



Comments on Draft General Comment No. 24 (201x), replacing General Comment 10 (2007) on Children's rights in juvenile justice

Department of Child Law, Leiden Law School, Leiden University, The Netherlands
Leiden, 7 January 2019¹

Introduction

These comments aim to support the UN Committee on the Rights of Child (the Committee) with the revision of its General Comment No. 10 (2007) on children's rights in juvenile justice. We concur with the Committee that this General Comment could benefit from an update in light of the developments since its adoption in 2007, in particular the promulgation of international and regional standards (and case law), the growing body of scientific knowledge on child and adolescent development (and behaviour, effective participation and evidence-based interventions), persistent challenges regarding children in the context of juvenile justice, among others with regard to the use of deprivation of liberty, and frontiers, including children involved in informal or customary justice systems, issues related to children associated with extreme violence or violent extremism and the position of adolescents in transition from childhood into adulthood (i.e. upper age limit; see further below). At the same time, we would recommend the Committee to uphold the comprehensiveness, key messages and strong, specific and practical guidance of General Comment No. 10, which has served as a catalyst for law reform across the globe.

General remarks

Scientific enough?

We submit that the Committee could use the opportunity to provide more guidance on the implications of the growing body of knowledge supporting the use of *diversion* and the use of *non-custodial measures* as a more effective way of dealing with juvenile delinquency, benefiting both the interests of children in conflict with law and public safety. In addition, the extensive body of knowledge on children's rights to effective participation in all criminal justice proceedings could be referred to more explicitly, since it provides strong arguments, *inter alia*, for a minimum age of criminal responsibility of at least 14 years of age, for the right to legal or other appropriate assistance during police interrogations, for specific guidance to probation services on the enforcement of community or conditional/suspended sentences, and for the safeguarding of child-specific court proceedings, in both the pre-trial and trial phase.

Comprehensive enough?

We also submit that the Committee could refer more (and more explicitly) to legal developments in regional human rights systems and domestic jurisdictions in its underpinning of recommendations and standpoints, particularly with regard to procedural safeguards, court proceedings and sentencing. In doing so, it could benefit from the emergence of a multi-layered and rather comprehensive legal framework on the rights of the child since the adoption of the CRC. For example, regarding minimum sentences, the Committee could underpin its recommendations with convincing case law from the South African Constitutional Court, which has ruled that minimum sentences are a violation of the principle that deprivation of liberty can only be

¹ This document has been prepared by: Prof. Dr. Ton Liefaard, UNICEF Chair in Children's Rights, Leiden Law School (corresponding author: t.liefaard@law.leidenuniv.nl); Prof. Dr. Julia Sloth-Nielsen, Leiden Chair of Children's Rights in the Developing World; Prof. Dr. Jaap E. Doek, Emeritus Professor of Family and Child Law, Chair UN Committee on the Rights of the Child 2001-2007; Dr. Stephanie Rap, Assistant Professor in Children's Rights; Dr. Yannick van den Brink, Assistant Professor in Child Law and Criminal Law and Ms. Eva Schmidt, LL.M / BSc, PhD Researcher.

used as a measure of last resort.² Case law could also be used regarding the Committee's recommendations on child-friendly justice, legal assistance, mandatory sentencing and severe sentences, such as capital punishment and life imprisonment.

Innovative enough?

We wonder if the draft is innovative enough and – at the same time – wary enough of the potential negative impact of new technologies on children and families (e.g. around (racial and ethnic) profiling). We submit that the Committee could elaborate further on potential innovative avenues to address structural, persistent and systemic challenges. For example, regarding the periodic review of pre-trial detention, the Committee could elaborate on the potential use of audio-visual technologies to secure judicial oversight, but also to protect children against unnecessary travels back and forth to courts, which can in practice be an ordeal or even potentially damaging. We also wonder to what extent the Committee has considered including some (critical) observations on the risks of the use of technologies, such as algorithms, in risk assessment, decision-making and profiling.

Inclusive enough?

A final general remark relates to the persistent challenges around inequalities, discrimination (e.g. on the basis of race, social class, gender, sexuality (LGBTI)) and disparities. We believe the Committee could strengthen the draft in terms of the Committee's disapproval and its recommendations on how to combat these challenges that go against the most fundamental principles underlying the CRC. Furthermore, we recommend the Committee to elaborate further on other groups of children that find themselves within the ambit of the criminal justice system, e.g. as victims or witnesses, children of sentenced and imprisoned parents.³

Specific remarks

1. Age limits: MACR and upper-age limit

Minimum Age of Criminal Responsibility (MACR) (para. 30-36 and para. 43)

The Committee suggests that it finds the MACR of 12, named in General Comment No. 10 as 'the absolute minimum age', as being too low (para. 33). The Committee should spell out why (on what basis?) it regards a MACR of 12 as too low. There is also no explicit justification for why states are encouraged to increase the MACR to at least 14 years, or why a MACR of 15 or 16 years calls for commendation. It would be preferred to cite scientific research to substantiate these chosen age limits. Moreover, we recommend the Committee to make explicit which age should be considered as the absolute minimum.

Paragraph 35 deals with exceptions to the MACR. However, it does not expressly and sufficiently clearly deal with those countries where there exists a rebuttable presumption of incapacity for children between particular ages (e.g. South Africa). The presumption has been said to operate as a 'protective mantle', removal of which would expose more children to prosecution. The General Comment should clearly state why such a presumption does not operate as a protection for children, and why it is undesirable. This is not cured by the discussion at paragraph 43 concerning two minimum ages. This is because the text speaks of children who are 'at or above the lower minimum age but below the higher minimum age [who] are assumed to be criminally responsible only if they have the required maturity in that regard'. This turns the test around as the default position is the lack of assumption of capacity. The Committee could consider merging para. 43 with 35, since both paragraphs seem to regulate more or less the same issue.

Upper age limit of the juvenile justice system (para. 37-42 and para. 46-48)

The Committee has named providing clarity on the upper age limit of the juvenile justice system, also referred to as the 'age of criminal majority', as one of the objectives of the revised General Comment. As in

² See Centre for Child v. Minister for Justice etc., [2009] ZACC 18. See also A. Skelton, 'South Africa', in: T. Liefaard & J.E. Doek, *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, Dordrecht: Springer 2015, pp. 13-30.

³ See e.g. the South African landmark case S v M, 2008 (3) SA 232 (CC).

General Comment No. 10, this age limit is seen as fixed at 18 years ('at the time of the commission of the offence'). The Committee, again, 'notes with appreciation that some States parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, usually until the age of 21, whether as a general rule or by way of exception' (para. 42). However, a stronger endorsement of this application of juvenile justice to young adults could provide more of an impetus to the (increasing) attention for the cognitive and emotional development and the legal position of young adults.⁴ Moreover, some further guidance and clarification on the application of an extended upper age limit in practice is highly recommendable. For instance, if juvenile justice can be applied to young adults by way of exception, some of the factors to be taken into account for deciding on this application could be mentioned.⁵ Finally, the Committee merely mentions that the application of juvenile justice is usually reserved for young adults until the age of 21, without providing a justification for this particular age limit. Based on international research into the development of adolescents and young adults the age limit of 21 is not self-evident: young adults seem to develop until well into their twenties.⁶

We recommend the Committee to make all specialised services available for children who age out of the system during the application of the sentence/measure – in line with paras. 42, 46 and 105 – at least until the age of 23. However, it should be born in mind that as a consequence more youth who are over 18 will inhabit youth custodial institutions. It would be helpful if the Committee could give practical recommendations on how States should deal with the extended age differences in youth facilities, without disregarding the rights and well being of children in these facilities?

Furthermore, it would be appropriate if the Committee expresses its concerns about recent developments in countries, such as India and Brazil, to lower the upper age limit allowing that children aged 16 and 17 are treated as adults. The Committee could include a stronger recommendation – in para. 37 – not to make any exception to the rule that all persons below the age of 18 accused of having committed an offence should be treated in full accordance with the CRC and related juvenile justice standards.

2. Public safety

Empirical research shows that public safety is broadly considered one of the key objectives of juvenile justice by juvenile justice practitioners. This has also been acknowledged by the Committee, stating that public safety is a legitimate aim of juvenile justice, but 'is best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in the CRC' (para. 16). Yet, this claim would be more convincing if substantiated with empirical evidence, for example by pointing out that a child-friendly, tailored approach to dealing with children in conflict with the law, preferably using community-based, non-custodial interventions, is proven to be more effective for preserving public safety than a strictly punitive approach (cf. the 'What Works' principles).

Moreover, the General Comment does not give clear guidance how children's rights standards can be upheld without disregarding public safety concerns. In fact, new proposals such as the minimum age for deprivation of liberty at 16, both at the pre-trial and the post-trial stage, seem to imply that police investigation and interrogation of children under the age of 16, who committed severe offences will be seriously limited, because these children cannot be arrested and held in police custody. This may be seen

⁴ See for example Recommendation Rec(2003)20 of the Committee of Ministers (of the Council of Europe) to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, in which it is mentioned that 'it should be possible for young adults under the age of 21 to be treated in a way comparable to juveniles and to be subject to the same interventions, when the judge is of the opinion that they are not as mature and responsible for their actions as full adults' (emphasis added).

⁵ Compare again to Recommendation Rec(2003)20, in which the 'maturity' and 'responsibility' of the young adults are mentioned as factors to be taken into account by judges when deciding on the application of juvenile justice to young adults. In addition, the approach of Germany towards young adult offenders could provide inspiration in this respect. See for example F. Dünkel, 'Juvenile Justice in Germany: Between Welfare and Justice', especially p. 247-248, in J. Junger-Tas & S.H. Decker (eds.), International Handbook of Juvenile Justice, Springer 2006.

⁶ See an overview of international research in V. Schiraldi, B. Western & K. Bradner, 'Community-Based Responses to Justice-Involved Young Adults', *New Thinking in Community Corrections* 2015, no. 1.

as a measure that does not contribute to public safety or that is incompatible with the harsh realities juvenile justice practitioners face in daily practice.

3. Deprivation of liberty

Non-custodial measures instead of alternative to detention

It is noticeable that the Committee no longer uses the term ‘alternatives to detention’ in its General Comment, but instead uses ‘non-custodial measures’. This is a positive change. The term ‘alternatives to detention’ implicitly and unjustly presents detention as the default position and non-custodial measures as ‘the alternative’, while, in fact, under Art. 37(b) CRC detention should be ‘the alternative’ (i.e. the last resort and absolute exception). The replacement of the term ‘alternatives to detention’ with the more neutral term ‘non-custodial measures’ is therefore an improvement.

Definition of diversion

The Committee provides a clear definition of ‘diversion’: ‘measures for dealing with children in conflict with the law, taken by designated authorities, without resorting to judicial proceedings’ (para. 6). This is a very welcome addition, after a long time of inconsistency in defining the notion of ‘diversion’ in several of the Committee’s Concluding Observations. ‘Diversion’ was sometimes defined as ‘alternative to judicial proceedings’ (cf. Art. 40(3) CRC), but sometimes used as ‘alternative to deprivation of liberty’ (cf. Art. 37(b) CRC). However, the use of the term diversion in para. 97 of the General Comment is somewhat confusing again, as ‘diversion’ is explicitly presented as avoiding deprivation of liberty. This seems to ignore that deprivation of liberty of children also takes place outside the juvenile justice system (i.e. diverting a case to the child protection system can result in placement of a child in a closed child care institution).

The risk of “net-widening”

The explicit warning that developing alternatives to detention (i.e. non-custodial measures) should be carefully structured to reduce the use of pre-trial detention and should not ‘widen the net’ of children subject to pre-trial interventions, has been removed from the General Comment (para. 97; cf. GC No. 10, para. 80). Net-widening is a real risk when States develop (new) non-custodial measures to reduce the use of detention. This requires explicit attention in the General Comment.

Maximum duration of deprivation of liberty (para. 86)

We welcome the Committee’s recommendation to set a maximum for the duration of the deprivation of liberty, which should be much shorter than the duration of custodial sentences for adults. However, the terms ‘penalty’ and ‘custodial sentences’ suggest that this recommendation is not applicable to pre-trial detention. We recommend that the Committee makes very clear that also the duration of pre-trial detention of children should be set at a maximum much shorter than the duration of pre-trial detention of adults.

Judicial review of pre-trial detention

In the previous General Comment, the judicial review of pre-trial detention was recommended to take place every two weeks. This has been changed to every week (para. 102). There are potential practical downsides to this proposal that should be recognized and addressed, e.g. children traveling often and far to court, missing school, etc. The Committee should consider mentioning innovative ways to facilitate this proposal, e.g. by setting up video links or stimulating judges to travel to institutions.

4. Life imprisonment (para. 92)

Life imprisonment bears different meanings in different legal systems and this should possibly be reflected in the General Comment. Indeterminate sentencing generally should be condemned (such as detention at the pleasure of the executive). The General Comment should advocate for fixed term sentences (of shorter duration than those applicable to adults). Early release opportunities should always be possible.

5. Child-friendly justice

The Committee recognises that ‘the child’s right to be heard is fundamental for a fair trial’ and that ‘a child who is considered to be criminally responsible should be considered competent to effectively participate in all aspects of the trial’ (para. 55). In the past decade, the notion of *child-friendly justice* has increasingly gained attention, also in relation to children in conflict with the law. Specifically in Europe, the practical conceptualisation of this notion shows that participation of children is seen as a fundamental part of a child-friendly justice system. In the revised General Comment, the Committee maintains its rather narrow focus on effective participation, namely by stressing the fact that children need to understand the language (as such) and the issues at stake (para. 57- 59). It would be beneficial to make a more concrete link between the right to be heard (art. 12 CRC), effective participation (as among others conceptualised by the European Court of Human Rights) and child-friendly justice. This latter notion implies that justice systems are adapted to the age and level of maturity of children and are specialised in dealing with children’s cases and communicating with children, to make them not only understand but also feel heard in the procedures.⁷ The Committee merely acknowledges that ‘the child’s age and maturity *may* also require modified courtroom procedures and practices’ (para. 57, emphasis added) and thereby ignores the importance of a specialised and child-friendly juvenile justice system.

6. Protection of children under international criminal law

We recommend the Committee to add a new paragraph after para. 110 highlighting the lack of adequate protection of children of 15, 16 and 17 years of age under international criminal law. While the Optional Protocol on the involvement of children in armed conflict sets a widely adopted international rule that children (below the age of 18) must not be recruited in armed forces or armed groups, nor participate in hostilities, the Rome Statute of the International Criminal Court qualifies such recruitment and participation only as a war crime in case the child is below the age of 15 years. The Committee could also call upon states that are party to the CRC and OPAC, as well as to the Rome Statute to undertake all necessary measures to safeguard that all children recruited for or participating in armed conflict, including those who are 15, 16 and 17, are adequately protected.

7. Role of social workers and other participants in the social workforce

Overall, the draft General Comment does not accord enough significance to the need for social workers and other participants in the social workforce as integral to building an effective juvenile justice system and in specific areas, such as diversion and disposition. Whilst social workers, probation officers and other relevant professionals are mentioned a number of times (see e.g. para. 25 and 28), insufficient emphasis is devoted to their wider role as part of a social workforce in accessing diversion, presenting diversion programmes, dealing with children below the MACR, and providing pre-sentence reports. The Committee could also better highlight the fundamental importance of the social workforce for the connection between the juvenile justice system and other systems relevant for children and families, such as the welfare system, child protection system, educational system and (mental) health system.

Some final remarks

We would like to conclude by recommending the Committee to include in the General Comment the findings of the UN Global Study on Children Deprived of Liberty, which will come out in the course of 2019. In addition, we would like to inform the Committee that the Department of Child Law of Leiden University is willing to further assist in the revision of the General Comment where needed.

⁷ See Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice 1, 13 (2010), available at: www.coe.int/childjustice