

1 - Child justice systems; age limits; age determination

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Children have a special position in the criminal justice system. They are different than adults in that their physical and psychological development points to lesser culpability and a higher capacity for rehabilitation. Also, scientific research has exposed on numerous occasions the significant harm the criminal justice system inflicts on children. For these reasons international law urges states to establish separate justice systems for children in conflict with the law. Such systems are meant to protect young persons and not to facilitate prosecution or the limitation of procedural guarantees under the guise of protection.

It is also recognized that development among children is different and while all children below the age of 18 should benefit of separate justice system, such separate systems should also be applied to young adults until at least the age of 21 (see also Section 2.1. below). Finally, difficulties have arisen in practice concerning the age determination; the question being how to establish the age of persons who do not have adequate documentation. These issues will be elaborated upon below.

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1. Existence of a separate child justice system

International law, in particular Article 40 of the [Convention on the Rights of the Child](#) (the “CRC”) and [General Comment no. 24 \(2019\)](#) on children’s rights in the child justice system, strongly recommend that states establish separate child justice systems, for children accused or suspected of having infringed criminal law ([General Comment no. 24 § 4](#)). The basis for this recommendation is scientific evidence attesting that young persons differ from adults in their development thus their lesser culpability should be recognized in order to limit the harmful effects of the criminal justice system ([General Comment no. 24 § 2](#)).

Nevertheless, there is no binding European or international norm mandating states to adopt such a separate justice system. Proceedings involving children must be organised so as to respect their best interests, being understood that a child charged with an offence is dealt with in a manner which takes full account of their age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote their ability to understand and participate in the proceedings (ECtHR, *Adamkiewicz v. Poland*, no. 54729/00, § 70; ECtHR, *Panovits v. Cyprus*, no. 4268/04, § 67). Furthermore, it is not permissible for state authorities to deprive children of procedural

guarantees of the criminal justice system by arguing that such deprivation of procedural guarantees is effected for the purpose of their protection (ECtHR, *Blokhin v Russia*, no. 47152/06, § 196).

Conversely, establishing a different sentencing system for children compared to adults does not constitute discrimination based on age as systems of sanctioning for young offenders are justified by many provisions of international law as well as by considerations of protecting children in light of their presumed immaturity and greater malleability and capacity for rehabilitation and reformation (ECtHR, *Khamtokhu and Aksenchik v. Russia*, nos. 60367/08 and 961/11 § 80; also Factsheet no. 9: Sentencing of children)

2. Age limits

2.1. Maximum age

Article 1 of the CRC provides that “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

In the European Union, Article 2(3) of Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (the “**Procedural Safeguards Directive**”) provides that the guarantees in this instrument apply to persons who were children when they became subject to the proceedings even if they have subsequently reached the age of 18. Nevertheless, under the same provision, Member States are entitled not to apply the Procedural Safeguards Directive after the person concerned has reached the age of 21. This means that all EU Member States must apply the provisions of the directive to persons between 18 to 21 years old. It is left to the discretion of Member States whether they wish to allow the application of the Procedural Safeguards Directive to persons older than 21 years at the end of the criminal proceedings.

The **CRC Committee** recommends that states apply child justice rules even if a criminal offence has been committed together with adults or when some offences were committed before the age of 18 and some were committed after that age ([General Comment no. 24](#) §§ 36 and 37).

2.2. Minimum ages

The minimum age of criminal responsibility (the “MACR”) refers to the age below which the law determines that children do not have the capacity to infringe the criminal law. Article 40 (3) (a) of the **CRC** encourages states to establish a MACR. Even if there is no hard law on the actual MACR, in its latest General Comment, the **CRC Committee** has strongly recommended States to set the MACR at least at 14 years old ([General Comment no. 24](#), § 21). For the CRC Committee, 14 years old should be the absolute MACR; states are encouraged to increase the limit to 15 and 16 years old ([General Comment no. 24](#), § 22).

The MACR is different from the age below which a child cannot be subject to a measure of deprivation of liberty. Some countries (insert references from national factsheets) provide that custodial sentences (such as deprivation of liberty) shall not be imposed on children below a certain age, even if they are criminally liable according to domestic criminal law. In paragraph 89 of

[General Comment no. 24](#), the **CRC Committee** recommends that states set the age of 16 as threshold below which deprivation of liberty cannot be imposed.

From the perspective of **European Union Law**, the **Procedural Safeguards Directive** does not apply where deprivation of liberty cannot be imposed as a sanction (Article 2 (6) (b)). This means that if national law excludes the possibility to deprive a child of liberty as a result of a finding of guilt, Member States are not obliged to apply the provisions of the Directive.

The **European Court of Human Rights** (the “ECtHR” or the “(European) court”) has accepted that different sentencing systems for adults and children are not discriminatory as the latter are justified by developmental differences and consistent with the CRC (ECtHR, *Khamtokhu and Aksenchik v Russia*, nos. 60367/08 and 961/11, § 80).

3. Age Determination

Recital 13 of the **Procedural Safeguards Directive** provides that Member States should determine the age of the child on the basis of the child’s own statements and other documents. Only if such evidence is inconclusive should Member States resort to a medical examination which must be conducted in compliance with the child’s rights, their physical integrity and human dignity. In case of doubt the person shall be presumed a child for the purposes of the Directive. The **CRC Committee** has similar recommendations, paragraphs 33 and 34 of General Comment no 24 further ruling out methods such as bone and dental analysis as sole basis for age determinations. The CRC Committee also recommends that documents presented should be presumed genuine unless there is proof to the contrary. These recommendations are echoed in instruments relating to children in migration and in the relevant case law on this topic where age assessment is a question often posed to the authorities (in this sense, for example [Joint general comment No. 4 \(2017\)](#) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, § 4. Also, the in the case of *Darboe and Camara* no. 5797/07 currently pending, the ECtHR will provide more guidance on this issue in the context of migration).

Further reading

On the topic of age assessment in the context of criminal proceedings: The Supreme Court of India has delivered a judgment in the case of [Bhoop Ram vs State Of U.P.](#) , 4 April 1989.