



PRACTICAL GUIDE FOR LAWYERS

*How to defend a child in conflict
with the law?*

DEFENCE FOR CHILDREN INTERNATIONAL (DCI) - BELGIUM



PROJECT “MY LAWYER, MY RIGHTS: ENHANCING CHILDREN’S RIGHTS IN CRIMINAL PROCEEDINGS IN THE EU”

(JUST/2015/J1CC/AG/PROC/8618)
SEPTEMBER 2016 - AUGUST 2018

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AUTHORS & PROJECT

This Practical Guide (hereinafter “Guide”) was drafted by **Marine Braun**, a juvenile justice expert, who is also the coordinator of the “My Lawyer, My Rights” project and **Mia Magli**, juvenile justice assistant, under the supervision of **Benoit Van Keirsbilck**, Director of Defence for Children International (DCI)-Belgium and former President of DCI-International. Members of the team of DCI-Belgium have also strongly contributed to the conception and the production of this Guide, in particular **Aurélie Carré** and **Julianne Laffineur**. The development of this Guide was supported by the expertise of the ten partners and associated partners from across Europe and also of the five experts of the EU funded project “My Lawyer, My Rights”.

Defence for Children International (DCI)-Belgium is the lead partner of this project. The purpose of the work of DCI-Belgium is to protect and defend children’s rights in Belgium as well as in other countries. DCI-Belgium is part of the DCI Worldwide Movement, comprised of a network of 38 National Sections and other associated members spread out across the globe. DCI’s main actions include: training, education and awareness raising; taking action when children’s rights are being infringed and providing oversight and monitoring of Belgium’s respect for the fundamental rights of children. The main fields of intervention are: juvenile justice and children’s access to justice; children’s deprivation of liberty; the rights of children on the move; children’s right to participation and to freedom of expression.

This Guide is one of the main outputs of the project “**My Lawyer, My Rights**” (MLMR). It has been developed to provide clear guidance concerning the right of the child to access a lawyer in juvenile justice proceedings in the EU.

Even though the right to legal representation for children suspected or accused in juvenile justice proceedings is well-established by international, regional and national laws, in practice, it is often unevenly applied by the EU Member States or not guaranteed at all. This constitutes a serious obstacle for children to exercise their right to defend themselves in juvenile justice proceedings and is a threat to the fulfilment of all their other procedural rights. A child in conflict with the law deserves to be defended by a specialised lawyer. A specialised lawyer will play a crucial role in ensuring respect for due process principles, in influencing the measures taken by the judge and ultimately in contributing to the child’s ability to reintegrate and rehabilitate into society following juvenile justice proceedings.

The “**My Lawyer, My Rights**” project aims to (1) advocate for full and proper application of EU law and support EU Member States in particular in the application of the EU directives on the procedural rights of suspected or accused persons in criminal proceedings (EU directives on fair trial rights), with particular regard to children’s rights of access to and assistance by a lawyer; (2) advocate for the establishment of

national structures that specialise in free legal aid for children in compliance with the EU directives, the Convention on the Rights of the Child (UNCRC), the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (the CoE Guidelines on CFJ) and with all the other relevant instruments mentioned in this Guide. In order to guide and assist EU Member States in establishing these structures, ☐ a Manual for EU Member States “*How to ensure the rights of children in conflict with the law?*” is published as another main output of the MLMR project and is devoted, in particular, to its first and second goals; (3) provide lawyers for children with information and practical tools on their role, the basic training required and all the conditions for ensuring an effective right to defence for children suspected or accused of having infringed the criminal law. This Guide is dedicated, in particular, to the third goal of the project. All outputs of the project are available on the database accessible via its devoted website:

www.mylawyermyrights.eu

DATA COLLECTION AND COVERAGE

This Guide is based on information collected as part of national research conducted in the “My Lawyer, My Rights” project, using a common methodology developed and drafted in October 2016 with the cooperation of all partners to and experts of the project. In particular, we have relied on 6 field studies in Belgium, Bulgaria, Ireland, Italy, Poland and in the Netherlands and 12 desk studies in Austria, England and Wales, Finland, France, Germany, Hungary, Luxembourg, Portugal, Romania, Slovakia, Spain and Sweden. The 18 national reports and their “country overviews”, summing up the reports, are published and available on our website.

The national reports briefly describe the juvenile justice systems in several EU Member States, verify the transposition, implementation and application (given the nature of the juvenile justice system) of the set of EU directives on fair trial rights¹ and analyse whether specialised lawyers for children are available at national or local level, what their role is and how they work in practice.

All the field and desk studies were conducted with a view to:

- Investigate the role, mandate and training of lawyers defending children in conflict with the law so that improvements can be made in regard to their situation;

- Verify the transposition and application of the set of EU directives on fair trial rights ensuring the procedural rights that an individual has when he² is a suspect or accused in criminal proceedings: the right to receive information concerning his rights and the procedure, the right to receive interpretation and translation in a language that he understands, the right to have access to a lawyer, the right to be assisted by a lawyer and the right to receive legal aid (□ see the Manual for EU Member States “*How to ensure the rights of children in conflict with the law?*”).

The 6 field studies covered two main elements:

The perspectives of **77 juvenile justice professionals** who interact with children in juvenile justice proceedings: including **36 lawyers for children**, (youth) judges, (youth) prosecutors, (youth) court staff, psychologists, social workers, interpreters and police officers. These were gathered through semi-structured interviews or focus groups.

The perspectives of **55 children in conflict with the law** on their experiences within juvenile justice proceedings and with their lawyers were gathered through semi-structured interviews or focus groups.

¹ Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, (EU) 2016/800 and (EU) 2016/1919.

² In this Guide, persons are referred to as ‘he’ or ‘him’ for ease of reference, but these usages should be understood to mean ‘she’ and ‘her’ as well.

This work included a preparatory phase undertaken in October 2016. It involved examining the requirements for conducting interviews with children; identifying appropriate and diverse channels to reach and contact children; and developing a methodology³ for interviewing children. The interviews followed semi-structured interview guidelines with open-ended and potential follow-up questions and supportive material explaining the project in a child-friendly way to the interviewee. The guidelines were based on the fundamental principles and general elements of the CoE Guidelines on CFJ.

In addition to this, **an awareness-raising video** has been released on the basis of the children’s interviews collected during the research phase. The video is aimed at all juvenile justice professionals: lawyers, judges, prosecutors, police officers, social workers, etc. working with children in conflict with the law in order to increase their awareness on the importance of respecting the child’s right to a trained lawyer at every stage of juvenile justice proceedings.

³ This included procedural and ethical considerations in conducting a research study with children such as safeguarding, consent, data protection, confidentiality, etc.

ACKNOWLEDGMENTS

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

We also thank the principal funder of this project – the European Union – as well as the co-funder – La Fédération Wallonie-Bruxelles (Belgium) – without whom this project would not have been possible.

Moreover, we would like to thank the partners such as the HELP Programme of the Council of Europe, the European Criminal Bar Association (ECBA) and the law firm DLA-Piper for their voluntary participation in the project as well as the national and local bar associations, lawyers, judges, organisations of the civil society, experts, researchers and other key actors who have provided their support to the research and the work carried out in the framework of this project.

We particularly thank Deirdre Kelleher for proofreading this Guide.

The pro-bono Europe section of DLA-Piper coordinated 12 desk studies conducted by their peer offices at national level. We wish to extend a special word of thanks to the 12 national teams and the pro-bono coordination team for their in-kind contribution to organising the research, collecting the data at national level and contributing to national reports.

We wish to thank all the children who agreed to be interviewed as part of this project and in doing so, shared their experience about their lawyer(s) (when they had one or more) and on their procedural rights while facing juvenile justice proceedings.

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

FOREWORD

There is no field where the demand for justice is stronger than that of juvenile justice. Inadequate responses, inappropriate for children in conflict with the law, can harm their future, sometimes forever, and even further contribute to insecurity. Lost lives, shameful societies. The stakes are fundamental and the responsibility of the decision-makers is enormous. Yet, paradoxically, juvenile justice is often neglected, if not forgotten.

Children in conflict with the law

For years, a variety of international and European texts (hard law, soft law) have been insisting on the same issue: children in contact with the criminal justice system are in an increased vulnerable situation and have the right to be protected by the State. The violation of their human rights is not a myth, but a reality, as I have had the occasion to observe in the (too) many cases that have reached the European Court of Human Rights and that reveal unbearable and intolerable situations. Yes, there are children who take their own life in prison¹, who die in custody² or who endure such ill treatments that these are sometimes qualified of torture³. Even slaps given by a police officer to a child who is entirely under his or her control constitute a violation of human dignity and can give birth to feelings of arbitrariness, injustice and powerlessness⁴.

In a democratic society, ill-treatment is never an adequate answer to the difficulties, which are real and should not be minimised, faced by the authorities. In that regard, the situation of girls in detention cannot be ignored anymore⁵. The conditions of detention themselves often reach the gravity threshold set by Article 3 of the European Convention on Human Rights⁶. As for the very principle of deprivation of liberty and of detention of children, the limits of “educative surveillance” should be subject to an extreme vigilance for there is a risk of drift in the current security climate⁷.

Children’s rights

Through all these very real cases, there is one essential need that arises: to ensure children’s rights time and again, and always more. In addition to the fact that children have access to the rights and liberties guaranteed “to everyone” by Article 1 of the European Convention on Human Rights, Article 24 of the Charter of Fundamental Rights of the European Union is a remarkable disposition for it expressly acknowledges children’s rights. It is indeed about “fundamental” rights, which means that these rights are in relation with the very foundations of democracy and of the rule of law. The Charter of Fundamental Rights has become “the compass of all policies decided at EU level” and acquired full legally binding nature with the entry force of the Treaty of Lisbon on 1st December 2009.

¹ ECtHR, 13 June 2002, *Anguelova v. Bulgaria*.

² ECtHR, 9 October 2012, *Çoşelav v. Turkey*.

³ ECtHR, 3 June 2004, *Bati and Others v. Turkey*.

⁴ ECtHR (GC), 28 September 2015, *Bouyid v. Belgium*.

⁵ ECtHR, 1 February 2011, *Yazgül Yılmaz v. Turkey*.

⁶ ECtHR, 3 March 2011, *Kuptsov and Kuptsova v. Russia*.

⁷ ECtHR (GC), 23 March 2016, *Blokhin v. Russia*.

Its incorporation into the Treaties marks a significant step in the constitutional order of the European Union.

Nonetheless, it is now urgent that these rights become “practical and effective”, rather than “theoretical or illusory” as the European Court of Human Rights keeps repeating. Declarations are not enough for children anymore, they need actions.

In the field of juvenile justice, the demands of the fair trial are at the centre of the debate. Children have the right to a judgment⁸, given by an independent and impartial tribunal⁹ within a reasonable time. They have the right to the presumption of innocence and to all the procedural guarantees. Defence rights from the beginning of the procedure and at all stages of the juvenile justice proceedings are an essential part of the scheme¹⁰. As opposed to this, the practice of interrogating and holding a child in a context lacking procedural guarantees, including lack of legal representation, is regarded as an inhuman and degrading treatment¹¹. The role of the lawyer, free, independent and trained, is more necessary than ever, for he or she is responsible for the relationship of trust and for the confidentiality in the interest of the young litigant and of the justice. In a democratic society, lawyers are the first and last bulwark against arbitrariness.

Towards a European model

Against this background, the EU directive (EU) 2016/800 of the European Parliament and of the Council of the European Union of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings is a valuable tool. It endorses and develops relevant European and international standards and principles, in particular: Non-retroactive juvenile justice; the right to be heard; the right to effective participation in the proceedings; prompt and direct legal assistance; free assistance of an interpreter; full respect for privacy. These are not merely criminal but constitutional guarantees. The directive (EU) 2016/800 is important and significant for in that it proposes a common European model for fair trials for children in conflict with the law.

If we are to take children’s rights “seriously”, it is obligatory for the EU Member States to transpose and implement the directives¹². In this respect, the interest and the added value of this excellent handbook are to provide guidance to lawyers to fulfil their task in assisting children in conflict with the law. This handbook invites them to be specialised and trained to ensure the children all their procedural rights.

New horizons

A last issue arises and it might well be the most important. Indeed, juvenile justice must answer to the demands of fundamental rights, and be appropriate to the children’s needs and proportionate both to the circumstances and the offence.

Yet, it is necessary to go further because rights are a necessary but insufficient condition. Historically, we can observe that, very often, it is youth justice that has paved the way towards new horizons. Today, should the “best interests” of a child in conflict with the law suffer the unavoidable negative effects of the punitive and repressive answer against which human rights are supposed to offer protection? But where exactly does this strange need to punish come from in our society? As a “heritage of modernity”, we have integrated the punitive reasoning as if it was obvious, we have put the idea of punishment on such a pedestal¹³ that it is now difficult for us to see beyond it. A genuine child-friendly justice should offer something else.

We must urgently find other ways to settle conflicts in order to prevent children from entering the vicious spiral of penal intervention. It is not only about having a better criminal justice; we must above all have something better, something more humane and more intelligent¹⁴. We have known this “something” for a long time: lawyers should advocate for it in refusing detention and using the other measures

that exist, wanting the reinsertion of children to enable them to participate in the social life as it is, favouring education for all and offering future prospects to children in conflict with the law. As Adolphe Prins wrote over a century ago, children in conflict with the law do not respect property or life for neither life nor property have real value to them¹⁵. Today, I think that the return to repression, in its most severe forms, as if it offered an answer to the idea of justice, is not only a regression but also an illusion. This is a dead-end that will contribute to violence instead of appeasing it. We are all responsible, individually and collectively, for the consequences it will have on future generations.

Françoise TULKENS

Former Vice-President of the European Court of Human Rights (ECtHR)

⁸ ECtHR, 30 June 2015, *Grabowski v. Poland*.

⁹ ECtHR, 2 March 2010, *Adamkiewicz v. Poland*.

¹⁰ ECtHR (GC), 27 November 2008, *Salduz v. Turkey*.

¹¹ ECtHR, 3 February 2011, *Dushka v. Ukraine*.

¹² The partners and experts of the project agree with this statement and therefore refer to the sections of the Manual addressed to EU Member States on “Recommendations and key directions for implementation”. □

¹³ See A. P. Pires, *Quelques obstacles à une mutation du droit pénal*, in *Revue générale de droit - R.G.D.*, 1995, p. 145.

¹⁴ *Ibid.*, p. 135.

¹⁵ A. Prins, *Criminalité et répression. Essai de science pénale*, Paris/Bruxelles, Guillaumin et Cie Editeurs/Librairie européenne C. Mucquart, 1886, p. 15.

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ACRONYMS

BPRL	The UN Basic Principles on the Role of the Lawyers
CAT	The UN Committee Against Torture
CCPR	The UN Committee on Civil and Political Rights or the Human Rights Committee
CECHR	The Council of Europe Commissioner for Human Rights
CEDAW	The UN Committee on the Elimination of Discrimination against Women
CED	The UN Committee on Enforced Disappearances
CESCR	The UN Committee for Economic, Social and Cultural Rights
CRPD	The UN Committee on the Rights of Persons with Disabilities
CFJ	Child-Friendly Justice
CJEU	The Court of Justice of the European Union
CM	The Committee of Ministers
CoE	The Council of Europe
CPT	The Committee on the Prevention of Torture of the CoE
CRC Committee	The UN Committee on the Rights of the Child
CRIN	The Child Rights International Network
DCI	Defence for Children International
EAW	European Arrest Warrant
EC	The European Commission
ECHR	The European Convention on Human Rights
ECSR	The European Committee of Social Rights
ECTHR	The European Court of Human Rights
EP	The European Parliament
ESC	The European Social Charter
EU	The European Union
EUCFR	The European Union Charter of Fundamental Rights
GACCJS	The UN Guidelines for Action on Children in the Criminal Justice System
GC N°5	The General Comment N°5 of the CRC: General measures of implementation of the Convention on the Rights of the Child

GC N°10	The General Comment N°10 of the CRC: Children's rights in juvenile justice
GC N°12	The General Comment N°12 of the CRC: The right of the child to be heard
GC N°14	The General Comment N°14 of the CRC: The right of the child to have his or her best interests taken as a primary consideration
GPJD	The UN Guidelines for the Prevention of Juvenile Delinquency or The Riyadh Guidelines
HRC	The Human Rights Council
IAYFJM	The International Association of Youth and Family Judges and Magistrates
ICCPR	The International Covenant on Civil and Political Rights
MACR	The Minimum Age of Criminal Responsibility
MLMR	The My Lawyer, My Rights project
NGO	Non-Governmental Organisation
OP3 UNCRC	The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
PGALA	The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems
RAJJ	The UN Standards Minimum Rules for the Administration of Juvenile Justice or The Beijing Rules
RPJDL	The UN Rules for the Protection of Juvenile Deprived of their Liberty or The Havana Rules
SLDC	Socio-Legal Defence Centre ¹
SPT	The UN Subcommittee on Prevention of Torture
TS	Technical Sheet
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union
UDHR	The Universal Declaration of Human Rights
UN	The United Nations
UNCRC	The United Nations Convention on the Rights of the Child
UPR	The Universal Periodic Review

¹ For this project, we use the definition of Socio-Legal Defence Centre as conceived by Defence for Children International (DCI): <https://defenceforchildren.org/socio-legal-defence-centres/>.

LEXICON

Throughout this Guide reference is made to:

HARD LAW

The rules of hard law are contained within the international and regional instruments that are legally binding or which create obligations in the domestic law of EU Member States. These rules generally arise from a negotiation process among Member States of the United Nations, of the Council of Europe or of the European Union to produce a set of commonly accepted standards.

SOFT LAW

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

CASE-LAW

The judgments of the European Court of Human Rights (ECtHR) and of the Court of Justice of the European Union (CJEU) do have an impact at national level for EU Member States. The ECtHR decisions are binding and should at least provide guidance to every EU Member State.

JUVENILE JUSTICE PROCEEDINGS

The set of EU directives on fair trial rights refers to “criminal proceedings”. Nonetheless, in order to facilitate the reading of this Guide we will use the term “juvenile justice proceedings” to talk about all the proceedings that a child in conflict with the law, regardless of the EU Member State legislation, can be involved in.

DEPRIVATION OF LIBERTY ²

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

² This definition has been taken from the Practical Guide “Monitoring places where children are deprived of liberty” (p.14), edited by DCI-Belgium as part of the EU funded project “Children's Rights Behind Bars” available on: <https://defenceforchildren.org/wp-content/uploads/2016/02/DCI-Practical-GuideEN.pdf>. □

INTRODUCTION

“Concern over violation of children’s rights in these situations (of children who come into contact with the justice system as a result of being suspected or accused of committing an offence), throughout the world, is growing. Policy and practice relating to juvenile justice are among those areas most frequently criticized by the Committee on the Rights of the Child, the body responsible for monitoring the implementation of the United Nations Convention on the Rights of the Child. The Committee has in fact made reference to problems in this sphere in relation to some two thirds of the State reports it has reviewed so far. Juvenile justice, however, is not seen as a top priority in many countries, and its realities are often hidden or ignored”.¹

Nigel Cantwell, the co-founder of the Defence for Children International movement (DCI), issued a publication in 1998 in the Innocenti Digest, journal of the UNICEF Research Center, on the main issues of concern in juvenile justice. Twenty years later, in spite of the recommendations of the UN Committee on the Rights of the Child (CRC Committee) on juvenile justice, too many children suspected or accused of having committed an offence are still victims of violations of their fundamental human rights.

The United Nations Convention on the Rights of the Child (UNCRC) defines the juvenile justice system in article 40, paragraphs 3 and 4, as a justice system that should be specifically applicable to children alleged as, accused of, or recognized as having infringed the criminal law, appropriate to their well-being and proportionate both to their circumstances and the offence. It further grants, in article 37, the use of arrest, imprisonment or deprivation of liberty as a measure of last resort. Other international and regional instruments and standards on juvenile justice² are in line with the UNCRC and confirm the primarily educational aim of the system, meaning that the justice system should in no way be strictly punitive. Regrettably in practice this is not the case.

In the context of this Guide the definition of “juvenile justice system or proceedings” requires a broad interpretation in order to include proceedings that are considered welfare- or education-based but yet can end up with a child being deprived of his liberty.

¹ See <https://www.unicef-irc.org/publications/pdf/digest3e.pdf>.

² Non-exhaustive list of the main standards on juvenile justice for children: The Beijing Rules; The Riyadh Guidelines; The Havana Rules; the CoE Guidelines on CFJ and the set of EU directives 2010/64/EU, 2012/13/EU, 2013/48/EU, (EU) 2016/800, (EU) 2016/343 and (EU) 2016/1919 (« EU directives on fair trial rights»). These instruments are explored in detail in the Manual for EU Member States. Directive (EU) 2016/343 on the presumption of innocence has not been part of the national research carried out in the framework of the MLMR’s project. □

Under no circumstances should EU Member States abdicate from safeguards and protections guaranteed to children in conflict with the law by international and regional instruments because they do not consider their juvenile justice proceedings as ‘criminal’.

Who is this Practical Guide for?

Our research demonstrates that:

- ➊ Children in conflict with the law are not always represented and assisted by a lawyer;
- ➋ Even when children are assisted, the lawyer is not necessarily specialised in representing children;
- ➌ Even when children are assisted by a specialised lawyer, they are not always represented at all stages of juvenile justice proceedings;
- ➍ In some EU Member States, children can waive their right to a lawyer.

This Guide seeks to raise awareness among lawyers about their essential role as agents of change in combatting children’s rights violations in juvenile justice proceedings.

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

We hope this Guide will provide lawyers with the tools to improve their role towards children in the juvenile justice system. The lawyer for children needs to be the child’s adviser that will help him through the juvenile justice proceedings in order to ensure that all his procedural rights are guaranteed and protected.

Objectives of the Practical Guide

The overall objective of this Guide is to act as a **practical tool** for the lawyer for children, demonstrating how such role should operate in practice and how to combine legal expertise (knowledge of legal instruments and standards) with soft skills (child-friendly language, appropriate communication, attitude towards children and other technical advice when defending a child in juvenile justice proceedings). The structure and the length of this Guide were thus designed with the idea of providing lawyers for children with a useful tool that they can use in their daily work.

The specific objectives of this Guide are to:

- ➊ **Focus on the child' right of access to a lawyer**, under directive 2013/48/EU, and on the **assistance by a lawyer**, under directive (EU) 2016/800;
- ➋ **Analyse the other procedural rights of children in conflict with the law** under directives 2010/64/EU; 2012/13/EU; and (EU) 2016/1919³.

This Guide has a European scope. Therefore, some adaptations might be needed in order to respond to different contexts or national specificities. For example, Ireland, the United Kingdom and Denmark have opted-out from most EU directives on fair trial rights.

How to use this Practical Guide?

This Guide consists of a manual accompanied by technical sheets.

The manual is divided into 4 parts:

Part A focuses on the key concepts relevant to the scope of this Guide, in order to give the reader a general idea of the context:

- ➊ Who is a child?
- ➋ Who is a child in conflict with the law?
- ➌ What is the minimum age of criminal responsibility?
- ➍ What is a child-friendly juvenile justice system?



³ Detailed information is provided on these directives in a technical sheet attached to the Manual for EU Member States "How to ensure the rights of children in conflict with the law?" (TS 3).

Part B outlines the overall role and mission of the lawyer when defending a child in national juvenile justice proceedings by distinguishing (a) the general role of the lawyer from (b) the specific characteristics of lawyers for children.

Part C sets out the specific actions which lawyers for children should undertake across the different stages of juvenile justice proceedings at pre-trial, trial and post-trial phase.

Further information, readings, and appendices, are contained in **Part D**.

Additionally, five **technical sheets (TS)** are attached to the manual. These sheets give more technical information on legal instruments and procedures in order to facilitate the reading of this Practical Guide.

- ➊ **TS 1** gives a detailed overview of **the applicable international and regional legal instruments and standards** guaranteeing children in conflict with the law their procedural rights in juvenile justice proceedings;
- ➋ **TS 2** aims to raise awareness among lawyers about what **"strategic litigation"** is and how to use it to improve the respect of children's rights. This TS gives the lawyer the tools to undertake the necessary steps for a strategic litigation at international (UN) and regional (CoE and EU) level;
- ➌ **TS 3** provides the lawyer with a **checklist on the assistance by a lawyer** (article 6 of directive (EU) 2016/800);
- ➍ **TS 4** provides the lawyer with a **checklist on the right to an individual assessment** (article 7 of directive (EU) 2016/800);
- ➎ **TS 5** gives the lawyer more information on the **existing training-programmes on children's rights** in the different EU Member States.

It is recommended that the technical sheets are used together with the manual.



What the Lawyer must do



Technical Sheet



Quote



Child specific aspect



Reference



Important

A. KEY CONCEPTS

This part of the Guide explains key concepts relevant to its scope. The concepts are based on international children's rights standards and instruments. The EU directives on fair trial rights, that need to be transposed and implemented at national level by the EU Member States, should be read in line with the following standards.

1. Who is a child?

A child is every person below the age of eighteen (18) years unless under the law applicable to the child, majority is obtained earlier. (UNCRC, art. 1; Directive (EU) 2016/800, art. 3.1)¹



“Where it is uncertain whether a person has reached the age of 18, that person shall be presumed to be a child”. (Directive (EU) 2016/800, art. 3, last paragraph)

18 years is the “age of majority”, the threshold of adulthood. It is the moment when children assume legal control over their person, actions and decisions², thus terminating the control and legal responsibilities of their parents or guardian over them. The age of majority does not necessarily correspond to the mental or physical maturity of an individual and it should not be confused with the minimum age of criminal responsibility (MACR) (see below p. 23-26). □

For the purpose of this Guide, we will refer to the term “child” rather than “juvenile”, “young person”, “minor” or “youngster”, even if a young person of 15 or 17 years old will not necessarily recognise himself in the term “child”.

This Guide also applies to young adults, above the age of 18, suspected or accused in juvenile justice proceedings where:

- ➊ The young adult is suspected or accused of an offence committed when he was a child;
- ➋ The young adult became subject to the juvenile justice proceedings when he was a child.

¹ The UNCRC defines a ‘child’ as a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger (UNCRC, art. 1). “For the purposes of this Directive the following definitions apply: ‘child’ means a person below the age of 18” (directive (EU) 2016/800, art. 3.1). The Committee on the Rights of the Child, the monitoring body for the UNCRC, has encouraged States to review the age of majority if it is set below 18 years old in order to increase the level of protection for all children under 18 (CRC Committee, GC N° 10, § 38). See https://www.unicef.org/crc/files/Guiding_Principles.pdf.

² There may be different types of legal age requirements, alongside the notion of majority, for example, the age at which children can get married, vote and engage with the criminal justice system or access complaints mechanisms.

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

A child in conflict with the law is a person who has reached the age of criminal responsibility but not the age of majority (under 18 years old), who is suspected or accused of having committed an offence under his national criminal law. (CRC/C/GC/10, Introduction, §1)

The age that needs to be taken into consideration to determine whether a child is in conflict with the law is the age at the time of committing the offence, not later than that.

A child in conflict with the law, alleged to have committed a criminal offence, is involved in juvenile justice proceedings. In many countries these proceedings, which result in sanctions and measures, are not classified as “criminal” under the national law but are criminal in nature, according to the autonomous understanding of the term “criminal” as adopted by international and regional bodies. This is further explained with concrete national examples in the Manual for Member States. It is important to underline that the same reasoning is adopted by this Guide. □

3. What is the minimum age of criminal responsibility?

The age of criminal responsibility is the age that a person reaches when he is presumed to have the capacity to infringe the criminal law and thus to be judged by a criminal court or other relevant competent authority.

Normally, the age of criminal responsibility does not coincide with the age of majority and these two concepts must not be confused³.

³ See: UNCRC, art. 40.3; CRC Committee, General Comment N°10, Children's rights in juvenile justice, (CRC/C/GC/10), §31-35; Beijing Rules, Rule 4.

3.1 The minimum age of criminal responsibility (MACR)

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

There are no hard law international standards setting out what the MACR should be. This is why there is a wide range of MACR throughout the UNCRC States parties⁴, including in the EU. Such a variety is due to different national juvenile justice systems. (See below, p. 27) □

Guidance is however provided by soft law instruments such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”) which recommend that any MACR “*shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity*” (Rule 4).

Moreover, the CRC Committee considers that a MACR below the age of 12 years is not internationally acceptable. (CRC/C/GC/10, §32)

In some countries exceptions to the MACR are allowed. These permit the use of a lower MACR 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 (CRC/C/GC/10, §34). According to the CRC Committee, these exceptions should not be allowed: States parties of the UNCRC must set a MACR that does not allow the use of a lower age. (CRC/C/GC/10, §34)

The MACR of the 6 partners’ countries of the My Lawyer, My Rights’ project are⁵:

MACR	BELGIUM	IRELAND	THE NETHERLANDS	BULGARIA	ITALY	POLAND
	No age limit*	12 y**	12 y	14 y	14 y	17 y***

* *Belgium has not clearly defined an age below which children are not considered responsible under the criminal law. Therefore, there is no minimum age below which the child cannot be the subject of a measure by the youth tribunal (generally 12 years). However, certain types of measures cannot be imposed below a certain age (generally 14 years).*

** *Children aged 10 years can be held criminally liable for serious offences.*

*** *For some specific offences children can be tried from the age of 15 years. Moreover, correctional measures can be imposed to children who have committed a prohibited act between 13 and 17 years.*

⁴ CRC/C/GC/10, §30: “They range from a very low level of age 7 or 8 to the commendable high level of age 14 or 16. Quite a few States parties use two minimum ages of criminal responsibility”.

⁵ A complete list and further detail on the MACR across Europe is available on the Child Rights International Network’s (CRIN) website: <https://www.crin.org/en/home/ages/europe>.

3.2 Below the minimum age of criminal responsibility

The CRC Committee gives authoritative opinions in its General Comment N°10.

Children below the MACR are considered not to have the capacity to infringe the law, and should only be involved in proceedings that are corrective, protective and/or educational. (CRC/C/GC/10, §31.1)

This means that when they are recognized as having infringed the criminal law or alleged to have committed a criminal offence, they cannot be involved in criminal proceedings. (CRC/C/GC/10, §33)

3.3 Above the minimum age of criminal responsibility

Children above the MACR at the time of the commission of an offence, but younger than 18 years old, can be formally charged and be subject to criminal law procedures. (CRC/C/GC/10, §31)

This means that they are presumed to have the capacity to infringe the criminal law and, therefore, to be held responsible for their actions.

The determination of the criminal responsibility is not only subject to the age of the child, but also to an assessment of his developmental maturity or ability of individual discernment and understanding. (Beijing Rules, Commentary to Rule 4)

Therefore, a child above the MACR that commits an offence could be not criminally charged if the judge ascertains his developmental immaturity.

A child above the MACR can be subject to proceedings that may take the form of corrective, protective, educational or criminal models depending on the national system. In any event, these proceedings, including the final outcome, should always be in line with the principles of a child-friendly juvenile justice system, according to the CRC Committee. (CRC/C/GC/10, §31.2)

3.4 Young adults, over the age of 18 years old

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

Nevertheless, according to the CRC Committee, young adults who committed a criminal offence when they were children (younger than 18 years old) or who were children when they became subject to criminal proceedings have the right to be judged in the framework of the juvenile justice system. (CRC/C/GC/10, §37)

Neither age bracket nor age limit are mentioned in the UNCRC or in the CRC Committee's General Comment N°10 on juvenile justice, to limit the fundamental right of young adults, who have committed an offence in one of the abovementioned situations, to benefit from the juvenile justice system.

CRC Committee, GC N° 10, § 37:

*“The Committee wishes to remind States parties that they have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of article 40 of UN-CRC. This means that every person under the age of 18 years **at the time of the alleged commission** of an offence must be treated in accordance with the rules of juvenile justice”.*

Consequently, this Guide shall also apply to this category of person.⁶

Furthermore, the CRC Committee welcomes the extension of the application of the rules of juvenile justice to young adults who committed an offence when they were 18 or older, which is the case in some countries:

CRC Committee, GC N° 10, §38:

*“The Committee notes with appreciation that some States parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, **usually** till the age of 21, either as a general rule or by way of exception”*

⁶ See more on this in the Manual for Member States, section “e. Children who reach majority before or during the start of the proceeding”, p.56. □

4. What is a child-friendly juvenile justice system and what are its key principles?

Every EU Member State is responsible for the establishment and implementation of its own national juvenile justice system.

UNCRC, art. 40.3:

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

EU Member States apply different types of proceedings which follow different models, depending on the objective of said proceedings (e.g. criminal, restorative, educational, welfare, etc.). Most of the time, these models are combined or mixed.

Nonetheless, whatever these differences are, every country is bound by the UNCRC to establish a child-friendly juvenile justice system.

A system is considered child-friendly if it respects the principles and standards established at international and regional level. These principles have been identified first by the UN, developed by the Council of Europe (CoE) and then incorporated into EU law. They will be listed and described below.

4.1 The UN principles: the four general principles of the UNCRC and the fundamental principles of juvenile justice

The UNCRC is the most widely ratified Convention in the world and incorporates the complete range of international human rights — including civil, cultural, economic, political and social rights as well as aspects of humanitarian law⁷.



According to the CRC Committee “In the administration of juvenile justice, States parties have to apply systematically the general principles contained in articles 2, 3, 6 and 12 of UNCRC, as well as the fundamental principles of juvenile justice enshrined in articles 37 and 40”. (CRC/C/GC/10, §5-14)

⁷ In order to facilitate the reading and interpretation of the UNCRC, UNICEF published “A summary of the rights under the Convention on the Rights of the Child”, available on https://www.unicef.org/crc/files/Rights_overview.pdf.

These articles of the UNCRC were distinguished as general principles by the CRC Committee during its first session in 1991, when guidelines were formulated on how States should structure their reports to the Committee (CRC/G/5/1991, §13; CRC/C/58/1996, §25-47; CRC/GC/2003/5, §12) and represent the general requirements for all children's rights, including those pertaining to juvenile justice:

- 1) The principle of non-discrimination (UNCRC, art. 2);
- 2) The principle of the best interests of the child (UNCRC, art. 3);
- 3) The right to life, survival and development (UNCRC, art. 6);
- 4) The right to be heard (UNCRC, art. 12).

These guiding principles shall be applied systematically together with the **fundamental principles of juvenile justice, enshrined in articles 37 and 40 of the UNCRC (see below, p. 33)** ^{□□}, including that the juvenile justice system must be child-friendly, adapted to and focused on the needs and rights of the child involved in juvenile justice proceedings and thus different from justice for adults. In particular, the UNCRC provides a set of fundamental principles that would ensure that children in conflict with the law are to be treated in accordance with the child's fundamental (human) rights. There are guarantees that are basic human rights (e.g. human dignity) as well as child-specific procedural rights and guarantees before, during and after the end of juvenile justice proceedings, which are crucial to ensure the respect of the child's right to a fair trial (e.g. information adjusted to his age and level of understanding, the parents' role in the proceedings, the principle of rehabilitation, etc.) (see below, from p. 43). ^{□□}

I. The principle of non-discrimination

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

No child should be treated unfairly on any basis. As a consequence, all children in conflict with the law enjoy procedural rights without discrimination. (See also Beijing Rule 2 (1))

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

II. The principle of the best interests of the child

Article 3 of the UNCRC states that the best interests of the child shall be a primary consideration in all actions concerning children. General Comment N°14 (CRC/C/GC/14) provides authoritative guidance on the application of article 3 of the UNCRC.

EU Member States should think about how their decisions will affect children and this particularly applies to laws, policies and budget. (CRC/GC/2003/5, §19, §27, §51 and 52)

CRC Committee, GC N°5, §12, art.3.1:

“Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions”.

The well-being of the child involved in juvenile justice proceedings should always be the guiding factor in the consideration of his case.⁸

The CRC Committee's General Comment N°10 provides authoritative guidance on the application of article 3 of the UNCRC in the administration of juvenile justice. (CRC/C/GC/10, §10)

CRC Committee, GC N° 10, §10:

“The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders”.

It is strongly recommended that EU Member States should include rehabilitation in their juvenile justice system instead of solely serving the purpose of retribution. EU Member States where the juvenile justice system remains excessively punitive should focus more on rehabilitation. Alternatives to imprisonment should be sought in order to improve the response of States to juvenile crime and violence.

⁸ There is a difference between the “objective best interests of the child”, usually identified by the youth judge or other relevant authority, and the “subjective best interests” claimed by the child.

III. The right to life, survival and development

Children have the right to life and development. Governments should ensure that children survive and develop healthily. All forms of deprivation of liberty (including arrest, detention and imprisonment) can have negative consequences for a child's harmonious development and can seriously hamper his reintegration. (CRC/C/GC/10, §11)

Therefore, deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate time. (UNCRC, art. 37 b)

IV. The right to be heard⁹

The UNCRC requires that a child who is capable of expressing his views is able to do so freely and that his views are given due weight in accordance with his age and maturity.

UNCRC, art. 12.2:

"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".

This part of article 12 relates specifically to the right of the child in conflict with the law to legal assistance in the preparation and presentation of his defence.

The right to be heard also means that the child has the right to effectively participate in the proceedings in which he is involved (UNCRC, art. 40), to share his views, to say what he thinks and to have his opinions taken into account by the court and all the relevant actors in the proceedings.

In order to guarantee the right to effective participation, the proceedings should be specifically adapted to children. (UNCRC, art. 40.3)

General Comment N°12 of the CRC Committee provides guidelines on how to guarantee the child's right to be heard in juvenile justice proceedings. (CRC/C/GC/12, p.13)

⁹ A Manual on the "Promotion of the implementation of article 12 (UNCRC) in the juvenile justice system" was published under the EU funded project Twelve and is available on the following link: http://www.dei-belgique.be/IMG/pdf/dci_-_twelve_handbook_eng_web.pdf □

Equally important is the right of the child to remain silent and the right not to give his views, if he is involved in juvenile justice proceedings. In order to ensure this, the role of lawyers for children is fundamental in advising and guiding a child as to when being silent might be in his best interests.

CRC Committee, GC N° 10, Non-discrimination

“States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Many children in conflict with the law are also victims of discrimination, e.g. when they try to get access to education or to the labour market. It is necessary that measures are taken to prevent such discrimination, inter alia, as by providing former child offenders with appropriate support and assistance in their efforts to reintegrate in society and to conduct public campaigns emphasizing their right to assume a constructive role in society”.

CRC Committee, GC N° 10, The right to life, survival and development

“This inherent right of every child should guide and inspire States parties in the development of effective national policies and programmes for the prevention of juvenile delinquency. The death penalty and a life sentence without parole are explicitly prohibited under article 37 (a) of CRC. Deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child’s right to development is fully respected and ensured”.

CRC Committee, GC N° 10, The right to be heard

“The right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile justice. The Committee notes that the voices of children involved in the juvenile justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfilment of their rights”.

GENERAL PRINCIPLES UNCRC

CRC Committee, GC N° 10, Best interests of the child

“In all decisions taken within the context of the administration of juvenile justice, 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. The best interests of the child should be a primary consideration”.

4.2 The UN fundamental principles that relate specifically to juvenile justice

- The UNCRC

Articles 37 and 40 of the UNCRC are devoted specifically to the subject of juvenile justice. These articles enumerate important rights of children in conflict with the law, such as the use of deprivation of liberty as a measure of last resort; the right of the child to be separated from adults when deprived of liberty; the right to access to a lawyer and all the other procedural rights related to a fair trial which apply equally to adults.

In addition to the protections available to adults, children accused of, or recognized as having infringed the criminal law, have the right to *“be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society”*. (UNCRC, art. 40.1)

- The CRC Committee

The CRC Committee provides authoritative guidance on how the UNCRC should be implemented in its General Comment N°10 on *Children’s rights in juvenile justice*. (CRC/C/GC/10)

According to the CRC Committee, a juvenile justice system is a justice system adapted to the child’s needs that must deal with the following core elements (CRC/C/GC/10, §15 to §89):

- ➊ The prevention of juvenile delinquency;
- ➋ Interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings with specific procedural adaptations;
- ➌ The setting of the minimum age of criminal responsibility and upper age-limits for juvenile justice;
- ➍ Guarantees for a fair trial;
- ➎ The deprivation of liberty, including pre-trial detention and post-trial incarceration, as a measure of last resort and for the shortest appropriate period of time.

- The Beijing Rules

In order for a juvenile justice system to be classified as child-friendly it should be in line not only with the UNCRC but also with other fundamental international standards such as those enshrined in the UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) which, even if not legally binding, represent minimum conditions which have been accepted at international level for the treatment of children who are in conflict with the law.

Beijing Rules, Rule 5 “Aims of juvenile justice”:

“The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence”.

- The Riyadh Guidelines

The UN Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”) provide a practical, positive and pro-active approach to preventing the rise of crime in the youth population by listing various (non-binding) methods to discourage juvenile delinquency.

The Riyadh Guidelines, “Fundamental principles”:

“The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes”.

National prevention policies should facilitate the socialisation and integration of all children, by focusing on support for vulnerable families and in particular by involving children at risk of social exclusion.

- The Havana Rules

Child-friendly juvenile justice offers alternative sanctions and measures to detention, in order to respect the principle that detention of children should only be used as a measure of last resort and for the shortest appropriate amount of time to better promote their reintegration into society.¹⁰

This important principle is also provided for by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“The Havana Rules”). These rules are intended to establish minimum standards for the protection of children deprived of their liberty in all forms, consistent with their human rights and fundamental freedoms, with a view to counteracting the detrimental effects of all types of deprivation of liberty and to fostering the child’s reintegration into society.

The Havana Rules, “Fundamental perspectives”:

“The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort”.

According to article 40.3 of UNCRC, States parties should seek to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected, and General Comment N°10 (CRC/C/GC/10) provides a series of useful guidelines on how to use these kind of measures without undermining the rights of children in conflict with the law. (CRC/C/GC/10, §26-27)

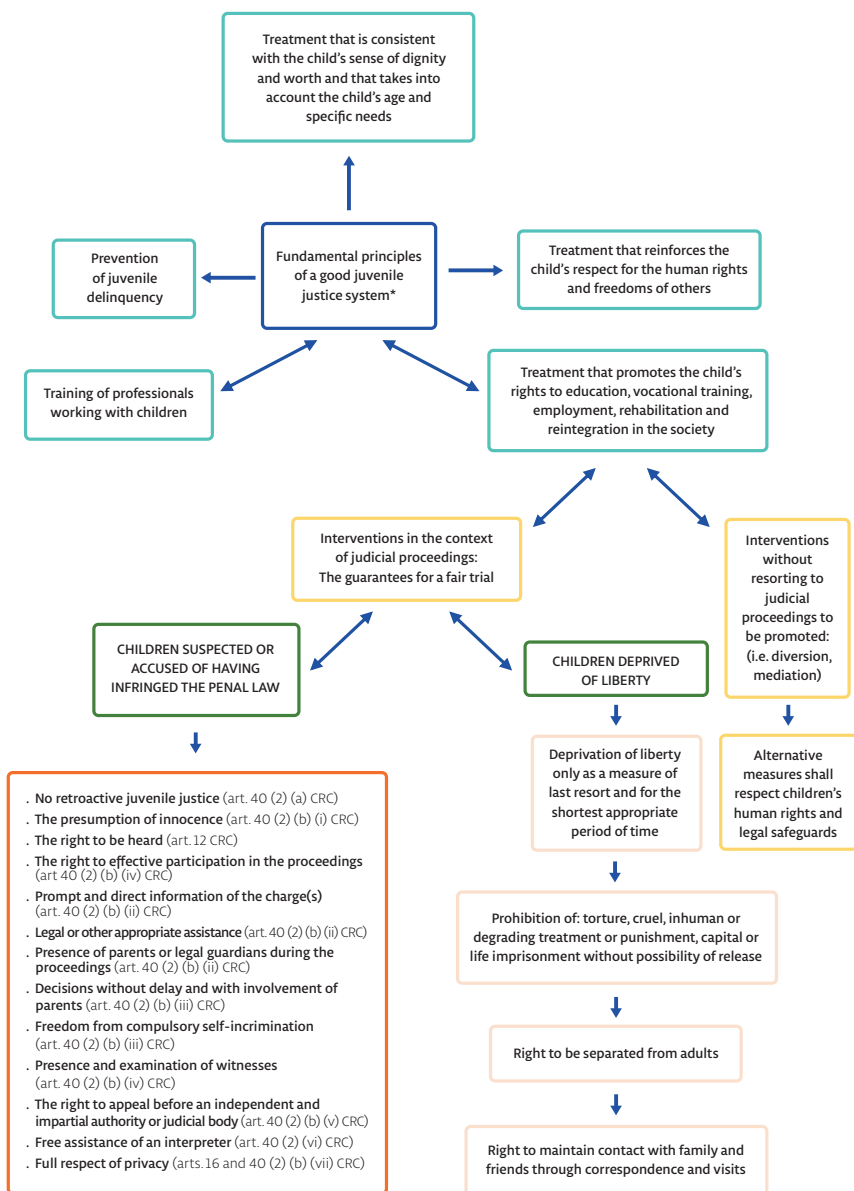
CRC Committee, GC N° 10, §26:

“States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children’s human rights and legal safeguards are thereby fully respected and protected”.

Therefore, the use of a range of measures involving removal from juvenile justice proceedings and referral to alternative (social) services (i.e. diversion) should be a well-established practice which should be used in the majority of cases concerning children. (CRC/C/GC/10, §24-25)

¹⁰ About alternative measures, see: UNCRC, art. 40.4; General Comment N°10, (CRC/C/GC/10), especially §24-27 and §68-77; The Beijing Rules, Rules 17-18; The Recommendation of the Committee of Ministers to Member States on the European Rules for juvenile offenders subject to sanctions or measures (adopted by the Committee of Ministers on 5 November 2008 at the 1040th meeting of the Ministers’ Deputies), Rules 5, 23.1, 23.2, 24, 26, and 30.1. For more information, see also the “Alternatives to detention for juvenile offenders – Manual of Good Practices in Europe”, published by the International Juvenile Justice Observatory (www.ijjo.org). □

The following graphic summarises the main characteristics of an effective and appropriate juvenile justice system.



4.3 The Council of Europe principles: Guidelines on child-friendly justice

The Council of Europe (CoE) Guidelines on Child-Friendly Justice (CFJ)¹¹ is another key instrument in the field of the juvenile justice that is intended to enhance children's access to justice and their treatment in the justice system. The guidelines promote the principles of the best interests of the child, care and respect, participation, equal treatment and the rule of law. They also encourage the development of multidisciplinary approaches and training and require States to provide safeguards at all stages of juvenile justice proceedings.

The CoE Guidelines on CFJ are not formally legally binding but they are built on existing and binding international and European standards and instruments such as the UNCRC. (CoE Guidelines on CFJ, Preamble, p. 13)

Directive (EU) 2016/800, recital 7 :

"This Directive promotes the rights of the child, taking into account the Guidelines of the Council of Europe on child-friendly justice".

According to these Guidelines, "child-friendly justice" refers to:

CoE Guidelines on CFJ, Definitions:

"Justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity".

¹¹ Available on: <https://rm.coe.int/16804b2cf3>.

The CoE Guidelines also stress the importance of the use of alternative measures to judicial proceedings but under very specific conditions.

CoE Guidelines on CFJ, Part IV, §24:

"Alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged whenever these may best serve the child's best interests. The preliminary use of such alternatives should not be used as an obstacle to the child's access to justice".

4.4 The principles of child-friendly justice in EU law

The European Union has devoted a wide range of procedural safeguards to persons suspected or accused in criminal proceedings by following the "Roadmap for strengthening their procedural rights".¹²

To date, five EU directives address the rights of suspects and accused persons in criminal proceedings (both for children and adults).

- ➊ Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, 2010 (for children and adults);
- ➋ Directive 2012/13/EU on the right to information in criminal proceedings, 2012 (for children and adults);
- ➌ Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, 2013 (for children and adults);
- ➍ Directive (EU) 2016/343 on the presumption of innocence and of the right to be present at the trial in criminal proceedings, 2016 (for children and adults);
- ➎ Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings, 2016 (for children and adults).

These directives, the so called "directives on fair trial rights", are examined in more detail in the Manual addressed to the EU Member States. □

In 2016, the EU adopted the directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, with the aim of setting minimum binding standards across EU Member States. This directive is the only one which is addressed specifically to children in conflict with the law and therefore it represents the main instrument by which certain principles of child-friendly justice have been incorporated into EU law.

Directive (EU) 2016/800, recital 1:

"The purpose of this directive is to establish procedural safeguards to ensure that children, meaning persons under the age of 18, who are suspects or accused persons in criminal proceedings, are able to understand and follow those proceedings and to exercise their right to a fair trial, and to prevent children from re-offending and foster their social integration".

This directive takes into account the UNCRC, the CoE Guidelines on CFJ (as mentioned above), the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) and must be read in conjunction with articles 21.1 and 24 of the EU Charter of Fundamental Rights (EUCFR) which have incorporated the four guiding principles of the UNCRC (non-discrimination, participation, best interests of the child and protection of the child's well-being).

¹² Council Resolution regarding the Roadmap to strengthen the procedural rights of suspects or people prosecuted in a criminal procedure, 30 November 2009, JO C/295/1.

¹³ Available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L0800>. Ireland, the United Kingdom and Denmark are not bound by this directive since they have opted-out from the European Union's area of freedom, security and justice

B. WHO IS A “LAWYER FOR CHILDREN”?

1. Concept

For the purpose of this Practical Guide, we will refer to the term “lawyer for children” when referring to a lawyer specialised in defending children involved in juvenile justice proceedings.

The CoE Guidelines on CFJ help to understand better what qualities and skills are required to be a lawyer for children.

The CoE Guidelines on CFJ, Principle 39:

“Lawyers representing children should be trained in and knowledgeable on children’s rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding”.

2. The role of the “lawyer for children”

As indicated in the Preamble of the UNCRC, *“the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”.*

The lawyer for children needs to have the same qualifications as a lawyer for adults, but should, in addition, adapt his role and act differently, according to the age and maturity of the child and to his specific rights as a child in conflict with the law.

There are currently only a few EU Member States that have a specific category of lawyers specialised to defend children (e.g. in Belgium, the Netherlands, Italy, Luxembourg and Spain). Lawyers will need to refer themselves to the domestic rules established by the bar association to which they belong and, more specifically, to the regulations defining the role and mandate of the lawyers for children in order to adapt their role to each specific case.

Even if this specialisation does not exist in the country¹, lawyers will have to comply with the general regulations for lawyers established by their bar association or other relevant authorities, bearing in mind their different role of “guardians” of the rights of the child.

The UN Basic Principles on the Role of Lawyers (BPRL)² provide an accurate account of the general duties and obligations of the lawyer.

¹ In the frame of the MLMR project, it is recommended to the EU Member States to organise such a specialisation at national or local level (see the Manual addressed to EU Member States)

² See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>

2.1 The general role of the lawyer

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

As already well-known by lawyers, the general duties and obligations include³:

a. The respect of the fundamental rules of the profession

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

b. The respect of his general duties towards the client (adult or child)

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

The BPRL provide a common definition on the lawyers’ duties. These principles should be respected and taken into account by EU Member States that approved them. Member States then need to apply and adapt the principles within the framework of their national legislation and practice.

In particular, BPRL Rule 13 states that:

“The duties of lawyers towards their clients shall include:

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

³ See <http://www.ccbe.eu/documents/professional-regulations/>

c. The knowledge of the general principles of criminal law

The general principles of criminal law are usually applied in juvenile justice proceedings, regardless of the model put in place at national level (welfare, criminal, administrative or other).⁴

Article 6 of the European Convention on Human Rights (ECHR) enshrines the right to a fair trial and details the guarantees that constitute the general principles of criminal law.

A guide was established by the European Court of Human Rights (ECtHR) in order to help legal practitioners understand the key principles and the relevant case-law on article 6 (criminal limb).⁵

These principles need to be respected in every proceeding. The lawyer shall verify and adapt them to the child's situation (see the next section "The specific role of the lawyer who is defending a child", p. 43). □

Knowledge of and training on the following principles is essential:

ECHR, art. 6§1

- ➊ The right to be judged by a tribunal established by law (also UNCRC, art. 40.2 (b) (iii));
- ➋ Independence and impartiality of the tribunal (also UNCRC, art. 40.2 (b) (iii));
- ➌ Fairness: equality of arms and adversarial proceedings, reasoning of judicial decisions, right to remain silent and not to incriminate oneself, use of evidences, entrapment, waiver of these guarantees;
- ➍ Public hearing (for adults) **vs.** Court hearings in absence of the public for children in conflict with the law (also directive (EU) 2016/800, art. 14.2 "Right to protection of privacy" and UNCRC, art. 40.2 (b) vii "Respect of privacy through all stages of the proceedings")⁶;
- ➎ The right to a fair hearing within a reasonable amount of time (also directive (EU) 2016/800, art. 13 "Timely and diligent treatment of cases" and UNCRC, art. 40.2 (b) (iii)).⁷

⁴ Consequently, principles of civil and administrative law may also be applicable depending on the national circumstances.

⁵ See http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf. A guide on the civil limb is also available.

⁶ In Ireland, Children Act 2001 as amended, section 94 makes comparable provision for in camera proceedings by stipulation who may be in attendance during proceedings involving children.

⁷ In Ireland Children Act 2001 as amended, section 73(1) provides that "As far as practicable, the hearing of proceedings in the Court shall be arranged so that the time that the persons involved have to wait for the proceedings to be heard is kept to a minimum."

ECHR, art. 6§2

- ➏ The presumption of innocence (also UNCRC, art. 40.2 (b) (i) and directive 2016/343/EU).

ECHR, art. 6§3

- ➐ The rights of the defence include:
 - Information on the nature and cause of the accusation (also UNCRC, art. 40.2 (b) (ii))⁸;
 - Preparation of the defence (adequate time, adequate facilities – e.g. right of access to the case file – and consultation with a lawyer) (also UNCRC, art. 40.2 (b) (ii));
 - Right to defend oneself in person or through legal assistance (practical and effective legal assistance), right to communicate with his lawyer in private (also UNCRC, art. 40.2 (b) (ii), directive 2013/48/EU and directive (EU) 2016/800, art. 6), legal aid (also directive (EU) 2016/800, art. 18), examination of witnesses (also UNCRC, art. 40.2 (b) (iv)), free assistance of an interpreter (also UNCRC, art. 40.2 (b) (vi) and directive 2010/64/EU);
 - Effective participation (also directive (EU) 2016/800, art. 16): e.g. the right to be present, the right to hear and follow the proceedings, the right to express (or not) his views and the right to remain silent during the proceedings.

As mentioned, most of these principles are also listed in other international and regional child-specific instruments such as the UNCRC, the CoE Guidelines on CFJ and directive (EU) 2016/800.

2.2 The specific role of the lawyer who is defending a child

The specific role of the lawyer for children is to assist the child in exercising his rights of defence effectively, according to article 6.2 of directive (EU) 2016/800.

To understand which skills lawyers need to have when defending a child in conflict with the law, it is important to read this last article in combination with articles 40 and 12 of the UNCRC.

⁸ In Ireland, Children Act 2001 as amended, section 57 sets out the information that must be provided to a child who has been arrested and who is in police custody at a Garda (police) station. This section also stipulates that a child must be informed of their right to consult with a lawyer and how to do so.

Article 40.2 (b) (ii) of the UNCRC states that: *“Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (...) the right to have legal or other appropriate assistance in the preparation and presentation of his or her defence”*.

This means that children who are accused of breaking the criminal law have the right to legal help and fair treatment in a justice system that respects their rights.

Article 12.1 of the UNCRC highlights the importance to: *“... 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”*.

Therefore, children have the right to say what they think and have their opinions taken into account when they are in conflict with the law. The right to express their views is strictly related to their right to be informed at every stage of the proceedings. The level of the child's participation in the decisions affecting him must be always appropriate to the child's level of maturity.



Whether the lawyer is a lawyer chosen by the child or appointed ex officio by a court or competent authority, he needs to:

a. Be a trusted person for the child

To gain the child's trust, the lawyer needs to be trained on how to:

- ➊ **Guide the child during the juvenile justice proceedings;** To do so, the lawyer should have a good understanding on how the juvenile justice system works (especially the social services system which has a key role in these kind of issues), and be aware of the different measures that can be taken in these kind of proceedings. This may include avoiding judicial proceedings when it is in the best interests of the child (e.g. by proposing diversion and alternative measures).

Moreover, lawyers for children should have a good understanding on the role of each actor in the juvenile justice system and be able to explain their roles to the child.

The lawyer is the only professional that should be present throughout the entire juvenile justice proceedings (and also after it concludes). It is therefore important that the child is represented by the **same lawyer** throughout the various stages of the procedure wherever possible.

- ➋ **Inform the child about his rights in adapted (i.e. child-friendly) language;**

- ➌ **Inform the child about the different options and ensure realistic expectations;**
- ➍ **Listen to the child and take his point of view into account;** This is fundamental to guarantee the child's right to participate effectively in a trial. If the child does not express his opinion because he is not capable or not willing to do so, the lawyer should merely guarantee the respect of the child's rights and make sure that the judge has the necessary means to form an opinion and eventually take a decision in the best interests of the child.
- ➎ **Establish trust with the child;**
- ➏ **Communicate in an appropriate way with the child during the proceedings by building active two-way communication;**
- ➐ **Meet the child several times** in an environment that is appropriate and adapted to the child's needs;
- ➑ **Make a regular assessment on the maturity and developing skills** of the child.

b. Be the child's spokesperson and defender of his opinion(s) and interests

The relationship of the lawyer with the child should not be influenced by the child's family or by other people holding parental responsibility. Lawyers must work on the child's instructions and in his best interests and not in those of family-members, even if the lawyer is appointed and therefore rewarded by the family.

- ➊ **Understand what the child's point of view is and convey this through the formal procedure;** In the process of listening to and interacting with the child, lawyers should try to understand what his understanding of the situation is and what his wishes are in order to convey the message to the judge, even if the child's opinion does not appear to be sound, realistic or relevant in the eyes of an adult. It is essential for the child to feel heard, to be understood and supported so that his voice is present in the proceedings. The lawyer will then have the opportunity to advise the child and explain to him the consequences of his reasoning. In this way, the child will be able to make an informed decision. Moreover, it is necessary that the lawyer brings the child's logic in the debate between adults, without depriving the child of his right to speak before the judge or relevant authorities.
- ➋ **Identify the best interests of the child** (case-by-case analysis); The lawyer should always be able to evaluate the possible impact (positive or negative) of all the decisions affecting the child and his physical and psychological well-being. Assessing and determining the best interests of the child requires the respect of due process principles. Furthermore, the justification of the decision must show

that these procedural rights have been explicitly taken into account. (CRC/C/GC/14, §6)

- **Ask for the use of all necessary procedural adaptations**⁹ because children in conflict with the law have the right to appear in specialised proceedings, adapted to their age and needs; In particular, the following guarantees shall be ensured to the child:
 - The set-up of audio-visual recording of questioning by police or other law enforcement authorities;
 - Court hearings held in the absence of the public (as a general rule) (See also Beijing Rules 8.1 and 8.2); ☐
 - The treatment of cases involving children in a timely and diligent manner;
 - The involvement of the holders of parental responsibility (or of another appropriate adult);
 - Parents should be provided with all the necessary information concerning the situation of their child (the same information which the child has the right to receive) and they have the right to accompany him during court hearings and also during other stages of the juvenile justice procedure (if they are not in a position of conflict of interest with respect to their child). Therefore, every child in conflict with the law has the right to be accompanied by his parents and by a lawyer without having to choose between each of them.
- **Enable the child’s voice to be presented to the other stakeholders** (parents or another appropriate adult and professionals working in the juvenile justice system); The lawyer must have contact with all stakeholders – in the presence of the child if this is possible – in order to avoid being excluded from their decisions. He should form a multidisciplinary collaboration with the view to make sure the child’s voice is heard in the proceedings. In any event, every professional should observe his obligation of professional confidentiality.
- **Invite the child to participate in the decisions concerning him**; Lawyers should always remind judges to take into consideration the opinions of the child and to give reasons for the refusal to accept his wishes.

c. Collaborate with other professionals in the juvenile justice system

In several EU Member States, according to our research¹⁰, the lawyer for children is often not seen as a vehicle for the realization of the best interests of the child and, therefore, he can sometimes be considered as an “opponent” by other professionals (including, for example, judges, social workers, caretakers, probation officers, psychologists, psychotherapists or others).

It is therefore important that a lawyer for children understands his role in the context of the juvenile justice system in order to play an active part in it.

In particular this means that the lawyer needs to:




- Understand his **distinct role** and what his function is within juvenile justice proceedings;
- Have a **good understanding of how the system works** and on the **role of every stakeholder** involved in it;
- Be aware of the possibility of receiving **support from other professionals** in his work as a lawyer;
- **Communicate** continuously with the different professionals involved in the case;
- Strengthen **the cooperation** between these different professionals;
- **Promote mutual knowledge** of the roles and tasks of each other;
- **Bring the child’s voice** to the other professionals (this includes also the child’s positive or negative feedback concerning a particular professional).

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

¹⁰ All the national reports of the project “My Lawyer, My Rights” are available on: www.mylawyermyrights.eu.


d. Pay special attention to the child's specific rights

- ➊ **The right to participate** in juvenile justice proceedings (UNCRC, art. 12; ECHR, art. 6; and directive (EU) 2016/800, art. 16.1)¹¹ The child has the right to participate effectively, to be heard and to express his views but, at the same time, the child has also the right to remain silent. (See *supra*, p. 30-31 )



The lawyer needs to:

- Listen to the child at every stage of the proceedings, take his voice into account and convey this to the other professionals during the proceedings.

- ➋ **The right to information** (directive (EU) 2016/800, art. 4 and directive 2012/13/EU)¹² is the right of the child to be informed promptly about all his rights (listed below, p. 78 ) and about general aspects of the conduct of the proceedings.



The lawyer needs to:

- Ensure that all the necessary information has been given to the child in writing (through a Letter of Rights¹³), orally or both, in simple and accessible language and ensure that this information has been received by the child and has been well understood;
- Continue to inform the child by repeating the same information, several times if this is necessary, to be sure that the child has correctly understood;
- Answer all the child's questions and ensure that he effectively understands the answer (which is not always the case).

- ➌ **The right to have the holder of parental responsibility informed** (directive (EU) 2016/800, art. 5)¹⁴ about the same information the child has the right to receive.



The lawyer needs to:


- Inform the child about this right;
- Help the child reach his parents (or other appropriate adult) in order to facilitate the implementation of this right.

¹¹ In Ireland, Children Act 2001 as amended, Section 96(1) (a) states that "Any court when dealing with children charged with offences shall have regard to the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in particular, a right to be heard and to participate in any proceedings of the court that can affect them..."

¹² In Ireland, Children Act 2001 as amended, section 57 sets out the information that must be provided to a child who has been arrested and who is in police custody at a Garda (police) station. This section also stipulates that a child must be informed of their right to consult with a lawyer and how to do so.

¹³ Directive (EU) 2016/800, art. 4.3 and directive 2012/13/EU, art. 4.

¹⁴ In Ireland, Children Act 2001 as amended, section 58 requires inter alia Garda (police) to notify the child's parents or guardian of his arrest "as soon as practicable" and to request their attendance at the police station "without delay".

- ➍ **The assistance by a lawyer** (directive (EU) 2016/800, art. 6)¹⁵ presupposes that the child has the right of access to a lawyer from the moment the child becomes suspected or accused of having committed a criminal offence (directive (EU) 2013/48, art.3). For more information, see **TS 3** which provides a checklist on the assistance by a lawyer. 

Right to a lawyer: access and assistance

1. As previously stated, the full set of EU directives on fair trial rights needs to be read together. We would therefore highlight the fact that article 6 of directive (EU) 2016/800 on "assistance by a lawyer" needs to be read in conjunction with directive 2013/48/EU on "the right of the child to access a lawyer".

Directive (EU) 2016/800, art. 6.1 ("Assistance by a lawyer"):

"Children who are suspects or accused persons in criminal proceedings have the right of access to a lawyer in accordance with directive 2013/48/EU. Nothing in this directive, in particular in this article, shall affect that right".

According to the frame introduced by directive (EU) 2016/800, it is now an obligation of EU Member States to provide children with the assistance of a lawyer and, therefore, this obligation must be introduced in the Member States' domestic laws. This means, that in any event, the child should always be assisted by a lawyer and this assistance should not be limited to guarantees of access to a lawyer or the mere presence of the lawyer during the juvenile justice proceedings. The lawyer should be allowed to have an active role and to participate during all steps of the proceedings.

Directive (EU) 2016/800, recital 25:

"Since children are vulnerable and not always able to fully understand and follow criminal proceedings, they should be assisted by a lawyer in the situations set out in this directive. In those situations, Member States should arrange for the child to be assisted by a lawyer where the child or the holder of parental responsibility has not arranged such assistance".

¹⁵ In Ireland, Children Act 2001 as amended, section 57(b) states that the officer in charge of a police station will inform a child who has been arrested "that he or she is entitled to consult a solicitor and how this entitlement can be availed of."

2. The possibilities to derogate from the right of access to and assistance by a lawyer introduced, respectively, by the two directives (directive 2013/48/EU and directive (EU) 2016/800) must be interpreted as strict exceptions by the Member States and should be as limited as possible. In directive (EU) 2016/800, in particular, there are some provisions that encourage EU Member States not to derogate from the assistance by a lawyer when dealing with children:

Directive (EU) 2016/800, recital 26:

"Assistance by a lawyer under this directive presupposes that the child has the right of access to a lawyer under directive 2013/48/EU. Therefore, where the application of a provision of directive 2013/48/EU would make it impossible for the child to be assisted by a lawyer under this directive, such provision should not apply to the right of children to have access to a lawyer under directive 2013/48/EU. On the other hand, the derogations and exceptions to assistance by a lawyer laid down in this directive should not affect the right of access to a lawyer in accordance with directive 2013/48/EU, or the right to legal aid in accordance with the Charter and the ECHR, and with national and other Union law".

3. Finally, Member States are obliged to ensure the assistance of a child by a lawyer. Children cannot waive being assisted by a lawyer. No waiver has been foreseen in Directive (EU) 2016/800. This conclusion appears also from directive (EU) 2016/1919 on legal aid.

Directive (EU) 2016/1919 (on legal aid), recital 9:

"Without prejudice to article 6 of directive (EU) 2016/800, this directive should not apply where suspects or accused persons, or requested persons, have waived their right of access to a lawyer in accordance with, respectively, article 9 or article 10.3 of directive 2013/48/EU, and have not revoked such waiver, or where Member States have applied the temporary derogations in accordance with article 3.5 or 3.6 of directive 2013/48/EU, for the time of such derogation".



The lawyer needs to:

- Check if access to legal assistance has been provided without undue delay once the child is made aware that he is suspected or accused of having committed a criminal offence;
- Ensure that there is an opportunity to meet the child and communicate confidentially in private with him before any procedural action or hearing;

- Assist the child actively;
- Ensure effective participation of the child:
 - During the questioning by the law enforcement authorities (e.g. police);
 - During (at least) investigative or evidence-gathering acts such as identity parades, confrontations and reconstructions of the scene of a crime;
 - Before the child has to appear in front of the competent court or judge;
 - During court proceedings;
 - During and after deprivation of liberty (for more information, see the sections "During the trial" and "Post trial" at p. 75 and 83 □).

➤ **The right to legal aid** (directive (EU) 2016/800, art. 18 and directive (EU) 2016/1919) is the right of the child to have free legal assistance and thus the effective exercise of the right to be assisted by a lawyer.

EU Member States should ensure that children have fair access to the national legal aid system in order to guarantee the effective exercise of their right to be assisted by a lawyer.

The Beijing Rules also provide that: *"Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country"* (Rule 15.1).

The lawyer needs to:

- Ensure the child has access to legal aid according to the national rules;
- Make sure not to be paid and/or instructed by the parents of the child;
- Be trained in how to represent children.

➤ **The right to an individual assessment** (directive (EU) 2016/800, art. 7) is the right of the child to be assessed on the basis of his individual characteristics and circumstances. See **TS 4** which provides a checklist on the right to an individual assessment.¹⁶

Factors such as the child's personality and maturity, his economic, social and family background and any specific vulnerability should be taken into account in order to determine *ad hoc* measures, decisions or courses of action that need to be taken during the juvenile justice proceedings.

¹⁶ In the preparatory stage for the Guide, Child Circle carried out research and analysis on article 7, and developed the checklist concerning the role of the lawyer in relation to such assessment.



Directive (EU) 2016/800 does not provide any specific role for lawyers in relation to the individual assessment. However, since the results of an individual assessment have the potential to be central to the conduct and outcomes of the proceedings, lawyers should have the opportunity to be involved in it. This is important to ensure that the assessment is done in the best possible way and, therefore, reflects the child's individual needs and characteristics.

The scope of article 7 of directive (EU) 2016/800 is very broad. First of all, it is important to clarify that the individual assessment does not appear to be directed at establishing the facts of the offence or the fact that the child was involved in the offence.

Nevertheless, the examination of all the circumstances of the case may influence and determine:

- ➊ The extent of the responsibility of the child (directive (EU) 2016/800, Recital 35);
- ➋ The procedure or other measures pending the final sentencing;
- ➌ The measures addressing the consequences of responsibility.



Consequently, the lawyer needs to:

- Verify whether the assessment has been undertaken in an appropriate way;
- Ensure that the assessment has been properly taken into consideration in the choice of the measures and procedural steps during the juvenile justice proceedings and also in the final sentence;
- Know how and when to use the information contained in the individual assessment.

➍ **The right to privacy** (directive (EU) 2016/800, art. 14)¹⁷ provides that:

- Court hearings should usually be held in the absence of the public or courts or judges should be allowed to decide to hold such hearings in the absence of the public (also in Beijing Rules 8.1 and 8.2); □
- Audio-visual records are not publicly disseminated;
- The media take self-regulatory measures to achieve the objectives set out by this right.

More broadly, the UNCRC (in particular art. 40.2 (b) (vii)) provides that the child has the right to have his privacy fully respected at all stages of the proceedings

¹⁷ In Ireland, Children Act 2001 as amended, section 94 makes comparable provision for in camera proceedings by stipulation who may be in attendance during proceedings involving children.

The lawyer needs to:

- Ensure that this right is respected.

➎ **The right to be accompanied by the holder of parental responsibility (or other appropriate adult) during the proceedings** when this is in the child's best interests (directive (EU) 2016/800, art. 15)¹⁸.

The lawyer needs to:

- Ensure that this right is respected;
- Assist the child in contacting the appropriate adult(s) if his parents are not available or are not appropriate.

➏ **The right to an effective remedy** in the event of a breach of one of the rights enshrined in directive (EU) 2016/800 (directive (EU) 2016/800, art. 19).

The lawyer needs to:

- Inform the child of the available legal remedies;
- Ensure that the competent national authorities enforce such remedies when granted;
- Use strategic litigation as a tool to contest children's rights violations in juvenile justice proceedings; (See **TS 2** for further information on strategic litigation);
- Make sure that the preferred remedy is fair, effective and accessible to the child (if necessary, legal aid must always be available to ensure effective access to the remedy);
- Ensure that the child can receive fair economic compensation for the violation of his rights.

¹⁸ In Ireland Children Act 2001 as amended, section 91 required parents/guardians to attend all stages of inter alia any juvenile justice proceedings, with sanctions in place for non-attendance. Exceptions may be made where it is not in the interests of justice for the parent or guardian to attend, if the whereabouts of the parent or guardian are unknown or if the child in question is married.

When a child is deprived of liberty

He has other specific rights that are guaranteed:

- ➊ **The right to medical examination, including the right to medical assistance** is the right of the child deprived of liberty to be assessed on his general mental and physical condition (directive (EU) 2016/800, art. 8)¹⁹.



The lawyer needs to:

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

- ➋ **The right to limit the use of the deprivation of liberty and maximise the use of alternative measures to detention** (directive (EU) 2016/800, arts. 10 and 11)²⁰ means that:

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



The lawyer needs to:

- Know and understand the juvenile justice system in order to be able to propose alternative measures to detention;

¹⁹ Albeit not specific to children, in Ireland, Statutory Instrument (SI) 119/1987 Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987), section 21 requires the police officer in charge of the station to summon medical attention for a person in custody who *inter alia* is injured, under the influence of alcohol or drugs and cannot be roused or who otherwise is in need of medical attention. If it is an emergency, the officer in charge may arrange for the person to be transferred to hospital.

²⁰ In Ireland, Children Act 2001 as amended, section 96(2) stipulates that "a period of detention should be imposed only as a measure of last resort."

- Ensure that the judge has applied this principle by actively checking whether there was an appropriate measure, less detrimental than deprivation of liberty;
- Verify that there is a regular review of the decision when the child is deprived of his liberty;
- Visit the child when he is deprived of liberty;
- Help the child to stay in touch with his parents or appropriate adult(s) during the deprivation of liberty.

- ➌ **The right to specific treatment when deprived of liberty** ((EU) 2016/800, art. 12)²¹ includes:

- The right of the child to be separated from adults during detention (including during police custody), unless it is considered to be in the child's best interests not to do so;
- The right to health and to physical and mental development;
- The right to education and training (including when the child has physical, sensory or learning disabilities);
- The right to family life, which the child must be able to exercise effectively and regularly through regular contacts, visits, temporary return in the family, etc.;
- The right to access programmes that foster the development and the reintegration of the child into society;
- The right to practice a religion or belief freely.

The lawyer needs to:

- Take appropriate action when he has learnt from the child that one of these rights is not respected;
- Advise the child on how to take appropriate action himself (through submitting a complaint for example).

²¹ In Ireland, Children Act 2001, section 158 sets out the objectives of detention schools in Ireland, which is "to promote their [children's] reintegration into society and prepare them to take their place in the community as persons who observe the law and are capable of making a positive and productive contribution to society." This is done through provision of "appropriate educational, training and other programmes and facilities" whilst having regard for *inter alia* the wellbeing of the child, providing proper care and supervision, developing relationships between the child and his family. Section 199 of the same legislation provides for the opportunity for children to practice their religion.



3. Code of conduct specific to lawyers for children in juvenile justice proceedings


BPRL, Rule 26 states that “Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms”.


The national codes of conduct for lawyers registered in EU Member States are all available on the website of the Council of Bars and Law Societies of Europe (CCBE): <http://www.ccbe.eu/documents/professional-regulations/#panel-712-0A>.


There are no specific codes of conduct for “lawyers for children in juvenile justice proceedings” published by the EU Member States.

It is more common to find articles as part of the general code of conduct for lawyers, explaining how to listen to the child and how to manage the relationship with his parents (or appropriate adult).

Research based scenarios

 **In Belgium**, a new regulation of AVOCATS.BE (art. 2.24) clarifies the conditions that must be met by a lawyer who wishes to register and remain on the list of the youth section of his bar association;

 **In Italy**, the general Code of conduct for lawyers (art. 56) prescribes the court hearing process involving the child, while in most of the Local Bar Councils there are specific lists of “youth lawyers”. Particular conditions and training are required to be included in these lists;

 **In Bulgaria**, the Code of conduct for lawyers does not provide any reference to children, except for a general ban on age discrimination.



The lawyer needs to:


- Verify whether a specific code for lawyers for children exists at national or local level in his country;
- Question the competent authorities (national or local bar associations) in order to encourage the development of a specific regulation on the role of lawyers for children (if no such specific code or regulation yet exists).

C. STEP-BY-STEP APPROACH TO JUVENILE JUSTICE PROCEEDINGS WHEN DEFENDING A CHILD

This part is more practical and aims to guide the lawyer during each step of the juvenile justice proceedings.

1. In General (at all stages of the procedure)

1.1 How do I communicate and engage effectively with the child?

 “The child and his assistant (lawyer) must have adequate time and facilities for the preparation of his defence. Communications between the child and his assistance, either in writing or orally, should take place under such conditions that the confidentiality of such communications is fully respected (...)”. (ICCPR, art. 14 (3) (b) and CRC/C/GC/10, §50)

It may be difficult for a child to understand how the juvenile justice system works. Therefore, it is vital that the adults representing children are able to ensure that the child has understood what is happening and why, and that his views are then listened to and represented in an appropriate manner. Much more than with adults, lawyers need to take responsibility for ensuring that children in conflict with the law are able to participate effectively in the proceedings through adapted processes.

a. Communication

Communication is the key element to build the relationship between the lawyer and the child.

Generally the first step towards good communication is for the lawyer to listen to the child for as long as necessary and to be comfortable with periods of silence.

Good communication will enhance the child’s trust in the lawyer. It is therefore important to communicate in an adapted way, taking into account the child’s needs and capacities from the very first moment of meeting. The child’s

first impression of his lawyer will usually determine their entire relationship. It is thus essential to adapt language and address things differently to children. Lawyers must always keep in mind that each child will have different individual needs. Therefore, means of communication and language need to be adapted to each child. For example, many children who appear before a court have developmental disabilities and/or severe language problems. In some cases these conditions are not immediately apparent and this is another reason why the collaboration of lawyers with other actors involved (such as the social services, psychologists, psychotherapists and specialised doctors) is vital.

b. Language used



When he meets the child for the first time the lawyer needs to¹:

- Use **child-friendly language**: simplify his language, avoid jargon and legal terminology, use visual aids or post-it notes;
- Adapt his body language to reassure the child;
- Try to establish and maintain appropriate eye-contact (smile, nod, use non-verbal cues etc.). This demonstrates unconditional positive regard, facilitates openness in the speaker and helps the child to focus and to listen;
- Find out tools to explain to every child the information that he needs to know and tailor it to each child's level of maturity and capacities;
- Use short sentences and simple vocabulary;
- Use drawings, photos, images;
- Not use time related concepts (e.g. two weeks ago, last year, next hearing, ...) that are difficult for children to understand;
- Repeat back the statements made by the child, by saying, for example, “*you said xxxx, by that did you mean yyyy?*”. This is very important because it enables the child to stop and think about the factual content of what he has said and enables the lawyer to verify if he has understood correctly;

¹ The following elements were listed on the basis of information obtained during two workshops. The first one was organised in London by the Youth Justice Legal Centre (<http://www.yjlc.uk/>) in June 2017. More information on communication techniques are available on their website: <http://www.yjlc.uk/new-sra-toolkit-for-youth-court-advocacy> and on the website of the Solicitor's Regulation Authority that has developed a toolkit to support solicitors practicing in the Youth Court: <http://www.sra.org.uk/solicitors/cpd/youth-court-advocacy/communicating-effectively.page>. The toolkit was developed with the support of Just for Kids Law (<http://www.justforkidslaw.org/>) and the Association of Youth Offending Team Managers (<http://aym.org.uk/>). The second workshop was organised by Fair Trials (<https://www.fairtrials.org/>) in the frame of the project “Advancing the Defence Rights of Children” in London, in July 2017. The workshop on “communicating with child suspects and accused persons” was led by Mai van Dijk – Fleetwood-Bird, a speech and language therapist. More information is to be found on: <https://www.fairtrials.org/the-abcs-of-fair-trials-language-in-the-juvenile-justice-system/>.

- Reflect words, phrases or emotions. This enables the child to think about his words or emotions and may open up further areas for discussion;
- Summarise what the child says. This is a key skill in bringing structure to the interview. The lawyer can use this tool to confirm his understanding of the case, bring together different aspects raised by the child into a coherent sentence and then either explore further what the child has already introduced or move the interview on to a new topic;
- Actively listen to what the child has to say, without trying to over-interpret his words;
- Understand that vocabulary used by children is often different or has different meanings than words to adults;
- Understand the slang used by the child but not to use it with other professionals; Make sure the child has understood his procedural rights and all other relevant information;
- Avoid leading questions (for example, do not ask “*Do you understand?*”) as children are often suggestible and compliant, it may invite the child to automatically answer “*Yes*”;
- Use humour but without the use of sarcasm, idioms or dialects that the child may not understand;
- Provide specific information for children on the website of his law firm;
- Promote, with the involvement of other professionals, the development and use of specific materials such as child-friendly folders on police custody, police hearings, prosecution, probation, court hearings, complaint mechanisms and child-friendly house rules for youth justice institutions.

When the child **does not understand or speak the language of the proceedings**, the lawyer needs to:

- Ensure that the competent authorities have arranged an interpreter to facilitate communication;
- Ensure that the competent authorities have provided the translation of the most relevant documents of the case-file (directive 2010/64/EU, art. 3);
- Make sure an interpreter is present when the child is interviewed, also by the lawyer himself.



c. Means of communication

It is important to remember that children do not use the same methods of communication as adults, so the lawyer should be familiar with the methods used by children, and adapt his way of communication to build a good relationship with the child.

A child can be contacted:

- by letter;
- by phone (including SMS);
- through social media;
- face-to-face.



The lawyer needs to:

- Ask the child what his preferred method of communicating is;
- Try to use the communication medium the child is most accustomed to (e.g. e-mails, Facebook, texts, WhatsApp² or other);
- Explain to the child that all communication media do not guarantee the same level of confidentiality. E.g. Police officers could analyse the content (WhatsApp or texts) of a seized phone in the course of an investigation;
- Establish clear rules on when the child can contact him and expect an answer. Although these methods are more effective than the sending of a letter, it can result in the child contacting the lawyer at any time and expecting an immediate answer.
- Inform the child of typical working practices;
- Explain clearly to the child the importance of legal assistance and defence, in order to remain in contact with him. For example, a child can change phone number frequently and he needs to be aware of the need to notify the lawyer about this;
- Prefer a visit in the police cell or institution, rather than a phone call, when the child is deprived of liberty;
- Generally, choose face-to-face meetings with the child in order to apply the above-mentioned language techniques.

² A mobile application that incorporates an instant messaging system via the Internet.

1.2 Confidentiality and Privacy

Each national code of conduct envisages that communications and consultations between lawyer and client should remain confidential.

Lawyers should play a major role in facilitating the confidentiality of the communications in order to ensure the protection of the child's privacy.

a. Privacy

(See UNCRC, art. 40.2 (b) (vii) and directive (EU) 2016/800, art. 14)

The lawyer needs to:



- Ensure that the room where the consultation takes place is private;
- Ensure that the room is adapted for a child. According to the Guidelines of the CoE on CFJ, § 62: "As far as appropriate and possible, interviewing and waiting rooms should be arranged for children in a child-friendly environment";
- Ensure that what the child says will not be publicly shared and disseminated.

When a child is deprived of liberty, the lawyer needs to:



- Ensure no law enforcement official is present during confidential communications if there are no security reasons;
- Ask the child if he is alone when conversations take place on the phone.

b. Confidentiality

International (BPRL, Rules 8 and 22; PGALA, Guideline 10) and regional (directives 2013/48/EU, art. 4 and (EU) 2016/800, art 5.6) standards stipulate that confidentiality of communication between children and their lawyer, when the lawyer is providing professional assistance, should always be respected. Such confidentiality includes meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

**The lawyer needs to:**

- Inform the child about the fact that certain aspects of their exchanges must and will remain confidential;
- Explain to the child that a parent or appropriate adult is not protected by the same confidentiality. The child will then be able to decide whether his parents (or appropriate adult) can be present (or not) during their exchanges;
- Be clear with the child about what kind of information will be used in his defence and, therefore, what will be told to the judge (or prosecutor).

**When the child is deprived of liberty, the lawyer needs to:**

- Ensure that the child is provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with him, without delay, interceptions or censorship and in full confidentiality. Such communications may be within sight, but not within hearing distance, of law enforcement officials (BPRL, Rule 8).

1.3 Build trust

It is important that the lawyer acts at the earliest stage of juvenile justice proceedings to be able to build trust with the child.

**The lawyer needs to:**

- Allow himself the time and space to build a relationship with the child;
- Act at all stages of the proceedings, as far as possible. Any change of lawyer can be detrimental to the child's trust in his lawyer and, more broadly, in the juvenile justice system;
- Respect what the child knows (or does not know) and do not hesitate to repeat all the information several times, at all stages of the proceedings, if needed;
- Take time to understand the child (his background, who he is as an individual) and respect who the child is;
- Make sure the child feels safe when he is with him;
- Be able to show the child that he has an understanding of the circumstances and that he is interested about his future and situation (e.g. to show empathy);

- Ask the child how he is doing and other questions not related to the case before starting to work on the legal strategy. Talking only about the alleged offence is not the correct way to earn the child's trust;
- Support the child in what he says, take his views seriously and advocate whatever the child wants to be heard;
- Let the child know that he is on his side, by avoiding judgmental comments;
- Respect the principle of the freedom to choose a lawyer by allowing the child to change lawyer if the bond of trust is broken (while explaining the complications of switching lawyers too often).

1.4 Child participation

It is part of the lawyers' role to create the space to permit the child to be heard and participate actively during the juvenile justice procedure.

According to the ECtHR, every accused, including a child, has the right to participate effectively in his trial, including the right to attend, but also to hear and understand the procedure³.

**The lawyer needs to:**

- Hear what the child has to say, even if it is not directly related to the alleged facts or the offence;
- Try to create a child-friendly environment in his office and waiting room;
- Prepare the child in advance for participation in the court hearing (if possible more than once in order to give the child the opportunity to familiarise himself with the procedure);
- Be prepared to go over the defence a number of times when necessary;
- Remind the child that he has the right to remain silent;
- Check the language barriers and appoint an interpreter if necessary;
- Be available and contactable after saying to the child in what ways they may communicate (see the section on "Communication" p. 57-60). □

³ ECtHR, 16 December 1999, V. vs. UK, §§ 85-90; ECtHR, 15 June 2004, S.C. vs. UK, §§ 28-29.

Research-based national examples

In Belgium

The regulation of AVOCATS.BE states that “*the lawyer shall defend the child in a manner that takes into account his age, maturity and intellectual and emotional capacities and promotes his understanding of and participation in the proceedings*”⁴. Thus, when the child is able to express himself clearly, the lawyer, in addition to being the guarantor of the procedure and its corresponding rights, will also have the role of being the spokesperson of the child at all stages of the procedure, and must do so as accurately as possible. Therefore, the main mission of the lawyer is to help the child to formulate his opinion and to bring it forward⁵;

In Ireland

The Children Court is governed by the provisions of the Children Act of 2001⁶ which provides a number of safeguards for children who are charged with minor offences. These safeguards include increased privacy protections and an increased emphasis on the child’s right to participate and be heard throughout the court process⁶. The Practice Direction sets out the Court’s expectation of legal practitioners, namely that where a young defendant has a particular vulnerability requiring special arrangements in order to meaningfully participate in the proceedings, it is the duty of the legal practitioner to bring this to the attention of the court as soon as practicable.

1.5 Interaction with other professionals involved in the juvenile justice system

The child involved in the justice system will meet many different professionals throughout the process.

Lawyers cannot promote the rights of the child alone, they need to collaborate with other professionals.

Different actors involved in the proceedings include, mainly, police officers, prosecutors, judges, interpreters (if needed), social workers, psychologists (if needed), doctors (if needed), etc.

As mentioned above, it is essential for the lawyer to know how the system works and to know who the different actors are in order to be able to interact with all of them effectively and to be able to explain to the child who he will meet during the juvenile justice proceedings.

In this regard, the lawyer needs to:

- Have a conversation with the child about the role of each actor;
- Interact with the others professionals and help them understand the importance of using child-friendly communication, with regard to both verbal and body language.

Moreover, a child in conflict with the law, facing the reality of being suspected or accused, will often have other issues like school exclusion, family troubles, housing problems, connections with social services, health problems, etc. In most of the EU Member States some specialised services and initiatives do exist in order to provide support to the child in such situations.

The lawyer needs to:

- Be aware of service providers to help children and what services they offer.



⁴ AVOCATS.BE, Code of conduct of the lawyer, art. 2.20.

⁵ A. De Terwangne, « Aide et protection de la jeunesse : textes, commentaires et jurisprudence », Liège, Jeunesse et droit, 2001, p. 294; J. Vandorpe, « De rol van de jeugdadvocaat : een pedagogische benadering », T.J.R., 2004, n° 3, p. 156.

⁶ Children Act 2001, Part 7.

Defence for Children International makes use of **Socio-Legal Defence Centers** (SLDCs) to ensure a human rights and child centered approach are implemented when children are involved in the justice system.

The work of Socio-Legal Defence Centres (SLDC) consists in actively offering children direct access to justice and corresponding quality social-legal support (including information provision, referrals to other service providers, psychosocial counselling and free-of-charge legal advice and representation - including in court). A SLDC is a place where children (individuals under 18 years old), as well as adults who are confronted with children's rights violations, can walk in the door to a welcoming environment to report child rights violations (or threats thereto) and be assured of professional and child-focused assistance.

(Source: "Socio-Legal Defence Centres: A model to realize children's rights" - Defence for Children International and <https://defenceforchildren.org/socio-legal-defence-centres/>).

Research-based national examples of entities similar to DCI's SLDCs



In the UK:

SLDCs do not exist as such but there are similar structures as: **Just for Kids Law** (provides advocacy, support and legal assistance to children in difficulty); **Children's Advocacy Service of the British Foundation Barnardo's** (independent advocacy for young people in institutions, assistance and planning resettlement); **National Youth Advocacy Service** and **Coram Voice** (face-to-face meetings and helpline);



In Belgium:

In the French-speaking community: **The Service droits des jeunes** (Juvenile rights service); the **General Delegate for the Rights of the Child** (Ombudsman for Children) are responsible for providing support, answering questions and complaints concerning the rights of the child. **The 103 line** offers listening services for children in all matters and **The centres Infor-jeunes** are information services for children mainly on procedural rights and legal assistance;

In the Flemish community: **The Kinderrechtswinkels** (Children's rights shops); **The Kinderrechtencommissaris** (Ombudsman for Children) and its **Klachtenlijn** (complaint line); **Jongerenwelzijn**, **The JO-lijn** (help-line); **The Association Awel** (active listening service that answers all the questions and concerns of children in all matters); **JAC** (information services mainly on procedural rights and legal assistance); and **Cachet association** (promotes children's participation, accompanies children in their transition to autonomy and carries out a general awareness-raising work);



In Bulgaria:

There are **four Child Rights Hubs for Children in Conflict and Contact with the Law** which provide information, legal consultation, specialised evaluation of the child's needs and awareness-raising. They also prepare and accompany children in legal proceedings and assist the professionals in the development of a child-friendly procedure for child interrogation;

**In Italy:**

SLDCs do not exist as such but there are: **the Authorities for Childhood and Adolescence** (which implement and protect children's rights and interests at national and regional level) and also **the National Guarantor of the Rights of Person Detained or Deprived of personal Liberty**. In addition, **the National Union of Juvenile Chambers**, which includes more than 34 local Chambers, has, as a main object, the study and the dissemination of child and family law.

**In the Netherlands:**

The Association of Dutch youth lawyers (that exists also at local level in The Hague, Amsterdam and Rotterdam). It demands quality and training requirements for all its members; **The children's Ombudsman; Control Alt Delete** (an organisation giving advice to (young) suspects and which publishes information on their rights with the emphasis on ethnic profiling); **DCI-The Netherlands** (provides social legal support by the Helpdesk); **Dutch NGO coalition for Children's Rights** (a group of NGO's working to enforce children's rights); **The Children's Rights Shop** (run by law students who support children in family and youth law matters);

**In Finland:**

Central Union for Child Welfare; Save the Children; The Mannerheim League for Child Welfare; Victim Support Finland;

**In France:**

Organisation le Défenseur de droits (it has a specific mission regarding the protection and promotion of children's rights); **Directorate of Judicial Youth Protection** (public service for juvenile justice);

**In Germany:**

Governmentally consulting assistance centres: where lawyers and legal advisors provide ad hoc legal advice to people with low income, including children and adolescents;

**In Hungary:**

The **Hintalovon Alapítvány Foundation** helps children to engage pro bono lawyers to represent them in criminal proceedings;

**In Portugal:**

Associação "A Voz da Criança" ("The Child's Voice Association"): association of lawyers specialised in family and youth law, dedicated to the protection of children in court;

**In Slovakia:**

The bodies of the social and legal protection of children and social custody (under The Central Office of Labour, Social Affairs and Family);

**In Spain:**

Fundacion Raices.

As already explained, the lawyer needs to play an active role in ensuring the right of the child to an individual assessment, as envisaged by article 7 of the directive (EU) 2016/800. Lawyers need to be the intermediary between all the other services involved in the juvenile justice system in order to bring together all the specific needs of the child (in social, economic, health, psychological and legal terms) in the individual assessment, which will be the main source of information for the final decision on his case.

The lawyer, therefore, needs to:

- Be the link between the child and the other competent services;
- Make sure that all the needs and (relevant) personal characteristics of the child are taken into consideration in his individual assessment file;
- Be able to help the child to find a solution for a specific problem by referring him to the right service providers;
- Participate in multidisciplinary training sessions (where available);
- Try to meet the other professionals in person.



1.6 Interaction with the parents or legal guardian(s) of the child

Parents and legal guardians are important stakeholders when the child comes into contact with the juvenile justice system.

Most parents are concerned for their child and may not understand that the lawyer shall exclusively work in defence of the child. Confusion arises from the fact that sometimes parents pay the lawyer's fees and costs and, therefore, they can be led to believe that they can influence and decide their child's defence.

On the other hand, parents may be reluctant to have their child defended by a lawyer who works through legal aid (according to our research, they are worried about less quality/experience of these lawyers⁷).

There is a presumption of conflict of interests when a child is in conflict with the law and where parents (or legal guardians) may also be involved as civilly liable for the child in the juvenile justice proceedings. (For example, parents are the ones who will have to pay for the compensation for the victim in certain circumstances).



The lawyer needs to:

- Be instructed by the child;
- Explain to the parents that he represents only the child and remains independent by refusing to take orders from them that conflict with the child's instructions;
- Report to the competent authority (usually the bar association) when a conflict of interests arises;
- Recommend that the parents seek their own legal representation where appropriate;
- Refer to other service providers if the parents or legal guardian require help or support.

⁷ See the national reports on the project's website: www.mylawyermyrights.eu.

2. During the Pre-Trial Phase of Juvenile Justice Proceedings

2.1 By whom and under what system am I instructed?

a. How can I be appointed?

As a 'chosen lawyer':

- By the child
- By the parents or the legal guardian

Through the legal aid system, as an appointed lawyer or as an ex officio lawyer (automatically appointed when the child has no lawyer and when assistance by a lawyer is mandatory):

- By the legal aid bureau
- By the police officer
- By the prosecutor
- By the judge or the court

b. By whom am I instructed?

Regardless of the system through which the lawyer is appointed (chosen lawyer or appointed under legal aid) and regardless of by whom the lawyer is paid (by the child's parent(s)/representative(s), by the child, by someone else or by the State through the legal aid system), the lawyer is **always instructed directly by the child**.

The lawyer needs to:

- Listen to the child's viewpoint;
- Gain the child's trust;
- Become the child's spokesperson;
- Defend the child's best interests taking into account his instructions.



c. Who pays for my fees and costs?

- Chosen lawyers

Usually the parents or legal guardians of the child pay for the lawyers' costs and fees. The lawyer cannot represent the parents' interests if they are in conflict with the child's best interests.

(See section "Interaction with the parents or legal guardian(s) of the child", p. 70). 

- Legal aid system

Appointed lawyers

The State (or other competent authorities) bears the lawyers costs and fees.

The system is usually organised in such a way so that the fees received by the lawyer are generally based on hourly rates and paid when he closes the file. This depends on each national system.

Ex officio lawyers

The lawyer appointed *ex officio* will automatically enter the legal aid system and his costs and fees will be borne by the State or other competent authority. The fees received by the lawyer are generally based on hourly rates and paid to him when he closes the file. This depends on each national system.

d. Can a lawyer representing a child be paid by his parents?

Yes, but the child's choice of lawyer and the child's best interests must prevail as paramount considerations⁸.

Research-based national example

In Belgium: At the Brussels bar association free legal aid is always available for the child. Moreover, there is a prohibition on parents paying the lawyer's fees as a means to avoid any conflict of interests. Parents are independent process parties in Belgian juvenile justice proceedings.

⁸ For more information, see the section "Interaction with the parents or legal guardian(s) of the child", p. 70 

e. When do I meet the child?

The lawyer should meet the child for the first time without undue delay once the child is made aware that he is a suspect or accused person (directive (EU) 2016/800, art. 6.3).

🕒 When the child is not deprived of liberty

The lawyer firstly needs to plan the first meeting by:

- Calling the child and arranging an appointment;
- Writing to the child (by registered letter, on Facebook, by email, on WhatsApp or other relevant means of communication).



The lawyer will meet the child for the first time:

- At his office, or;
- At another appropriate venue, or;
- At the police station before the police interview.



🕒 When the child is deprived of liberty

The lawyer should meet the child for the first time without undue delay when he is deprived of liberty (directive (EU) 2016/800, art. 6.3 (c)):

1) Before he is questioned by the police or by another law enforcement or judicial authority, prosecutor or investigating judge (directive (EU) 2016/800, art. 6.3 (a)).

It is difficult for the lawyer to plan this meeting as he will normally be appointed directly before the interview (as a *chosen lawyer* – by the child or child's parents/legal guardians that called him or as an *appointed* or *ex officio lawyer* called by the police officer or other competent authority).

Moreover, in some EU Member States, like Belgium, it is legally foreseen that the lawyer will receive only 30 minutes to communicate with the child for the first time.

This moment is crucial to establish first contact, build the trust and prepare the child's defence. According to our research it is generally assumed by lawyers and children themselves that the timeframe is too short to really create a constructive exchange between them. Children are generally very vulnerable and extremely stressed when they come into contact with the juvenile justice system. In addition, as previously noted, the lawyer and the child may not communicate in the same way.

It is thus essential for the lawyer to obtain the child's trust and understanding as soon as possible.

Further, while it might be not guaranteed that this meeting will take place in a separate, private room, confidentiality of communication between the child and his lawyer needs to be respected (directive (EU) 2016/800, art. 6.5; directive 2013/48/EU, art. 4).

Finally, the child's stress and vulnerability can also increase when his lawyer is late and he has to wait in a cell until his lawyer arrives. Long waits may have a negative impact on the child's psychological well-being and can make the future building of confidence with the lawyer even more difficult.



The lawyer therefore needs to:

- Be on time (at least within 2 hours of appointment or refuse it if he will not make it on time in order to find the child another lawyer);
- Make the child aware if he is delayed;
- Be aware of the negative consequences that delay can cause the child (particularly when he is at the police station);
- File a complaint when the delay is caused by the police;
- Use appropriate communication (language skills) in order to immediately build an understanding with the child;
- Ensure he can meet the child in private, ideally in a private separate room without the presence of anyone else;
- Try to protect the child's right to confidentiality and privacy whenever he can.

2) Before the child appears in the court he has been summoned to appear before (directive (EU) 2016/800, art. 6.3 (d) (see below, section "During the trial", p. 75). □

3) The child has also the right to meet his lawyer and to be assisted by him upon the carrying out (by an investigating or other competent authority) **of an investigative or other evidence-gathering act.** For example the lawyer should be present, as a minimum, during the following acts: identity parades, confrontations or reconstructions of the scene of the crime, if they are provided for under national law and if the child is required or permitted to attend them (directive (EU) 2016/800, art. 6.3 (b)).

2.2 Provide the child with information on his rights in juvenile justice proceedings

During the meeting, the lawyer needs to:

- Explain to the child what the next steps will be;
- Begin preparing the defence with the child;
- Inform the child about all his other procedural rights.



3. During the Trial

Even though the lawyer should meet the child for the first time without undue delay once the child is made aware that he is a suspect or an accused person in juvenile justice proceedings (directive (EU) 2016/800 art. 6.3), it often happens that lawyers meet their young clients directly before the first hearing of the trial.

Generally, this means that:

- The lawyer is court-appointed;
- The child was not represented by a lawyer or was represented by another lawyer during the pre-trial proceedings.

When the child is assisted by a court-appointed lawyer, the relationship with the legal representative can be more difficult. It is not uncommon, for example, that national authorities do not have the data to trace the child and, consequently, lawyers can face difficulties in contacting their client and his family before the trial.

It is clear that the entire defence can change a lot if the child and his lawyer have already met before the hearing or not. In this latter situation, lawyers will face more obstacles in effectively defending the child due to a lack of information on his personal situation and family background. It is extremely difficult to obtain this kind of information if the first meeting with the child takes place in a crowded court hearing since, in the same limited period of time, the lawyer must also build trust with the child.

During the trial phase, every child in conflict with the law should be assisted by a lawyer where he has been summoned to appear before a court having jurisdiction in criminal matters, in due time before he appears before that court (directive (EU) 2016/800, art. 6.3 (d)).

Moreover, it is extremely important to point out that article 16 of directive (EU)

2016/800 guarantees the right of children to appear in person at, and participate in, their trial. According to this provision, lawyers shall ensure that children have the right to be present at their trial and, consequently, they shall take all necessary measures to enable them to participate effectively therein.



The lawyer needs to:

- Propose some adaptations to the process, such as: having frequent breaks, arranging for the child to sit close to the lawyer or to another suitable adult, explaining the legal principles to the child; modifying the language used with the child; ensuring the hearing is private, etc.

Furthermore, lawyers should ensure that children who were not present at their trial have the right to new proceedings or to another legal remedy in accordance with, and under the conditions set out in, directive 2016/343/EU (on the strengthening of certain aspects of the presumption of innocence).

This article applies also to children deprived of liberty who have the right to be physically present in court during the hearings of the criminal proceeding in which they are involved.

3.1 When do I meet the child?

🔗 When the child is not deprived of liberty

In an ideal situation, before the start of a court hearing, lawyers should have already met their young clients (e.g. at their office or at the police station before the police interview) and meet them again at the courthouse, in child adapted waiting rooms.

This means, in particular, that the environment should be child-friendly and the right of confidentiality should be guaranteed. In addition, in these rooms, the direct contact or interaction between a child victim (or witness) of a crime with the child suspected or accused of that criminal offence should, as far as possible, be avoided.

In practice, before the start of the hearing, the child normally meets the lawyer in the court's corridor or outside the courtroom, in places where the confidentiality is not always ensured.

The lawyer therefore needs to:



- Be on time;
- Alert the court if he cannot arrive on time (in order to find the child another lawyer);
- Use a child appropriate language to immediately enter into trusted and understandable communication with the child (above all, if it is the first time they meet);
- Try to find an appropriate place when he can meet the child in private before the hearing

🔗 When the child is deprived of liberty

- Before the start of the hearing:

The lawyer should have already met the child in the institution where the child is temporarily placed or also at his office because, sometimes, social services can accompany the child to the law firm.

- Immediately before the start of the hearing:

The child deprived of liberty will wait for the lawyer in a court cell or in a separated room controlled by a police officer, a member of the institution or, more likely, by the court's security personnel.

3.2 Provide the child with information

As mentioned above, it may happen that the lawyer and the child meet initially at the court hearing with very little time to prepare the child's defence. It is therefore essential to use this time to provide the child with all the necessary information about, in particular:

- ✚ - All charges against him. This is crucial, above all if the lawyer is meeting with the child for the first time just before the hearing. He should always explain the nature and legal classification of the alleged criminal offence to the child, as well as the nature of his participation in child-friendly language. In general, it is always important to remind the child of the reasons for his involvement in the juvenile justice proceedings;
- How the procedure will take place (how the questioning will be carried out, what the expected duration will be, the importance and impact of any given testimony, the consequences of a certain act, etc.), and the role of each actor involved;
- The specific rights of the child at each and every stage of the proceedings (right to silence, right to talk with the judge (the lawyer shall explain to the child how to use effectively his right to be heard), the role the child may play in the trial (i.e. testimony, etc.), the means and eventual impact of the child's views and/or opinions);
- The possible outcomes of each stage of the juvenile justice proceedings (how things could move forward, i.e. type of measures which can be applied to the child, risk of deprivation of liberty, etc.).

3.3 Provide the child with effective assistance before and during court hearings

a. Before the court hearing

🕒 Consult and review the file

The lawyer needs to:



- Access the file from the appropriate authority, get copies of it (if this is allowed), take some notes and prepare the child's defence as soon as possible;
- Analyse the individual assessment (if available) and contact all the professionals involved in its production. As mentioned above, lawyers should also be present during the assessment of the child since the choice of the best strategy comes mainly from information concerning the child and his family's economic and psychological needs;
- Translate, in child-friendly language, the case file in order to provide the child with all the relevant information before the trial (orally and in writing);
- Work together with an interpreter and/or a translator if the child does not understand the language of the proceeding.

🕒 Prepare for the hearing(s)

Children need to understand what is happening and, therefore, before the start of a court hearing, it is necessary to provide the child with all the relevant information, as far as possible, via the use of child-friendly materials.

The lawyer should seek the child's informed consent on the best strategy to use. If the lawyer disagrees with the child's opinion, he should try to convince the child as he would do with any other adult client. (CoE Guidelines on CFJ, Explanatory Memorandum, § 104, p. 108)

In particular, children need to be informed of the possible alternatives to the proceedings (like diversion) and of the different consequences of such a choice.

🔗 Legal assistance before the hearing



The lawyer needs to:

- Help the child to familiarise, *inter alia*, with the composition of the court and the role and identities of all the professionals involved (judge, prosecutor, social and welfare services, etc). This is very important for the child and in directive (EU) 2016/800 it is possible to find additional guidance in relation to this key aspect: “Children should receive information about general aspects of the conduct of the proceedings. To that end, they should, in particular, be given a brief explanation about the next procedural steps in the proceedings in so far as this is possible in the light of the interest of the criminal proceedings, and about the role of the authorities involved. The information to be given should depend on the circumstances of the case” (recital 19, directive (EU) 2016/800);
- Access the file and store it in a confidential manner;
- Ensure that the privacy and personal data of the child are protected in accordance with the national law. This implies that no information or personal data should be made available or published, particularly in the media, which could reveal (directly or indirectly) the child’s identity. This includes: images, detailed descriptions of the child or his family, names or addresses, audio and video records, etc.⁹

b. During the hearing

🔗 Effectively represent the child

The lawyer must pay particular attention to the following procedural adaptations and try to ensure that they are complied with, without fear of contradicting the judge or the public prosecutor.



In particular, the lawyer needs to:

- Ensure that court hearings involving children are adapted to the child’s pace and attention span: regular breaks should be planned and hearings should not last too long¹⁰;
- Ensure that the child can speak freely in a calm atmosphere in which he feels safe. This, in practice, means that the hearing shall not be disturbed by unwarranted interruptions or distractions, unruly behaviour or transit of

people in and out of the room¹¹. Consequently, only those directly involved in the proceeding should be present (provided that this is in the best interests of the child)¹² and proceedings involving children in conflict with the law, as a general rule, shall be held behind closed doors;

- Ensure that the child can be accompanied by persons whom he can trust (parents or another appropriate adult of their choice) as this may make him feel more comfortable. This right cannot be denied unless a reasoned decision has been made to the contrary in respect of the best interests of the child involved¹³;
- Verify if it wouldn’t be better if the parents are not present during the entire hearing, for example when sensitive issues are discussed;
- Ensure that judges and public prosecutors interact with the child with respect and sensitivity. This means, for example, that they must be careful with questions unrelated to the case and its solution (e.g. questions concerning the child’s private life).

Moreover, the lawyer needs to:



- Present the voice of the child. The lawyer does not have to support what he considers to be in the best interests of the child (as would a guardian *ad litem*¹⁴), but should determine and defend the child’s views and opinions as in the case of an adult client;
- Ensure the presence of an interpreter during the hearing if the child does not understand the language of the proceedings.

¹¹ CoE Guidelines on CFJ, Explanatory Memorandum, § 113, p. 81.

¹² CoE Guidelines on CFJ, Guideline 9, p. 22.

¹³ CoE Guidelines on CFJ, Guidelines 57-8, p. 22

¹⁴ The “guardian ad litem”, according to the CoE Guideline on CFJ, Guideline 42, is a professional appointed by the court (not by “a client” as the lawyer) and should help the court in defining what is in the best interests of the child involved.

See directive (EU) 2016/800, art. 15(2); In certain exceptional cases the holder of parental responsibility can be excluded if his presence would substantially jeopardise the criminal proceedings or would not be in the best interests of the child (e.g. cases where parents are involved in the same criminal proceedings

⁹ CoE Guidelines on CFJ, Guideline 6, p. 22.

¹⁰ CoE Guidelines on CFJ Guideline 61, p. 27.

➤ Assist the child immediately after the hearing



After the end of each court hearing, the lawyer needs to:

- Explain to the child the reasons behind the decisions which have been taken and their effects (i.e. the measures imposed);
- Clarify, in general, everything that has happened during the hearing to the child in a language adapted to his level of understanding;
- Repeat all this information to the child;
- Explain why the child's point of view has or has not affected the decisions taken;
- Inform the child about the possibility to appeal the measures/decision(s) in the next procedural stage;
- Explain to the child what kind of options he has in the next procedural stage and what the eventual consequences of these options would be¹⁵;
- Inform the child about the next procedural stages and their duration.



Moreover, the lawyer needs to:

- Preserve the confidentiality of records concerning the child;
- Ensure that the court is aware that any final judgment that reveals the child's identity is not to be disclosed publicly;
- Try to ensure the non-disclosure of criminal records of children outside the justice system on reaching the age of majority, in order to guarantee their successful reintegration into society.

¹⁵ CoE Guidelines on CFJ, Guideline 75 p.31 and Explanatory Memorandum § 134, p. 90.

4. Post-Trial

Depending on the national legal aid scheme, an appointed or *ex officio* lawyer will not always be paid by the State for his intervention in this last phase of the proceedings. In any event, we recommend that the lawyer undertakes the following steps:

4.1 Visit the child

During the rehabilitation/reintegration phase, the lawyer needs to:



- Visit the child and maintain contact with him and his family, above all if the child is deprived of liberty;
- Help facilitate the visits of parents to the institution or to any other place of deprivation of liberty;
- If the child is not deprived of liberty, meet the child at the office or in any other appropriate place.

4.2 Provide the child with effective assistance during the rehabilitation and reintegration phase

The mandate of the lawyer does not end after the last hearing since the main goal of juvenile justice proceedings is the reintegration of the child into society. The reintegration process is a right of every child in conflict with the law. (UNCRC, art. 40.1)

Consequently, lawyers have a key role also in this phase and should not disappear at this crucial moment.

➤ Monitor measures/sanctions imposed on the child

In order to properly assist the child during this phase, the lawyer needs to:



- Verify if the measures and sanctions imposed on the child are constructive and represent an individualised response to the criminal acts that have been committed, bearing in mind the principle of proportionality. This means that the child's age, his physical and mental well-being and development and all the circumstances of the case must have been taken into account by the judicial decision;

- Guarantee the respect, without stigmatization, of the rights to education, vocational training, employment, rehabilitation and reintegration, above all if the child is deprived of liberty;
- Take all the necessary steps to facilitate the execution of the judicial decision while respecting the child's rights and well-being;
- Ensure that the judicial decision is re-evaluated by the competent authority on a regular basis (especially when it is a decision removing the child from his family environment or depriving him of his liberty);
- Inform the child of the available remedies (either through non judicial mechanisms or access to justice), if a judicial decision has not been enforced¹⁶;
- Ensure that after the end of the juvenile justice proceedings, the child and his family can receive guidance and support for their specific family needs, ideally free of charge, by specialised social services¹⁷.

D. FURTHER INFORMATION, READINGS AND APPENDICES

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

www.mylawyermyrights.eu

¹⁶ CoE Guidelines on CFJ, Guidelines 76-77, p. 32.



¹⁷ CoE Guidelines on CFJ, Guideline 79, p. 32.

TECHNICAL SHEET 1

TS 1 – THE INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

The objectives of this TS are to:

1. List the different instruments and standards concerning children in conflict with the law as follows: (1) the UN instruments, (2) the CoE instruments and (3) the EU instruments;
In the following lists, a distinction is made between these instruments regarding their binding force (hard law, soft law and case-law).
2. Provide the reader with an overview on the applicable international and regional instruments and standards guaranteeing children in conflict with the law their procedural rights in juvenile justice proceedings. In order to do so, 3 tables are attached to this Guide in the form of posters:
 - a. The first table contains an overview of the hard law instruments at the UN, CoE and EU level.
 - b. The second table contains an overview of the soft law instruments at the UN, CoE and EU level.
 - c. The third table contains case-law decisions of the ECtHR and the CJEU.

Furthermore, in the Manual addressed to EU Member States, there is a specific section which explains why EU Member States shall respect their international and regional obligations regarding children's rights (See part B. EU MEMBER STATES' OBLIGATIONS REGARDING CHILDREN'S RIGHTS, p. 42-50.)  and a technical sheet clarifies what bodies control whether the States are respecting their obligations at international and regional level (**TS 5** of the Manual for EU Member States). In this Guide, it is possible to find some information in the **TS 2** on strategic litigation about, in particular, the control bodies at EU level. 

1. AT INTERNATIONAL LEVEL

a. Hard Law

Binding international instruments applying to children in conflict with the law relevant for this Guide include, but are not limited to:

- *The Universal Declaration of Human Rights (UDHR), 1948;*
- *The International Covenant on Civil and Political Rights (ICCPR), 1966;*
- *The United Nations Convention on the Rights of the Child (UNCRC), 1989;*
- *The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3 UNCRC), 2011.*

b. Soft law

International soft law instruments in the field of juvenile justice include, but are not limited to:

- *The UN Standards Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules or RAJJ), 1985;*
- *The UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines or GPJD), 1990;*
- *The UN Rules for the Protection of Juvenile Deprived of their Liberty (The Havana Rules or RPJDL), 1990;*
- *The UN Basic Principles on the Role of the Lawyers (BPRL), 1990;*
- *The UN Guidelines for Action on Children in the Criminal Justice System (GACCJS), 1997;*
- *General Comment N°10 of the Committee on the Rights of the Child: Children's rights in Juvenile Justice (CRC – GC N°10), 2007;*
- *General Comment N°12 of the Committee on the Rights of the Child: The right of the child to be heard (CRC – GC N°12), 2009;*
- *General Comment N°14 of the Committee on the Rights of the Child: The right of the child to have his or her best interests taken as a primary consideration (CRC – GC N°14), 2013;*



- *The UN Principles and Guidelines on access to legal aid in criminal justice systems (PGALA), 2013;*
- *Guidelines on children in contact with the justice system (prepared by an International Working Group of the International Association of Youth and Family Judges and Magistrates (IAYFJM)), 2017.*

2. AT REGIONAL LEVEL

The Council of Europe

a. Hard law

Binding CoE instruments applying to children in conflict with the law relevant for this Guide include, but are not limited to:

- *The European Convention on Human Rights (ECHR), 1950;*
- *The European Social Charter (ECSR), 1961, revised in 1996.*

b. Soft Law

CoE soft law instruments in the field of juvenile justice include, but are not limited to:

- *Recommendation of the Committee of Ministers on the European Rules for juvenile offenders subject to sanctions or measures, CM/Rec (2008)11, 2008;*
- *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, (CoE Guidelines on CFJ), 2010;*
- *CPT Standards on Juveniles deprived of their liberty of the Europe an Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2010.*

c. The European Court of Human Rights' case-law

The ECtHR's judgments are binding for the 47 CoE Member States that have ratified the ECHR (among which are all the EU Member States) and they often have led governments to alter their legislative and administrative practice in a wide range of areas.

The ECtHR's case-law makes not only the ECHR a powerful living instrument but also the UNCRC since the ECtHR often relies on the UNCRC when interpreting ECHR claims pursued either by or on behalf of children.

The ECtHR has a vast jurisprudence on children's rights, unlike the CJEU, including on the violation of the right to a fair trial (article 6 ECHR).

In particular, regarding the violation of this last provision, the UNCRC has had considerable influence on the ECtHR's reasoning in relation to the rights of children in conflict with the law¹ (see the table "case-law" p. 92-96 □).

¹ The case-law of the ECtHR's is available on the website <https://www.coe.int/en/web/children/case-law>. Here you will find two databases, HUDOC and THESEUS. This latter contains only the ECtHR's case-law regarding children's rights. For further information see also U. Kil Kelly, *The impact of the Convention on the case-law of the European Court of Human Rights in D. Fottrell (ed.), Revisiting children's rights, 10 years of the UN Convention on the rights of the child*, Kluwer Law International, 2000.

The European Union

a. Hard law

Binding EU instruments applying to children in conflict with the law relevant for this Guide include, but are not limited to²:

- ④ *The European Union Charter of Fundamental Rights (EUCFR), 2000 (in particular art. 24 (Rights of the child), arts. 47-50 (specific section focused on “Justice”) and art. 52, §3 on the scope of guaranteed rights);*
- ④ *Treaty on European Union (TEU), 2009 (in particular art. 3 concerning the EU obligation to promote the protection of the rights of the child);*
- ④ *Treaty on the Functioning of the European Union (TFEU), 2012 (in particular art. 82, §2, as legal basis for the adoption of EU directives concerning the rights of individuals in criminal procedure);*
- ④ *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, 2010 (for children and adults);*
- ④ *Directive 2012/13/EU on the right to information in criminal proceedings, 2012 (for children and adults);*
- ④ *Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, 2013 (for children and adults);*
- ④ *Directive (EU) 2016/343 on the presumption of innocence and of the right to be present at the trial in criminal proceedings, 2016 (for children and adults)³;*
- ④ *Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, 2016 (devoted specifically to children in conflict with the law);*
- ④ *Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings, 2016 (for children and adults).*

² As noted earlier, not all directives are applicable in all EU Member States. In particular, directives concerning fair trial rights, such as those discussed in this Guide are not always applicable in Ireland, the United Kingdom or Denmark. These States may elect to opt in or opt out of such directives.

³ Directive (EU) 2016/343 on the presumption of innocence is not part of the project but will be mentioned in the section “Other relevant rights of children in conflict with the law” see **TS 4** of the Manual for EU Member States. □



In the Manual addressed to EU Member States, there is a technical sheet (**TS 2**) which is devoted to the transposition process of the EU directives and another (**TS 3**) which details the above mentioned directives. Moreover, the Manual addressed to EU Member States provides practical guidance to the Member States on how properly transpose and implement these directives at national level (see **part C** of the Manual addressed to EU Member States, p. 51-96). □



b. Soft law

EU soft law instruments in the field of juvenile justice include, but are not limited to:

- ④ *The European Commission’s Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02), 2013;*
- ④ *The European Commission’s Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03), 2013.*

c. The Court of Justice of the European Union’ case-law

To date, the CJEU’s case-law concerning the protection of children’s rights is not as broad as the ECtHR’s. Most of CJEU judgments relevant to children are in the context of the free movement of persons and in issues relating to EU citizenship and have been delivered after a request for a preliminary ruling by a national court⁴.

⁴ For the case-law of the CJEU see https://curia.europa.eu/jcms/jcms/j_6/en/.

CASE-LAW TABLE

PROJECT "MY LAWYER, MY RIGHTS" (2017)		
CASE-LAW AND INFRINGEMENT PROCEDURE AGAINST EU MS		
Right to legal representation	Right to access to a lawyer	ECHR case-law
		Child under police arrest (ECtHR, 17 October 2006, Okkali v. Turkey , no. 52067/99, § 69 et seq.)
		Legal assistance to minors in police custody since the first police questioning (ECtHR, Grand Chamber , 27 November 2008, Salduz v. Turkey , no. 36391/02, § 55-62)
		Access to a lawyer for a child during police investigation (ECtHR, 2 March 2010, Adamkiewicz v. Poland , no. 54729/00)
		Access to a lawyer in cases involving children (ECtHR, 11 December 2008, Panovits v. Cyprus , no. 4268/04 and ECtHR, Grand Chamber , 23 March 2016, Blokhin v. Russia , no. 47152/06, §196, p. 64: "a child may in no case be deprived of procedural safeguards for the sole reason that under domestic law the procedure, which could lead to deprivation of liberty, is intended to protect the interests of the minor rather than to punish".
		Waiver of the rights of defence under certain and restrictive conditions (ECtHR, 11 December 2008, Panovits v. Cyprus , no. 4268/04, § 68 and ECtHR, 27 April 2017, Zherdev v. Ukraine , no. 34015/07, § 140)
		Access to a lawyer during the proceedings determining the lawfulness of the child detention (ECtHR, 29 February 1988, Bouamar v. Belgium , no. 9106/80)
		The importance of the right to legal representation for a minor (ECtHR, 15 June 2004, S.C. v. UK , no. 60958/00, § 29)
		Infringement procedures against MS

		Non-communication cases concerning the implementation of directive 2013/48/EU on the right of access to a lawyer in criminal proceedings: Luxembourg, Bulgaria, France, Slovenia, Greece, Croatia, Slovakia, Cyprus and Germany → For all these States: letter of formal notice (art. 258 TFUE), except for Bulgaria: reasoned opinion (art. 258 TFEU)
	Access to free legal aid	ECHR case-law
		Access to a lawyer free of charge for a child (ECtHR, 11 December 2008, Panovits v. Cyprus , no. 4268/04)
Right to information	The right to information and advice	CJUE case-law
		CJEU, 15 October 2015, C-216/14, Covaci (not child-focused)
		Infringement procedures against MS
		Non-communication cases concerning the implementation of directive 2012/13/EU on the right to information in criminal proceedings: Luxembourg, Cyprus, Malta, Slovenia, Slovakia, Spain and Czech Republic → For Luxembourg: letter of formal notice (art. 258 TFUE), for the other EU Member States: the infringement proceedings have already been closed
Right to be heard	Right to be heard / to participate	ECHR case-law
		The concept of "effective participation" in a case dealing with an accused minor with a low level of understanding (ECtHR, 15 June 2004, S.C. v. UK , no. 60958/00, § 29)
		The effective participation of children in the courtroom (ECtHR, Grand Chamber , 16 December 1999, T. v. UK , no. 24724/94, § 88 and ECtHR, Grand Chamber , 16 December 1999, V. v. UK , no. 24888/94, § 90)

		<i>"The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police"</i> (ECtHR, 27 April 2017, <i>Zherdev v. Ukraine</i> , no. 34015/07, § 135; see also ECtHR, 11 December 2008, <i>Panovits v. Cyprus</i> , no. 4268/04, § 67)
	Right to interpretation & translation	CJUE case-law
		CJEU, 15 October 2015, C-216/14, <i>Covaci (not child-focused)</i>
		Infringement procedures against MS
		Non-communication cases concerning the implementation of directive (EU) 2010/64/EU on the right to interpretation & translation in criminal proceedings: Lithuania, Belgium, Slovenia, Romania, Luxemburg, Greece, Ireland, Italy, Slovakia, Austria, Spain, Finland, Hungary, Malta, Bulgaria and Cyprus → All the infringement proceedings have already been closed
Right to privacy	Right to privacy & protection of personal data	ECHR case-law
		In a case of young child charged with a grave offence attracting high levels of media and public interest (ECtHR, Grand Chamber , 16 December 1999, <i>V. v. UK</i> , no. 24888/94, § 87 and ECtHR, Grand Chamber , 16 December 1999, <i>T. v. UK</i> , no. 24724/94)
	Conducting proceedings behind closed doors	ECHR case-law
		ECtHR, Grand Chamber , 16 December 1999, <i>T. v. UK</i> , no. 24724/94 and ECtHR, Grand Chamber , 16 December 1999, <i>V. v. UK</i> , no. 24888/94.
Best interests of the child	Taking the best interests of the child into consideration	ECHR case-law

		To modify the adult courts' procedures in order to attenuate the rigours of an adult trial (ECtHR, Grand Chamber , 16 December 1999, <i>T. v. UK</i> , no. 24724/94 and ECtHR, Grand Chamber , 16 December 1999, <i>V. v. UK</i> , no. 24888/94)
		Detained children should be separated from adults (ECtHR, 20 January 2009, <i>Güveç v. Turkey</i> , no. 70337/01; ECtHR, 6 May 2008, <i>Nart v. Turkey</i> , no. 20817/04; ECtHR, 9 October 2012, <i>Çoşelav v. Turkey</i> , no. 1413/07)
		When a child is suspected of a crime, justice must respect the principle of the best interest of the child (ECtHR, 2 March 2010, <i>Adamkiewicz v. Poland</i> , no. 54729/00, § 70)
	Right to an individual assessment	ECHR case-law
		Taking full account of the age, level of maturity and intellectual and emotional capacities of the child (ECtHR, Grand Chamber , 16 December 1999, <i>V. v. UK</i> , no. 24888/94, § 28)
	Avoiding undue delay	ECHR case-law
		Avoiding undue delay in cases of detention of minors (ECtHR, 29 February 1988, <i>Bouamar v. Belgium</i> , no. 9106/80, § 63; ECtHR, 21 December 2010, <i>Ichin and others v. Ukraine</i> , no. 28189/04)
		Special diligence in bringing children to trial within a reasonable time (ECtHR, 28 October 1998, <i>Assenov and Others v. Bulgaria</i> , no. 24760/94, § 157; ECtHR, 3 March 2011, <i>Kuptsov and Kuptsova v. Russia</i> , no. 6110/03, § 91)
	The vulnerability of the child at the police station	ECHR case-law

		<i>"The Court emphasizes that it is vital for law-enforcement officers who are in contact with minors in the exercise of their duties to take due account of the vulnerability inherent in their young age (European Code of Police Ethics, § 44). Police behavior towards minors may be incompatible with the requirements of Article 3 of the Convention simply because they are minors, whereas it might be deemed acceptable in the case of adults. Therefore, law-enforcement officers must show greater vigilance and self-control when dealing with minors"</i> (ECtHR, Grand Chamber , 28 September 2015, Bouyid v. Belgium , no. 23380/09, § 110)
	Deprivation of liberty as a measure of last resort & promotion of alternative measures	ECHR case-law
		Pre-trial detention of children as a measure of last resort (ECtHR, 19 January 2012, Korneykova v. Ukraine , no. 39884/05, § 43-44; ECtHR, 10 January 2006, Selçuk v. Turkey , no. 21768/02, § 35-36; ECtHR, 13 November 2012, J.M. v. Denmark , no. 34421/09, § 63; ECtHR, 6 May 2008, Nart v. Turkey , no. 20817/04)
		Selçuk v. Turkey , no. 21768/02, § 35-36; ECtHR, 13 November 2012, J.M. v. Denmark , no. 34421/09, § 63; ECtHR, 6 May 2008, Nart v. Turkey , no. 20817/04)
		Placement of a juvenile in a shelter for juveniles (equivalent to pre-trial detention): ECtHR, 30 June 2015, Grabowski v. Poland , no. 57722/12.
		Child detention for the purposes of "educational supervision" (ECtHR, 16 May 2002, D.G v. Ireland , no. 39474/98)
		Alternatives to pre-trial detention for children (ECtHR, 9 July 2013, Dinç and Çakır v. Turkey , no. 66066/09, § 63; ECtHR, 20 January 2009, Güveç v. Turkey , no. 70337/01, § 108)
	Training of professionals	ECHR case-law
		Juvenile defendants must be, in any case, represented by skilled lawyers experienced in dealing with children (ECtHR, Grand Chamber , 16 December 1999, T. v. UK , no. 24724/94, § 88 and ECtHR, Grand Chamber , 16 December 1999, V. v. UK , no. 24888/94, § 90)

TECHNICAL SHEET 2

TS 2 – STRATEGIC LITIGATION

The objectives of this TS are to:

1. Educate lawyers about the importance of using all the existing international and regional mechanisms to improve children's rights globally;
2. Raise awareness among lawyers for children about what strategic litigation is and how to use it to improve the respect of children's rights when there is no solution at national level;
3. Provide a checklist in order to help lawyers to check if they have full knowledge of all the mechanisms in place to protect children's rights and lead them in the choice of the correct mechanism;
4. Invite the lawyers for children to use these mechanisms and procedures.

1. STRATEGIC LITIGATION

a. Definition of strategic litigation to advance children's rights

There is, to our knowledge, no official definition of the term "strategic litigation". Many organisations do refer to this concept and have specific understanding of it.

We propose the following definition¹:

¹ This definition has been elaborated by DCI-Belgium.

Strategic litigation consists of using, in a very deliberate and considered manner, all available legal instruments, mechanisms, procedures and actions, at national, regional and international level, with the aim of persuading or obliging the authorities to better respect human rights and, therefore, children's rights globally.

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

Ideally, strategic litigation should be part of a broader advocacy strategy seeking to ensure social changes.

This means that an effective strategic litigation must have clear goals and targets and an effective communication component in order to bring about significant changes in the law and/or in its implementation in practice. Therefore, the main purpose of strategic litigation is to promote a culture of respect of children's rights.

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

Whenever a decision is taken to act against these repeated violations of human rights involving a number of actors at national level, it is imperative to seriously take into account all the risks implied by this kind of action. Indeed, a negative decision before an international judicial or quasi-judicial body may result in negative and undesirable effects at a higher level, undermining the impact of these actions. This is why they should be carried out alongside specialised NGOs and lawyers that can help to carefully select the cases, the right mechanism, action or jurisdiction and build an effective, proactive, coordinated and needs-based strategic litigation. Collaboration and sharing are necessary to try to render legislation, policy and practice more child-friendly at EU level.

Ethically, the need to receive the consent of the child whose rights have been violated, and his best interests must always be taken into consideration and carefully assessed before initiating strategic litigation.

By respecting certain conditions, strategic litigation is a way for lawyers to bring systematic violations of human rights (more specifically children's rights in the context of this Guide) before national and/or international judicial or quasi-judicial bodies. Therefore, lawyers can be agents of change and must be aware of all the existing opportunities to further develop national legislation and practices in line with children's rights. (See **TS 5** "Training" for further information on the available courses and materials about strategic litigation).



Successful examples of strategic litigation

- In Belgium, thanks to the **Salduz judgment of the ECtHR** against Turkey (ECtHR, 27 November 2008, *Salduz v. Turkey*, n. 36391/02), the presence and assistance of lawyers during police questionings of children is now mandatory and required by law. This case has been fundamental to start a social change also in other EU Member States (such as in the Netherlands);
- The **CJEU** issued a judgement in 2013 within the area of asylum law. The Court considers that "*where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'*".² The Court based its decision on the fact that it is in the best interests of "*unaccompanied minors, who form a category of particularly vulnerable persons, not to prolong unnecessarily the procedure for determining the Member State responsible and to ensure them a prompt access to the procedures for determining the refugee status*".³ This decision has had an important impact across the EU and its public opinion, since it brought up a particularly topical and sensitive point;
- In 2013 the association APPROACH, a UK-based NGO that campaigns for a global ban on the corporal punishment of children, brought seven separate collective complaints before the **European Committee of Social Rights (ECSR)** against Belgium, Cyprus, the Czech Republic, France, Ireland, Italy and Slovenia as countries whose laws failed to properly protect children from physical punishment. The Committee declared that there had been a breach of art. 17 of the European Social Charter (ESC) (right of children and young persons to social, legal and economic protection) in Ireland, Slovenia, Belgium, the Czech Republic and France. These decisions prompted public debates also in several other countries and some of the States concerned changed legislation.⁴

² CJEU, 6 June 2013, *The Queen, on the application of MA and Others v. Secretary of State for the Home Department (C-648/11)*, § 66. In this case, the AIRE Centre (*Advice on Individual Rights in Europe*: <http://www.airecentre.org/>) was an intervener. The organisation works on a broad range of human rights issues, including refugee protection. It is able to directly represent applicants, to provide free legal advice to lawyers or to individuals and to intervene as a third party before the ECtHR and CJEU.

³ *Ibid.*, §55 and §61.

⁴ See <https://www.crin.org/sites/default/files/approachcollectivecomplaintscasestudy.pdf>.

b. Practical advice for lawyers from Olivier de Schutter's interview⁵:

Concerning the right choice of the procedure → *“In denouncing violations of human rights, it is extremely important to correctly choose which procedure to use. That is crucial because there is usually an admissibility requirement in these international/regional procedures which means that the Court or body may not address a particular instance if that instance or that case has already been decided by another body. Therefore, the choice made by the lawyer, once it is made, is usually irreversible. Moreover, how to choose a procedure or another one is not always obvious: each procedure has its pros and cons, its advantages and disadvantages and it is a very important responsibility for the lawyer to provide the right advice to the individual victim as to where to file the claim”;*

Concerning the role of the NGO's → *“Lawyers shall be aware of the important role and work of the NGO's in the follow up of the decisions adopted by human rights treaty bodies. Without these NGO's and the crucial monitoring role of civil society, it would be very difficult for these bodies to have their decisions respected and implemented by the State concerned. Once a decision is obtained from a particular human rights body established within the UN, the CoE or the EU, the NGO's try to convince national parliamentarians and governments to reform the law or to change the practice in order to implement the findings that were made at international or regional level. Therefore, NGO's are a vital part of the enforcement of human rights law at international, regional and national level. Usually the NGO's have experience in assisting individual victims in these international and regional procedures and can help lawyers in an effective way because they have normally already selected a number of cases that shall complement each other to move the jurisprudence in a particular direction and so create a case-law that is favourable to a certain progressive interpretation of a specific human right. In this sense, lawyers and NGO's shall cooperate in order to convince the judges to whom the case is presented”;*

Concerning the choice to defend an individual case or to focus on a structural problem → *“The individual and collective dimensions of any particular violations of human rights are difficult to really separate from one another. That imposes on the lawyer, accompanying the individual victim, a very important responsibility. It is important to put the individual situation in its broader context and show how it is a symptom of a larger problem that deserves the attention of the human rights body before which the complaint is filed. At the same time, it is important not to instrumentalise the individual case in the name of the collective goal to be pursued”.*

⁵ Olivier De Schutter is a Belgian legal scholar specialized in economic and social rights. He served as the United Nations Special Rapporteur on the right to food from 2008 to 2014. He is a Professor of international human rights law, European Union law and legal theory at the Université Catholique de Louvain in Belgium, as well as at the College of Europe and at SciencesPo in Paris. He has regularly contributed to the American University Washington College of Law's Academy on Human Rights and Humanitarian Law. The full interview is available on the website <http://www.mylawyermyrights.eu/outputs/>.

2. LIST OF THE JUDICIAL AND QUASI-JUDICIAL BODIES

At international and regional level

With a focus on children in conflict with the law

a. At international level (UN)

- The Committee on the Rights of the Child (CRC Committee);
- The Human Rights Committee or the Committee on Civil and Political Rights (CCPR);
- The Committee against Torture (CAT);
- The Human Rights Council (HRC) and the UN Special Procedures⁶;
- The UN Special Rapporteurs on various Human Rights;

b. At regional (CoE) level

- The European Court of Human Rights (ECtHR);
- The European Committee of Social Rights (ECSR);
- The CoE Special Rapporteur on Human Rights;

c. At regional (EU) level

- The Court of Justice of the European Union (CJEU).

⁶ See <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>.

3. STRATEGIC LITIGATION AT EU LEVEL

The European Commission (EC) (in the first place) and the CJEU are the control bodies at EU level:

- In particular, **the European Commission** has the role of “*Guardian of the Treaties*” and is responsible for monitoring the correct application of EU law.
- **The CJEU** (or Court of Justice) is responsible for ensuring the uniform and coherent application of EU law in all EU Member States and issues decisions regarding many types of legal actions, in particular⁷:
 1. Preliminary rulings;
 2. Infringement procedures;
 3. Actions for annulment;
 4. Actions for failure to act;
 5. Actions for damages.

a. The preliminary ruling

The preliminary ruling (TFEU, art. 267) is one of the most important instruments of the CJEU to guarantee legal certainty by uniform application of EU law.

Even if, to date, no cases have been brought to the CJEU concerning the interpretation of article 24 of the EUCFR (“The rights of the child”), in conjunction with one of the directives on fair trial rights, lawyers should consider the preliminary ruling as a useful instrument to argue for the respect of the rights of children in conflict with the law.

Purpose of the preliminary ruling:

To enable national judges to question the CJEU on the interpretation or validity of EU law if this is of relevance in the case pending before them⁸.

⁷ It is important to remember the division of powers between the Court of Justice and the General Court. The General Court has jurisdiction to hear and determine at first instance actions brought by individuals. The Court of Justice has jurisdiction to hear and determine actions brought by the Member States. It may also hear appeals brought against judgments given by the General Court at first instance. In the latter case, the Court of Justice rules only on questions of law and cannot re-examine the facts.

⁸ The CJEU only gives a decision on the constituent elements of the reference for a preliminary ruling made to it. The national court remains competent for the original case and the national proceeding shall be stayed until the CJEU has given its ruling.

Types of references for a preliminary ruling:

- Reference for a ruling on the interpretation of EU primary and secondary law: the national judge requests clarification from the Court of Justice in order to apply a specific EU provision correctly;
- Reference for a preliminary ruling on the validity of an EU act of secondary law issued by a Union institution, body, office or agency in order to check its validity. The same mechanism can be used to determine whether a national law or practice is compatible with EU law.

How a preliminary ruling works:

I. The request

National courts/tribunals should always refer to the CJEU in case of doubts which can give rise to a wrong application/interpretation of EU law in a pending case⁹;

The request shall contain a clear definition of the factual and legal elements of the case and also of the dispositions of EU law which are specifically relevant and applicable.

II. Limits

- A request for a preliminary ruling cannot be based on a virtual/hypothetical or manifestly irrelevant case;
- If the specific matter could have been the subject of an action for annulment, it cannot be contested through a preliminary ruling;
- A preliminary ruling may be requested of the national judge by one of the parties involved in the dispute (through their lawyers), but the decision to refer the case to the CJEU rests with the national judge/court;
- Nevertheless, according to article 267 of the TFEU, national courts which act as a court of final appeal (i.e. against whose decisions there is no judicial remedy) are obliged to make a reference to the Court of Justice for a preliminary ruling in case of doubts which can give rise to a wrong application/interpretation of EU law;
- There are some exceptions to this last rule, which enable national courts of final appeal not to be obliged to refer to the CJEU for a preliminary ruling, when:

⁹ For more information, see the Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2016/C 439/01).

- The CJEU has already ruled on the same matter;
- The interpretation of the EU rule of law in question is obvious;
- There is a settled case-law of the CJEU on that issue.

III. Effects on the pending case

The national dispute is suspended until the decision of the CJEU on which the final decision of the referring court shall be based.

IV. Types of procedures in urgent cases

Article 267 of the TFEU states that “with regard to a person in custody, the CJEU shall act with the minimum of delay”. In this regard, the Rules of Procedure of the CJEU provide two particular procedures for the preliminary rulings¹⁰:

- The expedited procedure: a reference for a preliminary ruling may be subject to an expedited procedure when the nature of the case and exceptional circumstances require it to be handled quickly;
- The urgent procedure: this procedure only applies in areas relating to freedom, security and justice. It has already been used by the Court of Justice in many cases concerning children’s rights in issues relating, mostly, to parental responsibility¹¹ and can be used also in cases involving children in conflict with the law;

V. Legal effects of the preliminary rulings

- Today there is no doubt that each decision taken by the CJEU in a preliminary ruling has an “erga omnes effect”, which means that it is binding not only for the national referring court, but also for the national courts of the other Member States. In practice, the decisions of the CJEU are considered as binding precedents;

¹⁰ Rules of Procedure of the CJEU, arts. 105-114.

¹¹ See, for example, CJEU, 23 December 2009, *Detiček* (C-403/09); CJEU, 1 July 2010, *Povse* (C-211/10); CJEU, 5 October 2010, *McB* (C-400/10); CJEU, 22 December 2010, *Aguirre Zarraga* (C-491/10); CJEU, 22 December 2010, *Mercredi* (C-497/10). See also the CJEU “Report on the use of the urgent preliminary ruling procedure by the Court of Justice”, delivered to the Council in accordance with the statement annexed to its decision of 20 December 2007 (OJ L 24 of 29 January 2008, p. 44): https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-07/en_rapport.pdf.

- In the context of a reference for a preliminary ruling concerning validity, if a disposition or a legislative instrument of EU law is declared invalid all of the other instruments adopted that are based upon it, are automatically invalid. Normally, the decisions of the CJEU have retroactive effects but the Court can also decide to declare invalid an act of EU law with *ex nunc* effects in order to preserve legal certainty and the protection of legitimate expectations.

Recommendations for lawyers for children

The lawyer needs to:



- Be aware of the existence of the preliminary ruling and understand its purpose and its potential to serve the best interests of the child;
- Be aware that the preliminary ruling can be used to determine whether a national law or practice is compatible with EU law and also to clarify if a EU act of secondary law (for example a directive) is compatible with certain international standards which bind the EU (e.g. the ECHR) or with EU primary law itself (e.g. EU treaties and the EUCFR);
- If justified, request the use of the preliminary ruling in order to clarify the interpretation of a specific provision laid down in one of the EU directives on fair trial rights in light of article 24 of the EUCFR. A preliminary ruling can be very useful to raise a new matter of interpretation before national judges, which is of general interest to the uniform application of EU law or when the existing CJEU’s case-law does not provide any relevant clarification;
- Understand that national judges have an obligation to take seriously a request for a preliminary ruling raised by a lawyer since, according to the fundamental principle of precedence of EU law, they cannot apply a national rule which contradicts EU law. It is the task of national judges to ensure the precedence principle is adhered to;
- If justified, request the use of the “urgent procedure” when they defend a child in conflict with the law, especially in cases involving children deprived of liberty;
- Be aware that preliminary ruling proceedings before the CJEU are free of charge and the Court does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal; it is for the referring court or tribunal to rule on those costs; Moreover, if a party to the main proceedings has insufficient means and where possible under national rules, the referring court or tribunal may grant that party legal aid to cover the costs, including those of lawyers’ fees, which it incurs before the Court of Justice. In addition, the Court of Justice itself may also grant legal aid where the party in question is not already in receipt of aid under national rules or to the extent to which that aid does not cover, or only partly covers, costs incurred before the Court¹².

b. The infringement procedures

According to article 258 of the TFEU: *“If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union”*.

For further information on this procedure, see the Manual addressed to EU Member States, section I. The Infringement procedure, p. 154-155. [□](#)

c. Actions for annulment

Through the action for annulment, the claimant (Member States, the EC, the EP, the Council and individuals under certain conditions) requests the annulment of an act adopted by an EU institution, body, office or organisation. The CJEU shall annul the act concerned if it is judged to be contrary to EU law.

According to article 263 of the TFEU: *“Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”*.

In contrast to the “preferential plaintiffs” (Member States, the EC, the EP and the Council), individuals and their lawyers must demonstrate that the contested act is addressed to them or concerns them directly and individually.

¹² CJEU, *Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2016/C 439/01)*, § 26 and 27: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016H1125\(01\)&from=IT](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016H1125(01)&from=IT).

d. Actions for failure to act

The EP, the Council and the EC must take certain decisions under certain circumstances. If they do not respect their tasks, EU governments, other EU institutions, individuals (under certain conditions) or companies can complain to the CJEU.

According to article 265 of the TFEU: *“Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion”*.

In this procedure, individuals and their lawyers must demonstrate that the contested omission has adversely affected them directly and individually.

e. Actions for damages

Any person or company who has had their interests harmed as a result of the action or inaction of the EU or its staff can take action against them through the CJEU. (TFEU, arts. 268 and 340)

According to article 340 of the TFEU: *“In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties”*.

This action may be brought also by individuals who can obtain compensation for damages for which the Union is responsible.

The deadline for acting is five years from the date on which the damage occurred.

The Court of Justice shall recognise the liability of the Union when three conditions are met:

- The claimant has suffered damage;
- The EU institutions or their agents have acted illegally under EU law;
- There is a direct causal link between the damage suffered by the claimant and the illegal act of the EU institutions or their agents.

N.B. Individuals may also render Member States liable in the case of damage caused by EU law being poorly applied. However, actions taken against Member States must be brought before the national courts.



Summary of all the UN, CoE and EU control mechanisms relevant for children in conflict with the law¹³

	Which Committees?	Procedure?	Outcomes?
<p>INDIVIDUAL COMMUNICATIONS¹⁴</p> <p>Complaints against a State before a Committee, introduced by an individual who considers himself to have been victim of a violation of his rights enshrined in a treaty. The State must be party to the treaty in question.</p>	<ul style="list-style-type: none"> - All the UN Committees, including the CRC Committee (OP3 CRC, art. 5); - The ECtHR. 	<ul style="list-style-type: none"> - National remedies must be exhausted; - Respect the deadline for filing a complaint; - The assistance of a lawyer is not necessary, but it is recommended (legal aid is not provided); - Third parties, on behalf of individuals, can bring a complaint under certain circumstances. 	<ul style="list-style-type: none"> - Legally binding decision: ECtHR - Authoritative interpretation: UN Committees - Interim measures: (Urgent measures which apply only where there is an imminent risk of irreparable harm) <p>ECtHR (Rules of Court, Rule 39) and some UN Committees</p>

¹³ There are also other mechanisms useful to advance respect for children's rights, like: 1. Reports: reports are elaborated by Governments after the ratification of a treaty (1 or 2 years after) and then usually every 5 years. NGOs often present an alternative or shadow report. All the UN Committees, included the Committee on the Rights of the Child (CRC) and the European Committee of Social Rights of the CoE, use reports in order to make observations and recommendations concerning a State which should then be implemented at national level before the next report; 2. Complaints against States: these are complaints from one State party, claiming a violation of a specific treaty committed by another State party. The CRC (OP3 CRC, art. 12), the Committee on Civil and Political Rights (HR committee) and the Committee on the Prevention of Torture (CPT-CoE) provide for use of this mechanism even if, to date, it has never been used; 3. The Universal Periodic Review (UPR): mechanism under which the Human Rights Council examines once every four and a half years the human rights situation in every Member State of the UN); 4. UN Special Procedures: these procedures are managed by a person (Independent expert in Human Rights) or by a working group and can include different approaches (visits to the countries, issuing reports and recommendations, making requests to Governments...). To defend, specifically, children's rights there are also: The UN Special Representative of the Secretary General (SRSG) on Violence against children, the UN Special Rapporteur on the sale and sexual exploitation of children and the UN Special Representative of the Secretary-General for Children and Armed Conflict; 5. The rapid alert procedure of the CERD (Committee on the Elimination of Racial Discrimination): preventive measures, which include early-warning, to respond to problems requiring immediate attention to prevent or limit the number of serious violations of the Convention.

¹⁴ For more information concerning individual complaints, see: <http://www.ohchr.org/EN/HRBodies/TBPe-titions/Pages/IndividualCommunications.aspx#overviewprocedure>.

<p>COLLECTIVE COMPLAINTS</p> <p>Complaints against a State before a Committee, introduced by social partners and accredited NGOs.</p>	<ul style="list-style-type: none"> - The ECSR of the CoE <p>concerning the non-implementation of the ESC (if the concerned State has accepted its provisions and this mechanism)</p>	<ul style="list-style-type: none"> - No need to exhaust national remedies. - No need to identify every single victim. - The claimant organisation must not, necessarily, be a victim of breach of one of the rights of the ESC. 	<ul style="list-style-type: none"> - Interim measures: The ECSR may, at the request of a party, or on its own initiative, indicate to the parties any immediate and necessary measure (to avoid the risk of serious damage and to ensure the effective respect for the rights recognised in the ESC); - Decision on the merits of the complaint: The decision is made public and must be respected by the States concerned (the ESC is a binding international Convention for the States which ratified it). In the event of violation of the ESC, the State is asked to notify the CM of the CoE the measures taken or planned to bring the situation into conformity¹⁵. Then, the State must present in every subsequent report on the provision(s) concerned in the complaint the measures taken to bring the situation into conformity.
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¹⁵ The Committee of Ministers' role is very important because it can contribute to making the ECSR's decisions operational and thereby giving concrete effect to the rights guaranteed under the ESC (by adopting resolutions or recommendations). Texts adopted by the Committee of Ministers in the framework of the Collective Complaints procedure are available on line on the Committee of Ministers' website: http://www.coe.int/t/cm/home_EN.asp?

INSPECTIONS	<ul style="list-style-type: none"> - The CPT; - The SPT. 	<p>The CPT and SPT visit places of detention in the Member States to see how persons deprived of their liberty are treated without restrictions.</p> <p>The visits can be also unannounced.</p>	<p>After each visit, the CPT and the SPT send a detailed report to the State concerning their findings, recommendations, comments and requests for information.</p> <p>The State shall submit its own observations on the report, usually within six months of authorities receiving the report.</p>
INQUIRIES	<ul style="list-style-type: none"> - The CRC Committee; (OP3 CRC, art. 13) - The CESCR; - The CAT; - The CEDAW; - The CRPD; - The CED. 	<p>Upon receipt of reliable information on serious, grave or systematic violations of the rights contained in the Convention which it monitors, the Committee may initiate an inquiry.</p> <p>An inquiry may include a visit with the consent of the concerned State.</p> <p>Any inquiry is conducted confidentially.</p>	<p>The State party is requested to submit its own observations on the Committee's findings, comments and recommendations, usually within six months and, where invited by the Committee, to inform it of the measures taken in response to the inquiry.</p>

4. CHECKLIST

Lawyers for children can use this checklist in order to determine all the available mechanisms to defend the rights of their clients and to make a choice between them.

(This checklist has been drafted by the International Commission of Jurists (ICJ)¹⁶, in the frame of several European projects, and adapted by DCI-Belgium.)

a. Applicability of international obligations

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

b. Temporal jurisdiction

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

c. Territorial jurisdiction

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

¹⁶ See <https://www.icj.org/>

d. Material jurisdiction

1. Do the facts on which the complaint is based constitute violations of human rights treaty provisions?
2. Which mechanisms are competent to hear complaint on these human rights claims? (If there are many of them, see annex II to determine how to make the best choice).
3. On which specific provision should the complaint be based?
4. Is there a precedent (one mechanism that has already taken a decision on a similar case)?

e. Standing

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

f. Time-limits

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

g. One or more bodies?

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

h. Which body is more strategic?

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

i. Effect in the domestic system

1. Are the decisions of the court, tribunal or administrative entity concerned binding or non-binding at the level of the State?
2. What is the effect of the mechanism's decisions on the national system? Is there any possibility of re-opening national proceedings following the decision of the international body or mechanism? Is there an effect on the decisions of other courts?
3. Is there a system in place for payment of any compensation to the complainant recommended by the mechanism?
4. Is there a system in place for review of law/regulation in the light of the conclusions of the mechanism on the case?

5. What is the political impact of the mechanism's decision in the State concerned?
6. Is the decision made public or not? If not, what is the effect of the confidentiality of the decision?
7. What are the risks if you lose the case?
8. What are the risks if the identity of the client (child) is disclosed? Is there a possibility to keep his/her identity confidential?

j. Participation of the client (child)

1. Towards which body has the child the highest level of participation?
2. Is the procedure easy to explain to a child?
3. How much will the child have to carry on the burden of the procedure?

4. LIST OF NGOs USING STRATEGIC LITIGATION TO IMPROVE CHILDREN'S RIGHTS¹⁷

- European Council on Refugees and Exiles (ECRE)¹⁸
- The AIRE Centre (Advice on Individual Rights in Europe)¹⁹
- Soroptimist international of Europe (SI/E)²⁰
- Association for the Protection of all Children (APPROACH)²¹
- International Association of Charities (AIC)²²
- World Association of Children's Friends (AMADE)²³
- European Centre of the International Council of Women (ECICW)²⁴
- European Roma Rights Centre (ERRC)²⁵
- International Commission of Jurists (ICJ)²⁶
- International Council on Social Welfare (ICSW)²⁷
- Defence for Children International (DCI)²⁸
- International Federation of Human Rights (FIDH)²⁹
- World Organisation Against Torture (OMCT)³⁰
- European Anti-Poverty Network (EAPN)³¹
- European Union of Women (EUW)³²
- European Youth Forum (YFJ)³³
- Union des Avocats Européens (UAE)³⁴
- Amnesty International (AI)³⁵
- Caritas Internationalis (International Confederation of Catholic Charities)³⁶
- Médecins du Monde – International (MdM)³⁷
- European Committee for Home-based Priority Action for the Child and the Family (EUROCEF)³⁸
- European Network of Ombudspersons for Children (ENOC)³⁹
- Federation of European Bars (FEB)⁴⁰

¹⁷ This list is not exhaustive and concerns only the NGOs entitled to lodge collective complaints before the ECSR (except for The AIRE Centre). See TS 5 on "Training" for further information on the activities of some of these NGOs concerning the protection of children's rights.

¹⁸ <https://www.ecre.org/>

¹⁹ <http://www.airecentre.org/>

²⁰ <http://www.soroptimisteurope.org/fr/>

²¹ <http://www.charitychoice.co.uk/approach>

²² <http://www.aic-international.org/en/>

²³ <https://www.amade-mondiale.org/fr/index.html>

²⁴ <http://www.womenlobby.org/?lang=en>

²⁵ <http://www.errc.org/>

²⁶ <https://www.icj.org/>

²⁷ <http://www.icsw.org/index.php/fr/>

²⁸ <https://defenceforchildren.org/>



²⁹ <https://www.fidh.org/en/>³⁰ <http://www.omct.org/>³¹ <http://www.eapn.eu/>³² <http://www.europeanunionofwomen.com/>³³ <http://www.youthforum.org/>³⁴ <http://www.uae.lu/fr/>³⁵ <https://www.amnesty.org/en/>³⁶ <https://www.caritas.org/>³⁷ <https://www.medecinsdumonde.be/r%C3%A9seau-international>³⁸ <http://eurocef.eu/en/>³⁹ <http://enoc.eu/>⁴⁰ <http://www.fbe.org/home/>

TECHNICAL SHEET 3

TS 3 – CHECKLIST ON THE ASSISTANCE BY A LAWYER

(ART. 6 DIRECTIVE (EU) 2016/800)¹

1. WHAT?

The assistance by a lawyer includes²:

- The right of access to a lawyer in accordance with directive 2013/48/EU (art. 6.1);
- The right to exercise the rights of defence effectively (art. 6.2);
- The right to meet in private and communicate with the lawyer representing them (art. 6.4 (a));
- The right to confidentiality in meetings, correspondence, telephone conversations and other forms of communication between the child and his lawyer (art. 6.5);
- The effective participation of the lawyer during questioning (art. 6.4 (b));
- The assistance by a lawyer, as a minimum, during the following investigative or evidence-gathering acts if the child is required or permitted to attend the act concerned: Identity parades, confrontations and reconstructions of the scene of a crime (art. 6.4 (c));
- The right to legal aid where this is necessary to ensure that the child is effectively assisted by a lawyer (art. 18 in line with directive (EU) 2016/1919 on legal aid).

2. WHEN?

- Without undue delay, once children are made aware that they are suspects or accused persons (art. 6.3);

¹ This will exclude Ireland, the United Kingdom and Denmark as they did not opt-in to directive (EU) 2016/800.

² For the distinction between “access” and “assistance” of a lawyer, see p. 49-50. 

- In any event, children shall be assisted by a lawyer from whichever of the following points in time is the earliest:
 - a) Before they are questioned by the police or by another law enforcement or judicial authority;
 - b) In due time before they appear before a court having jurisdiction in criminal matters;
 - c) During the following investigative or evidence-gathering acts: identity parades, confrontations and reconstructions of the scene of a crime;
 - d) Without undue delay after deprivation of liberty.

3. ARE DEROGATIONS ALLOWED?

Yes. According to directive (EU) 2016/800, derogations to the assistance of a child by a lawyer are allowed but only in exceptional circumstances.

When? (art. 6.8)

In general, a decision to proceed to questioning in the absence of the lawyer may be taken only:

- Upon decision of a judicial authority or by another competent authority on condition that the decision can be submitted to judicial review; On a case-by-case basis.



Therefore, lawyers needs to:

- Ensure that these conditions are respected.

There are two types of derogations: permanent (1) or temporary (2):

a. Permanent derogations (art. 6.6)

When?

The assistance by a lawyer can be derogated when it is not proportionate in the light of the circumstances of the case, taking into account:

- The child's best interests as primary consideration;
- The right to a fair trial;
- The seriousness of the alleged criminal offence;
- The complexity of the case;
- The measures that could be taken in respect of such an offence.

In any event, the derogation of assistance by a lawyer is not allowed when:

- The child is brought before a court or judge in order to decide on detention (at any stage of the proceedings);
- During the period of detention.

Moreover, a deprivation of liberty cannot be imposed as a criminal sentence, unless the child has been assisted by a lawyer in such a way as to allow him to exercise the rights of the defence effectively and, in any event, during the trial hearings before a court.

More generally, the lawyer needs to:



- Take all necessary action in order to lead EU Member States to withdraw all the existing reservations to articles 37 and 40 of the UNCRC that allow children not to have access to a lawyer in cases concerning minor offences, with support from civil society organisations³;
- Ensure that all young suspects, including children below the MACR or children not under arrest (i.e., children only invited to go to the police station for questioning) have access to a lawyer, free of charge, 24 hours a day.

b. Temporary derogations (art. 6.8)

When?

- Only in exceptional circumstances;
- Only at the pre-trial stage;
- Only if the child's best interests has been taken into account;
- Only if the derogation is justified on the basis of one of the following compelling reasons:

a) Where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;

³ See the table "Hard Law", Poster: front page, for the list of these reservations. □

b) Where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings in relation to a serious criminal offence.



The lawyer needs to:

- Ensure that these conditions are respected;
- Read the section « *Recommendations and key directions for implementation* » on the assistance to a lawyer in the Manual for EU Member States (p. 68); ☐
- Be aware that when he participates in questioning, the fact that such participation has taken place in the absence of a lawyer shall be noted using the recording procedure under national law (art. 6.4 (b));
- Be aware that the competent authorities shall postpone the questioning of the child, or other investigative or evidence-gathering acts, when the child is to be assisted by a lawyer but no lawyer is present. The postponing shall be for a reasonable period of time in order to allow for the arrival of the lawyer or, where the child has not nominated a lawyer, to arrange a lawyer for the child (art. 6.7);
- Be aware that EU Member States shall also ensure that deprivation of liberty is not imposed as a criminal sentence, unless the child has been assisted by a lawyer in such a way as to allow him to exercise the rights of the defence effectively and, in any event, during the trial hearings before a court (art. 6.6).



The pre-trial stage is the most vulnerable moment of the whole juvenile justice process as it is often decisive for the outcome of the proceeding. Precisely for this reason, any kind of derogation to the right of access to a lawyer in this stage should be avoided in line with ECtHR's case-law.

In this regard, lawyers for children must be aware of these important judgments of the ECtHR:

Case *Salduz v. Turkey*, in which the ECtHR has stated that, in order to guarantee a practical and effective right to a fair trial, access to a lawyer shall be assured from the first police questioning⁴;

Case *S.C. v. the United Kingdom*, in which the ECtHR has pointed out that suspects are particularly vulnerable at the investigation stage and evidence gathered may determine the outcome of the case. The right of access to legal assistance is particularly important for vulnerable suspect such as minors⁵.

IMPORTANT: To date, the ECtHR has not found any specific “compelling reason” that could lead to a derogation of this right during the investigative stage in cases concerning children in conflict with the law⁶.

⁴ ECtHR, 27 November 2008, *Salduz v. Turkey*, n. 36391/02, § 52-55.

⁵ ECtHR, 15 June 2004, *S.C. v. the United Kingdom*, n. 60958/00.

⁶ For the ECtHR's case-law see the databases “HUDOC” and “THESEUS” on the website <https://www.coe.int/web/children/case-law>.

4. ARE THERE ACTIONS WHERE THE ASSISTANCE OF A LAWYER IS NOT REQUIRED?

Yes. Recital 28 of directive (EU) 2016/800 lists several actions that do not require the obligation for EU Member States to ensure children in conflict with the law the assistance of a lawyer:

- Identifying the child;
- Determining whether an investigation should be started;
- Verifying the possession of weapons or other similar safety issues;
- Carrying out investigative or evidence-gathering acts other than those specifically referred to in this directive, such as body checks, physical examinations, blood, alcohol or similar tests, or the taking of photographs or fingerprints;
- Bringing the child to appear before a competent authority or surrendering the child to the holder of parental responsibility or to another appropriate adult, in accordance with national law.

These derogations are allowed only if:

- ☛ They comply with the right to a fair trial.

In this regard, the lawyer should be aware of:

- This list includes some important investigative acts and other actions invasive for children;
- This provision must be interpreted and applied in the light of the principle of the best interests of the child and of the principle of non-discrimination between children and adults.



5. CAN THE CHILD WAIVE BEING ASSISTED BY A LAWYER?

As seen before, children cannot waive being assisted by a lawyer. Unfortunately, in some States, the possibility to waive assistance by a lawyer still exists.



The child's decision not to be assisted by a lawyer might not be conscious and could have a crucial impact on the outcome of the proceeding.

The presence of the lawyer for a child is fundamental to:

- Ensure the effective exercise of all rights linked to a fair trial;
- Guarantee that children are able to exercise their rights consciously;
- Prevent abuses during police questioning (in particular at the pre-trial stage but not only then).

In this regard, lawyers for children must always be aware of these important judgments of the ECtHR:

1. **Case *Panovits c. Cyprus***, in which the ECtHR has stated that “*given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct*”⁷;
2. **Case *Adamkiewicz v. Poland***, in which the ECtHR has affirmed that the police questioning of a child without the presence of his lawyer constitutes a violation of article 6 of the ECHR⁸.

The child may waive his right to a lawyer currently in the following countries:

In Bulgaria: At the police stage, when the child is not accused yet;

In England and Wales (but the child cannot waive his right to an appropriate adult);

In Finland: Possibility to waive and revoke the waiver.

In Ireland: As there is no automatic entitlement to a lawyer (only a right to be notified of the entitlement to consult a lawyer), there is also no right to waive such a right. In practice, a child (or his parent) may choose not to request a lawyer and police may continue to interview or question the child. Please note that UK and IE have not opted in the directive (EU) 2016/800.

⁷ ECtHR, 11 December 2008, *Panovits c. Cipro*, n. 4268/04, § 68.

⁸ ECtHR, 2 March 2010, *Adamkiewicz v. Poland*, n. 54729/00, § 87-92.

TECHNICAL SHEET 4

TS 4 – CHECKLIST ON THE RIGHT TO AN INDIVIDUAL ASSESSMENT

(ART. 7 DIRECTIVE (EU) 2016/800)¹

This checklist has been drafted by Child Circle.

1. HOW IS THE INDIVIDUAL ASSESSMENT TO BE CARRIED OUT?

Scope of the assessment:

- Who decides on the scope of the assessment, in particular considering that it is possible “to adapt the extent and detail of an individual assessment according to the circumstances of the case”?
- What role does the lawyer have in determining the scope of the assessment?

Sources of information for the assessment:

- Who contributes to the assessment?
- Is there a mechanism that allows the lawyer to propose sources for the assessment, based on the child’s circumstances or characteristics?

Child’s participation in the assessment:

- What is the consequence of the child failing to cooperate?
- How is the lawyer involved?
- What mechanisms are in place to ensure that the assessment is carried out in a child sensitive way, so as to ensure the participation of the child, to secure disclosure of important and relevant information and to avoid alienation or traumatising of the child?
- What is the role of the lawyer in this regard?

2. TAKING THE ASSESSMENT INTO ACCOUNT

Type of output:

- Are the outcomes of the assessment provided to the child and his lawyer?
- How is the output(s) shared with the lawyer?
- Which “competent authorities” receive the assessment outcomes? (e.g. Law enforcement authorities, judges, prosecutors, social professionals, medical professionals, centres where the child can be deprived of his liberty?)
- Whose responsibility is it to ensure that the assessment is brought before the judge?

¹ This will exclude Ireland, the United Kingdom and Denmark as they did not opt-in to directive (EU) 2016/800.

TECHNICAL SHEET 5

TS 5 – TRAINING FOR LAWYERS

This technical sheet provides a list of: (1) some key directions on the content and design of good-quality training for lawyers for children, (2) the available online courses (3) and the live training courses which exist in the States partners of the My Lawyer, My Rights project (Italy, Belgium, Poland, Ireland, the Netherlands and Bulgaria) and in other EU Member States.

Many lawyers still think that “*youth law is not law*” and, therefore, do not understand the need to receive specific training to defend children in juvenile justice proceedings. This idea is detrimental to the correct implementation of children’s rights at national level and it also creates obstacles to initiatives, in bar associations, which aim to provide lawyers with a specific training to work with children in conflict with the law (as happens in Belgium or in Poland).

Lawyers for children need to be specialists when they defend a child suspect or accused in juvenile justice proceedings.

One of the most important ethical rules of this profession is that every lawyer, to ensure the quality of his professional services, should not accept assignments that he may not be able to conduct with adequate competence. To work with children in conflict with the law, it is necessary that a lawyer has, at least been trained to a good knowledge of the practices and procedures in the area of juvenile justice proceedings and of all the international, regional and national rules and standards pertaining to juvenile justice.

Lawyers must be necessarily trained (permanently and continuously) in order to provide children with a good defence.

Some EU Member States already organise training sessions for lawyers for children.

Research-based national examples

In some EU Member States specialised lawyers for children do exist:

- **In Belgium**, lawyers registered on the list of voluntary lawyers (youth list), as part of the legal aid, have an obligation to be trained in youth law. In particular, the Flemish Bar Association and its Youth Lawyer Commission offers a two-year course on children’s rights for trainee youth lawyers. The obligatory training includes 80 hours of interdisciplinary courses: the legal information is complemented with basic training (in child psychology and development) and practical training (such as communication with children in role-playing). This training is mentioned as “good practice” in the Memorandum of the CoE Guidelines on CFJ¹;
- **In the Netherlands** there is specialised training for lawyers for children and the outcomes of the interviews have shown that there is no difference in quality between a “*piket lawyer*” (legal aid lawyer) and a “paid lawyer” (chosen lawyer);
- **In Italy** only court-appointed lawyers have an obligation to receive specialised training;
- **In Luxembourg** there is multidisciplinary training offered by the bar associations, in order to be included on the list “lawyers for children”;
- **In Spain** only court-appointed lawyers need to be registered on the juvenile list and have completed a specialisation course.

Nevertheless, even in these EU Member States, the content, the amount of hours, the quality and the evaluation of training of lawyers for children (when it exists) can vary greatly from one bar association to another. The training is often not multidisciplinary. Usually it is not mandatory and, the lawyers may personally establish the programme of their continuing vocational training.

¹ CoE Guidelines on CFJ, Explanatory Memorandum, §69, p. 65.

1. KEY DIRECTIONS ON THE CONTENT AND DESIGN OF THE TRAINING

a. Content

The training-programme should at least include:

- ➊ A session on the rights of the child at national, regional and international level;
- ➋ A session on the practice and procedure in the area of juvenile justice proceedings involving child defendants;
- ➌ A session on the basic knowledge of psychological issues regarding children and adolescent problems;
- ➍ A focus on the needs and communication level of children;
- ➎ Some advice on how to improve contacts with children;
- ➏ Professional seminars to discuss, cooperate and share perspectives, identify challenges and establish mechanisms and strategies to address them.

b. Design

The training-programme should:

- ➊ Be organised as a multidisciplinary training (alongside other professionals in the juvenile justice system) in order to promote the exchange of good practices;
- ➋ Include children in the training process in order to bring the voice of the child's experiences in the juvenile justice system (ex. important to work on communication methods with children);
- ➌ Include practical cases, role plays, children's testimonies and interactive sessions throughout the course.

2. ONLINE COURSES ABOUT CHILDREN'S RIGHTS

- a. **Project TALE** (Training Activities for Legal Experts)²: the **online training course**³ is designed to support legal practitioners in making the legal process more sensitive to the distinct rights and needs of child clients. It consists of two preliminary sessions and six modules. The preliminary sessions include an introduction to the course and an overview of ethical and professional obligations when representing children. The six modules are as follows: Module 1: "Meeting and taking instructions from children", Module 2: "Giving advice and information to children", Module 3: "Drafting statements and representations", Module 4: "Representing the child in formal proceedings", Module 5: "Acting on decisions", Module 6: "International remedies".
- b. **Project HELP** (Human Rights Education for Legal Professionals)⁴: this project has developed an **e-learning platform**⁵ on human rights where it is possible to find online courses on, for example, the "alternative measures to detention" and "pre-trial investigation and the ECHR". Moreover, the EU Member States can benefit from the "HELP in the 28"⁶ Programme where there are four online courses, among which one is devoted to "Data protection and privacy rights".
- c. **Project FAIR**⁷ (Fostering Access to Immigrant Children's Rights)⁸: this project aims to create a core group of lawyers that will be equipped to engage in strategic litigation before international human rights judicial and non-judicial mechanisms to defend migrant children's rights. Practical training modules and learning tools will be widely disseminated across the EU to support lawyers in defending migrant children's rights. d. Project "Advancing defence rights for children": this project will develop a replicable and interdisciplinary training programme (with both in-person and online components) for defence lawyers which will cover international and regional standards as well as the specific skills required for effective legal representation of child suspects and defendants in juvenile justice proceedings.

² The project TALE is funded by the EC and is being led by Save the Children Italy, with partners in Romania (Save the Children Romania), Spain (La Merced Migraciones Foundation), Portugal (The Instituto de Apoio à Criança), Belgium (Defence for Children Belgique) and the UK (The University of Liverpool).

³ See www.project-tale.org/online-training/.

⁴ The European Programme for Human Rights Education for Legal Professionals (HELP) supports the Council of Europe (CoE) Member States in implementing the ECHR at the national level. HELP aims at providing high-quality and tailor-made training tools to all European legal professionals in the 47 CoE Member States (judges, lawyers and prosecutors). Moreover, the EU Member States benefit from the "HELP in the 28" Programme, funded by the EU. It supports legal professionals from the EU in acquiring the knowledge and skills on how to refer to the EUCFR, the ECHR and the ESC. Furthermore, they will get familiar with the European jurisprudence.

⁵ See <http://help.elearning.ext.coe.int/course/index.php?categoryid=356>.

⁶ See <https://www.coe.int/en/web/help/help-courses>.

⁷ See <https://www.icj.org/wp-content/uploads/2016/09/FAIR-Project.pdf>.

⁸ The project FAIR (<http://www.oijj.org/en/adr-introduction>) is funded by the EC and is being led by The International Commission of Jurists (ICJ), with partners Malta (Aditus foundation), Germany (Bundesfachverband Unbegleitete Minderjährige Flüchtlinge e.V.), Greece (Greek Council for Refugees), Spain (Fundación Raíces), Ireland (Immigrant Council of Ireland)

- d. Project “Advancing defence rights for children”⁹** : this project will develop a replicable and interdisciplinary training programme (with both in-person and online components) for defence lawyers which will cover international and regional standards as well as the specific skills required for effective legal representation of child suspects and defendants in juvenile justice proceedings.
- e. Project I.D.E.A (Improving Decisions through Empowerment and Advocacy): “Building Children’s Rights Capacity in Child Protection Systems”¹⁰** : this project provides training seminars¹¹ designed to keep you informed on legal developments, child participation, child development and welfare as well as staff welfare.
- f. Project TRACHILD¹²** (Training of lawyers representing children in criminal, administrative and civil justice)¹³ : this project will produce electronic training material (a kit) that will be available on the project’s website.
- g. Children’s Human Rights – An Interdisciplinary Introduction¹⁴**: This open online course by the University of Geneva provides an overview of the most important features of children’s human rights. The course consists of seven topical modules distributed in 4 weeks. English is the only language of instruction.
- h. HREA (The global human rights education and training centre)¹⁵**: HREA offers self-directed e-courses, tutored e-learning courses and training workshops in 13 areas among which there is one devoted to “Children’s Rights, Child Development, Participation and Protection” that provided several online courses on: Rights of the Child (rapid e-course), Children’s Rights (Foundation Course), Child Development, Child Rights Governance, Child Participation, Child Rights-Based Approaches (Advanced Course), Child Survival, Child Rights Situation Analysis, Child Safeguarding, Children in War and Armed Conflicts, Education in Emergencies, Monitoring Children’s Rights and The Right to Education.

⁹ This project is funded by the EC and is being led by Fair Trials International. It aims to increase the capacity of defence lawyers to effectively represent children in criminal proceedings.

¹⁰ This project is funded by the EC and is being led by University College Cork (UCC) and by the National University of Ireland (Cork). It aims to develop networks of professionals to facilitate consultation, delivery of training and ongoing learning through collaboration and information exchange and to deliver interdisciplinary training on legal developments, child development, child participation and staff welfare.

¹¹ See <http://ideachildrights.ucc.ie/events/>

¹² See <http://trachild.org/en/>

¹³ This project is funded by the EC and is being led by the bar associations of the Court in Paris. It aims to train 180 lawyers from 6 jurisdictions (Spain, Greece, Ireland, Poland, Cyprus and France) in representing children in criminal, administrative and civil justice.

¹⁴ https://www.coursera.org/learn/childrens-rights?siteID=D8u8CTDRU0o-cky3mljju8Ds4gFOiU-jN7g&utm_content=10&utm_medium=partners&utm_source=linkshare&utm_campaign=D8u8CTDRU0o.

¹⁵ HREA (<http://www.hrea.org/?lang=fr>) is an international non-governmental and non-profit organisation that supports human rights education, the training of human rights defenders and professional groups and the development of educational materials and programming. HREA is dedicated to quality education and training to promote understanding, attitudes and actions to protect human rights, and to foster the development of peaceable, free and just communities.

- i. Project “Unlocking Children’s Rights”¹⁶**: this project has developed an innovative training resource¹⁷, which has been successfully piloted across Europe. It enables professionals and practitioners working with children to: strengthen their skills and knowledge of children’s rights, enable children and young people to express their views, communicate effectively and sensitively with children and young people in a professional context and ensure children participate meaningfully in decisions affecting them. The modules are all available for download and are: Module 1: Introduction to child rights; Module 2: Introduction to child development and communication; Module 3: Communication skills; Module 4: The child-friendly justice guidelines.
- j. IDC Online Toolkit¹⁸**: the Toolkit consists of a number of short courses, each focusing on a particular area of interest relating to alternatives to detention. Each short course includes modules with information, case studies, examples, tools and resources, and links to further information. Courses are all free of charge. At present, specific for children, there is a course on “Ending Child Detention”¹⁹.
- k. Future Learn courses²⁰**: there are, in particular, two free online courses concerning children, which have been developed by CELCIS in the University of Strathclyde in Scotland in partnership with a steering group established by the Geneva Working Group on Children without Parental Care: “Getting Care Right for All Children: Implementing the UN Guidelines for the Alternative Care of Children”²¹ (this course aims to ensure that alternative care is a necessary, suitable and positive experience for children) and “Caring for Vulnerable Children”²² (this course develops an understanding of some of the approaches involved in caring for vulnerable children). These courses are designed for practitioners and policymakers from both state and non-state bodies (such as NGOs, CBOs and private service providers) and anyone working in providing services around children’s care but they are also accessible for people not working directly in this field and others with an interest or responsibility in the field of child protection and child care.

¹⁶ This project is co-funded by the Fundamental Rights and Citizenship Programme of the European Union and part funded by the Allan and Nesta Ferguson Charitable Trust and involves partners from ten European countries: Coram Children’s Legal Centre and Coram Voice from the UK, FICE Bulgaria, Czech Helsinki Committee, University College Cork, Children of Slovakia Foundation, Estonian Centre for Human Rights, European Roma Rights Centre (Hungary), Fondazione L’Albero della Vita (Italy),

¹⁷ See <http://coraminternational.org/unlocking-childrens-rights/>.

¹⁸ This course is elaborated by the International Detention Coalition (IDC). The IDC is a global network, of over 300 civil society organisations and individuals in more than 70 countries that advocate for research and provide direct services to refugees, asylum-seekers and migrants affected by immigration detention.

¹⁹ See <https://toolkit.idcoalition.org/courses/campaign-to-end-child-detention/>.

²⁰ Future Learn offers high quality online education, free of charge, from top universities and specialist organizations

²¹ See <https://www.futurelearn.com/courses/alternative-care>.

²² See <https://www.futurelearn.com/courses/vulnerable-children>.

- l.** Training online organised by the **International School of Juvenile Justice**²³: this school organizes online courses on the following topics: Improving Juvenile Justice Systems in Europe: Training for Professionals, Alternatives to Detention for Young Offenders and Juvenile Justice within Europe from an International perspective.
- m. Project “Separated Children in Judicial Proceedings”**²⁴: one of the main outputs of this project is the development of a training template and training modules on thematic issues (in particular concerning asylum and trafficking, relocation and abduction and European and international mechanisms). These training materials can serve as a strategic litigation instrument in terms of good practices in litigating children cases. This is particularly the case in the 3rd training module which is devoted to litigating children cases before international fora.
- n.** For more information about strategic litigation case studies concerning children’s rights, see the **CRIN**²⁵ (Child Rights International Network) website.
- o.** For other materials about strategic litigation, above all concerning the UK, see the following links:
- <http://www.publiclawproject.org.uk/data/resources/153/Guide-to-Strategic-Litigation.pdf>;
 - <http://ohrh.law.ox.ac.uk/learning-lessons-from-litigators-realising-the-right-to-education-through-public-interest-lawyering/>;
 - <http://baringfoundation.org.uk/wp-content/uploads/2016/07/Framework-for-better-use-of-law-WPaper2-1.pdf>.

²³ The International School of Juvenile Justice (ISJJ) is an international centre whose objective is to develop training and research programmes as well as to generate and disseminate knowledge in the field of the most relevant juvenile justice topics around the world.

²⁴ This project (<http://www.airecentre.org/pages/separated-children.html>), co-funded by the EU and led by the AIRE Centre (UK), aims to promote a joined up child centred approach by legal professionals who work with children separated (or being separated) from their families. The project explores the similar procedural and substantive law questions which arise, including how separated children access justice and how their best interests can be assessed.

The other partners of the project are Child Circle (Belgium), the Centre for Women War Victims (ROSA) in Croatia and University College Cork (Ireland).

²⁵ See <https://www.crin.org/en/home/law/strategic-litigation/strategic-litigation-case-studies>.

3. LIVE TRAINING COURSES (also on demand)

- a)** Training organised by the Youth Justice Legal Centre²⁶;
- b)** Training organised by Jeunesse et droits²⁷;
- c)** Training organised by Include Youth²⁸;
- d)** Training organized by the Coram Children’s Legal Centre²⁹: at present, it provides courses only on topics relating to the rights of migrant and refugee children.

²⁶ See <http://www.yjlc.uk/training>.

²⁷ See <http://www.jeunesseetdroit.be/formations/index.php>.

²⁸ See <http://www.includeyouth.org/trainingservices>.

²⁹ Coram Children’s Legal Centre, part of the Coram group of charities, promotes and protects the rights of children in the UK and internationally in line with the UN Convention on the Rights of the Child: <http://www.childrenslegalcentre.com/childrens-rights-training/courses-at-coram/>.

English edition

Practical Guide for lawyers: How to a child in conflict with the law?

This publication has been produced with the financial support of the Justice Programme of the European Union and La Fédération Wallonie-Bruxelles (Belgium). **The contents of this publication are the sole responsibility of Defence for Children International (DCI) - Belgium and can in no way be taken to reflect the views of the European Commission nor any other donor.**

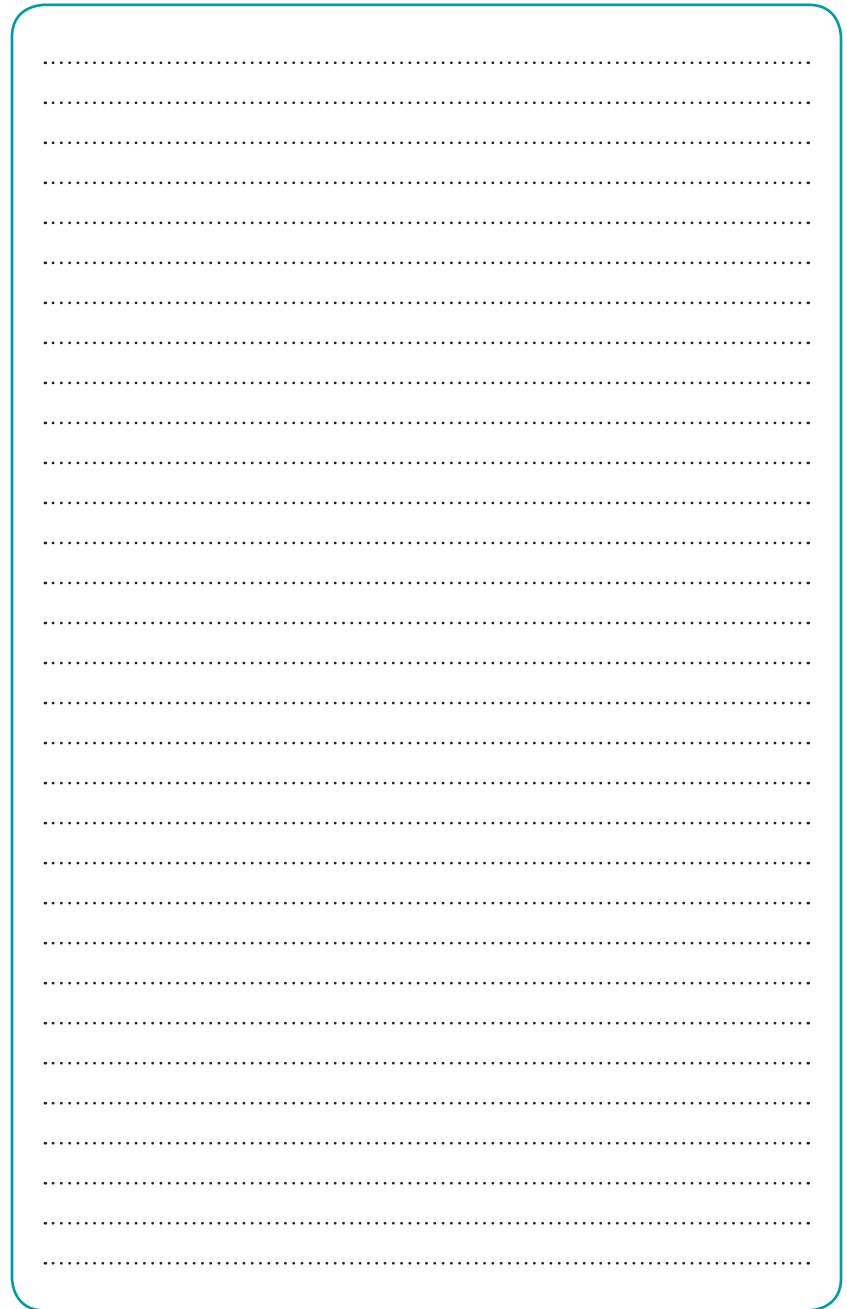
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ISBN: 978-2-9601826-3-7

Graphic design and printing: Click Click Graphics

Proofreading of the English edition: Deirdre Kelleher (UCC Ireland)

Printed in EU on 100% recycled paper.



This Practical Guide for lawyers, with the Manual for EU Member States, marks the final outcome of the project “My lawyer, My Rights”, a project coordinated by Defence for Children International (DCI) – Belgium and funded by the Justice Programme of the European Union.

On the premise that too many children in conflict with the law are still victims of violations of their fundamental human rights in the European Union, this Practical Guide aims to serving as a **practical tool for the lawyer for children**, demonstrating how to put their role into practice and combine legal expertise (knowledge of legal instruments and standards) with soft skills (child-friendly language, appropriate communication, attitude with children and other technical advice when defending a child in juvenile justice proceedings).

“If we are to take children’s rights “seriously”, it is obligatory for the EU Member States to transpose and implement the directives. In this respect, the interest and the added value of this excellent handbook are to provide guidance to lawyers to fulfil their task in assisting children in conflict with the law. This handbook invites them to be specialised and trained to ensure the children all their procedural rights.”

Françoise TULKENS

**Former Vice-President of the European
Court of Human Rights (ECtHR)**

Funded by



JUSTICE PROGRAMME OF THE EUROPEAN UNION

Co-funded by

La Fédération Wallonie-Bruxelles (Belgium)



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