



European
Social
Charter



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

DECISION ON THE MERITS

Adoption: 20 October 2020

Notification: 16 November 2020

Publicity: 17 mars 2021

International Commission of Jurists (ICJ) v. Czech Republic

Complaint No. 148/2017

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 316th session in the following composition:

Giuseppe PALMISANO, President
François VANDAMME, Vice-President
Eliane CHEMLA, General Rapporteur
Petros STANGOS
József HAJDU
Krassimira SREDKOVA
Raul CANOSA USERA
Barbara KRESAL
Kristine DUPATE
Aoife NOLAN
Karin Møhl LARSEN
Yusuf BALCI
Ekaterina TORKUNOVA
Tatiana PUIU

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 17 June 2020, 6 July 2020 and 20 October 2020,

On the basis of the report presented by Aoife NOLAN,

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint lodged by the International Commission of Jurists (“ICJ”) was registered on 20 March 2017.
2. The complainant organisation alleges that the situation in the Czech Republic amounts to a violation of Article 17, read either alone or in light of the non-discrimination clause of the Preamble to the 1961 European Social Charter (“the 1961 Charter”), on the grounds that the Czech Republic has failed to ensure equal legal protection for and participation of children below the age of criminal responsibility in the pre-trial stage of juvenile justice procedures, and to ensure alternatives to formal trials.
3. On 13 September 2017, the Committee declared the complaint admissible, in accordance with Article 6 of the 1995 Protocol providing for a system of collective complaints (“the Protocol”).
4. In its decision on admissibility, the Committee invited the Government to make written submissions on the merits of the complaint by 15 November 2017.
5. Referring to Article 7§1 of the Protocol, the Committee invited the States Parties to the Protocol and the States having made a declaration in accordance with Article D§2 of the Charter, to submit any observations they wished to make on the merits of the complaint before 15 November 2017. No such observations were received.
6. Referring to Article 7§2 of the Protocol, the Committee invited the international organisations of employers or workers mentioned in Article 27§2 of the European Social Charter to make observations by 15 November 2017. No such observations were received.
7. The Government’s submissions on the merits were registered on 15 November 2017.
8. The President of the Committee invited ICJ to submit a response to the Government’s submissions on the merits by 11 January 2018. ICJ’s response was registered on 11 January 2018.
9. The President of the Committee invited the Government to submit a further response by 15 March 2018. The Government’s further response was registered on 15 March 2018.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

10. The ICJ alleges that the situation in the Czech Republic amounts to a violation of Article 17, either alone or in light of the non-discrimination clause of the Preamble to the 1961 Charter, on the grounds that the Czech Republic has failed to ensure equal legal protection for and participation of children below the age of criminal responsibility in the pre-trial stage of juvenile justice procedures, and to ensure alternatives to formal trials.

B – The respondent Government

11. The Government invites the Committee to find the complaint unfounded in all respects.

RELEVANT DOMESTIC LAW AND PRACTICE

12. In their submissions the parties refer to the following provisions of domestic law:

13. Act No. 218/2003 Coll. on the Responsibility of Juveniles for Unlawful Acts and on Juvenile Justice (“Juvenile Justice Act”)

Article 1

The purpose of the law and its relation to other laws

[...]

(2) The purpose of considering unlawful acts committed by children under the age of 15 and juveniles is to use, in relation to the person who has committed such act, a measure that will effectively help such person to refrain from committing additional unlawful acts and to find his or her place in society matching his or her abilities and mental development, and to help, to the extent of his or her abilities and capacity, to redress the damage caused by the unlawful act; the proceedings shall be conducted so that they help to prevent and obviate the committing of unlawful acts.

[...]

Article 2

Definition of terms

(1) If the law does not state otherwise, it is understood that:

- a) the term “youth“ includes both children and juveniles,
- b) a child below the age of fifteen is a person, who has not reached his or her fifteenth birthday at the time of the commission of an otherwise criminal act,
- c) a juvenile is a person, who has reached his or her fifteenth birthday, but has not reached his or her eighteenth birthday at the time of the commission of the act,

(2) According to this law, it is understood that

- a) an unlawful act is an offense, a crime or an otherwise criminal act,

[...]

Article 3

Basic principles

[...]

(2) Criminal measures can only be imposed if special proceedings methods and measures, in particular, rehabilitation of disturbed social relations and measures contributing to the prevention of the commission of unlawful acts, are not likely to satisfy the purpose of this Act.

(3) Measures imposed under this Act shall take into account the personality of the person on whom they are imposed, including the age, rational and moral maturity, health condition, as well as personal, family and social circumstances and shall be proportionate to the nature and gravity of the offense. The political, national, social or religious beliefs of a juvenile or child under the age of 15, his/her family or family he/she lives in, or the way of bringing up a juvenile or a child under the age of 15, cannot be a reason for imposing measures under this Act.

(4) In proceedings under this Act, it is necessary to proceed with regard to the age, health condition, rational and moral maturity of the person, against whom the proceedings are conducted, in order to ensure that the danger posed to his or her future development is limited, and that the acts and causes, and the circumstances that have led to them, have been properly examined and explained and that a responsibility has been assumed under this Act. The proceedings must be conducted in such a way as to prevent further unlawful acts. [...]

(6) Every child under the age of 15 or a juvenile, unless otherwise provided by this Act, has the right to have his or her act discussed without undue delay and within a reasonable time by a juvenile court.

(7) Proceedings under this Act must be aimed at ensuring that the harmed party obtains compensation for the damage caused by the offense or has received other reasonable satisfaction.

(8) Judges, state prosecutors, police officers and officials of the Probation and Mediation Service involved in juvenile justice cases must be given special training for the treatment of youth.

Article 42

Juvenile rights

(1) The juvenile has the right to treatment appropriate to his or her age, mental maturity and health condition.

(2) A juvenile must have a lawyer

(a) from the moment when measures taken pursuant to this Act are applied against him or performed acts in accordance with the Code of Criminal Procedure, including acts of urgent and unrepeatable nature, unless the act can be postponed and the defense counsel informs him about it,

(b) in the enforcement procedure, when the juvenile court decides in public session,

(c) in the infringement complaint proceedings, in the appeal proceedings and in the proceedings on the application for renewal of the proceedings, if the Juvenile Court decides in public session, up to eighteen years of age.

(3) All bodies acting under this Act shall always inform the juvenile of his/her rights and give him/her full opportunity to exercise them. In appropriate cases, they will also instruct them on the conditions for the suspension of criminal prosecution, settlement or withdrawal from criminal prosecution.

Article 90

Initiation of proceedings

(1) A measure can be imposed on a child under the age of 15, who has committed an otherwise criminal act, upon a motion of the public prosecutor's office. The public prosecutor's office shall file the motion proposing the measure promptly upon learning of the impossibility of prosecution because it concerns a person who is not criminally responsible due to age.

(2) Where proceedings for the imposition of measures on a child below fifteen years of age which has committed an otherwise criminal act are not initiated on a motion by the public prosecutor's office pursuant to paragraph 1, the juvenile court may initiate such proceedings on its own initiative.

Article 91(2)

The juvenile court shall appoint a lawyer as the child's guardian for the proceedings. In this respect, the lawyer shall also continue to carry out his/her authorisations following the child's majority until the end of the proceedings in the case of the under-15 child.

Article 93

Measures

(1) If an under-15 child commits an otherwise criminal act, the juvenile court can impose on the child, usually on the basis of the results of prior pedagogical and psychological examination, the following measures:

- a) educational duty;
- b) educational restriction;
- c) warning;
- d) enrolment in a therapeutic, psychological or another suitable educational programme at an educational care centre;
- e) supervision by a probation officer;
- f) protective institutional education;
- g) protective institutional treatment.

(2) Protective education can be imposed by a juvenile court on a child, who committed an offense for which the Criminal Code allows the imposition of an exceptional penalty, and who, at the time of the commission, reached the age of twelve and did not reach the age of fifteen.

(3) Protective education can also be imposed on a child, who was younger than fifteen years at the commission of the offense, if it is reasonable considering the nature of the committed otherwise criminal act, and if it is necessary to ensure his or her proper education.

(4) Protective treatment can be imposed by a juvenile court on a child, who had not reached the age of fifteen, based on the result of prior examination of the mental state of the child (§ 58) if he or she committed an otherwise criminal act

- a) in the state caused by a mental illness, or
- b) under the influence of addictive substances or in relation to their abuse, if it concerns a child, who abuses such substances, and remaining on liberty without the imposition of protective treatment poses danger.

(9) A child can be imposed more measures simultaneously if it is necessary to satisfy the purpose of this law (Article 1§2).

(10) The juvenile court can refrain from imposing a measure if the consideration of the child's act by the public prosecutor or before the juvenile court suffices to achieve the purpose of this law (Article 1§2)

Article 95a

Protective treatment

(1) Juvenile court orders the execution of a protective treatment in a medical facility, in which the protective treatment should be carried out. (...)

14. Act No. 141/1961 Coll., Code of Criminal Procedure (effective from 1st of January 1962)

Article 11
Inadmissibility of criminal prosecution

- (1) Criminal prosecution cannot be initiated and if it has already started, it cannot be continued and must be stopped
(...)
(d) in the case of a person who is not criminally liable due to being underage (...).

Article 65
Access to documents

(1) The accused, the injured and the interested person, their attorneys and the agents have the right to inspect the files, with the exception of the voting protocol and personal data of the witness under Section 55 (2), to make excerpts and notes and to take copies at their expense files and parts thereof. The same right has the legal guardian or guardian of the accused, injured or interested person, if these persons are not fully entitled or limited by their own authority. Other persons may do so only with the approval of the chairman of the Senate and in the preliminary proceedings with the consent of the public prosecutor or the police body only if it is necessary to exercise their rights.

(2) During the pre-trial, the public prosecutor or the police authority can deny the right to consult the files and simultaneously the other rights laid down in (1) for serious reasons. The public prosecutor shall, at the request of the person whom the denial concerns, expeditiously review the gravity of the reasons for which the police authority has denied the rights. These rights cannot be denied to the accused person and the defence counsel once they have been notified of the opportunity to consult the files and also on the occasion of the negotiation of the agreement on guilt and punishment.

Article 137
Notification of resolution

(1) Notification of a resolution must be served to persons directly affected by it, as well as to the person who instigated the resolution by his petition; a court resolution shall also be announced to the public prosecutor. Notification is executed either by the announcement of the resolution in the presence of the person who is to be notified, or by serving a copy of the resolution to him.
(...)

Article 141
Admissibility and effect

- (1) The remedy against a resolution is a complaint.
(2) A complaint may be lodged against any resolution of a police authority. A resolution by a court or by public prosecutor may be challenged by means of a complaint only if the law expressly provides for this opportunity and if they decide as a first instance body.

Article 142
Authorised persons

(1) Unless otherwise provided by law, a complaint may be lodged by a person who is directly concerned by the resolution (...)

Article 143
Deadline and place for submission

- (1) A complaint shall be filed with the body against whose resolution the complaint is directed, within three days from the notification of the resolution (Section 137) (...)

Article 145

Grounds for complaints

- (1) The resolution may be challenged

a) on the ground of the erroneousness of any of its holdings, or
b) on the ground of the breach of the provisions regulating the procedure that preceded the delivery of the resolution if such breach was capable of causing any holding of the resolution to be erroneous." (...)

- (2) The complaint may be based on new facts and evidence.

Article 146

Proceedings before the authority, against whose resolution a complaint is filed

(1) An authority, against whose resolution a complaint is filed, may grant it itself, provided that changing the original resolution does not affect the rights of another party to the criminal proceedings. In the case a resolution of the Police authority issued with a prior consent of the public prosecutor or on his order is concerned, the Police authority may grant the complaint itself only with a prior consent of the public prosecutor.

(2) If the time limit for filing a complaint has already expired for all entitled persons and the complaint was not granted pursuant to sub-section (1), the matter shall be submitted

a) by the Police authority to the public prosecutor, who exercises supervision over the pre-trial proceedings and if it concerns a complaint against a resolution, to which the public prosecutor gave his consent or instruction, they submit it via the public prosecutor to the superior public prosecutor,

b) by the public prosecutor to the superior public prosecutor or the court, (...)

Article 158

Procedure before prosecution

(3) The police authority shall promptly write a record of starting steps in criminal proceedings to clarify and check facts that good reasons exist to believe that they indicate that a criminal offence has been committed; in the record, the police authority shall describe the facts and circumstances for which it is initiating the proceedings and the manner in which it has learned of them. Within 48 hours from starting the criminal proceedings, it shall send a copy of the record to the public prosecutor. Where danger from delay is imminent the police authority shall write the record once it has carried out the urgent and unrepeatable steps. In order to clarify and check facts that good reasons exist to believe that they indicate that a criminal offence has been committed, the police authority shall gather the required information and the necessary explanations and clues of the criminal offence. As part of this, the police authority is authorised, in addition to the steps specified in this Chapter, to the following, without limitation:

- a) request explanations from natural and juristic persons and governmental authorities;
- b) request expert statements from the relevant authorities and, if needed for assessing the matter, also expert opinions;
- c) obtain the required information, in particular documents and other written material,
- d) examine the object and search the site;
- e) subject to the conditions in Article 114, request a blood test and other such tests, including the sampling of the required biological material;
- f) make audio and video recordings of persons, take fingerprints subject to the conditions in Article 114, and have a person of the same sex or a doctor examine the body and measure the body from the outside if this is necessary for identifying the person or for identifying and capturing the traces or consequences of the act;
- g) subject to the conditions in Article 76, arrest the suspect;

- h) subject to the conditions in Articles 78 to 81, take the decisions and measures that are indicated in those Articles;
- i) in the manner specified in Chapter IV, carry out urgent or unrepeatable steps provided the taking of such steps does not, under this law, fall within the exclusive powers of another criminal justice authority.

(5) When providing an *explanation*, every person has the right to receive legal assistance from a lawyer. Where explanation is requested from a minor, the minor's legal guardian or appointed guardian shall be notified of this step in advance; the foregoing shall not apply where this step cannot be postponed and it is not feasible to notify the legal guardian or appointed guardian.

Article 159a(2)

Discontinuation or other settlement of the case

(...)

(2) Prior to the commencement of criminal prosecution, the public prosecutor or the police authority shall decide not to proceed with the matter by means of a resolution if the criminal prosecution is inadmissible pursuant to Article 11.

Article 159a(6)

A decision to discontinue a case must be delivered to the injured party, if known. A decision to discontinue a matter under paragraphs 1 to 5 must be delivered to the prosecutor within 48 hours. The notifier shall be notified of the discontinuation of the case if he has requested it pursuant to Section 158 (2).

Article 174

Supervision by the public prosecutor

(1) The public prosecutor shall supervise lawfulness in pre-trial proceedings.

(2) In addition to the authorizations specified in § 157 para. 2, the public prosecutor is also authorised to the following when exercising supervision:

(e) annul illegal or ill-founded decisions and measures taken by the police authority, which he/she may replace with his/her own; in the case of a resolution to discontinue the case, the prosecutor may do so within 30 days of delivery; if the prosecutor has replaced the resolution of the police authority with his own decision/resolution other than on the basis of a complaint of the entitled person against the resolution of the police authority, a complaint against the prosecutor's decision is admissible to the same extent as against the resolution of the police authority, (...)

15. Act No. 273/2008 on the Police of the Czech Republic

Article 24 § 2 reads as follows:

“At the request of the person whose liberty has been restricted the police shall notify a person close to this person, or another person as may be determined by the person whose liberty has been restricted, thereof. Where this person is a minor or a person with restricted legal capacity, the police shall also notify the legal guardian or appointed guardian of such person. Where this person is under the age of 15, the police shall also notify the authority for social and legal protection of children. [...] The police shall make the notifications promptly.”

16. Opinion No. 1 SL 705/2017 of the Analytical and Legislative Department of the Supreme Public Prosecutor's Office

The opinion on the service of the police's (public prosecutor's) decision not to proceed with the matter under Article 159a §§ 1 to 5 of the Code of Criminal Procedure and the right to complain against this decision (1 SL 702/2016) is amended as follows:

The police or the public prosecutor shall notify the child's legal guardians of the decision not to proceed with the matter under Article 159a § 2 in conjunction with Article 11§1 (d) of the Code of Criminal Procedure.

However, the notification of the decision not to proceed with the matter does not establish a right for the legal guardians to lodge a complaint against the police's or the public prosecutor's decision not to proceed with the matter under Article 159a § 2 in conjunction with Article 11§1 (d) of the Code of Criminal Procedure.

The purpose of notifying the child's legal guardians of the decision not to proceed with the matter is for the police or the public prosecutor to provide information about the result of the examination of the facts related to the committing of an otherwise criminal act by an under-15 child before the public prosecutor's office moves for the initiation of proceedings under Article 90 § 1 of Act No. 218/2003, the Juvenile Justice Act.

RELEVANT INTERNATIONAL MATERIALS

A – The Council of Europe

1. European Court of Human Rights

17. Case of *Blokhin v. Russia*, Application No. 47152/06, Grand Chamber Judgment of 23 March 2016, §§ 179, 181, 182, 196 – 199, 218. The case concerned the detention for 30 days of a 12-year old boy, who was suffering from a mental and neurobehavioural disorder, in a temporary detention centre for juvenile offenders. The Court held, *inter alia*, that his defence rights had been violated because he had been questioned by the police without legal assistance and the statements of two witnesses whom he was unable to question had served as a basis for his placement in temporary detention. The Court agreed with the Chamber judgment in the case that the proceedings concerning the boy's placement in the temporary detention centre were to be considered criminal proceedings for the purpose of Article 6, although they had not been classified as criminal under Russian law. Furthermore, the Court underlined that it was essential for adequate procedural safeguards to be in place to protect the best interest and well-being of a child when his or her liberty was at stake.

196. In view of his status as a minor, when a child enters the criminal justice system his procedural rights must be guaranteed and his innocence or guilt established, in accordance with the requirements of due process and the principle of legality, with respect to the specific act which he has allegedly committed. On no account may a child be deprived of important procedural safeguards solely because the proceedings that may result in his deprivation of liberty are deemed under domestic law to be protective of his interests as a child and juvenile delinquent, rather than penal. Furthermore, particular care must be taken to ensure that the legal classification of a child as a juvenile delinquent does not lead to the focus being shifted to his status as such, while neglecting to examine the specific criminal act of which he has been accused and the need to adduce proof of his guilt in conditions of fairness. Processing a child offender through the criminal justice system on the sole basis of his status of being a juvenile delinquent, which lacks legal definition, cannot be considered compatible with due process and the principle of legality (see, *mutatis mutandis*, *Achour v. France* [GC], no. 67335/01, §§ 45-47, ECHR 2006-IV, relating to the legal classification of recidivism). Discretionary treatment, on the basis of someone being a child, a juvenile, or a juvenile delinquent, is only acceptable where his interests and those of the State are not incompatible. Otherwise – and proportionately – substantive and procedural legal safeguards do apply. [...]

218. However, the Court considers it important to add, as did the Chamber (see paragraph 176 of its judgment), that the above restrictions were due to the fact that the applicant was under the age of criminal responsibility and therefore fell outside the protection offered by the procedural guarantees provided for by the Code of Criminal Procedure (see paragraphs 59-63 above). Instead, the Minors Act was applicable to the applicant. This Act provided for significantly restricted procedural safeguards (see § 68 of this judgment) since it was intended as protective legislation for minors. According to the Court, and as also noted by the League of Human Rights in its submission (see § 192 of this judgment), this is where, as illustrated by present case, the legislature's intention to protect children and ensure their care and treatment comes into conflict with reality and the principles set out in paragraph 196 above, since the child is deprived of his liberty without having the procedural rights to defend himself properly against the imposition of such a harsh measure.

18. Case of *Bouamar v. Belgium*, Application No. 9106/80, Judgment of 29 February 1988, §§ 57-58.

57. The Juvenile Court, which is a single-judge section of the Liège tribunal de première instance, is undoubtedly a "court" from the organisational point of view, but the European Court has consistently held that the intervention of a single body of this kind will satisfy Article 5 § 4 (art. 5-4) only on condition that "the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question"; "in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place" (see in particular the Winterwerp judgment previously cited, Series A no. 33, p. 23, § 57, and the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, p. 24, § 47).

58. That being so, it must be determined whether the applicant enjoyed such guarantees before the Juvenile Court. The 1965 Act does contain some of them. Section 62 lays down that the provisions relating to proceedings in respect of lesser criminal offences normally apply also to proceedings against juveniles (see paragraph 26 above). Furthermore, sections 54 and 55 permit juveniles to be represented by a lawyer, who will be allowed access to all the documents in the file (see paragraph 31 above).

2. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

19. Report to the Czech Government on the visit to the Czech Republic carried out from 2 to 11 October 2018

"17. As regards the situation of juveniles *aged 15 to 18*, the information gathered during the visit indicates that a lawyer was appointed for them promptly after their apprehension by the police and was present, usually together with a parent, during any police questioning.

However, the delegation could not obtain a clear picture as to whether the obligatory presence of a lawyer also applies to juveniles *below the age of 15*. While they are not criminally liable, the CPT notes that the proceedings may have important legal implications for them and that they may be subjected to measures under the Juvenile Justice Act, including the imposition of "protective education" and "protective treatment" in a closed institution.

In the CPT's opinion, juveniles (i.e. persons under the age of 18) should never be subjected to police questioning or requested to make any statement or to sign any document concerning the offence(s) they are suspected of having committed without the presence of a lawyer and, in principle, a trusted adult person. The CPT would like to receive clarification on this issue from the Czech authorities."

3. Recommendations and other texts of the Committee of Ministers

20. Recommendation of the Committee of Ministers to member states on social reactions to juvenile delinquency, R(87)20, adopted on 17 September 1987 at the 410th meeting of the Ministers' Deputies

"The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe, [...]

Recommends the governments of member states to review, if necessary, their legislation and practice with a view: [...]

II. Diversion - mediation

2. to encouraging the development of diversion and mediation procedures at public prosecutor level (discontinuation of proceedings) or at police level, in countries where the police has prosecuting functions, in order to prevent minors from entering into the criminal justice system and suffering the ensuing consequences; [...]

III. Proceedings against minors

[...]

8. to reinforcing the legal position of minors throughout the proceedings, including the police investigation, by recognising, inter alia: [...]

- the right to the assistance of a counsel who may, if necessary, be officially appointed and paid by the state;

- the right to the presence of parents or of another legal representative who should be informed from the beginning of the proceedings; [...]

- the right of minors to speak and, if necessary, to give an opinion on the measures envisaged for them;

- the right to appeal;

- the right to apply for a review of the measures ordered; [...]"

21. Recommendation of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Rec(2003)20, adopted on 24 September 2003 at the 853rd meeting of the Ministers' Deputies

"[...] I. Definitions

For the purposes of this recommendation:

- "juveniles" means persons who have reached the age of criminal responsibility but not the age of majority; however, this recommendation may also extend to those immediately below and above these ages; [...]

III. New responses

7. Expansion of the range of suitable alternatives to formal prosecution should continue. They should form part of a regular procedure, must respect the principle of proportionality, reflect the best interests of the juvenile and, in principle, apply only in cases where responsibility is freely accepted. [...]

15. Where juveniles are detained in police custody, account should be taken of their status as a minor, their age and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer and a doctor. [...]"

22. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted on 17 November 2010

I. Scope and purpose

[...]

2. The guidelines should apply to all ways in which children are likely to be, for whatever reason and in whatever capacity, brought into contact with all competent bodies and services involved in implementing criminal, civil or administrative law.

3. The guidelines aim to ensure that, in any such proceedings, all rights of children, among which the right to information, to representation, to participation and to protection, are fully respected with due consideration to the child's level of maturity and understanding and to the circumstances of the case. [...]

III. Fundamental principles

[...]

E. Rule of law

1. The rule of law principle should apply fully to children as it does to adults.

2. Elements of due process such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, should be guaranteed for children as they are for adults and should not be minimised or denied under the pretext of the child's best interests. This applies to all judicial and nonjudicial and administrative proceedings.

3. Children should have the right to access appropriate independent and effective complaints mechanisms.

IV. Child-friendly justice before, during and after judicial proceedings

[...]

B. Child-friendly justice before judicial proceedings

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

25. Children should be thoroughly informed and consulted on the opportunity to have recourse to either a court proceeding or alternatives outside court settings. This information should also explain the possible consequences of each option. Based on adequate information, both legal and otherwise, a choice should be available to use either court procedures or alternatives for these proceedings whenever they exist. Children should be given the opportunity to obtain legal advice and other assistance in determining the appropriateness and desirability of the proposed alternatives. In making this decision, the views of the child should be taken into account.

26. Alternatives to court proceedings should guarantee an equivalent level of legal safeguards. Respect for children's rights as described in these guidelines and in all relevant legal instruments on the rights of the child should be guaranteed to the same extent in both in-court and out-of-court proceedings.

C. Children and the police

28. Whenever a child is apprehended by the police, the child should be informed in a manner and in language that is appropriate to his or her age and level of understanding of the reason for which he or she has been taken into custody. Children should be provided with access to a lawyer and be given the opportunity to contact their parents or a person whom they trust.

B – The United Nations

1. Convention on the Rights of the Child

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 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 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.

2. United Nations Committee on the Rights of the Child

23. General Comment No. 24 (2019) on children's rights in the child justice system (UN Doc. CRC/C/GC/24 of 18 September 2019)

6. The objectives and scope of the present general comment are:

[...]

- (b) To reiterate the importance of prevention and early intervention, and of protecting children's rights at all stages of the system;
- (c) To promote key strategies for reducing the especially harmful effects of contact with the criminal justice system, in line with increased knowledge about children's development, in particular:

- (i) Setting an appropriate minimum age of criminal responsibility and ensuring the appropriate treatment of children on either side of that age;
- (ii) Scaling up the diversion of children away from formal justice processes and to effective programmes; [...]

Prevention of child offending, including early intervention directed at children below the minimum age of criminal responsibility

11. Early intervention for children who are below the minimum age of criminal responsibility requires child-friendly and multidisciplinary responses to the first signs of behaviour that would, if the child were above the minimum age of criminal responsibility, be considered an offence. Evidence-based intervention programmes should be developed that reflect not only the multiple psychosocial causes of such behaviour, but also the protective factors that may strengthen resilience. Interventions must be preceded by a comprehensive and interdisciplinary assessment of the child's needs. As an absolute priority, children should be supported within their families and communities. In the exceptional cases that require an out-of-home placement, such alternative care should preferably be in a family setting, although placement in residential care may be appropriate in some instances, to provide the necessary array of professional services. It is to be used only as a measure of last resort and for the shortest appropriate period of time and should be subject to judicial review.

12. A systemic approach to prevention also includes closing pathways into the child justice system through the decriminalization of minor offences such as school absence, running away, begging or trespassing, which often are the result of poverty, homelessness or family violence. Child victims of sexual exploitation and adolescents who engage with one another in consensual sexual acts are also sometimes criminalized. These acts, also known as status offences, are not considered crimes if committed by adults. The Committee urges States parties to remove status offences from their statutes.

Interventions that avoid resorting to judicial proceedings

15. Measures dealing with children that avoid resorting to judicial proceedings have been introduced into many systems around the world and are generally referred to as diversion. Diversion involves the referral of matters away from the formal criminal justice system, usually to programmes or activities. In addition to avoiding stigmatization and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost-effective.

16. Diversion should be the preferred manner of dealing with children in the majority of cases. States parties should continually extend the range of offences for which diversion is possible, including serious offences where appropriate. Opportunities for diversion should be available from as early as possible after contact with the system, and at various stages throughout the process. Diversion should be an integral part of the child justice system, and, in accordance with art. 40 (3) (b) of the Convention, children's human rights and legal safeguards are to be fully respected and protected in all diversion processes and programmes

17. It is left to the discretion of States parties to decide on the exact nature and content of measures of diversion, and to take the necessary legislative and other measures for their implementation. The Committee takes note that a variety of community-based programmes have been developed, such as community service, supervision and guidance by designated officials, family conferencing and other restorative justice options, including reparation to victims.

Minimum age of criminal responsibility

[...]

23. The Committee recognizes that although the setting of a minimum age of criminal responsibility at a reasonably high level is important, an effective approach also depends on how each State deals with children above and below that age. The Committee will continue to scrutinize this in reviews of State party reports. Children below the minimum age of criminal responsibility are to be provided with assistance and services according to their needs, by the appropriate authorities, and should not be viewed as children who have committed criminal offences.

Right to be heard (Article 12)

44. In paragraphs 57 to 64 of general comment No. 12 (2009) on the right of the child to be heard, the Committee explained the fundamental right of the child to be heard in the context of child justice.

45. Children have the right to be heard directly, and not only through a representative, at all stages of the process, starting from the moment of contact. The child has the right to remain silent and no adverse inference should be drawn when children elect not to make statements.

Prompt and direct information of the charge(s) (Article 40 (2) (b) (ii))

47. Every child has the right to be informed promptly and directly (or where appropriate through his or her parent or guardian) of the charges brought against him or her. Promptly means as soon as possible after the first contact of the child with the justice system. Notification of parents should not be neglected on the grounds of convenience or resources. Children who are diverted at the charge stage need to understand their legal options, and legal safeguards should be fully respected.

48. Authorities should ensure that the child understands the charges, options and processes. Providing the child with an official document is insufficient and an oral explanation is necessary. Although children should be assisted in understanding any document by a parent or appropriate adult, authorities should not leave the explanation of the charges to such persons.

Legal or other appropriate assistance (Article 40 (2) (b) (ii))

49. States should ensure that the child is guaranteed legal or other appropriate assistance from the outset of the proceedings, in the preparation and presentation of the defence, and until all appeals and/or reviews are exhausted. The Committee requests States parties to withdraw any reservation made in respect of article 40 (2) (b) (ii).

50. The Committee remains concerned that many children face criminal charges before judicial, administrative or other public authorities, and are deprived of liberty, without having the benefit of legal representation. The Committee notes that in Article 14 (3) (d) of the International Covenant on Civil and Political Rights, the right to legal representation is a minimum guarantee in the criminal justice system for all persons, and this should equally apply to children. While the article allows the person to defend himself or herself in person, in any case where the interests of justice so require the person is to be assigned legal assistance.

51. In the light of the above, the Committee is concerned that children are provided less protection than international law guarantees for adults. The Committee recommends that States provide effective legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities. Child justice systems should not permit children to waive legal representation unless the decision to waive is made voluntarily and under impartial judicial supervision.

52. If children are diverted to programmes or are in a system that does not result in convictions, criminal records or deprivation of liberty, "other appropriate assistance" by well-trained officers may be an acceptable form of assistance, although States that can provide legal representation for children during all processes should do so, in accordance with Article 41. Where other appropriate assistance is permissible, the person providing the assistance is required to have sufficient knowledge of the legal aspects of the child justice process and receive appropriate training.

Freedom from compulsory self-incrimination (Article 40 (2) (b) (iv))

58. States parties must ensure that a child is not compelled to give testimony or to confess or acknowledge guilt. The commission of acts of torture or cruel, inhuman or degrading treatment in order to extract an admission or confession constitutes a grave violation of the child's rights (Convention on the Rights of the Child, art. 37 (a)). Any such admission or confession is inadmissible as evidence (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 15).

59. Coercion leading a child to a confession or self-incriminatory testimony is impermissible. The term “compelled” should be interpreted broadly and not be limited to physical force. The risk of false confession is increased by the child’s age and development, lack of understanding, and fear of unknown consequences, including a suggested possibility of imprisonment, as well as by the length and circumstances of the questioning.

60. The child must have access to legal or other appropriate assistance, and should be supported by a parent, legal guardian or other appropriate adult during questioning. The court or other judicial body, when considering the voluntariness and reliability of an admission or confession by a child, should take all factors into account, including the child’s age and maturity, the length of questioning or custody and the presence of legal or other independent assistance and of the parent(s), guardian or appropriate adult. Police officers and other investigating authorities should be well trained to avoid questioning techniques and practices that result in coerced or unreliable confessions or testimonies, and audiovisual techniques should be used where possible.

Right of review or appeal (Article 40 (2) (b) (v))

62. The child has the right to have any finding of guilt or the measures imposed reviewed by a higher competent, independent and impartial authority or judicial body. This right of review is not limited to the most serious offences. States parties should consider introducing automatic measures of review, particularly in cases that result in criminal records or deprivation of liberty. Furthermore, access to justice requires a broader interpretation, allowing reviews or appeals on any procedural or substantive misdirection, and ensuring that effective remedies are available.

63. The Committee recommends that States parties withdraw any reservation made in respect of Article 40 (2) (b) (v).

E. Measures

Diversion throughout the proceedings

72. The decision to bring a child into the justice system does not mean the child must go through a formal court process. In line with the observations made above in section IV.B, the Committee emphasizes that the competent authorities – in most States the public prosecutor – should continuously explore the possibilities of avoiding a court process or conviction, through diversion and other measures. In other words, diversion options should be offered from the earliest point of contact, before a trial commences, and be available throughout the proceedings. In the process of offering diversion, the child’s human rights and legal safeguards should be fully respected, bearing in mind that the nature and duration of diversion measures may be demanding, and that legal or other appropriate assistance is therefore necessary. Diversion should be presented to the child as a way to suspend the formal court process, which will be terminated if the diversion programme is carried out in a satisfactory manner.

24. General Comment No. 12, The right of the child to be heard (UN Doc. CRC/C/GC/12 of 20 July 2009)

38. The opportunity for representation must be “in a manner consistent with the procedural rules of national law”. This clause should not be interpreted as permitting the use of procedural legislation which restricts or prevents enjoyment of this fundamental right. On the contrary, States parties are encouraged to comply with the basic rules of fair proceedings, such as the right to a defence and the right to access one’s own files.

39. When rules of procedure are not adhered to, the decision of the court or the administrative authority can be challenged and may be overturned, substituted, or referred back for further juridical consideration.

The child offender

58. Article 12, paragraph 2, of the Convention requires that a child alleged to have, accused of, or recognized as having, infringed the penal law, has the right to be heard. This right has to be fully observed during all stages of the judicial process, from the pre-trial stage when the child has the right to remain silent, to the right to be heard by the police, the prosecutor and the investigating judge. It also applies through the stages of adjudication and disposition, as well as implementation of the imposed measures.

59. In case of diversion, including mediation, a child must have the opportunity to give free and voluntary consent and must be given the opportunity to obtain legal and other advice and assistance in determining the appropriateness and desirability of the diversion proposed.

25. Concluding Observations: Czech Republic adopted on 17 June 2011 (UN Doc. CRC/C/CZE/CO/3-4, 2011)

“Administration of juvenile justice

69. While noting that the State party has undertaken measures to make sections of criminal courts dealing specifically with children under the age of 18 available throughout its territory, the Committee is concerned that:
[...]

(b) Children under the age of 15 are not held criminally responsible, but can be placed, even for petty offences, in institutional care prior to legal proceedings, without the guarantees associated with standard criminal proceedings;

70. The Committee urges the State party to continue reforming its juvenile justice system in line with the Convention, in particular articles 37, 39 and 40, and with other relevant standards, including the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), the Vienna Guidelines for Action on Children in the Criminal Justice System; and the Committee’s general comment No. 10 (2007) on children’s rights in juvenile justice [*Note: it has been replaced by the General Comment No. 24 (2019) see above*]. In particular, the Committee urges the State party to:
[...]

(b) Undertake the legislative amendments necessary for ensuring that children under the age of 15 years have at least the same level of legal guarantees associated with standard criminal proceedings;”

3. United Nations Human Rights Committee

26. Concluding Observations on the third periodic report of the Czech Republic, 22 August 2013 (UN Doc. CCPR/C/CZE/CO/3, 2013)

20. The Committee is concerned that, although children under the age of 15 are not held criminally responsible, they are subject to standard pretrial criminal proceedings when suspected of an unlawful act, without the required legal assistance or the possibility of accessing their file (Articles 14 and 24).

The State party should:

(a) Ensure, as a minimum, that children under the age of 15 suspected of an unlawful act enjoy the same standard criminal procedural safeguards at all stages of criminal or juvenile proceedings, in particular the right to an appropriate defence;

(b) Consider, wherever appropriate, dealing with juveniles suspected of an unlawful act who are not held criminally responsible without resorting to formal trials or placing them in institutional care; [...]

4. United Nations General Assembly

27. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") adopted by General Assembly resolution 40/33 of 29 November 1985

2. Scope of the Rules and definitions used

[...]

2.2 For purposes of these Rules, the following definitions shall be applied by Member States in a manner which is compatible with their respective legal systems and concepts:

(a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult;

(b) An offence is any behaviour (act or omission) that is punishable by law under the respective legal systems;

(c) A juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence. [...]

3. Extension of the Rules

3.1 The relevant provisions of the Rules shall be applied not only to juvenile offenders but also to juveniles who may be proceeded against for any specific behaviour that would not be punishable if committed by an adult.

3.2 Efforts shall be made to extend the principles embodied in the Rules to all juveniles who are dealt with in welfare and care proceedings. [...]

7. Rights of juveniles

7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings. [...]

11. Diversion

11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in rule 14.1 below.

11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.

11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims. [...]

15. Legal counsel, parents and guardians

15.1 Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.

15.2 The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.

28. United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("Havana Rules") adopted by General Assembly resolution 45/113 of 14 December 1990 (UN Doc. A/RES/45/113 (1990), Annex)

[...]

11. For the purposes of the Rules, the following definitions should apply:

- (a) A juvenile is every person under the age of 18. The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law;
- (b) 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. [...]

18. The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following:

- (a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications; [...]

29. United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines") adopted by General Assembly resolution 45/112 of 14 December 1990 (UN Doc. A/RES/45/112 (1990))

"6. Community-based services and programmes should be developed for the prevention of juvenile delinquency, particularly where no agencies have yet been established. Formal agencies of social control should only be utilized as a means of last resort."

30. United Nations Standard Minimum Rules for Non-custodial Measures (“The Tokyo Rules”) adopted by General Assembly resolution 45/110 of 14 December 1990 (UN Doc. A/RES/45/110 (1990), annex)

5. Pre-trial dispositions

5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

31. Vienna Guidelines for Action on Children in the Criminal Justice System Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997 (UN Doc. 1997/30 (1997))

15. A review of existing procedures should be undertaken and, where possible, diversion or other alternative initiatives to the classical criminal justice systems should be developed to avoid recourse to the criminal justice systems for young persons accused of an offence. Appropriate steps should be taken to make available throughout the State a broad range of alternative and educative measures at the pre-arrest, pre-trial, trial and post-trial stages, in order to prevent recidivism and promote the social rehabilitation of child offenders. Whenever appropriate, mechanisms for the informal resolution of disputes in cases involving a child offender should be utilized, including mediation and restorative justice practices, particularly processes involving victims. In the various measures to be adopted, the family should be involved, to the extent that it operates in favour of the good of the child offender. States should ensure that alternative measures comply with the Convention, the United Nations standards and norms in juvenile justice, as well as other existing standards and norms in crime prevention and criminal justice, such as the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), with special regard to ensuring respect for due process rules in applying such measures and for the principle of minimum intervention.

16. Priority should be given to setting up agencies and programmes to provide legal and other assistance to children, if needed free of charge, such as interpretation services, and, in particular, to ensure that the right of every child to have access to such assistance from the moment that the child is detained is respected in practice.

32. UN Secretary General, Guidance Note, UN Approach to Justice for Children (September 2008)

“6. Respecting legal guarantees and safeguards in all processes

Basic procedural safeguards as set forth in relevant national and international norms and standards shall be guaranteed at all stages of proceedings in state and non-state systems, as well as in international justice. This includes, for example, the right to privacy, the right to legal aid and other types of assistance and the right to challenge decisions with a higher judicial authority.”

33. The Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; entry into force: 27 January 1980; United Nations Treaty Series vol. 1155, p. I-18232) provides as follows:

“Article 31 – General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

3. There shall be taken into account, together with the context:

a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

c) any relevant rules of international law applicable in the relations between the parties. [...]”

THE LAW

PRELIMINARY CONSIDERATIONS

As to the applicability of Article 17 of the 1961 Charter to the case at hand

34. In its observations on admissibility, the Government claims that the complaint is incompatible *ratione materiae* with the Charter, since it does not relate to any provision of the 1961 Charter binding on the Czech Republic in terms of Article 4 of the Protocol. The Government argues that the content of Article 17 of the 1961 Charter as ratified by the Czech Republic strives clearly to ensure social and economic protection of mothers and children. It asserts, however, that it does not in any way guarantee the right to a fair trial of children below the age of criminal responsibility, which is, in the Government’s view, the subject matter of the complaint at hand.

35. The ICJ emphasises that the subject matter of its complaint concerns the failure by the Czech Republic to ensure appropriate treatment of children below the age of criminal responsibility who are in conflict with the law and the administration of juvenile justice. In the view of ICJ, Article 17 of the 1961 Charter directly relates to protection in the way children are treated generally, but especially by institutions of the State. Thus, the ICJ argues that the subject matter of the complaint falls within the scope of Article 17 of the 1961 Charter and that the objection *ratione materiae* invoked by the Government should be dismissed by the Committee.

36. The Government argues that, in principle, the Charter does not and should not protect civil and political rights. Its system of protection is not adapted for that purpose. It recalls that the right to a fair trial is guaranteed under Article 6 of the European Convention on Human Rights. It is one of the fundamental civil rights, a prerequisite of the principle of rule of law, and it cannot be regarded as a social or economic right to be protected by the Charter. The Government is of the view that the systems of protection under the Charter and the Convention should not be regarded as interchangeable.

37. The ICJ strongly disagrees with the argument that the Charter does not and should not protect civil and political rights and with the differentiation of human rights into distinct categories. The ICJ concurs with the view that all human rights are universal, indivisible and interdependent and interrelated (Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5). This principle is also recalled by the Committee in

International Federation of Human Rights (FIDH) v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, §28.

38. The Committee recalls its decision on admissibility in the present complaint according to which the issues concerning the applicability of Article 17 of the 1961 Charter in the circumstances of the current complaint should be dealt with at the merits stage (decision on admissibility of 13 September 2017, §12).

39. When interpreting the scope of Article 17 of 1961 Charter, the Committee has repeatedly stated that matters related to children and the law, children in public care and protection of children from ill-treatment and abuse fall within the scope of Article 17 of the 1961 Charter (Conclusions XV-2 (2001), Statement of interpretation, Article 17). It has directly engaged with issues of criminal procedure within the scope of Article 17 of the 1961 Charter (see e.g. Conclusions XIX-4 (2011), Denmark; Conclusions XIX-4 (2011), United Kingdom). Of particular importance for the purposes of this complaint, the Committee has made clear that Article 17 of the 1961 Charter encompasses the situation of children in conflict with the law (Statement of interpretation regarding Article 17, Conclusions XV-2 (2001), see also Conclusions XX-4 (2015), Article 17, Denmark, Poland and the United Kingdom).

40. The Committee notes in this respect that States Parties to the 1961 Charter, including the Czech Republic, have repeatedly reported on Article 17 in relation to “children in conflict with the law”, including, as relevant, the situation of children below the age of criminal responsibility (see most recently Conclusions XX-4 (2015), Article 17; Conclusions XXI-4 (2019), Article 17).

41. Moreover, the Committee stresses that the Charter contains comprehensive provisions protecting the fundamental rights and human dignity of children – that is, persons aged under 18. It enhances the requirements of the European Convention on Human Rights in this regard (Association for the Protection of All Children (APPROACH) Ltd. v. the Czech Republic, Complaint No. 96/2013, decision on the merits of 20 January 2015, §46).

42. The European Court of Human Rights has emphasised that there is no water-tight division separating the sphere of social and economic rights from the field covered by the European Convention on Human Rights (*Airey v. Ireland*, Application no. 6289/73, Judgment of 9 October 1979, §26). While the ECHR sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature (*ibid*). Similarly, the Charter sets forth what are essentially social or economic rights, but many of them have implications of a civil and political nature. The Committee recalls that it attaches great importance to the indivisibility of all human rights which form the European system of human rights (*Transgender Europe and ILGA-Europe v. the Czech Republic*, Complaint No. 117/2015, decision on the merits of 15 May 2018, §83).

43. The Committee thus interprets the rights under the Charter in light of the principle of indivisibility and interrelatedness of human rights. This has been a feature of its Article 17 jurisprudence under both the 1961 Charter and the Revised Charter (see e.g. FIDH v. France, Complaint No. 14/2003, op. cit., §28). The Committee's work on Article 17 has directly engaged with a range of issues with strong civil and political rights-related aspects, including physical punishment of children (see e.g. Association APPROACH Ltd v. the Czech Republic, Complaint No. 96/2013, op. cit.; World Organisation against Torture (OMCT) v. Greece, Complaint No. 17/2003, decision on the merits of 7 December 2014) and protection of psychological and physical integrity (see e.g. Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, decision on the merits of 23 October 2012, §35).

44. Indeed, the Committee considers that Article 17 of the Charter embodies the indivisibility of human rights as it imposes on States Parties obligations to prohibit and penalise all forms of violence against children, including all forms of corporal punishment, as well as positive obligations to ensure the accommodation, basic care and protection of children, including children in conflict with the law. Any other reading would be contrary to the Committee's established practice, which is consistent with the principle of seeking the interpretation of the Charter that is most appropriate in order to realise the aim and object of the Charter (Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, decision on the merits of 20 October 2008, §36).

45. The Committee therefore considers that the right to *social and economic protection* envisaged in Article 17 of 1961 Charter has long been considered to apply to children in conflict with the law. Furthermore, the obligation of States in terms of Article 17 to 'take all appropriate and necessary measures' to ensure the effective exercise of that right, including 'the establishment or maintenance of appropriate institutions or services' necessarily extends to those measures, institutions and services that are specific to the position of children in conflict with the law.

46. In the light of the above, the Committee holds that the matters which form the object of the present complaint fall within the scope of Article 17 of the 1961 Charter.

As to the allegation of discrimination

47. Referring to the non-discrimination requirement as formulated in the Preamble to the 1961 Charter, ICJ alleges that children below the age of criminal responsibility are subject to discrimination in comparison with juveniles during the pre-trial stage of juvenile justice proceedings. The ICJ argues that children below the age of criminal responsibility enjoy a significantly lower standard of protection during the pre-trial stage of juvenile justice proceedings than juveniles do. The ICJ claims that the pre-trial stage of the juvenile justice proceedings is identical for both age groups when in conflict with the criminal law and they are therefore indeed in a comparable situation.

48. The Government firstly recalls that the Czech Republic has ratified the 1961 Charter. It considers that the State's obligation to prohibit discrimination on grounds of age or on grounds of other status does not follow from the text of the Preamble or other provisions of the 1961 Charter. Secondly, the Government rejects the argument of the ICJ based on prohibition of discrimination on grounds of "other status" which is based on the wording of Article E of the Revised Charter of 1996 given that the Czech Republic has not ratified the Revised Charter and is therefore not bound by it. Finally, the Government emphasises that criminal proceedings dealing with offences committed by criminally responsible juveniles and civil proceedings dealing with "otherwise criminal acts" committed by children under the age of 15 are based on completely different principles, and the legal guarantees afforded to the parties to these proceedings therefore cannot be compared in any manner.

49. The Committee recalls that it has repeatedly held that issues of discrimination may be examined in light of the Preamble of the 1961 Charter in conjunction with substantive rights of the 1961 Charter (European Roma and Travellers Forum (ERTF) v. the Czech Republic, Complaint No. 104/2014, decision on the merits of 17 May 2016, §112; Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, decision on the merits of 23 March 2017, §§194-197, GENOP-DEI and ADEDY v. Greece, Complaint No. 66/2011, decision on the merits of 23 May 2012, §§66-69).

50. However, the primary issue with regard to the children whose rights are the subject of this complaint is not discrimination, whether as compared to juveniles or adults. Rather, the key question is whether their rights in terms of Article 17 of the 1961 Charter are effectively guaranteed (European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France, Complaint No. 114/2015, decision on the merits of 24 January 2018, §59; DCI v. the Netherlands, Complaint No. 47/2008, op. cit., §§72-75 and DCI v. Belgium, Complaint No. 69/2011, op.cit., §§148-151).

51. Therefore, the Committee does not consider it necessary to address the question of alleged discrimination as a distinct aspect of the present complaint. The Committee therefore decides to examine this case solely with regard to Article 17 of the 1961 Charter.

I. ALLEGED VIOLATION OF ARTICLE 17 OF THE 1961 CHARTER

52. Article 17 of the 1961 Charter reads:

Article 17 – The right of mothers and children to social and economic protection

Part I: "Mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection."

Part II: "With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services."

A – Arguments of the parties

1. The complainant organisation

53. The ICJ alleges that the Czech Republic has failed to ensure equal legal protection for and participation of children below the age of criminal responsibility in the pre-trial stage of juvenile justice proceedings, and to ensure access to effective restorative justice measures applicable to these children, in violation of Article 17 of the 1961 Charter read alone or in light of the non-discrimination clause in the Preamble to the 1961 Charter.

54. The ICJ states that the present complaint concerns the rights of the group of children below the age of criminal responsibility, i.e. children below the age of 15. It further explains that the Juvenile Justice Act covers two age groups: children below the age of criminal responsibility (under the age of 15) and juveniles (those who at the moment of committing a criminal act reached 15 years of age but were younger than 18 years of age).

55. The ICJ states that in case of juveniles, the criminal procedure is divided into three stages: (i) the pre-trial stage (*examination phase*); (ii) the pre-trial stage (*investigation phase*); and (iii) trial stage. In the case of children below the age of criminal responsibility, the pre-trial stage is limited to the *examination* phase only. When the police authority reasonably believes that a child below the age of criminal responsibility committed an unlawful act, it sets aside the proceedings in line with Article 159a (2) of the Code of Criminal Procedure. Under Article 90 (1) of the Juvenile Justice Act, the state prosecutor then has an obligation to bring a case of a child below the age of criminal responsibility before the juvenile court. The juvenile court may impose one of the sanctions (measures) listed under Article 93 of the Juvenile Justice Act, including measures of deprivation of liberty (protective institutional education and protective institutional treatment).

56. According to the ICJ, the examination phase usually lasts several months. During this phase, the police authorities carry out a number of measures including interrogations, reconstructions of the crime scene, and DNA extractions. ICJ argues that evidence and other information gathered at this stage are crucial in terms of the imposition of measures by the juvenile courts, since these courts rely primarily on evidence gathered by the police authorities in the pre-trial stage.

57. The ICJ claims that during the examination phase, children below the age of criminal responsibility do not benefit from specific procedural rights such as the right to mandatory legal assistance, the right to access their police file, the right to be served with the final resolution of the police authority in their case or the right to file an appeal against the resolution of the police authority. In addition, the ICJ states that children below the age of criminal responsibility are subject to formal trials without any possibility of benefitting from alternatives (diversions). The ICJ argues that children below the age of criminal responsibility are not perceived and treated as rights holders

and equal subjects of human rights, but rather solely as objects of care and moral education.

58. The ICJ asserts that the following forms of conduct by the State give rise to a violation of Article 17 of the 1961 Charter.

- (i) *The alleged failure to ensure mandatory legal assistance for children below the age of criminal responsibility in the pre-trial stage of juvenile justice proceedings*

59. The ICJ submits that children below the age of criminal responsibility are not assigned a lawyer who can inform them about the specificities of the procedure and their procedural rights such as the right to remain silent, help them to prepare their defence, counsel them during the interrogations, and support them in the course of the pre-trial proceedings. The ICJ further indicates that the Juvenile Justice Act is silent in respect of the right to legal aid in the pre-trial stage of children below the age of criminal responsibility. Under the same Act, all juveniles must be represented by a lawyer of their choice or a compulsory defence counsel (legal aid lawyer) who is assigned from the very beginning of the proceedings, including during the *examination* phase.

60. The ICJ recalls that in line with international standards, the interests of justice requires that children in conflict with the law, whether or not in proceedings that are formally designated as criminal in national law, must benefit from the right to legal assistance from the beginning of formal proceedings against them. Moreover, the ICJ argues that children shall be granted at least the same procedural rights as adults in similar situation. In doing so, the ICJ invokes a range of Council of Europe standards, including the case law of the European Court of Human Rights, as well as UN standards.

- (ii) *The alleged failure to ensure access to the police file in the pre-trial stage of juvenile justice proceedings*

61. The ICJ argued in its complaint that during the pre-trial stage, neither children below the age of criminal responsibility nor their parents, legal guardians or any of their other possible representatives are entitled to access the police file. Article 65 (1) of the Code of Criminal Procedure lists the persons entitled to access the file. The ICJ stated that children below the age of criminal responsibility and their representatives are not included on that list. The ICJ alleged that at the pre-trial stage of juvenile justice proceedings, children below the age of criminal responsibility are effectively at the mercy of police investigators. The ICJ emphasised that without knowing the content of the file, children below the age of criminal responsibility cannot effectively submit new evidence or challenge already gathered evidence.

62. In its submissions on the merits of the complaint, the Government stated that it is possible for children below the age of criminal responsibility or their representatives to access the file upon request, unless serious reasons for refusing such request apply. In its response to the Government's submissions on the merits, the ICJ stated that the standard is absent or unclear and, in any event, arbitrarily applied as access depends on the discretion of the police or the state prosecutor.

(iii) The alleged failure to ensure that children below the age of criminal responsibility are served with the final resolution of the police authority in their case and have the right to appeal against this resolution

63. The ICJ argues that children below the age of criminal responsibility do not have the right to be served with the final resolution of the police authority in the pre-trial stage and do not have the right to challenge this resolution, either directly themselves or through a legal representative. The ICJ asserts that the resolution of the police authority under Article 159a (2) of the Code of Criminal Procedure, by which it sets aside the procedure and informs the state prosecutor of the result, automatically leads to a formal trial before the juvenile court.

64. The ICJ further states that while juveniles and adults must be served with the decision to stop the pre-trial proceedings and they have a right to appeal such a decision (under Articles 172 (1) and (3) of the Code of Criminal Procedure), children below the age of criminal responsibility do not benefit from the same level of social protection. In its response to the Government's submissions on the merits, the ICJ stresses that there is a difference between *being notified* of a decision and *being served* with a decision. In the ICJ's opinion, national law clearly does not provide for a possibility to be served with the resolution. Moreover, the ICJ argues that the possibility of being notified, which in any event is not satisfactory, is also unclear. The ICJ argues that, in not being served with the resolution and having no right to appeal it, a child below the age of criminal responsibility and her representatives cannot seek a possibly more favourable outcome of the proceedings. Having the right to challenge the resolution can thus be crucial for children to prevent unnecessary judicial proceedings and their possible traumatising.

65. The ICJ submits that children below the age of criminal responsibility should enjoy the right to appeal against the resolution taken in accordance with Article 159a (2) of the Code of Criminal Procedure because the resolution fundamentally establishes the subsequent procedural position of the minors concerned. The ICJ argues that the law does not provide for any remedy to challenge such a resolution before a superior authority. The ICJ finally stresses that there is no objective and reasonable justification for not providing children below the age of criminal responsibility with the right to be served with the resolution and with the right to appeal against the resolution to discontinue the proceedings under Article 159a (2) of the Code of Criminal Procedure.

- (iv) *The alleged failure to protect children below the age of criminal responsibility who are suspected of an unlawful act against formal trials before juvenile courts*

66. The ICJ indicates that in cases of children below the age of criminal responsibility, the Czech juvenile justice system does not provide for any restorative justice measures, typically mediation or so-called “diversions”, or other alternatives to a formal trial before the juvenile court. After the case has been discontinued under Article 159a (2) of the Code of Criminal Procedure, the state prosecutor is obliged under Article 90 (1) of the Juvenile Justice Act to refer the case of a child to the juvenile court. The ICJ stresses that, even though the Juvenile Justice Act proclaims in Article 3 (1) that it is built on restorative justice principles, it does not provide for mediation or any form of diversion for children below the age of criminal responsibility. Such children are thus always subjected to formal judicial proceedings, including when accused of petty offences. The ICJ points out that, in contrast, in case of both juveniles and adults, the law provides for specific diversions at the pre-trial stage. The ICJ argues that the lack of restorative justice for children under the age of criminal responsibility leads to unnecessary formal trials.

67. The ICJ submits that guaranteeing social protection of children under Article 17 of the 1961 Charter requires States Parties to ensure that children below the age of criminal responsibility are not forced to face formal trials in cases where it is inappropriate and unnecessary and that alternatives based on restorative justice principles are available and accessible. The ICJ recalls that international human rights standards on juvenile justice favour alternatives to criminal prosecution and formal trial so as to prevent unnecessary stigmatisation of young children and strengthen their social protection. The ICJ refers to numerous Council of Europe standards and UN standards such as the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010) and the Beijing Rules adopted by the UN General Assembly (1985).

68. As to the Government’s argument that “*the existence of diversions within the meaning of the Criminal Code would, on the contrary, constitute a lowering of the standard of protection currently afforded to children*”, the ICJ points out that the Government presents no justification for this view, but rather argues that the current “diversions” as formulated in the criminal law, would represent a lowering of the standard of protection.

2. The respondent Government

69. The Government firstly stresses that one of the essential aspects which must be considered when examining the present complaint is the different nature of proceedings applicable to juveniles, on one hand, and to children below the age of criminal responsibility, on the other hand. The Government submits that proceedings conducted against juveniles have the nature of criminal proceedings, while proceedings in cases of children under the age of 15 suspected of unlawful acts have the nature of civil proceedings to which civil law regulations are applicable.

70. As for the proceedings in cases of children under the age of 15, the Government further states that the legal system rests on the social and guardianship model, where emphasis is placed on identifying the causes of and preventing child delinquency through the choice of appropriate measures. The Government provides an overview of the system of proceedings in cases in which children under the age of 15 suspected of having committed unlawful acts, including the measures that can be imposed by the juvenile court (e.g., an educational duty, an educational restriction, a warning alert, inclusion in a therapeutic, psychological or another suitable care programme at an educational care centre, supervision by a probation officer, protective institutional education or protective institutional treatment (see Article 93 (1) of the Juvenile Justice Act)).

71. The Government points out that compliance of the wording of the Juvenile Justice Act and the resulting state practice with the Czech Republic's constitutional order and international obligations has been examined by the Constitutional Court, which has repeatedly concluded that children's rights are effectively protected in judicial proceedings.

72. As to the grounds of the complaint, the Government more particularly invites the Committee to find the complaint unfounded for the following reasons:

- (i) *The alleged failure to ensure mandatory legal assistance for children below the age of criminal responsibility in the pre-trial stage of juvenile justice proceedings*

73. The Government states that during the *examination* phase, the police authority has the opportunity to request the child to provide an 'explanation'. According to the Government, the purpose and objective of this explanation, it is to provide for the child's right to voice his or her views of the suspicion in line with Article 12 of the Convention on the Rights of the Child. The Government points out that under Article 158 (5) of the Code of Criminal Procedure, on the occasion of providing an explanation, the child (as any other person) has the right to legal assistance, albeit that it also makes clear that the state does not provide legal assistance to the child. The Government also asserts that a staff member of the authority for social and legal protection of children shall be present during the providing of explanation by an under-15 child at all times, and it is usually possible for the child's legal guardian or court-appointed guardian to attend the provision of explanation, and to ensure that the child has access to legal assistance from a lawyer at all times. The Government therefore believe that the child's rights are effectively protected.

74. As regards the ICJ's statement that children providing an explanation are themselves unable to request the assistance of a lawyer making access to legal assistance illusory, the Government refers to Article 158 (5) of the Code of Criminal Procedure according to which if an explanation is requested from a minor, the minor's legal guardian or appointed guardian shall be notified of this step in advance. The Government submits that the legal guardian or appointed guardian of the child is aware

of the fact that the child shall provide an explanation and therefore he or she is in a position to ensure legal assistance for the child.

(ii) The alleged failure to ensure access to the police file in the pre-trial stage of juvenile justice proceedings

75. The Government states that the opportunity for the child and their parents to consult the police file during the examination phase is not excluded. It is possible to accommodate the child's or their legal guardians' request for accessing the file unless serious reasons for refusing this request are found. Such serious reasons, according to the Government, would primarily include reasons of tactics in the pending examination or a conflict of interests of the persons requesting access to the file.

76. The Government acknowledges that, in certain cases, the child has no access to the police file during the examination phase. However, it argues that even in such cases the child's rights are not curtailed on the basis that the collection of evidence takes place during the proceedings before the juvenile court, while the pre-trial examination phase is limited to uncovering the facts that can be reasonably taken to indicate that an unlawful act has been committed.

(iii) The alleged failure to ensure that children below the age of criminal responsibility are served with the final resolution of the police authority in their case and have the right to appeal against this resolution

77. The Government rejects the ICJ's claim that children and their legal guardians are not informed of the resolution not to proceed with the matter because prosecution is inadmissible in case of underage children. The Government refers to the provisions of Article 159a (6) of the Code of Criminal Procedure which stipulates that, as a general rule, a person who is directly affected by a decision should be notified of that decision. The Government further indicates that, in cases where children under the age of 15 are suspected of having committed an unlawful act, the child's legal guardians are duly notified of the result of the examination of the facts and receive this information before the public prosecutor's office sends the file to the juvenile court.

78. In its further response on the merits, the Government submits the text of the Opinion No. 1 SL 705/2017 of the Analytical and Legislative Department of the Supreme Prosecutor's Office. This Opinion stipulates that the parents of a child suspected of having committed an unlawful act shall be notified of the final resolution of the police authority. The notification of the resolution not to proceed with the matter due to the inadmissibility of prosecution due to the suspect child's age includes information on gathered evidence in the case. The Government states that, in compliance with the above mentioned Opinion, public prosecutors are being trained in specialised seminars to the effect that the child's legal guardians should be notified of the decision not to proceed with the matter due to the inadmissibility of prosecution of underage children.

79. The Government acknowledges that the applicable legislation does not allow children under 15 to lodge an appeal against the resolution not to proceed with the matter due to the inadmissibility of prosecution of underage children. It further indicates that Article 145 of the Code of Criminal Procedure provides for an ordinary remedy against the police authority's resolution. The latter provides that a resolution may be challenged on the grounds of the erroneousness of any of its holdings or for a breach of the provisions regulating the procedure which preceded the delivery of the resolution if such breach was capable of causing any holding of the resolution to be erroneous.

(iv) The alleged failure to protect children below the age of criminal responsibility who are suspected of an unlawful act against formal trials before juvenile courts

80. The Government is of the view that the existence of diversions within the meaning of the Criminal Code in cases of children under the age of 15 would constitute a lowering of the standard of protection currently afforded to children suspected of having committed an unlawful act.

81. According to the Government, the applicable legislation provides children with a high standard of protection of their rights in juvenile court proceedings. The Government believes that if diversions were to be made possible in the pre-trial examination phase, the police authority would simultaneously *de facto* decide, in its decision on the diversion, that the child actually *has* committed the unlawful act, but without any proceedings having been conducted before an independent court and ensuring the child's procedural rights.

B – Assessment of the Committee

82. The Committee recalls that it has consistently interpreted Article 17 of the 1961 Charter to cover matters related to children in conflict with the law (Conclusions XV-2, (2001), General Introduction, General observations regarding Articles 7§10 and 17; see §§34-46 of this decision). The Committee has previously held, for example, that the procedure with respect to children and young persons must be suitable for them and that they must be afforded the same procedural guarantees as adults. (Conclusions XV-2 (2001), Statement of interpretation, Article 17). Indeed, the procedural guarantees required to secure the Charter rights of children will in many instances go beyond those required for adults.

83. In order to ensure the social and economic protection of children under Article 17 of the 1961 Charter, States Parties must take all appropriate and necessary measures to ensure that children enjoy adequate protection, including appropriate legal procedural protections. A failure to do so, and the resultant risks posed to the child in the context of, and a result of, the relevant legal proceedings, are likely to have significant and wide-ranging implications both for the child's short-term circumstances as well as for their longer term mental, moral and social development. Such measures are therefore central to ensuring the child's right to social and economic protection in terms of Article 17.

84. Furthermore, with regard to the situation of children below the age of criminal responsibility in the Czech Republic, the Committee previously took note in its Conclusions of NGO comments submitted in relation to the 12th national report of the Czech Republic (2015) that the juvenile system does not provide children below the age of criminal responsibility with individualised treatment and restorative measures. This information also indicated that cases of children younger than 15 years (1371 children in 2012) are allegedly always brought before a juvenile court even for petty offences (see Conclusions XX-4 (2015), Article 17, Czech Republic and comments by non-governmental organisations on the 12th national report on the implementation of the revised European Social Charter of 3 February 2015, pages 9 – 15).

85. Noting the Government's argument that proceedings in cases of children under the age of 15 suspected of having committed an unlawful act have the nature of civil proceedings, the Committee considers that under Article 17 of the 1961 Charter children must benefit from an adequate level of protection, irrespective of the formal designation and nature of proceedings (criminal or civil) in national law. The Committee emphasises that the adoption of measures in light of the intention of the State to create a more protective system for children below the age of criminal responsibility should not result in children being provided with less and/or weaker legal procedural protection than adults.

86. In view of the particular and multifaceted vulnerability of children under 15, the Committee stresses the fundamental importance of providing adequate protection to children below the age of criminal responsibility in both the pre-trial and trial stages of proceedings. The Committee considers that, even though children below the age of criminal responsibility cannot be held criminally liable, they must be afforded adequate legal procedural protections because those proceedings may have important consequences for them in terms of their social and economic protection. This may include being subjected to measures under the Juvenile Justice Act such as "protective education" and "protective treatment" in an institution (see Article 93 (1) f) and g) of the Juvenile Justice Act).

87. The Committee recalls that Article 31§§1 and 3 of the Vienna Convention on the Law of Treaties require the terms of a treaty to be read in their context and in the light of its objective and purpose, as well as in harmony with other relevant and applicable rules of international law (see paragraph 33 above). In so doing, the Committee must consider Article 17 of the 1961 Charter in the light of complementary international instruments and authoritative interpretations thereof. This includes, above all, the Convention on the Rights of the Child and the General Comments of the Committee on the Rights of the Child (*mutatis mutandis*, FIDH v. France, Complaint No. 14/2003, op. cit., § 26; DCI v. the Netherlands, Complaint No. 47/2008, op. cit., §§35-

36; European Council of Police Trade Unions (CESP) v. France, Complaint No. 101/2013, decision on the merits of 27 January 2016, §82).

88. In light of the specific allegations put forward in the present complaint, the Committee will examine whether the protection afforded in national law and practice to children below the age of criminal responsibility suspected of having committed an unlawful act is in conformity with Article 17 of the 1961 Charter.

(i) *On the alleged failure to ensure mandatory legal assistance for children below the age of criminal responsibility in the pre-trial stage of juvenile justice proceedings*

89. The Committee notes that, according to the ICJ, children below the age of criminal responsibility are not assigned a lawyer who can inform them of the specificities of the procedure and their procedural rights (especially the right to remain silent), help them to prepare their defence, counsel them during the interrogations and support them in the course of the pre-trial proceedings. Under the Juvenile Justice Act, children below the age of criminal responsibility do not have the right to free legal assistance in the pre-trial stage. In contrast, all juveniles must be represented by a lawyer of their choice or a legal aid lawyer who is assigned from the very beginning of proceedings, including during the examination phase.

90. The Committee notes from the information and examples provided by the ICJ that during the pre-trial stage, which in practice could last several months, children are subject to lengthy interrogations at police stations in the absence of a lawyer or their parents/guardian. They can also be subjected to blood sampling, fingerprinting and extracting DNA. As indicated by the ICJ, statistical data provided by the Ministry of Interior show that a significant number of children are concerned, since in 2015 one third of all children in the juvenile justice system were children below the age of criminal responsibility.

91. The Committee notes that according to Article 158 (5) of the Code of Criminal Procedure, when providing an explanation, every person has the right to receive legal assistance from a lawyer. The same provision establishes that, where an explanation is requested from a minor, the authorities have an obligation to notify the minor's legal or appointed guardian of the step of explanation in advance, with some exceptions such as when the explanation cannot be postponed and it is not feasible to notify the legal guardian or appointed guardian. The Committee further notes that according to Article 24 (2) of the Act No. 273/2008 on the Police of the Czech Republic, where the person is under the age of 15, the police authority shall notify the authority for social and legal protection of children.

92. The Committee understands that children under the age of criminal responsibility have the "right" to receive legal assistance only when they provide an explanation in the context of the examination stage. The Committee notes that there is no obligation incumbent on the authorities to provide mandatory legal assistance to children below the age of criminal responsibility from the outset of the pre-trial proceedings.

93. The Committee notes that due to their relative immaturity, children below the age of criminal responsibility are not always able to understand and follow pre-trial proceedings. It cannot therefore be assumed that they are able to defend themselves in this context. The Committee stresses that children below the age of criminal responsibility should be assisted by a lawyer in order to understand their rights and the procedure applied to them, so as to prepare their defence. Moreover, they should in all cases be able to obtain legal assistance from the outset of the proceedings and especially during questioning by the police. States should arrange for the child to be assisted by a lawyer where the child or the legal guardian has not arranged such assistance.

94. The Committee underlines that failure to ensure legal assistance for children below the age of criminal responsibility in the pre-trial stage of proceedings is likely to impact negatively on the course of the proceedings, thereby increasing the likelihood of their being subjected to measures such as deprivation of liberty under the Juvenile Justice Act (namely “protective education” and “protective treatment” in an institution according to Article 93 (1) f) and g) of Juvenile Justice Act). The Committee is therefore of the view that the provision of legal assistance to children in conflict with the law, which is required to secure their social and economic protection in terms of Article 17, should not be left at the discretion of the authorities, even in the context of the pre-trial stage of proceedings.

95. The Committee notes that, when interpreting Article 40 (2) (b) (ii) of the Convention on the Rights of the Child which provides that children should “have legal or other appropriate assistance in the preparation and presentation of his or her defence”, the UN Committee on the Rights of the Child has recommended that “States provide effective legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities” (see UN CRC, General Comment No. 24 (2019) on children’s rights in the child justice system §§49-53).

96. The Committee further notes the opinion of the Committee on the Prevention of Torture of the Council of Europe according to which persons under the age of 18 should never be subjected to police questioning or requested to make any statement or to sign any document concerning the offence(s) they are suspected of having committed without the presence of a lawyer and, in principle, a trusted person (see Report to the Czech Government on the visit to the Czech Republic carried out from 2 to 11 October 2018, §17). The Committee also notes that the UN Human Rights Committee has recommended that the Czech Republic should “ensure, as a minimum, that children under the age of 15 suspected of an unlawful act enjoy the same standard criminal procedural safeguards at all stages of criminal or juvenile proceedings [as applicable to any other person], in particular the right to an appropriate defence.”(UN Human Rights Committee, Concluding Observations on the third periodic report of the Czech Republic, §20).

97. The Committee also refers to the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted on 17 November 2010, according to which, “whenever a child is apprehended by the police [...] Children

should be provided with access to a lawyer and be given the opportunity to contact their parents or a person whom they trust (§28).”

98. The Committee notes the Government’s view that the rights of the child are protected by the fact that the legal or appointed guardian and the welfare officer attend the explanation given before the police. However, the Committee points out that under Article 17 of the 1961 Charter, and in line with the international instruments mentioned above, the child must enjoy effective access to legal assistance and should be supported by a parent, legal guardian or other trusted person during questioning. The latter have the role of providing general psychological and emotional assistance to the child and thereby contribute to effective outcomes, but they cannot be expected to have sufficient knowledge of the legal matters concerning the rights of the child and the child justice system.

99. The Committee considers that legal assistance is necessary in order for children to avoid self-incrimination and fundamental to ensuring that a child is not compelled to give testimony or to confess or acknowledge guilt (see UN CRC, General Comment No. 24 (2019) on children’s rights in the child justice system, §58). The assistance of a lawyer is moreover necessary in situations where parents/legal guardians have interests that conflict with those of the child and where it is in the child’s best interest to exclude the parents/legal guardians from being involved in the proceedings. As such, mandated separate legal representation for children is crucial at the pre-trial stage of proceedings.

100. In the light of the above, the Committee holds that mandatory legal assistance for children below the age of criminal responsibility in the pre-trial stage of proceedings is not ensured and that this amounts to a violation of Article 17 of the 1961 Charter.

(ii) On the alleged failure to ensure access to the police file in the pre-trial stage of juvenile justice proceedings

101. The Committee notes the ICJ’s submission that children below the age of criminal responsibility and their representatives are not included on the list of persons entitled to access the police file under Article 65 (1) of the Code of Criminal Procedure. It also notes the Government’s statement that it is nevertheless possible to accommodate the child’s or his/her legal guardians’ request for accessing the file unless there are serious reasons for refusing such a request. The Committee notes that under Article 65 (2) of the Code of Criminal Procedure, during the pre-trial proceedings, “the public prosecutor or the police authority can deny the right to consult the files (...) for serious reasons. The public prosecutor shall, at the request of the person whom the denial concerns, expeditiously review the gravity of the reasons for which the police authority has denied the rights.”

102. The Committee further notes that under Article 65 (1) of the Code of Criminal Procedure, “other persons” have the right to consult the files with the consent of the public prosecutor or the police authority. The Committee understands that children below the age of criminal responsibility or their representatives have the right to consult their file in the pre-trial proceedings with the consent of the public prosecutor or the police body - a right that can only be denied for serious reasons. The Committee notes the ICJ’s assertion that the standard is absent or unclear, and, in any event, arbitrarily applied as access depends on the discretion of the police or the state prosecutor. However, the Committee could not find sufficient evidence supporting the allegations of the complainant organisation on this point. For this reason, the Committee finds that it has not been demonstrated that there is a violation of Article 17 of the 1961 Charter with regard to this element of the complaint.

(iii) On the alleged failure to ensure that children below the age of criminal responsibility are served with the final resolution of the police authority in their case and have the right to appeal against that resolution

103. The Committee notes the ICJ’s submission that children below the age of criminal responsibility are not served with the final resolution of the police authority in the pre-trial stage (under Article 159a (2) of Code of Criminal Procedure) and do not have the right to challenge this resolution, either directly themselves or through a legal representative. It also notes the Government’s statement that as a general rule under the Code of Criminal Procedure a person who is directly affected by a decision should be notified about that decision. It further notes that according to the Opinion No. 1 SL 705/2017 of the Analytical and Legislative Department of the Supreme Public Prosecutor’s Office, the legal guardians of the child suspected of having committed an unlawful act shall be notified of the final resolution of the police authority.

104. The Committee considers that ensuring the effective exercise of children below the age of criminal responsibility of the right to protection under Article 17 of the 1961 Charter requires that children are accorded the right to be informed of the content of the final resolution of a police authority. This is consistent with the international children’s rights framework that makes clear that every child has the right to be informed promptly and directly (or where appropriate through his or her parent or guardian) of the charges brought against him or her and that this should only be done through their parents or guardian where this is appropriate in terms of the child’s age and maturity (see UN CRC General Comment No. 24 (2019) on children’s rights in the child justice system, §47).

105. Based on the information presented by the Government, the Committee understands that the child’s legal guardians receive a notification of the resolution of the police authority not to proceed with the matter. The purpose of notifying the child’s legal guardians of this decision is so that the police authority and the public prosecutor provide information about the result of the examination of the facts related to the committing of an unlawful act by a child under 15 (see also the text of the Opinion No. 1 SL 705/2017 of the Analytical and Legislative Department of the Supreme Public Prosecutor’s Office, see §16 above of this decision).

106. The Committee considers that as long as children or their legal guardians are effectively notified of the content of the police resolution, the State may choose the means and measures used to achieve this in practice. The Committee notes that according to the Opinion No. 1 SL 705/2017 of the Analytical and Legislative Department of the Supreme Public Prosecutor's Office, the legal guardians of a child suspected of having committed an unlawful act shall be notified of the final resolution of the police authority. Moreover, as a general rule, Article 137 of the Code of Criminal Procedure, provides that notification of a resolution must be served to persons directly affected by it. The Committee therefore considers that the Czech Republic has satisfied its obligations under Article 17 of the 1961 Charter with regard to this aspect of the complaint.

107. As regards the right to appeal against the final resolution of the police authority, the Committee notes that the Government acknowledges that the applicable legislation does not allow children under the age of 15 to lodge an appeal against the resolution not to proceed with the matter due to the inadmissibility of prosecution on the basis of the child's age. The Government emphasises, however, that under Article 145 of the Code of Criminal Procedure the police authority's resolution can be challenged on grounds of its erroneousness or for breaching the provisions on the proceedings that preceded the delivery of the resolution.

108. The Committee considers that at any stage of legal proceedings involving children, review of any decision by a higher competent, and impartial authority or judicial body should be provided for. This is particularly so with regard to cases that result in deprivation of liberty - as it is the case with some measures imposed on children below the age of criminal responsibility under the Juvenile Justice Act, namely, protective institutional education and protective institutional treatment (see also UN CRC Article 40 (2) (b) (iv) and UN CRC, General Comment No. 24, §62). The Committee endorses the interpretation given by the UN Committee in its General Comment No. 24 that access to justice requires a broader interpretation, allowing reviews or appeals on any procedural or substantive issue, and ensuring that effective remedies are available (UN CRC, General Comment No. 24, §62).

109. The Committee further notes that according to the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, in all judicial, nonjudicial and administrative proceedings, elements of due process such as (...) the right to access to courts and the right to appeal should be guaranteed for children as they are for adults and should not be minimised or denied under the pretext of the child's best interests (see part III E *Rule of law*, §§1-3). The Committee also notes that according to the Beijing Rules, basic procedural safeguards such as (...) the right to appeal to a higher authority shall be guaranteed at all stages of proceedings (UN Beijing Rules, §7.1).

110. The Committee notes that an ordinary remedy against the police authority's resolution exists – namely a complaint challenging said resolution on the grounds of the erroneousness of any of its holdings or for a breach of the provisions regulating the proceedings which preceded the delivery of the resolution if such breach was capable of causing any holding of the resolution to be erroneous (see Article 145 of Code of Criminal Procedure, §14 of this decision). The Committee notes that the grounds related to the erroneousness of any of the holdings of the resolution may consist in, for

example, an insufficiently established factual situation, an incorrect assessment of the evidence carried out and/or a flawed legal assessment. Moreover, the resolution may be challenged on grounds related to breaches of the procedure that preceded the resolution if such breaches may have caused the resolution to be erroneous (see *Commentary* on Article 145 paragraph 1 of Code of Criminal Procedure by JUDr. Vladimír Král - Judge of the High Court in Prague, available in the ASPI system, 1 May 2017).

111. Noting that any interested person, including children below the age of 15 or their representatives, may complain against the police authority's resolution to discontinue the matter due to inadmissibility of prosecution on the grounds outlined above, the Committee holds that there is no violation of Article 17 of the 1961 Charter with regard to this element of the complaint.

(iv) On the alleged failure to protect children below the age of criminal responsibility who are suspected of an unlawful act from formal trials before the juvenile courts

112. The Committee notes the ICJ's submission that the Czech legislation does not provide for any alternatives (diversion) to formal judicial proceedings for children below the age of criminal responsibility.

113. The Committee also notes the Government's view that the existence of diversions within the meaning of the Criminal Code in cases of children under the age of 15 would constitute a lowering of the current high standard of protection afforded to children below the age of criminal responsibility suspected of having committed an unlawful act.

114. The Committee notes that when the police authority reasonably believes that a child below the age of criminal responsibility committed an unlawful act, it discontinues the proceedings under Article 159a (2) of the Code of Criminal Procedure. Under Article 90 (1) of the Juvenile Justice Act, the state prosecutor then has an obligation to bring a case of a child below the age of criminal responsibility before the juvenile court. In the case of juveniles, the prosecutor has an option as to whether to bring an indictment against a juvenile before the juvenile court or rather to use one of the available alternatives (diversions). These latter include: (i) settlement, (ii) conditional termination of criminal proceedings, (iii) withdrawal of criminal proceedings, (iv) conditional withdrawal of a proposal to punish the juvenile.

115. The Committee recalls that in the context of the reporting procedure, it has taken note under Article 17 of the Charter as regards children in conflict with the law that some States Parties have introduced alternatives (diversion) to trial in their child justice systems (see Conclusions XV-2 (2001), Statement of interpretation on Article 17; Conclusions 2011 Ireland, the United Kingdom and Conclusions XVII-2 (2005), Austria; Conclusions XXI-4 (2019), United Kingdom on Article 17).

116. The Committee notes that according to the Committee on the Rights of the Child, exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults. The UN CRC defines "diversion" as measures for referring children away from the formal judicial system

usually to programmes or activities, at any time prior to or during the relevant proceedings. It has also been noted that, in addition to avoiding stigmatisation and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost effective (UN CRC, General Comment No. 24 (2019) on children's rights in the child justice system, §§2, 8 and 15). From a Charter perspective, the possibility of "diversion" directly contributes to enjoyment of the right to social and economic protection on the part of children in conflict with the law.

117. The Committee further notes that under international human rights law, in particular the CRC, diversion should be the preferred manner of dealing with children in the majority of cases and diversion options should be available from as early as possible after contact with the system, before a trial commences, and throughout the proceedings (UN CRC, General Comment No. 24 (2019) on children's rights in the child justice system, §§16 and 72). While the UN Committee's statements on diversion are made in relation to children above the minimum age of criminal responsibility, they apply to an even greater degree to a situation in which children below that age can still be engaged in the child justice system.

118. The Committee notes the Recommendation of the Committee of Ministers of the Council of Europe to member states on social reactions to juvenile delinquency which encouraged the development of diversion and mediation procedures at public prosecutor level or at police level in order to prevent minors from entering into the criminal justice system and suffering the ensuing consequences (see CM Recommendation of 17 September 1987, part II Diversion-mediation (2)). It also notes the Guidelines of the Committee of Ministers on child-friendly justice according to which alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) should be encouraged whenever these may best serve the child's best interests (Guidelines of CM, 17 November 2010, §§24-26). It further notes that according to the Beijing Rules of the UN General Assembly, consideration shall be given to dealing with juvenile offenders without resorting to formal trial by the competent authority (see Rule 11 of Beijing Rules).

119. In addition, the Committee notes that the UN Human Rights Committee in its Concluding Observations on the third periodic report of the Czech Republic adopted on 24 July 2013, recommended to the Czech Republic to consider, wherever appropriate, dealing with juveniles suspected of an unlawful act who are not held criminally responsible without resorting to formal trials or placing them in institutional care (UN HRC, Concluding Observations on the third periodic report of the Czech Republic adopted on 24 July 2013, §20 (b)).

120. The Committee considers that the obligation to take all appropriate and necessary measures in order to ensure the effective exercise of children of the right to social and economic protection under Article 17 of the 1961 Charter includes the obligation to develop and take measures to reduce the especially harmful effects of contact with the justice system and to ensure that the danger posed to the child's wellbeing and development by such contact is limited. One of the primary ways in which this can be achieved is through the diversion of children away from formal processes and into effective diversionary programmes in line with international standards on the rights of the child (such as CRC, see UN CRC, General Comment No. 24 (2019) on children's rights in the child justice system, §6).

121. The Committee considers that it may be left to the discretion of States Parties to decide on the exact nature and content of measures of diversion measures, and to take the necessary legislative and other measures for their implementation. With regard to the form that such diversion measures might take, the Committee notes that according to the UN Committee a variety of community based programmes have been developed such as community service, supervision and guidance by designated officials, family conferencing and other restorative justice options, including reparation to victims (UN CRC, General Comment No. 24 (2019) on children's rights in the child justice system, §17).

122. The Committee notes the Government's argument that using diversion measures at the examination phase would result in a considerable impairment of the current high standard of protection as the police authority/prosecutor would simultaneously *de facto* decide, in its decision on the diversion, that the child *has* actually committed an unlawful act, without any proceedings having been conducted before an independent court and without ensuring the child's procedural rights being engaged. However, the Committee is of the view that the possibility of such diversion at the examination phase is central to ensuring the social protection of the child in terms of Article 17.

123. The Committee stresses that all diversion measures must be consistent with the child's human rights and in the child best interests. This includes ensuring respect for legal safeguards in this context, such as ensuring legal assistance relating to the diversion offered to the child and the possibility of review of the measure (see also UN CRC, General Comment No. 24 (2019) on children's rights in the child justice system, §§18 and 72).

124. In the light of the above, the Committee holds that the failure to provide alternatives (diversion) to formal judicial proceedings for children below the age of criminal responsibility amounts to a violation of Article 17 of the 1961 Charter.

II. REQUEST FOR COMPENSATION

125. The ICJ requests the Committee to invite the Committee of Ministers to recommend that the Czech Republic pay the sum of 10,000 € (provisional estimate) to the complainant by way of compensation for legal costs.

126. The Government argues that there is no legal basis for awarding financial compensation to the complainant organisation under the Additional Protocol to the Charter providing for a system of collective complaints nor is such compensation foreseen in the Explanatory Report to the Protocol.

127. The Committee decides not to make a recommendation to the Committee of Ministers as regards the complainant's request for a payment of 10,000 € in compensation for legal costs incurred in connection with the present proceedings. It refers in this respect to the stance taken by the Committee of Ministers to reimbursement of expenses in the past (see Resolution CM/ResChS(2016)4 in *European Roma Rights Centre (ERRC) v. Ireland*, Complaint No. 100/2013) and to the letter of the President of the Committee addressed to the Committee of Ministers dated 3 February 2017 in which the President announced that the Committee would for the time being refrain from inviting the Committee of Ministers to recommend reimbursement of costs.

CONCLUSION

For these reasons, the Committee concludes:

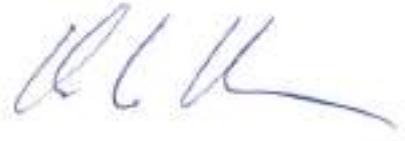
- unanimously that there is a violation of Article 17 of the 1961 Charter due to the failure to ensure mandatory legal assistance for children below the age of criminal responsibility in the pre-trial stage of proceedings;
- unanimously that there is no violation of Article 17 of the 1961 Charter due to the failure to ensure access to the police file in the pre-trial stage of proceedings for children below the age of criminal responsibility;
- unanimously that there is no violation of Article 17 of the 1961 Charter due to the failure to ensure that children below the age of criminal responsibility are served with the final resolution of the police authority in their case and have the right to appeal against that resolution;
- unanimously that there is a violation of Article 17 of the 1961 Charter due to the failure to provide alternatives (diversion) to formal judicial proceedings for children below the age of criminal responsibility.



Aoife NOLAN
Rapporteur



Giuseppe PALMISANO
President



Henrik KRISTENSEN
Deputy Executive Secretary