GUIDELINES ON
CHILDREN IN CONTACT WITH THE JUSTICE SYSTEM

Prepared by an International Working Group of the
International Association of Youth and Family Judges and Magistrates

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INTRODUCTION

Guidelines and children's rights – The legal status of children has evolved considerably over the last decades. Beyond the numerous changes that have been made to national legislation in many countries, important international instruments have confirmed the status of children as bearers of rights. The shift occurred in the 1980s, culminating with the *Convention on the Rights of the Child* in 1989. Other significant United Nations instruments were adopted around the same time and in more recent years, such as:

- the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules", 1985);
- the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* ("The Havana Rules", 1990);
- the *United Nations Guidelines for the Prevention of Juvenile Delinquency* ("The Riyadh guidelines", 1990);
- the *United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime* (ECOSOC Res 2005/20, 2005);
- *Guidance note of the United Nations Secretary General: UN approach to justice for children* (2008);
- the *United Nations Guidelines for the Alternative Care of Children* (2010);
- the United Nations Human Rights Council Resolution 18/12 on *Human rights in the administration of justice, in particular juvenile justice* (2011).

Other important documents have been issued by the United Nations Committee on the Rights of the Child, namely its General Comments on various subjects, which provide a remarkable understanding on how the various instruments should be interpreted and implemented. Furthermore, international organizations other than the United Nations have taken stands and thus have brought their contribution to the collective consideration of children and justice.

Such instruments and documents have to be understood, interpreted and implemented in order to find their way into policies, legislation and daily practice. Many of them are written in a legal style that some people with no legal training consider an obstacle. Interpretations have to be provided to extract their most appropriate meanings. Implications have to be drawn from their rules to allow for their optimal implementation. Furthermore, the various rules that they contain are often scattered in several documents. In brief, their contents benefit from being put together in a single comprehensive document, written in a language accessible to a wide group of people, and complemented by proper explanations and interpretations. They must be useful to policy makers and legislators as well as to practitioners whose daily professional activities are devoted to children and justice (such as judges, lawyers, police officers, social workers, psychologists, educators and others).

The idea of providing models as sources of inspiration is not new. It existed first under other titles. One may think for example of the 23 volumes of the

Juvenile Justice Standards elaborated in the 1970s by a joint commission of the Institute of Judicial Administration and the American Bar Association, that were meant to provide a unifying vision badly needed by a fragmented justice system for children in the United States[1]. Under the title of *Guidelines*, more recent endeavours have generated regional guidelines with a view to facilitating access to the contents of international instruments and documents related to children and justice (especially children's rights). The Council of Europe has thus adopted Guidelines for the use of its States members[2]. Guidelines have been produced in Africa[3] and in the Mercosur part of South America[4]. Thematic Guidelines have also been issued by the U.S. National Council of Juvenile and Family Court Judges[5]. Other regional Guidelines are in preparation. Those regional Guidelines have much in common: they rely to a large extent on a corpus of international instruments and documents that is shared by all. They also have their own specificities, derived from their own culture and traditions as well as specific problems that they have to face and resolve. Focussing primarily on issues related with children's rights, these Guidelines convey a vision of how the justice system should interact with children.

The International Association of Youth and Family Judges and Magistrates is not a regional association. It draws its membership from all continents. Its members are mostly judges and magistrates, but they also include other professionals who work in the area of youth and family justice. It can rely on the experience and expertise of members who work daily with children, families and various professionals in justice systems of numerous countries. Its members are used to communicating not only with people with a legal background, but also with all other people (professionals and others) who interact in the daily administration of justice.

Regional Guidelines have much in common. Yet there is a need for Guidelines drawn from a global international perspective, to which people may refer whatever country they come from. There is a need for Guidelines that speak as simply and directly as possible to people from various backgrounds who come into contact with the law in the daily activities of the justice system. These Guidelines must be phrased in terms that are accessible to all those

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[1] The *Juvenile Justice Standards* reports can be found at: http://www.americanbar.org/groups/criminal_justice/pages/JuvenileJusticeStandards.html.

[2] *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (Adopted by the Committee of Ministers on 17 November 2010 and explanatory memorandum). Strasbourg, Council of Europe Publishing, Building a Europe for and with children, Monograph 5, 2011.

[3] *Guidelines on Action for Children in the Justice System in Africa*. Final draft, 2011.

[4] Asociación Internacional MERCOSUR de los Jueces de la Infancia y Juventud; Asociación Uruguaya de Magistrados y Operadores Judiciales de Familia, Infancia y Adolescencia. *Guidelines of a Justice Adapted to Children. Presentation of Reference Document for Discussion.*

[5] National Council of Juvenile and Family Court Judges. *Resource Guidelines*. Reno, Nevada, NCJFCJ, 1995. Also: *Adoption and Permanency Guidelines*. Reno, Nevada, NCJFCJ, 2000. Also: *Juvenile Delinquency Guidelines*. Reno, Nevada, NCJFCJ, 2005.

who are involved in the justice system, in whatever capacity, and whatever may be their background. They must be based on the experience of actors who, over the years, have developed an intimate understanding of the working of the justice system, of those who make it work and of the citizens who need its interventions or are targeted by them. It was felt that the Association could bring a useful contribution in drafting Guidelines that would meet those concerns, based on the diversity, wide scope and expertise of its membership.

Preparation and adoption of the Guidelines – An International Working Group was appointed and given the mandate to prepare a set of Guidelines to recommend for adoption by the Association. Its members were:

M. Imman Ali (Bangladesh)
Ivonne Allen (Argentina)
Andrew Becroft (New Zealand)
Avril Calder (United Kingdom – member *ex officio* as President of the Association)
Daniel Pical (France)
Julia Sloth-Nielsen (South Africa)
Jean Trépanier (Canada – Chairperson)
Renate Winter (Austria – Former President of the Association).

After an initial meeting held in Geneva in January 2015, contacts between members were made mainly through email.

Relevant documentation was gathered and transmitted to the members of the International Working Group. Initial drafts were prepared by Jean Trépanier for the various parts of the Guidelines and discussed first with a local Advisory Working Group made of four Canadian judges:

Oscar d'Amours (former Vice-President of the Association)
Lise Gagnon
Claude Lamoureux
Viviane Primeau (Deputy Secretary General of the Association).

Thus improved, the drafts were sent for comments to the members of the International Working Group. The latter were invited to consult with colleagues from their own environment before formulating their comments if they so wished, which could widen the consultation process. Comments were exchanged between members of the International Working Group until a consensus was reached on the text. The original version of the text was English and was checked by Avril Calder. Translation to French was done by Jean Trépanier and checked by Daniel Pical, whereas translation to Spanish was done by Patricia Klentak and checked by Gabriela Ureta. Throughout these operations, the chair person was responsible for the overall organization of the work, the drafting and the consultation process.

The text was adopted in its English version by the Council of the Association at its meeting held in London on October 21st, 2016. Once translated in Spanish and French, it was ratified by the members of the Association on April 26th, 2017.

Scope of the Guidelines – In domains such as health and social services as well as delinquency and crime policies, it is usual to distinguish between three

levels of prevention. Primary prevention aims at avoiding the initial occurrence of a problem through strategies that apply to the population at large. Secondary prevention aims at avoiding the occurrence of the problem through more targeted interventions, directed at people who are identified as being at risk. Tertiary prevention aims at reducing recurrence amongst persons facing the same problem again, through interventions targeted at those who are being touched by the problem. In such spheres as delinquency prevention, child protection and similar areas, justice interventions aim at preventing recurrence of the problem and, therefore, are part of what is viewed as tertiary prevention. As they aim at ensuring the quality of children's interactions with the justice system, including due respect for the rights of children, the Guidelines are part of tertiary prevention and do not impinge on the other two levels of prevention.

Children are likely to come into contact with the justice system for various reasons, including for example separation of parents, custody, protection, adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, displaced children, asylum-seeking and refugee children and so forth. They may appear before various types of courts, be they civil, criminal or administrative – including, in some countries, traditional or religious courts. They may appear as a party or as a witness. Whatever the setting, children's rights must be respected and the Guidelines should apply to all matters where children are in contact with the justice system.

Contents of the Guidelines – The main basis on which the Guidelines are built is children's rights. Children are acknowledged as bearing rights of their own. They are not seen as objects whose rights are secondary to the views of adults. The Guidelines are structured in six parts:

- *Part 1* contains some *Definitions*.
- *Part 2* enunciates *Fundamental principles*, which have in common their general relevance to all situations and the fact that they set orientations for the various elements that are presented in other parts of the Guidelines. They include:
    - the right to be treated according to the rule of law, which must recognize children as subjects of substantive and procedural rights;
    - the right to have their best interests considered as a primary consideration;
    - the right to participate and have their views heard in proceedings that affect them;
    - the right to be respected and treated with dignity;
    - the right to be treated equally, without discrimination of any kind.
- *Part 3* presents *General elements of a child focussed justice* – which are qualified as general in the sense that they are relevant to all stages of proceedings, be it before, during or after judicial proceedings. They include:
    - the right to be provided with relevant information and advice;

  - the right to a number of procedural guarantees that can ensure the fairness of proceedings;
  - the right to legal assistance and representation;
  - the right to hearings where the environment, communications and the course of proceedings are well adapted to children;
  - the right to be accompanied by their parents and to remain under their care;
  - the right to be assisted by an interpreter and other intermediaries if needed;
  - the right not to be deprived of liberty, unless required as a measure of last resort and for the shortest possible time;
  - the right to have appropriate age thresholds defined in law for the minimum age of criminal responsibility and for the age up to which a person will be considered a child under criminal law;
  - the abolition of status offences;
  - the right to confidentiality and the protection of their privacy;
  - the utmost importance of avoiding all unnecessary delays in the proceedings;
  - the need for multidisciplinary and interdisciplinary approaches, as well as that of specialization, selection and training of both legal and non legal staff to meet the needs of children.
- *Part 4* presents the *elements of child focussed justice* that are relevant to interventions *before and during judicial proceedings*. They include such issues as:
  - interactions between children and the police;
  - children as victims and witnesses;
  - alternatives to judicial proceedings;
  - children's access to courts or other bodies;
  - independence and impartiality of the courts;
  - the choice of measures imposed on children in conflict with the law;
  - the right to appeal decisions.
- *Part 5* presents the *elements of child focussed justice* that are relevant to interventions that *follow judicial proceedings*, in the course of the implementation of decisions.
- *Part 6* raises briefly issues about *Implementation, monitoring, assessment and amendment of the Guidelines*.

On each topic, the text presents first the *Guidelines* themselves, followed by a section of *Explanations and comments* whenever needed.

PART 1 – DEFINITIONS

Guideline:

1 – *Definitions*

Child – A child means any person under the age of 18 years. Where it is uncertain whether the person has reached the age of 18 years, that person is presumed to be a child.

Child in conflict with the law – A child in conflict with the law is a person alleged to have, or accused of, or recognized as having infringed the criminal law after attaining the age of criminal responsibility and before the age of 18.

Justice – The "justice system" must be understood as referring not only to judicial organizations and processes, but also to authorities and services whose interventions are related to those of the courts (such as the police, social or health care services and other related services). It refers to both its legal and non-legal staff.

Parent – A person with parental responsibility according to national law. In the absence of parents or if no parent holds parental responsibility, such responsibility may be exercised by a guardian or appointed legal representative.

Explanations and comments:

- ***Intention –*** The intention in this section is not to provide an extensive number of definitions, but to offer a few clarifications concerning some of the key words or concepts.

- ***Child –*** The Guidelines cover a heterogeneous group. They may concern for example babies who are in need of care and protection, young children whose custody is contested by divorced parents or strong and aggressive 17 years old delinquents. One might feel inclined to refer to the younger ones as *children* but to use some other term (such as *youth*) for the latter. Yet the use of more than one word to refer to the whole group would make the text unnecessarily complicated, creating an obligation to use such expressions such as *child/youth*, *children/youths* or other combinations of the kind. Hence the decision to use one single word to include the whole group of children and youths covered by the Guidelines. However imperfect, the word *child* (or *children*) appears to be the best choice. It is used in the *Convention on the Rights of the Child* as well as in other international instruments to refer to all persons under 18 years of age, which is precisely the group for which these Guidelines have been designed. It seemed preferable to follow this common trend. Special provisions apply to young persons in conflict with the law; they can be found in Guideline 3.8.2.

- ***Child focussed justice –*** Other Guidelines have used various concepts to describe their orientation. For example, the Council of Europe refers to *child-friendly justice* in the English version of its Guidelines, *justice adaptée aux enfants* in its French version and *justicia adaptada a los niños* in its Spanish version. Beyond the difference that one may note between the concepts used in the English version on the one hand and the French and Spanish versions on the other, the Council of Europe Guidelines define the content of these concepts in the same terms:

  > " 'Child-friendly justice' refers to justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focussed on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity." (Council of Europe Guidelines, article II on *Definitions*.)

  For the present Guidelines, this definition is fully endorsed to describe what is referred to as *child focussed justice*. Using the expression *child-friendly justice* appears totally appropriate in matters such as civil, child protection, immigration and various other fields, but not in criminal matters, where it is likely to strengthen the unfair and unfounded stereotype that judges who hear cases of children in conflict with the law are too friendly and soft on crime. Another alternative might be *child adapted justice*. However this expression might carry the message that "real" justice is adult justice, of which justice for children would only be an adaptation. The intention is rather to refer to elements of the justice system that have their own specific nature, which they derive from focussing on who and what children are. Hence the choice that was made to refer to *child focussed justice* in the present guidelines.

- ***Juvenile justice –*** The expression *juvenile justice* is commonly used to refer to that part of the justice system specialized in hearing children's cases. However it is not without ambiguities. Its meaning is not the same everywhere: in some countries the expression refers only to courts that hear children's criminal cases, whereas in other countries it also includes other matters such as child protection cases. Furthermore, the meaning of the word *juvenile* is bound to vary from country to country depending on the varying age levels on which the jurisdiction of these courts is based. Hence the choice that was made to avoid using this expression in the present document (except, of course, when quoting a passage from another document that uses that expression). Preference was given to various expressions referring to *children in conflict with the law* when the intention was to speak about children dealt with under criminal law.

- ***Parents and family –*** Parenthood and family may have quite different meanings depending on cultures. Article 5 of African Guidelines remind us that this must be taken into account when interpreting the Guidelines:

  "These Guidelines shall take cognisance of the need for respect for family life, and the diversity of family and kinship forms in Africa that sustain and support children's growth and development. Where the Guidelines refer to a 'parent', the context may require that care-givers and members of the extended family or others who fulfil a parental responsibility role are accorded recognition. Appointed guardians or appointed legal representatives may substitute for parents or care-givers. Justice for children should include the recognition of the support role of parents, family members and members of the kinship group, and the need to reintegrate children who come into contact with the justice system into families and communities. Contact with parents family and friends shall be encouraged and supported, except where restrictions are required in the interests of the child."

  Needless to say, this reminder extends to countries of all continents.

PART 2 – FUNDAMENTAL PRINCIPLES

Guideline:

2. ***Fundamental principles*** – This part of the document presents what other guidelines call "fundamental" or "overarching" principles. These principles have in common their general relevance to all situations and the fact that they set orientations for the various elements that are presented in other parts of the Guidelines.

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SECTION 2.1 – RULE OF LAW

Guideline:

2.1 – *The rule of law* – Every justice intervention involving children must be based on the rule of law. Children must be recognized by law as subjects of substantive and procedural rights. No law shall have a retroactive effect.

Explanations and comments:

- ***What is the "rule of law"? –*** The *rule of law* has been described in the following terms by the United Nations Secretary-General:

  "The 'rule of law' is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." (*Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies* (S/2004/616), paragraph 6.)

- ***The rule of law and children in contact with the justice system –*** The requirements of the rule of law were not always met by the justice system when dealing with children. Children were for a long time subject to the discretionary power of their parents – chiefly fathers (paternal authority). When States felt the need to intervene at the end of the 19th century in cases where parents were defaulting their responsibilities, they did so with laws that vested courts with unfettered discretionary powers. Motives for

interventions were often defined in general terms lacking precision and certainty. Children were not granted rights, were they procedural or substantive: it was felt that granting them rights would amount to providing them with ways to oppose interventions that they needed and were in their best interests. This was particularly true for children in need of care and protection and for children in conflict with the law. Such perspectives were challenged, particularly from the 1960s. It is now acknowledged that the requirements of the rule of law apply not only to adults but also to children. This is clearly reflected in international instruments as well as in most national legislation.

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SECTION 2.2 – BEST INTERESTS OF THE CHILD

Guideline:

2.2 – *The child's best interests: a primary consideration* – The best interests of the child shall be a primary consideration in all actions concerning children.

Explanations and comments:

- ***A key disposition –*** The first paragraph of article 3 of the *Convention on the Rights of the Child* is one of the most important – and best known – provisions of the Convention. It places the best interests of the child as a key concern whenever actions have to be taken with children:

  "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".

  Consequently this concern is bound to be omnipresent in interactions that children have with the justice system – be it in civil, criminal or administrative matters. Hence the choice that Guideline 2.2 should use the very words of this paragraph of the Convention.

- ***Interpreting the significance of the provision –*** In paragraphs 32-40 of its *General Comment No. 14*, the Committee on the rights of the child has clarified its interpretation of this provision. In brief:
  - The concept of the child's best interests is complex and its content must be determined on a case-by-case basis. It is flexible and adaptable. The child's best interests must be determined in light of the circumstances of the child or group of children concerned.
  - One must be aware of the danger that the flexibility of the concept – which allows it to be responsive to the situation of individual children – may also leave room for abuses by State authorities, parents and professionals.

- The mention in the Convention that the best interests of children "*shall be*" a primary consideration in all actions concerning children place a strong legal obligation on States, which may not exercise discretion as to whether children's best interests are to be ascribed the proper weight as a primary consideration in any action undertaken.
- The expression "*primary consideration*" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

However, we must not lose sight of the fact that other imperative concerns – such as the rights of other persons – may conflict with a child's best interests and have to be taken into account.

- ***The best interests of children in conflict with the law –*** When stating that the best interests of the child shall be a primary consideration in all actions concerning children, article 3 of the Convention does not make any exception for children in conflict with the law. This does not mean that it should be the only consideration. As indicated in Guideline 4.6.1, the concern for the needs of the child does not preclude the courts from considering the seriousness of the offence and the needs of society when deciding on a measure to be imposed on a child. In paragraph 10 of its *General Comment No.10*, the Committee on the Rights of the Child explains why and how the justice system should consider the best interests of children in conflict with the law as a primary consideration:

  "Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety."

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SECTION 2.3 – PARTICIPATION

Guidelines:

2.3.1 – ***The right of children to participate –*** Children who are capable of forming their own views have the right to participate, intervene and

express those views freely in all judicial or administrative proceedings that affect them. Their views must be given due weight in accordance with their age and maturity. They may decide to participate. If they participate, they may do so either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

When necessary, the Court or other official may appoint a psychologist or other expert to have a better understanding of the views and needs of the child, and to ensure that the child understands the proceedings and the information that is relevant for him or her.

2.3.2 – *Children who are too young or immature* – When children are too young or too immature to form and express their own views, independent representatives (court appointed lawyers or other representatives) should be designated to bring forward their best interests and respect for their rights.

2.3.3 – *Participation and information* – In order to participate adequately, children must be provided with all necessary information. When decisions or rulings are made, they should be explained to the children in a language that they can understand, particularly when they conflict with their expressed wishes or views.

2.3.4 – *Context and attitudes* – The context in which children exercise their right to participate has to be enabling and encouraging, so that they can be sure that the adults who are responsible for the proceedings are willing to listen and seriously consider the views that they wish to express.

Explanations and comments:

- ***The rights to be heard and to participate –*** Article 12 of the *Convention on the Rights of the Child* deals with the right to be heard and express views. However, as explained by the Committee on the rights of the child (*General Comment No. 12*, paragraphs 3 and 13), the concept of participation has made its way over the years:

  "Since the adoption of the Convention in 1989, considerable progress has been achieved at the local, national, regional and global levels in the development of legislation, policies and methodologies to promote the implementation of article 12. A widespread practice has emerged in recent years, which has been broadly conceptualized as "participation", although this term itself does not appear in the text of article 12. This term has evolved and is now widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes." (Paragraph 3)

  "These processes are usually called participation. The exercise of the child's or children's right to be heard is a crucial element of such

processes. The concept of participation emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children's lives." (Paragraph 13)

Hence the choice made in the present Guidelines – as in other Guidelines – to refer to the right to be heard as a component of the right to participate.

- ***The rights to participate and to be informed –*** The right to participate is linked to a number of other rights. The association with the right to be informed is particularly important. Being informed is a precondition for children's ability to make appropriate decisions concerning their participation. Namely, children must be informed of their rights, the proceedings (including their place and role in them), the possible outcomes and consequences of the proceedings for them, the option of either communicating directly or through a representative, the availability of services that can provide help and support and the availability of review of decisions (see Guideline 3.1 on *Information and advice*).

- ***Children's views to be given due weight in accordance with age and maturity –*** Due weight must be given to children's views in accordance with their age and maturity. This assessment cannot be made solely on the basis of age: the individual child's maturity must be assessed on a case-by-case basis to see how capable the child is of forming his or her own views, and thus to determine the weight to be ascribed to these views.

  As indicated in the Council of Europe's Guidelines, the requirement for children to be capable of forming their own views

  > "should not be seen as a limitation, but rather a duty on the authorities to fully assess this capacity. Instead of assuming too easily that the child is unable to form an opinion, states should presume that a child has in fact this capacity. It is not up to the child to prove this. [The text] underlines the essential message that children are bearer of rights." (Council of Europe's Guidelines, Explanatory memorandum, paragraph 33.)

- ***Participation as a right, not a duty –*** The right to participate and be heard is a right, not a duty. Children who are capable of forming their own views are free to decide on their participation in the proceedings. No undue pressure should be exerted on them in that respect.

- ***Context and attitudes to encourage children's participation –*** Elements of context as well as attitudes can encourage children's participation. Adults must convey the message to children that their contribution to the proceedings is welcome and taken seriously. They must be made to feel that they are in a safe environment, respectful of their person. Questions and other interventions must be in a language easily understood and at a tempo that can be followed by the child, keeping in mind the latter's age and maturity. Cross-examination of child witnesses must be child-appropriate and must not be intrusive or hostile.

As reminded by the Committee on the Rights of the Child:

> "A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms". (*General Comment No. 12*, paragraph 34.)

Furthermore:

> "[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". (*General Comment No. 12*, paragraph 24.)

It is important that children can speak freely, without any disruption. Of course, this must be done with due consideration for other rights, such as the right for children in conflict with the law not to incriminate themselves.

- ***Participation in administrative proceedings –*** Judicial proceedings are often more formal than administrative proceedings. That is why children's participation – or lack of it – can be more visible in the former than in the latter. Nonetheless one should remain vigilant to encourage participation in administrative proceedings, which may have a major impact for children. One may think for example of administrative processes that lead to the adoption of individual plans of care for children in need of protection, or plans for the execution of rehabilitative measures imposed on children in conflict with the law. One should also pay particular attention to the processes through which decisions are made on a regular basis to determine the conditions of placement of children who are placed in all forms of alternative care, including in institutions. These are examples of administrative processes where legislation should require that children be provided with appropriate information as well as meaningful opportunities to express their views, and for those views to be given due weight throughout decision-making processes.

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SECTION 2.4 – DIGNITY

Guidelines:

2.4.1 – *Dignity –* In their contacts with justice, children must be treated with respect, care, sensitivity and fairness, regardless of their legal status or the reasons for which they have come into contact with justice.

2.4.2 – *Torture and degrading treatment –* Children shall not be subjected to torture or inhuman or degrading treatment or punishment.

Explanations and comments:

- ***Importance of dignity –*** The very first two paragraphs of the Preamble of the *Convention on the Rights of the Child* insist on the central importance of dignity:

  > "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
  > Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person [...]".

  Children are entitled to be treated with dignity, like all other human beings. To be treated with dignity is not an act of charity: it is the right of any human being – like other rights that are granted to children and other persons. In some countries, the attitudes of justice officials may require significant improvements, including towards such groups as children who are recidivists, drug addicts or street children.

  Furthermore, being treated with dignity is inherent in learning to treat other people with dignity. In treating children with dignity, justice and other officials contribute to their education.

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SECTION 2.5 – PROTECTION FROM DISCRIMINATION

Guideline:

2.5 – ***Discrimination –*** All children who come into contact with the justice system must be treated equally, without discrimination of any kind, irrespective of their – or their parents' or legal guardians' – race, colour, sex, sexual orientation, language, religion, political or other opinion, national, ethnic or social origin, immigration or refugee status, family condition, socio-economic condition, disability, birth or other status.

Children must be protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of their parents, legal guardians or family members.

Explanations and comments:

- ***All children to be treated equally –*** All children must be treated equally. And, as reminded by the Committee on the rights of the child:

“Particular attention must be paid to *de facto* discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law (recidivists). (*General Comment No. 10*, paragraph 6.)

PART 3 – CHILD FOCUSSED JUSTICE: GENERAL ELEMENTS

Guideline:

3. ***General elements*** – Part 3 of the Guidelines deals with "general elements" of children's contacts with justice, *i.e.* elements that are relevant to all stages of proceedings, be it before, during or after judicial proceedings.

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SECTION 3.1 – INFORMATION AND ADVICE

Guidelines:

3.1.1 – *Obligation to provide information and advice* – From their very first involvement with the justice system or other authorities (such as the police, immigration, educational, social or health care services), children must be promptly and adequately provided with all the information and advice that is relevant to their status, whether as witnesses, victims, alleged offenders, plaintiffs or any other capacity.

3.1.2 – *In a manner adapted to the child* – This must be done in a manner and a language adapted to each child's age, maturity, abilities, gender and culture.

3.1.3 – *Issues on which information and advice is to be provided* – Information and advice should be provided on various issues, such as, amongst others, the rights of the child and ways to exercise and protect them; the court system; the proceedings (in court and out of court), including the place and role of the child, as well as the possible outcomes and consequences of the proceedings on him or her; the charges, if any, laid against the child; availability of services which can provide help and support; the availability of review of decisions.

3.1.4 – *Information to other persons* – As a rule, the information should also be provided to parents and legal representatives.

3.1.5 – *Exceptions* – Unless it is mandatory under law, the communication of information to the child, the parents or a legal representative can be withheld from them if such communication is deemed prejudicial to the child.

Explanations and comments:

- ***Links with other rights*** – Children's ability to participate in the proceedings and to exercise other rights depends on their knowledge and

understanding of the proceedings themselves, of the functioning of the court and other services, and of their place and role in interacting with them. Persons who do not know and understand their rights cannot affirm and exercise them. They are in the same position as someone who does not have those rights. It is therefore crucial to inform children adequately about their rights, the proceedings, as well as the roles of the various officials and professionals, and their own role in their interplay with them.

- ***The Convention on the Rights of the Child*** – The Convention affirms that every child alleged as or accused of having infringed the penal law must "be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians" (article 40 (2) (b) (ii)).

- ***Council of Europe Guidelines*** – The Council of Europe Guidelines include a non-exclusive list of issues on which children and their parents should be promptly and adequately informed:

  "*a.* their rights, in particular the specific rights children have with regard to judicial or non-judicial proceedings in which they are or might be involved, as well as the instruments available to remedy possible violations of their rights including the opportunity to have recourse to either a judicial or non-judicial proceeding or other interventions. This may include information on the likely duration of proceedings, possible access to appeals and independent complaints mechanisms;
  b. the system and procedures involved, taking into consideration the particular place the child will have and the role he/she may play in it and the different procedural steps;
  c. the existing support mechanisms for the child when participating in the judicial or non-judicial procedures;
  d. the appropriateness and possible consequences of a given in-court or out-of-court proceedings;
  e. where applicable, the charges or the follow-up given to their complaint;
  f. the time and place of court proceedings and other relevant events, such as hearings, if the child is personally affected;
  g. the general progress and outcome of the proceedings or intervention;
  h. the availability of protective measures;
  i. the existing mechanisms for review of decisions affecting the child;
  j. the existing opportunities to obtain reparation from the offender or from the state through the justice process, through alternative civil proceedings or through other processes;
  k. the availability of the services (health, psychological, social, interpretation and translation, and other) or organisations which can provide support as well as the means of accessing such services along with emergency financial support, where applicable;
  l. any special arrangements available in order to protect as far as possible their best interests if they are resident in another state." (Council of Europe Guidelines, pp. 5-6, section 1 on *Information and advice*.)

- ***Child victims –*** More than any others, child victims are likely to need information and advice on how to obtain psycho-social treatment and support, compensation, reparation and redress.

- ***Advice –*** Beyond information, the child may also need advice. It should be provided by people with adequate knowledge, who have no conflict of interest with the child and can act in the latter's best interests.

- ***Exceptions –*** As a rule, the information provided to children should also be provided to their parents or legal representatives. Exceptions to that rule could be justified in cases where the communication of information is not mandatory under law and where communicating the information to parents or legal representatives would be deemed prejudicial to the child.

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SECTION 3.2 – GUARANTEES OF FAIR PROCEEDINGS

Guidelines:

3.2.1 – *Guarantees of fair proceedings –* Guarantees of fair proceedings include a number of procedural rules that aim at ensuring that each party in a given case be treated with fairness. In criminal proceedings, they include what is often referred to as the rights of the defence. These guarantees are equally relevant in other types of interventions and proceedings, such as civil, child protection or administrative law procedures.

3.2.2 – *Most important guarantees –* The following stand amongst the most important guarantees that are granted to children who are involved in legal proceedings:

- the right of children to be treated in a manner consistent with the promotion of their sense of dignity and worth;
- the right not to be judged under a retroactive law, including the right not to be alleged as, be accused of, or recognized as having infringed the 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 until proven guilty according to law;
- the right to participate effectively in the proceedings, which includes the right to be heard and be provided with the necessary information;
- the right to have legal or other appropriate assistance and representation for the preparation and presentation of their case;

- the right to have the matter determined without delay by a competent independent and impartial authority or judicial body in a fair hearing according to law;
- the right to be informed promptly and directly of the charges or reasons for intervention aimed at them;
- the right not to be compelled to give testimony or to confess guilt;
- the right to examine opposing witnesses, as well as to obtain the participation and examination of their own witnesses under conditions of equality;
- if needed, the right to have the free assistance of an interpreter;
- the right to have decisions reviewed on appeal by a higher impartial authority or judicial body;
- the right to have their privacy fully respected at all stages of the proceedings.

Some of these guarantees are further explained in separate sections of the Guidelines.

Explanations and comments:

- ***Children's rights and the child welfare model*** – The child welfare model that inspired much juvenile court legislation in the early decades of these courts' existence made little room for legal guarantees for fair proceedings, or what is often referred to as the "rights of the defence" in criminal matters. Juvenile court interventions were viewed as being in the best interests of the child. Granting rights to children was perceived as creating obstacles to the courts, whose intention was to provide help and services to children that needed them: granting rights was viewed as against the best interests of children. Unlike adult criminals, juvenile delinquents were not supposed to be punished but to be provided with help, care and education.

  As of the 1960s, this perspective was challenged. Benevolent intentions on the part of interveners did not prevent the fact that interventions involved intrusions in private lives and, in some cases, deprivation of liberty, to which children and their families could object. This became viewed as sufficient ground for acknowledging children's rights to fair proceedings. In that context the basis for children's rights was not only to prevent undue punishments (as in adult criminal cases), but also to prevent undue interventions in the private lives of children and families or deprivation of liberty. The child welfare model was adapted so as to leave room for the rights of children. This perspective has inspired the *Convention on the Rights of the Child* as well as other international instruments adopted from the 1980s. Whether they are considered as juvenile delinquents or as children in need of care and protection, children must be guaranteed fair proceedings. The same applies to children involved in other types of proceedings, such as family, immigration or other proceedings.

  Those rights are now considered so important that they should not be overruled by the concern for the best interests of the child. To quote the Council of Europe Guidelines:

> "Elements of due process such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, should be guaranteed for children as they are for adults and should not be minimised or denied under the pretext of the child's best interests. This applies to all judicial and non-judicial and administrative proceedings." (Council of Europe Guidelines, p. 5, section E on *Rule of law*, paragraph 2.)

- ***Respect for the child*** – Paragraph 1 of article 40 of the *Convention on the Rights of the Child* affirms the right of the child in conflict with the law to be treated in a manner consistent with his or her sense of dignity and worth, thus reinforcing his or her respect for the rights of others. In other words, children's encounters with the justice system can be an educative experience if the adults whom they meet treat them with respect. It is essential for justice officials to express respect for children if they want to be taken seriously by the latter when they try to teach them to respect their fellow citizens. Respect for others must be taught through example. This educative role applies not only to officials who work with children in conflict with the law, but to all justice officials with whom children are in contact.

- ***Rule of law*** – It is essential to a democratic society that one cannot be declared guilty of a crime nor a punishment imposed unless the crime or punishment is defined as such in the law. That is why article 40 (2) (a) of the Convention provides that no child can be charged with or sentenced under the penal law for acts or omissions which at the time they were committed were not prohibited under national or international law. One should add that no heavier penalty should be imposed than the one applicable in the law at the time when the offence was committed. But if a change of law after the act provides for a lighter penalty, the child should benefit from this change. (See the Committee on the Rights of the Child's *General Comment No. 10*, paragraph 41.)

- ***Presumption of innocence*** – The presumption of innocence is a basic right of the defence (*Convention on the Rights of the Child*, article 40 (2) (b) (i)). The prosecution has the onus of proving beyond reasonable doubt that the child has committed the offence. Should any reasonable doubt exist about his or her guilt, the child must be acquitted, even in cases where the prosecution's evidence might be stronger than that of the defence: the child must be given the benefit of the doubt, like any accused person.

- ***Protection against self-incrimination*** – One of the implications of the presumption of innocence is that children in conflict with the law – like adults – cannot be compelled to give testimony or to confess guilt (*Convention on the Rights of the Child*, article 40 (2) (b) (iv)). This applies to all stages of proceedings prior to a finding of guilt, including police interrogations, the choice of a plea of guilty or not guilty and the trial. A consequence of the presumption of innocence is that the responsibility for proving a child's culpability lies with the prosecutor. Children cannot be compelled to help the prosecutor in establishing their own guilt. This

implies, amongst other things, that children have the right to enter a plea of not guilty, even in cases where they know that they have committed the offence.

- ***Information on the charges*** – Children have the right to be informed promptly and directly of the charges against them (*Convention on the Rights of the Child*, article 40 (2) (b) (ii)). This is a basic requirement for enabling children to prepare their defence. It is a crucial element of their right to information, which itself is a prerequisite for exercising their right to participate in the proceedings.

- ***Participation and examination of witnesses*** – Children have the right to examine adverse witnesses as well as to obtain the participation and examination of witnesses on their behalf (*Convention on the Rights of the Child*, article 40 (2) (b) (iv)). This stands high amongst the elements of the right to an effective participation in the proceedings (see Guideline 2.3 on *Participation*). Evidence presented in criminal trials relies to a very large extent on the contribution of witnesses who are called by the parties and may be examined and challenged by opposing parties. Fair proceedings require that this right be granted equally to all parties, including children. This is true for all types of proceedings, whether in criminal, civil or other hearings.

- ***Access to a competent independent, impartial and fair authority or judicial body*** – Access to a competent independent and impartial authority or judicial body that will provide a fair hearing according to law is as essential for children as it is for adults. Obstacles that are specific to children must be removed. Children do not have the same legal capacity nor the same abilities and means as adults to defend themselves. They depend on adults with whom they may have a conflict of interest, be they parents, other family members, various interveners of the justice or social services systems and so forth. States must remove obstacles that stand between children and authorities who can hear their cases and make appropriate decisions. Interveners must facilitate children's access to appropriate jurisdictions.

- ***Other guidelines relevant to guarantees of fair proceedings*** – Further explanations and comments can be found on specific guarantees of fair proceedings. See in particular the following sections:
    - 2.1 – Rule of law
    - 2.3 – Participation
    - 3.1 – Information and advice
    - 3.3 – Legal assistance and representation
    - 3.5 – The family
    - 3.6 – Assistance of an interpreter and other intermediaries
    - 3.11 – Delays and priority in the proceedings
    - 4.7 – The right to appeal decisions

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SECTION 3.3 – LEGAL ASSISTANCE AND REPRESENTATION

Guidelines:

3.3.1 – *Right to legal assistance and representation* – Children must be provided with access to legal assistance and representation in their contacts with justice whenever their interests are at stake. In cases where there is, or could be, a conflict of interest between children and their parents or any other party, children must have their own counsel and representation, in their own name.

3.3.2 – *Role of legal assistant and representative* – Persons who provide legal assistance and representation have the same obligations towards children as they would have towards adult clients. These obligations have to be executed in a manner that is consistent with the level of understanding and communication of the child. In particular, legal assistants and representatives should:

1. provide children with all necessary information;
2. advise and guide children throughout the proceedings;
3. after consulting with the child, express the latter's views to the court or to other authorities;
4. be present throughout the proceedings, including interrogations by the police or other law enforcement authority whenever applicable.

Beyond this strictly legal role, legal assistants and representatives should be aware of the needs of children for general and psychological support throughout the proceedings and they should contribute to such support.

3.3.3 – *At which stages of the proceedings?* – Persons who provide legal assistance and representation must be given the means to exert their responsibilities at all stages of the proceedings. This goes from the earliest stages of the proceedings, including the preparation of questioning by the police or by any investigating authority, until the end of the execution of any measure imposed on the child. They must accompany the child through administrative as well as judicial proceedings.

3.3.4 – *Privacy and other requirements* – Whether they are in writing or oral, communications between children and their legal assistant or representative should take place in conditions that guarantee the full privacy and confidentiality of these communications. Legal assistants and representatives must be provided with adequate time and facilities to help children to prepare for the role they have to play in the case, whether as victims, witnesses, suspects or accused persons.

3.3.5 – *Free legal aid* – Children should be provided with free legal aid, chiefly supported by the State. Such provision is particularly essential in cases where there may be a conflict of interest between parents and child (where a child's lawyer should not be chosen and paid for by the

parents) and in situations where children are – or may be – deprived of their liberty or otherwise separated from their family.

3.3.6 – *Training of legal assistants and representatives* – Lawyers or other legal assistants and representatives who work with children should have special training and knowledge on children's rights as well as on communicating with children at their level of understanding.

Explanations and comments:

- ***Who should provide legal assistance and representation?*** – Legal assistance and representation should normally be provided by lawyers. However, the Committee on the Rights of the Child reminds us that, in cases of children in conflict with the law, the *Convention on the Rights of the Child*

  "does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of States parties to determine how this assistance is provided but it should be free of charge. The Committee recommends the State parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals. Other appropriate assistance is possible (e.g. social worker), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law." (Committee's *General Comment No. 10*, paragraph 49.)

- ***Avoiding potential conflicts of interest*** – Parents are the first and main educators of their children. As such, they are entrusted with the multifaceted responsibility of ensuring that all decisions are made in the best interests of their children. Yet conflicts of interest are frequent in situations where children and parents interact within justice systems. One may think of separated or divorced parents who are guided by their personal interests when fighting over the legal custody of their children; or parents who are brought before the justice system for abusing or neglecting their children; or parents of delinquent children who may feel overwhelmed and exhausted by their child's behaviour and see no other solution than a custodial placement which the child may refuse. These are but a few examples of situations where parents and children are likely to have conflicting interests. Whenever a potential conflict of interest exists between a child and his parents, the child must be provided with legal assistance and representation by someone who:
  - acts in his or her own name;
  - does not provide any legal services to the parents or to one or other of them;
  - has not been chosen by the parents and is not paid by them.

  The person who assists and represents the child legally must be in a position where he or she can express and defend exclusively the views or the child.

- ***Exceptions to the rule*** – The primary responsibility to ensure that children are provided with legal assistance and representation lies with the State. According to the European Parliament and the Council of the European Union, a State may choose to make exceptions to the rule in cases where such provision is not proportionate given the circumstances of the case, it being understood that the best interests of the child must be a primary consideration (*Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings*, paragraph 30 of the Preamble). However, it is our view that no such exception should be made – and children should always be provided with legal assistance and representation – whenever the interests of the child are at stake, which includes situations where courts or other bodies consider making decisions involving any deprivation of liberty, placement or separation of children from their family.

- ***Privacy and confidentiality of communications*** – The privacy and confidentiality of communications between children and their legal assistant or representative is absolutely essential to fair proceedings. Whether children are involved in proceedings as victims, witnesses, plaintiffs, suspects, accused or otherwise, they cannot be adequately assisted and represented without the assurance that communications will be private and remain strictly confidential.

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SECTION 3.4 – ORGANISATION OF THE PROCEEDINGS, CHILD FOCUSSED LANGUAGE AND ENVIRONMENT, FORMALISM

Guidelines:

3.4.1 – *Children to be treated as children* – Judges, professionals and others who interact with children should do so with sensitivity and respect. Their interventions and decisions should express consideration for the children's age, their special needs, their levels of maturity and understanding, and any communication difficulties they may have.

3.4.2 – *Communication adapted to children* – Interactions with children should be made in a language that is appropriate to their age and level of understanding. Adults who interact with children should ensure that children understand the proceedings and the information that is relevant for them. Various legal documents have to be written in a technical legal language that is required for their validity. Those documents should be explained – at least orally – in a language that the child can understand. The responsibility that the child's parents or legal representative may have in this respect does by no means reduce that of justice authorities such as the judge, the prosecutor, the police and others for making sure

that the child understands the relevant documents. The provision of the information to the child's parents should not be an alternative to communicating this information to the child: both should receive the information in a way that they can understand it.

3.4.3 – *Children accompanied by their parents* – The parents' presence may be a reassuring factor for children. Thus children should be allowed to be accompanied by their parents, unless a reasoned decision is made to the contrary.

3.4.4 – *Familiarising the child with the court environment and proceedings* – Before the proceedings begin, children should be familiarised with the layout and the functioning of the court or other facilities, with the role and identities of the officials involved, as well as with the nature of the proceedings.

3.4.5 – *Interrogation of children as witnesses* – The evidence provided by children is best when children are exposed only to minimal stress. Children should be protected from hostile or intimidating questioning. Evidence obtained with methods such as video or audio recording or pre-trial hearings *in camera* should be admissible. Interrogation practices should be adapted to afford maximum protection to children and their rights, without undermining the rights of other parties to fair proceedings.

3.4.6 – *Court proceedings adapted to children* – Court proceedings should be adapted to the pace and attention span of children. Breaks should be provided, disruptions should be kept to a minimum and hearings should not be too long.

3.4.7 – *Articulation of multifaceted proceedings* – Some children may be subjected to more than one type of proceeding, each involving its own legal processes (*e.g.* child protection, criminal and family procedures). In so far as it can be done without jeopardizing the rights of the parties involved, those procedures should be articulated with each other in order to simplify them, to avoid the repetition of evidence, interviews and evaluations, and to ensure optimal consistency between the decisions made in each of the processes.

3.4.8 – *Solemnity of the justice environment* – Solemnity is often a characteristic of judicial proceedings. It is expressed in various ways, including the physical layout of court facilities and the clothing of court officials (gowns, wigs). This characteristic of the justice environment may prove rather intimidating and oppressive for children. Court facilities and environment where cases involving children are heard on a regular basis should be designed so as to keep formal solemnity to a strict minimum.

Explanations and comments:

- ***Communication adapted to children –*** Principles 6 and 7 of the *Principles of Judicial Ethics for Youth and Family Judges and Magistrates* of the IAYFJM state that:

  "***Principle 6 –*** *A judge shall strive to explain clearly the reasons of his or her decisions and to ensure that his or her decisions are understood by the child or youth and the adults into whose charge the child or youth is entrusted.*

  Principle 7 – *A judge shall manifest sensitivity and shall communicate with the child or youth and other persons involved in a manner adapted to their levels of understanding.*"

  This approach should not be viewed as specific to judges and should be adopted by all justice officials and professionals.

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SECTION 3.5 – THE FAMILY

Guidelines:

3.5.1 – ***Parents and family in the proceedings –*** In normal circumstances, children should have the right to be accompanied by their parents at every moment of the proceedings, including questioning by the police or other investigating authority as well as court hearings. Efforts should be made to have both parents present and involved in the proceedings. Parents' involvement may be a key contribution towards the solution of some of the problems for which a child may be brought before a court. Parents should remain present throughout the proceedings in order to provide general and psychological support to their children, unless excluded by order of the court considering the best interests of the child. If there are serious grounds, parents may be denied the right to accompany their child, who should then be accompanied by another appropriate adult.

3.5.2 – ***Parents, family and decisions concerning the child –*** Decisions concerning children must aim at keeping them in their family environment.

Where placements are necessary, return of children to their home environment must be planned as a key objective from the outset. These children must be enabled and encouraged to maintain regular contact with their parents, other family members and other significant persons for them, except where restrictions are required in their best interests.

If several children of a same family have to be placed away from home, every effort should be done to avoid separating siblings.

3.5.3 – *Continuity and stability in care* – When placements are necessary, children must benefit, insofar as possible, from being in contact with the persons most important to them, in particular grandparents or other members of the extended family, from continuity of care, and from stable relationships and stable living conditions. Parents' involvement must be fostered, with a view to encouraging and helping them to exercise their parental responsibilities.

In exceptional cases where returning children to their family is impossible, one must ensure continuity of care, stable relationships and stable living conditions on a permanent basis.

Explanations and comments:

- ***Parents: rights or obligations? –*** The *Convention on the Rights of the Child* as well as other national and international instruments acknowledge the existence of rights for children. Legislation of previous eras tended to grant rights to their parents, who were presumed to exercise those rights in the interests of their children. Now parents are viewed as having obligations towards their children. Some rights are conferred upon parents to enable them to do whatever has to be done to serve the best interests of their children. In that sense, they are granted rights as trustees, to ensure that they are empowered to do what is necessary for the best interests of their children.

- ***The essential role of parents*** – Parents bear a unique responsibility as educators of their children. They must take part in significant events of their lives, including contacts with the justice system. In addition to their legal responsibilities and duties as first guardians of their children, they must be present to provide psychological and emotional support and assistance to the child. Their role is not to be confused with that of a legal advisor, and one must be sensitive to potential conflicts of interest in some cases. Yet the participation of parents – as parents – in the proceedings is essential.

- ***Parents: part of the problem or the solution?*** – Weaknesses and vulnerabilities of some parents may lead some interveners to view parents as part of their children's problems to such an extent that it is difficult to see them as part of the solution. Yet the contribution of parents should be discarded only in situations of very last resort. Everything must be done to keep the child in his or her family environment. If a placement is necessary, return of the child to his or her home must be planned from the start as a key objective. In that context, parents must be viewed as partners in the interventions. Some may need support and assistance to play their role adequately. Whenever necessary, such help should be provided and the social and educational potential of the parents should be

promoted. Parents must be viewed as key actors in the solution of their children's problems. Their involvement must be fostered.

- ***What about fathers?*** – Many children who are in contact with justice systems come from disrupted families, with divorced or separated parents, where children are usually legally placed by the courts with their mothers. This is often taken as a fact, and some interveners may be tempted to deal primarily with mothers, leaving little or no room for fathers' involvement in the situation. Children need both their mother and father, who have a joint responsibility towards them. Whether it is due to exclusion or self-exclusion, the absence of some fathers should be viewed as a problem to be addressed and solved, not as a mere situation to be acknowledged as an inescapable fact. Like mothers, fathers must be viewed as part of the solution of their children's problems.

- ***Exceptions*** – Exceptional situations may justify denying parents the right to accompany their child. One may think for example of situations where parents and child have been involved jointly in criminal activities, where the child has been a victim of his or her parents' behaviour or where parents have a conflict of interest with their child.

- ***Punishment of parents for the offences committed by their children*** – It is worth quoting the Committee on the Rights of the Child on the issue of the punishment of parents:

  "[T]he Committee regrets the trend in some countries to introduce the punishment of parents for the offences committed by their children. Civil liability for the damage caused by the child's act can, in some limited cases, be appropriate, in particular for the younger children (e.g. below 16 years of age). But criminalizing parents of children in conflict with the law will most likely not contribute to their becoming active partners in the social reintegration of their child." (Committee's *General Comment No. 10*, paragraph 55.)

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SECTION 3.6 – ASSISTANCE OF AN INTERPRETER AND OTHER INTERMEDIARIES

Guidelines:

3.6.1 – *Assistance of an interpreter* – Children involved in justice processes should have the free assistance of an interpreter if they cannot understand or speak the language used. This assistance should be available at all stages of the processes.

3.6.2 – *Assistance of other intermediaries* – Similarly, children with communication disabilities should be provided with adequate and

effective assistance by well-trained professionals (for example in sign language) at all stages of the process. Children who display signs of disabilities should be assessed by appropriate professionals to determine whether communication assistance is required.

Explanations and comments:

- ***Assistance of an interpreter –*** The *Convention on the Rights of the Child* states that States parties to the Convention should ensure that children alleged as or accused of having infringed the penal law should have the free assistance of an interpreter if they cannot understand or speak the language used (article 40 (2) (b) (vi)). This requirement should apply equally to all other types of proceedings – such as child welfare or protection proceedings – and should be extended to them. The assistance should not be limited to court proceedings but should also be available at other stages of the process (police, social evaluations and so forth). In cases where it is needed, it is an essential element to ensure fair proceedings.

- ***Assistance of other intermediaries –*** As stated by the Committee on the Rights of the Child:

  "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" (*General Comment No. 9*, paragraph 74 a)).

  This requirement stresses the importance not only of interpreters but also of other communication professionals. It should not be limited to children in conflict with the law but should be extended to all children in contact with the justice system, at all stages of the proceedings.

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SECTION 3.7 – DEPRIVATION OF LIBERTY

Guidelines:

3.7.1 – *Minimal use of deprivation of liberty –*Whether as a detention following an arrest, as a provisional measure during proceedings or as a final disposition, any form of deprivation of liberty should be used only as a measure of last resort, for the shortest appropriate period of time and restricted to serious cases.

3.7.2 – *Deprivation of liberty and social integration –* As with any other measure, measures involving deprivation of liberty must aim at the social integration and rehabilitation of children. Individual care plans should integrate interventions during both periods of custody and freedom in a

complementary way, so as to foster optimal development of children and ensure their integration (or re-integration) in their family and community.

3.7.3 – *Alternative measures to deprivation of liberty* – Alternative measures must be developed and used to avoid deprivation of liberty and keep children in their family and community. They can take various forms, such as counselling, psycho-social guidance and supervision, help and support to the child and their family, release under specific conditions, probation and so forth. Early release – with or without conditions – should be considered at the earliest date possible.

3.7.4 – *Protection of other rights* – Children deprived of their liberty shall not be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty.

3.7.5 – *Pre-trial detention* – Pre-trial detention of children in conflict with the law should only be used as a measure of last resort and for the shortest period of time.

The law should clearly state the conditions in which it can be used, in particular to ensure children's appearance at court proceedings or as a measure of protection if children are in immediate danger or a danger to themselves or others.

The law should set limits to the duration of each period of pre-trial detention and provide for periodic judicial review. Whether detention is imposed in one detention order or in several successive orders, the law should provide for a maximum total duration beyond which the child would have to be released from detention, whether or not criminal proceedings have been concluded.

3.7.6 – *Places of detention or custody* – Children deprived of liberty must be held separately from adults. They must be placed in specific facilities for children, separately from any adult prison or other facility for adults. Children may be detained with adults only for very exceptional reasons, based only on their best interests or the protection of others.

3.7.7 – *Communication with the family and wider community* – Children deprived of liberty should have the right to maintain regular contact with their family through correspondence as well as visits to and from their family. In order to facilitate visits, children should be placed in facilities that are as close as possible to the place of residence of their family.

The staff of the facilities where children are kept should promote and facilitate contacts with members of the wider community, including friends and other persons or representatives of reputable outside organizations.

Exceptional restrictions to these contacts might be justified if required by the best interests of the child, protection of others or the interests of justice. The circumstances that may justify such limits should be clearly described in the law and not be left to the discretion of the competent authorities.

3.7.8 – ***Requests or complaints*** – Children who have complaints about the conditions of their placement or detention should have the right to make requests or complaints, without censorship as to the substance, to the central or other relevant administration, the judicial authority or other proper independent authority, and to be informed of the response without delay. Children have to be informed about and have easy access to these mechanisms.

Explanations and comments:

- ***Social integration and rehabilitation of children –*** Ensuring children's social development and integration as well as, where relevant, their rehabilitation, must stand high amongst the concerns that should orient justice officials' decisions. Meeting the specific needs of children concerning protection, education, training and social integration must be taken into account in those decisions. It should be considered as a key objective for all measures used for children, be it in child protection, criminal, family or other matters.

  Depriving children of their liberty may go against this objective. Taking children away from their natural environment may contribute significantly their social exclusion rather than fostering their harmonious social development. A twofold strategy should be used in that respect. On the one hand, justice should make minimal use of deprivation of liberty. On the other, custodial measures should be much more than mere detention: they should be part of rehabilitation programmes that integrate interventions during both periods of custody and freedom in a complementary way, so as to foster an optimal development of the child and ensure his or her integration (or re-integration) in the family and the community. Thus an individual care plan should be designed for each child subjected to a measure depriving him or her of his or her liberty; this plan should include preparation of the child in advance for his or her return in the community.

- ***The case of pre-trial detention –*** In cases involving children in conflict with the law, justice officials should be particularly sensitive to using pre-trial detention only as a measure of very last resort for the shortest period of time possible. The Committee on the Rights of the Child has noted "with concern that, in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC" (*General Comment No. 10*, paragraph 80). Not yet convicted, the child is still presumed innocent; this implies that his or her freedom should not be limited beyond what is strictly necessary. Furthermore, pre-trial detention is not a stage where restorative measures or psycho-social interventions should be undertaken: the child could refuse rightly to

engage in interventions or measures that would require or suppose an acknowledgement of guilt. And beyond any legal argument, some children need to be faced psychologically with the reality of an official finding of guilt by the court before they will agree to engage in anything involving internal change. Pre-trial detention is wasted time in so far as useful interventions are concerned. In jurisdictions where pre-trial detention time is later deducted from the duration of a custodial measure, it reduces the custody time during which a useful intervention could be undertaken. It is harmful and should be limited only to those cases and for the time where it cannot be avoided.

The Committee on the Rights of the Child has recommended that a child remanded in custody

> "should be formally charged with the alleged offences and be brought before a court or other competent, independent and impartial authority or judicial body, not later than 30 days after his/her pretrial detention takes effect. The Committee, conscious of the practice of adjourning court hearings, often more than once, urges the States parties to introduce the legal provisions necessary to ensure that the court/juvenile judge or other competent body makes a final decision on the charges not later than six months after they have been presented." (*General Comment No. 10*, paragraph 83.)

Needless to say, pre-trial detention should never be used as a punishment: this would be a clear violation of the presumption of innocence.

- ***Separation from adults –*** The Committee on the Rights of the Child comments as follows on the obligation to place children in places designed specifically for them:

  > "85. Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37 (c) of CRC, 'unless it is considered in the child's best interests not to do so', should be interpreted narrowly; the child's best interests does not mean for the convenience of the States parties. States parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices.
  >
  > 86. This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility." (*General Comment No. 10*, paragraphs 85-86.)

On this last point, the Mercosur Guidelines introduce the notion of establishments for young adults: “Once children reach majority, they should be inserted in establishments for young adults, separated from adults.” (Mercosur Guidelines, p. 32, s. C.2.1, sub-section 4: paragraph *g* in *Children in conflict with the law – Execution.*)

The Council of Europe Guidelines Explanatory Memorandum states that:

> “In some cases, such as those involving infants, it can be in their best interests not to be separated from a detained parent, or in the case of children of immigration detainees who should not be separated from their family. Several Council of Europe member states believe that in large, sparsely populated areas, it may exceptionally be in the best interests of the child to be detained in adult facilities (facilitating visiting of the parents residing hundreds of kilometres away, for example). However, such cases require particular vigilance on the part of detaining authorities, in order to prevent abuse of children by adults.” (Council of Europe Guidelines Explanatory Memorandum, p. 27, section 76.)

- ***Protection of other rights –*** Guideline 3.7.4 on *Protection of other rights* is inspired by article 13 of the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty* (the Havana Rules).

- ***Requests or complaints –*** Guideline 3.7.8 on *Requests or complaints* reproduces one of the recommendations of the Committee on the rights of the child (*General Comment No. 10*, paragraph 89).

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SECTION 3.8 – AGE OF CHILDREN IN CONFLICT WITH THE LAW

Guidelines:

3.8.1 – *Minimum age of criminal responsibility* – The minimum age of criminal responsibility is the age beyond which children can be held responsible in criminal justice proceedings. Before reaching that age, children are deemed not to have the capacity to infringe criminal law (which is to be treated as an irrebuttable presumption).

That age must not be lower than 12, and States should be encouraged to choose higher age limits. It must be specified by law and should apply uniformly to all offences created under the criminal law.

When children who have not reached the age of criminal responsibility commit an act that would be considered an offence had they reached that age, they should be dealt with, if necessary, under child welfare or child protection law so that protective measures can be taken. This

should apply even in cases of children who have reached the age of criminal responsibility at the time of the proceedings.

3.8.2 – *Age of penal majority* – The age of penal majority is that from which children become adults under the criminal law and cease to be dealt with by the children or youth justice system. This age should be set at 18. Therefore all situations where persons are alleged as, accused of or found guilty of offences committed under that age should be dealt with by the children or youth justice system.

Children in conflict with the law who have committed an offence before the age of 18 may have measures imposed which extend beyond their 18th birthday.

3.8.3 – *Young adults* – When deemed appropriate, educative measures should be available for young adults found guilty of an offence committed between the ages of 18 and 21.

3.8.4 – *Uncertainty about a child's age* – If there is uncertainty about a child's age, the child shall have the right to benefit from the most favourable interpretation related to his/her age.

Explanations and comments:

- ***The minimum age of criminal responsibility –*** This age varies between countries. Some countries have opted for age 12, whereas others have chosen a lower or a higher age. Some international instruments do not take a precise position and limit themselves to stating that the age "should not be too low". The Council of Europe Guidelines and the *Beijing Rules* are examples of that position. The *Convention on the Rights of the Child* offers even less guidance and simply states that States parties must establish a minimum age (article 40 (3) (a)). Others take a more definite position, recommending States to consider the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level. Such is the position taken in the African Guidelines (section 46), by the Committee on the Rights of the Child (*General Comment No. 10*, paragraph 33) and by the United Nations Human Rights Council (Resolution 18/12 on *Human rights in the administration of justice, in particular juvenile justice*, 2011, article 12).

  The minimum age must be established clearly in the law. It should not leave discretion to the court. As reported by the Committee on the Rights of the Child:

  > "Quite a few States parties use two minimum ages of criminal responsibility. Children in conflict with the law who at the time of the commission of the crime are at or above the lower minimum age but below the higher minimum age are assumed to be criminally responsible only if they have the required maturity in that regard. The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice

> in the use of the lower minimum age in cases of serious crimes. The system of two minimum ages is often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices." (*General Comment No. 10*, paragraph 30.)

Furthermore, the minimum age should not vary according to the seriousness of the offence. The issue at stake is to establish at what age children are mature enough to be held responsible for their behaviour. That level of maturity is independent of the seriousness of the offence. To quote the Committee on the Rights of the Child:

> "The Committee wishes to express its concern about the practice of allowing exceptions to a [minimum age of criminal responsibility] which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends that States parties set a [minimum age of criminal responsibility] that does not allow, by way of exception, the use of a lower age." (*General Comment No. 10*, paragraph 34.)

- ***The age of penal majority –*** This age also varies between countries. Yet, as stated by the Committee on the rights of the child:

  > "State parties [to the CRC...] have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of article 40 of CRC. This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice." (*General Comment No. 10*, paragraph 37.)

  The age of 18 at the time of the offence has been adopted in many countries.

  Some countries consider that a transition period is desirable when a child becomes legally an adult. Eighteen year old young adults are not all alike, and some may benefit more from educative measures than from adult sentences. That is why it is recommended that it should be possible to use educative measures for young adults found guilty of an offence committed between the ages of 18 and 21. This recommendation is in line with *Beijing Rule* 3.3, which prescribes that:

  > "Efforts shall also be made to extend the principles embodied in the Rules to young adult offenders".

  A similar position has been adopted by the Committee on the Rights of the Child in its *General Comment No. 10* on *Children's Rights in Juvenile Justice*:

  > "The Committee 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 till the age of 21, either as a general rule or by way of exception." (Paragraph 38.)

Some countries have introduced exceptions in their legislation, mainly under the form of waivers to adult courts or adult sentences imposed by children's courts. Such practice is not to be recommended and should be avoided.

- ***Uncertainty about a child's age –*** Uncertainty about a child's age may occur, particularly in places where birth registration faces problems. As noted by the Committee on the Rights of the Child:

  "A child without a provable date of birth is extremely vulnerable to all kinds of abuse and injustice regarding the family, work, education and labour, particularly within the juvenile justice system. Every child must be provided with a birth certificate free of charge whenever he/she needs it to prove his/her age. If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt." (*General Comment No. 10*, paragraph 39.)

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SECTION 3.9 – STATUS OFFENCES

Guideline:

3.9 – *Status offences –* Children are not to be the target of interventions under criminal law for acts that are not considered as offences if committed by adults. Offences that are linked with the status of being a child should be abolished in criminal law. Behaviour such as vagrancy, roaming the streets, runaways or other serious behavioural disturbances should be dealt with through the implementation of child protection measures.

Explanations and comments:

- ***Abolition of status offences –*** In its *General Comment No. 10 (*paragraphs 8 and 9) the Committee on the Rights of the Child summarizes the issue:

  "8. It is quite common that criminal codes contain provisions criminalizing behavioural problems of children, such as vagrancy, truancy, runaways and other acts, which often are the result of psychological or socio-economic problems. It is particularly a matter of concern that girls and street children are often victims of this criminalization. These acts, also known as Status Offences, are not considered to be such if committed by adults. The Committee recommends that the States parties abolish the provisions on status offences in order to establish an equal treatment under the law for children and adults. In this regard, the Committee also refers to article

56 of the *Riyadh Guidelines* which reads: 'In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.'

9. In addition, behaviour such as vagrancy, roaming the streets or runaways should be dealt with through the implementation of child protective measures, including effective support for parents and/or other caregivers and measures which address the root causes of this behaviour."

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SECTION 3.10 – PROTECTION OF PRIVATE LIFE

Guidelines:

3.10.1 – *Confidentiality of private information* – Records, documents and contents of hearings containing private data on children and their families shall be kept strictly confidential and closed to third parties. Access shall be limited to persons directly concerned with the case or other duly authorized persons.

3.10.2 – *Confidentiality of child's identity* – No information shall be published on a case involving a child which could reveal or indirectly enable the disclosure of the child's identity.

3.10.3 – *Court hearings behind closed doors* – Court or other hearings involving children as witnesses, accused persons or in any other capacity shall be held behind closed doors, in the absence of the public and the media. Exceptions to this rule should be very limited and clearly stated in the law. The outcome/verdict/sentence should be pronounced in public at a court session in such a way that the identity of the child is not revealed.

3.10.4 – *Use of a child's records in future adult proceedings* – Records of child offenders should not be used in adult proceedings in subsequent cases involving the same offender, or to inform such future sentencing.

3.10.5 – *Name removed at age of 18* – States should introduce rules which would allow for an automatic removal from the criminal records of the name of children who committed an offence before reaching the age of 18. For certain limited, serious offences, removal might not be automatic, but might be possible at the request of the child, if necessary under certain conditions (such as not having committed an offence within two years after the last conviction).

Explanations and comments:

- ***The Convention on the Rights of the Child –*** Two articles of the Convention set rules concerning the protection of privacy:
    - **Article 16:**

      1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, 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.
    - **Article 40 (2) (b) (vii):**

      2. [...] States Parties shall [...] ensure that: [...]

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

      (vii) To have his or her privacy fully respected at all stages of the proceedings.

  Article 16 applies to all matters. Article 40 applies specifically to children in conflict with the law.

- ***Principles of judicial ethics of the IAYFJM –*** Principle 8 of the *Principles of Judicial Ethics for Youth and Family Judges and Magistrates* of the IAYFJM states that:

  "***Principle 8 –*** A judge shall respect the confidential character of information acquired in his or her judicial capacity and the disclosure or use of which could infringe the private life of the child or youth, of his or her family or of other persons concerned in a judicial proceeding."

  The same conduct must be adopted by all justice officials and professionals.

- ***Why protect children's and families' privacy? –*** Very personal information about the private lives of children and their families is presented and debated in numerous cases involving children, whether in family, child protection or delinquency matters. Most of this information is of no public interest. Disclosing it to the public can be damaging, especially when children may be identified. Stigmatization and labelling may have long-lasting consequences on their present and future access to education, work, desirable friends or personal safety, thus threatening their social integration and their chances to become full citizens.

  The concern for the protection of privacy must be balanced against and reconciled with other concerns. Justice is a public institution whose legitimacy depends partly on the confidence of the public, which requires that the public be informed about how it fulfils its duties. Furthermore, the presence of the public eye in court can be viewed as an incentive for justice officials to ensure the quality of their services. In cases of children in conflict with the law, public knowledge about police and court actions may appear as a necessary condition for deterring potential delinquents and reaffirming the strength of the law that has been violated.

However one must remain vigilant about the perverse effects which such publicity can generate, such as increasing the status of a delinquent in his deviant milieu because he "has been in the newspapers" (a "badge of honour" for him), thus increasing the threat that he can represent for public safety. Shaming practices and publication of young offenders' identity on the internet or elsewhere must be banned.

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SECTION 3.11 – DELAYS AND PRIORITY IN THE PROCEEDINGS

Guidelines:

3.11.1 – *Avoiding unnecessary delays* – It is of the utmost importance that delays be reduced to the strict minimum time required to process cases with due respect to the rule of law and the rights of the parties involved. Children do not experience time in the same way as adults. Decisions affecting children should, wherever practicable, be made and implemented within a time-frame appropriate to their sense of time. Procedures involving children should be designed so as to minimise as much as possible the number of procedural steps.

3.11.2 – *Priority* – While all proceedings involving children must be dealt with promptly, an assessment of the degree of urgency based on risk and vulnerability should be made to ascribe a level of priority to each case.

3.11.3 – *Reducing delays: whose responsibility?* – Long delays in the administration of justice are the result of the (shorter) delays caused by each of the successive actors who intervene in a case. All actors and organizations should identify and monitor the delays for which they are responsible and take every measure to reduce them to a minimum. They should aim at fostering a sense of responsibility and accountability amongst all groups of actors to ensure that children's cases are dealt with expeditiously.

Explanations and comments:

- ***Why should we be concerned with delays?* –** Delays can be a major hindrance to the best interests of children. Not only do they increase uncertainty about the fate of the child, but they also make it impossible to have the quick intervention that might be essential to prevent deterioration in the child's situation. In family matters, they can have adverse consequences on children and family relations.

  In criminal matters, youths who are reprimanded by the judge several months after the offence have had the time to rationalize and forget a great deal about their actions; they have had plenty of time to reinterpret and reconstruct the events in a way that reduces considerably the possibility

for the sanction to be meaningful for them. They may have been involved in new offences unknown to the court, thus reducing the relevance of what the judge may say and decide. The credibility of interventions is at stake.

Delays may also occur in the implementation of measures, either because of waiting lists or for other reasons. They may influence youths' perceptions of the importance of taking the measures seriously: if these measures were as important as court officials had said, would they not have been implemented swiftly after the court's decision?

At the starting point of the process, whether for example an arrest by the police or a referral to a child protection agency, delays can be harmful. These moments are very often times of crisis, which may lead parents and child to mobilize and perhaps be open to changes, but where both may need immediate help and support to do so. Without a quick intervention, life goes back to its "normal" course, where the necessary changes are more difficult to achieve.

These are only a few examples. But they all point in the same direction: delays put the very credibility of the intervention at stake, with the ensuing reduction in its potential effect. That is why the *Principles of judicial ethics* of the IAYFJM require that:

> "A judge shall act with promptness and diligence that are suited to the particular perceptions of the child or youth with regard to time" (Principle 12 of the *Principles of Judicial Ethics for Youth and Family Judges and Magistrates* of the IAYFJM).

This holds true as well for all other officials and professionals.

- ***Undue delays and undue hurry –*** The avoidance of undue delays must not open the door to undue hurry. It must not lead to hasty procedures where respect for the rule of law, the rights of the parties or the ability of court officials to be fully informed about the situation of the child might be threatened. These concerns must be taken into consideration in assessing whether a delay is necessary or not.

- ***Which actors should contribute to the reduction of delays? –*** The process followed in most cases involves interventions by successive actors: police officers, social workers, psychologists, lawyers, prosecutors, judges, probation officers, educators and so forth. They all contribute their share to the total delay. However experience suggests that each group is far more aware of the delays that can be attributed to the other groups than those that should be attributed to their own group. All actors have to be made aware of the contribution which they and their group make to the total sum of delays. That is the necessary starting point to create a consciousness amongst all actors that reducing delays is everyone's business. Hence the need for justice administrators to monitor the state of delays at various steps of interventions, to communicate the data to the actors concerned and to mobilize them to improve the situation.

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SECTION 3.12 – MULTIDISCIPLINARY APPROACH

Guideline:

3.12 – *The need for multidisciplinary and interdisciplinary approaches –* The nature of the problems that have to be addressed when children are involved in the justice system may go far beyond legal issues. A decision based on a comprehensive understanding of children and their situation is likely to require assessments and interventions by professionals trained in various disciplines, such as psychologists, social workers, psychiatrists, criminologists, educators and others. Their services must be made available to the courts and the latter should use them whenever necessary to make enlightened decisions and interventions.

Explanations and comments:

- ***The need for multidisciplinary and interdisciplinary approaches –*** Most domains in which children come into contact with justice require interdisciplinary approaches. Judges or other judicial authorities have the responsibility for making just decisions, following the procedures and other rules prescribed by law. Hence their need for legal training and experience. However they have to work with other professionals, whose contributions are essential for assessing children and their situation, for advising the courts on crucial aspects of decisions they have to make, and for carrying out various interventions (often ordered by the courts). Various types of problems may have to be addressed: family, social, psychological, genetic and so forth. They may require the expertise of specialists from various disciplines. A multidisciplinary approach makes it possible to take into account the contributions of relevant disciplines. Even better, an interdisciplinary approach brings the contributions of various disciplines to mingle and interact with each other, which is all the more enlightening.

- ***Requirements of a multidisciplinary or interdisciplinary approach –*** Obviously, a multidisciplinary or interdisciplinary approach should not be viewed as requiring that everyone should have full training in several disciplines – which would be totally unrealistic. The requirement should rather be that:
  (1) each person should first have completed the college, university or other training required for admission to his or her functions (*e.g*. law for a judge or lawyer, psychology for a psychologist and so forth);
  (2) each person should add to this basic training the components from other disciplines that are necessary to understand the necessary contributions from those disciplines (*e.g*. a judge or lawyer should become able to understand reports prepared by a psychologist or a social worker, in the same way as the latter should be able to understand the minimum legal vocabulary, rules and reasoning to work in a justice environment);
  (3) it being understood that:

a. everyone working with children should have the necessary training to work with children;
b. officials and professionals should make their written and oral communications in terms accessible to people trained in other disciplines than their own.

* * *

SECTION 3.13 – SPECIALIZATION, SELECTION AND TRAINING

Guidelines:

3.13.1 – *Selection* – People who work with children in the justice system must be selected on the basis of the skills required to play the professional role expected from them, including suitability to work with children.

3.13.2 – *Training* – Training is required at all stages of people's professional life in order to ensure quality services.

Training prior to employment – including college or university training – must provide the general professional training that is the most relevant to the functions to be performed.

In-service training is needed to provide the complementary knowledge and skills that are specifically required for the functions to be performed. It should normally be provided by the employer.

Continuing education is required to ensure that interveners keep abreast of new developments in knowledge and practice. Both interveners and employers should be responsible for ensuring that this training is offered and taken.

3.13.3 – *Specialization* – Where population density allows it, specialized units should be established within the justice system to deal with situations involving children and their families (namely child protection, children in conflict with the law, custody, adoption). This should be done within the police, the court system, legal aid or other services providing legal assistance and representation to children, and the prosecutor's office. Specialized judges or magistrates should be appointed. Psycho-social services such as those providing assessments, counselling, supervision or probation, as well as facilities for day or residential treatment and care and custodial services, should be specialized in services for children and their family.

Explanations and comments:

- ***The aim: ensuring competence in knowledge and skills –*** Working with children in the context of justice requires particular skills. Staff selection aims at ensuring that people have the necessary training, competence and skills at the time of their employment. Specialization and training aim at supporting the development of such competence and skills.

  In its General comment aimed at the treatment of children in conflict with the law, the Committee on the Rights of the Child underlines the central importance of the quality of the people involved in youth justice to ensure the respect of children's rights. This should apply to all children who are in contact with the justice system at large:

  > "[A] key condition for a proper and effective implementation of these rights or guarantees is the quality of the persons involved in the administration of juvenile justice. The training of professionals, such as police officers, prosecutors, legal and other representatives of the child, judges, probation officers, social workers and others is crucial and should take place in a systematic and ongoing manner. These professionals should be well informed about the child's, and particularly about the adolescent's physical, psychological, mental and social development, as well as about the special needs of the most vulnerable children [...]". (*General Comment No. 10*, paragraph 40 on *The guarantees for a fair trial.*)

  The quality of justice – including the respect of rights – is largely a reflection of the quality of those who administer it.

- ***Specialization and versatility –*** Versatility has its advantages. In areas with low population density and large territories to cover, the staff is bound to play more diverse roles than in densely populated areas. Furthermore, one might say that versatility may help in preventing people from being confined to limited approaches; it may foster importing practices in use in other sectors of activity. However, in areas where population density justifies it, specialization has clear advantages. Working in fields such as child protection, family matters, children in conflict with the law or adoption requires skills, knowledge, know-how and contacts whose development requires time and experience. Investing oneself in multiple fields reduces the ability to develop in-depth expertise. The advantages of specialization are particularly visible in the case of children in conflict with the law, in countries where judges and other officials who work in large areas cannot specialize in children's cases and often have to share their time between minor and adult offenders' cases. The significant involvement that these officials have in adult cases is likely to colour their view of justice for minors and hinder the development of a specific justice for youths. Specialization may help to prevent youth justice from being modelled on adult justice.

- ***Training –*** In-service training can take various forms. One may think spontaneously of special sessions organized for that purpose, in or outside the working milieu; one of the advantages of this formula is that the

content of the session can be tailored to meet the specific needs of a group. Such sessions can be designed for one particular professional group. They can also be organized jointly for several professional groups, in which case they can provide the opportunity for exchanges between members of different professional belongings (between which communications are often lacking). One can also evoke attendance at conferences and lectures, or even studies in a college or university programme. Obviously, one should not underestimate the central importance of professional supervision within the working milieu – both individual and group supervisions can bring a valuable contribution.

In-service training must focus on meeting the most relevant needs of people who work with children, including children's rights, appropriate interviewing techniques, child psychology, and communication in a language adapted to the child. Special needs may have to be met in some countries or localities, such as the development of skills to work with indigenous people or ethnic minorities.

Principle 11 of the *Principles of Judicial Ethics for Youth and Family Judges and Magistrates* of the IAYFJM states that:

> "A judge shall maintain his or her professional competence, both in law and in other disciplines relevant to the performance of his or her judicial duties".

The same should apply *mutatis mutandis* to all officials and professionals.

* * *

PART 4 – CHILD FOCUSSED JUSTICE: BEFORE AND DURING JUDICIAL PROCEEDINGS

Guideline:

4 ***Elements relevant to stages before or during judicial proceedings –*** Part 4 of the Guidelines deals with elements that are relevant to stages of proceedings that take place before or during judicial proceedings.

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SECTION 4.1 – CHILDREN AND THE POLICE

Guidelines:

4.1.1 – ***Children in conflict with the law and the police –*** Whenever children are arrested in relation to an alleged offence, special precautions shall be taken to ensure that they will be granted the necessary protection associated with their age. In particular, the following measures should be adopted in regard to children in conflict with the law:

(a) Police should respect the personal rights and dignity of all children and have regard to their vulnerability, *i.e*. take into account their age and maturity and any special needs of those who may be under a physical or mental stress or disability or have communication difficulties.

(b) Children arrested by the police should be informed in a manner and a language appropriate to their age and level of understanding of the reasons for their arrest.

(c) Parents should be informed of their child's presence in the police station, given details of the reason why the child has been taken into custody and be asked to come to the station.

(d) Children who have been arrested should be provided with access to a lawyer and be given the opportunity to contact their parents or an adult person whom they trust. They should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer or at least one of their parents or, if no parent is available, another adult person whom they trust. The parent or this person may be excluded if suspected of involvement in the alleged criminal behaviour or if engaging in conduct which amounts to an obstruction of justice.

(e) In States where this falls under their mandate, prosecutors should ensure that child-appropriate approaches are used throughout the investigation process.

(f) Children in police custody should be kept in conditions that are safe and appropriate to their needs. They should not be detained together with adults.

National law should determine which consequences should be attached to the breach of the above requirements. These consequences should include the power for a judge to rule inadmissible in evidence any statement or admission made in breach of paragraphs (a) to (d), unless the non-compliance was reasonable in the circumstances.

4.1.2 – *Child victims and witnesses and the police or other investigating officials* – Child victims and witnesses should be able to provide information with the minimum stress and should be protected from hostile or intimidating questioning. Investigation practices should be adapted to afford protection to children and to respect their rights, without undermining the defendant's right to a fair trial. In particular, States should adopt the following measures in regard to child witnesses who may also be child victims:

(a) Child witnesses shall not be questioned by the police or any investigating official without the presence of their parents, a family relative or legal guardians, or – where the latter are not traceable or where their presence is contrary to the best interests of the child – in the presence of a social worker.

(b) Police and investigating officials shall conduct their questioning of child witnesses in a manner that avoids any harm and promotes the well-being of the child.

(c) Police and investigating officials shall ensure that child witnesses, especially those who are victims of sexual abuse, do not come into contact with or made to confront the alleged perpetrator of the crime. As far as possible, interview and waiting rooms should be adapted to create a child-friendly environment.

(d) Female victims of sexual abuse must be dealt with by female police officers and all necessary comfort, consoling and counselling provided to them.

(e) Where necessary, a child witness shall be questioned by law enforcement officials through an intermediary.

(f) Law enforcement personnel, parents and families of child victims of sexual abuse shall refrain from pressurizing the child victim not to testify. Wherever possible, appropriate prosecutions for the commission of sexual offences against children should proceed even where the victim refuses to testify.

Explanations and comments:

- ***Guideline 4.1.1 –*** This guideline (on *Children in conflict with the law and the police*) is largely drawn from the Council of Europe Guidelines on *Children and the police*, p. 25-26, sections 27-33.

- ***Presence of parents and lawyers or other officials –*** Children must have access to both their parents and lawyers: they cannot replace each

other. Lawyers have a legal understanding of the situation that parents may not have. Furthermore, there may be a (at least perceived) conflict of role between parents and lawyers. For example, parents who, as educators, have tried to train their children to tell the truth and face up to their responsibilities might be inclined to tell their child to confess what he did, whereas lawyers may put forward the right of the child not to incriminate himself or herself.

In countries or places where lawyers may not be easily accessible, States may entrust trained officials to assist children in their relations with the police.

- ***Girls in police custody –*** Depending on countries, conditions of detention in police custody may require that, for their safety, girls be kept in premises where no boys are detained and be under the responsibility of female staff. Girls brought to a police station should be attended by a female police officer. They should be provided with appropriate hygiene facilities, particular attention being paid to their privacy. Particular attention should also be paid to the needs of girls who are pregnant or menstruating. Such needs should be met in a caring and respectful manner.

- ***Guideline 4.1.2 –*** This guideline (on *Children victims and witnesses and the police*) is drawn mostly from African Guideline No. 64 on *Fair trial rights in matters involving child victims and witnesses in any justice proceedings*.

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SECTION 4.2 – CHILDREN AS VICTIMS AND WITNESSES; EVIDENCE AND STATEMENTS BY CHILDREN

Guidelines:

4.2.1 – *Age and testimony –* Children have the right to participate fully in the justice process. Their testimonies must not be presumed invalid or untrustworthy simply on the basis of their age.

4.2.2 – *Special measures and procedures –*

(1) Every effort should be made for children to give evidence in the most favourable settings and under the most suitable conditions, having regard to their age, maturity, level of understanding and any communication difficulties they may have.

(2) Special measures and procedures should be considered in cases of children victims or witnesses, without undermining defendants' right to a fair trial. Amongst such measures and procedures:

(a) Interview protocols taking into account different stages of the child's development should be designed and implemented.

(b) In investigations or trials, questioning of children should be conducted by trained professionals, in a child-sensitive and respectful manner.
(c) Preparation programmes should be implemented to familiarise children with court procedures and environment. These programmes should prepare children. However the fine line between preparing children to testify and telling them what to say in their testimonies should not be crossed.
(d) Whenever practical, judicial officers, prosecutors and lawyers should be permitted to wear ordinary dress during the testimony of a child witness, particularly when a child is a party to the case.
(e) Children should be protected from hostile or intimidating questioning.
(f) Direct contact, confrontation or interaction between child victims or witnesses with alleged perpetrators should be avoided as far as possible, especially in cases of sexual abuse. Defendants should be prevented from personally cross-examining child witnesses. Children should have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrators.
(g) Child witnesses should testify from a separate room or behind screens located around the witness box to shield them from viewing the defendant.
(h) The use of audio or video-recorded pre-hearing interviews with, or statements by, child witnesses should be accepted.
(i) Information about the previous sexual history of alleged child victims or witnesses should not be allowed as evidence in trials for sexual offences.
(j) Before deciding whether children should give evidence in family matters, due regard should be given to their vulnerable position in the family and to the effect such testimony may have on present and future relationships. Children should be made aware of the consequences of testifying or not. If they choose to testify, they should be supported in the giving of evidence.

4.2.3 – *Safety of children* – Where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions must be put in place to ensure their safety. These may include:

(1) the avoidance of contact between the child and the alleged perpetrator;
(2) court ordered restraining orders;
(3) pre-trial detention or house arrest;
(4) “no contact” bail conditions;
(5) child protection by the police or other agencies and safeguarding the child’s whereabouts from disclosure.

Removal of a child should be considered as a last resort.

Some extra-judicial settlements, including those negotiated between families, may pose particular risks to some child victims – especially girls where marriage is proposed as the settlement. Courts should refuse to

endorse private arrangements that do not promote the rights of the child victim.

Explanations and comments:

- ***Importance of the point –*** Issues related to testimonies, statements or other forms of evidence provided by children stand amongst the core issues linked with the interactions between children and the justice system. They are relevant to all contexts where children are being interviewed or interrogated, whether by the police, in court proceedings, in child protection investigations and so forth. Hence the importance ascribed to this point.

- ***Other Guidelines –*** The U.N. Economic and Social Council *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* have been a source of inspiration for drafting our Guidelines on the topic of children as victims and witnesses. Our Guidelines have a much wider scope than the latter and, consequently, have to include less detail than specialized guidelines. Readers are invited to consult the Economic and Social Council's Guidelines (http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf). Other guidelines provide detailed guidelines as to how child witnesses should be examined in court. A British example may be found in Lord Justice Thorpe's Working Party's *Guidelines in relation to Children Giving Evidence in Family Proceedings* published in 2011 (https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Children+Giving+Evidence+Guidelines+-+Final+Version.pdf). In view of the importance of this topic, special guidelines could be designed for judges, prosecutors and lawyers as to how child witnesses should be examined in court.

- ***Issues dealt with under other themes –*** A number of issues dealt with under other themes are relevant to the theme of *Children as victims and witnesses*. They are not repeated here. One may think for example of legal assistance, the presence of parents and so forth.

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SECTION 4.3 – ALTERNATIVES TO JUDICIAL PROCEEDINGS

Guidelines:

4.3.1 – ***Alternatives to judicial proceedings to be encouraged –*** Alternatives to judicial proceedings should be encouraged whenever they may best serve the child's and society's interests. They should be used in all matters where they can help in resolving conflicts, whether criminal, civil, family, youth protection or other matters.

4.3.2 – *Alternatives to judicial proceedings and the rights of children* – Alternatives to judicial proceedings must grant children the same level of rights and legal safeguards as that provided in judicial proceedings.

4.3.3 – *Voluntary and active participation* – Children, parents and other parties to a conflict must freely and voluntarily consent to take part in alternatives to judicial proceedings. They must be fully informed and consulted on the opportunity to have recourse to an alternative to judicial proceedings. They must be informed of their rights and of the possible consequences of each option. They must be given the opportunity to obtain legal assistance in determining which option they should take and whether, in the end, they should give their agreement to the outcome of the alternative proceedings. They must also be given the opportunity to consult with their parents, unless there is a conflict of interest with them. They must be encouraged to play an active role in the search for a solution.

4.3.4 – *Alternatives to judicial proceedings in criminal matters* – Extrajudicial proceedings and measures have been particularly developed in criminal matters, where special rules may apply:

(1) National law should provide the police or the prosecutor with the power not to lay charges, either with or without alternatives to judicial proceedings. Police officers and prosecutors should be encouraged to use that power as long as this is compatible with the public interest.

(2) Rules regarding extrajudicial processes and measures should be established in law or regulation.

(3) Recourse to extrajudicial processes and measures should be favoured. It should by no means be limited to cases involving minor offences or first offenders.

(4) Extrajudicial processes and measures should be used only when there is compelling evidence that the child committed the alleged offence. The child must accept responsibility for the act or omission that forms the basis of the offence. No intimidation, pressure or inducement may be used to get that admission. The victim and the offender should normally come to an agreement on the basic facts of the case as the basis for their participation in the extrajudicial process.

(5) Participation of the child in the process shall not be used as evidence of an admission of guilt in any subsequent legal proceedings, and no admission made in the course of an extrajudicial process shall be used against the child in such subsequent legal proceeding.

(6) Extrajudicial processes rely on mediation, conciliation, family group conferencing, restorative justice and other similar approaches. They tend to be initiated without any judicial involvement. However they can also be initiated in the course of judicial proceedings, through delegation and supervision by the court, particularly in serious cases.

(7) Children must be given the opportunity to consult with and be advised by a legal representative. They must also be given the opportunity to consult with their parents, unless there is a conflict of interest with them.

(8) Extrajudicial measures must be limited to community-based measures. Any form of custodial measure must be ordered by a court.

(9) An extrajudicial process or measure suspends criminal proceedings, which are deemed terminated once the measure has been carried out in a satisfactory manner. Failure to implement an agreed measure may lead to judicial proceedings.

(10) Participation in extrajudicial processes or measures must be confidential. Any record that is kept on such participation will not be deemed a "criminal record" and the child will not be viewed as having a previous conviction.

(11) Restorative justice stands as one of the major approaches under which extrajudicial processes and measures have developed. It is based on the principle that the role of justice is to ensure that the offender repairs the harm caused by his or her wrongdoing, thus fostering the offender's reintegration in the community. When possible, this is best accomplished through cooperative processes involving the offender, the victim and appropriate people from the community. Reparation should preferably be real; if this is not possible, symbolic reparation may be considered (for example through community service). Because it is widely used in extrajudicial contexts, restorative justice is often associated with extrajudicial processes and measures – forgetting that courts should have the power to refer cases to restorative justice programmes and to order reparation of the harm caused by the offence.

4.3.5 – *Alternatives to judicial proceedings in civil, family, child protection and other matters* – In matters other than criminal proceedings:

(1) Extrajudicial processes may rely on mediation, conciliation and other similar approaches. They can be initiated by the parties or by the courts.

(2) Participation in extrajudicial processes or measures must be confidential. No information revealed in the course of extrajudicial processes will be admissible as evidence in later proceedings.

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SECTION 4.4 – CHILDREN'S ACCESS TO COURT OR OTHER BODIES

Guidelines:

4.4.1 – *Children's access to judicial process* – All children must have access to remedies (judicial or other processes) to effectively exercise their rights, or act upon violations of their rights.

4.4.2 – *Obstacles to be removed* – Obstacles to access court or other bodies, such as the cost of proceedings or the lack of legal assistance and representation, should be removed.

4.4.3 – *Military justice* – No person should be judged by a military court for an act alleged to have been committed while that person was a child. Appropriate recourse should be available to such persons to be excluded from military jurisdictions.

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SECTION 4.5 – IMPARTIALITY AND INDEPENDENCE OF THE COURT

Guidelines:

4.5.1 – *Independence* – Judges must exercise their judicial function so as to maintain their personal independence and the independence of the judiciary.

4.5.2 – *Impartiality* – Judges must be manifestly impartial.

Explanations and comments:

- ***Independence and impartiality* –** The role of justice is to decide in disputes between opposed parties. The legitimacy of its decisions hinges on the independence and impartiality that judges must embody.

- ***Impartiality and the best interests of the child* –** An issue might arise concerning judicial impartiality in matters involving children: some might suggest that the obligation for the courts to take into account the best interests of the child as a primary consideration (article 3 of the *Convention on the Rights of the Child*) might carry some form of bias or partiality, particularly in cases of children in conflict with the law. Article 3 of the Convention should not be construed as introducing an element of partiality and, whenever necessary, the courts must harmonize the child's interests with those of the victim and society.

- ***Source* –** Guidelines 4.5.1 and 4.5.2 are inspired from principles 2 and 3 of the *Principles of Judicial Ethics for Youth and Family Judges and Magistrates* of the IAYFJM.

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SECTION 4.6 – THE CHOICE OF MEASURES IMPOSED ON CHILDREN IN CONFLICT WITH THE LAW

Guidelines:

4.6.1 – *Guiding principles in the choice of measures imposed on children in conflict with the law (often referred to as disposition)* – Courts or other disposition authorities shall be guided by the following principles when deciding on the choice of measures for children in conflict with the law:

(1) Measures shall always be in proportion not only to the circumstances and the gravity of the offence, but also to the circumstances and the needs of the child as well as the needs of society. In that context, the best interests of the child shall be a primary consideration in determining the choice of the measure.

(2) Recourse to restorative processes and measures should be given preference whenever possible. It should by no means be limited to cases involving minor offences or first offenders.

(3) Restrictions on the personal liberty of children shall be imposed only after careful consideration and shall be limited to the possible minimum, both in terms of their duration and their nature.

(4) Deprivation of personal liberty shall be a measure of last resort. It shall not be imposed unless the child is found guilty of a serious act involving violence against another person or of a heinous nature, or of persistence in committing other serious offences, and unless there is no other appropriate response.

4.6.2 – *Variety of measures* – A sufficient variety of measures shall be made available to the courts or other disposition authorities, allowing for flexibility, adaptation to the needs of individual cases and avoidance of deprivation of liberty to the maximum extent possible.

4.6.3 – *Discretion* – In order to adapt the choice of measures to the particular needs of each individual case, appropriate scope for discretion shall be allowed to the courts or other disposition authorities. However, sufficient accountability should be ensured in the exercise of such discretion.

4.6.4 – *Social inquiry reports* – In order to provide them with adequate information about the children on whom they are to impose a measure – thus facilitating judicious adjudication – courts or other disposition authorities should be provided with social inquiry reports in all cases except those involving minor offences. In particular, they should be under the obligation of consulting such a report before imposing measures depriving children of their liberty.

4.6.5 – *Capital or corporal punishments* – Capital or corporal punishments shall not be imposed for any crime committed by children.

4.6.6 – *Life imprisonment* – Life imprisonment shall not be imposed for any crime committed by children.

Explanations and comments:

- ***Sources –*** The *Beijing Rules* as well as the *General Comment No. 10* of the Committee on the Rights of the Child are key sources that inspired the guidelines on the choice of measures imposed on children in conflict with the law. They can be consulted for further information.

- ***The principle of proportionality: a re-formulation –*** The principle of proportionality is a cardinal principle in criminal law. The severity of the punishment must be proportional to the seriousness of the offence. This is sometimes stated as "let the punishment fit the crime". In the case of children, the advent of juvenile courts with the child welfare model at the beginning of the 20th century changed the factors that the courts had to consider. Offenders and their situation moved to the forefront of attention, in the perspective of better protecting society. In this context, little room was left for the offence and the victim.

  In the 1970s, as the capacity of rehabilitative measures to prevent recidivism was challenged, the weight of the offence as a factor influencing decisions increased. For some, the doubts cast on the efficiency of the welfare approach led to the position that juvenile offenders had to be punished, and this was to be in proportion to the seriousness of the offence, as in adult criminal law. For others, welfare-oriented measures had to be privileged, but the degree of intervention (not punishment) was not to exceed what could be justified on the basis of the seriousness of the offence. The principle of proportionality could be used to limit the degree of an educative or welfare intervention – and it could be applied with lesser rigour than was the case in adult criminal law. Educative and welfare measures could be encouraged, and the *Convention on the Rights of the Child* went so far as to affirm (without excluding criminal matters) that in "all actions concerning children [...] the best interests of the child shall be a primary consideration" (article 3). However their use had to be tempered through limits imported from criminal law. Adopted in the 1980s, the key United Nations instruments opted for this type of hybridization of welfare and criminal justice approaches for children in conflict with the law. This is particularly reflected in the U.N. *Standard Minimum Rules for the Administration of Juvenile Justice* (the *Beijing Rules*).

  Beijing Rule No. 17.1 provides that dispositions:

  > "shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society", and that the "well-being of the juvenile shall be the guiding factor in the consideration of her or his case".

  This rule, which is part of a section on *Guiding principles in adjudication and disposition*, is a re-affirmation of rule 5.1 according to which the "Aims of juvenile justice" are to:

> "emphasize the well-being of the juvenile and [to] ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence".

Two observations emerge from these provisions:

(1) The *Beijing Rules* define the principle of proportionality not only in terms of the seriousness of the offence, but also according to the circumstances and needs of the child and the needs of society. This involves a re-formulation of the principle of proportionality with three poles instead of one: the offender and society are added to the offence.

(2) The well-being of the child is presented as "the guiding factor in the consideration of her or his case" (rule 17.1). As stated in the Commentary on rule 17.1:

> > "Whereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person."

A proper equilibrium must be reached between the weight to ascribe to the offence, to the needs of society and to the well-being and best interests of the child. The underpinning model is one that leaves considerable room for the welfare and best interests of the child while avoiding welfare oriented measures that "may go beyond necessity and therefore infringe upon the fundamental rights of the young individual" (rule 5, commentary). This hybrid model retains essential elements of the welfare model while granting the offence a weight that may prevent abuses. "In essence, rule 5 calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime" (rule 5, commentary).

- ***Restorative justice –*** The emphasis placed on the three poles offender-society-offence does not mean that victims are forgotten. The partial reintroduction of the offence in the decision-making process is not there to simply justify punishing offenders: it is a basis for introducing victims in the process. *Beijing Rule* 11.4 encourages the use of restitution and compensation of victims in diversion practices. The commentary on rule 5.1 mentions the youth's endeavour to indemnify the victim amongst the factors to be considered when deciding on a case. Furthermore, the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* – which applies both to adult and child offenders – emphasizes the need for ensuring proper compensation and redress for victims, as well as adequate processes to reach this aim (see in particular sections 4, 5, 7, 8 and 9). Victims are presented as being entitled to reparation, not as claiming vengeance and more punishment for delinquents. This is in line with the movement that re-affirmed in the 1980s the need for the justice system to take into account the rights and needs of victims and to repair the consequences of delinquent acts. This movement gained recognition in the 1990s, particularly with the

development of restorative justice. It can offer a positive version of making offenders accountable for the consequences of their acts – more so than by punishing them. Focussing on repairing the harm done is advantageous to victims and it is likely to have an educative impact on children. It should be privileged both in extrajudicial and judicial proceedings.

- ***Life imprisonment –*** In its *General Comment No. 10* (paragraph 77), the Committee on the Rights of the Child concludes that no one should be sentenced to life imprisonment without the possibility of release or parole for a crime committed while under the age of 18. Furthermore, since life imprisonment *with* the possibility of release or parole makes it "very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release", the Committee recommends the abolition of all forms of life imprisonment:

  "77. No child who was under the age of 18 at the time he or she committed an offence should be sentenced to life without the possibility of release or parole. For all sentences imposed upon children the possibility of release should be realistic and regularly considered. In this regard, the Committee refers to article 25 of CRC providing the right to periodic review for all children placed for the purpose of care, protection or treatment. The Committee reminds the States parties which do sentence children to life imprisonment with the possibility of release or parole that this sanction must fully comply with and strive for the realization of the aims of juvenile justice enshrined in article 40 (1) of CRC. This means inter alia that the child sentenced to this 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/her possible release. Given the likelihood that a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18."

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SECTION 4.7 – THE RIGHT TO APPEAL DECISIONS

Guideline:

4.7 – ***Right to appeal –*** Children must have the right to appeal decisions in which they have an interest. Their right to appeal must not be lesser than that which adults would have in similar circumstances. This appeal should be decided promptly by a higher, competent, independent and impartial authority or judicial body.

Explanations and comments:

- ***Appeals by children in conflict with the law –*** The Committee on the Rights of the Child indicates that some States parties to the *Convention on the Rights of the Child* have made reservations in order to limit the right of appeal by the child to the more serious offences and/or imprisonment sentences. The Committee reminds States parties to the *International Covenant on Civil and Political Rights* that a similar provision is made in article 14 (5) of the Covenant. In the light of article 41 of Convention, it means that this article should provide every adjudicated child with the right to appeal. (Committee's *General Comment No. 10*, paragraphs 60-61.)

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PART 5 – CHILD FOCUSSED JUSTICE: AFTER JUDICIAL PROCEEDINGS

Guideline:

5 ***Elements relevant to stages following judicial proceedings*** – Part 5 of the Guidelines deals with elements that are relevant to stages of proceedings that take place after judicial proceedings.

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SECTION 5.1 – IMPLEMENTATION OF JUSTICE DECISIONS

Guideline:

5.1 – ***Implementation of justice decisions*** **– J**ustice decisions must be implemented without delay, within the limits set by the law and the judgment, with an unremitting consideration for children's rights and best interests.

Explanations and comments:

- ***Implementation of decisions and children's rights –*** The fact that a judgement has been pronounced or that an extrajudicial decision has been made does not mean that one should not be concerned about the rights of children.

  Implementing decisions requires that new decisions have to be made, and interventions carried out, by various people. This implementation must be done with the same concerns for children's rights as the processes that have led to the decisions themselves. It must be done within the limits set by the law and the judgement, with a constant consideration for the rights and best interests of children. For example:
  (1) children must be treated with dignity and protected from discrimination;
  (2) they must be informed of their rights in the implementation process in a manner that they can understand;
  (3) their private lives must be protected against any undue intrusion; particular attention must be paid to the non-disclosure of criminal records, if any, to facilitate their successful integration in society;
  (4) decisions must be implemented without delay once they have been pronounced; it is of the utmost importance that delays be reduced to the strict minimum in the implementation of decisions;
  (5) children must be granted an easy and free access to independent bodies or authorities if they have complaints about the respect of their rights.

Numerous examples could be provided. For example, in family matters, the daily implementation of custody or visiting rights once the divorce has been pronounced can give rise to conflicts between parents, as well as between parents and children; those conflicts have to be resolved with due consideration for the rights of the children involved, without resorting to coercion whenever possible to avoid unnecessary traumatisation.

One situation where one must be particularly sensitive to children's rights is that where children are placed outside their family and deprived of their liberty. They are the ones who have the greatest need for easy and free access to an independent body if they have complaints about the respect of their rights.

One must be particularly concerned with avoiding delays in implementing measures. For example, waiting lists can totally transform court decisions. When a decision involves referring a child to a given service and this service has a long waiting list, "temporary" measures that are taken in the meantime may, over time, become the "real" measures. In the end, the measure that is implemented is not that which was ordered by the court, nor in the best interests of the child.

These are but a few examples that illustrate how important it is to be concerned with what happens to children's rights once the judicial process is over and judicial decisions are being implemented.

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PART 6 – IMPLEMENTATION, MONITORING, ASSESSMENT AND AMENDMENT OF THE GUIDELINES

Guideline:

6 – ***Implementation, monitoring, assessment and amendment of the Guidelines*** **–** Measures should be taken to ensure the implementation, monitoring, assessment and amendment of the Guidelines. To that effect:

(1) States should first carry out an initial review of domestic legislation, policies and practices to determine their level of conformity with the Guidelines as well as the international instruments on which they are based; they should take necessary actions to ensure the implementation of such conformity.

(2) Periodic reviews should later be carried out to ensure that actions are taken whenever necessary and to assess their results.

(3) Necessary information systems should be established to monitor and assess on a continuous basis the implementation of the Guidelines, whether their goals are being attained and, at a more general level, the functioning of the justice system in so far as it deals with children. These information systems should include data gathered by judicial and law enforcement authorities, as well as social welfare, health care, legal aid and other services.

(4) An independent body should be entrusted with promoting and monitoring the implementation of the Guidelines.

(5) Without infringing upon the jurisdiction of the courts, an independent body (such as an ombudsperson) should have the responsibility of promptly investigating and prosecuting alleged violations of the legal rules on which the Guidelines are based, particularly those that concern the rights of children. Where local or national legislation grants jurisdiction to courts to hear cases of such alleged violations, access to those courts should be facilitated for children.

(6) The Guidelines may be amended whenever an updating or other need arises.

Explanations and comments:

- ***Monitoring and assessment –*** In its General comment on young persons in conflict with the law, the Committee on the rights of the child has expressed concerns about the lack of basic necessary data:

  "98. The Committee is deeply concerned about the lack of even basic and disaggregated data on, inter alia, the number and nature of offences committed by children, the use and the average duration of pretrial detention, the number of children dealt with by resorting to measures other than judicial proceedings (diversion), the number of convicted children and the nature of the sanctions imposed on them. The Committee urges the States parties to systematically collect disaggregated data relevant to the information on the practice of the administration of juvenile justice, and necessary for the development,

> implementation and evaluation of policies and programmes aiming at the prevention and effective responses to juvenile delinquency in full accordance with the principles and provisions of CRC.
> 99. The Committee recommends that States parties conduct regular evaluations of their practice of juvenile justice, in particular of the effectiveness of the measures taken, including those concerning discrimination, reintegration and recidivism, preferably carried out by independent academic institutions. Research, as for example on the disparities in the administration of juvenile justice which may amount to discrimination, and developments in the field of juvenile delinquency, such as effective diversion programmes or newly emerging juvenile delinquency activities, will indicate critical points of success and concern. [...]" (Committee's *General Comment No. 10*, paragraphs 98-99.)

Similar observations and concerns could be expressed *mutatis mutandis* about the treatment of children in other areas of justice, such as child protection for example.

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