



**Submission on the General Comment on article 9 (liberty and security of person)  
of the International Covenant on Civil and Political Rights  
By the Child Rights International Network - CRIN  
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The Child Rights International Network (CRIN) is a rights-based organisation that advocates for the full realisation of all children's rights. Our submission aims at ensuring that the special guarantees children should receive as to their right to liberty and security are properly highlighted in the Committee's General Comment on article 9.

Article 24(1) of the Covenant on Civil and Political Rights ("the Covenant") entitles every child "to such measures of protection as are required by his status as a minor on the part of his family, society and the State." Elaborating on this principle, General Comment No. 17 (on the Rights of the Child) noted that this provision "entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant."<sup>1</sup> These provisions clearly foresee the need to make provisions for children in the implementation of the Covenant beyond those required for the population generally.

Article 9 guarantees a right to liberty and security as well as providing for specific protections for people arrested, charged with criminal offences or otherwise deprived of their liberty. While these aspects of the article clearly affect children within the criminal justice system, articles 9(1) and 9(4) also affect those who are detained outside the criminal justice system, whether in the immigration setting, as part of the health system or in any number of other non-criminal settings.

This submission will broadly address the right to liberty and security of person with regards to children, before highlighting specific settings in which article 9 requires special protections for children.

**Article 9 in relation to the criminal justice system**

**Right to liberty and security of person**

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<sup>1</sup> General Comment No. 17: Rights of the Child (Art. 24) 07/04/1989 CCPR

With regards to the Covenant's article 9(1) guarantee of a right to liberty and security of person, CRIN argues that this right has specific effects regarding the rights of children.

Article 37(b) of the Convention on the Rights of the Child (CRC) clearly states that "the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time". The text of paragraphs 17(b)<sup>2</sup> and 19<sup>3</sup> of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules") is in line with article 37 of the CRC and imply that punitive approaches are not appropriate.

CRIN believes that children should be kept out of the criminal justice system; they should be met with systems which renounce retribution and focus exclusively on children's rehabilitation, with the necessary attention to public safety and security.

Even in cases of severe offences committed by children, detention should be the exception and should be outweighed by the interest of safeguarding the well-being and development of the child. The World Report on Violence against Children, issued following the UN Secretary General's Study, urged governments "to ensure that detention is only used for child offenders who are assessed as posing a real danger to others, and then only as a last resort, for the shortest necessary time, and following judicial hearing, with greater resources invested in alternative family-and community-based rehabilitation and reintegration programmes".

In 2003, the European Network of Ombudsperson's for Children (ENOC) issued a position statement that argues: "The Convention on the Rights of the Child (CRC) proposes a separate, distinct system of juvenile justice; it requires that this must be focused on respect for all the rights of the child and on the aims of rehabilitation and reintegration. This focus and these aims are not compatible with 'criminalising' child offenders."

In July 2011, a report of the Inter-American Commission on Human Rights and Juvenile Justice and Human Rights in the Americas, also argues that "the element of retribution is not appropriate within juvenile justice systems if the objectives pursued are the reintegration and rehabilitation of the child."

Articles in the CRC identified by the Committee on the Rights of the Child as general principles require that the best interest of the child be a primary consideration "in all actions concerning children", including those taken by courts of law (article 3 (1)), and that States ensure "to the maximum extent possible the survival and development of the child" (article 6). In its General Comment No. 10 on Children's Rights in Juvenile Justice, the Committee on the Rights of the Child reaffirms children's right must be met with a system that understands their special needs:

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<sup>2</sup> Paragraph 17(b) of the Beijing Rules "restriction on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum"

<sup>3</sup> Paragraph 19 of the Beijing Rules "the placement of juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period"

"[...]The best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety."<sup>4</sup>

Not criminalising children does not mean that children who commit criminal offences will avoid "justice". There must be an investigation and hearings to determine what happened and who was responsible for the offence. Children have an explicit right in article 12(2) of the Convention to be heard in any judicial and administrative proceedings that affect them.

*CRIN recommends that children should be kept out of the criminal justice system; they should be met with systems which renounce retribution and focus exclusively on children's rehabilitation, with the necessary attention to public safety and security.*

## **Pre-trial detention**

Article 9(3) of the ICCPR provides that "anyone arrested or detained on a criminal charge ... shall be entitled to trial within a reasonable time or release", and that "[i]t shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of judicial proceedings, and, should occasion arise, for execution of the judgement". Two issues are at stake here, the right to an expeditious trial and the recognition that pre-trial detention should be exceptional. Both of these aspects of the article are of particular importance for children and require specific protections.

### *Exceptional use of pre-trial detention*

Article 37(b) of the CRC further requires that "[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time". This provision includes pre-trial detention. Rule 13.1 of the "Beijing Rules" requires that "detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time" and the "Havana Rules" further emphasise that in relation to juveniles, "[d]etention before trial shall be avoided to the extent possible and limited to exceptional circumstances".<sup>5</sup>

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<sup>4</sup> Committee on the Rights of the Child, General Comment No. 10, Children's Rights in Juvenile Justice, 2007, para. 10

<sup>5</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the "Havana Rules") para. 17

The inappropriate use of pre-trial detention of children has persistently featured in the Concluding Observations of the Committee on the Rights of the Child, in relation to 22 of the 41 States that have reported to the Committee since September 2010. Of this sample, nine recommendations contained a focus on the number of children held in pre-trial detention or the frequency with which children are so held. This information indicates that with regards to children, pre-trial detention is in common use, and is used in a way that does not meet the standards set by CRC.

There is consensus within international juvenile justice standards that pre-trial detention of children should not only be exceptional but a measure of last resort.

### *Expeditious trial*

Article 40(2)(b)(iii) of the CRC further requires that “States Parties shall, in particular, ensure that: Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (iii) To have the matter determined **without delay** by a competent, independent and impartial authority or judicial body in a fair hearing according to law...”. This language stresses the particular importance of expeditious proceedings with regards to juvenile justice.

The “without delay” approach is also emphasised by rule 20.1 of the Beijing Rules<sup>6</sup>, the commentary of which stressed that “the speedy conduct of formal procedures in juvenile cases is a paramount concern” and that “[a]s time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offence, both intellectually and psychologically”.<sup>7</sup> The Havana rules further require that in relation to preventative detention “juvenile courts and investigating bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention”.<sup>8</sup>

The above mentioned sample of the Concluding Observations of the Committee on the Rights of the Child made criticisms or recommendations related to the length of pre-trial detention with regards to 10 of the 41 States that have reported to the Committee since September 2010. It is again clear that there is consensus as to the need to limit the time that children spend in pre-trial detention and that states are frequently failing to meet this requirement.

CRIN recommends that the Committee stress that the special protection of children requires that any use of pre-trial detention be, not only exceptional, but a measure of last resort. Furthermore, children who are detained must be brought before a court without delay.

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<sup>6</sup> Paragraph 20.1 of the Beijing Rules “Each case shall from the outset be handled expeditiously, without any unnecessary delay”

<sup>7</sup> Commentary to Paragraph 20.1 of the Beijing Rules

<sup>8</sup>United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the “Havana Rules”) para.

## **Child friendly justice**

Article 24(1) of the Covenant's requirement of "measures of protection as are required by his status as a minor" in conjunction with the Covenant's justice provisions sets a prerequisite that children should always be met with a child friendly justice system, a system that understands and respects both their rights and their unique vulnerability.

Article 40 of the CRC proposes a special approach: the establishment of laws, procedures, authorities and institutions specifically applicable to these children – not to some of them but to all of them - up to the age of 18.

### *Minimising the challenges*

Child-friendly justice asks States to appreciate and minimise the challenges that children face at each step in each aspect of a legal proceeding, building confidence in the view of the justice system as a solution to children's legal issues rather than another of an already long list of problems. Respecting child-friendly justice principles will not only eliminate many of the traumatic experiences children face in the legal system, it will foster greater respect for their rights by providing children the full access to justice they need to bring violations of these rights forward.

### *Children's rights at the time of the arrest*

With regards to article 9(2), the requirement that a person who is arrested "be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him", the manner in which a child should be informed must be age appropriate.

This requirement is developed in conjunction with the article 14(3)(a) provision that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".

Any child apprehended by the police and suspected of wrongdoing should be given an immediate opportunity to contact a parent, guardian or trusted person and provided with access to a lawyer free of charge.

Police officers should explain to children why they have been apprehended in a way that they can understand, and should not question children about their potentially offending behaviour until a parent, guardian, trusted person or lawyer has arrived.

### *Legal representation*

Children are often denied the right to defence and legal representation, yet this is a fundamental right, for adults and children. Children left alone without any independent legal counsel are not

only deprived of their voice, but can also be subject to numerous abuses as they are often intimidated and not aware of their rights.

The Covenant (Article 14) and the Basic Principles on the Role of Lawyers (Principles 3, 6) further emphasise that legal assistance must be offered without charge as necessary to any person facing criminal proceedings, and the Beijing Rules (Rules 7, 13, 15) clarify that children have both the right to counsel and the right to apply for free legal aid where this is available.

### *The right to a fair trial*

Children suspected of wrongdoing should not lose their rights during trial. Article 40(2) of the CRC provides the main rights and guarantees that ensure that every child accused of having infringed the penal law receives a fair treatment and trial. Article 9(3) reaffirms the right "to be brought promptly before a judge or other officer authorised by law to exercise judicial power".

In its General Comment No. 10 on Children's Rights in Juvenile Justice, the Committee on the Rights of the Child reaffirms children's right to a fair trial:

"A fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed.... Taking into account the child's age and maturity may also require modified courtroom procedures and practices."

*CRIN recommends that the Human Rights Committee highlight in its General Comment to article 9, children's need to be met with a child friendly justice system that minimises the challenges they face in each aspect of a legal proceeding, provides them with free legal representation and insures the rights and guarantees of a fair trial adapted to their needs.*

### **Other forms of deprivation of liberty**

In its General Comment No.8, the "Committee points out that [article 9] paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc." the General Comment goes on to say: "and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention."

### **Detention of migrant children**

Migrant children are often dealt with according to their migration status prior to being seen as minors. Article 9 applies to all deprivation of liberty, including detention for the purposes of

immigration control. Liberty is a fundamental human right, and irregular migrants are not criminals per se, and should not be treated as such. Children should not be detained because they, their parents and caregivers or other family members do not have legal status in the country.

*CRIN recommends that the Human Rights Committee highlight in its General Comment to article 9 that children should not be detained because of their migrant status.*

### **Detention for drug use**

Children are routinely criminalised for drug use. If caught using drugs, and apprehended by police, they may be sent to mandatory treatment or rehabilitation facilities, where, in the worst cases, they may be subject to torture, inhuman or degrading treatment,<sup>9</sup> or to youth detention centres or jails. They may be kicked out of schools and educational institutions. In many countries, children are detained in the same prison wards as adults, for example in Jamaica<sup>10</sup> and Bangladesh.<sup>11</sup>

The Beijing Rules notes that juveniles under detention pending trial who may be addicted to drugs have particular needs (part 13), and that medical and psychological assistance is extremely important for institutionalised juveniles including in cases of drug addiction (part 26).

*CRIN recommends that the Human Rights Committee highlight in its General Comment to article 9 that children should not be criminalised for drug use. The use of drugs should be dealt with as a health issue and the focus should be on the prevention of harm related to drug use.*

### **Detention for mental illness**

Children who are held in mental health institutions are victims of many human rights abuses such as forced sterilisation and abortion, denial of essential pain relief, and the use of involuntary detention as “treatment”.

“Health care settings should be places where human rights are realised. Yet, too often, they are places where human rights are severely abused, sometimes amounting to torture or cruel, inhuman, and degrading treatment.”<sup>12</sup>

In its Concluding observations to Serbia (2009), the Committee against Torture notes the following:

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<sup>9</sup> The illegal arrest, arbitrary detention and torture of people who use drugs in Cambodia (<http://www.hrw.org/en/reports/2010/01/25/skin-cable-0> )

<sup>10</sup> see <http://www.crin.org/resources/infoDetail.asp?ID=21947&flag=news>

<sup>11</sup> see <http://www.crin.org/resources/infoDetail.asp?ID=18194&flag=news>

<sup>12</sup> The Open Society Foundation, 20 Mechanisms for Addressing Torture in Health Care, available at: <http://www.soros.org/sites/default/files/twenty-mechanisms-addressing-torture-health-care-20120829.pdf>

“The Committee notes the State party’s acknowledgment that poor and inadequate treatment takes place in some institutions and remains concerned at the reports of treatment of children and adults with mental or physical disability, especially at the forceful internment and long-term restraint used in institutions that amount to torture or cruel, inhumane and degrading treatment or punishment in social-protections institutions for persons with mental disability and psychiatric hospitals. The Committee is concerned that no investigation seems to have been initiated with respect to treatment of persons with disability in institutions amounting to torture or inhuman or degrading treatment.”

*CRIN recommends that the Human Rights Committee highlight in its General Comment to article 9 that children with mental health problems should not be systematically held in institutions. States should initiate investigations with respect to the treatment children receive in mental health institutions and ensure that where detention in the civil setting is only used with the consent of the child or, where the child lacks capacity to decide on his or her treatment, in the best interests of the child.*

## **Conclusion**

Therefore, CRIN recommends that in drafting the General Comment on article 9, the Committee take account of the article 24(1) requirement to ensure the special protection of children in conjunction with article 9. In particular, CRIN recommends that the General Comment include the following:

1. Children should be kept out of the criminal justice system; they should be met with systems which renounce retribution and focus exclusively on children’s rehabilitation, with the necessary attention to public safety and security.
2. Any use of pre-trial detention must be not only exceptional, but a measure of last resort, and that children who are so detained must be brought before a court without delay;
3. Children need to be met with a child friendly justice system that minimises the challenges they face in each aspect of a legal proceeding, provides them with free legal representation and insures the rights and guarantees of a fair trial adapted to their needs;
4. Children should not be detained because of their migrant status;
5. Children should not be criminalised for drug use. The use of drugs should be dealt with as a health issue and the focus should be on the prevention of harm related to drug use;
6. Children with mental health problems should not be systematically held in institutions. States should initiate investigations with respect to the treatment children receive in mental health institutions and ensure that where detention in the civil setting is only used with the consent of the child or, where the child lacks capacity to decide on his or her treatment, in the best interests of the child.