

# FORUM

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Human Rights

NGO information to the UN Committee on the Rights of the Child

For consideration of the fifth and sixth periodic reports of

**CZECHIA**

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Submitted by:

Forum for Human Rights (FORUM)

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## I. OVERVIEW

1. This written submission provides an outline of issues of concern with regard to the Czechia's compliance with the provisions of the Convention on the Rights of the Child (hereinafter "the CRC"), with particular focus **on problematic issues relating to domestic application of Article 40**. The purpose of the submission is to assist the UN Committee on the Rights of the Child (hereinafter the "Committee") with its consideration of the Czechia's Fifth and Sixth Periodic Report in the compilation of the Committee's Concluding Observations. The submission has been written by Forum for Human Rights (FORUM).
2. **FORUM** is an international human rights organisation active in the Central European region. It provides support to domestic and international human rights organisations in advocacy and litigation. FORUM has been supporting a number of cases pending before domestic judicial authorities and before the European Court of Human Rights. FORUM has authored and co-authored a number of reports and has provided information to UN and Council of Europe bodies on the situation in the Central European region, especially in Slovakia and Czechia. For more information, please visit [www.forumhr.eu](http://www.forumhr.eu)

## II. SPECIFIC COMMENTS

3. Czechia faces several structural deficiencies as regards its obligations deriving from Article 40 of the CRC. The common denominator of all these deficiencies is the scope in which Czechia makes children liable for their behaviour, not necessarily unlawful. The wide scope of liability of children is then connected with the failure to provide children with appropriate procedural safeguards. In fact, criminal responsibility applied with respect to children who have reached the defined age of 15 years constitutes only one part of the State's authoritative interventions adopted in reaction to the behaviour of the child with the aim to correct this behaviour. The other authoritative corrective interventions are adopted outside the system of criminal responsibility under the pretext of protection of the child. They can be divided into two contexts: 1) situation of children below the age of criminal responsibility who may be held liable for an "otherwise unlawful act" in the juvenile justice system; and 2) situation of all children, regardless their age, in the child protection system which is traditionally used in Czechia not only to protect children against abusive treatment by their parents or other caregivers but also to correct the child's behaviour. In both contexts the intervention may result in placing the child in a closed regime institution.

### (a) Children below the age of criminal responsibility

4. The age of criminal responsibility in Czechia is set forth at 15. However, that does not mean that children below this age cannot be held liable if they

commit an act that would be a criminal offence if committed by a juvenile over 15 or by an adult. This liability is enforced according to the Juvenile Justice Act<sup>1</sup> and may result in the most serious cases into deprivation of the child's liberty either in closed regime institution (protective care) or in psychiatric hospital (protective treatment). All these interventions are not formally interventions "of liability" but "of protection". It is argued that the proceedings are not held "against the child" but "in the matter of the child's protection".

5. It is true that the Committee's General Comments no. 10 and 24 do not prohibit to take special measures with respect to children below the age of criminal responsibility but, as the Interamerican Commission on Human Rights (hereinafter "the IACHR") reminds pursuant to the Committee's General Comment no. 10, "such special measures must be the exception" and must never result into the detention of the child.<sup>2</sup> In Czechia, however, children below 15, although incapable to be criminally prosecuted, are regularly subjected to juvenile justice system if they are suspected of having infringed the penal law. The adoption of special measures in reaction to their unlawful behaviour therefore becomes a rule and not an exception. This is obvious regarding the legal option for the juvenile court to decide, under defined conditions<sup>3</sup>, to refrain from imposing a measure. This option in fact means that if these conditions are not met, the juvenile court is required to impose a measure.
6. Although children below 15 are subjected to juvenile justice system and may be imposed a measure according to the Juvenile Justice Act, including in the form of their detention, they are not provided with traditional criminal proceedings safeguards. The argument to justify this shortage of safeguards is that the subject matter of the proceedings is not the liability of the child but his/her protection. However, this argument shows faulty considering that the measures imposed on children below 15 and criminally responsible juveniles overlap considerably (see scheme no.1). In addition to measures that may be imposed on children below 15 criminally responsible juveniles may be imposed participation in a probation program (which requires their consent), security detention as protective measure and punitive measures, including imprisonment. However, only a minimum of juveniles is imprisoned in Czechia. The factual difference between the situation of children below 15 and over 15 in the juvenile justice system is not as significant as we could expect from the regulation of the minimum age of criminal responsibility. If there is a significant difference, it consists paradoxically in greater availability of diversions for juveniles.

### **Scheme no. 1: Juvenile justice measures applicable to children below 15 and juveniles**

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<sup>1</sup> Act no. 218/2003 (Juvenile Justice Act).

<sup>2</sup> IACHR. Juvenile Justice and Human Rights in the Americas (2011), para. 55. Available at: <https://www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf>.

<sup>3</sup> § 93 (10) of the Juvenile Justice Act.

Measures		Children below 15	Juveniles
Diversions	Discontinuation of criminal prosecution	X	√
	Approval of settlement	X	√
	Withdrawal of criminal prosecution	X	√
	Refrainment from imposing a measure	√	√
Educational	Supervision of probation officer	√	√
	Probation Program	X	√
	Educational duties	√	√
	Educational restrictions	√	√
	Admonition with warning	√	√
	Placing in a therapeutic, psychological or another suitable educational program in the centre of educational care*	√	X
Protective	Protective care*	√	√
	Protective treatment, ambulatory or institutional*	√	√
	Security detention*	X	√
	Confiscation of a thing	X	√
Punitive	Community service activities	X	√
	Financial measures	X	√
	Financial measures with conditional suspension of sentence	X	√
	Confiscation of a thing	X	√
	Prohibition to undertake activities	X	√
	Banishment	X	√
	House confinement	X	√
	Ban from sport, cultural and other social events	X	√
	Imprisonment conditionally suspended	X	√
	Imprisonment conditionally suspended under supervision	X	√
	Unconditional imprisonment*	X	√

\* Measures that result or may result into the detention of the child

7. Since the formal aim of the juvenile justice system applied with respect to children below 15 is to ensure protection of the child rather than to enforce the child's liability, the key role in the whole system is granted to judicial proceedings before the juvenile court. These proceedings are conceived as civil, subsidiary regulated by civil procedure law and not by criminal procedure law. The Juvenile Justice Act, however, does not contain any regulation of the proceedings before the police and such regulation

cannot be naturally found in the civil procedure law either. The reason is that the authors of the Juvenile Justice Act supposed that suspicions against children below the age of criminal responsibility would be immediately brought to a juvenile court that would decide on the measure that should be imposed on the child. However, the practice, as it has developed from the adoption of the Juvenile Justice Act in 2003, has shown that it is not possible for the court to carry out investigation of an unlawful act on its own, without the pretrial proceedings by the police. Therefore, the police continue to lead investigation but without formally accusing the child who finally lacks appropriate position in this investigation, i. e. a position that would be accompanied naturally with adequate procedural safeguards.

8. This has several negative consequences for children below 15. First of all, these children are deprived during the pre-trial stage of proceedings of procedural safeguards traditionally guaranteed to child suspects by the international human rights law, especially safeguards relating to the right not to be forced to self-incrimination such as the obligatory assistance of a lawyer at the police interrogation of the child<sup>4</sup>. The child is granted with a lawyer only for the proceedings before the juvenile court. This is, however, too late. Since the judicial proceedings are civil and not criminal, lower standard of evidence applies. There is therefore no barrier to use the record of the interrogation of the child before the police as evidence proving the child's guilt. In addition, since the child is during the whole pre-trial stage only a suspect and not the defendant, he/she has no right to access the police file, take part in other investigatory operations like interrogation of witnesses, reconstruction of the unlawful act etc. Neither the child or his/her parents must be, according to the law, informed that the police have closed the proceedings and that the public prosecutor will bring the case before the juvenile court. Although the Supreme Public Prosecutor issued in this regard an intern order requiring to inform the child's parents, either they or the child are still not granted at this stage of proceedings with any right to challenge the conclusions by the police and the public prosecutor.
9. Furthermore, since the court proceedings are according to the law the exclusive moment of the juvenile justice system applied to children below 15, these children are deprived of all diversions that exist in the Czech law for juveniles. Since the obligation to initiate the proceedings before the juvenile court in every single case, regardless the seriousness of the act, the personality of the child and his/her attitude to the act, was subjected to critique by public prosecutors themselves<sup>5</sup>, the Supreme Court tried in its case-law to mitigate this rule and to argue that the public prosecutor had to carefully assess all aspects of the case, including the fact whether the

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<sup>4</sup> The importance of this rights has been emphasised, inter alia, in *Blokhin v. Russia*, the Grand Chamber judgment of the European Court of Human Rights of 23/3/2016, complaint no. 47152/06.

<sup>5</sup> For instance the Annual Report of Public Prosecution of 2010, p. 6. Available at: [http://www.nsz.cz/images/stories/PDF/Zpravy\\_o\\_cinnosti/2010/Text2010.pdf](http://www.nsz.cz/images/stories/PDF/Zpravy_o_cinnosti/2010/Text2010.pdf).

child's act corresponded to legal definition of a crime, the seriousness of the act, the intensity of its negative impacts, the way in which the child had committed the act and the child's motivations as well as his/her personal characteristics. The submission before the juvenile court may be filed only if the child's act presumably fulfil both – actus reus and Mens rea.<sup>6</sup>

10. However, it would be a mistake to interpret this Supreme Court's judgment in a way that it ensures the benefits of diversions also for children below 15. It is rather a reaction to the fact that even banal cases were brought before juvenile courts in the past. Nevertheless, diversions should be widely available to all children in conflict with law.<sup>7</sup> In addition, although it was not the intention of the Supreme Court, its judgment testifies well that the investigation of the child's unlawful act takes place before the case is brought before the juvenile court.
11. Finally, since the proceedings before the juvenile court are civil and not criminal, they are governed by the civil standard of proof even though their subject matter is the question whether the child committed the unlawful act he/she is suspected of. This has serious implications for the child's right to defence and to question witnesses since witnesses may be interrogated during the pretrial stage and their testimony is then only read before the court. Even the guilt of the child does not need to be proven beyond reasonable doubt.
12. All these consequences together with measures that may be imposed on the child in the juvenile justice system show very clearly that the regulation of the age of criminal responsibility in Czechia is rather formal and it cannot comply with obligations deriving from Article 40 (3) (a) of the CRC. This failure then inevitable leads to systemic violations of all other rights guaranteed by Article 40 with respect to children below 15 since the most significant effect the regulation of the age of criminal responsibility in the Czech law has is the argumentation that proceedings relating to these children fall outside the scope of application of Article 40.

### **Recommendations**

- **Reform the legislation in order to ensure that children below the age of criminal responsibility are not held liable for infringing the penal law, not even under the pretext of their protection, and that these children are never deprived of their liberty in reaction to their unlawful act, in any kind of institution.**
- **Adopt legislative amendments providing children below the age of criminal responsibility with adequate procedural safeguards in case of being suspected of having infringed the penal law, especially with the**

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<sup>6</sup> Judgment of the Supreme Court of 25 October 2017, 8 Tdo 1314/2017.

<sup>7</sup> CRC/C/GC/24, para. 16.

**right to obligatory assistance by a lawyer when being questioned about the act.**

**(b) Status offences of children**

13. The other context in which children in Czechia are deprived of their rights guaranteed by Article 40 of the CRC, both substantive and procedural, relates to the way of operation of the child protection system. Although designed for ensuring the protection of children from abusive treatment by their parents or other caregivers, this system is used in Czechia also to correct behaviour of the child considered as “risky” or “problematic”. The behaviour does not need to reach the intensity of a crime, not even to be unlawful; to adopt an authoritative intervention against the child, it suffices that the child’s behaviour is considered as a “behaviour difficulty”. The intervention may take form of placing the child in alternative care of a closed regime institution. In fact, “behaviour difficulties” are the third common reason for removing the child from his/her family (see table no. 2) and the number of children placed in closed regime institutions reaches approximately one third of the total number of children who are institutionalized in institutions operating under the Ministry of Education, Youth and Sports (see table no. 3).

**Table no. 2: Reasons for removing the child from his/her family 2016-2018**

	<b>Child maltreatment (violence against the child)</b>	<b>Child abuse</b>	<b>Child neglect</b>	<b>Behaviour difficulties</b>	<b>Other obstacles to childcare</b>
<b>2016</b>	158	42	1665	937	1010
<b>2017</b>	141	24	1640	871	1070
<b>2018</b>	122	43	1541	862	1071

Source: Ministry of Labour and Social Affairs

**Table no. 3: The number of children in closed regime institutions (diagnostic institutions, children homes with school, closed educational institutions) 2016-2018**

	<b>Children homes (open institutions)</b>	<b>Diagnostic institutions</b>	<b>Children homes with school</b>	<b>Closed educational institutions</b>	<b>Total number in educational institutions</b>	<b>Total number of children in closed regime institutions</b>	<b>%</b>

<b>2015</b>	3751	376	728	983	<b>5838</b>	<b>2087</b>	<b>38,8</b>
<b>2016</b>	3785	390	720	1009	<b>5904</b>	<b>2119</b>	<b>35,9</b>
<b>2017</b>	3846	369	682	941	<b>5838</b>	<b>1992</b>	<b>34,1</b>
<b>2018</b>	3831	377	749	926	<b>5883</b>	<b>2052</b>	<b>34,9</b>

Source: Ministry of Education, Youth and Sports

14. The situation in Czechia thus corresponds to what the IACHR describes as the “irregular situation” doctrine which, however, must have been abandoned with the adoption of the CRC.<sup>8</sup> Furthermore, we argue that this situation compromises the prohibition of applying status offences as a form of direct discrimination of children. Even though the authoritative interventions against children for their “behaviour difficulties” are not formally part of the juvenile justice system, the fact that they are adopted in reaction to the child’s own behaviour (and not in reaction to the abusive behaviour of the child’s parents or other caregivers) and their aim is to correct this behaviour, makes them punitive in nature. In the end, they widen the space in which the state may authoritatively correct the individual’s behaviour what is, with respect to adults, possible only in the criminal justice system.
15. The fact that the authoritative interventions are adopted outside the juvenile justice system in the end only worsens the situation of the child. Not only that the child must bear the sanction for an act that would not be considered as an offence if committed by an adult but he/she is furthermore deprived of all procedural safeguards relating traditionally to criminal proceedings since the intervention is adopted in guardianship proceedings under the pretext of the child’s protection and his/her “best interests”.
16. Since the authoritative intervention against the child in the form of placing the child in a closed regime institution is adopted as an alternative care measure, this practice may be viewed also as violation the right of the child guaranteed in Article 20 since, as the Committee emphasized, a measure of special protection under Article 20 of the CRC must never result in detention of the child.<sup>9</sup>
17. Finally, regarding the fact that these corrective measures in the form of placing the child in a closed regime institution concern mainly adolescents, of whom the majority is over 15<sup>10</sup>, this practice compromises seriously the concept of evolving capacities of the child. The Committee has

<sup>8</sup> IACHR. Fulfillment of Children’s Rights (2017), para. 39. Available at: <https://www.oas.org/en/iachr/reports/pdfs/FulfillmentRights-Children.pdf>.

<sup>9</sup> CRC/C/GC/21,2017, para. 44.

<sup>10</sup> Report of the Czech School Inspectorate of 4/5/2017. Available in Czech at: <https://www.csicr.cz/cz/Dokumenty/Tematicke-zpravy/Tematicka-zprava-Kvalita-vychovne-vzdelavaci-cinno>.

strengthened that adolescents do not lose their right to special protection<sup>11</sup>, the aim of this special protection should be, however, to protect the child from all forms of exploitation<sup>12</sup> and not from his/her autonomy corresponding to his/her evolving capacities.

### **Recommendation**

- **Take all necessary legislative, administrative and other measures, including training of professionals and awareness raising, to abandon the concept of “behaviour difficulties” and to end the practice of using authoritative interventions within the child protection system as corrective measures against the child.**

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<sup>11</sup> CRC/C/GC/20, para. 19.

<sup>12</sup> Ibid., para. 40.