



# **Social Workers' Manual for the Protection of the Child in Conflict with the Law**

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## Preamble

### 1. Manual's objective

In accordance with the Convention on the Rights of the Child (Convention), the child must be provided with assistance, which may not necessarily<sup>1</sup> be legal in all circumstances, but which must be appropriate. States parties enjoy discretion to determine how such assistance is provided, such as through social workers.

In addition, States parties to the Convention undertake to take appropriate measures to implement the rights of the child and to make the principles and provisions of the Convention widely known, through appropriate and active means, among adults and children alike (art. 42 of the Convention). Accordingly, States Parties are obligated to develop training and capacity-building for all those working with and for children<sup>2</sup>.

It is essential for the quality of the administration of child justice that all the professionals involved receive appropriate training on the content and meaning of the Convention in general and in particular training on the provisions that relates to their daily work. The training should be systematic and continuous and should not be limited to information on the relevant national and international legal provisions. It should include established and emerging information from a variety of fields on, inter alia, the social and other causes of crime, the social and psychological development of children, with special focus on girls and children belonging to minorities or indigenous peoples, and the available measures to deal with children in violation of the law, in particular the alternative measures for judicial proceedings. A special consideration should also be given to the possible use of new technologies such as video "court appearances", while noting the risks of others, such as DNA profiling.<sup>3</sup>

In this context, this manual aims to:

- Provide a reference tool for social services providers working with children in conflict with the law within a system of procedures consistent with international standards, national legislation and best practices.
- Achieve coordination and integration among those involved with children in conflict with the law, in particular among social services providers and lawyers.

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<sup>1</sup> A number of States parties expressed reservations about this guarantee (article 40, paragraph 2 / b /ii of the Convention on the Rights of the Child), arguing that only legal assistance is required, i.e. through a lawyer.

<sup>2</sup> CRC General Comment No. 5 (2003), General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42, 44/6), para. 53. The CRC general comment No. 1 (2001) on the aims of education.

<sup>3</sup> CRC General Comment No. 24 (2019) on children's rights in the child justice system, para. 112.

<https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>

## 2. Methodology of the manual

The present manual will shed light on the rights particularly provided for in the Convention on the Rights of the Child and its Optional Protocols in addition to the comments of the Committee on the Rights of the Child (CRC) explaining the Convention provisions, in particular CRC General Comment No. 24 of (2019) on children's rights in the child justice system, as well as other relevant international texts, and comparative law, particularly Lebanese and Tunisian laws.

## 3. Content of the Manual

The manual contains general provisions on children in conflict with the law, in addition to the role of social services providers in protecting the rights of children in conflict with the law. The Manual also focuses on the importance of cooperation between social services providers and lawyers in order to protect the child.



Some of the terms used in the Manual may be unfamiliar but derive from their original reference, for example the “No retroactive juvenile justice or unintended punishment of children,” included in CRC General Comment No. 24 of (2019) on children's rights in the child justice system.

Also, the term “juveniles” was sometimes used instead of “children” according to the source, for example, in the “UN Rules for the Protection of Juveniles Deprived of their Liberty”, as well as Lebanese Law No. 422 of 6 June 2002 on the protection of minors that are in conflict with the law or are at risk, etc...

## 4. The beneficiary of the Manual

The beneficiaries of the present manual are social services providers working with children in conflict with the law in particular in their dealing with lawyers. This relationship is very important given that it consecrates the best interest of the child.

## Introduction

On November 20, 1989, the UN General Assembly unanimously approved the text of the Convention on the Rights of the Child (hereinafter Convention). In September 1990, after its ratification by 20 countries, it became a binding legal instrument. States subsequently ratified it or acceded to it, to become the most universally accepted human rights instrument. To this date, all countries of the world, except the United States of America, have become party to the Convention.

The Convention is comprised of 54 articles and three optional protocols. It unequivocally illustrates the fundamental human rights that children must enjoy anywhere and without discrimination. The Convention recognizes the interdependence and equal importance of all rights (civil, political, economic, social and cultural)<sup>4</sup> that enable all children to develop their mental and physical abilities, personalities and talents to the fullest extent possible<sup>5</sup>.

For further protection, in 2000, the UN General Assembly unanimously adopted the two Optional Protocols to the CRC on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography. The third Optional Protocol was adopted by the UN General Assembly in 2011 and it provides for a Communications Procedure to allow individual children to submit complaints to the CRC regarding specific violations of their rights under the Convention and the first two Optional Protocols to conduct the relevant investigation.

We hereinafter tackle the provisions on (1) the protection of children in conflict with the law i.e. any child alleged to, accused of or proven to have violated the Penal Code by reviewing the general provisions on the child in conflict with the law as well as (2) the role of lawyers in protecting the rights of the child in conflict with the law and finally (3) the importance of cooperation between social services providers and lawyers.



“Children in contact with the justice system” refers to children who come into contact with the justice system as victims or witnesses, children alleged as, accused of or recognized as having infringed criminal law, or children who are in any other situation requiring legal proceedings, for example regarding their care, custody or protection, including cases involving children of incarcerated parents” (Paragraph 6(c))

<sup>4</sup> It is the international legal instrument that encompasses the full range of universal human rights - civil, political, economic, social and cultural rights as well as other aspects of humanitarian law.

<sup>5</sup> General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), paragraph 7.

of the 2014 United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice)

Therefore, the criminal justice system covers:

- 1- Children in conflict with the law subject of the present manual (in some cases “children in dispute with the law”);
- 2- Children victims or witnesses.

## 1. General provisions on the child in conflict with the law

### 1.1 Child Definition

“[...] a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” (Art. 1 of the Convention)

#### Comparative Law



##### **Lebanese Law**

The juvenile subject to Law No. 422 of June 6, 2002 on the protection of juveniles in conflict with the law or at risk (hereinafter Law No. 422) is a person under eighteen years of age (art. 1).

##### **Tunisian Law**

Within the meaning ascribed in the Code for Protection of the Child issued in 2005, “every person under the age of eighteen years ... (art. 3).

### 1.2 The concept of the child in conflict with the law

“Every child alleged as, accused of, or recognized as having infringed the penal law [...]” (art. 40 of the Convention) and “young person who is alleged to have committed or who has been found to have committed an offence,” according to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Rule 2.2 (c))

In its General Comment No. 24 (2019)<sup>6</sup>, the Committee on the Rights of the Child encouraged State Parties “to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and

<sup>6</sup> CRC General Comment No. 24 (2019) on children’s rights in the child justice system, paragraph 22.

neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with article 41 of the Convention.”

### Comparative Law



There is a large array of minimum ages of criminal responsibility ranging from the very low age of seven years (for example in Article 3 of Lebanese law No. 422 stipulating “a person who has not attained the age of seven at the time of the offense shall not be criminally prosecuted”; and (art. 1) stating that “The juvenile to which this law applies is a person under eighteen years of age ...”); or eight years and the maximum age level raised to 14 (Libyan law) or 16 years.

Article 71 of the Tunisian law (Code for Protection of the Child) defines a “delinquent” as “Children, aged between 13 and 18 years old, to who are attributed a violation, misdemeanour [...]” However, Article 68 of the Code for Protection of the Child provides that a child who has not attained the age of thirteen years shall be “irrefutably presumed as lacking the capacity to violate criminal laws...” and therefore shall not be referred to the criminal justice services. But, such child may be deemed as a children with a “difficult case” and thus benefit from the protection mechanisms established for the threatened child (i.e. at risk).



### Age assessment

- ➔ If there is no proof of age by birth certificate, the authority should accept all documentation that can prove age, such as notification of birth, extracts from birth registries, equivalent documents or school reports. Documents should be considered genuine unless there is proof to the contrary. Authorities should allow for interviews with or testimony by parents regarding age, or for permitting affirmations to be filed by teachers or religious or community leaders who know the age of the child.
- ➔ Only if these measures prove unsuccessful, the child may be subjected to a comprehensive assessment of the child’s physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in



combining different aspects of development [...]. States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes. In the case of inconclusive evidence, the child shall have the benefit of the doubt<sup>7</sup>.

### Case Law

#### **Lebanese criminal cassation, Decision No. 1/2001, dated 9/1/2001:**

“Whereas the principle is that, age is determined by the official records of civil status, yet the criminal judge, within the scope of examining the matter of his competence, may rely on other means of proving the age of the defendant when there are suspicions regarding these records for serious, clear and legitimate reasons, which is a matter corroborated by Article 201 in addition to Article 6 of the Civil Code allowing the court, even if no allegation of forgery is submitted before it, to reject any document if it clearly appears based on said document’s condition or the circumstances of the case that the said document is forged, provided that it indicates in its judgment the circumstances and presumptions on which it was based for this purpose; and

Whereas, in the light of the statement of the accused and her father, it appeared to the court that the content of the produced civil abstract indicating that the defendant was born on 1/12/1978 is marred by serious suspicion that legitimately justifies the inability of relying on this abstract to determine the age of her birth; and

Whereas, in the absence of an official record stating correctly the age of the defendant, it reverts to this court to estimate the age in the light of the available evidentiary elements, including the statements she herself made in the preliminary investigation that she was born in 1975; and

Whereas the crime attributed to the accused occurred 02/08/1994, on which she [the accused] had reached adulthood, therefore this court and not the juvenile court would be competent to examine the present case.”

#### **Mount Lebanon Criminal Court, Decision No. 581/2006, dated 13/7/2006:**

- ➔ The decision of the accusatory authority deemed the accused as an adult on the date of the offense is based on the forensic report in accordance with X-Rays and physical observation.

<sup>7</sup> CRC General Comment No. 24 (2019) on children’s rights in the child justice system, paragraphs 33 and 34

- ➔ The production by the accused of a copy of an individual civil record confirming that he was a minor on the date of the offense.
- ➔ The individual civil record is deemed an official document having probative force *erga omnes*, and the contrary may only be proven by invoking forgery or by virtue of another official deed that cancels the first deed. It was established that the accused was a minor on the date of the offense.

### 1.3 The international legal framework for the rights of children in conflict with the law

The international legal framework refers to international texts relevant to the rights of children in conflict with the law which, in addition to the Universal Declaration of Human Rights (1948), includes international and regional conventions, as well as general comments of committees of the UN human rights conventions, in particular the Committee on the Rights of the Child, as well as the guiding principles and standard rules<sup>8</sup>:

#### ➔ Most important international conventions<sup>9</sup>:

- The four Geneva Conventions of August 12, 1949 and the two Additional Protocols of June 8, 1977<sup>10</sup>, in particular on the recruitment of children.
- International Covenant on Economic, Social and Cultural Rights (December 16, 1966)
- International Covenant on Civil and Political Rights (December 16, 1966)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (December 10, 1984).
- The United Nations Convention on the Rights of the Child, adopted by the General Assembly in its resolution 44/25 of November 20, 1989 and the three Protocols to the Convention on the Rights of the Child:
  1. First Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (resolution 54/263 of May 25, 2000).
  2. Second Optional Protocol on the involvement of children in armed conflict (resolution 54/263 of May 25, 2000).

<sup>8</sup> To see all international texts please visit: <https://www.ohchr.org/EN/pages/home.aspx>

<sup>9</sup> According to the chronological order.

<sup>10</sup> Additional Protocol I on the Protection of Victims of International Armed Conflicts and Additional Protocol II on the Protection of Victims of Non-International Armed Conflicts. Additional Protocol III (December 8, 2005) creating a new emblem, i.e. the red crystal added alongside the emblems of the Red Cross and Red Crescent.

3. Third Protocol concerning the communications procedure (resolution 66/138 of December 19, 2011).

- Rome Statute of the International Criminal Court (July 17, 1998).
- Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (No. 182) of June 17, 1999.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) of November 15, 2000.

➔ **Most important regional conventions<sup>11</sup>:**

- Charter of the Rights of the Arab Child (1984).
- Arab Charter on Human Rights, 2004<sup>12</sup>.
- African Charter on Human and Peoples' Rights (June 27, 1981)<sup>13</sup>.
- African Charter on the Rights and Welfare of the Child (1990).
- European Convention on the Exercise of the Rights of the Child (1996).

➔ **Principles and Rules<sup>14</sup>:**

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), adopted by the General Assembly in its resolution 40/33 of November 29, 1985.
- United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), adopted by the General Assembly in its resolution 45/112 of December 14, 1990.
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), adopted by the General Assembly in its resolution 45/113 of December 14, 1990.
- Guidelines for Action on Children in the Criminal Justice System, annexed to Economic and Social Council resolution 1997/30 of July 21, 1997.
- Rules and guidelines on children associated with armed forces or armed groups / Paris Principles (February 2007).
- United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, adopted by the General Assembly in its resolution 69/194 of December 18, 2014.

➔ **General comments of the Committee on the Rights of the Child on children in conflict with the law:**

<sup>11</sup> Arab, African and European. In addition to the Covenant on the Rights of the Child in Islam (2005)

<sup>12</sup> In particular, chapter 33

<sup>13</sup> In particular, article 18, paragraph 3, on the duty of the State to ensure the rights of the child “as provided for in international declarations and conventions”.

<sup>14</sup> In chronological order

1. General comment No. 2 (2002) on the role of independent national human rights institutions in the promotion and protection of the rights of the child.
2. General comment No. 5 (2003). General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)
3. General comment No. 6 (2005) on Treatment of Unaccompanied and Separated Children Outside their Country of Origin.
4. General comment No. 8 (2006) on The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)
5. General comment No. 12 (2009) on the right of the child to be heard.
6. General comment No. 13 (2011) on the right of the child to freedom from all forms of violence.
7. General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)
8. General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No. 18 of the Committee on the Rights of the Child on harmful practices.
9. General comment No. 21 (2017) on children in street situation.
10. Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration.
11. Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return.
12. General comment No. 24 replaces general comment No. 10 (2007) on children's rights in juvenile justice. It reflects the developments that have occurred since 2007 as a result of the promulgation of international and regional standards, the Committee's jurisprudence, new knowledge about child and adolescent development, and evidence of effective practices, including those relating to restorative justice. It also reflects concerns such as the trends relating to the minimum age of criminal responsibility and the persistent use of deprivation of liberty. The general comment covers specific issues, such as issues relating to children recruited and used by non-State armed groups, including those

designated as terrorist groups, and children in customary, indigenous or other non-State justice systems <sup>15</sup>.

## 2. The role of social services providers in protecting the rights of children in conflict with the law

Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. The primary providers of legal aid are lawyers, but the Principles and Guidelines also suggest that States involve a wide range of stakeholders as legal aid service providers in the form of non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations and academia<sup>16</sup>.”

Principle 11 of the Guidelines and Principles states, “Legal aid provided to children should be prioritized, in the best interests of the child, and be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.”



### Who is the social services provider by the Lebanese law?

He is a social worker who works in the framework of an organization entrusted by the Ministry of Justice to follow-up on the juvenile during legal procedures, to prepare the social file, to suggest an appropriate measure against him or her, to monitor the implementation of said measure, and to assess the development of the juvenile through periodic reports.

### 2.1 The importance of the role of the social services providers

➔ The Convention on the Rights of the Child<sup>17</sup> requires that every child is entitled to assistance, not necessarily legal in all circumstances<sup>18</sup>, but which must appropriate

<sup>15</sup> General Comment No. 24 (2019), paragraph 1.

<sup>16</sup> States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution. (Principle 1 of the UN Principles and Guidelines on Access to Legal Assistance in Criminal Justice Systems)

<sup>17</sup> Article 14/ 3/d/ of the International Covenant on Civil and Political Rights specifies, “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full

(art. 40). It reverts to States parties to determine how such assistance should be offered, such as through social workers, provided that the service provider enjoys sufficient knowledge of the legal aspects of the child justice process and has received appropriate training on working with children in conflict with the law and provided this assistance is offered free of charge.

- ➔ According to the Committee on the Rights of the Child<sup>19</sup>, States should ensure that the child is guaranteed legal or other appropriate assistance from the outset of the proceedings, in the preparation and presentation of his/her defence and until all appeals and/or reviews are exhausted.
- ➔ The Convention recommends that States provide effective legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities. Child justice systems should not permit children to waive legal representation unless the decision to waive is made voluntarily and under impartial judicial supervision.
- ➔ If children are diverted to programmes or are in a system that does not result in convictions, criminal records or deprivation of liberty, “other appropriate assistance” by well-trained officers may be an acceptable form of assistance, although States that can provide legal representation for children during all processes should do so, in accordance with Article 41. Where other appropriate assistance is permissible, the person providing the assistance is required to have sufficient knowledge of the legal aspects of the child justice process and receive appropriate training.
- ➔ Social services providers protect the child by exploring the best available means to ensure his / her social, school and professional integration allowed by his / her status, circumstances and crime, these issues must be clarified to the court. This means that they are responsible for this fateful step for the child and for other parties such as the family and society.
- ➔ Preventing children from recidivism is the most important goal for social services providers.
- ➔ According to General Comment No. 2 (2002) on the role of independent national human rights institutions in the promotion and protection of the rights of the child 20:
  - National human rights institutions (NHRIs) must be established in compliance with the Principles relating to the status of national institutions for the

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equality: [...] To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

<sup>18</sup> A number of States parties have expressed reservations about this guarantee (article 40, paragraph 2 / b / 2, of the Convention on the Rights of the Child), arguing that only legal assistance is required, i.e. through a lawyer.

<sup>19</sup> General Comment No. 24 (2019), paragraph 49 and follows.

<sup>20</sup> Paragraph 4 and follows.

promotion and protection of human rights (The “Paris Principles”) adopted by the General Assembly in 1993<sup>21</sup>.

- The NHRI establishment process should be consultative, inclusive and transparent, initiated and supported at the highest levels of Government and inclusive of all relevant elements of the State, the legislature and civil society. (para 10)
- NHRIs should ensure that their composition includes pluralistic representation of the various elements of civil society involved in the promotion and protection of human rights. They should seek to involve, among others, the following: human rights, anti-discrimination and children’s rights non-governmental organizations (NGOs), including child- and youth-led organizations; [...]



### **The importance of the social services providers’ role in accordance with the Lebanese law<sup>22</sup>**

- ➔ Attending the preliminary investigation alongside the juvenile and ensuring respect of all his/her rights, the rules for investigation and initiation of social examination;
- ➔ Follow-up on the juvenile, either within his/her family or within the place of arrest, in coordination with his custodians;
- ➔ Attending all investigation and trial sessions;
- ➔ Submitting the social report and proposing an appropriate measure;
- ➔ Following up on the implementation of judgments, submitting periodic reports and proposing to replace the measure in light of the juvenile’s violation;
- ➔ During the course of procedures before a juvenile court, the social representative shall:
  - Submit a social report to the court, informing it that the juvenile is at risk of delinquency and asking it to protect him/her;
  - Open the juvenile protection file;
  - Propose the most appropriate measure for the juvenile;
  - Follow-up on the application of the measure and submit periodic reports to the judge who can amend this measure

### **What does the social report include?**

<sup>21</sup> These minimum principles, transmitted by the Commission on Human Rights in 1992, provide guidance with regard to the establishment, competence, responsibilities, composition, independence, pluralism, working methods and quasi-judicial activities of these national bodies.

<sup>22</sup> Juveniles in conflict with the criminal law or at risk - A guide for social workers issued by the Ministry of Justice, Lebanese Republic, 2006



- ➔ Information about the relatives of the juvenile (their financial and social conditions, the housing situation and the surrounding environment, the formation of the family and the distribution of roles in it, their relationship to the juvenile, the scale of values, etc.)
- ➔ Information about the juvenile (school, professional environment, relationship with friends, psychological and emotional maturity of the juvenile, his/her health and mental condition and degree of intelligence, scale of values, his/her deviant behavior and conduct, his/her attitude towards the crime attributed to him/her and his/her criminal record)
- ➔ The repercussions of the crime on the juvenile (school, family, community, and work)
- ➔ The social representative's proposal of the appropriate measure
- ➔ The parents' opinion regarding the appropriate measure against the juvenile.

### What is the periodic report?

It is submitted by the social representative to the Juvenile Court during the implementation of the measures; it aims to:

- ➔ Follow up on the implementation of the measure taken against the juvenile;
- ➔ Assess the objectives set to improve the situation of the juvenile;
- ➔ Assess the juvenile's status and degree of interaction with the measure;
- ➔ Reconsider the measure taken.



### Lebanese Law

**UPEL**<sup>23</sup> is an association of public utility that works for juveniles who have problems of moral disorder or difficulties with the law. These juveniles conflict with justice, laws and regulations and therefore need control, protection, prevention and care.

- ➔ UPEL has helped the youth for more than seventy-five years through volunteers, social workers and others. UPEL has been mandated by the government to secure social services to the juvenile courts, to ensure juveniles an education, to address the prevention of hazards, by pushing for decrees and laws, most recently Law 422/2002.
- ➔ UPEL guarantees social welfare charges in the juvenile courts in the six governorates of Lebanon.
- ➔ UPEL also operates a center in Al-Fanar area to shelter juveniles who are in conflict with the law. This center is capable of receiving ninety juveniles between detainees and convicts between the ages of twelve and eighteen years. The center subjects each juvenile to the educational, vocational, health and psychological programs developed

<sup>23</sup><http://ahdath.justice.gov.lb/index.htm>



by UPEL that are appropriate to the Juvenile's level.

- ➔ Social work at UPEL includes prevention, protection, correction and rehabilitation.
- ➔ Boys and girls under the age of 18 on all Lebanese territory will benefit from this social work.
- ➔ UPEL sponsors the juvenile, rehabilitates him/her, helps him/her stabilize, develop his/her personality, regain self-confidence and helps him/her reintegrate into society.
- ➔ The juvenile will have access either to literacy courses and school enrolment or various vocational courses in cooperation with the Lebanese National Employment Organization including carpentry, blacksmithing, electricity works, hotel works, sewing, computer programming and others ... These trainings provide the juvenile with job opportunities allowing him/her to ensure future livelihood.
- ➔ **Stakeholders:** Parents, courts, internal security forces, accredited private sector, forensic doctors, relevant ministries and the Higher Council for Childhood are partners in society to secure the interests of children at risk or in conflict with the law.

### *What are the necessary competencies of Juveniles' social services providers?*

Social Services providers, in particular, must:

- Understand their distinctive roles in child justice procedures.
  - Have a good understanding of how the child justice system works and the role of everyone involved.
  - Continuously communicate with various intervening professionals.
- ➔ The CRC emphasizes that continuous and systematic training of professionals in the child justice system is crucial to uphold those guarantees.<sup>24</sup> A comprehensive child justice system requires the establishment of specialized units within the police<sup>25</sup>, the judiciary, the court system and the prosecutor's office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child.<sup>26</sup> Social services providers should, in particular, receive training on the provisions related to children in conflict with the law, whether national or international, in particular the Convention on the Rights of the Child and its three protocols (especially if the state ratified the protocol(s) since

<sup>24</sup> General Comment No. 24 (2019), paragraph 39.

<sup>25</sup> Rule 12 of Beijing Rules specifies that, "In order to best fulfil their functions, police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime shall be specially instructed and trained. In large cities, special police units should be established for that purpose."

<sup>26</sup> General Comment No. 24 (2019), paragraph 106.

most national legislation provides for supremacy of ratified International conventions over national laws.

➔ Training must not be limited to introducing national and international legal provisions, since professionals should be able to work in interdisciplinary teams, and should be well informed about the physical, psychological, mental and social development of children and adolescents, as well as about special needs of the most marginalized children.<sup>27</sup> Consideration should also be given to the possible use of new technologies such as video “court appearances,” while noting the risks of others, such as DNA profiling<sup>28</sup>.

### Comparative Law



#### **Lebanese law**

Article 2 of the Civil Procedure Code stated that “International treaties ratified by the Lebanese Parliament are part of the domestic legal system and have supremacy over domestic laws” .

#### **Tunisian law**

Article 20 of the Constitution expressly states that “International agreements approved and ratified by the Assembly of the Representatives of the People have a status superior to that of laws and inferior to that of the Constitution.”

### *Is the presence of social services providers' mandatory?*

➔ Every child must have legal or other appropriate assistance in the preparation and presentation of his or her defence.

➔ The Convention on the Rights of the Child<sup>29</sup> requires that every child is entitled to assistance, not necessarily legal in all circumstances<sup>30</sup>, but which must appropriate (art. 40). It reverts to States parties to determine how such assistance should be offered,

<sup>27</sup> General Comment No. 24 (2019), paragraph 39.

<sup>28</sup> General Comment No. 24 (2019), paragraph 112.

<sup>29</sup> Article 14/ 3/d/ of the International Covenant on Civil and Political Rights specifies, “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

<sup>30</sup> A number of States parties have expressed reservations about this guarantee (article 40, paragraph 2 / b / 2, of the Convention on the Rights of the Child), arguing that only legal assistance is required, i.e. through a lawyer.

such as through social workers, provided that the service provider enjoys sufficient knowledge of the legal aspects of the child justice process and has received appropriate training on working with children in conflict with the law and provided this assistance is offered free of charge.

### Comparative Law



#### **Lebanese law**

- ➔ Article 40 of the Juvenile Protection Law No. 422 states: that "Juveniles are tried in secret and the trial shall be attended only by the juvenile... and the accredited social representative ..."
- ➔ When bringing the juvenile before the Public Prosecution or the judicial police on count of offense for investigation, the investigating officer shall immediately contact the accredited social representative and invite him/her to attend the investigation. The representative shall be present within six hours as of the time of his invitation. The investigation may not commence unless the representative is present under the pain of disciplinary prosecution.
- ➔ If the representative is unable to attend for any reason, the Public Prosecution or the Juvenile Department at the Ministry of Justice shall appoint a social representative from one of the associations classified in this department to appear with the juvenile during the investigation. The presence of the social representative is not sufficient. The representative must undertake social research and submit its findings to the person carrying the investigation with the juvenile (article 34 of Law 422.)
- ➔ The investigative judge shall follow the procedures above mentioned (art 35 of law 422, during the investigation;
- ➔ If a social file has not been opened for the juvenile within the scope of the prosecution, investigation and trial proceedings, the juvenile court shall, prior to sentencing, obtain a social investigation by the authorized social representative or by the representative commissioned by the court to carry out this task from among social workers.

### CASE LAW

#### **1- Lebanese Criminal Cassation Decision No. 138/2018, dated 8/3/2018:**

The issue of attendance of a juvenile representative besides the juvenile during interrogation is mandatory according to the text of article 34 of Law No. 422/2002, however, the lawyer must invoke the invalidity of the investigation due to the absence of the juvenile representative before the indictment is issued and the submittal of the

case file before the criminal court, otherwise his request will be rejected, as happened in the case below...

The issuance of the indictment conceals the defects that may have marred the preliminary investigation, which requires the rejection of the allegation made by the Claimant that the text of article 34 of Law No. 422/2002 was violated by the fact that a social representative did not appear with the minor during the preliminary investigation and that the minor parents or guardians were not informed, in particular, since the Claimant did not challenge the indictment.

**Lebanese Criminal Cassation, Decision No. 234/2013, dated 3/10/2013<sup>31</sup>:**

Failure to adhere to the confidentiality of the trial of a minor, holding a public trial, and the absence of a juvenile representative, entail the annulment of the trial proceedings infringing the fundamental principles during trial:

The Court of Cassation overturned the challenged criminal decision pursuant to Article 296 (b) and (d) of the Criminal Code of Procedure on the violation of the law and infringement of the Fundamental Standards During Trial since the Ordinary Criminal Court held a public trial for a minor prosecuted with adults without the presence of a representative from the Union for the Protection of Juveniles in violation of the provisions of Article 33 and Article 40 of Law No. 422 dated 6/6/2002 and of the obligation imposed on the ordinary court to provide the juvenile with all legal guarantees, especially the confidentiality of the trial.

***Relationship between the social services providers and the other parties***

<b>Relationship with the Child</b>	<p>Good communication is the main key to build the relationship between social services providers and the child. In order to gain the confidence of the child, in particular, a social service provider must:</p> <ul style="list-style-type: none"> <li>→<sup>1</sup> Adapt his/her language and deal differently with children, always keeping in mind that each child has different individual needs.</li> <li>→<sup>1</sup> Use a child-friendly language: simplify language, use short sentences, use humor but without the use of irony and idioms that the child may not understand.</li> <li>→<sup>1</sup> Use tools that explain to each child the information he/she needs to know and adapt to each child's level of maturity and abilities (for example, using graphics and images).</li> <li>→<sup>1</sup> Avoid leading questions (for example, don't ask "Do you understand?") Because children will often agree, and the child</li> </ul>
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<sup>31</sup> <http://www.legallaw.ul.edu.lb/>

	<p>may automatically answer "Yes."</p> <ul style="list-style-type: none"> <li>→ Meet the child in an environment adapted to the child's needs (allocating a special room at the lawyer's firm).</li> <li>→ Inform the child of his/her rights in child-friendly language and make sure that he/she understands these rights.</li> <li>→ Listen to the child at each stage of the proceedings, and relay his / her opinion to other stakeholders during the proceedings and relay his/her opinion to other involved parties during the proceedings. This is essential to ensure the child's right to participate efficiently in the trial.</li> <li>→ Invite the child to efficiently participate in decisions relating to him/her, knowing that the child also has the right to remain silent.</li> <li>→ Answer all of the child's questions and make sure he understands the answer correctly.</li> <li>→ Talk to the child about the role of each party involved in the judiciary.</li> <li>→ Inform the child about the various options for measures that can be taken. This includes avoiding judicial proceedings (alternative measures).</li> <li>→ Repeat statements made by the child because this allows the child to think about the actual content of what he said and enables the lawyer to verify if the child has correctly understood.</li> </ul>
<b>Relationship with the Child's Parents</b>	<ul style="list-style-type: none"> <li>→ The Convention on the Rights of the Child requires the adjudication of a case in the presence of a legal counsel or other appropriate assistance and in the presence of his or her <b>parents or legal guardians</b>, unless this is deemed to be against the child's best interest<sup>32</sup>, especially if he or she takes into account his or her age or situation (art. 40, 3).</li> <li>→ In line with the central role played by the family in the well-being of children, independent child institutions typically support efforts to urge the State to fulfil its obligations to provide families with the necessary assistance and to support policies that uphold the families' ability to care for their children, including by preventing forced placement in correctional institutions<sup>33</sup>.</li> </ul>
<b>Relationship with other parties involved</b>	<ul style="list-style-type: none"> <li>→ As mentioned above, it is essential for the lawyer to know how the child justice system works and to know all those involved in the system, since the lawyer cannot promote the</li> </ul>

<sup>32</sup> CRC Comment No. 14 para. 61, "Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm [...]"

<sup>33</sup> Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children, Summary Report, UNICEF Research Office 2012, p. 11.

<b>in children justice</b>	<p>rights of the child alone; he or she needs to cooperate with other involved parties.</p> <p>→ Various key players taking part in the proceedings mainly include judicial police, public prosecutors, judges, interpreters (if necessary), psychologists (if necessary), physicians (if necessary), etc.</p>
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### *When does the role of the social service provider starts and ends?*

- ➔ States should guarantee the right to legal assistance at all stages of the criminal justice process for any person who is detained, arrested or suspected of a crime punishable by imprisonment or death or accused of such a crime. Children should receive legal assistance on the same terms as adults or on more lenient terms.
- ➔ By virtue of the Convention of the Rights of the Child, correspondence between the child and the legal representative or any assisting person must be kept confidential in accordance with Article 40 paragraph (b), and the right of the child to be protected against interference with regard to privacy and correspondence must be respected (art. 16).
- ➔ In accordance with Principle 7 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, “States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process. Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.” Therefore, the role of social services providers begins immediately after the arrest of the child and ends with the end of the measure taken against him/her.
- ➔ In all cases, social services providers should meet with the child and his or her family if they are able to, in order to get an initial idea of the child, his or her circumstances and situation.



#### **Lebanese Law**

- ➔ **Before the trial:** Before the public prosecution or the judicial police on the known crime, to attend the first six hours of the arrest and the police questioning unless this is impossible for any reason (appointing a social representative from a classified association) (Article 34 of Law 422).

➔ **During the investigation procedure:** Attend the investigation unless it is impossible for any reason (appointment of a social representative from a classified association) (Article 35 of Law 422).

➔ Contact the social representative to be present during the preliminary investigation,  
as it is not permissible to start the investigation unless this representative is present

- ➔ The social representative introduces himself/herself to the juvenile and explains to him/her the progress of the investigation and his/her rights and duties;
- ➔ The social representative fills out the social form of the juvenile and includes information about the juvenile, his/her family and his record;
- ➔ The social representative makes sure that the juvenile understands the questions addressed to him/her when asked by the investigator;
- ➔ The social representative makes sure that what is stated in the report corresponds to the statement of the juvenile;
- ➔ The social representative may refuse to sign the report in the event that the investigation principles are not observed and shall write down a reason for withholding his signature, for example: if the minor is pressured or beaten or his statements were taken out of context;
- ➔ The file shall be referred by the investigator to the Public Prosecutor for examination and taking the appropriate decision.

**The Lebanese law stipulated that pre-trial detention is a measure that should not be resorted to except in the most necessary and extreme cases for a juvenile over the age of 12 and that the punishment for the crime attributed to him/her should not exceed a year in prison.**

➔ **During trial and before sentencing:**

➔ Juveniles are tried in secret and the trial shall be attended only by the juvenile, his/her parents, legal guardian, the person to whom the juvenile is handed, the plaintiff, the witnesses, the accredited social representative and the lawyers (article 40 of Law 422). Circular No. 42 dated 27/03/2003

➔ The judge explains to the juvenile the crime attributed to him/her, questions him/her about his/her responsibility, and listens to his/her statements ...

➔ The juvenile judge issues his ruling on the juvenile after examining the file and reviewing the report of the social representative, and he takes the appropriate measure against him/her;

➔ Supervised freedom (i.e. placing the juvenile under the control of the social representative or the authority designated for this purpose) (article 10 of Law 422).

➔ If a juvenile's social file has not been placed in the framework of the prosecution, investigation and trial proceedings, the juvenile court shall, prior to the judgment, obtain a social investigation by the authorized social representative or by the social



workers commissioned by the court. The investigation shall include the necessary information on the material and social conditions of the juvenile, his social, school and professional environment, his morals, degree of his intelligence, his health and mental condition and his criminal backgrounds, with the appropriate measure for his reform. All this depends on the situation at the time of the offense and at the trial (Article 41 of Law 422).

➔ During probation, the child is monitored<sup>34</sup> by the social representative (article 8 of Law 422).

### ➔ During sentencing and post-trial

➔ The social representative supervises the upbringing of the juvenile when taking measures that deprive the juvenile from guarding his / her parents or guardian (attaching their right to guard and raise the child) (article 20 of Law 422)

➔ Work shall be carried out for the aggrieved or work of public benefit, which is decided by the judge with the consent of the minor and the consent of the victim, under the supervision of the competent social representative (article 11 of Law 422).

➔ The social representative supervises the measure of protection (that is, handing over the juvenile to his or her parents, guardian or family). In the absence of any of these persons in Lebanon or the absence of the conditions of moral guarantee and the ability to educate the child handed over, the juvenile may be handed over to a trusted family or to a social or health institution accredited by the competent ministries or others (Article 9 of Law 422).

➔ The Juvenile Court shall enforce the judgments rendered by it through its Registry and instruct the accredited social representative to accompany the juvenile to the institute or institution in which he or she has been placed<sup>35</sup> (art. 49 of Law 422).

➔ Non-custodial measures, except for probation, may be extended to the age of 21 if the juvenile's personal circumstances and his/her upbringing require such extension. The juvenile judge shall decide on the extension after hearing the juvenile, the person in charge of him or her or to whom he or she was handed and the social representative (article 12 of Law 422).

➔ If the juvenile is sentenced to a reform measure (i.e. the juvenile is placed in rehabilitation institute) for a period after which he/she would exceed 18 years of age, the judge may, after hearing the juvenile, suspend the rehabilitation measure when the juvenile reaches the mentioned age and release him / her and place him/her under the supervision of the social representative for the period determined by him. (Article 13 of Law 422).

➔ The juvenile shall be held at the correction institute for a minimum period of three months. If he/she completes 21 years old at the institute, the judge may, at the request of the juvenile or the social representative, upon obtaining a social investigation, and a report of the director of the institute and after hearing the juvenile, release him/her and, if necessary, place him/her under supervised freedom. (Article 14 of Law 422).

<sup>34</sup> suspending any other measure against the child for a period between three months to a year.

<sup>35</sup> unless this is impossible, or if the juvenile reaches adulthood the internal security forces members shall handle this.



- ➔ If the juvenile rebels or escapes from the rehabilitation or correction institute, the director of the institute shall report this to the court who took the measure. The judge may decide, after hearing the juvenile, if he/she appease before the court, and the social representative, to extend the duration of the measure or replace the remaining period with a more severe measure (article 16 of Law 422)
- ➔ The juvenile judge may, based on the report of the person responsible for the juvenile and the social investigation, after hearing the juvenile, replace the measure taken with a more severe or lighter measure and terminate or suspend it under conditions that he determines if he sees this as useful (art. 19 of Law 422).
- ➔ The social representative shall monitor the juvenile and report every three months on his / her situation to the authority who took the measure (article 21 of Law 422).

### **Good practices**

- ➔ **The role of the UPEL social worker in Lebanon during the legal procedures:** <sup>36</sup>
  - ➔ Coordinate with the social representative at the court and distribute roles in terms of intervention with family and juveniles.
  - ➔ Offer emotional and social support for parents.
  - ➔ Search for social authorities and rules, recruit networks and enable the family to cope with the current situation.
  - ➔ Intervene in extreme cases.
  - ➔ Facilitate family cooperation with the social representative.
  - ➔ Provide the social representative with information and experience on the status of the juvenile to enable him/her to prepare the juvenile's social file and propose the most appropriate measure for the judge including the interest of the juvenile.
- ➔ **The role of the social worker in the rehabilitation of juvenile offenders**
  - ➔ Develop and participate in an individual rehabilitation program.
  - ➔ Develop a behavioral change strategy, define mechanisms of action and evaluation measures.
  - ➔ Work on the causes that led to the delinquency of the juvenile: Identify and work on the economic, social, family and emotional elements of the offense.
  - ➔ Enable the juvenile through specialized and educational support to solve his/her problems in a constructive manner acceptable by the community.
  - ➔ Work with the juvenile to build his self-confidence and restore confidence in adults, in authority and in society.

<sup>36</sup> <http://ahdath.justice.gov.lb/file-chart-Workers-Role.htm#top> (1)

### ➔ The role of the social worker in preventing recidivism

- ➔ Support and help the juvenile not to become delinquent again.
- ➔ Strengthen the juvenile ability to settle within his family, work and surroundings.
- ➔ Facilitate adaptation in new circumstances.
- ➔ Enable the juvenile to face difficulties and seek help from the social worker
- ➔ Strengthen the capacity of society to accept juvenile offenders through education, acceptance, exclusion of prejudices and marginalization.
- ➔ Find useful interests for the juvenile that will help him/her to participate constructively in the community and enhance his/her self-confidence.

## 2.2 The procedural rights of the child in conflict with the law

Article 40, paragraph 2, of the Convention on the Rights of the Child contains a list of rights and guarantees, all of which aim to ensure that every child in conflict with the law is treated properly and is guaranteed a fair trial. One of the prerequisites for the proper and effective implementation of these rights and guarantees is the competence of persons involved in the administration of the judiciary. The training of professionals, such as police officers, prosecutors, legal representatives of children, judges, observers, social workers and others is extremely important and should be systematic and ongoing.

These professionals should be aware of the physical, psychological, mental and social development of children and adolescents in particular, and the special needs of vulnerable groups such as children with disabilities, displaced children, street children, refugee and asylum-seeking children, and children belonging to ethnic, religious, linguistic or other minorities. Since girls are easily overlooked in the child justice system because they represent only a small group, special attention must be paid to their needs, such as those related to past abuse or special health needs.

Professionals should behave under all circumstances 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<sup>37</sup>.

All of the guarantees recognized in article 40, paragraph 2, of the Convention on the Rights of the Child constitute minimum standards, which means that States parties can and should attempt to establish and respect higher standards in areas such as legal

<sup>37</sup> Convention art. 40, para. 1

assistance and the involvement of the child and his or her parents' participation in the judicial process.

Guarantees are not limited to the implementation of the provisions set out in articles 37 and 40 of the Convention, but should also take into account the general principles established in articles 2 (non-discrimination), 3 (primary consideration in the best interests of the child), 6 (the child's right to life, survival and development) and 12 (the child's right to be heard).

**Below are the rights that social services providers must be aware of to defend the child in conflict with the law and which shall be respected in all proceedings:**

### 1) Non-discrimination<sup>38</sup>

- ➔ The right to non-discrimination means that the rights contained in the Convention on the Rights of the Child apply to every child within the jurisdiction of the State party "irrespective of the child's or his/ her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status" and without discrimination "on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. (art. 2 of the Convention)
- ➔ In particular, gender-sensitive attention should be paid to girls [...] and accommodation should be made for children with disabilities, which may include physical access to court and other buildings, support for children with psychosocial disabilities, assistance with communication and the reading of documents, and procedural adjustments for testimony<sup>39</sup>.



*In accordance with the principle of non-discrimination, a social service provider may not refuse to defend a child because of his nationality, color, religion, etc. and must make sure that the child in conflict with the law is not subject to discrimination.*

<sup>38</sup> The Committee on the Rights of the Child has identified four general principles of the Convention on the Rights of the Child necessary for the interpretation and enforcement of all children's rights (general comment No. 5 (2003) on general measures to implement the Convention on the Rights of the Child, para. 12 and general comment No. 12 (2009) on the right of the child to be heard.):

1. Non-discrimination,
2. Primary consideration for the best interests of the child;
3. The right to life, survival and development (art. 6 of the Convention);
4. The right of the child to be heard.

<sup>39</sup> CRC General Comment No. 24 (2019) para. 40

## 2) Primary consideration for the best interests of the child

- ➔ In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (art. 3, para 1 of the Convention)<sup>40</sup>
- ➔ For the protection of the best interests of the child, for example, the traditional objectives of justice, such as repression and retribution, shall be replaced by objectives such as rehabilitation and correctional justice when dealing with children in conflict with the law.
- ➔ It is not in the best interests of the child to grow up in circumstances where the involvement of the child in criminal activities may become an increased or dangerous possibility. Various measures should therefore be taken for the full and equal enjoyment of the right of an adequate standard of living (Article 27), of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health and access to such health care services (article 24), education (articles 28 and 29), and protection from all forms of violence or physical or mental harm or abuse (article 19), economic or sexual exploitation (articles 32 and 34), and the right to other care or protection services for children.



*The social service provider protects the child by safeguarding his or her best interest by diagnosing, presenting and explaining it to the court that is, making sure that the court does not take decisions that are contrary or threatening to that interest, which may lead to the social exclusion of the child or his or her delinquency.*

### ***The concept of the best interests of the child***

- The Convention on the Rights of the Child has not defined the concept of “best interests of the child”. However, in accordance with the UNHCR Guidelines on “Determining the Best Interests of the Child” (May 2008), the term “best interests” broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child’s environment and experiences.
- The concept of the best interests of the child is designed to ensure the full and efficient enjoyment of all rights recognized in the Convention on the Rights of the Child.

<sup>40</sup> CRC General Comment No. 4 on the right of the child to primary consideration for his/her best interests

- ➔ The application of the principle with regard to children in conflict with the law includes: separation of children from adults in prison (art. 37 of the Convention), procedural safeguards, including the presence of the child's parents during court hearings in criminal cases involving children infringing the law (art. 40/2/b/ii).

### *How to assess the best interests of the child*

- ➔ The concept of the child's best interests is flexible and adaptable.→ It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.<sup>41</sup> These circumstances relate to the individual characteristics of the child or children concerned, such as, inter alia, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc.<sup>42</sup>
- ➔ The elements that must be taken into account when assessing and defining children's best interests, are: (1) the child's views, (2) the identity of the child<sup>43</sup> and (3) the Preservation of the family environment and maintaining relations. <sup>44</sup> In accordance with the UNHCR Guidelines on the Determination of the Best Interests of the Child (2008) A "best interests determination" (BID) describes the formal process with strict procedural safeguards designed to determine the child's best interests for particularly important decisions affecting the child. [...] This process should ensure the appropriate and non-discriminatory participation of the child, who must be able to express his/her views and to have such views given due weight in accordance with the child's age and level of maturity."

### Comparative Law



The principle of the primary consideration for the best interests of the child is enshrined in many national laws, for example, article 47 of the **Tunisian Constitution** (also article 4 of the Code for Protection of the Child), article 2

<sup>41</sup> CRC General Comment No. 14, para 32

<sup>42</sup> CRC General Comment No. 14, para 48

<sup>43</sup> The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities. The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests. CRC General Comment No. 14, para 55

<sup>44</sup> CRC General Comment No. 14, para 52

of the Lebanese **Law No. 422**, and article 7 of the **Algerian Child Protection Act**.

### CASE LAW

#### **Single Penal Judge in Jeb Jenin (Lebanon), Decision No. 625/2015, dated 30/10/2015:**

The law establishes special guarantees for the prosecution of a minor who is in conflict with the law or at risk to protect all the rights of the minor and to secure his/her best interest. These are public order rules and may not be violated.

### **3) The right of the child to be heard<sup>45</sup>**

- ➔ The right of all children to be heard constitutes one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified article 12 as one of the four general principles of the Convention, [...] which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.<sup>46</sup>
- ➔ Children in conflict with the law have the right to be heard (article 12/2). This right has to be fully observed during all stages of the judicial process, from the pre-trial stage when the child has the right to remain silent, to the right to be heard by the police, the prosecutor and the investigating judge. It also applies through the stages of adjudication and disposition, as well as implementation of the imposed measures. In case of diversion, including mediation, a child must have the opportunity to give free and voluntary consent and must be given the opportunity to obtain legal and

<sup>45</sup> Article 12 of the Convention:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

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

+ CRC General Comment No. 12 (2009) on the right of the child to be heard.

<sup>46</sup> CRC General Comment No. 12 (2009) on the right of the child to be heard, para 2

other advice and assistance in determining the appropriateness and desirability of the diversion proposed.<sup>47</sup>

- ➔ The child should have the right to express his / her views freely and these views shall be given due weight in accordance with the age and maturity of the child (Article 12/1) throughout the child judicial process. This means that the child must not only be informed of the charges against him / her, but must also be informed of the process of child justice itself and of possible measures, so that he / she can participate efficiently in the proceedings. The child should be given the opportunity to express his / her views on diversions that may be imposed and his /her determined desires or preferences in this respect must be given due consideration. Researches show that the active involvement of children in this implementation often contributes to a positive outcome.
- ➔ “Freely” means that the child can express his / her views without pressure and can choose whether or not he / she wants to exercise her or his right to be heard. “Freely” also means that the child must not be manipulated or subjected to undue influence or pressure<sup>48</sup>. The child, however, has the right not to exercise this right. Expressing views is a choice for the child, not an obligation. It must be ensured that the child receives all necessary information and advice to make a decision in favor of his / her best interests<sup>49</sup>.
- ➔ Simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views<sup>50</sup>. The decision maker has to inform the child of the outcome of the process and explain how his / her views were considered. The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously<sup>51</sup>.
- ➔ By requiring that due weight be given in accordance with age and maturity, article 12 makes it clear that age alone cannot determine the significance of a child's views. Children's levels of understanding are not uniformly linked to their biological age. Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view. For this reason, the views of the child have to be assessed on a case-by-case examination<sup>52</sup>.
- ➔ Article 12 does not impose an age limit on the right of the child to express his or her views. The Committee on the Rights of the Child has prohibited States parties from

<sup>47</sup> CRC General Comment No. 12 (2009), para 58 and 59

<sup>48</sup> CRC General Comment No. 12 (2009), para 22

<sup>49</sup> CRC General Comment No. 12 (2009), para 16

<sup>50</sup> CRC General Comment No. 12 (2009), para 28

<sup>51</sup> CRC General Comment No. 12 (2009), para 45

<sup>52</sup> CRC General Comment No. 12 (2009), para 29



setting age limits whether in law or in practice, which may limit the right of the child to be heard in all matters affecting him/her.

- ➔ A child should not be interviewed more often than necessary, in particular when harmful events are explored. The “hearing” of a child is a difficult process that can have a traumatic impact on the child<sup>53</sup>. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age.<sup>54</sup>
- ➔ After the child has decided to be heard, he or she will have to decide how to be heard: “either directly, or through a representative or appropriate body”. The representative may be a parent, or both parents, a lawyer or other (social worker for example)<sup>55</sup>. The child must, furthermore, receive information about the option of either communicating directly or through a representative<sup>56</sup>.

### Comparative Law



#### **Lebanese law**

##### ***Applications of principle:***

- ➔ The juvenile judge shall decide on the extension of the non-custodial measure after hearing the juvenile, the person in charge of him / her or to whom he /she was handed and the social representative (article 12 of Law 422).
- ➔ The juvenile shall be held at the discipline institute for a minimum period of three months. If he/she completes 21 years old at the institute, the judge may, at the request of the juvenile or the social representative, upon obtaining a social investigation, and a report of the director of the institute and after hearing the juvenile, release him/her and, if necessary, place him/her under release on probation. (Article 14 of Law 422).
- ➔ The juvenile judge may, based on the report of the person responsible for the juvenile and the social investigation, after hearing the juvenile, replace the measure taken with a more severe or lighter measure and terminate or suspend it under conditions that he determines if he sees this as useful (art. 19 of Law 422).

#### **Tunisian law**

The Code for the Protection of the Child guarantees the child “the right to express his or her views freely” and guarantees that these views are given due consideration in accordance with the child's age and maturity. For this

<sup>53</sup> CRC General Comment No. 12 (2009), para 24

<sup>54</sup> CRC General Comment No. 12 (2009), para 34

<sup>55</sup> CRC General Comment No. 12 (2009), para 35

<sup>56</sup> CRC General Comment No. 12 (2009), para 41



purpose, the child shall in particular have the opportunity to express his / her views and to be involved in judicial proceedings and in the social and educational measures concerning his or her situation (Article 10). The code not only states the child's right to expression, but also to efficient participation in decision-making.

***Applications of principle:***

- ➔ The children's judge shall examine the violations without the presence of the child unless the child so desires (article 73 of the Code for the Protection of the Child).
- ➔ The child shall be present upon examination of the file to consult on the measures or punishment before the children's judge (article 90 of the Code for the Protection of the Child).
- ➔ The judgment shall be issued by the children's judge or the children's court after hearing the child (article 95 of the Code for the Protection of the Child).
- ➔ The child has the right to appeal (article 104 of the Code for the Protection of the Child).
- ➔ The child has the right to request a decision on execution difficulties and all emergency matters and to request the re-examination of the file (article 110 of the Code for the Protection of the Child).
- ➔ The child has the right to request a change to the decision in absentia (article 111 of the Code for the Protection of the Child).
- ➔ The child may submit a request for mediation (article 116 of the Code for the Protection of the Child)

#### 4) Legal or other appropriate assistance<sup>57</sup>

- ➔ The person providing the assistance is required to have sufficient knowledge of the legal aspects of the child justice process and receive appropriate training on working with children in conflict with the law and to offer assistance free of charge. As required under article 14 (3) (b) of the International Covenant on Civil and Political Rights, the child and his or her assistant must have adequate time and facilities for the preparation of his/her defence.
- ➔ Under the Convention on the Rights of the Child, the confidentiality of oral or written communications between the child and his or her legal representative or other assistant is to be guaranteed (Convention -art. 40 (2) (b) (vii)), and the child's right of protection against interference with his or her privacy and correspondence is to be respected (art. 16 of the convention).<sup>58</sup>

<sup>57</sup> Convention -art (2) (b) (ii)),

<sup>58</sup> CRC General Comment No. 24 (2019), para 53

## 5) The right to protection from all forms of violence<sup>59</sup>

- ➔ States parties, furthermore, shall ensure that all persons who, within the context of their work, are responsible for the prevention of, protection from, and reaction to violence and in the justice systems are addressing the needs and respecting the rights of children<sup>60</sup>.
- ➔ **Definition of violence**<sup>61</sup>. “All forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or Exploitation, including sexual abuse” as listed in article 19, paragraph 1, of the Convention. The term violence has been chosen here to represent all forms of harm to children. In common parlance the term violence is often understood to mean only physical harm and/or intentional harm. However, the Committee emphasizes most strongly that the choice of the term violence in the present general comment must not be interpreted in any way to minimize the impact of, and need to address, non-physical and/or non-intentional forms of harm (such as, inter alia, neglect and psychological maltreatment).<sup>62</sup>



In a series of judgments, the **European Court of Human Rights** has incrementally condemned corporal punishment of children, first in the criminal system, then in schools including private schools and then at home: *Tyrer v. United Kingdom*, 1978; *Campbell and Cosans v. United Kingdom*, 1993; *Costello-Roberts v. United Kingdom*, 1998<sup>63</sup>.

<sup>59</sup> Article 19 of the Convention on the Rights of the Child: “1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.” + CRC General Comment No. 13 (2011) on The right of the child to freedom from all forms of violence

<sup>60</sup> CRC General Comment No. 13 (2011), para 5

<sup>61</sup> For the purposes of CRC General Comment No. 13 (2011) on The right of the child to freedom from all forms of violence

<sup>62</sup> CRC General Comment No. 13 (2011), para 4

<sup>63</sup> Refer to the judgments issued by the European Court of Human Rights on the following address: <http://www.echr.coe.int/echr>

## 6) The right to effective participation in the proceedings<sup>64</sup>

- ➔ To effectively participate, a child needs to comprehend the charges and possible consequences and options in order to direct the legal representative, challenge witnesses, provide an account of events and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Proceedings should be conducted in a language the child fully understands or an interpreter is to be provided free of charge.
- ➔ Proceedings should be conducted in an atmosphere of understanding to allow children to fully participate. Developments in child-friendly justice provide an impetus towards child-friendly language at all stages, child-friendly layouts of interviewing spaces and courts, support by appropriate adults, removal of intimidating legal attire and adaptation of proceedings, including accommodation for children with disabilities<sup>65</sup>.

### Comparative law

#### **Review paragraph 3 (Right of the child to be heard)**

## 7) Principle of protection of the child's privacy

- ➔ A child in conflict with the law shall be treated in a manner consistent with the promotion of the child's sense of dignity and worth, and therefore his or her privacy must be fully respected at all stages of the proceedings. (Convention-art. 40, para. 2 vii). This is in addition to the general principle set forth in Article 16<sup>66</sup>.



*Respect for the private life of the child is one of the most important duties of social services providers and one of the parties most keen to protect the private life of the child because of the nature of their tasks, especially in terms of access to the facts of the case and the child's family, social and psychological circumstances, etc.*

<sup>64</sup> Convention -art. 40 (2) (b) (ii)

<sup>65</sup> CRC General Comment No. 24 (2019), para 46

<sup>66</sup> Article 16: "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks."



The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") stressed the importance of the protection of the juvenile's right to privacy at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. (Rule 8)

Guideline 10 on Special measures for children of United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems states that "The privacy and personal data of a child who is or who has been involved in judicial or non-judicial proceedings and other interventions should be protected at all stages, and such protection should be guaranteed by law. This generally implies that no information or personal data may be made available or published, particularly in the media, that could reveal or indirectly enable the disclosure of the child's identity, including images of the child, detailed descriptions of the child or the child's family, names or addresses of the child's family members and audio and video records."

- ➔ States parties should respect the rule that child justice hearings are to be conducted behind closed doors. Exceptions should be very limited and clearly stated in the law.
- ➔ If the verdict and/or sentence is pronounced in public at a court session, the identity of the child should not be revealed. Furthermore, the right to privacy also means that the court files and records of children s should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case.<sup>67</sup>
- ➔ Case-law reports relating to children should be anonymous, and such reports placed online should adhere to this rule.<sup>68</sup>
- ➔ There should be lifelong protection from publication regarding crimes committed by children. The rationale for the non-publication rule, and for its continuation after the child reaches the age of 18, is that publication causes ongoing stigmatization, which is likely to have a negative impact on access to education, work, housing or safety. This impedes the child's reintegration and assumption of a constructive role in society. States parties should thus ensure that the general rule is lifelong privacy protection pertaining to all types of media, including social media.<sup>69</sup>

<sup>67</sup> CRC General Comment No. 24 (2019), para 67

<sup>68</sup> CRC General Comment No. 24 (2019), para 68

<sup>69</sup> CRC General Comment No. 24 (2019), para 70

## Comparative Law



### **Lebanese law**

It is prohibited to publish the photo of the juvenile and to publish the facts of the investigation and trial or its summary in books, newspapers, cinema, and any other media. The final judgment may be published provided that the defendant's name, nickname and surname are mentioned only in initials. Any violation of these provisions shall entail a sanction of imprisonment from three months to one year and a fine of one to five million LBP or one of these two sanctions (Article 48 of Law 422).

### **Tunisian law**

Article 6 of the Code for the Protection of the Child, sets out the principle of respect for the child's private life; Article 12 guarantees the right of the child to whom the charge is attributed "to a treatment that protects his/her honour and person." To this end, judicial hearings are confidential and the publication of pleadings and decisions of judicial bodies is prohibited<sup>70</sup>

## Case law

### **Lebanese Criminal Cassation, Decision No. 4/2011 Publications, dated 10/2/2011:**

Although article 48 of Law No. 422/2002 permits the publication of final judgments against juveniles, it stipulates that the name, nickname and surname of the defendant should not be mentioned except in initials, which the newspaper did not adhere to. The Court of Publications, by convicting the director in charge of the publication in accordance with the said article 48, in addition to article 26 of Law No. 104/77, would have properly applied the law. Whereas the foregoing may not be revoked by invoking the fact that the respondent had reached adulthood on the date of publication of the news subject of the complaint and therefore this precludes the application of the provisions of Article 48 since the protection conferred by Law No. 422/2002 to the juvenile extends over time even when the latter reaches the age of adulthood.

<sup>70</sup> Public hearings in judicial hearings is one of the principles of a fair trial, but the trial of children has its own specificity, which makes confidentiality a means of protecting the child in conflict with the law in his or her private life, this is why judgments shall be rendered separately for each case with the attendance of defendants in other cases. Persons who are allowed to attend the hearings are limited by the text and are generally those whose attendance is strictly necessary (the purpose of confidentiality is to ensure respect for the child's private life).

## 8) Free assistance of an interpreter<sup>71</sup>

- ➔ If a child cannot understand or speak the language used by the juvenile justice system, he/she has the right to get free assistance of an interpreter. This assistance should not be limited to the court trial but should also be available at all stages of the juvenile justice process. It is also important that the interpreter has been trained to work with children. The condition starting with “if”, “if the child cannot understand or speak the language used”, means that a child of a foreign or ethnic origin for example, who - besides his/her mother tongue - understands and speaks the official language, does not have to be provided with the free assistance of an interpreter.
- ➔ With reference to the rights enshrined in article 23 and given the high level of vulnerability of **children with disabilities**, the following elements of the treatment of children with disabilities (allegedly) in conflict with the law be taken into account: a) A child with disability who comes in conflict with the law should be interviewed using appropriate languages and otherwise dealt with by professionals such as police officers, attorneys/advocates/social workers, prosecutors and/or judges, who have received proper training in this regard.<sup>72</sup>

**In addition to the abovementioned rights, the child in conflict with the law has the other rights mentioned below:**

- ➔ Child justice shall not be applied retrospectively (art. 40(2)(a)): This means that “No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed.”
- ➔ The right to be presumed innocent; which means that the public prosecution shall bear the burden of the proving the child committed the offense of which he/she was accused. (art. 40(2)(b)(i))
- ➔ The right to be informed promptly and directly of the charges against him or her. (art. 40(2)(b)(ii))
- ➔ The right to have the matter determined without delay in the presence his or her parents. (art. 40(2)(b)(iii))
- ➔ The right not to be compelled to give testimony or to confess guilt: This means that torture or cruel, non-humane or degrading treatment for obtaining a confession or an acknowledgment shall be deemed a violation of the right of the child. (art. 37(2)(b)(iv));
- ➔ The right to appeal (art. 40 (2)(b)(v))

<sup>71</sup> Convention-art. 40 (2) (vi)

<sup>72</sup> CRC General Comment No. 9, para 74.

## 2.3 Dispositions related to the child in conflict with the law

- ➔ The reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances (age, lesser culpability, circumstances and needs, including, if appropriate, the mental health needs of the child). A strictly punitive approach is not in accordance with the principles of child justice spelled out in article 40 (1) of the Convention. Where serious offences are committed by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need for public safety and sanctions. Weight should be given to the child's best interests as a primary consideration as well as to the need to promote the child's reintegration into society.
- ➔ Recognizing the harm caused to children and adolescents by deprivation of liberty, and its negative effects on their prospects for successful reintegration, the Committee recommends that States parties set a maximum penalty for children accused of crimes that reflects the principle of the "shortest appropriate period of time" (Convention on the Rights of the Child, art. 37 (b)).<sup>73</sup>
- ➔ When a child is deprived of his or her liberty, he has guaranteed rights →<sup>1</sup> The right to medical examination by qualified professionals and in a manner that respects the privacy of the child, the right to visit and communicate with parents, the right to physical integrity, etc.

### Comparative Law



#### **Lebanese law**

A juvenile who violates the law should benefit from humane and fair treatment; the manner by which the child is prosecuted, investigated, shall be subject to special procedures that save him, to the extent possible, from normal criminal procedures through adopting amicable settlements and solutions, away from liberty depriving measures. (Article 2 of Law 422).

#### **Tunisian law**

Article 79 of the Code of Protection of the Child states that "the children's judge or children's court shall take, as the case may be, appropriate means of prevention, relief, surveillance and education. Exceptionally, they may, based on facts and the personality of the child, punish the child who has reached the age of fifteen with a criminal penalty. In this case, the punishment shall be served in an appropriate and competent institution":

➔ The legislator confirmed the adoption of social means, excluding the criminal penalties and rendering them an exception, provided that their primary purpose is to redress and rehabilitate the child, as indicated in

<sup>73</sup> CRC General Comment No. 24 (2019), para 76 et seq.



article 99 of the Code of Protection of the Child, allowing a criminal penalty when such penalty is deemed required for the child's rehabilitation.

➔Exceptionally, a child who has reached the age of fifteen can be punished with a criminal penalty. A child who has not reached the age of fifteen cannot be punished with a criminal penalty but only subject to the appropriate means of prevention, relief, surveillance and education.

### Case law

#### **Juveniles Judge in Zahle (Lebanon), Decision No. 4/2014, dated 4/9/2014:**

In implementation of the provisions of Article 3 of the Convention on the Rights of the Child, and the provisions of Articles 2, 7, 10 and 19 of the law on the protection of juveniles in conflict with the law or at risk No. 422/2002 the penalty imposed on the juvenile must be replaced with a rehabilitation measure and the child must be placed under the measure of release on probation for one year in order to safeguard the minor's interest and rights and to guarantee that all signs of criminal behavior are eliminated from the child's personality and behavior and with the aim of ensuring his rehabilitation outside the framework of the penal institution.

### **1) Protection of the child from corporal punishment and other cruel or degrading forms of punishment**

- ➔ The Committee defines "corporal" or "physical" punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices).
- ➔ In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.<sup>74</sup>

<sup>74</sup> CRC General Comment No. 8, para 11





Social service providers shall not impose on the child a physical or psychological punishment.



The Committee of the Rights of the Child recognizes that there are exceptional circumstances in which teachers and others, e.g. those working with children in institutions and with children in conflict with the law, may be confronted by dangerous behaviour which justifies the use of reasonable restraint to control it. Here too there is a clear distinction between the use of force motivated by the need to protect a child or others and the use of force to punish. The principle of the minimum necessary use of force for the shortest necessary period of time must always apply. Detailed guidance and training is also required, both to minimize the necessity to use restraint and to ensure that any methods used are safe and proportionate to the situation and do not involve the deliberate infliction of pain as a form of control.<sup>75</sup>

- ➔ Article 37 of the Convention requires States to ensure that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”. This is complemented and extended by article 19, which requires States to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”. There is no ambiguity: “all forms of physical or mental violence” does not leave room for any level of legalized violence against children.<sup>76</sup>
- ➔ Corporal punishment and other cruel or degrading forms of punishment of children take place in many settings, including within the home and family, in all forms of alternative care, schools and other educational institutions and justice systems - both as a sentence of the courts and as a punishment within penal and other institutions - in situations of child labour, and in the community.<sup>77</sup>

<sup>75</sup> CRC General Comment No. 8, para 15

<sup>76</sup> CRC General Comment No. 8, para 18

<sup>77</sup> CRC General Comment No. 8, para 12



In a decision issued by the **African Commission on human and people's rights**<sup>78</sup> in 2003<sup>79</sup> on a communication related to imposing the penalty of lashing against students, the commission concluded that the penalty violates Article 5 of the African Charter on human and people's rights, which specifies that cruel, inhuman or degrading punishment and treatment shall be prohibited. The African Commission requested the Government of Sudan to amend its laws to abolish the penalty of lashes and take appropriate measures to ensure compensation of the victims. The decision stated that "there is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the Charter and contrary to the very nature of this human rights treaty."

## 2) Abolishing the death penalty

- ➔ Article 37/a of the Convention on the rights of the child reiterates the internationally recognized standard (for example Article 6/5 of the International Covenant on the Civil and Political Rights) that capital punishment shall be imposed for offences committed by persons below eighteen years of age.
- ➔ Despite the clarity of the text, a few States parties assume that the rule prohibits only the execution of persons who are below the age of 18 years at the time of execution. The Committee reiterates that the explicit and decisive criterion is the age at the time of the commission of the offence<sup>80</sup>. This means that the death penalty may not be imposed for a crime committed by a person under the age of 18 regardless of the age at the time of trial, sentencing or execution.

## 3) No life imprisonment without parole

- ➔ No child who was below the age of 18 at the time he or she committed an offence should be sentenced to life imprisonment without the possibility of release or parole.

<sup>78</sup> The African Commission on Human and Peoples' Rights monitors the implementation of the African Charter on Human and Peoples' Rights.

<sup>79</sup> African Commission on Human and Peoples' Rights, *Curtis Francis Doebbler v. Sudan*, Commission Comment No. 236/2000 (2003), para. 42.

<sup>80</sup> CRC General Comment No. 24 (2019), para 79



Article 25 of the Convention on the Rights of the Child recognizes the right of every child who has been placed by the competent authorities for the purposes of care, protection or treatment, to a periodic review of the circumstances relevant to his or her placement.

- ➔ In the case that children are sentenced to life imprisonment with the possibility of release or parole, the aims of article 40 (1) of the Convention must be realized. This means, inter alia, that a child sentenced to life imprisonment should receive education, treatment and care aiming at his/her release, reintegration and ability to assume a constructive role in society. This also requires a regular review of the child's development and progress in order to decide on his or her possible release. Life imprisonment makes it very difficult, if not impossible, to achieve the aims of reintegration. The Committee strongly recommends that States parties abolish all forms of life imprisonment, including indeterminate sentences, for all offences committed by persons who were below the age of 18 at the time of commission of the offence.<sup>81</sup>

### Comparative Law



#### Lebanese law

The juvenile shall be sentenced with reduced penalties according to the following:

- 1- In the offenses and misdemeanors, the penalties observed in the law, including fines, shall be reduced by half.
- 2- In felonies, if the felony is punishable by death or hard labor for life, it shall be reduced to imprisonment for five to fifteen years. In other offenses, the minimum and maximum imprisonment limit shall be reduced by half (Article 15 of Law 422).

#### Tunisian law

Delinquents shall not be sentenced to death and life imprisonment. According to article 43 of the Criminal Code, "If the penalty imposed is one of death or of life imprisonment, it shall be replaced by a term of imprisonment of 10 years. If the penalty incurred is a term of imprisonment, it shall be reduced by one half, provided the pronounced sentence does not exceed five years. Supplementary penalties shall not apply ... (residence ban, denial of exercise of rights, etc.) as well as the rules of recidivism" (Article 43 of the Criminal Code).

<sup>81</sup> CRC General Comment No. 24 (2019), para 81

#### 4) Treatment and conditions

- ➔ Every child deprived of liberty is to be separated from adults, including in police cells. A child deprived of liberty is not to be placed in a centre or prison for adults. The permitted exception to the separation of children from adults stated in article 37 (c) of the Convention – “unless it is considered in the child’s best interests not to do so” – should be interpreted narrowly and the convenience of the States parties should not override best interests. The above rule does not mean that a child placed in a facility for children should be moved to a facility for adults immediately after he or she reaches the age of 18. The continuation of his or her stay in the facility for children should be possible if that is in his or her best interests and not contrary to the best interests of the children in the facility.<sup>82</sup>
- ➔ Every child deprived of liberty has the right to maintain contact with his or her family through correspondence and visits. To facilitate visits, the child should be placed in a facility as close as possible to his or her family’s place of residence. Exceptional circumstances that may limit this contact should be clearly described in law and not be left to the discretion of the authorities.<sup>83</sup>
- ➔ In all cases of deprivation of liberty, the following principles and rules are observed:
  - Children should be provided with a physical environment and accommodation conducive to the reintegrative aims of residential placement. Due regard should be given to their needs for privacy, for sensory stimuli and for opportunities to associate with their peers and to participate in sports, physical exercise, arts and leisure-time activities;
  - Every child has the right to education suited to his or her needs and abilities, including with regard to undertaking exams, and designed to prepare him or her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him or her for future employment;
  - Every child has the right to be examined by a physician or a health practitioner upon admission to the detention or correctional facility and is to receive adequate physical and mental health care throughout his or her stay in the facility, which should be provided, where possible, by the health facilities and services of the community;
  - The staff of the facility should promote and facilitate frequent contact by the child with the wider community, including communications with his or her family, friends and other persons, including representatives of reputable outside organizations, and the opportunity to visit his or her home and family. There is to be no restriction on the child’s ability to communicate confidentially and at any time with his or her lawyer or other assistant;

<sup>82</sup> CRC General Comment No. 24 (2019), para 92

<sup>83</sup> CRC General Comment No. 24 (2019), para 94

- Restraint or force can be used only when the child poses an imminent threat of injury to himself or herself or others, and only when all other means of control have been exhausted. Restraint should not be used to secure compliance and should never involve deliberate infliction of pain. It is never to be used as a means of punishment. The use of restraint or force, including physical, mechanical and medical or pharmacological restraints, should be under close, direct and continuous control of a medical and/or psychological professional. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;
  - Any disciplinary measure is to be consistent with upholding the inherent dignity of the child and the fundamental objectives of institutional care. Disciplinary measures in violation of article 37 of the Convention must be strictly forbidden, including corporal punishment, placement in a dark cell, solitary confinement or any other punishment that may compromise the physical or mental health or well-being of the child concerned, and disciplinary measures should not deprive children of their basic rights, such as visits by legal representative, family contact, food, water, clothing, bedding, education, exercise or meaningful daily contact with others;
  - Solitary confinement should not be used for a child. Any separation of the child from others should be for the shortest possible time and used only as a measure of last resort for the protection of the child or others. Where it is deemed necessary to hold a child separately, this should be done in the presence or under the close supervision of a suitably trained staff member, and the reasons and duration should be recorded;
  - Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or any other proper independent authority, and to be informed of the response without delay. Children need to know their rights and to know about and have easy access to request and complaints mechanisms;
  - Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting;<sup>84</sup>
- ➔ Visiting detention centers and reviewing the conditions of detention of children represents a major competency for these institutions. [...] Independent institutions regularly advocate the separation of juveniles from adults and make recommendations for the improvement of juvenile detainees' living conditions<sup>85</sup>.

<sup>84</sup> CRC General Comment No. 24 (2019), para 95

Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children,<sup>85</sup> (2)

Summary Report, UNICEF Research Office 2012, p. 11.

[https://www.unicef-irc.org/publications/pdf/championing2\\_eng.pdf](https://www.unicef-irc.org/publications/pdf/championing2_eng.pdf) (3)

### Comparative Law



#### **Lebanese law**

The penalty shall be imposed by placing the juvenile in the disciplinary institute or in a juvenile prison, as determined by the judge (art. 15 of Law 422).

#### **Tunisian law**

A child may be subject to a criminal sanction, subject to the provisions of the Code, if it appears that his or her rehabilitation requires it. In this case, the sanction shall be served in a specialized institution (the Correctional Center), when this is not possible, in a prison ward dedicated to children (Article 99 of the Code for Protection of the Child).

The child handed to an educational welfare and rehabilitation institution or who is placed in a detention facility shall have the right to health, physical and moral protection, as well as the right to social and educational care, taking into account his age, sex, abilities and personality (article 15 of the Code for Protection of the Child).

### Case law

#### **European Court for Human Rights**

In the case of *Güveç v. Turkey*<sup>86</sup>, a 15 years old boy was arrested on suspicion of membership of the PKK. He was detained in an adult prison where he was kept with adults for a period of over five years. The European Court for Human Rights observed that the applicant's detention in an adult prison was in contravention of the applicable Regulations which were in force at the time and which reflected Turkey's obligations under International Treaties inter alia Article 37 of the Convention on the Rights of the Child which states that every child deprived of liberty shall be separated from adults. The court noted that the conditions of his detention had adversely affected his mental health and had led him to attempt suicide. The Court further considers that the national authorities have manifestly failed to provide adequate medical care for him. Having regard to the applicant's age, the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and, finally, the failure to take steps with a view to preventing his repeated attempts to commit suicide, the Court entertains no doubts that the applicant was subjected to inhuman and degrading treatment. There has accordingly been a violation of Article 3 of the European Convention on Human Rights.

<sup>86</sup> ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

**Tunisian Administrative Court / First Instance / May 24, 2017<sup>87</sup>**

After a child was sentenced to six months' imprisonment for acts such as extremely violent assault, he was put in prison at the age of 16 instead of being placed in a correctional facility. As a result, the child, after being released from prison, suffered neurological disorders and mental illness after being assaulted in prison.

The court held that the placement of the plaintiff, as a child, in prison without being separated from the rest of the prisoners pursuant to the provisions of article 94 of the Code on the Protection of the Child was an error on the part of the administration and entitles the injured person to seek compensation for the ensuing sustained damage.

The court ruled that the officer-in-charge of state litigation with the Ministry of Justice shall pay the plaintiff compensation for his physical and moral harm.

### **3. The importance of cooperation between social service providers and lawyers**

Legal aid plays an important role in facilitating diversion and the use of community-based sanctions and measures, including non-custodial measures; promoting greater community involvement in the criminal justice system; reducing the unnecessary use of detention and imprisonment; rationalizing criminal justice policies; and ensuring efficient use of State resources. (United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems)

Non-governmental organizations can and do play an important role in preventing children delinquency, also in managing child justice. The Committee therefore recommends that States parties seek the active involvement of such organizations in the development and implementation of their comprehensive child justice policy and, where appropriate, provide them with the necessary resources for this involvement.<sup>88</sup>

States should recognize and encourage the contribution of lawyers' associations, universities, civil society and other groups and institutions in providing legal aid. Where appropriate, public-private and other forms of partnership should be established to extend the reach of legal aid. (United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 14)

<sup>87</sup> Not published

<sup>88</sup> CRC General Comment No. 24 (2109), para 110



### 3.1 Fields of cooperation

The importance of cooperation between lawyers and social service providers is particularly evident in their attendance with children, in social reporting, in interventions without recourse to judicial proceedings, in alternative measures and in communications to United Nations conventions committees such as the Committee on the Rights of the Child.



#### **Reminder:**

The social service providers networking extends to other parties and institutions imposed by each proceeding that the child in conflict with the law goes through:

- ➔ Relationship with the police (judicial police).
- ➔ Relationship with the school, the training institution, or others can be based on requesting information and data about the child and on the search for ways to ensure that he or she does not drop out of school or training or any other useful activity or guarantee his or her reintegration.
- ➔ Relationship with the family can be centered around requesting information and data about the child and research on ways and measures that the family can take to avoid the child recidivism.

#### **Conditions for successful cooperation between the intervening parties:**

- ➔ Each intervening party must be aware of the role assigned to it.
- ➔ Each intervening party must be aware of the role assigned to the other parties.
- ➔ Each intervening party must respect the role of other parties.

### **A. Attendance with children and social inquiry reports**

Children in conflict with the law are in need of legal, psychological, social and educational protection within a justice system for children. International standards have stressed the importance of the assistant social, psychological, educational and consultative role of the justice system for children and emphasized the importance of social inquiry reports when dealing with children in conflict with the law. These standards described social inquiry reports as an indispensable aid in most legal proceedings involving juveniles. This is based on the necessity that the competent authority should be informed of relevant facts about the juvenile, such as social and family background, school career, educational experiences, etc.

Principle 16.1 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") states, "In all cases except those involving minor

offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority.”

### Comparative Law



#### **Lebanese law**

- ➔ When bringing the juvenile before the Public Prosecution or the judicial police on count of offense for investigation, the investigating officer shall immediately contact the accredited social representative and invite him/her to attend the investigation. The representative shall be present within six hours as of the time of his invitation. The investigation may not commence unless the representative is present under the pain of disciplinary prosecution. If the representative is unable to attend for any reason, the Public Prosecution or the Juvenile Department at the Ministry of Justice shall appoint a social representative from one of the associations classified in this department to appear with the juvenile during the investigation. The presence of the social representative is not sufficient. The representative must undertake social research and submit its findings to the person carrying the investigation with the juvenile (article 34 of Law 422.)
- ➔ The investigating judge, at the beginning of the investigation of the juvenile, shall follow the procedures set forth above (Article 35 of Law 422.)
- ➔ If a social file has not been opened for the juvenile within the scope of the prosecution, investigation and trial proceedings, the juvenile court shall, prior to sentencing, obtain a social investigation by the authorized social representative or by the representative commissioned by the court to carry out this task from among social workers.
- ➔ The investigation shall include the necessary information on the financial and social situation of the juvenile, his/her social, school and professional environment, his/her ethics, the degree of his/her intelligence, his/her mental and health status and his/her criminal backgrounds, with the appropriate correction measure. All according to the current situation at the time of the offense and at the trial<sup>89</sup>.
- ➔ The court may place the juvenile at probationary facility for a period not exceeding three months prior to the verdict if the social investigation or inspection requires such a measure. This time limit

<sup>89</sup> The court may order when necessary any medical examination, whether physical, psychological or mental.

shall be extended only by a justified decision (Article 41 of Law 422).

- ➔ The Juvenile Court shall enforce the rendered judgments through its affiliated clerk office and shall instruct the accredited social representative to accompany the juvenile to the institute or institution to which he or she has been sentenced (art. 49 of Law 422).

### **Tunisian law**

The Children's Judge shall collect through social research all information on the financial and cultural status of the family, the child's personality and precedents, attendance at the school, circumstances of upbringing and education, and, where appropriate, order a health file to be added to the social file by conducting a medical and psychological examination of the child. This report shall imperatively contain the opinion of competent experts and their practical suggestions that would help the court to make the necessary and appropriate decisions and means (article 87 of the Code for the Protection Child).

## **CASE LAW**

### **1- Lebanese Criminal Cassation Decision No. 138/2018, dated 8/3/2018:**

The issue of attendance of a juvenile representative besides the juvenile during interrogation is mandatory according to the text of article 34 of Law No. 422/2002, however, the lawyer must invoke the invalidity of the investigation due to the absence of the juvenile representative before the indictment is issued and the submittal of the case file before the criminal court, otherwise his request will be rejected, as happened in the case below...

The issuance of the indictment conceals the defects that may have marred the preliminary investigation, which requires the rejection of the allegation made by the Claimant that the text of article 34 of Law No. 422/2002 was violated by the fact that a social representative did not appear with the minor during the preliminary investigation and that the minor parents or guardians were not informed, in particular, since the Claimant did not challenge the indictment.

### **Lebanese Criminal Cassation, Decision No. 234/2013, dated 3/10/2013<sup>90</sup>:**

<sup>90</sup> <http://www.legallaw.ul.edu.lb/>

Failure to adhere to the confidentiality of the trial of a minor, holding a public trial, and the absence of a juvenile representative, entail the annulment of the trial proceedings infringing the fundamental principles during trial:

The Court of Cassation overturned the challenged criminal decision pursuant to Article 296 (b) and (d) of the Criminal Code of Procedure on the violation of the law and infringement of the Fundamental Standards During Trial since the Ordinary Criminal Court held a public trial for a minor prosecuted with adults without the presence of a representative from the Union for the Protection of Juveniles in violation of the provisions of Article 33 and Article 40 of Law No. 422 dated 6/6/2002 and of the obligation imposed on the ordinary court to provide the juvenile with all legal guarantees, especially the confidentiality of the trial.

## **B. Interventions that avoid resorting to judicial proceedings**

- ➔ State authorities can use two kinds of measures: i) measures without resorting to judicial proceedings and ii) measures in the context of judicial proceedings. According to Article 40 (3) of the Convention, “[States parties shall seek to promote...] 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. Given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services (i.e. diversion) should be a well-established practice that can and should be used in most cases.<sup>91</sup>
- ➔ States parties are required to promote the establishment of measures for dealing with children without resorting to judicial proceedings, with respect to children committing minor offenses and children committing offenses for the first time... Dealing with all of these cases without resorting to judicial proceedings is in line with the principles specified in Article 40 (1) of the Convention. In addition to avoiding stigmatization and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost-effective.<sup>92</sup>
- ➔ It is necessary that the competent authorities – in most States the public prosecutor – will continuously explore the possibilities of avoiding a court process or conviction, through diversion and other measures. In other words, diversion options should be offered from the earliest point of contact, before a trial commences, and be available throughout the proceedings.
- ➔ In the process of offering diversion, the child’s human rights and legal safeguards should be fully respected, bearing in mind that the nature and duration of diversion

<sup>91</sup> Protecting the Rights of Children in Conflict with the Law

<sup>92</sup> CRC General Comment No. 24, para 15

measures may be demanding, and that legal or other appropriate assistance is therefore necessary.<sup>93</sup>

### *Conditions of diversion before the competent judiciary*

- ➔ Diversion should be used only when there is compelling evidence that the child committed the alleged offence, that he or she freely and voluntarily admits responsibility, without intimidation or pressure, and that the admission will not be used against the child in any subsequent legal proceeding;
- ➔ The child's free and voluntary consent to diversion should be based on adequate and specific information on the nature, content and duration of the measure, and on an understanding of the consequences of a failure to cooperate or complete the measure;
- ➔ The law should indicate the cases in which diversion is possible, and the relevant decisions of the police, prosecutors and/or other agencies should be regulated and reviewable;
- ➔ The child is to be given the opportunity to seek legal or other appropriate assistance relating to the diversion offered by the competent authorities, and the possibility of review of the measure;
- ➔ The completion of the diversion should result in a definite and final closure of the case. Although confidential records of diversion can be kept for administrative, review, investigative and research purposes, they should not be viewed as criminal convictions or result in criminal records<sup>94</sup>.



*Diversion is referral to alternative social services and therefore to social services providers.*

### C. Alternative measures

Non-custodial measures such as release on probation, which is a measure provided for in comparative law such as Lebanese and Tunisian law (dubbed “guarded freedom”).

#### **Comparative Law**



##### **Lebanese law**

Law No. 422 provided for the guarded freedom (Article 5), which is

<sup>93</sup> CRC General Comment No. 24, para 7.

<sup>94</sup> CRC General Comment No. 24, para 18

“placing the juvenile under the surveillance of the social representative or authority designated for this purpose under the supervision of the judge” (Article 10).

### **Tunisian law**

- If a measure is to be taken or a criminal sanction is to be imposed, it may be permitted to place the child under a system of guarded freedom until he or she reaches the age of twenty (article 101 of the Code for the Protection of the Child).
- The children's investigating judge and the children's judge may place the child under the system of pre-trial guarded freedom measure as a **temporary measure** (Articles 91 and 93 of the Code).
- The child judge can approve this measure as an **initial measure** limited to offenses pursuant to Article 73 of the Code.
- The children's judge (or children's court) may decide, in addition to the initial measures provided for in Article 99 of the Code, to place the child under the guarded freedom system as a **complementary disciplinary means** (implementing the decision on guarded freedom when the child leaves the disciplinary institution).
- The possibility of placing the child under the guarded freedom system as a supplementary measure until the child reaches the age of twenty years, i.e. after the end of childhood in order to inform the child of all means of protection (subsequent protection) (Article 101 of the Code).

- ➔ Principle 16.1 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") states, "In all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority."
- ➔ In order to provide effective care for the child in conflict with the law, it is essential that the lawyer be aware of all social institutions working in the field of child protection in conflict with the law, either to propose a specific institution as a measure or to visit the child upon placement. Thus, the importance of social service providers is evident at every stage of the public prosecution until enforcement of the judgment.

## Comparative Law



### Lebanese Law

- ➔ The protection measure: is the delivery of the juvenile to his parents or one of them or to the legal guardian or his/her family provided that the recipient enjoys the ethical guarantee and the ability to raise him/her under the supervision of the social representative in charge. In the absence of any of these persons in Lebanon or if the above conditions are not met, the juvenile may be handed over to a trusted family or to a **social or health institution accredited by the competent ministries or others if the accredited institutions do not have the required competencies** (Article 9 of Law No. 422).
- ➔ Juveniles who have not attained the age of twelve years may not be arrested unless they are found to be begging or homeless. They shall be arrested in a specialized social institution (Article 35 of Law No. 422).
- ➔ The data system at the Lebanese Ministry of Justice shows that 75% of offences are minor offences, and are mainly property related. In fact, young people are mostly charged with (petty) theft, often committed as a means of survival. The fact that most offences reported are considered minor offences is a strong argument for the use of alternative measures<sup>95</sup>.

### Tunisian law

If the acts attributed to the child are evidenced, the children's court (or children's judge) shall take measures by virtue of a justified decision, including placing the child in a public or **private institution dedicated to education and vocational training and qualified for this purpose** (Article 99 of the Code of Protection of the Child).

## CASE LAW ON ALTERNATIVE MEASURES

### Lebanon

1) On February 2018, the investigating judge in North Lebanon issued a decision ordering two Muslim young men arrested for insulting the Virgin Mary to memorize Quranic verses from Surat Al-Omran glorifying the Virgin Mary, as a condition for their release. This was aimed to make them “learn about tolerance between religions and Muslims' love for the Virgin Mary, contrary to the horrible ideas that extremists place in

<sup>95</sup> Protecting the rights of children in conflict with the law, p. 108  
[https://www.unodc.org/pdf/criminal\\_justice/Protecting\\_children\\_en.pdf](https://www.unodc.org/pdf/criminal_justice/Protecting_children_en.pdf)



their minds.” After the judge confirmed that the young men had memorized the Quranic verses, she ordered their release.

2) On April 2018, the Investigative Judge in Mount Lebanon issued a decision to release the detainee A.G. on the condition that he memorizes a verse from the Holy Quran from Surat Maryam and gave him several days to appear before him again, provided that he had memorized the said verse. This decision comes against the backdrop of a clash between a number of young men in the region of (...) during which A.G. desecrated divine religion and insulted monotheistic religions in what was considered an offense of provoking sectarian strife.

**REMARKS:** With regard to the first decision (the second decision is inspired by the first), which is a precedent in the history of the Lebanese judiciary, the judge enforced a provision in Article 111 of the Code of Criminal Procedure. She replaced the defendants' detention sanction by release them subject to “one or more of the [following] conditions” the judge deems necessary. Remarkably, the mentioned legal article, on which the investigating judge relied, does not explicitly mention among the conditions reading the Quran. But the judge was resourceful as she benefited from the terms “notably<sup>96</sup>.” → This is in application of article 40, paragraph 4, of the Convention on the Rights of the Child.

### **Tunisia**

**Children's court judgment No. 1957 dated 1/2/2018, issued by the children's judge<sup>97</sup>**

### **Principle**

“Children in conflict with the law shall enjoy, irrespective of their place of birth, nationality or sex, the protection measures stipulated in the new Tunisian Constitution, the Code for the Protection of the Child and all international conventions guaranteeing the protection of the rights of the child ratified by the Tunisian State. These measures shall take into account all aspects related the child for effectiveness and efficiency

<sup>96</sup> Testimony of the judge issuing the decision: “On February 8, two young men appeared before me and they were guilty of not knowing what they have done. When I interrogated them, it appeared to me that their ignorance and misinformation led them to commit an act without knowing its ensuing consequences..... As a human being and a judge obliged to ensure the application of the law, I had to approach the matter in a constructive and useful manner. I relied on Article 111 of the Code of Criminal Procedure, which states that “the Investigating Judge may, irrespective of the nature of the offence, release the defendant and place him under judicial supervision, with one or more of the following conditions that such supervision requires, notably [...]” The Article listed some of these conditions. This article allowed me to choose the educative approach, not only criminal punishment. I had several options, so I resorted to the principle that a true believer holds in his heart great respect for others. I held that a Muslim cannot be a true Muslim without applying the teachings of the Quran. I went back to the Kuranic texts that honor the Virgin Mary and invoked Surat Al-Omran to remind these two young men that, by their actions, they desecrate Islam before desecrating the Virgin Mary. [...] My experience as a judge is based on my strong belief that everything is developing, then why not the law? Why not approach the judiciary in an educative manner?” <http://www.alkalimaonline.com/Newsdet.aspx?id=267847>

<sup>97</sup> Not published

purposes. This includes informing the concerned diplomatic authorities of any case of a child with a non-Tunisian nationality and whose family is outside Tunisia, including guaranteeing to such child all the services provided by the state institutions until the completion of the notification and deportation procedures as required for the child's best interest."

### **Text of the judgment:**

The children judge Mrs. (...) with the Court of First Instance of Sfax II in the hearing held on 1/2/2018 in the **presence of the child protection delegate, child consultants and the Assistant Undersecretary of the Republic** and with the assistance of the clerk of the hearing Mr. (...), issued the following judgment:

### **Public interest:**

**On the one hand,**

### **And on the other hand, the child:**

Born in (...) holder of the Moroccan nationality, represented by attorney (...).

Referred to this court by virtue of the referral decision issued by the Public Prosecution on 5/12/2017 on charge of entering and staying in Tunisia without a visa in accordance with the provisions of Article 23 of Law 8/3/1968 on the situation of foreigners in Tunisia.

### **At the hearing:**

Whereas after the referral of the child by virtue of the above referral decision, a hearing for the case published was set on 5/12/2017, during which the child confirmed that he was Moroccan, that he was living in Tunisia without documents, that he had entered the Tunisian territory clandestinely through Libya and spent nearly a year in Tunisia, during which he worked and was able to raise a sum of three thousand dinars that he paid to the smuggler sailing from Tunisia to Italy — the smuggling group was identified — whereas he expressed his remorse since he had no guidance as his father is dead and his family is in Morocco and his readiness to stay in Tunisia after regularizing his situation; and whereas the Child Protection Delegate was present after being summoned given that the matter is related to a child at risk, requested postponement to be able to inform the Moroccan embassy and prepare a report regarding the status of the child and suggested temporarily placement at the Center for Social Guidance and Support in Sfax to ensure his protection since he has no guardian; and whereas the Public Prosecution was granted competence to examine the case,

Whereas it was decided at the end of the hearing to notify the Moroccan Embassy through the child protection delegate of the status of the child (...) holder of the Moroccan nationality and to **keep the child until the completion of the procedures and researches in a state of liberty, place him in the Center for Social Guidance and Support in Sfax**, confiscate his passport pending this completion of the case until

appropriate measures are taken to ensure his safety and keep him from getting involved in cases of illegal and unsafe travel during this period.

Whereas several hearings were held, most recently on 1/2/2018, attended by the Child Protection Delegate, accompanied by the representative of the International Organization for Migration (IOM) in Tunisia, who submitted a report indicating that he coordinated with the IOM and the Moroccan diplomatic authorities to ensure the deportation of the child and his handing over to his family there and to guarantee his future by enabling him to launch a project that provides him with a livelihood and prevents him from leaving his country clandestinely;

Whereas the Child Protection Delegate also indicated that he is keen on completing the procedures to ensure the best interest of the child and requested the Center for Social Guidance and Support in Sfax where the child is placed to hand him all the child's documents to carry out the remaining procedures, in particular after setting the date of travel on 5/2/2018;

Whereas after hearing all the parties, the following judicial ruling was issued:

**The measure prescribed for the child in conflict with the law:**

The First Instance court issued a judgment in presence convicting the child, [.....] for entering the Tunisian country and residing therein without a visa; ordering his handing over to his guardian as required for his best interest by deporting him to Morocco through the **International Organization for Migration**, which shall bear the expenses incurred thereon, lifting the attachment imposed on all the supporting documents related to the child and submitting same to IOM representative Mrs. (...) to complete the travel procedures set for 5/2/2018, keeping the child ... until that date at the Center for Social Guidance and Support in Sfax where he was staying throughout the proceedings stages; entrusting the Child Protection Delegate to follow up on the travel procedures and provide us with the relevant report in the meantime and giving permission for execution based on the draft.

#### **D. Providing remedies for breaches of children's rights**

- ➔ Most independent human rights institutions for children have the ability to address specific situations in which child rights are at stake. The complaint mechanism is the route by which to remedy individual and collective child rights violations.<sup>98</sup> According to the Committee on the Rights of the Child General Comment No. 2: The role of independent human rights institutions in the promotion and protection of the rights of the child:<sup>99</sup>

<sup>98</sup> Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children, Summary Report, UNICEF Research Office 2012, p. 13

<sup>99</sup> paragraphs 13 and 14

- ➔ NHRIs must have the power to consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children. In order to be able to effectively carry out such investigations, they must have the powers to compel and question witnesses, access relevant documentary evidence and access places of detention. They also have a duty to seek to ensure that children have effective remedies - independent advice, advocacy and complaints procedures - for any breaches of their rights. Where appropriate, NHRIs should undertake mediation and conciliation of complaints.
- ➔ NHRIs should have the power to support children taking cases to court, including the power (a) to take cases concerning children's issues in the name of the NHRI and (b) to intervene in court cases to inform the court about the human rights issues involved in the case.



### What makes independent human rights institutions for children effective?

#### 1- Independence:

Independence is the defining feature of human rights institutions for children. It is their main strength and their source of legitimacy and authority. It is the quality that allows them to keep child rights front and centre regardless of political trends. The degree of independence is pivotal in determining the success or failure of institutions<sup>100</sup>.

Financial autonomy is one of the key aspects of independence. Institutions need sufficient and sustainable financial resources to carry out their mandates. At the same time, funding sources must respect the legitimacy and independence of an institution. [...] The Committee on the Rights of the Child has consistently noted in its concluding observations to state party reports that efforts to provide reasonable and secure funds to child-related institutions are insufficient. External funding is necessary in many places – especially for child rights programmes – because of resource shortages. In these countries, private and foreign donors have become involved in supporting the work on children's rights within national institutions (For example in Afghanistan, Pakistan, Columbia and others).<sup>101</sup>

#### 2- Accountability mechanisms

Accountability may preserve independence: an institution must be held accountable for its own actions and performance, in a way that preserves its independence.<sup>102</sup>

#### 3- Child participation

Independent human rights institutions for children have a unique role in promoting and modelling the realization of the right to be heard.<sup>103</sup>

<sup>100</sup> Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children, Summary Report, UNICEF Research Office 2012, p. 16

<sup>101</sup> Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children, Summary Report, UNICEF Research Office 2012, p.17

<sup>102</sup> Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children, Summary Report, UNICEF Research Office 2012, p. 17

#### 4- Accessibility to all groups of children

Being accessible to all children, including the most marginalized, embodies the principle of nondiscrimination enshrined in Article 2 of the Convention on the Rights of the Child. In pursuit of equity, independent human rights institutions for children have made increasing efforts to reach the most marginalized, such as the poorest [...] and those with disabilities, (for example by adapting websites, offering messages to children in sign languages...) among others<sup>104</sup>.

### E. Submitting complaints to the CRC

The Committee on the Rights of the Child (CRC) is the body of 18 Independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties. It also monitors implementation of two Optional Protocols to the Convention. The Committee also publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues (24 comments<sup>105</sup>) and organizes days of general discussion. On 19 December 2011, the UN General Assembly approved a third Optional Protocol on a communications procedure (OPIC), which allow individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols.



#### **Arab countries that ratified OPIC to date:**

- i) The Tunisian State (2018)<sup>106</sup> ; ii) the State of Palestine (2019); and iii) Morocco signed it on (2012).

For a list of countries ratifying OPIC, visit the OHCHR

website: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=en)

The Committee is also able to consider individual complaints alleging violations of the Convention on the Rights of the Child and its first two optional protocols (OPAC and OPSC) by States parties to the OPIC<sup>107</sup>, as well as to carry out inquiries into allegations

<sup>103</sup> Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children, Summary Report, UNICEF Research Office 2012, p. 19

<sup>104</sup> Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children, Summary Report, UNICEF Research Office 2012, p. 22

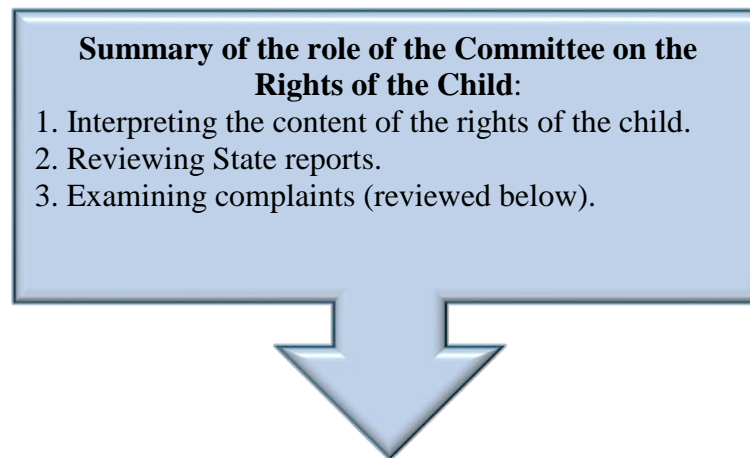
<sup>105</sup> To this date

<sup>106</sup> The Tunisian parliament ratified a basic draft law approving the accession of the Republic of Tunisia to the Third Protocol to the Convention on the Rights of the Child on May 23, 2018.

<sup>107</sup> [A/RES/66/138](#) was taken at plenary session N. 89 on 19 December 2011, without voting based on the Committee recommendation (A/66/457 para 20). The Protocol entered into force in April 2014.

of grave or systematic violations of rights under the Convention and its two optional protocols.

Children's special and dependent status may create real difficulties for them in pursuing remedies for violations of their rights, → the Protocol will reinforce and complement national and regional mechanisms allowing children to submit complaints for violations of their rights.



- ➔ The objective of the communications procedures is → to reinforce and complement the national mechanisms and to further enhance the implementation of the Convention and, where applicable, the Optional Protocols thereto on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflict (OPIC preamble). Thus reveals the importance of cooperation between lawyers and civil society in preparing complaints for violations of the rights of children in conflict with the law.
- ➔ No communication shall be received by the Committee if it concerns a State that is not a party to the present Protocol. (Article 1) The Committee shall have competence solely in respect of violations by the State party of any of the rights set forth in the Convention and/or the first two Optional Protocols thereto occurring after the entry into force of the present Protocol. (Article 20)
- ➔ In fulfilling the functions conferred on it [...], the Committee shall be guided by the principle of the best interests of the child<sup>108</sup>. It shall also have regard for the rights and views of the child, the views of the child being given due weight in accordance with the age and maturity of the child. (Article 2) It may decline to examine any communication that it considers not to be in the child's best interests. (Article 3)

<sup>108</sup> The best interests of the child should be a primary consideration to be respected in pursuing remedies for violations of the rights of the child, and that such remedies should take into account the need for child-sensitive procedures at all levels. (Preamble)



- ➔ Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of any of the rights set forth in any of the following instruments to which that State is a party: The Convention; The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography; The Optional Protocol to the Convention on the involvement of children in armed conflict.(Article 5)

### *When is a complaint admissible?*

The Committee shall consider a communication inadmissible when:

- The communication is anonymous;
- The communication is not in writing;
- The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention and/or the Optional Protocols thereto;
- The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
- All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;
- The communication is manifestly ill-founded or not sufficiently substantiated;
- The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned, unless those facts continued after that date;
- The communication is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit. (Article 7)

### *How civil society contributes to communications procedures?*

- Given their role at the national level, independent human rights institutions for children are likely to be a primary domestic link supporting access to this international communications procedure. They are in an opportune position to provide a preliminary assessment for eligibility for consideration under the Optional Protocol, and to refer and support potential complainants through the process or provide documentation to the Committee. They are also expected to monitor states' compliance with the recommendations made by the Committee for cases admitted under the Optional Protocol. Independent human rights institutions can play a fundamental role in informing children and their communities about the existence of an international remedy; they can also carry



out targeted efforts to reach those children whose rights are most at risk of being violated<sup>109</sup>

- Civil society should support independent institutions by cooperating with them, sharing information, supporting children and other actors in making complaints, supporting the follow-up of recommendations and, where appropriate.<sup>110</sup>



### **Importance of sufficient substantiation**

*It is important for the lawyer, with the **support of the social service provider**, of the claim to sufficiently substantiated the violations of the rights included in the Convention on the Rights of the Child and / or the Optional Protocols. In the light of all of the above and while being aware of the deteriorating human rights situation in Afghanistan, the Committee considers that the authors have failed to justify a personal risk of a serious violation of [alleged victim]'s rights upon return to Afghanistan. The Committee therefore considers that this part of the communication is also insufficiently substantiated and declares it inadmissible under article 7 (f) of the Optional Protocol. (Communication No. 7/2016 against Denmark. Subject matter: Deportation of family with child to Afghanistan, where they claim a risk of persecution based on their alleged conversion from Islam.)*

*It is important that civil society participates in the preparation of the communication and in the substantiation of the claim.*



The communications procedure applies to other human rights convention committees such as the Human Rights Committee.

An example of **good practices**: In the **Philippines**, PREDA considered cases of children tortured in detention for OMCT to present individual complaints to Human Rights Committee or Committee against Torture. These elements were shared for follow-up with the Committee on the Rights of Child, when it examined the Philippines report in 2005.<sup>111</sup>

<sup>109</sup> Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children, Summary Report, UNICEF Research Office 2012, p. 29

<sup>110</sup> Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children, Summary Report, UNICEF Research Office 2012, p. 31

<sup>111</sup> Protecting the rights of children in conflict with the law, UNICEF and others p. 105

### 3.2 Method of cooperation between social service providers and lawyers

According to the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, states must establish “mechanisms and procedures to ensure close cooperation and appropriate referral systems between legal aid providers and different professionals to obtain a comprehensive understanding of the child, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.”

**Start of cooperation**→ The presence of the lawyer and/or the social worker at the police station immediately upon arrest of the child is decisive for three reasons: (1) The child must know his/her rights, [...] (2) With a lawyer or social worker present, there is a better chance that questioning will take place in conditions that respect procedures and the rights of the child, and (3) In many cases, the alternative to detention at the police station depends on the possibility of finding the child’s family, which police officers cannot always do immediately. Without assistance in this matter, the child is often taken into custody by default.<sup>112</sup>

#### Comparative law



#### Lebanese law

#### **Reminder:**

When bringing the juvenile before the Public Prosecution or the judicial police on count of offense for investigation, the investigating officer shall immediately contact the accredited social representative and invite him/her to attend the investigation.

The representative shall be present within six hours as of the time of his invitation. The investigation may not commence unless the representative is present under the pain of disciplinary prosecution.

If the representative is unable to attend for any reason, the Public Prosecution or the Juvenile Department at the Ministry of Justice shall appoint a social representative from one of the associations classified in this department to appear with the juvenile during the investigation. The presence of the social representative is not sufficient. The

<sup>112</sup> Protecting the rights of children in conflict with the law, UNICEF and others p. 41

representative must undertake social research and submit its findings to the person carrying the investigation with the juvenile (article 34 of Law 422.)

The investigating judge, at the beginning of the investigation of the juvenile, shall follow the procedures set forth above (Article 35 of Law 422.)

### **Good practices<sup>113</sup>:**

In Lebanon<sup>114</sup>, to support gaps in legal and social protection for children in conflict with the law, Terre des Hommes appoints and trains independent lawyers (from among fresh graduates) and social workers. These lawyers and social workers are contacted upon the arrest of the child and support police officers in filing social reports, finding the child's parents, preventing pre-trial detention and advocating for alternative sanctions where possible.

### **Due to Terre des Hommes' efforts<sup>115</sup>:**

- Approximately [the three quarters] of children who are supported by lawyers and/or social workers are not deprived of their liberty.
- On the whole, government partners find that it is less costly to appoint social workers than to imprison children.

### **Necessary Conditions:**

- Neutral reputation: → Much of TDH's work is facilitated by the fact that it is well known and trusted by both governmental and non-governmental partners.
- Legal Permission: → The law of some countries allows the lawyer to be present at the police station (such as the French law); in other countries, he or she may be present only after 24 hours of police detention. In still other countries, such authorization is granted only to social workers.<sup>116</sup>

<sup>113</sup> Protecting the rights of children in conflict with the law, UNICEF and others p. 41, 42

<sup>114</sup> Also in Romania, Mauritania and Guinea

<sup>115</sup> This initiative in Romania has led a group of lawyers to form their own NGO, "Jean Val jean" to protect the rights of children in conflict with the law. Protecting the rights of children in conflict with the law, UNICEF and others p. 42.

<sup>116</sup> Protecting the rights of children in conflict with the law, UNICEF and others p. 43, 44

### 3.3 Overview of special cases

These are precisely the situation of child soldiers and children deprived of their family environment, especially children on the move.

#### A. Child recruitment

- ➔ International law prohibits the [military] recruitment of children; however, the age of recruitment varies from convention to another:
- Convention on the Rights of the Child: States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities/ States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. (Art. 38 (2) and (3))
  - **Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict**<sup>117</sup>: under 18 years of age<sup>118</sup>.
  - **Additional Protocol I to the Geneva Conventions on the Protection of Victims of International Armed Conflicts (1977) and Additional Protocol II to the Geneva Conventions on the Protection of Victims of Non-International Armed Conflicts (1977)**: Under 15 years of age.
  - **The International Criminal Court Statute (1998)**: Under 15 years of age.
  - **Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (No. 182) of 1999**: Under 18 years of age.

<sup>117</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 - Entry into force 12 February 2002

<sup>118</sup> Distinction shall be made between armed forces and armed groups:

##### **Armed forces:**

- States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities. (Article 1)
- States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces. (Article 2)
- States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.

##### **Armed groups:**

- Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
- States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices. (Article 4)

## CASE LAW

### THE INTERNATIONAL CRIMINAL COURT

**Thomas Lubanga Dyilo**, Trial Chamber, March 14, 2012<sup>119</sup>

In all the circumstances, the Chamber is persuaded that the Statute [ICC Statute] in this regard is aimed at protecting vulnerable children, including when they lack information or alternatives. The manner in which a child was recruited, and whether it involved compulsion or was “voluntary”, are circumstances which may be taken into consideration by the Chamber at the sentencing or reparations phase, as appropriate. However, the consent of a child to his or her recruitment does not provide an accused with a valid defence.

[...] As with “conscripting” and “enlisting” children under the age of 15 into armed forces or groups, the prohibition against “using them to participate actively in hostilities” is generally intended to protect children from the risks that are associated with armed conflict, [...]

The prohibition against using children under the age of 15 to participate actively in hostilities is not dependent on the individuals concerned having been earlier conscripted or enlisted into the relevant armed force or group. [...] Therefore, consistently with Article 22(2) of the Statute, a child can be “used” for the purposes of the Statute without evidence being provided as regards his or her earlier “conscription” or “enlistment” into the relevant armed force or group.

- ➔ The authorities of States parties face a number of challenges when dealing with these children. Some States parties have adopted a punitive approach with no or limited consideration of children’s rights, resulting in lasting consequences for the development of the child and having a negative impact on the opportunities for social reintegration, which in turn may have serious consequences for the broader society. Often, these children are arrested, detained, prosecuted and put on trial for their actions in conflict areas and, to a lesser extent, also in their countries of origin or return.
- ➔ The Committee draws the attention of States parties to Security Council resolution 2427 (2018). In the resolution, the Council stressed the need to establish standard operating procedures for the rapid handover of children associated or allegedly associated with all non-State armed groups, including those who committed acts of terrorism, to relevant civilian child protection actors. The Council emphasized that children who had been recruited in violation of applicable international law by armed forces and armed groups and were accused of having committed crimes during armed conflicts should be treated primarily as victims of violations of

<sup>119</sup> [www.icc-cpi.int](http://www.icc-cpi.int).

international law. The Council also urged Member States to consider non-judicial measures as alternatives to prosecution and detention that were focused on reintegration, and called on them to apply due process for all children detained for association with armed forces and armed groups<sup>120</sup>.

- ➔ If, under certain circumstances, exceptional internment of a child soldier over the age of 15 years is unavoidable and in compliance with international human rights and humanitarian law, for example, where she or he poses a serious security threat, the conditions of such internment should be in conformity with international standards, including article 37 of the Convention and those pertaining to juvenile justice, and should not preclude any tracing efforts and priority participation in rehabilitation programmes.<sup>121</sup>
- ➔ If, in exceptional cases, [...], children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection (Article 77 of Additional Protocol I to the Geneva Conventions on the Protection of Victims of International Armed Conflicts)<sup>122</sup>
- ➔ If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units (Article 77 of Additional Protocol I to the Geneva Conventions on the Protection of Victims of International Armed Conflicts)
- ➔ The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed. (Article 77 of Additional Protocol I to the Geneva Conventions on the Protection of Victims of International Armed Conflicts).



### **Good Practices**

Numerous institutions conduct research to examine the root causes of children's problems. An example is an analysis carried out in 2006 by the Defensoría del Pueblo in Colombia of risk factors leading to vulnerability to child soldier recruitment. This subsequently informed recommendations for effective programming to support the reintegration of demobilized child combatants<sup>123</sup>.

<sup>120</sup> CRC General Comment No. 24, para 99 and 100

<sup>121</sup> CRC General Comment No. 6, para 57

<sup>122</sup> Children shall be provided with the care and aid they require, and in particular: [...] Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities. (Article 4 of Additional Protocol I to the Geneva Conventions on the Protection of Victims of International Armed Conflicts) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolII.aspx>

<sup>123</sup> Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children, Summary Report, UNICEF Research Office 2012, p. 10 and 11

## **B. Children deprived of their family environment especially children on the move**

- ➔ There are varied and numerous reasons for a child being unaccompanied or separated, ranging from: 1) persecution of the child or the parents; to 2) international conflict and civil war; to 3) trafficking in various contexts and forms, including sale by parents; and the search for better economic opportunities.<sup>124</sup>
- ➔ Every child is covered by the “care” of someone. There are only three conditions for children: 1) emancipated, 2) in the care of primary or proxy caregivers, or 3) in the de facto care of the State. The definition of “caregivers”, referred to in article 19, paragraph 1, as “parent(s), legal guardian(s) or any other person who has the care of the child”, covers those with clear, recognized legal, professional-ethical and/or cultural responsibility for the safety, health, development and well-being of the child.
- ➔ In the case of unaccompanied children, the State is the de facto caregiver. →Article 19 also applies to children without a primary or proxy caregiver or another person who is entrusted with the protection and well-being of the child such as, for instance, children in child-headed households, children in street situations, children of migrating parents or unaccompanied children outside their country of origin. The State party is obliged to take responsibility as the de facto caregiver or the one “who has the care of the child”, even if these children are not within the context of physical care settings such as foster homes, group homes or NGO facilities. The State party is under the obligation “to ensure the child such protection and care as is necessary for his or her well-being” (art. 3, para. 2) and to “ensure alternative care” to “a child temporarily or permanently deprived of his or her family environment” (art. 20). There are different ways to guarantee the rights of these children, preferably in family-like care arrangements, which must be carefully examined with respect to the risk of these children being exposed to violence.<sup>125</sup>
- ➔ **Deprivation of freedom and treatment of children subject to deprivation of freedom**→ In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37 of the Convention and other international obligations.<sup>126</sup>

<sup>124</sup> CRC General Comment, No. 6, para 2.

<sup>125</sup> CRC General Comment, No.13, para 33, 34 and 35

<sup>126</sup> CRC General Comment, No. 6, para. 61 and 63





### **Good Practices**

Numerous institutions conduct research to examine the root causes of children's problems. An example is an analysis carried out in 2006 by the Defensoría del Pueblo in Colombia of risk factors leading to vulnerability to child soldier recruitment. This subsequently informed recommendations for effective programming to support the reintegration of demobilized child combatants<sup>127</sup>.

### **CASE LAW**

#### **Juvenile Judge in Zahle, Decision No. 95/2013, dated 12/9/2013:**

1- The clandestine entry of a minor into Lebanon: Misdemeanor Article 32 Foreigners in addition to the provisions of Law No. 422/2002 given that the matter is related to a minor.

2- Not to expel the minor from the country due to the dangerous security situation in Syria according to Article 3 of the Convention against Torture and Article 3 of the Convention on the Rights of the Child applicable in Lebanon which requires considering the best interests of the minor in the various judicial proceedings against him/her.

3- Placing the minor for a period of one year under release on probation and entrusting the juvenile delegate to follow up the execution of the judgment and to submit a social report to the court every three months on the behavioral, social, economic and health status of the minor.

➔ States shall, in particular where government capacity is limited, accept and facilitate assistance offered by UNICEF, the World Health Organization (WHO), United Nations Joint Programme on HIV/AIDS (UNAIDS), UNHCR and other agencies (art. 22 (2)) within their respective mandates, as well as, where appropriate, other competent intergovernmental organizations or non-governmental organizations in order [to secure an adequate standard of living for unaccompanied and separated children and] to meet the health and health-care needs of unaccompanied and separated children.<sup>128</sup>

<sup>127</sup> Child Rights Advocacy, Global Study on Independent Human Rights Organizations for Children, Summary Report, UNICEF Research Office 2012, p. 10 and 11

<sup>128</sup> CRC General Comment, No. 6, para. 45 and 49

## CASE LAW

### European Court For Human Rights

The case of **Mubilanzila Mayeka and Kaniki Mitunga v. Belgium**<sup>129</sup>, related to a detained unaccompanied child. A five year old girl was detained for nearly two months in a Transit Centre for adults with no appropriate assistance. The girl had travelled from the Democratic Republic of Congo without the requisite travel papers hoping to be reunified with her mother who obtained the refugee status in Canada. The girl was deported later to the DRC although there is no family member waiting for her there to provide her with care.

In the absence of any risk of the child's seeking to evade the supervision of the Belgian authorities, her detention in a closed center for adults was unnecessary. "Other measures could have been taken that would have been more conducive to the higher interest of the child guaranteed by Article 3 of the Convention on the Rights of the Child. These included her placement in a specialized center or with foster parents." The Court held that there has been a violation of Articles 3, 5 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

**Rahimi v. Greece**<sup>130</sup> concerning the conditions in which a minor from Afghanistan, who had entered Greece illegally, was held in a detention centre and was later on released for deportation. In violation of Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedom, the Court held that the information brochure provided by the authorities to the Applicant, mentioned the possibility of making a complaint to the chief of police but did not indicate the procedure to be followed. Furthermore, the information brochure outlining some of the remedies available in respect of the Applicant's conditions of detention had been written in a language, which the Applicant does not understand. Based on the visits of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the court noted that there is no independent authority in Greece to inspect detention facilities. Accordingly, the Court held that there has been a violation of Articles 3, 5 (para 1 and 4) and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

### *Other roles of civil society*

#### **1- Parallel reports**

There is another role that the civil society can provide is the preparation of parallel

<sup>129</sup>ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No.13178/03, 12 October 2006.

<sup>130</sup>ECtHR, *Rahimi v. Greece*, No.8687/08, 5 April 2011.

reports to be submitted to the CRC. For example, in accordance with their cooperation protocol, UNICEF provided technical support to the Libyan Ministry of Social Affairs in the preparation of the official State and Civil Society report for parallel reporting on children's rights. In this context, workshops and meetings were held with representatives of ministries concerned with children's rights and representatives of the civil society from different regions of Libya.<sup>131</sup>

## 2- Awareness- raising

Children who commit offences are often subjected to negative publicity in the media, which contributes to a discriminatory and negative stereotyping of those children. This negative presentation or criminalization of children is often based on a misrepresentation and/or misunderstanding of the causes of crime, and regularly results in calls for tougher approaches (zero-tolerance and “three strikes” approaches, mandatory sentences, trial in adult courts and other primarily punitive measures). States parties should seek the active and positive involvement of Members of Parliament, non-governmental organizations and the media to promote and support education and other campaigns to ensure that all aspects of the Convention are upheld for children who are in the child justice system. It is crucial for children, in particular those who have experience with the child justice system, to be involved in these awareness-raising efforts.<sup>132</sup>

<sup>131</sup>

<https://unsmil.unmissions.org/ar/%D8%A7%D9%84%D9%8A%D9%88%D9%86%D8%B3%D9%8A%D9%81-%D8%AA%D8%AF%D8%B9%D9%85-%D8%A5%D8%B9%D8%AF%D8%A7%D8%AF-%D8%A7%D9%84%D8%AA%D9%82%D8%B1%D9%8A%D8%B1-%D8%A7%D9%84%D8%B1%D8%B3%D9%85%D9%8A-%D9%84%D9%84%D8%AF%D9%88%D9%84%D8%A9-%D9%88-%D8%A7%D9%84%D8%AA%D9%82%D8%A7%D8%B1%D9%8A%D8%B1-%D8%A7%D9%84%D9%85%D9%88%D8%A7%D8%B2%D9%8A%D8%A9-%D9%84%D9%84%D9%85%D8%AC%D8%AA%D9%85%D8%B9-%D8%A7%D9%84%D9%85%D8%AF%D9%86%D9%8A-%D8%AD%D9%88%D9%84-%D8%AD%D9%82%D9%88%D9%82-%D8%A7%D9%84%D8%B7%D9%81%D9%84-%D9%81%D9%8A-%D9%84%D9%8A%D8%A8%D9%8A%D8%A7>

<sup>132</sup> CRC General Comment No. 24, para. 111.

## Annex 1

### Article 37 of the Convention on the Rights of the Child:

States Parties shall ensure that:

- 1) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- 2) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- 3) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- 4) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

### Article 40 of the Convention on the Rights of the Child:

- 1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
- 2) To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
  - a. No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

- b. Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
    - i. To be presumed innocent until proven guilty according to law;
    - ii. To be informed promptly and directly of the charges against him or her, and, if appropriate, through 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;
    - iii. To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
    - iv. Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
    - v. If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
    - vi. To have the free assistance of an interpreter if the child cannot understand or speak the language used;
    - vii. To have his or her privacy fully respected at all stages of the proceedings.
- 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."

## Annex 2. Communication with children<sup>133</sup>

Communication for children needs to consider different abilities and needs at different ages, and thus must be child-centred and age-appropriate. Quality communication can support existing development programmes and priorities to address particular needs or competencies. These can be as varied as: the need to help children learn when and how to wash their hands correctly; the importance of everyone being treated with respect; how to prevent exploitation or abuse; getting ready for school;...

But is there a better or fail-proof way to present these issues when communicating with children? What do we know about what does and does not work? For example, there is debate about the effectiveness of using “fear” in communicating to children and adults. Research suggests that fear-arousing messages can be ineffective and have a “boomerang effect” of stimulating negative behaviour if overused and if they do not offer acceptable solutions to the fear-arousing situation.

The following is an overview of integrated principles, guidelines and examples of good practices in creating effective communication for children based on a comprehensive review of hundreds of projects and products developed by UNICEF and other organizations and producers around the world in recent years. These guidelines aim to raise, inspire, sensitize, educate and recover.

### **Principle 1. Age-appropriate discourse must be used**

Children learn best when communication is tailored to their specific developmental age, needs and interests. Good-quality and effective communication begins with an understanding of the basics of child development and how to best nurture this development and learning. Each age group also has specific strengths and interests that translate into the most appropriate choices in selecting storylines, characters and specific content. Fundamental to each group is the level of conceptual difficulty, with progressive age groups able to understand and requiring more complex content, contexts and forms.

### **Principle 2. Communication with children must be comprehensive**

Research from the fields of health, nutrition, psychology, child development and anthropology, among others, confirms that all aspects of child development are interconnected. Physical, social, emotional and cognitive development are inextricably linked. A child can be bright, but live with neglect or abuse. A child can be well fed, and yet yearn for love. A child can be loved, but can be physically or emotionally fragile.

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<sup>133</sup> [https://www.unicef.org/arabic/cwc/61044\\_61046.html](https://www.unicef.org/arabic/cwc/61044_61046.html)

Communication that balances and gives complementary attention to all their developmental needs best serves all children, from infants to adolescents. In many countries, producing holistic communication has been a cost-effective way of meeting the needs of children and caregivers on several cross-sectoral issues.

### **Principle 3. Communication must be positive and based on strengths**

Strengths-based communication focuses on portraying and nurturing the strengths and potential in every child rather than focusing on the deficits or problems. Using this principle, the goal is not only to teach but also to develop resilience and the capacity to cope. It does this in a healthy way for both large and small struggles in life. It helps move communication from focusing only on problems to suggesting and presenting options and possibilities.

Regardless of country or situation, it means developing communication that invites children to imagine or be transported to seeing things they have not previously experienced; that excites children about possibilities of what they can do today or become in the future; and channels their energy into positive thought and action. Such communication can be transformative.

### **Principle 4. Communication must discuss all the needs of children, including the most disadvantaged**

Media reflects who and what is valued by society. This is true in presentations of people and of culture and traditions. It is critical that communication allows all children to hear and see themselves reflected positively, as opposed to communication that focuses on marginalization, shame, or negative or patronizing portrayals. Good communication includes positive portrayals of children from different cultures and ethnic groups and all socio-economic backgrounds, those with disabilities, and children who have or are experiencing trauma, grief or living through emergencies.

Creative solutions and competencies should come from marginalized groups themselves, not just from those in positions of authority or from privileged backgrounds. Conscious decisions should be made to include the most vulnerable and disadvantaged children as a regular part of all types and forms of communication. Whether it is a PSA about hand washing, a documentary about HIV/AIDS prevention, a puppet show about resisting bullies, a board game teaching life skills, or a live action drama about emergency preparedness, boundaries need to be pushed to ensure that the needs and abilities of all are portrayed.



### Annex 3 - Relevant websites

The Arab Center for the of the Rule of Law and Integrity (ACRLI)	<a href="http://arabrulEOFlaw.org">http://arabrulEOFlaw.org</a>
European Court of Human Rights	<a href="http://www.echr.coe.int">http://www.echr.coe.int</a>
Office of the United Nations High Commissioner for Human Rights (OHCHR)	<a href="http://www.ohchr.org">www.ohchr.org</a>
The United Nations	<a href="http://www.un.org">www.un.org</a>
UNICEF	<a href="http://www.unicef.org">www.unicef.org</a>

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<sup>134</sup> By alphabetical order