Children's Rights and the Minimum Age of Criminal Responsibility

A Global Perspective

VRIJE UNIVERSITEIT

Children's Rights and the Minimum Age of Criminal Responsibility

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ABSTRACT AND SAMENVATTING (SUMMARY IN DUTCH)

This study offers a comprehensive analysis of the minimum age of criminal responsibility (MACR) from an international children's rights perspective. The MACR is the youngest age at which children may potentially be held liable in juvenile or adult courts for infringements of a country's penal laws. In approaching the MACR, juvenile justice history reflects a broad division between welfare and justice approaches, but both bring serious problems that revolve around criminal responsibility as their tipping point. For example, the welfare approach deemphasizes and postpones criminal responsibility, while the justice approach is based directly upon it. Instead, international children's rights mediate such tensions and flaws by contextualizing responsibility and the MACR within a series of key principles and substantive and procedural rights. In fact, regional and international law instruments provide obligations and guidance to countries regarding the establishment and application of their respective MACRs. Broader historical influences, however, are most important for explaining the origins of current MACRs around the world, which are documented for the first time ever by country, including key provisions, source citations, and excerpts in most cases. Indeed, the nearly uniform existence of MACRs worldwide – evidencing the legal principle that children younger than some established age should never face criminal procedures or punishments – affirms that a general principle of international law exists in this context, bringing legal obligations for all countries.

Recent MACR trends are driven primarily by the reporting process under the Convention on the Rights of the Child (CRC), which is linked to the establishment, increase, or proposed increase of national MACRs in more than one-third of the world's countries. At the same time, many countries' sensationalized debates over youth crime and MACRs suggest the fragility of simple age amendments. Practical implications and challenges in MACR implementation also affect, in all likelihood,

every country in the world. Among these, the most common are the lack of proof of age and reliable age estimates; responses to children younger than MACRs that are substantially punitive in nature; and the absence of any appropriate response at all to children younger than MACRs in conflict with the law. Overall, this study underscores the important role of the MACR, but finds that the age limit quickly loses value unless it is understood and implemented in a holistic children's rights framework, which among other points requires coordination of law, policy, and practice regarding children both younger and older than the MACR's limit.

Kinderrechten en de Minimumleeftijd voor Strafrechtelijk Aansprakelijkheid. Een studie wereldwijd.

Deze studie biedt een uitgebreide analyse van de Minimum Leeftijd voor Strafrechtelijke Aansprakelijkheid (MLSA) vanuit het perspectief van de internationale rechten van het kind. Onder deze MLSA wordt verstaan de jongste leeftijd waarop kinderen aansprakelijk kunnen worden gehouden in jeugd- of volwassenen rechtspraak voor het overtreden van het strafrecht van een land.

Bij het bestuderen van de MLSA toont de rechtsgeschiedenis een enorm verschil tussen welzijns- en justitiële benaderingen. Maar beide benaderingen brengen ernstige problemen met zich mee waar het gaat om strafrechtelijke aansprakelijkheid. Vanuit het perspectief van welzijn ligt mindernadruk op strafrechtelijke aansprakelijkheid en meer op het uitstellen ervan, terwijl de justitiële benadering op aansprakelijkheidsstelling juist is gebaseerd. Ten behoeve van de internationale kinderrechten wordt geprobeerd om met deze spanningen en gebreken om te gaan door de verantwoordelijkheid voor de MLSA in de context te plaatsen van een aantal grondbeginselen, binnen het kader van materieel en formeel recht. Meer specifiek: regionale en internationale wetsinstrumenten geven verplichtingen en richtlijnen aan landen met betrekking tot het vaststellen en hanteren van een minimum aansprakelijkheidsleeftijd.

Voor het begrijpen en verklaren van de oorsprong van hedendaagse MLSA's over de hele wereld, zijn uitgebreide historische gegroeide invloeden van groot belang. Deze zijn nu voor het eerst gedocumenteerd per land, inclusief de belangrijkste voorzieningen, met bronvermeldingen en in de meeste gevallen ondersteund door fragmenten.

Men kan stellen dat het bijna uniforme bestaan van minimum aansprakelijkheidsleeftijden wereldwijd – een uiting van het grondbeginsel dat kinderen onder een bepaalde leeftijd nooit strafrechtelijke procedures of bestraffingen mogen ondergaan – bevestigt dat er in deze context een algemeen principe van internationaal recht bestaat met juridische verplichtingen voor alle landen.

Recente ontwikkelingen in de minimum aansprakelijkheidsleeftijd komen vooral voort uit het rapportageproces van de Conventie van de Rechten van het Kind, dat zich bezighoudt met het opzetten en de uitbreiding – of voorgestelde uitbreiding – van nationale minimum aansprakelijkheidsleeftijden in ongeveer eenderde van de landen in de wereld.

In veel landen geven felle debatten over jeugdcriminaliteit en de minimum aansprakelijkheidsleeftijd een indruk van de kwetsbaarheid van eenvoudige leeftijdswijzigingen. Praktische implicaties en uitdagingen van de MLSA beïnvloeden het beleid overal ter wereld. De meest voorkomende zijn het gebrek aan bewijs voor het vaststellen van de leeftijd of betrouwbare leeftijdschattingen; zware straffen voor kinderen die onder de minimum leeftijd vallen; en het ontbreken van elk adequaat antwoord op kinderen die onder de minimum leedtijd vallen en in aanraking komen met justitie.

Samenvattend laat deze studie zien wat het grote belang is van de Minimum Leeftijd voor Strafrechtelijke Aansprakelijkheid, maar ook dat een leeftijdslimiet zinloos is wanneer zij niet wordt begrepen en geïmplementeerd in het holistisch kader van rechten voor kinderen, waarvoor coördinatie van wet, beleid en praktijk noodzakelijk is voor kinderen onder en boven de minimumleeftijd.

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PREFACE

This study presents a worldwide analysis of the minimum age of criminal responsibility (MACR) as it relates to international children's rights. In a nutshell, the MACR is the lowest age at which children may potentially be held liable for infringements of a given country's penal laws, in either juvenile or adult courts. Terminology varies widely across countries, legal families, and languages, yet the underlying concept is relatively stable: before some stipulated age, children may never face criminal responsibility, procedures, or punishments. When children younger than the stipulated age are accused of illegal acts, civil law measures of welfare, care, assistance, and protection may be triggered. When they reach the MACR and allegedly break the law, the possibility exists for the first time for penal procedures and sanctions. Nonetheless, this does not mean to say that *all* such children should face criminal law procedures or criminal punishment – as alternative procedures and measures are often available. Even though the MACR seems fairly straightforward at this level, it proves to be surprisingly complex in theory and practice. Regardless, as detailed in this study, basic tenets of criminal law and various international legal obligations hold that all countries must establish respective MACRs.

Due to common confusion, it is important to note immediately the distinction between the MACR and the minimum age of penal majority, or the lowest age at which children may be held responsible specifically in adult criminal courts. As explored later in this study, international standards consistently hold that national minimum ages of penal majority must be 18 years of age or higher – that is, that children should only be subject to juvenile justice court proceedings. Contrary to such standards, many countries still give jurisdiction over some children to adult criminal courts, and in some cases the minimum age of penal majority even coincides

with the MACR (i.e., the very youngest age for criminal responsibility may signify responsibility in adult courts).

International children's rights have a great deal to say about such issues. As enunciated most visibly in the United Nations Convention on the Rights of the Child (CRC) – ratified or acceded to by 190 of 192 countries in the world – international children's rights set out all children's civil, political, economic, social, and cultural rights, as well as a comprehensive framework for their implementation.[1] National-level progress, under the CRC, is periodically reviewed before an international body of experts, the Committee on the Rights of the Child. In other words, children's rights offer a shared and principled approach to addressing children's issues, based on a nearly universal consensus, which international law further validates and supports. In particular, international children's rights also bring a mandate for countries to establish respective MACRs, as well as certain restrictions on how they are established and applied. The CRC and international children's rights form the explicit basis for the current study because of, inter alia, this international legitimacy and legal weight, their broad and balanced framework, their orientation towards practical implementation, and their intrinsic link to the MACR.

It must be stressed that MACRs are by no means the greatest challenge in juvenile justice or for children's rights around the world. Detailed analysis of MACRs may inherently risk overstating their relative significance, or the significance of specific age levels. This is not the intention of the current study, nor is there any intention to downplay other common and serious problems in juvenile justice systems worldwide, such as the vast over-reliance on the deprivation of liberty; general conditions and violence in places of confinement; trial and/or punishment of children as adults; and application of criminal law procedures and punishments for status offenses (i.e., acts that are not offenses when committed by

[1] Beyond 190 of 192 United Nations Member States, Cook Islands, the Holy See, and Niue increase the total number of CRC States Parties to 193. See Annex 1 for the full text of the CRC.

adults, such as truancy and running away).[2] However, the substantial body of research on juvenile justice, including from an explicit children's rights perspective, tends to address primarily such problems and the children older than MACRs affected by them. At the same time, it tends to overlook the MACR and its implications, or to make simplistic assumptions about the MACR's implications for children's rights – particularly when it comes to preferred MACR age levels, respective governments' claims about their MACRs, and children younger than MACRs.

Thus, a narrow focus on MACRs seems justified, if for no other reason, because no thorough children's rights analysis of MACRs has ever been undertaken. Indeed, the absence of a modern foundational analysis reflects a historical lack of clarity on how MACRs fit into the children's rights framework. When applied in practice, such gaps can lead to very real consequences for children and, unexpectedly, for the broader prospects for children's rights. In this sense, stepping up very closely to scrutinize the MACR brings not only a richer understanding of the MACR itself, but upon turning around again, it also seems to offer useful insights for the larger children's rights context and some of its fundamental principles. This much is indeed intentional – to attempt to contribute to the ongoing debate on the substance and application of children's rights. This study's examination of MACRs seeks to uncover how MACRs – as one small but important piece of a larger puzzle – can best be integrated with and reinforce children's rights.

Therefore, more succinctly, this study's scope is a worldwide analysis of MACRs and their key intersections as they ultimately relate to children's rights. The nature of this endeavor unfortunately precludes examination of the full context of any given country's criminal justice system, society, culture, and history, although crucial aspects are addressed thematically and case studies are employed to illustrate

[2] For an excellent overview of common juvenile justice challenges, see Meuwese, Stan, ed., *KIDS BEHIND BARS: A study on children in conflict with the law: towards investing in prevention, stopping incarceration and meeting international standards*, Amsterdam, Defence for Children International The Netherlands, 2003.

common issues.[3] There are other unavoidable simplifications. Several closely related topics are discussed summarily or omitted entirely, such as children's lessened culpability in terms of sentence mitigation, and criminal responsibility in the context of military conflict, international crimes, extradition, and refugee law.[4] Despite such limitations, the current study seeks to offer useful contributions for such research as well.

With these caveats in mind, the seven chapters of this study are structured to peel away in succession a series of key perspectives on the MACR:

- Chapter 1 introduces basic notions about rights, explains how perceptions of children's competence largely determine the rights made available to them, and illustrates how juvenile justice history has swung around two predominant models as such – with the MACR precisely in the middle.
- Chapter 2 directly introduces international children's rights, as well as the international juvenile justice standards derived from them, and probes how these standards mediate the classic juvenile justice tensions that hover around the MACR.
- Chapter 3 documents the precise obligations regarding MACRs under regional and international law instruments, and under their formal interpretations, in order to identify the current international consensus guidance on MACRs and their application.
- Chapter 4 explores the main historical influences that broadly explain national MACRs in force today.
- Chapter 5 instead presents these MACRs country-by-country – including key related provisions, statutory citations, and excerpts in

[3] For a discussion of the importance of such factors, see Friday, Paul C., and Xin Rend, *Delinquency and Juvenile Justice Systems in the Non-Western World*, Monsey (New York), Criminal Justice Press, 2006.

[4] For excellent discussions of such issues, see respectively Scott, Elizabeth S., and Laurence Steinberg, "Blaming Youth," 81 *Texas Law Review* 799, 2003; and Happold, Matthew, *Child Soldiers in International Law*, Manchester, Manchester University Press, 2005.

most cases – and summarizes the evidence and arguments that a general principle of international law exists with respect to MACRs. It also highlights the modern trends in MACR age levels and the dynamics of national debates on MACRs.

- Chapter 6 identifies and analyzes the main recurring challenges and implications of applying MACRs in practice.
- Finally, Chapter 7 draws from all of the preceding viewpoints in order to encapsulate the principal theoretical and practical considerations necessary to make MACRs work for children's rights.

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CHAPTER 1 SHIFTING PERSPECTIVES ON CHILDREN, SHIFTING RIGHTS AND CRIMINAL RESPONSIBILITY IN JUVENILE JUSTICE

This chapter begins by presenting a series of basic concepts about rights, rights holders, and the role of competence in determining rights. As explored thereafter, these ideas are tightly linked to the ways in which adult society interprets and constructs the meaning of childhood, particularly as its understanding of childhood includes assumptions about children's competencies. If adults come to understand children as competent in relevant ways – and it is largely a question of adults' interpretation, not of children's actual competence – then certain rights may or may not be granted by adults to children. This chapter also shows how the central historic themes of juvenile justice follow these same lines. When conventional wisdom coalesced toward the late 1800s around the idea of children as innocent and limited in competency, modern juvenile justice emerged with a welfare model justification, which refuses to assign criminal responsibility to children. Historic developments helped pull apart that particular construction of childhood, and a new vision of children as competent and capable emerged over time – including a major shift towards the justice approach in juvenile justice, which holds competence, rights, and criminal responsibility as core elements. The sliding scale from the welfare approach to the justice approach, with competency and responsibility as the central tipping points, is in reality vastly more nuanced than the account offered in the present study. However, as this chapter highlights, its history and elements present the basic dilemmas that virtually every country faces to some extent, stemming from the inherent flaws of each approach. This common narrative is part of the essential background for understanding children, age, and criminal responsibility.

Rights and Right-Holders, Competence, and Competing Constructions of Childhood

An important starting point for understanding children and rights is to offer some basic notion of what is meant by "rights." Theories, meanings, functions, and types of rights are all subject to fierce ongoing debates in various arenas, most of which lie beyond the scope of this study. Such questions, while perhaps seeming academic, do prove to bear very real consequences in the lives of children and their families, thus at least a preliminary view is quite helpful. In the broadest sense, rights are a special or justified type of claim, or in other words a "claim against someone whose recognition as valid is called for by some set of governing rules or moral principals."[1] Indeed, the justification for rights, beyond and as distinguished from other possible types of claims, is often found in

> a special kind of importance, urgency, universality, or endorsement that makes them more than disparate or simply subjective demands. Their success is dependent on such endorsement—by a government or a legal system that has power to grant and protect such rights, by a tradition or institution whose authority is accepted in those circles that recognize these claims as rights, by widespread social sentiment, regionally, nationally, or internationally.[2]

Consideration of the types or categories of rights that exist, when looking at the properties of rights themselves, often leads to a division between liberty rights and protection rights.[3] Liberty rights affirm peoples' prerogative to act with freedom in specific contexts – in the sense that there is no restriction on them – and in fact,

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[1] Feinberg, Joel, "The Nature and Value of Rights," in *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy*, Princeton, Princeton University Press, 1980, at 155.
[2] Kamenka, Eugene, "Human Rights, Peoples' Rights," in Crawford, James, ed., *The Rights of Peoples*, 1988, at 127, reprinted in Steiner, Henry J., and Philip Alston, eds., *International Human Rights in Context: Law, Politics, Morals: Texts and Materials*, 2nd ed., Oxford, Oxford University Press, 2000, at 329-330.
[3] Archard, David William, "Children's Rights," in Zalta, Edward N., ed., *Stanford Encyclopedia of Philosophy*, Stanford, Stanford University Center for the Study of Language and Information, 2002, http://plato.stanford.edu/entries/rights-children.

liberty rights trigger the duty for others not interfere with relevant actions.[4] Specific liberty rights include, for example, the rights to free speech, to freedom of religion, and to vote. Of course, such rights presuppose the ability to exercise them; freedom of religion, for example, offers limited value if one cannot comprehend different religious concepts and make a personal choice in beliefs. In this sense, depending on the context, it is possible for children not to have the requisite capacities to bear various liberty rights. Protection rights, instead, are claims that other people owe some duty to protect important interests of the right-holder.[5] For instance, the rights to education, health, and physical safety are protection rights, which refer to fundamental interests of all people. Right-holders see these rights fulfilled by others on their behalf – protecting the right-holders' interests. In contrast to liberty rights, protection rights may exist wherever there are such core interests at stake, and as such all children may possess them.

The majority viewpoint is that children enjoy protection rights, but that they may or may not have liberty rights depending on the exact context and their capacity in that context. Competence thus takes a central role in the predominant rights discourse; an individual generally must have relevant competence to enjoy a given liberty right. Even though protection and liberty are both framed in terms of rights, there is an inverse relationship between the two, with competency as the pivot point. With less competency, protection rights come to the fore and liberty rights drift to the rear; yet with greater competency, liberty rights take greater prominence.[6] Among many other contested questions in rights discourses, the role of competence is thus highly controversial.

Just as competence typically has a noted and decisive place in the attribution of certain rights – and in determining whether children may even be rights-holders at all – it is also a crucial element in how adults think about children and childhood.

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[4] Ekman Ladd, Rosalind, "Rights of the Child: A Philosophical Approach," in Alaimo, Kathleen, and Brian Klug, *Children as Equals: Exploring the Rights of the Child*, Lanham (Maryland), University Press of America, 2002; and Fagan, Andrew, "Human Rights," *The Internet Encyclopedia of Philosophy*, 2005, www.iep.utm.edu/h/hum-rts.htm.
[5] Archard, *supra* note 3; and Fagan, *ibid*.
[6] See Ekman Ladd, *supra* note 4.

Before examining competence in this realm, a few introductory remarks on children and childhood are in order. Although childhood is certainly related to the natural, biological realities of children, the notion and meaning of childhood is not itself a natural phenomenon or scientific fact.[7] Childhood is a concept that only exists insofar as meaning and definition are attributed to it. Thus, it is a bundle of ideas and expectations – culturally assembled and constructed over time – about young people and their role in societies. In other words, childhood is a dynamic package of cultural goods, constantly changing and contested. Institutions, government, adults, children, politics and power, economics, and historical events – among other factors – all contribute to and compete in the common understanding of childhood at a given point in time.[8] While childhood sits conceptually within the larger structure of society, its own meaning also exerts an influence back upon the institutions situated around it (e.g., schools, juvenile justice), just as children themselves confront and contest the boundaries of what their childhood is commonly given to mean.[9] Thus, the social construction of childhood's meaning varies over time both within and across cultures, with no one universal meaning:

> the sociological study of childhood is more accurately a study of 'childhoods' in which the universality of the biological immaturity of children is differently shaped, interpreted and understood by distinctive societies and cultures.[10]

As discussed below, very specific models of childhood shaped contemporary children's rights movements, and the understandings of childhood are just as varied

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[7] Freeman, Michael, *The Moral Status of Children: Essays on the Rights of the Child*, The Hague, Kluwer Law International, 1997.
[8] Goldson, Barry, "'Childhood': An Introduction to Historical and Theoretical Analyses," in Scraton, Phil, ed., '*Childhood' in 'Crisis'?*, London, University College London Press, 1997.
[9] Asquith, Stewart, "When Children Kill Children: The Search for Justice," 3 *Childhood* 99, February 1996.
[10] Franklin, Bob, "Children's rights and media wrongs: changing representations of children and the developing rights agenda," in Franklin, Bob, ed., *The New Handbook of Children's Rights: Comparative Policy and Practice*, London, Routledge, 2002, at 17.

and debated within that context.[11] Indeed, childhood became a modern aspect of international relations through historic developments and concrete evolutions in how people understand children.[12] The dominant conceptions of childhood within children's rights discourses, as in societies and cultures, predispose people and institutions to understand, interpret, and address various challenges from distinct vantage points.[13]

In terms of the law, legal norms tend to reflect the predominant conceptualization of childhood at a fixed point in time.[14] Again, the meaning of childhood is contested ground, and correspondingly, different actors often seek to manipulate that meaning for political or other motives – a recurring backdrop to juvenile justice debates – particularly when law and policy are at stake. When the debate focuses even further on the meaning of adolescence, a notion invented in advanced technological societies, law may struggle to account coherently for the conflicting notions contained within.[15] A wide array of age limits, often arbitrary and inconsistent, attempt to mark the form and boundaries of the complex notions of childhood and adolescence, even though age structures play a less dominant role in many non-Western accounts of childhood.[16] More specifically, legal age limits are essentially proxies for assessments of children's competency across the span of childhood, and in this sense competency is a central aspect among notions about childhood's meaning. The age-competency connection reduces the dynamic social

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[11] Heinze, Eric, "The Universal Child?," in Heinze, Eric, ed., *Of Innocence and Autonomy: Children, Sex and Human Rights*, Aldershot (England), Ashgate/Dartmouth, 2000.
[12] Marshall, Dominique, "The Construction of Children as an Object of International Relations: The Declaration of Children's Rights and the Child Welfare Committee of League of Nations, 1900–1924," 7 *International Journal of Children's Rights* 103, 1999.
[13] Boyden, Jo, "Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood," in James, Allison, and Alan Prout, eds., *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood*, London, Falmer Press, 1997.
[14] *Ibid*.
[15] See Skolnick, Arlene, "The Limits of Childhood: Conceptions of Child Development and Social Context," 39 *Law and Contemporary Problems* 38, 1975; and Scott, Elizabeth S., "The Legal Construction of Adolescence," 29 *Hofstra Law Review* 547, 2000.
[16] James, Allison, and Alan Prout, "Re-presenting Childhood: Time and Transition in the Study of Childhood," in James, Allison, and Alan Prout, eds., *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood*, London, Falmer Press, 1997, at 235.

construction processes in the background down to precise age limits, often concealing the battles contained within, and forces the difficult link between competency and rights. When law prescribes a given age limit denoting the beginning of children's legal competence in a specific area (e.g., to make medical decisions for themselves), regardless of the mix of ideas and assumptions justifying that age, it demarcates the onset of a specific liberty right. When younger than that limit, children are generally assumed legally incompetent; this finding leaves them with rights to protection, but no longer to liberty rights. As a further complication, even the comparative meaning of such rights proves to be tightly linked to cultural values and specific societal perspectives.[17] In the end, the extent of justification for protection rights versus liberty rights – and thus the amount of control that the adult world has in deciding and protecting children's interests – is in effect negotiable based on predominant images of children and their competencies.[18]

In most countries, children progressively acquire liberty rights as they pass successive age limits, each denoting legal competency and responsibility in different areas, such as in legal and medical counseling without parental consent, the end of compulsory education, marriage, sexual consent, and the minimum age of criminal responsibility (MACR). For example, Germany has reported a series of over 25 such age limits tied to 11 different age brackets.[19] Thus, children in Germany become subjects of legal rights and duties at birth, have a limited capacity to enter into legal transactions at age 7, may work in agricultural operations at age 13, and may be granted permission to marry at age 16. Typically, the age of majority in a given country is the final or nearly final age limit, bringing adult rights and responsibilities in most contexts. This approach is broadly reflected in the United Nations Convention on the Rights of the Child (CRC), which is introduced more fully in

[17] Boyden, *supra* note 13.
[18] Asquith, *supra* note 9.
[19] Committee on the Rights of the Child, *Initial reports of States parties due in 1994: Germany*, CRC/C/11/Add.5, 16 September 1994.

Chapter 2. As a general rule, the CRC designates 18 as the age of majority, and defines as children all human beings younger than this age.[20]

In consideration of related information submitted under the CRC, it is safe to say that age limits vary extremely widely, both by the same limit among different countries and by different limits within countries. Apart from international norms, this seems a natural consequence of different political, historical, cultural, and other factors across countries that feed into the construction of childhood and designation of age limits. Within individual countries, however, the principle of consistency holds more strongly that the reasons underlying the setting of different age limits should roughly correspond across different legal contexts.[21] Even though there are differences in the minimum competencies held necessary for different liberty rights, it is generally incoherent to argue that children at a given age are fully mature and responsible in one domain yet unready for liberty rights in a comparable domain. Indeed, despite general trends of increasing rights and responsibilities with age, disparate national age limits often suggest an inconsistent narrative of children and their legal status. This is a further indication that children's age limits – plus the notions of competence behind them, and the rights to which they are the gateway – depend most heavily upon the fluctuating and contested social construction of childhood, and not on children themselves.

Welfare Approach and the Postponement of Criminal Responsibility

All of these competing ideas – about rights, bearers of rights, the construction and definition of childhood, and children's competencies – come to a head in modern debates on juvenile justice. In the simplest terms, the central continuum in ideology plays out from the social welfare approach – which essentially dismisses the notion of the competence and criminal responsibility of children – to the justice approach – which relies upon criminal responsibility and children's alleged competence as its

[20] Art. 1.
[21] See, inter alia, Archard, David, *Children: rights and childhood*, 2nd ed., London, Routledge, 2004.

very foundation. While children have been historically subject to criminal law to some extent – as outlined in Chapter 4 – the modern notion of a juvenile justice system as distinct from adult criminal justice began with a strong welfare orientation, but recent decades have seen clear shifts towards justice models. Descriptions in terms of a welfare-justice continuum are an intentional simplification, of both theory and practice, for the sake of analytical ease in the broader context of the present study. Nonetheless, at this level of understanding alone, significant conflicts emerge between the implications of this ideological shift and children's rights interpretations of the MACR. A selective historical overview of the welfare approach and the founding of modern juvenile justice systems, particularly in key influences from England and the United States, helps bring such issues to light.

In broad terms, juvenile justice finds its origins in earlier pauper laws, criminal justice systems, child protection systems, and other elements. Even towards the end of feudal England, authorities developed a range of policies and mechanisms to cope with poverty, such as provisions for cash assistance to the disabled.[22] As different approaches developed, including many exerting social control over the poor, in the 1500s and 1600s statutory law granted officials the independent authority to remove children from the custody of their pauper parents, and to place them as apprentices with others until the age of majority. These were seen as measures to ensure the proper upbringing of children, and were likely understood as advantageous for society. American colonies imported English poor laws, including a prominent role for the forced apprenticeship system, and later took these laws west as Europeans settled further into North America. In their apprenticeships, children's labor was intended to offset the costs of care and education while they nominally received skilled training, but the quality of children's care was questionable. The industrial revolution, however, soon changed the very nature of children's labor, care, and education.

[22] Rendleman, Douglas R., "Parens Patriae: From Chancery to the Juvenile Court," 23 *South Carolina Law Review* 205, 1971.

The advent of the industrial revolution brought vast changes, in the United States as in many other countries, in social structures, family life, immigration trends, demographic and urban growth patterns, and labor.[23] Among other consequences, relevant societies saw the family-based economy and children's role in it diminish, thus propelling new ideas about children's proper place in the family and society. Here was a crucial episode in the evolving construction of childhood. From pre-industrial ideas of children as little adults who were largely integrated in family and work life, society increasingly viewed children as a separate class from infants or adults, a class that was both impressionable and innocent. With a certain sentimentality, children became a symbol of optimism calling for protection. Social reformers – some of whom would come to be known as the Progressives – sought to whisk children quickly away from any nefarious influences that might endanger them. Communities hosting such influences were frowned upon, especially in the context of booming industrial urban centers and the dangers attributed to them. While this movement led to historic developments such as public education systems, compulsory schooling for children, and child labor laws, many commentators also argue that this apparently benevolent spirit masked the driving desire for social control over the children of poor, minority, and immigrant families in urban centers.

In terms of policies for the poor in general, by the 1800s the United States saw an increasing focus on almshouses, work houses, and poor houses – in effect, institutionalization of the poor and pooling of their labor. These adult-oriented centers came to be seen as inappropriate for children, for exposing them to negative influences, disease, and the like. At the same time, the forced break-up of families and apprenticeship of children continued, and dedicated children's institutions arose to accommodate these practices, clearly in part as a continuation of earlier poor laws. Similar child-specific institutions for care and labor had ample precedent. Beginning in the 1500s, the city of Amsterdam (the Netherlands) had addressed problems of poverty, begging, and petty thievery among youth through houses of correction,

[23] Feld, Barry C., "Race, Politics, and Juvenile Justice: The Warren Court and the Conservative 'Backlash'," 87 *Minnesota Law Review* 1447, 2003.

which provided both a stable source of manual labor and a reformatory alternative to otherwise brutal penal methods.[24] The Amsterdam model was copied in modern-day Belgium, the Netherlands, Germany, and Scandinavia, and was influential in major English correctional reforms in the late 1700s with indirect influences in the United States. In the United States, juvenile-specific reform institutions – such as houses of refuge, reformatories, and training schools – assumed custody of convicted or poor children, again annulling parents' custody, and took charge of their education, upbringing, and vocational training. Well before juvenile courts even existed, United States efforts in juvenile reform in the early 1800s championed humane treatment of children in these places – more humane than treatment in adult poor houses and jails, for example.[25] Many institutions held the authority to send out children for apprenticeships, while some conducted work activities in-house. Nonetheless, most children in these institutions were not delinquent children, and the definition of poor or unsuitable parents – from which children were to be removed – grew with the social reformers' expansive notions of the dangerous environments that threatened children.

At the same time, reformers found legal and ideological justification to intervene and protect at-risk children from the dangers of criminality. First, in this time and context, the concept of *parens patriae* began to accrue particular importance.[26] *Parens patriae* had evolved since feudal England, as did the influential pauper laws, but essentially on a piecemeal case-law basis in chancery courts – originally the courts of the lord chancellor, an official delegate of the king. The doctrine generally signified the state's interest and authority to act in place of parents to order a proper resolution in individual cases, in matters such as the protection of children's property interests, the continuation of their education, and their protection from improper marriages. In other words, cases often revolved around questions of property or guardianship, but never criminal law intervention in the lives of

[24] Sellin, Thorsten, *Pioneering in Penology: The Amsterdam Houses of Correction in the Sixteenth and Seventeenth Centuries*, Philadelphia, University of Pennsylvania Press, 1944.
[25] Rendleman, *supra* note 22.
[26] *Ibid*.

delinquent children.[27] However, in the 1800s the notion of *parens patriae* was for the first time grafted onto a branch of the poor laws, and was used to justify the state's intervention and assertion of custody over the expanding category of children needing assistance. *Parens patriae* saw its mandate grow to hold the government as the ultimate custodian of children when parents or guardians were unable or unwilling – as deemed by the state itself – to provide acceptable care and guidance. Thus, the state intervenes and directly assumes a parental role vis-à-vis the child, and its prerogative for taking custody of children away from parents was expanded and bolstered.

Also in the late 1800s, positivist legal and criminological theory emerged and began to gain prominence, aiming its focus in criminal law upon human character and the divergent influences on it. In its view, the origins of crime lay in biological, social, environmental, and other factors – fully rejecting classic criminal law fundamentals such as free will, moral responsibility, and strictly defined offenses, which are further discussed below. Instead, the personality and rehabilitation of offenders become central. People do not simply choose to commit crimes, since other background forces are the real drivers of crime, thus they cannot be held responsible based on some illusory choice. Rather than the crimes actually committed, attention turns to offenders and the needs of offenders in order to prevent them from recidivating. In this vein, one outgrowth of positivism was social defense theory, which makes penal law's key objective the protection of society. With the focus on individuals, and not their offenses, this theory accepts a broad definition of people that may pose danger to society, that may legitimately be separated from society, and that may benefit from rehabilitation. Judges in this scheme, of course, enjoy much greater discretion as compared to classic constraints on judicial prerogative, particularly in adapting the state's resources to best meet the needs of the individual at hand. Although positivism eventually influenced criminal law in

[27] Cogan, Neil Howard, "Juvenile Law, Before and After the Entrance of 'Parens Patriae'," 22 *South Carolina Law Review* 147, 1970.

important ways, especially in European continental law, juvenile justice law was the first field of law to see the wholesale impact of these debates.[28]

In basic terms, reformers were thus armed with their expansive vision of which children needed state assistance, the long history of poor laws in intervening in families' lives, a modified *parens patriae* concept to justify further and broader interventions, and positivist theory as an alternative framework – apart from classic criminal law – to put it all into motion. They sought a system for children that would be entirely separate in spirit and in reality from the adult criminal justice and correctional system: a paternalistic system that would protect based upon the individualized interventions of judges. The convergence of these and other elements led to the historic creation of the world's first juvenile court, and the advent of juvenile justice as a modern institution, in Chicago, Illinois, in 1899. As many of its components already enjoyed great influence internationally – child protection and juvenile reform systems, the Progressive movement, legal positivism, etc. – juvenile justice systems spread quickly across the United States, Canada, and Europe, leading to the ratification of new legislation to carry out this mission. Primarily from Europe, juvenile courts spread to Latin America and many European colonies around the world.

Although specific models did vary widely among countries, the basic justification and characteristics in this early period were essentially quite similar and reflect the antecedents outlined above. *Parens patriae* theory, as an implicit or explicit basis, enabled state intervention as deemed necessary by the state itself. A fundamental consequence of this conception, which assumes that children are aided by the state rather than tried and punished as criminals, is that "there is no need to determine whether the child had the capacity to act in a culpable fashion."[29] The very notion of criminal responsibility – and therefore the MACR – is essentially irrelevant under the welfare approach, and indeed, it was irrelevant in early juvenile

[28] Ancel, Marc, and Louis B. Schwartz, "The Collection of European Penal Codes and the Study of Comparative Law," 106 *University of Pennsylvania Law Review* 329, 1958.
[29] Walkover, Andrew, "The Infancy Defense in the New Juvenile Court," 31 *UCLA Law Review* 503, 1984, at 516.

justice systems. If anything, a child's lack of overall maturity – and parallel lack of criminal responsibility – only highlighted the need for intervention. The underpinning of *parens patriae* and the absence of criminal responsibility turned proceedings into civil matters, and rejected the obligations of normal criminal law. Fact-finding, adversarial processes to prove guilt, and criminal defenses were superfluous, and court procedures were informal and closed to public access.

In many senses, the child became an object, without liberty rights or power, on whose behalf benevolent decisions were made. Even though there were occasional efforts to involve children in hearings, their active participation or even ability to understand and follow such processes was secondary. Typically, there was not even a need for an offense to have occurred, since juvenile courts enjoyed jurisdiction over all children in need of state assistance or treatment; the focus was on the child, the child's needs, and the child's personality, not on his or her actions or offenses per se. Even if there was an alleged offense, it did not necessarily have any relation to the prescribed treatment, its severity, or its duration. Instead, therapeutic treatment – presumably designed in the best interests of individual children – was linked to the diagnostic guidance of the social sciences and child development theory, and guided by judges with wide discretion. Indeed, at all points along the way, from police custody through treatment, discretion was maximized for decision-makers to meet children's needs. This extreme emphasis on treating the supposed problems of individual children and their families also meant that underlying structural problems, particularly those arising from the growth of industrial capitalism, went unnoticed and unaddressed.[30] Furthermore, as some detractors argue, these arrangements led to a virtually endless supply of children with needs for state treatment – which was little more than a euphemism for state control and protection of the social order – and significant powers for the state to wrest custody over children away from parents.

[30] Tanenhaus, David S., "Book Review: Victoria Getis, 'The Juvenile Court and the Progressives'," 21 *Law and History Review* 240, 2003.

Despite this historical summary, it is important to note that juvenile justice was not predestined to have these central characteristics.[31] Tanenhaus demonstrates how the abolition of slavery in the United States led by the late 1800s to a highly sophisticated discourse on children's rights, which carefully weighed the balance between liberty and protection rights. While an 1838 Pennsylvania Supreme Court case had solidified *parens patriae* as the predominant legal principle in this field, the Illinois Supreme Court's 1870 decision in *The People v. Turner* – "the first modern children's rights case" – interpreted the state's new post-abolition constitution as guaranteeing due process protections to children.[32] The decision – emerging from a courtroom in Chicago, the eventual birthplace of the juvenile court – reached a nationwide audience and led to similar decisions in a number of state courts. Moreover, drawing from this legacy, the Progressives initially included due process guarantees in the early administration of dependency cases, even though their support behind those principles did not last long. Their understanding of children's rights soon shifted towards children's needs and protection rights, and to states' obligations to regulate and intervene to ensure those rights; the Progressives essentially employed the juvenile court to push a limited vision of children's rights as such. Thus, what might have been an entirely different starting point for juvenile justice was reverted to a classic welfare approach justification with little focus on procedural rights. Moreover, juvenile justice systems evolved and diversified from their very beginning and into the present, so there are few systems remaining based strictly on the welfare approach. In fact, as the first systems were being established, they continuously and pragmatically adapted their structures, rules, and institutional identity to meet local challenges and conditions, such that pure welfare approach systems may have been rare in practice.[33]

Nonetheless, the original welfare theory can still be seen in general terms as an important and influential point along the continuum of juvenile justice approaches.

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[31] Tanenhaus, David S., "Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age," 23 *Law and History Review* 351, 2005.
[32] *Ibid*., at 354.
[33] Tanenhaus, David S., *Juvenile Justice in the Making*, New York, Oxford University Press, 2004.

The thinking behind the 1912 Belgian Child Protection Act, an influential model for similar laws in many countries, further illustrates relevant assumptions. The Act rested on the belief that children below a certain age should not face criminal prosecution for any reason – thus there was no attempt to attribute responsibility to such children.[34] More directly, "[n]otions of individual responsibility, capacity and intention therefore have no place in determining the age of criminal responsibility."[35] Instead, children were presumed to act without discernment, yet this presumption did not intend to suggest that children were incapable of discernment.[36] To the contrary, it was a presumption based on the notion that courts should not even take the concept of discernment into account. It was a question that should not even be posed, nor that should determine the treatment a child received in the justice system. This viewpoint was not about pursuing indulgence or idealism in children's policy, but the sublimation of broader social values – especially social defense as cited above – over juridical norms.

This foundation has decisive implications for the establishment of MACRs and for state responses to children in conflict with the law. The release from binding legal precepts of capacity and responsibility enables countries to set rather high MACRs as a matter of social policy. In this view, countries fix their MACRs beyond the ages at which children are generally assumed capable of bearing responsibility for their actions. It is a policy choice defended as advancing the best interests of both children and society. Theoretically, youthful offenders are viewed and treated less as criminals, and more as troubled children in need of welfare-based services. This perspective also seeks greater flexibility to address the problems of youth crime, while still respecting the principle that children below a certain age should not be prosecuted.

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[34] Tulkens, F., "Les impasses du discours de la responsablité dans la repénalisation de la protection de la jeunesse," in *La criminologie au prétoire*, Gand, Editions Story-Scientia, 1985.
[35] Johnston, Helen, "Age of Criminal Proceedings in Europe," in The Howard League for Penal Reform, *Child Offenders: UK & International Practice*, London, 1995.
[36] Tulkens, *supra* note 34.

Belgium's juvenile justice system is still based largely upon the 1912 Child Protection Act, maintaining a central role for welfare approach responses. However, mounting criticisms of the Belgian system over recent decades, among other reasons, have led to the formal introduction of justice approach and criminal law components.[37] For example, critics had claimed that supposedly non-punitive care, custodial, prevention, and educational measures concealed effectively punitive responses without procedural guarantees.[38]

The former *situación irregular* doctrine in Latin America offers the best illustration of the potential problems and abuses of the welfare approach in practice. In fact, the defining phenomenon in Latin American juvenile justice is the predominance of *situación irregular* through the 20th century and ongoing efforts to fully implement national laws that have replaced it. Argentina's 1919 Agote Law – abrogated only in late 2005 – was the first and model law of *situación irregular*; virtually every other Latin American country adopted the doctrine within 20 years of its passing. In essence, *situación irregular* referred to the broad and vague category of children in an "irregular situation" who, due to this generic status, needed state intervention and assistance. It was a direct application and outgrowth of the welfare approach *in extremis*: the state should step in as necessary to assist – through theoretically welfare care and protection measures – all *situación irregular* children. In practice, judges typically ordered children to indeterminate sentences in juvenile correctional institutions, with few rights, safeguards, or treatment; paradoxically, state protection of children's fundamental interests served as the ultimate justification for the entire scheme. *Situación irregular* assumed children's lack of competence to commit crimes, and accordingly, criminal responsibility and the MACR were technically postponed until the beginning of adult criminal court jurisdiction. The

[37] See, inter alia, Delens-Ravier, Isabelle, "La justice juvénile en Belgique: nouvelles pratiques et évolution d'un modèle," presented at the II International Conference, International Juvenile Justice Observatory, *Juvenile Justice in Europe: A framework for integration*, Brussels, 24-25 October 2006.

[38] Walgrave, Lode, "Restorative Juvenile Justice: A Way to Restore Justice in Western European Systems?," in Asquith, Stewart, ed., *Children and Young People in Conflict with the Law*, London, Jessica Kingsley Publishers, 1996.

cornerstone of wide discretion to meet children's needs – historically the path to discrimination by socio-economic status and race – enabled much of the burden of *situación irregular* to fall upon children from lower socio-economic backgrounds.[39] Beyond Latin America, Chapter 6 highlights modern trends in substantially punitive procedures and treatment for children younger than MACRs, which are frequently related to the welfare approach and its historic weaknesses.

Criminal Responsibility and the Justice Approach

Regardless of recent trends in Belgium, Latin America, and other countries, support for the welfare approach quietly eroded in the mid-1900s, and the model's pre-eminence ended with three United States Supreme Court decisions between 1966 and 1970. The Supreme Court's decisions forced a pivotal reassessment of welfare-based procedures in juvenile justice, and prompted legal reform around the world that surged toward the justice approach and placed criminal responsibility in the center of juvenile justice practice. As noted earlier, analysis in terms of the welfare-justice continuum is an intentional simplification for the sake of brevity – as is the attention given to influential factors and developments originating in the United States – yet these remain predominant themes in juvenile justice history worldwide.

Over time, particularly with rapidly changing post-World War II social conditions, larger disillusionment ate away at the bases of the welfare approach.[40] Positivism in general faced criticisms for its lack of clarity between two unstated yet contradicting aims: did rehabilitation truly seek to benefit offenders, or to isolate and remove them to protect society?[41] Across the political spectrum, complaints were lobbed against the juvenile justice system: unwarranted social control, excessive discretion leading to unequal treatment among offenders, and lack of explicit

[39] Feld, Barry C., *Bad Kids: Race and the Transformation of the Juvenile Court*, New York, Oxford University Press, 1999.
[40] Tanenhaus, David S., "Book Review: Christopher P. Manfredi, 'The Supreme Court and Juvenile Justice'," 17 *Law and History Review* 415, 1999.
[41] Von Hirsch, Andrew, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, Manchester, Manchester University Press, 1986.

punishments.[42] At the same time, almost any intervention came to be easily labelled as rehabilitative, and by the early 1970s social science research findings showed treatment to have little effect – contributing to a wider loss in the belief that individuals could be molded as such. As these elements coalesced for the first time into a compelling broad-based critique of welfare-oriented juvenile justice, historical developments also led to wider jurisprudence in the 1960s United States Supreme Court that strongly advanced due process rights. Largely following the spirit and legal reasoning of key 1950s civil rights decisions, the Supreme Court further developed its interpretations of civil rights, individual liberties, limitations on state authority in criminal justice, and criminal defendants' rights.[43]

The growing debate came to a head in *Kent v. United States* (1966), *In re Gault* (1967), and *In re Winship* (1970), wherein the United States Supreme Court brusquely rejected many assumptions of the welfare model and "formally placed the concept of criminal culpability at the heart of the juvenile proceedings."[44] In essence, the Supreme Court decided that the supposedly rehabilitative and non-punitive goals of juvenile justice proceedings did not justify the absence of fair treatment and due process protections for children. The court examined the reality of the pervasive deprivation of liberty of children in juvenile justice, and the non-therapeutic conditions and outcomes that resulted, and found that any proceeding that could lead to such dispositions required the minimum guarantees for a fair trial. Welfare approach rhetoric and its *parens patriae* rationale did not justify such treatment, and certainly provided no foundation for claims that the state acted as a benevolent parent. The court found little practical meaning and no constitutional consequence in the difference among the various euphemisms for institutions – industrial school, receiving home, etc. – in which children were effectively deprived of their liberty.[45] In these three key decisions, the Supreme Court found that children

[42] Feld, *supra* note 23.
[43] *Ibid*.
[44] *Kent v. United States*, 383 U.S. 541, 1966; *In re Gault*, 387 U.S. 1, 1967; *In re Winship*, 397 U.S. 358, 1970; and Walkover, *supra* note 29, at 521.
[45] *In re Gault*, *ibid*.

in juvenile delinquency trials are constitutionally entitled to numerous protections, including the following: adequate written notice to the child and parents or guardian of the charges; right to counsel, notice of that right, and the provision of free counsel if needed; the right to confront and cross-examine witnesses under sworn testimony; the privilege against self-incrimination; and the safeguard of proof beyond a reasonable doubt. However, the Supreme Court declined, in these and other related decisions, to order for children all of the protections of United States adult criminal law, such as the right to trial by jury. All the same, judges' vast discretion was limited in welfare approach juvenile justice in the United States, and open-ended treatment orders were curtailed and eliminated.

Many of the criticisms that contributed to the welfare approach's fall from grace also played a role in the general decline of rehabilitation, indeterminate sentencing, and positivism, as well as in shifting debates in criminal law theory. The consensus view, by the early 1970s, supported the restoration of classic criminal law principles; in particular, desert or just deserts theory became the predominant paradigm.[46] Borrowing from moral philosophy, this theory held in basic terms that people should only face punishment proportionate to the acts they commit, and to the extent that they are responsible for them. The core considerations became the actual offenses committed; proof of the offenses committed; procedural safeguards to ensure fairness in such proof; determinate sentences commensurate to the gravity of the acts committed; and an overall central role for equity and justice.[47] However, as discussed further below, the fortification of due process safeguards would plant the seed of justification for increasingly punitive penalties and retribution.[48]

With the Supreme Court's historic decisions and the ascendancy of just deserts theory, new legislation around the world provided due process rights for children: a giant step from the welfare approach towards the justice approach in juvenile justice. In harmony with those broader changes, the justice approach's foundations are

[46] Feld, *supra* note 23.
[47] Von Hirsch, *supra* note 41.
[48] Feld, *supra* note 23.

accountability, due process, and punishment, and juvenile proceedings that are more directly subsidiary to the criminal justice system than the child protection and welfare system. Courts typically hold formal and adversarial legal proceedings, often with prosecution and defense lawyers, where the charges against the defendant must be proven. Offenders, once proven guilty, are held personally accountable for their actions. As such, there is much less focus on treatment and protection, while penal intervention becomes quite important. This feature was particularly true for retributive tendencies that developed in the 1980s and 1990s in the United States, Canada, and then in Europe.

As noted, desert theory and the justice approach place individual criminal responsibility at the heart of all considerations, thus a brief examination of the concept of criminal responsibility in this context is helpful. Relevant legal systems borrow the notion of moral agents – in simple terms, those who may be held morally responsible for the actions that they have performed – and limit criminal responsibility to those meeting an adapted definition of it. Essentially, these systems view human action as governed by reason, assuming that individuals are capable of some minimal level of rationality and that they act accordingly.[49] Likewise, this outlook finds that people have some appropriate degree of ownership, causation, and control of their choices and actions; that is, the supposition is that people act with free will.[50] It should be noted, as detailed further below, that these assumptions are abandoned for children younger than a given MACR; the conclusive presumption is that such children do not possess these various capacities to a sufficient degree, such that they may never bear criminal responsibility. For all others, the law holds people responsible for their autonomous choices and actions if they "had, when they acted, the normal capacities, physical and mental, for doing what the law requires and

[49] Morse, Stephen J., "Immaturity and Irresponsibility," 88 *Journal of Criminal Law and Criminology* 15, 1997.
[50] O'Connor, Timothy, "Free Will," in Zalta, Edward N., ed., *Stanford Encyclopedia of Philosophy*, Stanford, Stanford University Center for the Study of Language and Information, 2002, http://plato.stanford.edu/entries/freewill.

abstaining from what it forbids, and a fair opportunity to exercise these capacities."[51] A person who does not act "through a meaningful exercise of free will" is not responsible for his or her actions and cannot appropriately bear criminal liability for them.[52] Indeed, it is morally wrong to hold such a person criminally responsible, on the basis of arguments that "'he could not have helped it' or 'he could not have done otherwise' or 'he had no real choice'."[53]

Up to this point, the characteristics of criminal responsibility do broadly coincide with the boundaries of moral agency and responsibility, although as discussed further below they are not ultimately coterminous. Even where the two overlap, the boundaries for what constitutes responsibility in general do not enjoy universal agreement. There is a vigorous debate, reflected both in various academic branches and in diverse legal standards across jurisdictions, on questions such as which physical and mental capacities are necessary, what levels are considered normal per se, and how to define the fair opportunity to exercise them. In the present context, however, the direct link to underlying conceptions of rights has special importance. As suggested above, only those who bear the capacity for autonomy and choice – or to self-determination – may hold and exercise certain liberty rights. Some minimum set of competencies is necessary for such rights, and where those competencies exist, both liberty rights and their correlative responsibilities accrue. The justified claims of liberty rights – to respect and protect a competent individual's choices – necessarily assign responsibility for choices and actions back to the individual who makes them. The similarity here to both moral and criminal responsibility is no accident. Rough, related parallels exist between the capacities necessary for liberty rights and those necessary for moral agency; indeed, when the respective threshold level of capacities is met, responsibility, moral responsibility, and even criminal responsibility may generally follow. Thus, among other purposes,

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[51] Hart, H.L.A., *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford, Clarendon Press, 1968, at 152.
[52] Robinson, Paul H., "Criminal Law Defenses: A Systematic Analysis," 82 *Columbia Law Review* 199, 1982, at 221.
[53] Hart, *supra* note 51.

when a person is held criminally responsible for his or her actions, society conveys its moral reprobation of those actions through the mechanisms of criminal justice – it operates on the premise that the person is indeed morally responsible for those actions.

Legal systems under the justice approach thus face the task of assessing children's normative moral competencies and assigning one age level as the onset of children's potential criminal responsibility. As discussed earlier in this chapter, this designation is an instance of setting age limits according to notions of competency and childhood. In addition, as mentioned above, children younger than the determined age are assumed not to have the necessary attributes to bear criminal responsibility, and cannot be held penally responsible for their actions. Children at and above the specified age – as a general class and as a question of legal status – are assumed to have the necessary attributes to act intentionally, and may bear criminal responsibility for their acts. Again, this justice approach designation means that all children are assumed to have met by the specified age the minimum requirements for both moral and criminal responsibility. In any given case regarding a child at or above this minimum age, there exists the possibility for criminal responsibility. Nonetheless, a court of law must still determine whether or not an individual child has committed a given offense, and whether or not he or she committed that act intentionally, before criminal responsibility and guilt are confirmed. On the other hand, subsequent to both the onset of potential criminal responsibility by age, and the determination of guilt in individual cases, there is the additional question of sentencing. Here, age, maturity, and other related factors may be re-examined, on an individual basis, as mitigating factors for the degree of criminal liability; the severity of the criminal sanctions imposed may be attenuated accordingly. While these questions are generally beyond the scope of this study, they include further differences of opinion on the appropriate bases for attributing criminal liability.

The central features and advantages of the justice approach become even clearer in this light. Not only is there a theoretical premise that individuals act freely and autonomously, there is a fundamental respect and concern for liberty, autonomy,

and the individual, which also tends to support human rights and children's rights. Government intrusion into the lives of individuals, and social control through criminal justice mechanisms, is only permitted insofar as it is a proportional response to the free choices of individuals. As such, people may act freely in their everyday lives without fear of government intervention, up until the point that they decide to violate the criminal law. Furthermore, when people do not have the ability or the chance to act freely, penal sanctions may not apply; these can only be levied against those people who can legitimately be held accountable for their actions and who "deserve" some response to their choices. Indeed, some commentators argue that where peoples' responsible acts are not the basis for state intervention, there may be no meaningful limit to authorities' discretion at all.[54] As noted above, it would indeed be morally repugnant to penalize a person who did not sufficiently understand, or could not have helped doing, what he or she did; as such, criminal responsibility is essential for the moral legitimacy of the criminal or juvenile justice system. At its core, the burden of potential criminal responsibility, and the submission to a criminal procedure, triggers the guarantees of certain rights in part to ensure such legitimacy.

In this sense, the MACR serves as the basis for children's rights in criminal proceedings; as with adults, children's potential responsibility limits the ability of government to intervene in their lives. Where children's responsibility is deemed irrelevant, or where children are assumed to be free from it, government discretion to act in their lives expands enormously. Governments directly assert, with or without legitimate justification, their authority over children – not on the basis of things that children have done, but on the basis of children's need for protection and state assistance. It is true that the minimum rights and guarantees under the CRC – including due process rights and other international standards examined in Chapter 2 – apply to all relevant children at all times. But in the realities of criminal law, without a specific MACR, there is no platform to ensure that responsibility does exist

[54] Kadish, Sanford H., "The Decline of Innocence," 26 *Cambridge Law Journal* 273, 1968.

and that individual rights must follow. In the absence of responsibility, there may be little practical counterweight to anchor down children's rights.

More recent trends in Latin American juvenile justice, to completely replace *situación irregular* with stronger foundations for children's rights, illustrate these points. Indeed, the *situación irregular* era began its long demise with the CRC and the subsequent passing of Brazil's 1990 *Estatuto da Criança e do Adolescente*. Since then, all Latin American countries have amended their legislation into alignment with international juvenile justice standards. While these standards – and not the justice approach per se – represent the new ideal in Latin American juvenile justice, many of the most salient changes are indeed drawn from the justice approach. Thus, children become subjects of individual rights under law who enjoy procedural guarantees, including due process rights. Depending on respective national laws, the MACR is roughly 12-14 years of age; younger than the given age, children may only be subject to child welfare care and protection measures, but no longer on the discretionary basis of *situación irregular*, and they enjoy certain procedural and substantive guarantees. Adolescents, beginning at the MACR, are assumed competent enough to bear criminal responsibility in juvenile justice courts, but state intervention into their lives is only justified by, and is limited in proportion to, penal offenses. It should be noted, however, that reform away from *situación irregular* has more often than not been restrained by political and practical challenges for full implementation.

Nonetheless, the justice approach is not free from criticism either. For current purposes the central critique is that the theoretical reliance upon free will, and the working assumption that people act on the basis of their own free will, may be based more on a myth than reality. Most philosophers accept that it is easy to imagine examples of choices that are not free, and that the very concept of free will remains incoherent or inconsistent at least on some level.[55] While fundamental respect for individuals and their choices may remain an important value, it may be utterly simplistic to claim that individuals decide and act strictly based on their own

[55] O'Connor, *supra* note 50.

deliberations and decisions. Such claims ignore the vast array of factors that may limit the choices available to individuals and that predispose the decisions they will ultimately make. As the argument goes, law cannot efficiently or fairly take account of such broad – and perhaps innumerable – influences in its mechanisms:

> The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism or free will. . . . Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.[56]

Even among scholars who support only the most limited excuses from criminal responsibility, there is an admission that "the law rests, of necessity, on a convenient fiction, that of free will, and could not operate if it did not embrace that myth."[57]

How the criminal law embraces such a myth moves quickly to the differences between moral and criminal responsibility. In effect, the legal system imposes its own mechanisms and processes of determining its own criminal responsibility threshold, as it effectively "truncates the inquiry into moral responsibility, deforming the generally accepted concept of moral responsibility itself."[58] For example, in transcribing one pillar of moral responsibility, "the common law employs a very low cognitive threshold - knowledge of 'right from wrong' - to establish criminal guilt" – a standard which "entails only minimally rational understanding."[59] While a moral inquiry might seek to consider whatever circumstances bear relevance and provide context for a given act, classic criminal law actively eliminates such context.[60] A broader time frame, predominant socio-economic and cultural realities, and a wider

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[56] Packer, Herbert L., *The Limits of the Criminal Sanction*, Stanford, Stanford University Press, 1968, at 74-75.
[57] Wilson, James Q., *Moral Judgment: Does the Abuse Excuse Threaten Our Legal System?*, New York, BasicBooks, 1997, at 40.
[58] Wright, R. George, "The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived," 43 *Catholic University Law Review* 459, 1994, at 463.
[59] Feld, Barry C., "Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy," 88 *Journal of Criminal Law and Criminology* 68, at 98.
[60] Armour, Jody, "Just Deserts: Narrative, Perspective, Choice, and Blame," 57 *University of Pittsburgh Law Review* 525, 1996.

perspective on the individual at hand are all rejected from consideration. The law cannot let itself be bogged down by more subjective, psychological, and difficult-to-prove considerations; excusing conditions from criminal responsibility are thus limited, and attention is focused on the objective and the easy-to-prove.[61] It simplifies the concepts of moral responsibility and free will into more easily manageable terms for courts of law.

These observations are particularly true with respect to children.[62] In the justice approach, criminal law conceives of and only seeks or even admits knowledge about children in very limited ways: proof of alleged acts and their nature, and selective stories about children's pasts to determine culpability. Where the criminal law appears to broaden its inquiry, for example in considering medical and socio-psychological science perspectives, it may be just as much a pro forma exercise. This exploits the appearance of broader authority and legitimacy to satisfy the needs of its own logic.[63] In contrast, children's moral competency – and thus their moral agency and responsibility – develops dynamically over time via relationships with the people that surround them. Children's peers, and the environments in which children live, tend to play a crucial role in their decision-making.[64] While these factors are important in understanding to what extent children make decisions and act freely as individuals – and thus to what extent they are morally responsible – a strict justice approach may downplay or ignore them entirely.

Reliance upon a myth assumption is, to say the least, vastly problematic for the justice approach on various levels. Fundamentally, it subverts the approach's centerpiece – respect for the autonomy and choices of individuals:

> We do not enhance the dignity of those deprived of the capacity for morally responsible choice by simply pretending, through the judicial

[61] Hart, *supra* note 51.
[62] King, Michael, and Christine Piper, *How the Law Thinks about Children*, Aldershot (England), Gower, 1990.
[63] King, Michael, *A Better World for Children? Explorations in Morality and Authority*, London, Routledge, 1997.
[64] Fagan, Jeffrey, "Context and Culpability in Adolescent Crime," 6 *Virginia Journal of Social Policy and the Law* 507, 1999.

> system, that they do bear such responsibility. It is essentially backwards to imagine that a judicial system promotes dignity by falsely ascribing moral responsibility to any group of persons.[65]

A just legal system – as defined in the same rhetoric that led to and sustains the justice approach – requires that people be truly free if they are to be held responsible, and refuses to accept "that an essential presupposition of our legal and moral system is true when it is not."[66]

In practical terms, criminal processes – through their analogy of legal and moral accountability, arguably based upon a myth of free will and selective in their interpretation of what free will means – ultimately justify social control and punishment.[67] In its extreme, a sort of institutional bait-and-switch transpires. The law proclaims that only the morally responsible will be held responsible and punished, and criminal conviction and punishment indeed bear heavy moral condemnation, yet a diluted test for criminal responsibility opens the back door to punishment. In this way, criminal law consistently assigns moral responsibility to and punishes the group of the "most deprived" – who may bear no responsibility for the greater circumstances that led to their crimes – while it refuses to recognize the contradictions of its moral accounting in doing so.[68] In the justice approach, it is insisted that the government only intervene via criminal law against responsible agents; however, the state simultaneously defines in the law who is a responsible agent, and exercises social control over that same group. Given the state's stakes in maintaining social order, its own criminal courts are a poor forum to make proper judgments about moral responsibility, and indeed, they make a weak attempt to exempt from criminal responsibility those who are not morally blameworthy.[69] The protection from government intrusion in individuals' lives is greatly compromised, with truly the same murky transparency of a bait-and-switch ploy. In this light, it

[65] Wright, *supra* note 58, at 501.
[66] Moore, Michael S., "Causation and the Excuses," 73 *California Law Review* 1091, 1985, at 1123.
[67] Arenella, Peter, "Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability," 39 *UCLA Law Review* 1511, 1992.
[68] Wright, *supra* note 58.
[69] Arenella, *supra* note 67.

would seem that the aims of social control might not be fundamentally compatible with the determination of moral responsibility.

These legal schemes enable the public-at-large to maintain its faith in the individual acting freely, to focus almost exclusively on the role of individuals in crime, and to tell itself and believe that the punished are morally responsible for their actions and receive only what they deserve.[70] Nowhere is there space for a candid appraisal of broader factors, beyond individuals' actions, that may limit free choice and drive crime trends:

> strategies of social control locate the 'causes' of delinquency in the individual offender, rather than in criminogenic social structures, communities, or political economy. . . . [They ignore] the broader social structural factors that 'cause' delinquency and crime and thereby ensure their continued replication. . . . As long as . . . [some] youths grow up in single-parent households, live in greater poverty and social isolation, drop out of mediocre urban schools at higher rates, remain structurally unemployed and unemployable, and realistically have limited future prospects, they face greater risk of criminality and higher probabilities of incarceration when juvenile courts' individualized justice focuses on their personal circumstances and real needs. While young people certainly can and do make 'choices' about their behavior, social structural conditions and economic opportunities mediate the quality of their choices. Ultimately, juvenile and criminal justice policies can do very little to alter the social structural forces that impel some youths to 'choose' crime and others to 'choose' college.[71]

Once such broader factors are considered, it becomes clear that "the problem is that choice can be so limited by circumstances as to be more illusory than real."[72] It also becomes clearer that the core of the problem is general societal problems, for

[70] *Ibid*.
[71] Feld, *supra* note 39, at 285.
[72] Armour, *supra* note 60, at 546.

which there is a burden of collective responsibility: "Providing for child welfare is a social responsibility, not a judicial one. Society collectively bears responsibility to provide for the welfare of children by supporting families, communities, schools, and social institutions that nurture all young people."[73] Thus, the criminal law serves as an anodyne for the collective social conscience: if the criminal is morally responsible, then the public is not, and any underlying collective moral responsibility remains out of sight. It is convenient for the public to ignore the full reality, divert all attention to individuals as scapegoats, and avoid any collective guilt.[74] As the criminal law facilitates this convenience, it accentuates the blaming and moral condemnation of children who commit crimes:

> What the law has done is to choose from among the characteristics of certain children, not their lack of a decent education (through no fault of their own), or their location in dilapidated slum housing (through no fault of their own), or their unattended to health problems (through no fault of their own), *etc*., but the instance of conduct in which they violated the penal law. So long as the legal system thus isolates and highlights that aspect of the child which rationally calls for the least sympathy, and ignores the conditions of his life that would evoke a desire to help, the law simply serves to reinforce the severity of public attitudes.[75]

True justice for children – moral and not strictly legal justice – "must surely be based as much on a concern with the effects of social and economic inequalities and injustice as on the rules and standards set by criminal law."[76] As mentioned in the previous section, early juvenile court founders also focused excessively on the problems of individual children and their families – rather than appraising or addressing the underlying structural problems at hand – yet the welfare approach

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[73] Feld, *supra* note 39, at 286; and Tulkens, *supra* note 34.
[74] Armour, *supra* note 60; and Tulkens, *ibid*.
[75] Fox, Sanford J., "Responsibility in the Juvenile Court," 11 *William and Mary Law Review* 659, 1969-1970, at 674.
[76] Asquith, *supra* note 9, at 114.

omits any moral condemnation whereas the justice approach packs one of its most powerful punches in that very condemnation.

The stakes are thus quite high in the meaning and uses of criminal and moral responsibility, so it is no surprise that they – similar to the meaning and uses of childhood – are matters of complex and competing social construction. In broader social discourse, the confines of what responsibility means and who bears it are constantly being negotiated, redefined, and reconstructed in any given culture and at any given historical moment. As suggested previously, moral philosophers continue a varied and lively debate on the meaning of moral agency and responsibility, which is further reflected in the equally vigorous debate among criminal law theorists. In the criminal law alone, there is a need to mediate the "constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man."[77] Political power and ideological struggle loom large in such tensions and in how responsibility is ultimately assigned:

> Doubtless, ascriptions of responsibility are matters of politics. Whether a person or group is said to bear moral responsibility for an event is subject to bargaining, which undoubtedly reflects differences in group power.[78]

It is in one sense a power struggle where the definer of responsibility sees social control – and control over other groups – legitimated by government acceptance and enforcement. The politics inherent to such discourses also feed back into the collective conscience and identity of groups and society; responsibility and blame are less likely to be attributed where the dominant group can identify itself with the individual at hand.[79] Where responsibility can be assigned, social control can be extended via the criminal law, attention and moral blame can be diverted, and broader societal responsibility is ignored. Furthermore, the ways in which different

[77] Boldt, Richard C., "The Construction of Responsibility in the Criminal Law," 140 *University of Pennsylvania Law Review* 2245, 1992, at 2287.
[78] Wright, *supra* note 58, at 463.
[79] Armour, Jody David, "Bring the Noise," 40 *Boston College Law Review* 733, 1999.

groups are likely to interpret responsibility – the recurring narratives of what responsibility means to them, and the selective and interpretive constructions of facts – is directly related to the group's ideology of rights.[80] Once again, divergent notions fight for consideration: what rights mean, who may be a rights-holder, how moral and legal status for rights is ascribed, and how this should play out for children. Indeed, given the complexity of this never-ending social construction of responsibility, it would be surprising if a strictly moral interpretation of responsibility were to prevail:

> Once we see that existing views of human responsibility are merely constructs that are alternatively adopted and discarded in successive situations, we will understand that they are not necessary concomitants of the concepts of moral responsibility and desert.[81]

As described above, juvenile justice systems usually designate one age level as the starting point for children's potential criminal responsibility – the MACR. Theoretically, in the justice approach this is based upon the assumption that children generally meet the minimum standards for moral agency and responsibility by that age. In reality, though, the calculations for determining that age are anything but straightforward. The hypothetical guideposts – moral agency and responsibility – are subjected to powerful forces of social construction, and may have little relation in the end to criminal law's standards and processes for criminal responsibility, which may rest upon the myth assumptions of free will anyway. When trying to compare children to this weakened and volatile standard – as with all assessments of children and their competencies – there awaits another Pandora's box of dynamic and competing priorities and concepts. Lawmakers ultimately encapsulate in one age, at one point in time, in a specific socio-political-cultural context, some batch of ideas about children's capabilities and society's expectations about children's appropriate role – as related in some manner to an equally context-specific predominant notion of responsibility. Upon that age, children may potentially bear criminal responsibility

[80] Balkin, J.M., "The Rhetoric of Responsibility," 76 *Virginia Law Review* 197, 1990.
[81] *Ibid*., at 201.

for their actions, and the state can first legitimately levy – in legal terms – criminal sanctions against them. Of course, among other pitfalls mentioned above, it would still violate justice approach principles and remain morally problematic – and undermine the moral legitimacy and authority of a justice system – to set that age below the level where children can be expected to have the capacity for responsibility.

The calculus for designating the MACR may thus vary in extremes among countries, or even in the same country at different points in time. Chapter 4 outlines some of the major historical influences at hand, while Chapter 5 examines modern trends in MACR changes including the wide impact of the CRC reporting process. Chapter 5 also surveys how legal reform following the logic of the justice approach often embodies the conflicts described above, and suggests that the justice approach's increasing predominance places such conflicts in a central and visible role in juvenile justice and MACR debates. Many countries have assimilated the paradigm that delinquency is strictly a matter of individual children's decisions to offend, and have followed that paradigm's closed loop. Selective accounts of juvenile delinquency are sensationalized, crucial factors are edited out, the public's moral outrage is piqued, and its conscience is relieved. Discussions about children's moral responsibility are repeatedly consumed by retributive rhetoric, without reference to underlying socio-economic conditions or society's role in meeting basic obligations towards children.

Conclusion

Societies' understandings and images about childhood do not arise because of some innate nature of children themselves. Instead, childhood is a constructed notion that is hotly contested and subject to constant revision of its meaning in any given era or place. It may bear little relation to biological facts. Predominant conceptions of childhood in large part determine questions of rights, legal status, parental authority, and governments' power to intervene – including which legal rights children may or may not enjoy at all. In particular, children's competence – or how adults interpret

and depict children's competence – proves to be an exceptionally political question that determines rights and policies for children.

Juvenile justice history reflects the influence of divergent portrayals of children's competence. The origins of juvenile justice along the welfare approach are based upon the belief in children's incompetence and lack of criminal responsibility. This foundation lends itself to broad state authority to intervene in children's lives, which in reality has often proven disastrous for children. Partly in response to such problems, juvenile justice shifted towards the justice approach, thus inserting a construction of childhood based around competence and criminal responsibility. Here the MACR controversially symbolizes the tipping point among competing notions about childhood; children's competencies; liberty and protection rights; and the continuum from welfare to justice approaches. Yet the notion of responsibility in the justice approach – open to further bargaining over its own meaning – often serves as a trap door rather than the safeguard for which it is intended. Instead of ensuring freedom from state intrusion, its meaning can become distorted and may legitimize social control over children whose true responsibility is questionable. The effects of moral condemnation and punishment follow even where underlying moral responsibility is missing. At the cost of individual liberty, moral legitimacy, and justice, the public's conscience is relieved and authorities' effective social control is consolidated. Paradoxically, the welfare approach shares some of the same troublesome consequences. The two approaches may appeal to different conceptions of rights for children, but neither communicates a clear role for society-at-large, and both bring the weight of problems down upon individual children and families. Such inherent flaws leave both the justice approach and the welfare approach as problematic models.

CHAPTER 2 INTERNATIONAL CHILDREN'S RIGHTS AND JUVENILE JUSTICE STANDARDS, AND THE MEDIATION OF WELFARE-JUSTICE TENSIONS

People around the world have come to know and accept the notion of human rights as a special class of rights or justified claims. Indeed, a large part of the broad appeal of human rights surely rests in their underlying justification. In essence, human rights are founded upon the argument that all people, due to their very nature as human beings, merit certain moral considerations. According to this conception, the moral force of human rights means that no society or government should deny them to people.[1] In other words, human rights can be seen as a category of justified, moral claims – with the frequent addition of the force of law, including international human rights law, to validate and enforce them. Within this broad class of human rights, children's rights refer to the justified, moral claims to which all children are entitled both as people and because of their special status, regardless of where they are or under what government they live. From this point of departure, Chapter 2 devotes its attention to international children's rights and children's rights law as a subset of human rights, and examines how children's rights apply in the field of juvenile justice and impact the welfare-justice continuum. In particular, close attention is paid to how the conceptual framework of international children's rights can address the systemic flaws in both the welfare and justice approaches.

International Human Rights and Children's Rights, and the United Nations Convention on the Rights of the Child

The scope and depth of international human rights law – which in relevant jurisdictions imparts the force of law to human rights' moral claims – have evolved

[1] Sidorsky, David, "Contemporary Reinterpretations of the Concept of Human Rights," in Sidorsky, David, ed., *Essays on Human Rights*, 1979, at 89, reprinted in Steiner, Henry J., and Philip Alston, eds., *International Human Rights in Context: Law, Politics, Morals: Texts and Materials*, 2nd ed., Oxford, Oxford University Press, 2000, at 327.

relatively quickly from the basic concept of human rights.[2] Leaving aside both history and antecedents for current purposes, the 1948 Universal Declaration of Human Rights – adopted unanimously by the United Nations General Assembly – was a milestone event in bringing international prominence and recognition to human rights, noting in Article 1 that "All human beings are born free and equal in dignity and rights."[3] Although the Declaration is not itself a treaty, and thus not legally binding, it was essentially codified with the adoption in 1966 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These two International Covenants, plus seven other international conventions, constitute the core international human rights treaties and collectively provide a holistic legal framework for the promotion and protection of human rights. Among these other conventions, the following treaties in force bring legal obligations for countries that have acceded to or ratified them:

- the 1965 International Convention on the Elimination of All Forms of Racial Discrimination
- the 1979 Convention on the Elimination of All Forms of Discrimination against Women
- the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- the 1989 Convention on the Rights of the Child, and
- the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[4]

Each of these has its own expert committee to monitor implementation of treaty provisions by respective States Parties. At the same time, human rights treaties should be thought of as a collective body. The underlying principle is that respective

[2] Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 30: Human Rights: The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, Geneva, n.d.
[3] Resolution 217 A (III), 10 December 1948.
[4] The United Nations General Assembly adopted in December 2006 two core treaties that have not yet entered into force: the International Convention for the Protection of All Persons from Enforced Disappearance and the Convention on the Rights of Persons with Disabilities.

human rights are only fully realized with the enjoyment of all human rights, and accordingly, human rights and the treaties that enunciate them are interdependent, interrelated, and mutually reinforcing.

In this broader umbrella of key international human rights law, the 1989 Convention on the Rights of the Child (CRC) is an integral and historic component, and indeed, it is the cornerstone for children's rights in the world.[5] The CRC drew upon its own specific antecedents, such as the 1924 League of Nations Declaration of the Rights of the Child[6] and the 1959 United Nations Declaration of the Rights of the Child.[7] In light of these declarations and the special provisions for children in existing treaties, momentum grew for a comprehensive and legally binding statement of children's rights in international law. In fact, the CRC would become the first international treaty to address holistically all the human rights of one specific group of people, focusing in detail on the particular circumstances of that group. After roughly a decade of drafting, the United Nations General Assembly unanimously adopted the Convention text in 1989, and within one year, the Convention enjoyed enough ratifications to enter into legal force.[8] By October 2006, there were 193 States Parties to the CRC[9] – "the most widely ratified treaty in history" – with Somalia and the United States as the only steps remaining before full worldwide ratification.[10]

The CRC contains a total of 54 Articles; of these, the four summarized below have been designated "general principles" of the Convention and serve as a basic starting point to the CRC's content:

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[5] Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 10: The Rights of the Child*, Geneva, n.d.
[6] Adopted by the General Assembly, Geneva, 26 September 1924.
[7] Adopted by the United Nations General Assembly, Resolution 1386(XIV), 20 November 1959.
[8] Adopted by the United Nations General Assembly, Resolution 44/25, 20 November 1989; entered into force 2 September 1990.
[9] Office of the United Nations High Commissioner for Human Rights, *Ratifications and Reservations,* 13 July 2007, www.ohchr.org/english/countries/ratification. Cook Islands, the Holy See, and Niue are classified as States Parties even though they are not United Nations Member States.
[10] Alston, Philip, and John Tobin, *Laying the Foundations for Children's Rights: An Independent Study of Some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child*, Florence, UNICEF Innocenti Research Centre, 2005, at ix.

- Article 2: Non-Discrimination: the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind.
- Article 3 (1): Best Interests of the Child: the best interests of the child as a primary consideration in all actions concerning children.
- Article 6: Child's Right to Life and Maximum Survival and Development: the child's inherent right to life and States Parties' obligation to ensure to the maximum extent possible the survival and development of the child.
- Article 12: Respect for the Views of the Child: the child's right to express his or her views freely in "all matters affecting the child," those views being given due weight.[11]

Even these brief descriptions of the four "general principles" make the heart of the CRC understandable with a certain immediacy. Article 2 essentially prohibits discrimination of any kind against or among children, while at the same time obligating special measures as may be necessary to protect the rights of certain groups of children. Article 3(1) creates the broad requirement, including the need for systematic appraisal and proactive measures, to make the best interests of the child a primary consideration in all relevant actions. Article 6 underscores children's right to life, survival, and development, with development implying the broadest meaning of development at the highest possible levels for all children. Finally, Article 12 explicitly gives children an active role and voice in all matters that affect them and their rights. In the application of these principles and the entire CRC, it should be noted that under Article 1, the term "children" refers to "every human being below the age of eighteen years," except when majority is attained earlier under applicable national law.

[11] See Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003. See Annex 1 for the full text of the CRC.

As suggested above, a fundamental concept in human rights overall is that human rights are indivisible and interrelated, with equal importance given to each right. Consequently, these CRC "general principles" should not be construed as a privileged set of children's rights that supersede other rights, but rather as those broad CRC principles that apply in all contexts (e.g., not solely in health care, adoption, or juvenile justice) and that are particularly relevant in guiding overall CRC implementation. In any given context, all the "general principles" plus all other relevant rights must be seen as indivisible and interrelated. Children's rights are not a menu à la carte; all relevant rights must be balanced out. For example, as seen below in this chapter, discussions on juvenile justice bring to the forefront the delicate balancing between Article 3(1) – the best interests of the child essentially as interpreted by adults – and Article 12 – the views of children as expressed by children themselves. In addition, the very question of the minimum age of criminal responsibility (MACR) cannot be examined in isolation, but instead must be understood in terms of its practical implications for the rights of all children both younger and older than its limit.

Beyond the four "general principles" of the CRC, the remaining content-focused articles cover the full range of protection rights and liberty rights for children. The CRC includes a detailed accounting of the special protection measures guaranteed to children due to their status and circumstances. For example, the CRC addresses children's rights in the context of name and identity (Arts. 7 and 8); separation from parents (Art. 9); protection from all forms of violence (Art. 19); adoption (Art. 21); disabilities (Art. 23); economic exploitation and child labor (Art. 32); and sexual exploitation (Art. 34). Traditional civil, political, economic, social, and cultural rights are also carefully elaborated for children. Thus, inter alia, children's rights are solidified and/or reaffirmed in the area of freedom of expression (Art. 13); freedom of thought, conscience, and religion (Art. 14); freedom of association and peaceful assembly (Art. 15); privacy (Art. 16); access to appropriate information (Art. 17); health and health services (Art. 24); social security (Art. 26);

and leisure, play, and culture (Art. 31). Collectively, the CRC's articles enshrine children's fundamental rights in all areas of their lives.

However, the CRC is much more than just a collection or listing of rights. As noted above, each of the core international human rights treaties has a committee of experts to monitor its implementation in respective States Parties. In the case of the CRC, Articles 43-45 provide for the establishment and functioning of a Committee on the Rights of the Child "for the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention."[12] The Committee is currently composed of 18 independent experts, of high moral standing and recognized competence in children's rights, each of whom was elected for a term of four years by States Parties. In practical terms, the central work of the Committee on the Rights of the Child is to consider the reports that States Parties periodically submit, under the obligations of the CRC, on their progress in implementing the treaty. In three three-week sessions per year, the Committee convenes in Geneva to officially consider such reports, to dialogue with States Parties' representatives on these reports and their progress, and to offer an appraisal and recommendations on better implementing the CRC and children's rights. All relevant documents – including all States Parties' reports, the Committee's preliminary written questions on reports, States Parties' written replies to those questions, minutes of public meetings between the Committee and States Parties' representatives, and the Committee's Concluding Observations on respective States Parties' progress – are publicly available and readily accessible.[13]

The Committee undertakes a wide range of other activities to support, promote, and monitor CRC implementation. The CRC's success hinges upon effective implementation of its provisions at the national level, thus the Committee tends to focus its energy on providing both the broad guidance necessary for international cohesion on children's rights, while trying to stimulate regional, national, and local capacity to support children's rights priorities and policies. For

[12] Art. 43(1).
[13] See www2.ohchr.org/english/bodies/crc/index.htm.

example, the Committee periodically hosts General Discussion Days during its sessions in Geneva on topics of particular urgency or interest. It regularly issues General Comments to elucidate its interpretation of certain CRC provisions or to offer consideration and guidance on challenging issues for children's rights implementation.[14] In recent years, the Committee has coordinated Regional Follow-Up Workshops to address topics of relevance and importance for various States Parties in given geographical regions, and to offer detailed support and guidance in CRC implementation. The Committee also actively supports non-governmental organizations – which played an important and historic role in drafting the CRC text itself – by welcoming and closely considering their independent reports on States Parties' CRC implementation, by inviting them to meet with the Committee in private pre-session working group meetings, and by advocating for their participation at various levels.[15] Likewise, it collaborates closely with UNICEF and other United Nations agencies and bodies, as well as with other regional and international intergovernmental organizations (e.g., the Council of Europe), in undertaking pertinent initiatives. Finally, it should be noted that the CRC does not create any mandate for the Committee to accept or review individual complaints from or on behalf of children, although there is a broad debate underway to create such mechanisms. As discussed in the following section, some complaints may be submitted to other international human rights treaty monitoring bodies.

International Juvenile Justice Standards

Among the various provisions highlighted above, the CRC includes three different articles – Articles 37, 39, and 40 – that directly relate to the field of juvenile justice, making this a prominent area in the Convention. At the same time, it is important to recall that the entire CRC applies to all children at all times in States

[14] E.g., Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, CRC/C/GC/10, 25 April 2007.
[15] For access to all NGO Alternative Reports submitted to the Committee on the Rights of the Child, see the Child Rights Information Network at www.crin.org/docs/resources/treaties/crc.25/annex-vi-crin.asp.

Parties, thus detailed discussions of juvenile justice standards should not be understood as downplaying the importance of other rights. Children in conflict with the law and children deprived of their liberty are entitled to protection against all forms of discrimination, to respect for their views, to privacy, to health and health services, to education, and to all other rights of the CRC. Indeed, an array of related instruments – which collectively form international juvenile justice standards and which are discussed in this section – offer greater context-specific detail on how these and other rights should apply to all people under the age of 18 involved in juvenile justice systems.

The applicability of these rights to all children – all persons younger than 18 – is another specific point for clarification. CRC Article 1 defines children as all people below the age of 18 years, except when majority is attained earlier under applicable national law. Nonetheless, States Parties agree under Article 40(3) to promote the establishment of distinct juvenile justice systems that will apply to all children alleged as, accused of, or recognized as having infringed the penal law.[16] The Committee on the Rights of the Child has interpreted this to mean, and has consistently stated, that all international juvenile justice standards, and a distinct juvenile justice system, should apply for all people under 18 years of age in conflict with the law.[17] Likewise, the Human Rights Committee – the official monitoring body for the International Covenant on Civil and Political Rights (ICCPR) – has noted that even where a State Party sets a lower age of majority in national law, it "cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18."[18] More explicitly, it interpreted the ICCPR's provisions to mean that "all persons under the age of 18 should be treated as juveniles, at least in

[16] "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. . . ."
[17] Committee on the Rights of the Child, *supra* note 14; and Hodgkin, Rachel, and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, New York, UNICEF, 2002.
[18] Human Rights Committee, *General Comment No. 17: Rights of the child (Art. 24)*, 7 April 1989, par. 4.

matters relating to criminal justice."[19] Additionally, the American Convention on Human Rights, which is introduced more generally in Chapter 3, states in Article 5(5) that "[m]inors while subject to criminal proceedings shall be . . . brought before specialized tribunals." The Inter-American Commission on Human Rights has explained that "this article establishes the duty to create a special jurisdiction with competence to try crimes and offenses committed by persons under the age of 18, which shall be the only court competent to prosecute minors," and that "the prohibition against prosecuting children as adults" is "one of the principal rules of international law in the matter of children's rights."[20] Thus, international human rights bodies conclusively hold that juvenile justice laws and systems, and all other relevant children's rights, should apply to all persons younger than 18 who come into conflict with the law.

Recent developmental and neuroscience research, although conducted primarily in just one country, provides further support for this approach. Even though children by age 16 are generally comparable to adults in cognitive abilities, their psychosocial maturity – particularly in terms of judgment – continues to develop into early adulthood.[21] Likewise, closely affiliated brain regions and systems begin their final stages of maturation during adolescence and do not complete their development until early adulthood (early- to mid-20s).[22] This evidence suggests that children are substantially less equipped than adults to control their own actions – and juvenile courts are better positioned to take into account this developmental trajectory and children's lesser culpability. Prior to this research, yet based intuitively upon what it tentatively confirms, many countries already extended

[19] Human Rights Committee, *General Comment No. 21: Replaces General Comment 9 concerning humane treatment of persons deprived of liberty (Art. 10)*, 10 April 1992, par. 13.
[20] Inter-American Commission on Human Rights, *Minors in Detention v. Honduras*, Case 11.491, Report No. 41/99, OEA/Ser.L/V/II.95 Doc.7 rev. at 573, 1998, pars. 99-100.
[21] See, inter alia, Grisso, Thomas, and Robert G. Schwartz, eds., *Youth on Trial: A Developmental Perspective on Juvenile Justice*, Chicago, University of Chicago Press, 2000; and MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, "Less Guilty by Reason of Adolescence," *Issue Brief* 3, Philadelphia, 2006.
[22] See, inter alia, Coalition for Juvenile Justice, *What Are the Implications of Adolescent Brain Development for Juvenile Justice?*, parts 1-2, Washington, 2006.

juvenile justice jurisdiction into early adulthood to better account for this continuing development.[23] In contrast, it is fundamentally unfair to submit children to adult criminal court procedures that erroneously assume they meet adult standards for judgment and culpability.

With these clarifications in mind, this section offers in succession an overview of CRC juvenile justice provisions, of other related children-specific instruments, and of broader international instruments applying to both adults and children, in order to give a sense of the breadth and detail of international juvenile justice standards.

Even a summary overview of the CRC's juvenile justice provisions – particularly in terms of juvenile justice aims, ample procedural guarantees, and strict limitations on the deprivation of liberty and other penalties – demonstrates the great extent of the core legally binding obligations for States Parties. To begin with, Article 40(1) essentially lays out the aims and principles for juvenile justice:

> States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law 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.

Several points, at a minimum, bear special note in this dense article. First, the article extends relevant rights to every child alleged as, accused of, or recognized as having infringed the penal law; these rights are in effect from the very earliest moment of implication in the juvenile justice system, not just from the time of trial or sentencing. Furthermore, the juvenile justice system's treatment of children must be consistent with the promotion of children's sense of dignity and worth – a crucial guidepost in the face of the juvenile justice realities around the world. The article also stresses the importance of children's respect for the human rights of others; this

[23] For example, Serbia recognizes the category of "young adults" from 18 to 21 years of age.

implicitly affirms both the role of children's responsibilities vis-à-vis other people, and States Parties' obligations to foster children's abilities in this regard. The article also notes that treatment of children should take into account their ages, and fundamentally seeks to reintegrate children into society in constructive roles, thus implying a societal responsibility to accept and reintegrate children. In addition, excessive or strictly retributive penalties, to the extent that they hinder children's successful reintegration into society, cannot be seen as consistent with this approach.

Children that are actually implicated in juvenile justice systems – alleged as, accused of, or recognized as having infringed the penal law – enjoy a wide range of legal and procedural guarantees. In the briefest of terms, these include the following:

- Penal offenses must be defined in law by the time of alleged crimes (Art. 40(2)(a))
- The law should stipulate an age below which children are presumed incapable of committing offenses (Art. 40(3)(a))
- Children are presumed innocent until proven guilty (Art. 40(2)(b)(i))
- Right to be notified promptly of charges (Art. 40(2)(b)(ii))
- Right to legal assistance (Art. 40(2)(b)(ii-iii))
- Right to the presence of parents or guardians except where not in child's best interest (Art. 40(2)(b)(iii))
- Determination without delay by a competent, independent and impartial authority or judicial body in a fair hearing (Art. 40(2)(b)(iii))
- Right to remain silent and to confront and cross-examine witnesses (Art. 40(2)(b)(iv))
- Right to judicial review of decisions (Art. 40(2)(b)(v))
- Right to a free language interpreter (Art. 40(2)(b)(vi))
- Right to full respect for privacy at all stages (Art. 40(2)(b)(vii))

Most of the foregoing rights are typically set within the context of formal judicial proceedings, but children also arguably have the right to a properly

functioning diversion system.[24] Under Article 40(3)(b), States Parties agree to promote diversion options whenever appropriate and desirable, wherein children who have allegedly committed offenses are handled via alternative responses rather than in formal proceedings. As stipulated in the same article, any such measures must fully respect human rights and legal safeguards, including notably the guarantees summarized above.

A final predominant theme in the CRC's juvenile justice provisions is its guidance and limitations on the deprivation of liberty and other penalties. Article 40(4) clarifies that the appropriate purpose of consequences for children legally recognized as having committed offenses – squarely overlapping with the overall juvenile justice aims – is to "ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." To this end, States Parties agree to make available a variety of dispositions – such as care, guidance, and supervision orders; counseling; probation; foster care; and education and vocational training programs.

In creating a wide variety of dispositions as such, States Parties explicitly agree to make available appropriate alternatives to institutional care. Indeed, the CRC very strictly limits and regulates the deprivation of liberty of children, not just in the context of juvenile justice but also through child welfare, protection, medical, educational, training, and any other measures or settings whatsoever. The non-binding 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, discussed in detail below, clarify this broad understanding of the deprivation of liberty:

> The deprivation of liberty means *any form of detention or imprisonment or* the placement of a person in a public or private *custodial setting,*

[24] Abramson, Bruce, "The Right To Diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights Into Reality," presented at the First International Conference, International Juvenile Justice Observatory, *Juvenile Justice and the Prevention of Juvenile Delinquency in a Globalized World*, Salamanca, 2004.

from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.[25] [emphasis added]

As a starting point, given the serious nature and grave risks involved in the deprivation of liberty, Article 37(b) dictates that the deprivation of liberty "shall be used only as a measure of last resort and for the shortest appropriate period of time." In those exceptional cases where children are deprived of their liberty – which under the CRC must first pass the test of being appropriate to children's well-being, taking into account their eventual reintegration into and constructive roles in society – Article 37(c) reemphasizes that such children "shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age." Beyond these core principles for treatment while deprived of their liberty, such children enjoy an array of additional rights and legal guarantees, including the following:

- Deprivation of liberty must be in conformity with the law and not arbitrary (Art. 37(b))
- Right to maintain contact with family (Art. 37(c))
- Children will be separated from adults unless not in their best interest (Art. 37(c))
- Right to prompt access to legal and other assistance (Art. 37(d))
- Right to a periodic review of treatment provided and all other circumstances relevant to placement, where deprivation of liberty is on the basis of care, protection or treatment of physical or mental health (Art. 25)
- Right to challenge legality of the deprivation of liberty before a court or other competent, independent and impartial authority, and to a prompt decision (Art. 37(d))

Therefore, in exceptional cases and under a long list of restrictions and conditions, the CRC does grant that the deprivation of liberty may potentially be an

[25] Rule 11(b).

appropriate disposition in juvenile justice. Certain other punishments, under any circumstances, are expressly forbidden under the CRC as incompatible with children's rights. Thus, Article 37(a) prohibits torture and other cruel, inhuman, or degrading treatment or punishment. With regard to any child victim of any such treatment (as well as victims of any form of neglect, exploitation, abuse, or armed conflict), States Parties are obligated to "take all appropriate measures to promote physical and psychological recovery and social reintegration. . . . in an environment which fosters the health, self-respect and dignity of the child."[26] Finally, Article 37(a) completely bans capital punishment and life imprisonment without the possibility of release as punishments for offenses committed by persons below the age of 18 years.

As noted previously, the foregoing CRC juvenile justice provisions – plus related international treaty provisions, particularly from the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – trigger legal obligations for respective States Parties. In addition, a series of other international instruments guide countries in designing and operating their juvenile justice systems; these are generally passed by the United Nations General Assembly but do not carry any binding legal obligations per se. Yet in a broad sense, CRC Article 40(2) obliges States Parties to have "regard to the relevant provisions of international instruments" as they ensure children's rights in juvenile justice, and the Committee on the Rights of the Child explicitly promotes their "integration in a national and comprehensive juvenile justice policy."[27] Indeed, the Committee, "in its examination of States Parties' reports and in other comments, has indicated consistently that it regards the United Nations rules and guidelines relating to juvenile justice as providing relevant detailed standards for the implementation of article 40 and the administration of juvenile justice. . . ."[28] The collective body of international juvenile justice standards thus carries the weight of international

[26] Article 39.
[27] Committee on the Rights of the Child, *supra* note 14, par. 3.
[28] Hodgkin et al., *supra* note 17, at 592.

opinion, an undeniable moral force, and as highlighted in this section, a comprehensive set of guidance for rights-based juvenile justice. Indeed, such guidance is unparalleled; "[i]n both binding and non-binding international law, juvenile justice and its associated fields . . . are the subject of provisions whose comprehensive and detailed nature has no equal in the overall field of children's rights."[29] The present study refers back to these instruments frequently for guidance on specific questions and for various key themes highlighted below.

In consideration of international instruments specific to children, the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (commonly known as the Beijing Rules) provided the first detailed treatment of juvenile justice in international law, as approved by a Resolution of the United Nations General Assembly.[30] They also remain the most comprehensive international guidance on juvenile justice. The Beijing Rules begin with a set of guidelines under the heading General Principles, which among other points "refer to comprehensive social policy in general and aim at promoting juvenile welfare to the greatest possible extent, which will minimize the necessity of intervention by the juvenile justice system."[31] Countries are expected to provide for children's overall well-being, education, and general rights implementation – in a sense, society's broad obligations to children that when fulfilled reduce the very need for juvenile justice systems. Subsequent headings offer a series of concise and practical rules subdivided by theme, which are indicative of the broad scope of the Beijing Rules: Investigation and Prosecution; Adjudication and Disposition; Non-Institutional Treatment; Institutional Treatment; and Research, Planning, Policy Formulation and Evaluation. Brief Commentaries, intended to be read as an integral part of the Beijing Rules, accompany each rule and provide a brief contextual explanation. Overall, the Beijing Rules touch upon most major aspects of juvenile justice systems and provide a clear basis for fair and effective operation of them.

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[29] UNICEF International Child Development Centre, "Juvenile Justice," *Innocenti Digest* 3, Florence, 1998, at 2.
[30] Adopted by the United Nations General Assembly, Resolution 40/33, 29 November 1985.
[31] Commentary to Rule 1, Beijing Rules.

Just a few years after approving the Beijing Rules, and one year after adopting the CRC, the United Nations General Assembly adopted the 1990 Guidelines for the Prevention of Juvenile Delinquency (commonly known as the Riyadh Guidelines).[32] The earlier Beijing Rules already address delinquency prevention as a matter of foremost and fundamental importance, while the Riyadh Guidelines both reemphasize this importance and offer a detailed framework for undertaking prevention efforts. The guidelines systematically describe the necessary roles for – and recommend action steps regarding – general prevention efforts; families, schools, communities, and the mass media; social policy; juvenile justice legislation and administration; and research and policy development. At the same time, the Riyadh Guidelines stress the efforts of all of society in promoting children's successful development, as well as the rights and responsibilities of children in society. This includes defining and limiting the circumstances wherein the deprivation of liberty and institutionalization of children may be permissible as a matter of social policy, thereby reiterating a central concern in juvenile justice standards.

Concurrent with its 1990 approval of the Riyadh Guidelines, the United Nations General Assembly adopted the Rules for the Protection of Juveniles Deprived of their Liberty (commonly known as the Havana Rules).[33] Just as the Riyadh Guidelines propose a practical-oriented framework on delinquency prevention efforts – offering a significant level of detail beyond the Beijing Rules and CRC – the Havana Rules address all major concerns regarding the deprivation of liberty of children. The Havana Rules are a core component of international juvenile justice standards, but as cited above, they make it clear that deprivation of liberty is not solely a concern of juvenile justice systems per se:

> The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from

[32] Adopted by the United Nations General Assembly, Resolution 45/112, 14 December 1990.
[33] Adopted by the United Nations General Assembly, Resolution 45/113, 14 December 1990.

> which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.[34]

In fact, the Havana Rules complement the content of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations General Assembly just two years earlier.[35] This Body of Principles applies "for the protection of all persons under any form of detention or imprisonment," including children and regardless of the formal setting in which the detention or imprisonment occurs.[36]

The CRC, Beijing Rules, and Riyadh Guidelines all place limitations on the practice and use of deprivation of liberty of children, and the Havana Rules reflect those restrictions in general:

> Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.[37]

The bulk of the rules, following special consideration of children's treatment under arrest or awaiting trial, details standards for the management of facilities where children are deprived of their liberty. These rules cover all principal areas of concern, including, inter alia, record keeping, placement, physical environment, education and work, community contact, limitations on physical restraint, disciplinary procedures, inspection and complaints, and return to the community. As a whole, the Havana Rules provide an informative overview of relevant principles and a practical guide to ensuring children's rights standards when children are deprived of their liberty.

The final child-specific international juvenile justice instrument is the Guidelines for Action on Children in the Criminal Justice System (commonly known

[34] Rule 11(b).
[35] Adopted by the United Nations General Assembly, Resolution 43/173, 9 December 1988.
[36] Scope of the Body of Principles.
[37] Rule 2 (excerpt).

as the Vienna Guidelines). The United Nations Economic and Social Council welcomed the Vienna Guidelines in a 1997 Resolution,[38] while the Guidelines themselves were elaborated at an expert meeting pursuant to an Economic and Social Council Resolution from the preceding year. In essence, the Vienna Guidelines aim to establish a framework to promote national-level implementation of international juvenile justice standards – as established primarily in the CRC, the Beijing Rules, the Riyadh Guidelines, and the Havana Rules – and to facilitate development assistance to countries for such implementation. Even though the Vienna Guidelines are not primarily designed to add further content to juvenile justice standards, but to help direct national and international efforts for their implementation, a number of relevant principles are salient within them. For example, the guidelines stress issues regarding age, birth registration, and the respect for all children's rights regardless of legal age limits.

As far as international instruments that apply to both adults and children, the starting point is the 1955 Standard Minimum Rules for the Treatment of Prisoners, which the Economic and Social Council first approved in 1957.[39] Even at this early date – 30 years prior to the juvenile justice-specific Beijing Rules – the Standard Minimum Rules note that Part I on "Rules of General Application" would be equally applicable to children's institutions in general.[40] This section "covers the general management of institutions, and is applicable to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to 'security measures' or corrective measures ordered by the judge."[41] Once again, the standards show utmost concern for actual treatment of all relevant people, without regard for how detention orders, places of detention, or detainee classifications are named or presented. In their content, the rules under Part I govern the various aspects of the management of

[38] United Nations Economic and Social Council, Resolution 1997/30, 21 July 1997.
[39] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 30 August 1955, approved by the United Nations Economic and Social Council, Resolution 663 C, 31 July 1957, and amended by the United Nations Economic and Social Council, Resolution 2076, 13 May 1977.
[40] Rule 5(1).
[41] Rule 4(1).

institutions and the rights of detainees, with some similarity to the Beijing Rules. Of particular importance for children, they also give a full accounting of the necessary separation of prisoners by category: sex, age, criminal record, legal reason for detention, and necessities of treatment.[42] In this context, the 1990 Basic Principles on the Treatment of Prisoners, affirmed by United Nations General Assembly Resolution, are also noteworthy for concisely rearticulating the basic principles underlying the 1955 Standard Minimum Rules.[43]

Like the CRC, the 1966 ICCPR is one of the core international human rights treaties.[44] The ICCPR entered into force in 1976 and currently has 160 States Parties.[45] While it generally applies to both adults and children, the ICCPR is also the first international human rights treaty to explicitly mandate States Parties to provide special treatment and procedures for juvenile persons in criminal matters. Indeed, the Human Rights Committee has remarked on juvenile justice concerns both with respect to individual States Parties and in its General Comments. With particular regard to children, the ICCPR bans capital punishment of juvenile offenders,[46] requires special procedural and treatment considerations for juveniles accused or convicted of criminal offenses,[47] and guarantees children's rights to birth registration and to protection measures as required by their status as minors.[48] Among its broader provisions on civil and political rights, the ICCPR details the basic human rights and freedoms in the context of criminal justice systems and the deprivation of liberty. In accord with other restrictions on the deprivation of liberty, Article 9(1) establishes that

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of

[42] Rule 8.
[43] Resolution 45/111, 14 December 1990.
[44] Adopted by the United Nations General Assembly, Resolution 2200A (XXI), 16 December 1966.
[45] Office of the United Nations High Commissioner for Human Rights, *Ratifications and Reservations,* 20 July 2007, www.ohchr.org/english/countries/ratification.
[46] Article 6(5).
[47] Articles 10(2)(b), 10(3), 14(1), and 14(4).
[48] Articles 24(2) and 24(1).

> his liberty except on such grounds and in accordance with such procedure as are established by law.

Furthermore, the Human Rights Committee has underscored that Article 9(1) is "applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc."[49]

It is also important to note that while the CRC creates few practical mechanisms to respond to rights violations, the ICCPR and its First Optional Protocol envision state-to-state complaints and individual communications against States Parties. Although never exercised, ICCPR Articles 41-43 establish procedures before the Human Rights Committee to resolve disputes between States Parties over alleged treaty violations. In terms of individual communications, the First Optional Protocol to the ICCPR, both adopted and entering into force concurrently with the ICCPR, establishes procedures for the Human Rights Committee to consider individual complaints against those States Parties that have accepted the Optional Protocol.[50] By April 2007, the Human Rights Committee had received over 1500 registered communications under these procedures with respect to 81 States Parties.[51] Children, or certain people acting on their behalf, are entitled to send complaints to the Human Rights Committee under these procedures; no such complaints have been filed to date, although these mechanisms are potentially valuable resources in responding to violations of children's rights.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is also one of the core international human rights treaties, and has a committee of experts (the Committee Against Torture) to monitor implementation of its provisions by its States Parties. Approved by the United

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[49] Human Rights Committee, *General Comment No. 8: Right to liberty and security of persons (Art. 9),* 30 June 1982.
[50] Adopted by the United Nations General Assembly, Resolution 2200A (XXI), 16 December 1966.
[51] Office of the United Nations High Commissioner for Human Rights, *Statistical survey of individual complaints dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*, 5 April 2007, www.ohchr.org/english/bodies/hrc/stat2.htm.

Nations General Assembly in 1984, the CAT entered into force in 1987 and currently has 144 States Parties.[52] These countries must submit regular reports on their implementation of the Convention to the Committee Against Torture, which examines each report and subsequently issues its formal concerns and recommendations. The basis for all deliberations is the definition of torture in Article 1(1):

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Among other examples, children's deprivation of liberty in violation of national law could sometimes meet this definition of torture, such as when involving young children beneath the MACR threshold. Going beyond the mechanisms of the ICCPR and its Optional Protocol, the CAT enables the Committee Against Torture – under specific circumstances and procedures – to undertake inquiries of its own initiative, to consider interstate complaints, and to consider complaints from individuals claiming that their rights under the CAT have been violated.[53] Thus, in some cases children or third parties on their behalf could bring formal complaints before the Committee. Although never exercised in this context, such complaints – and the Committee's own inquiries and complaints brought by other States Parties – are

[52] Office of the United Nations High Commissioner for Human Rights, *supra* note 45.
[53] Articles 20, 21, and 22.

another noteworthy enforcement mechanism for international juvenile justice standards and children's rights.

The United Nations General Assembly adopted in 1990 the Standard Minimum Rules for Non-Custodial Measures (commonly known as the Tokyo Rules).[54] The Tokyo Rules "provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment."[55] Since there are no parallel rules specific to children, and in light of the general emphasis in juvenile justice standards on non-custodial measures, the Tokyo Rules bear particular importance in the current context. They are in a sense a progressive and proactive approach to encourage the use of non-custodial measures; a range of sound non-custodial measures both reduces reliance on the deprivation of liberty and favors policies that are more amenable to respect for human rights.

Juvenile Justice Standards' Mediation of Welfare-Justice Tensions

With the foregoing introduction to children's rights and international juvenile justice standards in mind, a very different vantage point begins to emerge on the historic juvenile justice tensions and problems outlined in Chapter 1. In the most basic sense, juvenile justice standards help mediate but not resolve conflicts along the welfare-justice continuum. Most importantly, and as reflected in the previous section, international standards clarify the guiding principles for juvenile justice, and lay out key practical directives. However, they do so without definitively sponsoring any welfare, justice, composite, or other approach to juvenile justice.[56] Extreme points along the welfare-justice continuum, such as sweeping deprivation of liberty under welfare actions and strictly punitive systems, may indeed be incompatible with the standards. Nevertheless, as long as the guiding principles are respected, which implicitly favors the protection of children's broader rights, theoretically they can be

[54] Resolution 45/110, 14 December 1990.
[55] Rule 1.1.
[56] Beijing Rule 17 and Commentary.

implemented in the context of most juvenile justice systems. The international standards were drafted with such flexibility in mind. Taken together, they focus attention on other considerations – some of which are already highlighted above – and it is precisely these considerations that inherently mediate the welfare-justice continuum. By insisting upon a richer conceptualization of children, and staking out a broader set of core principles, they also seek to avoid the systemic flaws in the welfare and justice approaches. This section successively examines key themes, including the best interests of the child, due process guarantees, children's right to participation and to due consideration of their views, children's evolving capacities, responsibility and criminal responsibility in the context of evolving capacities, and reintegration into society. These are some of the key principles that give meaning to the MACR in a full children's rights context.

Part of the international standards' balance between welfare and justice derives from the indivisible and interrelated nature of children's rights. Even though isolated provisions may tend to support one approach or another, all relevant rights must be considered in their fullest context. Thus the best interests of the child concept – most visibly in CRC Article 3(1) and as a general principle of the Convention – leaves ample room for welfare approaches in international standards, but is only one part of the puzzle: "[i]nterpretations of the best interests of children cannot trump or override any of the other rights guaranteed by other articles in the Convention."[57] The text of Articles 3(1)-(2) shows this welfare orientation:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals

[57] Hodgkin et al., *supra* note 17, at 39.

> legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

As seen here, Article 3(1) creates the wide obligation in international law that "the best interests of the child shall be a primary consideration" in all actions concerning children, while Article 3(2) further underscores state responsibilities – including taking all appropriate measures – to ensure the "well-being" of individual children.

This broad principle serves, at a minimum, the roles of helping to clarify issues arising in children's rights, resolving conflicts between different rights, and providing relevant criteria in the absence of more contextually-specific rights.[58] If, for example, it is not clear from relevant rights and standards what action ought to be taken with respect to an individual juvenile justice case, the prominence of the child's best interests grows as a primary consideration. This is likewise reflected in Beijing Rule 5, "Aims of Juvenile Justice," wherein "[t]he juvenile justice system shall emphasize the well-being of the juvenile. . . ." The corresponding Commentary notes that among two of the most important objectives of juvenile justice, "[t]he first objective is the promotion of the well-being of the juvenile."[59]

Exactly what this means depends on the particulars of the case and the context – suggesting that despite its utility, the principle remains somewhat indeterminate and subjective. Although procedures, sanctions, and treatment in some juvenile justice systems are surely harmful to children's interests – and would thus be clearly barred by the principle – the best interests of the child are often distorted and applied arbitrarily and inconsistently within respective legal systems, even to justify such outcomes.[60] In fact, by its conceptual nature, the best interests of the child refer to a child's or children's best interests as ultimately interpreted by adults. This point

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[58] Alston, Philip, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights," in Alston, Philip, ed., *The Best Interests of the Child: Reconciling Culture and Human Rights*, Oxford, Clarendon Press, 1994.

[59] See also, inter alia, Beijing Rule 1.1 under "Fundamental perspectives," stating that "Member States shall seek, in conformity with their respective general interests, to further the well-being of the juvenile and her or his family."

[60] Breen, Claire, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law*, The Hague, Kluwer Law International, 2002.

completes the connection to protection rights, which are essentially predicated upon children's best interests or welfare.[61] As outlined in Chapter 1, all children – without regard to their degree of competence – have certain fundamental interests that merit protection as a matter of right. However, it generally impinges upon adults to interpret and ensure those rights. In line with this logic, state intervention in families' and children's lives based upon the perceived best interests of children – coupled with the perceived incompetence, innocence, and lack of criminal responsibility of children – was a defining feature of early juvenile courts.[62] That pre-CRC history includes a "massive legacy of misuse and abuse of the concept" of the best interests of the child, and despite advances "the ramifications of this legacy still abound, and often contribute substantially to violations of the rights of the child today."[63]

For such reasons, international juvenile justice standards also reflect in part the historic shifts towards the justice approach. They ". . . reject the unfettered discretion of authorities to rehabilitate children in their best interests," while "exclusive reliance on *parens patriae* has been discarded."[64] The concept of the best interests of the child remains quite important in international juvenile justice standards, because of the very useful roles it can play, but it is certainly moderated by the repeated emphasis within the same standards on the need for clear procedural guarantees.[65] Most notably, and as already emphasized in the preceding section, CRC Article 40 includes a detailed series of due process guarantees in juvenile justice – concrete rights that are denied when the best interests of the child are exploited as a blanket

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[61] Bellon, Christina M., "The Promise of Rights for Children: Best Interests and Evolving Capacities," in Alaimo, Kathleen, and Brian Klug, *Children as Equals: Exploring the Rights of the Child*, Lanham (Maryland), University Press of America, 2002.
[62] Minow, Martha, *Making All the Difference: Inclusion, Exclusion, and American Law*, Ithaca, Cornell University Press, 1990.
[63] Cantwell, Nigel, "The impact of the CRC on the concept of 'best interests of the child," in Bruning, Mariëlle, and Geeske Ruitenberg, eds., *Rechten van het kind in (inter)nationaal perspectief*, Amsterdam, Amsterdam Centrum voor Kinderstudies, 2005, at 66-67.
[64] Van Bueren, Geraldine, "Child-Oriented Justice – An International Challenge for Europe," 6 *International Journal of Law and the Family* 381, 1992, at 381-2.
[65] Zermatten, Jean, *The Swiss Federal Statute on Juvenile Criminal Law*, presented at the Conference of the European Society of Criminology, Amsterdam, August 25-28, 2004.

justification for state intervention. The CRC offers the most complete, legally binding account of due process guarantees for children, but these guarantees are also one of the central themes across international juvenile justice standards.[66] This emphasis on procedural guarantees, however, does not by any means suggest free range for the justice approach. For example, the Commentary on Beijing Rule 5 notes, "the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court [i.e. justice] model, thus contributing to the avoidance of merely punitive sanctions."

Indeed, international juvenile justice standards' mediation along the welfare-justice continuum does not simply mean the open possibility of either of the main models. A closer examination of other considerations continues to add guidance in navigating the welfare-justice continuum. CRC Article 12 on respect for views of the child – deemed one of the four CRC general principles by the Committee on the Rights of the Child – is a useful starting point as such:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The balance between CRC Articles 3 and 12, for example, is immediately clear. As seen above, Article 3 on the best interests of the child, in and of itself, does not stipulate an active role for children in the actions concerning them. Adults must

[66] See, inter alia, Beijing Rules 4, 7-8, 14-15, and 20-21; Havana Rules 17-19; Vienna Guidelines 13-15; Principles 2-5, 10-11, 14, 16-18, 32, and 36-38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Rules 84 and 93 of the Standard Minimum Rules for the Treatment of Prisoners; ICCPR Articles 9-10 and 14-15; and Tokyo Rules 3, 6, and 9.

effectively determine and protect children's best interests on their behalf. Article 12, however, guarantees children's right to be heard in all matters affecting them; here children automatically have a seat at the table and an opportunity to express themselves.

The Beijing Rules and the Vienna Guidelines further emphasize children's participation in the context of juvenile justice, such as where "[t]he proceedings . . . shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely."[67] The process at hand is thus entirely different, even if adults still hold final authority and responsibility for decisions: "[t]he outcome will be decided by adults but informed and influenced by the views of the child."[68] Importantly, even the very youngest of children and children with severe learning difficulties are capable of forming their own views, which may be expressed as emotions and drawings.[69] Adults must, in the course of their deliberations, give due weight to those views according to the age and maturity of the child. In this sense, the rights contained in Article 12 impose a series of obligations on adults that color how the best interests of the child may be interpreted and implemented under Article 3, except perhaps in the rare cases where children are not capable of expressing any view at all.

The Evolving Capacities of the Child

Building upon the foregoing themes, the CRC introduces for the first time in international human rights treaties the concept of the evolving capacities of the child.[70] Article 5, particularly in its second half, poses the most complete expression of the concept:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or

[67] Beijing Rule 14.2. See also Vienna Guidelines 8(a) and 8(e).
[68] Lansdown, Gerison, *The Evolving Capacities of the Child*, Florence, UNICEF Innocenti Research Centre, 2005, at 4.
[69] *Ibid*.
[70] *Ibid*.

> community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Similarly, Article 14(2) stipulates in the context of freedom of thought, conscience, and religion that "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child." The context of both articles is the crucial role of parents and caregivers in children's guidance and upbringing.

However, the fundamental point for the current discussion is the emphasis on the exercise by individual children of their own rights. Whereas Article 3 states children's right to have their best interests be a primary consideration (by adults) in all actions concerning them, and Article 12 guarantees children's right to express their views in all matters affecting them (with those views given due weight by adults), Articles 5 and 14 instead shift to children exercising their own rights. In citing "the child in the exercise of his or her rights," and "in the exercise by the child of the rights recognized in the present Convention," these articles imply "a transfer of responsibility for decision-making from responsible adults to children, as the child acquires the competence, and of course, willingness to do so."[71] State action based on the best interests of the child is further tempered, as protectionist interventions must take into account "the child's evolving capacities or the guidance given by the extended family or community."[72] Without regard to their age per se, as children acquire greater competence, knowledge, and maturity over time, they may exercise their rights with increasing independence. In other words, in line with their evolving capacities, children assume greater responsibility for exercising their rights and

[71] *Ibid*., at 4.
[72] Ronen, Ya'ir, "Protection for Whom and from What? Protection Proceedings and the Voice of the Child at Risk," in Douglas, Gillian, and Leslie Sebba, eds., *Children's Rights and Traditional Values*, Aldershot (England), Ashgate/Dartmouth, 1998, at 252.

making their own decisions – a clear alignment with competency-based liberty rights as described in Chapter 1. At the same time, it must be remembered that all children are entitled to all rights in the CRC, regardless of age or competency. The current discussion explores "to what extent children themselves exercise those rights, and what responsibilities are undertaken on their behalf by parents or other caregivers, and how the process of transition takes effect."[73]

The importance and various components of "evolving capacities" go further still, as "[t]he 'evolving capacities' of the child is one of the Convention's key concepts – an acknowledgement that children's development towards independent adulthood must be respected and promoted throughout childhood."[74] Indeed, Lansdown identifies three conceptual frameworks for the evolving capacities of the child: as a developmental concept, as a participatory or emancipatory concept, and as a protective concept.[75]

First, as a developmental concept, the overall realization of children's rights supports and helps further develop children's various evolving capacities, and it is incumbent upon adults to respect and foster these capacities. Article 6(2) is the leading CRC article on the importance of children's development, wherein "States Parties shall ensure to the maximum extent possible the survival and development of the child." Among other aspects, children's development includes all of their skills, knowledge, abilities, and competencies that grow over time – and the nurturing of these is thus a central aim in the implementation of children's rights generally.

The CRC reiterates this concern in various contexts. For instance, the Preamble refers to "the full and harmonious development of [a child's] personality"; Article 23(3) highlights for the disabled child "achieving the fullest possible . . . individual development, including his or her cultural and spiritual development"; Article 27(1) affirms the "right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development"; and Article

[73] Lansdown, *supra* note 68.
[74] Hodgkin et al., *supra* note 17, at 91.
[75] Lansdown, *supra* note 68.

29(1)(a) prescribes that education shall be directed to "[t]he development of the child's personality, talents and mental and physical abilities to their fullest potential."

Juvenile justice instruments also stress the importance of supporting children's overall development, and thus of supporting and nurturing children's evolving capacities. For example, the Commentary to Beijing Rule 17 notes the "fundamental rights of personal development and education," while Rule 1.2 refers to "a meaningful life in the community, which . . . will foster a process of personal development" for children. Likewise, Vienna Guideline 11(a) stresses juvenile justice for children that "fully respects their age, stage of development and their right to participate meaningfully in, and contribute to, society." In general, the fullest possible development of children – in the broadest sense of their evolving capacities – thus proves to be a core concern for children's rights, the CRC, and international juvenile justice standards.

Related obligations and processes support the transition wherein children increasingly exercise their rights on their own behalf, and this is the heart of the second conceptual framework for evolving capacities – as a participatory or emancipatory concept. As suggested above, at the same time that children's various capacities develop, children have a right to take a more active role in the decisions affecting them, and to begin gradually to make such decisions for themselves. This is the same transition wherein children become full moral agents with the capacities to exercise all of their liberty rights. In other words, "[w]ith the principle of evolving capacities, we recognize that children come to have capacities of moral agency, that these capacities develop in the child with the assistance of caring adults, and are enhanced through meaningful participation in matters where children's own interests are at stake."[76] As discussed in Chapter 1, individual children's skills and capacities do not develop uniformly per se, as they may quickly become competent in some contexts while needing further encouragement and growth in others, such that they begin to exercise distinct rights for themselves at different points in time.[77]

[76] Bellon, *supra* note 61, at 112.
[77] Lansdown, *supra* note 68.

Nonetheless, in general children may rightly expect to gain various liberties and responsibilities with some degree of consistency. As their capacities grow over time, and as they participate more actively, both rights and responsibilities should generally follow. It is logically inconsistent, as well as inconsistent with children's rights, to push rights and responsibilities in opposite directions. Instead, children's own capacities should act as the ballast for carrying both ahead on course.

Here, the concept of evolving capacities means not only encouraging children on their way towards greater participation and autonomy, but also fostering their sense of control over and responsibility for their own lives, and for their roles in society. These aspects are recurring themes in relevant international instruments, including in juvenile justice standards. For example, the CRC Preamble begins one paragraph by "[c]onsidering that the child should be fully prepared to live an individual life in society," while Article 29(1)(d) states "States Parties agree that the education of the child shall be directed to. . . . [t]he preparation of the child for responsible life in a free society." The ICCPR Preamble stresses a similar point on the responsibilities of individuals towards society, "[r]ealizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." As seen in Riyadh Guideline 23, children must have the knowledge about such roles that they are expected to assume, as "[y]oung persons and their families should be informed about the law and their rights and responsibilities under the law, as well as the universal value system, including United Nations instruments." The Riyadh Guidelines also note that it is important to "recognize the future role, responsibilities, participation and partnership of young persons in society."[78] Havana Rule 12 holds that children deprived of their liberty should be guaranteed "meaningful activities and programmes . . . to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society." Likewise, Tokyo Rule 1.2 notes

[78] Rule 18.

that the "Rules are intended to promote . . . among offenders a sense of responsibility towards society," while the Standard Minimum Rules for the Treatment of Prisoners seek in part to "develop a sense of responsibility" among detainees.[79] Thus, as children develop their capacities overall, they are encouraged to assume greater autonomy and responsibility as individuals and as fully participating members of their communities.

Nonetheless, the pace of evolving capacities' push towards independence and responsibilities is implicitly set by the level of those same capacities and the preparedness of children to accept, with appropriate support, greater autonomy. Therein enters Lansdown's third and final lens on evolving capacities – as a protective concept. Children should not be forced to accept or see imposed upon them responsibilities for which they are not equipped or ready to handle; responsibilities must accrue only in alignment with the relevant prerequisites of knowledge, experience, and other competencies. This also means, for example, that children's inability to participate meaningfully in a given context indicates their need for further support and growth before assuming the rights and responsibilities of making their own decisions. Children are due protection from excessive responsibilities that lie out of step with their readiness and that may expose them, or the continuing development of their capacities, to harm. To be sure, there are strong moral arguments that children are "entitled to have both their present autonomy recognized and their capacity for future autonomy safeguarded. And this is to recognize that children, particularly younger children, need nurture, care and protection."[80] Maintaining these delicate balances according to the demands of children's evolving capacities is no simple task:

> One of the most fundamental challenges posed by the Convention on the Rights of the Child is the need to balance children's rights to adequate and appropriate protection with their right to participate in and take

[79] Rule 70. See also Rule 60(1).
[80] Freeman, Michael, *The Moral Status of Children: Essays on the Rights of the Child*, The Hague, Kluwer Law International, 1997, at 37.

> responsibility for the exercise of those decisions and actions they are competent to take for themselves.[81]

In fact, part of the difficulty lies in the nature of the balance; it is not a dichotomy but a continuum between protection and liberty rights, where both are necessary, just as in the tensions along the welfare-justice continuum.[82] Likewise, the national minimum age limits for various liberty rights, mentioned in Chapter 1, refer in a sense to points along this continuum. The Committee on the Rights of the Child reviews these limits and related measures to ensure "that children are not forced to participate in activities that expose them to responsibilities, risks or experiences that are inappropriate or harmful in view of their youth," that is, in view of their still evolving capacities in different contexts and at different ages.[83]

In summary, the concept of the evolving capacities of the child – as expressed primarily in CRC Article 5 and supported by provisions in related instruments – includes the ideas that children's capacities must be developed and supported in accord with the realization of their other rights; that the responsibility for exercising children's rights transfers gradually from adults to children; and that children should be protected from experiences and responsibilities that exceed the level of their evolving capacities.

Evolving Capacities, Responsibility, and Criminal Responsibility

Turning back more directly to the welfare-justice continuum in juvenile justice, these same principles hold firm. Evolving capacities in juvenile justice mean that children's capacities must be nurtured; that children increasingly participate, exercise rights, and assume responsibilities as their capacities grow; and that children should be protected from harm and excessive responsibilities for which they are not yet prepared. Importantly, all children should enjoy support for their evolving capacities, and should enjoy encouragement towards autonomy, in *developmentally*

[81] Lansdown, *supra* note 68, at 32.
[82] Freeman, M.D.A., *The Rights and Wrongs of Children*, London, Frances Pinter Publishers, 1983.
[83] Lansdown, *supra* note 68, at 7.

appropriate ways – that is, appropriate given the level of those capacities. As they participate in decision-making, children must also learn that responsibility entails accountability for their decisions, both good and bad, as part of the participatory and learning process through which their capacities continue to evolve. This much is true, again in developmentally appropriate ways, for children of virtually all ages. Likewise, in the context of juvenile justice, "children are regarded not only as vulnerable and developing individuals, but also—and equally—as individuals who are developing the capacity for rational choice, more independent decision making, and, hence, a growing moral and legal responsibility."[84] As their capacity for responsibility grows, children should also be encouraged towards accountability for their decisions in a supportive and learning environment that respects all their other rights. Once children have reached the beginning age for the juvenile justice system – and assuming that they have already gained the capacities for this to be an appropriate step – it still holds that

> Whatever can be said about the (growing) capacity of minors of adolescents to make important decisions, it cannot be stressed enough that we are talking of a *growing capacity*. . . . The delinquent child has the right that his *growing* development is taken into account by a specialised judge (= the juvenile court).[85]

In consideration of international juvenile justice standards, there is broad support for this perspective in general. CRC Article 12's mandate on respect for the views of the child, with the views given due weight according to the age and maturity of the child, provides children the right to effective participation in all juvenile justice proceedings. This point is reinforced where Beijing Rule 14.2 notes that "[t]he proceedings shall be . . . conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself

[84] Doek, Jaap E., "Modern Juvenile Justice in Europe," in Rosenheim, Margaret K., Franklin E. Zimring, David S. Tanenhaus, and Bernardine Dohrn, eds., *A Century of Juvenile Justice*, Chicago, University of Chicago Press, 2002, at 522.
[85] Doek, Jaap, "The Future of the Juvenile Court," in Junger-Tas, Josine, Leonieke Boendermaker, and Peter H. Van der Laan, eds., *The Future of the Juvenile Justice System/L'avenir du système pénal des mineurs*, Leuven, Acco, 1991, at 206.

freely." Article 40(1) adds more specifically "the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which . . . takes into account the child's age." Similarly, ICCPR Article 14(4) states that "[i]n the case of juvenile persons, the procedure shall be such as will take account of their age. . . ." Consequently, the international standards reaffirm children's right to effective participation in juvenile justice matters, and to enjoy proceedings and treatment that take into account their age. These provisions implicitly require that juvenile justice mechanisms be adapted to fit the needs of relevant children at different ages and of different capacities.

As seen most specifically in Beijing Rule 4.1, its related Commentary, and CRC Article 40(3)(a), all of which are examined in detail in Chapter 3, the concept of criminal responsibility lies clearly embedded in this framework. Beijing Rule 4.1 states, "In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity." The rule does not direct countries to establish MACRs per se, but instead cautions that any such ages should not be set too low. This phrasing can be classified as an approach to criminal responsibility from the protective aspect of children's evolving capacities. In consideration of children's evolving emotional, mental, and intellectual maturity, children at young ages still may not have gained the necessary competency to sustain individual responsibility for their choices and actions – in particular in the sense of criminal responsibility and the gravity of its implications. In effect, young children are still learning to choose and act with autonomy and with mature consideration of likely consequences. Therefore, MACRs should be set high enough to protect children from a type of responsibility, and from experiences that may potentially follow, for which they are not prepared and that may cause them undue harm.[86]

[86] Lansdown, *supra* note 68.

The Commentary to Rule 4.1 reinforces these points, describing the modern trend

> to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility of delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

By directing attention to moral and psychological development, discernment, and understanding, the Commentary stresses individual competencies – among children's overall evolving capacities – with particular relevance to criminal responsibility. The mentioned "close relationship" simply suggests and rephrases a core message of children's evolving capacities: as children acquire greater competency in general, they accrue more liberty rights, autonomy, and the responsibility that follows from them. It is unreasonable to expect that young children are competent enough to bear criminal responsibility, just as they would not be granted independence and liberty rights in other contexts. However, evolving capacities is not only a protective concept, but also a developmental and participatory/emancipatory concept.[87] Thus, as children mature over time in the prerequisite competencies for criminal responsibility – in line with their broader evolving capacities – it becomes appropriate for them to increasingly exercise their own rights and bear responsibility, including criminal responsibility.

CRC Article 40(3)(a) states similarly "States Parties shall 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." Unlike the Beijing Rules, the CRC

[87] *Ibid*.

directs States Parties to establish respective MACRs, but without any proviso on how or at what age level to set them. In the absence of explicit instructions, the meaning of Article 40(3)(a) needs to be understood in the context of, inter alia, the Beijing Rules as mentioned above and interpretations by the Committee on the Rights of the Child. Chapter 3 examines in detail such specific guidance on MACRs, but for current purposes, it is sufficient to note that the Article 40(3)(a) language on age and capacity essentially continues the same discourse as the Beijing Rules. It instructs States Parties to establish a minimum age, linked directly to children's evolving capacities, which is explicitly protective – protective in the sense that all minimum ages protect children from rights and responsibilities for which they may not yet be prepared, and protective in the sense that the Convention's language addresses the immature capacities of children beneath the minimum age.

The article's content and intent, however, cannot be interpreted exclusively as a protective measure. In spinning upon the axis of children's evolving capacities, it must also be seen from a developmental and emancipatory angle.[88] The article's developmental content, for example, is inherent in its very language: it is fundamentally posed as a matter of children's capacity. As such – and as in all accounts of children's evolving capacities from a rights perspective – children's capacity at younger ages will generally be insufficient; it can be expected over time to grow with support and encouragement; and at older ages it will generally be sufficient. Children deserve support, encouragement, and developmentally appropriate opportunities to learn as part of this process. This is true even though the specific context here happens to be evolving capacities necessary for criminal responsibility.

In an emancipatory light, Article 40(3)(a) also has relevance for older children. It implies that at a certain age, older children will be presumed to have the capacity to infringe the penal law; they will reach the MACR, typically the formal starting point to juvenile justice. Once they reach that threshold, they may claim for themselves

[88] *Ibid*.

the wide range of rights and guarantees spelled out in the rest of Article 40 and related articles, as discussed above. Such rights do also apply, whenever and wherever relevant, to children younger than MACRs, but the content of Article 40 is geared so directly to juvenile justice as to be relevant in the majority of cases to children at or older than MACRs. In addition, it is less likely that younger children will be capable of exercising some of these rights on their own behalf.

Regardless, the very inclusion of the notion of children's criminal responsibility within international juvenile justice standards – and directly in the context of children's evolving capacities – underscores that it can have an appropriate role in rights-based juvenile justice. Children's criminal responsibility is indeed an integral part of children's rights – a logical extension of the concept of children's evolving capacities insofar as it is an appropriate step in respecting children's progression from lesser to greater competence, which gradually prepares them for adult rights and responsibilities in society. Where it is not an appropriate step as such, it must be rejected – in triggering a level of responsibility that exceeds children's relevant evolving capacities; in forcing upon them responsibilities for which they are not prepared to handle; in exposing them to undue risks or harm to their future development; in violation of their other rights; in launching them directly into the adult criminal justice system without full respect for all their rights; etc. In this sense, a rights framework assumes that the onset of children's criminal responsibility occurs against the backdrop of rigorous application of all other juvenile justice standards, and full implementation of all rights and guarantees. There can be no connotation that criminal responsibility somehow legitimizes deprivation of liberty, excessive punishments, sheerly vindictive or retributive penalties, etc., as all of these are prohibited or very strictly limited and regulated under international standards. Later sections in this study examine questions of when related problems do emerge in practice. In the present discussion, from the theoretical viewpoint of children's rights, it therefore seems untenable to argue that children should never be held criminally responsible, or that MACRs should be increased to the age of 18 years.

The possibility of criminal responsibility does not necessarily mean that a penal approach should or will be taken in response to children in conflict with the law. It is true that the international standards envision both penal and non-penal responses to delinquency, albeit with a decided preference for diversion and non-penal approaches, as discussed in the previous section. Yet whenever children are found guilty of committing delinquent acts, their evolving capacities continue to be a guiding principle in consideration of possible responses – be it penal or non-penal approaches. Indeed, also as mentioned in the previous section, CRC Article 40(4) identifies the appropriate purpose therein: to "ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." For a response to be proportionate to children's circumstances, it must be calibrated in part to individual children's evolving capacities to bear responsibility for their actions. In other words, the nature of children's evolving capacities "affects among other things the way the judge has to deal with the principle of proportionality. Not only the committed crime is important, but also the degree of culpability of a child with a growing capacity to be held responsible."[89] The Tokyo Rules, applicable to children and adults alike, already stress that the personality and background of offenders must be assessed in considering possible measures.[90] In the broader context of the obligations regarding children's evolving capacities, the child-specific instruments repeat in various forms the requirement that responses to juvenile offenders must be based in part on their personal circumstances.[91] The international standards thus hinge both procedures and outcomes to the concept and demands of the evolving capacities of the child. Furthermore, as noted, the CRC and related instruments place substantive limits on the penalties and punishments that may be available, particularly on the deprivation of liberty.

[89] Doek, *supra* note 85, at 206.
[90] See Rules 2.3 and 3.2.
[91] See for example Beijing Rule 5.1 and Commentary, and Beijing Rule 17.1(a).

CRC Article 40(4) thus suggests the importance of children's evolving capacities in considering dispositions at the same time that it obligates States Parties to make available a wide range of non-penal-oriented dispositions, such as "care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care." One conclusion from this pairing is that all children who are found to have committed offenses should face some appropriate response – appropriate, among other ways, relative to children's evolving capacities. From evolving capacities as a developmental concept, children must see some consequence to the offenses that they commit – some meaningful response that encourages them to understand and take personal responsibility for their choices, and which demonstrates the expectation that they be increasingly accountable for their actions as they mature. Indeed, as a rule, it is difficult to see how a non-response to delinquency could foster children's capacities for autonomous life in society. International juvenile justice standards direct states to create and employ appropriate responses that will serve this developmental purpose. They encourage a progressive range of policies that upend the timeworn options of many juvenile justice systems – excessively-punitive responses or no response at all.

Turning attention back to younger children, as suggested above the concept of children's evolving capacities means that they should not face the possibility of criminal responsibility since they generally lack the requisite competencies. Nonetheless, it should be noted that the same principles at hand continue to apply, even when criminal responsibility is eliminated from the equation. Children's evolving capacities still need to be developed, respected, and fulfilled.[92] Insofar as they are competent in relevant ways, children should have both the opportunity to exercise their autonomy and the opportunity to learn from the results of such practice. For example, developmental researchers have shown that even preschool children can internalize social norms, understand in basic terms the impact of their

[92] Lansdown, *supra* note 68.

behavior on others, and control their behavior; these are capacities to be respected and nurtured in developmentally appropriate ways.[93] That is to say, all children should be granted developmentally appropriate independence, with encouragement and support as they become willing to accept that independence, as well as developmentally appropriate responsibility – all of which must be driven primarily by children's evolving capacities. Consequently, *all children* who commit unlawful acts should arguably experience some response to their actions – an individualized developmentally appropriate response that respects their competence, helps develop it further, and yet protects them from excessive responsibilities and harm. Younger children, including those younger than MACRs, can certainly commit delinquent acts, and these children also deserve the learning experience of an appropriate response to their acts:

> Though the message of the Convention on the Rights of the Child is that criminalisation of children should be avoided, this does not mean that young offenders should be treated as if they have no *responsibility*. On the contrary, it is important that young offenders are held responsible for their actions and, for instance, take part in repairing the damage that they have caused.[94]

This is not a discourse about punishment per se, which as explained in Chapter 6 is decidedly counterproductive for at least the youngest offenders. Instead, at levels where children can engage and communicate, appropriate responses should focus on the teachable moment at hand – a moral dialogue aimed at fostering moral awareness of the significance of the harm caused.[95] A talk with a respected elder, the experience of offering an apology, mediation, and community conferencing (restorative justice) may provide effective channels to express disapproval to children

[93] Loeber, Rolf, David P. Farrington, and David Petechuk, "Child Delinquency: Early Intervention and Prevention," *Child Delinquency Bulletin Series*, Washington, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, May 2003.
[94] Hammarberg, Thomas, *The Human Rights Dimension of Juvenile Justice*, presented at the Conference of the Prosecutors General of Europe, Moscow, 5-6 July 2006.
[95] Weijers, Ido, "The Moral Dialogue: A Pedagogical Perspective on Juvenile Justice," in Weijers, Ido, and Antony Duff, eds., *Punishing Juveniles: Principle and Critique*, Oxford, Hart, 2002.

but also to give them the counsel, support, and inclusion that they need.[96] Responses do not necessarily call for any formal or government response, and in fact formal justice institutions may block any meaningful communication as such. Chapter 6 discusses from a practical viewpoint the most and least effective responses to young children in conflict with the law. To be sure, the fact that such children are younger than respective MACRs rules out all penal charges, treatment, procedures, and punishments. Instead, the response must generally be non-penal and non-coercive, and must respect all relevant children's rights.

The Riyadh Guidelines' focus on comprehensive delinquency prevention efforts – which concern all children and young persons,[97] from early childhood in particular[98] – provides the context for such an approach. The Guidelines find that children "should have an active role and . . . should not be considered as mere objects of socialization or control," and note that prevention policies and measures should safeguard "the well-being, development, rights and interests of all young persons."[99] In further support of approaches calibrated to children's evolving capacities, Guideline 5(a) notes that policies should involve the "provision of opportunities, in particular educational opportunities, to meet the varying needs of young persons and to serve as a supportive framework for safeguarding the personal development of all young persons." Guideline 6 recommends community-based services and programs in delinquency prevention, which typically create options that are appropriate even for children younger than MACRs. These also overlap well with the most effective programs surveyed in Chapter 6.

After the concept of evolving capacities and its implications for responsibility, the final principle within international juvenile justice standards that helps mediate

[96] Walgrave, Lode, "Not Punishing Children, but Committing Them to Restore," in Weijers, Ido, and Antony Duff, eds., *Punishing Juveniles: Principle and Critique*, Oxford, Hart, 2002.
[97] See Guidelines 5(d), 7, 10, 20, and 52.
[98] See Guidelines 2 and 4.
[99] Guidelines 3 and 5(d), respectively.

welfare-justice continuum tensions is the goal of reintegration. As mentioned in the preceding section, CRC Article 40(1) includes children's reintegration into society as one of the core aims of juvenile justice: "the right of every child . . . to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, . . . which takes into account . . . the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." Beginning with the CRC, reintegration has become increasingly prominent within international juvenile justice standards, and for this reason it holds a special role in balancing the welfare-justice continuum.[100] Older instruments within juvenile justice standards discouraged the institutionalization of children in favor of children's rehabilitation, but the latter became closely aligned over time with abuses of the welfare approach. In effect, children were forced into rehabilitation for political motives and social control, a program that "implies that responsibility rests solely with an individual who can be removed from society for the purposes of treatment and then once restored, released."[101] Due to such difficulties, reintegration has come to replace rehabilitation as an ideal in juvenile justice; it rejects the assumption that individual children are the source of problems that emerge, and instead looks at structural influences and the role and responsibilities of society at large.

For example, there is an emphasis on the full *integration* of children into community life in general, before delinquency is even an issue, such as where comprehensive delinquency prevention projects "should focus on strategies to socialize and integrate all children and young persons successfully, in particular through the family, the community, peer groups, schools, vocational training and the world of work."[102] Similarly, the Riyadh Guidelines stress "efforts on the part of the entire society to ensure the harmonious development of adolescents," and direct that education systems undertake "activities that foster a sense of identity with and of

[100] Van Bueren, *supra* note 64.
[101] *Ibid*., at 381.
[102] Vienna Guideline 36.

belonging to the school and the community."[103] As mentioned in the previous section, the Beijing Rules also focus on society's broad obligations to ensure children's welfare "to the greatest possible extent," thus fully including children in society and preventing delinquency in the first place.[104] Those children who do come into conflict with the law – and in particular those children deprived of their liberty – should enjoy contact with their families,[105] continuing links to their communities,[106] education services,[107] vocational skills,[108] medical services,[109] early release arrangements,[110] and guidance and other reintegration services[111] so as to lay the foundation for successful reintegration back into their communities.

The standards also recognize the particular importance of communities in ensuring the full reintegration of children following their involvement in the juvenile justice system, or deprivation of liberty, as successful reintegration requires that societies be willing to accept and welcome children back into community life. Thus, the Havana Rules note that "competent authorities should constantly seek to increase the awareness of the public that the . . . preparation for [detained juveniles'] return to society is a social service of great importance," and that they should "provide or ensure services . . . to lessen prejudice against such juveniles."[112] The Tokyo Rules dedicate an entire section to "Volunteers and other Community Resources," which encourages public participation, public understanding and cooperation, and volunteers.[113] For example, it states that "[c]onferences, seminars, symposia and other activities should be regularly organized to stimulate awareness of the need for

[103] Guidelines 2 and 21, respectively.
[104] Commentary to Rule 1.
[105] See Vienna Guideline 20.
[106] See Vienna Guideline 20 and Havana Rules 8 and 59.
[107] See Beijing Rule 26.1 and Havana Rules 38 and 79.
[108] See Beijing Rule 26.1 and Havana Rule 79.
[109] See Havana Rule 81.
[110] See Havana Rule 79.
[111] See Vienna Guidelines 35 and 42, Havana Rules 3 and 80, and Beijing Rule 29 and Commentary.
[112] Rules 8 and 80, respectively.
[113] See Tokyo Rules Section VIII.

public participation. . . ." and that "[a]ll forms of the mass media should be utilized to help to create a constructive public attitude. . . ."[114]

Here the principle of reintegration acts to restrain the excesses of both the welfare and justice approaches – including their common weakness of approaching delinquency as a question of individual children, in isolation from the obligations and consequences of broader society and systemic-structural factors. In a children's rights approach to juvenile justice, the role of the state and obligations of society are directly addressed. In addition, as a primary goal of juvenile justice, all of the various aspects of reintegration must be weighed and duly pursued with respect to all children in conflict with the law – regardless of a child's age, potential criminal responsibility, or alleged or adjudicated offense. Therefore, any treatment, procedure, or penal sanction that tends to demonize children, use children as moral or political scapegoats, remove them from society and effectively isolate them, etc., must be considered in violation of the principle of reintegration, among other children's rights. International juvenile justice standards' emphasis on reintegration thus holds a light up to every juvenile justice function and asks, at a minimum, "Is this consistent with children's full reintegration into society?"

Conclusion

Chapter 2 outlines the concept of human rights, the evolution of international human rights law, and the emergence of children's rights law as seen mainly in the CRC. The CRC is the legal foundation for children's rights in all but two countries of the world, and spells out children's rights in all areas of their lives. While the CRC itself offers a great degree of detail on juvenile justice, its requirements in this field are complemented by a series of other international instruments related to juvenile justice. Collectively, these international juvenile justice standards offer comprehensive guidance on rights-based juvenile justice law and practice.

[114] Tokyo Rules 18.2 and 18.3, respectively.

These international standards force many probing questions in the face of common juvenile justice practices, and in doing so help mediate the tensions along the welfare-justice continuum. It is true that a splintered analysis may alternatively find support for the welfare approach or the justice approach within international standards. Indeed, CRC Article 3 and the best interests of the child do share links to the welfare approach; in isolation, children's competence and liberty rights seem secondary, while state intervention to ensure protection rights is accentuated. Likewise, Article 40 taken alone sits close to the justice approach; it generally assumes children's competence, liberty rights, and correlative responsibilities, yet limits state intervention and authority with procedural guarantees and proportionality. Neither article, however, can legitimately be understood alone nor in these simple terms. Both are integral parts of a broader rights framework that must be collectively considered and contextualized.

This framework crystallizes further principles that help mediate the breaches along the welfare-justice continuum. Children's right to respect for their views, and to due consideration for their views according to their age and maturity, stakes out a role for children's participation in all juvenile justice proceedings. While children's participation may be admitted under both the welfare and justice approaches, it is central under the international standards. Thus, CRC Article 12 and related provisions force the welfare approach to listen to and include children in all processes. Children can no longer be relegated to the position of objects for adults' expert analysis, diagnosis, and prescriptions for intervention. The justice approach, whose mechanisms often drift toward a prove-blame-punish cycle, is forced to reconcile its drive to attribute responsibility with the actual voices, experiences, and perspectives of children – not just a legal-political narrative about children that feeds into and satisfies the needs of its blaming cycle.

The concept of children's evolving capacities is also critical. In crude terms, its participatory and emancipatory aspect curtails various welfare approach methods, while its protective aspect both appeals to the welfare approach and limits the justice approach. It does not accept the assumption that children are incompetent. All

children have competencies that must be recognized and respected, and it is to be generally expected that both rights and responsibilities accrue as those competencies grow. Concurrently, it demands that children be protected from experiences that threaten them or their future development. More directly as a developmental concept, the notion of evolving capacities means that treatment in juvenile justice should effectively support and foster children's continuing development. This mandate checks the reaches of both the welfare and justice approach.

The implications of children's evolving capacities for responsibility and criminal responsibility are intertwined with all of these nuances. On the one hand, the welfare approach wholly rejects children's criminal responsibility, while the justice approach makes competency and criminal responsibility its centerpiece. In contrast, international juvenile justice standards reserve an important space for children's responsibility and criminal responsibility, but that space is driven above all else by children's evolving capacities. All children should see some developmentally appropriate response to their unlawful behavior. As children's capacities evolve over time, they should be supported and granted greater independence in exercising liberty rights for themselves, which necessarily carries with it an increasing degree of responsibility. When children eventually reach the legal minimum age for criminal responsibility – which should neither lag behind nor overtake children's normative capacity to bear criminal responsibility for their actions – that responsibility may be assigned in the context of juvenile justice processes. There, both processes and outcomes must be calibrated to individual children's evolving capacities. They must also respect the international standards' various obligations, including their precedence for non-institutional dispositions and for diversion from penal proceedings, as well as their substantive and procedural limitations on the deprivation of liberty. In these various shades of meaning, the concept of evolving capacities drops the welfare approach's denial of children's responsibility, and vastly limits the justice approach's construction of free will myths to justify heavy-handed penalties for children. All children have competencies, and indeed these must be respected in the responses to children's delinquent behavior. Therefore, such

responses – and the responsibility justifying them – are limited to levels at which individual children can successfully cope without risk of harm to them or their future development.

Finally, the international standards' emphasis on reintegration works to address a criticism of both the welfare and justice approaches: both view individual children in isolation and out of context, either as objects needing aid to correct their problems or deficiencies, or as subjects who simply decide to commit crimes and deserve punishment for breaking the law. In the first place, the international standards' view of reintegration insists upon the full implementation of all children's rights, which requires coordinated implementation and monitoring efforts in social, economic, legal, political, institutional, and policy spheres, as well as measures for the realization of rights at the level of individual children. It further stresses children's integration and involvement throughout society and in all of its institutions, and calls upon communities to work actively to reintegrate children during and after involvement in juvenile justice. This perspective explicitly advocates a structural-institutional understanding of juvenile delinquency, as well as a principled approach to each individual child, and consequently redistributes the responsibilities for preventing and addressing delinquency on a vastly broader basis than either the welfare or the justice approach.

As explored in Chapter 1, childhood is a constantly changing and contested mix of ideas, and juvenile justice history and the welfare-justice continuum likewise reflect divergent conceptions of childhood, children, their rights, and responsibility. International children's rights and juvenile justice standards are not neutral in these clashing dynamics – they communicate their own distinct conception of children and childhood. Notably, this vision brings important advantages, including greater transparency, international legitimacy, a coherent moral framework and basis, and a corresponding set of principles that guide societies' understanding of children. In this sense, international children's rights do insist to some extent on how adults interpret childhood and the competencies and rights of children. This includes an integrated (rather than fragmented) account of protection rights and liberty rights,

including their respective prerequisites, their balance and interaction, the conditions for their implementation, and the roles of adults and society overall.

Children's rights, therefore, also intervene in the welfare-justice continuum, the depiction and consequences of responsibility and criminal responsibility, and the manner and extent of societies' regulation of children's lives. This intervention opens space for an account of children's morality that is richer and more principled, for example, than that of criminal law myths and narratives of simplified moral inquiry and blaming. It is concerned with both individual justice and social justice, and rejects the myopic tendencies of the welfare approach and justice approach to look almost exclusively at the needs or faults of individuals. Yet around the principles of international children's rights, there also remains space for cultural differences, varying conceptions of childhood, and debate. There are in fact many ambiguities and points of friction, but this is only a natural consequence of what is fundamentally a dynamic and evolving project. Much of the vitality of children's rights lies in the universal relevance of its principles, and this point underscores the need for vigilance in constantly revisiting and remaining faithful to them. Indeed, the continued value of children's rights as a way of framing issues about children depends to some extent on how these principles are applied in practice over time, and on how successfully they can be adapted with integrity to address the new challenges that will continue to arise.

CHAPTER 3 MACRS AND STATES' OBLIGATIONS UNDER REGIONAL AND INTERNATIONAL LAW INSTRUMENTS

A wide array of regional and international legal instruments gives specific consideration to the minimum age of criminal responsibility (MACR), and at times creates legal obligations for relevant countries. This chapter chronologically surveys the main instruments, paying particular attention to the emergence of and drafting history behind relevant provisions, as well as their subsequent interpretation by monitoring bodies and other judicial bodies.[1] A number of points remain open to debate or beg further clarification, such as how to respond to children younger than MACRs who come into conflict with the law. At the same time, the available guidance is both detailed and extensive, thanks principally to the work of the Committee on the Rights of the Child. The Committee's recommendations, largely affirmed over time by other instruments and bodies, suggest a general convergence in international standards for countries' MACRs and their implementation. This chapter departs from Chapter 2's analysis of the broader children's rights theoretical framework to document this very specific practical guidance on MACRs.

International Covenant on Civil and Political Rights (ICCPR) (1966)

Article 10(2)(b)

Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

Article 14(4)

[1] As discussed in the Preface, instruments and provisions related exclusively to children's potential criminal responsibility for crimes related to military conflict lie beyond the scope of the present study. Information included in this chapter is believed to be complete through at least February 2007.

In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

Article 24

1. *Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.*
2. *Every child shall be registered immediately after birth and shall have a name.*
3. *Every child has the right to acquire a nationality.*

Introduced more generally in Chapter 2, the ICCPR is the first international human rights treaty with explicit criminal justice protections for children. Importantly, both the United States of America and Somalia, the only countries in the world that have not ratified the Convention on the Rights of the Child (CRC), are States Parties to the ICCPR. Even though the ICCPR does not define "juvenile persons," Article 14(4) clearly uses the term to refer to the span of years between the MACR and the age of penal majority. While this presupposes that there is a precise lower age limit for "juvenile persons," scholars have noted that the ICCPR's provisions occasion the following conclusions:

- Each State Party is obligated to establish a respective MACR.
- Each State Party may choose its respective age level, provided that it falls within the general limits of internationally recognized norms.
- Each State Party must apply its same respective MACR to boys and girls alike.[2]

[2] Muhammad, Haji N.A. Noor, "Due Process of Law for Persons Accused of Crime," in Henkin, Louis, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York, Columbia University Press, 1981; and Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl (Germany), N.P. Engel, 1993.

Indeed, the Human Rights Committee – the ICCPR's monitoring body – has long interpreted the Covenant accordingly. In its General Comment on the implementation of Article 14, the Human Rights Committee highlighted States Parties' obligations on the issue:

> Article 14, paragraph 4, provides that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile . . . and how all these special arrangements for juveniles take account of "the desirability of promoting their rehabilitation".[3]

The Committee has also examined and critiqued the MACR provisions of specific States Parties. In light of Suriname's MACR provisions, it concluded the following:

> The Committee is concerned about the compatibility with the Covenant of the low age of criminal responsibility in Suriname (10 years). . . . The State party should revise its legislation with regard to the age of criminal responsibility, which at its present level is unacceptable under international standards. The State party should inform the Committee as to how its practice complies with articles 10, paragraph 2 (b), 14, paragraph 4, and 24 of the Covenant.[4]

Likewise, it was concerned that Cyprus's MACR of 7 years did not conform with international standards and the spirit of Article 24(1), just as it expressed concern for and recommended an increase in another State Party's MACR of 7 years.[5] It also

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[3] Human Rights Committee, "General Comment 13 (Twenty-first session, 1984)," in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1, 1992, par. 16.

[4] Human Rights Committee, *Concluding observations of the Human Rights Committee: Suriname*, CCPR/C/80/SUR, 4 May 2004, par. 17.

[5] Human Rights Committee, *Concluding observations of the Human Rights Committee: Cyprus*, CCPR/C/79/Add.39, 21 September 1994. See also Human Rights Committee, *Concluding*

noted that Zambia's MACR of 8 years "appear[s] to be incompatible" with ICCPR provisions.[6]

The Committee has taken the opportunity to appraise other aspects of MACR provisions, including the *doli incapax* doctrine, which exists in scores of countries and is examined closely in Chapters 4 and 6. In brief, the doctrine creates a presumption that children between the MACR and a higher age limit are not capable of bearing criminal responsibility. Theoretically, the presumption may be rebutted by sufficient evidence before the court of an individual child's maturity or understanding. If the presumption is rebutted as such, the possibility for criminal responsibility opens, and the trial proceeds. If it is not rebutted, the child is not capable of criminal responsibility under the law, and penal proceedings are in theory excluded. In addition to Sri Lanka's low MACR of 8 years, the Committee noted as a matter of profound concern Sri Lanka's *doli incapax* statutes:

> The low age of criminal responsibility and the stipulation within the Penal Code by which a child above 8 years of age and under 12 years of age can be held to be criminally responsible on the determination by the judge of the child's maturity of understanding as to the nature and consequence of his or her conduct are matters of profound concern to the Committee.[7]

Apparently, if not the *doli incapax* scheme in general, the Committee was troubled by the discretion of judges to determine individual children's potential criminal responsibility in the given age range.

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

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observations of the Human Rights Committee: Cyprus, CCPR/C/79/Add.88, 6 August 1998, par. 16; and Human Rights Committee, *Concluding observations of the Human Rights Committee (Hong Kong): China*, CCPR/C/79/Add.117, 12 November 1999, par. 17.

[6] Human Rights Committee, *Concluding observations of the Human Rights Committee: Zambia*, CCPR/C/79/Add.62, 3 April 1996, par. 19.

[7] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Sri Lanka,* CCPR/C/79/Add.56, 27 July 1995.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Like the ICCPR, the ICESCR was adopted in 1966 and entered into force in 1976.[8] The treaty now has 156 States Parties[9] – including Somalia, which has not yet ratified the CRC – and the Committee on Economic, Social and Cultural Rights monitors implementation by these countries.[10] Although the ICESCR does not explicitly address juvenile justice concerns, the Committee has viewed Article 10 as having important implications for the MACR. For instance, it has expressed concern for low ages of criminal responsibility (i.e., 7 and 9 years), and has explicitly encouraged and

[8] Adopted by the United Nations General Assembly, Resolution 2200A (XXI), 16 December 1966.
[9] Office of the United Nations High Commissioner for Human Rights, *Ratifications and Reservations,* 20 July 2007, www.ohchr.org/english/countries/ratification.
[10] United Nations Economic and Social Council, Resolution 1985/17, 28 May 1985.

called upon States Parties to increase their MACRs in accord with the obligations of Article 10.[11]

American Convention on Human Rights

(1969)

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

> *a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;*
>
> *b. prior notification in detail to the accused of the charges against him;*
>
> *c. adequate time and means for the preparation of his defense;*
>
> *d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;*
>
> *e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;*

[11] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Malta*, E/C.12/1/Add.101, 14 December 2004, pars. 21 and 38; and Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights* (Hong Kong): China, E/C.12/1/Add.58, 21 May 2001, pars. 24 and 43.

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

h. the right to appeal the judgment to a higher court.

. . . .

Article 19. Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

Delegates of the Member States of the Organization of American States adopted the American Convention on Human Rights in 1969, and the treaty entered into force in 1978.[12] There are 25 States Parties to the Convention, which has two bodies responsible for overseeing compliance with its provisions: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. In 2001, the former requested before the latter an Advisory Opinion on the Juridical Condition and Human Rights of the Child.[13] Although the request was much broader than MACRs, it was driven by a concern for law and practice regarding judicial and administrative officials' discretionary decisions on children's lack of full discernment. As noted in Chapter 1, such decisions have historically led to measures that in practice curtail children's rights, legal protections, and guarantees, particularly in criminal law, despite justification as the best interests of the child.

[12] Adopted 22 November 1969 by the Inter-American Specialized Conference on Human Rights, Organization of American States, Treaty Series, No. 36.

[13] Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/2002 of August 28, 2002, Requested by the Inter-American Commission on Human Rights.

In its wide-ranging discussion on these matters, the majority opinion of the Inter-American Court of Human Rights briefly discusses the notion of minimum capacity for criminal responsibility, which it terms "chargeability":

> From a criminal perspective -associated with conduct that is defined and punishable as a crime, and with the consequent sanctions-, chargeability refers to a person's capacity for culpability. If the person does not have this capacity, it is not possible to file charges in a lawsuit as in the case of a person who is chargeable. Chargeability is not an option when the person is unable to understand the nature of his or her action or omission and/or to behave in accordance with that understanding. It is generally accepted that children under a certain age lack that capacity. This is a generic legal assessment, one that does not examine the specific conditions of the minors on a case by case basis, but rather excludes them completely from the sphere of criminal justice.[14]

The opinion subsequently refers to relevant provisions of the CRC and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), as discussed below, and refutes the application of the criminal law under the *situación irregular* doctrine.[15] As seen in this excerpt, the majority opinion reaffirms the notion that MACRs must be established by law, and apparently refutes the notion of individual assessments for the capacity for criminal responsibility as in the case of *doli incapax* tests. It should be noted that one concurring opinion raises doubts about the establishment of a standard MACR without appraising individuals' capacity for criminal responsibility.[16]

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977)

[14] Par. 105.
[15] Par. 106 *et seq*.
[16] Judge Sergio García Ramírez, Concurring Opinion, par. 10-12.

In the case of Additional Protocol I to the 1949 Geneva Conventions, the implications for states' MACR obligations emerge not from the protocol text – as it includes no references at all to MACRs – but from the extensive debates on MACRs that transpired in the drafting history. During the first few decades after World War II, international support and efforts grew to further develop humanitarian law, and in particular to update the 1949 Geneva Conventions.[17] Following tradition, the International Committee of the Red Cross (ICRC) played the lead role in preparatory stages by consulting relevant experts worldwide over several years, and by convening an international Conference of Government Experts in 1971-1972. Based largely on its own analysis and the views expressed through that point, the ICRC composed an initial text of two draft Protocols to the 1949 Geneva Conventions, which were distributed to all governments in 1973. Then, using this ICRC draft as the starting point for discussions, the Swiss Government convened a Diplomatic Conference in four sessions from 1974-1977. In order to debate, revise, and ultimately adopt the Protocol texts, the Swiss Government invited all States Parties to the Geneva Conventions and all United Nations Members to participate. The Diplomatic Conference carried out its work by subdivision into three main plenary committees, among other committees.

Of particular interest in the ICRC's draft Additional Protocol I, Article 68(3) prohibited the pronouncement of the death penalty against persons under 18 who commit offenses related to certain international armed conflicts.[18] This scope is relatively limited, arguably excluding ordinary criminal offenses in general, as is the

[17] See Pictet, Jean, "General introduction: The task of the development of humanitarian law," in Sandoz, Yves, Christophe Swinarski, and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, International Committee of the Red Cross, 1987. Note that the Geneva Conventions and their Additional Protocols pertain to humanitarian law, not human rights law.

[18] "The death penalty for an offence related to a situation referred to in Article 2 common to the Conventions shall not be pronounced on persons who were under eighteen years at the time the offence was committed." International Committee of the Red Cross, "Article 68 – Protection of children," *Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, Geneva, 1973, reprinted in "Volume I," *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977,* Bern, Federal Political Department, 1978.

case for the version adopted as Article 77(5) in the final text.[19] In consideration of draft Article 68(3), the Brazilian delegation proposed the simple addition of the following sentence, still referring to offenses related to certain international conflicts: "Penal proceedings shall not be taken against, and sentence shall not be pronounced on, persons who were under sixteen years of age at the time the offence was committed."[20]

Of the three main plenary committees of the Diplomatic Conference, Committee III took up consideration of draft Article 68 and the amendments proposed to it. In the committee's first meeting on the article, the representative of Brazil formally introduced his delegation's proposal and made explicit reference to Brazilian criminal law's age of penal majority of 18. At the time, 18 was also technically Brazil's MACR, as no penal proceedings, sentences, or punishments were foreseen for people younger than 18 at the time of alleged criminal offenses. The representative explained that his delegation's amendment proposed an age limit of 16 to penal proceedings and sentences, rather than 18, "in the hope that it would prove generally acceptable."[21] Even if 16 was not acceptable, he still considered it desirable to specify some age limit. As such, it seems that the Brazilian representative wished to stress the importance of having a fixed age limit to children's criminal responsibility for relevant offenses. Interestingly, Committee

[19] "The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed." See Pilloud, Claude, and Jean Pictet, "Protocol I: Article 77 -- Protection of children," par. 3205, in Sandoz, Yves, Christophe Swinarski, and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, International Committee of the Red Cross, 1987, at 904.

[20] *Amendments to Draft Additional Protocol I and Annex: Article 68, Protection of Children [Art. 77 of the Final Act]: Brazil*, CDDH/III/325, 30 April 1976, reprinted in "Volume III," *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977,* Bern, Federal Political Department, 1978, at 301.

[21] *Summary Record of the Forty-Fifth Meeting held on Wednesday, 5 May 1976, at 10.20 a.m.: Article 68 – Protection of children*, CDDH/III/SR.45, par. 12, reprinted in "Volume XV," *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977,* Bern, Federal Political Department, 1978, at 66.

III's debate specifically on the Brazilian proposal, examined here in detail, looked to and commented primarily upon domestic criminal law provisions.

Indeed, in the first direct comment on the Brazilian proposal, the representative of Japan observed that many countries' criminal laws set the age of 14 years as the minimum age limit for penal proceedings; Japan's MACR at the time was ostensibly 14 years. As such, he suggested that the Brazilian proposal would have to be lowered to 14 to make it acceptable.[22] Apparently, the committee's strong preference for decision-making by consensus implicitly favored a lowest-common-denominator approach that would accommodate existing domestic criminal laws.

Canada's representative, instead, declined to support Brazil's amendment and noted the following:

> The fixing of the age of criminal responsibility was a national responsibility which each State would exercise having regard to its own peculiar culture, state of development and requirements. To attempt to formulate a provision in the Protocol impinging on the exercise of that sovereign right would be unacceptable to many States as an unwarranted interference.[23]

One may conjecture that Canada's relatively low MACR – which remained 7 years of age until 1984 – influenced the representative's argument on the principle of sovereign rights, thus avoiding the practical issue of accommodating diverse national laws.

Various governments' representatives commented on the proposal and raised broadly similar points. Thus, the representative of Yugoslavia supported the principle of the Brazilian amendment, in setting a minimum age limit for penal proceedings, as well as the specific Brazilian proposal of 16 years.[24] The Uruguayan representative, in turn, declined to support the Brazilian amendment on the basis that

[22] *Ibid*., par. 20 at 67.
[23] *Ibid*., par. 24 at 68.
[24] *Ibid*., par. 25 at 68.

"it would be difficult to arrive at a provision that would be universally applicable."[25] The Venezuelan representative supported in principle Brazil's amendment for striking a balance between criteria of biological maturity and legal considerations in choosing an age limit for children's protection.[26] The representative of the United Kingdom sympathized with the Brazilian delegation's views but feared that differences across respective domestic laws might create difficulties. In doing so, he pointed out that "persons under the age of eighteen could be sentenced" in the United Kingdom, yet failed to mention that even children as young as 8 could be guilty of criminal offenses there.[27] The representative of the Federal Republic of Germany agreed with the Brazilian amendment's aims, but held the same doubts as the United Kingdom's representative.[28] Finally, the representative of Czechoslovakia also noted that the Brazilian amendment might cause difficulties in some countries, and recommended that the committee's Working Group carefully consider the precise age limit to be included in the amendment. Subsequently, Committee III agreed to refer the entire draft Article 68 to the Working Group for further debate.[29]

The Working Group discussed the entire draft article for one week, reaching a compromise that in many respects was not completely satisfactory to various representatives. With specific regard to the Brazilian proposal at hand, the Working Group's official report back to the Committee notes the following:

> One representative wished to have it noted in the report that he would have preferred to add a new paragraph 6 prohibiting any penal prosecution and punishment of a child who was not old enough at the time the offence was committed to understand the implications of his acts. The Working Group, however, decided that the definition of such standards was better left to national law.[30]

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[25] *Ibid*., par. 28 at 69.
[26] *Ibid*., par. 31 at 69.
[27] *Ibid.*, par. 34 at 70.
[28] *Ibid*., par. 36 at 71.
[29] *Ibid*., pars. 37 and 40 at 71.
[30] *Report to Committee III on the work of the Working Group, submitted by the Rapporteur*, CDDH/III/391, reprinted in "Volume XV," *Official Records of the Diplomatic Conference on the*

As such, the Working Group returned the draft article to Committee III for final consideration without the Brazilian amendment or its principles included. Save one minor suggested amendment, the draft Article 68 was deemed ready for Committee III's adoption by consensus.

In seeking to complete its business overall, Committee III had to take positions on 15 different draft articles and consider numerous proposals from the Working Group.[31] In order to expedite this work, the Committee's Chairman declined to reopen discussion on the draft articles but offered delegations the opportunity to explain their votes on articles after the fact. Accordingly, following final amendment and adoption of draft Article 68 by consensus, delegations took the opportunity to explain their votes. On that occasion, the summary record notes the Italian representative's statement in the following manner:

> Mr. BARILE (Italy) said there was an ommission [sic] in Article 68 of draft Protocol I and Article 32 of draft Protocol II. No mention was made in those articles of the universally recognized principle that a child, whatever its age, could not be sentenced if, at the time of the offence, it was incapable of cognizance. Should it be impossible to set a specific age for cognizance, a general principle should at least be included both in a separate paragraph of Article 68 of Protocol I, and as a general rule in Protocol II. That paragraph might be worded as follows: "No sentence in respect of an offence related to armed conflict shall be pronounced on children who, by reason of their age, did not have the capacity of discernment at the time of the offence". His delegation felt that it had been deemed unnecessary to spell out that rule, which occurred in every legal system, but that it must nevertheless be

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Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977, Bern, Federal Political Department, 1978, at 522.

[31] *Summary Record of the Fifty-Ninth Meeting held on Tuesday, 10 May 1977, at 3.15 p.m.: Proposals submitted by the Working Group for further study*, pars. 1 and 17-18, CDDH/III/SR.59, reprinted in "Volume XV," *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977,* Bern, Federal Political Department, 1978, at 209 and 212.

> applied. Both that interpretation and the general principle should therefore be mentioned specifically in the final report.[32]

Indeed, no such provisions were inserted into either Protocol I or Protocol II, but this statement opened the Italian delegation's advocacy in the context of Committee III's final report. When the committee later debated the section of its final report dedicated to draft Article 68, an Italian representative interjected to pursue the same point:

> he took it as understood that no one in the Working Group had ever questioned the existence of a general principle to the effect that any person who, at the time when an offence was committed, was incapable of understanding the meaning of his own acts could not be regarded as guilty of the offence. He believed that it would be desirable to refer to that principle in paragraph 65, and proposed that the last sentence should be replaced by the following text:
>
> "The Committee recognized that it was a principle of general international law that no person could be convicted of a criminal offence if, at the time the offence was committed, he was unable to understand the consequences of his act. The Committee nevertheless decided that the application of this principle should be left to national legislation."[33]

Immediately thereafter, the Working Group's Rapporteur confirmed "that the proposed text seemed to him an accurate and clear reflection of the Committee's intentions,"[34] and Committee III adopted the proposed amendment in its final report. As such, Committee III's official report on its work – albeit without any trace in the adopted text of Additional Protocol I – notes the following:

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[32] *Ibid*., par. 62 at 219.
[33] *Summary Record of the Sixtieth (Closing) Meeting held on Friday, 13 May 1977, at 10.20 a.m., [Fourth Session], Adoption of the Draft Report of Committee III*, CDDH/III/SR.60, par. 4, reprinted in "Volume XV," *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977,* Bern, Federal Political Department, 1978, at 221-222.
[34] *Ibid*., par. 5 at 222.

> One representative wished to have it noted in the report that he would have preferred to add a new paragraph 6 prohibiting any penal prosecution and punishment of a child who was not old enough at the time the offence was committed to understand the implications of his acts. The Committee recognized that it was a principle of general international law that no person could be convicted of a criminal offence if, at the time the offence was committed, he was unable to understand the consequences of his act. The Committee, nevertheless, decided that the application of this principle should be left to national legislation.[35]

Additional Protocol I was adopted on June 8, 1977, entered into force on December 7, 1978, and currently has 167 States Parties, but in the end it does not stipulate any age limits to criminal prosecution. Committee III's final report records, however, what appears to be the first claim that a general principle of international law exists in this domain. The participants agreed upon, and indeed never even questioned, the existence of the principle that no person could be convicted of a criminal offense if, at the time the offense was committed, he or she was unable to understand the consequences of his or her act. In the end, this arguably includes a number of relevant contexts: it was understood with specific regard to children, and as related to children's understanding at different ages; it bars criminal prosecution, conviction, and punishment; it holds true without regard to the nature of the offense; and its validity is independent of the presence or absence of conflict situations. Apparently due to protests seen in the drafting debates – primarily the difficulty in agreeing upon one common age limit – it was held that national legislation should regulate the application of the principle. While the foregoing may seem at first glance the arcane footnotes of drafting history, these developments raised vastly important questions for the first time. Indeed, recent scholarship has tentatively supported the conclusion of Committee III that a general principle of law existed,

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[35] *Report of Committee III*, CDDH/407/Rev. 1, par. 65, reprinted in "Volume XV, Annex II," *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977,* Bern, Federal Political Department, 1978, at 466.

while noting that as presented the rule would seemingly permit either a fixed age limit or a case-by-case examination of individual children's potential criminal responsibility.[36] These points are explored further in Chapter 5, upon presentation of current MACRs worldwide.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984)

As noted in the general introduction to the Convention in Chapter 2, the CAT applies equally to children and adults. In addition, its provisions are binding for both Somalia and the United States of America, the only countries that are not States Parties to the CRC. Although the CAT does not stipulate any special protections for children, the Committee Against Torture – the Convention's monitoring body – has often dedicated particular attention to children's status in the implementation of the CAT. In this regard, it has commented upon the MACR, and has focused on the inherent links between MACRs and certain violations of children's rights.

In the case of New Zealand, the Committee expressed concern for the low MACR (i.e., 10 years) and for the problematic handling of children as young as that age:

> The Committee expresses concern about: . . . . [t]he low age of criminal responsibility, and the fact that juveniles are sometimes not separated from adult detainees and have been detained in police cells, owing to a shortage of Child, Youth and Family Residential Facilities. . . .[37]

Likewise, the Committee expressed its concern for Yemen's low MACR (i.e., 7 years) and for the detention of children as young as the MACR. Importantly, the Committee suggested the links among the MACR, the deprivation of liberty, and

[36] Happold, Matthew, *Child Soldiers in International Law*, Manchester, Manchester University Press, 2005, at 144.
[37] Committee Against Torture, *Conclusions and recommendations of the Committee Against Torture: New Zealand*, CAT/C/CR/32/4, 11 June 2004, par. 5(e).

international juvenile justice standards, without granting extra leeway for nominally medical or protective bases:

> The Committee is concerned at the low minimum age of criminal responsibility and at the detention of child offenders as young as 7 years in specialized hospitals or social protection institutions.
>
> The Committee recommends that the State party: . . . . Review the minimum age of criminal responsibility and ensure that all protective institutions and other places of detention meet international juvenile justice standards, including those of the Convention. . . .[38]

More recently, it explicitly noted Burundi's plans to increase its MACR from 13 to 15 years, and recommended that the country do so "in order to bring it into line with the generally accepted international norms on the subject."[39] However, the suggestion that "generally accepted international norms" for MACRs are at 15 years and higher seems questionable; and there may have been some misunderstanding between the MACR and the age of penal majority.

The Committee brought other concerns to light with its remarks on Argentina's MACR provisions. At the time of its reporting, Argentina's MACR of 16 years overlapped with its minimum age for responsibility in adult criminal court. Technically, children younger than 16 were not criminally responsible, and were only subject to supposedly non-punitive welfare measures. Nonetheless, as discussed in Chapter 1, *situación irregular* provisions clearly permitted sanctions of a penal-correctional nature against children without any lower age limit at all. Thus, the Committee Against Torture expressed its concern for the treatment of children younger than the MACR – under nominally welfare and protection measures that may have amounted to torture:

> The Committee expresses its concern at the following: . . . . The reports of arrests and detention of children below the age of criminal

[38] Committee Against Torture, *Conclusions and recommendations of the Committee Against Torture: Yemen*, CAT/C/CR/31/4, 5 February 2004, pars. 6(i) and 7(l).
[39] Committee Against Torture, *Conclusions and recommendations of the Committee Against Torture: Burundi*, CAT/C/BDI/CO/1, 15 February 2007, par. 13.

> responsibility, most of them "street children" and beggars, in police stations, where they are held together with adults, as well as on the alleged torture and ill-treatment suffered by such children, leading to death in some cases. . . .[40]

United Nations Standard Minimum Rules for the Administration of Juvenile Justice
(The Beijing Rules) (1985)

4. Age of Criminal Responsibility

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

Commentary

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

Introduced more generally in Chapter 2, the Beijing Rules provide the first explicit MACR guidelines in international human rights instruments. Rule 4 and its

[40] Committee Against Torture, *Conclusions and recommendations: Argentina*, CAT/C/CR/33/1, 10 December 2004, par. 6(f).

Commentary, intended to be read as an integral part of the Rule, still constitute the most extensive guidance available. They offer the only direct note in international instruments on appropriate considerations for selecting an MACR, and the only direct caution that the MACR should not be too low. Even though they do not carry the force of binding international law, the Committee on the Rights of the Child has recommended that the Beijing Rules be applied to all children. Furthermore, as discussed below, the Beijing Rules were the direct source for the language of MACR provisions adopted in the CRC. A closer examination of the history of the Beijing Rules provides even greater insights for understanding the MACR.

The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders created the mandate in 1980 for the future Beijing Rules. In its proceedings, the Congress approved the Report of Committee II, one of the Congress's Committees, which considered among other items the topic of "Juvenile justice: before and after the onset of delinquency." In that report, Committee II noted the following:

> Many countries discussed their respective ages of criminal or social responsibility, and it was discernible from the various discussions that such ages, by and large, represented the point(s) when the youth was regarded as socially responsible in the sense of legal liability for the consequences of his actions, although there were intermediate age-shades between absolute non-responsibility and responsibility. Some problems were noted on this issue, prominent among which was that of the criteria for the age(s) of responsibility: should such age be chronological or mental? Again, having regard to the now generally accepted welfare aims of juvenile justice, ought society to continue to base juvenile justice on age of responsibility or on stages and types of welfare programmes? The legalistic demarcation, with its attendant attraction of constitutional rights, in particular due process, is known to

> result in a blockage of the applicability of the much needed welfare programmes beneficial to the youth involved.[41]

This commentary demonstrates Committee II's curious perspective on the evolution of juvenile justice and the MACR. Although the welfare approach continues to enjoy adherents worldwide even today, three key United States Supreme Court decisions from 1966 to 1970 – discussed in Chapter 1 – clearly pushed the justice approach into ever-greater prominence. It seems skewed to refer in the summer of 1980 to "the now generally accepted welfare aims of juvenile justice." Essentially advocating the welfare approach, Committee II suggests that the MACR blocks the provision of needed and beneficial welfare programs to children, to the point of implying that it is a disposable anachronism. In stark contrast, the drafters of Additional Protocol I to the Geneva Conventions believed that a general principle of law existed by 1977 for the establishment of specific national MACRs. Quite revealingly, Committee II recognizes yet downplays the attachment of constitutional and due process rights to the MACR. The necessary corollary, unstated yet preferred, is that rights do not necessarily attach to welfare actions imposed by adults upon children. Such a position seems incompatible with a children's rights approach.

More generally, among the Sixth Congress's final resolutions, the fourth Resolution called for the development of "standard minimum rules for the administration of juvenile justice and the care of juveniles, which can serve as a model for Member States."[42] Following the Congress, the Crime Prevention and Criminal Justice Branch of the United Nations Centre for Social Development and Humanitarian Affairs took primary responsibility for the creation of the proposed minimum rules, and it requested Professor Horst Schüler-Springorum to

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[41] "Report of Committee II," par. 150, in United Nations Department of International Economic and Social Affairs, *Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Caracas, Venezuela, 25 August-5 September 1980: Report prepared by the Secretariat*, A/CONF.87/14/Rev.1, New York, United Nations, 1981, at 65.

[42] United Nations Department of International Economic and Social Affairs, *Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Caracas, Venezuela, 25 August-5 September 1980: Report prepared by the Secretariat*, A/CONF.87/14/Rev.1, New York, United Nations, 1981.

independently compose an initial working draft. As seen in the following excerpt, Professor Schüler-Springorum's original summer 1983 version – which he submitted to the United Nations – is strikingly similar to the final Beijing Rules text:

> The beginning of criminal responsibility should not be fixed at too low an age level. An age between 12 and 14 years being internationally widespread, an even lower age seems hardly compatible with the legal and social implications of criminal responsibility.[43]

With regard to the ICCPR's provisions on age and its implicit requirement for MACRs, Professor Schüler-Springorum has indicated that the 1966 Covenant had no influence on his work at the time of this draft. The ICCPR did not have any direct bearing on the subsequent elaboration and ratification of the Beijing Rules either. Thus, as far as the MACR is concerned, it seems that the ICCPR served as an early forerunner to the Beijing Rules and the CRC strictly for its general consideration of age. Explicit interpretations of the ICCPR consequent to the MACR were not yet fully matured and recognized by the time of the Beijing Rules. The same can be said for the findings in drafting Additional Protocol I to the Geneva Conventions.

The core of Professor Schüler-Springorum's 1983 draft text – that the MACR should "not be fixed at too low an age level" – remained verbatim in the final Beijing Rules, while negotiations and international debate led to other secondary revisions. It should be underscored from the start, however, that this drafting process did not reflect any deeper understanding of the MACR or its importance for children's rights.[44] Instead, arguments based on history, culture, and legal tradition were the primary motivations for textual revisions of the draft. In a series of regional conferences worldwide, and at the conclusive Beijing inter-regional conference, it became clear that a full consensus on the MACR was impossible. Official MACRs, where they existed around the world at the time, spanned from 0 years to 18 years. Among other national and regional concerns, countries with Islamic *shari'a* law

[43] Schüler-Springorum, Horst, *Report on the standard minimum rules for the administration of juvenile justice and the handling of juvenile offenders*, unpublished draft, Summer 1983, e-mail correspondence with author, May 2002.
[44] Schüler-Springorum, Horst, e-mail correspondence with author, May 2002.

jurisprudence played a forceful role in such debates.[45] As a result, the suggestion of the Schüler-Springorum draft that 12-14 years would be an appropriate minimum level for the MACR was deleted, and the hopes for designating a worldwide baseline MACR became a recommendation for the future.

In the final adopted text, the Beijing Rules' guidance for United Nations Member States on the MACR conveys a strong concern for establishing MACRs that are not too low. This is true both at the State level and in the hopes of agreeing upon a reasonable lowest MACR applicable internationally. However, this advice should be seen in the context of the incomplete understanding of the MACR's implications from which it emerged. Although there is no formal record of the final negotiators and drafters' intentions, there may have been a continuing preference for higher MACRs in order to preserve discretion in welfare interventions. To some extent, the push for higher MACRs is linked in the text to the "modern approach" of responsibility, in consideration of "the facts" of maturity and development. However, it assumes a prejudiced view of children as insufficiently mature and developed until older ages, even implying that criminal responsibility should be delayed until approximately the age of civil majority or for consent to marriage. At the same time, there seems to have been a desire to spare younger children the legal and social implications of responsibility. From there, it appears plausible that the conceptual bases may be inferred as the following: 1) Countries should establish a definitive lower boundary for juvenile justice delinquency jurisdiction, and 2) It is preferable to keep young children outside the purview of juvenile justice systems, and consequently it is preferable to not hold young children criminally responsible.

Beyond this foundation, the MACR provisions in the Beijing Rules reflect certain political consequences of the drafting process and other contradictions. For example, there is the concession of Rule 4.1, virtually outdated as it was written, that some countries may not even recognize the very concept of the MACR. The Rule then endorses the onset of criminal responsibility based upon criteria related to

[45] See Chapter 4's description of this historical period as one of particularly dramatic political shifts in the uses of Islamic law.

emotional, mental, and intellectual maturity, and moral and psychological development. While these are indeed relevant factors in considering MACR levels, the Rule vaguely suggests that *individual* children may be assessed for criminal responsibility based on their *individual* development in such areas. This implies recourse to *doli incapax* provisions, whose compatibility with key international human rights guarantees has subsequently been called into question.

Despite these various shortcomings, the Beijing Rules serve as the baseline in international law for MACRs. They recognize the importance of MACRs in juvenile justice, support the establishment of national MACRs, suggest in basic terms the relationship between children's evolving capacities and their increasing rights and responsibilities over time, and acknowledge the variations among national MACRs for historical and cultural reasons. Just four years later, with the MACR stage set by the Beijing Rules, the United Nations General Assembly adopted the CRC.

Convention on the Rights of the Child (CRC) (1989)

Article 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, and, in particular:

(a.) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law

Already during 1979 deliberations on the initial Polish draft of what would become the CRC, delegates apparently identified the MACR as one of a number of key issues for consideration.[46] Nonetheless, neither the drafting process through

[46] See Annex 1 for the full CRC text as adopted. The historical record refers to "the age of criminal responsibility of children," and it is possible that the Working Group was actually referring to the age of penal majority. "Report of the Working Group," E/CN.4/L.1468, 12 March 1979, par. 6, reprinted in Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. 1, New York, 2007.

1988 nor the preliminary text adopted at first reading that year led to any further reference to the MACR. During the subsequent technical review, however, the Social Development Division of the United Nations Centre for Social Development and Humanitarian Affairs noted the absence of the MACR as its very first critique of the draft article on juvenile justice:

> *Paragraph 1* does not make any reference to the fact that children, in principle, should neither be considered criminally responsible, nor be incarcerated. In this respect, your attention is drawn to "Beijing Rule" 4. Accordingly, and with due respect to national laws, it should be clearly stated that there should be no criminal responsibility of children until they reach a certain age.[47]

Later in 1988, based on such comments, UNICEF requested that the Crime Prevention and Criminal Justice Branch of the same United Nations Centre for Social Development and Humanitarian Affairs formulate a new draft article on juvenile justice. This Branch, which had not contributed directly to the elaboration of the draft convention up to that point, was the same office that directed the drafting of the Beijing Rules. It drew directly and extensively from the Beijing Rules in providing two draft options for new juvenile justice articles. The first option sought to minimize changes to the draft text already adopted at first reading, and to integrate only the basic principles of the Beijing Rules. Its second paragraph begins with the following:

> States Parties recognize the right of children not to be considered criminally responsible before reaching a certain age, according to national law, and not to be incarcerated. The age of criminal responsibility shall not be fixed at too low an age level, bearing in mind

[47] "Comment by the Social Development Division, Centre for Social Development and Humanitarian Affairs," E/CN.4/1989/WG.1/CRP.1, reprinted in Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. 2, New York, 2007.

> the facts and circumstances of emotional, mental and intellectual maturity and stage of growth.[48]

The alternative draft based the juvenile justice article more comprehensively around the Beijing Rules, and its entire third paragraph reads as follows:

> States Parties recognize the right of children who are accused or recognized as being in conflict with the penal law not to be considered criminally responsible before reaching a specific age, according to national law, and not to be incarcerated. The age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts and circumstances of emotional, mental and intellectual maturity and stage of growth.[49]

Both drafts' formulations – the first specific MACR proposals during the CRC drafting process – pull language directly from Beijing Rule 4. Interestingly, both versions abandon the Beijing Rules' notation that some legal systems may not recognize the concept of the MACR, and they aim to establish the higher standard that all States Parties set MACRs. They also omit the Beijing Rules Commentary discussion of different approaches to MACRs and its support for efforts towards a common lowest-acceptable age. These omissions may well be a consequence of the fruitless efforts to set a common minimum MACR age limit during the Beijing Rules' drafting, which may have also spared the CRC drafters the contentious debates seen in finalizing both the Beijing Rules and Additional Protocol I to the Geneva Conventions. The two draft proposals maintain the focus on the MACR not being set too low, however, and specify that incarceration is ruled out below MACRs. Yet in surprisingly loose constructions, they hinge their stipulations on children not being "considered" criminally responsible, and the second version even

[48] "Background note submitted by the Crime Prevention and Criminal Justice Branch, Centre for Social Development and Humanitarian Affairs," E/CN.4/1989/WG.1/CRP.1/Add.2, reprinted in Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. 2, New York, 2007.
[49] *Ibid*.

foresees formal accusations and recognition of children being in conflict with the law at the same time that they are not "considered" criminally responsible.

Subsequently, a drafting group took into consideration several different motions and suggested amendments regarding juvenile justice in general. In particular, the group had before it the second proposal of the Crime Prevention and Criminal Justice Branch, and it subsequently presented a revised text of what would become Article 40 of the CRC.[50] The revised text replaced the proposed MACR language with the following:

> 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and in particular:
>
> (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law [51]

This new language on the MACR was retained verbatim in subsequent drafts, and it was ultimately adopted as such in the CRC. It is not clear why this drafting group pared down the draft proposal on the MACR, omitting its consideration for "emotional, mental and intellectual maturity and stage of growth," its prohibition of incarceration for children under the MACR, and its language on children being "considered" responsible. Even though there was significant debate on many different aspects of Article 40 at the time of these textual revisions, there is no record of debate specifically on the MACR at any point in the *Travaux Préparatoires*.[52] This fact suggests a rather basic thrust to the drafters' language – reminiscent of the Beijing Rules – and that is to obligate States Parties to specify a definitive lower boundary for juvenile justice delinquency jurisdiction, as demarcated by an MACR.

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[50] "Discussion and adoption at second reading," E/CN.4/1989/48, reprinted in Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. 2, New York, 2007.
[51] *Ibid*.
[52] See Detrick, Sharon, ed., *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires,"* Dordrecht, Martinus Nijhoff, 1992.

The substantive addition of the CRC text over the Beijing Rules is its explicit treaty obligation – the first ever – for States Parties to establish MACRs. Yet it defines the MACR as the age "below which children shall be presumed not to have the capacity to infringe the penal law." This definition is troublesome in several respects. First, its formulation is ambiguous and may carry little weight in legal traditions not familiar with such phraseology, which is closely linked to English common law. Thus, it permits wide conceptual interpretation from the start and offers minimum practical guidance. Since the MACR is defined as a simple presumption and not as a rule, without any further explanation, the CRC is silent on some of the most difficult questions regarding the MACR. Although not to the extent of the Beijing Rules, it may vaguely leave the door open to *doli incapax* tests to rebut the presumption of individual children's incapacity to infringe the penal law. There is no indication of the intended understanding of criminal responsibility and its implications, such as the expectations for what may or may not happen to children who are above or below the age limit. Interestingly, the original draft MACR language, submitted by the United Nations Centre for Social Development and Humanitarian Affairs, defined the MACR clearly as a right of children, not as a presumption in their favor. It also prohibited, explicitly and as a matter of right, incarceration beneath the MACR age limit. Where the CRC is silent and unclear, countless countries have manipulated or ignored the MACR, as seen in Chapter 6. Such misrepresentation serves in practice to obfuscate their treatment of children, especially below the age limit. Indeed, the CRC's definition of the MACR is neither descriptive nor practical enough, in the absence of detailed interpretation, to act as a conceptual base or meaningful international legal provision for children's rights.

As discussed in Chapter 2, the Committee on the Rights of the Child – created according to CRC Article 43 – is the international body that oversees implementation of the CRC. As such, the Committee has been the most frequent commentator on the MACR, and it bears the challenging responsibility of interpreting the CRC's MACR provisions in the course of its deliberations. In fact, from its first consideration of States Parties reports in January 1993 through and including its 44th Session in

January-February 2007, the Committee on the Rights of the Child has commented on MACR-related provisions in roughly 150 different Concluding Observations. These Concluding Observations convey the Committee's formal appraisal and suggestions to some 110 different States Parties. More broadly, and drawing from such experience, the Committee issued in February 2007 a General Comment on "Children's rights in juvenile justice," which expounds the Committee's interpretation as such. The General Comment on juvenile justice devotes extensive coverage to the MACR, and represents its most authoritative statement to-date on the topic.[53] In it, the Committee notes that it understands the CRC provisions

> as an obligation for States parties to set a minimum age of criminal responsibility (MACR). This minimum age means the following:
> - Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. . . .
> - Children at or above the MACR at the time of the commission of an offence (or: infringement of the penal law) but younger than 18 years . . . can be formally charged and subject to penal law procedures.[54]

While the CRC itself proffers unassertively that "States Parties shall seek to promote the establishment . . . in particular" of MACRs, the Committee stresses clearly here that States Parties are obligated under the CRC to establish MACRs, and that children younger than MACRs at the time of alleged crimes cannot be charged or held criminally responsible. Indeed, on numerous occasions, the Committee has recommended to individual States Parties without MACRs or with insufficiently

[53] Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, pars. 30-39.
[54] Par. 31.

clear MACRs that they establish them,[55] and has even specifically stressed that relevant laws be enforced and implemented.[56]

The Committee on the Rights of the Child also intervenes in the CRC's difficult definition of the MACR as "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law." Shortly after referring to this provision, yet seeming to downplay its awkward phraseology, the Committee accepts that

> Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests. . . .[57]

Here the Committee states clearly that children, and even very young children, are indeed capable of committing acts that are against the law. It is not the case that capacity is somehow assumed away or overlooked in this discourse. It becomes instead a more nuanced point to which the Committee refers elsewhere in the General Comment, in terms of children's evolving capacities, of how these are fundamental to children's lesser culpability compared to adults, and how they help calibrate the appropriate response to children's offenses.[58] In the passage above, the Committee stresses the tangible function of the MACR, regardless of the rationale behind any given MACR, which is to establish the onset of potential criminal responsibility for illegal acts that children commit. In drawing that line, regardless of the act that a child below it may have committed, no formal charges may follow, and criminal law's processes are excluded. Instead, younger children may be held accountable for

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[55] See, inter alia, Committee on the Rights of the Child, *Concluding observations: Marshall Islands*, CRC/C/MHL/CO/2, 2 February 2007, pars. 70-71; and Committee on the Rights of the Child, *Concluding observations: United Republic of Tanzania*, CRC/C/TZA/CO/2, 2 June 2006, par. 71.

[56] See, inter alia, Committee on the Rights of the Child, *Concluding observations: Lebanon*, CRC/C/15/Add.169, 1 February 2002, par. 22; and Committee on the Rights of the Child, *Concluding observations: Bangladesh*, CRC/C/15/Add.221, 3 October 2003, par. 27.

[57] Par. 31.

[58] See pars. 10, 16, and 71, as well as related discussion in Chapter 2.

their otherwise illegal actions through special protective measures – if necessary in their best interests. Such measures and what they may entail are discussed in detail further below. The Committee's choice of language repudiates any ambiguities about presumptions suggested in CRC Art. 40(3)(a), in line with its formal rejection of the *doli incapax* doctrine, which is also discussed below.

Among a series of other MACR-related points, the Committee highlights in the General Comment that the pertinent moment in time for considering a child's age is at the moment of the alleged offense. This is consistent with its recommendation in the past that India amend its laws accordingly so as not to consider children's ages at the time of their trials.[59] Also along these lines, the Committee stresses in the General Comment proof of age for children: "If there is no proof of age and it cannot be established that the child is at or above the MACR, the child shall not be held criminally responsible."[60] The Committee reiterates both principles in its discussion on dispositions for children older than the MACR.[61] These protections are closely linked to children's right to birth registration:

> the Committee wishes to emphasize the fact that it is crucial for the full implementation of article 7 of CRC requiring, inter alia, that every child shall be registered immediately after birth to set age-limits one way or another, which is the case for all States parties. A child without a provable date of birth is extremely vulnerable to all kinds of abuse and injustice . . . particularly within the juvenile justice system. Every child must be provided with a birth certificate free of charge whenever he/she needs it to prove his/her age. If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish

[59] Committee on the Rights of the Child, *Concluding observations: India,* CRC/C/15/Add.228, 26 February 2004, pars. 78-80.
[60] Par. 35. See also Chapter 6.
[61] "[T]he explicit and decisive criteria is the age at the time of the commission of the offence. . . . regardless of his/her age at the time of the trial or sentencing or of the execution of the sanction" (par. 75). "The Committee notes that if a penal disposition is linked to the age of a child, and there is conflicting, inconclusive or uncertain evidence of the child's age, he/she shall have the right to the rule of the benefit of the doubt." (par. 72).

> his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.[62]

In this context, and with respect to the MACR, the Committee has expressed on at least one occasion its concern to a State Party where there was no official system of age verification in place.[63]

The General Comment also directly considers the appropriate age levels for MACRs. The Committee acknowledges reference to the Beijing Rules in making recommendations to individual States Parties, and deduces from these same recommendations its consideration that 12 years of age is the lowest internationally acceptable MACR. As such, it recommends that States Parties increase their MACRs to at least 12 years of age, and continue increasing them to even higher ages:

> Rule 4 of the Beijing Rules recommends that the beginning of MACR shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase an 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.[64]

Indeed, the Committee notes the "commendable high level of age 14 or 16" of some countries' MACRs, as such a level "contributes to a juvenile justice system which, in accordance with article 40 (3) (b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights

[62] Committee on the Rights of the Child, *supra* note 53, par. 39.
[63] Committee on the Rights of the Child, *Concluding observations: Nepal*, CRC/C/15/Add.260, 3 June 2005, par. 97.
[64] Par. 32.

and legal safeguards are fully respected."[65] It thus explicitly urges countries not to lower their MACRs to the age of 12 where they are already at higher levels.

This guidance is largely confirmed in the Committee's recommendations to individual States Parties through February 2007. On roughly 100 different occasions, it has observed or expressed concern for low MACRs, or recommended that MACRs be increased, with regard to MACRs generally from 0 through 11. Nonetheless, for unclear reasons, it is also true that the Committee recommended that Jamaica increase its MACR of 12 years, and that Slovenia increase its MACR of 14 years.[66] Otherwise, the Committee has welcomed new MACRs at – and proposals for increases to – 12 through 16 years of age,[67] just as it has specifically recommended that individual States Parties maintain or set new MACRs at levels from 12 through 15 years of age.[68] Likewise, it has deemed as insufficient both proposed and enacted MACR increases to only 10 years of age,[69] and has disapproved of proposed MACR decreases and an actual decrease to 14 years from a higher level.[70] The Committee has never expressed disapproval of an MACR for it being set too high per se. In light of the foregoing calculations, although the Committee does not suggest a recommended or optimal age level for MACRs, it would appear to be most comfortable with MACRs of 16 years. Somewhat surprisingly, there still remains

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[65] Pars. 30 and 33.
[66] Committee on the Rights of the Child, *Concluding observations: Jamaica*, CRC/C/15/Add.210, 4 July 2003, pars. 21-22; and Committee on the Rights of the Child, *Concluding observations: Slovenia*, CRC/C/15/Add.65, 30 October 1996, pars. 19 and 27.
[67] See, inter alia, Committee on the Rights of the Child, *Concluding observations: Ghana*, CRC/C/GHA/CO/2, 27 January 2006, pars. 4 and 73. Note that the occasionally cited case of the Committee welcoming a proposed MACR increase to 18 years seems most likely a semantic mix-up, wherein the proposal at hand was in effect an increase in the age of penal majority to 18 years, with juvenile court jurisdiction beginning at 7 years. Although official documents leave room for doubt, it appears that the Committee understood the proposal as creating juvenile court jurisdiction between ages 7 and 18. See, inter alia, Committee on the Rights of the Child, *Concluding observations: Nigeria*, CRC/C/15/Add.61, 30 October 1996, par. 39; and Committee on the Rights of the Child, *Summary record of the 323rd meeting*, CRC/C/SR.323, 1 October 1996, par. 66.
[68] See, inter alia, Committee on the Rights of the Child, *Concluding observations: Mexico*, CRC/C/MEX/CO/3, 2 June 2006, pars. 71.
[69] See, inter alia, Committee on the Rights of the Child, *Concluding observations: Australia*, CRC/C/15/Add.79, 10 October 1997, par. 29.
[70] Committee on the Rights of the Child, *Concluding observations: Japan*, CRC/C/15/Add.231, 26 February 2004, par. 53.

some ambiguity as to the desirability of setting MACRs at 17 or 18 years of age. On the one hand, the Committee's counsel to "continue to increase it to a higher age level" seems to suggest the view that the higher the MACR, the better, although this is not necessarily the only logical conclusion. On the other, as explored in Chapter 2, it would be difficult to argue from children's rights principles that children should never be held criminally responsible, or that MACRs should be increased to the age of 18 years. It appears likely that such ambiguity is a reflection of the underlying interrelated debates on liberty and protection rights, and the justice-welfare continuum in juvenile justice.

The Committee devotes particular attention in the General Comment to provisions that set multiple age limits for responsibility, either by establishing an age range for a rebuttable presumption of non-responsibility (e.g., *doli incapax* tests) or by fixing different age limits applicable to ostensibly more serious and less serious offenses. The Committee observes that the former system frequently substitutes for the latter, wherein the presumption is rebutted, and criminal responsibility is affirmed in cases of more serious crimes. As such, it remarks that this type of system is "often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices."[71] The Committee further emphasizes such apprehensions in a separate paragraph:

> The Committee wishes to express its concern about the practice of allowing exceptions to a MACR which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends that States parties set a MACR that does not allow, by way of exception, the use of a lower age.[72]

[71] Par. 30.

[72] Par. 34. Note that the present study refers to the MACR as the lowest possible age limit for criminal responsibility in a given country. Thus, where the Committee refers to a standard MACR with an exceptional lower age limit for serious offences, this study characterizes the same provisions as an MACR for specified serious offences and a higher age limit for other offences.

Pertinent Concluding Observations bear out the remarks pursuant to multiple ages of criminal responsibility according to the type or seriousness of offense. For example, the Committee noted with concern to one State Party the lack of conformity of such laws with the definition of the child under the CRC, and suggested that they be reviewed as a matter of priority.[73] It appears that anti-terrorism and other emergency laws, where they set different ages of criminal responsibility or otherwise circumvent existing MACRs, should be interpreted in the same light. In the General Comment, the Committee remarks the following:

> In the light of the fact that many States parties have recently strengthened and/or expanded their criminal law provisions to prevent and combat terrorism, the Committee recommends that States parties ensure that these changes do not result in retroactive or unintended punishment of children.[74]

More explicitly, the Committee has stated its concern over reports on Nepal's "Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) which has no set minimum age."[75]

With respect to *doli incapax* age ranges and tests, however, the General Comment seems to bring to a definitive resolution the widely varying recommendations issued by the Committee in the past. For example, most recently the Committee seemed to value the *doli incapax* system of one State Party insofar as it conditioned an otherwise low MACR: "the Committee is concerned that: a) the age of criminal responsibility, set at 10 years, is too low, although there is a presumption against criminal responsibility until 14 years (common law doli incapax)."[76] It

[73] Committee on the Rights of the Child, *Concluding observations: New Zealand*, CRC/C/15/Add.71, 24 January 1997, pars. 10 and 23.
[74] Par. 41.
[75] Committee on the Rights of the Child, *supra* note 63, par. 98. See also Committee on the Rights of the Child, *supra* note 59, on the Committee's deep concerns in general about India's Prevention of Terrorism Act, 2002.
[76] Committee on the Rights of the Child, *Concluding observations: Australia*, CRC/C/15/Add.268, 20 October 2005, par. 73.

suggested a similar viewpoint in 2002,[77] while in 2000 it strongly recommended that the decision to abolish *doli incapax* provisions be reconsidered.[78] More in line with the General Comment, the Committee has also expressed concern for the possibility of prosecution under the age of 12 years via the *doli incapax* test,[79] just as it has taken issue with the legal standard of acting with "mischievous intent" provided for in Malta's *doli incapax* provisions.[80] Regardless of these differences, which may stem in part from the Committee's reactions to divergent provisions and contexts, the General Comment leaves no doubt about the Committee's appraisal of discord between *doli incapax* and children's rights. As noted above, the Human Rights Committee and the Inter-American Court of Human Rights have drawn similar conclusions.

The Committee does not mention in its General Comment two other issues related to multiple ages of criminal responsibility that it has raised in the past. First, the Committee expressed grave concern that Nigeria featured wide disparities among state MACRs, and it urged the country to ensure that one MACR was applicable in all its states.[81] Similarly, it has noted with concern discrepancies among the statutory MACR and age limits in other legislation and jurisprudence, recommending that different standards not be imposed upon different children in conflict with the law.[82] It would seem, generalizing from these recommendations, that each State Party is expected to establish a single MACR that applies to all children throughout its territory.

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[77] Committee on the Rights of the Child, *Concluding observations: United Kingdom of Great Britain and Northern Ireland*, CRC/C/15/Add.188, 9 October 2002, par. 59.
[78] Committee on the Rights of the Child, *Concluding observations: United Kingdom of Great Britain and Northern Ireland - Isle of Man*, CRC/C/15/Add.134, 16 October 2000, pars. 18-19.
[79] Committee on the Rights of the Child, *Concluding observations: Seychelles*, CRC/C/15/Add.189, 9 October 2002, par. 54.
[80] Committee on the Rights of the Child, *Concluding observations: Malta*, CRC/C/15/Add.129, 28 June 2000, pars. 49-50.
[81] Committee on the Rights of the Child, *Concluding observations: Nigeria*, CRC/C/15/Add.257, 28 January 2005, pars. 12, 78, and 81.
[82] Committee on the Rights of the Child, *Concluding observations: Malaysia*, CRC/C/MYS/CO/1, 2 February 2007, pars. 102-103.

Indeed, these points allude to the principle of non-discrimination, which in addition to being one of the four general principles of the CRC, the General Comment also characterizes as one of the "leading principles of a comprehensive policy for juvenile justice."[83] The Committee remarks that

> States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children. . . .[84]

The Committee has stressed this theme in relation to the MACRs of several States Parties. It was concerned for the determination of minimum ages by arbitrary criteria, including puberty, which allowed for discrimination between girls and boys in Sudan, and recommended that legislation be reviewed for gender neutrality.[85] The gender neutrality of MACRs has been a recurring concern.[86] Discrimination based on socio-economic status has also arisen in the context of MACRs, particularly under former *situación irregular* legislation in Latin America. Justified as welfare-oriented measures, judges held broad discretion to impose substantially punitive measures against children of all ages, yet this judicial discretion often proved to be a mechanism for applying such measures discriminatorily:

> The Committee expresses its concern at the prevalence in the country of the doctrine of "children in an irregular situation" which paves the way for the stigmatization and frequent institutionalization and deprivation of

[83] Par. 5.
[84] Par. 6.
[85] Committee on the Rights of the Child, *Concluding observations: Sudan*, CRC/C/15/Add.190, 9 October 2002, pars. 24-25.
[86] Committee on the Rights of the Child, *Concluding observations: Jordan*, CRC/C/15/Add.125, 2 June 2000, par. 28; Committee on the Rights of the Child, *supra* note 56 (Lebanon) par. 22(b); and Committee on the Rights of the Child, *Concluding observations: Iran (Islamic Republic of)*, CRC/C/15/Add.123, 28 June 2000, pars. 19-20.

> liberty of children on the basis of their economic and socially disadvantaged situation.[87]

One of the most complex issues related to the MACR, that of how to respond to children younger than MACRs who come into conflict with the law, also surfaces in the General Comment. Although not specifically citing the MACR, the Committee repeats one of the most pertinent rules at hand:

> Note that the rights of a child deprived of his/her liberty, as recognized in CRC, apply with respect to children in conflict with the law, and to children placed in institutions for the purposes of care, protection or treatment, including mental health, educational, drug treatment, child protection or immigration institutions.[88]

Tacitly, this concedes that children may – in highly restricted circumstances explored in detail in Chapter 2 – be legally and appropriately deprived of their liberty for purposes of care, protection, or treatment, including in educational and child protection institutions. This is especially important since the Committee understands the MACR as meaning that children younger than its threshold "cannot be formally charged and held responsible in a penal law procedure," but that "special protective measures can be taken if necessary in their best interests."[89] Such measures could be decided in non-penal judicial proceedings, or without resorting to judicial proceedings, as the General Comment discusses in general terms.[90] Thus, the Committee has not taken the deprivation of liberty entirely off the table in terms of theoretically available responses to such children, even though the most stringent conditions on such measures continue to apply. Indeed, it seems that the Committee trusts that the underlying principles are sufficiently clear, and declines to take a prescriptive approach to States Parties' policies in this regard:

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[87] Committee on the Rights of the Child, *Concluding observations: Uruguay,* CRC/C/15/Add.62, 30 October 1996, par. 14. See also Committee on the Rights of the Child, *Concluding observations: Bolivia,* CRC/C/15/Add.1, 18 February 1993, par. 11.
[88] Footnote 1.
[89] Par. 31.
[90] See pars. 22-29.

> States parties should inform the Committee in their reports in specific detail how children below the MACR set in their laws are treated when they are recognized as having infringed the penal law, or are alleged as or accused of having done so, and what kinds of legal safeguards are in place to ensure that their treatment is as fair and just as that of children at or above MACR.[91]

The Committee's recommendations to individual States Parties round out the picture of what treatment is acceptable for children younger than MACRs. The General Comment's basic notion of the MACR – that children younger than the minimum age cannot be formally charged, subject to, or held responsible in penal law procedures – is largely reaffirmed in Concluding Observations. For example, the Committee was concerned about Jordan's provisions for "criminal proceedings" against children younger than its nominal MACR,[92] and recommended that Madagascar make sure that children younger than its MACR were not "brought before a criminal court."[93] Similarly, the Committee registered its concerns for "the application of penal responses" in certain circumstances to children younger than one State Party's MACR,[94] and indeed has indicated that children younger than MACRs should not be "treated in a criminalized manner" either.[95] Likewise, the Committee urged Burundi to ensure that no children younger than its MACR were either detained or imprisoned as per its domestic laws[96]; recommended that Seychelles ensure that such children were not "held in police custody or other forms of detention"[97]; and stated its particular concern that Ukraine placed children, including

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[91] Par. 33.
[92] Committee on the Rights of the Child, *Concluding observations: Jordan*, CRC/C/15/Add.21, 25 April 1994, par. 16.
[93] Committee on the Rights of the Child, *Concluding observations: Madagascar*, CRC/C/15/Add.218, 3 October 2003, par. 69(b).
[94] Committee on the Rights of the Child, *Concluding observations: Chile*, CRC/C/CHL/CO/3, 2 February 2007, par. 71.
[95] Committee on the Rights of the Child, *Concluding observations: Russian Federation*, CRC/C/15/Add.274, 30 September 2005, par. 86.
[96] Committee on the Rights of the Child, *Concluding observations: Burundi*, CRC/C/15/Add.133, 16 October 2000, pars. 73-74.
[97] Committee on the Rights of the Child, *supra* note 79, par. 56.

some younger than the MACR, in isolation "in juvenile reception/distribution centres."[98] However, the very fact that an MACR is low may be problematic even if criminal penalties are not technically available for children as young as its limit.[99] Furthermore, to be sure, criminal responsibility for children younger than MACRs is problematic even if it is assigned through juvenile court procedures.[100]

As described in the General Comment, the Committee does accept that States Parties may take special protective measures in the best interests of children younger than their MACRs, if necessary when they come into conflict with the law. Regarding children younger than Syria's nominal MACR, the Committee recommended taking "measures to deal with children . . . in conflict with the law not through the criminal justice system but through child protection procedures."[101] Similarly, it recommended that Liberia "[w]ith regard to the minimum age of criminal responsibility, make sure that children under 16 years of age who have committed an offense and are dealt with via the present procedure only face protective and educative measures."[102] At the same time, the Committee did recommend that Poland, based on related legislation, "establish 13 years as the minimum age for criminal responsibility in all cases, below which children cannot be sentenced to either correctional or educational measures."[103] While this statement certainly marks educative/educational measures as a sort of grey territory, which may or may not be acceptable before MACRs, it appears that the Committee was addressing the particular context at hand. Indeed, the Committee had already advised Poland, in consideration of its previous report, that "[p]articular attention should be paid to . . . respect for fundamental rights and legal safeguards in all aspects of the

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[98] Committee on the Rights of the Child, *Concluding observations: Ukraine*, CRC/C/15/Add.191, 9 October 2002, par. 70.
[99] Committee on the Rights of the Child, *Concluding observations: Cameroon*, CRC/C/15/Add.164, 6 November 2001, pars. 66 and 68.
[100] Committee on the Rights of the Child, *Concluding observations: Liberia*, CRC/C/15/Add.236, 1 July 2004, par. 66.
[101] Committee on the Rights of the Child, *Concluding observations: Syrian Arab Republic*, CRC/C/15/Add.212, 10 July 2003, par. 53.
[102] Committee on the Rights of the Child, *supra* note 100, par. 68.
[103] Committee on the Rights of the Child, *Concluding observations: Poland*, CRC/C/15/Add.194, 30 October 2002, par. 26.

juvenile justice system, including under the pretext of public assistance."[104] This point also recalls the Committee's emphasis in the General Comment that younger children facing protective and related measures enjoy all rights enunciated in the CRC, and are as entitled to fair and just treatment as children older than MACRs.

The Committee has also implied in Concluding Observations that if such rights are fully protected, it may theoretically be acceptable to deprive children of their liberty on a protection basis. While apparently referring to Nigeria's proposed juvenile court procedures, the Committee emphasized that "the legal safeguards provided for in the relevant principles and provisions of the Convention, including those of article 40, must be provided to all children, whether the deprivation of their liberty results from the application of a welfare or a criminal procedure."[105] In considering Denmark's new policies for responding to children younger than the MACR, the Committee recommended that the government "[f]ully implement the rules for children under 15 in conflict with the law and ensure that they are not deprived of their liberty without due process in accordance to article 40 of the Convention."[106] The Committee raised similar points on the Republic of Korea's provisions, which establish "protection dispositions" involving deprivation of liberty for children both younger and older than the MACR found to have committed illegal acts. The Committee was "concerned that juveniles accused of violating the law and subject to protective disposition may be deprived of their liberty without undergoing criminal procedures and having access to legal assistance," and recommended that the government "[u]se deprivation of liberty only as a measure of last resort and ensure that all juveniles involved in protection dispositions that may result in deprivation of liberty have access to legal counsel at an early stage."[107] Likewise, it recommended to Madagascar to "[m]ake sure that children below the age of 13 years

[104] Committee on the Rights of the Child, *Concluding observations: Poland*, CRC/C/15/Add.31, 15 January 1995, par. 32.
[105] Committee on the Rights of the Child, *supra* note 67 (Nigeria).
[106] Committee on the Rights of the Child, *Concluding observations: Denmark*, CRC/C/15/Add.273, 30 September 2005, par. 58(c).
[107] Committee on the Rights of the Child, *Concluding observations: Republic of Korea,* CRC/C/15/Add.197, 18 March 2003, pars. 56-57(b).

are not brought before a criminal court and that educational measures permit deprivation of liberty only as a measure of last resort."[108] In the case of Kyrgyzstan, the Committee's concern seemed to be that the deprivation of liberty was the *only* response available for children younger than the MACR, not that it was a *possible* response: "the lack of alternative penalties for those under the age of 14 years (i.e. only deprivation of liberty) [is] also of concern to the Committee."[109] In each of these cases, the Committee declines to prohibit out of hand all deprivation of liberty. Instead, it emphasizes some of the many restrictions on its application: CRC legal safeguards must be provided; due process and legal assistance is required; its use comes only as a measure of last resort; and there must be non-custodial alternatives.

At other times, however, the Committee has called into question and disapproved of protective and educative responses depriving the liberty of children younger than MACRs. For example, although the Czech Republic applied nominally protective measures to children younger than the MACR of 15 years, their application seemed to give pause to the Committee: "The Committee recommends that the State party . . . [c]larify the minimum age of criminal responsibility in the light of the legal provisions authorizing protective custody for children under the age of 12."[110] This recommendation suggests a central theme with MACRs: responses to young children are so incongruous with the very concept of the MACR that the supposed age limit is called into question or deemed immaterial. Despite other recommendations for educational measures for young children, as mentioned above, the Committee seemed to find their use in Poland problematic: "The Committee is concerned that there is no clear minimum age of criminal responsibility and that, in some cases, children as young as 10 years of age can be sentenced to educational measures."[111] Again, it would seem that where educational/educative measures may deprive children of their liberty, and depending upon their practical application in a

[108] Committee on the Rights of the Child, *supra* note 93.
[109] Committee on the Rights of the Child, *Concluding observations: Kyrgyzstan*, CRC/C/15/Add.244, 1 October 2004, par. 66.
[110] Committee on the Rights of the Child, *Concluding observations: Czech Republic*, CRC/C/15/Add.201, 18 March 2003, par. 66(b).
[111] Committee on the Rights of the Child, *supra* note 103, par. 25.

given context, the Committee may find such measures in violation of children's rights. If, for example, such deprivation of liberty reflects punishment and not protection below the MACR, they are not acceptable: the Committee was concerned for Kazakhstan's "placement of children aged 11 to 14 in 'special educational institutions' as a form of punishment."[112]

At times, the Committee concludes that there is simply no effective MACR when nominally educational or welfare measures cannot be reconciled with the stated age limit. The Committee observed that in Bahrain "there is no minimum age of criminal responsibility: although article 32 of the 1976 Penal Codes provides that persons under 15 are not criminally responsible, they can nevertheless be subject to sanctions under the 1976 Juvenile Act, such as detention in social welfare centres for up to 10 years for felonies."[113] It stated its concern that in Libya, "[e]ven though the age of criminal responsibility is formally said to be 14 years, in practice a measure of criminal responsibility is also imputable to children aged 7 to 14 years and is punishable by, inter alia, custodial sentences; in the Committee's view, this is incompatible with the Convention."[114] Consequently, it recommended the enactment of "legislation ensuring that the minimum age of criminal responsibility, in law and practice, is consonant with international standards."[115] Similarly, despite respective citations of related provisions, the Committee found no effective MACR in France or Senegal.[116]

Former *situación irregular* provisions, respectively abrogated by 2007, followed this same pattern in most Latin American countries. All children younger than stated MACRs, which were effectively ages of penal majority and not MACRs,

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[112] Committee on the Rights of the Child, *Concluding observations: Kazakhstan*, CRC/C/15/Add.213, 10 July 2003, par. 66.
[113] Committee on the Rights of the Child, *Concluding observations: Bahrain*, CRC/C/15/Add.175, 7 February 2002, par. 47.
[114] Committee on the Rights of the Child, *Concluding observations: Libyan Arab Jamahiriya*, CRC/C/15/Add.209, 4 July 2003, par. 21.
[115] *Ibid*., par. 22.
[116] See, inter alia, Committee on the Rights of the Child, *Concluding observations: France*, CRC/C/15/Add.240, 4 June 2004, pars. 16-17; and Committee on the Rights of the Child, *Concluding observations: Senegal*, CRC/C/15/Add.44, 27 November 1995, pars. 11 and 25.

could face substantially penal responses to their illegal acts or for other discretionary reasons. Such responses systematically included the deprivation of liberty of children yet were justified as welfare measures in children's best interests – without any lower age limit to their application. Thus on multiple occasions the Committee deemed that there was no effective MACR in force in systems based around *situación irregular*.[117]

These various scenarios lying along the distinction between protection measures and penal measures are both difficult and controversial. On the one hand, albeit with many conditions, the Committee does sanction the possibility of special protective measures for children younger than MACRs who come into conflict with the law. Such measures would in effect be welfare responses triggered by the commission of delinquent acts. At the same time, the Committee has repeatedly stressed the need to distinguish between child protection and juvenile delinquency in children's policy. *Situación irregular* provisions brought out this paradox repeatedly. The Committee stated its concern to Chile, at the same time that it recommended addressing and setting an MACR, that "the doctrine of 'irregular situation' . . . does not make a clear distinction, in terms of judicial procedures and treatment, between children in need of care and protection and those in conflict with the law."[118] The Committee recommended making such a distinction upon considering Chile's subsequent report, as it did in the case of Guatemala.[119] Although Portugal's policy was not *situación irregular*, but a classic welfare approach, the Committee welcomed its legal reform allowing "for children and young people between 12 and 16 in a situation of risk to be treated separately from those involved in criminal activities."[120] The distinction between the two is thus

[117] E.g., Committee on the Rights of the Child, *Concluding observations: Chile*, CRC/C/15/Add.173, 1 February 2002; Committee on the Rights of the Child, *Concluding observations: Panama*, CRC/C/15/Add.68, 24 January 1997; Committee on the Rights of the Child, *Concluding observations: Guatemala*, CRC/C/15/Add.58, 7 June 1996.
[118] *Ibid*. (Chile), par. 53.
[119] Committee on the Rights of the Child, *supra* note 94, par. 8; and Committee on the Rights of the Child, *Concluding observations: Guatemala*, CRC/C/15/Add.154, 9 July 2001, par. 11.
[120] Committee on the Rights of the Child, *Concluding observations: Portugal*, CRC/C/15/Add.162, 6 November 2001, par. 3.

desirable, yet its balance remains along the fault line between welfare-oriented and justice-oriented approaches – a challenging balance as discussed in Chapter 1.

In summary, the Committee on the Rights of the Child has developed detailed guidance for States Parties on the CRC's MACR provisions, covering a wide range of concerns. Taken collectively, as seen most authoritatively in the General Comment on juvenile justice and in Concluding Observations to respective States Parties, the following represents a synopsis of its key points:

- Each State Party must establish and enforce one clear MACR, applicable throughout its territory, at the level of 12 years of age at a minimum. States Parties should continue to increase their MACRs to higher age levels, and should not decrease them.
- Secondary and multiple ages of criminal responsibility are not compatible with CRC provisions (n.b., this issue is distinct from the minimum age of penal majority, which must be set at 18 years or higher). These include *doli incapax* and similar age ranges for rebuttable presumptions; multiple age limits according to type or supposed seriousness of offense; and age limits in anti-terrorism and other emergency laws.
- MACRs must fully respect the principle of non-discrimination in law and practice (e.g., by gender, according to socio-economic status, by vulnerable groups of children).
- If there is no proof of age (e.g., birth certificate) for children in conflict with the law, they are entitled to reliable medical or social investigations via official systems of age verification. In cases of conflict or inconclusive evidence on whether children are younger than MACRs or not, children shall not be held criminally responsible.
- Children younger than MACRs at the time of alleged offenses cannot be formally charged, or be held responsible in or be subject to penal law procedures or responses, via either juvenile or adult criminal court.

Furthermore, they cannot be treated in a criminalized manner, including inter alia by detention in police custody or other forms of detention.

- Special protective measures can be taken if necessary in the best interests of children younger than MACRs at the time of alleged offenses, through non-penal judicial proceedings, or without resorting to judicial proceedings. In all such cases, legal safeguards must be in place to ensure that their treatment is as fair and just as that of children at or above MACRs, including the protection of children's rights in the context of juvenile justice. In those cases where such children are deprived of their liberty via special protective measures, all rights of children deprived of their liberty apply.

African Charter on the Rights and Welfare of the Child
(1990)

Article 17: Administration of juvenile justice

4. *There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.*

The 1990 African Charter on the Rights and Welfare of the Child entered into force in 1999 and currently enjoys 37 States Parties out of 53 Member States of the African Union.[121] This regional human rights treaty effectively restates the obligation found in the CRC that States Parties establish an MACR. The treaty's monitoring body, the African Committee of Experts on the Rights and Welfare of the Child, has not yet begun to review States Parties' reports on their implementation efforts. However, in light of the African Charter on the Rights and Welfare of the Child, the African Commission on Human and Peoples' Rights has apparently laid down specific MACR guidelines. The African Commission on Human and Peoples' Rights is mandated under the African Charter on Human and Peoples' Rights – itself ratified

[121] Adopted 11 July 1990 by the Organisation of African Unity Assembly of Heads of State and Government, OAU Doc. CAB/LEG/24.9/49. See www.africa-union.org/child/home.htm.

or acceded to by all 53 African Union Member States – to establish human rights principles upon which countries may base their legislation.[122] In the 2001 Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, it stipulated the following:

> (a) In accordance with the African Charter on the Rights and Welfare of the Child, a child is any person under the age of 18. States must ensure that domestic legislation recognises any person under the age of 18 as a child.
>
> (b) Children are entitled to all the fair trial guarantees applicable to adults and to some additional special protection.
>
> . . . .
>
> (d) States shall establish laws and procedures which set a minimum age below which children will be presumed not to have the capacity to infringe the criminal law. The age of criminal responsibility should not be fixed below 15 years of age. No child below the age of 15 shall be arrested or detained on allegations of having committed a crime.[123]

The meaning of this phrasing is not entirely clear. Since paragraph (a) reaffirms the definition of children as all persons younger than 18 – and since it is well-established internationally that the minimum age of penal majority should be 18 years or higher – it would seem that paragraph (d) indeed refers to the MACR in requiring an age limit of 15 years or higher. However, since apparently only 5 African countries have MACRs that high, it is possible that the paragraph instead refers to the minimum age of penal majority and does not say anything about the lower age limit to juvenile justice jurisdiction.[124] In either case, the reasoning behind this standard is not clear.

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[122] African Charter on Human and Peoples' Rights, adopted 27 June 1981 by the Assembly of Heads of State and Government of the Organization of African Unity, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, Art. 45.

[123] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa*, ACHPR Doc/OS (XXX) 247, 2001, pars. O(a-b, d), www.achpr.org/english/_doc_target/documentation.html?../declarations/Guidelines_Trial_en.html.

[124] See Table 5.1.

European Social Charter

(1961, revised 1996)

Article 17. The right of children and young persons to social, legal and economic protection

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1 *a. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;*

b. to protect children and young persons against negligence, violence or exploitation;

. . . .

The European Social Charter was opened to signature by Council of Europe Member States in 1961 and entered into force in 1965.[125] The 1996 revised European Social Charter, which replaces the 1961 Charter over time, entered into force in 1999.[126] 39 Member States have ratified either the 1961 Charter or the 1996 revised Charter, and these States report annually to the European Committee of Social Rights, the body responsible for monitoring Charter compliance.[127] The Charter is considered the major European treaty for children's rights.[128]

[125] European Treaty Series, No. 35, 18 October 1961.
[126] Council of Europe Treaty Series, No. 163, 3 May 1996.
[127] Council of Europe Secretariat of the European Social Charter, *Member States of the Council of Europe and the European Social Charter: Situation at 21 December 2006*, www.coe.int/t/e/human_rights/esc.
[128] Council of Europe Secretariat of the European Social Charter, *Children's Rights Under the European Social Charter*, Strasbourg, 2005.

In its Conclusions on State compliance with the European Social Charter, the European Committee of Social Rights consistently remarks upon MACR provisions. The Committee has found that MACRs lower than 12 years of age are incompatible with Article 17, and that any decrease in MACRs may be problematic. With respect to Turkey's MACR of 11 years, for example, the Committee concluded that "the situation in Turkey is not in conformity with Article 17 of the Charter on the grounds that . . . the age of criminal responsibility is manifestly too low."[129] The Committee has made similar conclusions with respect to even lower MACRs of various States Parties, while it frequently notes without objection MACRs of 12 and higher.[130] In the case of Slovakia, the Committee expressed concern over a proposal to decrease the MACR from 15 years to 14 years, despite remaining above the implied limit of 12 years. The Committee noted that "[i]t wishes to know the reasons for this and considers that this may be a retrograde step."[131]

Perhaps more importantly, the European Committee of Social Rights has shown a willingness to scrutinize MACR provisions reported by States Parties, with particular attention to the treatment in law and in practice given to children younger than MACRs. Again in the case of Turkey, which had reported an MACR of 12 years, the Committee took the initiative of noting that the Juvenile Courts Law establishes an effective MACR of 11 years, and probed even further into the reality for children beneath that age:

> The Committee notes that the Juvenile Courts Law holds that no investigation can be conducted nor sentence given to minors who at the time of the crime being committed were under 11 years. However, if the crime requires a sentence of more than one year, one of the measures specified in Article 10 is applied. The measures applicable are inter alia placement in an institution for children with learning difficulties, in

[129] European Committee of Social Rights, *Conclusions XVII-2 (Turkey)*, 2005, at 30.
[130] See, for example, concerns expressed in the following: *Second Addendum to Conclusions XV-2 (Ireland)*, 2001; *Conclusions XVII-2 (Malta)*, 2005; and *Conclusions XVII-2 (United Kingdom)*, 2005. States Parties with MACRs of 12 and higher included Croatia, Finland, Germany, Hungary, Iceland, Italy, Latvia, Lithuania, Netherlands, Norway, Romania, Spain, and Sweden.
[131] European Committee of Social Rights, *Conclusions XVI-2 (Slovakia)*, 2003, at 103.

factories, in agricultural enterprises or in a public or private hospital. These measures can also be applied to minors whose physical, moral or spiritual development is in danger or children who seriously disobey their parents. The Committee asks more details on the placement procedure. It asks whether there is an age limit for the measures to be applied and the number of minors under 11 years of age subject to these measures. Lastly, the Committee asks that the next report provide more details as to the regime of the placements.[132]

Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (1999 and 2004 Judgments)

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The Convention for the Protection of Human Rights and Fundamental Freedoms, or the European Convention on Human Rights, was opened for signature

[132] European Committee of Social Rights, *supra* note 129, at 29.

by Council of Europe Member States in 1950 and entered into force in 1953.[133] All 47 Member States of the Council of Europe are party to the Convention, which is interpreted and applied by the European Court of Human Rights. In 1999, the Court heard jointly and delivered decisions on two critical cases involving the MACR, and delivered an unrelated decision in 2004 that also touched upon the issue.[134]

The context for the 1999 decisions was the infamous Bulger case, which is described in detail in Chapter 5. In brief, the original 1993 case involved two ten-year-old boys, in Liverpool, England, who kidnapped and beat to death a two-year-old toddler, James Bulger. The boys then left the toddler's body on railroad tracks where it was later severed by a passing train. Their three-week trial saw unprecedented public outrage and media sensationalism, with angry protests upon the arrival of the boys to the courtroom, including attempts to attack the vehicle transporting the boys to the court. The adult courtroom and trial proceedings, despite some adaptations on the boys' behalf, were generally formal and took place in a packed courtroom. At the time, the MACR in England was 10 years of age, with a rebuttable presumption of non-responsibility between the ages of 10 and 14 years based on a child's discernment of right from wrong. This presumption was rebutted, the trial jury found both children guilty, and the presiding judge sentenced them to detention "during Her Majesty's pleasure" as required under law. Both children subsequently complained before the European Court of Human Rights that a number of their rights had been violated under the Convention during their trial and sentencing.

Among other points in the cases, the Court considered whether the combined effect of England's MACR and other factors related to the trial and sentencing constituted a violation of Article 3 – the children's right not to be subjected to torture or to inhuman or degrading treatment or punishment. In fact, it first considered

[133] European Treaty Series, No. 5, 4 November 1950.
[134] European Court of Human Rights, *Case of T. v. the United Kingdom: Judgment*, Strasbourg, 1999; European Court of Human Rights, *Case of V. v. the United Kingdom: Judgment*, Strasbourg, 1999; and European Court of Human Rights, *Case of S.C. v. the United Kingdom: Judgment*, Strasbourg, 2004.

whether the application of an MACR of 10 years, in and of itself, might construe a violation of Article 3. In doing so, the Court took account of the MACR provisions among Council of Europe Member States, as well as relevant international texts and instruments. While noting the low MACR of the United Kingdom, the Court did not find a commonly accepted lowest age for MACRs in Europe, nor did it see England's MACR so low as to differ disproportionately from prevailing standards. It did not find a clear tendency either, for a lowest acceptable age limit, in the Beijing Rules or the CRC.[135] As such, the Court held that the United Kingdom's attribution of criminal responsibility to the boys did not constitute by itself a violation of Article 3.

One of the partly dissenting opinions to the Court's decisions, signed by nearly one-third of its judges, opposed this interpretation.[136] In particular, these judges maintained that the low MACR, prosecution in adult court, and subjection to an indeterminate sentence (i.e., detention during Her Majesty's pleasure) collectively reached a level of mental and physical suffering for the boys that constituted inhuman and degrading treatment in violation of Article 3. They also argued that the majority erred in considering the MACR in isolation from the trial process, and in failing to find a clear tendency in the MACR among European states and international instruments. The partly dissenting opinion noted that only 4 of 41 Member States then had an MACR as low as or lower than England's MACR, and argued that this disparity constituted a disproportionate difference. The judges noted that even in the absence of a specific recommendation in the Beijing Rules, the concepts of maturity and criminal responsibility were clearly related, and almost all Member States found that children younger than 13 or 14 lacked the appropriate maturity.

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[135] Note that, among other developments, the General Comment on juvenile justice by the Committee on the Rights of the Child, which clarifies international standards in this regard, was completed several years after the Court's hearing.

[136] European Court of Human Rights, "Joint Partly Dissenting Opinion of Judges Pastor Ridruejo, Ress, Makarczyk, Tulkens, and Butkevych," *Case of T. v. the United Kingdom: Judgment*, Strasbourg, 1999; and European Court of Human Rights, "Joint Partly Dissenting Opinion of Judges Pastor Ridruejo, Ress, Makarczyk, Tulkens, and Butkevych," *Case of V. v. the United Kingdom: Judgment*, Strasbourg, 1999.

The Court's judgments also considered the question of whether or not the boys' right to a fair trial under Article 6§1 had been violated. In particular, the Court noted that Article 6, taken as a whole, guarantees the right to effective participation in one's criminal trial. Consequent to its reasoning under Article 3 above, the majority first summarily concluded that the England's low MACR could not violate by itself the right to a fair trial. However, the Court held that "it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings."[137] The Court in effect made an explicit link, more prominently than ever before in international law, among children's ages, MACRs, and the ages at which children may be capable of participating effectively in their criminal trials.

The Court noted that in order for young children to participate effectively in their own trials, it would be necessary to reduce their feelings of intimidation and inhibition, and to protect their privacy, particularly when involving serious offenses and great media and public interest. Although concrete steps were taken to modify the courtroom and trial proceedings as such in the Bulger case, the Court found that such steps were insufficient. The Court cited psychiatric evidence regarding one of the boys in particular, submitted by both the defense and prosecution during his trial.[138] Before the trial itself, experts observed that the boy cried inconsolably during each interview, and was unable to talk about the crime in any useful way. He was overwhelmed when thinking or talking about the circumstances, leaving it impossible to ascertain numerous aspects. The boy reported that during the trial he had been terrified and distressed, that he was unable to pay attention to the proceedings, and actively tried to distract himself from them. One expert strongly doubted that the boy understood the situation or could give useful instruction to his lawyers. Given the overall atmosphere of the court, and the evidence of at least one boy's distress, the Court held that the boys could not have meaningfully consulted

[137] European Court of Human Rights, *supra* note 134, (*T.*) par. 84, and (*V.*) par. 86.
[138] *Ibid*. (*V.*), par. 89.

with their lawyers, either inside or outside the courtroom, in their own defense. Consequently, the Court held, by sixteen votes to one, that the boys were unable to participate effectively in their trials, and had thus been denied fair trials in violation of Article 6§1.

In the unrelated 2004 case of *S.C. v. the United Kingdom*, the Court re-examined both the issue of the MACR and that of children's right to effective participation in their trials.[139] The case involved the criminal trial and conviction of S.C., an 11-year-old boy, for attempted robbery in 1999. Although S.C. did not ask the Court to reconsider that the application of a low MACR might constitute a violation of the Convention, the Court still referred to the precedent of the Bulger case: "The Court observes, firstly, that the attribution of criminal responsibility to, or the trial on criminal charges of, an 11-year-old child does not in itself give rise to a breach of the Convention, as long as he or she is able to participate effectively in the trial."[140] Indeed, S.C.'s principle contention was that "under Article 6 § 1 of the Convention that he was denied a fair trial because, by virtue of his age and intellectual ability, he was unable to participate effectively in the criminal proceedings against him."[141] S.C.'s attorneys presented significant evidence to this effect. Following a pre-trial examination of S.C., a clinical psychologist reported that the boy's cognitive abilities were comparable to those of children 6 to 8 years of age, signifying a noticeably restricted ability to reason. On appeal following conviction, S.C.'s supervising social worker stated that during trial S.C. did not fully understand the situation of his criminal trial, frequently asked what was happening, did not understand the sentence that had been handed down against him, and was confused as to the consequences of his trial and sentence despite repeated explanations. The Government argued instead that trial procedures had been substantially modified to accommodate S.C., including a less formal courtroom setting, constant accompaniment by the supervising social worker, and no media

[139] European Court of Human Rights, *supra* note 134 (*S.C.*).
[140] *Ibid*., par. 27.
[141] European Court of Human Rights, *Decision as to the Admissibility of Application no. 60958/00 by S.C. against the United Kingdom*, 2003.

coverage of the trial or public response to it. Moreover, S.C.'s attorneys did not mention at trial that the boy was encountering difficulties in following the proceedings, nor was there any evidence of trauma caused by the trial.

In consideration of such evidence, the European Court of Human Rights held by five votes to two that there had been a violation of Article 6§1 due to S.C.'s inability to participate effectively in his trial. After citing its decisions in the Bulger case, the Court further expounded its reasoning:

> "effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.[142]

The Court considered that in the case of criminal proceedings against a child "who risks not being able to participate effectively because of his young age and limited intellectual capacity . . . it is essential that he be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly."[143]

Although the European Court of Human Rights dedicated substantial attention to the MACR in these decisions, its consideration of children's right to participation at trial brings more significant implications. Explicitly, the judgments recognize that despite extensive modifications of courtrooms and trial procedures, some children due partly to their age and immaturity may not be able to participate effectively in

[142] European Court of Human Rights, *supra* note 134 (*S.C.*), par. 29.
[143] *Ibid*., par. 35.

their own criminal defense, constituting a breach of their rights under the European Convention on Human Rights. As discussed extensively in Chapter 2, international juvenile justice standards also place a strong emphasis on children's right to participation. Arguably, it may be inferred that where an MACR is so low as to regularly preclude some children's effective participation at trial, despite adaptations of juvenile court settings and procedures, the MACR inherently breaches children's right to participation. This point underscores the international standards' broad considerations for children's ages and maturity in juvenile justice, both in respect to the MACR and to children's right to participation in their trials. Such links are explored further in Chapter 7. Finally, given subsequent clarification by the Committee on the Rights of the Child as to international standards for MACR age levels, it seems nearly certain that the European Court of Human Rights will be asked to revisit its reasoning on the MACR in coming years.

Conclusion

Over the course of several decades, international law instruments have scrutinized MACRs and their implications – in regional and international settings; in human rights and humanitarian instruments; in instruments' drafting histories and final language; via regional and international jurisprudence; and in binding and advisory contexts. The corresponding legal obligations for MACRs that have arisen depend, from country to country, on such variables and leave several points for future debate. These include the possibility that there exists a general principle of international law regarding MACRs, as first raised during deliberations on Additional Protocol I to the Geneva Conventions, and as discussed in further detail in Chapter 5. Nonetheless, in a more general sense, it does seem possible to infer a basic convergence on MACRs, their establishment, and their implementation, drawing most visibly from the work of the Committee on the Rights of the Child. Indeed, the Committee has examined the MACR in the greatest detail, and it brings added authority as the monitoring body for the most widely legally binding instrument, which is also specific to children. Moreover, the other instruments and related

monitoring bodies surveyed in this chapter have largely reaffirmed several of the key points emphasized by the Committee. Arguably, this international convergence includes the following points:

- Every country must establish and enforce one clear MACR, applicable throughout its territory, at the level of 12 years of age at a minimum. Ages higher than 12 are preferable, and respective MACRs should not be lowered.
- Secondary and multiple ages of criminal responsibility are not compatible with international standards (n.b., this issue is distinct from the minimum age of penal majority, which must be set at 18 years or higher). These include *doli incapax* and similar age ranges for rebuttable presumptions; multiple age limits according to type or supposed seriousness of offense; and age limits in anti-terrorism and other emergency laws.
- MACRs must fully respect the principle of non-discrimination in law and practice (e.g., by gender, according to socio-economic status, by vulnerable groups of children).
- If there is no proof of age (e.g., birth certificate) for children in conflict with the law, they are entitled to reliable medical or social investigations via official systems of age verification. In cases of conflict or inconclusive evidence on whether children are younger than MACRs or not, children shall not be held criminally responsible.
- Children younger than MACRs at the time of alleged offenses cannot be formally charged, or be held responsible in or be subject to penal law procedures or responses, via either juvenile or adult criminal court. Furthermore, they cannot be treated in a criminalized manner, including inter alia by detention in police custody or other forms of detention.
- Special protective measures can be taken if necessary in the best interests of children younger than MACRs at the time of alleged

> offenses, through non-penal judicial proceedings, or without resorting to judicial proceedings. In all such cases, legal safeguards must be in place to ensure that their treatment is as fair and just as that of children at or above MACRs, including the protection of children's rights in the context of juvenile justice. In those cases where such children are deprived of their liberty via special protective measures, all rights of children deprived of their liberty apply.

Among other implications, the progressive consolidation of these standards would seem to favor further judicial review of national MACRs, particularly in national and regional tribunals. The European Court of Human Rights, which has closely examined the MACR in widely reported and influential decisions, appears to be a likely forum as such. In the same judgments, the European Court also highlighted the fundamental requirement of children's effective participation in their own criminal trials, which brings further attention to the link between MACRs and children's competency for participation.

Behind this convergence, however, the antecedents, drafting histories, instrument texts, and formal interpretations periodically demonstrate inconsistencies in their ideas about the significance and purpose of MACRs. To a large extent, these are further reflections of the historic debates and tensions described in Chapter 1. They are also related to the growth in conceptual sophistication over time, as children's rights scholarship has progressed and its principles have been applied in practice. The early history behind the Beijing Rules' specific consideration of the MACR, for example, suggests a notable welfare bias and loss of conceptual clarity; children's rights thinking no longer doubts the need for due process rights for children. Isolated consideration of the MACR can also create, ironically, distractions from an appropriate sense of perspective vis-à-vis the broader children's rights framework as explored in Chapter 2. As noted there, this framework contains its own ambiguities and points of contention, yet its principles generally provide sufficient clarity for a grounded perspective. They demand much broader context than, for example, just the protective rationale that underlies many calls for very high

MACRs. Although these calls are typically motivated to protect children from the harmful practices that abound in many juvenile justice systems, they do not sufficiently explain their own implicit characterization of children as incompetent, nor do they generally give a convincing account of how to respond appropriately to the larger group of children younger than MACRs as these are increased.

The question of appropriate responses to children younger than MACRs is already one of the most complicated issues, even without raising the MACR to very high levels. International standards do envisage state responses to children younger than MACRs in conflict with the law, and there are specific substantive and procedural restrictions, as well as constructive guidance, on such responses. Chapter 2 additionally argues that children's rights principles strongly encourage developmentally appropriate responses to all such children. Nevertheless, these standards do not simply rule out deprivation of liberty in all cases for children younger than MACRs, which might seem to be the easy answer. Although all pertinent international rules apply, protection measures may at times include the deprivation of liberty, even if its use should be seen as exceptionally rare. Moreover, in looking at other responses which seem to suggest non-custodial approaches – such as many protection, education, welfare, treatment, and other measures – these may amount to punishment in practice, indicating criminal responsibility. Thus, even though international guidance gives some direction, it is not always clear how states may or should respond to children younger than MACRs, nor which responses are a sign of criminal responsibility and thus inadmissible for such children.

This is perhaps the area where further interpretive guidance by both monitoring and judicial bodies would be most useful in clarifying international standards – teasing out in practical terms how relevant principles apply to children younger than MACRs. It would seem particularly helpful as such to promote greater transparency and disclosure on national provisions and practices for children younger than MACRs, including among respective governments and national and international NGOs, and to foster dialogue and exercise closer scrutiny as such. Ideally, these steps would progressively reaffirm in greater detail what is desirable

for children younger than MACRs in conflict with the law, and what state responses are prohibited.

CHAPTER 4 HISTORICAL INFLUENCES ON MACRS

Chapter 1 of this study surveys the direct roots of modern juvenile justice reaching back into feudal England, primarily in order to explore the dilemmas of its central continuum today – from the social welfare approach to the justice approach. The present chapter offers a complementary overview of major historical trends behind minimum ages of criminal responsibility (MACRs) themselves. To a significant extent, these histories are part of the same narrative, and the present chapter touches again upon the earliest foundations in juvenile justice history. However, the legal history of MACRs merits distinct consideration, as it offers an important explanatory perspective on relevant provisions across the world today, and brings to light the common threads behind a number of recurring problems and challenges. Ancient Roman law, itself influenced extensively by Greek philosophy, formed the basis for later European continental law on children's criminal responsibility, and contributed heavily to English common law as well. Subsequently, European colonial law, particularly English and French, carried its models around the globe. Islamic criminal law lies behind the formal MACR provisions of various countries, yet its far-reaching authority influences many more. The Soviet model led to parallel MACRs and related practices across many countries in Asia and Central and Eastern Europe. All told, these few sources explain at least in part most countries' current MACR provisions, as documented in Chapter 5. In addition, beneath the surface of national law and institutions, various customary, traditional, and religious law systems also regulate juvenile justice and children's criminal responsibility for large segments of many countries' populations.

Roman Law, European Law, and European Colonial Law

Among other ancient bodies of law, Babylonian law, Hebrew law, and Greek law all referred to the severity of punishments as contingent upon the degree of

conscious wrongdoing in various crimes.[1] The Romans' earliest written legal code, the Law of the Twelve Tables (c. 450 B.C.), applied such notions more directly to children. The Twelve Tables mention pre-pubescent children in two dispositions in penal-related law, and distinguish between voluntary and involuntary crimes as a basis for mitigating punishments. Thus, as pre-pubescence constituted a presumed lack of discernment, it led to an attenuation of punishment for most crimes, although not a total exemption as such from criminal responsibility.[2]

The growing influence of Greek philosophy upon Roman law led to greater consideration of moral criteria in general and with respect to children in particular.[3] By the time of the *Lex Cornelia* (c. 81 B.C.), pre-pubescent children's criminal acts were excused, beyond simple mitigation of their punishment, on the basis that they lacked the capacity to intend harm.[4] Upon reaching puberty, children were liable to all punishments.[5]

Over time, children beneath the limit of puberty for criminal responsibility were further divided into three distinct groups, reflecting the continuing focus on the development of children's comprehension; upon reaching puberty children still faced criminal liability. The first group, that of *infantia* or infancy, referred to children who were considered incapable of *dolus*, or guilty intention, and who could thus never be held criminally responsible.[6] Initially, this group apparently included children (*infantes*) from birth until they literally gained the ability of *fari*, that is, "to

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[1] Perrin, Bernard, "La minorité pénale en droit romain et dans les législations européennes antérieures au XIX[e] siècle," in Donnedieu de Vabres, Henri, and Marc Ancel, eds., *Le problème de l'enfance délinquante: l'enfant devant la loi et la justice pénales,* Paris, Librairie du Recueil Sirey, 1947; and Thomas, J.A.C., "Delictal and Criminal Liability of the Young in Roman Law," in *L'enfant*, *Recueils de la Société Jean Bodin pour l'histoire comparative des institutions*, vol. 38, Bruxelles, Éditions de la Librairie encyclopédique, 1977.
[2] Perrin, *ibid*.
[3] *Ibid*.
[4] Platt, Anthony, and Bernard L. Diamond, "The Origins of the 'Right And Wrong' Test of Criminal Responsibility and its Subsequent Development in the United States: An Historical Survey," 54 *California Law Review* 1227, 1966.
[5] Crofts, Thomas, *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law*, Aldershot (England), Ashgate, 2002.
[6] Perrin, *supra* note 1; and Robinson, Olivia F., *The Criminal Law of Ancient Rome*, London, Duckworth, 1995.

use words according to grammatical and lexical rules of speech."[7] By the 300s A.D., this physical test was replaced in law by a standard age limit of 7 years denoting the end of *infantia*.[8]

The subsequent two periods were *infantiae proximus*, near infancy, and *pubertati proximus*, near puberty. It seems that ancient Roman law did not establish an age-based division between these groups, distinguishing between them instead upon individuals' physical appearances. Similarly, potential criminal responsibility was determined within both groups on an individual basis, according to whether children were deemed *doli capax* – capable of forming guilty intentions.[9] Children among *infantiae proximus* generally faced the presumption that they were *doli incapax* (incapable of guilty intentions), while those among *pubertati proximus* were presumed *doli capax*. In both cases, the presumptions were rebuttable, based on the presentation of clear and certain evidence showing a child's intentions.[10] Those ultimately held *doli capax* and found criminally responsible were treated as adults with mitigation of their punishments.[11] Commentary from the 100s A.D. notes that the majority of jurists agreed with such an approach.

These divisions among pre-pubescent children were at times clouded by the notion of *malitia supplet aetatem* – malice or wickedness supplies age – meaning that the demonstrated vice of a child could justify criminal responsibility despite his or her youthfulness. The joint emperors Maximian and Diocletian had invoked this principle in related circumstances around 300 A.D., yet there is evidence of its use even at the beginning of the Roman Empire.[12] However, in later centuries of the Empire, with heavier state penal repression and public order measures, recourse to

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[7] Voigt, Moritz, *Die XII Tafeln*, vol. 1, 1883, reprinted Aalen, Scientia, 1966, at 314, paraphrased by Crofts, *supra* note 5, footnote 3 at 93.
[8] Perrin, *supra* note 1.
[9] Crofts, *supra* note 5.
[10] Crofts, *ibid*; and Platt et al., *supra* note 4.
[11] Stettler, Martin, *L'évolution de la condition pénale des jeunes délinquants examinée au travers du droit suisse et de quelques legislations étrangères: Les seuils de minorité pénale absolue ou relative confrontés aux données de la criminologie juvénile et aux impératifs de la prévention*, Geneva, Librairie de l'université, 1980.
[12] Laingui, André, *La responsabilité pénale dans l'ancien droit (XVI^e^ - XVIII^e^ siècle)*, Paris, Librairie générale de droit et de jurisprudence, 1970; and Perrin, *supra* note 1.

malitia supplet aetatem led to the increasing assimilation of *pubertati proximus* directly into adulthood.[13] At the same time, *infantiae proximus* were progressively incorporated into the group of *infantia* with no criminal responsibility.[14] Consistently, however, the beginning of puberty triggered criminal responsibility. Whereas examination for physical signs of puberty was the earlier practice, by the 500s A.D. explicit age limits were established as the accepted onset of puberty: 14 years for boys, and 12 years for girls.[15] Thus, by that point in Roman law, children younger than 7 were *doli incapax*; girls 7-11 years old and boys 7-13 years old were only presumed *doli incapax*; and girls 12 and older and boys 14 and older were *doli capax*.

Centuries later, the resurgence in the study of ancient Roman law, beginning by roughly the 1000s, led to its instruction at universities and eventual adaptation and gradual application in practice across most of Europe by the 1500s. Different European peoples and nations often had their own penal rules and practices regarding children, which had evolved over the intervening centuries, but these were influenced across the board by the reception of Roman law. Already in the 1000s, scholars began reestablishing the Roman age periods regarding children's criminal responsibility, drawing extensively from the Justinian Code of the 500s AD.[16] These eventually became the common rule among almost all legal traditions of Europe. Nonetheless, the meaning and age boundaries of children's criminal responsibility were determined in practice by independent appraisal of judges. Despite a common legal framework, case law shows that legal practice was logically incoherent and contradictory, and the supposed rules were often violated. It seems most likely that children's status in the criminal law typically led to mitigation of sentences and not exclusion of responsibility. In particular, the principle of *malitia supplet aetatem* saw a great revival in the Middle Ages, and frayed away the special considerations attached to the respective age groups. Scholars, who widely commented upon the

[13] Perrin, *ibid*.
[14] Stettler, *supra* note 11.
[15] Crofts, *supra* note 5; and Platt et al., *supra* note 4.
[16] Perrin, *supra* note 1.

principle, found in it the justification to hold even very young children criminally responsible – as seen in numerous cases where it was invoked to punish children.[17] In fact, all the governments of monarchical Europe used *malitia supplet aetatem* as a cornerstone in criminal law practice for children.[18]

Despite its watering-down in practice, Roman law often remained legally in force until national codification efforts began in the 1700s. Just prior to the French Revolution, most European states still applied a system of mitigation for children, with criminal liability withheld only for some of the youngest children.[19] By this time, age limits certainly varied among countries and even regions, and judges continued to exercise great discretion in considering the individual circumstances of children's cases and applying unwritten laws. Importantly, the French Penal Codes of 1791 and 1810 eliminated the stages of penal minority and set a simplified age of penal majority of 16 years. For children under the age of 16, it was determined in court if they had acted with discernment or not. If they had not exercised discernment, criminal responsibility was technically excluded and no penal sanctions were permitted. If children before 16 years had acted with discernment, without any lower age limit, criminal responsibility and mitigated penalties ensued. The drafters for these codes drew inspiration directly from Roman law *doli capax* provisions.[20] Nonetheless, with their elimination of the minimum age limit for criminal responsibility, French penal law did not feature any MACR between 1791 and 1912, when an MACR of 13 years was codified. The 1791 and 1810 French Penal Codes were influential models through the 1800s, alongside the original Roman law formulation, in Europe and the Americas.[21] After the first half of the 1800s, many

[17] Laingui, *supra* note 12; and Perrin, *ibid*.
[18] Perrin, *ibid*.
[19] Stettler, *supra* note 11.
[20] Laingui, André, *Histoire du droit pénal*, Paris, Presses Universitaires de France, 1985.
[21] Cieślak, Marian, "De la répression a la protection des mineurs: Histoire de la délinquance juvénile: Rapport de synthese," in *L'enfant*, *Recueils de la Société Jean Bodin pour l'histoire comparative des institutions*, vol. 38, Bruxelles, Éditions de la Librairie encyclopédique, 1977.

countries that had adopted the French model began adding MACRs to their respective codes, becoming a common feature in the criminal law.[22]

England was the principal exception to the European trend of receiving Roman law, yet England's own history on children's criminal liability is nonetheless a mixed evolution of Anglo-Saxon and Roman law. Ancient Anglo-Saxon law, as early as 688 A.D. and through the 900s, showed special concern for young offenders, generally exempting youth from the severe punishments given to adults.[23] Through this period, age limits for such clemency ranged from roughly 10 to 15 years of age in various circumstances. Over time, this general notion of leniency for children developed in law and jurisprudence into two distinct age limits: the first, an age below which punishment was never possible; and the second, a higher age limit beneath which children could be punished in certain circumstances. Regarding the former, from roughly the late 1200s to the early 1600s there is evidence of evolution, albeit neither linear nor consistent, towards a concrete minimum age below which no punishment could be given. Evidence suggests that judges held significant discretion in deciding if individual children were old enough to face punishment or not, while guideline age limits of 7 and 8 years were occasionally cited. These limits, especially that of 7 years, are probably related to the influence of the Catholic Church, whose Canon Law drew directly from ancient Roman law in its provisions on children's criminal responsibility. Indeed, over time, 7 years became the consensus lower age limit below which no punishment could be given, understood as the age where children first began to understand the difference between good and evil. As such, it marked the beginning of the possibility for punishment depending upon individual children's development and understanding.

Beginning by the early 1300s, a conditional range for children's criminal responsibility came into common practice, where responsibility depended in broad terms on individual children's knowledge or understanding of the difference between

[22] *Ibid*.; and Nillus, Renée, "La minorité pénale dans la législation et la doctrine du XIX^{e} siècle," in Donnedieu de Vabres, Henri, and Marc Ancel, eds., *Le problème de l'enfance délinquante: l'enfant devant la loi et la justice pénales,* Paris, Librairie du Recueil Sirey, 1947.
[23] Crofts, *supra* note 5.

good and evil.[24] In general, as commonly cited by judges and legal scholars, children beginning at the minimum age limit of 7 years were presumed to lack the minimum mental capacity to commit crimes and to understand the moral implications of their acts. The prosecution had to submit evidence of children's actions, demonstrating their understanding, to convince the court and rebut this presumption, thus opening the possibility for criminal responsibility.[25] The upper boundary to this conditional range evolved over time, hovering around 12 and 14 years, and became fixed by consensus at 14 years probably by the end of the 1600s.[26] Before the introduction of systematic birth registration systems in the early 1600s, it fell upon judges to decide individual children's maturity as a question of fact in each case. This was done based on children's physical appearances, in part to determine their exclusion from criminal responsibility or the availability of the presumption of being *doli incapax*.[27] In summary, by the early 1700s English common law held that children beneath the age of 7 years could not be punished for any crime, and that children between the ages of 7 and 14 years were (rebuttably) presumed incapable of understanding the gravity of their acts, while children from 14 were subject to criminal responsibility. These rules, notwithstanding variations in practice, remain unchanged until the United Kingdom raised the MACR from 7 to 8 years by statute in 1932, and again so from 8 years to 10 years in 1963. As discussed later in this study, the United Kingdom abolished the *doli incapax* presumption for children between 10 and 14 years in 1998.

In addition to the influence of the French Penal Code as a model for national legal codification efforts in the 1700s-1800s, both French law and English common law are particularly important for propagating MACRs worldwide through respective colonies and protectorates. France, for example, pursued a strategy from 1921-1928 to introduce across its colonies the measures of the *Loi du 22 juillet 1912 sur les*

[24] Crofts, *ibid*.; and Platt et al., *supra* note 4.
[25] Crofts, *ibid*.
[26] Crofts, *ibid*.; and Platt et al., *supra* note 4.
[27] Kean, A.W.G., "The History of the Criminal Liability of Children," 53 *Law Quarterly Review* 364, 1937; and Platt et al., *ibid*.

tribunaux pour enfants et adolescents et sur la liberté surveillée.[28] This is the law that established an MACR of 13 years, but that also maintained the stipulation that children between 13 and 18 years must have acted with discernment in order to face imprisonment.[29] The French Ministry of Colonies elaborated a text based on that law, which subsequently went into force in numerous French colonies. As generally discussed below, there were widespread challenges in taking account of indigenous customs in implementing the law, and not all colonies adopted the measure. Where the text went into force, it established an MACR of 13 years, while other colonies and protectorates maintained laws based on earlier French statutes and strict discernment tests without age limits. In later decades, new countries generally retained the colonial law that stood in force immediately prior to independence. Consequently, among 26 countries that were French colonies or protectorates in the 1900s, 15 have an MACR of 13 years, while 7 maintain some form of test for children's discernment before criminal responsibility may ensue.

The impact of English common law on MACRs around the world is even more notable. As Great Britain settled colonies, it carried and adapted provisions for children's criminal responsibility under colonial law. Typically, common law countries received common law as it stood in effect in England on a specified date, while in many cases penal codes were established in diverse forms and drew from complex sources. Statutory changes were often made over time, mirroring amendments undertaken in Great Britain or otherwise modifying the language of provisions. All the same, former British colonies generally share "underlying unity" in the realm of English criminal law.[30] By extension, the strongest indications are that virtually all former British colonies and protectorates derived their MACRs from English common law or later amending statutes. Indeed, out of some 75 countries that were once British colonies or protectorates, or otherwise recipients of common

[28] Bouvenet, Gaston Jean, *La minorité pénale dans les colonies françaises*, doctoral dissertation, Université de Nancy, Faculté de droit, 1936.
[29] Griffe, Clément, *Les tribunaux pour enfants: Étude d'organisation judiciaire et sociale*, Paris, Fontemoing, 1914.
[30] Read, James S., "Criminal Law in the Africa of Today and Tomorrow," 7 *Journal of African Law* 5, 1963, at 5.

law, 56 set their MACRs at 7, 8, or 10 years. Furthermore, out of the 55 countries that do have *doli incapax* or similar provisions, approximately 40 have been directly influenced by English common law.[31]

Other European countries with colonies and protectorates tended to transplant their MACR provisions overseas as well. As discussed above, most continental European countries shared the legacy of Roman law, if not the influence of the first French Penal Codes, and these were the basic models carried forth despite numerous variations. Due to the breadth of their colonial reach, however, France and England bear disproportionate and more direct influence on historical MACR provisions around the world.

Islamic Law

At first glance, Islamic law may seem to hold far less influence on MACR provisions across the 192 countries of the world. Among the 64 nations that are part of the Islamic world, only 9 clearly base their MACR provisions to some extent upon Islamic law: Afghanistan, Comoros, Iran, Malaysia, Maldives, Nigeria, Pakistan, Somalia, and Sudan.[32] Among the remaining Islamic countries, the majority can trace their MACR provisions through the history of English, French, or Soviet influences, as described in this chapter. However, the importance of Islamic law goes beyond the provisions of these 9 countries. As discussed below in this chapter, national statutory law often holds little importance compared to Islamic law and customary law in terms of effective limits to children's criminal responsibility. Although codified law across the Islamic world is frequently European in origin, respect for legal standards in practice may be greatly influenced by their legitimacy under Islamic law, and Islamic law has played a primary role in various debates on

[31] See Chapters 5 and 6 for further considerations.

[32] The estimate of 64 countries is based upon a composite list of the Member States of the Organization of the Islamic Conference (www.oic-oci.org) and the countries profiled by the Islamic Family Law program at Emory University School of Law (www.law.emory.edu/ifl/index2.html) that are also United Nations Member States.

MACR reform.[33] In particular, this section highlights classic Islamic criminal law doctrine on children's responsibility, discusses problematic issues in that doctrine and in its transcription to modern statutory law and practice, and illustrates how Islamic jurists have applied classic law to further harmonize MACR provisions with international standards.

In general, it is important to note that there are in fact eight major schools of thought within Islamic law, and they hold diverse viewpoints even on some questions of children's age and responsibility. Among these eight, the four Sunni schools (i.e., Hanafites, Malikites, Shafi'ites, and Hanbalites) and two Shi'a schools are of critical importance, as almost all Muslims are either Sunni or Shi'a, respectively 85-90% and 10-15%. Already in the 700s, Islamic philosophers and jurists – including founders of some of the legal schools – held vigorous debates on the implications of childhood and responsibility for child protection, such that by the 900s classic Islamic legislation on children had evolved entirely.[34]

In all cases Islamic law predicates criminal responsibility, for adults and children alike, upon certain individual characteristics, among which the capacity for intelligent reason (*akl*) and the existence of free choice are central.[35] *Akl* bears special, broader importance as a prerequisite to understanding and appreciating the significance of divine morality and judgment. As such, it is tied to the capacity for comprehension and to the faculty of discerning between good and evil. Indeed, in Islamic criminal law, only those who can understand a legal norm, and act according to that understanding, are liable to criminal responsibility for violating that norm. In turn, reflecting an underlying conception of criminal responsibility based on the

[33] See An-Na'im, Abdullahi Ahmed, "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry," 3 *Harvard Human Rights Journal* 13, 1990.
[34] Fahd, Toufy, and Muhammad Hammoudi, "L'enfant dans le droit islamique," in *L'enfant*, *Recueils de la Société Jean Bodin pour l'histoire comparative des institutions*, vol. 35, Bruxelles, Éditions de la Librairie encyclopédique, 1975; and Sait, M. Siraj, "Islamic Perspectives on the Rights of the Child," in Fottrell, Deidre, ed., *Revisiting Children's Rights: 10 Years of the United Nations Convention on the Rights of the Child*, London, Kluwer Law International, 2000.
[35] El Accad, Mohamed, *La responsabilité pénale en droit musulman*, doctoral dissertation, Université de Droit, d'Économie et de Sciences Sociales de Paris, 1984.

existence and degree of fault, penal sanctions depend upon the nature of the offender's intentions. *Akl*, however, is a capacity that develops over time, but not in immediately or objectively visible ways. The *Qur'an* does not provide explicit age guidelines regarding the development of *akl*, thus Islamic legal and religious scholars interpret relevant ages as objective criteria to denote its growth.[36] In particular, they designate ages by which children are presumed to have acquired *akl*; where it is lacking, criminal responsibility is not possible.

With this basic conceptual foundation, Islamic law recognizes three age groups with respect to children and criminal responsibility:

1) From birth to age 7: The general view among classical scholars is that children up to the age of 7 years are considered non-discriminating, without the capacity of *akl*, and are not held criminally responsible for any reason.[37]
2) From age 7 to the onset of puberty: During this "age of discretion," children's reasoning is still incomplete in its development, and therefore precludes any criminal responsibility.[38] Even where individual children demonstrate discernment, they are not held criminally responsible.[39] However, as described further below, beginning with at least this age group various schools apparently contemplate *ta'dīb* punishments for certain offenses committed by such children.

   The temporal end of this period, the onset of puberty, is calculated differently by the various schools. To begin with, most establish an age range – from a minimum age before which puberty can never be established, to a maximum age upon which puberty is assumed – between

[36] Pearl, David, "A Note on Children's Rights in Islamic Law," in Douglas, Gillian, and Leslie Sebba, eds., *Children's Rights and Traditional Values*, Aldershot (England), Ashgate/Dartmouth, 1998.
[37] Bahnassi, Ahmad Fathi, "Criminal Responsibility in Islamic Law," in Bassiouni, M. Cherif, ed., *The Islamic Criminal Justice System*, London, Oceana Publications, 1982.
[38] *Ibid*.
[39] Fahd et al., *supra* note 34.

which the presence of puberty must be ascertained according to individual children's physical development.[40]

Peters compiles the authoritative opinions of most Islamic schools' age ranges for the consideration of puberty, which sometimes vary for boys and girls under the same school, as seen in Table 4.1.

Table 4.1[41]: Selected Islamic School Age Ranges (in years) for Individual Determinations of Puberty

School(s)	Hanafites	Malikites	Shafi'ites	Hanbalites	Shiites
Boys	12-15	9-18	9-15	10-15	none - 15
Girls	9-15	9-18	9-15	9-15	none - 9

In consideration of children within their respective age ranges, Islamic schools also hold divergent views on the admissible physical evidence of puberty for boys and girls.[42] In all cases, puberty remains a proxy for the intellectual capacity of individual children, with puberty of course varying both by gender and among individuals.[43] In terms of physical signs, boys are commonly accepted as having attained puberty when they are capable of producing sperm, and girls upon their first menstruation.[44] In Shi'a Islam, the growth of pubic hair also provides evidence of puberty.[45] Other schools may accept as proof of puberty, for example, pregnancy and the deepening of the voice during puberty.[46]

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[40] *Ibid*.
[41] Adapted from Peters, Rudolph, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge, Cambridge University Press, 2006, tables 2.1-2.2, at 21.
[42] Bahnassi, *supra* note 37. Nobahar, Rahim, Mofid University, Iran, e-mail correspondence with author, July 2001.
[43] El Accad, *supra* note 35.
[44] *Ibid*.
[45] Nobahar, *supra* note 42.
[46] *Ibid*.

3) From the onset of puberty and beyond: Even after the onset of puberty, children are not automatically held criminally responsible for their illicit acts. For such responsibility to follow, children must have reached puberty and be of sound mind.[47] If these conditions are met, complete maturity and full criminal responsibility are accepted, with penal sanctions for such children's delinquent acts.[48]

Within this tiered system of criminal responsibility, two further clarifications are necessary regarding children younger than the age of puberty. First, children of all age groups may bear civil responsibility for their actions against persons and property.[49] For example, they or their families may face reparation obligations for property offenses or damage. The second issue poses a greater complication. In brief, for one category of offenses (*ta'zīr*) that are punishable at judges' discretion, some children may be punished or disciplined (*ta'dīb*) despite the general Islamic criminal law age divisions.[50] It appears that *ta'dīb* may be imposed conditionally in certain contexts against children of all ages, and by judges against any child committing a *ta'zīr* offense and deemed to possess *akl*.[51] However, it does seem that there are varying interpretations of *ta'zīr* offenses regarding the possibility of *ta'dīb* for children younger than 7, and that at least the Sunni Shafi'ites and Hanafites do not allow such punishments until the age of 7.[52] Regardless, even though *ta'dīb* in theory "serves more as a lesson or warning than as a punishment," the disciplining generally consists of explicit corporal punishment in the form of flogging.[53]

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[47] Bahnassi, *supra* note 37.
[48] Fahd et al., *supra* note 34.
[49] See, inter alia, Safaï, Hossein, *La protection des incapables: Étude comparative du droit musulman classique et des législations modernes des pays islamiques*, Paris, Librairie Dalloz, 1966.
[50] Peters, Rudolph, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge, Cambridge University Press, 2006.
[51] Fahd et al., *supra* note 34; and Peters, *ibid*.
[52] See Bahnassi, *supra* note 37; and Khan Nyazee, Imran Ahsan, *General Principles of Criminal Law (Islamic and Western)*, Islamabad, Advanced Legal Studies Institute, 1998.
[53] Serrano, Delfina, "Legal Practice in an Andalusi-Maghrib Source from the Twelfth Century CE: The *Madhāhib al-ḥukkām fī nawāzil al-aḥkām*," 7 *Islamic Law and Society* 199, 2000, at footnote 63. See also Fahd et al., *supra* note 34.

In larger terms, this issue derives from classical Islamic government theory, wherein the head of state may delegate authority to courts staffed by individual judges (*qādīs*), who then decide cases based on Islamic legal doctrine.[54] At the same time, the head of state retains power to personally hear cases and administer punishment. Although trials before *qādīs* are generally regulated by formal adversarial procedures, with weighed evidence of alleged offenses and defenses, formal procedures are greatly relaxed and judges are granted wide-ranging discretion when alleged offenses regard *ta'zīr*. *Ta'zīr* itself is a broad category. It concerns discretionary punishment for all the following: forbidden or sinful behavior, including punishment for acts similar to but not meeting the strict legal definition of crimes in Islamic criminal law; the refusal to perform religious duties; and acts that could not otherwise be convicted for procedural reasons. Although *ta'zīr* pertains to the final of three separate chapters in Islamic criminal law, and its purview only commences where the other chapters leave off, *ta'zīr* is in practice the most important base for punishment.[55] Under it, *qādīs* may order measures from a nearly unlimited range of punishments, including reprimand, public scorn, flogging, banishment and imprisonment until repentance, and the death penalty. There are few limits on *qādīs*' authority as such, and these generally relate to the maximum number of lashes that may be ordered in flogging.

At the same time, such punishments are justified as rehabilitation for the offender, and accordingly they are individualized based upon the circumstances – as well as social and economic status – of each offender.[56] The primary goal of *ta'zīr* punishments is to prevent repeat offending, either by punishing past offenses or by coercing the fulfillment of religious duties. In this scheme, *ta'dīb* seeks to correct prohibited conduct.[57] Indeed, the etymological root of *ta'dīb* is *'adab*, broadly

[54] Peters, *supra* note 50.
[55] Al Awabdeh, Mohamed, *History and prospect of Islamic Criminal Law with respect to the Human Rights*, dissertation, Berlin, Humboldt-Universität, 2005; and Peters, *ibid*.
[56] Peters, *ibid*.
[57] See Serrano, *supra* note 53; and Tuşalp, Emine Ekin, *Treating Outlaws and Registering Miscreants in Early Modern Ottoman Society: A Study on the Legal Diagnosis of Deviance in* Şeyhülislam *Fatwas*, thesis, Istanbul, Sabancı University, 2005.

meaning manners or culture, which gives context to *ta'dīb*'s meaning as "education conceived as moral discipline, our means to the refinement of character."[58] The concept is used widely in the contexts of Islamic education and child rearing, and has variously been described in more succinct terms as "education, discipline, refinement,"[59] "corrective punishment,"[60] "admonition,"[61] "formation of character,"[62] and "teaching a lesson."[63] As such, at least some legal schools strictly consider *ta'dīb* to be non-criminal and non-penal in nature.[64]

It is noteworthy that the complex nature of *ta'dīb* for children parallels several aspects of juvenile justice systems that employ substantially punitive measures as welfare responses. Both systems draw upon elaborate historical and theoretical foundations; they grant almost unfettered discretion to judges in meting out punishments; they justify punishments on the basis of children's own best interests or rehabilitation; they are sometimes defended as non-penal approaches despite fundamentally punitive responses; and there is limited legal and statistical information available, if any, on relevant procedures and practices. Additionally, as discussed in general terms in Chapter 5, *ta'zīr*'s primary goal of preventing recidivism would automatically characterize *ta'dīb* as a punishment indicative of criminal responsibility. However, further research is needed on the doctrine and practice of applying *ta'dīb* to children younger than 7 and/or the age of puberty, both in countries where the statutory MACR already reflects Islamic law and where *ta'dīb* may be handed down independently of such provisions. As one example of the intricate legal standards at hand, before enactment of the Abolition of the Punishment

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[58] Goodman, Lenn E., *Jewish and Islamic Philosophy*, Edinburgh, Edinburgh University Press, 1999, at 131; and Goodman, Lenn E., "Humanism and Islamic Ethics," in Carr, Brian, ed., *Morals and Society in Asian Philosophy*, Richmond (England), Curzon Press, 1996.
[59] Goodman, *ibid*. ("Humanism . . . "), at 4.
[60] Peters, *supra* note 50, at 196.
[61] Wansbrough, John, and Andrew Rippin, *Quranic Studies: Sources and Methods of Scriptural Interpretation*, Amherst (New York), Prometheus Books, 2004, at 231.
[62] Haddad, Fuad Said, "An Early Arab Theory of Instruction," 5 *International Journal of Middle East Studies* 240, 1974, at 243.
[63] Peters, Rudolph, "For His Correction and as a Deterrent Example for Others - Mehmed Ali's First Criminal Legislation (1829-1830)," 6 *Islamic Law and Society* 169, 1999, at footnote 23.
[64] See Fahd et al., *supra* note 34; and Khan Nyazee, *supra* note 52.

of Whipping Act (Act VII of 1996), Pakistan allowed whipping as *ta'dīb* for *ta'zīr* offenses committed by children 7 and older with sufficient mental maturity, irrespective of puberty.[65] However, other laws apparently sanction *ta'zīr* punishments for any child, regardless of puberty or age, including fines and/or imprisonment up to five years for certain offenses.[66] Beyond the issue of corporal punishment as a violation of children's rights, such norms call for analysis on a case-by-case basis to determine how they interact with and potentially undermine MACRs.

To be sure, Islamic countries' modern legislation does not necessarily correspond to classical Islamic criminal law doctrine – essentially consolidated by the 900s – as outlined above. From the earliest period through the 1700s, the criminal law was implemented across various regions and dynasties of the Islamic world by different authorities and institutions, while subsequent Western colonization initiated a period of more fundamental changes.[67] Western powers began to influence and colonize parts of the Islamic world by the late 1700s, and as suggested in the case of French and English colonial law earlier in this chapter, new Western-style penal codes most often replaced Islamic criminal law in Asia and Africa through the 1800s. In some cases, such as in British India, Islamic law was gradually reformed over time but ultimately substituted by statute law. Independent Islamic states that were influenced by the West typically reformed and codified aspects of classic law, while a limited number of other independent countries continuously applied traditional doctrine until at least the 1900s. In fact, on the surface only Saudi Arabia, Qatar, and Yemen have continuously applied classic criminal law without interruption by Western law. Even in these countries, observers in recent decades had expected that modernization would eventually overtake the practice. Under the surface, however, scholars across the Islamic world have continuously studied and taught traditional doctrine, and as discussed later in this

[65] Khan Nyazee, *ibid*.
[66] E.g., Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979, Arts. 7 and 10; and the Prohibition (Enforcement of *hadd*) Ordinance, 1979, Arts. 2 and 11.
[67] This discussion is drawn primarily from the summary and analysis in Peters, *supra* note 50.

chapter, informal Islamic law has often enjoyed greater legitimacy and importance than official state laws among local populations.

In modern times, that popular appeal has fed into a major political-religious resurgence. Libya's Muammar Gaddafi announced in 1972 the reintroduction of *shari'a* law in his country, thus signaling a surprising rupture from the predominant trend of secularization, and unexpectedly triggering similar changes elsewhere. Over the ensuing years, Islamist movements worldwide sought to establish Muslim states, and to consolidate and expand their legitimacy where already in power, pursuing the reestablishment of Islamic law as their most visible objective. The enforcement of Islamic criminal law was generally the first step. Movements and governments seized upon rising popular discontent over growing Western influences, and pushed Islamization as both a faithful return to cultural traditions and as a religious obligation for Muslims and their societies. Such messages were broadly appealing and received general support, while popular opposition has generally been limited where criminal law was reintroduced. For the ruling classes, the imposition of Islamic law also provided means of suppression and further political power, and at times a method to co-opt and undermine the influence of other religious opposition movements. Also in support of state institutional power, the usual statutory reintroduction of Islamic law actually betrays Islamic law's foundation as a jurisprudence of scholars, not of state law making. The purported return to the pre-colonial state of things is disingenuous; instead, Islamic substantive criminal rules are delivered through Western-style legal institutions.

After Libya in 1972, Pakistan, Iran, Sudan, Nigeria, Malaysia, and the United Arab Emirates have passed legislation to reintroduce systems of Islamic criminal law, while as noted Saudi Arabia, Qatar and Yemen never interrupted their systems. In the context of MACRs in particular, current research confirms that Afghanistan, Comoros, Iran, Malaysia, Maldives, Nigeria, Pakistan, Somalia, and Sudan all derive their provisions to some extent from Islamic criminal law principles.[68] The

[68] See Table 5.1.

discrepancy between these two sets of countries may lie in part in the limited information available on MACR provisions in some countries (i.e., Libya, Qatar, Saudi Arabia, United Arab Emirates, and Yemen), such that the specific basis in Islamic law may not be apparent or cannot readily be verified.[69] For example, at first glance this might also appear to be the case with Afghanistan, since the language for Afghanistan's MACR of 12 in the 2005 Juvenile Code does not have any ostensible link to Islamic criminal law.[70] However, further information on the Code's drafting history demonstrates that the MACR is actually the direct result of innovative compromises between Islamic law principles and international juvenile justice standards.[71] Besides Afghanistan, MACR references to Islamic law are explicit, although they do not all embody classic Islamic criminal law doctrine as outlined above, and may not necessarily form part of a broader Islamic criminal law system.

The respective MACR provisions that stem from Islamic law, again with the exception of Afghanistan, discriminate on the basis of gender in assigning criminal responsibility to children. In most cases, puberty explicitly delimits criminal responsibility, such as in Section 51 of Malaysia's *Syariah* Criminal Offences (Federal Territories) Act: "Nothing is an offence which is done by a child who is not *baligh*." At times, the application and enforcement of legal norms exacerbate such inherent discrimination against girls. For example, Pakistan's 1979 Offence of *Zina* (Enforcement of *Hudood*) Ordinance (No. VII) specifically regulates adultery, premarital sex, rape, and other related crimes. In basic terms, in order for certain categories of sexual crimes to have occurred, the perpetrator of the rape, or the

[69] E.g., Libya has broadly described its MACR-related provisions with the logic of classic Islamic doctrine, but without making any direct reference to Islamic law. The current study classifies Libya's MACR as 7 years on the basis of Penal Code provisions and measures applicable from this age, which happens to coincide with classic doctrine for the onset of the "age of discretion" and with Libya's explanation of the "age of discernment." See Committee on the Rights of the Child, *Summary record of the 432nd meeting: Libyan Arab Jamahiriya*, CRC/C/SR.432, 12 January 1998, pars. 68-74. Note that this study also concludes that the MACRs of Qatar, Saudi Arabia, United Arab Emirates, and Yemen are all 7 years of age; historic British legal influences in all of these countries except Saudi Arabia may also be relevant.

[70] Art. 5(1): "A person who has not completed the age of 12 is not criminally responsible."

[71] See Cipriani, Don, *South Asia and the Minimum Age of Criminal Responsibility: Raising the Standard of Protection for Children's Rights*, Kathmandu, UNICEF Regional Office for South Asia, 2005.

participants in consensual premarital or extramarital sex, must have reached puberty.[72] Consequently, girls – due to the earlier onset of puberty – potentially bear criminal responsibility several years before their male cohorts for this class of crimes. In addition, procedural and evidentiary requirements tend to delay and even avoid the conferral of responsibility upon boys. It can be difficult to prove the onset of puberty in boys depending on the standard used, and there is no religious consensus on admissible evidence. In the absence of irrefutable proof of puberty, certain rape accusations must be corroborated by four adult male Muslims of good repute who were eyewitnesses to the "act of penetration."[73]

Instead, for girls, menstruation and/or pregnancy are clear and irrefutable signs of puberty and criminal responsibility. In practice, this is equally true for consensual sex and for cases where girls have ostensibly been raped; in the absence of direct proof of rape, the fact that a girl is pregnant proves that she has committed adultery or has had premarital sex. Girls, by virtue of reaching puberty earlier, are then also exposed to the possibility of severe, fixed *hadd* punishments earlier than boys.[74] In the mid-1990s, UNICEF found cases where 12- and 13-year old girls were punished for adultery because rape could not be proven.[75] Courts continue to convict women for adultery based upon evidence of pregnancy – more than 80% of all women prisoners have been judged guilty of fornication – even though many were actually rape victims.[76] Furthermore, following the promulgation of the *Zina* Ordinance, the number of women in prison increased sharply, while the percentage of girls in prison

[72] Di Martino, Kirsten, *Analysis of the Juvenile Justice System in Pakistan for the UN Juvenile Justice Project*, draft, Geneva, United Nations Centre for Human Rights, 1996. However, Art. 7 regards similar acts when committed by boys younger than 18, girls younger than 16, or pre-pubescent boys and girls.
[73] Art. 8.
[74] However, the actual imposition of *hadd* punishments is rare, and there are no known cases of girls receiving them. Geiger, Andrea, "International Law - Juvenile Justice in Pakistan," 23 *Suffolk Transnational Law Review* 713, 2000.
[75] Committee on the Rights of the Child, *Summary record of the 134th meeting: Pakistan*, CRC/C/SR.134, 11 April 1994, par. 6.
[76] See Chadbourne, Julie Dror, "Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance," 17 *Wisconsin International Law Journal* 179, 1999; and "A general state of disarray," *Economist*, 17 May 2007.

accused of *zina* has become extremely disproportionate to the percentage of girls accused of other crimes.[77]

Besides gender discrimination, Pakistan's MACR provisions are also an example of codified Islamic criminal law that deviates from classical doctrine, as is the case in several countries. The Offence of *Zina* (Enforcement of *Hudood*) Ordinance is one of five presidential decrees, the *Hudood* Ordinances, enacted in 1979 during a period of military dictatorship, martial law, and broader legal Islamization. These Ordinances hold all Pakistanis criminally responsible for various categories of crimes, including pre-pubescent children without any lower age limit.[78] As in Somalia and Sudan, Islam-inspired criminal laws in Pakistan thus maintain jurisdiction over all children, without any clear minimum age limit, in apparent contradiction to the elaborate consideration of age, reasoning, and puberty in classical Islamic criminal law. In Nigeria, Islamic criminal laws limit responsibility with puberty for some crimes, and with the age limit of 7 years for others. However, the predominant Islamic legal school in the country, the Maliki school, holds that puberty and thus criminal responsibility can never be established before the age of 9 years for boys or girls.[79] In Comoros, boys attain criminal responsibility with physical maturity or upon reaching 14-15 years of age.[80] Girls, on the other hand, only acquire criminal responsibility through marriage, which is not contemplated at all in classic Islamic criminal law. Thus, criminal responsibility is triggered for girls even by early marriages and arranged marriages at any age; while the extent of such

[77] Amnesty International, *Pakistan: Denial of basic rights for child prisoners*, London, 2003; and Tufail, Pervaiz, Thomas Feeny, and Marie Wernham, *Street Children and Juvenile Justice in Pakistan*, London, AMAL Human Development Network and the Consortium for Street Children, 2004.
[78] Di Martino, *supra* note 72.
[79] See also Peters, Ruud, and Maarten Barends, *Islamic criminal law in Nigeria*, Ibadan (Nigeria), Spectrum Books, 2003.
[80] See Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Comoros (Additional Info from State Party)*, CRC/C/28/Add.13, 7 October 1998, par. 52.

phenomena is not clear in Comoros, there are examples of early marriages in other countries that involve even toddlers.[81]

A final key consideration for Islamic law is its intrinsic flexibility as a scholars' body of law. Where questions are not already resolved by the definitive sources of law, a number of juridical tools may be available to develop the jurisprudence and supplement its content, such as analogy, juristic preference or equitable solution, common good or public interest, and necessity.[82] Modern scholarly debate has applied such tools to adapt Islamic legal principles to human rights norms, including arguments that support an underlying harmony between Islamic texts and children's rights. In particular, "modern Muslim scholars would mostly agree that many of the legal principles in this area of child law are developments of *Ijma* or consensus of the scholars (in particular using the notion of *ijtihad* or independent search)," which allows for further jurisprudential elaboration that is not possible in other areas of law.[83] The use of such techniques may lend greater legitimacy and credibility of children's rights claims vis-à-vis Islamic law, which is fundamental in light of the moral, political, social, and cultural authority of Islamic law, regardless of whether or not it has not been codified by the state.[84]

Oftentimes, the purported disconnect between Islamic law and children's rights discourses is not a question of religion, but of political dynamics and political will.[85] Indeed, in the case of the MACR, one may even argue that classic Islamic criminal law doctrine lies closer to international standards than to some countries' contradictory provisions. Several countries have considered that religious scholarship supports such a conclusion; in some cases they have taken steps to better align MACR provisions with children's rights standards in light of Islamic law. For example, Iran's MACR provisions come directly from the consensus Shiite view that puberty may be assumed in boys by age 15 and in girls by age 9; fixed age limits

[81] UNICEF Innocenti Research Centre, "Early Marriage: Child Spouses," *Innocenti Digest* 7, Florence, 2001.
[82] Sait, *supra* note 34.
[83] Pearl, *supra* note 36, at 90.
[84] An-Na'im, *supra* note 33.
[85] Sait, *supra* note 34.

eliminate arbitrary puberty determinations but do remain inherently discriminatory. However, modern Iranian religious scholars and seminary research centers have argued that the age of maturity should be higher for girls, perhaps at 13 years. They base their arguments on textual evidence, religious tradition, changing social realities, and different historical rates of physical maturation. Likewise, modern psychology in the Islamic context suggests that puberty is just part of a continuum of development, and not itself the onset of adulthood.[86] There are related advocacy efforts to raise the MACR for girls, and a high-ranking official of the Iranian Judiciary even wrote an article that suggests such changes, while seminars on the Convention on the Rights of the Child (CRC) and juvenile justice have also explored the issue.[87]

In Oman, the only country where the Ibadi school is dominant, officials have considered in recent years an MACR increase from 9 to 14 years of age. Among other primary considerations for this change, the Dean of the Faculty of *Shari'a* Law argued that the current MACR of 9 years is undeniably incompatible with Islamic *shari'a* law. This argument was based upon explicit scriptural citations and interpretations regarding actions of Mohammed. Furthermore, experts found that it was safe to assume that 14-15 years is the common age for puberty in Oman, and that an MACR lower than this level would not be appropriate.

In Maldives, until 2006 the MACR was 7 or puberty, whichever came first, for *hadd* and other specific offenses, while a higher age limit of 14 applied to most other offenses. Such provisions contradicted classic Shafi doctrine, the predominant Islamic school in Maldives, which sets out the range of 9 to 15 years for the individual consideration of puberty in boys and girls. Over several years, the government debated the issue and considered one noted Islamic theologian's analysis of the compatibility of *shari'a* law with the CRC. In his draft report, "The Application of the CRC in the Republic of the Maldives from the Perspective of

[86] Boyle-Lewicki, Edna, "Need World's Collide: The Hudad Crimes of Islamic Law and International Human Rights," 13 *New York International Law Review* 43, 2000.
[87] Nobahar, *supra* note 42.

Islamic Law," Prof. Dr. Mohamed El-Said El-Dakkak reached similar conclusions to those noted above. Among other points, he specifically recommended an MACR of 12 years based upon Islamic texts and principles.[88] Finally, in 2006, the government amended the age limits to puberty or to 10 years for *hadd* and drug offenses, and to 15 years for all other offenses.

The most influential Islamic school in Syria is the Hanafi school, which traditionally considers puberty for girls 9-15 and for boys 12-15. In the past, Syria's MACR provisions remained below both age ranges at 7 years; the government cited Islamic law on children as a primary consideration for its MACR increase to 10 years in 2003.[89]

Finally, Afghanistan probably offers the best example in the world of juvenile justice legislation that integrates traditional Islamic principles with international children's rights standards for the MACR. As in Syria, the Hanafi school is the most influential in Afghanistan, yet Article 72 of the 1976 Penal Code formerly set the MACR at 7 years, beneath the Hanafi age range for puberty consideration. A high-level working group, including United Nations agencies, international donor countries, and government officials from various ministries and courts, convened for over a year to draft a new Juvenile Code to replace such provisions. In essence, they modeled the legislation after classic Islamic criminal law doctrine, defining as "non-discerning" children younger than 7, as "discerning" those between 7 and 12, and as juveniles those between 12 and 18; only juveniles bear criminal responsibility.[90] In effect, the law pegs criminal responsibility within the classic Hanafi age ranges for boys and girls, but sets it at the same level for both without further consideration of

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[88] El-Dakkak, Mohamed El-Said, *The Application of the CRC in the Republic of the Maldives from the Perspective of Islamic Law*, unpublished draft, UNICEF Maldives, 2000.

[89] Uddin Siddiqui, Kamal, "The Age of Criminal Responsibility and Other Aspects of the Children Act, 1974," presented at the workshop *Raising the Age of Criminal Responsibility and Other Aspects of the Children Act, 1974*, Dhaka, 16 January 2004.

[90] Arts. 4-5. In addition, the law makes available a range of non-punitive measures of accountability for children younger than the MACR. For children older than the MACR, *akl* and related factors are included wherein judges are duty bound to consider the degree of psychological development, character and aptitude, and behaviour of each child during and after offenses. It also sets the age of penal majority at 18 years.

puberty. As enacted, these provisions meet international children's rights standards for MACRs in all respects, and importantly are gender-neutral, yet are based upon and are considered compatible with Islamic criminal law.

Soviet Law

Soviet law has left an unmistakable legacy for MACR provisions mainly in Asia and Central and Eastern Europe, influencing the provisions of almost 35 countries. Although certainly a more recent historical phenomenon than Islamic law or European colonial law, a brief overview of relevant Soviet provisions helps explain the context for such trends. In pre-revolutionary Russia, the Law of 2 June 1897 and the Penal Code of 1903 established an MACR of 10 years, while courts appraised individual children's capacity for discernment between the ages of 10 and 17 in order to determine their potential criminal responsibility.[91] Indeed, Russian criminal law in this period was a part of progressive continental European legal trends, and these provisions parallel closely the French MACR model.[92]

While the early revolutionary period did not create any lasting legal frameworks, the Union of Soviet Socialist Republics adopted its first Constitution in 1924.[93] This Constitution relegated criminal law codification to the union republics, although their respective codes had to be in accord with the Fundamental Principles of Criminal Legislation, which were handed down by the all-union authority.[94] The

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[91] Griffe, *supra* note 29; and Cieślak, Marian, "Organisation de la lutte contre la délinquance juvénile dans les pays socialistes européens," in *L'enfant*, *Recueils de la Société Jean Bodin pour l'histoire comparative des institutions*, vol. 38, Bruxelles, Éditions de la Librairie encyclopédique, 1977.

[92] Naumov, Anatolii V., *Rossiiskoe Ugolovnoe Pravo, Obshchaia chast'* (Russian Criminal Law. The General Part), Moscow, Beck, 1996, cited in Pomorski, Stanislaw, "Review Essay: Reflections on the First Criminal Code of Post-Communist Russia: On the Occasion of Anatolii V. Naumov's *Rossiiskoe Ugolovnoe Pravo, Obshchaia chast'* (Russian Criminal Law. The General Part). Moscoe: Beck, 1996. P. 550.," 46 *American Journal of Comparative Law* 375, 1998.

[93] Butler, W.E., *Soviet Law*, 2nd ed., London, Butterworths, 1988; and Hooker, M.B., *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws*, Oxford, Oxford University Press, 1975.

[94] Berman, Harold J., *Soviet Criminal Law and Procedure: The RSFSR Codes*, Cambridge, Harvard University Press, 1966; and Savitsky, Valery M., and Victor M. Kogan, "The Union of Soviet Socialist Republics," in Cole, George F., Stanislaw J. Frankowski, and Marc G. Gertz, eds., *Major criminal justice systems: a comparative survey*, 2nd ed., Newbury Park (California), Sage, 1987.

first Fundamental Principles were also enacted in 1924, but MACR provisions underwent a long series of modifications, with the MACR varying at least from 11 years to 16 years, until 1958.[95]

That year saw the enactment of new Fundamental Principles of Criminal Legislation, in itself the culmination of a series of legal reforms undertaken following Stalin's death in 1953 that sought to liberalize and rationalize Soviet criminal law. The 1958 Fundamental Principles triggered the enactment of new criminal codes in all 15 republics between 1959 and 1961. Across the board, these apparently set MACRs of 14 years for specific "serious crimes," and higher limits of 16 years for responsibility for other crimes. For example, Article 10 in both the 1960 Russian Soviet Federated Socialist Republic Criminal Code and the 1958 Fundamental Principles lists the "serious crimes" as the following:

> homicide, intentionally inflicting bodily injuries causing an impairment of health, rape, assault with intent to rob, theft, robbery, malicious hooliganism, intentionally destroying or damaging state or social property or the personal property of citizens, with grave consequences, or intentionally committing actions that can cause a train wreck.[96]

Embedded within this structure, Soviet criminal law conceptualized a much narrower idea of culpability than common and civil law systems, based upon the now broadly rejected "psychological theory" of culpability.[97] Nonetheless, criminal responsibility rested upon an account of intentionality in committing crimes, and recognized the need for sufficient maturity.[98]

The 1958 Fundamental Principles remained in force until the dissolution of the Soviet Union in 1991, although relatively minor changes in MACR provisions were

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[95] Cieślak, *supra* note 91.
[96] "The Criminal Code of the RSFSR: October 27, 1960, as amended to July 3, 1965," in Berman, *supra* note 94. Compare to Cieślak, *ibid*., at 294.
[97] Pomorski, Stanislaw, "Review Essay: Reflections on the First Criminal Code of Post-Communist Russia: On the Occasion of Anatolii V. Naumov's *Rossiiskoe Ugolovnoe Pravo, Obshchaia chast'* (Russian Criminal Law. The General Part). Moscoe: Beck, 1996. P. 550.," 46 *American Journal of Comparative Law* 375, 1998.
[98] Savitsky et al., *supra* note 94.

undertaken over time among respective criminal codes of Union Republics.[99] The codes were then received directly as the criminal codes for the respective newly independent countries. As these have been modified or replaced since 1991, essentially the same MACR provisions have generally been maintained. For example, Article 20 of the 1996 Criminal Code of the Russian Federation repeats the pre-existing MACR age structure and further expands the list of "serious crimes."[100] 13 of the 15 former Soviet republics still reserve an MACR for "serious crimes" and a higher limit for other crimes. With the exception of Uzbekistan and Georgia, these countries maintain the historical 14 years/16 years division. On the other hand, it appears that the former republics of Estonia and Latvia have consolidated former dual age limits.

Beyond the former republics themselves, numerous countries with strong Soviet legal influences have followed these basic patterns. The respective Penal Codes of Albania, Bulgaria, China, Mongolia, Poland, Romania, and Viet Nam, presumably originating from historic Soviet influence, all establish lower age limits for more serious offenses and higher age limits for other offenses, and the majority of these follow the predominant 14 years/16 years division. Although further research is necessary to confirm the respective legal histories of exact provisions, it also seems likely that such influences contributed to the current MACRs in Bosnia and Herzegovina, Cuba, Croatia, Czech Republic, Democratic People's Republic of Korea, Hungary, Lao People's Democratic Republic, the former Yugoslav Republic of Macedonia, Montenegro, Serbia, Slovakia, and Slovenia. Three-quarters of these countries set their MACRs at 14 years, with the others setting MACRs of 15 or 16 years. For ease of comparison, Annex 3 presents the key MACR provisions of all countries influenced heavily by Soviet law; the methodology for this compilation is explained in general terms in Chapter 5.

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[99] *Ibid*.

[100] Butler, W.E., *Russian Law*, Oxford, Oxford University Press, 1999; Osheev, Oleg, "The Age of Criminal Responsibility in Accordance with the Criminal Code of the Russian Federation (1996)," 11 *Chronicle (International Association of Youth and Family Judges and Magistrates)* 13, July 2002; and UNICEF Innocenti Research Centre, "Young People in Changing Societies: The MONEE Project CEE/CIS/Baltics," *Regional Monitoring Report* 7, 2000.

A final influence of Soviet law seems to be the problematic institutional response to children in conflict with the law who are younger than formal MACRs, as discussed in further detail in Chapter 6. Due to the scarcity of information available in general on their legal bases, it is difficult to establish a clear historic link to Soviet law, yet there is a discernible pattern among relevant countries in dealing with and frequently depriving the liberty of such children, including in at least Azerbaijan, Bulgaria, China, Cuba, Kazakhstan, Kyrgyzstan, Lao People's Democratic Republic, the Russian Federation, Slovenia, Tajikistan, Ukraine, Uzbekistan, and Viet Nam. In some cases, there is a direct link to Soviet law. For example, China's "re-education through labor" system was introduced by the Soviet Union, where it had been a measure for juvenile punishment, while Bulgaria's Commissions for Prevention of Juvenile Delinquency are established by a law first adopted under communism.[101] In broad terms, most of these countries rely upon some administrative procedure, without full due process rights, to consider young children who theoretically bear no criminal responsibility. Relevant authorities – sometimes deemed Commissions on Minors or on Minors' Affairs – may order the deprivation of liberty of such children, in places such as special correction schools, special education institutions, and re-education institutions. The problematic treatment and deprivation of liberty of children younger than MACRs is one of the central challenges worldwide in this ambit, certainly not limited to former Soviet republics or countries reflecting Soviet influence, yet these countries do demonstrate a notable trend.

In fact, Estonia, Poland, and Romania also show recent signs of comparable responses to young children, yet the results of the present study set these countries slightly apart.[102] Convincing evidence is available that Estonia's MACR is 7 years, even though the Penal Code parallels others in the region in setting an age limit of 14

[101] Momchilov, Andrey, "Report on the Bulgarian juvenile justice system," in Institute for Penal Reform, *Materials of the Forum "Juvenile Justice in Eastern and South Eastern Europe": Chisinau, Republic of Moldova, September 14-16, 2005*, Chisinau, 2006; and Shengshan, Pan, "Chinese Re-education through Labor System in Relation to Religious Freedom: Hua'en Research Report Issued September 2006," 2 *Chinese Law & Religion Monitor* 5, 2006.
[102] See generally Annex 3.

years, which is in effect the age of penal majority.[103] As a result, children between 7 and 14 years are not classified as younger than the Estonian MACR in the present study. In Poland, on the other hand, research suggests most convincingly that there is no effective MACR at all, despite the Penal Code's provisions that parallel others in this group.[104] In Romania, Law no. 272/2004 on the protection and promotion of the rights of the child establishes the protection measures available for children younger than the MACR who come into conflict with the law, although the law's practical implementation is not yet clear. Previously, Law no. 108/1998 set out such options, which were simply the same educational measures authorized in the Criminal Code for children older than the MACR.[105] Indeed, the Constitutional Court declared these norms unconstitutional and disallowed their further application.

Customary, Traditional, and Religious Law Systems

While European colonial law, Soviet law, and Islamic law explain the trends behind most official MACR provisions around the world, traditional, customary, religious, and other informal law systems are broadly important, even if less conspicuous, in responding to children in conflict with the law and determining their criminal responsibility. Colonial-era legislation, for example, has never played a major role in the lives of most people – some 80% to 90% of the population in some countries is unaffected by it. In large part, this is because Western colonialization processes never fully displaced pre-existing law systems. The main powers took various approaches in establishing colonial legal structures, which differed even

[103] The 2001 Penal Code, §33, states that "A person is capable of guilt if at the time of commission of the act he or she is mentally capable and at least 14 years of age."
[104] The 1997 Penal Code, Art. 10, states the following: "§1. Whoever commits a prohibited act after having attained the age of 17 years shall be liable under the provisions of this Code. §2. A juvenile, who after attaining the age of 15 years shall commit the prohibited act specified in the following: Article 134, Article 148. § 1, 2 or 3, Article 156 § 1 or 3, Article 163 § 1 or 3, Article 166, Article 173 § 1 or 3, Article 197 § 3, Article 252 § 1 or 2 and in Article 280, may be liable under the provisions specified in this Code, if the circumstances of the case and the mental state of development of the perpetrator, his characteristics and personal situation warrant it, and especially when previously applied educational or corrective measures have proved ineffective."
[105] Romanian Ministry of Justice, *Practices and Standards in the System of Juvenile Justice in Romania*, 2004.

within individual colonial territories, yet colonial governments usually acquiesced to customary law's local jurisdiction as long as it did not negatively affect European settlers, authority, or sovereignty.[106] They selectively supported and intervened in customary systems, in fact, to help ensure their own stability, administrative ease, and authority, without necessarily attempting to modernize or align it with Western-style laws. In Africa, for example, customary law continued to exist as one of several layers of jurisprudence, and in fact "the overwhelming majority of Africans continued to follow the traditional customary laws."[107]

As mentioned above in this chapter, British and French colonization was especially important in setting MACR trends across continents. In basic terms, the British typically favored colonial administration by a simple protectorate system and indirect rule, which allowed greater deference to existing indigenous institutions and laws.[108] As long as British sovereignty and ultimate authority were respected, colonial rulers would recognize customary law, albeit on an *ad hoc* basis. In fact, they continually made use of indigenous institutions, including clan and lineage structures and customary courts, to facilitate colonial rule. The other main stipulation was the so-called repugnancy principle: colonial officials were not to uphold a rule of customary law that was repugnant to morality or justice.[109] Unrelated to the repugnancy principle, criminal responsibility was historically a point of conflict with customary law. In British colonies in both Asia and Africa, a significant problem for judges was "the fixing of the age necessary to support capacity for criminal responsibility."[110] Even if the underlying assumption derived from English common law, concessions were made arbitrarily to local customs and realities, including consideration of local norms for puberty and adulthood.

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[106] Mommsen, W.J., and J.A. De Moor, eds., *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia*, Oxford, Berg Publishers, 1992.
[107] Menski, Werner F., *Comparative law in a global context: The legal systems of Asia and Africa*, London, Platinium Publishing Limited, 2000, at 405.
[108] Hooker, *supra* note 93.
[109] Elias, T. Olawale, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies*, London, Stevens & Sons Limited, 1962.
[110] *Ibid*., at 177.

In contrast to the British, the French viewed colonialism as a process of assimilation requiring that "the administrative and legal model of the French executive be followed in all cases; so far as law is concerned it meant that native custom had to give way to the *Code Napoléon*."[111] In theory, customary law was an inadmissible exception to the overall system of French jurisprudence, yet the reality was that customary law continued to thrive, often due to administrative and financial limitations: "neither the courts nor the legal authorities attempted the suppression of customary law. Consequently, the greater part of the received metropolitan law remained inapplicable to the bulk of the population."[112]

Upon independence, former colonies generally retained the statutory law that had been in force, while the general state of customary law was more a complex mixture of pre-colonial customary law and colonial influences.[113] Over time, many countries sought to update their codified legislation, often drawing inspiration from contemporary European models, while sometimes recognizing, codifying, or integrating customary law. Yet in the end, customary law was and often remains far more important in the daily lives of people, such as in Africa where "for the majority of the citizens of the new states, the laws cloned from the colonial countries have been irrelevant to what the people do and the factors that determine their life style."[114] Various estimates suggest that 80-90% of the total population in Africa lives entirely under the guidance of customary law. In cases where national law and state courts seek to apply hybrid systems of customary law, there is even strong anthropological evidence that villagers resist such efforts by using "massive avoidance tactics."[115] In contrast, in past decades African traditional courts in many countries have heard roughly 90% of all criminal trials.[116] African customary law is

[111] Hooker, *supra* note 93, at 196.
[112] *Ibid*., at 220.
[113] Mann, Kristin, and Richard Roberts, eds., *Law in Colonial Africa*, Portsmouth, Heinemann, 1991.
[114] Okupa, Effa*, International bibliography of African customary law*, Hamburg, LIT and International African Institute, 1998, at ix, quoted in Menski, *supra* note 107, at 438.
[115] Menski, *supra* note 107, at 425.
[116] Read, *supra* note 30.

considered especially important in children's lives in rural areas, as children may not have access to formal legal channels.[117] For example, there are more than 40 different ethnic communities in Kenya which define children and childhood differently, based upon rites of passage, periodic and seasonal circumcision ceremonies, physical feats, retreats and socialization rites, etc.[118] These definitions continue to be used in many communities, and regardless of chronological age they confer adult status, duties, and responsibilities.

There are, in fact, many examples of traditional and religious law systems that respond to children in conflict with the law in place of formal juvenile justice systems. For example, in South Africa, victims of juvenile crime in most rural communities usually turn to traditional courts and communal systems rather than formal law enforcement officials.[119] Similarly, traditional justice systems are prevalent across Lesotho, with particular importance in rural areas, whereas the formal juvenile justice sector may be regarded with suspicion as well as misunderstanding.[120] In Samoa, every village features a traditional justice system that parallels the formal juvenile justice system in responding to some crimes.[121] Ethiopia's colonial-era juvenile justice laws never bore much relation to existing traditions and practices, which may offer comparative advantages, and in practice there is virtually no formal justice system anyway.[122] Yemeni rural areas, in particular, rely upon tribal and Islamic law systems.[123] An unofficial tribal justice system may address cases of children in conflict with the law before they arrive to the formal judicial system, which itself does not always proceed according to

[117] Menski, *supra* note 107.
[118] Committee on the Rights of the Child*, Initial reports of States parties due in 1992: Kenya*, CRC/C/3/Add.62, 16 February 2001, pars. 97-99.
[119] Sloth-Nielsen, Julia, and Jacqui Gallinetti, eds., *Child Justice in Africa: A Guide To Good Practice*, Cape Town, University of the Western Cape Community Law Centre, 2004.
[120] Nts'ikeng, Theresa Qhubu, *The Development of Restorative Justice in Lesotho*, Lesotho Ministry of Justice, Human Rights & Rehabilitation, c. 2004.
[121] Committee on the Rights of the Child, *Compte rendu analytique de la 1163e séance (Chambre A)*, CRC/C/SR.1163, 18 October 2006, pars. 40-42.
[122] Petty, Celia, and Maggie Brown, eds., *Justice for Children: Challenges for Policy and Practice in sub-Saharan Africa*, London, Save the Children-UK, 1998.
[123] Peterson, Scott, "Despite Islamic law, Yemen bans teen death penalty," *The Christian Science Monitor*, 2 February 2000.

juvenile law. Similar anecdotal evidence across countries generally affirms that local populations turn to customary and religious legal systems for diverse reasons, including greater familiarity with their processes, easier access, cultural legitimacy and authority, fairer and more appropriate treatment of children, justice and efficacy, and corollary benefits such as reinforcement of community norms and solidarity. At the same time, rapid socio-demographic changes have sometimes undermined such assets, and there are often challenges regarding the respect for children's rights within such systems.[124]

More specifically, there are also numerous examples where traditional and religious law systems address MACRs or the assignment of criminal responsibility to children. Throughout Somalia, both customary/traditional and Islamic law play a crucial role, due in part to historically weak state institutions, and they have provided the only legal fora during some periods of armed conflict.[125] Since there has never been a functioning juvenile justice system in the country, families resort first to community elders to address relevant cases, where customary/traditional law in effect supports an MACR of 15 years. In Nepal, the majority of cases of children in conflict with the law are apparently handled locally without any government involvement of any sort. Indeed, there is a multitude of traditional, village-based systems that operate on principles of religion and religious law. Where these derive from Hindu law and philosophy, fundamental Hindu precepts strongly support the notion of the innocence of children, and tend to lend support to higher MACRs.[126] Customary law predominates over statutory law in 70-90% of Sierra Leone, with non-formal courts at the village level, but it varies by the beliefs and practices of

[124] See, inter alia, UNDP Child Justice Project and The Restorative Justice Centre, *Research Report on Retributive Community Justice: A field study exploring why alleged child offenders sometimes become victims of communities taking the law into their own hands*, Pretoria, 2001; and Sloth-Nielsen et al., *supra* note 119.
[125] UNICEF Somalia, "Juvenile Justice in Post-Conflict Situations: Somalia," unpublished draft presented at the conference *Juvenile Justice in Post-Conflict Situations*, UNICEF Innocenti Research Centre, Florence, May 2001.
[126] Sangroula, Yubaraj, "The Roles Opportunities and Challenges of the Juvenile Justice System in Nepal: Need of a Diversion from the Criminal Justice System," *Kathmandu School of Law Journal*, 2004.

roughly 14 different ethnic groups.[127] Adults generally take full responsibility for children's actions, while the passage from childhood to adulthood may be variously indicated by factors such as physical ability, physical maturity, familial role, initiation ceremonies, marriage, and school attendance. In Afghanistan, statutory, *shari'a*, and customary law overlap in diverse forms throughout the country, yet in practice, courts typically apply Islamic and customary law rather than national laws.[128] Islamic law generally governs criminal law matters, and almost all courts, including the Supreme Court, rely directly upon it without necessarily referring to national statutory law. At the same time, roughly 80% of the population lives by any one of various highly localized forms of tribal or customary law, particularly in rural areas.[129] Among other provisions, the traditional law MACR is apparently 12 in Kabul, and 15 in Masar, as children beneath these ages are held accountable by their families. Upon reaching these ages, children's cases are referred to the local *shura*, a type of traditional dispute resolution council.[130] Finally, almost 90% of Malawi's population lives in areas where customary law applies, and customary laws seem to take precedence over statutory law on many topics concerning children.[131] Since most people do not have birth certificates or other proof of age, communities estimate children's ages as needed according to customary law.[132] Among some ethnic groups, the completion of initiation ceremonies or evidence of puberty may determine age, regardless of actual chronological age, and confer adulthood. For

[127] Man, Nathalie, "Juvenile Justice in Sierra Leone," unpublished draft presented at the conference *Juvenile Justice in Post-Conflict Situations*, UNICEF Innocenti Research Centre, Florence, May 2001.
[128] Lau, Martin, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*, Geneva, International Commission of Jurists, 2002.
[129] Cappelaere, Geert, *"Crime has no future. You have!": Juvenile Justice Mission to Afghanistan: 6-20 February 2002: Trip Report*, draft, UNICEF, 2002; and Winter, Renate, *Children's Rights: A Comparative Study of the Convention on the Rights of the Child and the Legislation of Afghanistan*, Kabul, UNICEF Afghanistan, 2004.
[130] Kabul University Faculty of Law and Political Science, *Customary Law Survey and Children Rights: Report on Customary Law Survey Results*, draft, UNICEF Afghanistan, December 2003.
[131] Committee on the Rights of the Child, *Summary record of the 765th meeting: Malawi*, CRC/C/SR.765, 31 January 2002, par. 35.
[132] Jolofani, Dorothy Alethea, *The State of Juvenile Justice in Malawi*, UNICEF Malawi, 1997.

girls, pregnancy automatically signals adulthood, and may trigger criminal responsibility for offenses of infanticide and abortion.

Conclusion

To a large extent, this chapter's historical sketch flows into the earlier discussion of social welfare approaches and justice approaches in juvenile justice, whose contrasting emphases involve almost all juvenile justice systems in the world. Of course, such prevailing trends over time often led to reforms in overall design as well as in MACRs. Customary, traditional, and religious law systems add another dimension because of their predominance in determining children's criminal responsibility in many countries. All the same, the historical role and explanatory power of Roman law, continental European law and common law, colonial law, Islamic law, and Soviet law remain strong. The majority of MACRs across countries today can still be traced back to these broad historical trends. Historic influences also contribute to modern recurring problems, such as the low MACRs of English common law, gender discrimination in assigning criminal responsibility in Islamic criminal law, and highly problematic welfare responses to children younger than MACRs in Soviet-influenced legal systems.

Despite varying elements, formulations, and problems, these central legal sources share a number of common attributes. Importantly, they all recognize some concept of maturity or moral agency before criminal responsibility may follow. In most cases, with the exception of the obsolete 1791 and 1810 French Penal Codes, this was constructed as a minimum age limit beneath which no criminal responsibility or punishment could theoretically be applied. In Roman law, former English common law, and classic Islamic law, this minimum age limit was held at 7 years, with a secondary stage of children's development typically extending from 7 years until mid-adolescence. Soviet law, instead, first opened the possibility for criminal responsibility at 14 years. In both early Roman law and Islamic law, the secondary stage concluded upon the onset of puberty. The Roman formulation, in addition, led directly to English common law's *doli incapax* and the French test of

discernment. As discussed in Chapters 5 and 6, dozens of countries still apply these tests in various forms.

While the respective traditions are compatible in general terms, they carry forth their own dynamic conceptualizations of childhood, their own accounts of children's development and its consequences, and their own statements about society's responsibility towards children. Upon these layers, the children's rights perspective adds an additional conceptualization of childhood, which has been endorsed almost universally in the form of the CRC. Given the historic commonalities, there would seem to be space for convergence among the various legal traditions and children's rights, although certain elements and particularities may certainly remain incompatible, such as antiquated French law's omission of any MACR. Modern Islamic law scholarship in several countries demonstrates the possibilities for such harmonization. Arguably, part of the commitment to children's rights under the CRC is in fact to reassess historical bases for MACRs, and the conceptions of childhood imbedded within them, against children's rights principles. Where dissonance remains, modern MACR provisions should be realigned with contemporary conceptions of children, the CRC, and international MACR standards. Indeed, Chapter 5 further illustrates the impact of historical influences on modern national MACR provisions, as well as the overwhelming trend in recent years to harmonize those provisions with standards set out largely under the CRC.

CHAPTER 5 CURRENT MACRS WORLDWIDE AND MODERN TRENDS

This chapter presents the first worldwide compilation of minimum ages of criminal responsibility (MACRs), including all key provisions by country plus statutory citations and excerpts in most cases. Modern trends in MACR reform are analyzed in extensive detail, focusing on the overwhelming influence of the Convention on the Rights of the Child (CRC) reporting process in leading to MACR increases, while volatile dynamics surrounding MACR debates and decreases are also scrutinized. Through this exposition, comprehensive evidence indicates that there exists a general principle of international law that all countries have the obligation to establish respective MACRs.

Making Sense of MACRs: Methodological Considerations

A long series of caveats must be taken into account for the data and discussions presented in this chapter, and for their ramifications as the basis for much of the current study. In the attempt to provide the most detailed examination to-date of MACRs around the world, research methodology has necessarily relied upon countless primary and secondary sources. These included governments' own accounts and third-party accounts about national MACR provisions, which regularly provided unclear, contradictory, and even self-contradictory information. In large part, such conflicts are due to widespread conceptual misunderstanding of the MACR; confusion with the age of penal majority (i.e., responsibility in adult criminal court), which happens to coincide with the MACR in many countries; confusion with and limited information on relevant civil welfare and protection measures; and certain attempts to downplay practices that would undermine formal claims about MACR provisions and policy. As one among innumerable examples, Lebanon has simultaneously claimed that no one younger than 18 is considered criminally

responsible, that no criminal charges may be brought against a child younger than 15, but that children as young as 7 may be sued and penalized when they commit crimes.[1]

The frequency of such accounts makes it highly unreliable to accept governments' own characterizations about their MACRs, or even third-party descriptions about them, in the absence of further substantiation. As explored in Chapter 3, the Committee on the Rights of the Child has appraised piecemeal, against general international children's rights standards, respective claims about MACRs. On numerous occasions – where it found that treatment of children younger than nominal MACRs amounted to punishment or implied criminal responsibility – the Committee has directly refuted countries' characterizations of supposed MACRs, and has recommended the establishment of clear MACRs. Thus, the MACR is certainly not just a question of what governments interpret as the minimum age limit for criminal responsibility, but also a matter of the age limit beneath which no treatment or penalty indicative of criminal responsibility can be applied by law. However, the Committee has typically emphasized the relevant principles that apply in juvenile justice, without necessarily finding the need to exposit or dictate a precise common standard – and there remain some grey areas on what treatment is reconcilable with MACRs. At the same time, there are occasions when the Committee has not had the benefit of full clarifying information, or simply the time to analyze and make sense of inaccurate claims, and has misinterpreted the meaning of different age limits or treatments.

Consequently, there is still some need for objective criteria against which any provision or treatment could be judged, both as an analytical tool for better understanding respective national provisions, but also as a roughshod mechanism to compare vastly different systems as in the present study. Indeed, just as understandings of punishment are dynamic and culture- and time-specific, questions of how to interpret and compare the treatment of children arise throughout this study,

[1] Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Lebanon*, CRC/C/8/Add.23, 3 February 1995.

including in the context of the classic welfare approach, *situación irregular* doctrine and practice, classical Islamic criminal law, and patterns of provisions across countries influenced by Soviet law.[2] Oftentimes, across such different contextual backdrops, it is very difficult to ascertain effective age limits. This is particularly true when provisions and practices for children younger than presumed MACRs seem to contradict the very meaning of the MACR.

Classic criminal law scholarship is helpful in this respect, not in the sense of standard concepts about criminal responsibility and justifications for punishment as suggested in Chapter 2, but rather in the sense of a more robust practical definition of punishment and criminal punishment. One seminal work in this respect is Packer's *The Limits of the Criminal Sanction*.[3] In basic terms, Packer holds that the first fundamental component of punishment in general is "something . . . done to a person that he would not wish to have done to him," or intentional "pain or other consequences normally considered unpleasant," without regard to the severity or degree of unpleasantness of the measure.[4] The second defining component of punishment is the predominant justifying purpose for its imposition: the prevention of and/or retribution for offending conduct. Thus, any sanction that is primarily for the purpose of protecting other people (i.e., preventing future offenses) and that is triggered by such conduct is a form of punishment, as is an imposed sanction that is driven by a determination of a wrongful act. The standard view is that punishment includes "whatever happens to people in the criminal process."[5] In other words, criminal punishments – a subset of punishments – include all dispositions available for those judged guilty of crimes through criminal law processes. The hallmark of

[2] See Garland, David, *Punishment and modern society: a study in social theory*, Oxford, Clarendon Press, 1994.
[3] Packer, Herbert L., *The Limits of the Criminal Sanction*, Stanford, Stanford University Press, 1968.
[4] *Ibid*., at 23.
[5] *Ibid*., at 27.

criminal punishment is a formal judgment of guilt, which as discussed in Chapter 2 signifies the community's moral condemnation of the act.[6]

Of particular interest, criminal punishment is frequently justified in juvenile justice on the basis of rehabilitation – in the sense of rehabilitative or reformatory sanctions that seek to promote changes in the offender's behavior and/or personality such that s/he will avoid future conflicts with the law. In such cases, the underlying purpose remains crime prevention, albeit with intended benefits for the offender, and this is a social justification not driven by the child's interests. Indeed, euphemisms that avoid calling such measures punishment are misleading:

> However benevolent the purpose of reform, however better off we expect its object to be, there is no blinking the fact that what we do to the offender in the name of reform is being done to him by compulsion and for *our* sake, not for his. Rehabilitation may be the most humane goal of punishment, but it is a goal of *punishment* so long as its invocation depends upon finding that an offense has been committed, and so long as its object is to prevent the commission of offenses.[7]

In contrast, Packer defines treatment as a type of sanction wherein the primary justifying purpose is to benefit or help the person being treated, with the expectation that treatment will be ameliorative. Offending conduct may bring attention to the need for treatment, but such conduct is not necessary or formally confirmed, and is in fact generally disregarded. The focus remains steadfastly on helping the person, not on past or future conduct, thus crime control and protecting other people play no role.

Although presented here in simplified terms, these distinctions among punishment, criminal punishment, criminal punishment justified as rehabilitation, and treatment are broadly useful in deciphering the validity of claims about national MACRs. This is especially true since such claims are scattered across divergent

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[6] For further discussion on this aspect of punishment, see, inter alia, Greenawalt, Kent, "Punishment," 74 *Journal of Criminal Law & Criminology* 343, 1983; Hart, Jr., Henry M., "The Aims of the Criminal Law," 23 *Law and Contemporary Problems* 401, 1958; Packer, *ibid*.; and Von Hirsch, Andrew, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, Manchester, Manchester University Press, 1986.

[7] Packer, *ibid*., at 53-54.

adult criminal justice, juvenile justice, and child protection and welfare systems. Packer's definitions approximate an objective standard against which sanctions may generally be compared, regardless of what type of system or institution hands them down. The majority of MACRs clearly overlap with criminal processes and punishments in the sense that they are stipulated, as seen in this chapter, in respective penal codes, criminal codes, and juvenile delinquency laws. Here there is little doubt about the MACR; it is the limit for unpleasant sanctions in response to offending conduct, either as retribution for that conduct or prevention for such future conduct.

Where criminal punishment is further justified as rehabilitation, Packer's definition clarifies that therapeutic, rehabilitative, or reformatory sanctions contingent upon the determination of a past offense, and with the predominant goal of preventing future offenses, remain criminal punishments – and thus indicative of criminal responsibility. Many juvenile justice sanctions fall into this category – punishment that is mitigated due to children's special status and that intends to assist them – yet they remain types of criminal punishments.

However, measures that claim to meet Packer's definition of treatment – primarily seeking to help the recipient, with limited or no consideration of offending conduct, and not concerning public safety – often need closer scrutiny. The justification for treatment in this sense is essentially the same motivation of the classic welfare approach to juvenile justice, and of many child protection systems, as discussed in Chapter 2. However, the welfare approach is one model along a continuum, and it is difficult for related systems to permanently fend off competing political and public policy pressures, such as crime control and the drive for retribution. As these pressures seep in, they undermine claims to treatment and begin to spread into the realm of punishment; this phenomenon is documented later in this chapter for several historically welfare-based juvenile justice systems. In such systems, euphemisms may deflect the denomination of measures as punishments, even once they have become substantially punitive, and the component of condemnation in the punishment often becomes implicit. Relevant institutions and the public understand that children are getting what they deserve, not that they are

getting above all else the help they need. For example, this was arguably the case in Belgium in the past, where in practice "educative measures" were "pronounced with a retributive undertone" and effectively punished children younger than the nominal MACR of 16 years.[8] In many cases, supposed child protection measures also follow such patterns, as evidenced by get-tough crime control rhetoric surrounding their application, and they discredit higher nominal MACRs. This is perhaps the margin where nominal MACRs require the closest scrutiny, and where they often merit rejection as effective bars to punishment of children.

In the present study, in cases of unclear or contradictory accounts of MACR provisions, additional research pursued the most reliable, complete, and current data available to the furthest practical extent possible. Particular attention has been given to the provisions and practices regarding the treatment of children vis-à-vis the distinctions described here. However, Packer's criteria are not used as a hard and fast rule, mainly in light of the contextual nuances that are beyond the scope of this study, and the inherent risks of holding all legal systems up against the concepts of predominantly one legal tradition. Reference to his work is in part an invitation to further research and debate, and a fairly restrained methodology has been applied for the time being. MACRs are classified in this chapter with significant deference to governments' own characterizations, but where an extensive preponderance of evidence confirms otherwise – against the broad standards suggested by Packer and the Committee on the Rights of the Child – MACRs are listed accordingly. In such cases, governments' own claims about their MACRs are sometimes but not always noted; statutory language often provides such abundant evidence that contrary government claims do not offer additional insight. Dozens of cases fall in between; significant evidence places nominal MACRs in doubt, but is not sufficiently complete to label a different age limit as the MACR. Footnotes in relevant tables and annexes point out such cases.

[8] Walgrave, Lode, "Restorative Juvenile Justice: A Way to Restore Justice in Western European Systems?," in Asquith, Stewart, ed., *Children and Young People in Conflict with the Law*, London, Jessica Kingsley Publishers, 1996, at 181.

Indeed, the collation of varied sources could not confirm with certainty all information, and information was often scarcest on countries where dubious signs were most abundant. In this sense, there is a hidden bias against countries with the most highly documented juvenile justice systems. For such reasons, the MACR listings are in part a subjective and interpretive exercise, in which it is unfortunately assumed that unknown errors remain. Nonetheless, the listings seek to present the most authoritative evidence found about the ages before which countries do not submit their children to penal or substantially punitive procedures or treatment. It is hoped that this world overview provides a useful starting point for future research that may more properly assess national law, policy, institutions, and procedures – across the spheres of criminal justice, juvenile justice, and child protection and welfare – in full, detailed national contexts.

Current MACRs Worldwide

Table 5.1, presented over the following pages, summarizes the basic MACR provisions of all 192 United Nations Member States. The table includes respective MACRs and, where known to exist, secondary ages of criminal responsibility for defined categories of offenses (ACR Specific Crimes), plus age ranges for *doli incapax* or similar assessments of individual children's potential responsibility (*Doli Incapax* Test). Annex 2 additionally excerpts and/or cites the sources of the MACR provisions for most countries of the world, and these often include critical clarification on sources, why certain ages are listed as MACRs, on *doli incapax* and related statutes, statutory language on offenses relevant for diverse age limits, and information on other complex and/or overlapping age limits.

Table 5.1: Summary of Worldwide MACR Provisions by Country

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**
Afghanistan	12	-	-
Albania	14	16	-

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test
Algeria	13[9]	-	-
Andorra	12	-	-
Angola	12	-	-
Antigua and Barbuda	8	-	-
Argentina	16[10]	18	-
Armenia	14	16	-
Australia	10	-	10-14
Austria	14	16	-
Azerbaijan	14[11]	16	-
Bahamas	7	-	7-12
Bahrain	0[12]	-	-
Bangladesh	9	-	9-12
Barbados	11	-	-
Belarus	14	16	-
Belgium	12	-	-
Belize	9	-	9-12
Benin	13	-	-
Bhutan	10	-	-

[9] While the Criminal Code stipulates that "Only protective or re-education measures may be applied to a minor aged under 13," such measures apparently include placement in any of roughly 30 specialized re-education centers administered by the Ministry of Justice. Nearly 2,000 children in conflict with the law between the ages of 8 and 13 were deprived of their liberty in these centers in 2005. See Committee on the Rights of the Child, *Second periodic reports of States parties due in 2000: Algeria*, CRC/C/93/Add.7, 3 March 2005, par. 332; and Committee on the Rights of the Child, *Compte rendu analytique de la 1057e séance*, CRC/C/SR.1057, 20 September 2005, par. 91.

[10] The 2005 *Ley de protección integral de los derechos de las niñas, niños y adolescentes* explicitly abrogates the 1919 Agote law, which was the basis for Argentina's *situación irregular* policy of, in effect, discretionary deprivation of liberty of children of any age. The 2005 law would also seem to annul provisions in this spirit in the 1980 *Ley 22.278, Régimen Penal de la Minoridad*. However, final analysis may hinge upon pending legislation on juvenile criminal responsibility, for which there were some ten pending bills under consideration in Congress as of February 2007.

[11] Under the 2002 Law on "Commission on minors and the protection of the rights of the children," administrative commissions may consider the cases of all children younger than 14 years of age suspected of having committed crimes, and they may impose disciplinary measures on such children including confinement in "special correction schools." See Azerbaijan NGO Alliance for Children's Rights, *Juvenile Justice in Azerbaijan: NGO Alternative Report on Situation of Juvenile Justice System in Azerbaijan within the period of 1998-2005*, Baku, 2005; and Committee on the Rights of the Child, *Second periodic reports of States parties due in 1999: Azerbaijan*, CRC/C/83/Add.13, 7 April 2005, pars. 436-444.

[12] Bahrain has held that its 1976 Penal Code, Article 32, establishes an MACR of 15 years, and that Juveniles Act No. 17 of 1976 provides non-criminal reform and protection responses to younger children. In reality, 15 years is the age of penal majority, and there is no lower age limit to what are clearly punitive responses, "such as detention in social welfare centres for up to 10 years for felonies (e.g. article 12 of the 1976 Juvenile Law)." The Committee on the Rights of the Child observed that there is no MACR. See Committee on the Rights of the Child, *Concluding observations: Bahrain*, CRC/C/15/Add.175, 7 February 2002, par. 47; and Committee on the Rights of the Child, *Initial reports of States parties due in 1994: Bahrain*, CRC/C/11/Add. 24, 23 July 2001.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**
Bolivia	12	-	-
Bosnia and Herzegovina	14	-	-
Botswana	8	12	8-14
Brazil	12	-	-
Brunei Darussalam	7	-	7-12
Bulgaria	14[13]	-	14-18
Burkina Faso	13[14]	-	13-18
Burundi	13	-	-
Cambodia	0[15]	-	-
Cameroon	10	-	-
Canada	12	-	-
Cape Verde	16	-	-
Central African Republic	13	-	-
Chad	13	-	-
Chile	14	16	-

[13] Art. 32(2) of the Penal Code allows corrective measures, as defined under the Juvenile Delinquency Law, to be applied against children under 14 who have committed socially dangerous acts. Commissions for Prevention of Juvenile Delinquency may administratively order such measures, including deprivation of liberty in Social-pedagogic boarding schools for children as young as 7, and in Correctional boarding schools for children as young as 8. See, e.g., Bulgarian Helsinki Committee, *Memorandum of the Bulgarian Helsinki Committee*, Sofia, 17 October 2005, www.bghelsinki.org/index_en.html; Momchilov, Andrey, "Report on the Bulgarian juvenile justice system," in Institute for Penal Reform, *Materials of the Forum "Juvenile Justice in Eastern and South Eastern Europe": Chisinau, Republic of Moldova, September 14-16, 2005*, Chisinau, 2006; and National Statistical Institute of the Republic of Bulgaria, *Anti-Social Acts of Minor and Juvenile Persons in 2005*, 31 March 2006, www.nsi.bg/index_e.htm.

[14] Although children younger than 13 are technically not criminally responsible, Act No. 19/61 of 9 May 1961 on juvenile offenders and children at risk does not prevent their deprivation of liberty by law enforcement officials: "Act No. 19/61 does not regulate the police phase of the deprivation of liberty. No specific provision is made for police custody of minors. Ordinary law is applicable. Consequently, minors under the age of 13 who are presumed not to be responsible for their actions may be held in police custody even though the cells in police stations and gendarmeries are cramped and overcrowded. Detention conditions are harsh and the time limit for custody (72 hours) is often not respected." Committee on the Rights of the Child, *Initial reports of States parties due in 1997: Burkina Faso*, CRC/C/65/Add.18, 13 February 2002, par. 440.

[15] The Draft Penal Code, which is still being finalized, establishes a MACR of 14 years.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**
China	14[16] Hong Kong: 10 Macao: 12	16 - -	- 10-14 -
Colombia	14	-	-
Comoros	13; or 14-15 or physical maturity (boys) or marriage (girls)[17]	-	-
Congo (Republic of the)	13[18]	-	-
Costa Rica	12	-	-
Côte d'Ivoire	10	-	-
Croatia	14	-	-

[16] The *laodong jiaoyang* system (variously translated as re-education through labor, or reform through education, or juvenile criminal camps) is one of the administrative detention systems used to punish most minor offences without official charge, trial, or judicial review. A patchwork regulatory framework apparently restricts its use to children 13 and older, although in the past children as young as 11 were detained. Deprivation of liberty is currently possible for up to 4 years total, based in large part upon the discretion of public security officials. Re-education is formally justified as a child protection measure of assistance for reintegration into society, yet the United Nations Special Rapporteur on Torture has considered the system a form of inhuman and degrading treatment or punishment. See, inter alia, Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning Worst Forms of Child Labour Convention, 1999 (No. 182): China*, 2007; Keyuan, Zou, "The 'Re-Education Through Labour' System in China's Legal Reform," 12 *Criminal Law Forum* 459, 2001; Trevaskes, Susan, "Severe and Swift Justice in China," 47 *British Journal of Criminology* 23, 2007; and United Nations Commission on Human Rights, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to China*, E/CN.4/2006/6/Add.6, 10 March 2006.

[17] Comoros has indicated that, as stipulated in the Criminal Code, its MACR is 13 years. However, the Criminal Code and Islamic law are both legally recognized sources, and there are no fixed age limits under Muslim law. Physical maturity or the age of 14-15 years confers criminal responsibility on boys, while marriage at any age confers criminal responsibility upon girls. Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Comoros (Additional Info from State Party)*, CRC/C/28/Add.13, 7 October 1998, pars. 52, 79, and 141-142.

[18] Although apparently classified as protection, assistance, and education measures, children younger than 13 may be declared guilty, held in remand institutions, and placed in "a suitable educational or professional training establishment, or any public or private institution providing care for children, or in an appropriate boarding school for offenders of school age." See Committee on the Rights of the Child, *Initial reports of States parties due in 1999: Congo*, CRC/C/COG/1, 20 February 2006, pars. 428-430.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**
Cuba	0[19]	-	-
Cyprus	10	12	10-12
Czech Republic	15	-	-
Democratic People's Republic of Korea	14	-	-
Democratic Republic of the Congo	0	-	-
Denmark	15[20]	-	-
Djibouti	13	-	-
Dominica	12	-	-
Dominican Republic	13	-	-
Ecuador	12	-	-
Egypt	7	-	-
El Salvador	12	-	-
Equatorial Guinea	16	-	-
Eritrea	12	-	-
Estonia	7	-	-
Ethiopia	9	-	-
Fiji	10	12	10-12
Finland	15	-	-

[19] Cuba generally maintains that its MACR is 16, but this limit is actually the age of penal majority as stipulated in Penal Code Art. 16(2). Instead, the main juvenile justice legislation, *Decreto-Ley No. 64 del Sistema para la Atención a Menores con Trastornos de Conducta del 30 de diciembre de 1982*, does not contain any minimum age for its application. Under this system, relevant children are seen as offenders in conflict with the law, and administrative "prevention and social welfare commissions" may order their deprivation of liberty indefinitely in specialized re-education centers. In 1998, one NGO reported to the Committee on the Rights of the Child that almost 62,000 children were held in such institutions. See, inter alia, Coalition of Cuban American Women, *Cuban State and the Implementation on the Convention on the Rights of the Child*, Hialeah (Florida), 1998; Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Cuba*, CRC/C/8/Add.30, 15 February 1996; Romero, Lidia, and Luis Gómez, *La Política Cubana de Juventud Entre 1995 y 1999: Principales Características (La Experiencia del Pradjal en Cuba)*, La Habana, Centro de Estudios Sobre la Juventud, 2000; and Zaragoza Ramírez, Alina, and Bárbara Mirabent Garay, "Administración de justicia de menores: un desafío a la contemporaneidad," *Cubalex: Revista Electrónica de Estudios Jurídicos*, No. 9, July-September 1999.

[20] The Administration of Justice Act (as amended by Act No. 443 of 9 June 2004), part 75b, grants police the authority to detain suspects as young as 12 years of age in waiting rooms, holding cells, etc. Detention may be extended for up to 24 hours, and solitary confinement is permitted for up to 6 hours. Police may also conduct wiretaps, surveillance, searches, and seizures against such children. See Committee on the Rights of the Child, *Written Replies by the Government of Denmark Concerning the List of Issues (CRC/C/Q/DNK/3) Received by the Committee on the Rights of the Child Relating to the Consideration of the Third Periodic Report Of Denmark*, CRC/C/RESP/91, 19 August 2005; and National Council for Children, *Report to the UN Committee on the Rights of the Child: Supplementary report to Denmark's 3rd periodic report*, Copenhagen, 2005.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**
France	0[21]	-	0-18
Gabon	13	-	-
Gambia	12	-	-
Georgia	12	14	-
Germany	14	-	14-18
Ghana	12	-	-
Greece	13[22]	-	-
Grenada	7	-	7-12
Guatemala	13	-	-
Guinea	13	-	-
Guinea-Bissau	16	-	-
Guyana	10	-	-
Haiti	13	-	-
Honduras	12	-	-
Hungary	14	-	-
Iceland	15	-	-
India	7	-	7-12
Indonesia	8	-	-
Iran (Islamic Republic of)	9/15[23]	-	-
Iraq	9	-	-
Ireland	10	12	-
Israel	12 OPT[24]: 9	- -	- -
Italy	14	-	14-18
Jamaica	12	-	-

[21] Note that all children deemed capable of discernment and found to have committed illegal acts are considered criminally responsible. The measures that such children may face vary according to their ages. The "loi particulière" to which the Code Pénal refers, the *Ordonnance relative à l'enfance délinquante* (as amended through March 2007), provides that adjudicated children of all ages are subject to "mesures de protection, d'assistance, de surveillance et d'éducation" (see, inter alia, Arts. 1-2). "Sanctions éducatives," which in certain cases deprive children of their liberty, are applicable to children ages 10 and older (Art. 15-1). "Peines," which also in certain cases deprive children of their liberty, are applicable to children 13 and older (Arts. 20-2 to 20-9).

[22] The Penal Code holds that children younger than 13 are not criminally responsible. However, juvenile courts have jurisdiction over children ages 8 and older in conflict with the law (Penal Code, Arts. 121 and 126), and may order rehabilitation and therapeutic measures (Arts. 122-123, respectively) for children that may deprive them of their liberty. See, inter alia, World Organisation Against Torture, et al., *State Violence in Greece: An Alternative Report to the United Nations Committee Against Torture 33rd Session*, Athens, 2004.

[23] The MACR is 9 lunar years (8 years and 9 months) for girls and 15 lunar years (14 years and 7 months) for boys.

[24] Occupied Palestinian Territory.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**
Japan	11[25]	-	-
Jordan	7	-	-
Kazakhstan	14[26]	16	-
Kenya	8	12	8-12
Kiribati	10	12	10-14
Kuwait	7	-	-
Kyrgyzstan	14[27]	16	-

[25] May 2007 amendments to the Juvenile Law will allow Family Courts to directly order their most severe disposition against children as young as 11 in conflict with the law – commitment to Juvenile Training Schools, which are supervised by the Ministry of Justice Correction Bureau. Previously, the minimum age for such placements was generally 14 years. Under the amendments, such children may also be subject to police questioning, searches, and seizures. The age limit of 14 years has also been frequently cited because, as permitted under Penal Code Art. 41, it is the lowest possible age for waiver to adult criminal court for certain serious crimes. See, inter alia, Ito, Masami, "Diet lowers incarceration age to 'about 12'," *The Japan Times*, 26 May 2007; Jin, Guang-Xu, "Japan: The Criminal Responsibility of Minors in the Japanese Legal System," 75 *International Review of Penal Law* (*Revue internationale de droit pénal*) 409, 2004; and "Juvenile crime wave prompts Justice Ministry crackdown," *The Japan Times*, 25 August 2004.

[26] The Commentary to Art. 15 of the Criminal Code notes courts' authority under certain conditions to apply coercive measures of correctional education to children ages 11 and older, via placement in a special educational institution for up to three years. These institutions are reorganized correctional colonies, which were in essence juvenile prisons. In addition, Centers of temporary isolation, adaptation and rehabilitation for juveniles may admit children younger than the MACR, and as young as 3, who have committed acts harmful to the public. See Children's Fund of Kazakhstan, Kazakhstan International Bureau for Human Rights and Rule of Law, Center for Conflict Resolution, and Crisis Center for Women and Children and the Feminist League, *Alternative Report of Non-Governmental Organizations of Kazakhstan with Commentaries to the Initial Report of the Government of Kazakhstan on Implementation of the Convention on the Rights of the Child Ratified by Kazakhstan in 1994*, Almaty, 2002; Committee on the Rights of the Child, *Second and third periodic reports of States parties due in 2006: Kazakhstan*, CRC/C/KAZ/3, 23 August 2006, pars. 28 and 458-466; Kazakhstan NGOs' Working Group "On Protection of Children's Rights," *Alternative Report of Non-Governmental Organizations with the Comments to the Second and Third Reports of the Government of the Republic of Kazakhstan Implementation of the Convention on the Rights of the Child as well as Recommendations of the UN Committee on the Rights of the Child*, Almaty, 2006; and UNICEF Kazakhstan, correspondence with author, May 2001.

[27] Special administrative bodies, known as Commissions on Minors' Affairs, have jurisdiction over children younger than 14 who are in conflict with the law. These Commissions may place children from the age of 11 in "special correctional schools" for 1 to 5 years, in effect depriving them of their liberty. See Meuwese, Stan, ed., *KIDS BEHIND BARS: A study on children in conflict with the law: towards investing in prevention, stopping incarceration and meeting international standards*, Amsterdam, Defence for Children International The Netherlands, 2003; and Youth Human Rights Group, *Alternative NGO Report to the United Nations Committee on the Rights of the Child in relation to the examination of the Second periodic report by the Kyrgyz Republic on the implementation of the UN Convention on the Rights of the Child*, Bishkek, 2004.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test
Lao People's Democratic Republic	15[28]	-	-
Latvia	14	-	-
Lebanon	7	-	-
Lesotho	7	-	7-14
Liberia	7	-	-
Libyan Arab Jamahiriya	7[29]	-	-
Liechtenstein	14	-	-
Lithuania	14	16	-
Luxembourg	0[30]	-	-
Madagascar	13	-	13-18
Malawi	7	12	7-12
Malaysia	0[31]	puberty/10/13	10-12
Maldives	puberty[32]	10/15	-
Mali	13	-	13-18
Malta	9	-	9-14

[28] Special measures are applied under the Penal Code against children at least as young as 12, including deprivation of liberty in custodial re-education institutions. See Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Lao People's Democratic Republic*, CRC/C/8/Add.32, 24 January 1996, pars. 161 and 166; and UNICEF East Asia and Pacific Regional Office, *Overview of Juvenile Justice in East Asia and the Pacific Region*, Bangkok, 2001.

[29] Although Libya generally maintains that its MACR is 14 years, relevant Penal Code articles provide that children between 7 and 14 who are proven culpable of acts classified as misdemeanours or felonies may be the subject of preventive measures, which include commitment for a period of less than one year to a juvenile education and guidance centre. See, inter alia, Committee on the Rights of the Child, *Second periodic reports of States parties due in 2000: Libyan Arab Jamahiriya*, CRC/C/93/Add.1, 19 September 2002, pars. 29-30 and 76.

[30] Luxembourg holds that 16 years is the lowest age for potential criminal responsibility (*Loi relative à la protection de la Jeunesse*, Art. 32), that this limit refers strictly to adult criminal court, and that only protection measures of care, therapy, and education are available for younger children. This claim implies that the age of penal majority and the MACR coincide at 16 years. However, several of the relevant juvenile court measures indicate a penal-correctional response to children's actions without any lower age limit. These may deprive children of their liberty, and in some cases, solitary confinement may be ordered for up to 10 consecutive days as a disciplinary sanction. See, e.g., Art. 6: "Si une mesure de placement dans un établissement ordinaire de garde, d'éducation ou de préservation est inadéquate en raison de la mauvaise conduite ou du comportement dangereux du mineur, le tribunal ordonne son internement dans un établissement disciplinaire de l'Etat." See also Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Luxembourg*, CRC/C/15/Add.250, 31 March 2005.

[31] Among explanations on various provisions regarding children and responsibility, Malaysia has suggested that Penal Code Section 82 establishes an MACR of 10 years. Other provisions clearly set a lower age threshold. Committee on the Rights of the Child, *Initial report of States parties due in 1997: Malaysia*, CRC/C/MYS/1, 22 December 2006, par. 131(f).

[32] Maldives has described its MACR as 10 years under Art. 4(a) of the Regulation on Conducting Trials, Investigations and Sentencing Fairly for Offences Committed by Minors. However, this same Regulation attributes criminal responsibility upon puberty, without consideration for age, for certain offences. Committee on the Rights of the Child, *Second and third periodic reports of States parties due in 1998 and 2003: Maldives*, CRC/C/MDV/3, 10 April 2006.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**
Marshall Islands	0[33]	-	-
Mauritania	12	-	12-16
Mauritius	0[34]	-	-
Mexico	12	-	-
Micronesia (Federated States of)	0[35]	-	-
Moldova	14	16	-
Monaco	13	-	-
Mongolia	14	16	-
Montenegro	14	-	-
Morocco	12	-	-
Mozambique	0[36]	-	-
Myanmar	7	-	7-12
Namibia	7	-	7-14

[33] Marshall Islands describes its MACR as 10 years according to Criminal Code Section 107. However, juvenile delinquency statutes establish procedures to adjudicate children as delinquent, without any lower age limit, and to order their deprivation of liberty as a consequence. The Committee on the Rights of the Child observed that there is no MACR. Committee on the Rights of the Child, *Concluding observations: Marshall Islands*, CRC/C/MHL/CO/2, 2 February 2007; and Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Marshall Islands*, CRC/C/28/Add.12, 18 November 1998.

[34] Children younger than 14 that the court deems not capable of discernment, apparently without any lower age limit at all, may be sent under certain circumstances to a correctional institution until their eighteenth birthdays. The court may place children deemed capable of discernment, again without any lower age limit, in a correctional institution. See Committee on the Rights of the Child, *Second periodic reports of States parties due in 1997: Mauritius*, CRC/C/65/ADD.35, 19 July 2005, pars. 125 and 477-478.

[35] Micronesia has suggested that the minimum age for penal majority under the Laws of the Federated States of Micronesia (Title 12 §1101), 16 years, is also its MACR. However, juvenile delinquency statutes establish procedures to adjudicate children as delinquent, without any lower age limit, and to order their deprivation of liberty as a consequence. The Committee on the Rights of the Child observed that there is no clearly defined MACR. Committee on the Rights of the Child, *Concluding observations: Micronesia (Federated States of)*, CRC/C/15/Add.86, 4 February 1998; and Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Micronesia (Federated States of)*, CRC/C/28/Add.5, 17 June 1996.

[36] Mozambique has alternatively suggested that its MACR is 10 years (Penal Code Art. 43) or 16 years (Penal Code Art. 42), stating in particular that children younger than 16 may only face punishment vis-à-vis protection, assistance or educational measures, and that they are not subject to punishment depriving them of their liberty. Instead, 16 years appears to be the age of penal majority, while younger children fall under the jurisdiction of the Juvenile Court as stipulated in the Statute of Legal Aid to Minors. Art. 16 of this Statute allows corrective measures, including measures of deprivation of liberty, to be ordered for children who have committed acts deemed crimes or misdemeanours in the penal law. See Committee on the Rights of the Child, *Initial reports of States parties due in 1996: Mozambique*, CRC/C/41/Add.11, 14 May 2001.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test
Nauru	0[37]	-	-
Nepal	0[38]	10	-
Netherlands	12[39]	-	-
New Zealand	10	14	10-14
Nicaragua	13	-	-
Niger	13	-	13-18
Nigeria	Northern States: 7 Southern States: 7 Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara States: puberty[40]	- 12 7	7-12 7-12 -
Norway	15	-	-
Oman	9	-	-
Pakistan	0[41]	7	7-12
Palau	10	-	10-14
Panama	14	-	-

[37] Children ages 14 and older are held criminally responsible in adult court, although the court also has the discretion to try younger children accused of murder. In general, children under the age of 14 are considered minors and their criminal responsibility is decided on a case-by-case basis without any lower age limit. Russell Kun, Principal Legal Adviser, Department of Justice, telephone interview with author, 19 September 2002.

[38] Nepal has noted its MACR as 10 years according to Children's Act Art. 11, but the Terrorist and Disruptive Activities (Control and Punishment) Ordinance undermines this age limit for certain offences. Committee on the Rights of the Child, *Second periodic report of States parties due in 1997: Nepal*, CRC/C/65/Add.30, 3 December 2004.

[39] Children younger than 12 may be deprived of their liberty on the basis of family law supervision orders in the same facilities and units as older children detained under criminal law. There have been reports of several such cases involving very young children. Legislative efforts are apparently underway to provide separate facilities for the respective categories of children. See Meuwese, *supra* note 27.

[40] Among many conflicting statements on children's criminal responsibility, Nigeria has cited various age limits as the MACRs according to state legislation. However, respective state *shari'a* criminal laws assign criminal responsibility upon puberty for certain offences, without regard to age per se. See, e.g., Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Nigeria*, CRC/C/8/Add.26, 21 August 1995; and Government of Nigeria, *Convention on the Rights of the Child: Second Country Periodic Report*, Federal Ministry of Women Affairs (Child Development Department), Abuja, 2004.

[41] Pakistan cites its MACR as 7 years according to Penal Code Sect. 82. However, various other legal provisions set no minimum age for responsibility for certain offences. Committee on the Rights of the Child, *Second periodic reports of States parties due in 1997: Pakistan*, CRC/C/65/Add.21, 11 April 2003.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**
Papua New Guinea	7[42]	14	7-14
Paraguay	14	-	-
Peru	12	-	-
Philippines	15[43]	-	15-18
Poland	0[44]	-	-
Portugal	12	-	-
Qatar	7	-	7-18
Republic of Korea	14[45]	-	-
Romania	14	-	14-16
Russian Federation	14[46]	16	-
Rwanda	14	-	-
Saint Kitts and Nevis	8	-	-
Saint Lucia	12	-	-
Saint Vincent and the Grenadines	8	-	-
Samoa	8	-	8-14

[42] Besides the Criminal Code's MACR provisions, the 1961 Child Welfare Act (as amended through 1990) allows the Children's Court to deprive the liberty of child offenders of any age. Art. 32(2)(a)(ii) states that "(2) Where a Children's Court deals summarily with an offence (other than a homicide or rape, or any other offence punishable by death or imprisonment for life) committed by a child, the Court may—(a) impose a penalty of—(ii) imprisonment for a term not exceeding six months, and, in addition to or instead of any penalty imposed under Subparagraph (i) or (ii) make an order in respect of the child as if the child had been declared to be an incorrigible or uncontrollable child under this Act. . . ." Art. 41(1)(b)(iii) notes that the Court, with such an order, may place a child in an institution until his or her sixteenth birthday.

[43] The MACR is technically 15 years and one day. See Bayoran, Gilbert, "56 minors to be cleared of criminal liability soon," *The Visayan Daily Star*, Bacolod City (Philippines), 23 May 2006, www.visayandailystar.com/2006/May/23.

[44] In response to evidence of any child's "demoralization," which includes his or her commission of an offense, courts may order educative, protective, and therapeutic measures. In some cases, these measures signify the deprivation of liberty for indeterminate periods of time. See, inter alia, Committee on the Rights of the Child, *Periodic reports of States parties due in 1998: Poland*, CRC/C/70/Add.12, 6 February 2002, par. 360; and Stando-Kawecka, Barbara, *The Juvenile Justice System in Poland*, presented at the Conference of the European Society of Criminology, Amsterdam, August 25-28, 2004.

[45] Children 12 and older accused of committing criminal offences, or deemed likely to do so and also beyond parental control, are handled as juvenile protection cases. Such children are not subject to sentences in juvenile prisons, as children 14 and older are, but they may face protection dispositions that include placement in child welfare institutions, juvenile protection institutions, and juvenile training schools or reformatories. See, inter alia, Republic of Korea, *The Juvenile Protection Education Institution*, www.jschool.go.kr/HP/JSC80/jsc_01/jsc_1020.jsp.

[46] The 1999 law on "The Bases of the System of Preventing/Combating Homelessness and Juvenile Offenses" allows for the placement of children younger than the MACR in centers for the temporary confinement of juvenile delinquents, via a judicial sentence or judge's order in response to "socially dangerous acts." Although placement is limited to 30 days, there were 54,800 such placements in 1999, 30,000 in 2000, and 24,400 in 2001. See Committee on the Rights of the Child, *Third periodic reports of States parties due in 2001, Russian Federation*, CRC/C/125/Add.5, 15 November 2004, par. 323; and Stoecker, Sally W., "Homelessness and criminal exploitation of Russian minors: Realities, resources, and legal remedies," *Demokratizatsiya*, Spring 2001.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test
San Marino	12	-	12-18
Sao Tome and Principe	16[47]	-	-
Saudi Arabia	7	-	-
Senegal	13	-	-
Serbia	14	-	-
Seychelles	7	12	7-12
Sierra Leone	10	-	-
Singapore	7	-	7-12
Slovakia	14	-	-
Slovenia	14[48]	-	-
Solomon Islands	0[49]	-	-
Somalia	0[50]	-	-
South Africa	7	-	7-14
Spain	14	-	-
Sri Lanka	8	-	8-12

[47] Under the Statute on judicial assistance for minors, children younger than 16 who have committed acts deemed offences or crimes in penal law are only subject to protection, assistance or education measures ordered by juvenile courts. Although there are indications that measures involving deprivation of liberty are not ordered in practice against such children, they are available as in the case of placement in educational institutions and private educational establishments. See, inter alia, Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Sao Tome and Principe*, CRC/C/8/Add.49, 1 December 2003, pars. 103, 107, and 109.

[48] Despite the nominal MACR of 14, welfare agencies called "Social Work Centers" have the authority to commit younger children to juvenile institutions, which are substantially equivalent to educational institution placements for older children in criminal cases. See Filipcic, Katja, "Slovenia: Dealing with Juvenile Delinquents in Slovenia," 75 *International Review of Penal Law* (*Revue internationale de droit pénal*) 493, 2004.

[49] Solomon Islands has indicated that Penal Code Section 14 sets the MACR at 8 years. However, the Juvenile Offenders Act does not set any lower age limit for holding children guilty of offences and depriving them of their liberty as a consequence. Committee on the Rights of the Child, *Initial reports of States parties due in 1997: Solomon Islands*, CRC/C/51/Add.6, 12 July 2002.

[50] Although overlapping customary/traditional law, Islamic law, and codified criminal law all contain relevant standards, there is no effective MACR. In customary/traditional law, the MACR is understood to be 15 years. Islamic law grants judges the authority to decide on the dangerous character of juvenile delinquents under the age of 15 and to order them to periods of up to three months in reformatory facilities. Under the Penal Code, article 59 nominally sets an MACR of 14 years: "Whoever, at the time of committing an act, had not attained 14 years of age shall not be liable." However, article 177 stipulates that "Where a minor under 14 years of age has committed an offence, and is of a dangerous character, the Judge, having special regard to the gravity of the act and the moral conditions of the family in which the minor has been brought up, may order him to be committed to a reformatory for a period of not less than 2 years. Where the crime is punished with death or imprisonment for life, or imprisonment for not less than three years, and the crime committed is not with culpa, commitment of a minor to a reformatory shall be ordered for a period of not less than 3 years." UNICEF Somalia, "Juvenile Justice in Post-Conflict Situations: Somalia," unpublished draft presented at the conference *Juvenile Justice in Post-Conflict Situations*, UNICEF Innocenti Research Centre, Florence, May 2001.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**
Sudan	0[51]	7/15/18/puberty	-
Suriname	10	-	-
Swaziland	7	-	7-14
Sweden	15	-	-
Switzerland	10	-	-
Syrian Arab Republic	10	-	-
Tajikistan	14[52]	16	-
Thailand	7	-	-
The former Yugoslav Republic of Macedonia	14	-	-
Timor-Leste	12	-	-
Togo	13	-	-
Tonga	7	-	7-12
Trinidad and Tobago	7	-	10-14
Tunisia	13	-	13-15
Turkey	12[53]	-	12-15
Turkmenistan	14	16	-

[51] Among various statements on children and criminal responsibility, Sudan has repeatedly suggested that Criminal Code Article 9 establishes an MACR of 7 years. However, other provisions clearly set an effective MACR of 0. For example, "Alcohol or drug consumption and sexual relations outside of the bonds of marriage are absolute crimes for which the age factor is not taken into account under the terms of the Criminal Law Act of 1991." (Committee on the Rights of the Child, *Initial reports of States parties due in 1992: Sudan*, CRC/C/3/Add.3, 16 December 1992, par. 33.) Also, "All children are forbidden to handle and consume alcohol. Any child who does so is in breach of the law in accordance with the provisions of articles 78, 79 and 80 of the Penal Code of 1991. Articles 15 and 20 of the Narcotic Drugs and Psychotropic Substances Act of 1994 also fully prohibit the use of narcotic drugs and psychotropic substances." (Committee on the Rights of the Child, *Periodic reports of States parties due in 1997: Sudan*, CRC/C/65/Add.17, 6 December 2001, par. 52.)

[52] Under Order n° 178 of the President of the Republic of Tajikistan, of 23 February 1995 (Regulations on the Commission on Minors), administrative Commissions on Minors consider the cases of children younger than 14 suspected of having committed criminal acts. There is no minimum age limit to the Commissions' mandate in this respect, and the Commissions may apply punishments including the deprivation of liberty for children apparently as young as 7. However, there are indications that even younger children, contrary to the Regulations, have been deprived of their liberty. See, e.g., World Organisation Against Torture, *Human Rights Violations in Tajikistan: Alternative Report to the United Nations Committee Against Torture 37th Session*, Geneva, 2006.

[53] Under the Criminal Code, children younger than 12 – as well as children between 12 and 15 deemed unable to perceive the legal meaning and consequences of their offences or as lacking the ability to control their actions – may face security measures/precautions. Furthermore, under the 2005 Juvenile Protection Law, any child in conflict with the law and deemed not criminally responsible may face "protective and supportive measures" that include deprivation of liberty in educational, governmental, and private care institutions. There is no lower age limit to the application of such measures, they may be imposed through a child's eighteenth birthday, and judges are not required to hold hearings before ordering them. See, inter alia, Arts. 3(1)(a)(2), 5(1)(b-c), 7(6), 11(1) and 13(1).

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**
Tuvalu	10	12	10-14
Uganda	12	-	-
Ukraine	14[54]	16	-
United Arab Emirates	7	-	7-n/a
United Kingdom of Great Britain and Northern Ireland	England and Wales: 10 Northern Ireland: 10 Scotland: 8 Other jurisdictions: varies 8-10	- - - varies	- - - varies
United Republic of Tanzania	10 Zanzibar: 12	- -	10-12 12-14
United States of America[55]	AL, AK, CA, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, KY, ME, MI, MO, MT, NE, NV, NH, NJ,[56]	-	CA[58]: 0-14

[54] Criminal Code Chapter XV on "Specific Features of Criminal Liability and Punishment of Minors" contains several provisions that call into question the effective MACR. Art. 97(2) states that "A court shall also apply compulsory reformation measures provided for by paragraph 2 of Article 105 of this Code to a person, who committed a socially dangerous act that classifies as an act provided for by the Special Part of this Code, before he/she attained the age of criminal liability." The final such measure stipulated in Art. 105(2) is "placing a minor in a special educational and correctional institution for children and teenagers until the minor's complete correction but for a term not exceeding three years. Conditions of stay in and procedure of discharge from these institutions shall be provided for by law." Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

[55] Juvenile justice is principally regulated and administered under respective state law. The states, plus the District of Columbia, and their respective abbreviations are the following: Alabama-AL, Alaska-AK, Arizona-AZ, Arkansas-AR, California-CA, Colorado-CO, Connecticut-CT, Delaware-DE, District of Columbia-DC, Florida-FL, Georgia-GA, Hawaii-HI, Idaho-ID, Illinois-IL, Indiana-IN, Iowa-IA, Kansas-KS, Kentucky-KY, Louisiana-LA, Maine-ME, Maryland-MD, Massachusetts-MA, Michigan-MI, Minnesota-MN, Mississippi-MS, Missouri-MO, Montana-MT, Nebraska-NE, Nevada-NV, New Hampshire-NH, New Jersey-NJ, New Mexico-NM, New York-NY, North Carolina-NC, North Dakota-ND, Ohio-OH, Oklahoma-OK, Oregon-OR, Pennsylvania-PA, Rhode Island-RI, South Carolina-SC, South Dakota-SD, Tennessee-TN, Texas-TX, Utah-UT, Vermont-VT, Virginia-VA, Washington-WA, West Virginia-WV, Wisconsin-WI, and Wyoming-WY.

[56] New Jersey case law, exemplified in two juvenile sex offender cases, arguably upholds the availability of the common law *doli incapax* presumption in juvenile court delinquency proceedings (see State of New Jersey in the Interest of J.P.F., 845 A.2d 173 (2004); In the Matter of Registrant J.G., 777 A.2d 891 (2001); and Carter, Andrew M., "Age Matters: The Case for a Constitutionalized Infancy Defense," 54 *Kansas Law Review* 687, 2006). However, neither decision attempts to reconcile such availability with the provision, referring to the Code of Criminal Justice chapter on sex offenses, that "No actor shall be presumed to be incapable of committing a crime under this chapter because of age. . . ." (New Jersey Statutes §2C:14-5(b)). One lower court decision in another juvenile sex offender case interpreted this provision as a "clear statutory disavowal of the old common law three-tiered rule." In granting the juvenile co-defendants' motion to dismiss the charges against them, based upon evidence that they were incapable of meeting the *mens rea* requirement of "knowingly" committing the alleged acts, it found no lower

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test
	NM, ND, OH, OK, OR, PA, RI, SC, TN, UT, VT, VA, WV, WY: 0[57] NC: 6 MD, MA, NY: 7 AZ, WA: 8 AR, CO, KS, LA, MN, MS, SD, TX, WI: 10	 PA: 10 VT: 10 - - - -	 - - - - WA: 8-12 -
Uruguay	13	-	-
Uzbekistan	13[59]	14/16	-
Vanuatu	10	-	10-14
Venezuela (Bolivarian Republic of)	12	-	-
Viet Nam	14[60]	16	-
Yemen	7	-	-
Zambia	8	12	8-12
Zimbabwe	7	12	7-14

age limit to juvenile court delinquency jurisdiction in statute or case law (State of New Jersey in the Interest of C.P. & R.D., 514 A.2d 850, 854 (1986)).

[57] In statutory and/or case law, these states either have no minimum age for adjudicating children delinquent in juvenile court proceedings, or have no minimum age for original adult criminal court jurisdiction. In addition, the federal government has no minimum age limit to adjudicating children delinquent; federal law enforcement officials arrest approximately 400 children per year, but cases may be transferred under certain conditions to state courts. See, inter alia, King, Melanie, and Linda Szymanski, "National Overviews," *State Juvenile Justice Profiles*, Pittsburgh, National Center for Juvenile Justice, 2006, www.ncjj.org/stateprofiles; and Snyder, Howard N., and Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, Washington, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 2006.

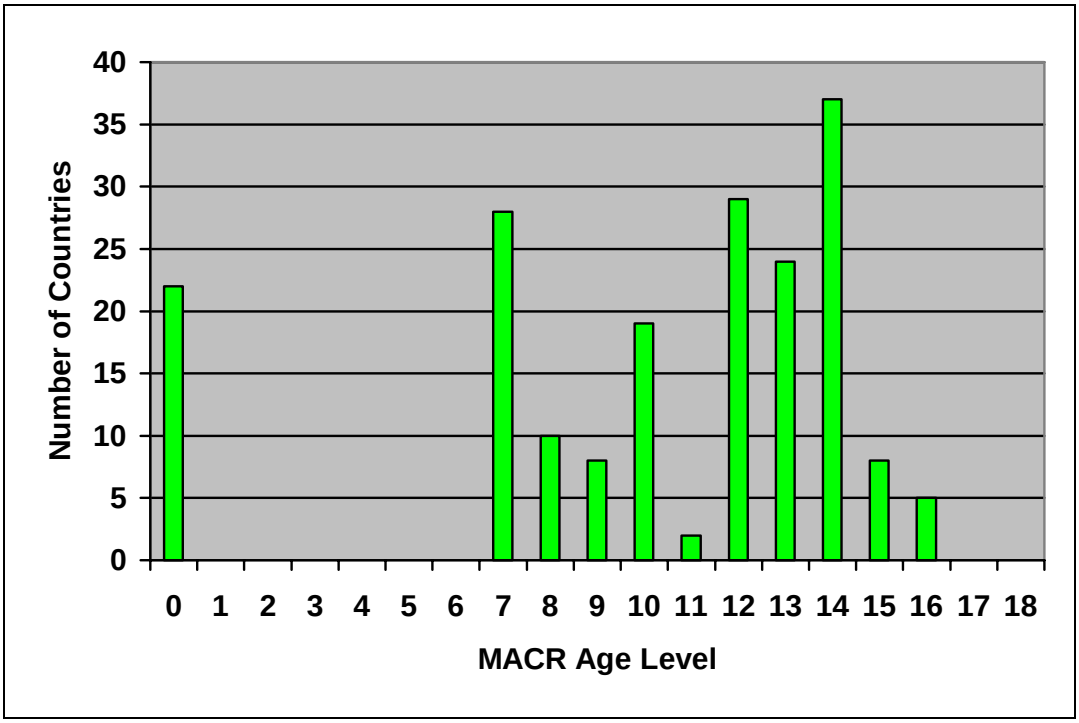
[58] This table notes the two states – California and Washington – where some type of *doli incapax* test is currently available in juvenile delinquency proceedings (see also footnote 56 regarding New Jersey). Case law in roughly 20 other states upholds the common law *doli incapax* provisions only in adult criminal courts, without necessarily barring delinquency proceedings in juvenile courts. Although such provisions are theoretically applicable to all relevant children in adult courts, *doli incapax* has generally fallen into disuse, and respective case law is typically dated. See Carter, *supra* note 56; King et al., *ibid*; and Thomas, Tim A., *Annotation: Defense of Infancy in Juvenile Delinquency Proceedings*, 83 ALR4th 1135, 1991 and August 2002 Supplement.

[59] Regional and municipal Commissions on Minors' Affairs have primary responsibility, subject to public prosecutor supervision, for responding to children younger than 13 in conflict with the law. Commissions may return such children to parental supervision or send them to children's institutions for at least three years. See Danish Centre for Human Rights and UNICEF, *Juvenile Justice in Uzbekistan: Assessment 2000*, Copenhagen, 2001; and World Organisation Against Torture, *Rights of the Child in Uzbekistan*, Geneva, 2006.

[60] Under the administrative procedures of Government Decree No. 33/CP of 1997, Art. 1, and the Ordinance on Sanctions against Administrative Violations, 2002, Art. 5(1)(a), children from age 12 who commit Penal Code violations are subject to placement in reform schools for 6 months to 2 years. See Human Rights Watch, *"Children of the Dust": Abuse of Hanoi Street Children in Detention*, New York, 2006; and Committee on the Rights of the Child, *Periodic reports of States parties due in 1997: Viet Nam*, CRC/C/65/Add.20, 5 July 2002, pars. 114(b) and 232(a).

Figure 5.1 below depicts the distribution of MACR age levels worldwide and provides a platform for interpreting some of the main characteristics of MACR provisions detailed in Table 5.1 in the preceding pages. As seen in Figure 5.1, the current range of MACRs across countries is from 0 to 16 years. The median MACR – i.e., the age level with as many MACRs at it and below it as there are MACRs at and above it – is 12 years. In comparison, the average MACR of roughly 9.5 years is not as useful a measure because, among other reasons, the mean is skewed by the 22 countries classified as having MACRs of 0 in Figure 5.1.

Figure 5.1: Current MACR Distribution Worldwide



This does not necessarily signify that such countries hold infants and toddlers criminally responsible for their acts; instead, they have no clear lower age limit below which criminal responsibility and/or sanctions are ruled out in all cases, as per the criteria outlined above in this chapter. In general terms of this nature, at least 15

of these 22 countries have either no MACR or no clear or effective MACR in force.[61] Three other countries – Malaysia, Nepal, and Pakistan – have no MACR due to anti-terrorism or security regulations that apply to all people without age restrictions; higher age limits and/or puberty limit responsibility for other offenses.[62] Pakistan also lacks an MACR, as does Sudan, because of laws presumably derived from Islamic criminal law and applying to all people for certain offenses; again, higher age limits and/or puberty apply for other offenses. Comoros, Maldives, and various states in Nigeria look more directly to traditional Islamic criminal law insofar as criminal responsibility is linked to puberty, yet this still means that there is no defined lower age for criminal responsibility. Precise age limits apply for some offenses in Maldives and Nigeria, while in Comoros, marriage at any age triggers criminal responsibility for girls under Islamic law.[63]

In moving along the columns of Figure 5.1 from left to right, and recalling the historical overviews of Chapter 4, it appears likely that most of the MACRs set at 7, 8, and 10 years are linked to the influences of English common law. Many of the MACRs of 12 years are in African, Latin American, and other countries that have amended their MACRs since the adoption of the CRC. The high number of countries with MACRs of 13 is due largely to historic influences of French law; those at 14 years are often related to Soviet law influences; and those at 15 are mostly in Scandinavian countries.

A number of related provisions and features are found in the details of Table 5.1 but are not reflected in Figure 5.1. First, within China, Israel, Nigeria, Tanzania, the United Kingdom, and the United States, respective political/administrative subdivisions have different MACR age levels. Instead, in terms of multiple national

[61] Bahrain, Cambodia, Cuba, Democratic Republic of the Congo, France, Luxembourg, Marshall Islands, Mauritius, Micronesia, Mozambique, Nauru, Poland, Solomon Islands, Somalia, and the United States of America.

[62] In addition, Sri Lanka's 1979 Prevention of Terrorism Act (POTA) formerly applied to all people with no age restriction whatsoever, nor with any distinction between children and adults. See 1979 Prevention of Terrorism Act, Section 28; and World Organisation Against Torture, *Sri Lanka Report for The Committee on the Rights of the Child 1995*, Geneva, 1995.

[63] In Comoros, where both Islamic law and the Criminal Code are applicable, the Criminal Code also establishes an age of criminal responsibility of 13 years for boys and girls alike.

ages of criminal responsibility according to the type and/or category of offense, at least 41 different countries have both MACRs and one or more higher age limits. As seen in further detail in Annex 3, 17 of these are former Soviet republics or other countries heavily influenced by Soviet law.[64] Others include Argentina, Austria, Chile, Ireland, New Zealand, and the United States (Pennsylvania and Vermont), as well as those mentioned above in the contexts of anti-terrorism laws and Islamic criminal laws. The group also includes 14 countries with secondary criminal responsibility age limits only for boys for offenses such as rape and sexual offenses.[65] Such provisions are apparently a remnant of English common law, and the United Kingdom generally abolished its rule to this effect in 1993. Although they have been cited as a protection for boys against unjust prosecutions, such provisions discriminatorily assign criminal responsibility for boys and girls at different ages for sex-related crimes; this could become an issue in particular where girl rape victims in some countries have sometimes been prosecuted for sex offenses.[66] Also related to English common law in many cases, there are at least 54 countries with *doli incapax* or substantially similar age ranges for considering potential criminal responsibility on a case-by-case basis. Several other countries have limits on boys' responsibility for sex offenses or *doli incapax* tests, but it appears that these only apply in adult criminal courts while MACRs and criminal responsibility independently apply at lower ages in juvenile courts.

At this summary level alone, the broad characteristics of MACRs worldwide show significant differences from the consensus international standards for MACRs as discussed in Chapter 3. One of the few points of convergence is the age of 12 years: the international standard holds that MACRs should be at least 12 years of age, just as the international median of MACRs is 12 years. However, this also means

[64] Albania, Armenia, Azerbaijan, Belarus, China, Georgia, Kazakhstan, Kyrgyzstan, Lithuania, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Viet Nam.
[65] Botswana, Cyprus, Fiji, Kenya, Kiribati, Malawi, Malaysia, Nigeria, Papua New Guinea, Seychelles, Tuvalu, the United Kingdom (British Virgin Islands), Zambia, and Zimbabwe. In Papua New Guinea, the provision is formulated as a rebuttable presumption for boys between the MACR of 7 years and 14 years.
[66] For an example of this phenomenon, see the case of Pakistan in Chapter 4.

that 89 countries have MACRs of 11 years or lower, including the 22 countries classified in this study with MACRs of 0 or tied to puberty. All of these countries' provisions fall outside the boundaries of the international standards. The same is true for 6 countries' multiple MACRs by political subdivision, 41 countries' dual or multiple age limits by type of offense, and 54 countries' *doli incapax* or similar tests. Even though these characteristics sometimes overlap within respective countries' laws, it is clear that the majority of countries in the world have one or more traits that are incompatible with the consensus international standards. In fact, there are only 73 countries that meet the basic standards at this level of analysis. This designation, however, still says almost nothing about respect for children's rights. Chapter 6 surveys practical challenges in national implementation, and one or more of these probably affects every country in the world. Ironically, some become more menacing particularly as MACRs grow higher and ostensibly more compatible with the standards. Although not a part of the international consensus on MACRs per se, another point of difference with state practice is the apparent preference of the Committee on the Rights of the Child for MACRs of 16 years. Only 5 countries set their MACRs this high, and none set them higher.

Modern Trends and Major Influences

MACR amendments form critical points in societies' never-ending construction of the meaning of childhood. National MACR debates immediately access a wide and often contradictory range of images and assumptions about children, about what children are capable of doing, and about what is fitting as a response to children's actions. Consequently, they regularly involve some of the most pointed and emotional public dialogues on child-related issues. This section offers an overview of modern trends in MACR changes, including the overwhelming influence of the CRC's understanding of children and its reporting process in leading to MACR increases. Although movements to reduce MACRs are much more limited in comparison, their dynamics in redefining childhood are consistently powerful and unwieldy. Case studies of relevant debates suggest that isolated cases of juvenile

crime, coupled with varying degrees of media and political grandstanding and other factors, often threaten to upend MACR-related provisions, to redefine understandings of childhood, and even to trigger major setbacks for overall national children's rights implementation. These patterns have a number of implications for juvenile justice and MACR reform efforts.

Table 5.2 portrays the basic trends in MACRs worldwide since 1989. From left to right, the table's columns list the following: a) the 40 countries that have established or increased their MACRs, and the pertinent years for those changes; b) over 25 countries that have formally stated their intention to do the same, or that are currently considering or have considered in recent years specific proposals as such; c) 4 countries that are currently considering or have considered in recent years specific proposals to reduce their MACRs; and d) 6 countries that have lowered their MACRs, and the respective years of those changes. MACR proposals, for both increases and decreases, only include legislatively oriented proposals that are active, that still appear to be pending, or that are recurring; it omits those that have been considered and subsequently abandoned, as well as calls for MACR reform from academics, NGOs, and advocacy groups. The table does not include changes or proposed changes strictly to *doli incapax* provisions or to secondary age limits for various categories of offenses. In general, the same caveats proffered for Table 5.1 above also apply to Table 5.2, whose listings are based upon the same interpretations of MACR provisions. Thus, this analysis excludes several presumed MACR changes, such as in Estonia, where the resultant age limit is not considered the effective MACR. In the same vein, the establishment of effective MACRs, where before there appears to have been no meaningful age limit (e.g., all former Latin American *situación irregular* countries), is tallied as the creation of new MACRs. Other presumed changes are not included where it has not been possible to confirm the effective provisions before legal amendments, such as in Angola and Tanzania.

Above all else, the sweeping number of countries that have increased or proposed to increase their MACRs – over 65 since the United Nations General Assembly's adoption of the CRC in 1989 – is a visible testament to the CRC's

Table 5.2: MACR Trends Since 1989

Increased MACR	Recent Proposed Increases	Recent Proposed Decreases	Decreased MACR
Afghanistan 2005	Albania	Brazil	Andorra 1999
Argentina 2005	Bahrain	Czech Republic	France 2002
Australia varies	Belize	Eritrea	Georgia 2007
Bangladesh 2004	Bhutan	Honduras	Japan 2007
Barbados 1999	Burundi		Nepal 2004
Belize 1999	Cambodia		Slovakia 2005
Bhutan 2004	Dem. Republic Congo		
Bolivia 1999	Egypt		
Brazil 1990	Jordan		
Chile 2006	Kenya		
China 2003	Lebanon		
Colombia 2007	Lesotho		
Costa Rica 1996	Malawi		
Cyprus 1999	Namibia		
Dominican Rep. 2003	Oman		
Ecuador 2003	Samoa		
El Salvador 1994	Saudi Arabia		
Gambia 2005	Sierra Leone		
Ghana 1998	South Africa		
Guatemala 2003	Sri Lanka		
Honduras 1996	Suriname		
Indonesia 1997	Swaziland		
Ireland 2006	Tanzania		
Maldives 2006	Thailand		
Mexico 2005	Timor-Leste		
Nepal 1992	Togo		
Nicaragua 1998	United Kingdom[68]		
Panama 1999			
Paraguay 2001			
Peru 1992			
Philippines 2006			
Portugal 1999			
Spain 2000			
Switzerland 2003			
Syria 2003			
Timor-Leste 2000			
Uganda 1996			
United Kingdom[67]			
Uruguay 2004			
Venezuela 1998			

[67] The Overseas Territories of Anguilla and Cayman Islands increased their respective MACRs from 8 years to 10 years between 2000 and 2007, with both maintaining *doli incapax* tests between 10 and 14 years.

[68] Bermuda (Overseas Territory) is considering an MACR increase.

impact overall and to the CRC country reporting process in particular. In contrast, although historical research becomes progressively less reliable, the matching 19-year span including 1970 through 1988 brings just 10 known MACR changes: 7 increases and 3 decreases. The nearly constant attention of the Committee on the Rights of the Child to the MACR, as detailed in Chapter 3, appears to be the driving force behind the scale of modern changes, as well as their lopsided nature – close to a 7:1 ratio of increases and proposed increases to decreases and proposed decreases. The pace of post-CRC MACR increases also seems to be quickening. For example, in the 10 years including 1989 through 1998, there were 11 MACR increases, while the 9 years including 1999 through 2007 have brought 28 increases, with 27 more proposed increases in the waiting. 23 of these 27 proposals are in countries with which the Committee on the Rights of the Child has raised the issue of the MACR in its Concluding Observations.

Of course, the larger picture is the CRC and the Committee's impact and implications for children's rights and juvenile justice systems. Table 5.2 includes many countries where MACR amendments are or were just one limited aspect of broader reform. For example, the CRC has pushed a fundamental rethinking and redefining of children's place in law and society across Latin America, and it spurred the intensive advocacy efforts that uprooted the *situación irregular* doctrine. Among many other factors, the Inter-American Court of Human Rights has bolstered this work in both the validation and enforcement of children's rights.[69] Thus, the 18 relevant countries listed in Table 5.2 as having created or increased their MACRs have, more importantly, legally defined children as holders of clear rights and guarantees, in both juvenile justice and child protection realms. In terms of the MACR, this also often means defining with great precision, for the first time, the ages and circumstances under which children may be deprived of their liberty; the procedural guarantees that children enjoy as a matter of right; and the legal procedures and presumptions to be followed in cases where there is no clear proof of

[69] See Dohrn, Bernardine, "Something's Happening Here: Children and Human Rights Jurisprudence in Two International Courts," 6 *Nevada Law Journal* 749, 2006.

children's ages. In Mexico, for example, respective states had independently regulated and administered their juvenile justice systems, in the spirit of *situación irregular*, with formal MACRs that ranged from 0 through 14 years.[70] Constitutional amendments passed in 2005 require states to create rights-based juvenile justice systems, MACRs of 12 years, minimum ages of penal majority of 18 years, strict limits on the deprivation of liberty, and only protection-oriented measures for children younger than the MACR in conflict with the law.[71] Similarly, the countries of South Asia were notable in the past for their very low MACRs – due largely to the influence of English law – but are prominent in Table 5.2 since all but India and Pakistan have now raised their MACRs at least once or are considering increases. Moreover, initial attention to low MACRs spread with advocacy efforts, particularly on the part of UNICEF, to a broader focus on juvenile justice reform overall. Such developments are linked with model processes and innovative solutions, such as in the case of Afghanistan as described in Chapter 4.

All the same, juvenile justice debates around the world regularly focus on the MACR as a particularly contentious and challenging issue. These debates raise a number of noteworthy issues, such as in the thoughtful engagement in Lebanon, where government circles and public debate have given close consideration to an MACR increase.[72] Pursuant to a broad agreement on raising the age level, the government planned for a Ministry of Labour commission to study and propose an increase, among other possible legal reforms in juvenile justice and child protection. The Higher Council for Children held a conference specifically on the potential MACR increase, with the participation of key broad-based stakeholders, and developed a draft amendment to this effect. Public awareness efforts included an NGO study on the need to increase the MACR, and a poster and petition campaign to support such reform.

[70] García, Dilcya Samantha, UNICEF Mexico, correspondence with author, October 2005.
[71] *Constitución Política de los Estados Unidos Mexicanos*, as amended through 2006, Art. 18.
[72] Committee on the Rights of the Child, *Written replies by the Government of Lebanon*, CRC/C/LBN/Q/3/Add.1, 27 April 2006.

Other countries, and political subdivisions of countries, have closely studied possible MACR reform.[73] In addition to Afghanistan, Chapter 4 describes how religious scholars and influential institutions in Iran, Oman, Maldives, and Syria have highlighted the common ground between classic Islamic doctrine and international children's rights around the MACR in particular, and have supported reform in some cases. Hong Kong examined the MACR in exceptional detail, soliciting public and academic comment, which eventually led to legal reform in 2003.[74] Similarly, upon ministerial request, the Scottish Law Commission produced a thorough discussion paper on the topic, convened a forum for debate, and published a formal report, which collectively prompted wide comment and debate although ultimately no MACR change.[75] Thailand continues to debate a proposed MACR increase, but a variety of viewpoints and pressures have prevented consensus on the appropriate age level so far.[76] A Justice Ministry Committee originally supported an increase from 7 to 13 years, arguing on the basis of children's incomplete physical, intellectual, and emotional development in that age range, while at least one prominent academic argued that children were fairly sophisticated thinkers by 11 or 12. In addition to other viewpoints, divergent public portrayals and images of children have been also powerful forces – of underage drug runners as sly outlaws, of young children as easy prey for criminal exploitation and instrumentalization, and of child victims of unfair and unduly harsh justice at tender ages.

After nearly a decade of debate, similarly powerful imagery and conceptions of children were central in the Philippines' recent MACR increase. An often-cited 2000 study of 300 out-of-school children ages 7 to 18, supported by UNICEF, was conducted specifically in support of related advocacy efforts.[77] The seeming

[73] Since these efforts have not always resulted in specific MACR proposals or amendments, they are not necessarily reflected in Table 5.2.
[74] See, inter alia, Law Reform Commission of Hong Kong, *Consultation Paper on the Age of Criminal Responsibility in Hong Kong*, Wanchai, 1999.
[75] See, inter alia, Scottish Law Commission, *Report on Age of Criminal Responsibility*, Edinburgh, 2002.
[76] See, inter alia, Charoenpo, Anucha, "Coming of Criminal Age," *Bangkok Post*, 27 January 2004.
[77] Ortiz, Will P., *Arrested Development: The Level of Discernment of Out-of-School Children and Youth*, Manila, Philippine Action for Youth Offenders, 2000.

manipulation of language and imagery to this end, however, is extremely problematic from a children's rights perspective. The report claims, for example, that "[a]t 18 years of age, the out-of-school children and youth tested in this study were at a level of discernment comparable to that of the average 7-year-old," that "[c]learly, most child offenders have a low level of moral development and an equally dismal level of discernment." Surprisingly, the report has been cited as a good practice and useful advocacy tool on the basis that it demonstrated that only children 15 and older, as compared to 9 and older previously, had sufficient discernment to bear criminal responsibility.

Other countries have focused more on the appropriateness of welfare responses to children younger than MACRs. Germany saw growing pressure through the 1970s to raise the MACR from 14 to 16, yet this dissipated in the 1980s because of concerns about how children beneath 16 might subsequently be treated.[78] There were fears that welfare approach responses could erode procedural guarantees and increase the indeterminate deprivation of liberty of children in institutions. In Canada, a general consensus by the early 1980s held that it was more appropriate for young children to access services through child welfare and mental health frameworks, rather than the criminal law, and the MACR was increased from 7 to 12 in 1984.[79] However, as discussed below in this section, both Germany and Canada subsequently faced pressures to decrease their MACRs.

In national debates around MACR decreases, the predominant forces frequently include isolated cases of violence by young children; inflammatory media coverage of them; public misperceptions about youth crime; associated support for harsher juvenile justice in general and lower MACRs in particular; and manipulation and scapegoating within the debate for political ends. The single most important and

[78] Dünkel, Frieder, "Juvenile Justice Systems in Europe – Legal Aspects and Actual Developments," in United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, 52 *Resource Material Series* 275, Tokyo, 1998.
[79] Augimeri, Leena K., Christopher J. Koegl, and Kenneth Goldberg, "Appendix B: Children Under Age 12 Years Who Commit Offenses: Canadian Legal and Treatment Approaches," in Loeber, Rolf, and David P. Farrington, eds., *Child Delinquents: Development, Intervention, and Service Needs*, Thousand Oaks (California), Sage Publications, 2001.

influential example as such is the United Kingdom and the Bulger case, even though the repercussions were for *doli incapax* and other juvenile justice provisions but not the MACR itself. The backdrop to the case was a period of plunging public opinion and optimism about the general state of affairs in the United Kingdom.[80] By the 1980s, crime policy began to take a prominent and dramatic role in the national discourse, including in legislative and policy arenas.[81] A number of violent youth crimes, broadly and visibly reported, added to the volatile mix that only awaited a final spark.[82] Then, in Liverpool in 1993, while being filmed by a mall security camera, two ten-year-old boys lured 2-year-old James Bulger away from his mother in a shopping center.[83] The boys took the toddler to a secluded area, used an iron bar and bricks to torture and brutally murder the child, and then left his body on train tracks to be sliced in half. The two boys were arrested and prosecuted; at the time, England's MACR was 10 years of age, and the *doli incapax* presumption of non-responsibility between 10 and 14 was rebutted based on the boys' discernment of right from wrong. The trial jury found both children guilty, and the presiding judge sentenced them to detention for an indeterminate period, which the Home Secretary held discretion to specify.

The case prompted unprecedented public hysteria. During the trial, hostile crowds awaited the arrival of the defendants at the courthouse, and protesters attempted to attack the vehicle carrying the boys. The boys themselves continued in a state of psychological and emotional shock, yet were denied therapeutic treatment until after the trial (i.e., for approximately eight months) for fear of altering potential evidence.[84] Despite some modifications of the formal adult court setting and procedures, the boys were unable to effectively participate or even follow the trial;

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[80] Freeman, Michael, *The Moral Status of Children: Essays on the Rights of the Child*, The Hague, Kluwer Law International, 1997.
[81] Sparks, Richard, Evi Girling, and Marion Smith, "Children talking about justice and punishment," 8 *International Journal of Children's Rights* 191, 2000.
[82] Freeman, *supra* note 80.
[83] European Court of Human Rights, *Case of T. v. the United Kingdom: Judgment*, Strasbourg, 1999.
[84] Freeman, *supra* note 80.

they could only bear the stress, for example, by intentionally not listening, playing with their hands, and counting in their heads.[85] Likewise, one of the boys spoke "of James Bulger as a character in a chocolate factory and imagined that . . . he might be brought back to life."[86] Following their conviction, the judge allowed only the names of the boys to be published, but on the following day tabloids throughout the country published their names, photographs, and other details about their lives anyway. The Bulger family started a public campaign seeking life imprisonment for the two boys, and submitted a petition with over 275,000 signatures to that effect. A newspaper campaign included a clipping for readers to send the Home Secretary supporting a life sentence for the boys; the more than 20,000 responses were considered a further expression of public opinion. Even beyond the tabloid press, the mass media demonized the boys and leveled "a kind of moral condemnation that is usually reserved for the enemy in times of war."[87] In the end, the boys were recommended to serve at least 8 years in a secure juvenile jail, and have since been released with new identities.

Extensive commentary has focused on the dynamics of the media in particular and the broad "moral panic" surrounding and following the Bulger case. This is in line with academic commentary since the late 1970s on the disconnect between successive moral panics over youth crime and actual levels of youth crime.[88] Both the mass media and the justice system fueled the panic by paring down the case into simplified elements and narratives, and by presenting a dramatic, seemingly complete, and unambiguous account with "straightforward moral messages" that were ready for mass consumption.[89] Other systems – including scientific, political, and medical – produced compatible interpretations that mutually reinforced

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[85] European Court of Human Rights, *supra* note 83.
[86] Freeman, *supra* note 80, at 241.
[87] King, Michael, "The James Bulger Murder Trial: Moral Dilemmas, and Social Solutions," 3 *International Journal of Children's Rights* 167, 1995, at 172.
[88] Ruddick, Susan, "Abnormal, the 'New Normal,' and Destabilizing Discourses of Rights," 18 *Public Culture* 53, 2006.
[89] Hay, Colin, "Mobilization Through Interpretation: James Bulger, Juvenile Crime and the Construction of a Moral Panic," 4 *Social and Legal Studies* 197, 1995; and King, *supra* note 87, at 178.

respective conclusions and authority, thus actively constructing conventional wisdom about the panic.[90] The two boys convicted in the Bulger case became the incarnation of evil and brutal children – to which other stereotypes of good and innocent children were the foil. This narrative was set within the broader context of, and further provoked, larger public fears about the country's path and what was seen as the crumbling of public safety.[91] At the same time, it excluded any serious discussion about the causes of crime,[92] possible effects of social and economic inequality and injustice,[93] other systemic societal factors,[94] and the role of social responsibility in providing appropriate children's services.[95] Instead, once the MACR allowed the case to be branded as a criminal matter, these larger perspectives faded away and the blame and scapegoating carried forth.[96] The horrific crime – and the problem of "evil" children – became a question of individual deficiencies, lack of discipline,[97] poor parenting,[98] social workers, schools, lenient juvenile justice,[99] as well as video games, movies, and television.[100] In these and many other aspects, the case illustrates many of the inherent weaknesses of the justice approach as explored in Chapter 1.

Politicians picked up on these images and narratives, and strategically deployed the most useful strands in policy and political debates.[101] Indeed, in large part due to the Bulger case, youth crime and punishment became a salient

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[90] King, Michael, *A Better World for Children? Explorations in Morality and Authority*, London, Routledge, 1997.
[91] Davis, Howard, and Marc Bourhill, "'Crisis': The Demonization of Children and Young People," in Scraton, Phil, ed., '*Childhood' in 'Crisis'?*, London, University College London Press, 1997.
[92] Freeman, *supra* note 80.
[93] Asquith, Stewart, "When Children Kill Children: The Search for Justice," 3 *Childhood* 99, February 1996.
[94] King, *supra* note 90.
[95] Davis et al., *supra* note 91.
[96] Fionda, Julia, "Youth and Justice," in Fionda, Julia, ed., *Legal Concepts of Childhood*, Oxford, Hart Publishing, 2001.
[97] Freeman, *supra* note 80.
[98] Davis et al., *supra* note 91.
[99] King, *supra* note 90.
[100] Asquith, *supra* note 93.
[101] Franklin, Bob, "Children's rights and media wrongs: changing representations of children and the developing rights agenda," in Franklin, Bob, ed., *The New Handbook of Children's Rights: Comparative Policy and Practice*, London, Routledge, 2002; and King, *supra* note 90.

battleground between the Conservative and Labour parties through the 1990s, with each side escalating its rhetoric and policy proposals in seeking to claim the upper hand on the issue.[102] It was a showdown over which party could win the public's confidence that it could reinstate order in the midst of chaos, and be tougher on dangerous children.[103] The shadow Home Secretary at the time, Tony Blair, had thus elaborated a clear vision on criminal and juvenile justice by the time Labour assumed power in 1997, and these ideas sought an aggressive departure from criticized Conservative policy.[104] In 1998, the Crime and Disorder Act passed, and as the Labour government sought, it eliminated outright the *doli incapax* presumption of non-responsibility, not even five years after the Bulger case but almost 700 years after the inception of the doctrine in England. This provision was one among several that tended to further criminalize children, including child safety orders against children younger than the MACR, local child curfews, and sanctions against parents for their children's behavior.[105]

Hindsight shows how media sensationalism charged public hysteria over youth crime in the debate leading to such changes, and this hysteria created political pressure, incentives, and opportunities for retributive policy.[106] In this scheme, images and ideas about children were adult products for adult purposes – "[a]dults construct the children they need."[107] The public conception about childhood was in essence manipulated, with broad-based complicity, for political motives and not "based on any real change in the nature of childhood or the competence of children."[108] In fact, in order to win the political upper hand, and in order to radically reform juvenile justice policy, the boys in the Bulger case had to be evil and representative of a broader class of fears – and this exigency was appositely met.[109]

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[102] Sparks et al., *supra* note 81.
[103] Freeman, *supra* note 80.
[104] Sparks et al., *supra* note 81.
[105] Gelsthorpe, Loraine, "Much ado about nothing -- a critical comment on key provisions relating to children in the Crime and Disorder Act 1998," 11 *Child and Family Law Quarterly* 209, 1999.
[106] Franklin, *supra* note 101.
[107] *Ibid*., at 29.
[108] Fionda, *supra* note 96, at 97.
[109] Freeman, *supra* note 80.

In symbolically scapegoating two boys, the children's criminal responsibility lined up major policy changes without any attention on the underlying causes; their scandalous crime kept the moral panic alive and allowed drastic changes without any need for statistics or facts.[110]

At the same time, such cases offer a critical reading on "the way in which a society views its children, the competencies we ascribe to children and the status we give to childhood."[111] They provide a vivid example that such ideas are constantly in transition, and potentially subject to upheavals, putting up for contention the boundaries and meaning of childhood.[112] Again, as explored in Chapter 1, those boundaries include the level of adult control and regulation of children's lives, children's status in the law, the MACR, and children's rights in general. Children's actual competency, to the extent it can be appropriately defined and measured, may not receive much consideration in such transitions despite common justifications to this effect. Around the re-designated boundaries, ideas about juvenile justice and other institutions are re-construed as well, forced to realign themselves with the shifting sands of what childhood is taken to mean. As in the Bulger case, children portrayed and understood as evil are not likely candidates for enhanced rights to participation or other liberty rights – thus such cases can bring disastrous results in very tangible ways for children's rights.[113] Just one aspect of the Bulger case aftermath – the end of *doli incapax* in the United Kingdom after some 700 years – demonstrates how a single case can provoke truly dramatic shifts in the ways societies are willing to think about children and how they respond to them.

The Bulger case even sparked shock and debate around the world, particularly in Europe and common law countries. At the time, popular support surged in several European countries to lower national MACRs. Both Uganda and Ghana, respectively in 1996 and 1998, increased their MACRs and abrogated their *doli incapax* provisions, in part to avoid the problems that arose in England with the Bulger case.

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[110] *Ibid*.
[111] Asquith, *supra* note 93, at 101.
[112] *Ibid*.
[113] Franklin, *supra* note 101.

The Bulger case and its political ramifications also led to related discussion and proposals in Australia.[114] The Queensland Parliament considered a bill to reverse the *doli incapax* presumption, such that children could raise it only as a defense, while the murder of a 6-year-old by an 11-year-old boy in New South Wales drew comparisons and led to a general review of MACR and *doli incapax* provisions.[115] Still in 2007, the Opposition in New South Wales stressed its position of eliminating the *doli incapax* presumption for children between 10 and 14.[116]

Although there are some similarities to the United Kingdom, the scenario in the United States brings other paradoxes and insights for the MACR, including a debate that has remained curiously and uniquely abandoned in the past. Both historically and today, the United States is widely influential in juvenile justice and youth crime policy, and it is arguably the single most widely-studied national context – but in contrast to every other country in the world with substantive juvenile justice debates, international human and children's rights remain new concepts,[117] and there is no national discussion whatsoever about the MACR. Ironically, such reasons make the United States an especially important case study for understanding how the MACR can come to be sidelined with extreme implications for children.

In the United States, the respective states and the District of Columbia legislate and operate their own juvenile justice systems. As seen in Table 5.1, only 15 states have established MACRs, which range from 6 to 10 years and thus fall uniformly short of the emerging international standard of a minimum of 12 years. In the remaining states, and under the very limited federal juvenile justice jurisdiction, there is no minimum age for adjudicating children delinquent. It appears that this situation

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[114] Crofts, Thomas, "Doli Incapax: Why Children Deserve its Protection," 10 *Murdoch University Electronic Journal of Law*, no. 3, 2003.
[115] Urbas, Gregor, "The Age of Criminal Responsibility," *Trends & Issues in Crime and Criminal Justice* 181, Australian Institute of Criminology, November 2000.
[116] "NSW Opposition wants criminal responsibility lowered to 10," *ABC News Online*, 2 March 2007.
[117] See Dohrn, Bernardine, "'I'll Try Anything Once': Using the Conceptual Framework of Children's Human Rights Norms in the U.S.," *University of Michigan Journal of Law Reform*, in press 2007; and National Collaboration for Youth and National Juvenile Justice Network, "Human Rights as a Catalyst for Juvenile Justice Reform," *Building Bridges to Benefit Youth Policy Brief* 3, Washington, 2006.

is a historical remnant of the original justifications and stated purposes of early juvenile justice systems. As described in Chapter 1, since the intention of the welfare approach was treatment instead of punishment, it would have been unreasonable to impose a lower age cut-off for presumed assistance to children. Indeed, this logic has generally led states to abrogate, either legislatively or by judicial decision, the availability of the common law *doli incapax* presumption of non-responsibility in juvenile courts.[118] Criminal proceedings were considered a wholly separate matter, however, and common law rules on children's criminal responsibility (i.e., an MACR of 7 years and *doli incapax* presumption between 7 and 14 years) generally continued to apply in adult criminal courts both before and after the emergence of distinct juvenile justice systems. In fact, jurisprudence in approximately 20 states still holds the *doli incapax* presumption available in adult criminal courts, although case law is dated and largely ignored. In juvenile courts and justice systems, the growth in the range of clearly punitive and retributive sanctions over time – and historic Supreme Court decisions on children's procedural rights – has failed to trigger any reconsideration of the role for MACRs.

Realistically, in the contemporary United States discourse there may simply be very little space for the MACR – the debate on age and children has typically been dominated by juvenile delinquency sensationalism and fear, and by political maneuvering on the age upon which children may enter the adult criminal justice system. After essentially constant levels through most of the 1980s, arrest rates for violent youth crimes made unparalleled increases from 1989 through 1993, and then followed a long decline from 1994 through at least 2003 to levels lower than 1980s rates.[119] Regardless, the brief years of violent youth crime increases were sufficient to fuel an unprecedented public obsession – consistently fed by the mass media – on juvenile crime through the 1990s.[120] Sensationalist publicity increased exponentially

[118] See Carter, *supra* note 56; and Thomas, *supra* note 58.
[119] Snyder et al., *supra* note 57.
[120] Dorfman, Lori, and Vincent Schiraldi, *Off Balance: Youth, Race & Crime In The News*, Washington, Justice Policy Institute, 2001.

on school violence and shootings, so-called "superpredator" youth, and brutal acts committed by the very young:

> America is now home to thickening ranks of juvenile "super-predators" - radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders. They do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience.[121]

This level of imagery and vitriol sabotaged and impoverished discussions on juvenile justice. For example, a 1994 study on the coverage of children in national news media, in news broadcasts and selected national newspapers, showed that almost half of all television news coverage and roughly 40% of newspaper articles on children were about violence and crime.[122] Child poverty and welfare were covered in approximately 4% of television and newspaper reports on children, with limited discussion of policy options and strategies on youth issues. A 1993 analysis of local television news in California found that violence dominated broadcasts. In particular, more than half of the segments on youth involved violence, while over two-thirds of reports on violence concerned youth.[123] News segments were generally isolated from the social context and focused on the specifics of individual sensational crimes. The public's knowledge base was clearly affected, especially since most people have little or no personal knowledge or experience of juvenile crime, and form their opinions based solely on media coverage.[124] Despite ten years of continuously falling violent youth crime rates, and the lowest juvenile crime rate in over 25 years, a national opinion poll showed that more than 90% of the public still

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[121] Bennett, William J., *Body Count: Moral Poverty . . . and How to Win America's War Against Crime and Drugs*, 1996, at 27, quoted in Difonzo, James Herbie, "Parental Responsibility for Juvenile Crime," 80 *Oregon Law Review* 1, 2001, at footnote 27.
[122] Shepherd, Jr., Robert E., "Film at Eleven: The News Media and Juvenile Crime," 18 *Quinnipiac Law Review* 687, 1999.
[123] Dorfman, Lori, Katie Woodruff, Vivian Chavez, and Lawrence Wallack, "Youth and violence on local television news in California," 87 *American Journal of Public Health* 1311, 1997.
[124] Dorfman et al., *supra* note 120.

believed that the percentage of teenagers who commit violent crimes had increased or stayed the same over the previous ten years.[125] Just 5% of adults correctly believed that juvenile delinquency rates had decreased.

With such an outlook on juvenile justice, every state but Nebraska amended its laws between 1992 and 1999 to make it easier to prosecute children as adults.[126] Most followed one or more of the following changes: reducing minimum age limits for transfer from juvenile court to adult court; expanding the offense categories allowing and/or requiring transfer; limiting juvenile court discretion to retain jurisdiction; and shifting transfer decision-making authority from judges to prosecutors. These reforms brought steep increases in the number of children prosecuted as adults.[127] Already by 1996, approximately 20-25% of all youth offenders – between 210,000 and 260,000 children – were prosecuted in adult criminal courts annually.[128] Only very recently have states begun to reconsider these policies, in light of the overwhelming evidence of negative and even criminogenic effects of adult trials and sentencing of children.[129]

The resultant overlaps between MACRs and adult court trial are also extensive. In 18 states where there is no MACR applicable in juvenile courts, there is no minimum age limit for responsibility in adult courts either.[130] Under various stipulations, children in these states are subject to prosecution as adults at any age. One of the most notorious examples was when a Florida criminal court tried and

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[125] Guzman, Lina, Laura Lippman, Kristin Anderson Moore, and William O'Hare, "How Children Are Doing: The Mismatch between Public Perception and Statistical Reality," *Child Trends Research Brief*, Washington, Child Trends, July 2003.
[126] Griffin, Patrick, "National Overviews," *State Juvenile Justice Profiles*, Pittsburgh, National Center for Juvenile Justice, 2000.
[127] Shook, Jeffrey J., "Contesting Childhood in the US Justice System: The transfer of juveniles to adult criminal court," 12 *Childhood* 461, 2005.
[128] Bishop, Donna M., "Juvenile Offenders in the Adult Criminal Justice System," 27 *Crime and Justice* 81, 2000.
[129] Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth As Adults and Strategies for Reform*, Washington, 2007.
[130] Alaska, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Maine, Nebraska, Nevada, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, and West Virginia. See Table 5.1 and Griffin, Patrick, "Transfer Provisions," *State Juvenile Justice Profiles*, Pittsburgh, National Center for Juvenile Justice, 2006.

convicted 12-year-old Lionel Tate of murdering his 6-year-old neighbor – when he claimed to have lost control in imitating television wrestling – and handed down the mandatory adult sentence of life imprisonment without possibility of parole. An appeals court overturned the conviction only because Tate's competency to stand trial had not been evaluated.[131] Moreover, 5 of these 18 states actually mandate adult prosecution for children of all ages charged with certain offenses.[132] Thus, all children of all ages charged in Indiana with certain felonies; in Nevada with certain felony or murder offenses; in Delaware with certain murder or person offenses; and in Florida with certain person offenses must be prosecuted by law in criminal court. In Pennsylvania, the same is true for all children charged with murder, the only offense for which children younger than 10 may be held responsible in that state.

These radical legal developments reflect an intensive episode in the reconstruction of the meaning and boundaries of childhood, a rethinking of the institutions built around them, and a notable distraction from the underlying social and economic policies that affect youth.[133] Schools have evolved into the first step of the so-called school to prison pipeline, where degrading treatment, abusive disciplinary measures, police intervention in those measures, and even arrest and excessive police use of force have found their way into the educational mission.[134] From there, targeted children are intentionally counseled to leave, suspended, transferred, and ultimately expelled out of school. This understanding of children, schools, and how society is willing to treat children in schools opens the door to situations where, for example, police officers can arrest, handcuff, fingerprint, photograph, charge with a felony, and detain in jail a 6-year-old girl for throwing an extended tantrum in her kindergarten class – and stand by such actions as justified in

[131] District Court of Appeal of Florida, Fourth District, *Tate v. State*, 864 So.2d 44, 2003.
[132] See Table 5.1 and Griffin, *supra* note 130.
[133] Shook, *supra* note 127.
[134] See, inter alia, Christle, Christine A., Kristine Jolivette, and C. Michael Nelson, "Breaking the School to Prison Pipeline: Identifying School Risk and Protective Factors for Youth Delinquency," 13 *Exceptionality* 69, 2005; and Sullivan, Elizabeth, *Deprived of Dignity: Degrading Treatment and Abusive Discipline in New York City & Los Angeles Public Schools*, New York, National Economic and Social Rights Initiative, 2007.

the face of the child's defiance.[135] Targeting also includes the family; it is now quite common for states to hold parents criminally liable for their children's illegal acts.[136] This vast expansion of the reach of criminal law both transgresses common law standards and juxtaposes the alleged increase in children's criminal responsibility – in holding ever-younger children responsible in adult criminal court – with parental sanctions that presuppose children's insufficient individual responsibility.[137] This phenomenon is certainly not limited to the United States, however, and the Committee on the Rights of the Child recently underscored the CRC's obligation to provide *assistance* to parents in undertaking their parental responsibilities, and firmly rejected the trend of criminalizing and punishing parents for their children's offenses.[138]

Many of the predominant influences and dynamics in the United Kingdom and the United States have played an even more direct role in MACR debates in other countries. In some, apparently disproportionate fear over youth crime has blocked debate on MACRs and scaled back the age limit increases that were originally envisioned. Switzerland's MACR increase, from the former 7 years to possibly as high as 12, 14, or 16 years, was stopped at 10 years over concerns about serious crime by young children and how to respond to it.[139] The government of New Zealand has repeatedly cited public hostility over crime and murders by young children, and the popular view that such children are not held sufficiently accountable, in explaining its failure to follow-through on MACR recommendations from the Committee on the Rights of the Child.[140] Current provisions are an MACR

[135] Herbert, Bob, "6-Year-Olds Under Arrest," *New York Times*, 9 April 2007.
[136] Brank, Eve M., Stephanie C. Kucera, and Stephanie A. Hays, "Parental Responsibility Statutes: An Organization and Policy Implications," 7 *Journal of Law & Family Studies* 1, 2005.
[137] See Brank et al., *ibid*.; and Nicholas, Deborah A., "Parental Liability for Youth Violence: The Contrast Between Moral Responsibilities and Legal Obligations," 53 *Rutgers Law Review* 215, 2000.
[138] Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, pars. 8 and 23g.
[139] Zermatten, Jean, *The Swiss Federal Statute on Juvenile Criminal Law*, presented at the Conference of the European Society of Criminology, Amsterdam, August 25-28, 2004.
[140] See, inter alia, Committee on the Rights of the Child, *Concluding observations: New Zealand*, CRC/C/15/Add.71, 24 January 1997; Committee on the Rights of the Child, *Second periodic*

of 10 years in cases of murder and manslaughter, a secondary age of criminal responsibility of 14 years for other crimes, and a *doli incapax* presumption for children between 10 and 14 years. New Zealand referred to the risk that putting the MACR up for debate would instigate pressure to decrease and not increase the MACR, which public opinion seemed to favor. Apparently driven by such forces, since the late 1990s it has successively considered broadening the category of offenses for criminal responsibility at age 10; setting a uniform MACR at 12; maintaining current MACR provisions; and most recently, adding a category of offenses for criminal responsibility at age 12, and eliminating *doli incapax* provisions for certain offenses. In Bangladesh, there was resistance to the recent MACR increase because of fears that the government would lose its discretion to respond to young children in conflict with the law.[141] In Uruguay, draft proposals to set the MACR at 14 years were later curtailed – due to populist law-and-order positions and misperceptions that children commit offenses at ever-younger ages – and final reforms settled for an MACR of 13 instead.[142]

In other countries, public opinion has created pressure for lowering the MACR without necessarily resulting in specific or current proposals to do so. Fears about violent juvenile crime led to calls in Finland to reduce the MACR, as well as significant and intensive discussion to this effect.[143] After several murders committed by children younger than the MACR of 12, there were calls in the Netherlands to reduce this age limit, including some politicians' support for adult criminal trials for 10-year-olds.[144] In Saint Lucia, due to alarm over the perceived number of serious crimes committed by children younger than its MACR of 12, the

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reports of States parties due in 2000: New Zealand, CRC/C/93/Add.4, 12 March 2003; and Committee on the Rights of the Child, *Written Replies by the Government of New Zealand*, CRC/C/RESP/38, 6 August 2003.

[141] Uddin Siddiqui, Kamal, "The Age of Criminal Responsibility and Other Aspects of the Children Act, 1974," presented at the workshop *Raising the Age of Criminal Responsibility and Other Aspects of the Children Act, 1974*, Dhaka, 16 January 2004.

[142] Palummo Lantes, Javier M., et al., *Discurso y Realidad: Informe de aplicación del Código de la Niñez y la Adolescencia en Maldonado, Montevideo y Salto, Montevideo*, UNICEF Uruguay, 2006.

[143] Marttunen, Matti, "Finland: The Basis of Finnish Juvenile Criminal Justice," 75 *International Review of Penal Law* (*Revue internationale de droit pénal)* 315, 2004.

[144] See Meuwese, *supra* note 27.

government noted there was broad support for lowering the age limit – including among law enforcement officials, the Church, health personnel, and parents.[145]

In the cases of Germany and Canada, discussed above in the context of past pressures to increase MACRs, public pressure came back around to support MACR decreases. In Germany, by the 1990s rising youth crime rates led to some politicians' calls to lower the MACR from 14 to 12.[146] Canada saw a major shift of thinking roughly 10 years after its 1984 MACR increase from 7 to 12, as academics and government officials began considering an MACR decrease largely in response to popular perceptions of youth crime. In fact, research around that time in Canada documented the tremendous impact of public opinion and perceptions of children and their crimes.[147] General misperceptions and public anger about the causes, rates, and supposedly lenient responses to youth crime – fueled by the media – had already led to the gradual harshening of penalties for children. At the same time, research showed that the more information people had about child offenders' backgrounds, the more likely they were to consider treatment as important in juvenile justice. When peoples' knowledge was limited to information about offenses and convictions, they were more likely to favor outright punishment in sentencing. Information, in fact, proved to be the best predictor of peoples' attitudes about punishments for children – and ironically, surveys showed that up to 90% of Canadians felt that juvenile courts were too lenient and that children should be treated more harshly. Likewise, some 75% of the public supported a decrease in the MACR.[148] By the time of preparatory work for the 2002 Youth Criminal Justice Act, based largely on such pressures and the belief that there was no effective way to

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[145] Committee on the Rights of the Child, *Compte rendu analytique de la 1026e séance*, CRC/C/SR.1026, 24 May 2005.

[146] Kerner, Hans-Juergen, "Crime Prevention, Prospects and Problems: The Case of Effective Institutional Versus Community-Based Treatment Programmes for Prevention of Recidivism Among Youthful Offenders," in United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, 68 *Resource Material Series* 35, Tokyo, 2006.

[147] See, inter alia, Covell, Katherine, and R. Brian Howe, "Public attitudes and juvenile justice in Canada," 4 *International Journal of Children's Rights* 345, 1996.

[148] Roberts, Julian V., "Public Opinion and Juvenile Justice," in Tonry, Michael, and Anthony N. Doob, eds., *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives*, Chicago, University of Chicago Press, 2004.

address crime by young children, the Department of Justice directly lobbied to decrease the MACR from 12 to 10 years. Ultimately, however, the 2002 Act maintained the MACR at 12 years.

Among countries that have decreased their MACRs, Japan is certainly reminiscent of pressures in both England and the United States, even though Japanese juvenile justice has still retained a much stronger welfare approach in modern times. Japan enacted reform in May 2007 that effectively lowers its MACR from 14 to 11, and this specific change marks a classic example of media hype, public fear, political over-response, and rapid shifts of the meaning of childhood in society and law. There are in fact many similarities between modern and historical juvenile delinquency in Japan, and state responses have consistently demonstrated a certain single-mindedness for ensuring far-ranging social control over children's lives.[149] In recent times, this predilection seems to have extended further. High-visibility media coverage of 1990s police scandals triggered policy responses such that relatively minor offenses were increasingly reported.[150] Official crime rates soared, which in turn prompted broad malaise over the supposed crumbling of public safety. Surveys in 1998 and 2004 showed a doubling of the proportion of the public that thought crime was worsening, even though Japan has continued to have a low violent crime rate, and is consistently one of the most crime-free industrialized countries in the world. On the International Crime Victims Survey, it registers among the lowest victimization rates yet among the highest – and at times the very highest – fear-of-crime rates.

In particular, in the early 2000s, the media seized upon a statistically isolated series of extremely violent crimes by children. It resorted to sensationalist coverage, shocking headlines, partial and inaccurate reporting, and even rhetorically charged Japanese-language articles versus cleaned-up versions for the foreign language

[149] Yoder, Robert Stuart, "Book Review: Bad Youth: Juvenile Delinquency and the Politics of Everyday Life in Modern Japan, by David Ambaras," 9 *Social Science Japan Journal* 289, 2006.
[150] Hamaia, Koichi, and Thomas Ellis, "Crime and criminal justice in modern Japan: From re-integrative shaming to popular punitivism," 34 *International Journal of the Sociology of Law* 157, 2006.

press.[151] In reality, the number of children younger than the former MACR of 14 years who were questioned and detained for delinquent behavior stood at almost 68,000 in 1981, below 30,000 in 1990, and around 20,000 in recent years.[152] In Japan, whose total population is approximately 127 million people, there were roughly 2 murders committed by such children per year through the 1990s, 10 in 2001, and between 3 and 6 per year since 2001. The broader context, however, is a range of rapid economic, social, cultural, and structural changes that have in many ways bewildered Japan's youth; child suicides climbed every year for five years through 2003, for an overall increase of more than 22% – over three times the adult suicide increase for the same period.[153]

Yet the sensationalism-fear chain reaction continued with public opinion that increasingly supported punitive crime control policies and sanctions, including an increasing majority preference for the deprivation of liberty of children in order to reduce juvenile delinquency.[154] These pressures became a political power lever – with crime and public safety becoming more central politically than they had been in decades.[155] These pressures translated into legal and policy reform: Japan first lowered its age of penal majority – the lowest age for adult criminal court trial – from 16 to 14 in 2001. In seeking further reform, one new Minister of Justice specifically identified juvenile crime and international terrorism, in the same breath, as great concerns under the Prime Minister's get-tough public security agenda.[156] In pushing this agenda ahead, the government's initial draft legislation for recent MACR changes set an effective MACR of 0 and, critics argued, threatened to put all children

[151] Arudou, Debito, "Upping the fear factor," *The Japan Times*, 20 February 2007.
[152] Kinoshita, Tsukasa, "Juvenile Law change raises questions; Reform or punishment-how young is too young to send kids to reformatories?," *The Daily Yomiuri*, 21 April 2007.
[153] Faiola, Anthony, "Youth Violence Has Japan Struggling for Answers: 11-Year-Old's Killing of Classmate Puts Spotlight on Sudden Acts of Rage," *Washington Post*, 9 August 2004.
[154] Hamaia et al., *supra* note 150. See also Foljanty-Jost, Gesine, ed., *Juvenile Delinquency in Japan: Reconsidering the "Crisis,"* Leiden, Brill, 2003.
[155] Arudou, *supra* note 151; and Hamaia et al., *supra* note 150.
[156] Ito, Masami, "Justice chief's mandate: make Japan safe, refugee-friendly," *The Japan Times*, 2 October 2004.

under police surveillance.[157] The Prime Minister claimed that there was "no other choice" but to pursue this age change because younger children needed corrective measures, while the Minister of Justice refused to rule out the possibility of committing even 5-year-olds to Juvenile Training Schools, which are supervised by his Ministry's Correction Bureau.[158] In the end, the enacted reforms set an effective MACR of 11 years by allowing commitment of children from that age to the Juvenile Training Schools.

France has witnessed similar media and opinion pressures that have challenged dearly held welfare precepts of its juvenile justice system. Ironically, France's 2002 MACR decrease is in one sense a return to criminal law standards of 1791 through 1912. During that period, and again since 2002, there was no MACR and children's criminal responsibility at any age hinged on the finding that they acted with discernment.[159] During the interim of 1912-2002, there was a clear MACR of 13 years, while the *Ordonnance relative à l'enfance délinquante* has continuously formed the basis of the French juvenile justice system since 1945. This system, which was among the most prominent and influential models in the world for a classic welfare approach, has suffered a gradual erosion of its underlying principles under the stress of public fear and retributive policies. In a broader 1990s context of conservative politics, racial and xenophobic tensions, and apprehensions about immigrant youths in particular, increasing child crime rates helped cement the public view that juvenile crime was more dangerous and uncontrollable than ever before.[160] Strong public opinion and political pressure for harsher juvenile justice led to amendments, enacted in 1996 in an emergency measure, that encouraged faster and more explicit punishment under the basic 1945 juvenile justice law. Further reform

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[157] "Lawmakers eye lowering age for sending juveniles to reformatory to 12," *Kyodo News Service*, 17 April 2007.
[158] "Bill lowering minimum age for reformatory entry clears Diet panel," *Kyodo News Service*, 18 April 2007; and Kinoshita, *supra* note 152.
[159] See, e.g., Bongert, Yvonne, "Délinquance juvénile et responsabilité pénale du mineur au XVIIIe siècle," in Abbiateci, André, et al., *Crimes et criminalité en France sous l'Ancien Régime: 17e-18e siècles*, Paris, Librairie Armand Colin, 1971.
[160] Peeler, Calvin, "Always a Victim and Never a Criminal: Juvenile Delinquency in France," 22 *North Carolina Journal of International Law and Commercial Regulation* 875, 1997.

in 2002 continued this trend, by describing all children with discernment as penally responsible and by creating a new class of tougher educative sanctions applicable to children 10 and older.[161] Pressures and punitive reforms continued even further. As one of his main policy objectives, then-Interior Minister Nicolas Sarkozy wielded shocking statistics to push through his get-tough juvenile crime measures, resulting in the *Loi 2007-297 du 5 Mar 07 relative a la prévention de la délinquance* that harshens the provisions and measures that are applicable to children in various age groups.[162] Upon assuming office, President Sarkozy acted quickly on one of his key campaign promises and began lobbying for a further "anti-crime" bill that would allow – very much in the spirit of United States reforms – adult criminal sentences for children 16 and older who are repeat offenders.[163]

In some Latin American countries, since the establishment of respective post-*situación irregular* juvenile justice systems and MACRs, similar public hostility has been common and has led to proposals for MACR decreases. In Brazil, based in part on the common misperception that children are responsible for the most violent crimes, some 80% of the public supports more adult criminal trials for children, and this hostility has also evidenced itself in various proposals to reduce the MACR.[164] In Honduras, a similar yet uncommonly virulent climate has led to proposals to lower the MACR, among a series of related draconian juvenile justice proposals.[165] Limited political will and resources in Nicaragua have hampered implementation of the new juvenile justice system, while the public broadly believes that children enjoy impunity under it, leading to proposals to suspend relevant legislation and otherwise

[161] See, inter alia, Pradel, Jean, "Quelques observations sur le statut pénal du mineur en France depuis la loi No 2002-1138 du 9 septembre 2002," 56 *Revue internationale de droit comparé* 187, 2004.
[162] Associated Press, "French Interior Minister says youth delinquency has soared 80 percent in 10 years," *International Herald Tribune*, 13 September 2006. See also, e.g., Art. 59 of *Loi 2007-297*.
[163] Associated Press, "Tougher punishments for repeat offenders, including children," *International Herald Tribune*, 9 July 2007.
[164] Bochenek, Michael, Fernando Delgado, Stephen Hanmer, and Helena Romanach, *Brazil: "Real Dungeons": Juvenile Detention in the State of Rio de Janeiro*, New York, Human Rights Watch, 2004.
[165] Harvey, Rachel, *From Paper to Practice: An analysis of the juvenile justice system in Honduras*, Essex, Children's Legal Centre, 2005.

make juvenile justice more punitive.[166] Similar themes dominate the debate in Panama and several other countries, threatening beyond MACR reform to undermine and roll back the historic achievements for children's rights since the CRC.

Georgia, another country that has reduced its MACR, seems to be struggling to address continuing social transitions; with youth crime, this includes much fear, angst, and a clear retributive response. Until 1999, the MACR of 14 years only applied in cases of certain relatively serious offenses, while criminal responsibility began at 16 years for all other offenses. In 1999, as a get-tough measure, the age limit of 14 years began to apply in all cases.[167] Subsequently, media reports about the murders of several teenagers prompted wide popular unease about youth crime, and led to growing support for an MACR decrease from 14 to 12 years.[168] Media coverage seemed to both depict and fuel popular fears at the same time, such as the loose claim of one article that "[t]he wounding or killing of a classmate, a schoolmate, a friend or a neighbor in the course of a minor spat has become commonplace among juveniles lately."[169] Juvenile justice policy increasingly became one of zero-tolerance and over-reliance on the deprivation of liberty; in schools, again reminiscent of the United States, the Ministry of Education was rolling out metal detectors, security video cameras, and police authority to enter and conduct student searches.[170] In terms of the proposal at the time to decrease the MACR, perhaps the most commonly-cited justification was that 12- and 13-year-olds "were acting as 'Kingpins' and were involved in significant amounts of crime and boasting of their impunity," yet this was supported only by anecdotal evidence and not born out by crime statistics.[171] Others argued that the MACR decrease would serve as a

[166] Palma, Evelyn, Juan Pablo Sánchez, and Thomas Feeny, *Street Children and Juvenile Justice in Nicaragua*, London, Consortium for Street Children, 2004.
[167] Hamilton, Carolyn, *Analysis of the Juvenile Justice System in Georgia*, Tbilisi, UNICEF Georgia, 2007.
[168] Rimple, Paul, "Georgia Grapples with Rising Teenage Crime," www.eurasianet.org, 19 June 2007.
[169] Japaridze, Nino, "Youth Violence Rises in Georgian Schools, Streets," *The Georgian Times*, 28 May 2007.
[170] Rimple, *supra* note 168.
[171] Hamilton, *supra* note 167, at 47.

deterrent against youth crime. In its explanatory note to the new law, which enters into force in 2008 and lowers the MACR to 12 for specified serious offenses, the government reiterated the change as a crime prevention measure and as a tool to make children more accountable for their actions and for them to "fear punishment."[172]

After several years of consideration, Slovakia recently lowered its MACR from 15 to 14 in response to public pressure over increases in serious crimes by younger children. As in other places, the media both reported and seemingly exacerbated such concerns, as in the case of one editorial on "juvenile marauders" and "child gangs terrorising entire neighbourhoods."[173] The changes were part of a larger effort to make criminal law and sanctions harsher, in response to an overall perceived rise in crime.[174] The Czech Republic seems poised to follow recent changes in Georgia and Slovakia. Over the past several years, the Czech Republic has closely considered various proposals to decrease its MACR of 15 years. The most recent of these, contained in a new draft Criminal Code sponsored by the Justice Minister, would lower it to 14 years. As in most places, such proposals seem largely driven by deep concerns over youth crime and the impression that children are out of control in schools and on the streets. Shock over the most sensational and highly-publicized youth crimes – even when serious crime rates among youth are decreasing – leads to successively accusatory and defensive positions among schools, parents, law enforcement officials, politicians, psychologists and social workers, and the mass media.[175] In the past, the debate has also taken on overtly discriminatory and hateful tones, as one conservative party leader argued for eliminating the MACR

[172] Human Rights Watch, *Georgia: Lowering the Age of Criminal Responsibility Flouts International Standards*, New York, 11 June 2007.
[173] Balogová, Beata, "Laws to stop juvenile marauders?," *The Slovak Spectator*, 27 September 2004.
[174] Jurinová, Martina, "New penal code passed," *The Slovak Spectator*, 30 May 2005.
[175] See, inter alia, Halkova, Jarka, "First Czech institution for child killers," *Radio Prague*, 19 October 2006; Kenety, Brian, "Justice Ministry may push to lower age of criminal responsibility from 15 to 12 for 'serious' crimes," *Radio Prague*, 13 September 2004; and Lazarova, Daniela, "Violence among the young: a growing problem in Czech society," *Radio Prague*, 5 April 2007.

strictly for Roma children.[176] Even though most sectors also recognize the macro-level backdrop of continuing rapid transitions in traditional family and socio-economic structures, the consensus conclusion is to redefine the boundaries of children's place in law, lower the MACR, and increase punitive measures beginning at younger ages.

The two other countries listed in Table 5.2 as having decreased their MACRs, Andorra and Nepal, are somewhat anomalous. Prior to 1999 Andorra apparently provided only welfare-oriented responses to children under 16 – the age of penal majority – and unlike many other countries there is no evidence to suggest that such responses were substantially punitive in nature. The 1999 *Llei qualificada de la jurisdicció de menors* saw the creation of Andorra's first juvenile delinquency jurisdiction beginning at age 12 – thus an effective MACR decrease from 16 to 12 years. In Nepal, the wide-ranging 2004 Terrorist and Disruptive Activities (Control and Punishment) Ordinance applies to children of all ages and thus undercuts the pre-existing MACR of 10 years, which remains the age of criminal responsibility for most offenses. The predecessor to the 2004 Ordinance was promulgated during a 2001 state of emergency as a tool for security forces against the Maoist insurgency, and led to detention of children upon accusations of Maoist involvement, as well as documented cases of enforced disappearances of children.[177]

This review of selected national debates is aimed at exploring the major contemporary influences in redefining childhood under the MACR. Clearly, this is one particularly contentious point in the larger, constant redefining of childhood's boundaries, and of societies' regulation, protection, and blaming of children. In recent years, the most powerful influence internationally is undoubtedly the CRC reporting process, which is related to more than 60 MACR increases or proposed increases. Yet behind this more visible MACR trend lies the explosive mix in many

[176] O'Nions, Helen, "Comment: A litmus test for civil society," *Guardian Unlimited*, 31 July 2002.
[177] See Human Rights Watch, *Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal's Civil War*, New York, 2004; and Kathmandu School of Law and the Center for Legal Research and Resource Development, "Part I: Juvenile Justice System in Nepal a Glance in View of International Standards," *Research Report on Juvenile Justice System in Nepal*, Kathmandu, 2003.

countries of isolated violent crimes by young children, sensationalist media coverage, public misperceptions about youth crime, and populist maneuvering that seizes upon fears for political gain. The point of this review is not to downplay juvenile crime, in the consequences of individual acts or at the societal level, nor to condemn the media and politicians. On the contrary, as acknowledged by international juvenile justice standards, public safety is undeniably important.[178] Similarly, public opinion, mass media information and images, and political compromises are all generally legitimate pressures and dynamics in national contexts.[179]

The reality is that the long-term viability of children's rights in juvenile justice depends upon coming to terms with actual and perceived youth crime, and with public opinion, the media, and political realities. In the absence of common ground, threats emerge for distorted debates, retributive tendencies, and the curtailing of children's procedural and substantive rights in the guise of safety and justice. Such policies go far beyond MACR amendments, and are indeed problematic in causing tangible harm to the broader children's rights agenda.[180] One of the clear implications of this review, however, is the role of responsible and ethical journalism in presenting images of children.[181] Likewise, there is a role for the state to develop law and policy in good faith, which includes the state's ultimate responsibility for ensuring implementation of children's rights. Political exploitation of youth crime is not reconcilable with this responsibility, despite its practice at the highest levels of government in countries such as France, Japan, and the United Kingdom. Among many other factors, children's rights implementation is also facilitated through an increasingly informed and engaged populace, including through human rights and children's rights education, as well as through stable democratic institutions and decision-making. Governments have leading roles in all of these areas, with clear

[178] E.g., Beijing Rules, Rule 17 and Commentary.
[179] See, e.g., CRC Art. 17, and Tokyo Rule 18.3.
[180] Hamilton, Carolyn, and Rachel Harvey, "The Role of Public Opinion in the Implementation of International Juvenile Justice Standards," 11 *International Journal of Children's Rights* 369, 2004.
[181] Tobin, John, "Partners worth courting: The relationship between the media and the Convention on the Rights of the Child," 12 *International Journal of Children's Rights* 139, 2004.

mandates for civil society, children's rights organizations, and other sectors as well.[182]

Other implications include lessons for MACR reform efforts in coming to terms with such dynamics. As explored in Chapter 2, the children's rights framework offers a richer understanding of children than welfare-justice and victim-perpetrator bifurcations. Where advocates base their strategy on children-as-victim and/or children-as-innocent discourses in MACR reform, there is a failure to faithfully imagine and convey the meaning of rights-based justice. Such strategy also overlooks the trap to which it unintentionally leads. National experiences repeatedly suggest that it is easy to depict MACR increases, sometimes accurately in terms of supporters' intentions, as going lightly on children. A single violent youth crime is sufficient to smash victim-perpetrator divisions, and children-as-victims narratives then capitulate quickly to children-as-perpetrator panics. These bring real consequences for individual children, and undercut larger fronts in the children's rights agenda. That broader agenda includes fostering an enduring social value on treating all children fairly and with dignity, and creating institutions that consistently do so. Some narrow MACR reforms may skew the debate and distract attention and pressure away from necessary system reforms.

Advocates obviously need to be savvy about media influence, public opinion, and political decision-making pressure points, yet these are means to an end – effective implementation of rights for all children – and the means must be consistent with the ends. This does not envisage, for example, further manipulation of imagery about children supposedly for their own benefit, such as in the Philippines' discernment study mentioned above. One alternative, pursuant to arguments laid out in Chapter 2, is to pair reform with comprehensive policies for responding to younger children that provide some appropriate form of accountability.[183] An effective range of measures preempts claims that children are somehow unaccountable, helps defuse

[182] See also Hamilton et al., *supra* note 180.
[183] See also Chapter 6 on responses to children younger than MACRs.

the threat of children-as-perpetrator panics, and wholly respects international juvenile justice standards.

The MACR as a General Principle of International Law

As detailed in Chapter 3, the drafting of Additional Protocol I to the Geneva Conventions led to the first claim ever that a general principle of international law existed around the MACR. Participants agreed on the existence of a general principle that no person could be convicted of a criminal offense if, at the time of the offense, he or she was unable to understand the consequences of his or her act. Apparently due to disagreements on the age for a common limit as such to children's potential criminal responsibility, application of the principle was deferred to respective national law.

In particular, general principles of international law are a binding source of international law – that is, giving rise to international legal obligations.[184] The recognition or confirmation of such a principle regarding MACRs would thus be no minor matter. General principles or rules of international law are, above all else, "expressions of national legal systems" that can be derived from the general principles common to the world's major legal systems.[185] Roughly speaking, they are deemed to have been accepted by countries as rules of international law because they are derived directly from legal systems around the world.[186] In fact, the best way to determine whether a certain fundamental principle of justice meets the threshold of a general principle of international law is by its existence in the national laws of United Nations Member States.[187] The inductive method of research is used to identify "the existence of a legal principle," and the more a given principle is

[184] Bassiouni, M. Cherif, "A Functional Approach to 'General Principles of International Law'," 11 *Michigan Journal of International Law* 768, Spring 1990; and "General principle of law," *Black's Law Dictionary*, 7th ed., 1999.
[185] Bassiouni, *ibid*., at 768.
[186] Kennel, John R., "International Law," 48 *Corpus Juris Secundum* §2, June 2007.
[187] Bassiouni, *supra* note 184.

reiterated, the more deference it deserves.[188] The focus is on the sameness of the legal principle or precept that underlies norms across countries.

The worldwide MACR information presented in this study permits a fresh appraisal of the existence of a relevant general principle of international law. As seen most comprehensively in Annex 2, and as discussed above in this chapter, nearly every country in the world has established an MACR. In consideration of actual provisions, the predominant historical influences behind them, and the influence of various juvenile justice approaches, many shades of meaning are discernible behind MACRs. These include the certainty of law, jurisdictional concerns, children's capacity to bear criminal responsibility, and youth policy, yet all of these interests lead to one broad legal reason for establishing MACRs in the law: children below some specified, fixed age limit should never be held criminally responsible for their actions. Chapter 4 illustrates how this common principle derives from respective historical developments in all of the major legal families, and how the limited exception of classic Islamic criminal law is still broadly compatible with it. Furthermore, as explained in this chapter and identified country-by-country, the principle includes the notion that children younger than the stipulated age limit shall not face punishments or sanctions implying criminal responsibility or procedures. The nearly universal acceptance of this general criminal law principle would seem to raise it to the status of a general principle of international law.

There are, in fact, only 8 countries that either do not claim to have an MACR in law or that effectively acknowledge not having one; among these 8, at least Cambodia and the Democratic Republic of the Congo are currently in the process of establishing MACRs.[189] The other 14 countries whose MACRs are classified as 0 or as puberty in this study still cite or describe related statutory age limits as their

[188] *Ibid*., at 809.
[189] Cambodia, Democratic Republic of the Congo, France, Mauritius, Nauru, Poland, Somalia, and the United States of America. See Annex 2 as well as respective documents related to consideration by the Committee on the Rights of the Child.

MACRs.[190] In other words, they formally support the underlying legal principle and refer to relevant norms, but empirical research either rebuts these norms as effective MACRs or identifies further provisions that assign criminal responsibility for certain offenses from puberty or without age restrictions. In this sense, the present study is concerned with children's criminal responsibility both in law and in practice. On the contrary, general principles are based upon the empirical evidence of subscription to the principle at hand – vis-à-vis the presence of relevant norms – leaving aside arguments over its application or the extent to which it is actually protected in practice.[191] The fact that countries still publicly and formally claim to have MACRs in law, and that they cite statutes and age limits to that effect, is evidence of their subscription to the principle despite inconsistencies or questionable practices.

It is important to note that although the CRC has greatly influenced MACR trends, it is not the case that current MACRs only reflect state efforts to comply with CRC provisions.[192] As noted above, this study counts 40 countries that have established or increased MACRs since the CRC's adoption in 1989, again from the perspective of both law and practice; 19 of these were MACR increases. Instead, 18 were Latin American countries that abandoned the *situación irregular* doctrine and codified substantive MACR provisions. Similarly, Portugal is counted as a country with a welfare juvenile justice approach that in the past appears not to have had any effective lower age limit for punitive sanctions, and that created a clear juvenile justice delinquency jurisdiction and MACR in 1999. In the past, nonetheless, this set of countries consistently claimed to have had MACRs in their national laws – which were actually minimum ages of penal majority in respective penal codes – yet again their claims to subscribe to the principle of the MACR were continuous while their

[190] See respective footnotes in Table 5.1 for Bahrain, Comoros, Cuba, Luxembourg, Malaysia, Maldives, Marshall Islands, Micronesia, Mozambique, Nepal, Nigeria, Pakistan, Solomon Islands, and Sudan.
[191] See Bassiouni, M. Cherif, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions," 3 *Duke Journal of Comparative & International Law* 235, 1993; and Bassiouni, *supra* note 184.
[192] See related discussions in Happold, Matthew, *Child Soldiers in International Law*, Manchester, Manchester University Press, 2005.

enforcement faltered. Instead, since the CRC's adoption, only Bhutan and Indonesia appear to have supported the precept behind the MACR for the first time and codified their first MACRs. In effect, a general principle of international law behind MACRs seems to predate the CRC.

However, the variations, range, and distribution of MACR provisions worldwide generally prevent further conclusions about such a general principle of international law. It does not seem possible to make any claims as such in terms of a mandatory age level, secondary age limits for other offenses, or *doli incapax* and related individual assessments of children's potential responsibility. At most, it may correctly be argued – as broadly reflected across rationales for MACRs worldwide – that countries must not set their MACRs at levels where children cannot normatively be expected to understand the consequences of their actions.[193] As discussed in this study, however, this is a highly ambiguous standard that is malleable across divergent constructions of childhood. As suggested in Chapter 7, future research and legal developments around children's right to effective participation at trial could conceivably lead to a more objective basis.

In the end, the current analysis maintains that there exists a binding general rule of international law that all countries must establish by law an age limit before which children, at the time of their acts, can never be held criminally responsible or face punitive sanctions. This rule brings legal obligations for all countries regardless of treaty law commitments, and depending on the legal system, it may be argued directly in domestic, regional, and/or international courts. It is especially relevant in the 22 countries noted in this country as having no MACR or no effective MACR, and in particular, the jurisprudence of the European Court of Human Rights suggests that it is again a likely forum for consideration of this apparent general principle of international law.

[193] *Ibid*.

Conclusion

Chapter 5 documents the wide variety and characteristics of MACRs around the world. Despite the substantial limitations and interpretive pitfalls that this analysis necessarily entails – particularly in surveying law and practice across adult criminal courts, juvenile justice, and child welfare and protection in divergent contexts – the insights provided by such a global snapshot are compelling. In this comparative effort, the practical and substantive meaning of criminal responsibility takes on unique importance since it is often described, understood, and interpreted differently across countries. As detailed in Chapter 3, the Committee on the Rights of the Child has set out a range of criteria that are useful as a basic standard in gauging what may be considered indicative of criminal responsibility, yet as noted, certain ambiguities remain.

This chapter takes further cues from the work of Herbert Packer in seeking to assess, with as universal and objective a standard as possible, the different laws and practices under consideration.[194] Where sanctions and measures meet his definition of criminal punishment, they arguably signal the presence of effective criminal responsibility for children. Importantly, Packer defines punishment as intentionally unpleasant sanctions that are justified predominantly as retribution for offending conduct or prevention of further offending conduct. That is, legally sanctioned measures linked to past conduct and imposed for punishment, retribution, public safety, or crime control are all criminal punishments. Likewise, rehabilitation and reform measures intended to change children's behavior and prevent recidivism are also forms of punishment, albeit with secondary therapeutic intentions. Instead, in his terms treatment includes measures justified and expected to help the person at hand; even if past conduct may point to the need for intervention to provide treatment, there is no formal recognition of or basis in past offenses. Although many welfare-oriented juvenile justice systems and child protection systems claim to deliver only treatment in this sense, both legal provisions and actual practices in

[194] Packer, *supra* note 3.

numerous countries belie such claims. In classifying and presenting MACR provisions in this chapter and study, close attention is paid to such considerations, although at the same time significant deference is paid to respective governments' claims about their MACR provisions and practices.

Even though these criteria suggest that 22 countries do not have clear or effective MACRs, virtually all countries in the world either have an MACR or consistently claim to have one anyway.[195] The median age limit worldwide is 12 years, which coincides with the international standard that MACRs be set at 12 years or higher. However, in looking at major characteristics of MACRs across countries, it is clear that the strong majority fall short of international consensus standards on some level. At the same time, there is a very strong and increasing trend since the 1989 adoption of the CRC to establish, increase, and to seek to increase respective MACRs – involving more than 65 countries, over one-third of all United Nations Member States. This predominant contemporary trend in MACRs is due above all else to the CRC reporting process, including the constant attention of the Committee on the Rights of the Child. At the same time, there is a hidden trend in the dynamics of debates surrounding MACR reform, much of which relates to inherent weaknesses of the justice approach. The basic elements vary in degree yet regularly reappear across numerous countries and contexts, including in historically strong welfare-approach systems: media sensationalization of isolated yet violent youth crimes triggers public misconceptions and fear; populist scapegoating further demonizes children and pushes new ideas about what childhood means; public opinion absorbs such ideas and accepts increasingly harsh measures against children; political factions vie to command the supposed morality and safety issues with get-tough measures; constructive debate about the structural causes for and prevention of juvenile crime is subdued; and proposals and amendments to decrease MACRs emerge. Such factors suggest the complexity of the continuous tensions in redefining childhood, as well as its tangible consequences. Due to varying motivations and

[195] See Chapter 6 for further discussion on nominal MACRs that do not effectively bar criminal penalties.

justifications, countries amend their MACRs and narrow or expand the group of children subject to criminal responsibility.

Perhaps the greatest implications and lessons are for efforts to reform national MACRs on a children's rights basis. Here the interdependent nature of human rights immediately comes to the fore, which demands a careful monitoring of MACR issues within the broader children's rights agenda. The volatility surrounding MACR debates, with potentially extensive harm to children's rights in general, suggests serious drawbacks to stand-alone MACR reform efforts. Indeed, the prospects for successful and sustainable MACR reform need to be weighed carefully in the overall balance of juvenile justice and children's rights implementation. Quick-fix age amendments, without deeper changes towards a culture of children's rights, would seem especially vulnerable to equally quick unraveling in the face of crime and fear juggernauts. At the same time, in view of the concept of punishments introduced in this chapter, and the unmistakable leitmotif of public safety and retribution in many MACR debates, particular attention needs to be paid to procedures and measures for children both younger and older than MACRs. These issues are doubly important because the mere impression that there is no system of responses to children in conflict with the law – when a rights approach calls for appropriate responses both above and below the MACR – can create intense pressure to make juvenile justice more retributive and to lower MACRs. Finally, great care should be taken in advocacy strategies to avoid playing into simplistic binary notions of children as innocent or evil, or as victim or perpetrator. In carving out boundaries where children should largely be excused, other children will be forced inevitably and more decidedly into areas where they shall largely be punished. Furthermore, in light of this chapter's discussion, it seems unrealistic to expect that modern societies will both extend the area of innocence until adulthood and at the same time treat all the children beneath it in truly appropriate ways. This does not appear to be a battle that can be won with age lines, or by forestalling a necessary and realistic coming to terms with juvenile crime. The children's rights perspective encourages a much richer appreciation of children and their development – one that focuses on dignity,

participation, reintegration, and full respect for all children – and reliance upon tactics and imagery outside this conception takes societies further away from the values it fundamentally seeks to advance.

Finally, in light of the near unanimity of national provisions that purport to bar criminal procedures and penalties for children younger than fixed age limits, there apparently exists a general principle of international law that countries must establish respective MACRs. This rule would seem to mandate national MACRs in law, although disparity among ages across countries prevents any conclusions about the appropriate age level as a matter of a general principle.

CHAPTER 6 PRACTICAL IMPLICATIONS AND CHALLENGES OF MACR IMPLEMENTATION

Throughout the present study, various perspectives bring to light different challenges related to the minimum age of criminal responsibility (MACR), such as in the context of theoretical foundations, modern international interpretations, and historical influences. Some of the highlighted problems, notably gender and socio-economic discrimination, are visibly recurrent. Others are similar to some of the widespread problems in juvenile justice systems for children older than MACRs, but lie beyond the scope of this study where there is no direct relation to MACRs. Chapter 6, in particular, offers a closer examination of some of the major difficulties and implications of practical MACR implementation. Beginning with the seemingly straightforward question of determining children's ages so as to apply MACRs, each of these difficulties proves to be surprisingly complex. The dilemma of how to respond to children younger than MACRs who come into conflict with the law is perhaps the most intractable. Countries tend either to respond punitively to children beneath their MACRs, often to the extent that their purported MACRs are meaningless, or to provide no systematic response whatsoever. In contrast, academic research demonstrates that certain non-punitive and non-custodial prevention/early-intervention programs are the most effective response to young offenders; that arrest, deprivation of liberty, and other legal sanctions can worsen their delinquent behavior over time; and that no response to young offenders is linked to children becoming serious, violent, and chronic offenders as adolescents. Finally, this chapter highlights problems related to *doli incapax* and similar tests for criminal responsibility; the instrumental use of children younger than MACRs for criminal activities; the limited applicability and implementation of MACR provisions; and national amnesties for children's offenses. All told, it appears almost certain that one or more of the challenges highlighted in this chapter affects every country in the world.

No Proof of Age or Reliable Age Estimates

Any age limit becomes problematic when a child has no birth certificate or other proof of age, and this scenario materializes regularly in juvenile justice systems worldwide with respect to the MACR. In light of the situation's surprising complexity, this section offers an overview of the frequency and extent of such difficulties, the checkered legal and procedural solutions that countries have pursued, the broad limitations of scientific age estimates, and the extent of children's rights guidance in mediating the confusion.

Overall, it is fairly common for children not to have proof of their ages. In 2003, for example, some 36% of births went unregistered around the world.[1] Broken down by region, the percentages of unregistered births varied widely: 55% in Sub-Saharan Africa, 16% in Middle East and North Africa, 63% in South Asia, 19% in East Asia and the Pacific, 15% in Latin America and the Caribbean, and 23% in Central and Eastern Europe and the Commonwealth of Independent States and Baltic States. As further evidence of the varying magnitude of this challenge, among industrialized countries, 2% of births go unregistered, while in countries such as Tanzania and Afghanistan, almost 94% of births are unregistered – yet migration patterns make the issue relevant in every country. Furthermore, birth registration rates in prior years – regarding children near MACRs today, for example – were likely even lower. Indeed, the data for 2000 births worldwide estimates that 41% went unregistered, a 5% difference in 3 years, not even including countries that had no registration system or for which data were not available.[2] In many countries, the cost of birth registration and the distance to government registration centers are cited as the main obstacles. Statistically, the level of mothers' education and household wealth are strongly correlated to birth registration rates. Indeed, poverty and social

[1] UNICEF, *The 'Rights' Start to Life: A Statistical Analysis of Birth Registration*, New York, 2005, at 3.
[2] UNICEF Innocenti Research Centre, 'Birth Registration: Right from the Start', *Innocenti Digest* 9, Florence, 2002.

exclusion play a strong role, as unregistered children are also more likely to face disadvantages in socio-economic status, education, health care, and protection.[3]

In addition, the varying cultural significance and determination of birthdays can bring further challenges. Already cited in the early 1900s as a major difficulty in French colonial juvenile justice systems, many cultures pay no special attention to chronological birthdays, and instead estimate age upon the succession of important communal events, years of cicada cycles, and years of abundant grain harvests.[4] Such obstacles continue today, such as in Papua New Guinea, where traditional society does not recognize the concept of chronological age; in remote areas it has little relevance in people's daily lives.[5] Likewise, a substantial percentage of people there, including children, do not know their birth dates or have them recorded with any state institution. In Afghanistan, the former Taliban regime substituted use of the solar calendar with the Islamic lunar calendar, which was then reverted to the solar calendar in 2002 – complicating age calculations in a country that has only recently created its first birth registration system ever.[6]

Where low birth registration rates overlap with the population of children in conflict with the law, juvenile justice systems obviously face increased difficulties in ascertaining children's ages – often multiplying socio-economic disadvantages. In the Dominican Republic, for example, although 74.6% of births overall are registered, only 56% of children in the poorest quintile are registered, versus 93% of the wealthiest quintile, and the most commonly cited reason for non-registration is the cost.[7] At the same time, 55% of children committing crimes are not registered.[8] Similarly, the Philippines has an overall registration rate of 82.8%, yet only 67.3% of

[3] Sharp, Nicola, *Universal Birth Registration: A Universal Responsibility*, Surrey (United Kingdom), Plan International, 2005.
[4] Bouvenet, Gaston Jean, *La minorité pénale dans les colonies françaises*, doctoral dissertation, Université de Nancy, Faculté de droit, 1936.
[5] Committee on the Rights of the Child, *Initial reports of States parties due in 2000: Papua New Guinea*, CRC/C/28/Add.20, 21 July 2003.
[6] Crock, Mary, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children*, Sydney, Themis Press, 2006.
[7] UNICEF, *supra* note 1, at 3.
[8] Campos, Niza, "El 55% menores infractores carece de actas nacimiento," *Listín Diario*, digital edition, Santo Domingo, 24 April 2002.

the poorest children are registered.[9] There, children in conflict with the law are more likely to be poor and socially excluded, and street children are consistently overrepresented.[10] In countries where children are trafficked and forced to commit crimes, smugglers often take identity documents away from children or supply them with false ones, and instruct child victims to lie about their ages, thus increasing the number of children who pass through juvenile justice systems without any reliable proof of age.[11]

Juvenile justice systems take various approaches in the face of such dilemmas. In numerous countries, including Burkina Faso, there may not be any clear guidelines at all on how to determine a child's age. Many countries grant juvenile courts and judges full discretion in ascertaining and/or estimating children's ages, such as in Tunisia as well as in Papua New Guinea, where juvenile courts may exercise this authority by sending children for age estimates based upon dental examinations.[12] The validity of such forensic approaches is discussed below in this section. A 2006 law in the Philippines gives courts the authority to decide children's ages, while granting children the ostensible guarantee that "In case of doubt as to the age of the child, it shall be resolved in his/her favor."[13] Nonetheless, at the same time it allows "[a]ny person contesting the age of the child in conflict with the law" to file a motion with the court to that effect. Oftentimes, criminal and juvenile law gives judges further direction in estimating children's ages. In Vanuatu, when birth registration records are not available, courts determine age "upon the balance of probabilities, after hearing the evidence of a medical expert."[14] In Mali, judges may accept as

[9] UNICEF, *supra* note 1.
[10] Amnesty International, *Philippines: Something hanging over me: child offenders under sentence of death*, London, 2003.
[11] International Organization for Migration and the Austrian Federal Ministry of the Interior, *Resource Book for Law Enforcement Officers on Good Practices in Combating Child Trafficking*, Vienna, 2006.
[12] See Tunisian Penal Code, as amended through 1995, Art. 46, "Si l'âge du délinquant est incertain, le juge du fait est compétent pour le déterminer"; and Human Rights Watch, *"Making Their Own Rules": Police Beatings, Rape, and Torture of Children in Papua New Guinea*, New York, 2005.
[13] Juvenile Justice and Welfare Act of 2006, Sect. 7.
[14] Penal Code, as amended through 1988, Sect. 17(3).

proof of age the registry or official documents of public or private institutions, if the record dates to before the illegal act in question. If these are absent as well, age can be deduced from children's physical appearances or declarations by them or their parents, teachers, or guardians.[15] If only the year of birth is known in the end, the 2001 *Loi portant sur la minorité pénale et institution de juridictions pour mineurs* holds that the date of birth is presumed to be 31 December of that year.[16] In Madagascar, courts' own judgments or physical exams may provide proof of minority status in the absence of birth registration documents.[17] If there are no official documents showing a child's exact age, Romanian courts may use any means to establish an approximate age, including questioning the parents and seeking the advice of medical experts.[18] In the United States, relevant case law includes highly elaborated conditions for proof of age in the absence of civil birth records, including rules on the admissibility and relevance of different types of evidence, forensic experts, witnesses, and the burden of proving age.[19]

The recent wave of juvenile justice law reform across Latin America has led to close consideration of age estimates and guarantees for procedural fairness in accord with children's rights. For example, the 2000 Peruvian *Código de los Niños y Adolescentes* establishes in its first article that if any doubt exists about a person's age, he or she will be considered a child or an adolescent as long as there is no proof to the contrary. Paraguay's 2001 *Código de la Niñez y la Adolescencia* elaborates these presumptions even further. If there is doubt whether a person is a child or an adolescent, he or she is presumed to be a child; if the doubt lies between adolescence and adulthood, the person is presumed to be an adolescent.[20] This further clarification is notable, since in both Peru and Paraguay "children" lie beneath the

[15] *Code de protection de l'enfant*, 2002, Art. 97.
[16] Art. 2.
[17] *Ordonnance 62-038 du 19 septembre 1962 sur la protection de l'enfance*, Art. 4.
[18] Antoniu, George, and Constantin Duvac, "Roumanie: La responsabilité pénale des mineurs dans l'ordre interne et international," 75 *International Review of Penal Law* (*Revue internationale de droit pénal)* 483, 2004.
[19] 45 Am. Jur. Proof of Facts 2d 631.
[20] Art. 2.

respective MACRs, 12 and 14 years, while "adolescents" are instead subject to criminal responsibility. Furthermore, the Paraguayan Code stipulates that during the course of proceedings if it is proved that a person was a child at the time of an alleged crime, criminal proceedings are halted and the case is referred to child protection authorities.[21] In addition to similar provisions, El Salvador's 1994 *Ley del Menor Infractor* also notes that in the absence of a birth certificate, age may be estimated upon a forensic medical statement that must be completed and remitted to the court within 48 hours.[22] In the Dominican Republic, the 2003 *Código para el Sistema de Protección de los Derechos Fundamentales de Niños, Niñas y Adolescentes* includes a range of methods to estimate children's ages, and stipulates that any errors in age estimates may be remedied at any time, including during post-trial sentencing. Children may be required to undergo relevant procedures for age estimations, even without their consent, although their fundamental rights must be respected and deprivation of liberty may not be ordered for the purposes of proving a child's age.[23] However, in practice, the procedures for ordering and obtaining medical examinations for age estimates are extremely long and difficult.[24]

As mentioned in Chapter 3, juvenile justice law and practice sometimes fuel additional confusion over the point in time at which a child's age should be considered: at the time of the alleged crime, at the time of arrest, or at the time of court proceedings. Although the context was the age of penal majority rather than the MACR, the Supreme Court of India has held that the Juvenile Justice Act makes no reference to the relevant point in time at which a child's age should be recorded and considered. Thus, the Court held that a suspected offender should be deemed a juvenile or an adult based on his or her age at the time of trial, not at the time of the alleged offense.[25] Similarly, in Pakistan, the Province of Punjab modified its Youthful Offenders Ordinance in 1984 to allow consideration of children's ages at

[21] Art. 236.
[22] Art. 26.
[23] See Principio III and Arts. 223-224 and 279.
[24] Campos, *supra* note 8.
[25] Committee on the Rights of the Child, *Second periodic reports of States parties due in 2000: India*, CRC/C/93/Add.5, 16 July 2003, par. 1005.

the time of arrest or at the outset of trial proceedings. Since children sometimes await trial for months or even years, this provision can easily leave children's true ages behind as an insignificant factor. Notably, Pakistan's 2000 Juvenile Justice System Ordinance attempts to remedy this situation by superseding the Punjab Youthful Offenders Ordinance, and by defining children upon their ages at the time of the alleged commission of offenses. Even so, persistent implementation difficulties mean that some Punjabi judges continue to apply provisions of the abrogated Punjab Youthful Offenders Ordinance.[26] In the United States, similar questions have arisen in trying to determine the jurisdiction of juvenile courts versus that of adult criminal courts; the issue is largely moot with respect to the MACR, since most states do not have statutory MACRs. Juvenile court jurisdiction may be based on a child's age at the time of the commission of an alleged offense or delinquent act, or at the time of legal proceedings, depending upon the exact statutory language or its underlying theory.[27] Indeed, the jurisprudence is highly contested and specific to respective states. Regardless of these isolated examples in India, Pakistan, and the United States, standard criminal law practices throughout the world regard age limits as effective at the time of alleged commission of the offense.[28] Likewise,

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[26] Integrated Regional Information Network, *Pakistan: Young Offenders Excluded from Justice in Tribal Areas*, United Nations Office for the Coordination of Humanitarian Affairs, 9 September 2004.

[27] Warren, H.D., and C.P. Jhong, "Annotation: Age of Child at Time of Alleged Offense or Delinquency, or at Time of Legal Proceedings, as Criterion of Jurisdiction of Juvenile Court," 89 ALR2d 506, 2004.

[28] See, e.g., Afghanistan, Juvenile Code, 2005, Art. 6(4); Belarus, Criminal Code, as amended through 1 May 1994, Art. 10; Cameroon, *Code Pénal*, Art. 80(5); Cuba, *Código Penal*, as amended through 2004, Art. 16(2); Dominican Republic, *Código para la protección de los derechos de los Niños, Niñas y Adolescentes*, 2003, Art. 225; Ecuador, *Código de la Niñez y Adolescencia*, 2003, Art. 5; Germany, *Strafgesetzbuch* (Criminal Code), 1998, §19, and *Jugendgerichtsgesetz* (Youth Court Act), 1953, §3; Latvia, Criminal Law, as amended through 2004, Sect. 11; Macedonia, Criminal Code, 1996, Art. 71; Madagascar; *Ordonnance 62-038 du 19 septembre 1962 sur la protection de l'enfance*, Art. 4; Mali, *Code de protection de l'enfant*, 2002, Art. 96; Nicaragua, *Código de la Niñez y la Adolescencia*, 1998, Art. 95; Panama, *Ley del Régimen Especial de Responsabilidad Penal para la Adolescencia*, 1999, Art. 7; Paraguay, *Código de la Niñez y la Adolescencia*, 2001, Art. 192; Spain, *Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores*, Art. 5(3); Timor-Leste, United Nations Transitional Administration in East Timor Regulation 2000/30, 2000, Sect. 45(2); Togo, *Code de Procédure Pénale*, 1983, Art. 456; Tunisia, *Code de la Protection de l'Enfant*, 1995, Art. 72; Turkey, Law on the Establishment, Duties and Procedures of Juvenile Courts, 1979, Art. 11; Vanuatu, Penal Code,

as discussed in Chapter 3, the Committee on the Rights of the Child has indicated that age should be counted at the time of the suspected offense.

With or without statutory guidance or case law on estimating children's ages, the practical outcomes are often unsatisfactory or worse. If there is still some question over a child's age by the time his or her case reaches a judge's attention, such as in Bangladesh, judges may simply guess the child's age by appearance.[29] Under Uganda's former juvenile justice legislation – which phrased its MACR in terms of people "under the apparent age of seven years" – judges often relied upon their offhand impressions of children's appearances and demeanor in estimating their ages.[30] In Oman, Ethiopia, and Sri Lanka, officials may seek guidance from medical professionals, but this procedure is not always followed, nor are doctors always available. Either children wait longer in custody for their trials, or officials base their decisions on informal, non-medical assessments of age. In either case, opportunities emerge for the arbitrary designation of ages, for equally arbitrary procedural decisions, and for the practical irrelevance of the official MACR and related age limits. There are indications that Timor-Leste, Ghana, and India face such difficulties as well. In Nigeria, further complications arise when parents and guardians provide false evidence on the ages of their children; this is facilitated by the low cost of, and easy access to, false medical and birth certificates issued directly from government hospitals.[31] While it is true that such cases more often involve the

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as amended through 1988, Sect. 17(2); and Venezuela, *Ley Orgánica para la Protección del Niño y del Adolescente*, 1998, Art. 531.

[29] Asian Centre for Human Rights, "A gravy train and shackled kids in Bangladesh," *ACHR Review*, New Delhi, 4 February 2004; Penal Reform International, "Access to Justice and Penal Reform: Special Focus: Under-trials, Women and Juveniles: Conference Report," in *PRI Second South Asia Regional Conference, 12-14 December 2002, Dhaka, Bangladesh*, London, 2003; Rahman, Mizanur, et al., *Tracing the Missing Cord: A Study on the Children Act, 1974*, Save the Children – UK, Dhaka, 2003; and Uddin Siddiqui, Kamal, "The Age of Criminal Responsibility and Other Aspects of the Children Act, 1974," presented at the workshop *Raising the Age of Criminal Responsibility and Other Aspects of the Children Act, 1974*, Dhaka, 16 January 2004.

[30] Note that this MACR was raised to 12 years in 1996. See Nsereko, D.D.N., "Uganda," 1995, in Fijnaut, Cyrillus, and Frankk Verbruggen, eds., "Criminal Law," in Blanpain, Roger, ed., *International Encyclopaedia of Laws*, The Hague, Kluwer Law International, 2004.

[31] Owasanoye, Bolaji, and Marie Wernham, *Street Children and the Juvenile Justice System in Lagos State: Nigerian Report*, Lagos, Human Development Initiatives and the Consortium for Street Children, 2004.

age of penal majority rather than the MACR, it is noteworthy that investigating police officers collaborate and encourage false documentation at times. Likewise, in Nepal – where only 34% of births were registered in 2000 – police sometimes register even children younger than the general age of responsibility of 10 years as if they were adults, leading to criminal prosecution.[32] There are widespread reports in Bangladesh and Pakistan that police officers and/or prosecutors commonly exaggerate children's ages in court documents, usually to avoid the additional procedural safeguards granted to children by law.[33] Street children and poor children, who may be less likely to have proof of age, are at a heightened risk for this practice. Busy magistrates then accept without question the ages reported by officers and prosecutors, without examining school records or questioning witnesses to ascertain children's ages. In the end, they frequently ignore the required procedures altogether; children often lack adequate legal representation to challenge the falsified ages. In Georgia, children themselves bear the burden of proving that they are younger than the MACR when they are initially processed in police stations for alleged offenses; if they claim but cannot prove they are younger, they are admitted and detained.[34]

As in other places, children in Burundi have accused law enforcement officials of overstating their actual ages, even when they are in fact younger than the MACR of 13 years, in order to detain them.[35] In one instance, officials arrested and detained a boy who asserted to be 12 years old, on suspected involvement in the murder of a

[32] Amnesty International, *Children in South Asia: Securing their Rights*, London, 1998; UNICEF, *supra* note 1; and UNICEF Regional Office for South Asia, e-mail correspondence with author, August 2001.
[33] Society for the Protection of the Rights of the Child, *The State of Pakistan's Children 2003*, Islamabad, 2004; and World Organisation Against Torture, *Rights of the Child in Bangladesh: Report on the implementation of the Convention on the Rights of the Child in relation to Children in Conflict with the Law by Bangladesh: A report prepared for the Committee on the Rights of Child 34th Session – Geneva, September 2003*, Geneva, 2003.
[34] Hamilton, Carolyn, *Analysis of the Juvenile Justice System in Georgia*, Tbilisi, UNICEF Georgia, 2007.
[35] Committee on the Rights of the Child, *Concluding observations: Burundi*, CRC/C/15/Add.133, 16 October 2000.

government militia member.[36] Independent human rights workers saw the boy, questioned his relatives and neighbors, and enquired with local officials to conclude that the boy was at the most 12 years old at the time of the murder. Nonetheless, the boy's age was reportedly noted as 20 in his case file, and he was ultimately detained without charge for some 10 months on suspected involvement in the murder, which the boy denied all along. On the other hand, law enforcement and court officials allege that children often claim to be younger than the MACR of 13 years to secure release.[37]

In Malawi, it is young adults who sometimes claim to be children, intentionally misrepresenting their ages in criminal proceedings so that they will be sentenced to juvenile correctional wards rather than adult wards.[38] There are detailed reports that such adults rape juvenile inmates, physically abduct them, and exploit them in a sexual slave trade from juvenile wards to adjacent adult wards. The adult convicts then use juvenile offenders as "wives" – sometimes taking multiple wives at once – and sell the children back and forth among fellow convicts. Furthermore, Malawi adult prisons and sexual slavery put children at the perils of unusually high transmission rates for HIV/AIDS. This extreme example shows that there can also be very serious risks in granting the benefit of the doubt to people claiming age-based statuses, as discussed below, in the absence of convincing evidence of age.

Clearly, the non-registration of births, coupled with the frequent failure of juvenile justice systems to find effective practical alternatives to ascertaining ages, leads to serious procedural flaws and violations of children's rights. These are often similar to problems that immigration authorities increasingly face in responding to the needs of unaccompanied minors. For example, a recent study on unaccompanied minors arriving to Australia suggests it is typical for children traveling without visas

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[36] Amnesty International, *Urgent Appeal: Burundi*, London, 27 January 2003.
[37] Amnesty International, *Poverty, isolation and ill-treatment: Juvenile justice in Burundi*, London, 2002.
[38] Centre for Youth and Children Affairs (Malawi), *A Survey Study Report on the Juvenile Offenders in Malawi Prisons and Approved Reform Centres*, 1999; and Penal Reform International, *HIV/AIDS in Malawi Prisons: A study of HIV transmission and the care of prisoners with HIV/AIDS in Zomba, Blantyre and Lilongwe Prisons*, Paris, 1999.

to have no proof of identity or age.[39] In the United Kingdom, in one 18-month period between 2002 and 2003, roughly one-third of asylum applicants claiming to be children had their stated ages disputed.[40] As in juvenile justice, procedural irregularities and rights violations often follow the backlog of children without proof of age.

In response to these challenges, both in the context of immigration and juvenile justice, officials have increasingly turned to forensic medical examinations to estimate children's ages. The most widely recommended method is to collate the independent results of a psychosocial assessment, a general physical examination, a dental examination looking in particular at the mineralization of third molars, and an X-ray of the wrist that is compared to reference atlases of standard images by age and sex.[41] Each exam is meant to be completed by an expert with forensic experience in the respective test.

Although the relevant scientific body of knowledge is growing, practitioners themselves point out a number of limitations to this approach, beginning with the extreme importance of equipment used and the qualifications and experience of examiners.[42] For example, the dental examination may take note of the eruption or emergence of the third molars, for which one comparative study documented a 5.6 year gap between black and white youth in the United States.[43] The risk of misinterpreting individual examinations can be quite high, with potentially vast effects on overall results. Even when examinations are conducted and interpreted correctly, none of the recommended components can establish an exact age of a

[39] Crock, *supra* note 6.
[40] International Organization for Migration et al., *supra* note 11.
[41] International Organization for Migration et al., *supra* note 11; Olze, A., W. Reisinger, G. Geserick, and A. Schmeling, "Age estimation of unaccompanied minors: Part II. Dental aspects," 159 *Forensic Science International* S65, May 2006 Supplement; and Schmeling, A., W. Reisinger, G. Geserick, and A. Olze, "Age estimation of unaccompanied minors: Part I. General considerations," 159 *Forensic Science International* S61, May 2006 Supplement.
[42] Schmeling, A., G. Geserick, W. Reisinger and A. Olze, "Age estimation," 165 *Forensic Science International* 178, 2007.
[43] Schmeling, A., A. Olze, W. Reisinger, F.W. Rösing, and G. Geserick, "Forensic age diagnostics of living individuals in criminal proceedings," 54 *Homo* 162, 2003.

child, and all of them carry inherent margins of error.[44] In addition, socio-economic status and ethnicity may play a key role in interpreting results, yet little or no reference data as such may be available. For example, ossification rates in the examination of wrist X-rays "depend primarily on a population's socio-economic status."[45] Although current data are inconclusive, low socio-economic status also seems to delay sexual development. Regarding dental examinations, it is still unclear how ethnic origin influences tooth mineralization.[46] Furthermore, when combining the various examinations, there is currently no scientifically valid method to determine the overall margin of error.[47] One validation study – based on a sample of 43 court case files where age was judged to be verified beyond doubt – found that age estimates conducted by the Institute of Legal Medicine in Berlin carried a deviation of plus or minus 12 months. In Sweden, for example, policy recommendations allow for a discrepancy in age estimates of 24 months for children from 9 to 18 years of age.[48] On top of these significant reliability questions, costs per child are an important practical consideration; wrist X-rays for these purposes may cost roughly 60 to 85 Euros in Europe, while the dental examination may cost approximately 90 Euros. Between the need for highly trained professionals and these immediate costs, such examinations would not seem to be financially practicable for the majority of countries in the world. Practitioners also raise important ethical and legal considerations, such as the question of ordering against a child's will X-rays that are not medically necessary.[49]

Critics of such forensic age estimates lodge an even broader range of complaints against their scientific and practical use. A recent study on the health of asylum seekers in the United States criticizes age determinations based on dental examinations and X-rays, noting "the frequent acknowledgement by medical experts that such exams are not an accurate method of determining age and the growing

[44] International Organization for Migration et al., *supra* note 11.
[45] Schmeling et al., *supra* note 41, at S63.
[46] Olze et al., *supra* note 41.
[47] Schmeling et al., *supra* note 41.
[48] International Organization for Migration et al., *supra* note 11.
[49] Schmeling et al., *supra* note 41.

consensus that the exams are ethically questionable."[50] The report cites a number of studies revealing the inconsistency and inaccuracy of such exams. In the United Kingdom, the Royal College of Paediatrics and Child Health reached similar conclusions, noting that there is no "absolute correlation between dental and physical age of children."[51] Likewise, the Royal College of Radiologists has found that "the accuracy of estimation of age from hand radiography amongst groups that have not been studied in detail remains in doubt."[52] In Austria, courts grew increasingly unconvinced of forensic experts' ability to estimate accurately children's ages; in fact, the Vienna Juvenile Court dismissed one forensic expert over the limitations of the wrist X-ray method, and the procedure is no longer used at all in Austria due to radiation exposure and its wide margin of error.[53] In Australia, an independent study of unaccompanied immigrant children concluded, "[a]ge assessments were found to be arbitrary, physically intrusive and unreliable."[54]

In the United States, one prominent physician – an oral, maxillofacial, and craniofacial surgeon who is an expert in skeletal maturity and an Instructor at the Harvard School of Dental Medicine – submitted public comment on relevant proposed United States immigration rules.[55] He underscored that chronologic age, dental age, and skeletal (bone) age are three different measurements among which deviation is "common and well appreciated in pediatric medical and dental practice. Discrepancies among these ages can amount to as much as five years. . . . Every recognized authority on physical development has stressed this fact."[56] For example,

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[50] Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, Boston, 2003, at 129.
[51] Royal College of Paediatrics and Child Health, *The Health of Refugee Children - Guidelines for Paediatricians*, London, 1999, at 14.
[52] *Ibid*.
[53] Höpfel, Frank, "Austria: Criminal Responsibility of Minors," 75 *International Review of Penal Law* (*Revue internationale de droit pénal)* 121, 2004; and International Organization for Migration et al., *supra* note 11.
[54] Crock, *supra* note 6, at 11.
[55] Ferraro, Nalton F., "Dr. Ferraro's Comment To The INS Regarding Determination Of Chronological Age Using Bone Age And Dental Age Standards," Appendix A in Physicians for Human Rights et al., *supra* note 50.
[56] *Ibid*., at 200.

he notes that the most widely used X-ray reference atlas in age estimation, *Radiographic Atlas of Skeletal Development of the Hand and Wrist* by William Walter Greulich and S. Idell Pyle, was not designed to ascertain chronologic age at all. Instead, it was meant to allow comparisons of individuals' skeletal age against average skeletal growth; skeletal or bone age as such is independent of chronological age. Furthermore, the Greulich and Pyle atlas is based upon a 1930s-1940s United States X-ray survey of white, upper class people of European origin; as noted above, ossification rates depend primarily upon socio-economic status.[57] The commenting physician concludes the following:

> Using bone age and dental age to help corroborate an administrative decision on minor or adult status is patently unreasonable because the fundamental premise is flawed. The margin of error in correlating bone, dental and chronologic age is too great to permit reasonable conclusions and the physical development literature makes this point over and over.[58]

In addition to these reservations, there are further ethical concerns for the invasive nature of radiographic examinations, and for how to ensure respect for the principle that physicians review all results and pursue medical interventions as necessary, even based on incidental findings.

It would seem that there are no easy answers or consensus approaches in estimating the ages of children who do not have birth certificates or other proof of age. At least in terms of the principles at stake, some guidance is available – developed largely in the context of immigration and juvenile justice – on the estimation of children's ages. As mentioned in Chapter 3, the Committee on the Rights of the Child established in its General Comment on "Children's rights in juvenile justice" that "If there is no proof of age and it cannot be established that the

[57] International Organization for Migration et al., *supra* note 11.
[58] Ferraro, *supra* note 55, at 201.

child is at or above the MACR, the child shall not be held criminally responsible."[59] The Committee further emphasized that "If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt."[60] Accordingly, the Committee stated its concern for the lack of an official system of age verification in Nepal.[61] In the context of the minimum age for military recruitment, it recommended that Bangladesh guarantee effective enforcement of age limits "by establishing and systematically implementing safeguards to verify . . . age . . . based on objective elements such as birth certificate, school diplomas and in the absence of documents, medical examination to determine the exact age of the child."[62] In even greater detail, the Committee addressed the question in its General Comment on unaccompanied children:

> identification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such. . . .[63]

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[59] Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, par. 35.
[60] *Ibid*., par. 39.
[61] Committee on the Rights of the Child, *Concluding observations: Nepal*, CRC/C/15/Add.260, 3 June 2005, par. 97.
[62] Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts: Concluding observations of the Committee on the Rights of the Child: Bangladesh*, CRC/C/OPAC/BGD/CO/1, 17 March 2006, par. 16(a).
[63] Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, par. 31(i).

The Committee's guidance complements related Guidelines issued earlier by the United Nations High Commissioner for Refugees:

> If an assessment of the child's age is necessary, the following considerations should be noted:
>
> a) Such an assessment should take into account not only the physical appearance of the child but also his/her psychological maturity.
>
> b) When scientific procedures are used in order to determine the age of the child, margins of error should be allowed. Such methods must be safe and respect human dignity.
>
> c) The child should be given the benefit of the doubt if the exact age is uncertain.
>
> Where possible, the legal consequences or significance of the age criteria should be reduced or downplayed. It is not desirable that too many legal advantages and disadvantages are known to flow from the criteria because this may be an incentive for misrepresentation. The guiding principle is whether an individual demonstrates an "immaturity" and vulnerability that may require more sensitive treatment.[64]

Finally, the previously cited study on unaccompanied minors in Australia offers useful suggestions on how such principles might be best translated into practice:

> Age assessment should be based on the totality of available evidence, taking account of: claims made by the child; physical and psychological maturity; documentation held (such as passports or identity cards); evaluation by healthcare professionals; information from family members; and any x-ray or other examinations. Where the outcome of age determination affects decisions about detention, independent experts should make the final determination.[65]

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[64] Office of the United Nations High Commissioner for Refugees, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, Geneva, 1997, par. 5.11.
[65] Crock, *supra* note 6, at 230.

The study additionally recommends, "accurate assessment of age should be viewed as a child welfare issue, rather than an immigration enforcement issue;" in juvenile justice, for example, this notion suggests that age assessment should not be viewed as a law enforcement issue.[66] Thus, there is a fairly stable base of authoritative principles to guide countries in their age estimation practices. Nonetheless, the survey of national provisions and practices above suggests that these principles are currently neither widely known nor widely practiced.

In summary, the challenge of reliably ascertaining children's ages is exceedingly widespread, complex, and difficult to resolve. The bottom line is that the MACR loses both legitimacy and practical value as a central component of children's rights in juvenile justice, leading to an array of problems and indeed violations of those rights. While the fundamental principles for approaching these problems are fairly clear, and indeed some countries have pursued legislative and procedural solutions that respect them, evidence available suggests that setting the principles into systematic practice is rarely successful.

Problematic Responses to Children Younger than MACRs

In dozens of countries, state responses to children younger than MACRs who come into conflict with the law may substantially equate to criminal procedures and punishments. Frequently, such treatment is legally categorized under domestic laws as welfare, care, protection, or education measures, despite clear resort to retribution-oriented deprivation of liberty. It also overlaps often with welfare approaches to juvenile justice.[67] International experts have long recognized the rights violations that occur in nominally non-penal institutions, at times amounting to cruel or inhuman treatment.[68] Such institutions are problematic for children both younger and

[66] *Ibid*.
[67] See Chapter 1 for further discussion.
[68] E.g., United Nations General Assembly, *Human rights questions: implementation of human rights instruments: Question of torture and other cruel, inhuman or degrading treatment or punishment: Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment*, A/55/290, 11 August 2000, pars. 11-12.

older than MACRs. However, the apparent likelihood that children younger than MACRs are placed in them as a substitute for criminal sanctions, and the widespread nature of this phenomenon, marks the issue as particularly relevant to children younger than MACRs. The long and troubled history of *situación irregular* in Latin America, for example, supports this characterization – for its protective justifications that belied clear punishment of children younger than nominal MACRs.

However, it remains difficult to assess comparatively how states respond to children younger than their MACRs, beginning with a scarcity of authoritative information. Civil law protection procedures, rather than criminal law procedures, are typically the route to such interventions and result in less publicly available information. At the same time, many child protection responses are poorly differentiated from state responses to children's adjudicated offenses, in terms of legal provisions and classification, responses available, procedures and practical implementation, and statistical reporting. Indeed, especially in welfare approaches to juvenile justice, it is difficult to estimate the extent to which children in conflict with the law of any age are deprived of their liberty in residential care.[69]

For these and other reasons, Chapter 3 closely examines the opinions of international monitoring bodies, particularly the Committee on the Rights of the Child, in characterizing related practices as indicative of criminal responsibility or not. As discussed at various points in this study, countries certainly enjoy the prerogative if not the obligation to respond appropriately to children younger than MACRs in conflict with the law. In addition, under a rigorous set of restrictions in international law, such responses may legitimately include (albeit rarely) the possibility of the deprivation of liberty. Thus, the existence of child protection responses geared towards children younger than MACRs, even when those responses allow for the deprivation of liberty, does not necessarily constitute a problematic response in terms of children's rights. Nonetheless, when compared against the

[69] Dünkel, Frieder, "Juvenile Justice Systems in Europe – Legal Aspects and Actual Developments," in United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, 52 *Resource Material Series* 275, Tokyo, 1998.

rough boundaries of international opinion, many national practices strongly imply punishment and criminal responsibility. For guidance beyond international opinion, Chapter 5 introduces Packer's definitions of punishment and criminal punishment as an additional standard against which national provisions and practices may be compared.[70] Ideally, national level research would evaluate the full legal context, relevant institutions, and implementation based on international monitoring bodies' guidance and such definitions.

Even within the limited scope of the present study, many countries' legal provisions for handling children younger than MACRs are clearly problematic as such, and indeed they call into question whether nominal MACRs are accurate indicators or not. Other countries' provisions may be predominantly retributive or punitive in orientation, such that their nominal MACRs cannot reasonably be accepted at face value. While these challenges occur in widely varying juvenile justice contexts on every continent, there are indications that they are particularly salient among countries with historic Soviet law influences. Finally, outside the bounds of legal provisions, extrajudicial responses in the form of police mishandling and private vigilante justice are further risks for children younger than MACRs who come into conflict with the law.

As seen in Table 5.1 and Annex 2, strong patterns suggest that provisions for children in conflict with the law and younger than nominal MACRs are often questionable. For example, Congo's laws seemingly classify the placement of such children – in educational or professional training establishments, public or private care institutions, and boarding schools – as protection, assistance, and education measures.[71] In Papua New Guinea, the Child Welfare Act includes both imprisonment and placement in institutions among its responses to children in conflict with the law, including for those younger than the nominal MACR of 7. Greece's Penal Code allows rehabilitation and therapeutic measures for children

[70] Packer, Herbert L., *The Limits of the Criminal Sanction*, Stanford, Stanford University Press, 1968.
[71] See Committee on the Rights of the Child, *Initial reports of States parties due in 1999: Congo*, CRC/C/COG/1, 20 February 2006, pars. 428-430.

between 8 and the nominal MACR of 13, including placement in a public, municipal, or private educational institution.[72] While Burkina Faso's Penal Code nominally sets an MACR of 13 years, legislation on juvenile offenders and children at risk does not prevent even younger children from being detained and held in police custody. Conditions are harsh and overcrowded, and the standard 72-hour limit on detentions is often violated with such children.[73] In the Republic of Korea, children between 12 and the nominal MACR of 14, including those found to be beyond parental control and likely to commit offenses, are treated as juvenile protection cases. Their protective dispositions may include placement in child welfare institutions, juvenile protection institutions, and juvenile training schools or reformatories.[74] Kenyan criminal and child protection laws overlap so broadly that police may indiscriminately arrest and detain almost any child, including through sweeping arrest raids, without specifying an alleged offense or legal care/protection basis.[75] Sao Tome's protection, assistance, and education measures include placement in educational institutions and private educational establishments.[76] At one point in 2005, ostensibly as protective or re-education measures, Algeria was depriving the liberty of nearly 2,000 children between 8 and the nominal MACR of 13 in specialized re-education centers.[77] Likewise, Turkey's Juvenile Protection Law counts placement in educational, governmental, and private care institutions among its protective and supportive measures for children not deemed criminally responsible.

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[72] See, e.g., World Organisation Against Torture, et al., *State Violence in Greece: An Alternative Report to the United Nations Committee Against Torture 33rd Session*, Athens, 2004.
[73] Committee on the Rights of the Child, *Initial reports of States parties due in 1997: Burkina Faso*, CRC/C/65/Add.18, 13 February 2002, pars. 424 and 440.
[74] See, inter alia, Republic of Korea, *The Juvenile Protection Education Institution*, www.jschool.go.kr/HP/JSC80/jsc_01/jsc_1020.jsp.
[75] CRADLE, The Undugu Society of Kenya, and The Consortium for Street Children, *Street Children and Juvenile Justice in Kenya*, London, 2004.
[76] See, inter alia, Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Sao Tome and Principe*, CRC/C/8/Add.49, 1 December 2003, pars. 103, 107, and 109.
[77] See Committee on the Rights of the Child, *Second periodic reports of States parties due in 2000: Algeria*, CRC/C/93/Add.7, 3 March 2005, par. 332; and Committee on the Rights of the Child, *Compte rendu analytique de la 1057e séance*, CRC/C/SR.1057, 20 September 2005, par. 91.

In other contexts, purported MACRs are arguably so problematic, in terms of implicit justifications, procedures, and outcomes, that they cannot reasonably be accepted as effective limits to criminal responsibility. This line is not always clear, but the present study draws it based on the criteria mentioned above, and where extensive documentation on respective countries is conclusive.[78] For example, Bahrain suggests that its MACR lies in the Penal Code provision that "a person under 15 years of age cannot be held responsible for the commission of an act constituting an offence," while the Juveniles Act applies to younger children who cannot be held criminally responsible.[79] In viewing the latter as socially endangered, the Juvenile Act's measures for protection, education, reform, and rehabilitation include detention in social welfare centres for up to 10 years. As such, the Committee on the Rights of the Child observed that there was in fact no MACR.[80] With some similarities, Luxembourg notes 16 years as both its minimum age of penal majority (i.e., for adult court trial) and MACR. However, several juvenile court measures under the *Loi relative à la protection de la Jeunesse* indicate a penal-correctional response to children's actions, without any lower age limit. These may deprive children of their liberty, and in some cases, solitary confinement may be ordered for up to 10 consecutive days as a disciplinary sanction. In Somalia, in addition to customary/traditional law and Islamic law, the Penal Code stipulates that children under 14 "shall not be liable" but holds that for certain acts such children may be placed in reformatories for a minimum of 3 years.[81] Following amendments in recent years, France's Penal Code directly states that children deemed capable of discernment and found to have committed illegal acts are considered criminally responsible.[82] Only the measures that children may face – and not their underlying

[78] See Chapter 5 for further methodological considerations.
[79] Committee on the Rights of the Child, *Initial reports of States parties due in 1994: Bahrain*, CRC/C/11/Add.24, 23 July 2001, pars. 115 and 315-316.
[80] Committee on the Rights of the Child, *Concluding observations: Bahrain*, CRC/C/15/Add.175, 7 February 2002, par. 47.
[81] Arts. 59 and 177. UNICEF Somalia, "Juvenile Justice in Post-Conflict Situations: Somalia," unpublished draft presented at the conference *Juvenile Justice in Post-Conflict Situations*, UNICEF Innocenti Research Centre, Florence, May 2001.
[82] See Art. 122-8.

criminal responsibility – vary according to age. Accordingly, the Committee on the Rights of the Child found that France had not established an MACR.[83] Despite the purported MACR of 16 years, Mozambique's Statute of Legal Aid to Minors permits corrective measures, including measures of deprivation of liberty, to be ordered for younger children who have committed acts deemed crimes or misdemeanours in the penal law. Although Libya generally maintains that its MACR is 14 years, its Penal Code provides that children between 7 and 14 who are proven culpable of acts classified as misdemeanours or felonies may be the subject of preventive measures; these include commitment for a period of less than one year to a juvenile education and guidance centre.[84] Indeed, the Committee on the Rights of the Child remarked that "[e]ven though the age of criminal responsibility is formally said to be 14 years. . . . the de facto age of criminal responsibility" was 7 years.[85]

As suggested previously, many of the cited countries pursue welfare-oriented juvenile justice, and indeed reflect hallmarks of its particular difficulties with children younger than MACRs. A similar trend exists among former Soviet republics and countries historically influenced by Soviet law, including nearly half of such countries, as seen in Annex 3. In many of these cases, countries follow administrative procedures, without full due process rights, to respond to children younger than nominal MACRs who come into conflict with the law. Commissions on Minors, Commissions on Minors' Affairs, and similar authorities may order the deprivation of liberty of such children, in special correction schools, special education institutions, and re-education institutions, etc. For example, in Azerbaijan, Commissions on minors and the protection of the rights of the children may consider the cases of children younger than the nominal MACR of 14, and may impose disciplinary measures on such children including confinement in "special correction

[83] Committee on the Rights of the Child, *Concluding observations: France*, CRC/C/15/Add.240, 4 June 2004, par. 16.
[84] See, inter alia, Arts. 80 and 150-151; and Committee on the Rights of the Child, *Second periodic reports of States parties due in 2000: Libyan Arab Jamahiriya*, CRC/C/93/Add.1, 19 September 2002, pars. 29-30 and 76.
[85] Committee on the Rights of the Child, *Concluding observations: Libyan Arab Jamahiriya*, CRC/C/15/Add.209, 4 July 2003, pars. 21 and 45.

schools."[86] China's "re-education through labor" system – introduced by the former Soviet Union – deprives children of their liberty for minor offenses on an administrative basis, and the United Nations Special Rapporteur on Torture has considered the system a form of inhuman and degrading treatment or punishment.[87] Cuba typically claims that its MACR is 16, but this study concludes that 16 is actually the age of penal majority and that the MACR is 0. In fact, Cuba's administrative "prevention and social welfare commissions" may order children's deprivation of liberty indefinitely in specialized re-education centers, without any lower age limit at all; one NGO reported that almost 62,000 children were held in these centers in 1998.[88] Kyrgyzstan's Commissions on Minors' Affairs may place children between 11 and the nominal MACR of 14 in "special correctional schools" for up to 5 years in response to their illegal acts.[89] Those in Uzbekistan may place children younger than the MACR of 13 years in institutions for at least 3 years.[90] Slovenia's Social Work Centers may commit children younger than the nominal MACR of 14 years to juvenile institutions – in substance the same as educational institution placements for older children in criminal cases.[91] While Viet Nam points to its Criminal Code's ostensible MACR of 14 years, children as young as 12 are subject to administrative procedures that may lead to placement in reform schools for

[86] See Azerbaijan NGO Alliance for Children's Rights, *Juvenile Justice in Azerbaijan: NGO Alternative Report on Situation of Juvenile Justice System in Azerbaijan within the period of 1998-2005*, Baku, 2005; and Committee on the Rights of the Child, *Second periodic reports of States parties due in 1999: Azerbaijan*, CRC/C/83/Add.13, 7 April 2005, pars. 436-444.
[87] See, inter alia, United Nations Commission on Human Rights, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to China*, E/CN.4/2006/6/Add.6, 10 March 2006.
[88] See, inter alia, Coalition of Cuban American Women, *Cuban State and the Implementation on the Convention on the Rights of the Child*, Hialeah (Florida), 1998.
[89] See Meuwese, Stan, ed., *KIDS BEHIND BARS: A study on children in conflict with the law: towards investing in prevention, stopping incarceration and meeting international standards*, Amsterdam, Defence for Children International The Netherlands, 2003; and Youth Human Rights Group, *Alternative NGO Report to the United Nations Committee on the Rights of the Child in relation to the examination of the Second periodic report by the Kyrgyz Republic on the implementation of the UN Convention on the Rights of the Child*, Bishkek, 2004.
[90] Danish Centre for Human Rights and UNICEF, *Juvenile Justice in Uzbekistan: Assessment 2000*, Copenhagen, 2001
[91] See Filipcic, Katja, "Slovenia: Dealing with Juvenile Delinquents in Slovenia," 75 *International Review of Penal Law* (*Revue internationale de droit pénal*) 493, 2004.

up to 2 years.[92] Estonia's Penal Code would seem to establish an MACR of 14 years; however, the punitive sanctions that juvenile committees may order under the Juvenile Sanctions Act, against children as young as 7, lead its MACR to be considered 7 years in this study.

In other former Soviet republics and countries influenced by Soviet law, various procedural arrangements seem to follow a similar path. Bulgaria's Penal Code nominally sets an MACR of 14 years, yet allows corrective measures to be applied against even younger children; these include the deprivation of liberty. In Georgia, children younger than the MACR may be "subject to sanctions for criminal acts or anti-social behaviour."[93] Kazakhstan's Criminal Code, Article 15, ostensibly establishes an MACR of 14, yet the Commentary to the Article provides for coercive measures of correctional education to children ages 11 and older, via placement in a special educational institution for up to three years. In addition, Centers of temporary isolation, adaptation and rehabilitation may admit children as young as 3 who have committed acts harmful to the public.[94] Laos's Penal Code appears to set an MACR of 15 years, yet also permits special measures against children from the age of 12, including deprivation of liberty in custodial re-education institutions.[95] Despite Russia's Criminal Code MACR of 14 years, the 1999 law on "The Bases of the System of Preventing/Combating Homelessness and Juvenile Offenses" allows for the placement of younger children in centers for the temporary confinement of

[92] See Human Rights Watch, *"Children of the Dust": Abuse of Hanoi Street Children in Detention*, New York, 2006.
[93] Hamilton, *supra* note 34, at 2.
[94] See Children's Fund of Kazakhstan, Kazakhstan International Bureau for Human Rights and Rule of Law, Center for Conflict Resolution, and Crisis Center for Women and Children and the Feminist League, *Alternative Report of Non-Governmental Organizations of Kazakhstan with Commentaries to the Initial Report of the Government of Kazakhstan on Implementation of the Convention on the Rights of the Child Ratified by Kazakhstan in 1994*, Almaty, 2002; and UNICEF Kazakhstan, correspondence with author, May 2001.
[95] See Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Lao People's Democratic Republic*, CRC/C/8/Add.32, 24 January 1996, pars. 161 and 166; and UNICEF East Asia and Pacific Regional Office, *Overview of Juvenile Justice in East Asia and the Pacific Region*, Bangkok, 2001.

juvenile delinquents, with over 24,000 such placements occurring in 2001.[96] Ukraine's Criminal Code sets a nominal MACR of 14 years, but also directs courts to apply compulsory reformation measures against younger children who commit certain acts; these measures include placement in special educational and correctional institutions.[97] In Poland, courts may order educative, protective, and therapeutic measures against children in conflict with the law of any age, amounting in some cases to indefinite deprivation of liberty.[98] Accordingly, the Committee on the Rights of the Child has observed that Poland has no clear MACR.[99] In Romania, a 2004 law seems to have appropriately clarified the protection measures available for children younger than the Criminal Code's MACR of 14, although further research is necessary on its application. In the past, protection measures for children younger than 14 were the same as the Criminal Code's educational measures for children 14 and older; the Constitutional Court declared the provisions unconstitutional and barred their application.[100] Finally, Tajikistan's Commissions on Minors may consider all cases of children younger than the nominal MACR (14 years) who come into conflict with the law, and may apply punishments including the deprivation of liberty for children apparently as young as 7. There are indications that even younger children, contrary to legal provisions, have been deprived of their liberty.[101]

Leaving behind the trends and influences of Soviet law, the suggestion that young children may have been illegally deprived of their liberty in Tajikistan leads to

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[96] See Committee on the Rights of the Child, *Third periodic reports of States parties due in 2001, Russian Federation*, CRC/C/125/Add.5, 15 November 2004, par. 323; and Stoecker, Sally W., "Homelessness and criminal exploitation of Russian minors: Realities, resources, and legal remedies," *Demokratizatsiya*, Spring 2001.

[97] See Art. 22 and Chapter XV.

[98] See, inter alia, Committee on the Rights of the Child, *Periodic reports of States parties due in 1998: Poland*, CRC/C/70/Add.12, 6 February 2002, par. 160; and Stando-Kawecka, Barbara, *The Juvenile Justice System in Poland*, presented at the Conference of the European Society of Criminology, Amsterdam, August 25-28, 2004.

[99] Committee on the Rights of the Child, *Concluding observations: Poland*, CRC/C/15/Add.194, 30 October 2002, par. 25.

[100] Romanian Ministry of Justice, *Practices and Standards in the System of Juvenile Justice in Romania*, 2004.

[101] See, e.g., World Organisation Against Torture, *Human Rights Violations in Tajikistan: Alternative Report to the United Nations Committee Against Torture 37th Session*, Geneva, 2006.

a final category of problematic responses to children younger than MACRs. Extrajudicial actions against children, including abuses by law enforcement officials as well as private vigilante justice, are a serious problem in some countries. These are often related to the belief that legal state responses to children are inadequate in some respect – thus the taking of the law into one's own hands. Children younger than MACRs may be at particular risk because, as described in the following section, many countries fail to offer any substantive response to their otherwise illegal acts – thus fueling impressions that young children are unaccountable. Consequently, as in Jamaica, children 9 and 10 years old – well below the MACR of 12 – have been held in police lock-ups, even for long periods and in the same cells as adults.[102] Apart from the implications of various state *Shari'a* Penal Codes, Nigeria's typical age of responsibility of 7 years is also the age limit for placement in remand homes, borstal institutions (i.e., reform schools), and approved schools under juvenile court care and protection jurisdiction.[103] However, nationwide research revealed that some children detained in various homes or directly in police custody were younger than 7.[104] In Mozambique, although this study classifies the effective MACR as 0 in light of provisions for corrective measures of deprivation of liberty at any age, there is arguably no effective system for responding to children younger than the age of penal majority of 16 years. Related to the impression that younger children alleged to have committed crimes will not be held accountable, adults directly resort to vigilante justice for retribution, by mistreating and beating up children who are suspected of robbery or other offenses. More often than not, this occurs with street children and children under the influence of drugs who are caught during attempted robberies or

[102] United Nations Economic and Social Council: Commission on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37*, E/CN.4/1996/35, 9 January 1996, par. 94.
[103] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1998: Nigeria*, CRC/C/70/Add.24, 17 September 2004, par. 50.
[104] See Owasanoye et al., *supra* note 31.

holding stolen goods.[105] In Tanzania, where instrumental use of young children is common in criminal activities, private citizens often apprehend children below the MACR during burglary attempts.[106] Apparently, mob justice is a normal response in such cases, including group beatings that are sometimes fatal.

No Effective Response to Children Younger than MACRs

Besides various problematic responses to children younger than MACRs in conflict with the law, the most common outcome worldwide seems to be no systematic response at all to such children. Many countries essentially treat the MACR as an absolute cut-off; there are no substantial provisions for what to do with children below its limit, and so there is no effective state response to their actions. Like the various problematic responses under MACRs, there is exceptionally limited information available for most countries on this issue. Research in the United States on young child offenders – even though such offenders are typically older than respective state MACRs – sheds the greatest light on such problems, albeit in only one national context. Therein, it seems clear that most attention is directed at older and more serious offenders, while mental health, child protection, juvenile justice, and affiliated systems fail to coordinate resources and responses to younger children in conflict with the law. Unfortunately, the failure to provide any systematic response allows these younger children to develop into more serious offenders, when it becomes much more difficult and more expensive to intervene successfully. The lack of any visible or effective response may also add pressure to lower MACRs, in the belief that criminal law responses can better handle the issue and hold children accountable. This was the case in the United Kingdom following reports that children who had committed almost 3000 crimes in 2006 were not prosecuted because they were younger than the MACR; this statistically modest level

[105] See Committee on the Rights of the Child*, Initial report of States parties due in 1996: Mozambique*, CRC/C/41/Add.11, 14 May 2001.
[106] Legal and Human Rights Centre, *The State of Juvenile Justice In Tanzania: A Fact-Finding Report on Legal and Practical Considerations*, Dar-Es-Salaam, 2003.

nonetheless left in doubt earlier calls to increase the MACR.[107] However, conventional criminal law approaches – arrest, deprivation of liberty, and other legal sanctions – may at times promote further delinquency problems. Alternatively, a large body of research shows that certain model universal prevention and early-intervention programs are the most effective approaches to preventing delinquency in young children, and to preventing later serious and violent juvenile offending. In particular, these include specific non-punitive and non-custodial programs.

Many countries have identified or attempted to address their lack of effective responses to children younger than MACRs. For example, countries of Southern and Eastern Africa convened in 2004 discuss improvements to juvenile justice systems across the region. In their deliberations, they identified as a core common problem the "need for measures to intervene with children" younger than MACRs who commit crimes.[108] In Switzerland's recent debate on MACR reform, the "lack of appropriate structures to deal with" crime among younger children emerged as a central concern and stumbling block.[109] In 1984, Canada increased its MACR from 7 to 12 years based on the consensus that it was more appropriate for children between these ages to access services through child welfare and mental health systems, rather than the juvenile justice system. However, surveys across the country showed that this reform did not generally spur the development of comprehensive intervention systems for such children – with one major exception, as noted below. Available options were rarely evaluated, and agencies typically received referrals only for cases that were more serious.[110] As suggested in Chapter 5, inconsistent and ineffective

[107] "Criminal age 'should rise to 18'," *BBC News*, 17 May 2007; "Lock up your sons and daughters," *Economist*, 6 September 2007; and "Thousands of crimes by under-10s," *BBC News*, 2 September 2007.
[108] Gallinetti, Jacqueline, "Child Justice Advocacy Initiatives in South Africa, Southern and Eastern Africa," in *Kids Behind Bars: A Child Rights Perspective: Conference Report*, Defence for Children International Palestine Section, Bethlehem, 2005.
[109] Zermatten, Jean, *The Swiss Federal Statute on Juvenile Criminal Law*, presented at the Conference of the European Society of Criminology, Amsterdam, August 25-28, 2004.
[110] See Augimeri, Leena K., Christopher J. Koegl, and Kenneth Goldberg, "Appendix B: Children Under Age 12 Years Who Commit Offenses: Canadian Legal and Treatment Approaches," in Loeber, Rolf, and David P. Farrington, eds., *Child Delinquents: Development, Intervention, and Service Needs*, Thousand Oaks (California), Sage Publications, 2001; and Burns, Barbara J., James

responses – despite the original consensus behind welfare and mental health approaches in Canada – fed into later pressures to roll back the MACR so as to let the criminal law handle younger children again. At the same time, when the police did continue to have contact with children younger than 12, including through largely unregulated arrest without warrant, there was insufficient statistical information on such interactions.

In particular, United States scholars have examined the dynamics of why states do not systematically respond to young children in conflict with the law – even though juvenile courts' jurisdiction in protection cases is not age-bound, and their delinquency jurisdiction is only limited by MACRs in less than one-third of the states. First, children 12 and younger who commit delinquent acts make up a small proportion of overall offenses.[111] Even when they are repeat offenders, they still have not generally accumulated long records or committed particularly serious or violent offenses; for example, they compose an infinitesimal portion of juvenile arrests for murder.[112] As such, most juvenile justice, child welfare, and school resources are aimed at older children and children with persistent problem behaviors, thus granting most younger offenders more chances to reform.[113] Juvenile courts, historically and as a general expectation, "do not adjudicate very young, first-time offenders and step in only when such institutions as families, social and child protective services, and schools fail in their efforts with children."[114] They do not "really anticipate [the] presence" of such children, and thus only intervene as the

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C. Howell, Janet K. Wiig, Leena K. Augimeri, Brendan C. Welsh, Rolf Loeber, and David Petechuk, *Treatment, Services, and Intervention Programs for Child Delinquents*, Washington, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 2003.

[111] Snyder, Howard N., Rachele C. Espiritu, David Huizinga, Rolf Loeber, and David Petechuk, *Prevalence and Development of Child Delinquency*, Washington, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 2003.

[112] McGarrell, Edmund F., "Restorative Justice Conferences as an Early Response to Young Offenders," *Juvenile Justice Bulletin*, Washington, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, August 2001; and Snyder et al., *ibid*.

[113] See Burns et al., *supra* note 110; and Loeber, Rolf, David P. Farrington, and David Petechuk, "Child Delinquency: Early Intervention and Prevention," *Child Delinquency Bulletin Series*, Washington, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, May 2003.

[114] Loeber et al., *ibid*., at 11.

end-of-the-line "dumping ground" for a gamut of problem behaviors of younger children – even though upon reaching juvenile court these children still gain less attention than older adolescents or those committing more serious or repeat offenses.[115] In addition, undefined, unclear, or overlapping roles and functions of the juvenile justice system, mental health system, and child welfare services mean that young offenders may be more likely to slip through the cracks, and may not even be identified or referred to juvenile courts.[116] Indeed, parents of the youngest delinquent boys are roughly half as likely to receive help from any service-providing agency as parents of the oldest delinquent boys; in other words, "the development of disruptive and delinquent behaviors was largely left unchecked by parents and helping agencies."[117] As a further indication of such trends, a survey of related professionals showed that over 70% believed that effective methods were available to deal with young offenders, yet only 3-6% thought that current juvenile justice, mental health, or child welfare programs were effective in using them to reduce risks of future offending.[118]

The irony is that the most difficult cases of juvenile offenders involve children who are very likely to have exhibited problem behavior or committed offenses when they were younger. Before considering such evidence, however, it must be emphasized that the majority of young children with disruptive behavior will not become child offenders, and it is not realistically possible to predict which children will commit offenses.[119] In essence, so many children exhibit problem behaviors at some point, and then discontinue on their own, that it is practically impossible to select out the comparatively few that will not eventually do so. Statistically, the rarer an event becomes, the more inherently difficult it is to predict it correctly, to the

[115] Burns et al., *supra* note 110, at 8.
[116] United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, "Serious and Violent Juvenile Offenders," *Juvenile Justice Bulletin*, Washington, May 1998.
[117] Thornberry, Terence P., David Huizinga, and Rolf Loeber, "The Causes and Correlates Studies: Findings and Policy Implications," *Juvenile Justice*, vol. IX, no. 1, Washington, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, September 2004, at 14.
[118] Loeber et al., *supra* note 113.
[119] *Ibid*.

point that predictions eventually become meaningless.[120] For example, since violent and persistent juvenile offenders in particular are so uncommon, predictions about which children will become such offenders will inevitably have low rates of accuracy.[121] There is no accurate method to predict which young boys with disruptive behavior will worsen or improve their behavior over time, or which children with serious behavior problems will move on to delinquency.[122] In one related effort, a prominent expert's risk assessment tool for 8- to 10-year-olds actually resulted in incorrect predictions of future chronic offenders 73% of the time.[123] There are serious and far-ranging ethical concerns that must be taken into account with such analyses, their scientific bases, their interpretations, and their potential uses, including implications for discrimination, state justifications for coercive intervention, and the deprivation of liberty.[124]

Of course, research on groups of children who have *already* committed offenses can describe *past* behavior patterns as well as correlations among various characteristics and offense histories. These may be compared to patterns for non-offending children and offer useful predictions about group trends based on respective correlations. However, there is a substantial difference between group estimates, which bring their own margins of error, and attempts to apply these to individuals, which may bring additional and insurmountable errors.[125] In other words, evidence that some aggregate percentage of a group with certain characteristics will likely offend does not mean that each person in the group is that likely to offend.

Within this carefully qualified context, juvenile delinquency research provides many insights for group trends, including on various factors related to offending. At

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[120] Szmukler, G., "Violence risk prediction in practice," 178 *British Journal of Psychiatry* 84, 2001.
[121] Farrington, David P., "Early Identification and Preventive Intervention: How Effective is this Strategy?," 4 *Criminology & Public Policy* 237, 2005.
[122] See Loeber et al., *supra* note 113; and Thornberry et al., *supra* note 117.
[123] However, this is not the only or most comprehensive indicator of accuracy. Described in Farrington, *supra* note 121.
[124] Grisso, Thomas, and Paul S. Appelbaum, "Is It Unethical to Offer Predictions of Future Violence?," 16 *Law and Human Behavior* 621, 1992.
[125] "The jailer's dilemma," *Economist*, 21 June 2007.

the aggregate level, this shows statistically significant correlations between the very earliest childhood behaviors and later offending. In general, "the foundations for both prosocial and disruptive behaviors are laid in the first 5 years of life," with certain problem behaviors observable in children as young as 2 years of age, and from there preschool problem behaviors are positively correlated to later conduct disorder and child delinquency.[126] In fact, early anti-social behavior may be the most highly correlated factor to later delinquency, and in particular, early aggression appears to be the social behavior characteristic that is most significantly tied to delinquent behavior before age 13.[127] Moreover, "[s]ix longitudinal studies conducted in five countries (Canada, England, New Zealand, Sweden, and the United States) . . . confirmed that childhood antisocial behavior tends to be the best predictor of early-onset delinquency for boys."[128] Again, these are aggregate predictors that do not necessarily apply at the individual level.

Minor behavior problems at very young ages, as well as early-onset delinquency, are then correlated more strongly to children who become serious and violent offenders than to other offenders.[129] In fact, children who begin to commit delinquent acts between the ages of 7 and 12 are two to three times as likely to become serious, violent, and chronic offenders versus children who begin to offend at older ages.[130] Results from the largest and most comprehensive investigation ever of the causes and correlates of delinquency, conducted longitudinally over roughly 20 years and following more than 4,000 subjects, attest to such conclusions.[131] In all of the major "pathways" observed in the study that children followed to delinquency, "an early age of onset of problem behavior or delinquency was associated with

[126] Loeber et al., *supra* note 113, at 8.
[127] Wasserman, Gail A., Kate Keenan, Richard E. Tremblay, John D. Coie, Todd I. Herrenkohl, Rolf Loeber, and David Petechuk, "Risk and Protective Factors of Child Delinquency," *Bulletin Series*, Washington, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, April 2003.
[128] Loeber et al., *supra* note 113, at 6.
[129] *Ibid*.; and United States Department of Justice, *supra* note 116.
[130] *Ibid*. (Loeber et al.)
[131] Thornberry et al., *supra* note 117.

escalation to more serious behaviors."[132] Problem behaviors also proved to be apparent in boys several years before later referrals to juvenile courts for offenses of homicide, rape, robbery, aggravated assault, burglary, larceny, auto theft, or arson. Considering boys' self-reports and their mothers' accounts over time, the average age at which boys began to have minor behavior problems was roughly 7; they showed moderately serious problem behavior at roughly 9.5 years; they committed serious delinquent offenses at approximately age 12; yet the first contact with the juvenile court occurred on average at 14.5 years of age. "Thus, approximately 7 1⁄2 years elapsed between the earliest emergence of disruptive behavior and the first contact with the juvenile court."[133] Research findings have consistently show as much.[134] In the Netherlands, a study of 110 chronic offenders using crime records and self-reporting also showed that the earliest offenders were more likely to become chronic offenders.[135] Results demonstrated that the average age at the time of first offenses was 11.9 years, but when chronic offenders ultimately committed more offenses, it was more likely that they had committed their first crimes even earlier, just as it was more likely that they had committed offenses that were more serious. A range of other indices follows such patterns. Among children referred to juvenile court in the United States, roughly 60% of 10-12 year-olds return to court a second time, and for those returning a second time the odds of a third referral increase to over 80%.[136] Once again, this does not mean that each 10-12 year old has a 60% chance of returning a second time, nor does it permit accurate predictions about which 60% of referred children will return.

As such, children and youth policies systematically miscalculate in a sort of continuous loop. They focus extensively on adolescent offenders and largely overlook early problem behavior and young and first-time offenders, who without

[132] *Ibid*., at 6.
[133] *Ibid*., at 14.
[134] Loeber et al., *supra* note 113, at 6.
[135] Sagel-Grande, Irene, "Juvenile Delinquency and Age," in Junger-Tas, Josine, Leonieke Boendermaker, and Peter H. Van der Laan, eds., *The Future of the Juvenile Justice System/L'avenir du système pénal des mineurs*, Leuven, Acco, 1991.
[136] McGarrell, *supra* note 112.

positive interventions are more likely to continue offending or to have persistent behavior problems as adolescents, and to become serious and violent offenders. From there, the cycle begins again. In contrast, the most effective approach is to break this cycle with early prevention and intervention – but in a sense that forces a fundamental shift in thinking about how most societies organize delinquency prevention efforts and responses to youngest offenders. In moving away from tendencies to ignore and/or overlook young children, first comes a proactive groundwork for delinquency prevention at young ages – through systematic universal prevention efforts as well as early intervention for disruptive behavior and offenses. As noted in Chapter 2, this approach is central in international juvenile justice standards, particularly the Riyadh Guidelines (for the Prevention of Juvenile Delinquency). Even though it is not possible to predict which children will eventually commit crimes, some factors are closely linked to delinquency, and certain early prevention programs addressing them can effectively reduce persistent disruptive behavior and early delinquency:

> Of all known interventions to reduce juvenile delinquency, preventive interventions that focus on child delinquency will probably take the largest "bite" out of crime. Specifically, these efforts should be directed first at the prevention of persistent disruptive behavior in children in general; second, at the prevention of child delinquency, particularly among disruptive children; and third, at the prevention of serious and violent juvenile offending, particularly among child delinquents. "The earlier the better" is a key theme in establishing interventions to prevent child delinquency. . . .[137]

Universal prevention programs should therefore begin from at least the beginning of elementary school onward, when they are more likely to be effective as compared to interventions at later stages towards delinquency.[138] The United States Office of Juvenile Justice and Delinquency Prevention convened a Study Group on Very

[137] Loeber et al., *supra* note 113, at 9.
[138] See Burns et al., *supra* note 110; Loeber et al., *ibid*.; and Thornberry et al., *supra* note 117.

Young Offenders, a group of 39 prominent experts on child delinquency and child psychopathology, to consider a broad range of related questions. The Study Group has stressed that "[b]y intervening early, young children will be less likely to succumb to the accumulating risks that arise later in childhood and adolescence and less likely to incur the negative social and personal consequences of several years of disruptive and delinquent behaviors."[139]

However, the type of prevention or early intervention is absolutely critical, and this is the second fundamental shift – to responses based on effective programs. Extensive research documents both the key characteristics for effective programs as well as specific proven models.[140] For example, effective "intervention methods must account for the wide range of individual, family, peer, school, and community" factors, since these present dynamic influences counteracting or contributing to the development of disruptive behavior and delinquency.[141] Programs that focus on parents and that are based in the home or school have proven to be most effective for younger children.[142] Effective family-oriented techniques include certain day care and pre-school programs, home-visiting programs, parent training, treatment foster care, multisystemic therapy, and cognitive-behavioral skills training.[143] In the educational setting, some proven interventions change schools' social contexts, reducing and preventing delinquent behavior among children 12 and younger.[144] Likewise, certain social competence promotion programs consistently reduce young children's aggressive and antisocial behaviors.[145] One program showed effects on

[139] Wasserman et al., *supra* note 127, at 10.
[140] See, inter alia, the Blueprints Model Programs (including the Midwestern Prevention Project; Big Brothers Big Sisters; Functional Family Therapy; Life Skills Training; Multisystemic Therapy; Nurse-Family Partnership; Multidimensional Treatment Foster Care; Olweus Bullying Prevention Program; Promoting Alternative THinking Strategies; The Incredible Years: Parent, Teacher and Child Training Series; and Project Towards No Drug Abuse), Center for the Study and Prevention of Violence, www.colorado.edu/cspv/blueprints/model/overview.html.
[141] Wasserman et al., *supra* note 127, at 10.
[142] Burns et al., *supra* note 110.
[143] Farrington, *supra* note 121.
[144] Burns et al., *supra* note 110.
[145] See also United States Department of Health and Human Services, Centers for Disease Control and Prevention, "The Effectiveness of Universal School-Based Programs for the Prevention of

antisocial behavior during the actual program intervention, immediately after its completion, as well as 6 years later when participants turned 18 years old. Comprehensive public health approaches, which seek to change community conditions and institutions that influence offending, are also important in such efforts.[146] In general, however, these various model programs must be replicated faithfully, which requires extensive training and program oversight, in order to maintain such positive and lasting results.

To be sure, these basic characteristics hold true for both universal prevention programs (i.e., implemented with all children) and for individual responses to specific disruptive behaviors and offenses by young children. For children 12 and younger, "the best intervention and service programs provide a treatment-oriented, nonpunitive framework that emphasizes early identification and intervention."[147] The early intervention programs that are most successful in preventing serious and violent offending "involve simultaneous interventions in the home and in the school."[148] The Study Group on Very Young Offenders, mentioned above, emphasizes that the most effective interventions for non-serious offenders at these ages are through mental health and child welfare systems, focusing on interventions involving parents.[149]

Toronto, Canada, hosts the very best example of combining these types of appropriate and effective early interventions for young children's aggressive, disruptive, and/or delinquent behavior. For over 20 years – spurred by Canada's 1984 MACR increase from 7 to 12 in favor of such approaches – the SNAP Under 12 Outreach Project has taken a multisystemic approach to children younger than the MACR through simultaneous interventions for children, parents, schools, and

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Violent and Aggressive Behavior: A Report on Recommendations of the Task Force on Community Preventive Services," 56/RR-7 *Morbidity and Mortality Weekly Report* 1, 2007.
[146] See Loeber et al., *supra* note 113; and United States Department of Justice, *supra* note 116.
[147] Burns et al., *supra* note 110, at 12.
[148] United States Department of Justice, *supra* note 116, at 3.
[149] Loeber et al., *supra* note 113.

communities.[150] The Project mobilized city police and fire departments, children's aid societies, school boards, and other children's service agencies to establish a centralized, single-entry access point for services. These agencies, including police that come into contact with children, thus refer relevant children through the same citywide mechanism for immediate responses to children engaging in antisocial behaviors or delinquent acts. After initial screening, all participating children learn cognitive behavior skills in structured groups, while their parents learn effective family and child management strategies. Depending on individual needs, children may also receive mentoring partners, counseling, in-home academic tutoring, school advocacy, teacher consultations, and other services. Extensive research, including controlled experiments, consistently demonstrates positive effects in treating children.[151] Most Canadian provinces and territories, as well as sites in the United States and various European countries, have replicated the SNAP Under 12 Outreach Project. Among other advantages, the project offers a model for coordinating consistent and effective interventions across diverse systems, including schools, child welfare and protection systems, juvenile justice, law enforcement, and mental health. Indeed, depending on the national context, juvenile justice systems may or may not be the best institutional setting to provide effective prevention and intervention programs. In many countries, such programs lie beyond what is considered the domain of juvenile justice, and it may be unwise to try to expand its institutional reach as such.

Where juvenile justice and/or other systems do not provide effective prevention and intervention programs, there is a great risk that responses to disruptive behavior and young children's offenses will actually increase juvenile delinquency.[152] For example, despite extensive evidence that they may be related to

[150] Augimeri, Leena K., Christopher J. Koegl, Kathryn S. Levene, and Nicola Slater, *A Comprehensive Strategy: Children Under 12 in Conflict With the Law: "The Forgotten Group,"* Toronto, Center for Children Committing Offenses, Child Development Institute, 2006.
[151] See, inter alia, Augimeri, Leena K., David P. Farrington, Christopher J. Koegl, and David M. Day, "The SNAP Under 12 Outreach Project: Effects of a Community Based Program for Children with Conduct Problems," *Journal of Child and Family Studies*, published online 10 January 2007.
[152] Thornberry et al., *supra* note 117.

worse outcomes for children, arrest, deprivation of liberty, and other punitive-oriented responses continue to be widely used in the United States for the youngest offenders.[153] Studies consistently show that when arrest has any impact, it is most likely to increase future delinquent behavior.[154] Deterrence programs such as "scared straight" approaches and boot camps are ineffective or harmful.[155] Children who are arrested and incarcerated are substantially more likely to be imprisoned as adults, and there are "no studies showing that incarceration of serious child delinquents results in a substantial reduction in recidivism or the prevention of later serious and violent offending."[156] Moreover, recent research suggests that interventions that aggregate high-risk youth – such as in juvenile jails and similar settings – may lead to increases in problem behavior.[157] Experts have expressed concern that the deprivation of liberty of children 12 and younger with older adolescent offenders usually exposes them to negative influences, but also to victimization by older offenders, with both phenomena tending to lead to further delinquent behavior.[158] In addition to being counterproductive, the deprivation of liberty is also notoriously more expensive per child than effective non-custodial early prevention and intervention programs. Likewise, the Study Group mentioned above specifically recommends against increased legal sanctions for non-serious child delinquents.[159] Despite such recommendations, and the extensive knowledge about effective responses to delinquency, juvenile court placements of young child offenders in residential

[153] Burns et al., *supra* note 110.
[154] Thornberry et al., *supra* note 117.
[155] Farrington, *supra* note 121; and United States Government Accountability Office, *Residential Treatment Programs: Concerns Regarding Abuse and Death in Certain Programs for Troubled Youth*, Washington, 2007.
[156] See Loeber et al., *supra* note 113, at 11; and Thornberry et al., *supra* note 117.
[157] Dishion, Thomas J., "Features of Ineffective and/or Unsafe Interventions," in conference report *Preventing Violence and Related Health-Risking Social Behaviors in Adolescents: An NIH State-of-the-Science Conference, October 13−15, 2004*, Bethesda (Maryland), National Institutes of Health, 2004.
[158] See Loeber, Rolf, and David P. Farrington, eds., *Child Delinquents: Development, Intervention, and Service Needs*, Thousand Oaks (California), Sage Publications, 2001; and Loeber et al., *supra* note 113.
[159] Loeber et al., *supra* note 113.

facilities increased 49% over a recent 10-year span in the United States.[160] Moreover, only a tiny fraction of child offenders placed in residential centers are separated from adolescent offenders.

It should also be noted that the research findings summarized above generally hold true for older children – 13 years and older – as well.[161] The effective programs for younger children are also what works for older children – certain model therapy- and treatment-based programs that are non-custodial. What does not work – and what is much less cost-effective – is also similar, including punishment and more severe legal sanctions. Deprivation of liberty also tends to be linked to negative outcomes for older children, particularly where it places together groups of adjudicated children. In those rare cases where the deprivation of liberty may be justified on public safety grounds, the only avenue for being effective would seem to be very small group settings with a predominant focus on model individualized treatment and therapy programs.[162]

In conclusion, the absence of a systematic response to young child offenders – and to children younger than MACRs – opens a complex set of issues and problems in and of itself. From a children's rights perspective – as argued in Chapter 2 – the lack of appropriate responses to young children's acts fails to respect their full evolving capacities; directly undermines the principle of enabling children to progress to full maturity and responsibility; and fails to follow-through on prominent guidelines for delinquency prevention in international juvenile justice standards. Empirically, it also allows worse delinquency problems to develop over time, which are in turn much more difficult to resolve and which weigh heavily upon the broader children's rights and policy agenda. The impression that there is no effective state response may provoke pressures to lower the MACR so as to allow criminal law responses – which are generally counterproductive – and it may even be linked to

[160] Snyder et al., *supra* note 111.
[161] See, inter alia, Greenwood, Peter, *Changing Lives: Delinquency Prevention as Crime Control Policy*, Chicago, University of Chicago Press, 2005.
[162] See e.g., Lipsey, Mark W., David B. Wilson, and Lynn Cothern, "Effective Intervention for Serious Juvenile Offenders," *Juvenile Justice Bulletin*, Washington, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, April 2000.

extrajudicial actions, vigilante justice, and the instrumentalization of children by adults for criminal activities. In contrast, the most effective and cost-effective approach – and one that fits neatly in the context of overall children's rights implementation – is comprehensive delinquency prevention that begins universal programs at young ages, and that provides early and appropriate interventions as needed. Model programs include certain multi-faceted, treatment-oriented, non-punitive, and non-custodial responses – and these tend to provide developmentally appropriate options that respect young children's absence of criminal responsibility before MACRs.

Undermining of *Doli Incapax* and Similar Presumptions

Chapter 4 sketches the ancient Roman law origins of the *doli incapax* doctrine, and describes how the influence of English common law was particularly important in spreading *doli incapax* around the world. As noted, relevant countries typically received common law as it stood in effect in England on a specified date, and most codified related provisions over time in statutory law. Dozens of countries have left their MACRs, and thus the lower age limit to the *doli incapax* test, unchanged at the common law level of 7 years, while others have amended their statutes over time. Many copied the United Kingdom's MACR amendments, from 7 to 8 years in 1932, and from 8 years to 10 years in 1963, although the United Kingdom ultimately annulled its *doli incapax* provisions entirely in 1998. Across respective countries, the *doli incapax* doctrine underwent innumerable modifications as it was disseminated, codified, amended, and judicially interpreted over time. Among other *doli incapax* variables, the relevant age range for its application, the statutory criteria for capacity, and the evidence that is admissible vary widely. Other legal traditions, with substantially similar tests also arising from ancient Roman law, add further variety to such practices, such as in the widely diffused discernment test of historic French law. Annex 2 documents some of this breadth and variety.

Despite such wide-ranging practices, as noted in Chapter 3 human rights bodies have reached the consensus that *doli incapax* systems are generally

irreconcilable with children's rights, even though they have at times held opposing viewpoints in the past. Indeed, *doli incapax* has prompted many vigorous national and international contemporary debates, where some commentators argue in support of the presumption on children's rights terms, and where others seek to abolish it in hopes of making juvenile justice systems more punitive.[163] Nonetheless, the present study takes the consensus human rights view as its point of departure, as a full international appraisal of *doli incapax* and these debates lies beyond its scope. Even so, a brief overview of *doli incapax* and other parallel tests across different legal systems suggests that problems are widespread in terms of practical outcomes for children. Across the world, their protective intent seems to be largely undermined as the presumption is ignored; it is subverted into a presumption of responsibility; application is inconsistent; the evidence used is problematic; and the ascription of criminal responsibility becomes more than anything a form of socio-economic discrimination.

For example, England's *doli incapax* provisions were the cause for vigorous debate over many decades before they were ultimately revoked in 1998.[164] Even by 1883, one commentator criticized that the test was "practically inoperative" and applied "capriciously."[165] *Doli incapax* evolved through common law interpretation, passing through various phrasings of its test over time, and it was only settled in 1919 as querying whether a child understood that his or her act was "seriously wrong." Nonetheless, "little attention was paid to clarifying what this phrase actually meant."[166] Indeed, the Ingelby Committee, a prominent committee assembled to review English juvenile court laws, issued a 1960 report recommending that the *doli incapax* presumption be abrogated. It cited evidence that that "presumption was not consistently applied and that courts differed in the degree of proof which they

[163] See, inter alia, Crofts, Thomas, "Doli Incapax: Why Children Deserve its Protection," 10 *Murdoch University Electronic Journal of Law*, no. 3, 2003; and Bradley, Lisa, "The Age of Criminal Responsibility Revisited," 8 *Deakin Law Review* 71, 2003.
[164] Crofts, Thomas, *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law*, Aldershot (England), Ashgate, 2002.
[165] Paraphrased by Crofts, *supra* note 163, pars. 39 and 10, respectively.
[166] Crofts, *supra* note 164, at 42.

required of guilty intention."[167] Even in the period before England abolished *doli incapax*, "there appeared to be a lack of clarity over what evidence could and should have been employed to rebut the presumption."[168] The preferred evidence, children's statements upon being questioned by police, was fraught with difficulties related to children's understanding of their legal rights, the lack of legal assistance, police intimidation, etc. For example, research in England "has shown that there [were] cases where the police harangue, belittle and directly or indirectly threaten the youth that they will not be left alone until the police get irrefutable evidence," and not surprisingly, that children confessed to crimes much more quickly than adults.[169] Problematically, children's admissions were accepted as evidence to rebut the *doli incapax* presumption, and courts may have unwittingly encouraged such practices by suggesting that police officers directly question children about their understanding, and by recommending that they explicitly ask children if they understood that their actions were seriously wrong. Furthermore, the admissibility of inferences from children's home backgrounds and their appearance and demeanor in court raised concerns about discrimination. In either case, as Parliament debated whether to abolish the *doli incapax* presumption, government officials admitted that there was no broad empirical data available anyway on the operation of the test.[170]

Very similar trends and problems are evident in Australia, where the *doli incapax* presumption applies in theory to all children between the MACR of 10 years and the age of 14.[171] As was the case in the United Kingdom, however, the presumption of *doli incapax* is rarely pleaded in practice in Australia. In certain rural and regional areas, many practitioners are apparently not even familiar with the concept or application of *doli incapax*. When it is pleaded, courts have admitted a wide range of evidence that would again seem to undermine procedural fairness for children, and many commentators have stated that not much evidence is demanded

[167] *Ibid*., at 24.
[168] *Ibid*., at 46.
[169] See *ibid*., at 49-50; and Crofts, *supra* note 163.
[170] Crofts, *supra* note 163.
[171] See Bradley, *supra* note 163; and Crofts, *ibid*.

for rebuttal anyway. As in England, research in Australia shows that children confess much more quickly than adults to their crimes, yet the most frequently admitted evidence may be confessions to police officers in the absence of legal counsel. Furthermore, children's advocates in one state have asserted that no statistics are available at all on how often *doli incapax* is argued.

In the United States, statutory law and case law have generally removed the *doli incapax* presumption entirely from juvenile court delinquency proceedings. State legislatures and courts typically accepted welfare approach claims that juvenile justice systems intend to aid and rehabilitate children, rather than punish them, thus undermining the need and justification for any criminal law presumption of non-responsibility.[172] Most recently, Maryland abrogated its common law *doli incapax* test in juvenile proceedings in 1994, while the test remains available in the juvenile courts of just two states.[173] In California, all children younger than 14 are considered capable of committing crimes upon clear proof that they knew the wrongfulness of their alleged acts. Children between 8 and 12 in Washington are presumed *doli incapax* until proven that they have sufficient capacity to understand their alleged acts and to know they were wrong. Some 20 other states theoretically accept common law *doli incapax* provisions in adult criminal courts, without necessarily barring delinquency adjudications at any age in juvenile courts. Even in these states, despite the ostensible common law requirement for rebuttal before any prosecution of children between 7 and 14, the test has largely fallen into disuse.[174]

In Canada, the *doli incapax* presumption was theoretically in force from the 1800s until 1984.[175] However, as in other common law countries, the issue was rarely raised in practice in juvenile court proceedings. Instead, judges tended to

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[172] See, inter alia, Thomas, Tim A., *Annotation: Defense of Infancy in Juvenile Delinquency Proceedings*, 83 ALR4th 1135, 1991 and August 2002 Supplement.
[173] See Maryland House Bill 1020, 1994 Regular Session. New Jersey case law is not entirely clear on this question; see footnote 56 in Table 5.1.
[174] Carter, Andrew M., "Age Matters: The Case for a Constitutionalized Infancy Defense," 54 *Kansas Law Review* 687, 2006.
[175] Bala, Nicholas, and D'Arcy Mahoney, *Responding to Criminal Behavior of Children Under 12: An Analysis of Canadian Law & Practice*, prepared for the Department of Justice, Canada, Summer 1994.

assume children's competency to bear criminal responsibility, especially as they approached the upper *doli incapax* age boundary of 14 years.

In at least two common law countries of Africa, there are signs that *doli incapax* has principally served as a lever for socio-economic discrimination. Kenya's MACR is 8 and its *doli incapax* test applies to children between 8 and 12, but law enforcement and child protection responses blur and leave the presumption "largely ineffectual."[176] Care and protection categories are defined so broadly that police exercise almost unfettered discretion in arresting and detaining children, even in broad sweeps and raids, without indicating clearly any alleged offense or welfare basis. Street children are a particular target for such practices. However, children's capacity to know that their acts or omissions were wrong loses relevance, as it remains unclear which acts might even be under consideration. There are also indications that Ugandan courts, prior to the country's MACR increase to 12 years in 1996, applied former *doli incapax* provisions discriminatorily. Prosecutors indeed had to produce evidence to rebut the presumption of non-responsibility of children 7 and older, yet they could "apparently rebut the presumption by showing that the child comes from a good family and had good upbringing and should have known better."[177]

In several common law countries in Asia, *doli incapax* has become a presumption of responsibility or a means of socio-economic discrimination. Bangladesh's *doli incapax* provisions theoretically limit criminal responsibility to children with sufficient maturity of understanding to judge of the nature and consequences of their conduct, yet courtroom practices undermine the presumption and wield it as a mechanism of discrimination. Children with "sufficient maturity" may simply mean street children, child prostitutes, and poor children, as criminal responsibility is ascribed to these groups without any true assessment of maturity.[178] When assessments do occur, they tend to be informal judgments about children's

[176] CRADLE et al., *supra* note 75, at 18.
[177] See Nsereko, *supra* note 30, par. 110.
[178] Uddin Siddiqui, *supra* note 29.

backgrounds and the nature of their alleged offenses. In Sri Lanka, informal judicial practices apparently reversed the *doli incapax* burden of rebuttal. Instead of prosecutors producing evidence to show that children between 8 and 12 "attained sufficient maturity of understanding to judge of the nature and consequence" of their conduct, in practice children are presumed responsible unless proven insufficiently mature.[179] In Myanmar, *doli incapax* provisions for children between 7 and 12 are rarely used in practice.[180] In Pakistan, judges enjoy wide discretion in applying the Penal Code's *doli incapax* test to children between 7 and 12, in practical terms withholding or conferring criminal responsibility to individual children as they see fit.[181] Since most judges are overwhelmed with cases on a daily basis, and many lack interest anyway, courts are simply unlikely to assess the maturity of such children. The presumption of non-responsibility has thus transformed into an effective presumption of responsibility. Indeed, one court decision held that the prosecution does not even need to provide any evidence of a child's maturity – even if such evidence would be desirable. As such, defense lawyers must specifically plead and prove children's immaturity in court to rebut the effective presumption of criminal responsibility, even though children typically do not have access to counsel aware of this burden.

South Africa and Namibia, two countries in the limited Roman-Dutch legal tradition, have encountered similar difficulties with their common law *doli incapax* presumptions. Research has indicated that Namibia's presumption of non-responsibility for children between 7 and 14 is usually ignored or simply transformed into a presumption of responsibility, and findings of non-responsibility are the exception.[182] In South Africa, contemporary case law on the *doli incapax* test for

[179] Penal Code, Sect. 76; and Committee on the Rights of the Child, *Summary record of the 872nd Meeting: Sri Lanka*, CRC/C/SR.872, 1 July 2003.
[180] UNICEF East Asia and Pacific Regional Office, correspondence with author, July 2001.
[181] Amnesty International, *Pakistan: Denial of basic rights for child prisoners*, London, 2003; and Jillani, Anees, *Cries Unheard: Juvenile Justice in Pakistan*, Islamabad, Society for the Protection of the Rights of the Child, 1999.
[182] Schulz, Stefan, and Marthinus Hamutenya, "Juvenile Justice in Namibia: Law Reform towards Reconciliation and Restorative Justice?," *Restorative Justice Online*, June 2004.

children between 7 and 14 is well elaborated, yet in practice lower courts usually accept incomplete and simplified inquiries that fail to consider all of the required questions for rebuttal.[183] For example, as evidence for rebutting the presumption of non-responsibility, judges customarily call and accept mothers' testimonies that they have taught their children the difference between right and wrong. Some decisions demonstrate that courts do not distinguish between *doli incapax* questions of criminal capacity in general, and *mens rea* as attached to specific alleged offenses.

In the civil law tradition, German courts individually assess children between 14 and 18 years for potential criminal responsibility based upon their maturity, moral and mental development, understanding of the wrongfulness of alleged acts, and ability to act accordingly.[184] Jurisprudence and commentary on the German test are highly refined, with significant guidance on the exact requirements of the assessments, standards of proof, presentable evidence, and factors for consideration, etc. While academics generally take such requirements seriously, "in practice there seems to be a tendency to circumvent the requirements . . . and to generally assume that the young person is criminally responsible."[185] Critics argue that the test no longer has any meaningful role, and empirical evidence suggests that it is often ignored as criminal responsibility becomes the rule. In fact, commentators already noted by 1938 that the assessment was ignored in practice. One modern study showed that roughly 28% of case judgments did not include any maturity assessment at all, and another revealed that where assessments were included, "in almost every case . . . young persons were found to be criminally responsible using standard formula without closer examination of their abilities."[186] In other words, rote and formulaic responses summarily justified and seemingly assumed children's responsibility. Among others, recurring problems also relate to problematic evidence. Courts frequently accept IQ tests as conclusive expert evidence, when the

[183] Sloth-Nielsen, Julia, *The Influence of International Law upon Juvenile Justice Reform in South Africa*, LLD thesis, University of the Western Cape, 2001.
[184] Crofts, *supra* note 164.
[185] *Ibid*., at 177.
[186] *Ibid*., at 178.

assessment is intended to consider a notably broader ranger of factors. Judges may also base assessments upon impressions of children in court, when instead the relevant moment in time is upon the alleged offense and not at trial.

Finally, in historic French civil law tradition, also sharing its roots in ancient Roman law, children's criminal responsibility in a predetermined age range is dependant upon evidence of their individual capacity of discernment. Judges in Madagascar, for example, decide children's potential criminal responsibility between 13 and 18 years based on such criteria. Nonetheless, even if criminal responsibility is ruled out for a child, the juvenile court may order an educational measure or placement in a re-education center until the child's twenty-first birthday.[187] At best, these measures are difficult to reconcile with children's non-responsibility, and parallel many countries' effectively punitive responses to children younger than MACRs. In Niger, also with the standard period of conditional responsibility between 13 and 18 years, the individual test of discernment has become a tool of socio-economic discrimination. Children 13 and older do not face criminal responsibility if they are deemed to have acted without discernment or judgment at the time of alleged offenses. Experts must make this determination in court, yet families bear the expense for the experts' fees.[188] Since most families cannot afford these costs, the assessments are rarely exercised in practice. Consequently, there are in effect two separate MACRs in force depending on the economic status of an alleged child offender's family: a typical child is criminally responsible at 13 years, while a wealthy child who can afford an expert's fees is not criminally responsible until 18 years.

[187] *Ordonnance 62-038 du 19 septembre 1962 sur la protection de l'enfance*, Art. 36.
[188] UNICEF Niger, correspondence with author, July 2001.

Instrumental Use of Young Children by Adults for Criminal Activities

Experts believe that adults instrumentally use children for criminal activities in every country of the world.[189] For example, with regard to Italy, the Committee on the Rights of the Child was concerned that children from certain disadvantaged groups seemed more likely to suffer instrumental use in organized criminal activities, and implied that measures were needed to assess and provide for their needs.[190] Russian officials have argued that adults instrumentally use children younger than the MACR of 14 in prostitution and drug-trafficking rings because they cannot be criminally arrested.[191] Indeed, child traffickers for criminal activities in Europe intentionally take advantage of MACR provisions in order to avoid triggering criminal justice responses.[192] In Western Australia, criminal gangs specifically exploited children younger than the MACR to commit both robberies and theft.[193] Although the instrumental use of children is certainly not limited to children younger than MACRs, it may present a more acute threat to them. In addition to greater vulnerability at younger ages in general, there is oftentimes no significant response to or consequence for children younger than MACRs who become involved in criminal activities. This probability, as compared to the threat of arrest and prosecution for both older children and adults, makes them a useful tool in the eyes of adult criminals. On the other hand, since children younger than MACRs are often excluded from juvenile court jurisdiction, they typically are not even tracked in official records. Thus, adults can manipulate children younger than MACRs less conspicuously than they can manipulate older children; for this reason, experts urge

[189] David, Pedro, "The Instrumental Use of Juveniles in Criminal Activities," in United Nations Centre for Human Rights, et al., *Children in Trouble: United Nations Expert Group Meeting*, report of the "United Nations Expert Group Meeting: Children and Juveniles in Detention: Application of Human Rights Standards, Vienna, 30 October to 4 November 1994," Vienna, Austrian Federal Ministry for Youth and Family, 1995.
[190] Committee on the Rights of the Child, *Concluding observations: Italy*, CRC/C/15/Add.41, 27 November 1995, par. 11.
[191] Committee on the Rights of the Child, *Compte rendu analytique de la 1077e séance*, CRC/C/SR.1077, 18 October 2005, par 18.
[192] International Organization for Migration et al., *supra* note 11.
[193] Bell, Duane, and Bruce Heathcote, "Gangs and Kinship: Gang Organisation Amongst Contemporary Indigenous Culture in Western Australia," presented at *Children and Crime: Victims and Offenders Conference*, Brisbane, Australian Institute of Criminology, 17-18 June 1999.

special monitoring and documentation of these cases.[194] At the same time, limited prosecution of adult perpetrators – for their criminal exploitation of children and for the offenses they force children to commit – enables continuing instrumentalization. These factors combine to reduce the visibility of the adults at hand, and increase the children's relative visibility in the public eye, which sometimes leads to victim blaming. Overall, protection efforts for affected children are complicated, and are often ineffective in assisting them and preventing further exploitation. Different countries, and levels and branches of governments, alternatively understand and address the issue as a question of international criminal organizations, child labor, child trafficking, child welfare and protection, and/or juvenile justice.[195] Further examples illustrate some of the various dynamics at hand.

There are indications that instrumentalization is a significant problem in Pakistan.[196] Adult drug traffickers pay children small amounts of cash to carry wrapped packages, without necessarily telling them that the packages are drug shipments. If deliveries go through successfully, the drug traffickers have cheap couriers available for future deliveries. Although Pakistan's MACR is 0, the Penal Code's age limit of 7 years for criminal responsibility applies for most offenses, as does its *doli incapax* test between the ages of 7 and 12. Thus, when police officers stop and arrest children between 7 and 12, traffickers bribe officers to ensure that their own drug trafficking and child exploitation crimes are ignored, while the children's presumption of non-responsibility is rebutted and children are blamed and imprisoned. Across Pakistan, there are roughly 5,000 children in jail, and one expert has estimated that the most common charge against them is drug carrying – even for

[194] Palomba, Federico, "The Instrumental Use of Juveniles in Criminal Activities," in United Nations Centre for Human Rights, et al., *Children in Trouble: United Nations Expert Group Meeting*, report of the "United Nations Expert Group Meeting: Children and Juveniles in Detention: Application of Human Rights Standards, Vienna, 30 October to 4 November 1994," Vienna, Austrian Federal Ministry for Youth and Family, 1995.
[195] See, inter alia, the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), 38 I.L.M. 1207, adopted 17 June 1999, entered into force 19 November 2000.
[196] Integrated Regional Information Network, *Pakistan: Focus on Boys Behind Bars*, United Nations Office for the Coordination of Humanitarian Affairs, 10 September 2001.

children as young as 8 years old.[197] Another type of adults' criminal instrumentalization of children in Pakistan involves revenge killings. More common in rural areas, family members order children to carry out murders, usually in revenge for previous family killings. One expert claims that 20% of children in one prison are awaiting trial on charges of murder, in most cases for such revenge killings.[198]

In post-conflict Kosovo, the juvenile justice system and its institutions were inoperative.[199] This system included the Centres for Social Work, which had been responsible for providing treatment and services to children in conflict with the law and younger than the MACR of 14 years. Therefore, in practice, the police force of the United Nations interim administration offered no substantive response to such children, while the lack of identity documents and proof of age enabled older children to claim successfully the same status as younger children. This effective impunity was seen to encourage adults to use children instrumentally for criminal acts.

In Hong Kong, officials explicitly rejected a proposed MACR increase due to the perceived additional risk for instrumental use of children.[200] This rejection was based on reports that adult drug traffickers were using children to transport drug packets. Officials feared that an increase in the MACR would lead drug racketeers to draw in more and older children – but children still younger than the increased MACR and thus free from criminal responsibility – for further instrumental use. The Legislative Council blocked a 1973 proposal to increase the MACR for this reason, and even in 2002, officials cited the instrumental use of children as a core argument against raising Hong Kong's MACR of 7 years.

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[197] *Ibid*.; and Society for the Protection of the Rights of the Child, *supra* note 33.
[198] *Ibid*. (Integrated Regional Information Network)
[199] UNICEF Kosovo, "Juvenile Justice in Post-Conflict Situations: The Kosovo Experience," unpublished draft presented at the conference *Juvenile Justice in Post-Conflict Situations*, UNICEF Innocenti Research Centre, Florence, May 2001, at 4.
[200] Law Reform Commission of Hong Kong, *Report on the Age of Criminal Responsibility in Hong Kong*, Wanchai, 2000.

At least in the past, Colombia's challenges with the instrumental use of children were related to presumably ineffective state responses to affected children. The 1989 *Código del Menor* regulated juvenile justice and ostensibly set an MACR of 12 years, but its basis in *situación irregular* meant that government officials had virtually unlimited power to impose sanctions against children both above and below 12 years of age. New legislation – the *Código de la Infancia y la Adolescencia* – was finally enacted in 2006, but its MACR-related provisions progressively enter into force by judicial district between 2007 and 2009. Under the old juvenile justice regime, many believed that state interventions did not prevent exploited children from slipping back into criminal circles, which fed into the opinion that nothing really happened at all to children involved in crime.[201] On the streets, drug bosses recruited young children and used them instrumentally, in exchange for petty cash, to carry out drug-related murders. Police officials complained that the law gave them no authority to act against such children, with some children suspected of committing over a dozen murders, and consequently they described young children as more dangerous than adult assassins. At the same time, law enforcement actions against adult exploiters of children seemed to receive less attention.

By the mid-1990s in Germany, traffickers were bringing Romanian children – most of whom were younger than Germany's MACR of 14 – to German cities for pick pocketing, burglary, and prostitution rings.[202] In particular, the traffickers targeted children from poorer regions of Romania and street children in Bucharest, placing large groups of them together in closely guarded apartments in Germany. Children's attempts to escape led to threats, beatings, rape, and torture. In one case, a high-profile Romanian diplomat in Germany allegedly directed the renting, buying, trafficking through third countries, and trading of children younger than the MACR

[201] Griswold, Eliza, "The 14-Year-Old Hit Man," *New York Times Magazine*, 28 April 2002.
[202] Gittrich, Thomas, "Overview on the Situation of Unaccompanied Minors in Germany – Examples of Good Practice in Reception," in *Final Report from Conference on Separated and Trafficked Children in the Baltic Sea Region*, Vilnius, September 14-16, 2003.

for instrumental use in such schemes.[203] The governments of Germany and Romania sought to address the problem with an expedited 36-hour repatriation program for all Romanian children separated from their parents, and the overall number of trafficked children declined as a result. However, deported children often returned to the streets in Romania or to families that had originally sold them to traffickers, with limited follow-up measures to ensure their protection against further trafficking.

In cases of burglary and theft involving at least three suspects in Tanzania, one of the suspects is regularly between 7 and 13 years of age.[204] Adult criminals use children, referred to as "vipanya" (i.e., mice), to enter homes through windows or other tight spaces. The children then open doors from the inside for the adults to enter and burglarize the homes. If the burglary attempt is discovered, children are usually caught alone while the adult masterminds are able to run away. One court's statistics show that almost 40% of adults' criminal offenses involved such instrumental use of children.

Limited Applicability and Implementation of Relevant Laws

There are some examples where domestic laws containing MACR provisions are not implemented nationwide or are simply not applied by the courts. Such practices obviously undermine any effective protection the MACR might provide. The reasons and motivations are not always clear, but seem to involve the strength of government institutions and rule of law in general; the level of training and competence of the judiciary; and possibly a greater willingness to overlook relevant laws in order to apply coercive measures against children in conflict with the law.

The most egregious cases involve Iran and the sentencing and imposition of the death penalty against children younger than Iran's MACR at the time of alleged crimes. Before the question of the MACR, it must be stressed that international law

[203] International Organization for Migration, *Trafficking in Unaccompanied Minors for Sexual Exploitation in the European Union*, Brussels, 2001.
[204] Legal and Human Rights Centre, *supra* note 106. Tanzania's MACR is 10, with *doli incapax* tests for children between 10 and 12. In Zanzibar, it is 12, with *doli incapax* tests for children between 12 and 14.

categorically prohibits – as a peremptory norm – the imposition of the death penalty against any person younger than 18 years at the time of alleged crimes.[205] There are just three countries in the world besides Iran that have executed juvenile offenders in recent years, and Iran has carried out more executions than those three combined.[206] In Iran, boys may only bear criminal responsibility upon reaching the age of 15 lunar years (i.e., 14 years and 7 months), yet boys even younger that this age at the time of alleged crimes have been sentenced and executed.[207] Authorities hanged Makwan Mouladzadeh on December 4, 2007, for crimes he allegedly committed when he was 13 years old, despite an explicit stay of execution and order for further judicial review by the head of Iran's judiciary, Ayatollah Shahrudi.[208] Ayatollah Shahrudi took this step after his determination that the original conviction was contrary to *shari'a*. The case emerged when three men complained to the police in late 2006 that Mouladzadeh had raped them as boys seven years earlier.[209] All three later withdrew their accusations, and Mouladzadeh retracted his own confession as false and coerced by police intimidation. In unrelated cases, Ahmad Nourzahi received a death sentence for drug offenses from when he was apparently 12 years old, while two other cases involve boys who were 14 years old at the time of alleged crimes, potentially younger than the MACR of 14 years and 7 months.[210] Hamid Reza received a death sentence for a murder he allegedly committed at 14, while Farshid Farighi was flogged and hanged in 2005 for stabbing to death five men in separate incidents, of which the first occurred when he was 14.

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[205] Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, CCPR/C/21/Rev.1/Add.6, 4 November 1994, par. 8. See also CRC Art. 37(a) and International Covenant on Civil and Political Rights Art. 6(5).
[206] The other three countries are China, Pakistan, and Sudan. Amnesty International, *Iran: The last executioner of children*, London, 2007.
[207] Islamic Penal Code, 1991, Art. 49, and Civil Code, as amended through 1982, Art. 1210, Note 1.
[208] Human Rights Watch, *Iran: Prevent Execution of Juvenile Offender*, New York, 5 December 2007.
[209] Human Rights Watch, *Iran: Revoke Death Sentence in Juvenile Case*, Washington, 3 November 2007.
[210] Amnesty International, *supra* note 206.

Several countries and regions provide further examples of the limited applicability and implementation of MACR-related laws. In the years following Uganda's 1996 increase of its MACR to 12 years, courts continued to charge and convict younger children. A 2000 survey across seven districts revealed that 3% of children in the criminal justice system were younger than the MACR.[211] In Tanzania, courts have also been found simply to hold children younger than the MACR criminally responsible for their acts.[212] In general, the MACR is 10, with *doli incapax* tests for children between 10 and 12, while Zanzibar's MACR is 12, with *doli incapax* provisions for children between 12 and 14. In one high-profile case, a 9-year-old boy was charged and convicted of raping a 5-year-old girl, despite being younger than the MACR. He was subsequently sentenced to life in prison, although an appellate court annulled this decision.

In Kosovo, the Organization for Security and Co-operation in Europe has monitored court cases of children alleged to have committed crimes before they reached the MACR of 14 years.[213] In two June 2006 cases, in the same court, two different children were tried for acts allegedly committed when they were respectively 13 years old, and one of these faced the possible sentence of two months imprisonment.

In several countries of South Asia, the general trend of uneven implementation of juvenile justice laws, plus the limited applicability of some laws, may at times directly prevent the statutory MACR from being applied.[214] For example, Afghanistan's 1976 Penal Code – which until 2005 was the source of the MACR of 7

[211] Uganda Child Rights NGO Network, *NGO Complementary Report to the GOU First Period Report on the CRC*, Kampala, 2000.
[212] Legal and Human Rights Centre, *supra* note 106.
[213] Organization for Security and Co-operation in Europe Mission in Kosovo, Department of Human Rights and Rule of Law, Legal System Monitoring Section, *Review of the Criminal Justice System in Kosovo: The protection of witnesses in the criminal justice system: The administration of justice in minor offences courts: Juveniles in criminal proceedings*, Pristina, 2006.
[214] Cipriani, Don, *South Asia and the Minimum Age of Criminal Responsibility: Raising the Standard of Protection for Children's Rights*, Kathmandu, UNICEF Regional Office for South Asia, 2005.

years – was not widely applied or enforced across the country.[215] In Bangladesh, the Supreme Court found in 2003 that the Penal Code's MACR provisions had not been heeded by lower authorities.[216] Its High Court Division specifically ordered officials to review the possible discharge of juveniles under Sections 82 and 83 of the Penal Code – in other words, to apply the Penal Code's MACR and *doli incapax* provisions retroactively and release children either too young or immature (by *doli incapax* standards) to bear criminal responsibility. Although the Supreme Court's step seems commendable, the need for this remedy to come from such a high authority implies that MACR statutes had been widely ignored.

National Amnesties for Children's Delinquent Acts

While they may seem to be an unrelated topic at first glance, amnesties are in fact directly linked to the issues and difficulties surrounding MACRs. Although the same is generally true for amnesties concerning children's alleged crimes during armed conflicts, such as in the case of the 2000 Ugandan Amnesty Act, such amnesties necessarily imply a broader range of issues that lie beyond the scope of the present study, and are thus not discussed here. Instead, amnesties within the scope of standard national criminal laws, as Haiti had considered in 2006, point to the basic challenges at hand.[217]

After the 2004 overthrow of former President Aristide, early 2006 general elections provided new stability to address long-standing problems of political and gang-related violence. Children's participation in gang violence was one facet for concern, including some children younger than the MACR of 13 years who allegedly committed multiple violent crimes such as murder and rape. The criminal justice system was in a general state of crisis, including severely backlogged cases,

[215] Lau, Martin, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*, Geneva, International Commission of Jurists, 2002.
[216] World Organisation Against Torture, *supra* note 33.
[217] The analysis in this section is largely based on information provided by confidential sources.

inhumane prison conditions, and alleged police collusion with gangs.[218] In the absence of any programs to deal with young children in conflict with the law, the criminal justice system simply deprived them of their liberty in violation of the law. Reform options under consideration varied widely, including factions pressuring to lower both the MACR and the age of penal majority as supposed crime control measures. Other groups noted that the government, even with heavy United Nations and international aid support, had very little to offer children as an incentive to leave behind gang activities and weapons. This factor, plus the desperate situation of the justice sector, led to extensive talks about a possible amnesty for children's alleged crimes as a way to wipe the slate clean, and to build a bridge to integrate children into law-abiding society. In the end, proposals regarding both MACR amendments and an amnesty were left aside, and instead the primary initiative undertaken was a United Nations-supported program offering money, food, and job training for gang members who disarmed. Leading public figures expressed doubts about the program, and President Preval had even warned gang members to disarm or "face death."[219] Months later, in the beginning of 2007, the United Nations stepped up the repressive side of its response and established a controversial peacekeeper stronghold in one central neighborhood for armed gang activity.[220]

In one sense, the amnesty that had been considered in Haiti would have amounted to a one-time, momentaneous increase in the MACR up to the age of penal majority. Theoretically, past alleged crimes committed by children younger than the age of penal majority would have been ignored, while future acts would again be liable to criminal prosecution beginning at the MACR. There is of course a question of justice among children, as some would have missed the amnesty and seen vastly different outcomes for the same offenses committed immediately before or after its enactment. A number of challenges surveyed in this chapter were also immediately

[218] See, inter alia, Caistor, Nick, "Poverty and gangs curb Haiti progress," *BBC News*, 28 February 2007; and Roig-Franzia, Manuel, "Haiti's Lost Boys: Port-au-Prince Prison Reflects Overwhelming Problems Facing Country's Children," *Washington Post*, 3 March 2007.
[219] Associated Press, "Haitian business leaders urge force if U.N.-backed gang disarmament fails," *International Herald Tribune*, 5 September 2006.
[220] "UN soldiers move into Haiti slum," *BBC News*, 25 January 2007.

foreseeable for the proposal, including the wide-ranging problems arising from the lack of verifiable proof of age; a clear risk for heightened instrumental use of children by gangs for criminal activities; and discrimination by gender, socio-economic status, and perceived gang affiliation. At the time, some observers expressed particular concern that violent extrajudicial and vigilante justice would increase against children covered by the amnesty. Indeed, the symbolism of impunity and unaccountability that is widely perceived in amnesties – similar to the symbolism propagandized and/or perceived in many proposed MACR increases – would likely have proven explosive in such a highly unstable political, legal, and public safety context. The immediate and long-term consequences for the broader children's rights agenda were both unpredictable and potentially very negative. At the same time, the amnesty itself would likely have reduced political pressure to undertake fundamental reforms necessary for the justice system in general, as well as critical steps needed in juvenile justice and children's rights implementation in particular. Finally, as highlighted throughout this study, the mandate of children's rights includes appropriate provisions and responses to all children in conflict with the law who are younger and older than the MACR – or in this case, who are included or not in a proposed amnesty – and this principle seems easily overlooked in the midst of such a controversial move.

Conclusion

A wide range of practical challenges, as explored in this chapter, complicate and undermine MACR implementation in countries around the world: no proof of age and unreliable age estimates; problematic responses or no response to children younger than MACRs who come into conflict with the law; *doli incapax* and similar presumptions that are ignored or applied inconsistently and discriminatorily; adults' instrumental use of young children in criminal activities; the limited application and implementation of MACR provisions; and problematic amnesties for children. Children's rights principles, as well as the rule of law and efficient public policy in general, call for these problems to be addressed and resolved. Debates on juvenile

justice and MACR provisions provide a fitting opportunity for such action, and indeed, they must take full account of at least these potential problems in order to achieve coherent reform.

For example, while the consensus on international MACR standards disapproves of any age level decrease, this chapter often points to problematic implications of higher age levels. Where children do not widely possess reliable proof of age, age estimates in later adolescence may be increasingly difficult as children's physical appearances approximate adults', and false age claims may increase. Unless governments provide credible, systematic, and appropriate (e.g., non-punitive) responses to children younger than MACRs in conflict with the law – whose numbers accrue in step with MACR increases – pressures and temptations grow to intervene inappropriately and/or to roll back MACRs for criminal law responses. State interventions that skirt and violate children's rights are a clear threat, as are extrajudicial treatment and vigilante justice. Indeed, juvenile justice history is marked by problematic state interventions, such as in many classic welfare-oriented juvenile justice systems and in former *situación irregular* systems across virtually all of Latin America. Current research shows that such risks continue, including in many juvenile justice systems influenced by Soviet law, and even in countries that have played decisive roles in modern juvenile justice theory and practice. Furthermore, higher MACRs without redoubling efforts to stop child exploitation may open the door to further instrumental use of young children in criminal activities.

The question of appropriate state responses to young children in conflict with the law deserves special attention in such debates. As this study argues in Chapter 2, a holistic children's rights perspective judiciously respects all aspects of children's evolving capacities. The logical consequence is that states should hold all children accountable for their actions at a developmentally appropriate level, and in appropriate ways, carefully heeding international juvenile justice standards. Such an obligation to respond to all children holds true both above and below the MACR; the MACR is the substantive and symbolic limit demarcating how children may legally

be held accountable. Beneath its age threshold, among other factors, responses must be non-criminal, non-punitive, and with only the very rarest of exceptions, non-custodial. Criminological research roughly supports this view and coincides with the international consensus that 12 years is the lowest acceptable MACR. It shows that the most effective responses to children 12 and younger preclude arrest, deprivation of liberty, and related legal sanctions. Moreover, the absence of effective responses to young children's delinquency is related to their development over time into serious, chronic, and violent offenders. What may be the two most common responses to children younger than MACRs who come into conflict with the law – punitive-oriented measures and no coordinated response at all – are probably the most counterproductive responses possible. At the same time that they violate children's rights, they lead to worse delinquency problems over time, which are then consistently more difficult and expensive to address. As seen in Chapter 5, increased delinquency may also pose major practical obstacles to overall children's rights implementation.

In the end, the assorted challenges highlighted in this chapter probably affect every country in some way, regardless of MACR age level or juvenile justice approach. Obligations under the Convention on the Rights of the Child pertain to all of these issues, as seen in Chapter 3 on consensus international MACR standards, and thus it would seem that virtually every country has pertinent problems awaiting action. Where implementation efforts fail to address them, the MACR tends to become less of a crucial milestone in juvenile justice, and more of a misleading claim about children's rights.

CHAPTER 7 MAKING MACRS WORK FOR CHILDREN'S RIGHTS

The minimum age of criminal responsibility (MACR) is the lowest age upon which children may potentially be judged delinquent or held liable for infringements of a given country's penal laws, in either juvenile or adult courts. It also marks a country's commitment to respond to younger children in conflict with the law only in ways that are non-punitive and that reflect the absence of criminal responsibility. Despite this inherent significance, MACRs themselves may indicate very little in practice about the protection of children's rights. Making MACRs work for children's rights depends, to a large extent, upon broader national efforts towards full implementation of all children's rights, including through effective juvenile justice and child protection systems that fully respect such rights. Within this larger framework, MACRs are an important turning point that needs to be carefully addressed, but only in close consideration of the implications for children both younger and older than their threshold.

At the same time, the basic legitimacy of legal systems necessitates the establishment of MACRs – as a minimum requirement for the certainty of law and the moral condemnation transmitted by criminal punishments. Moreover, as per obligations under the Convention on the Rights of the Child (CRC) for all but 2 countries of the world, and as a general principle of international law applicable to all countries, every country faces a legal obligation to establish an MACR. Depending on the country, such obligations may be enforceable before national, regional, and/or international judicial bodies. In addition, broad international guidance advises countries – sometimes, again, with the weight of legal obligation – on how they should establish and apply their MACR provisions.

By way of conclusion, and drawing from the findings of the present study, this chapter delineates the key considerations for establishing and implementing MACRs in ways that support the rights of children.

Defining a More Meaningful MACR

Although it may appear to be fairly straightforward, the MACR is not just a question of setting and applying an age limit. In the context of children, criminal responsibility must be understood in relation to associated procedures, measures, and conditions, as well as the justifications for them, both in law and in practice. This is true for children younger and older than MACRs, in adult and juvenile criminal law, and in civil law in the context of welfare, care, and protection. MACRs are certainly important legal milestones, but the ages at which they are set, and the nominal justifications for those age levels, are often not as revealing as what transpires in practice.

As such, it is generally insufficient to limit the MACR's description to simply the lowest age at which children may potentially be held criminally responsible. The emerging international consensus understands that the MACR must provide one clear legal standard that is applicable throughout the territories of respective countries, and that is equally applicable to all children within them, enforced uniformly without any form of discrimination. It precludes secondary and multiple ages of criminal responsibility, such as *doli incapax* and similar provisions, and multiple age limits according to type or supposed seriousness of offense. In contrast, pursuant to clear international human rights and juvenile justice standards, it presumes that the minimum age for responsibility in adult criminal court (i.e., the minimum age for penal majority) is 18 years or higher.

The international consensus further holds that children younger than MACRs at the time of alleged offenses cannot be formally charged or subjected to penal law procedures or responses, in either juvenile or adult criminal justice systems. Such children cannot be treated in any criminalized manner either, in the context of any system whatsoever, including by detention in police custody or other forms of detention. Instead, special protective measures may be taken in their best interests, either through non-penal judicial proceedings or without resorting to judicial proceedings at all. In either case, legal safeguards must ensure that procedures and treatment are as fair as for children at or older than MACRs, including the protection

of all relevant rights. In particular, all rights of children deprived of their liberty continue to apply in those exceptionally rare cases where special protective measures deprive children younger than MACRs of their liberty.

It is not always clear, however, how national practices should be held up against such rules. This is particularly true in the case of special protective measures, such as education and other measures, applied to children younger than MACRs. Classic criminal law definitions of punishment and criminal punishment provide an additional reference point to assess them.[1] In brief, practices that meet such definitions may be considered indicative of criminal responsibility, and thus unacceptable for children younger than MACRs. Punishment generally includes all unpleasant sanctions that are justified predominantly as retribution for offending conduct or as prevention of further offending conduct. More precisely, criminal punishments are legally sanctioned measures linked to some past offense that are primarily intended to punish the offender or ensure public safety. As such, even where rehabilitation, reform, and therapeutic measures are ordered based on past conduct or offenses, and are intended to prevent future conduct or offenses, they remain criminal punishments. In contrast to punishment and criminal punishment, treatment includes all measures justified and expected to help the people receiving them. Although conduct or offenses in the past may bring attention to the need for treatment, there are no formal findings about past conduct, and treatment is not based upon it. In this sense, only treatment is acceptable for children younger than MACRs.

These understandings of the MACR and criminal punishment provide an objective basis against which national MACR provisions and practices should actively be assessed. This is true for national authorities responsible for implementing MACR-related policies, as well as for national courts and independent human rights institutions; regional and international judicial bodies; regional and international human rights monitoring bodies; and national, regional, and

[1] Packer, Herbert L., *The Limits of the Criminal Sanction*, Stanford, Stanford University Press, 1968.

international NGOs. As a starting point, this includes a careful examination of rationales behind state responses to children younger and older than nominal MACRs, including retribution or deterrence; the function of past conduct to those responses; and whether or not treatment justifications are reflected in practice and are generally expected to be beneficiary. In addition, comprehensive data on state responses, lawful or otherwise, should be scrutinized for children both younger and older than MACRs, including data disaggregated by at least the following: age; gender; region; rural/urban area; national, social, and ethnic origin; reason for intervention; nature and setting of intervention; duration of intervention and periodicity of review; and all cases of deprivation of liberty for any period of time, including arrest.[2]

MACR Provisions: Establishment, Implementation, and Monitoring

Just as MACRs are surprisingly complex in practice, the very establishment of MACRs is a highly political and revealing moment in the constant struggle to define childhood. Across juvenile justice history, that struggle has been broadly driven in terms of welfare and justice approaches, which are founded upon drastically different accounts of children's competence, rights, criminal responsibility, and therefore MACRs. Both approaches bring conceptual flaws with important and far-reaching practical consequences for children. International children's rights also carry a set of ideas about children and childhood, but within a viable and enduring framework that addresses and mediates welfare-justice tensions. Its account of children's criminal responsibility is colored by a range of procedural and substantive considerations for children both above and below the MACR, with the multi-faceted concept of children's evolving capacities lying at the center. Several of these aspects are discussed here.

[2] "The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority." Rule 11(b), 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

A Question of Age?

In very specific terms of establishing an MACR age level, there is no definitive answer or optimal age limit per se. Nonetheless, this study does find a number of important indicators that point to 12-13 years as the MACR age levels most amenable to children's rights. First, the emerging international consensus is that MACRs should be set at 12 years or higher. Likewise, the current median age for MACRs worldwide is 12 years, an important practical consideration in terms of receptivity to change and long-term age level stability. Although conducted only in North America, the most comprehensive delinquency research available demonstrates that for children 12 and younger, the most effective responses are strictly non-punitive and treatment-oriented, and are based in homes or schools. When implemented correctly, certain model programs consistently reduce short-term and long-term problem behavior and offending. In contrast, arrest, deprivation of liberty, and other punitive-oriented responses to children 12 and younger are generally ineffective, and in fact typically worsen behavior and delinquency problems over time.

Children's ability to participate effectively in trials is also a relevant factor in establishing an age level. Low MACRs can expose children to criminal proceedings when it may be likely that they cannot participate effectively in them. Indeed, it is fundamentally unjust to order punishments based upon procedures in which children are not capable of assisting in their own defense or that they cannot sufficiently understand.[3] Both the CRC and international juvenile justice standards emphasize such concerns, and the European Court of Human Rights has been particularly noteworthy for its decisions on the minimum guarantees for children's effective participation in trial. Thus, it becomes immediately problematic to set MACRs at ages where it is likely that children will not be able to participate effectively in the criminal procedures to which they may be subjected. The latest comprehensive research finds that children 13 and younger are significantly less likely than older

[3] Archard, David, *Children: rights and childhood*, 2nd ed., London, Routledge, 2004.

children to be able to participate effectively in their own defense in adult criminal court trials.[4] Although this research is limited to the United States legal system – which contravenes international norms in subjecting children to adult criminal court trials – it should be noted that children's rights standards set a higher threshold for effective participation.[5] Research found that one-third of children 13 and younger were probably not able to participate effectively due to insufficient understanding of trials and attorneys, the meaning of legal rights, the significance of guilty pleas, the relevance of information necessary for their defense, and other prerequisite knowledge and cognitive skills. Even when researchers provided instruction on core legal concepts to children 13 and younger, they were less likely than older children to improve in their legal understanding.[6] Of course, not all procedures are or should be as formal, and even younger children may be able to participate effectively with modifications, assistance, and/or through other arrangements that still respect children's rights. Nonetheless, these results give some indication of the ages at which children, at least in one legal context, can normatively be expected to be able to participate effectively.

It is also important to note that progressively higher age levels for MACRs pose a wide range of difficulties for respecting children's rights, at both theoretical and practical levels. The general international consensus that MACRs should not be set lower than 12 already reflects relevant protective-oriented arguments, thus it is implicit that lower MACRs are generally so difficult to reconcile with children's rights as to be incompatible with them. Even though some authorities support setting

[4] See, inter alia, Grisso, Thomas, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci, and Robert Schwartz, "Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants," 27 *Law and Human Behavior* 333, 2003; Scott, Elizabeth S., and Thomas Grisso, "Developmental Incompetence, Due Process, and Juvenile Justice Policy," 83 *North Carolina Law Review* 793, 2005; and Steinberg, Laurence, "Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question," 18 *Criminal Justice* 20, 2003.
[5] Dohrn, Bernardine, "'I'll Try Anything Once': Using the Conceptual Framework of Children's Human Rights Norms in the U.S.," *University of Michigan Journal of Law Reform*, in press 2007.
[6] Viljoen, Jodi L., Candice Odgers, Thomas Grisso, and Chad Tillbrook, "Teaching Adolescents and Adults about Adjudicative Proceedings: A Comparison of Pre- and Post-Teaching Scores on the MacCAT-CA," *Law and Human Behavior*, published online 9 January 2007.

MACRs at age levels significantly higher than 12 – still driven largely by protective arguments – such levels also increase the difficulties in ensuring that procedures and outcomes for children will be consonant with children's rights.

Indeed, the interrelated nature of children's rights dictates that this protective thrust be balanced with other relevant principles. One of the key advantages of children's rights is their integrated account of protection and liberty rights, based on a richer and more nuanced understanding of children than that offered by welfare or justice approaches to juvenile justice. Isolated arguments for significantly higher MACRs detract from this underlying equilibrium and indeed fail to appreciate the totality of children's rights. For example, they inherently depict children as less competent and less responsible, and this characterization is irreconcilable with arguments for greater participation of such children, for further consideration of their views, and indeed for the exercise of their rights on their own behalf.

In contrast, the principle of evolving capacities calls for children's competencies to be faithfully acknowledged, respected, and fostered, and for both rights and responsibilities to accrue in step with their growth. Part of this process for children is to see increasingly the consequences of their choices at developmentally appropriate levels, in a gradual transition towards full adult rights and responsibilities. International standards approach juvenile justice systems as a compatible and valuable part of this developmental path, and both responsibility and criminal responsibility play important roles therein – driven above all else by children's evolving capacities. The protective aspect of evolving capacities, to protect children from responsibilities for which they are not prepared, and from consequences that may endanger further development or well-being, is indeed important. Nevertheless, delaying criminal responsibility in the name of such protection, by pushing MACRs increasingly higher, encroaches upon other rights of children, such as due weight for their views according to their age and maturity. At the same time, the procedural and substantive rules of international juvenile justice standards better address the recurring problems of juvenile justice that generally

prompt such protective concerns. Implementation of these standards is the challenging yet sustainable solution that respects all children's rights.

In contrast to the implementation of international standards, increasing MACRs beyond 12-13 years in hopes of avoiding the problems of juvenile justice seems neither sustainable nor likely to respect children's rights in practice. Relatively high MACRs often play into simplistic notions of children as innocent or evil, victim or perpetrator. These notions cannot realistically expect to claim all persons younger than 18 as "innocent," and some older children will be exposed to the possibility of criminal responsibility. At a minimum, harsh rhetoric and policies will likely be directed against them. Moreover, isolated violent crimes by younger children can quickly turn this logic against its protective intentions, leading to intense public and political pressures for retribution against the "evil" children committing them, as well as inestimable setbacks for the broader children's rights agenda. In the meantime, the push to higher MACRs lends itself in practice to broad and problematic state intervention against younger children, such as in former *situación irregular* systems of Latin America, some welfare-oriented juvenile justice systems, and apparently in many systems influenced by Soviet law. The difficulty of providing strictly non-punitive measures to relatively older groups of adolescents increases, and tends to conflict with public pressure for accountability, leading at times to extrajudicial treatment and vigilante justice. Other problems loom larger as the MACR grows higher. Where children do not widely possess reliable proof of age, age estimation may become increasingly difficult as more children in conflict with the law lie near its limit. Without significantly more effective efforts to stop child exploitation, instrumental use of young children in criminal activities may also increase.

Age Means Little without Implementation and Monitoring

As suggested above, MACRs lower than 12 are held to be incompatible with children's rights, at the same time that MACRs beyond 12-13 years grow

increasingly contradictory to children's rights. Nonetheless, simply setting MACRs at 12 or 13 years is insufficient. Age levels themselves cannot be separated from policies for children younger and older than respective MACRs, and MACRs will not effectively serve their intended function unless such policies are carefully coordinated. This section highlights some minimum considerations that need to be simultaneously addressed.

The foundation is full national implementation of children's rights and international juvenile justice standards. Quite simply, the realization of children's social, economic, civil, and political rights in particular decreases the need for subsequent interventions of all types, as does continuous and comprehensive delinquency prevention efforts for all children. These proactive steps directly decrease later pressures for punitive policies against young children and other practices contrary to children's rights. In general, such work requires coordinated implementation and monitoring across social, economic, legal, political, institutional, policy, and other spheres – synchronizing systems that may not traditionally see themselves as relevant – and it explicitly encourages a structural-institutional understanding of children and delinquency. This forces a fundamental rethinking of the conventional understanding of delinquency prevention. It shifts to a larger base of roles and responsibilities; an earlier start on prevention programs for all children; and a focus on specific model programs that are non-punitive, and home- and school-based, which prevent youth crime in the short- and long-term. As a fundamental right, it also requires universal birth registration, as well as age verification systems that conform to the latest international guidance and that, where evidence is inconclusive, give the benefit of the doubt to children.

Children's rights principles also guide actions at the level of individual children, and these include developmentally appropriate responses to all children, both younger and older than MACRs, in conflict with the law. First, for children younger than MACRs, procedures and responses must reflect the absence of criminal responsibility both in name and in substance. Fortunately, with similarities to universal prevention programs, the proven-effective model intervention programs for

younger children's disruptive, aggressive, and/or delinquent behavior are all treatment-oriented, non-custodial, and non-punitive – that is, generally acceptable in the absence of criminal responsibility. In contrast, punitive measures, legal sanctions, and the deprivation of liberty may all tend to worsen such behavior over time – then becoming more difficult and more expensive to address. At the same time, ignoring children's early disruptive behavior and offending is linked to continued and more serious offending over time, as well as to pressures to decrease MACRs to let the criminal law handle the youngest offenders. However, it must be noted that there is no accurate method to screen out which young children with such behavior will stop or continue in it. Thus, it is important to take young children and their actions seriously, to consistently respond to them in developmentally-appropriate ways, and to ensure that a range of effective programs are available and implemented well so as to preempt calls for counterproductive and inappropriate punitive measures.

For children who have reached the MACR, there exists the possibility of criminal responsibility. This neither means nor suggests, however, that all children beginning at the MACR and in conflict with the law should face criminal proceedings or be found criminally responsible. Such children should indeed see developmentally appropriate responses to their actions, but children's rights stress diversion (i.e., alternative procedures rather than formal criminal proceedings) and a wide variety of disposition options as the primary route to such responses. The same model intervention programs for younger children – which are consistently non-custodial, non-punitive, and treatment-oriented – are also the most effective responses to older children's problem behavior and delinquent acts. In fact, these programs offer a range of developmentally appropriate responses, and can generally be routed through diversion alternatives such as restorative justice, community conferencing, and traditional justice systems, assuming children's authentic consent and full respect for their rights.[7] Importantly, international children's rights also

[7] See Van Bueren, Geraldine, "A Curious Case of Isolationism: America and International Child Criminal Justice," 18 *Quinnipiac Law Review* 451, 1999.

dictate that the deprivation of liberty only be used in exceptional cases, as a disposition of last resort, and only for the minimum necessary period. Punitive sanctions and the deprivation of liberty are usually just as ineffective or harmful for older children as they are for younger children. In the relatively rare cases where deprivation of liberty is justified for the sake of public safety, custodial options may only be effective – in the best-case scenario – in very small groups where the primary focus is consistent individualized treatment, using methods similar to model programs described above.

This structure supporting the MACR – national implementation of all children's rights, universal delinquency prevention for all children, and appropriate responses to children respectively younger and older than the MACR– also needs the public's buy-in to keep the MACR stable and effective over time. As part of larger obligations and efforts to make the CRC's principles and provisions "widely known, by appropriate and active means, to adults and children alike," proactive national debates should be carefully fostered to encourage understanding of children's rights in juvenile justice.[8] Such efforts include constructive engagement with the media, public education and awareness campaigns, as well as training for relevant public officials, working towards broad social and political acceptance of the rights-based approach. Its message, therefore, includes a vision of childhood that resists a reduction of the debate into terms of good and evil children, that instead promotes respect and dignity for all children, and that therefore encourages appropriate responses to all children that foster their continued development. Yet it also underscores the common societal role and responsibility for implementing children's rights – as essential for the realization of children's rights, but also reaping benefits for all of society. When embedded within a broader acceptance of such discourses, the MACR more successfully marks and holds the line between non-responsibility and criminal responsibility in juvenile justice.

[8] Art. 42, CRC.

All the same, the presence of serious MACR-related challenges in probably every country of the world underscores the importance of careful monitoring of implementation efforts. Once again, monitoring for MACR problems falls under broader children's rights and juvenile justice monitoring. Where signs emerge of common challenges – such as those related to age estimates, inconsistent or problematic responses to children younger than MACRs, instrumental use of children for criminal activities, and even widening public misconceptions about juvenile justice – laws, policies, and programs should be adjusted accordingly. Such monitoring and adjustment are primarily the task of national authorities with responsibility for children's rights implementation under the CRC. Their work is both complemented and held accountable by bodies such as independent human rights institutions, national and international NGOs, and national, regional, and international judicial and treaty monitoring bodies.

The MACR is indeed a crucial marker in childhood, but the hopes pinned upon it are often unrealistically high, leading to disappointments and rights violations in practice. Making MACRs work for children's rights requires a broader approach and more holistic efforts, but the rights of children call for nothing less.

ANNEXES

Annex 1: United Nations Convention on the Rights of the Child

(Adopted by United Nations General Assembly Resolution 44/25 of 20 November 1989, and entered into force 2 September 1990.)

Preamble

The States Parties to the present Convention,
Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,
Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,
Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,
Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,
Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,
Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,
Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,
Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "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",
Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in

Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration, Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,
Have agreed as follows:

PART I

Article 1
For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2
1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her 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.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3
1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4
States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5
States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6
1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7
1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8
1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9
1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10
1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national

security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11
1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12
1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13
1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others; or
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14
1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15
1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16
1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 17
States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international

sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.
To this end, States Parties shall:
(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
(c) Encourage the production and dissemination of children's books;
(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18
1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19
1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20
1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21
States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable

information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22
1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23
1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development
4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24
1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
(a) To diminish infant and child mortality;
(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
(d) To ensure appropriate pre-natal and post-natal health care for mothers;
(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
(f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25
States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26
1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27
1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
(a) Make primary education compulsory and available free to all;
(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
(c) Make higher education accessible to all on the basis of capacity by every appropriate means;
(d) Make educational and vocational information and guidance available and accessible to all children;
(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
(e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31
1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32
1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
(a) Provide for a minimum age or minimum ages for admission to employment;
(b) Provide for appropriate regulation of the hours and conditions of employment;
(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33
States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34
States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials.

Article 35
States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36
States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37
States Parties shall ensure that:
(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
(b) 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;
(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his

or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38
1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39
States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40
1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law 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.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
(i) To be presumed innocent until proven guilty according to law;
(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
(vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41
Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:
(a) The law of a State party; or
(b) International law in force for that State.

PART II

Article 42
States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43
1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.
2. The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest

number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.
8. The Committee shall establish its own rules of procedure.
9. The Committee shall elect its officers for a period of two years.
10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.
11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.
12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44
1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights
(a) Within two years of the entry into force of the Convention for the State Party concerned;
(b) Thereafter every five years.
2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.
4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
6. States Parties shall make their reports widely available to the public in their own countries.

Article 45
In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:
(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized

agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;
(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;
(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;
(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46
The present Convention shall be open for signature by all States.

Article 47
The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48
The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49
1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50
1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51
1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52
A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53
The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54
The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Annex 2: Worldwide MACR Provisions and Statutory Sources by Country

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Afghanistan	12	-	-	Juvenile Code, 2005, Art. 5(1).[1] A person who has not completed the age of 12 is not criminally responsible.
Albania	14	16	-	Criminal Code, as amended through 2001, Art. 12.[2] A person bears criminal responsibility if, at the time he or she commits an offence, has reached the age of fourteen. A person who commits a criminal contravention bears responsibility at the age of sixteen.
Algeria	13[3]	-	-	Criminal Code, Art. 49.[4]
Andorra	12	-	-	Llei qualificada de la jurisdicció de menors, de modificació parcial del Codi penal i de la Llei qualificada de la Justícia, 1999, Art. 3. . . . . El menor de 12 anys és inimputable. Les accions en reclamació dels danys i perjudicis derivats d'una infracció penal comesa per un menor de 12 anys han de ser resoltes davant la jurisdicció civil ordinària.
Angola	12	-	-	Lei N.º 9/96 Sobre O Julgado de Menores, 1996, Art. 12 and 16. Art. 12: Compete ao Julgado de Menores: a) aplicar medidas de protecção social aos menores de qualquer idade; b) aplicar medidas de prevenção criminal aos menores com idade compreendida entre os 12 e os 16 anos de idade, exclusivé. Art. 16: As medidas de prevenção criminal são aplicáveis aos menores que pratiquem factos tipificados na lei como delitos.
Antigua and Barbuda	8	-	-	Juvenile Act, 1951, Sect. 3.[5]

[1] Unofficial translation provided by UNICEF Afghanistan.
[2] Translation by Alibali, Agron, Albanian Legal Information Initiative, Chicago-Kent College of Law, Illinois Institute of Technology, http://pbosnia.kentlaw.edu/resources/legal/albania/crim_code.htm.
[3] While the Criminal Code stipulates that "Only protective or re-education measures may be applied to a minor aged under 13," such measures apparently include placement in any of roughly 30 specialized re-education centers administered by the Ministry of Justice. Nearly 2,000 children in conflict with the law between the ages of 8 and 13 were deprived of their liberty in these centers in 2005. See Committee on the Rights of the Child, *Second periodic reports of States parties due in 2000: Algeria*, CRC/C/93/Add.7, 3 March 2005, par. 332; and Committee on the Rights of the Child, *Compte rendu analytique de la 1057e séance*, CRC/C/SR.1057, 20 September 2005, par. 91.
[4] Committee on the Rights of the Child, *Second periodic reports of States parties due in 2000: Algeria*, CRC/C/93/Add.7, 3 March 2005, par. 332.
[5] Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Antigua and Barbuda*, CRC/C/28/Add.22, 9 December 2003, par. 282.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
Argentina	16[6]	18	-	Ley 22.278, Régimen Penal de la Minoridad, as modified through 1983, Arts. 1-2.[7] Art. 1: No es punible el menor que no haya cumplido dieciséis años de edad. Tampoco lo es el que no haya cumplido dieciocho años, respecto de delitos de acción privada o reprimidos con pena privativa de la libertad que no exceda de dos años, con multa o con inhabilitación. . . . Art. 2: Es punible el menor de dieciséis a dieciocho años de edad que incurriere en delito que no fuera de los enunciados en el artículo primero. . . .
Armenia	14	16	-	Criminal Code, 2003, Arts. 24(1-2).[8] Art. 24 (1): The person who reached the age of 16 before the committal of the crime is subject to criminal liability. (2): The persons who reached the age of 14 before the committal of the crime are subject to criminal liability for murder (Articles 104-109), for inflicting willful severe or medium damage to health (Articles 112-116), for kidnapping people (Article 131), for rape (Article 138), for violent sexual actions (Article 139), for banditry (Article 179), for theft (Article 177), for robbery (Article 176), for extortion (Article 182), getting hold of a car or other means of transportation without the intention of appropriation (Article 183), for destruction or damage of property in aggravating circumstances (Article 185, parts 2 and 3), for theft or extortion of weapons, ammunition or explosives (Article 238), for theft or extortion of narcotic drugs or psychotropic substances (Article 269), for damaging the means of transportation or communication lines (Article 246), for hooliganism

[6] The 2005 *Ley de protección integral de los derechos de las niñas, niños y adolescentes* explicitly abrogates the 1919 Agote law, which was the basis for Argentina's *situación irregular* policy of, in effect, discretionary deprivation of liberty of children of any age. The 2005 law would also seem to annul provisions in this spirit in the 1980 *Ley 22.278, Régimen Penal de la Minoridad*. However, final analysis may hinge upon pending legislation on juvenile criminal responsibility, for which there were some ten pending bills under consideration in Congress as of February 2007.

[7] Art. 1: "No punishment may be imposed on any person under the age of 16 years. Nor may any punishment be imposed on a person under the age of 18 years for a privately actionable offence, an offence carrying a custodial sentence of not more than two years, or an offence punishable by a fine or disqualification. . . ." Art. 2: "Punishment may be imposed on a person between the ages of 16 and 18 years who has committed an offence other than the ones specified in article 1. . . ." Committee on the Rights of the Child, *Periodic reports of States parties due in 1998: Argentina*, CRC/C/70/Add.10, 26 February 2002, par. 615.

[8] Unofficial translation by the American Bar Association, Central European and Eurasian Law Initiative. See www.internews.am/legislation/index.asp.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				(Article 258).
Australia	10	-	10-14	Source depends on jurisdiction.[9] Commonwealth: Crimes Act 1914, s4M,[10] and Criminal Code Act 1995, s7.1[11]; *doli incapax*: Crimes Act 1914, s4N,[12] and Criminal Code Act 1995, s7.2.[13] Australian Capital Territory: Criminal Code 2002, s25[14]; *doli incapax*: Criminal Code 2002, s26.[15] Northern Territory: Criminal Code Act, as in force 2005, s38(1)[16]; *doli incapax*: Criminal Code Act, as in force 2005, s38(2).[17] New South Wales: Children (Criminal Proceedings) Act 1987, s5[18]; *doli incapax*: common law. Victoria: Children and Young Persons Act 1989, s127[19]; *doli incapax*: common law. South Australia: Young Offenders Act 1993, s5[20]; *doli incapax*: common law. Western Australia: Criminal Code Act Compilation Act 1913, s29.[21] Queensland: Criminal Code Act

[9] Australian Institute of Criminology, *Young People and Crime: Table 1: Ages of criminal responsibility by Australian jurisdiction (as at 12 July 2005)*, www.aic.gov.au/research/jjustice/definition.html.

[10] A child under 10 years old cannot be liable for an offence against a law of the Commonwealth.

[11] A child under 10 years old is not criminally responsible for an offence.

[12] (1) A child aged 10 years or more but under 14 years old can only be liable for an offence against a law of the Commonwealth if the child knows that his or her conduct is wrong. (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

[13] (1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong. (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

[14] A child under 10 years old is not criminally responsible for an offence.

[15] (1) A child aged 10 years or older, but under 14 years old, can only be criminally responsible for an offence if the child knows that his or her conduct is wrong. (2) The question whether a child knows that his or her conduct is wrong is a question of fact. (3) The burden of proving that a child knows that his or her conduct is wrong is on the prosecution.

[16] A person under the age of 10 years is excused from criminal responsibility for an act, omission or event.

[17] A person under the age of 14 years is excused from criminal responsibility for an act, omission or event unless it is proved that at the time of doing the act, making the omission or causing the event he had capacity to know that he ought not to do the act, make the omission or cause the event.

[18] It shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence.

[19] It is conclusively presumed that a child under the age of 10 years cannot commit an offence.

[20] A person under the age of 10 years cannot commit an offence.

[21] A person under the age of 10 years is not criminally responsible for any act or omission. A person under the age of 14 years is not criminally responsible for an act or omission, unless it is

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				1899, s29(1)[22]; *doli incapax*: Criminal Code Act 1899, s29(2).[23] Tasmania: Criminal Code Act 1924, s18(1)[24]; *doli incapax*: Criminal Code Act 1924, s18(2).[25]
Austria	14	16	-	Jugendgerichtsgesetz, 1988, §1(1-2) and 4. §1: Im Sinne dieses Bundesgesetzes ist 1. Unmündiger: wer das vierzehnte Lebensjahr noch nicht vollendet hat; 2. Jugendlicher: wer das vierzehnte, aber noch nicht das neunzehnte Lebensjahr vollendet hat. §4: (1) Unmündige, die eine mit Strafe bedrohte Handlung begehen, sind nicht strafbar. (2) Ein Jugendlicher, der eine mit Strafe bedrohte Handlung begeht, ist nicht strafbar, wenn 1. er aus bestimmten Gründen noch nicht reif genug ist, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln, 2. er vor Vollendung des sechzehnten Lebensjahres ein Vergehen begeht, ihn kein schweres Verschulden trifft und nicht aus besonderen Gründen die Anwendung des Jugendstrafrechts geboten ist, um den Jugendlichen von strafbaren Handlungen abzuhalten, oder 3. die Voraussetzungen des § 42 StGB vorliegen.
Azerbaijan	14[26]	16	-	Criminal Code, Art. 20 (1-2).[27] (1) The person who has reached age of 16, to time of committing a crime shall be subjected to the criminal liability. (2) The persons who have reached the age of 14, to time of committing a crime, shall be subjected to

proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

[22] A person under the age of 10 years is not criminally responsible for any act or omission.

[23] A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.

[24] No act or omission done or made by a person under 10 years of age is an offence.

[25] No act or omission done or made by a person under 14 years of age is an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make.

[26] Under the 2002 Law on "Commission on minors and the protection of the rights of the children," administrative commissions may consider the cases of all children younger than 14 years of age suspected of having committed crimes, and they may impose disciplinary measures on such children including confinement in "special correction schools." See Azerbaijan NGO Alliance for Children's Rights, *Juvenile Justice in Azerbaijan: NGO Alternative Report on Situation of Juvenile Justice System in Azerbaijan within the period of 1998-2005*, Baku, 2005; and Committee on the Rights of the Child, *Second periodic reports of States parties due in 1999: Azerbaijan*, CRC/C/83/Add.13, 7 April 2005, pars. 436-444.

[27] Unofficial translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
				the criminal liability for deliberate murder, deliberate causing of heavy or less heavy harm to health, kidnapping of the person, rape, violent actions of sexual nature, theft, robbery, extortion, illegal occupation of the automobile or other vehicle without the purpose of plunder, deliberate destruction or damage of property under aggravating circumstances, terrorism, capture of the hostage, hooliganism under aggravating circumstances, plunder or extortion of fire-arms, ammunition, explosives and explosives, plunder or extortion of narcotics or psychotropic substances, reduction unsuitability of vehicles or means of communication.
Bahamas	7	-	7-12	Penal Code, Ch. 84 of the 2001 Statute Law of the Bahamas, Sect. 91(1-2). (1) Nothing is an offence which is done by a person under seven years of age. (2) Nothing is an offence which is done by a person of or above seven and under twelve years of age, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct in the matter in respect of which he is accused.
Bahrain	0[28]	-	-	-
Bangladesh	9	-	9-12	Penal Code, as amended by Penal Code (Amendment) Act 2004, Sect. 82-83. Sect. 82: Nothing is an offense which is done by a child under nine years of age. Sect. 83: Nothing is an offense which is done by a child above nine years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.
Barbados	11	-	-	Juvenile Justice Act, 1999.[29]
Belarus	14	16	-	Criminal Code, as amended through 1 May 1994, Art. 10.[30] Criminal responsibility shall be applied

[28] Bahrain has held that its 1976 Penal Code, Article 32, establishes an MACR of 15 years, and that Juveniles Act No. 17 of 1976 provides non-criminal reform and protection responses to younger children. In reality, 15 years is the age of penal majority, and there is no lower age limit to what are clearly punitive responses, "such as detention in social welfare centres for up to 10 years for felonies (e.g. article 12 of the 1976 Juvenile Law)." The Committee on the Rights of the Child observed that there is no MACR. See Committee on the Rights of the Child, *Concluding observations: Bahrain*, CRC/C/15/Add.175, 7 February 2002, par. 47; and Committee on the Rights of the Child, *Initial reports of States parties due in 1994: Bahrain*, CRC/C/11/Add. 24, 23 July 2001.

[29] UNICEF Caribbean Area Office, *Situational Analysis of Children and Women in Twelve Countries of the Caribbean*, Barbados, 2001.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				to persons who had reached the age of sixteen before they committed a crime. Persons who have committed a crime at the age of between fourteen and sixteen shall be liable to criminal responsibility only for killing, encroachment upon the life of a militiaman, people's guard or other person, no less than for encroachment upon the life of their close relations, deliberate infliction of bodily injuries which have caused derangement of health, rape, robbery, robbery, stealing of property in especially grand amounts, distortion, theft, persistent or especially persistent hooliganism, deliberate destruction or damage of property which has entailed grave consequences, stealing of fire-arms, ammunitions or explosives, stealing of narcotic substances, as well as for deliberate committing of actions which may cause a crash of a train. . . .
Belgium	12	-	-	Loi relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait, as amended through 2006, Arts. 36(4°), 37(§1), 37(§2)(1er)(1°-3°), 37(§2)(2), 37(§ 2quater)(1er)(1°), and 37(§ 2quater)(3). Art. 36(4°): Le tribunal de la jeunesse connaît: . . . 4° des réquisitions du ministère public à l'égard des personnes poursuivies du chef d'un fait qualifié infraction, commis avant l'âge de dix-huit ans accomplis. Art. 37(§1): Le tribunal de la jeunesse peut ordonner à l'égard des personnes qui lui sont déférées, des mesures de garde, de préservation et d'éducation. . . . Art. 37(§2)(1er)(1°-3°): Il peut, le cas échéant, de façon cumulative: 1° réprimander les intéressés et, sauf en ce qui concerne ceux qui ont atteint l'âge de dix-huit ans, les laisser ou les rendre aux personnes qui en assurent l'hébergement, en enjoignant à ces dernières, le cas échéant, de mieux les surveiller ou les éduquer à l'avenir; 2° les soumettre à la surveillance du service social compétent; 3° les soumettre à un accompagnement éducatif intensif et à un encadrement individualisé d'un éducateur référent dépendant du service désigné par les communautés ou d'une personne physique répondant aux conditions fixées par les communautés. . . . Art. 37(§2)(2): Seules les mesures visées à l'alinéa 1er,

[30] Translation by SoftInform Engineering Information Company, Ltd., *JurInform Information System on Belarusian Legislation*, www.belarus.net/softinfo/lowcatal.htm.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
				1°, 2° et 3°, peuvent être ordonnées à l'égard des personnes de moins de douze ans (déférées du chef d'un fait qualifié infraction). En l'absence de mesures appropriées, le tribunal renvoie l'affaire au parquet qui peut à son tour la renvoyer aux services compétents des communautés. Art. 37(§ 2quater)(1er)(1°): § 2quater. Le tribunal ne peut ordonner la mesure de placement en institution communautaire publique de protection de la jeunesse visée au § 2, alinéa 1er, 8°, en régime éducatif ouvert, qu'à l'égard des personnes qui ont douze ans ou plus et qui: 1° soit, ont commis un fait qualifié infraction qui, s'il avait été commis par une personne majeure, aurait été de nature à entraîner, au sens du Code pénal ou des lois particulières, une peine d'emprisonnement correctionnel principal de trois ans ou une peine plus lourde. . . . Art. 37(§ 2quater)(3): Sans préjudice des conditions énumérées à l'alinéa 2, le tribunal peut ordonner la mesure de placement en institution communautaire publique de protection de la jeunesse visée au § 2, alinéa 1er, 8°, en régime éducatif fermé, à l'égard d'une personne âgée de douze à quatorze ans, qui a gravement porté atteinte à la vie ou à la santé d'une personne et dont le comportement est particulièrement dangereux.
Belize	9	-	9-12	Criminal Code, as amended through 2000, Sect. 25. (1) Nothing is a crime which is done by a person under nine years of age. (2) Nothing is a crime which is done by a person of nine and under twelve years of age who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct in the matter in respect of which he is accused.
Benin	13	-	-	l'Ordonnance 69-23 du 10 juillet 1969 relative au jugement des infractions commises par les mineurs de moins de 18 ans, Art. 23.[31]
Bhutan	10	-	-	Penal Code, 2004, §114. If the defendant is a child of 10 years and below, he shall not be held liable for any offence committed by him.
Bolivia	12	-	-	Código del Niño, Niña y Adolescente, 1999, Arts. 221-223. Art. 221: Se considera infracción a la conducta tipificada como delito en la Ley penal, en la que incurre como autor o participe un

[31] Sodjiedo Hounton, Rita-Félicité, "La Justice pour mineurs au Bénin: protection juridique et judiciaire de l'enfant au Bénin," in *Nouvelle Tribune Internationale des droits de l'enfant*, nos. 8-9, Défense des Enfants International - Belgique, September 2005.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
				adolescente y de la cual emerge una responsabilidad social. . . . Art. 222: La responsabilidad social se aplicará a los adolescentes comprendidos desde los doce años hasta los dieciséis años, al momento de la comisión de un hecho tipificado como delito en el Código Penal o leyes penales especiales siendo pasibles a las medidas socio-educativas señaladas en el presente Código. Art. 223: Las niñas y niños que no hubieren cumplido los doce años de edad, están exentos de responsabilidad social quedando a salvo la responsabilidad civil, la cual será demandada ante los tribunales competentes. . . .
Bosnia and Herzegovina	14	-	-	Criminal Code, 2003, Art. 8.[32] Criminal legislation of Bosnia and Herzegovina shall not be applied to a child who, at the time of perpetrating a criminal offence, had not reached fourteen years of age.
Botswana	8	12	8-14	Penal Code, Sect. 13.[33]
Brazil	12	-	-	Estatuto da Criança e do Adolescente, 1990, Arts. 2, 104-105. Art. 2: Considera-se criança, para os efeitos desta Lei, a pessoa até doze anos de idade incompletos, e adolescente aquela entre doze e dezoito anos de idade. Art. 104: São penalmente inimputáveis os menores de dezoito anos, sujeitos às medidas previstas nesta Lei. . . . Art. 105: Ao ato infracional praticado por criança corresponderão as medidas previstas no art. 101 [Medidas Específicas de Proteção].
Brunei Darussalam	7	-	7-12	Penal Code, Sects. 82-83.[34]

[32] Office of the High Representative Legal Department, www.ohr.int/ohr-dept/legal.
[33] Committee on the Rights of the Child, *Initial reports of States parties due in 1997: Botswana*, CRC/C/51/ADD.9, 27 February 2004, par. 86. Boys younger than 12 years of age are presumed to be incapable of having "carnal knowledge."
[34] Committee on the Rights of the Child, *Initial reports of States parties due in 1998: Brunei Darussalam*, CRC/C/61/Add.5, 13 March 2003, par. 292.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Bulgaria	14[35]	-	14-18	Penal Code, as amended through 2002, Arts. 31(2-3) and 32(1-2).[36] Art. 31(2) A juvenile who has accomplished 14 years of age but who has not accomplished 18 years of age shall be criminally responsible if he could have realised the quality and the importance of the act and handle his conduct. (3) The juveniles whose acts cannot be imputed shall be accommodated by a court decision in a corrective boarding school or in other suitable establishment if so required by the circumstances of the case. Art. 32(1) A juvenile who has not accomplished 14 years of age shall not be criminally responsible. (2) Applied, with respect of the juveniles who have committed social dangerous acts, can be respective corrective measures.
Burkina Faso	13[37]	-	13-18	Penal Code, 1996, Art. 74.[38]
Burundi	13	-	-	Décret-loi n°1/6 du 4 avril 1981 portant réforme du code pénal, Art. 14. Les infractions commises par les mineurs de moins de treize ans ne donnent lieu qu'à des réparations civiles.
Cambodia	0[39]	-	-	-
Cameroon	10	-	-	Code Pénal, Art. 80(1-2).[40] Art. 80(1): Le mineur

[35] Art. 32(2) of the Penal Code allows corrective measures, as defined under the Juvenile Delinquency Law, to be applied against children under 14 who have committed socially dangerous acts. Commissions for Prevention of Juvenile Delinquency may administratively order such measures, including deprivation of liberty in Social-pedagogic boarding schools for children as young as 7, and in Correctional boarding schools for children as young as 8. See, e.g., Bulgarian Helsinki Committee, *Memorandum of the Bulgarian Helsinki Committee*, Sofia, 17 October 2005, www.bghelsinki.org/index_en.html; Momchilov, Andrey, "Report on the Bulgarian juvenile justice system," in Institute for Penal Reform, *Materials of the Forum "Juvenile Justice in Eastern and South Eastern Europe": Chisinau, Republic of Moldova, September 14-16, 2005*, Chisinau, 2006; and National Statistical Institute of the Republic of Bulgaria, *Anti-Social Acts of Minor and Juvenile Persons in 2005*, 31 March 2006, www.nsi.bg/index_e.htm.

[36] Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

[37] Although children younger than 13 are technically not criminally responsible, Act No. 19/61 of 9 May 1961 on juvenile offenders and children at risk does not prevent their deprivation of liberty by law enforcement officials: "Act No. 19/61 does not regulate the police phase of the deprivation of liberty. No specific provision is made for police custody of minors. Ordinary law is applicable. Consequently, minors under the age of 13 who are presumed not to be responsible for their actions may be held in police custody even though the cells in police stations and gendarmeries are cramped and overcrowded. Detention conditions are harsh and the time limit for custody (72 hours) is often not respected." Committee on the Rights of the Child, *Initial reports of States parties due in 1997: Burkina Faso*, CRC/C/65/Add.18, 13 February 2002, par. 440.

[38] Committee on the Rights of the Child, *ibid.*, pars. 417 and 424.

[39] The Draft Penal Code, which is still being finalized, establishes a MACR of 14 years.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
				de dix ans n'est pas pénalement responsable. Art. 80(2): Le mineur de dix à quatorze ans pénalement responsable ne peut faire l'objet que de l'une ds mesures spéciales prévues par la loi.
Canada	12	-	-	Youth Criminal Justice Act, 2002, Arts. 2(1) and 14(1). Art. 2(1): The definitions in this subsection apply in this Act. . . . "child" means a person who is or, in the absence of evidence to the contrary, appears to be less than twelve years old. . . . "young person" means a person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old and, if the context requires, includes any person who is charged under this Act with having committed an offence while he or she was a young person or who is found guilty of an offence under this Act. Art. 14(1): . . . a youth justice court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he or she was a young person, and that person shall be dealt with as provided in this Act.
Cape Verde	16	-	-	-[41]
Central African Republic	13	-	-	Penal Code, Art. 49.[42]
Chad	13	-	-	Loi N° 007/PR/99 Portant procédure de poursuites et jugement des infractions commises par les mineurs de treize (13) à moins de Dix huit (18) ans, 1999, Arts. 1 and 22. Art. 1: Les mineurs de treize (13) à moins de dix huit (18) ans auxquels est imputée une infraction seront poursuivis devant les chambres pour enfants. Art. 22: Le mineur de 13 ans ne pourra être soumis, si la prévention est établie contre lui, qu'à des mesures de tutelle, de surveillance ou d'éducation prévues au Chapitre V de la présente loi. Aucune condamnation pénale ne pourra être prononcée contre lui.
Chile	14	16	-	Ley N° 20.084 que establece un sistema de responsabilidad penal de los adolescentes por infracciones a la ley penal, as amended through

[40] Défense des Enfants International – Section Cameroun, *Journées d'étude sur les enfants en conflit avec la loi et les enfants en difficulté au Cameroun: Rapport Général, 30-31 août et 1er septembre 1993, Yaoundé, Cameroun*, 1993.
[41] Committee on the Rights of the Child, *Periodic reports due in 1994: Cape Verde*, CRC/C/11/Add.23, 9 January 2001, par. 59.
[42] Committee on the Rights of the Child, *Initial reports of States parties due in 1994: Central African Republic*, CRC/C/11/Add.18, 18 November 1998, par. 7.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				2006, Arts. 1, 3, and 58. Art. 1: . . . . Tratándose de faltas, sólo serán responsables en conformidad con la presente ley los adolescentes mayores de dieciséis años y exclusivamente tratándose de aquéllas tipificadas en los artículos 494 números 1, 4, 5 y 19, sólo en relación con el artículo 477, 494 bis, 495 número 21 y 496 números 5 y 26 del Código Penal y de las tipificadas en la ley N° 20.000. En los demás casos se estará a lo dispuesto en la ley 19.968. Art. 3: La presente ley se aplicará a quienes al momento en que se hubiere dado principio de ejecución del delito sean mayores de catorce y menores de dieciocho años, los que, para los efectos de esta ley, se consideran adolescentes. . . . Art. 58: Si se sorprendiere a un menor de catorce años en la ejecución flagrante de una conducta que, cometida por un adolescente constituiría delito, los agentes policiales ejercerán todas las facultades legales para restablecer el orden y la tranquilidad públicas y dar la debida protección a la víctima en amparo de sus derechos. Una vez cumplidos dichos propósitos, la autoridad respectiva deberá poner al niño a disposición del tribunal de familia a fin de que éste procure su adecuada protección. En todo caso, tratándose de infracciones de menor entidad podrá entregar al niño inmediata y directamente a sus padres y personas que lo tengan a su cuidado y, de no ser ello posible, lo entregará a un adulto que se haga responsable de él, prefiriendo a aquéllos con quienes tuviere una relación de parentesco, informando en todo caso al Tribunal de Familia competente. . . .

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
China	14[43]	16	-	Criminal Code, 1997, Art. 17.[44] Anyone who has not reached the age of 14 shall not bear criminal responsibility. Anyone who has reached the age of 14 but not the age of 16 shall bear criminal responsibility for committing intentional homicide, intentionally inflict injury upon another person so as to cause serious injury or death of the person, or commits rape, robbery, drug-trafficking, arson, explosion or poisoning. Anyone who has reached the age of 16 and commits a crime shall bear criminal responsibility.
	Hong Kong: 10	-	10-14	Hong Kong Special Administrative Region (SAR): Juvenile Offenders Ordinance, as amended through 2003, Sect. 3, and common law. Juvenile Offenders Ordinance: It shall be conclusively presumed that no child under the age of 10 years can be guilty of an offence. Common law: *doli incapax* presumption.
	Macao: 12	-	-	Macao SAR: Decree-Law 65/99/M, 1999, Art. 6(1). O regime educativo é aplicável a menores que, tendo completado 12 anos e antes de perfazerem 16, pratiquem facto qualificado pela lei como crime, contravenção ou infracção administrativa e tem por finalidade a aplicação de medidas a tais menores, e a respectiva execução, tendo em conta as suas necessidades educativas.

[43] The *laodong jiaoyang* system (variously translated as re-education through labor, or reform through education, or juvenile criminal camps) is one of the administrative detention systems used to punish most minor offences without official charge, trial, or judicial review. A patchwork regulatory framework apparently restricts its use to children 13 and older, although in the past children as young as 11 were detained. Deprivation of liberty is currently possible for up to 4 years total, based in large part upon the discretion of public security officials. Re-education is formally justified as a child protection measure of assistance for reintegration into society, yet the United Nations Special Rapporteur on Torture has considered the system a form of inhuman and degrading treatment or punishment. See, inter alia, Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning Worst Forms of Child Labour Convention, 1999 (No. 182): China*, 2007; Keyuan, Zou, "The 'Re-Education Through Labour' System in China's Legal Reform," 12 *Criminal Law Forum* 459, 2001; Trevaskes, Susan, "Severe and Swift Justice in China," 47 *British Journal of Criminology* 23, 2007; and United Nations Commission on Human Rights, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to China*, E/CN.4/2006/6/Add.6, 10 March 2006.

[44] Zhou, Mi, and Shizhou Wang, "China," 2001, in Fijnaut, Cyrillus, and Frankk Verbruggen, eds., "Criminal Law," in Blanpain, Roger, ed., *International Encyclopaedia of Laws*, The Hague, Kluwer Law International, 2004.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Colombia	14	-	-	Código de la Infancia y la Adolescencia, 2006, Arts. 142-143 and 169.[45] Art. 142: . . . las personas menores de catorce (14) años, no serán juzgadas ni declaradas responsables penalmente, privadas de libertad, bajo denuncia o sindicación de haber cometido una conducta punible. La persona menor de catorce (14) años deberá ser entregada inmediatamente por la policía de infancia y adolescencia ante la autoridad competente para la verificación de la garantía de sus derechos de acuerdo con lo establecido en esta ley. . . . Art. 143: Cuando una persona menor de catorce (14) años incurra en la comisión de un delito sólo se le aplicarán medidas de verificación de la garantía de derechos, de su restablecimiento y deberán vincularse a procesos de educación y de protección dentro del Sistema Nacional de Bienestar Familiar, los cuales observarán todas las garantías propias del debido proceso y el derecho de defensa. . . . Art. 169: Las conductas punibles realizadas por personas mayores de catorce (14) años y que no hayan cumplido los dieciocho (18) años de edad, dan lugar a responsabilidad penal y civil, conforme a las normas consagradas en la presente ley.
Comoros	13; or 14-15 or physical maturity (boys) or marriage (girls)[46]	-	-	Criminal Code and Islamic law.

[45] Provisions on criminal responsibility in the *Código de la Infancia y la Adolescencia* progressively enter into force by judicial district between 1 January 2007 and 31 December 2009, substituting *situación irregular* provisions under the *Código del Menor, Decreto 2739 del 27 noviembre 1989*. See *Código de la Infancia y la Adolescencia*, Arts. 216-217, and *Decreto 4652* of 27 December 2006, Art. 2.

[46] Comoros has indicated that, as stipulated in the Criminal Code, its MACR is 13 years. However, the Criminal Code and Islamic law are both legally recognized sources, and there are no fixed age limits under Muslim law. Physical maturity or the age of 14-15 years confers criminal responsibility on boys, while marriage at any age confers criminal responsibility upon girls. Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Comoros (Additional Info from State Party)*, CRC/C/28/Add.13, 7 October 1998, pars. 52, 79, and 141-142.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Congo (Republic of the)	13[47]	-	-	Code de procédure pénale, 1963, Art. 686. 1o Le tribunal pour enfants et la cour criminelle des mineurs prononcent suivant les cas les mesures de protection, d'assistance et d'éducation qui semblent appropriées. 2o Ils peuvent cependant, lorsque les circonstances et la personnalité du délinquant leur paraissent l'exiger, prononcer à l'égard du mineur âgé de plus de treize ans une condamnation pénale conformément aux dispositions des articles 399 à 408.
Costa Rica	12	-	-	Ley de Justicia Penal Juvenil, 1996, Arts. 1 and 6. Art. 1: Serán sujetos de esta ley todas las personas que tengan una edad comprendida entre los doce años y menos de dieciocho años al momento de la comisión de un hecho tipificado como delito o contravención en el Código Penal o leyes especiales. Art. 6: Los actos cometidos por un menor de doce años de edad, que constituyan delito o contravención, no serán objeto de esta ley; la responsabilidad civil quedará a salvo y se ejercerá ante los tribunales jurisdiccionales competentes. . . .
Côte d'Ivoire	10	-	-	Code pénal, 1981, Art. 116. Les faits commis par un mineur de 10 ans ne sont pas susceptibles de qualification et de poursuites pénales. . . .
Croatia	14	-	-	Criminal Code, Art. 10, and Juvenile Courts Act, 1997, Art. 2.[48]

[47] Although apparently classified as protection, assistance, and education measures, children younger than 13 may be declared guilty, held in remand institutions, and placed in "a suitable educational or professional training establishment, or any public or private institution providing care for children, or in an appropriate boarding school for offenders of school age." See Committee on the Rights of the Child, *Initial reports of States parties due in 1999: Congo*, CRC/C/COG/1, 20 February 2006, pars. 428-430.

[48] Cvjetko, Bo_tica, "Croatia: Criminal Responsibility of Minors in the Republic of Croatia," 75 *International Review of Penal Law* (*Revue internationale de droit pénal*) 263, 2004.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Cuba	0[49]	-	-	Decreto- Ley No. 64 del Sistema para la Atención a Menores con Trastornos de Conducta del 30 de diciembre de 1982.
Cyprus	10	12	10-12	Criminal Code, as amended through 1999, Cap. 154, Sect. 14.[50]
Czech Republic	15	-	-	Law on the Responsibility of Youth for Criminal Acts and on Justice in Juvenile Matters, 2003.[51]
Democratic People's Republic of Korea	14	-	-	Criminal Law, as amended through 1995, Art. 14.[52]
Democratic Republic of the Congo	0	-	-	-[53]

[49] Cuba generally maintains that its MACR is 16, but this limit is actually the age of penal majority as stipulated in Penal Code Art. 16(2). Instead, the main juvenile justice legislation, *Decreto-Ley No. 64 del Sistema para la Atención a Menores con Trastornos de Conducta del 30 de diciembre de 1982*, does not contain any minimum age for its application. Under this system, relevant children are seen as offenders in conflict with the law, and administrative "prevention and social welfare commissions" may order their deprivation of liberty indefinitely in specialized re-education centers. In 1998, one NGO reported to the Committee on the Rights of the Child that almost 62,000 children were held in such institutions. See, inter alia, Coalition of Cuban American Women, *Cuban State and the Implementation on the Convention on the Rights of the Child*, Hialeah (Florida), 1998; Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Cuba*, CRC/C/8/Add.30, 15 February 1996; Romero, Lidia, and Luis Gómez, *La Política Cubana de Juventud Entre 1995 y 1999: Principales Características (La Experiencia del Pradjal en Cuba)*, La Habana, Centro de Estudios Sobre la Juventud, 2000; and Zaragoza Ramírez, Alina, and Bárbara Mirabent Garay, "Administración de justicia de menores: un desafío a la contemporaneidad," *Cubalex: Revista Electrónica de Estudios Jurídicos*, no. 9, July-September 1999.

[50] Government of Cyprus, *Second Periodic Report: Implementation of the Convention on the Rights of the Child: Answers to Questionnaire Dated 7 February 2003 CRC/C/Q/CYP/2*, 9 April 2003, at 66-67. Boys younger than 12 are presumed to be incapable of having "carnal knowledge."

[51] Válková, Helena, *New Juvenile Justice Law in the Czech Republic*, presented at the Conference of the European Society of Criminology, Amsterdam, August 25-28, 2004.

[52] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1997: Democratic People's Republic of Korea*, CRC/C/65/Add.24, 5 November 2003, par. 56.

[53] Otshudiin, Henri Wembolua, "L'anachronisme du Décret du 6 décembre 1950 sur l'enfance délinquante: cas du flou sur la majorité pénale en R.D.C.," in *Nouvelle Tribune Internationale des droits de l'enfant*, nos. 10-11, Défense des Enfants International - Belgique, December 2005.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Denmark	15[54]	-	-	Criminal Code, Sect. 15.[55]
Djibouti	13	-	-	Code pénal.[56]
Dominica	12	-	-	Children and Young Persons Act, 1970, Sect. 3.[57] It shall be conclusively presumed that no child under the age of twelve years can be guilty of an offence.
Dominican Republic	13	-	-	Código para el Sistema de Protección de los Derechos Fundamentales de Niños, Niñas y Adolescentes, 2003, Art. 223. . . . . Los niños y niñas menores de trece (13) años, en ningún caso, son responsables penalmente, por tanto no pueden ser detenidos, ni privados de su libertad, ni sancionados por autoridad alguna.
Ecuador	12	-	-	Código de la Niñez y Adolescencia, 2003, Arts. 4 and 307. Art. 4: Niño o niña es la persona que no ha cumplido doce años de edad. . . . Art. 307: Los niños y niñas son absolutamente inimputables y tampoco son responsables; por tanto, no están sujetos ni al juzgamiento ni a las medidas socio-educativas contempladas en este Código. . . .
Egypt	7	-	-	Penal Code, 1883, Art. 64.[58] L'enfant qui n'a pas atteint l'âge de sept ans révolus n'est pas mis en jugement.
El Salvador	12	-	-	Ley del Menor Infractor, 1994, Art. 2. Esta Ley se aplicará a las personas mayores de doce años de edad y menores de dieciocho. . . . Los menores que no hubieren cumplido doce años de edad y presenten una conducta antisocial no estarán sujetos

[54] The Administration of Justice Act (as amended by Act No. 443 of 9 June 2004), part 75b, grants police the authority to detain suspects as young as 12 years of age in waiting rooms, holding cells, etc. Detention may be extended for up to 24 hours, and solitary confinement is permitted for up to 6 hours. Police may also conduct wiretaps, surveillance, searches, and seizures against such children. See Committee on the Rights of the Child, *Written Replies by the Government of Denmark Concerning the List of Issues (CRC/C/Q/DNK/3) Received by the Committee on the Rights of the Child Relating to the Consideration of the Third Periodic Report Of Denmark*, CRC/C/RESP/91, 19 August 2005; and National Council for Children, *Report to the UN Committee on the Rights of the Child: Supplementary report to Denmark's 3rd periodic report*, Copenhagen, 2005.

[55] Langsted, Lars Bo, Peter Garde, and Vagn Greve, "Denmark," 2003, in Fijnaut, Cyrillus, and Frankk Verbruggen, eds., "Criminal Law," in Blanpain, Roger, ed., *International Encyclopaedia of Laws*, The Hague, Kluwer Law International, 2004.

[56] République de Djibouti, *Rapport périodique portant sur la mise en œuvre de la Convention relative aux droits de l'enfant*, CRC/C/DJI, April 2007, at 19.

[57] Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Dominica*, CRC/C/8/ADD.48, 15 October 2003, par. 69.

[58] Mostafa, Mahmoud M., *Principes de droit pénal des pays arabes*, Paris, Librairie Générale de Droit et de Jurisprudence, 1972.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				a este régimen jurídico especial, ni al común; están exentos de responsabilidad y, en su caso, deberá darse aviso inmediatamente al Instituto Salvadoreño de Protección al Menor para su protección integral.
Equatorial Guinea	16	-	-	-[59]
Eritrea	12	-	-	Transitional Penal Code, Art. 52.[60] Provision of this code shall not apply to children not having attained the age of 12 years. Such children are not deemed to be responsible for their acts under the law. Where an offence is committed by the child appropriate steps may be taken by the family, school or guardianship authority.
Estonia	7	-	-	Juvenile Sanctions Act, as amended through 2004, §1(1)-(2) and §2. §1(1) This Act provides sanctions applicable to minors and the competence of juvenile committees. §1(2) This Act applies to a minor: 1) who, at less than 14 years of age, commits an unlawful act corresponding to the necessary elements of a criminal offence prescribed by the Penal Code; 2) who, at less than 14 years of age, commits an unlawful act corresponding to the necessary elements of a misdemeanour prescribed by the Penal Code or another Act. . . . §2 For the purposes of this Act, a minor is a person between seven and eighteen years of age.
Ethiopia	9	-	-	Penal Code, 2004.[61]
Fiji	10	12	10-12	Penal Code, as amended through 2005, Sect. 14.[62] (1) A person under the age of ten years is not criminally responsible for any act or omission. (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. (3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.

[59] Committee on the Rights of the Child, *Compte rendu analytique de la 990e séance: Equatorial Guinea*, CRC/C/SR.990, 31 January 2005, par. 18.
[60] UNICEF Eritrea, correspondence with author, May 2002.
[61] Committee on the Rights of the Child, *Summary record of the 1162nd meeting (Chamber B): Ethiopia*, CRC/C/SR.1162, 21 September 2006, par. 49.
[62] These provisions are substantially repeated in the Juveniles Act, as amended through 2005, Sect. 29.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
Finland	15	-	-	Penal Code, as amended through 2003, Ch. 3, Sect. 4(1).[63] Conditions for criminal liability are that the offender had reached the age of fifteen years at the time of the act and is criminally responsible.
France	0[64]	-	0-18	Code Pénal, as amended through 2005, Art. 122-8. Les mineurs capables de discernement sont pénalement responsables des crimes, délits ou contraventions dont ils ont été reconnus coupables, dans des conditions fixées par une loi particulière qui détermine les mesures de protection, d'assistance, de surveillance et d'éducation dont ils peuvent faire l'objet. Cette loi détermine également les sanctions éducatives qui peuvent être prononcées à l'encontre des mineurs de dix à dix-huit ans ainsi que les peines auxquelles peuvent être condamnés les mineurs de treize à dix-huit ans, en tenant compte de l'atténuation de responsabilité dont ils bénéficient en raison de leur âge.
Gabon	13	-	-	Penal Code, Art. 56.[65]
Gambia	12	-	-	Children's Act, 2005, Sect. 209.[66] The minimum age of criminal responsibility is twelve years.
Georgia	12	14	-	Criminal Code, as amended through 2007.[67]
Germany	14	-	14-18	Strafgesetzbuch (Criminal Code), 1998, §19 and Jugendgerichtsgesetz (Youth Court Act), 1953, §1 and 3. Strafgesetzbuch §19[68]: Schuldunfähig ist,

[63] Unofficial translation by the Ministry of Justice, Finland.

[64] Note that all children deemed capable of discernment and found to have committed illegal acts are considered criminally responsible. The measures that such children may face vary according to their ages. The "loi particulière" to which the Code Pénal refers, the *Ordonnance relative à l'enfance délinquante* (as amended through March 2007), provides that adjudicated children of all ages are subject to "mesures de protection, d'assistance, de surveillance et d'éducation" (see, inter alia, Arts. 1-2). "Sanctions éducatives," which in certain cases deprive children of their liberty, are applicable to children ages 10 and older (Art. 15-1). "Peines," which also in certain cases deprive children of their liberty, are applicable to children 13 and older (Arts. 20-2 to 20-9).

[65] Committee on the Rights of the Child, *Initial reports of States parties due in 1996: Gabon*, CRC/C/41/Add.10, 13 July 2001, par. 76.

[66] Saine, Marie, *Protecting the Rights of Children in Trouble with the Law: A Case Study of South Africa and the Gambia*, thesis, Pretoria, University of Pretoria, 2005.

[67] New MACR provisions enter into force July 1, 2008, and create a lower MACR of 12 for premeditated murder, including under aggravated circumstances, intentional damage to health, rape, most types of robbery, assault, and possession of a knife. The pre-existing age limit of 14 continues to apply for other crimes. Human Rights Watch, *Georgia: Lowering the Age of Criminal Responsibility Flouts International Standards*, New York, 11 June 2007.

[68] "Whoever upon commission of the act is under fourteen years of age lacks capacity to be adjudged guilty." English translation by the German Federal Ministry of Justice; HTML edition by Schäfer, Lawrence, and Gerhard Dannemann, www.iuscomp.org/gla/statutes/StGB.htm.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				wer bei Begehung der Tat noch nicht vierzehn Jahre alt ist. Jugendgerichtsgesetz §1: (1) Dieses Gesetz gilt, wenn ein Jugendlicher oder ein Heranwachsender eine Verfehlung begeht, die nach den allgemeinen Vorschriften mit Strafe bedroht ist. (2) Jugendlicher ist, wer zur Zeit der Tat vierzehn, aber noch nicht achtzehn, Heranwachsender, wer zur Zeit der Tat achtzehn, aber noch nicht einundzwanzig Jahre alt ist. Jugendgerichtsgesetz §3[69]: Ein Jugendlicher ist strafrechtlich verantwortlich, wenn er zur Zeit der Tat nach seiner sittlichen und geistigen Entwicklung reif genug ist, das Unrecht der Tat einzusehen und nach dieser Einsicht zu handeln. . . .
Ghana	12	-	-	Criminal Code, as amended through 1998.[70]
Greece	13[71]	-	-	Penal Code, as amended through 2003, Arts. 121, 126-127.
Grenada	7	-	7-12	Criminal Code, Sect. 50 (1)-(2).[72]
Guatemala	13	-	-	Ley de protección integral de la niñez y adolescencia, 2003, Arts. 133 and 138. Art. 133: Serán sujetos de esta Ley todas las personas que tengan una edad comprendida entre los trece y menos de dieciocho años al momento de incurrir en una acción en conflicto con la ley penal o leyes especiales. Art. 138: Los actos cometidos por un menor de trece años de edad, que constituyan delito o falta no serán objeto de este título, la responsabilidad civil quedará a salvo y se ejercerá ante los tribunales jurisdiccionales competentes. Dichos niños y niñas serán objeto de atenciones médicas, psicológicas y pedagógicas que fueren

[69] "A young person is criminally responsible if at the time of the act he was mature enough, due to his moral and mental development, to understand the wrongfulness of the act and to act according to this understanding. . . ." English translation by Crofts, Thomas, *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law*, Aldershot (England), Ashgate, 2002, at 134.

[70] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1997: Ghana*, CRC/C/65/ADD.34, 14 July 2005, par. 49.

[71] The Penal Code holds that children younger than 13 are not criminally responsible. However, juvenile courts have jurisdiction over children ages 8 and older in conflict with the law (Penal Code, Arts. 121 and 126), and may order rehabilitation and therapeutic measures (Arts. 122-123, respectively) for children that may deprive them of their liberty. See, inter alia, World Organisation Against Torture, et al., *State Violence in Greece: An Alternative Report to the United Nations Committee Against Torture 33rd Session*, Athens, 2004.

[72] Committee on the Rights of the Child, *Initial reports of States parties due in 1992: Grenada*, CRC/C/3/Add.55, 28 November 1997, pars. 39 and 170.

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				necesarias bajo el cuidado y custodia de los padres o encargados y deberán ser atendidos por los Juzgados de la Niñez y la Adolescencia.
Guinea	13	-	-	Code pénal, 1998, Art. 64.[73] Les faits commis par un mineur de dix ans ne sont pas susceptibles de qualification et de poursuites pénales. Le mineur de treize ans bénéficie de droit, en cas de culpabilité, de l'excuse absolutoire de minorité. Les mineurs de dix à treize ans ne peuvent faire l'objet que de mesures de protection, d'assistance, de surveillance et d'éducation prévues par la loi. . . .
Guinea-Bissau	16	-	-	Penal Code, Arts. 10 and 12.[74]
Guyana	10	-	-	Juvenile Offenders Act.[75] It shall be conclusively presumed that no child under the age of 10 can be guilty of an offence.
Haiti	13	-	-	Code pénal, 1961, Art. 51.[76] Lorsque les circonstances de la cause et la personnalité du prévenu ou de l'accusé de plus de 13 ans exigent une condamnation pénale, le jugement sera prononcé ainsi qu'il suit, sous réserve, le cas échéant de la faculté pour le Juge compétent d'écarter l'excuse atténuante de minorité. . . .
Honduras	12	-	-	Código de la Niñez y de la Adolescencia, 1996, Art. 180. Los niños no se encuentran sujetos a la jurisdicción penal ordinaria o común y sólo podrá deducírseles la responsabilidad prevista en este Código por las acciones u omisiones ilícitas que realicen. Lo dispuesto en el presente Título únicamente se aplicará a los niños mayores de doce (12) años de edad que cometan una infracción o falta. Los niños menores de doce (12) años no delinquen. En caso de que cometan una infracción de carácter penal sólo se les brindara la protección especial que su caso requiera y se procurará su formación integral.

[73] Toure N'fa, Ousmane, and Fanta Oulen Bakary Camara, "Guinée," in Lachat, Michel, ed., *Séminaire de formation en justice des mineurs pour magistrats et autres acteurs en justice juvénile de l'Afrique francophone: Séminaire de Ouagadougou du 29 novembre au 3 décembre 2004: Working report*, Agence Intergouvernementale de la Francophonie, 2005, at 165.
[74] Committee on the Rights of the Child, *Initial reports of States parties due in 1992: Guinea-Bissau*, CRC/C/3/Add.63, 26 July 2001, par. 136.
[75] Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Guyana*, CRC/C/8/Add.47, 6 August 2003, pars. 382-383.
[76] Unofficial version compiled by the Canadian Ministry of Justice, www.oas.org/juridico/mla/fr/hti.

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Hungary	14	-	-	Criminal Code, 1978, Sect. 23.[77] The person who has not yet completed his fourteenth year when perpetrating an act, shall not be punishable.
Iceland	15	-	-	General Penal Code, as amended through 1 March 2004, Art. 14.[78] A person shall not be punished on account of an act committed before he or she attained the age of 15 years.
India	7	-	7-12	Penal Code, 1860, Sects. 82-82. Sect. 82: Nothing is an offence which is done by a child under seven years of age. Sect. 83: Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.
Indonesia	8	-	-	Juvenile Court Act, 1997, Art. 5.[79]
Iran (Islamic Republic of)	9/15[80]	-	-	Islamic Penal Code, 1991, Art. 49, and Civil Code, as amended through 1982, Art. 1210, Note 1. Penal Code: Les enfants, en cas de la commission d'une infraction, ne sont pas pénalement responsables. . . .[81] Civil Code: the age of majority for boys is fifteen lunar years and for girls nine lunar years.[82]
Iraq	9	-	-	Juvenile Welfare Act No. 76, 1983.[83]
Ireland	10	12	-	Children Act 2001, as amended by the Criminal Justice Act 2006, Sects. 52(1-3) and 76C. Sect. 52: (1) Subject to subsection (2), a child under 12 years of age shall not be charged with an offence. (2) Subsection (1) does not apply to a child aged 10 or 11 years who is charged with murder, manslaughter, rape, rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990 or

[77] Translation by the Trier Academy of European Law, www.era.int/domains/corpus-juris/public/texts/legal_text.htm.
[78] Official translation of the Icelandic Ministry of Justice and Ecclesiastical Affairs.
[79] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1997: Indonesia*, CRC/C/65/Add.23, 7 July 2003, par. 472.
[80] The MACR is 9 lunar years (8 years and 9 months) for girls and 15 lunar years (14 years and 7 months) for boys.
[81] Islamic Penal Code Art. 49, Note 1, defines "enfant" as anyone not having passed the age of "religious puberty" (*Bolug - é - sharii*), which is in turn defined by Civil Code Art. 1210, Note 1, as 15 lunar years for boys and 9 lunar years for girls. See Ardebili, Mohammad-Ali, and Ali-Hossein Nadjafi, "Iran: La responsabilité pénale des mineurs en droit iranien," 75 *International Review of Penal Law* (*Revue internationale de droit pénal*) 401, 2004.
[82] Translation by Alavi & Associates, www.alaviandassociates.com.
[83] Committee on the Rights of the Child, *Summary record of the 483rd meeting: Iraq*, CRC/C/SR.483, 30 September 1998, pars. 47-48; and UNICEF Middle East and North Africa Regional Office, "Juvenile Justice," in *Middle East and North Africa Child Protection Profile*, unpublished draft, Amman, 2001.

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				aggravated sexual assault. (3) The rebuttable presumption under any rule of law, namely, that a child who is not less than 7 but under 14 years of age is incapable of committing an offence because the child did not have the capacity to know that the act or omission concerned was wrong, is abolished. Sect. 76C: Where a child under 14 years of age is charged with an offence, the Court may, of its own motion or the application of any person, dismiss the case on its merits if, having had due regard to the child's age and level of maturity, it determines that the child did not have a full understanding of what was involved in the commission of the offence.
Israel	12 OPT[84]: 9	- -	- -	Penal Law, 1996, Sect. 34F, and OPT Child Law, 2005, Arts. 67-69.[85] Penal Law: A person is not criminally responsible for an act done by him before he has completed his twelfth year.[86]
Italy	14	-	14-18	Codice Penale, as of 1999, Arts. 97-98. Art. 97: Non è imputabile chi, nel momento in cui ha commesso il fatto, non aveva compiuto i quattordici anni. Art. 98: È imputabile chi, nel momento in cui ha commesso il fatto, aveva compiuto i quattordici anni, ma non ancora i diciotto, se aveva capacità d'intendere e di volere; ma la pena è diminuita. . . .
Jamaica	12	-	-	Juveniles Act, Sect. 3.[87] It shall be conclusively presumed that no child under the age of 12 years can be guilty of any offence.

[84] Occupied Palestinian Territory.
[85] Musleh, Dahab, and Katherine Taylor, *Child Protection in the Occupied Palestinian Territory: A National Position Paper*, Secretariat of the National Plan of Action for Palestinian Children, El Shurafeh, 2005; and UNICEF Middle East and North Africa Regional Office, *UN Study on Violence against Children: Regional Report: Middle East and North Africa Region*, draft, Amman, June 2005.
[86] Unofficial English translation. "Penal Law--Draft Proposal and New Code," 30 *Israel Law Review* 5, 1996, reproduced by Buffalo Criminal Law Center, State University of New York at Buffalo School of Law, http://wings.buffalo.edu/law/bclc/israeli.htm.
[87] Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Jamaica*, CRC/C/8/Add.12, 17 March 1994, pars. 19 and 28.

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Japan	11[88]	-	-	Juvenile Law, as amended through May 2007.[89]
Jordan	7	-	-	Juveniles Act, as amended through 2002, Art. 36.[90] Criminal proceedings shall not be instituted in respect of an offence committed by a person who was under seven years of age at the time the offence was committed.
Kazakhstan	14[91]	16	-	Criminal Code, as amended through 2004, Art. 15.[92] (1) A person shall be subject to criminal liability who reached sixteen years of age by the time of the commission of a given crime. (2) Persons, who reached fourteen years of age by the time of the commission of a crime, shall be subject to criminal liability for murder (Article 96),

[88] May 2007 amendments to the Juvenile Law will allow Family Courts to directly order their most severe disposition against children as young as 11 in conflict with the law – commitment to Juvenile Training Schools, which are supervised by the Ministry of Justice Correction Bureau. Previously, the minimum age for such placements was generally 14 years. Under the amendments, such children may also be subject to police questioning, searches, and seizures. The age limit of 14 years has also been frequently cited because, as permitted under Penal Code Art. 41, it is the lowest possible age for waiver to adult criminal court for certain serious crimes. See, inter alia, Ito, Masami, "Diet lowers incarceration age to 'about 12'," *The Japan Times*, 26 May 2007; Jin, Guang-Xu, "Japan: The Criminal Responsibility of Minors in the Japanese Legal System," 75 *International Review of Penal Law* (*Revue internationale de droit pénal*) 409, 2004; and "Juvenile crime wave prompts Justice Ministry crackdown," *The Japan Times*, 25 August 2004.

[89] Ito, *ibid*.

[90] Committee on the Rights of the Child, *Third periodic report of States parties due in 2003: Jordan*, CRC/C/JOR/3, 2 March 2006, par. 53.

[91] The Commentary to Art. 15 of the Criminal Code notes courts' authority under certain conditions to apply coercive measures of correctional education to children ages 11 and older, via placement in a special educational institution for up to three years. These institutions are reorganized correctional colonies, which were in essence juvenile prisons. In addition, Centers of temporary isolation, adaptation and rehabilitation for juveniles may admit children younger than the MACR, and as young as 3, who have committed acts harmful to the public. See Children's Fund of Kazakhstan, Kazakhstan International Bureau for Human Rights and Rule of Law, Center for Conflict Resolution, and Crisis Center for Women and Children and the Feminist League, *Alternative Report of Non-Governmental Organizations of Kazakhstan with Commentaries to the Initial Report of the Government of Kazakhstan on Implementation of the Convention on the Rights of the Child Ratified by Kazakhstan in 1994*, Almaty, 2002; Committee on the Rights of the Child, *Second and third periodic reports of States parties due in 2006: Kazakhstan*, CRC/C/KAZ/3, 23 August 2006, pars. 28 and 458-466; Kazakhstan NGOs' Working Group "On Protection of Children's Rights," *Alternative Report of Non-Governmental Organizations with the Comments to the Second and Third Reports of the Government of the Republic of Kazakhstan Implementation of the Convention on the Rights of the Child as well as Recommendations of the UN Committee on the Rights of the Child*, Almaty, 2006; and UNICEF Kazakhstan, correspondence with author, May 2001.

[92] Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

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				deliberate causation of serious damage to health (Article 103), deliberate causation of medium gravity damage to health under aggravated circumstances (Article 104, the second part), rape (Article 120), forcible acts of a sexual character (Article 121), kidnapping (Article 125), theft (Article 175), robbery (Article 178), brigandage (Article 179), extortion (Article 181), illegal occupation of an automobile or other transport vehicle without the purpose of theft under aggravated circumstances (Article 185, the second, third, and fourth parts), deliberate destruction or damage to property under aggravating circumstances (Article 187, the second and third parts), terrorism (Article 233), capture of a hostage (Article 234), deliberately false notice of an act of terrorism (Article 242), theft or extortion of arms, ammunition, explosive materials, and explosion devices (Article 255), hooliganism under aggravating circumstances (Article 257, the second and third parts), vandalism (Article 258), theft or extortion of drugs or psychotropic substances (Article 260), desecration of the bodies of the deceased and places of burial under aggravated circumstances (Article 275, the second part), and deliberate spoilage of transport vehicles or communications ways (Article 299). (3) If a minor reached the age stipulated in the first and second parts of this Article, but during the commission of a lesser or medium gravity crime, due to lagging behind in psychical development which is not associated with a mental disorder, could not be fully aware of the actual character or public danger of his acts (omission of acts), or could not guide them, then he shall not be subject to criminal liability.
Kenya	8	12	8-12	Penal Code, s. 14(1-2).[93]
Kiribati	10	12	10-14	Penal Code, as amended through 1999, Sect. 14. (1) A person under the age of 10 years is not criminally responsible for any act or omission. (2) A person under the age of 14 years is not criminally responsible for an act or omission, unless it is

[93] Situma, Francis D.P., "Kenya," 1999, in Fijnaut, Cyrillus, and Frankk Verbruggen, eds., "Criminal Law," in Blanpain, Roger, ed., *International Encyclopaedia of Laws*, The Hague, Kluwer Law International, 2004. Boys younger than 12 are irrebuttably presumed to be incapable of having "carnal knowledge," although they may be convicted of indecent assault if proved to have known that the act was morally wrong.

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				proved that at the time of doing the act or making the omission be had capacity to know that he ought not to do the act or make the omission. (3) A male person under the age of 12 years is presumed to be incapable of having sexual intercourse.
Kuwait	7	-	-	Penal Code, 1960, Art. 18.[94] Any one who, at the time of committing an offence, was under 7 years of age shall not be liable to criminal prosecution.
Kyrgyzstan	14[95]	16	-	Criminal Code, 1998, Art. 18.[96] (1) The person is subject to the criminal responsibility if at the moment of committing a crime he has reached the age of 16. (2) The person who has reached 14 years is subject to criminal responsibility in case of murder; deliberate "painful and more painful crimes"; kidnapping; rape; violent sexual actions; theft; rustler (cattle stealing); robbery; stealing property in a large quantity; extortion; car-stealing; deliberate arson; terrorism; capture of a hostage; hooliganism; vandalism; stealing or extortion with fire-arms; illegal drugs: producing possession, distribution and selling; stealing or extortion for drugs.
Lao People's Democratic Republic	15[97]	-	-	Penal Code, Art. 17.[98]
Latvia	14	-	-	Criminal Law, as amended through 2004, Sect. 11.[99] A natural person may be held criminally

[94] Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Kuwait*, CRC/C/8/Add.35, 9 December 1996, par. 22.

[95] Special administrative bodies, known as Commissions on Minors' Affairs, have jurisdiction over children younger than 14 who are in conflict with the law. These Commissions may place children from the age of 11 in "special correctional schools" for 1 to 5 years, in effect depriving them of their liberty. See Meuwese, Stan, ed., *KIDS BEHIND BARS: A study on children in conflict with the law: towards investing in prevention, stopping incarceration and meeting international standards*, Amsterdam, Defence for Children International The Netherlands, 2003; and Youth Human Rights Group, *Alternative NGO Report to the United Nations Committee on the Rights of the Child in relation to the examination of the Second periodic report by the Kyrgyz Republic on the implementation of the UN Convention on the Rights of the Child*, Bishkek, 2004.

[96] Meuwese, *ibid*.

[97] Special measures are applied under the Penal Code against children at least as young as 12, including deprivation of liberty in custodial re-education institutions. See Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Lao People's Democratic Republic*, CRC/C/8/Add.32, 24 January 1996, pars. 161 and 166; and UNICEF East Asia and Pacific Regional Office, *Overview of Juvenile Justice in East Asia and the Pacific Region*, Bangkok, 2001.

[98] Committee on the Rights of the Child, *ibid*., pars. 43 and 161.

[99] Translation by the Translation and Terminology Centre, www.ttc.lv, 2004.

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				liable who, on the day of the commission of a criminal offence, has attained fourteen years of age. A juvenile, that is, a person who has not attained fourteen years of age, may not be held criminally liable.
Lebanon	7	-	-	Law No. 422 for the Protection of Juveniles in Conflict with the Law or at Risk, 2002, Art. 3.[100]
Lesotho	7	-	7-14	Common law.[101]
Liberia	7	-	-	Juvenile Court Procedural Code, 1972, Sect. 11.11.[102]
Libyan Arab Jamahiriya	7[103]	-	-	Penal Code, Arts. 80 and 150-151.
Liechten-stein	14	-	-	Jugendgerichtsgesetz (Juvenile Court Act), 1988, §2(1-2). In diesem Gesetz werden genannt: 1. Personen, die zwar das vierzehnte, aber noch nicht das achtzehnte Lebensjahr vollendet haben: Jugendliche. 2. mit gerichtlicher Strafe bedrohte Handlungen und Unterlassungen, die von Jugendlichen begangen werden: Jugendstraftaten.
Lithuania	14	16	-	Criminal Code, 2003, Art. 13.[104]
Luxembourg	0[105]	-	-	Loi relative à la protection de la Jeunesse, as

[100] Committee on the Rights of the Child, *Third periodic reports of States parties due in 2003: Lebanon*, CRC/C/129/Add.7, 25 October 2005, pars. 500 and 502.
[101] Committee on the Rights of the Child, *Initial reports of States parties due in 1994: Lesotho*, CRC/C/11/Add.20, 20 July 1998, par. 26.
[102] American Bar Association Africa Law Initiative and UNICEF, *Assessment of the Liberian Juvenile Justice System*, Monrovia, 2006, at 21.
[103] Although Libya generally maintains that its MACR is 14 years, relevant Penal Code articles provide that children between 7 and 14 who are proven culpable of acts classified as misdemeanours or felonies may be the subject of preventive measures, which include commitment for a period of less than one year to a juvenile education and guidance centre. See, inter alia, Committee on the Rights of the Child, *Second periodic reports of States parties due in 2000: Libyan Arab Jamahiriya*, CRC/C/93/Add.1, 19 September 2002, pars. 29-30 and 76.
[104] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1999: Lithuania*, CRC/C/83/Add.14, 15 July 2005, par. 533.
[105] Luxembourg holds that 16 years is the lowest age for potential criminal responsibility (*Loi relative à la protection de la Jeunesse*, Art. 32), that this limit refers strictly to adult criminal court, and that only protection measures of care, therapy, and education are available for younger children. This claim implies that the age of penal majority and the MACR coincide at 16 years. However, several of the relevant juvenile court measures indicate a penal-correctional response to children's actions without any lower age limit. These may deprive children of their liberty, and in some cases, solitary confinement may be ordered for up to 10 consecutive days as a disciplinary sanction. See, e.g., Art. 6: "Si une mesure de placement dans un établissement ordinaire de garde, d'éducation ou de préservation est inadéquate en raison de la mauvaise conduite ou du comportement dangereux du mineur, le tribunal ordonne son internement dans un établissement disciplinaire de l'Etat." See also Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Luxembourg*, CRC/C/15/Add.250, 31 March 2005.

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				amended through 1995, Arts. 2-4. (2) Le mineur âgé de moins de dix-huit ans accomplis au moment du fait, auquel est imputé un fait constituant une infraction d'après la loi pénale, n'est pas déféré à la juridiction répressive, mais au tribunal de la jeunesse qui prend à son égard une des mesures prévues à l'article 1er. Si le mineur devient majeur, soit avant une procédure tendant à l'application des mesures prévues à l'article 1er ait été engagé, soit pendant la durée de cette procédure, le tribunal de la jeunesse peut prendre une des mesures prévues, soit à l'article 1er sous 3° et 4°, soit à l'article 6, pour un terme ne dépassant pas les limites fixées aux articles 3° et 4°. (3) Si le mineur a commis un fait qualifié délit, le tribunal de la jeunesse peut, s'il prend l'une des mesures prévues aux articles 1er, 5 et 6, prolonger cette mesure au-delà de sa majorité pour un terme qui ne peut dépasser sa vingt et unième année. (4) Si le mineur a commis un fait qualifié crime punissable de la réclusion, le tribunal de la jeunesse peut, s'il prend l'une des mesures prévues aux articles 1er, 5 et 6, prolonger cette mesure au-delà de sa majorité pour un terme qui ne peut dépasser sa vingt-cinquième année. Si le mineur a commis un fait qualifié crime punissable des travaux forcés, le tribunal de la jeunesse peut, s'il prend l'une des mesures prévues aux articles 1er, 5 et 6, prolonger cette mesure au-delà de sa majorité pour un terme de vingt ans au maximum.
Madagascar	13	-	13-18	Ordonnance 62-038 du 19 septembre 1962 sur la protection de l'enfance, Arts. 6-7, 35-37, 43-46. Art. 6: Si le mineur est âgé de moins de treize ans, il ne pourra faire l'objet que d'une admonestation du tribunal de simple police. Art. 7: Si le mineur est âgé de plus de treize ans et de moins de dix-huit ans et si la prévention est établie, le tribunal de simple police prononcera la peine d'amende prévue par la loi. . . . Art. 35: Si la prévention est établie à l'égard d'un mineur de treize ans, le tribunal pour enfants ne pourra prendre à son encontre qu'une simple mesure éducative : remise aux parents, au tuteur, à la personne qui en avait la garde ou à une personne digne de confiance. Art. 36: Si la prévention est établie à l'égard d'un mineur de treize à seize ans, le tribunal pour enfants délibérera sur la question de sa responsabilité pénale : - Si celle-ci est retenue, l'excuse atténuante de minorité jouera de plein droit : la peine prononcée contre le

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				mineur ne pourra s'élever au-dessus de la moitié de celle à laquelle il aurait été condamné s'il avait été majeur au moment de l'infraction ; - Si au contraire, l'irresponsabilité pénale est admise, le tribunal pour enfants ordonnera, soit l'une des mesures éducatives visées à l'article précédent, soit le placement du mineur dans un centre de rééducation pour une période déterminée, qui ne pourra excéder l'époque où l'intéressé aura atteint l'âge de vingt et un ans. Art. 37: Si la prévention est établie à l'égard d'un mineur de seize à dix-huit ans, les dispositions de l'article 36 seront applicables. Toutefois, le tribunal pour enfants aura la faculté d'écarter, par décision spéciale et motivée, l'excuse atténuante de minorité. Art. 43: Si l'accusé est mineur de treize ans, les mesures éducatives de l'article 35 pourront seules être prescrites. Art. 44: Si l'accusé a plus de treize ans et moins de seize ans et si son irresponsabilité pénale est admise, la cour criminelle des mineurs prononcera les mesures éducatives prévues à l'article 36, paragraphe 3. Art. 45: Si la cour criminelle des mineurs retient la responsabilité pénale d'un mineur de treize à seize ans, l'excuse atténuante de minorité sera de droit. . . . Art. 46: Si l'accusé a plus de seize ans et moins de dix-huit ans, les dispositions des deux articles précédents seront applicables. Toutefois, la cour criminelle des mineurs aura la faculté d'écarter, par décision spéciale et motivée, l'excuse atténuante de minorité. . . .
Malawi	7	12	7-12	Penal Code, Sect. 14.[106]
Malaysia	0[107]	puberty/ 10/13	10-12	Essential (Security Cases) Regulations, 1975, Sect. 3,[108] Syariah Criminal Offences (Federal

[106] Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Malawi*, CRC/C/8/Add.43, 26 June 2001, par. 56. The Penal Code also holds that boys younger than 12 are presumed incapable of having "carnal knowledge." See Committee on the Rights of the Child, *Written Replies by the Government of Malawi Concerning the List of Issues (CRC/C/Q/MALA/1) Received by the Committee on the Rights of the Child Relating to the Consideration of the Initial Report of Malawi*, no document number, 22 January 2002 (date received), at 19.

[107] Among explanations on various provisions regarding children and responsibility, Malaysia has suggested that Penal Code Section 82 establishes an MACR of 10 years. Other provisions clearly set a lower age threshold. Committee on the Rights of the Child, *Initial report of States parties due in 1997: Malaysia*, CRC/C/MYS/1, 22 December 2006, par. 131(f).

[108] Hussin, Nasimah, *Juvenile Delinquencies in Malaysia: Legal Provisions and Prospects for Reforms*, paper presented at 4th World Congress on Family Law and Children's Rights, Cape Town, South Africa, 20–23 March 2005, at footnote 16.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				Territories) Act, 1997, Sects. 2(1) and 51,[109] Syariah Criminal Procedure (Federal Territories) Act, 1997, Sect. 2(1), Evidence Act, 1950, Sect. 113,[110] and Penal Code, Sects. 82-83.[111] Essential (Security Cases) Regulations Sect. 3: Where a person is accused or charged with a security offence, he shall, regardless of his age, be dealt with and tried in accordance with the provisions of these Regulations and the Orders made thereunder, and the Juvenile Courts Act 1947 shall not apply to such a person. Syariah Criminal Offences (Federal Territories) Act Sect. 2(1): In this Act, unless the context otherwise requires . . . "*baligh*" means having attained the age of puberty according to Islamic Law. Sect. 51: Nothing is an offence which is done by a child who is not *baligh*. Syariah Criminal Procedure (Federal Territories) Act Sect. 2(1): In this Act, unless the context otherwise requires . . . "youthful offender" means an offender above the age of ten and below the age of sixteen years.[112] Evidence Act, 1950, Sect. 113: It shall be an irrebuttable presumption of law that a boy under the age of thirteen years is incapable of committing rape. Penal Code Sect. 82: Nothing is an offence which is done by a child under ten years of age. Sect. 83: Nothing is an offence which is done by a child above ten years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.
Maldives	puberty[113]	10/15	-	Regulation on Conducting Trials, Investigations and Sentencing Fairly for Offences Committed by

[109] Respective state laws reproduce these provisions as well as that of Sect. 1(2)(b), which holds that the act only applies "to persons professing the religion of Islam." See Committee on the Rights of the Child, *Initial report of States parties due in 1997: Malaysia*, CRC/C/MYS/1, 22 December 2006, par. 131(h-i).

[110] Hussin, *supra* note 108, at 9.

[111] Law Reform Commission of Hong Kong, *Report on the Age of Criminal Responsibility in Hong Kong*, Wanchai, 2000.

[112] This provision apparently signifies that children are assumed to bear criminal responsibility, regardless of physical signs of puberty, upon attaining the age of 10 years. See Committee on the Rights of the Child, *supra* note 107, par. 131(i).

[113] Maldives has described its MACR as 10 years under Art. 4(a) of the Regulation on Conducting Trials, Investigations and Sentencing Fairly for Offences Committed by Minors. However, this same Regulation attributes criminal responsibility upon puberty, without consideration for age, for certain offences. Committee on the Rights of the Child, *Second and third periodic reports of States parties due in 1998 and 2003: Maldives*, CRC/C/MDV/3, 10 April 2006.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
				Minors, 2006, Arts. 4-6. Art. 4: (a) Any child up to age of 10 years shall not be held criminally liable for any offence. (b) However, if the child of the age referred to in Clause 4 (a) has attained physical maturity [*baligh'*], the child shall bear criminal liability amongst the offences stated in Clause 5 (a) and (b) for which *hadh'* is prescribed in *Sharia'*. Art. 5: A minor from attainment of 10 years of age till completion of 15 years of age shall be liable to bear criminal responsibility only if the minor commits an offence specified below. (a) Amongst the offences for which *hadh'* is prescribed in Islam; (1) Apostasy. (2) Revolution against the state. (3) Fornication. (4) Fallaciously accusing a person of fornication. (5) Consumption of alcohol. (b) Unlawful intentional killing of human beings, other offences relating to homicide and participation therein. (c) All offences related to drugs. Art. 6: Children from attainment of 15 years of age till 18 years of age shall bear criminal liability in respect of all offences committed by them.
Mali	13	-	13-18	Loi portant sur la minorité pénale et institution de juridictions pour mineurs, 2001, Art. 2, and Code de protection de l'enfant, 2002, Art. 98. Loi portant sur la minorité pénale et institution de juridictions pour mineurs: Lorsque le prévenu ou l'accusé aura moins de treize (13) ans, il sera relaxé ou acquitté, comme ayant agi sans discernement. Lorsque le prévenu ou l'accusé aura plus de treize (13) ans et moins de dix-huit (18) ans, il sera relaxé ou acquitté s'il est décidé qu'il a agi sans discernement. Dans les cas prévus aux alinéas précédents le mineur sera remis à ses parents ou à une institution d'éducation spécialisée publique ou privée pour le temps que le jugement déterminera et qui, toutefois, ne pourra excéder la date de ses dix-huit (18) ans. . . . Code de protection de l'enfant: L'enfant âgé de moins de treize ans est présumé irréfragablement n'avoir pas la capacité d'enfreindre la loi pénale, cette présomption devient réfragable pour les enfants âgés de plus de treize ans et de moins de dix-huit ans. Lorsque le prévenu ou l'accusé aura moins de 13 ans, il sera relaxé ou acquitté comme ayant agi sans discernement. Lorsque le prévenu ou l'accusé aura plus de 13 ans et moins de 18 ans, il sera relaxé ou acquitté s'il est décidé qu'il a agi sans discernement. Dans les cas prévus aux alinéas précédents, le mineur sera remis à ses parents ou à

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				une institution d'éducation spécialisée publique ou privée pour le temps que le jugement détermine et qui, toutefois, ne pourra excéder l'âge de ses 18 ans.
Malta	9	-	9-14	Criminal Code, as amended through 2004, Arts. 35(1-2) and 36. Art. 35: (1) Minors under nine years of age shall be exempt from criminal responsibility for any act or omission. (2) Minors under fourteen years of age shall likewise be exempt from criminal responsibility for any act or omission done without mischievous discretion. Art. 36: Saving the powers of the Minister under the Children and Young Persons (Care Orders) Act, minors under the age of fourteen but over nine who, acting with a mischievous discretion, shall commit an offence, shall be liable on conviction to the punishments established for contraventions. . . .
Marshall Islands	0[114]	-	-	Revised Code, 2004, Title 26 Sects. 303(2-3) and 307. Sect. 303(2-3): As used in this Chapter . . . (2) 'child' means any natural person under the age of eighteen (18) years; and (3) 'delinquent child' includes any child: (a) who violates any law of the Republic, except that a child who violates any traffic law or regulation shall be designated as a 'juvenile traffic offender' and shall not be designated as a delinquent unless it be so ordered by the court after hearing the evidence; (b) who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient; (c) who is a habitual truant from home or school; or (d) who deports himself so as to injure or endanger the morals or health of himself or others.. Sect. 307: A person adjudged to be a delinquent child may be confined in such place, under such conditions, and for such period as the court deems the best interests of the child require, not exceeding the period for which he might have been confined if he were not treated as a 'juvenile offender' under this Chapter.

[114] Marshall Islands describes its MACR as 10 years according to Criminal Code Section 107. However, juvenile delinquency statutes establish procedures to adjudicate children as delinquent, without any lower age limit, and to order their deprivation of liberty as a consequence. The Committee on the Rights of the Child observed that there is no MACR. Committee on the Rights of the Child, *Concluding observations: Marshall Islands*, CRC/C/MHL/CO/2, 2 February 2007; and Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Marshall Islands*, CRC/C/28/Add.12, 18 November 1998.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
Mauritania	12	-	12-16	Criminal Code, Art. 61.[115]
Mauritius	0[116]	-	-	Criminal Code, Sects. 44-45.
Mexico	12	-	-	Constitución Política de los Estados Unidos Mexicanos, as amended through 2006, Art. 18. . . . . La Federación, los Estados y el Distrito Federal establecerán, en el ámbito de sus respectivas competencias, un sistema integral de justicia que será aplicable a quienes se atribuya la realización de una conducta tipificada como delito por las leyes penales y tengan entre doce años cumplidos y menos de dieciocho años de edad, en el que se garanticen los derechos fundamentales que reconoce esta Constitución para todo individuo, así como aquellos derechos específicos que por su condición de personas en desarrollo les han sido reconocidos. Las personas menores de doce años que hayan realizado una conducta prevista como delito en la ley, solo serán sujetos a rehabilitación y asistencia social. . . .
Micronesia (Federated States of)	0[117]	-	-	Laws of the Federated States of Micronesia, as amended through 1999, Title 12 §1102 and 1105.[118] §1102: As used in this Title, "delinquent child" includes any child: (1) who violates any Trust Territory or district law, except that a child who violates any traffic law or regulation shall be designated as a "juvenile traffic offender" and shall not be designated as a delinquent unless it be so ordered by the court after hearing the evidence; or

[115] Compare various documents of the Committee on the Rights of the Child: *Initial reports of States parties due in 1993: Mauritania*, CRC/C/8/Add.42, 10 January 2001, pars. 25-27; *Compte rendu analytique de la 723e séance: Mauritania*, CRC/C/SR.723, 3 October 2001, par. 35; and *Summary record of the 724th meeting: Mauritania*, CRC/C/SR.724, 4 October 2001, par. 19.

[116] Children younger than 14 that the court deems not capable of discernment, apparently without any lower age limit at all, may be sent under certain circumstances to a correctional institution until their eighteenth birthdays. The court may place children deemed capable of discernment, again without any lower age limit, in a correctional institution. See Committee on the Rights of the Child, *Second periodic reports of States parties due in 1997: Mauritius*, CRC/C/65/ADD.35, 19 July 2005, pars. 125 and 477-478.

[117] Micronesia has suggested that the minimum age for penal majority under the Laws of the Federated States of Micronesia (Title 12 §1101), 16 years, is also its MACR. However, juvenile delinquency statutes establish procedures to adjudicate children as delinquent, without any lower age limit, and to order their deprivation of liberty as a consequence. The Committee on the Rights of the Child observed that there is no clearly defined MACR. Committee on the Rights of the Child, *Concluding observations: Micronesia (Federated States of)*, CRC/C/15/Add.86, 4 February 1998; and Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Micronesia (Federated States of)*, CRC/C/28/Add.5, 17 June 1996.

[118] The state governments have parallel provisions in their respective codes. See http://fsmlaw.org.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				(2) who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient; or (3) who is a habitual truant from home or school; or (4) who deports himself so as to injure or endanger the morals or health of himself or others. §1105: A person adjudged to be a delinquent child may be confined in such place, under such conditions, and for such period as the court deems the best interests of the child require, not exceeding the period for which he might have been confined if he were not treated as a juvenile offender under this Chapter.
Moldova	14	16	-	Criminal Code, 2002, Art. 21(1).[119] Subject to criminal responsibility are liable natural persons who, at the moment of perpetrating grave, major or exceptionally grave offenses have reached the age of 14 years as well as persons who at the moment of perpetration minor or less grave offenses have reached the age of 16 years, as well as legal entities.
Monaco	13	-	-	Criminal Code.[120]
Mongolia	14	16	-	Criminal Code, Art. 9(1-2).[121]
Montenegro	14	-	-	Criminal Code, as amended through 2004, Art. 80.[122] Criminal sanctions can not be applied to a juvenile who at the time of the commission of a criminal offence was under the age of 14 fourteen years (a child).
Morocco	12	-	-	Penal Code, Art. 138.[123]

[119] Translation by Transparency International – Moldova, www.transparency.md/laws.htm.
[120] Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Monaco*, CRC/C/28/Add.15, 17 July 2000, par. 37.
[121] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1997: Mongolia*, CRC/C/65/Add.32, 15 November 2004, par. 66.
[122] Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.
[123] Committee on the Rights of the Child, *Second periodic reports of States parties due in 2000: Morocco*, CRC/C/93/Add.3, 12 February 2003, par. 160.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Mozam-bique	0[124]	-	-	Statute of Legal Aid to Minors, Art. 16.
Myanmar	7	-	7-12	Child Law, 1993, Art. 28. (a) Nothing is an offence which is done by a child under 7 years of age; (b) Nothing is an offence which is done by a child above 7 years of age and under 12 who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.
Namibia	7	-	7-14	Common law.[125]
Nauru	0[126]	-	-	Criminal Justice Act.
Nepal	0[127]	10	-	Terrorist and Disruptive Activities (Control and Punishment) Ordinance, 2004,[128] and Children's Act, 1992, Art. 11(1). Children's Act Art. 11(1): If the Child below the age of 10 years commits an at which is an offence under law, he shall not be liable to any type of punishment.
Netherlands	12[129]	-	-	Wetboek van Strafrecht (Penal Code), as amended

[124] Mozambique has alternatively suggested that its MACR is 10 years (Penal Code Art. 43) or 16 years (Penal Code Art. 42), stating in particular that children younger than 16 may only face punishment vis-à-vis protection, assistance or educational measures, and that they are not subject to punishment depriving them of their liberty. Instead, 16 years appears to be the age of penal majority, while younger children fall under the jurisdiction of the Juvenile Court as stipulated in the Statute of Legal Aid to Minors. Art. 16 of this Statute allows corrective measures, including measures of deprivation of liberty, to be ordered for children who have committed acts deemed crimes or misdemeanours in the penal law. See Committee on the Rights of the Child, *Initial reports of States parties due in 1996: Mozambique*, CRC/C/41/Add.11, 14 May 2001.

[125] Zimba, R.F., and E. Zimba, *Review of the compliance of Namibian domestic legislation to the Convention on the Rights of the Child*, Windhoek, UNICEF and the Ministry of Women Affairs and Child Welfare, 2004.

[126] Children ages 14 and older are held criminally responsible in adult court, although the court also has the discretion to try younger children accused of murder. In general, children under the age of 14 are considered minors and their criminal responsibility is decided on a case-by-case basis without any lower age limit. Russell Kun, Principal Legal Adviser, Department of Justice, telephone interview with author, 19 September 2002.

[127] Nepal has noted its MACR as 10 years according to Children's Act Art. 11, but the Terrorist and Disruptive Activities (Control and Punishment) Ordinance undermines this age limit for certain offences. Committee on the Rights of the Child, *Second periodic report of States parties due in 1997: Nepal*, CRC/C/65/Add.30, 3 December 2004.

[128] This Ordinance applies to children of all ages. See UNICEF Regional Office for South Asia, *Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law*, Kathmandu, 2006.

[129] Children younger than 12 may be deprived of their liberty on the basis of family law supervision orders in the same facilities and units as older children detained under criminal law. There have been reports of several such cases involving very young children. Legislative efforts are apparently underway to provide separate facilities for the respective categories of children. See Meuwese, *supra* note 95.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
				through 2005, Art. 77a.[130] Ten aanzien van degene die ten tijde van het begaan van een strafbaar feit de leeftijd van twaalf jaren doch nog niet die van achttien jaren heeft bereikt, zijn de artikelen 9, eerste lid, 10 tot en met 22a, 24c, 37 tot en met 38i, 44 en 57 tot en met 62 niet van toepassing. In de plaats daarvan treden de bijzondere bepalingen vervat in de artikelen 77d tot en met 77gg.
New Zealand	10	14	10-14	Children, Young Persons, and their Families Act, as amended through 2004, Arts. 2(1) and 272(2-3), and Crimes Act, as amended through 2006, Arts. 21(1) and 22(1). Children, Young Persons, and their Families Act, Art. 2(1): In this Act, unless the context otherwise requires,— . . . . "Child" means a boy or girl under the age of 14 years: . . . "Young person" means a boy or girl of or over the age of 14 years but under 17 years. . . . Art. 272: (2) Where any child who is of or over the age of 10 years is charged with murder or manslaughter . . . the provisions of this Act . . . shall apply accordingly as if that child were a young person. (3) Any young person charged with an offence other than— (a) Murder; or (b) Manslaughter; or (c) A traffic offence not punishable by imprisonment — shall be brought before a Youth Court to be dealt with in accordance with the provisions of this Act irrespective of whether the offence is punishable on summary conviction or on indictment. Crimes Act, Art. 21(1): No person shall be convicted of an offence by reason of any act done or omitted by him when under the age of 10 years. Art. 22(1): No person shall be convicted of an offence by reason of any act done or omitted by him when of the age of 10 but under the age of 14 years, unless he knew either that the act or omission was wrong or that it was contrary to law.
Nicaragua	13	-	-	Código de la Niñez y la Adolescencia, 1998, Art. 95. La Justicia Penal Especial del Adolescente establecida en el presente Código, se aplicará a los Adolescentes que tuvieren 13 años cumplidos y que sean menores de 18 años al momento de la comisión de un hecho tipificado como delito o falta

[130] "Articles 9, section 1, 10-22a, 24c, 37-38i, 44 and 57-62 are not applicable to a person who had reached the age of twelve, but was not yet eighteen years of age, at the time the criminal offense was committed. The special provisions laid down in articles 77d-77gg apply in lieu thereof." English translation: "The Dutch Penal Code," *The American Series of Foreign Penal Codes*, Littleton (Colorado), Fred B. Rothman & Co., 1997.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				en el Código Penal o leyes penales especiales. . . . Las niñas y niños que no hubieren cumplido los trece años de edad, no serán sujetos a la Justicia Penal Especial del Adolescente, están exentos de responsabilidad penal, quedando a salvo la responsabilidad civil, la cual será ejercida ante los tribunales jurisdiccionales competentes. Sin embargo, el Juez referirá el caso al órgano administrativo correspondiente con el fin de que se le brinde protección integral, velará y protegerá en todo caso para que se respeten los derechos, libertades y garantías de los mismos. Se prohibe aplicarles, por ningún motivo cualquier medida que implique privación de libertad.
Niger	13	-	13-18	Penal Code, Art. 45.[131]
Nigeria	North-ern States: 7 South-ern States: 7	- 12	7-12 7-12	Northern States: Penal Code, Art. 50.[133] No act is an offence which is done by a child under seven years of age; or by a child above seven years of age but under twelve years of age who has not attained sufficient maturity of understanding to judge the nature and consequence of such act. Southern States: Criminal Code, Art. 30. A person under the age of seven years is not criminally responsible for any act or omission. A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.

[131] Committee on the Rights of the Child, *Initial reports of States parties due in 1992: Niger*, CRC/C/3/Add.29/Rev.1, 17 October 2001, par. 38.

[132] Among many conflicting statements on children's criminal responsibility, Nigeria has cited various age limits as the MACRs according to state legislation. However, respective state *shari'a* criminal laws assign criminal responsibility upon puberty for certain offences, without regard to age per se. See, e.g., Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Nigeria*, CRC/C/8/Add.26, 21 August 1995; and Nigerian Federal Ministry of Women Affairs, *Convention on the Rights of the Child: Second Country Periodic Report*, CRC/C/70/Add.24/Rev.2, Abuja, 2004.

[133] World Organisation Against Torture and the Centre for Law Enforcement Education, *Rights of the Child in Nigeria: Report on the implementation of the Convention on the Rights of the Child by Nigeria: A report prepared for the Committee on the Rights of the Child 38th Session – Geneva, January 2005*, Geneva, 2004, at 9.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
	Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara States: puberty[132]	7	-	Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara States[134]: Zamfara State Sharia Criminal Procedure Code law of 2000, No. 1, Vol. 4, Sect. 237,[135] and Zamfara State of Nigeria Shari'ah Penal Code Law, Sects. 47, 71, and 126-141.[136] Zamfara State Sharia Criminal Procedure Code law of 2000: No sentence of hudud or qisas shall be imposed on a person who is under the age of taklif. Note- Hudud means offences or punishments that are fixed under the Sharia and includes offences or punishments Sections 126 to 141 of the Sharia Penal Code; Qisa means punishments inflicted upon the offenders by way of retaliation for causing death of or injuries to person; taklif means the age of puberty. Note: Hudud offences include sexual offences like zina (fornication). Zamfara State of Nigeria Shari'ah Penal Code Law Sect. 47: Taklif is the age of attaining legal and religious responsibilities. Sect. 71: No act is an offence which is done:- (a) by a child under seven years; or (b) in cases of hudud, by a child below the age of taklif. Sects. 126-141: 126: Zina defined [adultery or fornification]; 127: Punishment for zina; 128: Rape defined; 129: Punishment for rape; 130: Sodomy defined; 131: Punishment for sodomy; 132: Incest defined; 133: Punishment for incest; 134: Lesbianism defined; 135: Punishment for lesbianism; 136: Bestiality defined; 137: Punishment for bestiality; 138: Acts of gross indecency; 139: Qadhf defined; 140: Punishment for qadhf [False Accusation of Zina]; and 141: Remittance of the offence of qadhf.
Norway	15	-	-	General Civil Penal Code, as amended through 1994, §46. No person may be punished for any act committed before reaching 15 years of age.
Oman	9	-	-	Penal Code, 1974, Art. 104. Any person having not completed nine years of age when committing a crime shall not be penally prosecuted. . . .

[134] In 2000-2001, these 12 states adopted *shari'a* criminal law in virtually identical statutes based upon the Zamfara State laws. In theory, these laws apply in the respective jurisdictions to all Muslims and others who voluntarily consent to their regime (see *Shari'ah* Penal Code Law, Introduction (C)).

[135] Nigerian Federal Ministry of Women Affairs, *supra* note 132 at 29.

[136] See www.zamfaraonline.com/sharia/introduction.html. Note that for Sects. 126-141, only Section titles are reproduced here.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
Pakistan	0[137]	7	7-12	Penal Code, Sects. 82-83,[138] the 1979 Hudood Ordinances,[139] and the Anti-Terrorism Act, as amended through 2002.[140] Penal Code Sect. 82: Nothing is an offence which is done by a child under seven years of age. Sect. 83: Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.
Palau	10	-	10-14	National (Legal) Code, Title 17.106.[141]
Panama	14	-	-	Ley No. 40 del Régimen Especial de Responsabilidad Penal para la Adolescencia, 1999, Arts. 7 and 8. Art. 7: Esta Ley es aplicable a todas las personas que hayan cumplido los catorce y no hayan cumplido los dieciocho años de edad, al momento de cometer el acto infractor que se les imputa. . . . Art. 8: Las personas menores de edad que no hayan cumplido los catorce años, no son responsables penalmente por las infracciones a la ley penal en que hubieren podido incurrir, en los términos que establece la presente Ley. En estos casos, los jueces de niñez y adolescencia, serán las autoridades competentes y sólo aplicarán medidas reeducativas cónsonas con la responsabilidad social de las personas menores de catorce años.

[137] Pakistan cites its MACR as 7 years according to Penal Code Sect. 82. However, various other legal provisions set no minimum age for responsibility for certain offences. Committee on the Rights of the Child, *Second periodic reports of States parties due in 1997: Pakistan*, CRC/C/65/Add.21, 11 April 2003.
[138] Amnesty International, *Pakistan: Denial of basic rights for child prisoners*, London, 2003.
[139] The 1979 *Hudood* Ordinances hold all Pakistanis criminally responsible – regardless of age – for specific offenses such as rape, adultery, the use of alcohol and drugs, theft, armed robbery, and slander.
[140] Children of all ages are subject to arrest and trial, as well as the death penalty, under this Act's provisions. See UNICEF Regional Office for South Asia, *Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law*, Kathmandu, 2006.
[141] Committee on the Rights of the Child, *Initial reports of States parties due in 1997: Palau*, CRC/C/51/Add.3, 23 March 2000, par. 234.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Papua New Guinea	7[142]	14	7-14	Criminal Code, as amended through 1993, Art. 30. (1) A person under the age of seven years is not criminally responsible for any act or omission. (2) A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. (3) A male person under the age of 14 years is presumed to be incapable of having carnal knowledge, but this presumption is rebuttable.
Paraguay	14	-	-	Ley Nº 1.702/01, as amended through 2003, Art. 1, and Código de la Niñez y la Adolescencia, 2001, Arts. 192 and 194. Ley Nº 1.702/01, Art. 1: A los efectos de la correcta interpretación y aplicación de las normas relativas a la niñez y a la adolescencia, establécese el alcance de los siguientes términos: a) Niño: toda persona humana desde la concepción hasta los trece años de edad; b) Adolescente: toda persona humana desde los catorce años hasta los diecisiete años de edad. . . . Código de la Niñez y la Adolescencia, Art. 192: Las disposiciones de este libro se aplicarán cuando un adolescente cometa una infracción que la legislación ordinaria castigue con una sanción penal. Para la aplicación de este Código, la condición de adolescente debe darse al tiempo de la realización del hecho, conforme a lo dispuesto en el Artículo 10 del Código Penal. Art. 194: La responsabilidad penal se adquiere con la adolescencia, sin perjuicio de la irreprochabilidad sobre un hecho, emergente del desarrollo psíquico incompleto y demás causas de irreprochabilidad, previstas en el Artículo 23 y concordantes del Código Penal. Un adolescente es penalmente responsable solo cuando al realizar el hecho tenga madurez sicosocial suficiente para conocer la antijuridicidad del hecho realizado y para determinarse conforme a ese conocimiento. Con el

[142] Besides the Criminal Code's MACR provisions, the 1961 Child Welfare Act (as amended through 1990) allows the Children's Court to deprive the liberty of child offenders of any age. Art. 32(2)(a)(ii) states that "(2) Where a Children's Court deals summarily with an offence (other than a homicide or rape, or any other offence punishable by death or imprisonment for life) committed by a child, the Court may—(a) impose a penalty of—(ii) imprisonment for a term not exceeding six months, and, in addition to or instead of any penalty imposed under Subparagraph (i) or (ii) make an order in respect of the child as if the child had been declared to be an incorrigible or uncontrollable child under this Act. . . ." Art. 41(1)(b)(iii) notes that the Court, with such an order, may place a child in an institution until his or her sixteenth birthday.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				fin de prestar la protección y el apoyo necesarios a un adolescente que en atención al párrafo anterior no sea penalmente responsable, el Juez podrá ordenar las medidas previstas en el Artículo 34 de este Código.
Peru	12	-	-	Código de los Niños y Adolescentes, 2000, Arts. 1 and 183-184. Art. 1: Se considera niño a todo ser humano desde su concepción hasta cumplir los doce años de edad y adolescente desde los doce hasta cumplir los dieciocho años de edad. . . . Art. 183: Se considera adolescente infractor a aquel cuya responsabilidad ha sido determinada como autor o partícipe de un hecho punible tipificado como delito o falta en la ley penal. Art. 184: El niño menor de doce años que infrinja la ley penal será pasible de medidas de protección previstas en el presente Código.
Philippines	15[143]	-	15-18	Juvenile Justice and Welfare Act of 2006, Sects. 6 and 20. Sect. 6: A child fifteen (15) years of age or under at the time of the commission of the offense shall be exempt from criminal liability. However, the child shall be subjected to an intervention program pursuant to Section 20 of this Act. A child above fifteen (15) years but below eighteen (18) years of age shall likewise be exempt from criminal liability and be subjected to an intervention program, unless he/she has acted with discernment, in which case, such child shall be subjected to the appropriate proceedings in accordance with this Act. . . . Sect. 20: If it has been determined that the child taken into custody is fifteen (15) years old or below, the authority which will have an initial contact with the child has the duty to immediately release the child to the custody of his/her parents or guardian, or in the absence thereof, the child's nearest relative. Said authority shall give notice to the local social welfare and development officer who will determine the appropriate programs in consultation with the child and to the person having custody over the child. If the parents, guardians or nearest relatives cannot be located, or if they refuse to take custody, the child may be released to any of the following: a duly registered nongovernmental or religious organization; a barangay official or a

[143] The MACR is technically 15 years and one day. See Bayoran, Gilbert, "56 minors to be cleared of criminal liability soon," *The Visayan Daily Star*, Bacolod City (Philippines), 23 May 2006, www.visayandailystar.com/2006/May/23.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				member of the Barangay Council for the Protection of Children (BCPC); a local social welfare and development officer; or when and where appropriate, the DSWD. If the child referred to herein has been found by the Local Social Welfare and Development Office to be abandoned, neglected or abused by his parents, or in the event that the parents will not comply with the prevention program, the proper petition for involuntary commitment shall be filed by the DSWD or the Local Social Welfare and Development Office pursuant to Presidential Decree No. 603, otherwise known as "The Child and Youth Welfare Code".
Poland	0[144]	-	-	Law of 26 October 1982 on Procedure in Cases Involving Juveniles.
Portugal	12	-	-	Lei Tutelar Educativa, 1999, Art. 1. A prática, por menor com idade compreendida entre os 12 e os 16 anos, de facto qualificado pela lei como crime dá lugar à aplicação de medida tutelar educativa em conformidade com as disposições da presente lei.
Qatar	7	-	7-18	Juveniles Act No. 1 of 1994, Art. 7, and the Penal Code.[145] Juveniles Act Art. 7: Any person who has not attained the age of seven full years shall not be held responsible for his acts. Penal Code: 1. There shall be no criminal responsibility for any act perpetrated by a minor under seven years of age; 2. If the minor is over seven but under 18 years of age, he shall not be held criminally responsible unless he is sufficiently mature in awareness to judge the nature or consequences of the act which he perpetrates.

[144] In response to evidence of any child's "demoralization," which includes his or her commission of an offense, courts may order educative, protective, and therapeutic measures. In some cases, these measures signify the deprivation of liberty for indeterminate periods of time. See, inter alia, Committee on the Rights of the Child, *Periodic reports of States parties due in 1998: Poland*, CRC/C/70/Add.12, 6 February 2002, par. 360; and Stando-Kawecka, Barbara, *The Juvenile Justice System in Poland*, presented at the Conference of the European Society of Criminology, Amsterdam, August 25-28, 2004.

[145] Committee on the Rights of the Child, *Initial reports of States parties due in 1997: Qatar*, CRC/C/51/Add.5, 11 January 2001, pars. 21 and 28. The pertinent Penal Code article is not cited in this source.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
Republic of Korea	14[146]	-	-	The Criminal Procedure Act, Art. 9, and the Criminal Act.[147]
Romania	14	-	14-16	Criminal Code, 2004, Art. 113.[148] (1) A minor under the age of 14 shall not be criminally liable. (2) A minor aged from 14 to 16 shall be criminally liable, only if it is proven that he/she committed the act in discernment. (3) A minor over the age of 16 shall be criminally liable within the framework of the system of sanctions applicable to minors.
Russian Federation	14[149]	16	-	Criminal Code, as amended through 2004, Art. 20.[150] A person who, before the commission of a crime, has reached the age of 16 years shall be subject to criminal responsibility. 2. Persons who, before the commission of a crime, have reached the age of 14 years shall be subject to criminal liability for homicide (Article 105), intentional infliction of grave bodily injury causing a impairment of health (Article 111), intentional infliction of bodily injury of average gravity (Article 112), kidnapping (Article 126), rape (Article 131), forcible sexual actions (Article 132), theft (Article 158), robbery (Article 161), brigandism (Article 162), racketeering (Article 163), unlawful occupancy of a car or any other transport vehicle without theft (Article 166), intentional destruction or damage of property under aggravating circumstances (the second part of Article 167), terrorism (Article 205),

[146] Children 12 and older accused of committing criminal offences, or deemed likely to do so and also beyond parental control, are handled as juvenile protection cases. Such children are not subject to sentences in juvenile prisons, as children 14 and older are, but they may face protection dispositions that include placement in child welfare institutions, juvenile protection institutions, and juvenile training schools or reformatories. See, inter alia, Republic of Korea, *The Juvenile Protection Education Institution*, www.jschool.go.kr/HP/JSC80/jsc_01/jsc_1020.jsp.

[147] Committee on the Rights of the Child, *Periodic reports of States parties due in 1998: Republic of Korea*, CRC/C/70/Add.14, 26 June 2002, pars. 36 and 196.

[148] Unofficial translation by Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

[149] The 1999 law on "The Bases of the System of Preventing/Combating Homelessness and Juvenile Offenses" allows for the placement of children younger than the MACR in centers for the temporary confinement of juvenile delinquents, via a judicial sentence or judge's order in response to "socially dangerous acts." Although placement is limited to 30 days, there were 54,800 such placements in 1999, 30,000 in 2000, and 24,400 in 2001. See Committee on the Rights of the Child, *Third periodic reports of States parties due in 2001, Russian Federation*, CRC/C/125/Add.5, 15 November 2004, par. 323; and Stoecker, Sally W., "Homelessness and criminal exploitation of Russian minors: Realities, resources, and legal remedies," *Demokratizatsiya*, Spring 2001.

[150] Translation by http://law.park.ru, provided by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				seizure of a hostage (Article 206),making deliberately false report about an act of terrorism (Article 207), hooliganism under aggravating circumstances (the second part of Article 213), vandalism (Article 214), theft or possession of firearms, ammunition, explosives, and explosion devices (Article 226), theft or possession of narcotics or psychotropic substances (Article 229), the distruction of transport vehicles or ways of communication (Article 267).
Rwanda	14	-	-	Penal Code, Art. 77.[151] When the perpetrator or accomplice of a crime or an offence was over 14 and less than 18 years of age at the time of the offence, the penalties shall be as follows if he is liable to a criminal sentence: - If liable to the death sentence or life imprisonment, he shall be sentenced to between 15 and 20 years' imprisonment; - If liable to imprisonment or a fine, the sentences handed down may not be more than half those which he would have been given if he had been 18 years of age.
Saint Kitts and Nevis	8	-	-	Juvenile Act, Sect. 3.[152] It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence.
Saint Lucia	12	-	-	The Children and Young Person's Act of 1972, Section 3.[153]
Saint Vincent and the Grenadines	8	-	-	Juveniles Act, cap. 168, sect. 3, and the Criminal Code, cap. 124, sect. 12.[154]
Samoa	8	-	8-14	Crimes Ordinance 1961, Sects. 11-12. Sect. 11: No person shall be convicted of an offence by reason of any act done or omitted by him when under the age of 8 years. Sect. 12: No person shall be convicted of an offence by reason of any act done or omitted by him when of the age of 8 but under the age of 14 years, unless the jury by whom he was tried, or the Court before whom he is charged having jurisdiction to deal with the charge

[151] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1998: Rwanda*, CRC/C/70/Add.22, 8 October 2003, par. 92.
[152] Committee on the Rights of the Child, *Initial reports of States parties due in 1992: Saint Kitts and Nevis*, CRC/C/3/Add.51, 5 May 1997, par. 16.
[153] Prof. Hazel Thompson-Ahye, Eugene Dupuch Law School, Bahamas, correspondence with author, July 2005.
[154] Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Saint Vincent and the Grenadines*, CRC/C/28/Add.18, 10 October 2001, par. 34.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
				summarily, is of the opinion that he knew such act or omission was wrong.
San Marino	12	-	12-18	Codice penale, Art. 10. Non è imputabile chi ha un'età inferiore agli anni dodici. Per i minori che abbiano superato gli anni dodici ma non i diciotto, il giudice, ove accerti la capacità d'intendere e di volere, applica la pena con una diminuzione da uno a due gradi. . . .
Sao Tome and Principe	16[155]	-	-	Criminal Code, Art. 42, and Statute on judicial assistance for minors (Decree No. 417/71), Arts. 15-16.[156]
Saudi Arabia	7	-	-	-[157]
Senegal	13	-	-	Code pénal, as amended through 2000, Art. 52-53. Art. 52: Si, en raison des circonstances et de la personnalité du délinquant, il est décidé qu'un mineur âgé de plus de treize ans doit faire l'objet d'une condamnation pénale, les peines seront prononcées ainsi qu'il suit. . . . Art. 53: Si l'infraction commise par un mineur âgé de plus de treize ans est un délit ou une contravention, la peine qui pourra être prononcée contre lui dans les conditions de l'article 52 ne pourra, sous la même réserve, s'élever audessus de la moitié de celle à laquelle il aurait été condamné s'il avait eu dix-huit ans.
Serbia	14	-	-	Criminal Code, 2005, Art. 4(3).[158] A criminal sanction may not be imposed on a person who has not turned fourteen at the time of the commission of an offence. Rehabilitation measures and other criminal sanctions may be imposed on a juvenile under the conditions prescribed by a special law.
Seychelles	7	12	7-12	Penal Code, Sect. 15.[159] A person under the age of seven years is not criminally responsible for any act

[155] Under the Statute on judicial assistance for minors, children younger than 16 who have committed acts deemed offences or crimes in penal law are only subject to protection, assistance or education measures ordered by juvenile courts. Although there are indications that measures involving deprivation of liberty are not ordered in practice against such children, they are available as in the case of placement in educational institutions and private educational establishments. See, inter alia, Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Sao Tome and Principe*, CRC/C/8/Add.49, 1 December 2003, pars. 103, 107, and 109.

[156] *Ibid*., pars. 103 and 111.

[157] Committee on the Rights of the Child, *Initial reports of States parties due in 1998: Saudi Arabia*, CRC/C/61/Add.2, 29 March 2000, par. 55.

[158] Translated by OSCE Mission to Serbia and Montenegro, Organization for Security and Co-operation in Europe, www.legislationline.org.

[159] National Council for Children, Seychelles, correspondence with author, September 2002.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				or omission. A person under the age of 12 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.
Sierra Leone	10	-	-	Common law.[160]
Singapore	7	-	7-12	Penal Code, as amended through 1998, Arts. 82-83. Art. 82: Nothing is an offence which is done by a child under 7 years of age. Art. 83: Nothing is an offence which is done by a child above 7 years of age and under 12, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.
Slovakia	14	-	-	Penal Code, 2005, §94-96.[161]
Slovenia	14[162]	-	-	Criminal Code, 1995, Art. 71.[163] Criminal sanctions shall not be applied against minors who were under the age of fourteen at the time a criminal offence was committed (children).
Solomon Islands	0[164]	-	-	Juvenile Offenders Act, as amended through 1996, Sects. 2 and 16(i-j). Sect. 2: In this Act, unless the context otherwise requires— . . . "child" means a person who is, in the opinion of the court having cognisance of any case in relation to such person, under the age of fourteen years; . . . "young person" means a person who is, in the opinion of the court having cognisance of any case in relation to such person, fourteen years of age or upwards and under the age of eighteen years. Sect. 16(i-j): Where a child or young person charged with any offence is tried by any court, and the court is satisfied of his

[160] Committee on the Rights of the Child, *Second periodic report of States parties due in 1997: Sierra Leone*, CRC/C/SLE/2, 8 September 2006, par. 105.
[161] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1999: Slovakia*, CRC/C/SVK/2, 21 September 2006, pars. 49-50.
[162] Despite the nominal MACR of 14, welfare agencies called "Social Work Centers" have the authority to commit younger children to juvenile institutions, which are substantially equivalent to educational institution placements for older children in criminal cases. See Filipcic, Katja, "Slovenia: Dealing with Juvenile Delinquents in Slovenia," 75 *International Review of Penal Law* (*Revue internationale de droit pénal*) 493, 2004.
[163] *Ibid*., at 498.
[164] Solomon Islands has indicated that Penal Code Section 14 sets the MACR at 8 years. However, the Juvenile Offenders Act does not set any lower age limit for holding children guilty of offences and depriving them of their liberty as a consequence. Committee on the Rights of the Child, *Initial reports of States parties due in 1997: Solomon Islands*, CRC/C/51/Add.6, 12 July 2002.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				guilt the court shall take into consideration the manner in which, under the provisions of this or any other Act or law enabling the court to deal with the case, the case should be dealt with, and, subject to such provisions, may deal with the case in any of the following manners or combination thereof, namely— . . . (i) by committing the offender to custody in a place of detention; or (j) where the offender is a young person, by sentencing him to imprisonment. . . .
Somalia	0[165]	-	-	-
South Africa	7	-	7-14	Common law.[166]
Spain	14	-	-	Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores, as amended through 2006, Arts. 1(1), 3, and 5(3). Art. 1(1): Esta Ley se aplicará para exigir la responsabilidad de las personas mayores de catorce años y menores de dieciocho por la comisión de hechos tipificados como delitos o faltas en el Código Penal o las leyes penales especiales. Art. 3: Cuando el autor de los hechos mencionados en los artículos anteriores sea menor de catorce años, no se le exigirá responsabilidad con arreglo a la presente Ley, sino que se le aplicará lo dispuesto en las normas sobre protección de menores previstas en el Código Civil y demás disposiciones vigentes. El Ministerio Fiscal deberá remitir a la entidad pública de protección de menores testimonio de los particulares que considere precisos respecto al

[165] Although overlapping customary/traditional law, Islamic law, and codified criminal law all contain relevant standards, there is no effective MACR. In customary/traditional law, the MACR is understood to be 15 years. Islamic law grants judges the authority to decide on the dangerous character of juvenile delinquents under the age of 15 and to order them to periods of up to three months in reformatory facilities. Under the Penal Code, article 59 nominally sets an MACR of 14 years: "Whoever, at the time of committing an act, had not attained 14 years of age shall not be liable." However, article 177 stipulates that "Where a minor under 14 years of age has committed an offence, and is of a dangerous character, the Judge, having special regard to the gravity of the act and the moral conditions of the family in which the minor has been brought up, may order him to be committed to a reformatory for a period of not less than 2 years. Where the crime is punished with death or imprisonment for life, or imprisonment for not less than three years, and the crime committed is not with culpa, commitment of a minor to a reformatory shall be ordered for a period of not less than 3 years." UNICEF Somalia, "Juvenile Justice in Post-Conflict Situations: Somalia," unpublished draft presented at the conference *Juvenile Justice in Post-Conflict Situations*, UNICEF Innocenti Research Centre, Florence, May 2001.

[166] Milton, J.R.L., S.E. van der Merwe, and D. van Zyl Smit, "Republic of South Africa," 1994, in Fijnaut, Cyrillus, and Frankk Verbruggen, eds., "Criminal Law," in Blanpain, Roger, ed., *International Encyclopaedia of Laws*, The Hague, Kluwer Law International, 2004.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				menor, a fin de valorar su situación, y dicha entidad habrá de promover las medidas de protección adecuadas a las circunstancias de aquel conforme a lo dispuesto en la Ley Orgánica 1/1996, de 15 de enero. Art. 5(3): Las edades indicadas en el articulado de esta Ley se han de entender siempre referidas al momento de la comisión de los hechos. . . .
Sri Lanka	8	-	8-12	Penal Code, as amended through 1980, Sects. 75-76. Sect. 75: Nothing is an offence which is done by a child under eight years of age. Sect. 76: Nothing is an offence which is done by a child above eight years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.
Sudan	0[167]	7 15/18 /puberty	-	Criminal Law Act (Penal Code) of 1991, various articles,[168] and Narcotic Drugs and Psychotropic Substances Act of 1994, Arts. 15 and 20.

[167] Among various statements on children and criminal responsibility, Sudan has repeatedly suggested that Criminal Code Article 9 establishes an MACR of 7 years. However, other provisions clearly set an effective MACR of 0. For example, "Alcohol or drug consumption and sexual relations outside of the bonds of marriage are absolute crimes for which the age factor is not taken into account under the terms of the Criminal Law Act of 1991." (Committee on the Rights of the Child, *Initial reports of States parties due in 1992: Sudan*, CRC/C/3/Add.3, 16 December 1992, par. 33.) Also, "All children are forbidden to handle and consume alcohol. Any child who does so is in breach of the law in accordance with the provisions of articles 78, 79 and 80 of the Penal Code of 1991. Articles 15 and 20 of the Narcotic Drugs and Psychotropic Substances Act of 1994 also fully prohibit the use of narcotic drugs and psychotropic substances." (Committee on the Rights of the Child, *Periodic reports of States parties due in 1997: Sudan*, CRC/C/65/Add.17, 6 December 2001, par. 52.)

[168] "Article 8 of the Sudanese Penal Code of 1991 stipulates that criminal responsibility applies only to persons who are legally obliged to fulfil the precepts of the law and also capable of exercising free choice. In regard to acts of minors, article 9 provides that a minor who has not attained maturity is not deemed to have perpetrated an offence. . . . Accordingly: . . . (b) Article 3 stipulates that 'a mature person' means any person showing the unmistakable physical signs of proof that he has reached puberty, which could apply to a person having attained 15 years of age. Any person having attained 18 years of age is considered mature, even if he shows no such signs of maturity. . . . The Penal Code contains provisions relating to capital punishment. Article 27, paragraph 2, for example, stipulates that, **apart** from crimes of *hadd* (doctrinal punishment) or *qasas* (retribution), no person under 18 or over 70 years of age may be sentenced to death. Article 27, paragraph 2 (f), deals with the criminal responsibility of persons between the ages of 7 and 18. For crimes of murder or *qasas* (retribution), they are pardoned or ordered to pay blood money to the relatives of the victim. The death penalty is not enforced **unless** the latter refuse to accept the blood money or agree to a pardon. . . . In that regard, a major legal provision is contained in article 9, which provides that 'a minor below legal age shall not be deemed to have perpetrated an offence, although the welfare and reform measures contained in this Code shall apply to any person over

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Suriname	10	-	-	Code of Criminal Procedure, Art. 56, Par. 1.[169]
Swaziland	7	-	7-14	Common law.[170]
Sweden	15	-	-	Penal Code, as amended through 2004, Sect. 6. No sanction shall be imposed upon a person for a crime committed before attaining the age of fifteen.
Switzerland	10	-	-	Loi fédérale régissant la condition pénale des mineurs, 2003, Arts. 3(1) and 4. Art. 3(1): La présente loi s'applique à quiconque commet un acte punissable entre 10 et 18 ans. Art. 4: Si l'autorité compétente constate au cours d'une procédure qu'un acte a été commis par un enfant de moins de 10 ans, elle avise ses représentants légaux. S'il apparaît que l'enfant a besoin d'une aide particulière, elle avise également l'autorité tutélaire ou le service d'aide à la jeunesse désigné par le droit cantonal.
Syrian Arab Republic	10	-	-	Juveniles Act No. 18 of 1974, as amended by Legislative Decree No. 52 of 1 September 2003, Arts. 2 and 30.[171]
Tajikistan	14[172]	16	-	Criminal Code, Art. 23.[173] (1) A person who has attained the age of 16 years old by the time of committing a crime is liable to criminal

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seven years of age, as deemed appropriate by the court.' Article 47 of the Code also stipulates that, in the case of juveniles who were over seven and under 18 years of age at the time of committing the offence, the court may apply measures such as 'reprimand during the hearing and in the presence of his guardian, . . . surrender of the juvenile to his parent or a trustworthy person who has undertaken to provide proper care, or placement of the juvenile in a correctional institution for the purpose of reform and education for a period of not less than two years and not more than five years'." *Ibid*. (*Periodic reports*), pars. 40-41 and 347, emphasis added.

[169] Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Suriname*, CRC/C/28/Add.11, 23 September 1998, par. 18.

[170] Committee on the Rights of the Child, *Initial report of States parties due in 1997: Swaziland*, CRC/C/SWZ/1, 16 February 2006, par. 456.

[171] Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Third periodic report: Syria*, CCPR/C/SYR/2004/3, 19 October 2004, pars. 126, 250-251, and 384.

[172] Under Order n° 178 of the President of the Republic of Tajikistan, of 23 February 1995 (Regulations on the Commission on Minors), administrative Commissions on Minors consider the cases of children younger than 14 suspected of having committed criminal acts. There is no minimum age limit to the Commissions' mandate in this respect, and the Commissions may apply punishments including the deprivation of liberty for children apparently as young as 7. However, there are indications that even younger children, contrary to the Regulations, have been deprived of their liberty. See, e.g., World Organisation Against Torture, *Human Rights Violations in Tajikistan: Alternative Report to the United Nations Committee Against Torture 37th Session*, Geneva, 2006.

[173] Unofficial translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				responsibility. (2) Persons reached the age of 14 years old by the time of committing a crime are liable to criminal liability for homicide (Article 104), intentional major bodily injury (Article 110), intentional minor bodily injury (Article 111), kidnapping (Article 130), rape (Article 138), forcible act of sexual character (Article 139), terrorism (Article 179), capture of hostage (Article 181), theft of weapons, ammunition and explosives (Article 199), illegal trafficking of narcotics (Article 200), theft of drugs and precursors (Article 202), illegal cultivating of plants containing narcotic substances(Article 204), destruction of transport or ways of communication (Article 214), hooliganism under aggravating circumstances (Article 237, p.2 and 3), larceny (Article 244), robbery (Article 248), extortion (Article 250), robbery with extreme violence (249), hi-jacking of a vehicle or other means of transportation without the purpose of stealing (Article 252), intentional damaging or destruction of property under aggravating circumstances (Article 255). (3) In separate cases provided for by the Special Part of the Code only persons reached more than 16 years old are liable to criminal liability.
Thailand	7	-	-	Penal Code, Sect. 73.[174] A child below 7 years of age, who commits a criminal offence, is not liable to punishment.
The former Yugoslav Republic of Macedonia	14	-	-	Criminal Code, as amended through 2004, Art. 71.[175] Criminal sanctions may not be applied against a juvenile who at the time of perpetration of the crime has not reached fourteen years (child).
Timor-Leste	12	-	-	United Nations Transitional Administration in East Timor Regulation 2000/30 on Transitional Rules of Criminal Procedure, as amended through 2001, Sect. 45.1. . . . . A minor under 12 years of age shall be deemed incapable of committing a crime and shall not be subjected to criminal proceedings. . . .
Togo	13	-	-	Code de Procédure Pénale, 1983, Arts. 455-456. Art. 455: Les mineurs de treize ans sont pénalement irresponsables. Le Ministère Public peut requérir à leur égard une mesure de protection judiciaire. Art.

[174] Committee on the Rights of the Child, *Initial reports of States parties due in 1994: Thailand*, CRC/C/11/Add.13, 30 September 1996, par. 82.
[175] Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				456: Lorsqu'ils sont prévenus d'infraction à la loi pénale les mineurs âgés, au moment des faits, de plus de treize ans et de moins de dix huit ans sont déférés au juge des mineurs.
Tonga	7	-	7-12	Criminal Offences Act, as amended through 2005, Sect. 16. (1) Nothing shall be deemed an offence which is done by a person under 7 years of age. (2) Nothing shall be deemed an offence which is done by a person of or above 7 and under 12 years of age unless in the opinion of the Court or jury such person had attained sufficient maturity of understanding to be aware of the nature and consequences of his conduct in regard to the act of which he is accused.
Trinidad and Tobago	7	-	10-14	Common law.[176]
Tunisia	13	-	13-15	Code pénal, as modified through 1995, Arts. 38 and 43, and Code de la Protection de l'Enfant, 1995, Arts. 68 and 72. Code pénal, Art. 38: L'infraction n'est pas punissable lorsque le prévenu n'a pas dépassé l'âge de 13 ans révolus au temps de l'action. . . . Art. 43: Tombent sous la loi pénale, les délinquants âgés de plus de 13 ans révolus et moins de 18 ans révolus. . . . Code de la Protection de l'Enfant, Art. 68: L'enfant âgé de moins de treize ans est présumé irréfragablement n'avoir pas la capacité d'enfreindre la loi pénale, cette Présomption devient réfragable pour les enfants âgés de treize à quinze ans révolus. Art. 72: L'âge de l'enfant se détermine à partir de la date de la commission de l'infraction.
Turkey	12[177]	-	12-15	Criminal Code, 2004, Art. 31(1-2).[178] (1) The children having not attained the full age of twelve on the commission date of the offense, may not

[176] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1999: Trinidad and Tobago*, CRC/C/83/Add.12, 15 November 2004, pars. 248-250.

[177] Under the Criminal Code, children younger than 12 – as well as children between 12 and 15 deemed unable to perceive the legal meaning and consequences of their offences or as lacking the ability to control their actions – may face security measures/precautions. Furthermore, under the 2005 Juvenile Protection Law, any child in conflict with the law and deemed not criminally responsible may face "protective and supportive measures" that include deprivation of liberty in educational, governmental, and private care institutions. There is no lower age limit to the application of such measures, they may be imposed through a child's eighteenth birthday, and judges are not required to hold hearings before ordering them. See, inter alia, Arts. 3(1)(a)(2), 5(1)(b-c), 7(6), 11(1) and 13(1).

[178] Unofficial translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				have criminal responsibility. Besides, no criminal prosecution may be commenced against such persons; but, it may be deemed necessary to take certain security precautions specific to children. (2) In case a person who attained the age of twelve but not yet completed the age of fifteen on the commission date of the offense does not have the ability to perceive the legal meaning and consequences of the offense, or to control his actions, he may not have criminal responsibility for such behavior. However, security precautions specific to children may be adopted for such individuals. . . .
Turkmeni-stan	14	16	-	Criminal Code, 1998, Art. 21.[179]
Tuvalu	10	12	10-14	Penal Code, as amended through 1978, Sect. 14. (1) A person under the age of 10 years is not criminally age responsible for any act or omission. (2) A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. (3) A male person under the age of 12 years is presumed to be incapable of having sexual intercourse.
Uganda	12	-	-	Children's Statute, 1996, Sect. 89.[180] The minimum age of criminal responsibility shall be twelve years.
Ukraine	14[181]	16	-	Criminal Code, 2001, Art. 22.[182] 1. Persons who have reached the age of 16 years before the

[179] Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Turkmenistan*, CRC/C/TKM/1, 5 December 2005, pars. 54 and 194.
[180] Foundation for Human Rights Initiative, *The Human Rights Reporter 1998*, Kampala, 1999, Footnote 59.
[181] Criminal Code Chapter XV on "Specific Features of Criminal Liability and Punishment of Minors" contains several provisions that call into question the effective MACR. Art. 97(2) states that "A court shall also apply compulsory reformation measures provided for by paragraph 2 of Article 105 of this Code to a person, who committed a socially dangerous act that classifies as an act provided for by the Special Part of this Code, before he/she attained the age of criminal liability." The final such measure stipulated in Art. 105(2) is "placing a minor in a special educational and correctional institution for children and teenagers until the minor's complete correction but for a term not exceeding three years. Conditions of stay in and procedure of discharge from these institutions shall be provided for by law." Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.
[182] *Ibid*. (Translation)

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				commission of a criminal offense shall be criminally liable. 2. Persons who have committed criminal offenses at the age of 14 to 16 years shall be criminally liable only for a murder (Articles 115-117), attempted killing of a statesperson or public figure, a law enforcement officer, a member of a civilian peace-keeping or border-guard unit, or a serviceman, judge, assessor or juror, in connection with their activity related to the administration of justice, a defense attorney or agent of any person in connection with their activity related to legal assistance, or a foreign representative (Articles 112, 348, 379, 400 and 443), intended grievous bodily injury (Article 121, paragraph 3 of Articles 345, 346, 350, 377 and 398), intended bodily injury of medium gravity (Article 122, paragraph 2 of Articles 345, 346, 350, 377 and 398), sabotage (Article 113), gansterism (Article 257), act of terrorism (Article 258), hostage taking (Articles 147 and 348), rape (Article 152), violent unnatural satisfaction of sexual desire (Article 153), theft (sections 185, paragraph 1 of Articles 262 and 308), robbery (Articles 186, 262 and 308), brigandage (Article 187, paragraph 3 of Articles 262 and 308), extortion (Article 189, 262 and 308), willful destruction or endamagement of property (paragraph 2 of Articles 194, 347, 352 and 378, paragraphs 2 and 3 of Article 399), endamagement of communication routes and means of transportation (Article 277), theft or seizure of railroad rolling stock, air-, sea- or river-craft (Article 278), misappropriation of transportation (paragraph 2 and 3 of Article 289), and hooliganism (Article 296).
United Arab Emirates	7	-	7-n/a	Federal Act No. 9 of 1976, Art. 6.[183] Criminal proceedings shall not be brought against a juvenile delinquent under seven years of age. However, in all cases, the investigating authorities or the courts may order educational or remedial measures appropriate to the juvenile's situation if they deem such measures to be necessary.
United Kingdom of Great Britain and	Eng-land and Wales:			England and Wales: Children and Young Persons Act, as amended through 1988, Sect. 50. It shall be conclusively presumed that no child under the age of [ten] years can be guilty of any offence.

[183] Committee on the Rights of the Child, *Initial reports of States parties due in 1999: United Arab Emirates*, CRC/C/78/Add.2, 24 October 2001, par. 97.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Northern Ireland North-ern Ireland: 10 Scot-land: 8 Other jurisdic-tions: varies 8-10	10 - - varies	- - - varies	- - - varies	Northern Ireland: The Criminal Justice (Children) (Northern Ireland) Order, 1998, Sect. 3. It shall be conclusively presumed that no child under the age of 10 can be guilty of an offence. Scotland: Criminal Procedure (Scotland) Act, 1995, Sect. 41. It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence. Other jurisdictions (Overseas Territories and Crown Dependencies)[184]: Anguilla (MACR 10, *doli incapax* test 10-14)[185]; Bermuda (MACR 8, *doli incapax* test 8-14)[186]; British Virgin Islands (Criminal Code, Sect. 12: MACR 10, ACR Other Crimes: 12, *doli incapax* test 10-14)[187]; Cayman Islands (MACR 10, *doli incapax* test 10-14)[188]; Falkland Islands (MACR 10, *doli incapax* test 10-14)[189]; Isle of Man (Children and Young Persons Act, 2001, Sect. 70. 1. It shall be conclusively presumed that no child under the age of 10 years can be guilty of an offence. 2. It shall not be presumed that a child aged 10 or over is incapable of committing an offence.); Montserrat (MACR 10, *doli incapax* test 10-14) [190]; Pitcairn (MACR 10)[191]; St. Helena and its dependencies (MACR 10, *doli incapax* test 10-14)[192]; Turks and Caicos Islands (MACR 8)[193]

[184] MACR provisions from the Bailiwick of Guernsey, the Bailiwick of Jersey, and Gibraltar are not listed.
[185] UK Government, *The Consolidated 3rd and 4th Periodic Report to UN Committee on the Rights of the Child: United Kingdom Overseas Territories and Crown Dependencies: Summary Reports*, CRC/C/GBR/4, July 2007, par. 8.
[186] Committee on the Rights of the Child, *Initial reports of States parties due in 1996: Overseas Dependent Territories and Crown Dependencies of the United Kingdom of Great Britain and Northern Ireland*, CRC/C/41/Add.7, 22 February 2000, par. 62(a).
[187] *Ibid*., par. 136(a). Boys younger than 12 are presumed incapable of having "carnal knowledge."
[188] UK Government, *supra* note 185, par. 17.
[189] Committee on the Rights of the Child, *Initial reports of States parties due in 1996: Overseas Dependent Territories and Crown Dependencies of the United Kingdom of Great Britain and Northern Ireland*, CRC/C/41/Add.9, 29 May 2000, pars. 26 and 146.
[190] Committee on the Rights of the Child, *supra* note 185, par. 247(a).
[191] *Ibid*., par. 299.
[192] *Ibid*., pars. 333(a-b), 390(a-b), and 426 (a-b).
[193] *Ibid*., par. 459(c).

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
United Republic of Tanzania	10 Zanzi-bar: 12	- -	10-12 12-14	Penal Code, as amended through 1998, Sect. 15.[194] (1) A person under the age of ten years is not criminally responsible for any act or omission. (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. Act 11 of 1986.[195]
United States of America[196]	AL, AK, CA, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, KY, ME, MI, MO, MT, NE, NV,	-	CA[199]: 0-14	CA: CA Penal Code, as amended through 2006, §26. All persons are capable of committing crimes except those belonging to the following classes: One-Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness. . . . PA: PA Consolidated Statutes, as amended through 2006, Title 42 §6302 and §6355(e). §6302: The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section: . . . . "Delinquent act." (1) The term means an act designated a crime under the law of this Commonwealth, or of another state if the act occurred in that state, or under Federal law, or

[194] Mashamba, J. Clement, *Basic Elements and Principles to be Incorporated in New Children Statute in Tanzania*, National Network of Organisations Working with Children in Tanzania, Dar es Salaam, 2003.

[195] Committee on the Rights of the Child, *Initial reports of States parties due in 1993: United Republic of Tanzania*, CRC/C/8/Add.14/Rev.1, 25 September 2000, par. 96.

[196] Juvenile justice is principally regulated and administered under respective state law. The states, plus the District of Columbia, and their respective abbreviations are the following: Alabama-AL, Alaska-AK, Arizona-AZ, Arkansas-AR, California-CA, Colorado-CO, Connecticut-CT, Delaware-DE, District of Columbia-DC, Florida-FL, Georgia-GA, Hawaii-HI, Idaho-ID, Illinois-IL, Indiana-IN, Iowa-IA, Kansas-KS, Kentucky-KY, Louisiana-LA, Maine-ME, Maryland-MD, Massachusetts-MA, Michigan-MI, Minnesota-MN, Mississippi-MS, Missouri-MO, Montana-MT, Nebraska-NE, Nevada-NV, New Hampshire-NH, New Jersey-NJ, New Mexico-NM, New York-NY, North Carolina-NC, North Dakota-ND, Ohio-OH, Oklahoma-OK, Oregon-OR, Pennsylvania-PA, Rhode Island-RI, South Carolina-SC, South Dakota-SD, Tennessee-TN, Texas-TX, Utah-UT, Vermont-VT, Virginia-VA, Washington-WA, West Virginia-WV, Wisconsin-WI, and Wyoming-WY.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
	NH, NJ,[197] NM, ND, OH, OK, OR, PA, RI, SC, TN, UT, VT, VA, WV, WY: 0[198]	PA: 10 VT: 10	- -	under local ordinances or an act which constitutes indirect criminal contempt under 23 Pa.C.S. Ch. 61 (relating to protection from abuse). (2) The term shall not include: (i) The crime of murder. . . . (iv) Summary offenses, unless the child fails to comply with a lawful sentence imposed thereunder, in which event notice of such fact shall be certified to the court. (v) A crime committed by a child who has been found guilty in a criminal proceeding for other than a summary offense. . . . "Delinquent Child." A child ten years of age or older whom the court has found to have committed a delinquent act and is in need of treatment, supervision or rehabilitation. "Dependent Child." A child who: . . . (7) is under the age of ten years and has committed a delinquent act. . . . §6355(e): Where the petition alleges conduct which if proven would

[197] New Jersey case law, exemplified in two juvenile sex offender cases, arguably upholds the availability of the common law *doli incapax* presumption in juvenile court delinquency proceedings (see State of New Jersey in the Interest of J.P.F., 845 A.2d 173 (2004); In the Matter of Registrant J.G., 777 A.2d 891 (2001); and Carter, Andrew M., "Age Matters: The Case for a Constitutionalized Infancy Defense," 54 *Kansas Law Review* 687, 2006). However, neither decision attempts to reconcile such availability with the provision, referring to the Code of Criminal Justice chapter on sex offenses, that "No actor shall be presumed to be incapable of committing a crime under this chapter because of age. . . ." (New Jersey Statutes §2C:14-5(b)). One lower court decision in another juvenile sex offender case interpreted this provision as a "clear statutory disavowal of the old common law three-tiered rule." In granting the juvenile co-defendants' motion to dismiss the charges against them, based upon evidence that they were incapable of meeting the *mens rea* requirement of "knowingly" committing the alleged acts, it found no lower age limit to juvenile court delinquency jurisdiction in statute or case law (State of New Jersey in the Interest of C.P. & R.D., 514 A.2d 850, 854 (1986)).

[198] In statutory and/or case law, these states either have no minimum age for adjudicating children delinquent in juvenile court proceedings, or have no minimum age for original adult criminal court jurisdiction. In addition, the federal government has no minimum age limit to adjudicating children delinquent; federal law enforcement officials arrest approximately 400 children per year, but cases may be transferred under certain conditions to state courts. See, inter alia, King, Melanie, and Linda Szymanski, "National Overviews," *State Juvenile Justice Profiles*, Pittsburgh, National Center for Juvenile Justice, 2006, www.ncjj.org/stateprofiles; and Snyder, Howard N., and Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, Washington, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 2006.

[199] This table notes the two states – California and Washington – where some type of *doli incapax* test is currently available in juvenile delinquency proceedings (see also footnote 197 regarding New Jersey). Case law in roughly 20 other states upholds the common law *doli incapax* provisions only in adult criminal courts, without necessarily barring delinquency proceedings in juvenile courts. Although such provisions are theoretically applicable to all relevant children in adult courts, *doli incapax* has generally fallen into disuse, and respective case law is typically dated. See Carter, *supra* note 197; Thomas, Tim A., *Annotation: Defense of Infancy in Juvenile Delinquency Proceedings*, 83 ALR4th 1135, 1991 and August 2002 Supplement; and King et al., *ibid*.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				constitute murder, . . . the court shall require the offense to be prosecuted under the criminal law and procedures, except where the case has been transferred pursuant to section 6322 (relating to transfer from criminal proceedings) from the division or a judge of the court assigned to conduct criminal proceedings. VT: VT Statutes, as amended through 2006, Title 33 §5502(a)(1)(A) and (C). As used in this chapter, unless the context otherwise requires: (1) "Child" means an individual under the age of 18 years for the purposes of subdivision (12) of this subsection, or an individual who has committed an act of delinquency after becoming ten years of age and prior to becoming 16 years of age, for the purposes of subdivision (4) of this subsection provided, however: (A) that an individual who is alleged to have committed an act specified in section 5506(a) of this title after attaining the age of 10 but not the age of 14 may be treated as an adult as provided therein; . . . (C) that an individual who is alleged to have committed an act, before attaining the age of 10, which would be murder as defined in section 2301 of Title 13 if committed by an adult may be subject to delinquency proceedings. . . .
	NC: 6	-	-	NC: NC General Statutes, as amended through 2006, §7B-1501(7). In this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings. . . . (7) Delinquent juvenile. – Any juvenile who, while less than 16 years of age but at least 6 years of age, commits a crime or infraction under State law or under an ordinance of local government, including violation of the motor vehicle laws.
	MD, MA, NY: 7	-	-	MD: MD Code, as amended through 2006, § 3-8A-05(d). In a delinquency proceeding there is no presumption of incapacity as a result of infancy for a child who is at least 7 years old. MA: General Laws of MA, as amended through 2006, §119-52. The following words as used in the following sections shall, except as otherwise specifically provided, have the following meanings: . . . . "Delinquent child", a child between seven and seventeen who violates any city ordinance or town by-law or who commits any offence against a law of the commonwealth. NY: Family Court Act, as amended through ,

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				§301.2(1). As used in this article, the following terms shall have the following meanings: . . . . 1. "Juvenile delinquent" means a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law.
	AZ, WA: 8	-	-	AZ: AZ Revised Statutes, as amended through 2006, Sects. 8-201(11) and 8-201(13)(a)(iv). Sect. 8-201(11): "Delinquent juvenile" means a child who is adjudicated to have committed a delinquent act. 8-201(13)(a)(iv): "Dependent child": (a) Means a child who is adjudicated to be: . . . . (iv) Under the age of eight years and who is found to have committed an act that would result in adjudication as a delinquent juvenile or incorrigible child if committed by an older juvenile or child.
		-	WA: 8-12	WA: Revised Code of WA, as amended through 2006, §9A.04.050. Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong. Whenever in legal proceedings it becomes necessary to determine the age of a child, he may be produced for inspection, to enable the court or jury to determine the age thereby; and the court may also direct his examination by one or more physicians, whose opinion shall be competent evidence upon the question of his age.
	AR, CO, KS, LA, MN, MS, SD, TX, WI: 10	-	-	AR: AR Code, as amended through 2006, Sect. 9-27-306(a)(1)(A)(i). The circuit court shall have exclusive original jurisdiction of and shall be the sole court for the following proceedings governed by this subchapter, including but not limited to: (A)(i) Proceedings in which a juvenile is alleged to be delinquent as defined in this subchapter, including juveniles ten (10) to eighteen (18) years of age. CO: CO Revised Statutes, as amended through 2006, Sect. 18-1-801. The responsibility of a

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				person for his conduct is the same for persons between the ages of ten and eighteen as it is for persons over eighteen except to the extent that responsibility is modified by the provisions of the "Colorado Children's Code", title 19, C.R.S. No child under ten years of age shall be found guilty of any offense. KS: KS Revised Statutes, as amended through 2006, Sects. 38-2302(i) and 38-2302(n). Sect. 38-2302(i): "Juvenile" means a person to whom one or more of the following applies, the person: (1) Is 10 or more years of age but less than 18 years of age; (2) is alleged to be a juvenile offender; or (3) has been adjudicated as a juvenile offender and continues to be subject to the jurisdiction of the court. Sect. 38-2302(n): "Juvenile offender" means a person who commits an offense while 10 or more years of age but less than 18 years of age which if committed by an adult would constitute the commission of a felony or misdemeanor as defined by K.S.A. 21-3105, and amendments thereto, or who violates the provisions of K.S.A. 21-4204a or 41-727 or subsection (j) of K.S.A. 74-8810, and amendments thereto. . . . LA: LA Children's Code, as amended through 2006, Art. 804(3). As used in this Title: . . . (3) "Delinquent act" means an act committed by a child of ten years of age or older which if committed by an adult is designated an offense under the statutes or ordinances of this state, or of another state if the act occurred in another state, or under federal law, except traffic violations. It includes a direct contempt of court committed by a child. MN: MN Statutes, as amended through 2006, Sect. 260C.007(6)(12). "Child in need of protection or services" means a child who is in need of protection or services because the child: . . . (12) has committed a delinquent act or a juvenile petty offense before becoming ten years old. MS: MS Code, as amended through 2006, §43-21-105(i). The following words and phrases, for purposes of this chapter, shall have the meanings ascribed herein unless the context clearly otherwise requires: . . . . (i) "Delinquent child" means a child who has reached his tenth birthday and who has committed a delinquent act. SD: SD Codified Laws, as amended through 2006, §26-8C-2. In this chapter and chapter 26-7A, the

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				term, delinquent child, means any child ten years of age or older who, regardless of where the violation occurred, has violated any federal, state, or local law or regulation for which there is a penalty of a criminal nature for an adult, except state or municipal hunting, fishing, boating, park, or traffic laws that are classified as misdemeanors, or petty offenses or any violation of § 35-9-2 or 32-23-21. TX: TX Family Code, as amended through 2006, §51.02(2)(A). In this title: . . . . (2) "Child" means a person who is: (A) ten years of age or older and under 17 years of age. . . . WI: WI Revised Statutes, as amended through 2006, §938.02(3m). In this chapter: . . . (3m) "Delinquent" means a juvenile who is 10 years of age or older who has violated any state or federal criminal law . . . or who has committed a contempt of court, as defined in s. 785.01 (1), as specified in s. 938.355 (6g). . . .
Uruguay	13	-	-	Código de la Niñez y la Adolescencia, 2004, Art. 74. En todos los casos en que al adolescente se le impute el haber incurrido en actos que se presumen comportan infracción a la ley penal, deberá asegurarse el cumplimiento estricto de las garantías del debido proceso, especialmente las siguientes:. . . . B) Principio de responsabilidad.- Sólo puede ser sometido a proceso especial, regulado por este Código, el adolescente mayor de trece y menor de dieciocho años de edad, imputado de infracción a la ley penal. . . .
Uzbekistan	13[200]	14/16	-	Criminal Code, 1994, Art. 17.[201] Sane individuals aged sixteen years or above at the moment of commission of a crime, shall be subject to liability. Individuals aged thirteen years or above at the moment of commission of a crime, shall be subject to liability only for intentional aggravated killing (Paragraph 2 of Article 97). Individuals aged fourteen years or above at the moment of commission of a crime, shall be subject to liability

[200] Regional and municipal Commissions on Minors' Affairs have primary responsibility, subject to public prosecutor supervision, for responding to children younger than 13 in conflict with the law. Commissions may return such children to parental supervision or send them to children's institutions for at least three years. See Danish Centre for Human Rights and UNICEF, *Juvenile Justice in Uzbekistan: Assessment 2000*, Copenhagen, 2001; and World Organisation Against Torture, *Rights of the Child in Uzbekistan*, Geneva, 2006.

[201] Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				for the crimes envisaged by Paragraph 1 of Article 97, Articles 98, 104 – 106, 118, 119, 137, 164 – 166, and 169, Paragraphs 2 and 3 of Article 173, Articles 220, 222, 247, 252, 263, 267, and 271, Paragraphs 2 and 3 of Article 277 of this Code. . . .
Vanuatu	10	-	10-14	Penal Code, as amended through 1988, Sect. 17(1). No child under the age of 10 years shall be capable of committing any criminal offence. A child of 10 years of age or over but under 14 years of age shall be presumed to be incapable of committing a criminal offence unless it is proved by evidence that he was able to distinguish between right and wrong and that he did so with respect to the offence with which he is charged.
Venezuela (Bolivarian Republic of)	12	-	-	Ley Orgánica para la protección del niño y del adolescente, 1998, Arts. 2, 528, and 532. Art. 2: Se entiende por niño toda persona con menos de doce años de edad. Se entiende por adolescente toda persona con doce años o más y menos de dieciocho años de edad. . . . Art. 528: El adolescente que incurra en la comisión de hechos punibles responde por el hecho en la medida de su culpabilidad, de forma diferenciada del adulto. . . . Art. 532: Cuando un niño se encuentre incurso en un hecho punible sólo se le aplicarán medidas de protección, de acuerdo a lo previsto en esta Ley. . . .
Viet Nam	14[202]	16	-	Penal Code, 1999, Arts. 12 and 68.[203] Art. 12: 1. Toute personne âgée de seize ans accomplis est pénalement responsable de toute infraction. 2. Toute personne âgée de quatorze ans accomplis et de moins de seize ans est pénalement responsable des infractions très graves commises de manière intentionnelle ou des infractions extrêmement graves. Art. 68: Tout mineur coupable, âgé de quatorze ans accomplis à moins de dix-huit ans au moment de l'infraction, est pénalement responsable conformément aux dispositions du présent chapitre. . . .

[202] Under the administrative procedures of Government Decree No. 33/CP of 1997, Art. 1, and the Ordinance on Sanctions against Administrative Violations, 2002, Art. 5(1)(a), children from age 12 who commit Penal Code violations are subject to placement in reform schools for 6 months to 2 years. See Human Rights Watch, *"Children of the Dust": Abuse of Hanoi Street Children in Detention*, New York, 2006; and Committee on the Rights of the Child, *Periodic reports of States parties due in 1997: Viet Nam*, CRC/C/65/Add.20, 5 July 2002, pars. 114(b) and 232(a).

[203] Translation by la Maison du droit vietnamo-française, www.maisondudroit.org.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Yemen	7	-	-	Penal Code.[204]
Zambia	8	12	8-12	Penal Code, as amended through 1995, Art. 14. (1) A person under the age of eight years is not criminally responsible for any act or omission. (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. (3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.
Zimbabwe	7	12	7-14	-[205]

[204] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1998: Yemen*, CRC/C/70/Add.1, 23 July 1998, par. 6.

[205] Geltoe, Geoffrey, "Zimbabwe," 2000, in Fijnaut, Cyrillus, and Frankk Verbruggen, eds., "Criminal Law," in Blanpain, Roger, ed., *International Encyclopaedia of Laws*, The Hague, Kluwer Law International, 2004. Boys younger than 12 are irrebuttably presumed to be incapable of sexual intercourse, and cannot be guilty of rape or incest as principal offenders.

Annex 3: MACR Provisions and Statutory Sources: Countries Influenced by Soviet Law

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Albania	14	16	-	Criminal Code, as amended through 2001, Art. 12.[1] A person bears criminal responsibility if, at the time he or she commits an offence, has reached the age of fourteen. A person who commits a criminal contravention bears responsibility at the age of sixteen.
Armenia	14	16	-	Criminal Code, 2003, Arts. 24(1-2).[2] Art. 24 (1): The person who reached the age of 16 before the committal of the crime is subject to criminal liability. (2): The persons who reached the age of 14 before the committal of the crime are subject to criminal liability for murder (Articles 104-109), for inflicting willful severe or medium damage to health (Articles 112-116), for kidnapping people (Article 131), for rape (Article 138), for violent sexual actions (Article 139), for banditry (Article 179), for theft (Article 177), for robbery (Article 176), for extortion (Article 182), getting hold of a car or other means of transportation without the intention of appropriation (Article 183), for destruction or damage of property in aggravating circumstances (Article 185, parts 2 and 3), for theft or extortion of weapons, ammunition or explosives (Article 238), for theft or extortion of narcotic drugs or psychotropic substances (Article 269), for damaging the means of transportation or communication lines (Article 246), for hooliganism (Article 258).
Azerbaijan	14[3]	16	-	Criminal Code, Art. 20 (1-2).[4] (1) The person who

[1] Translation by Alibali, Agron, Albanian Legal Information Initiative, Chicago-Kent College of Law, Illinois Institute of Technology, http://pbosnia.kentlaw.edu/resources/legal/albania/crim_code.htm.

[2] Unofficial translation by the American Bar Association, Central European and Eurasian Law Initiative. See www.internews.am/legislation/index.asp.

[3] Under the 2002 Law on "Commission on minors and the protection of the rights of the children," administrative commissions may consider the cases of all children younger than 14 years of age suspected of having committed crimes, and they may impose disciplinary measures on such children including confinement in "special correction schools." See Azerbaijan NGO Alliance for Children's Rights, *Juvenile Justice in Azerbaijan: NGO Alternative Report on Situation of Juvenile Justice System in Azerbaijan within the period of 1998-2005*, Baku, 2005; and Committee on the Rights of the Child, *Second periodic reports of States parties due in 1999: Azerbaijan*, CRC/C/83/Add.13, 7 April 2005, pars. 436-444.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				has reached age of 16, to time of committing a crime shall be subjected to the criminal liability. (2) The persons who have reached the age of 14, to time of committing a crime, shall be subjected to the criminal liability for deliberate murder, deliberate causing of heavy or less heavy harm to health, kidnapping of the person, rape, violent actions of sexual nature, theft, robbery, extortion, illegal occupation of the automobile or other vehicle without the purpose of plunder, deliberate destruction or damage of property under aggravating circumstances, terrorism, capture of the hostage, hooliganism under aggravating circumstances, plunder or extortion of fire-arms, ammunition, explosives and explosives, plunder or extortion of narcotics or psychotropic substances, reduction unsuitability of vehicles or means of communication.
Belarus	14	16	-	Criminal Code, as amended through 1 May 1994, Art. 10.[5] Criminal responsibility shall be applied to persons who had reached the age of sixteen before they committed a crime. Persons who have committed a crime at the age of between fourteen and sixteen shall be liable to criminal responsibility only for killing, encroachment upon the life of a militiaman, people's guard or other person, no less than for encroachment upon the life of their close relations, deliberate infliction of bodily injuries which have caused derangement of health, rape, robbery, robbery, stealing of property in especially grand amounts, distortion, theft, persistent or especially persistent hooliganism, deliberate destruction or damage of property which has entailed grave consequences, stealing of fire-arms, ammunitions or explosives, stealing of narcotic substances, as well as for deliberate committing of actions which may cause a crash of a train. . . .
Bosnia and Herzegovina	14	-	-	Criminal Code, 2003, Art. 8.[6] Criminal legislation of Bosnia and Herzegovina shall not be applied to a child who, at the time of perpetrating a criminal offence, had not reached fourteen years of age.

[4] Unofficial translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.
[5] Translation by SoftInform Engineering Information Company, Ltd., *JurInform Information System on Belarusian Legislation*, www.belarus.net/softinfo/lowcatal.htm.
[6] Office of the High Representative Legal Department, www.ohr.int/ohr-dept/legal.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Bulgaria	14[7]	-	14-18	Penal Code, as amended through 2002, Arts. 31(2-3) and 32(1-2).[8] Art. 31(2) A juvenile who has accomplished 14 years of age but who has not accomplished 18 years of age shall be criminally responsible if he could have realised the quality and the importance of the act and handle his conduct. (3) The juveniles whose acts cannot be imputed shall be accommodated by a court decision in a corrective boarding school or in other suitable establishment if so required by the circumstances of the case. Art. 32(1) A juvenile who has not accomplished 14 years of age shall not be criminally responsible. (2) Applied, with respect of the juveniles who have committed social dangerous acts, can be respective corrective measures.
China	14[9]	16	-	Criminal Code, 1997, Art. 17.[10] Anyone who has

[7] Art. 32(2) of the Penal Code allows corrective measures, as defined under the Juvenile Delinquency Law, to be applied against children under 14 who have committed socially dangerous acts. Commissions for Prevention of Juvenile Delinquency may administratively order such measures, including deprivation of liberty in Social-pedagogic boarding schools for children as young as 7, and in Correctional boarding schools for children as young as 8. See, e.g., Bulgarian Helsinki Committee, *Memorandum of the Bulgarian Helsinki Committee*, Sofia, 17 October 2005, www.bghelsinki.org/index_en.html; Momchilov, Andrey, "Report on the Bulgarian juvenile justice system," in Institute for Penal Reform, *Materials of the Forum "Juvenile Justice in Eastern and South Eastern Europe": Chisinau, Republic of Moldova, September 14-16, 2005*, Chisinau, 2006; and National Statistical Institute of the Republic of Bulgaria, *Anti-Social Acts of Minor and Juvenile Persons in 2005*, 31 March 2006, www.nsi.bg/index_e.htm.

[8] Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

[9] The *laodong jiaoyang* system (variously translated as re-education through labor, or reform through education, or juvenile criminal camps) is one of the administrative detention systems used to punish most minor offences without official charge, trial, or judicial review. A patchwork regulatory framework apparently restricts its use to children 13 and older, although in the past children as young as 11 were detained. Deprivation of liberty is currently possible for up to 4 years total, based in large part upon the discretion of public security officials. Re-education is formally justified as a child protection measure of assistance for reintegration into society, yet the United Nations Special Rapporteur on Torture has considered the system a form of inhuman and degrading treatment or punishment. See, inter alia, Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning Worst Forms of Child Labour Convention, 1999 (No. 182): China*, 2007; Keyuan, Zou, "The 'Re-Education Through Labour' System in China's Legal Reform," 12 *Criminal Law Forum* 459, 2001; Trevaskes, Susan, "Severe and Swift Justice in China," 47 *British Journal of Criminology* 23, 2007; and United Nations Commission on Human Rights, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to China*, E/CN.4/2006/6/Add.6, 10 March 2006.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
	Hong Kong: 10 Macao: 12	- -	10-14 -	not reached the age of 14 shall not bear criminal responsibility. Anyone who has reached the age of 14 but not the age of 16 shall bear criminal responsibility for committing intentional homicide, intentionally inflict injury upon another person so as to cause serious injury or death of the person, or commits rape, robbery, drug-trafficking, arson, explosion or poisoning. Anyone who has reached the age of 16 and commits a crime shall bear criminal responsibility. Hong Kong Special Administrative Region (SAR): Juvenile Offenders Ordinance, as amended through 2003, Sect. 3, and common law. Juvenile Offenders Ordinance: It shall be conclusively presumed that no child under the age of 10 years can be guilty of an offence. Common law: *doli incapax* presumption. Macao SAR: Decree-Law 65/99/M, 1999, Art. 6(1). O regime educativo é aplicável a menores que, tendo completado 12 anos e antes de perfazerem 16, pratiquem facto qualificado pela lei como crime, contravenção ou infracção administrativa e tem por finalidade a aplicação de medidas a tais menores, e a respectiva execução, tendo em conta as suas necessidades educativas.
Croatia	14	-	-	Criminal Code, Art. 10, and Juvenile Courts Act, 1997, Art. 2.[11]

[10] Zhou, Mi, and Shizhou Wang, "China," 2001, in Fijnaut, Cyrillus, and Frankk Verbruggen, eds., "Criminal Law," in Blanpain, Roger, ed., *International Encyclopaedia of Laws*, The Hague, Kluwer Law International, 2004.

[11] Cvjetko, Bo_tica, "Croatia: Criminal Responsibility of Minors in the Republic of Croatia," 75 *International Review of Penal Law* (*Revue internationale de droit pénal*) 263, 2004.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Cuba	0[12]	-	-	Decreto- Ley No. 64 del Sistema para la Atención a Menores con Trastornos de Conducta del 30 de diciembre de 1982.
Czech Republic	15	-	-	Law on the Responsibility of Youth for Criminal Acts and on Justice in Juvenile Matters, 2003.[13]
Democratic People's Republic of Korea	14	-	-	Criminal Law, as amended through 1995, Art. 14.[14]
Estonia	7	-	-	Juvenile Sanctions Act, as amended through 2004, §1(1)-(2) and §2. §1(1) This Act provides sanctions applicable to minors and the competence of juvenile committees. §1(2) This Act applies to a minor: 1) who, at less than 14 years of age, commits an unlawful act corresponding to the necessary elements of a criminal offence prescribed by the Penal Code; 2) who, at less than 14 years of age, commits an unlawful act corresponding to the necessary elements of a misdemeanour prescribed by the Penal Code or another Act. . . . §2 For the purposes of this Act, a minor is a person between seven and eighteen years of age.

[12] Cuba generally maintains that its MACR is 16, but this limit is actually the age of penal majority as stipulated in Penal Code Art. 16(2). Instead, the main juvenile justice legislation, *Decreto-Ley No. 64 del Sistema para la Atención a Menores con Trastornos de Conducta del 30 de diciembre de 1982*, does not contain any minimum age for its application. Under this system, relevant children are seen as offenders in conflict with the law, and administrative "prevention and social welfare commissions" may order their deprivation of liberty indefinitely in specialized re-education centers. In 1998, one NGO reported to the Committee on the Rights of the Child that almost 62,000 children were held in such institutions. See, inter alia, Coalition of Cuban American Women, *Cuban State and the Implementation on the Convention on the Rights of the Child*, Hialeah (Florida), September 1998; Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Cuba*, CRC/C/8/Add.30, 15 February 1996; Romero, Lidia, and Luis Gómez, *La Política Cubana de Juventud Entre 1995 y 1999: Principales Características (La Experiencia del Pradjal en Cuba)*, La Habana, Centro de Estudios Sobre la Juventud, 2000; and Zaragoza Ramírez, Alina, and Bárbara Mirabent Garay, "Administración de justicia de menores: un desafío a la contemporaneidad," *Cubalex: Revista Electrónica de Estudios Jurídicos*, No. 9, July-September 1999.

[13] Válková, Helena, *New Juvenile Justice Law in the Czech Republic*, presented at the Conference of the European Society of Criminology, Amsterdam, August 25-28, 2004.

[14] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1997: Democratic People's Republic of Korea*, CRC/C/65/Add.24, 5 November 2003, par. 56.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
Georgia	12	14	-	Criminal Code, as amended through 2007.[15]
Hungary	14	-	-	Criminal Code, 1978, Sect. 23.[16] The person who has not yet completed his fourteenth year when perpetrating an act, shall not be punishable.
Kazakhstan	14[17]	16	-	Criminal Code, as amended through 2004, Art. 15.[18] (1) A person shall be subject to criminal liability who reached sixteen years of age by the time of the commission of a given crime. (2) Persons, who reached fourteen years of age by the time of the commission of a crime, shall be subject to criminal liability for murder (Article 96), deliberate causation of serious damage to health (Article 103), deliberate causation of medium gravity damage to health under aggravated circumstances (Article 104, the second part), rape (Article 120), forcible acts of a sexual character (Article 121), kidnapping (Article 125), theft (Article 175), robbery (Article 178), brigandage (Article 179), extortion (Article 181), illegal occupation of an automobile or other transport

[15] New MACR provisions enter into force July 1, 2008, and create a lower MACR of 12 for premeditated murder, including under aggravated circumstances, intentional damage to health, rape, most types of robbery, assault, and possession of a knife. The pre-existing age limit of 14 continues to apply for other crimes. Human Rights Watch, *Georgia: Lowering the Age of Criminal Responsibility Flouts International Standards*, New York, 11 June 2007.

[16] Translation by the Trier Academy of European Law, www.era.int/domains/corpus-juris/public/texts/legal_text.htm.

[17] The Commentary to Art. 15 of the Criminal Code notes courts' authority under certain conditions to apply coercive measures of correctional education to children ages 11 and older, via placement in a special educational institution for up to three years. These institutions are reorganized correctional colonies, which were in essence juvenile prisons. In addition, Centers of temporary isolation, adaptation and rehabilitation for juveniles may admit children younger than the MACR, and as young as 3, who have committed acts harmful to the public. See Children's Fund of Kazakhstan, Kazakhstan International Bureau for Human Rights and Rule of Law, Center for Conflict Resolution, and Crisis Center for Women and Children and the Feminist League, *Alternative Report of Non-Governmental Organizations of Kazakhstan with Commentaries to the Initial Report of the Government of Kazakhstan on Implementation of the Convention on the Rights of the Child Ratified by Kazakhstan in 1994*, Almaty, 2002; Committee on the Rights of the Child, *Second and third periodic reports of States parties due in 2006: Kazakhstan*, CRC/C/KAZ/3, 23 August 2006, pars. 28 and 458-466; Kazakhstan NGOs' Working Group "On Protection of Children's Rights," *Alternative Report of Non-Governmental Organizations with the Comments to the Second and Third Reports of the Government of the Republic of Kazakhstan Implementation of the Convention on the Rights of the Child as well as Recommendations of the UN Committee on the Rights of the Child*, Almaty, 2006; and UNICEF Kazakhstan, correspondence with author, May 2001.

[18] Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				vehicle without the purpose of theft under aggravated circumstances (Article 185, the second, third, and fourth parts), deliberate destruction or damage to property under aggravating circumstances (Article 187, the second and third parts), terrorism (Article 233), capture of a hostage (Article 234), deliberately false notice of an act of terrorism (Article 242), theft or extortion of arms, ammunition, explosive materials, and explosion devices (Article 255), hooliganism under aggravating circumstances (Article 257, the second and third parts), vandalism (Article 258), theft or extortion of drugs or psychotropic substances (Article 260), desecration of the bodies of the deceased and places of burial under aggravated circumstances (Article 275, the second part), and deliberate spoilage of transport vehicles or communications ways (Article 299). (3) If a minor reached the age stipulated in the first and second parts of this Article, but during the commission of a lesser or medium gravity crime, due to lagging behind in psychical development which is not associated with a mental disorder, could not be fully aware of the actual character or public danger of his acts (omission of acts), or could not guide them, then he shall not be subject to criminal liability.
Kyrgyzstan	14[19]	16	-	Criminal Code, 1998, Art. 18.[20] (1) The person is subject to the criminal responsibility if at the moment of committing a crime he has reached the age of 16. (2) The person who has reached 14 years is subject to criminal responsibility in case of murder; deliberate "painful and more painful crimes"; kidnapping; rape; violent sexual actions; theft; rustler (cattle stealing); robbery; stealing property in a large quantity; extortion; car-stealing; deliberate arson; terrorism; capture of a hostage;

[19] Special administrative bodies, known as Commissions on Minors' Affairs, have jurisdiction over children younger than 14 who are in conflict with the law. These Commissions may place children from the age of 11 in "special correctional schools" for 1 to 5 years, in effect depriving them of their liberty. See Meuwese, Stan, ed., *KIDS BEHIND BARS: A study on children in conflict with the law: towards investing in prevention, stopping incarceration and meeting international standards*, Amsterdam, Defence for Children International The Netherlands, 2003; and Youth Human Rights Group, *Alternative NGO Report to the United Nations Committee on the Rights of the Child in relation to the examination of the Second periodic report by the Kyrgyz Republic on the implementation of the UN Convention on the Rights of the Child*, Bishkek, 2004.
[20] Meuwese, *ibid*.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				hooliganism; vandalism; stealing or extortion with fire-arms; illegal drugs: producing possession, distribution and selling; stealing or extortion for drugs.
Lao People's Democratic Republic	15[21]	-	-	Penal Code, Art. 17.[22]
Latvia	14	-	-	Criminal Law, as amended through 2004, Sect. 11.[23] A natural person may be held criminally liable who, on the day of the commission of a criminal offence, has attained fourteen years of age. A juvenile, that is, a person who has not attained fourteen years of age, may not be held criminally liable.
Lithuania	14	16	-	Criminal Code, 2003, Art. 13.[24]
Moldova	14	16	-	Criminal Code, 2002, Art. 21(1).[25] Subject to criminal responsibility are liable natural persons who, at the moment of perpetrating grave, major or exceptionally grave offenses have reached the age of 14 years as well as persons who at the moment of perpetration minor or less grave offenses have reached the age of 16 years, as well as legal entities.
Mongolia	14	16	-	Criminal Code, Art. 9(1-2).[26]
Montenegro	14	-	-	Criminal Code, as amended through 2004, Art. 80.[27] Criminal sanctions can not be applied to a juvenile who at the time of the commission of a criminal offence was under the age of 14 fourteen years (a child).

[21] Special measures are applied under the Penal Code against children at least as young as 12, including deprivation of liberty in custodial re-education institutions. See Committee on the Rights of the Child, *Initial reports of States parties due in 1993: Lao People's Democratic Republic*, CRC/C/8/Add.32, 24 January 1996, pars. 161 and 166; and UNICEF East Asia and Pacific Regional Office, *Overview of Juvenile Justice in East Asia and the Pacific Region*, Bangkok, 2001.
[22] *Ibid*. (Committee on the Rights of the Child), pars. 43 and 161.
[23] Translation by the Translation and Terminology Centre, www.ttc.lv, 2004.
[24] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1999: Lithuania*, CRC/C/83/Add.14, 15 July 2005, par. 533.
[25] Translation by Transparency International – Moldova, www.transparency.md/laws.htm.
[26] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1997: Mongolia*, CRC/C/65/Add.32, 15 November 2004, par. 66.
[27] Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
Poland	0[28]	-	-	Law of 26 October 1982 on Procedure in Cases Involving Juveniles.
Romania	14	-	14-16	Criminal Code, 2004, Art. 113.[29] (1) A minor under the age of 14 shall not be criminally liable. (2) A minor aged from 14 to 16 shall be criminally liable, only if it is proven that he/she committed the act in discernment. (3) A minor over the age of 16 shall be criminally liable within the framework of the system of sanctions applicable to minors.
Russian Federation	14[30]	16	-	Criminal Code, as amended through 2004, Art. 20.[31] A person who, before the commission of a crime, has reached the age of 16 years shall be subject to criminal responsibility. 2. Persons who, before the commission of a crime, have reached the age of 14 years shall be subject to criminal liability for homicide (Article 105), intentional infliction of grave bodily injury causing a impairment of health (Article 111), intentional infliction of bodily injury of average gravity (Article 112), kidnapping (Article 126), rape (Article 131), forcible sexual actions (Article 132), theft (Article 158), robbery (Article 161), brigandism (Article 162), racketeering (Article 163), unlawful occupancy of a car or any other transport vehicle without theft (Article 166), intentional destruction or damage of property under aggravating circumstances (the second part of Article 167), terrorism (Article 205), seizure of a hostage (Article 206),making

[28] In response to evidence of any child's "demoralization," which includes his or her commission of an offense, courts may order educative, protective, and therapeutic measures. In some cases, these measures signify the deprivation of liberty for indeterminate periods of time. See, inter alia, Committee on the Rights of the Child, *Periodic reports of States parties due in 1998: Poland*, CRC/C/70/Add.12, 6 February 2002, par. 360; and Stando-Kawecka, Barbara, *The Juvenile Justice System in Poland*, presented at the Conference of the European Society of Criminology, Amsterdam, August 25-28, 2004.

[29] Unofficial translation by Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

[30] The 1999 law on "The Bases of the System of Preventing/Combating Homelessness and Juvenile Offenses" allows for the placement of children younger than the MACR in centers for the temporary confinement of juvenile delinquents, via a judicial sentence or judge's order in response to "socially dangerous acts." Although placement is limited to 30 days, there were 54,800 such placements in 1999, 30,000 in 2000, and 24,400 in 2001. See Committee on the Rights of the Child, *Third periodic reports of States parties due in 2001, Russian Federation*, CRC/C/125/Add.5, 15 November 2004, par. 323; and Stoecker, Sally W., "Homelessness and criminal exploitation of Russian minors: Realities, resources, and legal remedies," *Demokratizatsiya*, Spring 2001.

[31] Translation by http://law.park.ru, provided by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

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				deliberately false report about an act of terrorism (Article 207), hooliganism under aggravating circumstances (the second part of Article 213), vandalism (Article 214), theft or possession of firearms, ammunition, explosives, and explosion devices (Article 226), theft or possession of narcotics or psychotropic substances (Article 229), the distruction of transport vehicles or ways of communication (Article 267).
Serbia	14	-	-	Criminal Code, 2005, Art. 4(3).[32] A criminal sanction may not be imposed on a person who has not turned fourteen at the time of the commission of an offence. Rehabilitation measures and other criminal sanctions may be imposed on a juvenile under the conditions prescribed by a special law.
Slovakia	14	-	-	Penal Code, 2005, §94-96.[33]
Slovenia	14[34]	-	-	Criminal Code, 1995, Art. 71.[35] Criminal sanctions shall not be applied against minors who were under the age of fourteen at the time a criminal offence was committed (children).
Tajikistan	14[36]	16	-	Criminal Code, Art. 23.[37] (1) A person who has attained the age of 16 years old by the time of committing a crime is liable to criminal responsibility. (2) Persons reached the age of 14 years old by the time of committing a crime are liable to criminal liability for homicide (Article

[32] Translated by OSCE Mission to Serbia and Montenegro, Organization for Security and Co-operation in Europe, www.legislationline.org.

[33] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1999: Slovakia*, CRC/C/SVK/2, 21 September 2006, pars. 49-50.

[34] Despite the nominal MACR of 14, welfare agencies called "Social Work Centers" have the authority to commit younger children to juvenile institutions, which are substantially equivalent to educational institution placements for older children in criminal cases. See Filipcic, Katja, "Slovenia: Dealing with Juvenile Delinquents in Slovenia," 75 *International Review of Penal Law* (*Revue internationale de droit pénal*) 493, 2004.

[35] *Ibid*., at 498.

[36] Under Order n° 178 of the President of the Republic of Tajikistan, of 23 February 1995 (Regulations on the Commission on Minors), administrative Commissions on Minors consider the cases of children younger than 14 suspected of having committed criminal acts. There is no minimum age limit to the Commissions' mandate in this respect, and the Commissions may apply punishments including the deprivation of liberty for children apparently as young as 7. However, there are indications that even younger children, contrary to the Regulations, have been deprived of their liberty. See, e.g., World Organisation Against Torture, *Human Rights Violations in Tajikistan: Alternative Report to the United Nations Committee Against Torture 37th Session*, Geneva, 2006.

[37] Unofficial translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

Country	MACR	ACR Specific Crimes	*Doli Incapax* Test	MACR Source Statute
				104), intentional major bodily injury (Article 110), intentional minor bodily injury (Article 111), kidnapping (Article 130), rape (Article 138), forcible act of sexual character (Article 139), terrorism (Article 179), capture of hostage (Article 181), theft of weapons, ammunition and explosives (Article 199), illegal trafficking of narcotics (Article 200), theft of drugs and precursors (Article 202), illegal cultivating of plants containing narcotic substances(Article 204), destruction of transport or ways of communication (Article 214), hooliganism under aggravating circumstances (Article 237, p.2 and 3), larceny (Article 244), robbery (Article 248), extortion (Article 250), robbery with extreme violence (249), hi-jacking of a vehicle or other means of transportation without the purpose of stealing (Article 252), intentional damaging or destruction of property under aggravating circumstances (Article 255). (3) In separate cases provided for by the Special Part of the Code only persons reached more than 16 years old are liable to criminal liability.
The former Yugoslav Republic of Macedonia	14	-	-	Criminal Code, as amended through 2004, Art. 71.[38] Criminal sanctions may not be applied against a juvenile who at the time of perpetration of the crime has not reached fourteen years (child).
Turkmeni-stan	14	16	-	Criminal Code, 1998, Art. 21.[39]
Ukraine	14[40]	16	-	Criminal Code, 2001, Art. 22.[41] 1. Persons who have reached the age of 16 years before the commission of a criminal offense shall be

[38] Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

[39] Committee on the Rights of the Child, *Initial reports of States parties due in 1995: Turkmenistan*, CRC/C/TKM/1, 5 December 2005, pars. 54 and 194.

[40] Criminal Code Chapter XV on "Specific Features of Criminal Liability and Punishment of Minors" contains several provisions that call into question the effective MACR. Art. 97(2) states that "A court shall also apply compulsory reformation measures provided for by paragraph 2 of Article 105 of this Code to a person, who committed a socially dangerous act that classifies as an act provided for by the Special Part of this Code, before he/she attained the age of criminal liability." The final such measure stipulated in Art. 105(2) is "placing a minor in a special educational and correctional institution for children and teenagers until the minor's complete correction but for a term not exceeding three years. Conditions of stay in and procedure of discharge from these institutions shall be provided for by law." Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

[41] *Ibid*. (Translation)

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
				criminally liable. 2. Persons who have committed criminal offenses at the age of 14 to 16 years shall be criminally liable only for a murder (Articles 115-117), attempted killing of a statesperson or public figure, a law enforcement officer, a member of a civilian peace-keeping or border-guard unit, or a serviceman, judge, assessor or juror, in connection with their activity related to the administration of justice, a defense attorney or agent of any person in connection with their activity related to legal assistance, or a foreign representative (Articles 112, 348, 379, 400 and 443), intended grievous bodily injury (Article 121, paragraph 3 of Articles 345, 346, 350, 377 and 398), intended bodily injury of medium gravity (Article 122, paragraph 2 of Articles 345, 346, 350, 377 and 398), sabotage (Article 113), gansterism (Article 257), act of terrorism (Article 258), hostage taking (Articles 147 and 348), rape (Article 152), violent unnatural satisfaction of sexual desire (Article 153), theft (sections 185, paragraph 1 of Articles 262 and 308), robbery (Articles 186, 262 and 308), brigandage (Article 187, paragraph 3 of Articles 262 and 308), extortion (Article 189, 262 and 308), willful destruction or endamagement of property (paragraph 2 of Articles 194, 347, 352 and 378, paragraphs 2 and 3 of Article 399), endamagement of communication routes and means of transportation (Article 277), theft or seizure of railroad rolling stock, air-, sea- or river-craft (Article 278), misappropriation of transportation (paragraph 2 and 3 of Article 289), and hooliganism (Article 296).
Uzbekistan	13[42]	14/16	-	Criminal Code, 1994, Art. 17.[43] Sane individuals aged sixteen years or above at the moment of commission of a crime, shall be subject to liability. Individuals aged thirteen years or above at the moment of commission of a crime, shall be subject to liability only for intentional aggravated killing

[42] Regional and municipal Commissions on Minors' Affairs have primary responsibility, subject to public prosecutor supervision, for responding to children younger than 13 in conflict with the law. Commissions may return such children to parental supervision or send them to children's institutions for at least three years. See Danish Centre for Human Rights and UNICEF, *Juvenile Justice in Uzbekistan: Assessment 2000*, Copenhagen, 2001; and World Organisation Against Torture, *Rights of the Child in Uzbekistan*, Geneva, 2006.

[43] Translation by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, www.legislationline.org.

Country	**MACR**	**ACR Specific Crimes**	***Doli Incapax* Test**	**MACR Source Statute**
				(Paragraph 2 of Article 97). Individuals aged fourteen years or above at the moment of commission of a crime, shall be subject to liability for the crimes envisaged by Paragraph 1 of Article 97, Articles 98, 104 – 106, 118, 119, 137, 164 – 166, and 169, Paragraphs 2 and 3 of Article 173, Articles 220, 222, 247, 252, 263, 267, and 271, Paragraphs 2 and 3 of Article 277 of this Code. . . .
Viet Nam	14[44]	16	-	Penal Code, 1999, Arts. 12 and 68.[45] Art. 12: 1. Toute personne âgée de seize ans accomplis est pénalement responsable de toute infraction. 2. Toute personne âgée de quatorze ans accomplis et de moins de seize ans est pénalement responsable des infractions très graves commises de manière intentionnelle ou des infractions extrêmement graves. Art. 68: Tout mineur coupable, âgé de quatorze ans accomplis à moins de dix-huit ans au moment de l'infraction, est pénalement responsable conformément aux dispositions du présent chapitre. . . .

[44] Under the administrative procedures of Government Decree No. 33/CP of 1997, Art. 1, and the Ordinance on Sanctions against Administrative Violations, 2002, Art. 5(1)(a), children from age 12 who commit Penal Code violations are subject to placement in reform schools for 6 months to 2 years. See Human Rights Watch, *"Children of the Dust": Abuse of Hanoi Street Children in Detention*, New York, 2006; and Committee on the Rights of the Child, *Periodic reports of States parties due in 1997: Viet Nam*, CRC/C/65/Add.20, 5 July 2002, pars. 114(b) and 232(a).

[45] Translation by la Maison du droit vietnamo-française, www.maisondudroit.org.

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