



Lawyers defending children in conflict with the law

INTERNATIONAL PRACTICAL GUIDE

DEFENCE FOR CHILDREN INTERNATIONAL (DCI) – Belgium

A row of colorful silhouettes of people of various ages and ethnicities, some with their arms raised in a gesture of celebration or protest. The silhouettes are in shades of blue, green, orange, and red.

PROJECT “MY LAWYER, MY RIGHTS:

ENHANCING CHILDREN’S RIGHTS IN CRIMINAL PROCEEDINGS IN THE EU”

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AUTHORS AND PROJECT

This Practical Guide was drafted by **Marine Braun**, a Juvenile Justice Expert, who is also the coordinator of the “*My Lawyer, My Rights*” project, **Eva Gangneux**, a lawyer specialising in Human Rights and **Mia Magli**, a lawyer specialising in Juvenile Justice, under the supervision of Benoit Van Keirsbilck, Director of Defence for Children International (DCI)-Belgium and former President of Defence for Children (DCI)-International. Members of the team of DCI-Belgium also provided a valuable contribution to the design and production of this Guide, in particular Aurélie Carré and Julianne Laffineur. The development of this Guide was supported by the expertise of the partners and associated partners as well as the five experts of the European “*My Lawyer, My Rights*” projects.

This Guide is part of the framework of the “*My Lawyer, My Rights*” (MLMR) project launched in September 2016. The project, which was funded by the European Union (EU), the Organisation internationale de la Francophonie (OIF) and the Fédération Wallonie-Bruxelles (Belgium), was coordinated by DCI – Belgium and was conducted in partnership with six European partners¹.

The project was initially designed to provide clear guidance to lawyers who may be required to represent children in conflict with the law.

More specifically, it aims to provide lawyers representing children with practical information and tools relating to their role, their mission and the training required in order to enable them to ensure an effective right to defence for the children to whom they provide assistance.

All of the project’s outcomes are available in the database that can be accessed through the website devoted to it: <http://www.mylawyermyrights.eu>.

This project led to the creation of a “*Practical Guide for Lawyers: How to defend a child in conflict with the law?*” and a “*Manual for EU Member States: How to ensure the rights of children in conflict with the law? Focus on the role of the lawyer at the different stages of juvenile justice proceedings*”. Both are based on European regulations and in particular on the directives relating to procedural rights for persons suspected or accused of having committed an offence².

This Guide aims to go beyond the European criteria since it is based on the principles derived from international instruments and standards aimed at ensuring legal guarantees for children in conflict with the law. Thus, it is intended for lawyers defending children all over the world.

¹ Child Circle (**Belgium**), Bulgarian Helsinki Committee (**Bulgaria**), Child Law Clinic of the University College Cork (Ireland), Defence for Children International (**Italy**), Helsinki Foundation for Human Rights (**Poland**), Defence for Children International (**the Netherlands**).

² Directives 2010/64/EU, 2012/13/EU, 2014/8/EU, (EU) 2016/800 and (EU) 2016/1919.

Defence for Children International (DCI)-Belgium is the coordinator of this project. The work carried out by DCI-Belgium is aimed at protecting and defending children's rights in Belgium and other countries. DCI-Belgium is part of the Defence for Children International (DCI) Worldwide Movement comprised of a network of around forty National Sections and associated members spread out across the globe. DCI-Belgium's priorities are training, education and raising awareness about children's rights. DCI-Belgium takes action when children's rights are infringed, provides oversight and monitoring of Belgium's observance of children's fundamental rights. Its main fields of intervention are juvenile justice and children's access to justice; children's deprivation of liberty; the rights of migrant children; children's right to participation and to freedom of expression.

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The authors would like to thank the partners, associated partners and experts of the “*My Lawyer, My Rights*” project for their extremely valuable contributions. We particularly appreciate the commitment and efforts as well as the flexibility of everyone involved.

Thanks to the support of the Organisation Internationale de la Francophonie, we were given the opportunity to extend the initial project by drafting this Guide which is more universal in scope and is thus aimed at lawyers practicing in countries outside the European Union.

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The pro-bono Europe section of DLA-Piper coordinated 12 desk studies conducted

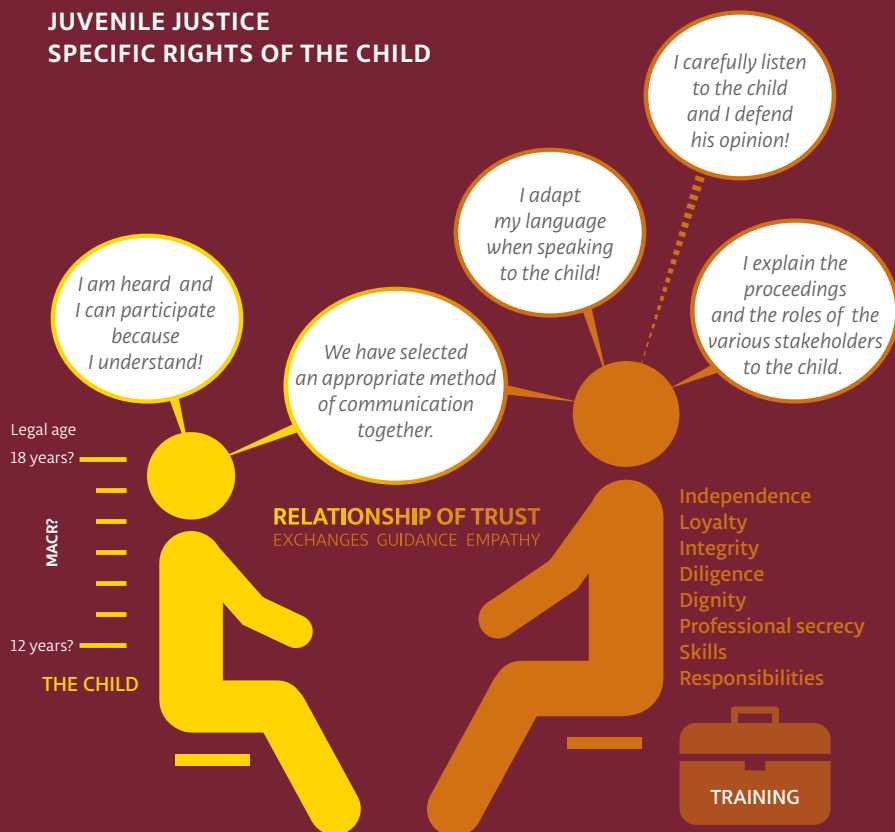
by their peer offices at national level. We wish to extend a special word of thanks to Özgür Kahale and Lamin Khadar as well as to the 12 national teams for their contributions to organising the research, collecting the data at national level and contributing to the national reports.

We wish to thank all the children who agreed to be interviewed as part of this project and who, in doing so, shared their experience about their relationships with their lawyer(s) and about the way in which they were able to exercise their rights while facing juvenile justice proceedings.

Finally, a very special and sincere thank you to all the DCI-Belgium team for their work, their dedication and their endless investment in bringing this project to fruition over the last two years.

THE RIGHTS OF THE CHILD

JUVENILE JUSTICE SPECIFIC RIGHTS OF THE CHILD



THE LAWYER



I contribute to improving the rights of the child: in collaboration with NGOs, I am able to carry out actions of strategic litigation!



I represent the child, by whom I am instructed. I am not the lawyer of his representatives. However, it is important to involve the child's family in the procedure when it is in the child's best interests!



I work with the other professionals involved in the juvenile justice proceedings, in the interest of the child!



I am the guarantor of the observance of the rights of the child, all the more when he is deprived of liberty!

RIGHT TO BE HEARD - RIGHT TO PARTICIPATE - BEST INTERESTS -
ALTERNATIVE MEASURES - NON-DISCRIMINATION - FAIR TRIAL -INDIVIDUAL
ASSESSMENT - PRIVACY -LIMITED USE OF THE DEPRIVATION OF LIBERTY

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ACRONYMS

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| BPRL | UN Basic Principles on the Role of the Lawyers |
| CED | UN Committee on Enforced Disappearances |
| CEDAW | UN Committee on the Elimination of Discrimination against Women |
| CESCR | UN Committee on Economic, Social and Cultural Rights |
| CJEU | Court of Justice of the European Union |
| CoE | The Council of Europe |
| CPT | UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN Committee Against Torture |
| CRC Committee | UN Committee on the Rights of the Child |
| CRPD | UN Committee on the Rights of Persons with Disabilities |
| DCI | Defence for Children International |
| ECTHR | European Court of Human Rights |
| EU | European Union |
| GC N°10 | General Comment No.10 of the CRC: Children's rights in juvenile justice |
| GC N°12 | General Comment No. 12 of the CRC: The right of the child to be heard |
| GC N°14 | General Comment No. 14 of the CRC: The right of the child to have his or her best interests taken as a primary consideration |
| ICCPR | International Covenant on Civil and Political Rights |
| MACR | Minimum Age of Criminal Responsibility |
| NGO | Non-Governmental Organisation |
| SPT | UN Subcommittee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| UN | United Nations |
| UNCRC | UN Convention on the Rights of the Child |

LEXICON

LAWYER FOR CHILDREN

In this Guide, we will use the term “lawyer for children” to describe any lawyer tasked with defending children in conflict with the law (whether they do so on a one-off basis or exclusively). Such lawyer must necessarily be specialised in defending children involved in juvenile justice proceedings.

HARD LAW

The rules of hard law are contained within the international and regional instruments that are legally binding or which create obligations in the domestic law of States.

SOFT LAW

The rules of soft law are contained within the international and regional instruments that are not legally binding or do not create any obligation in the domestic law of States. Nevertheless, these rules provide interpretative and authoritative guidance to States.

CHILD IN CONFLICT WITH THE LAW³

A “child in conflict with the law” is a human being under the age of 18, unless legal age is reached earlier under the legislation applicable to them, who is suspected, accused or convicted of an offence under criminal law.

DEPRIVATION OF LIBERTY⁴

In this Guide, we will use the term “deprivation of liberty” rather than “detention” to include closed establishments that are not necessarily prison-like and that do not involve incarceration. A place where a child may be deprived of his liberty is, according to this Guide, any kind of public or private establishment – penal, correctional, educational, protective, social, therapeutic, medical or administrative – from which a child is not allowed to leave at will.

JUVENILE JUSTICE PROCEEDINGS

In this Guide, we will use the term “juvenile justice proceedings” to refer to all proceedings that a child in conflict with the law, regardless of any States’ national legislation, can be involved in.

³ CRC/C/OG/10, Introduction, ¶1.

⁴ This definition has been taken from the Practical Guide “Monitoring places where children are deprived of liberty” (p.14), published by DCI-Belgium as part of the EU funded project “Children’s Rights Behind Bars” available at: <https://defenceforchildren.org/wp-content/uploads/2016/02/DCI-Practical-GuideEN.pdf>.

INTRODUCTION



“In the field of juvenile justice, the demands of the fair trial are at the centre of the debate. Children have the right to a judgment⁵, given by an independent and impartial tribunal⁶, within a reasonable time. They have the right to the presumption of innocence and to all the procedural guarantees. Defence rights from the beginning of the procedure and at all stages of the juvenile justice proceedings are an essential part of the scheme⁷. As opposed to this, the practice of interrogating and holding a child in a context lacking procedural guarantees, including lack of legal representation, is regarded as an inhuman and degrading treatment⁸. The role of the lawyer, free, independent and trained, is more necessary than ever, for he or she is responsible for the relationship of trust and for the confidentiality in the interest of the young litigant and of justice. In a democratic society, lawyers are the first and last bulwark against arbitrariness”.⁹

Françoise Tulkens, former judge and Vice-President of the European Court of Human Rights.

The United Nations Convention on the Rights of the Child (UNCRC) only grants the arrest, deprivation of liberty or imprisonment of a child as a measure of last resort. Article 40 of the Convention guarantees children the right to legal representation and defines the juvenile justice system as a system which must be specially designed for children suspected, accused or convicted of infringing criminal law, appropriate to their well-being and proportionate both to their circumstances and the offense.

Other international¹⁰ and regional¹¹ instruments and standards on juvenile justice are in line with the UNCRC and confirm the primarily educational aim of the system, meaning that the justice system should in no way be strictly punitive.

Thus, the lawyer plays a vital role as the guarantor of all of the child’s procedural rights in the juvenile justice system and ensures that his¹² client is able to effectively enjoy his rights.

Although legal aid and representation are rights vested in the child, it should be noted that they are not applied systematically in many States. Access to a lawyer remains a challenge in several States throughout the world.

⁵ ECtHR, 30 June 2015, Grabowski v. Poland.

⁶ ECtHR, 2 March 2010, Adamkiewicz v. Poland.

⁷ ECtHR (GC), 27 November 2008, Salduz v. Turkey.

⁸ ECtHR, 3 February 2011, Dushka v. Ukraine.

⁹ Extract of the foreword of the *“Practical Guide for lawyers: How to defend a child in conflict with the law”*, p.10

¹⁰ In particular the Beijing Rules, the Riyadh Guidelines and the Havana Rules.

¹¹ In particular the African Charter on the Rights and Welfare of the Child, the Council of Europe Guidelines on Child-Friendly Justice.

¹² In this Guide, persons are referred to as ‘he’ or ‘him’ for ease of reference, but these usages should be understood to mean ‘she’ and ‘her’ as well.

In the context of this Guide, the definition of “**juvenile justice system or proceedings**” requires a broad interpretation in order to include proceedings that are considered welfare- or education-based but yet can end up with a child suspected, accused or convicted of infringing criminal law being deprived of his liberty. Under no circumstances should States abdicate from safeguards and protections guaranteed to children in conflict with the law by international and regional instruments because they do not consider their juvenile justice proceedings as ‘criminal’ proceedings.

Objective of the Practical Guide

Research¹³ show that children in conflict with the law are not always represented and assisted by a lawyer and, even when they are, the lawyer is not necessarily specialised in providing assistance and representation to children. In addition, even when children are assisted by a specialised lawyer, they are not always represented at all stages of juvenile justice proceedings. Additionally, in some States, children can waive their right to a lawyer.

The overall purpose of this Guide is to provide an introductory **tool for lawyers for children**, which is not intended to be exhaustive.

With this in mind, it attempts to provide guidance to lawyers regarding their role and provide information on the manner in which they might combine their legal expertise (knowledge of legal instruments and standards) with soft skills (child-friendly language, appropriate communication, attitude with children and other technical advice when defending children in juvenile justice proceedings).

The Guide focuses on:

- The role the lawyer will play in practice when defending a child in conflict with the law;
- The lawyer’s assignment in the context of such exercise;
- The importance of the adequate and continuous training the lawyer for children should receive in order to be able to assist a child in conflict with the law.

13 Six field studies were carried out in the framework of the “*My lawyer, My Rights*” project: in Belgium, in Bulgaria, in Ireland, in Italy, in Poland and in the Netherlands and twelve desk studies were carried out: in Austria, in England and Wales, in Finland, in France, in Germany, in Hungary, in Luxembourg, in Portugal, in Romania, in Slovakia, in Spain and in Sweden. The 18 national reports and their “national overviews” which summarise the reports have been published and are available on the project’s website.

The UNICEF report entitled “*Child-Friendly Legal Aid in Africa*”, from 2011, reports on the “low number of lawyers available to represent children before the African courts”.

In Canada, the report of the Ministry of Justice entitled “*Legal Representation of Children in Canada*”, from 2015, also emphasizes that the child in conflict with the law is not always assisted by a lawyer in that country.

We are aware of the difficulties that lawyers can face in the exercise of their profession. Obstacles apparent from the context, the funding, the administration of justice and the working conditions of the lawyer can complicate their mission and tasks.

We hope this Guide will provide lawyers with the tools to improve their role towards children in the juvenile justice system. The lawyer for children needs to be the child's adviser that will help him through the juvenile justice proceedings in order to ensure that all his procedural rights are guaranteed and protected. As such, he plays a leading role in guaranteeing a fair trial, a principle that must be guaranteed for children and adults alike.

THIS GUIDE IS DIVIDED INTO SIX CHAPTERS:

The first chapter covers the main international legal sources concerning the rights of children in conflict with the law.

The second chapter aims to provide information on the key concepts and fundamental principles applicable to the child in conflict with the law.

The third chapter details the rights vested in children in conflict with the law. The children's lawyer must be the guarantor of such rights and must therefore be aware of those rights.

After explaining the legal framework, the Guide provides practical advice intended to help the lawyers for children to ensure that the rights of the child are observed.

The fourth chapter outlines the importance of ensuring that the lawyer for children receives specialised training, establishes a relationship of trust with the child, and uses methods of communication adapted to the child. These various points are crucial for ensuring that the lawyer is the guarantor of the rights of the child in conflict with the law.

The fifth chapter details the lawyer's particular role when defending a child in conflict with the law. This helps to identify what the lawyer can and should do to protect the rights of the child that he represents and the guarantees vested in the latter with respect to his lawyer.

The sixth chapter covers "strategic litigation" enabling the lawyer for children to contribute to global developments in the field of children's rights.

The Guide ends with a brief **conclusion**.

1. MAIN INTERNATIONAL LEGAL SOURCES RELEVANT TO CHILDREN IN CONFLICT WITH THE LAW

Various international legal texts concern the child in conflict with the law and the observance of his fundamental rights. The lawyer for children must be aware of these standards, whether or not they are legally binding.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (1989)

The UNCRC is the world's most ratified international Convention. It is legally binding on the States which ratified it.

Articles 37 and 40 of the UNCRC are devoted specifically to the subject of juvenile justice. They respectively cover the issue of the deprivation of liberty and of the procedural rights of the child in conflict with the law.

The UNCRC contains many other provisions that also apply to the situation of the child confronted with a justice system, including the right to have his best interests duly taken into consideration, the right to participation, including participation in the hearing in court, the right to protection, the prohibition of inhuman or degrading treatment and torture, etc.

THE GENERAL COMMENTS OF THE COMMITTEE ON THE RIGHTS OF THE CHILD ¹⁴

The Committee on the Rights of the Child is a body comprised of independent experts that supervises the States Parties' implementation of the UNCRC ¹⁵ and its three optional protocols on the involvement of children in armed conflict ¹⁶, on the sale of children, child prostitution and child pornography ¹⁷ and on establishing a communication procedure ¹⁸.

¹⁴ All the General Comments of the Committee on the Rights of the Child are available on the following link: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11

¹⁵ UNCRC, Part II, art. 42-45.

¹⁶ Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted and opened for signature, ratification and accession through a resolution of the General Assembly, A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002.

¹⁷ Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Adopted and opened for signature, ratification and accession through a resolution of the General Assembly A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002.

¹⁸ Optional protocol to the Convention on the Rights of the Child establishing a communication procedure, adopted and opened for signature, ratification and accession through a resolution of the General Assembly A/RES/66/138 of 19 December 2011, entered into force on 14 April 2014.

In addition, it issues General Comments on the articles of the UNCRC. The comments are the official interpretation of the way in which the UNCRC must be applied by the States Parties.

An example of this is General Comment N°10: The Rights of the Child in Juvenile Justice which provides guidance to the States Parties to the UNCRC with regard to establishing and implementing their juvenile justice system at national level (CRC/C/GC/10).

THE BEIJING RULES (1985)

The UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) are not legally binding on States. They list the minimum conditions which have been accepted at international level for the treatment of children who are in conflict with the law.

Thus, in order to be child-friendly, all juvenile justice systems must comply with those rules.

THE HAVANA RULES (1990)

The UN Rules for the Protection of Juveniles Deprived of their Liberty (“The Havana Rules”) are not legally binding on States. Their purpose is to guarantee observance of the child’s fundamental rights and freedoms when he is deprived of his liberty.

THE RIYADH GUIDELINES (1990)

The UN Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”) are not legally binding on States. They provide a practical, positive and pro-active approach to preventing juvenile delinquency.

To achieve this, the Guidelines focus on the socialisation and integration of all children, and in particular the most vulnerable children.

2. KEY CONCEPTS AND FUNDAMENTAL PRINCIPLES

This part of the Guide lists certain key concepts essential to understanding the rights of children in conflict with the law and the fundamental principles inherent to the juvenile justice system.

The concepts and principles are based on international hard law or soft law standards and instruments relating to children's rights.

1. Who is a child?

UNCRC, art. 1:

"A child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

African Charter on the Rights and Welfare of the Child, art. 2:

"A child means every human being below the age of 18 years."

Upon reaching legal age, children assume legal control over their person, actions and decisions¹⁹. At that age, their parents' or guardians' duty of control and education and legal responsibilities with respect to the children end.

The fact of reaching the legal age does not necessarily correspond to the mental or physical maturity of an individual and it should not be confused with the minimum age of criminal responsibility (MACR – see below).

2. Who is a child in conflict with the law?

A "child in conflict with the law" is a person under the age of 18, unless the legal age has been reached earlier pursuant to the legislation applicable to him, who is suspected, accused or convicted or infringing criminal law²⁰.

¹⁹ There can be different types of age-related legal requirements with respect to the concept of legal age, e.g. the age at which children may marry, vote, be involved in the criminal justice system, or access complaint mechanisms.

²⁰ CRC/C/GC/10, Introduction, ¶1.

The age that needs to be taken into consideration to determine whether a child is in conflict with the law is the age at the time of committing the offence he is suspected or accused of. Therefore, this Guide also concerns young adults over the age of 18, when they are suspected, accused or convicted of an offence committed as children.

In many countries, juvenile justice proceedings result in sanctions and measures that are not classified as “criminal”. However, according to the interpretations adopted by international and regional bodies ²¹, regardless of the qualification or name adopted by the State, such measures may be considered as “criminal” when they present similarities with criminal measures as a result of their purpose, their nature or their severity. In other words, it is not enough for the system to be classified as educational to rule out the application of the fundamental guarantees. Each time that the intervention of the justice system can lead to “punitive” measures and in particular to the deprivation of liberty, the proceedings become criminal in nature.

3. What is the minimum age of criminal responsibility (MACR)?

The minimum age of criminal responsibility (MACR) is the age that a person reaches when he is presumed to have the capacity to infringe the criminal law and thus to be judged by a criminal court or other relevant competent authority (CRC/C/OG/10 §31).

The States parties to the UNCRC are encouraged to “establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law” (UNCRC, art. 40.3. a)).

There are no hard law international standards setting out what the MACR should be. This is why there is a wide range of MACR in the national legislations of the UNCRC States parties.

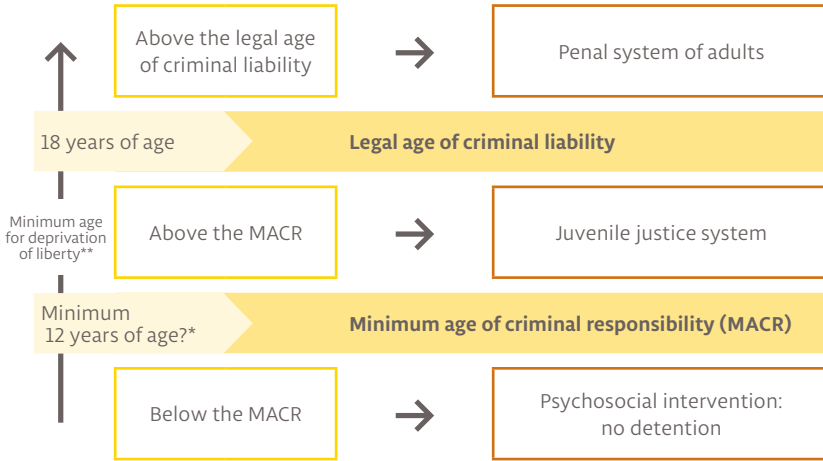
Guidance is however provided to the States by soft law instruments:

- According to the Beijing Rules (Rule 4): the MACR “*shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity*” of the child;
- According to General Comment N° 10 of the CRC (§32): the age of 12 is an “*absolute minimum*” under which the MACR may not be set.

According to the Committee on the Rights of the Child, the States Parties must set a MACR and not authorise any exception which could lead to a child being considered criminally liable before he has reached such age.

²¹ General Comment N° 32 of the Human Rights Committee relating to Article 14 of the International Covenant on Civil and Political Rights, §15, “This concept may also be extended by the criminal measures which are sanctions which, independently of their classification in domestic law, must be considered as criminal due to their purpose, their nature or their severity”.

The ECtHR and the CJEU use “Engel’s” criteria, they are defined in the judgments ECtHR, 1976, Engel and others v. the Netherlands, §82 and ECtHR, 2013, Blokhin v. Russia, §139.



* According to General Comment N° 10 of the Committee on the Rights of the Child (§32), the age of 12 is an "absolute minimum" under which the MACR may not be set.

** Some States have provided for a minimum age for deprivation of liberty which is above the MACR.

3.1. BELOW THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

Below the minimum age of criminal responsibility, the child is considered not to have the capacity to infringe the law and may thus not be involved in criminal proceedings²².

Such children may only be the subject of corrective, protective and/or educational measures. Although such measures are not taken in the context of juvenile justice proceedings, such children are entitled to the same special guarantees, particularly if they run the risk of being removed from their family environment and/or deprived of their liberty.

3.2. ABOVE THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

Children above the MACR at the time of committing the offence are considered to have the capacity to infringe criminal law. They may therefore be held liable for their actions, be formally charged and be the subject of criminal proceedings.

Such proceedings and their outcomes must be consistent with the principles of a child-friendly juvenile justice system²³.

Therefore, it is between the MACR and the legal age of criminal liability that the specific system of juvenile justice, with which many principles and guarantees are associated (see diagram above), can be found.

²² See §31 et 34 of General Comment N° 10 of the Committee on the Rights of the Child.

²³ See §31.2 of General Comment N° 10 of the Committee on the Rights of the Child.

3.3. YOUNG ADULTS ABOVE THE LEGAL AGE OF CRIMINAL LIABILITY

When a child has reached the age of 18 years old, he becomes a “young adult” and can be involved in the same criminal proceedings as other adults.

Nevertheless, according to the CRC Committee, adults who have committed a criminal offence when they were children at the time of the facts are entitled to be judged in juvenile justice proceedings²⁴.

Although the legal age of criminal liability is often set at the age of 18, some countries have extended the application of the rules of juvenile justice to young adults above the age of 18, which the CRC Committee welcomes. The cognitive and emotional development of the child extends, according to specialists, beyond the legal age.

4. What are the fundamental principles of a child-friendly juvenile justice system?

Each State Party to the UNCRC is responsible for establishing and implementing its own national juvenile justice system.

UNCRC, art. 40.3:

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

The child-friendly nature of the system can be assessed on the basis of the international standards and principles contained in various hard law and soft law instruments.

A child-friendly juvenile justice system must encourage the use of **alternative measures** in order to avoid, as much as possible, the use of legal proceedings. (GC N° 10, §3 and Beijing Rules, 11.1)

According to the CRC Committee: *"In the administration of juvenile justice, States parties have to apply systematically the general principles contained in articles 2, 3, 6 and 12 of UNCRC, as well as the fundamental principles of juvenile justice enshrined in articles 37 and 40"* (GC N° 10, §5).

²⁴ See §37 of General Comment N° 10 of the Committee on the Rights of the Child.

4.1. THE PRINCIPLE OF NON-DISCRIMINATION

The UNCRC applies to all children, without discrimination of any kind, irrespective of the child's or his parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (**UNCRC, art. 2**). This principle is also enshrined in the Beijing Rules, 2.

Special efforts must be made to ensure the human rights of particularly vulnerable children, including street children; children belonging to racial, ethnic, religious or linguistic minorities; children from indigenous communities; girls; children with disabilities; children on the move and recidivist children who are repeatedly in conflict with the law (GC N° 10, §6).

4.2. THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

The best interests of the child must be a primary consideration in all actions concerning children (**UNCRC, art. 3**).

General Comment N° 14 of the Committee on the Rights of the Child is entirely devoted to the best interests of the child, and it states that this principle also applies to children in conflict with the law (GC N° 14, §28).

General Comment N° 10 of the Committee on the Rights of the Child provides authoritative guidance on the application of article 3 of the UNCRC as regards the administration of juvenile justice (GC N° 10, §10).

Committee on the Rights of the Child, GC N° 10, §10:

“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.”

4.3. THE RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT

The States Parties must ensure the survival and development of the child to the fullest extent possible (**UNCRC, art. 6**).

Yet, all forms of deprivation of liberty can have negative consequences for a child's harmonious development and can seriously hamper his reintegration (GC N° 10, §11). Therefore, deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate time (UNCRC, art. 37 b)).

4.4. THE RIGHT TO BE HEARD

The UNCRC guarantees that a child who is capable of expressing his views is able to do so freely on all issues relevant to him. The child's opinions must be given due weight in accordance with his age and maturity. The child must be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child (**UNCRC, art. 12**).

General Comment N° 12 of the Committee on the Rights of the Child provides guidelines on how to guarantee the child's right to be heard in juvenile justice proceedings (GC N° 12, §57 to 64).

The right to be heard means that the child has the right to effectively participate in the proceedings in which he is involved, to share his views, to say what he thinks and to have his opinions taken into account by the court and all the relevant actors in the proceedings.

In order to guarantee the right to effective participation, the proceedings should be specifically adapted to children.

Equally important is the right of the child to remain silent and the right not to give his views, if he is involved in juvenile justice proceedings. In order to ensure this, the role of the lawyer for children is fundamental in providing advice and guidance to a child to best protect his interests.

3. THE RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW

When a child enters into conflict with the law, he enjoys specific rights throughout the duration of the proceedings and, where appropriate, for the length of his deprivation of liberty.

It is important for the lawyer for children to be aware of such rights in order to better defend and assist the child.

1. *The procedural rights of every child in conflict with the law*

The international instruments outlined in the first chapter of this Guide [□ See p. 13-14](#), guarantee various **procedural rights** for children in conflict with the law.

This Guide is limited to listing the rights that a child may enjoy when he is suspected, accused or convicted of infringing criminal law. A child in conflict with the law must be able to fully enjoy such rights throughout the course of the proceedings in which he is involved.

These rights are mainly contained in the UNCRC (in particular article 40), further explained by General Comment N° 10 of the Committee on the Rights of the Child, and in the Beijing Rules.

As mentioned above, a child-friendly juvenile justice system must **promote the use of alternative measures and avoid the use of judicial proceedings** (GC N° 10, §3 and Beijing Rules, 11.1).

In the context of juvenile justice proceedings, the child has:

➡ **The right** to his case being **heard** in accordance with the principles of a fair and equitable trial (UNCRC, art. 40.2. b) *iii*) and Beijing Rules, 14.1):

General Comment N° 32 of the Human Rights Committee on article 14 provides crucial explanations of the right to an equitable trial;

➡ **The right** to his case being heard without delay by **a competent, independent and impartial authority or judicial body** (UNCRC, art. 40.2. b) *iii*);

➡ **The right to the presumption of innocence** (UNCRC, art. 40.2. b) *i*) and ICCPR, art. 14.2.);

- **The right to observance of the principle of non-retroactivity of criminal law and the more severe punishment** (UNCRC, art. 40.2. a) and ICCPR, art. 15);
- **The right to be tried without delay** (UNCRC, art. 40.2. b) *iii*), GC N° 10, §51 and 52 and Beijing Rules, 20);
- **The right to appeal** before a higher competent, independent and impartial authority or judicial body (UNCRC, art. 40.2. b) *v*), GC N° 10, §60 and 61 and Beijing Rules, 7.1);
- **The right to be represented by a lawyer** (UNCRC, art. 40.2. b) *iii*));
- **The right to legal assistance or other appropriate assistance to prepare and present his defence** (UNCRC, art. 40.2. b) *ii*), GC N° 10, §49 and 50 and Beijing Rules, 7.1 and 15.1).
According to General Comment N° 10, legal or other appropriate assistance must be free of charge and adapted (the lawyers or paralegals must be trained to represent children);
- **The right to be informed of the charges in a clear and adapted language** (UNCRC, art. 40.2. b) *ii*) and *vi*), GC N° 10, §47 et 48 and Beijing Rules, 7.1):
The child's right to be informed presupposes that he would be informed in a language and using a vocabulary that he can understand (this presupposes the intervention of an interpreter when the child does not understand the language used in the proceedings);
- **The right to be heard** (UNCRC, art. 12 et GC N° 12, §57 à 64) and to remain silent;
- **The child's right to participate** (UNCRC, art. 40.2. b) *iv*), GC N° 10 §46 and Beijing Rules 14.2):
The right of the person in conflict with the law to participate in the proceedings is one of the foundations of the guarantee of a fair trial. In order to ensure that the child in conflict with the law is able to actually participate in the judicial proceedings, he must be made able to understand the proceedings and its issues. The child must be able to express himself freely, in particular with his lawyer, take decisions and provide instructions to his representative;
- **The right to individual assessment:** The child's best interests must be taken into account in all decisions concerning the child (UNCRC, art. 3). Observance of the best interests of the child involves a phase aimed at assessing his best interests by analysing the factual context, followed by a phase aimed at determining such best interests. In order to enable the competent authority or judge to determine the best interests of the child and duly take them into account in their decision, they must rely on an individual assessment. The lawyer must therefore inform the judges and prosecutors about the child, his age, his family context, his maturity, his belonging to a minority group, etc. The individual assessment requires the participation of the child (GC N° 14, § 46 to 49);

➤ **The right of the parents or legal guardians to participate in the proceedings:**

Such participation must be in the interest of the child. The judge may refuse such participation in order to preserve the interests of the minor child (GC N° 10, § 53 to 55 and Beijing Rules, 15.2);

➤ **The right to respect of his privacy at all stages of the proceedings** (UNCRC, art. 40. 2. b) *vii*), GC N° 10, §64 to 67 and Beijing Rules, 8 and 21):

This right implies that the child's privacy is respected from the time of the first contact between the child and the police up until such time as the competent authority has taken a final decision or the child has been released (GC N° 10, §64). The aim of this guarantee is to protect the child from harm that may be caused by unnecessary publicity and criminal characterisation (GC N° 10, §64 and Beijing Rules, 8.1).

In order to ensure that the child's privacy is respected at all stages of the proceedings, *it is important to ensure that:*

- The trial or hearing of the child is held behind closed doors (GC N° 10, §66);
- The judgment be given in public at a hearing of the court organised in such a way as to ensure that the child's identity is not disclosed (GC N° 10, §66);
- All professionals involved in the proceedings observe the confidentiality of all information that could enable the child to be identified (GC N° 10, §66);
- Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons (GC N°10, §66 and Beijing Rules, 21.1);
- Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender (GC N° 10, §66 and Beijing Rules, 21.1).

2. The rights of each child deprived of liberty

The child in conflict with the law enjoys additional rights when he is deprived of his liberty.

➤ Every child has the right to **the use of deprivation of liberty being limited and to the use of alternative measures to detention being maximised** (UNCRC, art. 37. b) and Havana Rules, 2). This implies that:

- Deprivation of liberty must only be used as a measure of last resort;
- Deprivation of liberty must be limited to the shortest appropriate period of time;
- Alternative measures to detention must always be the first option.

➤ A child deprived of liberty has **the right to receive medical assistance**.

This right includes the right to be examined from the time of his admission to a detention or correctional facility (GC N° 10, §89) and to have access to preventive and curative care throughout the duration of the deprivation of liberty (Havana Rules, 49 to 55).

➤ Finally, when he is deprived of liberty, a child has **the right to specific treatment** which takes into account “*the needs of persons of his age*” (UNCRC, art. 37. c)).

This right includes:

- The child’s right to be separated from adults during his deprivation of liberty (including during police custody), unless it is considered to be in the child’s best interests not to do so (UNCRC, art. 37. c)), GC N° 10, §85, Havana Rules, 29);
- The right to health and to physical and mental development (GC N° 10, §89 and Havana Rules, 49 to 55);
- The right to education and training (GC N° 10, §89 and Havana Rules, 38 to 46);
- The right to family life, which the child must be able to exercise effectively and regularly through regular contacts, visits, temporary return in the family, etc. (UNCRC, art. 37. c), GC N° 10, §87 and Havana Rules, 59 and 60);
- The right to access programmes that foster the development and the reintegration of the child into society (Havana Rules, 12: “*Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society*”);
- The right to practice a religion or belief freely (Havana Rules, 48).

4. LAWYER FOR CHILDREN: A LAWYER ADAPTED TO THE CHILD'S NEEDS

In order to be able to defend a child in conflict with the law in an effective and adapted manner, it is crucial for the lawyer to receive specialised training.

When assisting a child, the lawyer must build a relationship of trust with the child and use language and communication adapted to the child's age and level of understanding. These elements are fundamental for ensuring that the rights of the child in conflict with the law are observed.

1. *Receiving specialised training*

According to the United Nations' Basic Principles on the Role of Lawyers²⁵, N°9:

"Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law."

Defending a child is not the same as defending an adult. Lawyers must therefore undergo (continuous) training in order to be able to provide the children with a quality defence and therefore work towards the proper application of the children's rights at national level.

GUIDELINES FOR THE TRAINING-PROGRAMME:

The training-programme should at least include:

- ➔ A session on the rights of the child at national, regional and international level;
- ➔ A session on the practice and procedure in the area of juvenile justice proceedings;
- ➔ A session on the basic knowledge of psychological issues relating to children, their development and the specificities of adolescence;
- ➔ A session on the needs and communication level of children;
- ➔ Recommendations on how to improve contacts with children;

²⁵ The United Nations' Basic Principles on the Role of Lawyers were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana (Cuba) between 27 August and 7 September 1990.

- Interdisciplinary seminars to discuss and cooperate with the various professionals involved in juvenile justice proceedings, thus promoting the sharing of perspectives, the identification of challenges and the establishment of mechanisms and strategies for addressing them.

The training-programme should be organised in such a manner as to:

- Be multidisciplinary training (alongside other professionals involved in juvenile justice proceedings) in order to promote the exchange of good practices;
- Include children in the training process in order to hear the child's experiences in the juvenile justice system and thus focus on the importance of working on methods for communicating with children;
- Include practical cases, role plays, children's testimonies and interactive sessions throughout the training-programme.

2. Building a relationship of trust with the child

In order for the child to be truly heard and truly participate in the legal proceedings, it is crucial for the lawyer to build a relationship of trust with the child.



- In order **to build a relationship of trust with the child**, *we suggest that the lawyer:*
 - Meet with the child on several occasions in an appropriate environment adapted to the child's needs;
 - Make sure the child feels safe when he is with him;
 - Ask the child how he is doing and other questions not related to the case before starting to work on the legal strategy;
 - Be able to show the child that he has an understanding of the circumstances and that he is interested about his future and situation (e.g. to show empathy);
 - Let the child know that he is on his side, by avoiding judgmental comments;
 - Act at all stages of the proceedings, as far as possible. Any change of lawyer can be detrimental to the child's trust in his lawyer and, more broadly, in the juvenile justice system;
 - Respect the principle of the freedom to choose a lawyer by allowing the child to change lawyer if the bond of trust is broken (while explaining the complications of switching lawyers too often).

- It is important for the lawyer to be able **to understand the child** and to ensure that the child understands him effectively in order to assist and represent him in the most appropriate manner during the proceedings and maintain the relationship of trust.



To achieve this, we suggest that the lawyer:

- Regularly perform an assessment of the child's maturity and skills development;
- Take time to understand the child (his background, who he is as an individual) and respect who the child is;
- Listen to the child and give weight to his views:

This is a fundamental element for guaranteeing the child's right to effectively participate in the trial. If the child does not express his opinion because he is unable or unwilling to do so, the lawyer must simply guarantee the observance of the child's rights and ensure that the judge has the necessary resources to form an opinion and finally take a decision in the best interests of the child;

- Support the child in what he says, take his views seriously and advocate whatever the child wants to be heard.

- The **trust given by the child to the lawyer is also based on quality guidance**, and we therefore suggest that the lawyer:



- Inform the child of his rights in a language adapted to him:

It is important to respect what the child knows (or does not know) and do not hesitate to repeat all the information several times, at all stages of the proceedings, if needed;

- Provide guidance to the child throughout the juvenile justice proceedings:

For this, the lawyer must have a good understanding of the functioning of the juvenile justice system and be informed of the different measures that may be taken in such proceedings. This can include the fact of avoiding legal proceedings when the child's best interests so require (e.g. by proposing diversion and alternative measures);

- Inform the child of the different options available to him while warning him of the potential consequences of such options in order to enable him to take informed decisions, insofar as possible.

3. Communicating with the child in a child-friendly manner

Communication is a key component for building a relationship between the lawyer and the child. As a general rule, the first step in establishing good communication involves the lawyer listening to the child for as long as necessary and accepting the existence of moments of silence.

Good communication will improve the child's trust in the lawyer. It is therefore important to communicate in a child-friendly manner, taking into account the child's needs and abilities from the time of the first meeting. The child's first impression of the lawyer will usually determine their entire relationship.

Communicating with the child in a child-friendly manner also means choosing the most appropriate method for communicating with the child (face-to-face, telephone, social networks, letters, etc.).

Finally, good communication will foster the child's **participation** in the proceedings. It will lead to the child better understanding the proceedings, will encourage him to express himself and will enable his opinion to be heard.

It is therefore crucial to use adapted language and to treat matters differently when dealing with children.

Lawyers must always keep in mind that each child has different individual needs and abilities. Consequently, the methods of communication and language used must be adapted to each child.

This will enable the lawyer to assist the child in the most appropriate way possible.

3.1. USING CHILD-FRIENDLY LANGUAGE



In order to promote communication with the child, the lawyer needs to ²⁶:

- ➔ Ensure that he **understands what the child is saying** and that the child understands what he is telling him. For this, it is necessary to:
 - Understand that vocabulary used by children is often different or has different meanings than when it is used by adults;
 - Adapt your vocabulary to the child's language;
 - Repeat back the statements made by the child, by saying, for example, *"You said xxxx, by that did you mean yyyy?"*. This enables the child to stop and think about the factual content of what he has said and enables the lawyer to verify if he has understood correctly;
 - Summarise what the child says. The lawyer can use this tool to confirm his understanding of the case, bring together different aspects raised by the child into a coherent sentence and then either explore further what the child has already introduced or move the interview on to a new topic;
 - Actively listen to what the child has to say, without trying to over-interpret his words;
 - Reflect on words, phrases or emotions. This enables the child to think about his words or emotions and may open up further areas for discussion.
- ➔ **Speak to the child** in an adapted manner, for which it is important to:
 - Adapt his body language to reassure the child, with an aim to establishing and maintaining appropriate eye-contact, for instance (smile, nod of approval, etc.). This demonstrates an unconditional positive regard, facilitates openness in the speaker and helps the child to focus and listen;
 - Use short sentences and simple vocabulary, avoiding legal jargon and terminology, for instance;
 - Avoid leading questions (for example, do not ask *"Do you understand?"*) as children are often suggestible and compliant, and such questions may invite the child to automatically answer *"Yes"*;
 - Do not use time-related concepts that the child may have difficulty understanding (in two weeks' time, at the next hearing, etc.);
 - Use humour but without the use of sarcasm, idioms or dialects that the child may not understand;
 - Ensure that the child has understood his procedural rights and all other relevant information;

²⁶ The following information is listed on the basis of information received during the two workshops. The first was organised in London by the **Youth Justice Legal Centre** (<http://www.yjlc.uk/>) in June 2017. More information on the communication techniques can be found on their website: <http://www.yjlc.uk/new-sra-toolkit-for-youth-court-advocacy> and on the website of the Solicitor's Regulation Authority which developed a toolbox aimed at helping lawyers practicing at the Youth Court: <http://www.sra.org.uk/solicitors/cpd/youth-court-advocacy/communicating-effectively.page>. The toolbox was developed with the support of Just for Kids Law (<http://www.justforkidslaw.org/>) and the **Association of Youth Offending Team Managers** (<http://aym.org.uk/>). The second workshop was organised by **Fair Trials** (<https://www.fairtrials.org/>) in the framework of the "Advancing the Defence Rights of Children" project in London, in July 2017. The workshop on "Communicating with child suspects and accused persons" was led by Mai van Dijk - Fleetwood-Bird, a language therapist. For more information, visit: <https://www.fairtrials.org/the-abcs-of-fair-trials-language-in-the-juvenile-justice-system/>.

- Find tools to explain to every child the information that he needs to know and adapt such tools to the level of maturity and abilities of each child (use drawings, photographs, pictures);
- With the involvement of other professionals, promote the development and use of specific materials such as child-friendly brochures, for instance on police custody, police hearings, prosecution, court hearings, complaint mechanisms, the house rules of juvenile justice facilities, etc.

🕒 When the child **does not understand or speak the language of the proceedings**, the lawyer must ask for a translation of the most important documents in the casefile and ensure that an interpreter, who has also received appropriate training, is present when the child is interviewed, including by the lawyer himself.

3.2. USING METHODS OF COMMUNICATION ADAPTED TO THE CHILD

Exchanges with the child during the proceedings – made easier by using the methods of communication with which the child is the most comfortable (face-to-face, telephone, social networks, letters, etc.).

In order to simplify exchanges between the lawyer and the child, it is recommended that the lawyer chooses the method of communication with the child, based on the child's preferences, after explaining issues of confidentiality relating to using a given method of communication (the contents of a telephone may be analysed in the course of an investigation, for instance).

Face-to-face meetings should be preferred, particularly if the child is deprived of his liberty. Such meetings must take place in a location in which confidentiality may be guaranteed.

As a general rule, regardless of the method of communication used, the lawyer must explain to the child the rules of which he should be aware as regards their exchanges, and in particular the rule of professional secrecy which guarantees that everything that a child tells his lawyer will remain confidential and may only be used by the lawyer subject to agreement by his young client.

Finally, the lawyer must specify the limits of his intervention (e.g. the child cannot necessarily expect an immediate answer upon sending an e-mail to his lawyer, the lawyer does not work night and day, etc.).

5. THE ROLE OF THE LAWYER FOR CHILDREN

All lawyers have duties and obligations with respect to the persons that they represent. A lawyer for children has specific assignments due to his clients' particular needs.

1. The general role of the lawyer

The lawyer for children is primarily a lawyer. When he defends a child and deals with a child's case, the lawyer is bound by the general duties and obligations related to his role.

As already well-known by lawyers, the general duties and obligations include:

1.1. OBSERVANCE OF THE FUNDAMENTAL RULES OF THE PROFESSION

- ➔ Independence;
- ➔ Loyalty;
- ➔ Integrity;
- ➔ Diligence;
- ➔ Dignity;
- ➔ Observance of professional secrecy;
- ➔ Duty of competence and responsibility: a lawyer cannot accept an assignment which he is not able to carry out with appropriate expertise.

1.2. OBSERVANCE OF HIS GENERAL DUTIES TOWARDS THE CLIENT (ADULT OR CHILD)

The lawyer assists the client in the preparation of his defence. The lawyer advises and represents the client before a court.

The United Nations Basic Principles on the Role of Lawyers (BPRL) provide a common definition of the lawyers' duties.

BPRL Rule 13 states that:

“The duties of lawyers towards their clients shall include:

- (a) Advising clients as to their legal rights and obligations and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;*
- (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;*
- (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.”*

BPRL Rule 14 states that:

“Lawyers shall seek to uphold human rights and fundamental freedoms”.

1.3. KNOWLEDGE OF THE GENERAL PRINCIPLES OF CRIMINAL LAW

The general principles of criminal law are usually applied in juvenile justice proceedings, regardless of the model put in place at national level (welfare, criminal, restorative, administrative or other).²⁷

These principles include children’s procedural rights, listed above.

They must be observed in all proceedings.

The lawyer shall check that the principles are observed and shall apply them taking into account the child’s situation.

2. The lawyer for children: Spokesperson for the child and defender of his opinions and interests

The lawyer for children has a specific role as a spokesperson for and defender of the child. The lawyer must use specific resources to defend a child in conflict with the law, taking into account the child’s age, maturity, intellectual and emotional abilities, and his situation.

²⁷ Consequently, the principles of civil law and administrative law may also apply depending on national circumstances.

The lawyer must provide the child with effective assistance in order to enable the child to effectively exercise his rights of the defence and actually participate in his trial, including the right to attend the trial but also to hear and understand the discussions.²⁸



The child, not the lawyer, must direct the proceedings. However, in the event that the child is unable to understand his situation and is unable to express a reasoned opinion regarding such situation, the lawyer shall be responsible for ensuring that the child's rights and the rules of procedure are observed.

2.1. THE CHILD'S PARTICIPATION IN THE PROCEEDINGS

The child's participation in the proceedings is a crucial element for guaranteeing his rights.

Therefore, the lawyer's role is to create a space enabling the child to be heard and to actively participate in the juvenile justice proceedings.

 *To achieve this, we recommend that the lawyer:*

- Be able to **understand the child's point of view and convey it throughout the proceedings** and therefore establish a relationship of trust with the child  *See the section "Building a relationship of trust with the child" p.26* and communicate with the child in an appropriate manner  *See the section "Communicating with the child in a child-friendly manner" p.28*.

The lawyer should endeavour to understand what the child considers as being in his best interests and his wishes, in order to convey the message to the judge, even if the child's opinion does not appear to be sound, realistic or relevant in the eyes of an adult. The lawyer will then have the opportunity to advise the child and explain to him the consequences of his reasoning. In this way, the child will be able to make an informed decision.

- **Identify the best interests of the child, according to the child, and take them into account** (through a case-by-case analysis):

The lawyer should always be able to evaluate the possible impact (positive or negative) of all the decisions affecting the child and his physical and psychological well-being.

Assessing and determining the best interests of the child requires the observance of due process principles. Furthermore, the justification of the decision must show that these procedural rights have been explicitly taken into account (GC N° 14, §6);

²⁸ This conception of the defence lawyer is that used by the European Court of Human Rights; ECtHR, 16 December 1999, V. v. United Kingdom, <http://www.echr.coe.int/>, §§85-90; ECtHR, 15 June 2004, S.C. v. United Kingdom, <http://www.echr.coe.int/>, §§28-29; ECtHR, 15 June 2004, S.C. v. United Kingdom, <http://www.echr.coe.int/>, §29.

➤ Enable the child to **actively participate in his defence**:



To this end, the lawyer should:

- Prepare the child ahead of his participation in the hearing of the court (several times, if possible, in order to give the child the opportunity to become familiar with the proceedings);
- Be prepared to revise the defence as many times as necessary;
- Remind the child that he has the right to remain silent;
- Check that there are no linguistic barriers and appoint an interpreter if necessary.

➤ Promote the child's participation by requesting the use of all **necessary procedural adaptations**:

Children in conflict with the law have the right to appear in specialised proceedings, adapted to their age and needs ²⁹. Procedural adaptations can improve the child's participation in the proceedings. *To this end, the lawyer should:*



- Ensure that audiovisual recordings of questioning by the police or other law enforcement authorities are made ³⁰ ;
- Ensure that hearings at the court involving children are adapted to a child's rhythm and attention span: regular breaks should be scheduled and the hearings should not last for overly long periods ³¹;
- Ensure that cases involving children are handled with diligence and in a timely manner;
- Ensure that the child is able to speak freely, in a calm atmosphere in which the child feels safe. In practice, this means that the hearing may not be interrupted by unjustified interruptions or distractions, undisciplined behaviour or by people entering or leaving the room ³². Consequently, only those persons directly involved in the proceedings should be present (provided that such is in the best interests of the child) ³³ and proceedings involving children in conflict with the law should, as a general rule, be held in camera;
- Ensure that the holders of parental authority (or another appropriate adult) are involved. Such involvement involves informing the parents about their child's situation and their right to accompany him during the proceedings, in particular at the hearing, provided that such is compatible with the child's best interests. Such right may not be refused unless a reasoned decision has been taken to the contrary in the best interests of the child concerned ³⁴;
- Check whether it would be better if the parents were not present for the entirety of the hearing, for instance when sensitive topics are discussed;
- Ensure that the judges and the public prosecutors interact with the child with respect and sensitivity. This means, for instance, that they should be prudent when asking questions not linked to the case and its resolution (e.g. questions concerning the child's private life).

²⁹ UNCRC, art. 40.3

³⁰ See Directive (EU) 2016/800, arts. 5, 9, 13, 14.2 and 15

³¹ CoE Guidelines on Child-Friendly Justice, Guidelines 61, p. 27

³² CoE Guidelines on Child-Friendly Justice, Statement of reasons, § 113, p. 81

³³ CoE Guidelines on Child-Friendly Justice, Guidelines 9, p. 22

³⁴ CoE Guidelines on Child-Friendly Justice, Guidelines 57-8, p. 22

➔ Enable **the child's voice to be presented to the other stakeholders:**

To achieve this, the lawyer must have contact with all stakeholders, in particular the parents or holders of parental authority, as well as the professionals involved in the juvenile justice system.

The lawyers must always remind judges to take into consideration the opinions of the children and to give reasons for the refusal to accept his wishes.

2.2. THE LAWYER FOR CHILDREN'S LINKS WITH THE FAMILY OR THE HOLDER OF PARENTAL AUTHORITY

Most parents are concerned for their child and are unable to understand that the lawyer is the sole advocate who will work towards the child's defence. Parents may sometimes be reluctant to have their child defended by a lawyer providing his services in the context of **legal aid**³⁵.

The lawyer should work **according to the child's instructions and in the latter's best interests**, and not the best interests of the family members. The lawyer should therefore inform the parent that he only represents the child and that he remains independent with respect to the family members. He must, for example, refuse to take orders from the family members if such orders are contrary to the child's instructions.

A lawyer representing a child may sometimes be **paid by the child's parents**. However, even in such case, the lawyer must always receive the instructions from the child and not from the child's parents. In some countries, the applicable rules prohibit the lawyer from being paid by the parents due to potential conflicts of interest.

There is a presumption of **conflict of interest** when a child is in conflict with the law and the parents, or legal guardians, may also be involved in the juvenile justice proceedings as third-parties legally liable for the child (for example, the parents are those who, in some circumstances, will be required to pay compensation to the victim). When a conflict of interests arises, the lawyer must report such to the competent authority (generally the bar association) and clarify his situation.

In the event that the parents need help or support, the lawyer should be able to refer them to other service providers.

The involvement of the holders of parental authority in the proceedings is important in order to guarantee the children's rights, to the extent that such involvement is not contrary to the child's best interests.

³⁵ According to our research, they fear that those lawyers are of lower quality and have less experience. See the national reports on the project's website: www.mylawyermyrights.eu.

3. *The importance of working with other professionals*

☉ Understand the juvenile justice system and the role of each professional involved

The main stakeholders involved in the proceedings primarily include police officers, prosecutors officers, judges, social workers, and sometimes interpreters, psychologists, physicians, etc.

It is important that the lawyer understands his specific role in juvenile justice proceedings.

The lawyer must also have a good understanding of how the system works, the role of each stakeholder involved and the way in which each professional understands his own role. Thus, the lawyer will have to provide the child with explanations about the role of each professional that he will meet throughout the course of the proceedings.

In addition, he should be aware of the possibility of working with the other professionals and of receiving their support when necessary. This knowledge of the system will enable the lawyer to help the child in finding a solution to a specific problem by referring him to the appropriate service providers.

☉ Encourage cooperation between the various professionals involved

The lawyer for children has an important role to play in fostering cooperation between the various professionals involved in order to assist the child to the best of his abilities throughout the course of the juvenile justice proceedings.



To achieve this, we recommend that the lawyer should:

- Constantly communicate with the various professionals involved in the case, endeavour to meet with them in person and help them understand the importance of using child-friendly communication, with regard to both verbal and body language;
 - Participate in multidisciplinary training sessions (when available);
 - Promote mutual knowledge of each professional's roles and tasks;
 - Strengthen cooperation between the various professionals.
- ☉ In addition, it should be recalled that the lawyer plays an active role in guaranteeing the child's right to a **individual assessment**. To this end, the lawyers must act as intermediaries between all the other services involved in the juvenile justice system in order to meet all of the child's specific needs and ensure that the socio-economic, health-related, psychological and legal aspects of his situation are taken into account in his individual assessment, the latter of which will constitute the main source of information for taking a final decision in the case concerning him.

The lawyer must promote the **child's rights to be heard and to receive an individual assessment** carried out by said professionals.



To this end, we suggest that the lawyer should:

- Ensure that the child's voice is heard by the other professionals (which also includes reporting positive or negative opinions concerning a given professional);
- Make sure that all the needs and (relevant) personal characteristics of the child are taken into consideration in his individual assessment file.

➡ In addition, a child in conflict with the law confronted with the reality of being suspected or accused often also experiences other problems such as exclusion from school, family issues, housing problems, health issues, etc. It is important for the lawyer to be able to **refer the child** to the services that can help him when he has special requests.

4. The role of the lawyer of a child deprived of liberty

The lawyer for children has an important role to play in protecting the rights of children deprived of liberty. His intervention at this stage is crucial, given that:

➡ **Child detention must be a measure of last resort and be for the shortest appropriate time.**



In order to guarantee this, we suggest that the lawyer should:

- Know and understand the juvenile justice system in order to be able to propose alternative measures to detention;
- Ensure that the judge has applied this principle by actively checking whether there was an appropriate measure, less detrimental than deprivation of liberty;
- Verify that there is a regular review of the decision when the child is deprived of his liberty;
- Maintain regular contact with the child for the entire duration of the deprivation of liberty, and in particular by visiting him regularly;
- Ensure that nothing and no-one obstructs the child's right to contact him;
- Ensure that there are effective, accessible and independent complaint mechanisms if the child has cause to lodge a complaint about the way he is treated or non-observance of his rights.



➔ When he is deprived of liberty, a child has a right to **specific treatment adapted to his age**. To guarantee that this right is observed, *we suggest that the lawyer should:*

- Visit the child when he is deprived of liberty;
- Take appropriate measures if the child informs him that one of his rights has not been observed;
- Advise the child on how to take appropriate action himself (through submitting a complaint for example);
- Help the child to stay in touch with his parents or appropriate adult(s) during the deprivation of liberty.



➔ The child deprived of his liberty has the right to have **access to medical care**. To this end, *we suggest that the lawyer should:*

- Request a medical examination when it has not already been carried out on initiative of the competent authorities;
- Verify that the examination took place without undue delay and that it was performed by a qualified professional;
- Verify that the examination is not too invasive for the child;
- Verify that the examination respects the privacy of the child, and is not performed in the presence of a police officer or other competent authority;
- Immediately inform the competent authorities if the medical examination uncovers some form of maltreatment inflicted upon the child during arrest or while in detention;
- Require medical assistance, if necessary.

6. STRATEGIC LITIGATION: PROMOTING THE RIGHTS OF THE CHILD

Lawyers for children may, through strategic litigation, become agents of change by participating in the development of national legislation and practices that observe the rights of the child.

Provided that certain conditions are met, strategic litigation is a way for lawyers to report human rights violations (more specifically violations of the rights of the child in the context of this Guide) to judicial or quasi-judicial, national and/or international bodies.

1. Concept

Strategic litigation may be defined as follows ³⁶: The use, in a very deliberate and considered manner, of all available legal instruments, mechanisms, procedures and actions, at national, regional and international level, with the aim of persuading or obliging the authorities to better observe human rights and, therefore, children's rights globally.

These actions encompass individual or collective complaints lodged before national and/or international judicial or quasi-judicial bodies, requests for action, inquiries or visits from expert bodies, provision of information to the UN or other international treaty bodies, requests of assistance or intervention of international experts (including Special Rapporteurs, Special Representatives, Human Rights Commissioners, etc.).

When violations of children's rights occur, it can be in several individual cases or, more broadly, in grave or systematic situations at national level (collective issues or structural problems).

Effective strategic litigations must pursue clear goals and objectives and include a component of clear communication aimed at making significant changes to the law and/or its implementation in practice.

³⁶ This definition was drawn up by DCI-Belgium.

2. Precautions and advice for using strategic litigation ³⁷

The choice of the procedure

Choosing the right procedure is a major responsibility for the lawyer. Oftentimes, a given procedure excludes all other procedures. As a result, opting for a given procedure is often an irreversible choice. Choosing the right procedure is made all the more difficult given that each procedure has advantages and disadvantages. The checklist below (☐ See p. 44). is intended to help the lawyer choose the right procedure.

The lawyer's cooperation with NGOs

Before bringing an action in line with a strategy of strategic litigation, it is crucial to carefully consider all the risks involved in this type of action. A negative decision from a judicial or quasi-judicial body can have undesirable negative consequences at a higher level, by calling into question the impact of such actions. This is why they should be implemented with the help of NGOs and specialised lawyers able to contribute to carefully selecting appropriate cases and measures, the action to be undertaken, the court concerned, and thus develop an effective, proactive, coordinated and needs-based legal action.

In addition, NGOs have a crucial role to play in ensuring that the States comply with international decisions relating to human rights. They work to convince members of Parliament and governments to reform the law or change practices in order to comply with the decisions rendered.

Defending an individual case which reflects a structural problem

When assisting a victim, the lawyer must place the individual situation in its context and demonstrate that the case is the symptom of a larger problem which deserves the attention of the human rights defence body.

Ethically-speaking, it is necessary to obtain the authorisation of the child whose rights have been violated and his best interests must always be taken into consideration and carefully assessed before the lawyer can bring a strategic legal action. The lawyer should therefore always ensure that the individual case is not instrumentalised in the name of a common goal to be pursued.

³⁷ This practical advice for lawyers was inspired in particular by the interview with Olivier de Schutter. Olivier De Schutter is a Belgian legal scholar specialized in economic and social rights. He served as the United Nations Special Rapporteur on the right to food from 2008 to 2014. He is a Professor of international human rights law, European Union law and legal theory at the Université Catholique de Louvain in Belgium, as well as at the College of Europe and at SciencesPo in Paris. He has regularly contributed to the American University Washington College of Law's Academy on Human Rights and Humanitarian Law. The full interview is available on the website: <http://www.mylawyermyrights.eu/videos/>.

3. Useful international control mechanisms for strategic litigation

3.1. UNITED NATIONS MECHANISMS

Individual communications ³⁸

Complaints against a State before a Committee, introduced by an individual who considers himself to have been victim of a violation of his rights enshrined in a treaty. The State must be party to the treaty in question.

Which committees?

- All the UN Committees ³⁹, including the **Committee on the Rights of the Child** (Protocol 3 to the UNCRC, art. 5)

Procedure?

- National remedies must be exhausted;
- Complaints must be lodged within a specific timeframe;
- The assistance of a lawyer is not necessary, but it is recommended (legal aid is not provided);
- Third parties can lodge a complaint on behalf of individuals under certain circumstances.

Outcomes?

- **Authoritative interpretation:** All UN Committees
- **Interim measures** (Urgent measures which only apply where there is an imminent risk of irreparable harm) some UN Committees

Inspections

Which committees?

- The SPT

Procedure?

- The SPT visits places of detention in the Member States to see how persons deprived of their liberty are treated without restrictions. The visits can be also unannounced.

³⁸ For more information on individual communications, see:

<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#overviewprocedure>.

³⁹ The Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee against Torture (CAT), the Committee on the Rights of the Child (CRC), the Committee on Migrant Workers (CMW), the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on Enforced Disappearances (CED).

Outcomes?

- After each visit, the **SPT sends a detailed report** to the State concerning their findings, recommendations, comments and requests for information.
- The **State shall submit its own observations** on the report, usually within six months of authorities receiving the report.

Inspections**Which committees?**

- **The CRC Committee;** (Protocol 3 to the UNCRC, art. 13)
- **The CESCR;**
- **The CAT;**
- **The CEDAW;**
- **The CRPD;**
- **The CED.**

Procedure?

- Upon receipt of reliable information on serious, grave or systematic violations of the rights contained in the Convention which it monitors, the Committee may initiate an inquiry.
- An inquiry may include a visit with the consent of the concerned State.
- Any inquiry is conducted confidentially.

Outcomes?

- The State party is requested to submit its own observations on the Committee's findings, comments and recommendations, usually within six months and, where invited to do so by the Committee, to inform it of the measures taken in response to the inquiry.

Other international mechanisms can be used to promote observance of the rights of the child:

1. Reports: The reports are drafted by the States following the ratification of a treaty. They are submitted to the Committee, the body which monitors the treaty, one or two years following the ratification, and subsequently usually every five years. NGOs often also submit an alternative report or counter-report to the Committee.

2. Complaints against States brought by a State: These are complaints lodged by a State Party claiming that another State Party has violated a specific treaty. The Committee on the Rights of the Child and the Committee on Civil and Political Rights (CCPR) provide for this mechanism, although it has never been used to date.

3. The Universal Periodic Review (UPR): The mechanism through which the Human Rights Council reviews the human rights situation in each UN Member State every four and a half years.

4. The special procedures of the UN: These procedures can be initiated by an individual (an independent human rights expert) or by a working group and can use different approaches (visits to the countries, publication of reports and recommendations, requests made to the governments, etc.). As regards the rights of the child, special procedures can be initiated with the UN Special Representative of the Secretary-General on violence against children, the UN Special Rapporteur on the sale and sexual exploitation of children and the Special Representative of the Secretary-General for children and armed conflict.

5. The Early Warning Procedure of the Committee on the Elimination of Racial Discrimination (CERD): Under this procedure, the Committee can take preventive measures, including an early warning, to respond to problems requiring immediate attention, in order to prevent or limit the number of serious violations of the Convention.

3.2. MECHANISMS OF REGIONAL ORGANISATIONS

Some **regional mechanisms** may be relevant for the protection of children in conflict with the law.

In Africa:

The African Commission on Human and Peoples' Rights can receive individual or collective communications. It may, if it deems such to be necessary, refer such communication to the African Court on Human and Peoples' Rights. Finally, the African Committee of Experts on the Rights and Welfare of the Child can receive individual or collective communications.

 *More information is available on the Commission's website: <http://www.achpr.org/en/>.*

In America:

The Inter-American Commission on Human Rights can, for instance, receive individual or collective petitions or complaints. The Commission can then make recommendations to the State, although they are not legally binding. However, the Commission may refer the petition to the Inter-American Court of Human Rights. The Court's decisions are legally binding on the States.

 *More information is available on the Commission's website: <http://www.oas.org/en/iachr/>.*

In Europe:

At the level of the **Council of Europe:** The European Court of Human Rights can receive individual complaints. Collective actions can be brought before the Council of Europe's Committee on Economic and Social Rights. The Council of Europe's Committee Against Torture (CPT) conducts visits of places of deprivation of liberty and subsequently draws up reports addressed to the States.

 *The Council of Europe's website contains further information on the applicable procedures: <https://www.coe.int/en/web/portal/home>.*

At the level of the **European Union**: Strategic litigation can be brought before the Court of Justice of the European Union (CJEU). The Court's website provides information on the applicable procedure:

 The Court's website provides information on the applicable procedure: https://curia.europa.eu/jcms/jcms/j_6/en/.

4. Checklist

Lawyers for children can use this checklist in order to determine all the available mechanisms to defend the rights of their clients and to choose from among them.

This checklist has been drafted by the International Commission of Jurists (ICJ)⁴⁰, in the framework of several European projects, and adapted by DCI-Belgium.

4.1. INTERNATIONAL OBLIGATIONS

1. What human rights treaties is the relevant State party to?
2. Have any reservations or interpretative declarations been made by the State concerned?
3. Are all such reservations and declarations valid and permissible (i.e. is it permitted by the treaty; is it contrary to the object and purpose of the treaty)?

4.2. TEMPORAL JURISDICTION

1. Have the relevant treaties already entered into force?
2. Had the treaty entered into force before the facts of the case took place?
3. If separate ratification or agreement is necessary for the individual or collective complaints mechanism relevant to the treaty, has this taken place?

4.3. TERRITORIAL JURISDICTION

1. Did the acts complained of take place within the territory of the State concerned, or otherwise come under its authority or control so as to fall within its jurisdiction?
2. Does the human rights body with which the complaint was lodged have jurisdiction over the State concerned?

⁴⁰ See <https://www.icj.org/>.

4.4. MATERIAL JURISDICTION

1. Do the facts on which the complaint is based constitute violations of human rights treaty provisions?
2. Which mechanisms have jurisdiction to entertain complaints in these human rights actions?
3. On which specific provision should the complaint be based?
4. Is there a precedent (a mechanism that has already led to a decision on a similar case)?

4.5. STATUS

1. Does the proposed applicant have standing to bring a case under the individual or collective complaints mechanism concerned?
2. Have the domestic remedies been exhausted (if this is a relevant condition)?
3. Who should sign the application?
4. Is there a template for the application?

4.6. TIME LIMITS

1. Was the case lodged within permitted time limits for the particular international mechanism concerned? If not, are other international mechanisms still available?

4.7. ONE OR MORE BODIES?

1. Is it possible to submit the case to one or more mechanisms?
2. Do any of the mechanisms exclude complaints that have been or are being considered by others?
3. Can different elements of a single case be brought before different bodies?
4. Can you combine different mechanisms (for example, individual and collective complaints)?
5. Can newly arrived elements be brought under this mechanism?

4.8. WHICH BODY IS MORE STRATEGIC?

1. Under which mechanism does the case have the strongest chances of success (both for admissibility and on the merits)?
2. Which treaty or mechanism provides the strongest or most relevant guarantees?
3. Which body or mechanism has issued the strongest jurisprudence on the relevant point?
4. Which mechanism provides the strongest system of interim measures if the case so requires? Are the interim measures of one or another mechanism more respected by the State?
5. Which mechanism can provide the strongest remedies to the applicant?
6. Which mechanism assures the strongest system of enforcement of final decisions?
7. Is it a systemic problem or a purely individual one?
8. Is legal aid provided to lodge a complaint under these mechanisms?
9. Are there cost constraints to lodging a complaint under this mechanism?
10. What is the length of the procedure in front of each body?
11. Is it necessary to have exhausted domestic remedies?
12. Is there a possibility to request a preliminary ruling from the body or court?
13. Is there anyone who could make a third-party intervention to enlighten the body or mechanism before it takes a final decision?

4.9. EFFECT IN THE DOMESTIC SYSTEM

1. Are the decisions of the court, tribunal or administrative entity concerned binding or non-binding on the State?
2. What is the effect of the mechanism's decisions on the national system? Is there any possibility of re-opening national proceedings following the decision of the international body or mechanism? Is there an effect on the decisions of other courts?
3. Has a system been implemented, recommended by the mechanism, for the payment of damages to the applicant?
4. Has a system been implemented to review the law/regulations in the light of the mechanism's findings on the case?
5. What is the political impact of the mechanism's decision in the State concerned?
6. Is the decision made public or not? If not, what is the effect of the confidentiality of the decision?
7. What are the risks if you lose the case?
8. What are the risks if the identity of the client (child) is disclosed? Is it possible to keep his/her identity confidential?

4.10. PARTICIPATION OF THE CLIENT (THE CHILD)

1. In which body does the child have the highest level of participation?
2. Is the procedure easy to explain to a child?
3. To what extent will the child have to bear the burden of the procedure?

CONCLUSION

The vulnerability and specific needs of the child in conflict with the law make him a very special client for the lawyer defending him who is also the guarantor of his rights.

The child in conflict with the law has a fundamental and very precious right: the right to participate in the proceedings. However, believing that the child can participate in the proceedings that concern him without proper assistance from a lawyer is a delusion.

This Guide is an **introductory tool** that is not meant to be exhaustive. We do hope, however, that it has enlightened you on certain issues, provided useful practical advice and fostered interest and reflection, although it cannot replace appropriate training on the topic.

We invite you to continue informing yourself on the topic and to take part in face-to-face training, if you have the opportunity to do so, or follow online training courses.

All the documents used as inspiration for this Guide, as well as all reading materials and other relevant information on the topic of procedural guarantees for children in conflict with the law can be found in the project's database available on the following website:

www.mylawyermyrights.eu

English edition – translated from the French Edition

Lawyers defending children in conflict with the law: International Practical Guide

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The lawyer for children has a crucial role: he is the guarantor of all the rights of the child in the juvenile justice system. However, research has shown that children in conflict with the law are not always represented and assisted by a lawyer, and if they are, the lawyer is not necessarily specialised in providing assistance and representation to children. In addition, even when children are assisted by a specialised lawyer, they are not always represented at each stage of the juvenile justice proceedings. Additionally, children can waive their right to a lawyer in some States.

It is therefore crucial that the lawyer for children receives appropriate training to specialise in providing guidance to children in conflict with the law at each stage of the juvenile justice proceedings.

The overall purpose of this Guide is to be an **introductory tool for lawyers for children**. With this in mind, it attempts to provide guidance to lawyers with regard to their role and provides information on the manner in which they can combine their legal expertise (knowledge of legal instruments and standards) with soft skills (child-friendly language, appropriate communication, attitude with children and other technical advice relevant for defending children in juvenile justice proceedings) in order to meet the children’s expectations.

“My lawyer? I did not know him, so I did not trust him. Standing before the judge, I did not feel that he was defending my point of view.”
Patrizia, 14, interviewed as part of the *“My Lawyer, My Rights”*

“The words that the judge was using were difficult to understand, but my lawyer took the time to explain everything to me.”
Stephen 17, interviewed as part of the *“My Lawyer, My Rights”*

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