 6(3)(c) ECHR in conjunction with Article 6(1) ECHR on account of the lack of legal assistance to the minor in the initial stages of police questioning. Also, it held that the failure to provide the complainant with sufficient information on his right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of his defence rights. The European Court also noted that the fact that he had been represented by a lawyer at the trial stage did not cure the breach of his right to a fair trial, as his “confession” during police interrogation was relied on, to a decisive extent, in finding him guilty.<sup>58</sup> The court stressed that States should pay attention to minors’ vulnerability and capacities from the first stages of their involvement in a criminal investigation and, in particular, during any questioning by the police and take steps “to reduce as far as possible ... feelings of intimidation and inhibition and ensure that the accused minor has a broad understanding of the nature of the investigation, of what is at stake ..., including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent. ...”<sup>59</sup>
51. In *Adamkiewicz v. Poland* the European Court reiterated that in cases concerning minors, authorities must act in accordance with the principle of the best interests of the child, paying due regard to their age, level of maturity, intellectual and emotional capacities, and taking steps to promote the child’s ability to participate in the proceedings. It ruled that there had been a violation of Article 6(3)(c) ECHR because the State had not informed the minor of his right to seek legal assistance, and had

---

<sup>54</sup> Thomas Hammarberg, Council of Europe Commissioner for Human Rights, Report on his visit to Azerbaijan 3 – 7 September 2007, CommDH(2008)2, (2008), para. 104.

<sup>55</sup> Thomas Hammarberg, Council of Europe Commissioner for Human Rights, Report on his visit to the Netherlands 21 – 25 September 2008, CommDH(2009)2, (2009), para. 111.

<sup>56</sup> *Salduz v. Turkey*, ECtHR, Application No. 36391/02, Judgment of 27 November 2008, paras. 54-55.

<sup>57</sup> *Salduz v. Turkey*, ECtHR, Application No. 36391/02, Judgment of 27 November 2008, para.60.

<sup>58</sup> *Panovits v. Cyprus*, ECtHR, Application No. 4268/04, Judgment of 11 December 2008, paras. 73-77.

<sup>59</sup> *Panovits v. Cyprus*, ECtHR, Application No. 4268/04, Judgment of 11 December 2008, para.67.

imposed other restrictions on his defence rights. The court affirmed that it was crucial for the minor to have access to a lawyer from the very beginning of the proceedings.<sup>60</sup> It also reiterated its previous jurisprudence indicating that any person accused of committing an offence has the right to be defended by a lawyer, provided by the State, if needed, and this is one of the fundamental elements of the right to a fair trial.<sup>61</sup>

52. In a most recent and highly significant case, *Blokhin v. Russia*, the Grand Chamber of the European Court addressed the situation of an applicant, 12 years of age, who was arrested and taken to a police station on suspicion of having extorted money from another child. Also on the basis of his “confession”, which he later contested, the police found that he had committed offences punishable under the Criminal Code but no criminal proceedings were initiated since he was below the statutory age of criminal responsibility. The European Court applied the criminal procedural guarantees of Article 6 ECHR to the proceedings, stressing the need to look beyond appearances and at the realities of the situation.<sup>62</sup> The Court found that the “more far-reaching procedural guarantees” applicable to proceedings regarded as “criminal” under Article 6 ECHR should have applied to those proceedings: even though no standard criminal proceedings had been initiated against the applicant, the nature of the offence, together with the nature and severity of the penalty, were such as to engage the applicability of the criminal limb of that provision.<sup>63</sup> The Grand Chamber found a violation of Article 6 ECHR, especially on account of the absence of legal assistance during the applicant’s interview with the police. The European Court underlined that a child should not be deprived of procedural guarantees simply because the process that might result in his or her detention is deemed to be protective. Rather, those guarantees are triggered by the nature of acts a child is alleged to have committed, and not by the child’s status as a juvenile delinquent.<sup>64</sup>
53. The European Court has also addressed the imperative of providing legal assistance to minors under a variety of different circumstances involving allegations of breaches of other provisions of the Convention. Allegations in relation to Article 3 ECHR and Article 5 ECHR are of particular interest to the considerations in the instant case, as they both provide for rights related to restriction of one’s liberty, often at stake in matters of juvenile justice. In *Okkali v. Turkey*, the failure to assign a lawyer to a minor arrested on suspicion of theft led to the Court finding Turkey in breach of Article 3 ECHR of the Convention, which it considered particularly serious taking into account the age and highlighted the vulnerability of the minor.<sup>65</sup>

---

<sup>60</sup> *Adamkiewicz v. Poland*, ECtHR, Application No. 54729/00, Judgment of 2 March 2010, para. 87.

<sup>61</sup> *Adamkiewicz v. Poland*, ECtHR, Application No. 54729/00, Judgment of 2 March 2010, para. 82.

<sup>62</sup> *Blokhin v. Russia*, ECtHR, Application No. 47152/06, Judgment of 23 March 2016, para. 179. The Court on one hand recalled that States, in the performance of their task as guardians of the public interest, are entitled to create or maintain a distinction between different categories of offences for the purposes of their domestic law and to draw a dividing line between what belongs to the criminal sphere and what does not. Nevertheless, the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of Article 6. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention. Therefore, the fact that the proceedings against the applicant were not classified as criminal under Russian law has only a formal and relative value.

<sup>63</sup> *Blokhin v. Russia*, ECtHR, Application No. 47152/06, Judgment of 23 March 2016, para. 181.

<sup>64</sup> *Blokhin v. Russia*, ECtHR, Application No. 47152/06, Judgment of 23 March 2016, paras. 196, 218.

<sup>65</sup> *Okkali v. Turkey*, ECtHR, Application No. 52067/99, Judgment of 17 October 2006, paras. 69-70.

54. In *Bouamar v Belgium*, the European Court held that the State had violated Article 5(4) ECHR by failing to provide adequate procedural guarantees for the minor facing detention. The Court noted that the mere fact that he had appeared in person at the hearings preceding his placement in detention did not provide him with the necessary safeguards in the absence of the effective assistance of his lawyer. The European Court stressed that given the particular circumstances of the case, "*it is essential not only that the individual concerned should have the opportunity to be heard in person but that he should also have the effective assistance of his lawyer.*"<sup>66</sup> In *Hussain v the United Kingdom* the European Court noted that in situations where a substantial term of imprisonment may be at stake and where characteristics such as personality and level of maturity of the person are relevant in reaching a decision, Article 5(4) ECHR requires that an oral hearing is held in the context of an adversarial procedure involving legal representation, among other procedural safeguards.<sup>67</sup>

(c) The UN standards

55. The right to legal assistance of minors in context of social protection is recognised and guaranteed under Article 40 UN CRC, which reads as follows:

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

...

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

...

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

...

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

---

<sup>66</sup> *Bouamar v. Belgium*, ECtHR, Application No. 9106/80, Judgment of 29 February 1988, para. 60.

<sup>67</sup> *Hussain v. the United Kingdom*, ECtHR, Application No. 21928/93, Judgment of 21 February 1996, para. 60.

56. In its concluding observations on the Czech Republic adopted on 17 June 2011, the UN Committee on the Rights of the Child, the supervisory body charged with the authoritative interpretation of the CRC, expressed its concern that children under the age of 15 are not held criminally responsible, but can be placed, even for petty offences, in institutional care prior to legal proceedings, without the guarantees associated with standard criminal proceedings. The Committee recommended that the Czech Republic “[u]ndertake the legislative amendments necessary for ensuring that children under the age of 15 years have at least the same level of legal guarantees associated with standard criminal proceedings”.
57. Similarly, in the general Comment, the UN CRC Committee addressed concerns regarding the treatment of children below the minimum age of criminal responsibility when they are recognized or accused of having infringed the penal law. The Committee underscored the importance of legal safeguards that must be in place to ensure that their treatment is as fair and just, as that of children at or above the minimum age of criminal responsibility.<sup>68</sup> In addition, in a number of its concluding observations on the compliance of States with their CRC obligations, the UN CRC Committee has called upon States to ensure that authorities provide children in conflict with the law with special protection during the proceedings. For example, the Russian Federation was urged to ensure that children under the age of criminal responsibility are not treated ‘as criminals’ and “to guarantee that all children have the right to appropriate legal assistance and defence.”<sup>69</sup> Likewise, the Committee recommended that Poland ensure “respect for fundamental rights and legal safeguards in all aspects of the juvenile justice system, including under the pretext of public assistance.”<sup>70</sup> Vis-à-vis the practice of the Republic of Korea of subjecting young offenders to protective disposition or even deprivation of liberty without undergoing criminal procedures and having access to legal assistance, the UN CRC Committee recommended that the Government “use[s] deprivation of liberty only as a measure of last resort and ensure that all juveniles involved in protection dispositions that may result in deprivation of liberty have access to legal counsel at an early stage.”<sup>71</sup> Similarly, it recommended that Tajikistan “[g]uarantee that all children have the right to appropriate legal assistance and defence by assigning a sufficient number of lawyers with relevant training and competence and an adequate number of probation officers to assist juvenile courts.”<sup>72</sup> Regarding Cuba, the Committee noted that according to the national law children under the age of 16 are not held criminally responsible and their cases are dealt by administrative authorities, but was concerned that children under the age of 15 can be placed, even for petty offences, in institutional facilities, without the guarantees connected to a standard criminal proceeding and recommended for the government to “undertake the

---

<sup>68</sup> Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, UN Doc. CRC/C/GC/10, (2007), para. 6.

<sup>69</sup> Committee on the Rights of the Child, Concluding observations: Russian Federation, UN Doc. CRC/C/RUS/CO/323, (2005), para. 86 (a), (d).

<sup>70</sup> Committee on the Rights of the Child, Concluding observations of the Committee on the Rights of the Child: Poland, UN Doc. CRC/C/15/Add.31, (1995), para. 32.

<sup>71</sup> Committee on the Rights of the Child, Concluding observations: Republic of Korea, UN Doc. CRC/C/15/Add.197, (2003), paras. 56, 57(b).

<sup>72</sup> Committee on the Rights of the Child, Concluding observations: Tajikistan, UN Doc. CRC/C/TJK/CO/2, (2010), paras. 72, 73 (b)(d).

*necessary legislative amendments to provide children under the age of 15 years with the same level of legal guarantees connected to a standard criminal proceeding.*"<sup>73</sup>

58. The right to legal assistance of minors in the context of social protection is also recognised and guaranteed under Article 14 ICCPR, in conjunction with Article 24 ICCPR. The UN Human Rights Committee has affirmed that a child has the right to free legal assistance if he or she, or the parents, cannot pay for a lawyer. Regarding the right to legal assistance to minors, the UN Human Rights Committee noted in *Koreba v. Belarus* that "*juveniles need special protection in criminal proceedings. They should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence.*"<sup>74</sup>
59. The UN Human Rights Committee in its concluding observations on the Czech Republic adopted on 24 July 2013<sup>75</sup> expressed its concern that although children under the age of 15 are not held criminally responsible, they are subject to standard pre-trial criminal proceedings when suspected of an unlawful act without the required legal assistance or the possibility of accessing their file. The UN Human Rights Committee recommended that the State party "*[e]nsure, as a minimum, that children under the age of 15 suspected of an unlawful act enjoy the same standard criminal procedural safeguards at all stages of criminal or juvenile proceedings, in particular, the right to an appropriate defence.*"<sup>76</sup>
60. The right to legal assistance in the context of specific social protection of minors has been also stipulated in a number of UN standards related to juvenile justice. The Beijing Rules provides that "*[t]hroughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.*"<sup>77</sup> The Guidance Note by the Secretary-General of the United Nations on the UN Approach to Justice for Children stresses that: "*Basic procedural safeguards as set forth in relevant national and international norms and standards shall be guaranteed at all stages of proceedings in state and non-state systems, as well as in international justice. This includes, for example, the right to privacy, the right to legal aid and other types of assistance and the right to challenge decisions with a higher judicial authority.*"<sup>78</sup> The Vienna Guidelines for action on children in the criminal justice system call on States to prioritize the set-up of "*agencies and programmes to provide legal and other assistance to children [...] and, in particular, to ensure that the right of every child to have access to such assistance from the moment that the child is detained is respected practice.*"<sup>79</sup> The United Nations Rules for the protection of juveniles deprived of their liberty provide that "*an untried*

---

<sup>73</sup> Committee on the Rights of the Child, Concluding observations: Cuba, UN Doc. CRC/C/CUB/CO/2, (2011), paras. 54(a), 55(c).

<sup>74</sup> *Koreba v. Belarus*, Human Rights Committee Communication No. 1390/2005, Views of 25 October 2010, UN Doc. CCPR/C/100/D/1390/2005 (2010), para. 7.4.

<sup>75</sup> Human Rights Committee, Concluding observations on the third periodic report of the Czech Republic, UN Doc. CCPR/C/CZE/CO/3, (2013).

<sup>76</sup> Human Rights Committee, Concluding observations on the third periodic report of the Czech Republic, UN Doc. CCPR/C/CZE/CO/3, (2013), para. 20(a).

<sup>77</sup> UN General Assembly, United Nations Standard Minimum Rules for the administration of juvenile justice ("The Beijing Rules"), UN Doc. A/RES/40/33, (1985), para. 15.1.

<sup>78</sup> UN Secretary-General, Guidance Note, UN Approach to Justice for Children, (2008), para. 6.

<sup>79</sup> Economic and Social Council, Resolution on the administration of juvenile justice, UN Doc. 1997/30, (1997), para. 16.

*juvenile [...] should have the right to legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers.”<sup>80</sup>*

#### (d) Conclusions

61. International human rights law and standards underline the right to legal assistance of children in conflict with the law. In line with international standards, the interest of justice requires that children in conflict with the law, whether or not in the proceedings which are formally designated as criminal in national law, must benefit from the right to legal assistance from the beginning of formal proceedings against them. In the context of the Czech juvenile justice system, the right to legal assistance means with respect to juveniles (15-18 years) mandatory legal assistance from the moment measures under the Juvenile Justice Act have been used or actions under the Criminal Procedure Code have been taken. The State chose a specific system of juvenile justice which includes both age groups, juveniles and children below the age of criminal responsibility. In order to secure a high level of social protection, it ensured broad legal assistance for juveniles. The State party is however also under an obligation to ensure, at a minimum, the same level of social protection of children below the age of criminal responsibility (younger than 15 years).<sup>81</sup>

#### 3. Ground no. 2: The failure to ensure access to police file during the examination phase of the pre-trial stage of juvenile justice procedure

62. During the pre-trial stage, neither children below the age of criminal responsibility nor their parents, legal guardians or any other representatives are entitled to access the police file. Access to the police file is governed by Article 65 Criminal Procedure Code. The provision of Article 65(1) lists persons entitled to access the file. Children below the age of criminal responsibility and their representatives are excluded from that list. Therefore they do not have the right to access the police file and the police authority typically refuses when requested by such children (see paragraph no. 14 above). Without knowing the content of the file, children below the age of criminal responsibility cannot effectively propose new evidence or challenge already gathered evidence. Children in the proceedings are effectively at the mercy of police investigators. This situation is even more compelling when taking into account the fact that children below the age of criminal responsibility are left without legal assistance in this stage and the police file is crucial for the Juvenile Court which imposes measures, including a measure of deprivation of liberty, primarily on the basis of evidence from the police file. The ICJ submits that, in order to fulfil the obligation of social protection of children under Article 17, children below the age of criminal responsibility must enjoy the right to access the police file in the pre-trial stage of juvenile justice proceedings.

#### (a) The Council of Europe standards

---

<sup>80</sup> UN General Assembly, United Nations Rules for the protection of juveniles deprived of their liberty, UN Doc. A/RES/45/113, (1990), para. 18.

<sup>81</sup> *Mutatis mutandis, Bouamar v. Belgium*, ECtHR, Application No. 9106/80, Judgment of 29 February 1988, para. 52.

63. The Council of Europe standards underline the principle of child participation in juvenile justice proceedings, including participatory rights.<sup>82</sup> The Recommendation no. 1987/20 on social reactions to juvenile delinquency calls for the reinforcement of the legal position of minors throughout the proceedings, including the police investigation, by recognising, inter alia: *"the right of minors to call, interrogate and confront witnesses."*<sup>83</sup> The Recommendation CM/Rec(2008)11 European Rules for juvenile offenders subject to sanctions or measures provides that *"[t]he authority shall ensure that juveniles and, where appropriate, their parents or legal guardians have the opportunity to examine the evidence of non-compliance on which the request for modification or revocation is based and to present their comments."*<sup>84</sup>

(b) The case law of the European Court of Human Rights

64. In the context of the ECHR, the right to access case files arises under Articles 5(4) ECHR (the right to bring proceedings challenging the lawfulness of detention) and Article 6(3)(b) ECHR (the right to have adequate time and facilities for the preparation of one's defence). Notably, Article 6(3) ECHR provides the minimum baseline in respect of rights to be guaranteed to all charged with a criminal offence. In addition, the ECHR has issued relevant and important jurisprudence related to children rights to access the file where Article 8 ECHR is engaged.

65. Regarding Article 6 ECHR, in *Brandstetter v. Austria* the European Court ruled that Article 6(1) entails the "right to examine and reply directly to submissions made by prosecution", which cannot be substituted by "and indirect and purely hypothetical possibility for an accused to comment..."<sup>85</sup> In *Edwards v the United Kingdom*, the European Court explained that it is *"a requirement of fairness under paragraph 1 of Article 6 [...] that prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings."*<sup>86</sup>

66. In *Öcalan v. Turkey*, the European Court found a violation of Article 6(3)(c) ECHR where the applicant had not been able *"to gain direct access to the case file until a very late stage in the proceedings' and because 'his lawyers were given proper access to the case file belatedly."*<sup>87</sup> In *Foucher v. France*, where the applicant refused a counsel and chose to defend himself, the European Court stated that it *"considers that it was*

---

<sup>82</sup> For an overview of different participatory rights of the children see especially UNICEF, Fact sheet: The right to participation, available online at: <https://www.unicef.org/crc/files/Right-to-Participation.pdf> (Accessed 3 March 2017)

or Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Council of Europe Publishing, ISBN 978-92-871-7274-7, 2011, pp. 17, 50, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9> (Accessed 3 March 2017)

<sup>83</sup> Committee of Ministers of the Council of Europe, Recommendation on social reactions to juvenile delinquency, R(87)20, (1987), para. 8.

<sup>84</sup> Committee of Ministers of the Council of Europe, Recommendation on the European rules for juvenile offenders subject to sanctions or measures, CM/Rec(2008)11, (2008), Rule. 48.3.

<sup>85</sup> *Brandstetter v. Austria*, ECtHR, Applications Nos. 11170/84, 12876/87, 13468/87, Judgment of 28 August 1991, para. 68.

<sup>86</sup> *Edwards v. the United Kingdom*, ECtHR, Application No. 13071/87, Judgement of 16 January 1992, para.36.

<sup>87</sup> *Öcalan v. Turkey*, ECtHR, Application No. 46221/99, Judgement of 12 May 2005, para 148. In this case applicant's lawyers received a 17,000-page file approximately two weeks before the beginning of the trial.

*important for the applicant to have access to his case file and to obtain a copy of the documents it contained in order to be able to challenge the official report concerning him*<sup>88</sup> and found the authorities in breach of Article 6(3) ECHR for failing to provide such access.

67. Even though most of the case-law above has arisen in relation to the trial stage, there is no basis for considering that it would not be similarly applicable to the early pre-trial proceedings. This conclusion is also supported by European Court's statement in *Imbrioscia v. Switzerland* case, which explains that the scope of "Article 6 as far as criminal matters are concerned is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", but it does not follow that the Article [6] has no application to pre-trial proceedings."<sup>89</sup> Applying same line of reasoning in a later case, the European Court specified that "the primary purpose of Article 6 [...] as far as criminal matters are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge" and therefore 'Article 6 – especially paragraph 3 – may be relevant before a case is sent to trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions."<sup>90</sup>
68. In the context of the right to bring proceedings challenging detention, under Article 5(4) ECHR, in *Lietzow v Germany*, the European Court explained that authorities may not impose restrictions on the right to access to the case-file and noted that denial of access to the case file in a very complex case involving a large number of murder suspects resulted in unjustifiable restrictions on the defendant.<sup>91</sup> Similarly, in *Garcia Alva v Germany* the European Court found that restriction to access case files based on the suspicion that the applicant or his counsel could influence other witnesses and compromise the success of the on-going investigations, was in breach of Article 5(4) ECHR because, inter alia, "information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer."<sup>92</sup>
69. Importantly, the European Court has also addressed the right of a child to access to his file as an element of the right to respect for family life under Article 8 ECHR in *Gaskin v the United Kingdom*. In that case the European Court took into account the specific position of Mr Gaskin who had alleged that he was ill-treated in care and wished to obtain details of where he was kept and by whom and in what conditions in order to be able to help him to overcome his problems and learn about his past. The Court stated that "persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development."<sup>93</sup> This line of reasoning thus shows that even where the interest of the child does not rise to the level of those engaged in criminal proceedings, children have been considered to have a right to access information.

### (c) The UN standards

---

<sup>88</sup> *Foucher v. France*, ECtHR, Application No. 22209/93, Judgment of 18 March 1997, para. 36.

<sup>89</sup> *Imbrioscia v. Switzerland*, ECtHR, Application No. 13972/88, Judgment of 24 November 1993, para. 36.

<sup>90</sup> *Brennan v. the United Kingdom*, ECtHR, Application No. 39846/98, Judgment of 16 October 2001, para. 45.

<sup>91</sup> *Lietzow v. Germany*, ECtHR, Application No. 13972/88, Judgment of 24 November 1993, paras. 47-48.

<sup>92</sup> *Garcia Alva v. Germany*, ECtHR, Application No. 23541/94, Judgment of 13 February 2001, para.42.

<sup>93</sup> *Gaskin v the United Kingdom*, ECtHR, Application No. [10454/83](#), Judgment of 7 July 1989, para. 49.

70. The right to access to file has been recognised by the UN Human Rights Committee in respect to States obligation under Article 14(3)(b) ICCPR, which provides that in the determination of any criminal charge, one is entitled "*[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.*"<sup>94</sup> The right to have adequate time and facilities for the preparation of one's case has been recognised by the Human Rights Committee as an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms.<sup>95</sup> The rights associated with the preparation of one's case involve a range of issues, some of which are expressed as *minimum* guarantees in criminal proceedings.
71. The right to have access to file has been recognised under the notion of "adequate facilities" and clarified by the Human Rights Committee in General Comment no. 32 on Article 14 ICCPR.<sup>96</sup> The UN Human Rights Committee defines "adequate facilities" non-exhaustively as including "*access to documents and other evidence*",<sup>97</sup> noting that this refers to all materials<sup>98</sup> that the prosecution plans to offer in court against the accused or that are exculpatory, which "*should be understood as including not only material establishing innocence but also other evidence that could assist the defence.*"<sup>99</sup> With regards to procedural rights of juveniles, the Committee expressly affirms that juveniles are to enjoy *at least* the same guarantees and protection as are accorded to adults under article 14 of the Covenant.<sup>100</sup> More specifically, vis-à-vis the Czech Republic, the Committee expressed its concern in concluding observations on the Czech Republic adopted on 24 July 2013 that "*although children under the age of 15 are not held criminally responsible, they are subject to standard pre-trial criminal proceedings when suspected of an unlawful act without the required legal assistance or the possibility of accessing their file.*"<sup>101</sup>
72. The Committee on the Rights of the Child has affirmed that the right to access one's own file is one of the basic rules of fair proceedings and as such constitutes also an integral part of the right of the child to be heard in any judicial or administrative proceedings affecting the child guaranteed under Article 12 CRC. In its General comment No. 12 on Article 12 CRC, the Committee emphasises that the clause "in a manner consistent with the procedural rules of national law" under Article 12(2) CRC "*should not be interpreted as permitting the use of procedural legislation which restricts or prevents enjoyment of this fundamental right. On the contrary, States*

---

<sup>94</sup> Similar wording in Article 8(2)(c) American Convention; Article 2(E)(1) of African Commission Resolution; Articles 67(1)(b) and 67(2) of ICC Statute.

<sup>95</sup> *Smith v. Jamaica*, Human Rights Committee Communication No. 282/1988, Views of 15 February 1988, UN Doc. CCPR/C/47/D/282/1988 (1993), para. 10.4.

<sup>96</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, (2007).

<sup>97</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, (2007), para. 33.

<sup>98</sup> Human Rights Committee, Concluding observations of the Human Rights Committee: Canada, UN Doc. CCPR/C/CAN/CO/5, (2005), para. 13. The committee noted that the state has to "*guarantee the right of all persons to a fair trial, and in particular, to ensure that individuals cannot be condemned on the basis of evidence to which they, or those representing them, do not have full access.*"

<sup>99</sup> *Harward v. Norway*, Human Rights Committee Communication No. 451/1991, Views of 15 July 1994, UN Doc. CCPR/C/51/D/451/1991 (1994), para. 9.5.

<sup>100</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, (2007), para 42.

<sup>101</sup> Human Rights Committee, Concluding observations on the third periodic report of the Czech Republic, UN Doc. CCPR/C/CZE/CO/3, (2013), para. 20.

*parties are encouraged to comply with the basic rules of fair proceedings, such as the right to defence and the right to access one's own file".*<sup>102</sup>

(d) Conclusion

73. Children below the age of criminal responsibility are not expressly covered in Czech law, as beneficiaries of the right to access to their police files in the pre-trial stage of juvenile justice proceedings. The ICJ submits that in order to ensure adequate level of social protection, such children must enjoy this right because it represents part of *minimum* guarantees of a fair trial, is an inherent part of participatory children rights and can facilitate prevention of unreasonable stigmatisation with formal trials.

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

74. A further problematic aspect of Czech law and practice is that children below the age of criminal responsibility do not have the right to be served with the final decision of the police authority in the pre-trial stage and do not have the right to challenge this decision, either directly themselves or through a legal representative. According to the Criminal Procedure Code, when the police authority reasonably believe that an unlawful act was committed by a child below the age of criminal responsibility, under Article 159a(2) Criminal Procedure Code, in conjunction with Article 11(1)(d) of the Criminal Procedure Code, it sets aside the examination by a resolution (*usnesení*) on the grounds that the perpetrator is a child below the age of criminal responsibility and inform the state prosecutor about the result. Consequently, under article 90(1) Juvenile Justice Act, the state prosecutor has an obligation to promptly bring this case of a child below the age criminal responsibility before a juvenile court.

75. The decision of police under Article 159a(2) Criminal Procedure Code automatically leads to a formal trial before the juvenile court. Nevertheless, the child below the age of criminal responsibility is not served with the decision and informed about it and the law does not provide for any remedy to challenge such a decision before a superior authority. The law provides for an alternative process in Article 159a(4) Criminal Procedure Code, according to which the state prosecutor can suspend the examination on the grounds that the proceedings had already fulfilled its purpose. However, neither children below the age of criminal responsibility, nor their representatives are entitled to pursue this direction through an appeal against decision under Article 159a(2) Criminal Procedure Code. It is noteworthy in this connection that the child typically has no legal representation and has no knowledge about evidence against him or her. Therefore, children below the age of criminal responsibility effectively can take no action in respect of their cases and it is left completely to the discretion of the authorities as whether they stand formal trial or not.

---

<sup>102</sup> Committee on the Rights of the Child, General Comment No. 12, The right of the child to be heard, UN Doc. CRC/C/GC/12, (2009), para. 38.

76. The decision to set-aside the proceedings under Article 159a(2) Criminal Procedure Code is analogous to the decision to stop the proceedings under Article 172(1) Criminal Procedure Code. While juveniles and adults must be served with the decision and also under Article 172(3) Criminal Procedural Code, they have a right to appeal such a decision. Children below the age of criminal responsibility, on the other hand, do not benefit from the same level of social protection.
77. According to statistics (see table No. 3), the vast majority of children below the age of criminal responsibility end up before the judge in formal trials, even for petty offences (see paragraph 13 above). This conclusion can be demonstrated also by a high number of cases in which the juvenile courts after formal trial eventually refrain from imposing any measure. In the last two years (2015 and 2014), this number constituted approximately one-third of all of the measures used. The presented statistics thus clearly indicate that a high number of children below the age of criminal responsibility are subject to formal trial even where they have committed petty offences. To compare different measures see below table no. 6.

(a) Human rights standards

78. The right to be served with the decision, which is appropriately reasoned<sup>103</sup> and the right to challenge the decision is recognised as part of the rule of law principle which should be an inherent part of juvenile justice procedure. This is an inherent part of the more specific right to defence and the right to appeal. The Recommendation no. 1987/20 on social reactions to juvenile delinquency explicitly stipulates "*the right to appeal*".<sup>104</sup> In this respect, importantly Rule no. 13 of the Recommendation CM/Rec(2008)11 European Rules for juvenile offenders subject to sanctions or measures provides that "*any justice system dealing with juveniles shall ensure their effective participation in the proceedings concerning the imposition as well as the implementation of sanctions or measures. Juveniles shall not have fewer legal rights and safeguards than those provided to adult offenders by the general rules of criminal procedure*".<sup>105</sup> According to the Commentary, this rule "*makes it clear that there is no justification for giving juveniles lesser rights than adults. Therefore regulations that restrict the right to appeal or complaints procedures with arguments of education cannot be justified*".<sup>106</sup> Also, the Guidelines on child-friendly justice specify under the heading "Rule of law" that "*children should have the right to access appropriate independent and effective complaints mechanisms*".<sup>107</sup> According to the UN Beijing Rules, the law should guarantee basic procedural

---

<sup>103</sup> See, among many authorities, *Boldea v. Romania*, ECtHR, Application No. 19997/02, Judgment of 15 February 2007, paras. 28 – 30.

<sup>104</sup> Committee of Ministers of the Council of Europe, Recommendation on social reactions to juvenile delinquency, R(87)20, (1987), para. 8.

<sup>105</sup> Committee of Ministers of the Council of Europe, Recommendation on the European rules for juvenile offenders subject to sanctions or measures, CM/Rec(2008)11, (2008), Rule. 13.

<sup>106</sup> Committee of Ministers of the Council of Europe, Commentary to the European rules for juvenile offenders subject to sanctions or measures, CM(2008)128, (2008), p. 5.

<sup>107</sup> Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Council of Europe Publishing, ISBN 978-92-871-7274-7, 2011, p. 19, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9> (Accessed 3 March 2017)

safeguards such as *inter alia* "the right to appeal to a higher authority ... at all stages of proceedings".<sup>108</sup> Similarly, the right to appeal is acknowledged in Havana Rules.<sup>109</sup>

(b) Conclusion

79. The ICJ submits that the child below the age of criminal responsibility must enjoy the right to appeal against the decision under Article 159a(2) Criminal Procedure Code because the decision fundamentally establishes the further procedural position of the minor concerned. There is no objective and reasonable justification for not providing children below the age of criminal responsibility with the right to be served with the decision and with the right to appeal against the decision to suspend the proceedings under Article 159a(2) Criminal Procedure Code.

---

<sup>108</sup> UN General Assembly, United Nations Standard Minimum Rules for the administration of juvenile justice ("The Beijing Rules"), UN Doc. A/RES/40/33, (1985), para. 7.

<sup>109</sup> Adopted by UN General Assembly, United Nations Rules for the protection of juveniles deprived of their liberty, UN Doc. A/RES/45/113, (1990), para. 70.

Table No. 3:<sup>110</sup>

	2011	2012	2013	2014	2015
Number of children BACR detected by the police	1568	1371	1251	1369	1226
Number of acts committed by children BACR detected by the police	1636	1463	1286	1350	1308
Number of pre-trial proceedings terminated on the ground that the perpetrator is a child BACR	1757	1640	1466	1567	1442
Number of cases brought to the juvenile court	1764	1603	1477	1522	1423

Table No. 4:<sup>111</sup>

	2011	2012	2013	2014	2015
No. of decisions adopted by the court as regards children BACR	1425	1364	1411	1418	1283
Refraining from imposing measures by the court	547	453	414	397	346
Percentage	38	33	29	28	27

<sup>110</sup> Source: Judicial Statistics of the Ministry of Justice. Available in Czech at:

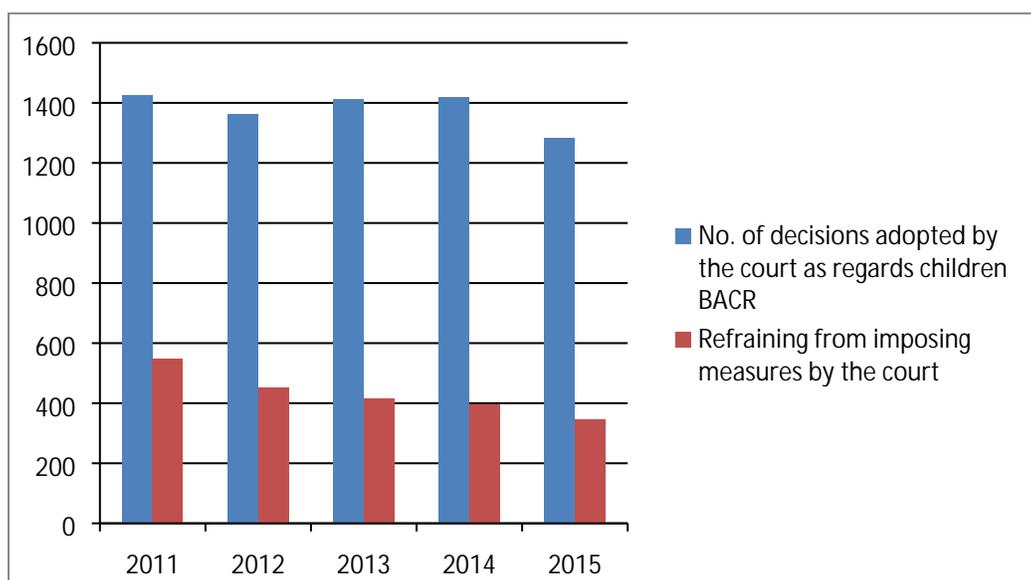
<http://cslav.justice.cz/InfoData/prehledy-statistickyh-listu.html?jsessionid=6c8eca560d30c03022b33938963e>

<sup>111</sup> Source: As regards the number of child offenders detected by the police and the number of acts committed by children BACR detected by the police: Police statistics of the Ministry of Interior, available in Czech at:

<http://www.mvcr.cz/clanek/statistiky-kriminality-dokumenty.aspx> (Accessed 3 March 2017)

As regards the number of pre-trial proceedings terminated on the ground that the perpetrator is a child BACR and the number of cases brought to the juvenile court: Judicial Statistics of the Ministry of Justice. Available in Czech at:

<http://cslav.justice.cz/InfoData/prehledy-statistickyh-listu.html?jsessionid=6c8eca560d30c03022b33938963e> (Accessed 3 March 2017)

Table No. 5<sup>112</sup>Table No. 6: Measures adopted by the juvenile court 2008-2012<sup>113</sup>

	2011	2012	2013	2014	2015
Refraining from imposing measures	547	453	414	397	346
Educational duties (since 1/1/2010)	59	66	92	91	90
Educational restrictions (since 1/1/2010)	7	9	27	26	18
Warning alert (since 1/1/2010)	352	441	445	461	410
Supervision by a probationer officer	265	246	232	213	172
Assignment to upbringing programme in educational care centre	136	108	120	76	98
Institutional protective custody	59	41	30	23	25
Institutional forensic treatment (since 1/11/2011)	No data	No data	7	2	6

<sup>112</sup> Source: Judicial Statistics of the Ministry of Justice. Available in Czech at: <http://cslav.justice.cz/InfoData/prehledy-statistickych-listu.html;jsessionid=6c8eca560d30c03022b33938963e> (Accessed 3 March 2017)

<sup>113</sup> Source: Judicial Statistics of the Ministry of Justice. Available in Czech at: <http://cslav.justice.cz/InfoData/prehledy-statistickych-listu.html;jsessionid=6c8eca560d30c03022b33938963e> (Accessed 3 March 2017)

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

80. The restorative justice measures such as mediation and various forms of diversions have become important forms of intervention in juvenile justice systems. International human rights standards relating to juvenile justice favours alternatives to criminal prosecution and formal trial so as to prevent unnecessary stigmatisation of young children and strengthen their social protection. The Czech Republic has itself adopted a juvenile justice system built on restorative justice principles. Under Article 3(1) of the Juvenile Justice Act, proceedings before authorities and ordered measures must be aimed at restoring disrupted relationships. A key aspect of modern juvenile justice system reflecting theoretical and practical implications of restorative justice principles is the availability of a pallet of appropriate diversions or alternatives to formal trial. In cases of juveniles, under Articles 69 and 70 Juvenile Justice Act there are three specific diversions available and also applicable in the pre-trial stage: conditional termination of the investigation (Article 69(1)(a) Juvenile Justice Act); settlement (Article 69(1)(b) Juvenile Justice Act); and termination of investigation (Article 70 Juvenile Justice Act). In cases of adults, the law provides for two specific diversions applicable also in the pre-trial stage: conditional termination of the investigation (Article 307 Criminal Procedure Code) and settlement (Article 309 Criminal Procedure Code). These alternatives to formal trial are not applicable to children under the age of criminal responsibility.

81. In cases of children below the age of criminal responsibility, the Czech juvenile justice system does not provide for any alternatives (diversions) to a formal trial before the juvenile court. After the case has been suspended under Article 159a(2), the state prosecutor is obliged under Article 90(1) Juvenile Justice Act to refer the case of a child to the juvenile court. Even though the Juvenile Justice Act proclaims in Article 3(1) that it is built on restorative justice principles, it does not provide for mediation or any form of diversions available to children below the age of criminal responsibility who are thus always subjected to formal judicial proceedings, including when accused of petty offences.

(a) The Council of Europe standards

82. The Council of Europe standards on juvenile justice and human rights underline the necessity to ensure that the system provides for diversions and mediation. Recommendation no. 1987/20 on social reactions to juvenile delinquency emphasised: *"development of diversion and mediation procedures at public prosecutor level (discontinuation of proceedings) or at the police level, in countries where the police has prosecuting functions, in order to prevent minors from entering into the criminal justice system and suffering the ensuing consequence."*<sup>114</sup> The subsequently issued Recommendation Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice recognised that *"[e]xpansion of the range of suitable alternatives to formal prosecution should continue. They should form part of a*

---

<sup>114</sup> Committee of Ministers of the Council of Europe, Recommendation on social reactions to juvenile delinquency, R(87)20, (1987), para. 2.

*regular procedure, must respect the principle of proportionality, reflect the best interests of the juvenile and, in principle, apply only in cases where responsibility is freely accepted.*"<sup>115</sup>

83. Specifically, the European Rules for Juvenile Offenders subject to Sanctions or Measures provides that "*[m]ediation or other restorative measures shall be encouraged at all stages of dealing with juveniles*".<sup>116</sup> The Commentary on the Rules explains that "*[m]ediation and other restorative justice measures have become important forms of intervention in juvenile welfare and justice systems. In many countries recent national legislation gives priority to mediation and restorative justice as methods of diversion from formal proceedings at various stages in the juvenile justice process. These strategies should be considered at all stages of dealing with juveniles and be given priority because of their special preventive advantages for the juvenile offenders as well as for the victims and the community.*"<sup>117</sup>
84. In 2009, Commissioner for Human Rights Thomas Hammarberg addressed this issue in his Issue Paper. He recalled article 40(3) CRC and stated that "*[d]iversion, whether it involves directing the child to health/social services or to informal procedures aimed at preventing further offending, should thus be a core objective of every juvenile justice system, and this should be explicitly stated in the legislation.*"<sup>118</sup> The Commissioner further emphasised the Scottish model of 'Children's Hearings', which aims to focus on children's needs rather than their criminal behaviour and underlined that "*it is an important means of ensuring that children who are below the age of criminal responsibility are diverted to the appropriate health/social services*".<sup>119</sup>
85. Most recently the rule that with respect to children "*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*" has been stipulated in the Guidelines on child-friendly justice.<sup>120</sup> In its general comments to the Guidelines, the European Committee on Legal Co-operation recalls "*that in several member states attention has been focused on provision of settlement to conflicts outside courts, by inter alia family mediation, diversion and restorative justice. This is a positive development in itself and member states are*

---

<sup>115</sup> Committee of Ministers of the Council of Europe, Recommendation concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Rec (2003) 20, (2003), Rule 13.

<sup>116</sup> Ibid., Rule. 12.

<sup>117</sup> Committee of Ministers of the Council of Europe, Commentary to the European rules for juvenile offenders subject to sanctions or measures, CM(2008)128, (2008), p. 5.. The emphasis added.

<sup>118</sup> Council of Europe Commissioner for Human Rights, Children and juvenile justice: proposals for improvements, CommDH/IssuePaper(2009)1, (2009), chapter 4.

<sup>119</sup> Ibid., 4.1. The emphasis added.

<sup>120</sup> Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Council of Europe Publishing, ISBN 978-92-871-7274-7, 2011, p. 25, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9> (Accessed 3 March 2017) The emphasis added.

*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".*<sup>121</sup>

(b) The case law of the European Court of Human Rights

86. The European Court of Human Rights has acknowledged a positive obligation to put in place appropriate facilities in line with objectives of the domestic law. Within the ambit of the right to liberty, in *Bouamar v Belgium*<sup>122</sup> and *D.G. v Ireland*<sup>123</sup> the European Court of Human Rights took fully into account that States chose a specific system of juvenile justice and a formulated positive obligation to put in place "appropriate institutional facilities". In *Bouamar*, the Court explicitly noted that the "*Belgian State chose the system of educational supervision with a view to carrying out its policy on juvenile delinquency. Consequently it was under an obligation to put in place appropriate institutional facilities which met the demands of security and the educational objectives of the 1965 Act*". In this connection, when the Czech Republic chose a juvenile justice system based on restoration, including in respect of proceedings against children below the age of criminal responsibility, it is under a positive obligation to ensure that mediation and appropriate diversions are available to children below the age of criminal responsibility.

(c) The UN standards

87. Alternatives to formal trial mirror the right of all children to special measures of social protection because of their status as minors.<sup>124</sup> According to Article 40(3) of the CRC, states must, whenever appropriate and desirable, promote measures for dealing with children alleged to have infringed, accused of infringing or recognised as having infringed penal law without resorting to judicial proceedings. The CRC Committee in its General Comment no. 10, Children's Rights in Juvenile Justice, formulated specific obligation of the States parties "*[...] to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings*", and emphasized particularly that these are not certainly "*[...] limited to children who committed minor offences, such as shoplifting or other property offences with limited damage, and first-time child offenders*".<sup>125</sup> The CRC Committee further emphasised diversions in its General Comment no. 12, the right of the child to be heard,<sup>126</sup> and explicitly recommended introducing diversion in cases of children with disabilities in its General Comment no. 9, persons with disabilities. The CRC Committee stated that "*Governments should develop*

---

<sup>121</sup> Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice , Council of Europe Publishing, ISBN 978-92-871-7274-7, 2011, p. 70, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9> (Accessed 3 March 2017)

<sup>122</sup> *Bouamar v. Belgium*, ECtHR, Application No. [9106/80](#), Judgment of 29 February 1988, para. 52.

<sup>123</sup> *D.G. v. Ireland*, ECtHR, Application No. 39474/98, Judgment of 16 May 2002, paras. 66, 72–85.

<sup>124</sup> Human Rights Committee, General Comment No. 17, Article 24 (Rights of the child), (1989), para. 4.

<sup>125</sup> See, Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, UN Doc. CRC/C/GC/10, (2007), para. 25. The CRC Committee emphasised alternatives also in para. 68.

<sup>126</sup> Committee on the Rights of the Child, General Comment No. 12, The right of the child to be heard, UN Doc. CRC/C/GC/12, (2009), para. 59.

*and implement alternative measures with a variety and a flexibility that allow for an adjustment of the measure to the individual capacities and abilities of the child in order to avoid the use of judicial proceedings. Children with disabilities in conflict with the law should be dealt with as much as possible without resorting to formal/legal procedures. Such procedures should only be considered when necessary in the interest of public order. In those cases special efforts have to be made to inform the child about the juvenile justice procedure and his or her rights therein."*<sup>127</sup>

88. The UN Human Rights Committee in its concluding observations adopted on 24 July 2013 recommended, under Articles 14 and 24 ICCPR that the Czech Republic, in order to fulfil its obligations under....."*[c]onsider, wherever appropriate, to deal with juveniles suspected of an unlawful act who are not held criminally responsible without resorting to formal trials or placing them in institutional care."*<sup>128</sup>
89. Other UN standards also underline requirement of diversions and alternatives to formal trial. According to the Beijing Rules, in the juvenile justice system, "*consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority*", and more specifically "*the police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system*".<sup>129</sup> The Riyadh Guidelines provide that "*[c]ommunity-based services and programmes should be developed for the prevention of juvenile delinquency, particularly where no agencies have yet been established. Formal agencies of social control should only be utilised as a means of last resort*".<sup>130</sup> The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) provide that: "*Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies ... should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. ...*".<sup>131</sup>
90. The Vienna Guidelines for action on children in the criminal justice system call on States to review existing procedures and to develop diversions or other alternatives to the classical formal procedures. According to the Guidelines: "*[a]ppropriate steps should be taken to make available throughout the State a broad range of alternative and educative measures at the pre-arrest, pre-trial, trial and post-trial stages, in order to prevent recidivism and promote the social rehabilitation of child offenders. Whenever appropriate, mechanisms for the informal resolution of disputes in cases*

---

<sup>127</sup> Committee on the Rights on the Child, General Comment No. 9, The rights of children with disabilities, UN Doc. CRC/C/GC/9, (2006), para. 74(b).

<sup>128</sup> Human Rights Committee, Concluding observations on the third periodic report of the Czech Republic, UN Doc. CCPR/C/CZE/CO/3, (2013), para. 20.

<sup>129</sup> UN General Assembly, United Nations Standard Minimum Rules for the administration of juvenile justice ("The Beijing Rules"), UN Doc. A/RES/40/33, (1985), Rule 11.

<sup>130</sup> UN General Assembly, Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), UN Doc. A/RES/45/112, (1990), para. 6.

<sup>131</sup> UN General Assembly, General Assembly Resolution, UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), UN Doc. A/RES/45/110, annex 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990), para 5.1.

*involving a child offender should be utilized, including mediation and restorative justice practices, particularly processes involving victims. In the various measures to be adopted, the family should be involved, to the extent that it operates in favour of the good of the child offender".*<sup>132</sup>

(d) Conclusion

91. The ICJ submits that the specific requirement of social protection of children under Article 17 Charter also requires the States parties to ensure that children below the age of criminal responsibilities are not forced to stand formal trial in cases when it is inappropriate and unnecessary and alternatives based on restorative justice principles are available and accessible. The human rights approach to juvenile justice recognises the stigmatising aspect of formal trials and calls for specific social protection of minors ensured by alternatives. A number of standards combine the human rights approach with restorative justice principles and acknowledge that these principles should be core principles dealing with minors in conflict with the law. The main feature of this approach is availability and accessibility of mediation and pallet of diversions at all levels of proceedings. The Czech law is rightly based on restorative justice principles however these principles are not reflected in proceedings against children below the age of criminal responsibility. This group of minors must undergo criminal or quasi criminal proceedings in cases where such an approach is fully inappropriate and unnecessary. This approach is not in compliance with an obligation to ensure a satisfactory level of social protection of children, *inter alia* by putting in place mediation and appropriate diversions and making these measures fully accessible to all children below the age of criminal responsibility.

---

<sup>132</sup> Economic and Social Council, Resolution on the administration of juvenile justice, UN Doc. 1997/30, (1997), para. 15.

## Conclusions – operative part

In ratifying the European Social Charter, the Czech Government signified that it intended to fully ensure social rights of children below the age of criminal responsibility in juvenile justice proceedings.

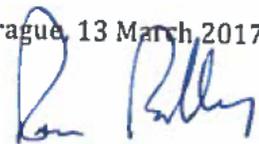
However serious systemic flaws deprive this specific group of the appropriate level of social protection and leave them at risk of inappropriate or unfair procedures leading to arbitrary punitive measures. Truly striking is the fact that the level of social protection is far lower in comparison with juveniles and in some cases even with adults. This situation concerns more than one thousand children every year and as a matter of urgency, it requires a structurally organised solution.

For these reasons,  
the International Commission of Jurists asks the European Committee of Social Rights to find:

- a violation of Article 17 of the European Social Charter;
- a further violation of Article 17 read in conjunction with the principle of non-discrimination.

The International Commission of Jurists also asks the Committee to invite the Committee of Ministers to recommend that the Czech Republic pay the sum of 10.000 euros (provisional estimate) to the complainant by way of costs. A detailed budget will be supplied to the Committee in due course.

Brussels and Prague, 13 March 2017



Róisín Pillay

Europe Programme Director, ICJ



Šárka Dušková

Human rights counsel, FORUM