# AIMJF COMPARATIVE AND COLLABORATIVE RESEARCH ON CHILDREN BELOW THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY: MEASURES, RIGHTS, PROCEDURE, PARTICIPATION

*Recherche comparative et collaborative de l´AIMJF sur les enfants n'ayant pas atteint l'âge de la responsabilité pénale : mesures, droits, procédure, participation*

*Investigación comparativa y colaborativa de l´AIMJF sobre los niños y niñas por debajo de la mínima edad de responsabilidad penal: medidas, derechos, procedimiento, participación*

Eduardo Rezende Melo[1]

**Abstract**: The paper analyzes comparatively 38 national reports on children below the minimum age of criminal responsibility collected from members and collaborators of the International Association of Youth and Family Judges and Magistrates (AIMJF). After a short exposition of the aims of the research and some methodological considerations, applicable international and regional standards are highlighted to introduce and guide specific analysis of 1) some general information regarding ages and capacity in local legislation; 2) age and capacity assessment both in case of application of 'doli incapax' and 'delayed maturity' rules or in case of lack of birth registration ; 3) the occurrence, nature and modalities of police intervention and the child's rights in this context; 4) applicable measures to the child; 5) the procedure when applying these measures, the authorities involved and availability of alternative resolution mechanisms or procedures; 6) the occurrence and nature of child assessment when any measure is applied; 7) the child legal and procedural guarantees and his or her rights to challenge the measures; 8) the role of the justice system, if involved in this intervention, the nature of this involvement and specific rights of the child in this context;

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9) supplementary support for the child; 10) the possibility, context and nature of child participation; 10) legal implications of the measures imposed, both regarding the child's further involvement with the justice system, and the possibility and nature of the victims intervention in this process and finally 11) reforms in progress. Final conclusions and recommendations for the future intend to stimulate further international judicial dialogue and experience sharing.

**Résumé :** Le document analyse de manière comparative 38 rapports nationaux sur les enfants n'ayant pas atteint l'âge minimum de la responsabilité pénale, recueillis auprès des membres et collaborateurs de l'Association internationale des magistrats de la jeunesse et de la famille (AIMJF). Après une brève présentation des objectifs de la recherche et quelques considérations méthodologiques, les normes internationales et régionales applicables sont mises en évidence afin d'introduire et de guider l'analyse spécifique 1) de certaines informations générales concernant l'âge et la capacité dans la législation locale ; 2) l'évaluation de l'âge et de la capacité tant en cas d'application des règles « doli incapax » et « maturité retardée » qu'en cas d'absence d'enregistrement de la naissance ; 3) la fréquence, la nature et les modalités de l'intervention policière et les droits de l'enfant dans ce contexte ; 4) les mesures applicables à l'enfant ; 5) la procédure d'application de ces mesures, les autorités concernées et l'existence de mécanismes ou de procédures de résolution alternatifs ; 6) la fréquence et la nature de l'évaluation de l'enfant lorsqu'une mesure est appliquée ; 7) les garanties juridiques et procédurales de l'enfant et son droit de contester les mesures ; 8) le rôle du système judiciaire, s'il est impliqué dans cette intervention, la nature de cette implication et les droits spécifiques de l'enfant dans ce contexte ; 9) le soutien supplémentaire apporté à l'enfant ; 10) la possibilité, le contexte et la nature de la participation de l'enfant ; 10) les implications juridiques des mesures imposées, tant en ce qui concerne la poursuite de l'implication de l'enfant dans le système judiciaire que la possibilité et la nature de l'intervention des victimes dans ce processus ; et enfin 11) les réformes en cours. Les conclusions finales et les recommandations pour l'avenir visent à stimuler la poursuite du dialogue judiciaire international et le partage d'expériences.

**Resumen**: El documento analiza comparativamente 38 informes nacionales sobre menores de la edad mínima de responsabilidad penal recopilados por miembros y colaboradores de la Asociación Internacional de Jueces y Magistrados de la Juventud y la Familia (AIMJF). Tras una breve exposición de los objetivos de la investigación y algunas consideraciones metodológicas, se destacan las normas internacionales y regionales aplicables para introducir y orientar el análisis específico de 1) información general sobre la edad y la capacidad en la legislación local; 2) la evaluación de la edad y la capacidad, tanto en caso de aplicación de las normas de «doli incapax» y «madurez tardía» como en caso de falta de registro de nacimiento; 3) la ocurrencia, naturaleza y modalidades de la intervención policial y los derechos del niño en este contexto; 4) las medidas aplicables al niño; 5) el procedimiento para aplicar estas medidas, las autoridades implicadas y la disponibilidad de mecanismos o procedimientos alternativos de resolución; 6) la ocurrencia y naturaleza de la evaluación del niño cuando se aplica cualquier medida; 7) las garantías legales y procesales del niño y sus derechos a impugnar las medidas; 8) el papel del sistema judicial, si participa en esta intervención, la naturaleza de esta participación y los derechos específicos del niño en este contexto; 9) el apoyo complementario al niño; 10) la posibilidad, el contexto y la naturaleza de la participación del niño; 10) las implicaciones jurídicas de las medidas impuestas, tanto en lo que respecta a la futura participación del niño en el sistema judicial como a la posibilidad y la naturaleza de la intervención de las víctimas en este proceso y, por último, 11) las reformas en curso. Las conclusiones finales y las recomendaciones para el futuro tienen por objeto estimular un mayor diálogo judicial internacional y el intercambio de experiencias.

## INTRODUCTION. THE RESEARCH AIMS IN THE CONTEXT OF AIMJF´S ACTIONS FOR THE IMPROVEMENT OF JUSTICE AND CHILDREN´S RIGHTS

The International Association of Youth and Family Judges and Magistrates (IAYFJM or AIMJF, in the French and Spanish acronym) is an NGO (Non-Governmental Organisation) with consultative status at the Council of Europe and associated with UNO's Department of Public Information (DPI).

It represents worldwide efforts to establish links between judges from different countries but also with other international associations working in the sector of the protection of youth and family.

Founded in 1928, AIMJF has a longstanding commitment towards the improvement of the Justice System in order to provide better conditions for a qualified attention to children based in a human rights approach in various areas and, therefore, is a key player in promoting transnational judicial dialogue.

Transnational judicial dialogue is not only based on a shared history or legal tradition, nor on a formal treaty-based organizational structure or hierarchy, such as the Convention on the Rights of the Child, but as part of a common enterprise of a world judicial community, recognizing that not only comparative law, but also foreign judicial decisions and organizational structures are important resources for deliberations in domestic courts (WATERS 2005). Judicial dialogue “allows judges to be more conscious about the environment in which they operate, making them aware that they belong to an international legal community in which everyone contributes to the development of a global normative system in benefit of the human person” (FERRER MAC-GREGOR 2017).

The horizontal dialogue between courts of the same status is therefore important to elucidate issues at hand and to suggest new approaches to similar problems. If cultural and legal particularities about controversial legal questions or judicial structures may cause uncertainty among judges, international legal standards and *pro personae* principle

(with more protective criteria than the international standard) (FERRER MAC-GREGOR 2017) are important tools to promote norm convergence in response to a perceived need for a single international legal norm on a particular issue (WATERS 2005).

The aims of this new research are to identify similarities and discrepancies among countries and to develop a cartography of the measures, rights, procedure and modalities of participation applied to children below the minimum age of criminal responsibility (MACR) if they commit any act that could be considered as an offence if they were above this minimum age.

The main focus is to consider what usually happens with those children. If they are not properly considered as offenders, is there any kind of structured and specific response to their acts and of what nature?

In a context of meagre, limited or even lacunary international legal standards, based much more on a negative guideline on how these children should not be treated than on their specific rights in the context of application of measures, probably the specificity of this research is to identify the role of the justice system in this response and how children have their rights granted in the case of application of more restrictive measures.

It is acknowledged that the controversial nature of the subject has already prevented the Committee on the Rights of the Child to address the matter (CIPRIANI 2009).

With this initiative AIMJF aims as well to collaborate to collect and analyze relevant data and information for appropriate assessment and future improvement and reform of the child protection's branch of justice system´s administration, especially in a moment where the Committee on the Rights of the Child discusses a General Comment on Access to Justice by children. This initiative also tries to put in practice what the justice system is also challenged by General Comment 7 on Implementing child rights in early childhood and 24, on children's rights in the child justice system and other international

and regional standards, promoting an improvement in communication, cooperation and individual exchange within and between professional associations civil society groups.

A guiding questionnaire (Attachment 1) has been prepared and shared with our members and partners, who have submitted a national report, explaining what kind of measures are applied to these children, the corresponding context of application, notably the role of the justice system, and how specific rights of the child are granted in this context. Each of these national reports is published in this edition and have its own value for bringing into public a description of their national system, including the Judiciary, when dealing with these cases, , its procedure and how the participation of children occur in their country.

The Commonwealth Magistrates and Judge's Association has given an incommensurable and valuable support to this research contacting judges and magistrates in countries where AIMJF has not yet members. We are grateful for their contribution to this initiative.

Thirty-eight countries have participated in this collaborative research, from all continents except the South Pacific or Oceania.


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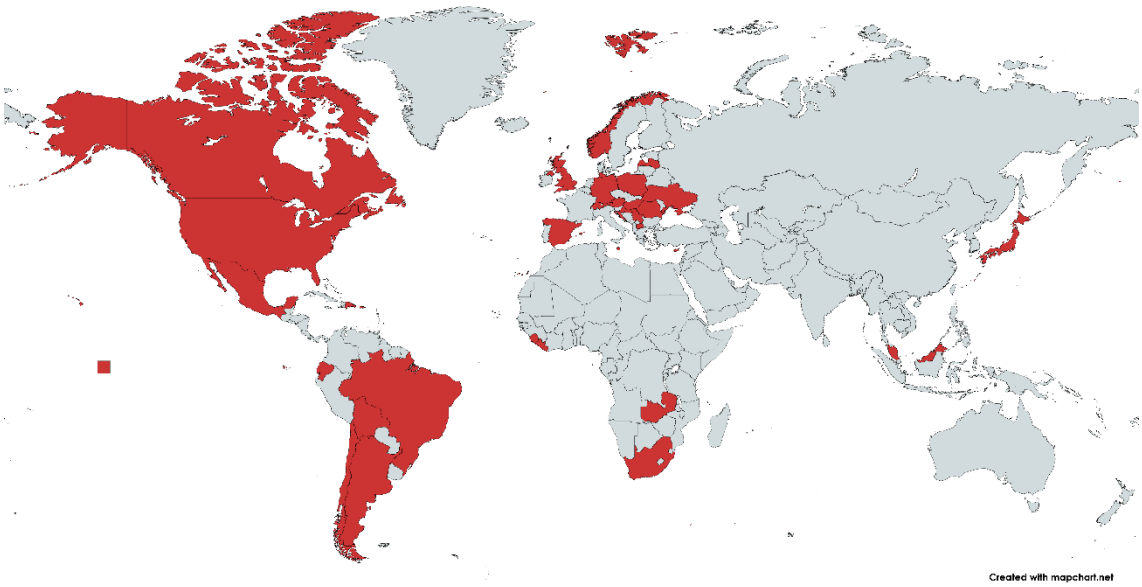


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This analysis is structured with the following elements:

1. Some initial methodological remarks on how the data are analyzed, considering the diversity of countries represented;
2. A brief presentation of international and regional legal standards that will guide the analysis;
3. A brief contextualization on some general information regarding ages and capacity in local legislation, focusing on the legal determination of what is the minimum age of criminal responsibility and about the existence or not of different ages or scales in this regard. The research was interested in knowing not only about the applicability of 'doli incapax' or 'delayed maturity' rules, but also the criteria adopted in these contexts.
4. An analysis of the adopted criteria to assess the exception of the general age for criminal responsibility in those countries where doli incapax or delayed maturity are adopted. As such decision involves the possibility of been prosecuted, the analysis focus as well on the rights granted to the child in this context, including his or her possibility to participate, being heard and challenging the conclusions. Besides capacity, the determination of age in a moment where many children and their families are on the move between countries, sometimes lacking documents, seemed also very important, given the risk of being treated as older than they really are.
5. The possibility of police intervention is a first approach on how the of children below minimum age of criminal responsibility are currently dealt by local systems. The involvement of children in 'offences' can both represent an individual misbehaviour, but also victimization or manipulation by others, young or adults. Police intervention can be both repressive or protective, therefore it is important to understand the nature and modalities of the intervention, its purposes and limits. In one situation or the other, children can be affected in various manners, both as 'victims' or 'offenders', with impact on themselves and on others and their rights should be clearly defined with mechanisms

to grant its effectiveness. In more serious cases, when social alarm demand stricter measures of control, it is important to know if remains to the police any kind of power to restrain the child's liberty.

6. A core element of this research is to understand what kind of measures can be imposed to children below MACR who commits acts legally considered as offences, its nature and the extension of the impact in children's rights, especially if there is the possibility of an out-of-home placement.
7. Once determined the prevalence of certain measures, the research focus on its implementation, in other words, which authority is in charge of the decision, if there is a clear procedure with the corresponding rights for the child to defend him or herself in case of disagreement. The transversal aspect of voluntariness or coerciveness of interventions appear once again in this context to understand if alternative resolution mechanisms are available to solve these conflicts.
8. The proposition or imposition of a measure should respond to the child's needs and interests, therefore the research has also focused on the modalities of assessment for this decision, aiming to understand as much as possible what is at stake at this moment.
9. The decision process regarding the measures agreed with or imposed to the child and his or her family represents as well a core moment of this research. The voluntary or coercive nature of the measures are identified in the rights granted to the child, the possibility to refuse the measures or to challenge them in court and, most of all, in the consequences of non-compliance.
10. The role of the justice system is of particular importance for our Association, composed mainly by judges and magistrates worldwide. If there is an international consensus that these children should not be involved with the justice system, especially youth courts, there is also a concern on how the child's rights are respected and granted in case of imposition of coercive measures, including those involving some kind of right restrictions, such as out-of-home and secure placement, eventually in mental health

institutions. The research aims to understand if there is some kind of judicial control of such restrictive measures and, in case of a positive answer, to identify which branch of the justice system would intervene, the legal and procedural rights and the corresponding procedure.

11. A supplementary aspect of concern in this research addresses the assistance provided for these children, independently of a measure specifically determined in response to the committed act, if this is considered as a reason for a measure. At stake is the question about how open the State is to further support on a voluntary basis.
12. Child participation, as a core principle and right on the Convention on the Rights of the Child, is another element to understand the nature of State intervention regarding the acts committed by children. The possibility of the child been heard, but also the frequency of this consultation or inquiry and the structured nature of this interaction were considered as important elements to have a full picture of the procedure involving measures in response to their conduct, especially in case of judicial control of restrictive measures.
13. Besides the measures, the research was also interested in understanding the legal implications of the decision, especially if there would be any record of this 'illegal infringement' committed by the child and how victims could interfere in this process and impact the child by searching compensation or retribution for the damages occasionally caused by children.
14. The analysis of reforms in progress aims to understand how each society stands regarding this issue, whether it is in a stable moment or if social alarm or commotion pressure for changes.
15. We conclude the research with some general remarks and considerations for the future, intending to stimulate further international judicial dialogue and experience sharing.

## SOME METHODOLOGICAL CONSIDERATIONS

As stated in our previous research, human rights are historical, social constructs, born out of social circumstances, characterized by the struggle in defense of new freedoms and new life possibilities, when the emphasis lies on social, economic and cultural rights. As a consequence, differences in the implementation of international standards are to be expected among countries, which is symbolized by the debate on universalism and particularism.

In this scenario, comparative research should have limited aims, which we consider as threefold.

First, assuming a main focus on children´s rights, we intend to understand how differences in organizational and procedural aspects may impact rights, according to the international and regional legal standards.

Second, the comparative study allow**s** us to get more familiar with our own system, because it will give us a better response to its formation, the model that served as base for its inception, its reactions and social values (BLAGOJEVIC 1973). But it is also important as an exercise of otherness in relation to our practices, norms and institutions, helping us to denaturalize some aspects of youth justice practices, arrangements and institutions and allowing us to problematize them. When we make the familiar appear strange – and the strangeness comes from comparative analysis-, it is possible to identify the rules shaping its operations (TAIT 2001).

Third, although there is not a presumption of linearity in this process, nor an aim to homogenize all practices, there is an intention in this project to enlarge the possibilities to dialogue about some fundamental aspect of justice system, such as the rights of the child in specific contexts, the modalities of child participation and the nature of interventions. As much as all these countries are attached to the same international standards, it is also important to enlarge the possibilities of transnational judicial dialogue. Comparative studies within the Judiciary aim to help courts that consult the practice of foreign courts to bring its own decision in line with these foreign decisions. If one solution

is suited to answer the same question in one country it may have a similar function in another one (FELDBRUGGE 1973).

In this context, the analysis of the most prominent differences and similarities will challenge us to recommend further discussions on some aspects and to continue this process of transnational judicial dialogue, involving, as much as possible, children themselves and other professionals.

In the context of this dialogue, it will be possible to go in deep into the collective realities in which and by which the specific rules and practices of some countries were formed, their presiding intentions and values and the analysis of the impact/effect that those norms and practices have produced (RECASÉNS-SICHES 1973).

These potentialities of a comparative research should be balanced with its challenges. The data were collected through a shared questionnaire with members and collaborators on a voluntary basis to cooperate in this process of common understanding of local challenges and possibilities of alternative solutions.

The extension and quality of the responses vary considerably: some national reports present a deep analysis of local context, while others are very objective in their responses, allowing, sometimes, a limited comprehension of the issue at stake.

However, it is important also to emphasize that the issue selected for this study has also posed some additional specific and challenging aspects.

There is a large bibliography on the reasons for fixing a higher age of criminal responsibility to avoid the involvement of children with the justice system, but not so many are the studies on the modalities of intervention in case of a child below the MACR who commits an act that could be considered otherwise a criminal offence.

Although normally dealt as child protection cases, the debate on lowering or on increasing the MACR is showing that there are particularities in these cases that should deserve a major attention on how to deal with the particular issues involved with these children.

Would the same interventions developed for abandonment, neglect or abuse cases, normally at stake within child protection services, be appropriated as well for these children? Is it an issue on social inequality to be addressed by cash transfer funds? On social exclusion towards minorities to be dealt by more inclusive and respectful policies?

Differently from regular child protection cases, this situation involves an external victim, who might have claims. Diversely from regular child protection cases, the acts of these children might cause not only public commiseration and sympathy, but also repulsion, rejection and clamor on harsher responses, which is clearly seen in the current public debate in many countries. What would be the nature of special measures for these children? Could they involve in any measure coerciveness? Liberty restriction?

In this context, what could be the role of the justice system, if any, for the involvement of this International Association in this matter? It is well known that, in the discussions about the ratio of penal law and criminal justice, they aim is not solely for the protection of society against unlawful acts committed by the people, but also to refrain irrational or disproportionate reactions by the society against the allegedly law breakers (FERRAJOLI 1995). When for scientific based reasons and for criminal policy decision, children below the MACR are not tried, what are the mechanisms currently in place to deal and to respond to these two challenges, on the one hand, the needs of the child and, on the other hand, the contention of personal and public reaction? Most importantly, how to do it in a child rights-based approach to avoid undue and illegitimate responses, some of them involving rights and liberty restrictions?

As stated above, this study intends to bring a panorama on what is going on in the world in this issue, including a judicial perspective, because it is an Association composed mainly by judges and magistrates. Interestingly, an important first outcome of this initiative came from the ambiguity of the Judicial system, worldwide, when invited to participate in this discussion: although acknowledging that the judicial system takes part in the responses to this issue, it was difficult to find a country who clearly identified a branch of justice in charge of the matter. It is not properly a youth justice issue, because

children are not considered criminal responsible for their acts, but family judges (or child protection judges) had also difficulties to see themselves as those competent to address these cases.

Is this limbo a positive or negative outcome?

If it were solely a dispute between branches of justice, one could consider it positive, because children would be kept apart of trials and of a less adapted space to deal with this situation. However, the same tension can be identified in the limits of action between protective or welfare services and an expected protective role by the police, especially when some interventions are adopted not only to preserve the child from actions committed by others, but also to protect him or her own safety and the limits of this protection in terms of liberty, privacy, dignity and integrity.

This context has posed some methodological challenges on who should be invited to participate and how accurate could be the answers to the questionnaire.

This is to say to invite the readers of this research not to look only to the clear outcomes, but to the unanswered questions, the limits or vagueness of the responses, because they say much about the current state of the issue in a child rights-based approach.

Notwithstanding the limits of the responses, AIMJF assumes as well the limitation of its own methodology by restraining the data to the responses to our questionnaire, without further interviews or on-site investigation. As such, the nature of this study as a preliminary survey to have a panorama of what are the major issues at stake in the world, invites our members and collaborators for further analysis. As a first step in any research, supplementary actions are adopted within the International Association to deepen the understanding of the topic: webinars to discuss some remarkable national experiences and study tours developed to have an on-site understanding of aspects raised in this study. These supplementary initiatives should be considered as an integral approach to this topic, inviting our readers to seek for further information and opportunities in our website.

## THE INTERNATIONAL LEGAL STANDARDS ON CHILDREN BELOW THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

The concern on having a minimum age for the involvement of children with youth courts was first addressed by the International Convenant on Civil and Political Rights, urging the States to take account of children's age in their procedures (article 14, 4). Although generic, this disposition should imply the obligation to establish a MACR. However, the first international document that explicitly addressed the minimum age of criminal responsibility, is the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules, stipulating that:

> **"**4 . Age of criminal responsibility
>
> 4.1 In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."

In its Commentary, it is stated that **"**The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behavior. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behavior and other social rights and responsibilities (such as marital status, civil majority, etc.). Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally." (UNITED NATIONS 1985)

The Convention on the Rights of the Child has confirmed this standard on article 40, 3, that "3. States Parties shall seek to promote the establishment of laws, procedures,

authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law"

The Committee on the Rights of the Child, in its General Comment 7, on implementing child rights in early childhood, stated that:

> "36. (i) *Deviant behavior and lawbreaking (art. 40).* Under no circumstances should young children (defined as under 8 years old; see paragraph 4) be included in legal definitions of minimum age of criminal responsibility. Young children who misbehave or violate laws require sympathetic help and understanding, with the goal of increasing their capacities for personal control, social empathy and conflict resolution. States parties should ensure that parents/caregivers are provided adequate support and training to fulfil their responsibilities (art. 18) and that young children have access to quality early childhood education and care, and (where appropriate) specialist guidance/therapies.
>
> 37. In each of these circumstances, and in the case of all other forms of exploitation (art. 36), the Committee urges States parties to incorporate the particular situation of young children into all legislation, policies and interventions to promote physical and psychological recovery and social reintegration within an environment that promotes dignity and self-respect (art. 39)." (UNITED NATIONS 2005).

In the previous General Comment n. 10 on children's rights in juvenile justice, the Committee addressed the issue of minimum age of criminal responsibility in paras 30 and followings, acknowledged the existence of a wide range of minimum ages of criminal responsibility, feeling that there was a need to provide the States parties with clear guidance and recommendations regarding the minimum age of criminal responsibility. For that, according to the Committee's interpretation,

> "article 40 (3) of CRC requires States parties to seek to promote, inter alia, the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law, but does not mention a specific minimum age in this regard. The committee understands this provision as an obligation for States parties to set a minimum age of criminal responsibility (MACR). This minimum age means the following: − Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests" (UNITED NATIONS 2007)

In its General Comment 24 on children's rights in the child justice system, the Committee has changed its understanding of the minimum age, emphasizing the need of a higher age:

> "21. Under article 40 (3) of the Convention, States parties are required to establish a minimum age of criminal responsibility, but the article does not specify the age. Over 50 States parties have raised the minimum age following ratification of the Convention, and the most common minimum age of criminal responsibility internationally is 14. Nevertheless, reports submitted by States parties indicate that some States retain an unacceptably low minimum age of criminal responsibility.
>
> "22. Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They

> are also affected by their entry into adolescence. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with article 41 of the Convention. " (UNITED NATIONS 2019).

Minimum ages are also considered by the monitoring bodies of our human rights committees. In his study, Cipriani brought into light concluding observations from the Committee on the Economic, Social and Cultural Rights based on article 10, and the Committee Against Torture (CIPRIANI 2009).

In the regional context, the American Convention on Human Rights states in article 19 that "every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state". Although laconic, the article is regularly interpreted by the Interamerican Court on Human Rights, as much as by the Interamerican Commission on Human Rights in accordance with the Committee's guidelines and general comments (OAS 2009, paras 45 ss) and since its Advisory Opinion 17 the requirement of a minimum age of criminal responsibility is considered as well as a State's obligation.

In Africa, the African Charter on the Rights and Welfare of the Child provides in article 17, 4, that "There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law." (AFRICAN UNION 1990). The African Committee recommends that "The law should set the minimum age for criminal responsibility; this should not be lower than 12 years of age and States must endeavor to raise this progressively to at least 15 years of age" (Guidelines, paras 46 and as provided for in the African Union Principles on the Rights to a Fair Trial and Legal Assistance in Africa). (ACERWC 2018).

In Europe, the Guidelines on child friendly justice also state that "23. The minimum age of criminal responsibility should not be too low and should be determined by law." (COUNCIL OF EUROPE 2010). In the European Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings has not affected national rules determining the age of criminal responsibility (article 5)" (EUROPEAN PARLIAMENT AND COUNCIL 2016). As much as in the Americas, the European Court of Human Rights considers in its interpretation the Committee's General Comments.

The ECtHR requires that criminal proceedings against children fully consider their age, maturity, and intellectual/emotional capacities. The famous Bulger case, involving two 10 years old boys who murdered James Bulger, a two year old toddle, raised the discussion on the acceptance of such a low MACR (ECtHR 1999). Since then, however, the capacity to be in court, and the importance of legal assistance is a major consideration, as noted in *Adamkiewicz v. Poland*, (ECtHR 2010). For further case law at the European Court related to children, see ECtHR 2025.

The European Committee on Social Rights also addresses MACR in its concluding observations (CIPRIANI 2009).

## 1. GENERAL INFORMATION ABOUT THE MACR IN THE 38 COUNTRIES

The first concern in this research was to understand where the participating countries were standing in terms of establishing the minimum age of criminal responsibility.

The establishment of a minimum age of criminal responsibility is a matter of criminal policy, a medium point between science and evidence-based conclusions and the social structure, between theory and practice (TIFFER 2000). Although many evidence exists on the need to increase worldwide the minimum age of criminal responsibility, as recommended by the Committee on the Rights of the Child and other regional bodies (as higher as possible, not lower than 14 years old), this is still a social challenge in many places.

The Committee, since its General Comment n. 10, acknowledged the existence of a great variety of ages. At that time, the Committee concluded that a minimum age of criminal responsibility below the age of 12 years would be considered by the Committee not to be internationally acceptable. States parties were encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level. (UNITED NATIONS 2007). In the General Comment 24, the committee has reviewed its conclusions, encouraging States parties to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age, as adopted by the majority of the countries (UNITED NATIONS 2019, paras 22).

In spite the trend identified by the Committee, to raise MACR, this was not the picture of the States participating in this research.

Eighteen out of 38 countries in this research had settled 14 years old as minimum, followed in quantitative terms by those who had it fixes in 12 (eight countries) and 13 (six countries). However, seven countries had minimum ages lower than 12 and, in total, twenty-one countries (the majority) had minimum ages lower than 14.

According to Cipriani's analysis, historical influences on MACR's are easily identified in this research. Former British colonies and protectorates have lower minimum ages of criminal responsibility and, as we will see, in some of them, remains the possibility of *doli incapax* rule. In former Soviet law countries there are still exceptions for some specific serious crimes and more coercive measures (CIPRIANI 2009)

This picture shows how challenging it still is to increase the minimum ages, even if statistics from some countries where there are legal initiatives to raise the minimum age of criminal responsibility show that only 4% of the cases were committed by children aged 10-14 (as we can see it in Australia, LAW COUNCIL OF AUSTRALIA 2002, p.40). Changes are dependent of awareness raising and political struggle to revert the tendency of repressive and punitive measures.

Below we present the data collected in this research. Generic data of the countries can be also checked in some other sources (see for example UNICEF 2002, CIPRIANI 2009 and CHILE 2022).

| **No minimum age** | **8** | **10** | **12** | **13** | **14** | **15** | **16** | **17** |
|---|---|---|---|---|---|---|---|---|
| Luxembourg | Bermuda | England and Wales | Brazil | Congo (Rep.) | Austria | Norway | Argentina | Poland |
| | | Isle of Man | Canada | Dominican Rep. | Bermuda (under this age, rebuttable presumption of non-responsibility) | Poland (for serious offences) | Liberia | |
| | | Malaysia (if attained sufficient maturity of understanding) | Ecuador | Malaysia (for rape) | Bolivia | | Ukraine | |
| | | Poland (children subject to proceedings concerning demoralization) | Hungary (in case of certain severe offences) | Poland | Chile | | | |
| | | Switzerland | Malaysia | Puerto Rico | Croatia | | | |
| | | | Mexico | Uruguay | Cyprus | | | |
| | | | South Africa | | Germany | | | |
| | | | Zambia | | Hungary | | | |
| | | | | | Japan | | | |
| | | | | | Latvia | | | |
| | | | | | Malta | | | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | Mauritius | | | |
| | | | | | North Macedonia | | | |
| | | | | | Poland (for homicide) | | | |
| | | | | | Romania | | | |
| | | | | | Serbia | | | |
| | | | | | Sierra Leone | | | |
| | | | | | Spain | | | |
| | | | | | Ukraine (in special cases) | | | |
| | | | | | USA - California | | | |

The Committee, in both General Comment 10 and 24, expresses its concern about the practice of allowing exceptions to a MACR which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends that States parties set a MACR that does not allow, by way of exception, the use of a lower age. For the Committee, "such practices are usually created to respond to public pressure and are not based on a rational understanding of children's development" and should be abolished, setting just one standardized age below which children cannot be held responsible in criminal law, without exception. (UNITED NATIONS 2007; 2019).

In this survey, the large majority of the countries have just one age reference. Thirty-two out of thirty-eight countries. Malaysia and Ukraine were the only country referring to three minimum ages. These six countries are impacted by their historical influences of either British colonization or Soviet dominance.

Ukraine and Poland are particular cases. The minimum age of criminal responsibility is high, 16 and 17 years old. For serious crimes, the minimum age is reduced to 14. However, for younger children, there are compulsory educational measures and no measures are applied to children below the age of 11.

| **Just one minimum age** | **Two minimum ages** | **Three or more minimum ages** |
|---|---|---|
| Argentina | Bermuda | Malaysia |
| Austria | Hungary | Poland (17, 15 for serious offences, 14 for homicide and 10 for demoralization acts) |

| | | |
|---|---|---|
| Bolivia | Malta | Ukraine (16 is MACR, 14 extended responsibility in special circumstances, 11 for compulsory educational measures) |
| Brazil | Sierra Leone (10 – doli incapax - and 14, general rule) | |
| Canada | | |
| Chile | | |
| Congo (Rep.) | | |
| Croatia | | |
| Cyprus | | |
| Dominican Rep. | | |
| Ecuador | | |
| England and Wales | | |
| Germany | | |
| Isle of Man | | |
| Japan | | |
| Latvia | | |
| Liberia (formally just one, but in practice children as young as 7 are prosecuted) | | |
| Mauritius | | |
| Mexico | | |
| North Macedonia (but the law defines a child between the age of 5 and 14 at risk if he/she commits a criminal offence punishable by more than 3 years of imprisonment) | | |
| Norway | | |
| Poland | | |
| Puerto Rico | | |
| Romania | | |
| Serbia | | |
| South Africa | | |
| Spain | | |
| Switzerland | | |
| Uruguay | | |
| USA - California | | |
| Zambia | | |

Most of these countries that have more than one minimum age apply the 'doli incapax rule', in other words, the possibility of demonstration that the child is sufficiently mature and capable to understand that the behavior was an offense and therefore could be criminally responsible.

Luxembourg is a special case, because there is no minimum age at all in its legislation, based in a solely protective perspective.

| **Doli incapax applicable** | **Doli incapax not applicable** | **Not applicable – no MACR** |
|---|---|---|
| Bermuda (between 8 and 14) | Argentina | Luxembourg |
| Hungary (between 12 and 14) | Austria | |

| | | |
|---|---|---|
| Malaysia (between 10 and 12) | Bolivia | |
| Poland (individualized maturity and development assessment) | Brazil | |
| Sierra Leone (between 10 and 13) | Canada | |
| | Chile | |
| | Congo (Rep.) | |
| | Croatia | |
| | Cyprus | |
| | Dominican Rep. | |
| | Ecuador | |
| | England and Wales | |
| | Germany | |
| | Isle of Man | |
| | Japan | |
| | Latvia | |
| | Mauritius | |
| | Mexico | |
| | North Macedonia | |
| | Poland | |
| | Puerto Rico | |
| | Romania | |
| | Serbia | |
| | South Africa | |
| | Spain | |
| | Switzerland | |
| | Ukraine | |
| | Uruguay | |
| | Zambia | |

A review of minimum ages of criminal responsibility from 2009 found that there are currently 55 countries which retain a doli incapax procedure (CIPRIANI, 2009; PRI 2013), among them many in Asia (MOUSAVI & NORDIN, 2012).

According to the General Comment 24, the Committee on the Rights of the Child, "is concerned about practices that permit the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence. Such practices are usually created to respond to public pressure and are not based on a rational understanding of children's development. The Committee strongly recommends that States parties abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception. (UNITED NATIONS 2019, para. 25).

The Committee is also critical to systems with two minimum ages, "with a presumption that a child who is at or above the lower age but below the higher age lacks criminal responsibility unless sufficient maturity is demonstrated. Initially devised as a protective system, it has not proved so in practice. Although there is some support for the idea of individualized assessment of criminal responsibility, the Committee has observed that this leaves much to the discretion of the court and results in discriminatory practices." For the Committee, "States are urged to set one appropriate minimum age and to ensure that such legal reform does not result in a retrogressive position regarding the minimum age of criminal responsibility." (UNITED NATIONS 2019, paras 26-27).

The Interamerican Commission on Human Rights concurs with the Committee in this concern, emphasizing that this system "if a State determines that a child under a certain age does not have the capacity to violate criminal law, it is unacceptable for the child to be held criminally responsible when the violation involves an especially serious crime." (OAS 2011, paras 52-53).

Regarding the provisions about delayed maturity, the Committee also adopts a critical stance in its General Comment 24:

> "Children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility. If not automatically excluded, such children should be individually assessed." (UNITED NATIONS 2019, para 28).

In this research four countries have mentioned the possibility of applying this criterium (Austria, Malta, Romania and South Africa).

In Australia, where there is an intense debate on raising the minimum age of criminal responsibility, one of the concerns about this strategy (introducing a developmental immaturity defense with a rebuttable presumption that a child between 14 and 15 years old lacks the developmental, laying to the prosecution the onus of proof of

the capacity, and to the defense when older) is that the same flaws regarding the criteria used to such a proof. One of those criteria to rebut the presumption is a prior criminal offending history, assuming that a child who has have previous contact with the criminal justice system and police and consequently been told that the particular conduct is wrong, should therefore possess an understanding of right and wrong. Such understanding would not prevent and protect children from the harms of the criminal justice system. More than that, it is not clear in which measure previous interaction with the criminal justice system may prevent children reacting instinctively because of their level of cognitive reasoning at the time and not having inhibited their decision-making meaning due to their emotional condition and reactive behaviour to contextual stimulus (TUOMI & MORITZ 2024).

## 2. CAPACITY/UNDERSTANDING AND AGE ASSESSMENTS

### Capacity assessment

The main criticism on the application of the **'doli incapax rule'** concerns how is this assessment made, notably if there is a specific methodology for this evaluation or a protocol on how to evaluate. As seen above, both the Committee and the Inter-American Commission on Human Rights consider this rule confusing and open to discretional application.

The seven countries who referred the adoption of doli incapax rule enumerated many criteria, as follows, with an emphasis in some of them (like Bermuda and Malaysia) on mental health examination.

Modalities of age/capacity assessment in case of application of **doli incapax rule**

| Previous convictions | Good upbringing/ educational level/ intelligence test | Conduct connected to the circumstances | Circumstances of the case/Sophistication of the act | Communicational ability of the child | Psychiatric examination | Medical examination | Witnesses | Social inquiry | Expert opinion |
|---|---|---|---|---|---|---|---|---|---|

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Bermuda | Bermuda | Bermuda | Bermuda | Bermuda | Bermuda | Hungary | Malaysia | Poland | Poland |
| | Poland | Malaysia | Poland | | Hungary | | USA – California | Sierra Leone | Sierra Leone |
| | | | | | Malaysia | | | | |
| | | | | | Sierra Leone | | | | |

In case of delayed maturity test, the enumerated criteria are fewer, mainly psychiatric assessment (in Austria and South Africa) or psychological evaluation (Romania and South Africa).

Irrespective of the modality, *doli incapax* or delayed maturity, all countries registered that children are heard in this procedure, legal assistance is provided during the assessment and there is the possibility of challenging the decision in case of application of any of these rules.

### Age assessment

In case of necessity of lack of birth registration, it is necessary to determine the child's age, with a clear procedure and legal guarantees.

According to Penal Reform International,

> "in many countries children are not registered at birth and do not have documentation proving their age. There is ample evidence that police at times exploit this and exaggerate a child's age so that they are above the age of criminal majority in order to avoid invoking additional protective safeguards, or may threaten to do so as means of extorting money. Judges and prosecutors may not take the time to properly investigate a child's age and often simply rely on their subjective assessment of the age of the defendant in front of them. If there is no proof of age and it cannot be established that the child is at or above the minimum age of criminal responsibility, the Committee on the Rights of the Child recommends that the child should not be held criminally responsible. (PRI 2013).

UNICEF also highlights that "the lack of birth registration opens the door to manipulation of children's ages, including the MACR. Although this is not a widespread

challenge in Europe and Central Asia, it is recommended that provisions on age assessment are incorporated into national child justice laws. (UNICEF 2022, p. 13).

The Committee on the Rights of the Child, reaffirming what already established in General Comment n. 10 (UNITED NATIONS 2007), repeated in its General Comment 24 that "if there is no proof of age and it cannot be established that the child is below or above the minimum age of criminal responsibility, the child is to be given the benefit of the doubt and is not to be held criminally responsible" (UNITED NATIONS 2019, para 24).

The Inter-American Commission on Human Rights concurs with the position of the Committee on the Rights of the Child to the effect that where there is no proof of age, or if it cannot be determined that the child is at or above the minimum age of criminal responsibility, then the child cannot be held responsible for a crime. (OAS 2011, para. 53).

The African Committee also states that "legislation should further describe the measures in place to ensure "independent and competent assessment of the age of a child" where birth registration or birth certification is not available. (ACERWC 2018, paras 25-26).

More than that, according to the Committee, "a child who does not have a birth certificate should be provided with one promptly and free of charge by the State, whenever it is required to prove age. If there is no proof of age by birth certificate, the authority should accept all documentation that can prove age, such as notification of birth, extracts from birth registries, baptismal or equivalent documents or school reports. Documents should be considered genuine unless there is proof to the contrary. Authorities should allow for interviews with or testimony by parents regarding age, or for permitting affirmations to be filed by teachers or religious or community leaders who know the age of the child. Only if these measures prove unsuccessful may there be an assessment of the child's physical and psychological development, conducted by specialist pediatricians or other professionals skilled in evaluating different aspects of development. Such

assessments should be carried out in a prompt, child- and gender-sensitive and culturally appropriate manner, including interviews of children and parents or caregivers in a language the child understands. States should refrain from using only medical methods based on, inter alia, bone and dental analysis, which is often inaccurate, due to wide margins of error, and can also be traumatic. The least invasive method of assessment should be applied. In the case of inconclusive evidence, the child or young person is to have the benefit of the doubt. (UNITED NATIONS 2019, paras 33 and 34).

UNICEF emphasizes that "the assessment of age is not an exact science. It is a process within which there will always be an inherent margin of error and a child's exact age cannot be established through medical or other physical examinations."(UNICEF 2022, p. 13). When analyzing individual communications, the jurisprudence of the Committee is highly critical to such methods (MELO 2025).

In Europe, due to the high number of unaccompanied and undocumented minors seeking for asylum, an Age Assessment Procedures has been developed by the European Union Agency for Asylum (EUAA 2025).

In our survey, the majority of the countries emphasized the almost universal birth registration, diminishing the need of age assessment. However, displacement of children is also much more frequent than before, as seen in the European region, demanding a clearer procedure and legal guarantees on this subject. In Europe, the Asylum Procedure Regulation (APR) promotes

> "a gradual implementation in age assessment, known as the cascade or gradual approach. The cascade approach aims to mitigate the risk of invasiveness which is implicit in medical methods. Following this gradual approach, non-medical methods are used first. Only in the case of inconclusive results, the authorities can proceed to use medical methods, as a last resort. When medical examinations are potentially effective, radiation-free methods must be prioritised. Radiation-based techniques, such as X-rays, must strictly adhere to the 'as low as reasonably

> achievable' (ALARA) principle and be employed only when the previous steps have been exhausted. Special safeguards must apply in the case of girls and young women, as X-rays could harm a foetus. Before any exposure, professionals must take all reasonable steps to establish whether the applicant may be pregnant, bearing in mind that the girl herself may not know or may not wish to disclose this due to cultural sensitivities, stigma or experiences of abuse or violence. Sexual maturity observation (nudity) can never be used for age assessment purposes since it is highly invasive and does not serve to estimate chronological age." (EUAA 2025, p. 51-52)

In our survey, eighteen countries registered medical examination and documentary evidence as main modality of age assessment, followed by x-ray exams. Eight countries affirmed the prevalence of a presumption of minority in case of doubt. In five countries there is a lack of specific and clear procedure on the matter.

Below the European flowchart illustrating the cascade and multidisciplinary approach and the outcomes of our survey regarding the modalities of age assessment in the countries participating in this research.


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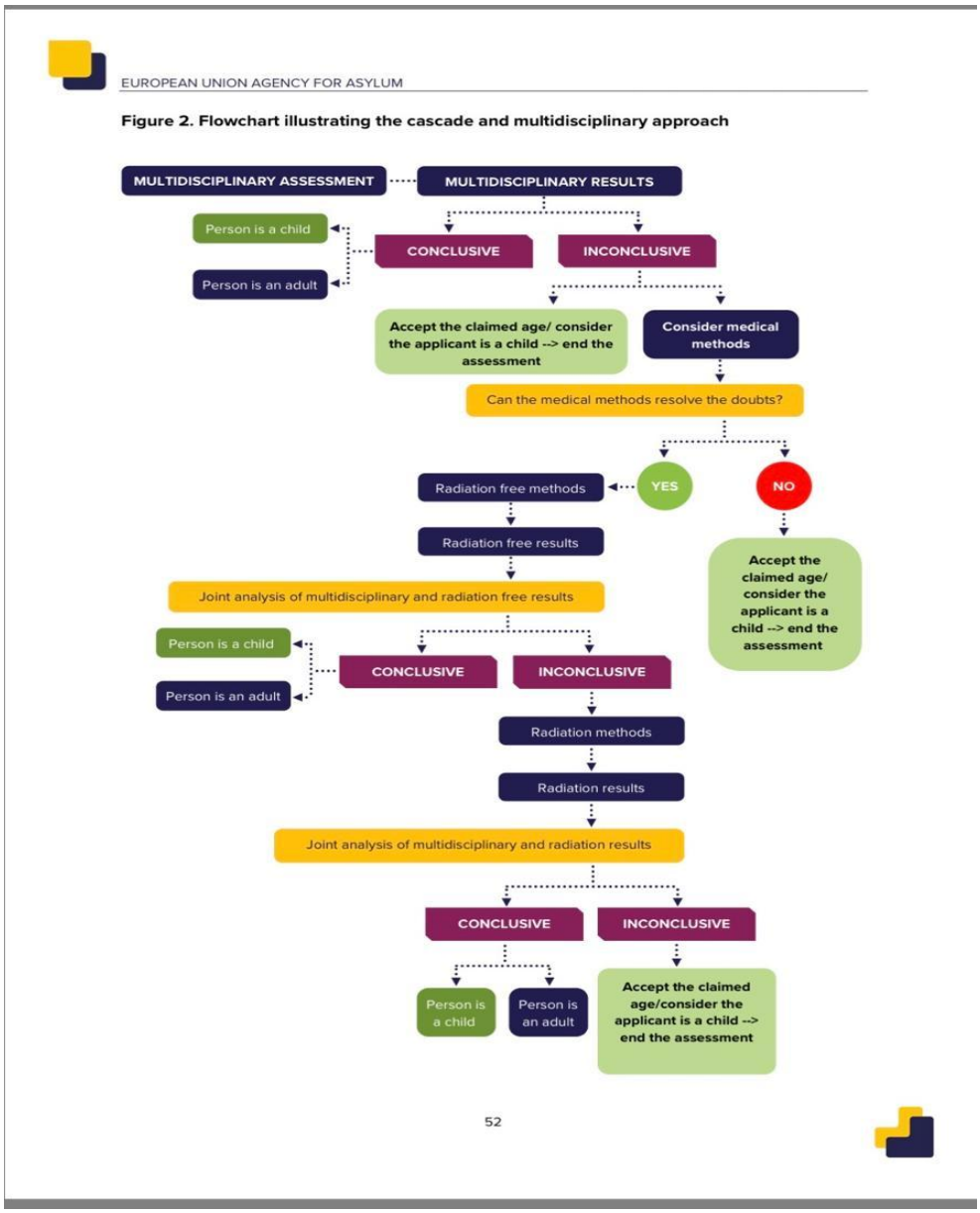


Modalities of age assessment in case of lack of **birth registration**

| Presumption of minority, in case of doubt | Lack of specific legal procedure | X-ray | Physical appearance | Medical examination | witnesses | Documentary evidence | Psychological examination | Court inquiry | Forensic anthropological expertise |
|---|---|---|---|---|---|---|---|---|---|

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Argentina | Argentina | Austria (with youth consent, but refusal can be used as evidence of a certain age) | Austria | Argentina (if needed) | Bermuda | Bermuda | Bolivia | Isle of Man | Romania |
| Bolivia | Liberia | Bolivia | Chile | Bolivia | Brazil (by the Civil Registry Office) | Bolivia (fingerprints or biometrical check based on previous registration) | Cyprus | Latvia (in case of insufficiency of documentary evidence and hearing) | |
| Croatia | Serbia | Luxembourg | England and Wales (cannot be the only basis, except in clear cases) | Chile | Japan | Brazil | North Macedonia | Poland | |
| England and Wales (if at the end of assessment, remains doubt) | Spain | Malaysia | Liberia | Croatia | Poland | Canada | Poland | Serbia | |
| Germany (issue would be object of normal investigation) | Uruguay | Malta | Malta | Cyprus | | Chile | | | |
| Luxembourg | | Spain | | Ecuador | | Congo (Rep.) | | | |
| North Macedonia | | Zambia | | Japan | | Croatia | | | |
| Spain | | | | Luxembourg | | Ecuador | | | |
| | | | | Malaysia | | England and Wales (general background, educational and other individual and family circumstances) | | | |
| | | | | Mexico (in case of lack of document) | | Japan | | | |
| | | | | North Macedonia | | Latvia | | | |
| | | | | Poland | | Malta | | | |
| | | | | Sierra Leone (physical examination) | | Mexico | | | |
| | | | | South Africa | | Poland | | | |
| | | | | Switzerland | | Spain | | | |
| | | | | Ukraine (subsidiarily) | | Ukraine | | | |



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|---|---|---|---|---|---|---|---|---|---|
| | | | | Uruguay | | Uruguay | | | |
| | | | | Zambia | | | | | |

Children should be usually heard for this assessment, although some of the countries informed that, due to the lack of a specific procedure, participation should be granted just as a generic right (Argentina). In Brazil the law is specific about child hearing only regarding adolescents (children above 12 years old). This situation shows that it would be important to have a more detailed procedure in this matter, specially because it was not specified in many of the responses what would be the subject of court inquiry and how it correlates to psychological assessment. According to the European guideline, the "age assessment interview it attempts to reconstruct a chronological sequence of life events to support the estimation of age. If the age assessment interview is sufficiently informative and conclusive results can be reached, there is no need to continue with a psycho-social assessment. If the findings are insufficient and the doubts on the claimed age persist, the psychosocial assessment should follow. The psychosocial assessment explores areas of the person's life, their psychological and emotional maturity, development and behaviour. Development in this context refers not only to cognitive and emotional growth, but also to observable behaviours such as the ability to engage in age-appropriate activities, the capacity to take responsibility for daily tasks, the way independence is expressed, the management of emotions, and interaction with peers and adults". (EUAA 2025, p. 54)

Regarding legal assistance during age assessment in case of lack of birth registration, many countries made reservations on how this legal guarantee is provided, either mentioning that it is a general principle that should be observed, while in others it is a disputable question or there is a lack of regulation.

In Europe, the practical guide on age assessment provides that the role of the legal counsellor consists of providing general guidance and assistance throughout the administrative international protection procedure including when an age assessment takes place. An effective legal assistance presupposes individualized counselling to safeguard

the best interests of a presumed child undergoing an age assessment procedure, not only to the child himself, but also to support the guardian or the parents/caregivers regarding the potential impact that the age assessment outcome might for any of the interests at stake (EUAA 2025, p. 28-29)

| **Legal assistance provided** | **Administrative procedure, legal assistance not necessary, but possible, if needed** | **No specific legal regulation** |
|---|---|---|
| Austria (in youth justice cases, if it is a disputable question, not in minor cases) | Brazil | North Macedonia |
| Bolivia | | Serbia |
| Canada | | Switzerland |
| Chile | | |
| Congo (Rep.) | | |
| Cyprus | | |
| Ecuador | | |
| England and Wales | | |
| Isle of Man | | |
| Japan | | |
| Malaysia | | |
| Malta | | |
| Poland | | |
| Romania | | |
| Sierra Leone (in principle) | | |
| South Africa | | |
| Spain (on the ongoing reform) | | |
| Uruguay | | |
| Zambia | | |

A clear majority of the countries assured that the child has the right to challenge the decision regarding age assessment. However, the lack of unanimity, with some restrictive observations highlighted concerning this legal guarantee, including due to a lack of specific legal regulation, are relevant signs that man challenges persist for a more adequate observation of international legal standards.

| **Possibility to challenge the decision** | **Possibility to challenge the decision in case of administrative denial** | **No specific legal regulation** | **No possibility to challenge examination conclusions** |
|---|---|---|---|
| Argentina | Brazil | Chile | Ecuador |
| Austria | | Mexico | |
| Bolivia | | North Macedonia | |
| Chile | | Serbia | |
| Congo (Rep.) | | | |
| Cyprus | | | |

| | | | |
|---|---|---|---|
| England and Wales (new evidence needed, once the court has deemed the child of a particular age | | | |
| Isle of Man | | | |
| Japan | | | |
| Malaysia | | | |
| Malta | | | |
| Poland | | | |
| Romania | | | |
| Sierra Leone | | | |
| South Africa | | | |
| Spain | | | |
| Uruguay | | | |
| Zambia | | | |

A provisional conclusion on this matter is that, irrespective of the emphasis and extension of birth registration of children, there is space for the improvement of rights and procedures in national legislations to be in accordance with international standards, including the presumption of minority.

## 3. POLICE INTERVENTION

### Contact with the police

The commission of an act considered as an offence bring the possibility of contact between the child, even below the minimum age of criminal responsibility, and the police. The survey's aim is to understand if this is really the case in many countries and, in that case, what should the police do.

In Australia, where an intense debate on the responses to the acts committed by children below the minimum age of criminal responsibility takes place, there is an understanding those children should not be primarily dealt with by police. It is recognized, however, that it will often be police that are first on the scene in crisis situations and should be considered as first responders. with training and support to deal with incidents involving children and prepared to assess the facts appropriately, acting in a way that

avoids or minimizes harm to the child. In this context, referrals from first responders to secondary support services should occur within the shortest appropriate period of time. (LAW COUNCIL OF AUSTRALIA 2022, p. 6-7).

Unicef, acknowledging that there are different circumstances in which children under the MACR can come into contact with police, recommends that the police officer in charge should without delay contact the child's parents/caregivers and the competent social welfare agency, arranging the child's transportation to the child police unit or social welfare agency in a car that cannot be identified as police car. This requires the establishment of a referral mechanism between police and the social welfare system. If immediate medical attention is required, the police officer or social welfare staff should ensure that the child is brought to the hospital without delay" (UNICEF 2022, p. 15)

The picture offered by the national reports in this survey shows concurs with this guideline. There is a majority of States (fifteen countries) where the child is brought just occasionally to a police station, mostly in exceptional cases, when it is not sure if the child is under the minimum age, or when the parents are not found and for protective reasons. In another ten countries, the child should not be brought to a police station. In those countries where it is more frequent the contact between the child and the police circumstances related to the offence itself seem to play a major role, such as seriousness of the act or a special vulnerability of the child, including those related to public reaction to his or her conduct.

The multiplicity of realities, with no obvious common ground, the different reasoning for conditioning the contact or, even worst, the lack of clear procedure in some States are important elements extract from the research to show the ambiguity of this relationship and a proper definition of guidelines and international standards.

| The child mandatorily is brought to a police station | The child is brought usually to a police station | The child is brought occasionally to a police station | The child shall not be brought to a police station | It varies according to the region | No clear procedure |
|---|---|---|---|---|---|
| Luxembourg (in all cases of offences) | Germany (in case of need for the child's own safety) | Austria | Cyprus | Argentina | Brazil |
| Mauritius | Isle of Man (in case of severe offences) | Bermuda (if not sure that the child is under MACR, with the assistance of Dept of Child and Family Services) | Dominican Rep. | | Serbia |
| North Macedonia | Latvia (in the situations specified in the law, not only in case of criminal offences, but also of begging, intoxication, running away) | Bolivia (if the case is first investigated by the police) | Ecuador | | |
| Poland | Romania (in case of serious offenses) | Brazil | Germany (if it is clear that the person is under age) | | |
| Ukraine (for children between 11 and 14 years old) | USA-California | Canada (just in case parents are not found) | Hungary | | |
| | | Chile (just in case parents are not found) | Mexico | | |
| | | Congo (Rep.) (in case of doubt about the age) | South Africa | | |
| | | Croatia (to be identified, if needed) | Switzerland | | |
| | | England and Wales | Uruguay | | |
| | | Japan (on a voluntarily basis) | Zambia | | |
| | | Liberia | | | |
| | | Malaysia (not as a suspect, but for identification, | | | |



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| | | | | | |
|---|---|---|---|---|---|
| | | protection or for assessment purposes) | | | |
| | | Malta | | | |
| | | Sierra Leone (in exceptional cases) | | | |
| | | Spain | | | |

## Modalities of police intervention

Once defined whether the child has a contact or not with the police, a key concern is about what kind of intervention is expected from the police.

According to international standards, mainly the CRC, a protective approach should be granted, which is in accordance with Unicef's recommendation to immediately involve the welfare services.

However, an offence, if effectively committed, has legal consequences and it will be necessary to coordinate investigative and protective initiatives.

Unicef proposes some guidelines on this matter, stressing the forefront responsibility of social workers in organizing any intervention involving the child:

- "Ensuring that the child is not kept longer in the child police unit/general police station than absolutely necessary to complete initial formalities.
- "Contacting the child's parents/caregivers and inviting them to come to the social welfare agency (if they are not already accompanying their child).
- "Identifying other adult relatives or persons who may support the child if the parents/ caregivers are unable or unwilling to come.
- "Acting as the child's case manager from the initial contact.
- "Establishing a professional relationship and building rapport with the child and his/her parents/ caregivers.

- "Closely coordinating with the police officer/investigator of the child police unit during both the investigation of the alleged offending behaviour of the child and during the interviewing of the child, if conducted by a child police investigator or other child justice professional
- "Contacting legal aid if the child and his/her parents/caregivers express their wish to have a lawyer or paralegal present during the investigative interview.
- "Requesting the (child) court to order a medical and/or social examination to assess whether the child is below, at or above the MACR if the child's age is unknown and cannot be verified through available certificates or other documents
- "Inviting an interpreter if the child and/or his/her parents/caregivers do not understand the local language.
- "Inviting a child expert if the child has special needs and requires special assistance (e.g. a sign language expert for deaf children, a psychologist if the child seems to be upset, traumatised, vulnerable, etc.).
- "Accompanying the child during the investigative interview, if conducted by a child police investigator, and during the medical and/or social examination(s), if the parents/caregivers or child expert/special support person are/is not accompanying the child. The social service worker or case manager and police investigator involved in the case discuss and decide together whether it will be necessary to conduct an investigative interview with the child in order to establish, beyond reasonable doubt, whether the child has been allegedly involved in behaviour that would have been an offence if

she/he would have been at or above the MACR and whether other persons have been harmed by the child's offending behaviour. For example, it might require an investigative interview to determine whether the child was used by peers and/or adult criminals". (UNIFEC 2022, p. 15- 17)

The outcomes of this survey reveal a clear a preponderance of deflection to protective services.

Interestingly, the second major predominance of responses involve investigation of the fact, but in many countries with remarks either because it is a disputable issue, or due to the dependence of police intervention to children willingness and voluntariness to be involved in the investigation, or because the intervention is circumscribed to the age determination or to the terms of a judicial order.

However, it is worrying the situation in many countries, where the avoidance of police intervention does not imply necessarily the involvement of protection services, while in some others police intervention is expected to assume a preventive or protective role. What is the nature of a protective or preventive role by the police? In many national reports there is no clear and detailed answer. There is a dense literature on the intertwinement of prevention and social control (PITCH 2014) in our contemporary risk society, specially in those contexts where limited responsibilities can be attributed to some members of our communities, such as children (PITCH 1995). The world report on violence against children has already identified the use of detention as a substitute of care in many countries (PINHEIRO 2006, p. 195), which should be an alert on the need to deepen the understanding on the allegedly protective role of the police.

The diverse panorama captured in the survey is represented as well by the necessary involvement either of the court or the prosecution in these cases.

We have therefore a wide spectrum of a relative ambiguous protection in this scenario: the police itself, social or welfare services, the parents, the court or prosecution office.

But not only protection. It should be highlighted that in some countries detention is also evident as a role of the police.

| **Deflection to protective services** | **Release to the legal guardian** | **Investigation of the fact – child hearing** | **Deflection to Court** | **Inquiries about child identity/age** | **Information to prosecution office** | **Deflection to Prosecution office** | **Preventive/ protective role** | **No clear procedure** |
|---|---|---|---|---|---|---|---|---|
| Argentina | Austria | Brazil (disputable issue) | Chile (family court) | Croatia | Croatia | Dominican Rep. | Germany | Brazil |
| Bolivia (to Defensoria del Niño) | Ecuador | Japan (on a voluntary basis) | Congo (Rep.) | | Serbia | | Isle of Man (police early action team, for behavior deterrence) | Serbia |
| Brazil | Latvia | Latvia | Latvia (orphan's and custody court) | | Spain | | Uruguay | |
| Canada | Malaysia | Luxembourg (children below the age of 12 are not normally heard by police officers, except in case of judicial order) | Poland | | | | Zambia | |
| England and Wales | North Macedonia | Malaysia | Uruguay (to communicate the urgency and exceptional intervention - in rare cases) | | | | | |
| Hungary | Puerto Rico | Malta | Ukraine (children between 11 and 14 years old) | | | | | |
| Latvia | Romania | Mauritius | | | | | | |
| Liberia | Sierra Leone | Puerto Rico (in case of serious crimes) | | | | | | |
| Malaysia | Spain | Sierra Leone | | | | | | |
| Mauritius | USA-California | South Africa | | | | | | |
| North Macedonia | | Switzerland (in case of need to | | | | | | |

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|---|---|---|---|---|---|---|---|---|
| | | determine the child's age) | | | | | | |
| Romania | | Ukraine | | | | | | |
| Serbia | | | | | | | | |
| Sierra Leone | | | | | | | | |
| South Africa | | | | | | | | |
| Zambia | | | | | | | | |

## Legal guarantees regarding the police

Once specified the modalities of police intervention, it is crucial to understand what are the most common legal guarantees provided for the child in relation to the police.

Unicef once again advise some procedural steps related to legal guarantees in this context:

- "In case of a police interview, if needed, the social service worker or case manager and police investigator decide together which specially trained interviewer will conduct the investigative interview, including the gender of the interviewer, and when and where the interview will take place. Potential interviewers include a social service worker, psychologist or another trained professional of the social welfare organization involved in the case (preference); a child police investigator or another trained professional from the child police unit involved in the case; a child prosecutor (in some jurisdictions); a combination of the above-mentioned professional interviewers, preferably a social service worker or psychologist and a child police investigator
- "The investigative interview is conducted in a child-friendly room, preferably in the social welfare agency, or arranged in a private room in the child's home, school or another place where the child feels comfortable. If national legislation requires that the child prosecutor

and/or the court has to be informed about any file of an alleged child-offender under the MACR and/or any investigative interview with an alleged child-offender under the MACR, the social service worker or case manager or child police investigator involved in the case fulfils this obligation.

- "The specially trained interviewer thoroughly prepares the interview to ensure that the child will be subjected to only one investigative interview and that the interview will be conducted in a child-sensitive, gender-sensitive and age-appropriate manner.
- "The investigative interview is conducted in the presence of the child's parents/caregivers (if in the best interests of the child) and their lawyer or paralegal (if requested).
- "The interviewer provides the child a full opportunity to be heard and to contest any allegations in regard to the child's behaviour and makes all reasonable efforts to verify the grounds for any allegations that the child denies.
- The investigative interview is recorded for investigation purposes and stored in a secure place with restricted access. (UNICEF 2022, p. 17)

In Australia, in study for a legislative reform, suggested principles to be observed in case of need of a more stringent intervention by the police, especially when some kind of deterrence could be considered necessary, adopting appropriate legislative thresholds and safeguards around the exercise of police powers.

- "Children under the minimum age of criminal responsibility should not be transported or accommodated in police vehicles, police watchhouses or other types of police facilities alongside adults. Police should not use spit hoods or chair restraints on children under the

minimum age of criminal responsibility. “Police should not strip-search children under the minimum age of criminal responsibility.

- “Police should seek to divert children towards health, social and community support services at the earliest reasonable opportunity.
- “Specialist crisis accommodation should be available to children as a voluntary option where it is not safe for children to return to their usual place of residence or where children need accommodation at short notice or after hours. This must be provided outside of policing or corrective services and must be separate from that provided to adults or children over the minimum age of criminal responsibility. (LAW COUNCIL OF AUSTRALIA 2022, p. 6-7)

These recommendations express in which measure protection and social control might be interwoven. However, even in rare cases, if some kind of stricter intervention is needed, there should be clear guidelines to prevent abuse of power and the possibility of resistance by any individual, children inclusive. According to Ferrajoli, legal guarantee means exactly the sine qua non conditions, both criminal and procedural, not only for the affirmation of criminal responsibility and the application of punishment, but in relation to any kind of exercise of power. By extension, legal guarantees designate a political philosophy that imposes on the law and the State the burden of external justification in accordance with the goods and interests whose protection and guarantee constitute precisely the purpose of both, due to the binding nature of public power in a state governed by the rule of law. Therefore, it presupposes the secular doctrine of separation between law and morality, between validity and justice, between internal (legal) and external (political) points of view in the assessment of the legal system (FERRAJOLI 1995, pp. 92 and 853-854). In the context of our discussion, legal guarantees should involve the separation of protection and social control.

In this survey, it is not clear if the rights mentioned in each report are just an exemplification or a full list. As mentioned at the beginning, there are some very detailed reports while others provide succinct responses, which allows us to make a recommendation to read this list carefully, just as the most emphasized rights by the participants.

Having this perspective in mind, contact with the family seems to be the most recurrent right of the child, followed by notification of the child protection services and the right to legal assistance.

However, it is interesting to see the necessity to communicate the intervention either to the court or to the prosecution office, which denotes the concern on controlling and supervising more invasive initiatives by the police. The justice system is involved in this context no only to control police intervention, but it might also entail restrictive judicial orders, such as placement. This is the case in Ukraine, for instance, where children between 11 and 14 years old can be placed by order of an investigative judge in a reception-distribution center for a term up to thirty days.

| **Separation of adults** | **Notification to child protection services** | **Communication with the family** | **Notification to Prosecution or Judge** | **Record or film police actions** | **Not to be exposed to embarrassment (respectful treatment)** | **Police can only approach a child if accompanied by a guardian or Guardianship council** | **Presumption of non-responsibility** | **Right to legal assistance** | **Right to remain in silence** |
|---|---|---|---|---|---|---|---|---|---|
| Argentina | Argentina | Argentina | Argentina | Brazil | Brazil | Malta | Cyprus | Latvia | Sierra Leone |
| Brazil | Bolivia | Austria | Chile (to family court) | | | North Macedonia | | Luxembourg | |
| Latvia | Brazil | Brazil | Congo (Rep.) | | | | | Malta | |
| Malaysia | Canada | Canada | Dominican Rep. (to prosecution) | | | | | North Macedonia | |
| North Macedonia | Croatia | Chile | Latvia | | | | | Poland | |
| Sierra Leone | Cyprus | Croatia | Poland | | | | | Sierra Leone | |
| | England and Wales | Ecuador | Ukraine (if the act is provided in the penal | | | | | Switzerland (if the child is summoned | |

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|---|---|---|---|---|---|---|---|---|---|
| | | | code with imprisonment for more than five years) | | | | | for questioning) | |
| | Malaysia | Latvia | Uruguay (in rare cases of intervention) | | | | | Ukraine | |
| | Mauritius | Malaysia | | | | | | | |
| | Romania | Malta | | | | | | | |
| | Serbia | Mauritius | | | | | | | |
| | | North Macedonia | | | | | | | |
| | | Poland | | | | | | | |
| | | Romania | | | | | | | |
| | | Sierra Leone | | | | | | | |
| | | Ukraine | | | | | | | |

## Possibility of deprivation of liberty

Deprivation of liberty should be a measure of last resort for children above the minimum age of criminal responsibility (CRC, article 37,b). Regarding children below the MACR, it should not be applied at all.

For Unicef, children under the MACR may never stay overnight in a general police station or child police unit and should not spend more time in the general police station or child police unit than absolutely necessary prior to the handover of the case to the social welfare agency, in any case (UNICEF 2022)

In the legislative debate in Australia, some situations were raised where police could be allowed to detain a child under the minimum age of criminal responsibility such as serious risk of harm to the child or others, and only until the specialist worker arrives, using the least restrictive means possible and using no more force than is reasonably necessary (LAW COUNCIL OF AUSTRALIA 2022, p. 6-7)

In this survey, eight countries out of 38 allow this measure under some special circumstances.

It is important to have in mind as well that some allegedly protective measures can disguise deprivation of liberty applied to children below the MACR. Serbia brought an example: “A notable example is the case of KK, who was 13 years old when he committed a series of murders during a school shooting in May 2023. According to media

reports, as the public has not been informed on the outcome of this case, he was placed in the mental health ward of a hospital, where he remains, and has been subject to multiple expert forensic examinations. This case illustrates the systemic gap, particularly in the social welfare system, in preventing and responding to serious offences committed by children below the MACR, underscoring the need for a clearly defined legal framework and specialized service provision" (CEROVIC 2025). Serbia is a country with no clear procedure and legal framework on this subject and therefore does no appear clearly in some tables.

Cipriani also points out that in dozens of countries, state responses to children younger than MACR's who come into conflict with the law are effectively criminal procedure ad punishments, adopting interventions named as treatments, and internally categorized as welfare, care, protection or education measures, but involve deprivation of liberty and sometimes amounts to cruel and inhuman treatment. These measures are clearly in conflict with international standards (CRIPRIANI 2009, p. 136).

**possibility of deprivation of liberty**

| **Varies according to the region** | **Detention while protective measures are taken** | **No possibility** | **Only in case of judicial order** | **Detention by the police allowed** |
|---|---|---|---|---|
| Argentina (in some provinces, possibility of retention for 12h to 24 hours in case of need) | Austria (short period, maximum 24h) | Bermuda (in case of jeopardy to the child's safety, placement under responsibility of Dept of Child and Family services) | Luxembourg | Poland (in exceptional circumstances for 24h, 48h or 5 days, according to specific criteria) |
| | North Macedonia (maximum of 8 hours, but usually between 2 and 4 hours) | Bolivia | Malaysia (under strict welfare protection grounds, authorized by a Magistrate or the Court for Children within 24 hours; maximum duration is one month, extendable only by court order upon further review) | |
| | Puerto Rico | Brazil (although some references of restraint measures in practice in some places) | Sierra Leone (in rare cases for no more than 72 hours) | |
| | Romania (child holding, not imprisonment) | Canada | Ukraine (for children between 11 and 14 years old for 30 days) | |

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|---|---|---|---|---|
| | | Chile | | |
| | | Congo (Rep.) | | |
| | | Croatia | | |
| | | Cyprus | | |
| | | Dominican Rep. | | |
| | | Ecuador | | |
| | | England and Wales (but other forms of restriction of liberty possible, such as placement in a secure accommodation) | | |
| | | Germany | | |
| | | Hungary | | |
| | | Isle of Man | | |
| | | Japan | | |
| | | Latvia | | |
| | | Malta | | |
| | | Mauritius | | |
| | | Mexico | | |
| | | South Africa | | |
| | | Spain | | |
| | | Switzerland | | |
| | | Uruguay | | |
| | | USA-California | | |
| | | Zambia | | |

## 4. MEASURES

In its General Comment n. 10, the Committee on the Rights of the Child emphasizes that, in case children below the MARC commit an offence, "special protective measures" can be taken if necessary in their best interests (UNITED NATIONS 2007, para 31).

In General Comment n. 24, the Committee does not anymore make use of the term "special measures", preferring to affirm that children below the minimum age of criminal responsibility are to be provided with "assistance and services according to their needs, by the appropriate authorities, and should not be viewed as children who have committed criminal offences".

The two approaches connote different meanings.

A measure is a plan or course of action taken to achieve a particular purpose, explains the Oxford Dictionary, or, according to Longman Dictionary, an action, especially an official one, that is intended to deal with a particular problem. Measure

connotes therefore a more proactive and intentional intervention to promote changes in some situation.

Assistance, by contrast, is the provision of money, resources or information to help someone, according to Oxford, while, for Longman, it is simply help or support. In comparison to measure, we can conclude that while measure focus on the person or body who intervenes in a situation, assistance displaces the focus of emphasis to the person who is supported. In a measure, the child could be considered more passive, while, when assisted, the nature and the extension of the support should correspond to the interests and needs of the child.

This is a lexical interpretation of terms, not necessarily written with this purpose, as both General Comments are very succinct and laconic about what could be done in this situation and how the child should be dealt. The international lack of consensus on the matter has already prevented the Committee to issue a specific General Comment on MACR (CIPRIANI 2009).

According to UNICEF, the involvement of children under the MACR in offending behavior is an indicator of potential vulnerability that has to be dealt with by the social welfare system as part of its secondary prevention strategy and not by the child justice system. Special protection measures for children under the MACR should address the root causes of their offending behavior; support their parents/ caregivers; and should never be punitive or disciplinary in nature, nor entail deprivation of liberty. (UNICEF 2022), but rather involve a sympathetic and protective approach to children.

The European Commission Recommendation of 23.4.2024 on developing and strengthening integrated child protection systems in the best interests of the child has addressed one aspect of violence committed by children, as bullying perpetrators, including them as target public for measures providing prevention and early identification, as much as guidelines, training, and practical tools on how to deal and cope with bullying. Such measures should also include the provision of information on how

to report and intervene in cases of bullying, how to seek help and support and how to reverse abusive and toxic behavior. (EUROPEAN COMMISSION 2024)

However, these guidelines are still vague and there is a lack of international normative recommendation on what should be these special measures or what kind of specific needs could be perceived and discerned to determine assistance through services.

The subject is polemic and an increasingly intense debate is taking place in different parts of the world on how to deal with these issues.

In Spain, where the MACR has been raised from 12 to 14 years old in 2000, an intense discussion tackles the nature of the measures and how specialized they should be.

Acknowledging that the behavior of these children might be equally severe in many cases regarding those committed by older peers and the fact that these children are not criminal responsible, authors such as Marquina understand that the dangerousness of their acts should not be disregarded, nor should we ignore the risk of 'recidivism', of repeating the act. There is a critical approach on leaving these situations to regular welfare services, usually focused in situations of abandonment, neglect or maltreatment, backing a specialized response, different from those imposed by the judicial system, but also dissimilar from those adopted by child protection services. Marquina proposes a specialized intervention system for these cases, even for those less severe, if they involve risk factors that could evolve to more severe situations (MARQUINA 2021).

In Serbia's report, a similar concern is raised regarding welfare services for these children: "there are no specialized programmes and services for children below the MACR. In practice, they are typically placed in social welfare institutions, defined as 'institutions for the upbringing of children and youth', according to the *Law on Social Welfare*, often alongside children above the age of criminal responsibility, who have undergone formal child justice proceedings. These institutions are open-type facilities where children attend regular school and can freely leave the institution in their leisure time during the day, usually until the evening. This arrangement raises concerns regarding

the appropriateness of care, the safeguarding of children and the potential for negative peer influence, given the absence of tailored interventions and rehabilitative measures designed specifically for this age group. In practice, these institutions have been consistently lacking capacities, resources and do not provide children in need with adequate care and protection". (CEROVIC 2025)

In an interesting analysis, Bernuz and colleagues have analyzed how welfare services have adapted themselves to the new local scenario after the increase of minimum age in Spain. In some provinces, such as Zaragoza, a specific team has been appointed to deal with these children, adapting what was the educative and preventive approach previously used with those who had achieved the MACR to a lower age. The focus of those programs was on pro-social activities, in follow-up activities similar to probation and mediation among others. In other provinces, the focus remained generic, on child protection. In Castilla, for instance, the challenge is to keep the children motivated to participate, as the proposed measures are merely administrative, thus dependent on a voluntary acceptance by the child and the family, with a lesser impact, especially because those who are more committed to participate seem to be those who needed lesser such kind of intervention. However, the alternative, to have the measures judicially and mandatorily imposed, would contravene the spirit of the Convention. This challenging balance is even more difficult in a climate of insecurity and social alarm (BERNUZ et al. 2006, p. 19).

In Australia, the Royal Australian College of General Practitioners (RACGP), while recommending to raise the age of criminal responsibility, understands that this kind of behavior in children below MACR is a health issue and should be treated with trauma informed, coordinated and integrated services for vulnerable children (RACGP 2025)

Based on the Committee on the Rights of the Child's General Comment, Unicef recommends evidence-based interventions, which should be continually developed and reflect not only the multiple psychosocial causes of children's behavior but also the protective factors that may strengthen resilience. Interventions must be tailored to the

child's needs and circumstances and, therefore, based on a comprehensive and interdisciplinary psychosocial assessment. Family-based and community-based programs or services could also be used for children under the MACR, such as:

- "Supplementary educational tutoring (e.g. study skills, homework support, support with specific subjects (writing, mathematics, reading, etc.), preparation for tests or exams, one-on-one support for specific learning problems)
- "Structured recreational and leisure activities and programs (e.g. sports, culture, music, arts, religion)
- "Participation in activities and programs of a day center (e.g. education, vocational training, recreation, individual or group counselling, life skills)
- "Participation in life skills and competency development programs (e.g. resisting peer pressure, anger management, dealing with emotions and stress, problem solving, health and hygiene skills)
- "Individual or group counselling (e.g. focusing on traumatic events, problems at home or school or with friends, better understanding of thoughts, feelings and emotions, dealing with concerns around relationships and sexuality)
- "Mentoring by peers or (young) adult volunteers, also called 'buddy' or 'big brother/sister programs', (e.g. focusing on self-esteem and confidence, friendship and relationships, communication, trust and resilience, goal setting and decision making, school attendance)
- " Treatment for behavioral problems or disorders (e.g. sexual harassment, bullying (online or in person), aggression, disruptive behavior, attention-deficit/hyperactivity disorder (ADHD), autism spectrum disorder, eating disorders)
- "Treatment for abuse and addiction problems (e.g. drugs, alcohol, smoking, gambling, excessive gaming, thrill seeking behavior)

- "Participation in restorative programs (e.g. verbal apology, apology letter, peer mediation, victim empathy courses)." (UNICEF 2022, p. 19-20)

Some other strategies are recommended by scholars such as Ross:

- "Child skills training which aims to teach children social, emotional, and cognitive competence by addressing appropriate effective problem solving, anger management and emotion language.
- Behavioral parent training (BPT) which teaches parents to be consistent in reinforcing helpful behavior and punishing or ignoring hostile or uncooperative behavior.
- Multisystemic therapy (MST) which is an intensive, individualized, home-based therapeutic intervention for high risk juveniles. Depending on the young person's needs MST could include child skills training, parenting training, measures aimed at reducing a young person's association with deviant peers, and measures for improving academic performance and attachment to school. Best practice:
- Family Functional Therapy (FFT) is a clinic-based intervention that includes three therapeutic stages: first, an engagement and motivation phase in which reframing techniques are used to reduce maladaptive perceptions, beliefs and emotions within the family. This then creates the context for a second phase employing behavioral change techniques. Finally there is a 'generalizations' phase in which families are taught to apply the learnt skills in various contexts (the school, the justice system, the community).
- Multi-Dimensional Treatment Foster Care (MTFC). Young people are placed in short-term foster homes where they receive individual therapy and behavioral coaching similar to child skills training.

• The reorganization of grades or classes to group together high-risk or disruptive pupils for periods of the school day, while teaching them with alternative curriculum material and using cognitive behavioral techniques.
• Classroom or instruction management interventions emphasizing interactive instructional methods using cognitive behavioral techniques
. • School discipline and management strategies, particularly those which draw on teams of staff and members of the local community to change the decision-making process or authority structures of the school in order to enhance its general capacity.
• Mentoring typically involves a non-professional drawn from the community spending time with an at risk young person in a non-judgemental, supportive capacity whilst also acting as a role model.
• After school recreation offers young people the opportunity to engage in and learn skills in a range of activities including non-academic ones. Best practice: Only effective if the program is highly structured and includes proper supervision.

- Interventions that do not work or are less effective include: • Interventions focused primarily on coercion or control, i.e. surveillance, deterrence or discipline • Military-style boot camps • Individual counselling (not based on cognitive behavioral techniques) • Unstructured life skills training • Community service activities • Gun buyback programs • Short-term non-residential training programs, summer jobs or subsidized work programs • Any program that groups high risk students together in the absence of a structured program is associated with increased levels of delinquency." (ROSS ET AL. 2010)

In another Australian study, there is a concern in developing what they call a secondary response to these acts (considering that the police is at the front-line as first responders). For this purpose, they are considering three tiers of responses.

The first, to children under MACR with complex needs, to whom all levels of government should provide long-term, stable investment in early intervention, diversionary, rehabilitative and therapeutic programs and services including the development of a range of support services directed at both addressing existing needs and at combatting pathways into the justice system at an older age, such as family, mental health, disability and substance abuse support, and access to safe, secure housing, areas of mental and physical health and disability, poverty, insecure housing, abuse and neglect.

The second tier consists of children with serious complex needs, not based on the seriousness of the offending, but on the individual needs of the child. For these children, coercive powers could be included, including involuntary admission to secure facilities, compulsory treatment in the community, or other civil orders (i.e. mental health orders, care orders). These coercive powers should be applied in the least restrictive manner possible, be used only in exceptional circumstances as a measure of last resort, be time-limited and for the shortest appropriate period of time, and be subject to merits and judicial review, always based in the best interests of the child and must be directed towards protecting or achieving their health and welfare.

The third tier relates to children with extreme complex needs. However, in contradiction to what have previously said, this tier is fundamentally based on the offence, such as homicide, torture, sexual abuse, considered to be gravely harmful to the community, and falling within the most exceptional categories of such behavior; the child is more likely than not to place members of the community at significant risk of grave harm to their person; existing responses under the relevant mental health legislation are not applicable to the child; and in the opinion of a medical practitioner existing community health and social service options are inadequate to respond to the child's extreme complex needs. For these children, it is considered important highly specialized

psychiatric care, treatment and rehabilitation, possibly provided under time-limited residential supervision. (LAW COUNCIL OF AUSTRALIA 2022).

Unicef suggests a different framing of the issue of out-of-home placement. The Committee on the Rights of the Child promotes family-based and community-based measures for children under the MACR as an absolute priority. Out-of-home placement (also called 'family-child separation') should be organized by the social welfare system and used only as a measure of last resort as well as for the shortest appropriate period of time. Placement might be necessary, for example, when the child and/or his/her parents/ caregivers refuse to cooperate or to give consent to duly decided family or community-based measures. "In the exceptional cases that require an out-of-home placement, such alternative care should preferably be in a family setting …" (paragraph 11 of CRC-GC24). Decisions on out-of-home placement of children under the MACR, for example in kinship care, foster care or a family-like facility, are taken only on a case-by-case basis and only after all available family or community-based options have been seriously and exhaustively considered. In most cases, kinship/foster care families will have to be prepared thoroughly to receive and take care of children under the MACR who have been involved in offending behavior. If the child is placed in a family or residential setting organized by the social welfare system, the placement should be regularly reviewed by the court with regard to its continuing necessity and suitability. Residential settings should respect minimum standards, including access to education, medical care, and recreation and contacts with the family and wider community. In various countries, including in European and Central Asian countries, local administrative bodies may apply disciplinary measures to children under the MACR. For example, Commissions of Minors might place children under the MACR in special educational institutions, which means in practice that they are deprived of their liberty for a period of time. Such punitive measures should be strongly discouraged".(UNICEF 2022, p. 23).

These very contrasting recommendations are also visible in this research.

Our survey exhibits a small group of countries with no measures at all, which could raise concern on a lack of attention to the children's needs and consequently a violation of social rights. The majority of countries allude to protective measures or supervision orders, not always detailing what kind of measures are considered as such. Out-of-home placement is permitted in all countries, for protective reasons, in case of lack of parental supervision and not necessarily in connection with the offence itself.

According to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), "the deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority." (rule 11 b). However, more than one third of the countries (fourteen out of thirty-eight) include stricter measures, with an extended degree of control of the child's liberty or other rights, such as inclusion in correctional facilities or secure accommodation, supervision by probation officers, prohibition to frequent some places, property confiscation or mental health treatment. A clearer international standard on the limits of liberty restriction or deprivation in case of violence committed by children below the MACR is highly recommended.

## Applicable measures

| **No measures** | **Out-of home placement** | **Restorative justice** | **Protective measures/ Supervision order** | **Liberty restrictive measures** | **Property confiscation** | **Probation** | **Correctional facility/ Secure accommodation** | **Counselling or warning** | **Anti-addiction/ mental health treatment** |
|---|---|---|---|---|---|---|---|---|---|
| Austria (if there is no risk) | Argentina | Argentina | Argentina | Canada (Prohibition to frequent some places) | Hungary | Japan | England and Wales (ordered by Family Court) | Liberia (counselling) | Luxembourg |
| Ecuador | Austria (if there is a risk and protective | Cyprus (mediation) | Austria (in case of risk) | Ukraine (restriction of leisure time and special | Ukraine | Latvia (social correctional program) | Japan (training school) | Luxembourg (anti-aggression counselling) | Malta |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | measures are not sufficient) | | | behavioral requirements) | | | | | |
| Puerto Rico | Bermuda | Mauritius | Bermuda | | | Mauritius | Luxembourg (educative measure) | Malaysia (counselling) | Poland (including placement in medical facility) |
| Ukraine (for children below 11 years old) | Bolivia (in case of lack of parents or relatives) | | Bolivia | | | Probation | Poland | North Macedonia (counselling both for the child and parents) | |
| | Brazil | | Brazil | | | Ukraine | Ukraine (for children between 11 and 14 years old) | Poland (warning) | |
| | Canada | | Chile | | | | | Romania (counselling) | |
| | Chile | | Congo (Rep.) | | | | | Sierra Leone (couselling) | |
| | Congo (Rep.) | | Croatia | | | | | Ukraine (warning) | |
| | Croatia | | Cyprus | | | | | | |
| | Cyprus | | Dominican Rep. (educational and resocialization measure) | | | | | | |
| | Dominican Rep. | | Ecuador | | | | | | |
| | England and Wales | | England and Wales | | | | | | |
| | Germany (according to family law) | | Germany (according to family law) | | | | | | |
| | Hungary (under child protectio rule)-family court | | Hungary (under child protection rule) | | | | | | |

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|---|---|---|---|---|---|---|---|---|---|
| | Isle of Man | | Isle of Man (in case of risk of significant harm to the child or that the child is beyond parental control) | | | | | | |
| | Japan | | Japan | | | | | | |
| | Liberia | | Luxembourg | | | | | | |
| | Luxembourg | | Malaysia | | | | | | |
| | Malaysia | | Malta (measures applied to the parents) | | | | | | |
| | Malta | | Mauritius | | | | | | |
| | Mauritius | | Mexico | | | | | | |
| | Mexico | | North Macedonia (psychological assistance and supervision of parents) | | | | | | |
| | North Macedonia | | Poland (both to the child and the family) | | | | | | |
| | Norway (placement considered deprivation of liberty by Supreme Court) | | Romania (family supervision) | | | | | | |
| | Poland | | Sierra Leone | | | | | | |
| | Puerto Rico | | South Africa | | | | | | |
| | Romania | | Spain | | | | | | |
| | Serbia | | Ukraine | | | | | | |
| | Sierra Leone | | Uruguay (for protective measures, | | | | | | |


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|---|---|---|---|---|---|---|---|---|---|
| | | | with no correlation with the offence) | | | | | | |
| | South Africa | | Zambia | | | | | | |
| | Spain (for protective reasons) | | | | | | | | |
| | Switzerland (for protective reasons) | | | | | | | | |
| | Ukraine | | | | | | | | |
| | Uruguay (for protective measures with no correlation with the offence) | | | | | | | | |
| | USA-California | | | | | | | | |
| | Zambia | | | | | | | | |

## 5. PROCEDURE

### 5.1. Who imposes such measures?

In a context where coercive measures might be imposed to the child, it is important to understand which authority is in charge of this decision-making process.

In the Australian legislative debate, it is highlighted as a key component in this stage of the secondary response to children under the MACR the determination of the nature of a decision-making body, which would review in detail the situation of a child referred to it and develop, through the input of advice and assessment from children's experts across different fields, a coordinated, individualized response plan for that child. In this context, this body could be judicial, quasi-judicial or administrative and both

advantages and disadvantages can be associated with each type of body, including the functions and powers that might be exercised by the body. Some of the structural and procedural aspects of the Youth Koori Court are recommended, such as a number of legal, cultural and social experts and supports are brought together with the judicial officer as chair; modification of the regular courtroom is modified; informal procedures with a minimum of hierarchy, in plain language and with all participants having the opportunity to speak; with the purpose being to identify the risk factors and issues associated with the child's circumstance and develop and monitor an 'Action and Support plan' for the child. It is also mentioned the New Zealand's Rangatahi court in Aotearoa New Zealand, in which the child takes an active role in developing the plan, which the court, again chaired by a judicial officer, monitors (LAW COUNCIL OF AUSTRALIA 2022)

The survey reveals some diversity in strategies, confirming the two main possibilities cited above, an administrative body, normally Child Protective or Welfare Services, and the Courts. There is also a preponderance of judicial intervention especially when involving more restrict intervention in the children's life, such as out of-home placement, or when the measures are not voluntarily accepted by the children and their families. Two exceptions are Norway, with a quasi-judicial body, and Luxembourg, where Prosecution detains some special powers.

Each national report has described the local procedures in a more detailed manner and with many differences among them. We present just the context of those procedures in order to allow an easy consultation by the reader.

| **Protection(administrative) services** | **Quasi-judicial body** | **Judiciary** | **Prosecution** |
|---|---|---|---|
| Argentina (with supervision of family courts) | Norway (child Welfare Tribunal, not part of ordinary court system) | Bermuda (Family Court with the assistance of Dept. of child and family services) | Luxembourg (in urgent cases, submitted afterwards to the Judiciary) |

| | | | |
|---|---|---|---|
| Austria (Youth Welfare Office, reviewed and approved by Family Court) | | Bolivia (Child and Adolescent Court) | |
| Brazil – child protective services (except out-of-home placement) | | Brazil (Child and Adolescent Court: subsidiarily for care orders; main authority for out-of-home placement) | |
| Canada (but judicial revision possible) | | Chile (family court) | |
| Cyprus (in case of protective measure within the family) | | Congo (Rep.) Children's court | |
| Ecuador (Junta cantonal de protección de derechos) | | Croatia (district court, Family department) | |
| Isle of Man | | Cyprus (in case of refusal by the family or out-of-home placement) – family court | |
| Latvia (municipal administrative commission or social services) | | Dominican Rep. (judge, for civil matters) | |
| Mauritius (probation officer) | | Ecuador | |
| North Macedonia (Center for Social Work) | | England and Wales (Family Court) | |
| Romania | | Germany (family court) with the involvement of welfare services | |
| Serbia (social services) | | Hungary (family court) | |
| Sierra Leone | | Isle of Man (if not voluntarily accepted by the child) | |
| Switzerland | | Japan | |
| Zambia (except placement) | | Latvia | |
| | | Liberia (out-of-home placement) | |
| | | Luxembourg (Youth Court) | |
| | | Malaysia (Court for children) | |
| | | Malta (Juvenile court, as civil court) | |
| | | Mexico | |
| | | Poland (family court) | |
| | | Puerto Rico | |
| | | Romania (in serious cases) | |
| | | Sierra Leone (family or children's courts) | |
| | | South Africa (children's court) | |
| | | Spain (family court) | |
| | | Ukraine | |



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| | | Uruguay (child protection court) | |
| | | USA-California | |
| | | Zambia (placement) | |

### 5.2. Main characteristics of the procedure

The decision-making process involves not only a clear definition of who are the authorities responsible for taking the appropriate measures for the child, but also which procedure should be observed.

De-judicialization is an important international standard regarding children below the MACR. However, the more restrictive the interventions become, the larger is the impact on children's rights and, by consequence, is the concern on how to control power abuse. In this context, a discussion whether or not the justice system should be involved takes place, because in a classical separation of powers' approach and, in observance to a fundamental civil right (article 2 (3) of the Covenant on Civil and Political Rights), all States should ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; and that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

This is clearly seen in our survey. The majority of the participants reported that the procedure is mainly judicial, especially regarding those measures that could entail rights restriction, both of the child and the family. This is particularly the case of out-of-home placement, but also other coercive measures.

In countries were there is a legislative debate on how to improve the system, such as Australia, there is an effort to delineate what could be some key components of this stage of the secondary response including:

• “Responses to children under the minimum age of criminal responsibility must not fall within the criminal jurisdiction of a court, even where these responses are diversionary;

• “Responses to children under the minimum age of criminal responsibility should not involve formal court proceedings.

• “Special-purpose forums that are child-centered, trauma informed and culturally safe should be created and used instead.

• “Proceedings should be conducted with as little hierarchy, formality and technicality as possible, while affording procedural fairness to the child.

• “Where this is to occur at a Children’s Court, the usual court proceedings and settings must be modified. For example, all participants in the process should sit at a round table.

• “In addition, these types of matters must be kept separate from the other business of the Children’s Court, particularly its criminal matters, in terms of divisions, timings and listings.

• “The decision-making body or panel should be chaired by a judicial officer, and include independent children’s experts in the legal, medical and social work fields, as well as the child and their support system, including their legal representative.

• “Where the child is Aboriginal or Torres Strait Islander, the decision-making body or panel must include Elders or other respected community leaders who are well-placed to advise on culturally safe responses. This practice can extend beyond Aboriginal or Torres Strait Islander children, involving other culturally appropriate panel members for such children.

• “The outcome of the proceedings is not a sentence or order, but rather the development of a response plan for the child, conceived in conversation between the child, their support system, and the independent children’s experts.

- "There should be recognition that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them.
- "The independent children's experts should assess the child and their circumstances, including any relevant information such as social and health assessments and reports, and make recommendations and referrals suited to them.
- "The response plan might include elements such as attending specific intervention programs, health and other services appointments, and agreeing to certain living arrangements, as well as engaging in restorative processes, such as meeting with victims. Day-to-day, a child's participation in the response plan should be facilitated through the support of a dedicated and specially trained caseworker and with wraparound services (LAW COUNCIL OF AUSTRALIA 2022, p. 12-15)

In this survey, the preponderance if of a judicial procedure, in Family or Child (Protection) Courts. However, there are some particularities to be highlighted, some of them worrisome, to be discussed when we will address the role of the Justice System.

The research confirms the understanding of the importance of a clear procedure, either administrative, by welfare services, or judicial, to allow the respect of due process, to grant transparency and the possibility for children and their families to challenge decisions.

| **Administrative procedure with judicial control** | **Administrative procedure** | **Judicial procedure** | **No clear procedure on the matter** |
|---|---|---|---|
| Argentina (out-of-home placement; administrative decision, followed by judicial control of legality within 72 hours and revision every 3 months) | Brazil (for care orders, not placement, except in emergency cases) | Bermuda (DCFS will prepare a report for determination by the Family Court whether the child should be placed on a Care Order | Dominican Rep. |

| | | | |
|---|---|---|---|
| | | or a Supervision Order or no order at all). | |
| Austria (under child welfare perspective) | Canada (if consensual) | Bolivia | |
| Isle of Man | Cyprus | Brazil (for out-of-home placement) | |
| Liberia | Ecuador (either administrative or judicial) | Canada (if not consensual) | |
| Norway (decisions taken by Child Welfare Tribunal, possibly reviewed by County Child Welfare Tribunal or appeal to ordinary court) | Mauritius | Chile | |
| Sierra Leone | North Macedonia | Congo (Rep.) | |
| Switzerland (in case of appeal) | Serbia (no clear procedure) | Croatia (Family Court) | |
| | | Cyprus (if the measures affect parental rights) | |
| | | Ecuador (either administrative or judicial) | |
| | | England and Wales (Family Court) | |
| | | Germany (family court) | |
| | | Hungary (family court) | |
| | | Japan | |
| | | Luxembourg | |
| | | Malaysia | |
| | | Malta | |
| | | Mexico | |
| | | Poland | |
| | | Puerto Rico | |
| | | Romania | |
| | | Sierra Leone (children's court) | |
| | | South Africa (children's court) | |
| | | Spain (Family court) | |
| | | Ukraine | |
| | | Uruguay (child protection court) | |
| | | USA-California | |
| | | Zambia | |

## 5.3. Possibility of alternative resolution mechanisms

Independently of the nature of the procedure, it is interesting to note that, in spite of the occasional possibility of coercive measures, the slight majority of countries allow, at least in principle, the adoption of alternative resolution mechanisms in this area. However, this possibility in some places is merely theoretical, not much implemented or adopted in practice.

Notwithstanding this limitation, the sole fact of the possibility of alternative resolution mechanisms, usually based in voluntariness and consent, is a positive data collected, showing efforts of States to improve the system.

| **Alternative resolution mechanisms available** | **Alternative resolution mechanisms not available or not allowed** | **Alternative resolution mechanisms available for youth, theoretically available** |
|---|---|---|
| Argentina | Austria | Bolivia (not in practice) |
| Bermuda (but parties are reluctant to participate) | Canada (just for youth over MACR) | Romania |
| Brazil (in schools, for instance) | Croatia | Spain (for protective measures) |
| Chile | Ecuador | |
| Congo (Rep.) | Isle of Man (but there are practices similar to mediation) | |
| Cyprus (restorative justice, mediation and community-based solutions) | Japan (but the child is encouraged to make restitution to the victim) | |
| Dominican Rep. | Luxembourg (but included in the law reform) | |
| Liberia | Mauritius | |
| Malaysia (although not formally codified) | Mexico | |
| Malta | Switzerland | |
| North Macedonia (in implementation) | Ukraine | |
| Norway (mediation-like process by the Child Welfare Tribunal) | | |
| Poland (mediation) | | |
| Serbia | | |
| Sierra Leone | | |
| South Africa | | |
| Uruguay | | |
| USA-California | | |
| Zambia | | |

## 6. ASSESSMENT

Special protection measures for children under the MACR should address the root causes of their behavior and support their parents/caregivers. “The measures should be tailored to the child’s needs and circumstances and based on a comprehensive and

interdisciplinary assessment of the child's familial, educational and social circumstances; social support system; motivation for her/his offending or problematic behavior; and particular characteristics and special needs". (UNICEF 2022, p. 13)

The majority of the countries assess the child's need, mainly by social services and with some prevalence of a psychological focus.

| **Interdisciplinary assessment** | **No assessment** | **Psychological assessment** | **Child welfare institutions consulted** |
|---|---|---|---|
| Argentina (with a plan of action) | Austria | Dominican Rep. | Brazil |
| Bermuda (contact with parents, relatives, teachers +psychiatric and psychological assessement) | Ecuador | | Germany |
| Bolivia | | | Ukraine |
| Canada | | | |
| Chile | | | |
| Congo (Rep.) | | | |
| Croatia (Community service center) | | | |
| Cyprus | | | |
| Isle of Man (by social worker) | | | |
| Japan (in family court) | | | |
| Liberia | | | |
| Luxembourg | | | |
| Malaysia (by social services) | | | |
| Malta | | | |
| Mauritius | | | |
| Mexico (requested by Public Ministery for Protection) | | | |
| North Macedonia | | | |
| Norway | | | |
| Poland | | | |
| Puerto Rico (in court) | | | |
| Romania (by social services) | | | |
| Serbia (social services) | | | |
| Sierra Leone (social services) | | | |
| South Africa (social services) | | | |
| Spain (in court) | | | |
| Switzerland (social services) | | | |
| Uruguay (both from social services and court team) | | | |
| USA-California (by child welfare agency) | | | |

| | | | |
|---|---|---|---|
| Zambia (social welfare) | | | |

## 7. LEGAL AND PROCEDURAL GUARANTEES

### 7.1. General remarks

The lack or limited legal guarantees for children below the MACR is pointed out in some cross-national studies as a major concern issue, especially in some countries where a structured judicial system is not in place in child welfare (ABRAMS, 2018). More than that, if children receive coercive measures, which could be considered as some form of punishment under another name, such as 'protective' intervention (BRINK & VALENTINE undated), the respect of legal guarantees is fundamental to tighten the conditions for any restriction of liberty in line with the child's best interests (CRIN undated).

The Committee of Social Rights has addressed the issue in the case *ICJ v. Czech Republic* in which a child under the age of 15, even not being held criminally responsible, can be placed, even for petty offences, in institutional care for 'protective treatment' before legal proceedings and without the procedural guarantees associated with standard criminal proceedings. The International Commission of Jurists (ICJ) and the Forum for Human Rights brought a collective complaint against the Czech Republic to the European Committee of Social Rights (the ESR Committee), which found a violation of Article 17 of the Charter due the failure to provide mandatory legal assistance to children below the MACR; and the failure to provide alternatives (diversion) to formal judicial proceedings for children below the MACR. Due to the relative immaturity of children below the MACR, they are not necessarily able to understand and follow pre-trial proceedings, neither to defend themselves. Legal assistance could enhance understanding of rights and procedures, to build a defense, or prevent a compelled testimony or admission of guilt (BRINK & VALENTINE undated)

Brink and Valentine have exposed the paradoxical situation at stake.

> "A likely explanation for the CRC Committee's lack of guidance on this issue is that children who cannot be held criminally responsible should not be subject to any pre-trial or trial proceedings. From this perspective, it could be argued that demanding and granting procedural criminal justice rights to children below the MACR – like the complainant and the ESR Committee do in the present case – ignores the fact that children should not be subject to any pre-trial and/or trial proceedings in the first place. However, it is also a reality that in many jurisdictions children below the MACR can be in contact with the justice system and be subject to (pre-)trial investigations and proceedings in response to allegedly committing an unlawful act, even though they cannot be held criminally liable. It is also a reality that in many jurisdictions procedures and interventions designed to respond to unlawful acts committed by children below the MACR are formally labelled as 'child protection' procedures and interventions. Yet, these can be equally intrusive as (and de facto very similar to) youth justice responses, but without the legal safeguards that are granted by, inter alia, Article 40 CRC. Such 'child protection' proceedings and interventions might be formally based on the child's needs and best interests, but are nevertheless very much informed by the alleged offence (or 'unlawful act') and might have serious implications for the child, including deprivation of liberty (by placement for 'protective treatment'). Subjecting children below the MACR to potentially lengthy and unspecified forms of deprivation of liberty or other intrusive interventions as a direct or indirect result of committing an offence (or 'unlawful act') without adequate legal safeguards, can mean that children below the MACR are de facto worse off than their older counterparts in the youth justice system." (BRINK & VALENTINE undated)

For this reason, the ESR Committee considered that, even though children below the MACR cannot be held criminally liable, they must be afforded adequate legal procedural protections if they are involved in pre-trial and trial proceedings as a result of allegedly committing an unlawful act and to ensure the social and economic protection of those children under Article 17 of the Charter. The importance of this decision, according to Brink and Valentine, it that the ESR Committee brings fair trial and personal liberty rights - traditionally categorized as 'civil and political rights' - into the realm of 'social and economic rights', because a failure to provide adequate legal procedural protections to children in youth justice proceedings is likely to have significant and wide-ranging implications both for the child's short-term circumstances as well as for their longer term mental, moral and social development, which thus impairs the child's right to social and economic protection (BRINK & VALENTINE undated).

However, according to the same authors, this decision also gives rise to debate. "From a principled standpoint, it could be argued that granting procedural youth justice rights to children below the MACR ignores that these children should not be subject to any pre-trial and/or trial(-like) proceedings in the first place. In doing so, the ESR Committee runs the risk of implicitly legitimizing such practices. The ESR Committee, however, seems to take a more pragmatic approach, based on the facts that were presented by the parties in this case, aimed at the improvement of the legal protections for children below the MACR who do get involved in pre-trial and trial proceedings. In doing so, the ESR Committee's considerations implicitly address concerns regarding a high MACR, expressed by children's rights scholars in response to General Comment No. 24, namely that large groups of children might end up in alternative systems and proceedings that are formally labelled as 'child protection' but are equally intrusive as the youth justice proceedings, but in which children are no longer protected by the procedural safeguards of Article 40 CRC, including fundamental fair trial rights." (BRINK & VALENTINE undated).

This paradox and lack of clear guidance is affecting many jurisdictions. In Argentina, the Children's Defenders' Office has filed three collective habeas corpus to release 227 children below the minimum age of criminal responsibility who were detained in facilities (ARGENTINA 2024)

The Inter-American Commission on Human Rights has expressed concern by the fact that although the States in the region have set a minimum age of criminal responsibility under the juvenile criminal justice system,

> "a number of member States still have laws, policies and practices that enable them to incarcerate children under the minimum age at which they can be held criminally responsible. In Argentina, for example, although Decree-Law 22,278 provides that a child or adolescent under the age of 16 cannot be held criminally responsible, the Commission observes that some children and adolescents under 16 years of age are deprived of their liberty for the sake of their "protection" based on the fact that Article 1 of that law states that 'if the studies show that the minor has been abandoned, is indigent, is in material or moral danger, or has behavioral problems, the judge shall decide the matter once and for all, in a reasoned judgment and after a hearing with the parents or guardian.'". Provisions like Article 1 above are used in a number of member States as a means to detain children who have not yet reached the legal minimum age of criminal responsibility, on the pretext of "protecting them", without even affording them the guarantees of due process of law. The Commission recognizes that while special measures may occasionally be needed to protect the best interests of the child, this does not mean that a child should be held criminally responsible or deprived of liberty before the child has reached the minimum age of criminal responsibility by invoking the need to "protect" the child. This is also the position of the Committee on the Rights of the Child. Even when intended to serve the best interests of the child,

such special measures must be the exception, be explicitly regulated by law, and be appropriate, necessary and proportionate; otherwise they may be deemed arbitrary or discriminatory". (CIDH 2011)

In this survey, it is not clear if the rights mentioned in each report are just an exemplification or a full list. As mentioned at the beginning, there are some very detailed reports while others provide succinct responses, which allows us to make a recommendation to read this list carefully, just as the most emphasized rights by the participants.

However, some aspects can be highlighted.

Most of the countries have referred to classic and generic due process's rights, such as the right to be heard, the right to legal assistance and the right to appeal, followed by those who allude to rights related to the preservation of family life and personal integrity or safety. In general, almost all countries called attention to the observation of the child's best interest. As a contrast, one country pointed out the lack of clear regulation and some others referred to rights most related to youth court, as the right to remain in silence.

| **No clear regulation** | **All civil rights** | **Right to be heard** | **Right to legal assistance** | **Right to parental assistance or guardian** | **Right to appeal** | **Right to personal integrity/ safety/ privacy/ confidenciality** | **Right to gratuity** | **Right to proportionality** | **Right to motivated decisions** | **Right to remain in the family** | **Right to remain in silence/ Right not to testify against himself** |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Serbia | Spain | Argentina | Argentina | Bermuda | Argentina | Bolivia | Brazil | Brazil | Brazil | Brazil | Japan |
| | Uruguay | Bermuda | Austria | Brazil | Austria | Brazil | | | Uruguay | Chile | Ukraine |

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Zambia | Bolivia | Bermuda | Chile | Bermuda | Chile | | | | Luxembourg | |
| | | Brazil | Bolivia | Croatia | Bolivia | Cyprus | | | | Malaysia | |
| | | Canada | Brazil (but rare in practice for care orders) | Luxembourg | Brazil | Liberia | | | | Sierra Leone | |
| | | Chile | Canada | Malta | Canada | Malaysia | | | | South Africa | |
| | | Congo (Rep.) | Chile | Mauritius | Chile | Romania | | | | | |
| | | Croatia | Congo (Rep.) | North Macedonia | Congo (Rep.) | Sierra Leone | | | | | |
| | | Cyprus | Croatia | Norway | Croatia | South Africa | | | | | |
| | | Dominican Rep. | Cyprus | Uruguay | Dominican Rep. | Ukraine | | | | | |
| | | Ecuador | Ecuador (facultative. In practice, no legal assistance) | Zambia | Germany | | | | | | |
| | | Germany | Hungary | | Hungary | | | | | | |
| | | Hungary | Isle of Man | | Japan | | | | | | |
| | | Japan | Japan | | Luxembourg | | | | | | |
| | | Liberia | Liberia | | Malta | | | | | | |
| | | Luxembourg | Luxembourg | | Mexico | | | | | | |
| | | Malaysia | Malaysia | | North Macedonia (within the Center for Social Work, not to court) | | | | | | |
| | | Malta | Malta | | Norway (both review by the County Child | | | | | | |



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|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | Welfare Tribunal and appeal to ordinary court) | | | | | | |
| | | Mexico | Mexico | | Poland | | | | | | |
| | | North Macedonia | North Macedonia (in more serious cases) | | Puerto Rico | | | | | | |
| | | Norway | Norway | | Romania | | | | | | |
| | | Poland | Poland | | Sierra Leone | | | | | | |
| | | Puerto Rico | Puerto Rico | | South Africa | | | | | | |
| | | Romania | Romania | | Uruguay | | | | | | |
| | | Sierra Leone | Sierra Leone | | Zambia | | | | | | |
| | | South Africa | South Africa | | | | | | | | |
| | | Switzerland | Switzerland | | | | | | | | |
| | | Ukraine | Ukraine | | | | | | | | |
| | | Uruguay | Uruguay | | | | | | | | |
| | | Zambia | USA-California | | | | | | | | |
| | | | Zambia | | | | | | | | |

## 7.2. Voluntariness, coerciveness and legal consequences of non-compliance

A child below the minimum age of criminal responsibility is presumed not to have the capacity to infringe the penal law (UNITED NATIONS 2007). Therefore, children at this age should to be held responsible in criminal law proceedings, due to evidence based knowledge that they face an unique defining stage of human development characterized by rapid brain development, affecting risk-taking, certain kinds of decision-making and

the ability to control impulses. Thus, they are unlikely considered to be able to understand the impact of their actions or to comprehend criminal proceedings (UNITED NATIONS 2019).

Children below the MACR synthetize one of the challenging issues in contemporary social control regarding, on the one hand, the limited responsibility attributable to them and, on the other hand, the nature of social mechanisms to control them.

We have already pointed out the two contrasting terms used by the Committee: measures or assistance, one involving some kind of external interference or intervention, the other some support for a personal project.

The same ambiguity is seen both in the emphasis on de-judicialization, but also in the need to ensure protection to intrusive interventions that might restrict civil rights and liberties.

This polarization could be expressed on the tension between voluntariness or the legitimated limits or possibilities of coercive intervention in case of risk or damages to others.

Social control are both the processes to induce conformity in society and those repressive strategies to deviance. Both are interwoven and regard a large spectrum of strategies, from primary and secondary socialization distinguishing what is acceptable, good and allowed to be done and what is forbidden, bad and should not be accomplished. The ways the disorder is controlled is an important sign to differentiate the order's edges and limits (PITCH 2014, p. 112).

The border between considering social control as a generative process, related to the complex processes of interaction to produce consciousness, personality and identity that should be improved, and a coercive, when not repressive, intervention to reinforce and substitute the agencies of primary socialization (especially the parents and regular schools) shows how delicate is the transition between terms such as regulation, conformity, consensus and coercion (PITCH 1995). It involves a deeper discussion on the

nature of an educative intervention, and the acceptability of coercive education in such lower ages, and, by extension, the tension between individual and society, human nature and culture. Pertains the problem to social causes that should be addressed in the living contexts of the children, providing social rights to improve their life conditions, or should the focus remain on the individual (both the child and the family), with interventions to restrain disorder?

If children below the MACR are considered socially dangerous, and not deprived of adequate living and rearing conditions, incapacitation is favored in detriment to empowering strategies. Pitch suggests to avoid a dualistic approach and to take into account the continual interchange between the criminal justice system and welfare and social services in their reciprocal referral, using the metaphor of a circuit between agencies. Familial neglect, in this context, should be considered as the indication of a system failure of the welfare policy as much as a resistance to institutional interventions. It expresses both the inadequacy of the system and the non-manageability of the problem, presented both as a social disturbance and social dangerousness (PITCH 1995).

This debate is very evident in terms of the limits of voluntariness of the measures or assistance and the possibility for the child to refuse or to resist such interventions, on how much such initiatives are focused on the child as an individual, in familial neglect with an impact in out-of-home placement, broader social approaches to overcome social inequalities and injustices that could play a role in the child's behavior or incapacitation measures to avoid further risks to social order. The accent on a more protective and empowering or on a controlling strategy can be differentiate on how the child can interact with these interventions.

In our survey, the nature of the intervention seems very blurry. There are countries where interventions are proposed and nothing can be done if the child does not cooperate, others where there is an emphasis on searching for consensus because the measure should be educational, and others where an imposition is more evident, even if there is a possibility of challenging the decision in court. However, the range of difference is broad,

including some particularities such as limited right to refuse the measures. A certain difficulty to characterize such variety would recommend a more detailed in loco investigation, observing how each system proceeds and what are the real possibilities for the child to respond to such interventions.

| **Right to refuse** | **No right to refuse** |
|---|---|
| Argentina (right to propose an alternative measure) | Bermuda |
| Austria (no method to force the child to cooperate) | Chile |
| Bolivia | Hungary |
| Brazil (measures should be applied by consensus, should be educational. Otherwise, can be subjected to judicial review) | Luxembourg (imposed by the judge) |
| Canada (but the subject is sent to court) | Malaysia |
| Congo (Rep.) | Mauritius (measures not imposed) |
| Croatia | North Macedonia (although consent is searched and the child has the right to appeal) |
| Cyprus (may challenge the decision if not consensual) | Norway (imposed by decision subjected to appeal. Placement considered deprivation of liberty, although not locked) |
| Dominican Rep. | Poland (compulsory measure, but the child has the right to appeal) |
| Ecuador (rare in practice) | Ukraine (but the child has the right to appeal) |
| Germany (the will of the child is relevant, according to a protective paradigm) | Zambia (child heard, but judicial measures should be complied) |
| Isle of Man (and challenge them in court) | |
| Liberia | |
| Malta (right to challenge the decision) | |
| Mexico | |
| Puerto Rico | |
| Romania (challenge them in court) | |
| Sierra Leone (right to challenge, but imposed mandatorily) | |
| Spain | |
| Switzerland (possibility to challenge the measure through appeal) | |
| Uruguay (possibility to challenge the measures) | |
| USA-California (challenging decisions in court) | |

## 7.3. Non-compliance and its impact on children

We have seen that the literature suggests an emphasis on behaviorist intervention models when defining the measures to be applied. In criminological thinking, Pitch

understands that this accent indicates the shift from the centrality of the mind to the centrality of the body and bring together other dichotomies such as rehabilitation and punishment, criminal justice and social welfare, civil liberties and social rights (PITCH 1995).

The centrality of the body used to induce to ideas of uncontrollability and dangerousness (PITCH 1995), of vulnerability understood as deprivation of rights and the vulnerable person in need of protection, dissociating the term of any kind of resistance (BUTLER 2016b).

In our survey, when confronted with the question about what would happen to a child in case of non-compliance, the participants present a predominant trend of plan adjustments. It is an important sign of emphasis on consensus, in an educative and dialogical approach.

However, many countries have also referred to more insistent control mechanisms, such as obligations and sanctions imposed to the parents, referral to court for compulsory measures and enforced implementations, warning, stricter supervision and placement, also in secure accommodation. Only eight out of thirty-eight mentioned that no sanction would be imposed and in one of the countries, due to its federal composition, a multiple reality is in place, according to the Inter-American Commission on Human Rights.

| **No legal sanctions** | **Plan adjustments** | **Parents obliged to comply** | **Referral to court by child protection services** | **Secure accommodation/ placement** | **Warning** | **Stricter protection/supervision** | **Enforced judicial implementation** |
|---|---|---|---|---|---|---|---|
| Argentina | Argentina | Bermuda | Brazil (children and adolescent courts) | Isle of Man (in case of child beyond parental control) | Japan | Romania | Spain |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Austria | Bermuda | Brazil | Cyprus (family court) | Japan (training school with correction purposes) | Liberia | Sierra Leone | |
| Dominican Rep. | Bolivia | Hungary | | North Macedonia (placement in a small group home) | Ukraine | | |
| Ecuador | Brazil | Malta | | Norway (placement considered deprivation of liberty by Supreme Court, police may use force to transport the child to the facility) | | | |
| Germany | Congo (Rep.) | | | Ukraine (for children over 11 years old) | | | |
| Mauritius | Croatia | | | | | | |
| Mexico | Cyprus | | | | | | |
| Puerto Rico | Isle of Man (the child can apply for variation/cancelation of the order) | | | | | | |
| Ukraine (for children below 11 years old) | Liberia | | | | | | |
| | Luxembourg | | | | | | |
| | Malaysia | | | | | | |
| | North Macedonia | | | | | | |
| | Poland | | | | | | |
| | Romania | | | | | | |
| | Sierra Leone | | | | | | |
| | Ukraine | | | | | | |
| | Uruguay | | | | | | |
| | USA-California (by the court) | | | | | | |
| | Zambia | | | | | | |



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## 8. THE ROLE OF THE JUSTICE SYSTEM

### 8.1. The occurrence and nature of judicial intervention and of its jurisdiction

The paradoxical dilemma faced by the Committee on Social Rights when granting legal and procedural guarantees to children below the MACR, even if they were supposed not to be involved with the justice system at all, respond to a situation where, worldwide, children are faced with intrusive interventions, both by administrative, quasi-judicial or judicial bodies, and limits to power should be in place.

This situation is even more paradoxical when it is largely acknowledged that the educative function of (youth) courts supposes a failure in parental guidance, limiting its intervention to repairing non-fulfilment and individual responsibility and sliding from the consideration of the act to the author. For this reason, education, in these terms, should not be a state task, at least not of a youth court, because it would entail the dismantling of a rights-based perspective (ALBRECHT 1992). Therefore, the challenge should be on how to control and reduce state intervention, as much as possible, based on legal and procedural guarantees, legal security (CILLERO 2001), overcoming an allegedly protective measures that some consider as an antiliberal idea of offence as pathology and of sanction as treatment (FERRAJOLI 1995).

If there has been a shift from a needs to a rights-based approach (MENDEZ 1994) and if protection has increasingly been considered as the minimum social conditions provided by law, as rights, to have interdependent relations in a society of equals (CASTEL 2003), there should be more distinguishing criteria on what should be assistance and services to children according to their needs, dissociated from the act of the offence itself (UNITED NATIONS 2019), from what has been in the past (?) an authored focused intervention in youth courts, named as protective measures.

The studies on the role of the justice system in this area show a variety of approach.

We have already pointed out the Australian legislative debate, in which it is discussed the advantages or disadvantages of a judicial, quasi-judicial or administrative body to prepare a coordinated, individualized response plan for that child (LAW COUNCIL OF AUSTRALIA 2022).

In Argentina, where the MACR is (was) one of the highest in the world, sixteen years old, and, according to the Inter-American Commission on Human Rights, many irregularities could be seen regarding the measures applied to these children, there is a variety of approaches due to the federal composition of the country. On the one hand, there is a disbelief on the capacities of administrative bodies to deal with such situations. In an interesting research made in Argentina, Guemureman shows that judges, acknowledging the inefficacy of administrative child protection intervention, try to intervene in order to avoid the void of response to these cases. In this situation, they either impose protection measures or consider that, even with a dismissal decision, the penal procedure would have an impact in the child, determining whether the offence has really occurred or not, if the author was or not a child below the MACR, always ensuring the respect of legal guarantees as an expression to the right to truth (GUEMUREMAN 2024).

In Entre Rios Province, the debate takes another figure, affirming that penal procedure would be a right of children below the MACR who are accused of having committed an offence, with all legal guarantees, in order to determine if an offence was really committed and by whom and in which circumstances. For Barbirotto and Sarmiento, only after having determined these aspects is it possible to dismiss the case because of a lack of responsibility. Invoking Thomas Hammarberg viewpoint, that we should separate the concepts of accountability and criminalization, there is an attempt to conceive a judicial procedure in this context as different from traditional youth court, although focused in the offence itself, which affront General Comment 24's perspective, of not considering the child as a person who has committed an offence. Even IF the penal

procedure is considered exception, due to the possible negative impact it may cause to children, especially in less severe cases, in those more severe, and for youth between 14 and 15 years old (MACR in Argentina is 16), they believe that there should be a procedure, with the possibility of coercive participation of the youth, in order to establish the truth, respecting the right to defense and to grant the victim's rights. This proposal is argued based on what is considered of psychologically important, both for the victim, to understand what has happened, and for the alleged offender, to restitute symbolically the deterrent effect of prohibition. (BARBIROTTO & SARMIENTO, 2018). In Argentina, as well, Kierszenbaum also understands that penal procedure is important to deter public reaction against the offences committed by children under the MACR with the same twofold functions: establish the truth and reaffirm the moral rejection of the act, both for the victim and the alleged offender. (KIERSZENBAUM 2017).

This trend is an important example of the consequences of a void in terms of legal regulation. More than that, it shows a new challenge to balance the rights of the child with those of the victims. It could be considered as a manifestation of what Pitch considers a slid in contemporary criminology from social policy to social security, from the attention to the criminal offender to the victim, therefore from the individual (the author) to the population, from deviance and control to risk the population is exposed to by criminality, in a nutshell, from the causes of the act to its consequences (PITCH 2014).

With this context in mind, and in order to really displace the focus from the offence to a rights-based approach, there should be an emphasis on what kind of rights a child who commits an offence might be suffering, what rights could she or he be trying to achieve through its inadequate behavior, and what could be a state, and judicial response, to this situation. The justice system can assume another role, in child protection cases, based both in legal guarantees to allow its intervention, but also in a constructive and dialogical procedure (MELO 2025).

The incidence of interventions in the body of the child to compel them to a behavior changing should be correlated to the contemporary efforts to liberate the body

of being reduced to social modelling (BUTLER 2016) and to discuss the impact of this liberation in the debate on social control (PITCH 2014). Feminist theories suggest that this body liberation should encompass the acknowledgment of new forms of resistance, of social claims, on how rights and equality can also be claimed by a corporal performative language (BUTLER 2015). In many circumstances claims for justice could involve not only rational verbal expressions, but apparently disruptive expressions through corporal enactments, which would involve a discussion on the role of justice in being able to expand its ways to frame or reframe such expressions and to deal with them with more empowering approaches (MELO 2021).

Unicef acknowledges that "child protection systems overlap with justice systems, and access to justice is key to establishing strong child protection systems that can prevent and respond to neglect, abuse, exploitation, violence and family separation. Many children still face enormous obstacles, including disabling cultural norms and attitudes, and a lack of knowledge among families and communities regarding their rights to protection and the availability of resources and one of the major challenges is to recognize that the state is the primary duty-bearer for the realization of children's rights (UNICEF 2021), but also sometimes the primary violator of their rights. Some countries such as Brazil have incorporated in their law the recognition that, in case of rights violation, the primary duty-bearer is the State, in joint and several liability with the family, creating procedures for individual and/or collective actions against the State to implement or to improve public policies in case of lack or insufficiency.

The world report on violence against children has already emphasized that

> "Violence in the home and the pressures of chronic poverty, coupled with a lack of adequate care and protection systems, result in many children coming into conflict with the law. Research conducted in Peru found that family violence and child mistreatment were the precipitating factors in 73% of cases of children migrating to the streets. Once there, many children engage in risky survival behaviors that bring them into contact

with the law, including begging, loitering, scavenging, petty thieving or prostitution. Hence the frequent association between petty crime and the desperate need of care. In a study of young offenders in three districts of Uganda, 70% of children said that meeting their own needs, including those for food, was their main motivation for stealing" (PINHEIRO 2006, p. 193)

For such a systematic change, there should be included (i) law and policy reforms; (ii) the capacity-building of justice systems to serve and protect children across criminal, civil and administrative law (including migration law); (iii) promoting restorative justice approaches and supporting the use of diversion and non-custodial measures; (iv) legal empowerment for children; and (v) improving support for child victims/survivors and witnesses of crime) (UNICEF 2021).

Our research shows that imposition of protective orders, such as care and supervision, but also out-of-home placement orders are the most mentioned role for the justice system in this matter. There is also a supervisory role in case of prominence of an administrative body, making the first-response decisions. In a lesser incidence, there are cases of more restrictive interventions, especially when involving placement in correctional facilities or restriction measures for medical reasons. A minority of countries do not have the justice system involved in this matter.

Interestingly, although there has been some discomfort from family judges to take part in the research, for not identifying themselves with the subject, a large majority of the responses explained that jurisdiction for such kind of measures is either of child protection/child courts or family courts, thus with a civil approach.

| **Protective measures (care or supervision order)** | **Out-of-home placements orders** | **Drug treatment** | **Supervision and approval of administrative decisions** | **Freedom-restriction measures** | **Training/correctional facility** | **No involvement of the justice system** |
|---|---|---|---|---|---|---|

| | | | | | | |
|---|---|---|---|---|---|---|
| Bermuda (supervision order, Family court) | Argentina (family courts, subsidiary to previous administrative intervention) | Argentina (family courts) | Argentina (family courts, subsidiary to previous administrative intervention) | Austria (for medical reasons) | Japan (family court) | Mauritius |
| Bolivia (Child and Adolescent Courts) | Bermuda (Family court) | Brazil (Child and Adolescent Courts) | Austria (family courts, in case of out-of-home placement) | Brazil (Child and Adolescent Courts) for medical reasons | Poland | North Macedonia |
| Brazil (subsidiarily) | Bolivia (Child and Adolescent Courts) | Canada (subsidiarily, in case of lack of consensus) | Isle of Man (application by the state, the parents or the child to make, vary or revoke an order) | Ukraine (for educational purposes) | Ukraine | Serbia (just police and social services) |
| Canada (subsidiarily, in case of lack of consensus) | Brazil (Child and Adolescent Courts) | | Poland | | | |
| Chile (family court) | Canada (subsidiarily, in case of lack of consensus) | | | | | |
| Congo (Rep.) (Children's courts/juge des enfants) | Chile (family court) | | | | | |
| Croatia (family court) | Congo (Rep.) | | | | | |
| Dominican Rep. (civil children's court) | Croatia family court) | | | | | |
| Ecuador (court can both impose the measures or just review those imposed by | Cyprus | | | | | |


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| | | | | | | |
|---|---|---|---|---|---|---|
| administrative body) | | | | | | |
| Germany (family court) | Germany (family court) | | | | | |
| Japan (family court) | Hungary (family courts) | | | | | |
| Liberia (in case of resistance or fail to comply | Japan (family court) | | | | | |
| Luxembourg | Luxembourg | | | | | |
| Malaysia | Malta (Juvenile court, civil section) | | | | | |
| Malta (Juvenile court) | Mexico (Family court) | | | | | |
| Mexico (Family Court) | Norway | | | | | |
| Romania (family court) | Poland (family Court) | | | | | |
| Sierra Leone (family or child protection courts) | Romania (family court) | | | | | |
| South Africa (children's court) | Sierra Leone (family or child protection courts) | | | | | |
| Spain (family court) | South Africa (children's court) | | | | | |
| Switzerland (applied by social services, possibility to appeal to court) | Spain (family court) | | | | | |
| Uruguay (family courts) | Ukraine | | | | | |
| USA-California (juvenile court) | Uruguay | | | | | |
| Zambia (juvenile or | USA-California (juvenile court) | | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| children's court) | | | | | | |
| | Zambia (juvenile or children's court) | | | | | |

## 8.2. Legal and procedural guarantees within the justice system

Much of what has been said above regarding legal and procedural guarantees can be repeated here.

In this survey, once again, it is not clear if the rights mentioned in each report are just an exemplification or a full list. As mentioned at the beginning, there are some very detailed reports while others provide succinct responses, which allows us to make a recommendation to read this list carefully, just as the most emphasized rights by the participants.

However, some aspects can be highlighted.

Most of the countries have referred to classic and generic due process's rights, such as the right to be heard, the right to legal assistance and the right to appeal, followed by those who allude to rights related to a child-focused approach, both related to environment itself of judicial settings and to aspects of communication and interaction with the child. In general, almost all countries called attention to the observation of the child's best interest. As a contrast, three countries pointed out the lack of involvement of the justice system at all and another three a right most related to youth court, the right to remain in silence.

| **Right to be heard** | **Right to legal assistance** | **Right to personal integrity confidentiality** | **Right to appeal** | **Right to a child-sensitive environment** | **Right to a guardian ad-litem** | **Right to remain in silence** | **Non applicable** |
|---|---|---|---|---|---|---|---|

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Argentina (within 48 hours after administrative measure) | Argentina | Bolivia | Argentina | Cyprus | Isle of Man | Japan | Mauritius (no involvement of the justice system) |
| Austria (informal proceeding) | Bermuda | Chile (family court) | Bermuda | Luxembourg | Romania | Poland | North Macedonia (no involvement of the justice system) |
| Bermuda (legal procedure-Family Court) | Bolivia (Child and Adolescent Courts) | Congo (Rep.) children's courts | Bolivia (Child and Adolescent Courts) | Malaysia | | Ukraine (children above 11 years old) | Serbia |
| Bolivia (Child and Adolescent Courts) | Brazil (Child and Adolescent Courts) | Malaysia | Brazil (Child and Adolescent Courts) | Poland | | | |
| Brazil (Child and Adolescent Courts) | Canada (youth chamber) | Ukraine (children above 11 years old) | Chile (family court) | | | | |
| Canada (youth chamber) | Chile (family court) | | Croatia | | | | |
| Chile (family court) | Congo (Rep.) children's courts | | Cyprus | | | | |
| Congo (Rep.) children's courts | Croatia | | Dominican Rep. | | | | |
| Croatia | Cyprus | | Ecuador | | | | |
| Cyprus | Dominican Rep. (facultative) | | Germany | | | | |
| Dominican Rep. | Ecuador | | Hungary | | | | |
| Ecuador | Germany | | Isle of Man | | | | |
| Germany | Isle of Man | | Japan | | | | |
| Hungary | Japan | | Liberia | | | | |
| Isle of Man | Liberia | | Luxembourg | | | | |
| Japan | Luxembourg | | Malaysia | | | | |
| Liberia | Malaysia | | Malta | | | | |
| Luxembourg | Malta | | Mexico | | | | |
| Malaysia | Mexico | | Norway | | | | |
| Malta | Norway | | Poland | | | | |
| Mexico | Poland | | Puerto Rico | | | | |
| Norway | Puerto Rico | | Romania | | | | |
| Poland | Romania | | Sierra Leone | | | | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Puerto Rico | Sierra Leone | | Spain | | | | |
| Romania | Spain | | Switzerland | | | | |
| Sierra Leone | Switzerland | | Ukraine | | | | |
| Spain | Ukraine (children above 11 years old) | | Uruguay (child protection court) | | | | |
| Ukraine (children above 11 years old) | Uruguay (family court) | | | | | | |
| Uruguay (family court) | Zambia (juvenile or children's court) | | | | | | |
| Zambia (juvenile or children's court) | | | | | | | |

## 9. ASSISTANCE OR SUPPORT

The Committee on the Rights of the Child, in its two general comments on children's rights in the child justice system, has adopted two different terms when addressing the possibilities of responses to an offence committed by a child below the MACR: special measures in General Comment n. 10 (UNITED NATIONS 2007) and assistance and services in General Comment n. 24 (UNITED NATIONS 2019).

We have already mentioned above that these terms can imply, in a lexical interpretation, that while measure focus on the person or body who intervenes in a situation, assistance displaces the focus of emphasis to the person who is supported. In a measure, the child could be considered more passive, while, when assisted, the nature and the extension of the support should correspond to the interests and needs of the child.

The research has tried to address both possibilities, first addressing the measures, following the initial idea, and then focusing on assistance.

Without further guidance whether assistance should effectively be considered with a voluntarily basis, in the Committee's reading, the questionnaire has focused on this nature of the support.

We have already seen above the predominance of measures in comparison to assistance. States are more interventive than supportive, this could be concluded from the previous responses.

Most of the countries, however, confirmed that many other public policies were available to children and their families.

Regarding the nature of such assistance, once again, it is not clear if the services mentioned in each report are just an exemplification or a full list. As mentioned at the beginning, there are some very detailed reports while others provide succinct responses, which allows us to make a recommendation to read this list carefully, just as the most emphasized services by the participants. This limitation explains a generic reference to protective services, without specifying its nature and characteristics.

However, some aspects can be highlighted based on what has been more emphasized, probably denoting the weight of some aspects. In this sense, it is interesting to see much more insistence on mentioning family support programs than child counseling, therefore a prevalence on the rearing context rather than in the individual. However, this conclusion could be also complemented, when not reframed, when we take into consideration the intensity of allusions to medical and mental health treatment, showing a more individual and therapeutic approach. Those conclusions are not contradictory nor mutual excluding and can reflect specific aspects of different cases.

It is also worth-mentioning two different minority approaches. Some countries referred to financial assistance, emphasizing the responsibility of the State to address social inequalities that could cause this situation. some others have referred to mediation, which brings attention to the victim´s needs.

| Family support | Educational support | Medical treatment | Mental health treatment | Financial assistance | Mediation | Child counseling | Protective services provided by welfare services |
|---|---|---|---|---|---|---|---|
| Argentina | Argentina | Argentina | Argentina | Argentina | Cyprus | Cyprus | Austria |
| Brazil | Brazil | Brazil | Brazil | Brazil | Romania | Japan (educational guidance on acts considered criminal) | Bermuda (free of charge) |
| Canada | Canada | Canada | Canada | Canada | | Malaysia | Germany (generic response) |
| Chile | Chile | Chile | Chile | Chile | | Mauritius | Hungary |
| Croatia | Croatia | Congo (Rep.) | Congo (Rep.) | Malaysia | | Romania | Isle of Man |
| Cyprus | Cyprus | Germany | Croatia | | | Sierra Leone | Japan |
| Liberia | Malaysia | Japan | Isle of Man | | | Zambia | Luxembourg |
| Malaysia | North Macedonia | Liberia | Japan | | | | Norway on voluntary basis) |
| Malta | Zambia | Malaysia | Liberia | | | | Puerto Rico |
| Mauritius | | Malta | Malaysia | | | | Serbia |
| North Macedonia | | Romania | Malta | | | | South Africa |
| Poland | | Zambia | North Macedonia | | | | Spain |
| Romania | | | Romania | | | | Switzerland |
| Sierra Leone | | | Sierra Leone | | | | Ukraine |
| South Africa | | | Ukraine | | | | Uruguay |
| | | | Zambia | | | | USA-California |
| | | | | | | | Zambia |

## 10. CHILD PARTICIPATION

The Committee's General Comment n. 12 on the right of the child to be heard states that "article 12 is a unique provision in a human rights treaty, because it addresses the legal and social status of children, as subjects of rights in spite of not completely autonomous. It assures to every child capable of forming his or her own views, the right

to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity in any judicial or administrative proceedings affecting him or her. As a fundamental value of the Convention, the right to be heard is considered as one of the four general principles of the Convention, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights (UNITED NATIONS 2009).

Interestingly, the Committee does not address the situation of children below the MACR in this General Comment, neither mentioning if this kind of situation is (or should be) normally dealt by the courts (and in which jurisdiction) nor by administrative bodies, although other examples have been referred. However, the Committee did allude to "inclusion of children in protective measures requiring information about their right to be heard and to grow up free from all forms of physical and psychological violence". (UNITED NATIONS 2009, para. 120)

In this survey, AIMJF was interested in knowing not only if the child is heard, which was already mentioned in previous parts of the research as a basic right, but also by whom, which institution and what kind of professional.

The majority of the participants mentioned the Court, the judge himself, or an interdisciplinary team, and, in an equivalent manner, experts, guardian ad litem or child advocate, and welfare services.

| **Interdisciplinary team** | **Court** | **Expert** | **Litigation guardian/guardian ad litem/child advocate** | **Welfare services Or Child protection services** | **No clear regulation** |
|---|---|---|---|---|---|
| Argentina (in person) | Austria | Austria | Bermuda | Brazil (Protective services/ Guardianship Council) | Serbia |
| Croatia | Bolivia (the judge with the support of a psychologist) | Croatia | Canada | Cyprus | |

| | | | | | |
|---|---|---|---|---|---|
| Luxembourg | Brazil (Child and Adolescent Courts – the judge or interdisciplinary team) | Dominican Rep. (psychologist at prosecution office) | Cyprus | Latvia | |
| Malaysia | Chile (by the judge, family court) | Hungary (expert psychologist) | Isle of Man | Mauritius (probation officer) | |
| Mexico | Congo (Rep.) Children's courts | | Malta | North Macedonia | |
| Romania | Cyprus (by the judge or guardian) | | | | |
| Sierra Leone | Ecuador (the judge) | | | | |
| South Africa | Hungary (judge) | | | | |
| Switzerland | Japan | | | | |
| Ukraine (Barnahus in implementation phase) | Liberia | | | | |
| Uruguay (up to the child to decide the way to be heard) | Luxembourg | | | | |
| | Malaysia | | | | |
| | Malta | | | | |
| | Norway | | | | |
| | Poland | | | | |
| | Romania (by the judge) | | | | |
| | Sierra Leone | | | | |
| | South Africa (presiding officer) | | | | |
| | Spain | | | | |
| | Ukraine | | | | |
| | Uruguay (up to the child the way to be heard) | | | | |
| | USA-California | | | | |
| | Zambia | | | | |

The Committee also highlights that, for an effective and meaningful participation, it needs to be understood as a process, not as an individual one-off event. Among other

aspects, it also should be relevant, child-friendly, safe and sensitive to risk, respectful, supported by training.

Two further aspects were considered in this research to have an insight on how participation is handled. On the one hand the frequency, if limited or not, and the criteria to be observed.

Those countries who have referred to one time usually were based on a child victims' perspective to avoid revictimization by multiple incidences of this interaction.

The countries who mentioned more than one time have taken into consideration the bodies or services who intervene in this kind of situation, all of them interacting and hearing the child.

Finally, the majority brought a wider perspective on the right of the child to be heard whenever it is relevant and desired by the child.

| **1 time** | **2 times** | **3 times** | **4 times** | **As much as the child wants or need to be heard** |
|---|---|---|---|---|
| Austria | Ecuador (before formal decision and during supervision | North Macedonia | South Africa | Argentina |
| Bermuda | Liberia | | | Chile |
| Bolivia | Ukraine (if necessary the second one) | | | Congo (Rep.) |
| Brazil | | | | Cyprus |
| Canada | | | | Dominican Rep. |
| Croatia | | | | Isle of Man |
| Hungary | | | | Japan |
| Malta | | | | Latvia |
| Norway | | | | Malaysia |
| | | | | Mexico |
| | | | | Puerto Rico |
| | | | | Romania |
| | | | | Sierra Leone |
| | | | | Spain |

| | | | | |
|---|---|---|---|---|
| | | | | Switzerland (frequency dependent on specificities of the case) |
| | | | | Uruguay |
| | | | | Zambia |

A second aspect concerns how supported are the judicial or administrative bodies not only by training but also by guidelines on best practices to fulfill the State's obligation to provide a sensitive, respectful, safe and sensitive to risk and child-friendly hearing.

Guidelines provide a concrete, public and transparent approach to children, allow control on how child hearing takes place and opportunities for the institutional and systemic improvements.

Although some countries have referred to training, even when there is no specific guideline, it is visible among those who have answered this question a slight preponderance of countries with guidelines on the matter, but only twenty-four out of thirty-eight participants have addressed the issue.

| **No specific guideline** | **Guideline on how to hear the child** |
|---|---|
| Austria | Brazil (specialized hearing by protective services) |
| Bolivia | Croatia (Ministry of social welfare) |
| Dominican Rep. | Cyprus |
| Ecuador | Malaysia |
| Isle of Man (for the guardian ad litem) | Malta |
| Japan | Mexico |
| Liberia | Norway |
| Luxembourg | Poland |
| North Macedonia | Puerto Rico |
| Ukraine | Romania |
| USA-California | Sierra Leone |
| Zambia | South Africa |
| | Spain |
| | Uruguay (as victims) |

## 11. LEGAL IMPLICATIONS

### 11.1. Offence's register or record

In the Committee's General Comment 24 on children's rights in the justice system, in observance of the right of the child to privacy (articles 16 and 40(2)(b)(vii)), State parties are recommended to refrain from listing the details of any child, or person who was a child at the time of the commission of the offence, in any public register of offenders, because they impede access to opportunities for reintegration. Therefore, there should be lifelong protection from publication regarding crimes committed by children due to stigmatization and a negative impact on access to education, work, housing or safety. Furthermore, the Committee recommends that States parties introduce rules permitting the removal of children's criminal records when they reach the age of 18, automatically or, in exceptional cases, following independent review (UNITED NATIONS 2019, paras. 69-71).

If this is the case regarding children above the MACR, it would be expected that children below the MACR would not be registered at all. This is clearly the case for the majority of the countries.

However, the survey shows that there are some exceptions, with variations. One possibility is to collect data for statistical analysis which could be important for the improvement of public policies. Other countries mention records by those institutions dealing with the child. In some countries, those records can be used when the child reaches the MACR. Important to mention that some countries acknowledged that, even if it is not allowed by law, informally this is an information that reaches the court when children achieve the MACR. Therefore, this is a field that deserves further international guidance.

| No record or register | Possibility of data collection for statistical analysis | Record by prosecution | Record by court may be used when MACR is achieved in case of a new offence | Record by social services | Confidential records |
|---|---|---|---|---|---|
| Argentina | Argentina | Austria (but cannot be used when the child reaches MACR) | Japan | North Macedonia (until the child reaches 18 years old, but not taken into consideration) | USA-California (sealed when the proceedings are concluded) |
| Bermuda | Romania | Spain (to analyze the opportunity of further actions when the child reaches 14. Not taken into consideration by the court.) | Latvia (for risk assessment) | South Africa (regarding diversion) | |
| Bolivia | | | Poland | | |
| Brazil | | | Ukraine | | |
| Canada | | | | | |
| Chile | | | | | |
| Congo (Rep.) | | | | | |
| Croatia | | | | | |
| Cyprus | | | | | |
| Dominican Rep. | | | | | |
| Ecuador | | | | | |
| England and Wales | | | | | |
| Germany (although able to be informally considered) | | | | | |
| Hungary | | | | | |
| Isle of Man (however, prosecution may bring into attention of the court previous involvement of the police early intervention | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| team, for discretionary use) | | | | | |
| Liberia | | | | | |
| Luxembourg | | | | | |
| Malaysia | | | | | |
| Malta | | | | | |
| Mauritius | | | | | |
| Mexico | | | | | |
| Puerto Rico | | | | | |
| Serbia | | | | | |
| Sierra Leone | | | | | |
| Switzerland | | | | | |
| Uruguay | | | | | |
| Zambia | | | | | |

## 11.2. The role and rights of the victims

As mentioned before, a consistent part of contemporary criminology is turning its attention from the offender and the causes of criminality to the victim and the consequences of the offences (PITCH 2014).

Until the 1940s, victims were a forgotten subject in the administration of justice, where there was a privilege on due process for the accused and social defense by the State. However, since the 1940s/50s, with the emergence in criminology of research on victimization, including secondary victimization by the justice system, the condition of victims became not only an important field for research but also for the recognition of fundamental rights.

Starting from the initial studies by Mendelsohn and von Hentig about the victims' responsibility for their condition, to the special consideration on the impact of victimization in the most vulnerable people, a large spectrum of interests have been developed such as the nature of victimization, its extent, victims' needs, how to help them to overcome the harmful consequences of the victimization experience. The inclusion of the post-traumatic stress disorder (PTSD) in the International Classification of Diseases

was determinant to understand that the etiological agent was external to the individual (i.e., the traumatic event) and not an inherent individual weakness (i.e., a traumatic neurosis), stimulating the creation of pressure groups to adapt the criminal justice system to be more sensitive to victims.

Bill of rights published with significant involvement of public prosecutors in providing information services, reforming the police and the justice system were issued almost everywhere and, as a consequence, important international legal framework was built: among others, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979; the 1983 European Convention on Compensation to Victims of Violent Crimes, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Resolution 40/34, UN General Assembly, 1985); the Convention of Belém do Pará Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994, (Article 7); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography, 2000; the Basic Principles and Guidelines on the Right to Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Resolution 60/147, UN General Assembly 2005) and the Guidelines on Justice in Matters involving Child Victims and Witnesses (Resolution 20/2005 ECOSOC).

With this context in mind, it was important to understand what could be the role of victims in any kind of procedure involving children below the MACR and the impact of victims' rights in the manner those children are dealt by the system.

If the offence itself is determinant for the victims in the emergence of their specific rights, it would be expected that some collision between their rights and those of the children could occur, conditioning the possibility of an exclusive focus on the children, in a sympathetic manner, based on their specific needs and not in the offence, as recommended by the Committee.

This is not the case in the majority of the countries. The possibility for the victims to sue the parents claiming for damage reparation was referred by the majority of the countries and is an expression of traditional tort law. It is not clear from the research if civil actions against the child (and not the parents) are related to singular dispositions of tort law. Financial compensation is also an emergent trend since the 1980's as an expression of pressure groups.

The majority of the countries also states that the victims are not allowed to have any kind of participation in the procedure. However, in some countries restorative justice, victim impact statements in court and the provision of information to the victims are specific initiatives in this field, showing that there is an emergent trend to adapt procedures and interventions to conciliate the right of the victims and those of the child.

| **Civil action against parents for damage reparation** | **Civil actions against the child** | **Victim impact statement presented to court** | **Restorative justice/mediation/conciliation** | **Financial compensation** | **Information about the measures provided to the victims** | **Victims are not allowed to have any kind of participation in the procedure** |
|---|---|---|---|---|---|---|
| Argentina | Austria | Cyprus (victims may submit an impact statement report to welfare services) | Argentina | Poland | Dominican Republic | Austria |
| Austria | Switzerland | Isle of Man (not determinative) | Liberia | South Africa | | Bermuda |
| Bermuda | | Japan | North Macedonia (within Center for Social Work, who calls the parties for an agreement) | | | Brazil |
| Bolivia | | Malaysia | Sierra Leone | | | Canada |
| Brazil | | Malta | South Africa | | | Chile |
| Canada | | Poland (party in the proceedings) | | | | Croatia |
| Chile | | Romania | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| Congo (Rep.) | | Ukraine | | | | Dominican Rep. (but victims are informed of the measures taken by prosecution office) |
| Croatia | | Uruguay (victims can challenge court decisions) | | | | Germany |
| Cyprus | | | | | | Hungary |
| Dominican Rep. | | | | | | Luxembourg |
| Ecuador | | | | | | Mauritius |
| Germany | | | | | | Mexico |
| Hungary | | | | | | North Macedonia |
| Japan | | | | | | Spain |
| Luxembourg | | | | | | Switzerland |
| Malaysia | | | | | | |
| Malta | | | | | | |
| Mexico | | | | | | |
| Romania | | | | | | |
| Spain | | | | | | |
| Switzerland | | | | | | |
| Ukraine | | | | | | |
| Uruguay | | | | | | |
| USA-California | | | | | | |
| Zambia | | | | | | |

## 12. REFORMS IN PROGRESS

The focus on reforms in progress show how stable or changeable is the issue in a comparative context and the pressure in the media, in society or by specific groups in this context.

In around one third of the countries there are no ongoing reform. In the remaining, a large majority, some aspect is currently revised.

The lowering of the MACR is at stake in three countries and during the publication of this research Argentina has approved this initiative in the Chamber of Deputies (still lacking approval from the Senate). In four countries there are discussions to introduce

compulsory or more restrictive measures to children. This group represents one fifth of the total.

If we consider improvements for victims, which might conduce to a focus on the offence rather than on the child, with potential addition of measures applied to the child, with three other countries, the percentage of less child-friendly countries rises to one fourth.

The remaining countries were more concerned with children's rights and protection system, which does not allow a clear picture of what is at stake.

This scenario shows a challenging picture in this matter, of children below the MACR as a pressing issue contemporarily.

| **No ongoing reform** | **Legal reform to lower the MACR** | **Legal reform on children rights** | **Improvements for victims** | **On protection system** | **Introduction of compulsory measures to children** | **Sanctions against parents** | **Improvements on court child-friendliness/ court specialization/ judicial training** |
|---|---|---|---|---|---|---|---|
| Bermuda | Argentina (to 14 years) | Chile (on child protection and youth justice) | Cyprus (restorative justice and expansion of Barnahus) | Dominican Rep. | Austria (under discussion) | Germany | Croatia |
| Bolivia | Germany | Luxembourg | Romania (restorative justice) | Romania (creation of centers for children with serious behavioral issues) | Germany | | Cyprus |
| Brazil | Serbia (possibly) | Malaysia | Ukraine (restorative justice) | Sierra Leone | Isle of Man (regarding youth and increase of age of majority to 18) | | Liberia |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Canada | | North Macedonia (education, health care, social work for children at risk) | USA-California (restitution fund) | | Malta (therapeutic and secure center and bootcamp) | | Malaysia |
| Congo (Rep.) | | Poland | | | | | Norway |
| Ecuador | | Sierra Leone | | | | | Sierra Leone |
| Japan | | Spain (on age determination in case of lack of documents) | | | | | Ukraine |
| Latvia | | Ukraine (participation, reintegration programs, legal assistance) | | | | | Zambia (regarding procedural application of provisions on the care and protection of children |
| Mauritius | | | | | | | |
| Mexico | | | | | | | |
| South Africa | | | | | | | |
| Switzerland | | | | | | | |
| Uruguay | | | | | | | |

## 13. CONCLUSIONS AND PERSPECTIVES FOR THE FUTURE

The lack of consensus that has prevented the Committee on the Rights of the Child to issue a General Comment on minimum age of criminal responsibility seems to remain in this comparative analysis.

This scenario is worrisome.

Regarding the establishment of a minimum age, the diversity of ages found in this research shows clearly some limits of an evidenced-based approach on the matter. Cultural and historical factors, associated to local challenges in terms of security, public opinion, group pressures and the media reveal how this is mainly a matter of criminal

policy, strongly dependent on external factors. It is urgent to raise awareness, both at international and local level, about the limited capacity of children to understand the impact of their actions and to comprehend criminal proceedings and the limited capacity of youth courts to address these issues. However, this is not enough and the debate cannot remain only in fixing or raising the minimum age,

On the one hand, the research legibly shows that the current undefinition on how to deal with these offences are creating various risks for the rights of the child. The tension between voluntariness or coercion in response to the child's deviant behavior confirm that it is simplistic to say that children should have a protective attention, if we do not consider the fluid and circular dimensions of social control.

On the other hand, it is clear that external pressures, including those of victims, are shaping the way the cases are dealt, bringing it closer to youth justice standards.

In general, the research shows that in almost all aspects of its questionnaire there were important topics to be better regulated and improved.

Regarding age determination, lack of regulation or lack of standards might cause errors, with an impact in the way the child is dealt by the system, exposing them to invasive procedures to determine the age. There are gaps or flaws in the procedures, with no clear regulation of basic rights such as the right of the child to be heard, legal assistance and the right to challenge decisions, that might increase these risks. Even the presumption of minority in case of doubt, which is unquestionably a good measure, could create situations where the child would be exposed to contact with people that are not of the same age, or are not minors, causing them risk. Therefore, although an important standard, it is not a solution per se.

The involvement of the police is a major sign on the ambiguous nature of all interventions. On the one hand an offence usually causes public alarm and impacts the rights of others, namely the victims. Children might be manipulated by adults or older children. There is space for investigation by the police. However, the involvement of a child below the MACR should change completely the approach, with a more protective

stance and the involvement of other services. Once again, the lack of procedures and of clear criteria for the various possible interventions are concerning, especially when many modalities of intervention might involve rights or even liberty restrictions.

In this context, a clear regulation of legal guarantees should be in place. Even if the child cannot be considered an offender, and all interventions should be protective, what the child will say will have an impact both for his or her life, the parent's and even others. Should the child have the right to remain in silence? To be assisted by legal attorney? How to balance the focus on protection and on liability for an offence, from the parents for a neglect behavior towards the child, or from others? It is a different approach both regarding the offender, when above the MACR, and the child victim.

This context is even worrisome when we have in mind the possibility of rigid interventions by the police in certain countries, irrespective of the name of these measures, usually termed as educative, but not necessarily imbued of such value in practice.

Special measures or assistance? The duality of terms employed by the Committee on the Rights of the Child reveal the double approach identified in this survey. While measures have a more interventive nature, designed by experts or other professionals to plan actions to deal with the behavioral problem, assistance should be based much more in the interests of the child and responses to rights violations (to use another approach instead of needs).

What should be the specificity of these special measures? In what should they differ from the traditional approach of welfare services dealing with neglect, abandonment, violence and exploitation? In which extension should these measures be inspired in what is done with youth above the MACR? This is a current debate, with ambiguous positions in many countries.

The research shows that more than one third of the countries adopt stricter measures for these children with an extended degree of control of the child's liberty or other rights, such as inclusion in correctional facilities or secure accommodation,

supervision by probation officers, prohibition to frequent some places, property confiscation or mental health treatment. A clearer international standard on the limits of such interventions in case of (severe) violence committed by children below the MACR is thoroughly recommended.

In a context where coercive measures might be imposed to the child, the determination of the authority in charge of this decision-making process and the nature and modalities of power control are decisive for the preservation of children's rights. De-judicialization is an important international standard regarding children below the MACR. However, the more restrictive the interventions become, the larger is the impact on children's rights and, by consequence, is the concern on how to control power abuse. This is traditionally a role for the justice system, a civil right, based on a legal guarantee perspective and on due process. In which measure should the justice system be involved in this field? What should be its role in relation to administrative or quasi-judicial bodies, responsible for first response to children?

The survey reveals some diversity in strategies, with two main possibilities, an administrative body, normally Child Protective or Welfare Services, and the Courts. There is also a preponderance of subsidiary judicial intervention when administrative bodies are in charge of this measures, especially when involving more restrict intervention in the children's life, such as out of-home placement, or when the measures are not voluntarily accepted by the children and their families.

The existence of a clear procedure, either administrative, by welfare services, or judicial, is important to allow the respect of due process, to grant transparency and the possibility for children and their families to challenge decisions. The lack of clear procedures is a threaten to children's rights.

Another aspect of de-judicialization is the adoption of alternative resolution mechanisms. Independently of the nature of the procedure, a slight majority of countries allow such kind of procedures. However, this possibility in some places is theoretical, not much implemented or adopted in practice. These mechanisms must observe legal

guarantees as well, especially in this context of the possibility of coercive measures and with the involvement of younger children, with less resources to resist.

This context of stricter measures, with the possibility of rights and liberty restrictions, has created a paradoxical dilemma expressed in the decision of the Committee on Social Rights. While granting procedural youth justice rights to children below the MACR ignores that these children should not be subject to any pre-trial and/or trial(-like) proceedings in the first place, there is a risk of implicitly legitimizing such practices. However, if children face the possibility of rights or liberty restriction, legal guarantees should be improved. This is a dilemma on a more pragmatic or theoretical approach, also dealt by the Inter-American Commission on Human Rights.

The lack or the limits of voluntariness on the measures and the possibility of coerciveness express the multiple strategies of social control in this field. In fact, in our survey, the nature of the intervention seems very blurry. There are countries where interventions are proposed and nothing can be done if the child does not cooperate, others where there is an emphasis on searching for consensus because the measure should be educational, and others where an imposition is more evident, even if there is a possibility of challenging the decision in court. However, the range of difference is broad, including some particularities such as limited right to refuse the measures.

When confronted with the question about what would happen to a child in case of non-compliance, the participants present a predominant trend of plan adjustments. It is an important sign of emphasis on consensus, in an educative and dialogical approach. However, many countries have also referred to more insistent control mechanisms, such as obligations and sanctions imposed to the parents, referral to court for compulsory measures and enforced implementations, warning, stricter supervision and placement, including in secure accommodation. Only eight out of thirty-eight mentioned that no sanction would be imposed and in one of these countries, due to its federal composition, a multiple reality is in place, with irregularities and intrusive placements, according to the Inter-American Commission on Human Rights.

If there has been a shift from a needs to a rights-based approach (MENDEZ 1994) and if protection has increasingly been considered as the minimum social conditions provided by law, as rights, to have interdependent relations in a society of equals (CASTEL 2003), there should be more distinguishing criteria on what should be assistance and services to children according to their needs, dissociated from the act of the offence itself (UNITED NATIONS 2019), from what has been in the past (?) an authored focused intervention in youth courts, named as protective measures.

The studies on the role of the justice system in this area show a variety of approaches. Some over emphasize the role of the procedure, dissociated from a perspective of criminalization, but rather with an accent on accountability, on establishing the truth, respecting the right to defense and granting the victim's rights. This proposal pretends to be based on what is considered psychologically important, both for the victim, to understand what has happened, and for the alleged offender, to restitute symbolically the deterrent effect of prohibition. However, this trend, completely dissonant from what is normally proposed for this children, with de-judicialization, could be considered as a manifestation of what Pitch considers a slid in contemporary criminology from social policy to social security, from the attention to the criminal offender to the victim, therefore from the individual (the author) to the population, from deviance and control to risk the population is exposed to by criminality, in a nutshell, from the causes of the act to its consequences (PITCH 2014). The tension between the rights of the child and those of the victim, besides all other external interferences by social alarm, media and political pressures, show that some important equation and balance between different rights are at stake. While an emphasis on the rights of the child, its priority in terms of social policy and social goals should always be guideline in this debate, it seems unrealistic to preclude the debate, without giving attention and guidance on how to address the rights of other people affected by these behaviors. Social pressure or erratic political or institutional initiatives take the floor and give place to violation of children's rights. A more pragmatic approach, such the one adopted by the Social Rights Committee should be considered.

In this context, what could be a more appropriate role for the justice system? This is a discussion that calls for an opposite perspective, not only focusing on consequences, but on which rights of the child have been violated to create the context for such an offence. In a scenario where social inequalities and vulnerabilities impact the child behavior, the primary duty-bearer is the State, in joint and several liability with the family, creating procedures for individual and/or collective actions against the State to implement or to improve public policies in case of lack or insufficiency.

In a context where the Committee on the Right of the Child discusses a new General Comment on Access to Justice it could be important to exert the justice system to discuss new strategies, approaches, procedures that could respond to such structural challenges. Some countries have interesting experiences on this subject, which could also be applied in this field.

Our research shows a more limited involvement of the justice system, focusing on imposition of protective orders, such as care and supervision, but also out-of-home placement orders, the most mentioned role for the justice system in this matter. There is also a supervisory role in case of prominence of an administrative body, making the first-response decisions. In this case, the judicial system focus on granting civil rights. In a lesser incidence, there are cases of more restrictive interventions, especially when involving placement in correctional facilities or restriction measures for medical reasons, with a more coercive stance. A minority of countries do not have the justice system involved in this matter.

Thought-provoking, although there has been some discomfort from family judges to take part in the research, for not identifying themselves with the subject, a large majority of the responses explained that jurisdiction for such kind of measures is either of child protection - child courts or family courts, thus with a civil approach. The justice system is involved in this matter, in one way or the other, but apparently it does not have a clear picture of it, nor of its own duties, calling for a deep immersion on the topic to

address the limits and potentialities of this intervention in a more respectful and empowering perspective for a children's rights-based approach.

This scenario show that there is space for change, for innovation and a more structured comprehension on how the rights of the child could be dealt in these cases.

The role of the State also calls attention to the nature of assistance provided. There is a wide range of possibilities, from those more focused on the child to others paying more attention to family support programs. The intensity of allusions to medical and mental health treatment, in one situation or the other, might give the impression of some kind of pathologization of these behaviors instead of considering social factors or inequalities. This is an important aspect when opposing a needs or rights-based approach, because it is not possible to dissociate any kind of analysis and interpretation of these situations from a critical and political view of the context where these children live. This is clearly seen in some experiences of financial assistance, emphasizing the responsibility of the State to address social inequalities that could cause this situation.

Finally, there is an accountability approach, especially when involving the victims, when including mediation, for instance.

The emergence of the victim in these procedures, we must say it one more time, seems to be a new trend, trying to shape the procedures and interventions in some countries. Restorative justice, victim impact statements in court and the provision of information to the victims are specific initiatives in this field, showing that there is an emergent inclination to adapt procedures and interventions to conciliate the right of the victims and those of the child.

This is not to say that victims should have a lesser consideration in this subject, but may be financial public funds to repair damages and other strategies could restrain the impetus of individual accountability of children and leave focus for a more child-focus and preventive intervention. This is a political debate and involve different strategies to deal with diverse problems, without the need to individualize the problem, both in the person of the child (and the family) and of the victim.

As we can see, there are insistent questions to be addressed on this matter, which is reflected in a surprising finding in this research, with the high number of countries with on-going reforms on this subject: two thirds! The lowering of the MACR is at stake in three countries and during the publication of this research Argentina has approved this initiative in the Chamber of Deputies (still lacking approval from the Senate). It is a disputable question whether this means a regression (when considering the lowering of MACR) or an advance, introducing an specialized youth justice system and trying to avoid the intrusive administrative measures to children without legal guarantees (MENDEZ 2026).

Apart from the countries who are discussing the introduction of compulsory or more restrictive measures to children, we should add those who consider improvements for victims, which might conduce to a focus on the offence rather than on the child.

This scenario shows a challenging picture in this matter, of children below the MACR as a pressing issue contemporarily.

The aim of this research, with all the methodological limitations we acknowledge in its development, was to raise awareness among the justice system and a larger public on the need to deepen understanding on what is happening with these children, what are the public responses to their acts and how can we, as civil society but also as judges and magistrates, improve the various aspects addressed in this study for a more child-focused and rights-based approach.

This is a discussion that should be carried out in different levels, locally and regionally, but also at a universal level, in the United Nations, improving international legal standards on this matter.

This is also a matter that should involve more experience changing and identification of good and innovative practices that could inspire a new framework when dealing with these cases.

AIMJF hopes to create opportunities for public debate and to assist in all of these areas with its various initiatives. From study tours to identify good practices, to the

development of guidelines and the creation of spaces for discussions, all converging to the improvement of international legal standards and in particular the role of the justice in this subject.

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## ATTACHMENT - QUESTIONNAIRE:

### 1. general information

1.1. What is the minimum age of criminal responsibility in your country (the **age of criminal responsibility** is the age below which a child is deemed incapable of having committed a criminal offense, it can also be referred as **age of accountability**, **age of responsibility**, and **age of liability for children and it is different of the age when a person becomes an adult)**?

1.2. Is there more than one minimum age of criminal responsibility? Which one? Is it possible to apply the 'doli incapax rule' in your country (possibility of demonstration that the child is sufficiently mature and capable to understand that the behavior was an offense and therefore could be criminally responsible)?

### 2. capacity and age assessment

2.1. In case of application of the 'doli incapax rule', how is this assessment made? Is there a specific methodology for this evaluation? A protocol on how to evaluate? Who assesses the child? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to challenge the conclusions of this assessment?

2.2. In case of necessity of age assessment (due to a lack of birth registration), how is this assessment made? Is there a procedure? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to challenge the conclusions of this assessment?

### 3. police intervention

3.1. In case a child under the minimum age of criminal responsibility commits an act considered as a crime, is he/she brought to a police station? Is it mandatory to do so? If not, in which situations is it necessary to be brought to the police station?

3.2. In case the child is brought to the police station, what is expected from the police to do? What are the legal guarantees for the child in this context? Is it possible, in any circumstance, that the child be imprisoned, even for a very short time? In this case, how long is it possible for the child to be deprived of liberty?

## 4. measures

4.1. In case a child below the minimum age of criminal responsibility has committed an act considered as a crime, is it possible to impose any kind of measure? Which one?

4.2. Is it possible to impose an out-of-home placement (such as alternative care, in institution or foster family; in health facilities, for instance)? in which circumstances? For how long?

## 5. procedure

5.1. Who imposes such measures?

5.2. Is there a legal procedure for the determination of these measures? What is the nature of these procedures? Can you describe it succintly?

5.3. Is it possible to adopt alternative resolution mechanisms in these situations, such as mediation or restorative justice?

## 6. assessment

6.1. Is there any kind of assessment of the child for the imposition of such measures (on vulnerabilities, risk, rights violations)? Who assesses the child? Is there a protocol or guideline on how to assess the child? Can you please share it?

## 7. legal and procedural guarantees

7.1. What are the rights of the child in this procedure (legal and procedural guarantees)?

7.2. Does the child have the right to refuse any of these measures? Or to challenge in court any of these measures?

7.3. What happens if the child does not fulfill the obligations inherent to these measures?

## 8. the role of the justice system

8.1. Is it possible in your country that the justice system gets involved in these situations? In which situation (vg. to impose the measure or to review it, in case of resistance by the child or his/her family, or to impose some child protection order)? For what purpose? Which branch of the justice system is involved (youth court, family court, child protection court, criminal court…)?

8.2.. In case of involvement of the justice system, can you briefly describe the procedure?



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8.3.. What are the rights of the child in this procedure? Does the child have the right to legal assistance? The right to appeal against any kind of decision?

## 9. assistance or support

9.1. Besides the measures imposed to children, are there other kind of assistance available on a voluntary basis (social, psychological, medical)?

## 10. child participation

10.1. Is the child heard in this procedure? By whom? At which stage of the procedure?
10.2. Is the child heard more than once in this procedure? How many times?
10.3. Is there a protocol or guideline on how to hear the child in this situation? Can you please share it?

## 11. legal implications

11.1. Is there any record of legal infringement committed by children below the age of criminal responsibility? When the child reaches the age of criminal responsibility, are these records taken into consideration?
11.2. In case of damages, what kind of rights and remedies does the victim have regarding the child and the family? Besides financial reparation, does the victim have the possibility to have a say on the measures applied to the child?

## 12. reforms in progress

12.1. Are there ongoing reforms on this subject?