

STOP MAKING CHILDREN CRIMINALS

Summary

CRIN wants to encourage a debate on juvenile justice which gets beyond pragmatism and compromise. In particular we want to provoke a new debate about the setting of minimum ages of criminal responsibility. We support those who believe the way forward is to separate the concept of responsibility from that of criminalisation – and stop criminalising children. Many are working in this direction, promoting forms of diversion and restorative justice. But those involved in promoting these positive approaches too often see them as compatible with still criminalising (some) children.

We want to work with other organisations and human rights advocates to encourage States to design systems which keep children out of the criminal justice system altogether, systems which renounce retribution and focus exclusively on children's rehabilitation, always with necessary attention to public safety and security.

The Convention on the Rights of the Child asserts the rights of every human being below the age of 18 years. The suggestion that States should define an age within the Convention's 0 – 18 definition of childhood at which children can be criminalised is inevitably discriminatory, conflicting with Article 2 of the Convention. It is in conflict with the Convention's requirement that the child's best interests must

be a primary consideration (Article 3) and the child's right to maximum possible development (Article 6). The Convention's Article 40 requires a distinct approach: that States shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the law – not to some of them but to all of them up to 18 (Article 40(3)).

Criminalising children causes persisting harm not only to the overall development of many children but also of human societies. It encourages a spiral downwards by children into further offending and increasingly violent offending which often extends into adulthood. It prevents societies moving on by upholding lingering beliefs in original sin and the need to beat the devil out of children.

Join CRIN's debate on how to stop making children criminals

This paper aims to encourage a constructive and influential debate, moving beyond proposals to move the minimum age of criminal responsibility up or down by a year or two.

CRIN welcomes:

- Comments on this paper
- Information about:
 - relevant positive developments in state laws and policies
 - research demonstrating the damage done by criminalising children
- Ideas for further regional and international advocacy

CRIN aims to promote policy discussions – let us know if your organisation would like to be involved by contacting info@crin.org.

We need to stop making children criminals.



Introduction

Once archaic doctrines of original sin are discarded, we can see the clear evidence that the roots of serious criminality in children develop and flourish from adult – mostly parental – violence and neglect, compounded usually by a failure of the State to fulfil its obligations to support parents in their child-rearing responsibilities and to provide children with absorbing and rights-respecting education. The more serious and extreme a child’s offending is, the more certain we can be of its origins in adult maltreatment – or sometimes simply the tragic loss of parents or other key carers. Freedom of religion suggests we can’t stop people believing in original sin, but this freedom does not extend to justifying violence, including retributive approaches to childhood offending, any more than a belief in witches or evil spirits can justify branding children as witches or possessed by evil spirits.

Hesitant, compromised advocacy, maintaining an element of retribution while emphasising the need for rehabilitation and reintegration, is just not working. In contrast to positive progress in some children’s rights arenas, recent reports suggest that penal systems for children in many states are becoming more punitive. And let’s not falsely categorise them as juvenile “justice” systems or pretend for one moment that they are “child friendly”. An authoritative 2013 UN report refers to us living in a time “when public opinion expresses concern at the perceived threat posed to society by juvenile delinquency, and states around the world contemplate reductions in the minimum age of criminal responsibility and longer sentences of imprisonment...”¹

“I would like to move the debate on from fixing an arbitrary age for criminal responsibility. Governments should now look for a holistic solution to juvenile offending which does not criminalise children for their conduct.”

*Thomas Hammarberg, Council of Europe
Commissioner for Human Rights, 2009*

Minimum ages are going down

CRIN has collected worrying evidence that a number of States in all regions, far from fulfilling their legal obligations to respect the rights of all children, are moving backwards in their approach to juvenile justice and criminalising more and younger children. Some are justifying this by misusing the Committee on the Rights of the Child’s unfortunate suggestion, in its General Comment No. 10 on “The rights of the child in juvenile justice” that 12 is an internationally acceptable minimum age of criminal responsibility (MACR).

Countries that have lowered:

Georgia
Panama
Denmark

Countries with proposals to lower:

Argentina
Bolivia
Brazil
France
India
Mexico
Peru
Philippines
Republic of Korea
Russian Federation
Spain
Uruguay.

Full details: <https://www.crin.org/en/home/what-we-do/policy/stop-making-children-criminals/states-lowering-age-criminal-responsibility>

This was not, of course, what the Committee expected or wanted to happen. The Committee starts by quoting the assertion in the Beijing Rules² (whose adoption by the UN General Assembly preceded the CRC by four years) that the minimum age should not be fixed at too low a level. And it goes on: “In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level. At the same time, the Committee urges States parties not to lower their MACR to the age of 12...”

But the damage is done and 12 becomes a sort of respectable norm. We understand the assertion that 12 is “internationally acceptable” had originally been arrived at by working out the average of all the known fixed ages: is it really the role of the Committee to accept an “average” approach to respect for children’s rights? There was unease in the children’s rights community when the Committee issued its statement; there has been discussion within the Committee about revisiting it. Surely by now there has been sufficient misuse of the

¹ Promoting Restorative Justice for Children, Report of the Special Representative of the UN Secretary General on violence against children, New York, 2013, page 39

² The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29 November 1985, A/RES/40/33, available at: <http://www.un.org/documents/ga/res/40/a40r033.htm>.

Committee's words to justify them in revising this part of the General Comment in the light of the best interests of so many children?

Conventions are living instruments and General Comments must not be set in stone. The language in the Convention's article 40 is in itself not altogether clear, urging States to seek to promote "... the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law". The Committee notes that "Even (very) young children do have the capacity to infringe the penal law...". And of course they do have the physical capacity to assault their siblings, shoplift and so on. But the CRC drafters presumably had a broader definition of capacity in mind. In the General Comment the Committee re-interprets this provision as an obligation for States parties to set a minimum age of criminal responsibility. There is nothing in the Convention which prevents States establishing 18 as their minimum age for criminalisation, and a lot of obligations which require them to do so. And according to CRIN's latest research around minimum ages a very small number do (although close examination is required to ensure that there are no exceptions, for example for serious crimes or for when adults commit crimes with children).³

Our research records shockingly that 28 of the States where minimum ages can be identified consider children criminally responsible at age seven, and another 12 at eight. In total, 87 States set an age lower than 12 or don't set an age at all.

During the drafting process of the Convention, in the late 1980s, some UN agencies and NGOs tried to argue that there is no place for retribution in juvenile justice. But in the end the heaviest arguments were about trying to rule out sentences of life imprisonment for children rather than only life imprisonment without possibility of release – and even that argument was lost in the interests of consensus. (Are there really human beings who still believe that sentencing a child to life imprisonment is not inhuman treatment?)

CRIN's ongoing campaign against inhuman sentencing of children highlights the extreme violations of children's rights perpetrated in so-called justice systems by more than a fifth of UN Member States which still authorise the sentencing of children to life in prison and corporal punishment and in a few cases to death. We had some misgivings about focusing our first campaign on juvenile justice on these grotesque extremes. We wrote then: "In challenging these particular violations, we must emphasise that we

are not in any way reducing our condemnation of all violations of the Convention on the Rights of the Child. State's obligations in the field of juvenile justice go far beyond ending inhuman sentencing; for example to develop separate, fully rights-compliant juvenile justice systems with a single focus on rehabilitation and reintegration not retribution; to ensure that within these systems detention of children should only be used as a last resort, for the shortest possible time and only for reasons of public safety".

<http://www.crin.org/violence/campaigns/sentencing>

In its General Comment, the Committee had another go at removing retribution: "The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety."⁴

Lowering minimum ages, as some States have done and more are considering, means stigmatising more and younger children as criminals and responding to them in a criminal law system which in every state is focused primarily on punishment and retribution. It is absurd to suggest that this system can fulfil for children the required aims of a juvenile justice system, which should be focusing exclusively on maximising their overall positive development and so on necessary rehabilitation and reintegration.

The other related regression is the trend in some States to lock up more children and at younger ages. A recent report from UN agencies states: "It is estimated that at least 1 million children are deprived of their liberty worldwide, a figure that is probably underestimated. Research shows that the majority of detained children is awaiting trial, that a large proportion of these children are held for minor offences and are first-time offenders. Violence at home, poverty, structural violence and risky survival activities propel children into the juvenile justice system, and detention in the criminal justice system is often used as a substitute for referral to child care and protection institutions. There is a worrying trend for children to be placed in institutions, rather than minimising the risk of violence against children by ensuring effective prevention. Incidents of violence occur while in custody of police and security forces, in both pretrial and post-sentence detention, as well as a form of sentencing. Violence can be perpetrated by staff, adult

³ See Minimum Ages of Criminal Responsibility around the world, CRIN: <https://www.crin.org/en/home/ages>.

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

detainees and other children, or be the result of self-harm.”⁵

All this conflicts plainly with the Convention’s obligations. Article 37 explicitly requires deprivation of liberty to be used “only as a measure of last resort and for the shortest appropriate time”. Regrettably, but predictably in a human rights instrument negotiated ultimately by governments’ representatives, there are some weasel words here: “a last resort” leaves plenty of room for punitive, retributive response by legislators and judges. And “appropriate” can be and is interpreted as making the punishment fit the crime, maintaining “proportionate” approaches to sentencing.

But, regarding the Convention as a living instrument, there is equally room for tightening the conditions for any restriction of liberty in line with the child’s best interests. Not enough has been made of the clear prohibition in article 9 on separating a child from his or her parents against their will unless such separation is “necessary for the best interests of the child”. In a system which rejects retribution, the only justification for locking up children can be that they pose an assessed serious risk to others’ safety and other ways of minimising this risk are considered inadequate. This limitation has also had authoritative support: the World Report on Violence against Children, issued following the UN Secretary General’s Study, urged governments to “ensure that detention is only used for child offenders who are assessed as posing a real danger to others, and then only as a last resort, for the shortest necessary time, and following judicial hearing, with greater resources invested in alternative family- and community-based rehabilitation and reintegration programmes”.⁶ CRIN hopes that the proposed new UNSG’s study on the restriction of liberty of children will provide new leadership in ending detention of children as a form of retribution or punishment.

“In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that

the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.”

Committee on the Rights of the Child, General Comment No. 10, Children’s Rights in Juvenile Justice, 2007, para. 10

The need for a new debate - moving beyond pragmatism

Pragmatism and compromise characterise most current debates about juvenile justice. Politicians and the media play on popular fears of each successive generation of children running amok if not repressed and punished, feral children out of all control. It’s easy and remains popular to stigmatise in extreme terms “bad” children: the general adult voting audience is still highly receptive because adult commitment to punitive responses to children runs deep, nurtured by religious assertion of original sin and legal acceptance of violent and humiliating punishment – “for the purpose of correcting what is evil in the child”: the words of the Chief Justice of England in the still-quoted 1860 leading judgment in English common law, justifying “reasonable chastisement” of children.

Over recent decades the horrifying prevalence of legalised violent punishment of children, most commonly in their homes, has become more visible and has been recognised as a rights violation by international and regional human rights systems; simultaneously research into its very harmful impact on children has accumulated. There is real progress now towards prohibition and elimination: by January 2015, 44 states had completely banned all violent punishment, including in the home and family and another 45 had clearly committed to doing so. A significant majority - 122 – have banned it in all their schools.⁷

Enacting bans on corporal/physical punishment of children – particularly within the family – is as unpopular as developing non-punitive justice systems for children; it also runs against social norms and does not win votes. In going ahead with prohibition, governments are having to accept their human rights obligations, listen to research and to professional views and lead public opinion. The universal prohibition and elimination of legalised violent punishment of children in private and public (state) settings is now in sight. For this, much credit should be given to the clear and uncompromising leadership of the Committee on the Rights of the Child. The

⁵ *Prevention of and responses to violence against children within the juvenile justice system*, Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system, page 7.

⁶ *World Report on Violence against Children*, published by the United Nations Secretary General’s Study on Violence against Children, 2006, page 218.

⁷ See the Global Initiative to End All Corporal Punishment of Children: www.endcorporal-punishment.org.

Committee, from when it started to examine states' reports in 1993, has asserted the obvious if unpopular truth that violence, "however light", and whether or not disguised as discipline, is a violation of the child's right to respect for his or her dignity and physical integrity and its legality breaches children's right to equal protection under the law: hitting people is a crime, and children are people too. Paulo Pinheiro's rights-based comprehensive UN Study into violence against children built on the Committee's work with his assertion that "No violence against children is justifiable; all violence against children is preventable" and his priority recommendation that all violence – including explicitly all corporal punishment – should be prohibited.⁸

Progress in challenging violent punishment of children has come from making the practice and the harm it does visible and from systematically building a human rights consensus for prohibition and elimination. A similar organised approach is needed now to challenge the violence inherent in states' criminalisation of children. The reality of existing penal systems for children and their harmful impact needs to be made ever more visible, as must the evidence that the roots of almost all serious child offending lie in adult violence and neglect. Loud, uncompromising, rights-based advocacy must insist that there is no place whatsoever for retribution.

We need to move beyond the hesitant pragmatism and compromise that characterise most current debates about the future of juvenile justice. There are plenty of global, regional and national organisations working on the rights-violating failures of punitive systems, tinkering with but also wrongly tolerating systems which still cling to criminalisation and retribution.

"During my visits to European countries I have met a number of juvenile inmates in prisons and detention centres. Many of them have suffered neglect and violent abuse within their own families and have received little support from society at large. Understanding the origins of violence and serious offending in children does not mean condoning or sympathising with it." -

*Thomas Hammarberg, Council of Europe
Commissioner for Human Rights, 2009*

Separating "responsibility" from criminalisation

As adults, we certainly owe children a different approach. We need to separate the need to identify, appropriately assess

and respond constructively to children's responsibility for crimes from the quite distinct urge to criminalise them. This is not an original proposal. More than 20 years ago, while the Convention was being drafted, it appears at least one state attempted to introduce an exclusive focus on rehabilitation, outside the criminal justice system. But, as the travaux préparatoires record, "it became obvious that there was a total lack of consensus".

A significant indication of support for not criminalising children is in the Rome Statute establishing the International Criminal Court; the Statute excludes all people under 18 from its jurisdiction: Article 26 states: "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."⁹

More recently, authoritative support has appeared for this approach – summarised below - which encourages CRIN to promote a new debate.

In 2003, the European Network of Ombudspersons for Children (ENOC) issued a position statement, adopted by member- institutions in 21 States who were "concerned at the tone of political and media debate and the direction of public policy and legal changes concerning juvenile offenders in many of our countries."¹⁰

ENOC's statement argues: "We believe that current trends to reduce the age of criminal responsibility and to lock up more children at younger ages must be reversed. The treatment of young people placed in penal institutions in many of our countries is a scandal – breaching their fundamental human rights.

"Across Europe, ages of criminal responsibility vary from as young as seven, eight and 10 up to 16 in some States and 18 – but with exceptions – in a few; the definition also varies. We believe that the concepts of 'responsibility' and of 'criminalisation' need to be separated. The Convention on the Rights of the Child (CRC) proposes a separate, distinct system of juvenile justice; it requires that this must be focused on respect for all the rights of the child and on the aims of rehabilitation and reintegration. This focus and these aims are not compatible with 'criminalising' child offenders.

"We do believe that children should be held 'responsible' for their actions in line with the concept of evolving capacities and our strong advocacy for respect for children's views in all aspects of their lives. It is essential to establish responsibility for crimes. Where responsibility is disputed, there has to be a

⁸ Read more about the United Nations Secretary-General's Study on Violence against Children at <http://www.unviolencestudy.org/>.

⁹ Rome Statute, adopted 1998, entered into force July 1 2002, article 26.

¹⁰ The full statement is available at: http://www.crin.org/docs/Juvenile_Justice_final_statement.doc.

formal process to determine responsibility in a manner which respects the rights of the alleged offender. But this process does not have to lead to criminalising children.”

In 2009, Thomas Hammarberg, the Council of Europe’s Commissioner for Human Rights from 2006 to 2012, concerned at proposals to lower minimum ages in some Member States, took up this call, issuing a viewpoint¹¹ which quoted ENOC’s statement and concluded: “Yes, it is in all our interests to stop making children criminals. We should therefore treat them as children while they are still children and save the criminal justice system for adults.”

He noted that the United Nations Guidelines for the Prevention of Juvenile Delinquency,¹² adopted 19 years previously, still provide the right benchmark: “Labelling a young person as ‘deviant’ or ‘delinquent’ or ‘pre-delinquent’ often contributes to the development of a consistent pattern of undesirable behaviour by young people...” (para. 5(f)).

Thomas Hammarberg wants “to move the debate on from fixing an arbitrary age for criminal responsibility. Governments should now look for a holistic solution to juvenile offending which does not criminalise children for their conduct.”

“The Commission considers that the element of retribution is not appropriate within juvenile justice systems if the objectives pursued are the reintegration and rehabilitation of the child. Removing [children] from the criminal justice system does not mean that they will not be held responsible for their actions, nor that they will be denied due process to determine whether allegations against them are true or false. Meanwhile, the Commission urges States to progressively raise the minimum age under which children can be held responsible in the juvenile justice system towards 18 years of age.”

Inter-American Commission on Human Rights, Rapporteurship on the Rights of the Child, Informe sobre Justicia Juvenil y Derechos Humanos en las Américas (Report on Juvenile Justice and Human Rights in the Americas), July 2011

In 2011, a report of the Inter-American Commission on Human Rights (IACHR), on Juvenile Justice and Human Rights in the Americas,¹³ prepared by Paulo Pinheiro in his then role as Special Rapporteur on the rights of the child to the

Commission, highlighted the incompatibility of asserting an arbitrary age under 18 “with the right to non-discrimination enshrined in article 2 of the CRC and the principle of the best interests of the child contained in article 3”.

The IACHR’s report goes on to argue that “the element of retribution is not appropriate within juvenile justice systems if the objectives pursued are the reintegration and rehabilitation of the child”. Professor Pinheiro quotes Thomas Hammarberg’s call for a new debate, separating the concepts of “responsibility” and “criminalisation” and ending the criminalisation of children: “Therefore, the Commission observes the need to begin a new debate, while at the same time recognising that excluding [children] totally from the sphere of criminal justice is a complex matter which merits analysis which goes beyond that set out in this report. Removing them from the criminal justice system does not mean that they will not be held responsible for their actions, nor that they will be denied due process to determine whether allegations against them are true or false. Meanwhile, the Commission urges States to progressively raise the minimum age under which children can be held responsible in the juvenile justice system towards 18 years of age.”

Despite this sort of leadership from some prominent children’s rights advocates, we still hear the reforming organisations arguing for modest raising of the MACR, to at least 12, or 14. And many of those promoting restorative justice for children do not see it as an alternative to criminalisation, more a mitigation of the worst effects, an optional alternative to really punitive sentencing. Among conditions for pursuing restorative justice described in a recent report are that “the alleged offence must fall within the scope of offences eligible for diversion as defined by the law”; also that the consent of the victim(s) and of the offending child’s parents must be obtained before diversion to a restorative process.¹⁴

Asserting children’s responsibility

Children are responsible for many actions defined by criminal law as crimes – in so far as they did it. And many are also responsible in the sense that they did know what they were doing was wrong, in one way or another, when they did it. It does not serve our purpose as advocates of children’s human rights to deny their immediate responsibility, to belittle their evolving capacities. But we must also recognise, as the Convention does, that their developmental status requires a special approach, for all our sakes.

Stopping criminalising children does not mean giving up on or giving in to children who are causing trouble and harm.

11 The viewpoint is available at: <https://www.crin.org/en/library/news-archive/thomas-hammarberg-it-wrong-punish-child-victims-viewpoint-juvenile-crime>.

12 Available at: <http://www.un.org/documents/ga/res/40/a40r033.htm>.

13 Available at: <http://www.cidh.org/countryrep/JusticiaJuvenileng/jjtc.eng.htm>.

14 Promoting Restorative Justice for Children, Report of the Special Representative of the UN Secretary General on violence against children, New York, 2013, page 17.

Keeping all under-18s out of the criminal justice system does not mean that young people who commit offences avoid “justice” or that nothing is done about their offending. Nor, as some have argued, does denying all under-18s a place in the criminal justice system consequentially deny them due process and encourage or force innocent children to accept, in the name of welfare, compulsory interventions and treatment that are as heavy as penal sanctions. Fear of children losing their due process rights has been advanced as a reason for continuing to deal with them in a criminal justice system.

But due process is not unique to criminal proceedings. It can be provided in any sort of proceedings – and article 40 of the CRC requires it. Children must not of course lose their right to due process by being denied criminalisation. And children have an explicit right in article 12(2) of the Convention to be heard in any judicial and administrative proceedings that affect them. So the proceedings which will remain absolutely necessary to determine “responsibility”, and other proceedings necessary to decide on responsive action to achieve rehabilitation, prevention of future offending and possible reparation must respect the traditional due process rights, including the right to be heard.

Others suggest that if under 18s are removed from the criminal justice system, more of them will be coerced or bribed into carrying out criminal activities on behalf of adult criminals, noting the lack of heavy penalties for the children. Such concerns are real – but surely the necessary response to such exploitation – which is already possible whatever the age of criminal responsibility – is to step up the penalties for those adults who pursue it?

It seems these are relatively simple arguments to counter. No doubt there are others which will be aired as the debate continues. And there is lots of detail that needs addressing, about the design and practice of proceedings that are genuinely appropriate to the capacity of the children concerned.



“The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood.”

“For the purposes of the interpretation of the present Guidelines, a child-centred orientation should be pursued. Young persons should have an active role and partnership within society and should not be considered as mere objects of socialisation or control.”

United Nations Guidelines for the Prevention of Juvenile Delinquency- the Riyadh Guidelines, adopted and proclaimed by General Assembly resolution 46/112 of 14 December 1990

How would it work?

One particularly awful (and very rare) crime, a murder of a two-year old toddler by two 10 year-olds in the north of England in 1993, seemed to put back the possibility of principled reform of justice for children by years, now decades. Media coverage of the murder and the subsequent trial in an adult court went round the world, together with images of the angelic two year old. The media were also fed with the full identity of the two 10 year-olds, named by the trial judge’s very perverse interpretation of the public interest, in direct violation of international law. And the judge’s decision has made the task of rehabilitation and reintegration of the boys infinitely more difficult – as later events have demonstrated. It also added immeasurably to the distress of their families.

Let us take an awful crime like that one and review how it could be treated in a system which separates “responsibility” from criminalisation. Because the suspected murderers are children, under the Convention on the Rights of the Child the State has a series of inter-dependent obligations to them, including to ensure that in all actions concerning them, their best interests are a primary consideration (article 3(1)); that their survival and development is ensured “to the maximum extent possible” (article 6); that they are not separated from their parents unless competent authorities decide “that such separation is necessary for the best interests of the child” (article 9).

And as they are children “alleged as, accused of, or recognised as having infringed the penal law”, States must not only recognise their equal rights to due process, but also “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” (article 40).

There must be investigation and a hearing to determine what happened and who was immediately responsible for the crime. The victim's family has a right to know what happened. The State has an active duty to protect everyone's right to life and to respect for their physical integrity and human dignity, to protect all members of society from such crimes. This means understanding as far as possible why the crime happened – contributory factors, both direct and indirect – including in the previous lives of the two killers, and how it could have been prevented. Any broader lessons that can be learned about preventing such crimes must inform future policy.

“... it should be considered that, in accordance with the current prevailing contemporary notion of juvenile justice, the aim of the processing of young offenders should not be penal or reformatory but it should be oriented towards individual development, growth and social integration...”

Comment by the Social Development Divisions, Centre for Development and Humanitarian Affairs, during Technical Review of Draft Convention on the Rights of the Child, 1988

Here for discussion is a rough outline of the possible proceedings in this case, in a future state which has decided not to criminalise children:

1 A hearing to determine – beyond reasonable doubt - whether the two 10 year-olds were responsible – whether they did or did not kill the two year-old. Whether, and in what way, the 10 year olds should be involved in this investigative hearing would need careful assessment to determine a procedure appropriate to their capacity.

2 If the two boys are found responsible, then a multi-disciplinary investigation is required (extensive and detailed for such a serious crime, less so for less serious crimes - but repetition of less serious offending could signal the need for more investigation). The investigation must cover the circumstances of the crime, focusing on why the killing took place, including:

- Environmental and circumstantial factors, not directly related to the killers – for example levels of supervision in public places for children, effective promotion of community responsibility to protect children, etc.
- Other immediate factors that may explain why the killing happened;
- Factors in the background – in the broadest sense - of the killers, which may help to understand their actions.

This judicial investigation should lead to a detailed report, attributing weight to different factors, but emphasising

uncertainty, where it exists, as much as certainty.

The hearing and the ongoing investigation would need the power to require the attendance of relevant witnesses – parents, relations, friends, teachers etc. (with the usual rules to protect their rights). The children involved would have the right to be heard and to be represented – but here too the procedures should be appropriate to their capacity.

“Sufficient attention shall be given to positive measures that involve the full mobilisation of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

“Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society.”

United Nations Standard Minimum Rules for the Administration of Juvenile Justice – The Beijing Rules, adopted by General Assembly resolution 40/33 of 29 November 1986, para. 13-14

The Convention requires (Article 40(2)(7)) that there should be no public identification of children in juvenile justice systems. To ensure their privacy, the privacy of all involved should be protected. But the well-known dangers of entirely closed hearings suggest that factual reporting of such hearings and the publication of reports of investigations, without identifying the children involved directly or indirectly, is in the public interest.

3 Depending on the findings and on which factors have been found to have greatest weight, the investigation - perhaps with different or additional experts - would be reconvened for its second stage: to identify both how the killing could have been prevented and what forms of supervision, education, treatment and support are most likely to prevent these particular children committing further crimes, to most fully rehabilitate and re-integrate them, ensuring their maximum development. This stage of the investigation would be required to consider whether the children pose an ongoing serious risk to the public and what actions are proposed to reduce the risk to an acceptable level. The State's responsibility requires it, in fulfilling its obligations to the two murderers, to ensure that public safety is not unreasonably put at risk.

Article 37 places very strict limits on any restriction of liberty of offending children: “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.

As noted above, in a system which rejects retribution, the only justification for locking up children is that they pose an assessed serious risk to others’ safety and other ways of minimising this risk are considered inadequate.

So in determining necessary action, the investigation will need to review any such risk and all possible measures for minimising it. Any decision to detain requires a judicial hearing to test it and needs ongoing frequent judicial review; and also as noted above, there has to be best interests consideration of which service should be responsible for such – very exceptional – detention.

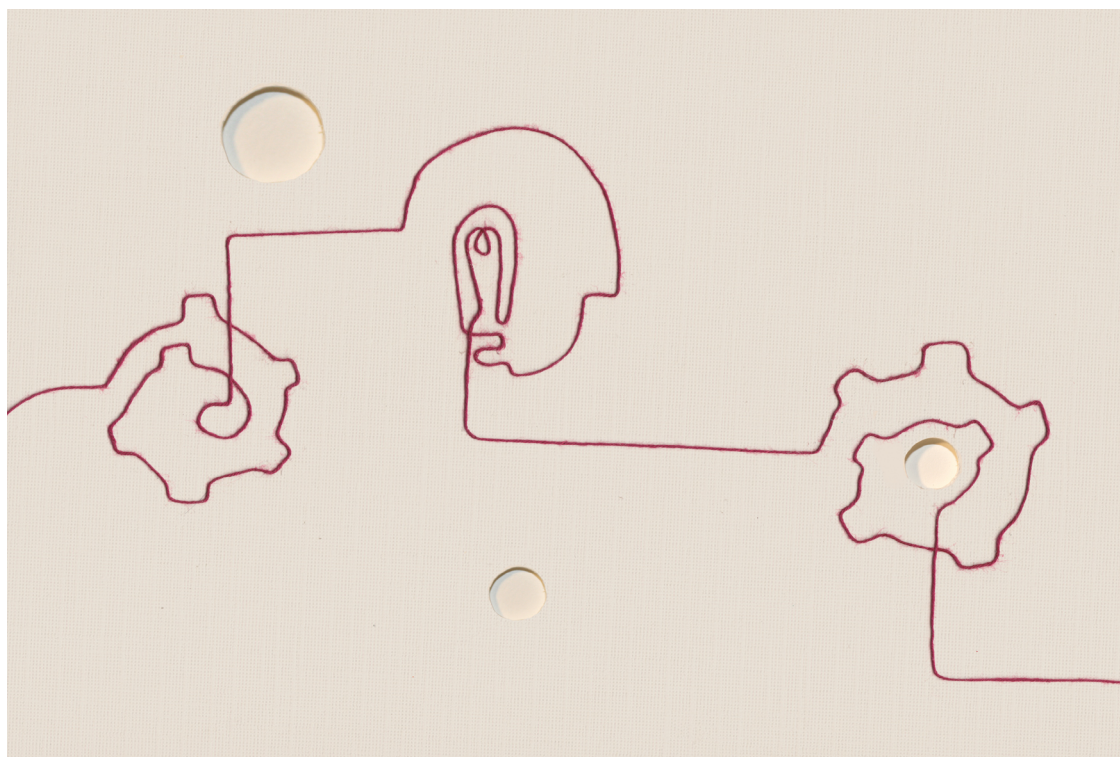
The second stage investigation would lead to a second detailed report and plan, including proposals for necessary monitoring and frequent and regular review and evaluation. In line with States’ obligations, the plan should have statutory force, with a statutory duty to fulfil it.

And what happens when a child who is being reviewed under this distinct child justice system becomes 18? The response to their offending behaviour, including necessary supervision or in a very small number of cases some form of restriction of liberty to ensure public safety, may have to continue for a period, determined by successive reviews.

There are already limitations in some States on the keeping of records of offending by children and their use in subsequent investigations. The Beijing Rules are clear that: “Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.” (Rule 21.2) So it seems that only the most serious considerations of public safety should allow records of responsibility for offences committed before 18 to be maintained and available to influence treatment of the person beyond 18.

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Surely the children’s rights community now owes children strong and uncompromising advocacy to end their criminalisation? Of course this is not going to be achieved easily or quickly, but there is a need for a principled and fully rights-compliant target.



About CRIN (www.crin.org)

Our goal: A world where children's rights are recognised, respected and enforced, and where every rights violation has a remedy.

Our organisation: CRIN is a global research, policy and advocacy organisation. Our work is grounded in the United Nations Convention on the Rights of the Child.

Our work is based on five core values:

- We believe in rights, not charity
- We are stronger when we work together
- Information is power and it should be free and accessible
- Societies, organisations and institutions should be open, transparent and accountable
- We believe in promoting children's rights, not ourselves.

The Child Rights International Network (CRIN) is registered in the United Kingdom and regulated by Companies House and the Charity Commission (Company Limited by Guarantee No 6653398 and Charity No 1125925).

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