

# UN STANDARDS AND NORMS ON JUVENILE JUSTICE: FROM SOFT LAW TO HARD LAW

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## I. THE NEED FOR UN STANDARDS AND NORMS ON JUVENILE JUSTICE

When a society or a government defines what conduct should be criminal and how society should respond, this decision is intimately linked to national (or local) values and traditions. Until relatively recently, societies have seen little reason to look beyond their borders for models or guidance in the development of criminal law or the criminal justice system.

During the second half of the 1800s, this began to change. Discussions on criminal justice policy became international. Practitioners and policymakers from different countries started to exchange their experiences in criminal justice. The first two themes to be taken up were intertwined: corrections and juvenile justice.<sup>2</sup> The First International Congress on Crime Prevention and the Repression of Crime, including Penal and Reformatory Treatment (London, 1872) brought together practitioners from many countries interested in learning from one another about how to deal with offenders. Among the issues considered at that first international congress were juvenile reformatories, and more broadly how society should deal with delinquent children.<sup>3</sup>

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<sup>2</sup> See, for example, Redo, p. 108.

<sup>3</sup> Questions 45 through 50 on the programme dealt with such questions as what to do about “children hovering on the verge of criminality” and “what is the best organization of reformatory institutions for juveniles, that which rests on the congregate or the family principle”. See <https://books.google.co.th/books?id=nYsIAAAAQAAJ&printsec=frontcover&dq=First+International+Congress+on+Crime>

Ten years later, juvenile justice was addressed in its own right on the international level. In 1882, the first International Congress on Child Welfare was held in Paris, followed by the International Congress for the Welfare and Protection of Children in 1896, in Florence. The Third International Congress for the Welfare and Protection of Children (London, 1902) considered the problem of neglected children, and the probability that such children would turn to delinquency if due care was not taken.

When the League of Nations was established a few years later, juvenile justice became one of its main areas of activity. Criminal justice thus became not only an international issue, but also an intergovernmental one. In 1919 the League of Nations established the Child Welfare Committee in order to examine the rights of children, primarily to identify the measures that states should take in respect of street children, slavery, child labour, child trafficking and the prostitution of minors.

This international sharing of experiences was designed to identify “what works” in crime prevention and criminal justice, in other words “good practice”.<sup>4</sup> At the same time, the growing respect that was being given to human rights resulted in the adoption of certain minimum legal safeguards and of certain mechanisms in criminal justice systems where they had been absent or inconsistently recognized. Respect for human rights has also been recognized as promoting effective crime prevention and control,

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[+Prevention+and+the+Repression+of+Crime&hl=th&sa=X&ved=0ahUKEwi12ayRyLHRAhXBs48KHW6RDhMQ6AEIKjAB#v=onepage&q=First%20International%20Congress%20on%20Crime%20Prevention%20and%20the%20Repression%20of%20Crime&f=false](#), p. 22.

<sup>4</sup> Different formulations have been used in this respect, such as “what works”, “good practice”, “best practice” and “promising practice”. Each has been criticized on somewhat different grounds, but usually with the argument that what works in one context may not work in another, and the argument that formulations such as “good practice” and “best practice” imply a value judgement (“You are doing this wrong, What I am advocating is a better way to do things.”).

nationally and internationally.<sup>5</sup> In particular the 1948 Universal Declaration of Human Rights and the 1966 Covenant on Civil and Political Rights have direct implications for the operation of the criminal justice system, and also for the juvenile justice system.

Good practice and human rights: these two factors have mixed in different ways, at different times and in respect of different issues, such as the prevention of delinquency, child protection, legal representation in juvenile court, care in an institutional environment, and greater use of mediation and restorative justice.

One key way in which good practice and human rights have been brought together is in the form of international standards and norms, a concept that has found a welcoming home in the United Nations crime prevention and criminal justice programme.

A “standard and norm” is a document that contains normative elements. It defines how members of the target audience – individuals, members of a certain profession, public officials and so on – should conduct themselves, and may even define the minimum level of the quality of justice. An “international standard and norm” on justice, accordingly, is a document that is intended to apply to target audiences in different states, often at different stages of development and with different legal and administrative systems.

A standard and norm can be set out in an international agreement, national law or other binding instruments. In the United Nations and the criminal justice context, however, the term refers

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<sup>5</sup> E/CN.15/1997/14, para 41. It may be noted that the United Nations Charter includes an obligation to promote universal respect and observance for human rights.

specifically to a number of instruments adopted by the General Assembly and the Economic and Social Council (and in a few exceptional cases, by other bodies) that are designed as benchmarks for the development of the criminal justice system. As noted on the UNODC website,<sup>6</sup> “These standards and norms provide flexible guidance for reform that accounts for differences in legal traditions, systems and structures whilst providing a collective vision of how criminal justice systems should be structured.”

The four UN standards and norms generally mentioned when speaking about juvenile justice are:

- the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules; GA 40/33);
- the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines; GA 45/112);
- the 1990 United Nations Rules for the Protection of Juveniles Deprived of Liberty (the Havana Rules; GA 45/113); and
- the 1997 Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines; ECOSOC 1997/30).<sup>7</sup>

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<sup>6</sup> <https://www.unodc.org/unodc/en/commissions/CCPCJ/ccpcj-standards-and-norms.html>

<sup>7</sup> Although they are not specifically focused on juvenile justice, some of the more general UN standards and norms apply also in the context of the juvenile justice system: the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

Furthermore, a number of applicable human rights instruments, although not particularly tailored to juvenile justice, form part of the international and/or regional legal framework: the International Covenant on Civil and Political Rights, the Convention against Torture, the European Convention on Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights (the Banjul Charter), the African Charter on the Rights and Welfare of the Child, and the African Youth Charter. Reference can also be made to the International Labour Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention 182) of 1999.

Standards and norms are commonly referred to as “soft law” instruments, in the sense that they provide guidance but are not legally binding. In any discussion of the UN standards and norms on juvenile justice, however, reference should also be made to a “hard law” instrument, the United Nations Convention on the Rights of the Child (CRC).<sup>8</sup> This has been ratified by all but one member state of the United Nations, and is thus as nearly universally binding an instrument as there can be in international law.

There is no formal mechanism for reviewing implementation of UN standards and norms in individual member states. Article 43 of the CRC, however, provides for an implementation review mechanism: the Committee on the Rights of the Child. State parties have to report every five years to the Committee (art. 44 of the CRC).<sup>9</sup> In the course of its work, the Committee has developed guidelines on the implementation of the Convention. One “General Comment”, in particular, should be mentioned, General Comment no. 10, on children’s rights in juvenile justice.<sup>10</sup>

Within the United Nations crime prevention and criminal justice programme, the issue of implementation review has proven to be quite sensitive. In the case of two hard law treaties, the United Nations Convention against Transnational Organized Crime and the United Nations Convention on Corruption, the way in which the respective Conferences of the States Parties can review how individual states parties implement their treaty obligations has caused extensive debate.<sup>11</sup> It is thus interesting to see that in the specific area of juvenile justice, an implementation review mechanism appears to function

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<sup>8</sup> General Assembly resolution 44/25 of 20 November 1989.

<sup>9</sup> To take the example of Japan, which ratified the CRC on 22 May 1994, three reports have been submitted, in, respectively, 1998, 2004 and 2008. The fourth periodic report was to have been submitted to the Committee by 21 May 2016 but at the time of this writing (January 2017) the report has not appeared on the Committee’s website, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=JPN&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=JPN&Lang=EN)

<sup>10</sup> Committee on the Rights of the Child, General Comment No. 10 (2007), Children’s rights in juvenile justice, 25 April 2007 (CRC/C/GC/10).

<sup>11</sup> See, for example, Joutsen and Graycar 2012.

relatively smoothly, with an international group of experts assessing implementation in over 190 states, in five year cycles, and issuing public recommendations to individual states parties.

It is the arc from academic discussions of “promising practice” to binding international hard law on juvenile justice that forms the framework for the present paper.

## **II. THE DRAFTING AND ADOPTION OF THE UN STANDARDS AND NORMS ON JUVENILE JUSTICE**

The production of a United Nations standard and norm on crime prevention and criminal justice generally goes through the following stages:

- an initiative comes from individual experts or organizations;
- a draft is prepared;
- the draft is discussed at one or more international meetings;
- the draft is discussed at the United Nations Commission on Crime Prevention and Criminal Justice (or earlier, the United Nations Committee on Crime Prevention and Control),
- the draft is discussed at a quinquennial UN Congress on Crime Prevention and Criminal Justice and its preparatory bodies, and
- the draft is submitted to the Economic and Social Council and/or the General Assembly for adoption.

This can be illustrated by the evolution of the four main standards and norms on juvenile justice.<sup>12</sup>

*The Beijing Rules.* The idea for drafting the Beijing Rules arose during the Sixth United Nations Congress discussions on “Juvenile Delinquency: Before and After the Onset of Delinquency”.<sup>13</sup> The report of the Congress called for the development of “model rules on juvenile justice administration”. The UN Secretariat requested that Professor Horst Schüler-Springorum prepare a draft for such model rules, which he then presented to the United Nations *ad hoc* Meeting of Experts on Youth, Crime and Justice held on 2 – 8 November 1983 in Newark, New Jersey. Following extensive rounds of consultations, including within the framework of a five-week international seminar held at UNAFEI in 1983, the draft “Standard Minimum Rules on the Administration of Juvenile Justice” were discussed at the Interregional Preparatory Meeting held at Beijing,<sup>14</sup> and then at the Seventh UN Congress in Milan. On the recommendation of the Seventh Congress, the Beijing Rules were adopted by the General Assembly.<sup>15</sup>

The Beijing Rules provide member states with guidelines on the elaboration of the juvenile justice system. It sets out a number of fundamental principles:

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<sup>12</sup> Reference can also be made to the Guidelines on Justice for Child Victims and Witnesses of Crime (ECOSOC 2005), and the model law on juvenile justice published by the UNODC (Justice in Matters Involving Children in Conflict with the Law. Model Law on Juvenile Justice and Related Commentary, UNODC 2013).

The development of the CRC took somewhat longer than was the case with the four standards and norms on juvenile justice referred to here, but went through somewhat similar stages. Essentially, the process began with the 1959 Declaration on the Rights of the Child, and ended with the adoption of the Convention by the General Assembly in 1989. The Convention entered into force on 2 September 1990.

More generally on United Nations standards and norms on crime prevention and criminal justice, see Clark, and Joutsen 1999 and 2016.

<sup>13</sup> A/CONF.87/14/Rev.1.

<sup>14</sup> A/CONF.121/IPM/1, paras 55 and 56.

<sup>15</sup> General Assembly resolution 40/33 of 29 November 1985.

- the guiding principle of juvenile justice should be to further the well-being of the juvenile and his or her family (the importance of fair and human treatment) (e.g. rules 1, 5.1, 10.3, 13.5, 14.2, 17.1, 26.2),
- non-discrimination in the application of the Beijing Rules (rules 2.1 and 26.4),
- ensuring that the age of criminal responsibility is not fixed at too low an age level (rule 4).
- the proportionality principle (rules 5.1 and 17.1),
- the use of discretion (rule 6),
- the protection of basic procedural safeguards (rules 7.1 and 15.1),
- the protection of privacy and confidentiality (rules 8 and 21),
- the possibility of release should be considered as soon as possible (rule 10.2),
- the use of diversion (rule 11),
- taking the minor's opinion into consideration (rule 11.3),
- detention should be used only as a last resort, and for the shortest possible period (rule 13.1),
- deprivation of liberty should be used only for extremely serious cases (rule 17.1),
- no capital or corporal punishment should be used (rules 17.2 and 17.3),
- the use of a large variety of disposition measures (rule 18.1),
- institutionalisation should be used only as a last resort (rule 19),
- avoidance of unnecessary delay (rule 20),
- the need for professionalism and training (rule 22), and
- the objective of measures should be rehabilitation (rules 24 and 26.1).

*The Riyadh Guidelines.* Although some of the drafters of the Beijing Rules argued that prevention is an essential part of juvenile justice, others regarded this as too broad an issue, and wanted to focus on the structure and operation of the juvenile justice system.<sup>16</sup> As a result, the Beijing Rules do not include provisions on prevention. Nonetheless, the drafters recognized the importance of the issue. On the same day as the General Assembly adopted resolution 40/33 approving the Beijing Rules, the General Assembly adopted resolution 40/35, which drew attention to the need for standards and norms on the prevention of juvenile delinquency. “Specific measures therefore had to be provided for the large number of the young who were not in conflict with the law but who were abandoned, neglected, abused and, in general, were endangered or at social risk”.<sup>17</sup>

The first draft for what became the Riyadh Guidelines was prepared by Professor Allison Morris. The draft was circulated among experts in juvenile justice, and then discussed at an International Meeting of Experts on the development of United Nations Draft Standards for the Prevention of Juvenile Delinquency, held at the Arab Security Studies and Training Centre<sup>18</sup> in Riyadh on 28 February – 1 March 1988. From there, the draft went to the regional preparatory meetings and the respective interregional preparatory meeting for the Ninth Congress, and then on to the General Assembly for adoption.<sup>19</sup>

The Riyadh Guidelines seek to cover the role of different sectors in the prevention of juvenile delinquency. The key points and sectors are the following:

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<sup>16</sup> Schüler-Springorum, p. 4.

<sup>17</sup> A/CONF.144/IPM.3, para 4.

<sup>18</sup> Now known as the Naif Arab University for Security Sciences.

<sup>19</sup> General Assembly resolution 45/112 of 14 December 1990. See A/CONF.144/16, para 26.

- furthering the well-being of the juvenile and his or her family (fair and human treatment) (e.g. guidelines 4 and 46),
- the need for comprehensive prevention plans (guideline 9),
- the importance of the family and support to the family (guidelines 11- 19),
- the importance of education (guidelines 20 - 31),
- the importance of community measures (guidelines 32 - 39),
- the role of mass media (guidelines 40 – 44),
- institutionalization of young persons should be a measure of last resort and for the minimum necessary period (guideline 46), and
- development of the appropriate legislation and juvenile justice administration (guidelines 52 - 59).

*The Havana Rules.* The International Covenant on Civil and Political Rights, the Standard Minimum Rules for the Treatment of Prisoners, and the Beijing Rules, are designed in part to considerably reduce the incarceration of children and youth. However, already when these instruments were adopted, it was clear that incarceration of children and youth would remain a widespread practice. The Havana Rules, instead of calling for better and more prisons for juveniles, were designed to encourage the use of alternatives to imprisonment, and to ensure that juveniles in custody have their basic rights protected.<sup>20</sup> These Guidelines were developed by an Open-Ended Working Group of Non-Governmental Organizations established by Defence for Children International in cooperation with the UNODC. The text was circulated for comment, following which the draft was developed by the Max-Planck Institute for Foreign and International Criminal Law.<sup>21</sup> As with the Riyadh Guidelines, the draft

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<sup>20</sup> A/CONF.144/IPM.3, para 10.

<sup>21</sup> A/CONF.144/IPM.3, paras 3 and 65-67.

went to the regional preparatory meetings and the respective interregional preparatory meeting for the Ninth Congress for discussion, and then on to the General Assembly for adoption.<sup>22</sup>

The Havana Rules define a juvenile as every person under the age of 18 years, and defines deprivation of liberty as 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). The Havana Rules are intended to counteract the detrimental effects of deprivation of liberty by ensuring respect for children's rights. They set out a number of fundamental principles that closely track those of the SMR for the Treatment of Prisoners (for example in respect of pre-trial detention, admission to juvenile facilities, classification, the physical environment and accommodation, education, vocational training and work, recreation, religion, medical care, limitations on physical restraint and the use of force, disciplinary procedures, inspections and complaints, personnel), but take into consideration the special situation of juveniles:

- deprivation of liberty should be a disposition of last resort and for the minimum period (rules 1, 2 and 17),
- non-discrimination in the application of the Havana Rules (rule 4),
- furthering the well-being of the juvenile (rehabilitation) (e.g. rules 12 and 32),
- guarantee of basic procedural safeguards (e.g. rules 18(a) and 70),
- protection of confidentiality (rule 19),
- separation of juveniles from adults (rule 29),
- encouragement of the establishment of small open facilities (rule 30),
- juveniles deprived of their liberty should be prepared for release (rules 38, 79 and 80),
- contacts with families and the wider community must be maintained (e.g. rule 59),

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<sup>22</sup> General Assembly resolution 45/113 of 14 December 1990. See A/CONF.144/16, para 26.

- no corporal punishment or solitary confinement (rules 67 and 87), and
- the professionalism and training of personnel (rules 81, 85 and 86).

*The Vienna Guidelines.* The entry into force of the Convention on the Rights of the Child in 1990 imposed obligations on states parties. It also provided a basis for cooperation among not only the states parties, but also different UN agencies (such as the UNODC, the Centre for Human Rights, the United Nations Children's Fund and the Committee on the Rights of the Child), as well as a broad range of nongovernmental organizations, professional groups, the media, academic institutions and other stakeholders. In order to provide guidelines for this cooperation, ECOSOC resolution 1996/13 called for a plan of action. This was drafted at an expert group meeting held in Vienna on 23 - 25 February 1997. The draft was submitted to the Commission on Crime Prevention and Criminal Justice two months later, and during the autumn of that same year, the Vienna Guidelines were adopted by ECOSOC.<sup>23</sup>

The Vienna Guidelines are intended to assist member states in implementing the CRC, and in using and applying the standards and norms in juvenile justice (para 5). They are divided into

- measures of general application (paras 10 – 11),
- specific targets (paras 12 – 25),
- measures to be taken at the international level (para 26 – 29),
- mechanisms for the implementation of technical advice and assistance projects (paras 30 – 40),
- further considerations in the implementation of country projects (paras 41 – 42), and
- child victims and witnesses (43 – 53).

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<sup>23</sup> ECOSOC resolution 1997/30 of 21 July 1997.

### III. ARE THE STANDARDS AND NORMS LEGALLY BINDING?

Are the United Nations standards and norms on juvenile justice legally binding? Do the member states of the United Nations have to incorporate their provisions into their laws and practices, and are individual practitioners in the criminal justice system – police officers, juvenile court judges, social workers, the staff of institutions and others – required to follow them?<sup>24</sup>

The dominant view is that the UN standards and norms are part of “soft law” and are thus not legally binding. They only embody an earnest request to their addressees (member states, members of a criminal justice profession, other stakeholders) to apply the contents, and not an absolute obligation to undertake a certain course of action.<sup>25</sup> One practical implication of this is that if a public official (or an entire state) acts contrary to a UN standard and norm (but not contrary to “hard law”), then the child or juvenile subjected to such action has no legal recourse on this basis alone. He or she has no legal basis on which to complain to a superior, or turn to court in order to have the decision overturned.

This does not mean that standards and norms, as “soft law”, are meaningless, and have no practical effect. The significance of soft law, including standards and norms, does not lie in any assumed legal binding effect. The significance lies elsewhere, on both the national and the international level.

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<sup>24</sup> A fuller discussion of whether or not standards and norms are legally binding is provided in Joutsen 2016.

<sup>25</sup> Castaneda 1969, pp. 7-8 and 193-195.

It may be noted that some authorities in international law deny the entire existence of “soft law”. See in particular Klabbers 1996. Essentially, he argues that either something is law, or it is not; there is no intervening category of “soft law”, nor is there a need for such a concept.

On the national level, UN standards and norms may have an instrumental value in guiding national development.<sup>26</sup> They may be used as clinching arguments by decision-makers in individual jurisdictions when these decision-makers seek to justify certain courses of action that they would have preferred even if the standard or norm did not exist. When selecting from among various alternative approaches to achieving a certain end, the decision-makers may thus defend their choice by referring to specific provisions in, for example, the Beijing Rules, the Riyadh Guidelines, or the Havana Rules.

Similarly, UN standards and norms can also be used by citizens, non-governmental organizations and other stakeholders in trying to influence their government to change laws and policy in a certain direction.

It is difficult to analyse the actual impact of UN standards and norms on the domestic level, due to a number of factors: the absence of an obligation to report, the heterogeneity of the criminal justice systems of different States, the possibility of different interpretations of the same text, and the difficulty in determining if a specific change in national law, policy or practice was due to the influence of a United Nations standard and norm, or to other factors.

Nonetheless, many reports from States to the United Nations cite examples of the impact, and the literature shows several further examples of impact. In many States, the UN standards and norms are becoming part of the national discourse on crime prevention and criminal justice.

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<sup>26</sup> The most noted example of a standard and norm guiding national development is the Standard Minimum Rules for the Treatment of Prisoners. It has clearly guided national practice in corrections and, in several cases, helped bring about legal reform.

On the international level, “soft law” may be seen as an intermediate stage in the formulation of ideas and concepts that may in time emerge as “hard law”, in the form of international agreements.

When ideas are embodied in standards and norms, the recognition and declaration of certain principles and even detailed rules may be intended to have a direct influence on the practice of states. If this happens, they contribute to the creation of customary international law, which is widely recognized as binding on states.<sup>27</sup> Standards and norms, even if they are not in themselves binding, may thus become a source of international law, in particular if they are drafted in the form of an obligation (e.g. “States *shall*” do something, as opposed to the wording “States *may consider*” doing something, or “States *are invited*” to do something).

#### **IV. FROM SOFT LAW TO HARD LAW:**

##### **THE IMPACT OF THE CONVENTION ON THE RIGHTS OF THE CHILD**

The development of customary international law is often a long process, requiring decades. There is also a fast-track possibility: soft law elements may find their way into hard-law international treaties. A clear example in juvenile justice is provided by certain provisions of soft law UN standards and norms on juvenile justice which have found their way in the space of just a few years into the hard law Convention on the Rights of the Child, and into the practice of the Committee on the Rights of the Child.

The provisions of the Convention on the Rights of the Child (CRC) that are relevant to juvenile justice can be divided roughly into three categories.<sup>28</sup> Some provisions lay out the basic rights and

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<sup>27</sup> Castaneda 1969, pp. 19 and 168-169.

<sup>28</sup> This distinction is made in General Comment no. 10, para. 4.

principles to be followed in practice: non-discrimination (article 2), the best interests of the child (article 3), the right to life, survival and development (article 6), and the right to be heard (article 12).

A second category of provisions deal directly with the juvenile justice context: article 37, which deals in general with deprivation of liberty, and article 40, on the treatment of a child in conflict with the law.

The third category of provisions applies to all children, and these provisions are considered particularly relevant if a child has been placed in an institution and is thus in a heightened state of vulnerability: the right of children in conflict with the law to maintain the relationship with their families (article 9), the right to express their views and to be heard (articles 12 and 13), the right to exercise their religion (article 14), the right to be protected from physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (article 19), and the right to live in a healthy environment and receive appropriate treatment in case of illness (article 24).

In addition to reviewing implementation of the CRC in individual states parties and providing them with extensive recommendations,<sup>29</sup> the Committee provides guidelines – “General Comments” – for implementation in specific areas. The General Comments are recommendations, and are not binding. However, they have proven influential. General Comment no. 7 of the Committee deals with the implementation of the rights under the CRC during early childhood, and General Comment no. 12 deals with the right of the child to be heard. Special reference, however, should be made to General Comment No. 10 (2007), which deals with the rights of children in respect of juvenile justice.

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<sup>29</sup> See, for example, the most recent publicly available recommendations given to Japan, CRC/C/JPN/CP/3 (2010).

Two examples can be provided of the integration of soft law UN standards and norms into the hard law Convention on the Rights of the Child, and into the practice of the Committee on the Rights of the Child. The first deals with setting the age of criminal responsibility, and the second with the right of the child or juvenile to be heard.

There is considerable disparity around the world in respect of the age of criminal responsibility. Many countries have set an absolute minimum age of criminal responsibility, often 14 or 16 years, below which no one may be tried or punished for criminal conduct. Other countries use two age limits, with a higher age limit at which all persons will be presumed to have full criminal responsibility, and a lower age limit above which a person can be treated either as a juvenile or an adult, depending on the circumstances and the seriousness of the conduct. Finally, there are countries where quite young children, for example aged six or seven, can be held to be criminally liable.<sup>30</sup>

Beijing rule 4 calls upon states to ensure that the age of criminal responsibility is not fixed at too low an age level. The Convention on the Rights of the Child has integrated this into art. 40(3), which requires that states parties establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”. Neither of these provisions can be seen to provide clear guidance as to what, exactly, that age of criminal responsibility should be.

However, in its General Comment 10, the Committee on the Rights of the Child does seek to provide guidance on the legislative technique to be used in establishing age limits for criminal

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<sup>30</sup> General Comment 10 (2007), para. 30.

responsibility. It even specifies what it considers to be the internationally accepted minimum age of criminal responsibility:<sup>31</sup>

“Rule 4 of the Beijing Rules recommends that the beginning of MACR [*minimum age of criminal responsibility*] shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are 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.”<sup>32</sup>

The right to be heard, in turn, is particularly important given the diversity of procedures and structures for dealing with children in conflict with the law: child welfare boards, administrative hearings, juvenile courts and so on.

Beijing rule 14.2 guarantees juveniles the right to be heard: “The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.”

Article 12 of the CRC has transformed this right to be heard into hard law:

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<sup>31</sup> General Comment 10 (2007), para. 32.

<sup>32</sup> General Comment 10 (2007) goes on to call upon countries that do set the minimum age of criminal responsibility at 12 years to raise this age even higher.

1. States Parties shall assure to the child who is 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 the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In its conclusions on the reports of states parties, the Committee on the Rights of the Child has time and again returned to the child's right to be heard, and recommended that laws be changed, policy be developed, more resources be given, and in general closer attention be given to this right in practice, and not just in law. In its General Comment 10, furthermore, the Committee has clarified its position on the child's right to be heard in any proceedings regarding him or her:<sup>33</sup>

“The child should be given the opportunity to express his/her views concerning the (alternative) measures that may be imposed, and the specific wishes or preferences he/she may have in this regard should be given due weight. Alleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions regarding the most appropriate response to allegations of his/her infringement of the penal law ... It goes without saying that the judges involved are responsible for taking the decisions. But to treat the child as a passive object does not recognize his/her rights nor does it contribute to an effective response to his/her behaviour. This also applies to the implementation of the measure(s)

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<sup>33</sup> General Comment 10 (2007), para. 45.

imposed. Research shows that an active engagement of the child in this implementation will, in most cases, contribute to a positive result.”

One hundred years ago, at the time the League of Nations was founded, the concern was with “children hovering at the verge of criminality”. The basic approach was quite paternalistic: the child was indeed regarded as a “passive object” who should be guided on the way to his or her full role as a well-adjusted citizen. It was also assumed that each state was free to develop its own juvenile justice system, although there was a growing interest in seeing how other states were dealing with child and juvenile offenders.

The United Nations standards and norms on juvenile justice mark a change in approach. They are a distillation of “what works” in different legal and administrative systems, and at different stages of development. They have been formulated as a benchmark by which the stakeholders involved in juvenile justice systems around the world – including the juveniles themselves – can assess how well these systems are responding to juveniles who are alleged to have committed crimes, or who otherwise are seen as being “on the verge of delinquency”.

They have also contributed to hard law, most noticeably in the form of the Convention on the Rights of the Child, and the work of the Committee on the Rights of the Child. The Committee, in particular, has taken an active but carefully considered role in building on the UN standards and norms as well as the text of the Convention in order to provide guidance to states parties. Paragraph 45 of General Guideline 10 issued by the Committee, cited above, shows how the Committee combines logical reasoning (“alleging that a child is criminally responsible implies that he or she is competent to act, and therefore he or she should have a right to be heard”; “treating a child as a passive object does

not recognize his or her rights or contribute to an effective response”) and research results (“research shows that in most cases a positive result will be achieved if the child is actively engaged in the process”).

Individual states continue to hold their sovereign right to develop their own juvenile justice system. But we have learned considerably from one another’s successes (and failures) over the course of 150 years. One result is that international experience is guiding individual states in finding the right and the most effective response – through the exchange of experience, through soft law, and ultimately through hard law.

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