

The minimum age of criminal responsibility



1. Introduction

A child under the age of criminal responsibility lacks the capacity to commit a crime. This means they are immune from criminal prosecution – they cannot be formally charged by authorities with an offence nor be subjected to any criminal law procedures or measures. The significance of the minimum age of criminal responsibility is that it recognises that a child has attained the emotional, mental and intellectual maturity to be held responsible for their actions. The minimum age of criminal responsibility set by different countries ranges hugely from as low as six up to 18 years of age. The median age of criminal responsibility worldwide is 12.¹

Having the requisite capacity to be held responsible for offending behaviour does not mean that children over the age of criminal responsibility should be subject to adult-oriented, formal criminal prosecution. However, in nearly all countries, children above the age of criminal responsibility can be arrested, detained and imprisoned. This means that children are drawn at an early age into criminal justice systems that can stigmatise them and damage their long-term prospects and opportunities.

This Briefing first examines what the international standards say about the minimum age of criminal responsibility and then looks at how minimum ages work in practice. It concludes that States should set as high a minimum age of criminal responsibility as possible bearing in mind the emotional, mental and intellectual maturity of children. A low age of criminal responsibility sends out a damaging message to society that children are criminals first and foremost and children second. However, irrespective of where the minimum age is set, States have obligations under the UN Convention on the Rights of the Child (CRC) towards all children under the age of 18 and,

as a matter of priority, governments should develop separate justice systems for children that do not focus on punishment or retribution but on their rehabilitation and reintegration into society and on promoting respect for the child's sense of dignity and worth.

2. International standards and the minimum age of criminal responsibility

● *Setting the minimum age*

Under Article 40(3) of the CRC, States parties are encouraged to establish a minimum age below which children are presumed not to have the capacity to infringe the criminal law. There is much controversy about what should be the most appropriate age of criminal responsibility and there are no categorical international standards in this regard. In General Comment No. 10, the Committee on the Rights of the Child concludes that '*a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable*'.² At the same time it stresses that States parties should not lower their age of criminal responsibility to 12 where it has already been set higher and strongly encourages States to introduce a higher minimum age of criminal responsibility, for instance 14 or 16 years of age. Certainly there is nothing to prevent States from having 18 as their minimum age of criminal responsibility and a number of countries have chosen to do so including Brazil.³

Guidance is also found in Rule 4 of the Beijing Rules which recommends that any minimum age of criminal responsibility '*shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity*'.⁴ The Commentary

1 Cipriani, D (2009) *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*, Ashcroft

2 UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10 Paragraph 32

3 Article 228 of the Brazilian Constitution states that 'Minors under eighteen years of age may not be held criminally liable and shall be subject to the rules of the special legislation.'

4 *UN Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules'), adopted by General Assembly resolution 40/33 of 29 November 1985, Rule 4

to this Rule states that *‘the modern approach is 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 anti-social behaviour.... The Rules advise that in general there should be a close relationship between the notion of criminal responsibility and other social rights and responsibilities (such as marital status, civil majority, etc).’*

Under Article 12 of the CRC, when a child is the subject of any administrative or judicial proceedings, he or she has the right to be heard directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. General Comment No.10 states that: *‘A fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child’s age and maturity may also require modified courtroom procedures and practices.’*⁵ The implication is that children must be able to participate effectively in trials but cannot do so if they are not sufficiently mature.

In international criminal law, the issue of the minimum age of criminal responsibility has not been addressed. The statutes of the International Criminal Tribunals for Former Yugoslavia and Rwanda do not include any provisions governing the age of criminal responsibility, nor have they indicted anyone under 18. The Rome Statute of the International Criminal Court states that *‘the court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the offence.’* This is a jurisdictional provision and in effect defers the issue to national law.

- **Consistent application of the age of criminal responsibility**

Some countries have age limits that vary according to the nature or severity of the offence. In others, the minimum age of criminal responsibility depends upon the relative maturity of the child within certain

defined ages – the principle of *doli incapax*. When this applies, the police or prosecutors can rebut the presumption that a child is ‘incapable of committing a crime’ by providing evidence that the child did in fact understand the consequences of his or her actions. A review of minimum ages of criminal responsibility from 2009 found that there are currently 55 countries which retain a *doli incapax* procedure.⁶ The Committee on the Rights of the Child has found that this practice has led to the use of lower ages of criminal responsibility for more serious offences and leaves children vulnerable to discriminatory practices. The Committee strongly recommends that States parties set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age.⁷

- **A justice system focused upon rehabilitation**

The Committee on the Rights of the Child makes it clear that children who are over the minimum age of criminal responsibility and in conflict with the law have a lesser culpability than adults because they *‘differ from adults in their physical and psychological development, and their emotional and educational needs’*.⁸ States must accommodate these differences by establishing justice procedures for children that guarantee their right to a fair trial and that are focused upon rehabilitation of the child rather than on punishment or retribution. These procedures must be in full compliance with all provisions of the CRC including the following:

- In all actions concerning children, **the best interests of the child** shall be a primary consideration. While ‘best interests’ has not been precisely defined, General Comment No. 10 states that *‘[t]he protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/ retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.’*⁹
- The obligation to **promote the child’s reintegration** into society so that they can assume a constructive role in society.
- The obligation to deal with children **without resort to judicial proceedings** (provided that human rights and legal safeguards are fully respected) in most cases.

5 Paragraph 46, General Comment No.10

6 See note 1, Cipriani, page 110

7 General Comment No. 10, Paragraph 34

8 General Comment No. 10, Paragraph 10

9 Paragraph 10, General Comment No. 10

- There will always be a need for secure accommodation for the very small minority of children over the age of criminal responsibility who commit serious violent offences and who pose a significant risk to themselves or their communities. However, a child can only be **arrested, detained or imprisoned as a measure of last resort** and for the shortest possible time. Detention before trial should only be used in exceptional circumstances (where the child is an immediate danger to himself/herself or others) and should only be used for limited periods of time. Bail and other forms of conditional release should be accompanied by measures to support and supervise the child during this period. Detention following conviction must only be used as a last resort and for the shortest possible time in situations where a child is convicted of a violent offence or has been involved in persistent serious offending and there is no other appropriate response.

3. The age of criminal responsibility in practice

In practical terms the international standards mean that a separate justice system for all children should be established. This should be engaged from the moment of first contact until all involvement with the system is concluded. It should apply regardless of the nature of the offence and should consist of separate and specialist authorities and institutions, including separate units within police stations and separate courts which are furnished and arranged in a child-friendly manner and staffed by specialised judges. As far as possible, cases should be dealt with without resort to judicial proceedings but instead through alternative dispute resolution, diversion and different community-based sentences for children who are found to have committed a crime. All those working in the justice system for children – including lawyers, judges, the police, the probation service, prison service and social services – should receive regular, ongoing, specialised training.

A separate justice system for children that has rehabilitation and reintegration as its central objective does not mean that children will not be held responsible for their actions, nor that they will be denied due process to determine whether or not they committed the alleged offence. Certainly it does not mean that the human rights of victims of crimes committed by children are neglected. These are of central importance to the process, particularly when the victims are children themselves, and States should implement the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.¹⁰ It can only be in the interests of victims and society in general

A phased approach to children who offend in Scotland

In Scotland children *under the age of eight* lack the legal capacity to commit an offence, cannot be prosecuted in the criminal courts and can only be referred to the children's hearings system on non-offence grounds, that is when they have been or may be harmed by others.

Children *aged between eight and 12* do have the legal capacity to commit an offence but cannot be prosecuted in the criminal courts and where necessary are referred to the hearings system on both offence and non-offence grounds. The hearings system seeks to determine what measures may be required to address the behaviour and welfare of children. It is premised on the belief that: 'the offending behaviour of young people is considered as part of a broader picture of who they are. Interventions are designed to be early, holistic and with a presumption that children stay in their communities.' (Preventing Offending by Young People: A Framework for Action (2008)). An increasing number of children involved in offending behaviour are now being dealt with by relevant agencies (police, health, education, social welfare) without even referral to the children's hearings system.

Children *aged 12 or over* can be prosecuted in Youth Courts (subject to guidance of the Lord Advocate on appropriate cases) or referred to the hearings system on both offence and non-offence grounds. In practice only a very small number of children are referred to the criminal courts and only for very serious offences.

Children *aged 16 and 17* may be dealt with within the hearing system or within Youth Courts designed to be transitional courts between the children's hearings system and the full adult criminal justice system.

for children who have broken the law to be properly rehabilitated and reintegrated into society and thereby less likely to re-offend. A separate justice system simply means that children are not criminalised and are less likely to re-offend as a consequence of cost-effective, evidence-based and child-oriented justice procedures and interventions.

Most countries do acknowledge, to a greater or lesser extent, that children above the minimum age of criminal responsibility are in a special category with regard to their treatment within justice systems. For example,

¹⁰ UN Economic and Social Council (ECOSOC), *UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, 22 July 2005, E/RES/2005/20

many have a justice system that encompasses at least some legislation, policies, procedures and institutions specifically applicable to children. However, few can be said to have a truly separate system of justice for children that is in compliance with the CRC. In nearly all countries children above the age of criminal responsibility may in principle be subject to arrest, detention and imprisonment. Few countries have adequate child crime prevention programmes, many rely heavily on pre- and post-trial detention, conditions of detention are unacceptable and children in detention are frequently exposed to violence. In some countries, children over the minimum age are automatically processed through the adult criminal justice system with inadequate consideration for the protections provided for in the CRC. In many other countries the protections afforded to children are poorly implemented in practice.

Depriving children of their liberty can lead to long-term and costly psychological and physical damage, whilst overcrowding and poor detention conditions threaten their development, health and well-being. The removal of children from their family and community networks as well as from educational or vocational opportunities at critical and formative periods in their lives can compound social and economic disadvantage and marginalisation. Exposure to criminal influences and violent behaviour whilst in detention, and in the worst instances, exposure to adult offenders, is likely to encourage repeat offending. This in turn will make it more likely that young children will build up a criminal record which makes subsequent custodial sentences more likely in the future. Criminal prosecution can easily become a 'default' response to offending and make it less likely that more appropriate protection and welfare services to respond to children's behaviour are developed and implemented.

There are many practical challenges in implementing the minimum age of criminal responsibility. In many countries children are not registered at birth and do not have documentation proving their age.¹¹ There is ample evidence that police at times exploit this and exaggerate a child's age so that they are above the age of criminal majority in order to avoid invoking additional protective safeguards, or may threaten to do so as means of extorting money. Judges and prosecutors may not take the time to properly investigate a child's age and often simply rely on their subjective assessment of the age of the defendant in front of them. If there is no proof of age and it cannot be

established that the child is at or above the minimum age of criminal responsibility, the Committee on the Rights of the Child recommends that the child should not be held criminally responsible.

In some instances, children under the minimum age of criminal responsibility may be at risk of being used by adults for criminal activities and this is sometimes proposed as a reason not to raise the age of criminal responsibility. However, if children are discovered to be exploited in this way then they should be provided with appropriate protection and the adults responsible prosecuted.

There are also challenges in how children below the minimum age of criminal responsibility who come into conflict with the law are treated. In many countries local administrative bodies (often Commissions of Minors) can apply disciplinary measures to children under the minimum age of criminal responsibility which includes placing them in special educational institutions and depriving them of their liberty for long periods of time. The behaviour of children under the age of criminal responsibility should be addressed through appropriate and targeted interventions that are proven to be in their best interests. They should never be taken through the criminal justice system. Such interventions can include educational measures or supervision by social workers.

At the other end of the spectrum, the age of criminal majority is the age at which offenders no longer have any additional protections under the CRC and are treated in the same way as adults. This is commonly held at 18 years of age but in many countries it sits at 16 or 17. Furthermore, certain measures can effectively lower the age of criminal majority; for example, some countries allow children's cases to be transferred to adult courts on the basis of the crime being 'too serious' to be dealt with in the children's justice system¹² or because the child is accused alongside adult co-defendants. Research from the US has suggested, perhaps not surprisingly, that transferring children to adult courts results in high rates of pre-trial detention, more severe sentences, placement of children in adult facilities and overall it has served to increase rates of recidivism.¹³

Conversely, in some countries the age of criminal majority is effectively extended above 18 and people aged between 18 and 21 are treated differently from adults particularly in relation to the sentences they

11 UNICEF estimates that, in 2009, one in four developing countries with available data had birth registration rates of less than 50 per cent

12 A well known example of this is the case brought before the European Court of Human Rights in *T v United Kingdom and V v United Kingdom* where T and V were ten years old when they abducted and killed a two year old boy. Aged 11 they were tried in public in an adult court before a judge and jury (although some allowances were made for their age). They were convicted of murder and abduction and sentenced to an indefinite period of detention. The court concluded that the attribution to the applicants of criminal responsibility for their acts did not violate Article 3 but that they were denied a fair hearing under Article 6 because they were unable to participate effectively. A partly dissenting opinion from five of the 18 judges did find a breach of Article 3: 'the public nature of the trial not only contributed to the inhuman but also to the degrading treatment, and the fact that the applicants were tried in accordance with the same criminal procedure as adults and sentenced without sufficient account being taken of the fact that they were children must be qualified as inhuman.' *T v the United Kingdom* judgment – Joint partly dissenting opinion. *T. v. United Kingdom* (2000) 30 E.H.R.R

13 Bishop, D. (2000) *Juvenile Offenders in the Adult Criminal Justice System*, Crime and Justice, 27, pp.81–168

receive and the type of detention facilities to which they are sent. In the Philippines for example, more lenient custodial sentences are given to adults up to the age of 21 and in Germany, offenders who are over 18 but under 21, can be transferred from adult to youth courts. In some countries, offenders are allowed to remain in youth detention facilities after they have reached the age of majority.

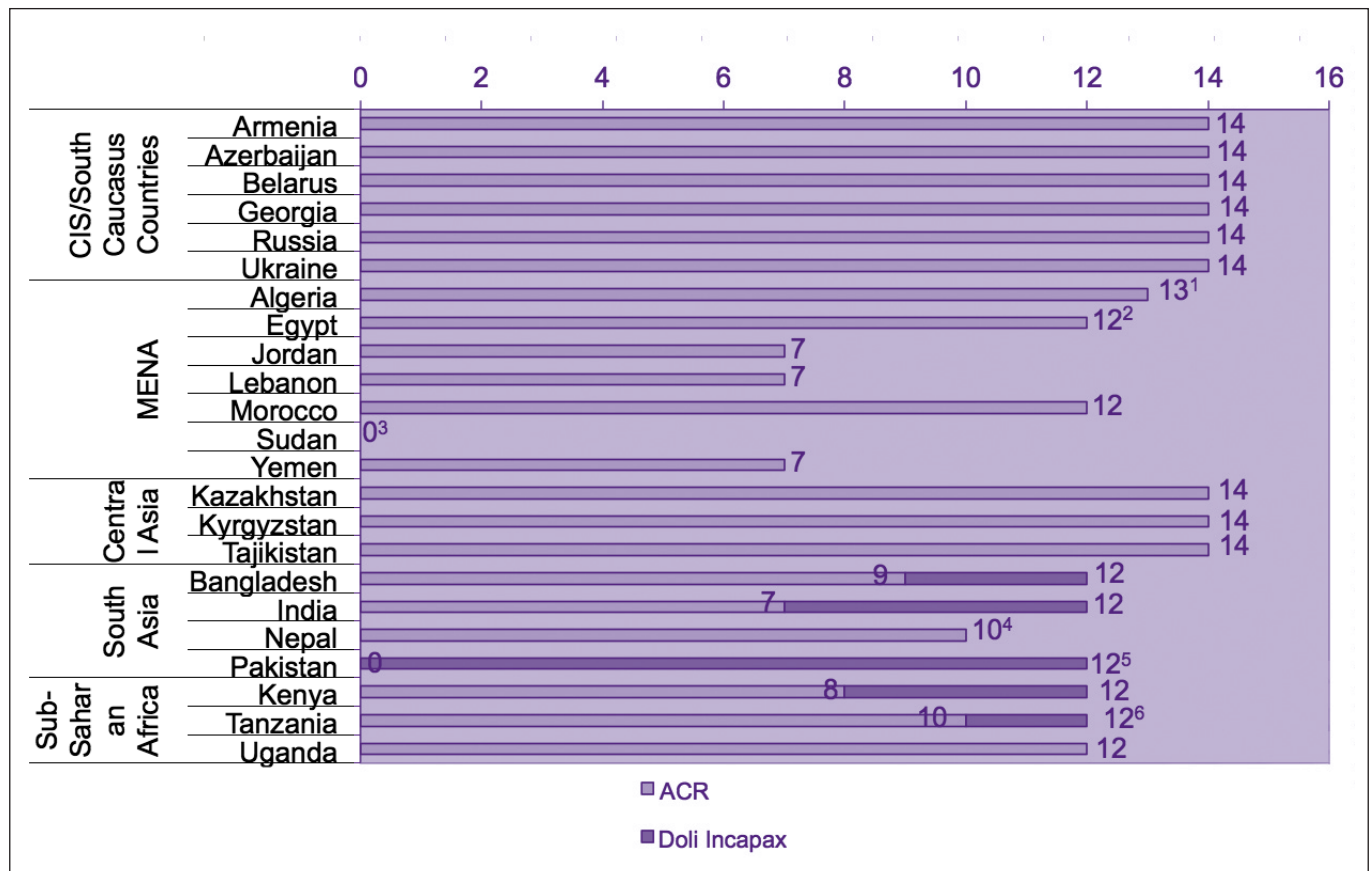
4. Recommendations

- States should set as high a minimum age of criminal responsibility as possible which reflects the emotional, mental and intellectual maturity of children.
- All children over the age of criminal responsibility should be subject to a separate justice system for children that: focuses on their rehabilitation and reintegration into society; promotes respect for the child's sense of dignity and worth; prohibits torture and cruel, inhuman and degrading treatment and punishment; and uses detention as a measure of last resort and for the shortest possible time.
- The minimum age of criminal responsibility should be applied consistently to all children in conflict with the law regardless of the nature or severity of the offence and should refer to the age of the child at the time of the offence.
- Given widespread misuse of the legal principle of *doli incapax*, States should revoke this principle in favour of a fixed minimum age of criminal responsibility for all children which is as high as possible.
- States should ensure that children below the age of criminal responsibility are never taken through the criminal justice system but face appropriate and targeted interventions in their best interests that address their behaviour.
- Legislation and policy that allows under-18s to be treated as adults within criminal justice systems, for example by transferring children to adult courts, should be amended to ensure it is in compliance with the CRC.
- Efforts should be made to strengthen systems of birth registration where required and to provide forms of identity for all children.
- Police and prosecutors should have to prove that a child is over the age of criminal responsibility if this is in doubt. If a child's age cannot be confirmed then the child should be given the benefit of the doubt and not be held criminally responsible.
- Efforts should be made by States and civil society to foster public understanding and awareness of children's rights in the context of justice for children in order to encourage acceptance of appropriate and proportionate responses for all children. The media should be targeted to challenge simplistic and inaccurate portrayals of children who break the law.

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Minimum age of criminal responsibility in PRI priority countries

The following table was produced based on information provided in Cipriani, D (2009) *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*, Ashcroft. It has been updated where necessary.



- 1 Algeria's Criminal Code states that only protective or re-education measures may be applied to a minor under 13 years, however, this does include placement in specialised centres administered by the Ministry of Justice. In 2005, nearly 2000 children between 8 years and 13 years were deprived of their liberty in these centres.
- 2 Despite the stated age of criminal responsibility as 12 years in Egypt, children aged between 7 and 12 are brought before the courts in certain circumstances and subject to measures such as placement in social care institutions.
- 3 Sudan's Criminal Code states that criminal responsibility is limited to those children aged 15 years or older who have attained puberty. However, Article 47 allows courts to order children aged 7 and older to correctional institutions for between 2 and 5 years. There is no minimum age limit at all for offences including alcohol or drug handling or consumption and sexual relations outside of marriage. Under certain circumstances, Article 27 allows capital punishment for children aged 7 to 18.
- 4 Despite a stated minimum age of 10 years, the Terrorist and Disruptive Activities Ordinance applies to children of all ages for certain offences.
- 5 Pakistan states its minimum age at 7 years. However, Pakistan's Hudood Ordinances 1979 hold all people criminally responsible, regardless of age, for certain offences.
- 6 Apart from the semi-autonomous region Zanzibar, whose minimum age is 12 years, with *doli incapax* applying up to the age of 14 years.

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