



DEFENSA DE NIÑAS Y NIÑOS INTERNACIONAL DNI
DEFENSE DES ENFANTS INTERNATIONALE DEI
DEFENCE FOR CHILDREN INTERNATIONAL DCI

“Protecting the Rights of Children in Conflict with the Law”

*Research on Alternatives to the
Deprivation of Liberty in Eight Countries*

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**Master of Advanced Studies in
Children’s Rights (2007 – 2008)**

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Preface

Putting children behind bars and separating them from their families and communities seriously damages their physical, mental and social development. Detention leads to lifelong stigmatisation which hampers reintegration of children into communities. It is the responsibility of children's rights organisations, such as Defence for Children International (DCI), to draw the attention of all relevant authorities and organisations at local, national and international levels to the situation children in conflict with the law. One of the key activities to achieve this objective is the development of a publication on alternatives to the deprivation of liberty. Within this framework, DCI proposed a research programme to the students of the Master of Advanced Studies in Children's Rights (MCR).

The MCR is an international and interdisciplinary postgraduate programme on children's rights. Accordingly, the project group is an independent group of students consisting of professionals working in the field of children's rights. The group members come from a variety of backgrounds with different professional experiences. This project seeks to provide an overview of what is prescribed in international standards regarding juvenile justice and identify the legal practice in the selected countries. In order to promote the use of alternatives to deprivation of liberty, some examples of alternatives to sanctions which are currently used have been selected.

It is an honor to contribute to the publication that seeks to improve the situation of children in conflict with the law.

Executive Summary

“I don’t have a place to go. My mother is dead and my father is that blind man begging there with my little brother. I do not remember having a home. We stay in different places on the street. Sometimes the police come and take us. Many times we are told that we threw stones or we are roaming the streets illegally. I just want to go to school but my father is here and he has no money...”¹

Alternative sanctions to deprivation of liberty represent an important opportunity to ensure that the rights of some of the most vulnerable people in our societies which are our children are further protected.

Building on the practice of national and international juvenile justice systems this study focuses on alternative sanctions and defines the practice in each of eight selected study countries.

A decade after the near universal ratification of the Convention on the Rights of the Child (CRC), children’s rights are slowly but still inching along. There are several international standards that contain provisions on alternatives to the deprivation of liberty in the field of juvenile justice. The Standards promote the use of alternatives to the deprivation of liberty and emphasize that detention of children who are alleged as, accused of or recognized as having infringed the law should be directed towards a restorative purpose and deprivation should always be a measure of last resort. Some of these international instruments include: The 1989 Convention on the Rights of the Child (CRC); The General Comment Number 10 (GC10) on “Children’s Rights in Juvenile Justice”; The 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”); The 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“The Havana Rules”) and the UN Guidelines for Action on Children in the Criminal Justice System, among others.

The United Nations Basic Principles on the use of Restorative Justice Programmes in Criminal Matters encourages states to develop restorative justice programmes and provides direction for how to create and manage those programmes.

State parties have modified their juvenile justice systems to guarantee children the rights set forth in the international instruments and guidelines. In spite of such guidelines and the progress made in each of the 8 countries, the study reveals that systemic failures to guarantee children all their rights still persist, albeit in varying degrees.

Children in many cases, and in some of the 8 countries studied, where international standards are enacted into law, are still deprived of their liberty arbitrarily on the basis of vague legal provisions. In Kenya, recent studies have found that street children have been committed for years to correctional institutions after they were found on the streets. Being on the street may simply mean that a child is in need of protection.

¹ Girl on the streets in Nairobi, Kenya

One of the specific objectives of the Defence for Children International's plan of action is to advocate for Juvenile Justice Systems that are respectful of children's rights and move forward measures that aim at preventing situations in which children would come into conflict with the law. In seeking to achieve this purpose the development of a publication that would provide accounts of alternatives to the deprivation of liberty was seen as central.

This project was realized by studying prescriptions set out by international law and standards on alternatives to deprivation of liberty underlined by a study of legislation in 8 countries. Their compliance to international standards was measured and their indicators examined. The project also took a look at the latest available statistics in the given countries.

The study incorporates good practices and makes the following recommendations:

1. Elaboration of a specific international law on diversion, pre-trial alternatives and alternative sanctions related to juveniles;
2. Compulsory observation of common and shared international juvenile justice indicators by State Parties, with paying special attention to diversion, pre-trial alternatives and alternative sanctions;
3. Correlation of all analysis on diversion, pre-trial alternatives and alternative sanctions with prevention policies, included in the indicators; and
4. Incorporation of international juvenile justice indicators already established by UNICEF and UNODC into the reporting guidelines of the Committee on the Rights of the Child as well as improvement of the indicators.

It is hoped that this study will help promote the use of alternatives to deprivation of liberty as recommended in the international standards.

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Chapter 1:

Introduction

1. Introduction

1.1. Research Project for DCI

One of the specific objectives of Defence for Children International's (DCI) plan of action is to "*advocate for juvenile justice systems that are respectful of children's rights and for measures that aim at preventing situations in which children would come into conflict with the law.*" One of the key activities to achieve this objective is the development of a publication on alternatives to the deprivation of liberty.

DCI proposed to students of the Master of Advanced Studies in Children's Rights (MCR) to contribute to the development of this publication by working on some aspects of the proposed publication. The students decided to focus on the following areas:

- a) An overview of what is prescribed in existing international standards including the UNCRC, General Comment No.10 on Juvenile Justice among others.
- b) An overview of current examples of alternatives to the deprivation of liberty within the juvenile justice systems of eight different countries and the existing indicators and data related to them. The countries agreed on were Germany, the Netherlands, Switzerland, Norway, Brazil, Canada, Argentina and Kenya.

1.2. Definitions

- a) **Child**
For the purpose of this work a child means every human being below the age of 18 years.
- b) **Minimum age of criminal responsibility (MACR)**
The minimum age of criminal responsibility establishes the minimum age below which children shall be presumed not to have the capacity to infringe the penal law. Children at or above the MACR at the time of the commission of an offence but younger than 18 years can be formally charged and subject to penal law procedures (General Comment No. 10 (2007) No. 16).
- c) **Alternatives to deprivation of liberty**
According to Article 37(b) of the Convention of the Rights of the Child (CRC), deprivation of liberty shall be used only as a measure of last resort. It is therefore necessary to develop a wide range of effective measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate both to their circumstances and the offence. In particular, a variety of dispositions such as; care, guidance and supervision orders, counseling, probation, foster care, educational and training programs, and other alternatives to institutional care

have to be made available. State authorities can use two kinds of measures: measures without resorting to judicial proceedings and measures in the context of judicial proceedings (General Comment No. 10 (2007) N. 10).

d) Diversion

Diversion refers to measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable (General Comment No. 10 (2007) N. 11).

e) Pre-trial alternatives

Pre-trial alternatives are measures for dealing with children accused of, or recognized as having infringed the penal law. The performance of such a measure should be presented to the child as a way to suspend the formal criminal/juvenile law procedure, which will be terminated if the measure has been carried out in a satisfactory manner (e.g. remission, mediation) (General Comment No. 10 (2007) No. 24).

f) Alternative sanctions

In cases of the termination of the procedure with a formal court sentence, the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty as a measure of last resort (General Comment No. 10 (2007) N. 14). For the purpose of this work all formal court sentences other than the deprivation of liberty are called alternative sanctions.

g) Indicator

An indicator provides a common way of measuring and presenting information that reveals whether standards are being met. (Manual for the measurement of juvenile justice indicators (2006), p. 2).

1.3. Methodology

The project was realized by carrying out the following steps:

- research on what international standards prescribe in relation to alternatives to deprivation of liberty
- identification of the relevant legislation and information about alternatives to deprivation of liberty within the national justice systems of eight countries
- analysis of the provisions related to alternatives to deprivation of liberty in national legislation
- collection of examples of alternatives to deprivation of liberty on the national level
- research on existing international indicators related to alternatives to deprivation of liberty
- identification of national indicators related to alternatives to deprivation of liberty in eight countries

- analysis whether each of the eight countries observe the existing international indicators
- research on available statistical data in relation to the use of alternatives to deprivation of liberty in the eight countries
- general conclusion on the observation of international legal standards and of international indicators
- perspectives and recommendations

1.4. Content

The present document is divided into seven chapters.

The 1st chapter provides a short introduction to this paper including a description of the project, a presentation of the employed definitions and the applied methodology as well as the content of the document. An overview of the relevant international standards which comprise provisions in relation to alternatives to deprivation of liberty is provided in chapter 2. Chapter 3 deals with the existing international indicators related to alternatives to deprivation of liberty. Chapter 4 contains the country reports on existing alternatives to deprivation of liberty and gives an outline of existing indicators and available statistical data on alternatives to deprivation of liberty at the national level. Examples of good practice for alternatives to deprivation of liberty at several levels in different countries are presented in chapter 5. Chapter 6 contains the main conclusions and finally chapter 7 gives perspectives and contains a set of recommendations.

All the 8 country reports address the following topics:

- Outline of the national legislation related to juveniles in conflict with the law
- Diversion programmes
- Pre-trial alternatives
- Alternative sanctions to deprivation of liberty
- Indicators on alternatives to deprivation of liberty
- Available statistical data
- Conclusion about the following questions:
 - a) whether diversion, pre-trial alternatives and alternative sanctions exist
 - b) whether there is a variety of alternative measures
 - c) whether there are national indicators on alternatives to deprivation of liberty
 - d) whether the national indicators mirror the international indicators
 - e) whether there are statistics to demonstrate that alternatives actually exist and whether they are nationally applied
 - f) whether there are statistics to demonstrate that the use of alternatives prevail over the use of deprivation of liberty.



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Chapter 2:

International Standards on Alternatives to Deprivation of Liberty

2. International Standards on Alternatives to Deprivation of Liberty

At the international level, there are several standards which contain provisions on alternatives to the deprivation of liberty in the field of juvenile justice. In general, the existing standards promote the use of alternatives to the deprivation of liberty and emphasize that detention of children who are alleged as, accused of or recognized as having infringed the law should always be a measure of last resort. Additionally, some of the standards mention concrete possible alternatives and occasionally give further orientations with regard to their implementation.

Different existing international standards which make reference to alternatives to deprivation of liberty are presented briefly below. The most relevant corresponding articles of those standards are quoted in Annex No. 1 of the present document.

2.1. The Convention on the Rights of the Child

The 1989 Convention on the Rights of the Child (CRC) is legally binding on all members of the United Nations, excluding Somalia and the United States of America as they have not ratified the Convention. It is therefore one of the most important international legal instruments.

Articles 37 and 40 of the CRC are of particular importance for children in conflict with the law. Article 37 contains guarantees for children deprived of their liberty, and article 40 contains specific provisions concerning juvenile justice. The most specific article in relation to alternatives to the deprivation of liberty is nevertheless article 40. The article lists several possible alternative measures and emphasizes that “a variety of dispositions (...) 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.”

Both articles must be set in the context of the overall framework of the CRC and in particular its general principles which include; the principle of non-discrimination (article 2), the best interests of the child (article 3), the right to life, survival and development (article 6), and the right of children to participate in all matters affecting them (article 12).

In addition to these general principles, which are relevant for all children, the state responsibilities laid down in article 27 of the CRC are also important. Article 27(1) recognises “the right of every child to a standard of living adequate for child’s physical, mental, spiritual, moral and social development”.

All of the CRC’s provisions are also applicable for children in prison, including for example; the prohibition of child labour and the rights to freedom of religion, to play, to protection against sexual exploitation, to education, to health care and to maintain

contact with parents. It is possible that there could be limitations directly connected with the fact that the children are behind bars (e.g. the right to privacy). But the fact that children are behind bars is also a basis for extra efforts on the part of the state party (government) to guarantee all of the rights recognised in the CRC.

(For further reference see point I. of Annex 1)

2.2. The General Comment No. 10 – “Children’s rights in Juvenile Justice”

In 2007 the Committee on the Rights of the Child published the General Comment number 10 (GC10) on “Children’s Rights in Juvenile Justice”. This document informs the States parties about the Committee’s interpretation of the content of the relevant articles of the CRC in the field of juvenile justice (articles 37 and 40 CRC). It provides them with guidance and recommendations for their efforts to establish a juvenile justice system in compliance with the CRC and thus assists them in fulfilling their obligations under the Convention.

In its GC10, the Committee points out that juvenile justice “should promote, inter alia, the use of alternative measures such as diversion and restorative justice” in order to “respond to children in conflict with the law in an effective manner serving not only the best interests of these children, but also the short- and long-term interest of the society at large”. Interventions without resorting to judicial proceedings are emphasised and the conditions for diversion listed in detail. In addition, the CG10 provides several examples for interventions in the context of judicial proceedings, as well as other possibilities of alternatives to a court conviction and to deprivation of liberty.

(For further reference see point II. of Annex 1)

2.3. The Riyadh Guidelines, the Beijing Rules and the Tokyo Rules

There are other international instruments which are not legally binding that deal with the protection of children in conflict with the law, among them:

- The 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines);
- The 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);
- The 1990 United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules).

The Riyadh Guidelines and the Beijing Rules apply exclusively to children, while the Tokyo Rules apply to adults and children alike. Some of the rights guaranteed by these instruments are also protected by the 1966 International Covenant on Civil and Political Rights and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Riyadh Guidelines are concerned with the prevention of juvenile delinquency. They focus on early protection as well as preventive interventions paying particular attention to children in situations of social risk. As prevention and early intervention are key strategies in addressing the issue of children in conflict with the law, the Guidelines play an important role in the field of juvenile justice, and more particularly with regard to alternatives to the deprivation of liberty. Several provisions of the Guidelines recommend the development of community-based interventions and call for the decriminalisation of status offences as well as for “comprehensive prevention plans at every governmental level”. The latter should include community involvement through a wide range of services and programmes, interdisciplinary co-operation and youth participation in prevention policies and processes.

In contrast to the Riyadh Guidelines, the Beijing Rules focus on children who have already come into conflict with the law. The Rules have been adopted before the CRC and are mentioned in its Preamble. Several of their principles have even been incorporated in the CRC body. The Beijing Rules contain detailed norms for the administration of juvenile justice pointing out that a juvenile justice system should emphasize the well being of the child and ensure that the reaction of the authorities is proportionate to the circumstances of the offender as well as the offence. The Rules encourage expressly the use of diversion and the consideration of release both on apprehension and at the earliest possible occasion thereafter. The Rules also highlight the importance of rehabilitation.

The Tokyo Rules promote the use of non-custodial measures and provide minimum safeguards for persons subject to alternatives to imprisonment. The Rules also intend to promote greater community involvement in the management of criminal justice, especially in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society. In addition, the states are encouraged to create criminal justice systems which provide a wide range of non-custodial measures. These measures range from pre-trial to post sentencing dispositions in order to allow greater flexibility consistent with; the nature and gravity of the offence; the personality and background of the offender; the protection of society; and to avoid unnecessary use of imprisonment.

(For further reference see points III., IV. and V. of Annex 1)

2.4. The Havana Rules

The purpose of the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) is to counteract the detrimental effects of deprivation of liberty by ensuring respect for the human rights of juveniles. They serve as an internationally accepted framework within which states can regulate the deprivation of liberty of all persons under the age of 18 years.

The Havana Rules are based upon different fundamental principles, among which the following are most specific in relation to alternatives to the deprivation of liberty:

- Deprivation of liberty should be a disposition of last resort and for the minimum period, and should be limited to exceptional cases.

- Juveniles should only be deprived of their liberty in accordance with the principles and the procedures of international law.
- Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures.
- The establishment of small open facilities is encouraged to enable individualised treatment and to avoid the additional negative effects of the deprivation of liberty.

The Havana Rules are a recommendation and therefore not legally binding. Nonetheless, they have attained an important status under international law. Some of the provisions have become binding by virtue of their incorporation into treaty law. They are also elaborations of the basic principles found in the Convention on the Rights of the Child.

(For further reference see point VI. of Annex 1)

2.5. The United Nations Guidelines for Action on Children in the Criminal Justice System and the United Nations Basic Principles on the use of Restorative Justice Programmes in Criminal Matters

The Guidelines for Action on Children in the Criminal Justice System were elaborated by a meeting of experts held in Vienna in February 1997. The Guidelines provide a comprehensive set of measures which needs to be implemented in order to establish a well-functioning system of juvenile justice administration according to the CRC, Riyadh Guidelines, Beijing Rules and Havana Rules. The Guidelines are an annex to the UN Resolution known as the Vienna Guidelines which provide an overview of information received from governments on the administration of juvenile justice in their countries.

The United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters were endorsed by the Economic and Social Council in 2002. The Basic principles represent a guide to countries seeking to implement restorative justice programmes. It provides common international standards in the field of restorative justice. The Basic Principles encourage states to develop restorative justice programmes and give orientations with regard to how to create and manage those programmes. Specific provisions of the guide deal with definitions, the use of restorative justice programmes, the operation of restorative justice programmes, and the continuing development of restorative justice programmes.

(For further reference see points VII. and VIII. of Annex 1)

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Chapter 3:

International Indicators related to Alternatives to Deprivation of Liberty

3. International Indicators Related to Alternatives to Deprivation of Liberty

According to the Manual for the Measurement of Juvenile Justice Indicators published by UNICEF and UNODC in 2006 (p. 2 et seq.), cases of abuse, violence and exploitation can occur within the juvenile justice system with impunity, resulting in experiences detrimental to the best interests of the child, when government officials and the institutions making up the juvenile justice system do not have proper information either about the functioning of the system or the children who are in contact with it. Government officials may also find it difficult to assess the impact of new juvenile justice policies or guidelines. However, a failure to carefully record and strategically make use of juvenile justice related information can contribute to a failure to ensure the protection of the child in conflict with the law.

Therefore, in the course of a global consultation on child protection indicators held in November 2003, participants discussed the development of a set of global indicators for juvenile justice. The meeting began with some sixty suggested indicators. Careful consideration and prioritization reduced the list to fifteen indicators, five of which were identified as of core importance. These fifteen indicators have been refined through field-testing in a number of countries and are endorsed by the Inter-agency Coordination Panel on Juvenile Justice.

The aim of this initiative is to make clear how the indicators can contribute to the protection of the child in conflict with the law through actions at both the local and the central level. It offers practical guidance, strategies and tools for information collection, information collation and calculation of the indicators. The juvenile justice indicators should provide a framework for measuring and presenting specific information about the situation of children in conflict with the law. This information concerns both quantitative values, such as the number of children in detention on a particular census date and the existence of relevant policy. The indicators are not designed to provide complete information on all possible aspects of children in conflict with the law in a particular country. Rather, they represent a basic dataset and comparative tool that offers a starting point for the assessment, evaluation and service and policy development. The utility of the juvenile justice indicators exists on a number of levels:

- A global 'baseline' definition: Firstly, the indicators offer a clear global definition of baseline information that every country should be able to produce. The availability of reliable and consistent information within and between countries is essential for; planning and monitoring policies and programmes; national and global advocacy; and providing focus for the different actors involved. The use of standard indicators allows comparison of the situation in different countries.
- Engagement of local actors: A national juvenile justice information collection process that leads to measurement of the indicators engages local institutions such as police stations, magistrate's courts and places of detention in information collection. Requiring local level institutions to develop, collect and report

information about individual children for whom they are responsible, contributes to the protection of those children by ensuring that they do not slip through the net and by causing the institution to consider and review its treatment of the child. The reporting of information introduces a level of accountability for the information source.

Review of policy: Measurement of the indicators also enables the existence of relevant policies to be assessed, both by local institutions and at the national level. The indicators may be used as a starting point for national assessment of how children in conflict with the law are dealt with, and for the identification of areas for improvement or reform. Where indicators are measured over time, the introduction of new laws, standards or policies may be monitored. In addition, the indicators are able to support State parties in adhering to international standards. In this respect, State parties to the United Nations Convention on the Rights of the Child are encouraged to use the indicators, where possible, in State party reporting to the United Nations Committee on the Rights of the Child.

The fifteen Juvenile Justice Indicators defined by UNICEF/UNODC are the following:

Indicator		Definition
Quantitative Indicators		
1	Children in conflict with the law	▪ Number of children arrested during a 12 month period per 100,000 child population
2	Children in detention (CORE)	▪ Number of children in detention per 100,000 child population
3	Children in pre-sentence detention (CORE)	▪ Number of children in pre-sentence detention per 100,000 child population
4	Duration of pre-sentence detention	▪ Time spent in detention by children before sentencing
5	Duration of sentenced detention	▪ Time spent in detention by children after sentencing
6	Child deaths in detention	▪ Number of child deaths in detention during a 12 month period, per 1,000 children detained
7	Separation from adults	▪ Percentage of children in detention not wholly separated from adults
8	Contact with parents and family	▪ Percentage of children in detention who have been visited by, or visited, parents, guardian or an adult family member in the last 3 months
9	Custodial sentencing (CORE)	▪ Percentage of children sentenced receiving a custodial sentence
10	Pre-sentence diversion (CORE)	▪ Percentage of children diverted or sentenced who enter a pre-sentence diversion scheme
11	Aftercare	▪ Percentage of children released from detention receiving aftercare
Policy Indicators		
12	Regular independent inspections	▪ Existence of a system guaranteeing regular independent inspection of places of detention ▪ Percentage of places of detention that have received an independent inspection visit in the last 12 months
13	Complaints mechanism	▪ Existence of a complaints system for children in detention ▪ Percentage of places of detention operating a complaints system
14	Specialised juvenile justice system (CORE)	▪ Existence of a specialised juvenile justice system
15	Prevention	▪ Existence of a national plan for the prevention of child involvement in crime

As one can see, only one of the fifteen indicators is related to alternatives to deprivation of liberty. It is indicator number ten, related to pre-sentence diversion. According to the Manual (p. 19 et seq.), this indicator should grant the following information:

Definition: Percentage of children diverted or sentenced who enter a pre-sentence diversion scheme.

Priority: CORE

Numerator: Number of children entering a pre-sentence diversion scheme during a 12 month period

Denominator: Number of children diverted or sentenced during the 12 month period / 100

What it measures?

This indicator measures the number of children diverted before reaching a formal hearing, as a proportion of all children either diverted or sentenced.

Why it is helpful to measure?

Diversion is used in order to resolve the case of a child in conflict with the law without recourse to a formal hearing before the relevant competent authority. International guidelines recommend that consideration should be given, wherever appropriate, to dealing with children in conflict with the law without resorting to a formal hearing before the competent authority.

Diversion may range from an informal police caution to a reconciliation scheme between the victim and the accused run by social or welfare services. A key principle of diversion is that the child and/or his or her parents or guardian must consent to the diversion of the child's case.

Typically, this also means that the child accepts responsibility for the offence. Diversion may involve recourse to solutions based on the principle of restorative justice.

Applicable International Standards

- “[States parties shall seek to promote...] 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.” *CRC, Article 40(3) (b)*.
- “Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority.” *Beijing Rules, Article 11(1)*.
- “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....” *Beijing Rules, Article 11(2)*.
- “Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian....” *Beijing Rules, Article 11(3)*.
- “Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the

offender... Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations.” *RJP – UN Basic Principles on the use of Restorative Justice Programmes in Criminal Matters - , Article 7.*

How to measure it?

This indicator requires that information is available from a completed 12 month period. The information that should be collected is the number of children who have entered a pre-sentence diversion scheme during the 12 month period. Pre-sentence diversion schemes used to avoid a formal hearing will need to be identified in each local context.

To accurately assess the significance of this value, it is also necessary to measure the total number of children diverted or sentenced to any measure during the 12 month period. This value -which represents all children admitting responsibility or those who have been found to have been responsible for an offence by a competent authority- forms the denominator of the calculation. Expressed in this way the indicator provides an indication of the extent to which diversion is used to avoid formal contact with the juvenile justice system.

a) Information sources

The information sources for this indicator are the persons or authorities responsible for deciding that a child’s case shall be disposed of by diversion. These may include:

- the arresting authority (police, gendarmes or military police);
- a public prosecutor or district attorney; or
- a magistrate, investigating judge or juvenile judge.

Other authorities, such as social or welfare services, may be involved in the implementation of the diversion scheme. It is, however, recommended that information sources are first identified within the regular justice system, out of which children may be diverted.

b) Child Populations

The numerator population for this indicator is all children who have entered a pre-sentence diversion scheme during a 12-month period. Provided that the 12 month periods are the same, the value of all children sentenced to any measure from Indicator 10 (Custodial sentencing) can be added to the total number of children diverted in order to form the denominator population. Sampling may be appropriate for this indicator. However, particular care is required in the selection of sample information sources in order to ensure that sample information is representative of both total children diverted and total children sentenced.

Disaggregation: Gender, Age at time of diversion, Ethnicity, District of origin, Category of offence, Type of diversion programme.

Tools: Information collection tools 1 and 2 may be used for assistance in information collection (see Manual for the Measurement of juvenile justice indicators, Appendix 3, p. 65 – 80).

Therefore, this is the way State Parties should collect data in order to use the indicator correctly.

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Chapter 4:

Alternatives to Deprivation of Liberty in Eight Countries

4. Alternatives to Deprivation of Liberty in Eight Countries

4.1. Argentina

4.1.1. Outline of the legislation related to Juveniles in conflict with the law

The National Constitution² (art 16, 18, 19) clearly indicates the role of the State when coercion is required. Art 16 refers to equal rights in front of the law, while Art. 18 provides and sets up the constitutional guarantees to be implemented in due process. Art. 19 recognizes the right to privacy, setting limits to the State's role.

In governance, Argentina presents a federal system (23 districts and the capital of the country) and this implies that there are national and provincial legislations and promotion for descentralisation.

One challenge faced in the implementation of the concerned legislation is that there are different modalities in the provinces, including variations in the same type of interventions. Furthermore, the body responsible for the institutionalization of children varies, ranging from the Family and Childhood Secretary to Judicial bodies.

Law 10.903

The judicial system for children is a complex set of laws that have been influencing the institutions and the practices involved and have been applied for almost a century. In 1919, Law 10.903³ (Patronato de Menores, 1919) was sanctioned and this originated the "tutelary system" (sistema tutelar), still valid in many aspects of the application of the law.

It provided the judge with full power, under his discretion – in the criminal and correctional spheres - on "minors" (persons under 18) in case they were in material or moral danger. So the children in this "irregular situation" (situación irregular) were considered as abandoned or neglected or in risk; child offenders were those who perpetrated offences.

The judge was the responsible agent to deal with them and to decide their future; his role exceeded the legal aspects to also cover social and moral aspects.

His intervention implied his judgement and appreciation on the vulnerability of children who were depending on his protection, and he could decide their future until they reached adulthood. One of his decisions might include their deprivation of liberty

² Constitución Nacional de la Republica Argentina

³ Ley 10903 - Patronato de Menores, 21/10/19, published in official bulletin: 27/10/19, with reforms of law-decret 5286/57 and laws 23.737 y 24.286

(into institutions or reformatories), while re-educating and re-socializing them and separating them from their family and community environment. This protective intervention restricted the exercise of their rights by children.

The “protective aspects” of this law was one of the most important justifications for applying it for almost ninety years. At present, Law 10.903 has been replaced with new legislation, however its philosophy impregnated all the policies and interventions with (abandoned) children in “irregular situations” and it is still possible to note that strong influence.

Law 22.278 (1980) / 22.803 (modified, 1983) – Minors’ Penal Law (“Regimen Penal de la Minoridad”)

This law was sanctioned in 1980, reformed and is the current legislation for children in conflict with the law. It regulates and administers offences committed by people under 18 years, with different judicial actions, depending on the age of children:

- a) under 16 years: children are actors not to be punished (art 1) and includes a provision for the institutionalization of the child until the age of 21, in case of “material or moral danger”, at the judge’s discretion.
- b) 16 and 17 years: the child is to be punished (art 2) with the same type of sanctions applicable for adults who perpetrate similar public offences, and that require more than two years of imprisonment (the age limit between 16 and 18 years). As a consequence, in Argentina there have been a few cases of life imprisonment of persons who committed the offence before 18 years. There is no provision for preventing imprisonment, however, they are deprived of their freedom as they are admitted in institutions.

Law 26.061 for the Protection of the rights of the children and adolescents (Ley de Protección Integral de los derechos de Niñas, Niños y Adolescentes)

After 1990, when the CRC was incorporated in the domestic legislation, there have been many discussions on what reform is required for children’s legislation.

In 2005 (fifteen years later), a new national law was approved that brought changes in the legal framework to the situation of children in the country, in their judicial consideration and in the conceptualization of the subject.

This new legislation provides a legal framework to reform the existing practices and legislation. As well it creates a specific department to act as an inter-ministerial body entitled the Federal Council of Children, Adolescents and Family, and is housed under the National Secretary of Children, Adolescents and Family. It also creates the position of Ombudsman for children’s rights.

Law 26.061 clearly enunciates the definition of deprivation of liberty (art 19) and establishes minimum guarantees for children during judicial and/or administrative processes (art 27)

Some provinces drafted new legislation including the new perspective, though some of the others still have strong influences of Law 10.903.

Hence at present there are two legislations (integral protection for children and penal

law for minors) that are acting simultaneously but with complete different perspectives and paradigms, and consequently bringing about contradictions when they are put into practice.

Since Law 26.061 was approved, several projects of law to have juvenile justice systems put in place were submitted to Congress for discussion and approval.

The situation of children in conflict with the law in Argentina is going through a transitional and critical period. There is a great debate among different stakeholders about the legal measures that need to be taken as well as the practices that should be changed. The new legislation will bring the possibility to design new policies, with guidelines and clarity on the roles that different stakeholders play as well as allocation of resources, etc.

As there is no specific law regarding the situation of children in conflict with the law, there is no detail of possible alternatives to detention. Nevertheless, individual initiatives have been taken place in some provinces; a consequence of this is that there may be different programmes under the same denomination. A common characteristic is that the alternative intervention is selected according to the evolving capacities of the child, his/her family, his/her environment, etc. and not for the offence committed; the treatment is not oriented by the cause of the institutionalization.

A clarification should be made: the alternatives are applied not only for children in conflict with the law but also for other institutionalized children – this is a consequence of the irregular situation philosophy still very dominant in the country.

4.1.2. Diversion Programs

Not available information.

4.1.3. Pre-trial alternatives

In some provinces, mediation is considered as an alternative to the imprisonment or institutionalization (Entre Rios, Mediación Penal Juvenil; Neuquen), and requested by Public Prosecutors.

4.1.4. Alternative Sanctions to deprivation of liberty

In some provinces the probation service is put in place, as a decision made by the Court but does not have the character of being chosen or a voluntary act from the child (Ciudad Autonoma de Buenos Aires).

4.1.5. Indicators on alternatives to deprivation of liberty

There is no indicator on alternatives to deprivation as there is no statistics on the subject.

4.1.6. Available statistical data

There is not a national and a systematized compilation of related data for the country. The irregular situation of children does not help either to clarify the situation as many children are deprived of their liberties, some as responsible for offences, but other as victims of civil causes (domestic violence, street children, orphaned).

Nevertheless, the provincial governments have been gathering some information related to children deprived of liberty (for tutelary and judicial reasons), however, it is necessary to highlight that this compilation is oriented more to administrative purposes than to produce real registration (with clear definitions of variables and construction of indicators) of the situation of the children.

Furthermore the information compiled follows individual / provincial criteria and it could not be updated regularly, sometimes highly influenced to their reporting line (from Welfare to Judicial bodies).

Some statistics related to children are available and they reflect the situation of children in relation with the law, and do not incorporate any data related to alternative interventions for children in conflict with the law. As mentioned before, the alternatives are implemented with children in conflict with the law (16-18 years) but also with other children that are in relation with the law (protective intervention).

The available statistics about children in conflict with the law are provided by the National Center for Registration for Recidivism, Ministry of Justice, Security and Human Rights and they provide information about the different aspect of the crime and the judicial process as well as socio-demographic information. However, these statistics are for all the population and it only provides information for children in conflict with the law from 16 to 18 years of age, according to existing legislation (this statistic is attached in Annex II).

The Supreme Court and the Judiciary Council jointly produced statistics on children and juveniles under the Minors Courts (Tribunales de menores), though it is not possible to find disaggregated information on alternatives to deprivation of liberty (the table is attached to Annex II).

4.1.7. Conclusion

a) *Do alternatives to deprivation of liberty like diversion, pre-trial alternatives or alternative sanctions exist?*

Yes, there are several alternatives to deprivation in Argentina, such as diversion, pre-trial alternatives and alternative sanctions; they have been implemented across the country as a response required by the situation of children in conflict and in contact with the law, inspired on international standards as well as on other countries experiences. However they are not yet reflected in public policies and/or legislation, although they have proved to be an excellent intervention for such children.

b) *Is there a variety of alternative measures?*

Yes. Mediation, probation service, supervised visits, day report centers, community monitoring, socio-educative (such as scholarships) programmes can be mentioned.

Available alternatives to the deprivation of liberty	In Argentina
Care, guidance and supervision orders	X
Probation	X
Community service orders	x
Financial penalties, compensation and restitution	x
Intermediate treatment and other treatment orders	x
Orders to participate in group counseling and similar activities	N/A
Orders concerning foster care, living communities or other educational settings	x
Other relevant orders	N/A

c) *Do national indicators exist?*

There is no national system that compiles the specific information on children in conflict with the law and the alternatives used.

d) *Do the national indicators mirror the international indicators?*

Not applicable as there is no systematized monitoring system on the implementation of juvenile justice.

e) *Are there statistics to demonstrate that alternatives to deprivation of liberty exist and are nationally applied?*

No, there is no existence of such statistics.

f) *Are the statistics demonstrating that the alternatives prevail the deprivation of liberty?*

Not yet.

Sources:

“Privados de libertad – Situación de Niños, Niñas y Adolescentes”, Secretaria de Derechos Humanos, Ministerio de Justicia y Derechos Humanos de la Nación Argentina y UNICEF, Buenos Aires, Argentina, 2006, p. 74

Dirección de Política criminal de Justicia y Derechos Humanos de la Nación para el SNIC (Sistema Nacional de Información criminal), Ministerio de Justicia, Seguridad y Derechos Humanos, Registro Nacional de reincidencias

www.dnrec.jus.gov.ar/Estad_sent_condenatorias.aspx

Oficina de Estadísticas del Consejo de la Magistratura y la Corte Suprema de la Nación, Justicia Penal Ordinaria, Tribunales de Menores

www.pjn.gov.ar

4.2. Brazil

4.2.1. Outline of the legislation related to Juveniles in conflict with the law

According to Brazilian legislation, a child is every person below 12 years old and an adolescent everyone between 12 and below 18.

In case of commitment of any conduct described as a crime, a child can only receive, by Guardianship Councils (*Conselhos Tutelares*), a protective measure. Guardianship Councils function as on-the-ground advocates for children. Each municipality is required to establish a five-member guardianship committee. These committees are responsible for monitoring compliance with the Statute, and intervening on behalf of vulnerable children.

The Protective measures regulated in art. 101 of the Statute of the Child and Adolescent (*Estatuto da Criança e do Adolescente*)⁴, passed in 1990 by the Brazilian National Congress are:

- Handing the child over to the responsibility of their parents by the Guardianship Counselor, with a formal record of the act.
- Inclusion in a temporary orientation, support or follow-up programme.
- Compulsory school enrolment and attendance.
- Inclusion in a communitarian or official support programme for the family, the child or the adolescent.
- Medical, psychological or psychiatric treatment, in a hospital or out-patient clinic.
- Inclusion in a communitarian or official treatment for drug addiction or alcoholism.
- Inclusion in a shelter.
- Placing in a substitutive family.

All protective measures can also be imposed to an adolescent if he/she commits a crime as the main State response to the crime or as a complementary provision in order to promote the adolescent's social inclusion.

Legal procedures

All adolescents that have committed a crime are presented in a police station to make a brief register of the occurrence and are referred to a district attorney specialized in children's rights.

It is important to mention that all decisions related to the socio-educational and protective measures that shall be imposed must consider an interdisciplinary study with the adolescent and his/her family (art. 186, paragraph 4, of the Statute).

Due process of law must be observed to the imposition of any measure (either protective or socio educational) if there is no consent by the adolescent and his/her family.

It is also important to note that no adolescent can be deprived of liberty more than 45 days during the legal procedure (art. 183 of the Statute).

Due process of law is established for all stages of the process, including during the execution of the measures.

⁴ http://www.presidencia.gov.br/estrutura_presidencia/sedh/spdca/eca3/

4.2.2. Diversion Programs

Although not regulated by Law, restorative justice pilot projects have been implemented in Brazil with the support of the Ministry of Justice and UNDP⁵. A brief description of what have been done is in a separate chapter, as it is not a legal right of juveniles nor a widespread programme in the country.

4.2.3. Pre-trial alternatives

Possibility of remission before the legal procedure

According to article 126 of the Statute, before the beginning of the legal procedure, the district attorney can give remission of any measure to the adolescent as a way of exclusion of the legal procedure. The adolescent and his/her family shall be heard informally by the district attorney, with legal assistance by a defender. If remission is accepted, the agreement is presented to the judge for the formal remission.

Remission can be given with protective measures, as listed above, and with socio-educational measures, except those that implicate deprivation of liberty.

Possibility of remission during the legal procedure

Remission can be given as well during the legal procedures, normally after the adolescent inquiry, by proposition of the judge and with consultation of the district attorney and the defender. In this case, remission implicates the extinction of the legal procedure. It can also include a protective or socio educational measure, except those that implicate deprivation of liberty (art. 126, paragraph one, of the Statute).

Due to the legal possibility of remission, restorative justice processes have been introduced in practice, involving victims and community support to empower all the stakeholders to deal with the crime in a more participative way.

If remission is not proposed or accepted, than the legal procedure is observed and a final decision is given, granting the right of legal defense to the adolescent.

4.2.4. Alternative Sanctions to deprivation of liberty

(Socio educational measures and the type of restrictions that can be imposed in each of them)

General comments

According to the Statute, socio educational measures have a double meaning and goal. They act as a sanction, to delimit an error committed according to the law and the responsibility to respond for it, but, at the same time, they promote conditions for the fulfillment of the adolescent's necessities and for granting all his/her social rights. Therefore, the 15 principles established by the National System for Socio educational services (SINASE – Sistema nacional de atendimento socioeducativo)⁶ are:

- respect to human rights

⁵ <http://www.mj.gov.br/data/Pages/MJFA315EACITEMID77F1739810BA415BB6715466574B0247PTBRIE.htm>

⁶ http://www.presidencia.gov.br/estrutura_presidencia/sedh/.arquivos/.spdca/sinase_integra1.pdf

- co-responsibility of family, society and the State to promote and defend children's and adolescent's rights
- recognition of the adolescent as a person in a particular situation of development and a subject of rights and responsibilities
- absolute priority to all measures related to children and adolescents
- legality
- respect to due process of law
- exceptionality, brevity and respect of the adolescent's particular condition as a person in development (related to deprivation of liberty)
- respect to the physical integrity and security of all adolescents;
- respect to the adolescent's capacity of accomplishment of the measure; observation of the circumstances, of the gravity of the infraction and the pedagogical necessities of the adolescent for the choice of each measure, with a preference for those that promote the strengthening of familial and communitarian bonds
- institutional incompleteness, using communitarian services as much as possible and promoting responsibility of all specific public and general policies due to the adolescent
- granting special services for disabled adolescents
- local based services
- political-administrative decentralization
- democratic and participative management of all policies and programmes
- co-responsibility by the federal, the provincial and local governments in funding the programs
- mobilization of public opinion for the participation of all sectors in the society for granting adolescent's rights

SINASE has been established by the National Children's Rights Councils. There are also provincial and local councils that are responsible for the implementation of the Statute at the policymaking and juridical level. These councils are made up of an equal number of representatives from civil society (NGOs) and from relevant government institutions. Provincial and local councils are supposed to establish their own socio-educational plan, involving all actors with responsibilities towards adolescents that have committed crimes.

Alternative Sanctions to Deprivation to Liberty

The socio educational measures - according to Art. 112 of the Statute- are:

- Warning/admonish
- Redress of the harm caused to the victim
- Community service
- Parole
- Semi-liberty
- Deprivation of liberty in a special unit (internação)

During legal procedure, in case of deprivation of liberty, there are separate provisional units (internação provisória).

Description of each measure (considering what kind of restrictions can be imposed in each of them, for how long, kind of activity expected by children, kind of restrictions imposed to children, timeframe of execution):

Warning/admonish

Warnings and admonishment are imposed by the judge, in a formal hearing, with the presence of the adolescent, his/her family, the district attorney and the defender. It is one single act, with no offense to the dignity and respect due to the adolescent.

Redress of the harm caused to the victim

In cases of patrimonial consequences only, the adolescent can be obliged to restitute the victim with the object that he/she has taken, to redress or compensate in anyway the victim's loss.

In the case that compensating the victim is impossible, the measure can be substituted by any other. Once the obligation is accomplished, the measure is declared finished.

Community service

Community service consists of non-paid tasks with general interest for the community for no more than six months and eight hours per week in hospitals, schools, social services institutions or similar institutions, or in communitarian or official programmes. All tasks are chosen following the capacities of the adolescent and cannot interfere in the adolescent's school attendance or regular work.

Parole (liberdade assistida)

Purpose: follow up, help and assistance of the adolescent

Obligations of the educator:

- Promote socially the adolescent and his/her family, giving them orientation and including them in social services or communitarian/official programmes
- Follow up school enrolment, attendance and learning
- Grant the adolescent opportunities for learning a profession
- Submit a report to the judge

Activities expected from the adolescent:

- Attendance at least once a week at the programme
- School enrolment, attendance and learning
- Learning for a profession
- Attendance to services related to his/her family relationships, psychological needs
- Non-commitment of further crimes

Time frame of execution: minimum of six months.

The two other measures stated below imply deprivation of liberty.

Semi-liberty (semi-deprivation of liberty)

The adolescent must sleep in an institution but may go during the day to school and regular activities. There is compulsory school attendance and learning for a profession.

It can be imposed as an initial or transitional measure.

Time frame: it is not defined from the beginning and is always related to the adolescent's performance. But it can last no longer than three years. The judge will establish a regular presentation of an interdisciplinary report to evaluate the possibility of finishing the measure or to allow the progression to a less severe measure.

Deprivation of liberty (internação)

Respect to the principles of brevity, exceptionality and respect of the adolescent's particular condition of person in his/her developmental condition.

Time frame: not defined from the beginning and is always related to the adolescent's performance. But it can last no longer than three years. The judge will establish a regular presentation of an interdisciplinary report to evaluate the possibility of finishing the measure or to allow the progression to a less severe measure.

The judge, after listening to interdisciplinary assistants, can allow external activities.

Pedagogical guidelines for every measure, according SINASE:

- Prevalence of pedagogical aspects over the punitive ones
- The Pedagogical project as the guideline of each action and management of the socio-educational services
- Adolescent participation in the construction, monitoring and evaluation of each socio-educational measure
- Respect of the adolescent's singularities, educational presence and exemplarity as necessary conditions to the socio-educational action
- Adolescent's comprehensible recognition and understanding of the consequences of his / her offence is required during the socio educational process.
- Directive approach in the socio educational process
- Discipline as a way to the realization of the socio educational action
- Horizontality of all information and knowledge in the institutional dynamic
- Special and functional organization of all socio educational services that may grant possibilities for personal and social development for the adolescent
- Respect to ethnic, gender and sexual orientation, diversity as a guideline in all pedagogical practice
- Familial and communitarian participation in all socio-educational activities
- Continuous formation of all social actors

Kind of support (including network)

Eight axes of support have been established in SINASE. Institutional and pedagogical support to the programmes responsible for each socio-educational measure. There are common and specific provisions for each programme/measure

- respect to ethnic, gender and sexual orientation diversity
- education
- sport, culture and leisure
- health
- familial and communitarian approach
- learning, professional schools, work and social security
- security

The State Department responsible for the programmes

Brazil is a federal State. It is established by art. 86 of the Statute that all actions related to children's rights shall observe a systemic approach and be interconnected. In each State socio-educational programmes are under the control of different departments. In 2006, a national unified social assistance system (SUAS -Sistema Único de Assistência Social) has been created which regulates that socio-educational programmes should be included in this system, including the co-responsibility for funding.

Existence of regulations for human and material resources needed for the execution

SINASE has established standards for human resources and architecture for all units that develop socio-educational programs.

For community service, it has established that each program shall have a coordinator, and one educator with special formation of 20 adolescents each, and is responsible for the assistance and orientation of all adolescents. This educator remains in the program and is responsible for the elaboration with the participation of the adolescent and his/her family of a socio educational plan with all the activities that the adolescent must accomplish and the support that must be provided to him/her. This plan is submitted to the judge in a formal hearing with the adolescent, his/her family, the defender and the district attorney. If approved, then the adolescent begins to accomplish it. In each institution where the adolescent should realize the services, there must be a socio-educational reference for each group of 10 adolescents. This is a person of the institution itself that is trained to coordinate all work realized by the adolescents. There must be also someone responsible for the orientation of these adolescents, therefore an advisor who is responsible for 2 adolescents each, is employed in order to respect their singularities.

For parole, there must be technicians from different areas, granting psychosocial attention as well as legal services. Each educator shall take under his/her responsibility at most 20 adolescents.

4.2.5. Indicators on alternatives to deprivation of liberty

The Brazilian indicators, according to SINASE, are:

- socio-demographic: incidence rate of delinquency among children in comparison to the population of children in the country, its regions, States and municipalities;
- indicators of ill-treatment;
- types of crimes and recidivism;
- indicators of offer and access: capacity of each programme in the country, per State and municipalities; number of children per programme; average number of children per programme
- indicator of system flow: time of permanence of children in each programme, process flows; progression and exit of the system;
- indicators of the socioeconomic conditions of the children and their families: characterization of the child's (in conflict with the law) profile;
- indicators of quality of the programmes: indicators that will allow the definition of minimum standards of the different programmes;
- indicators of results and performance: according to the goals established by each programme;
- indicators of financing and costs: the (in)direct cost of the different programmes; average cost per children in the different programmes

The quality indicators are divided per category:

a) human rights:

- civil registration
 - school enrollment
 - professionalization / work
 - sport
 - culture
 - leisure
 - health
 - respect and dignity
 - participation in community activities
- b) infrastructure
- capacity
 - health conditions
 - lavatories
 - spaces for group activities
 - spaces for individual activities
 - equipment
 - security
- c) socio educational services
- familial aspects
 - juridical aspects
 - relation to a network of different services
 - technical aspects
 - the individual planning
- d) human resources and management
- capacity of management
 - planning and pedagogical project
 - training
 - supervision and external support
 - data collection and registration
 - evaluation
 - partnerships

However the *ratio* of each indicator has not yet been established, avoiding effective monitoring and evaluation.

4.2.6. Available statistical data

See table in Annex II⁷. Only the last one of the statistics is related to alternative sanctions.

4.2.7. Conclusion

- a) *Do alternatives to deprivation of liberty like diversion, pre-trial alternatives or alternative sanctions exist?*

⁷ http://www.mj.gov.br/sedh/ct/Noticias_Anexos/tabela%202006%20consolidada%20P%20e%20B.xls

Yes, they do, in accordance with the international standards, at least in the law. However, it is widely known that in many States they do not exist effectively.

b) Is there a variety of alternative measures?

Yes, there is, in accordance with Beijing Rules, as the following table shows:

Available alternatives to the deprivation of liberty	Brazil
Care, guidance and supervision orders	X
Probation	X
Community service orders	X
Financial penalties, compensation and restitution	X
Intermediate treatment and other treatment orders	X
Orders to participate in group counseling and similar activities	X
Orders concerning foster care, living communities or other educational settings	X
Other relevant orders	X

It must be understood however that, according to Brazilian legislation, care, guidance and supervision orders; intermediate treatment and other treatment orders; orders to participate in group counseling and similar activities; as well as orders concerning foster care, living communities or other educational settings are all protective measures and not socio-educational ones. Therefore they are not exactly sanctions to juveniles. If not accomplished or respected, only their parents could be held responsible for not taking them to these treatments.

c) Do national indicators exist?

There are national indicators, but their ratio is not defined. Therefore there is no way to measure its effective implementation.

d) Do the national indicators mirror the international indicators?

National indicators do not mirror the international ones recommended by UNICEF and UNODC.

e) Are there statistics to demonstrate that alternatives to deprivation of liberty exist and are nationally applied?

No, there aren't.

f) Are the statistics demonstrating that the alternatives prevail to deprivation of liberty?

Not applicable, as there are not statistics on this topic.

4.3. Canada

4.3.1. Outline of the legislation related to Juveniles in conflict with the law

According to Canadian legislation, "young person" or "adolescent" means a person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old and if the context requires, includes any person who is charged under the Youth Criminal Justice Act with having committed an offence while he or she was a young person or who is found guilty of an offence under the Act. A child is a person below 12 years old. The minimum age of criminal responsibility is 12 years of age.

Youth Criminal Justice Act

On February 4, 2002, the Canadian House of Commons passed Bill C-7, the Youth Criminal Justice Act (YCJA). The new law replaced the Young Offenders Act (YOA), and came into force as of April 1, 2003.

The ***Youth Criminal Justice Act*** sets out a new legislative framework for Canada's youth justice system. The YCJA provides needed legislative direction to assist in achieving a fairer and more effective youth justice system. Key objectives of the YCJA include:

- Clear and coherent principles to improve decision-making in the youth justice system;
- More appropriate use of the courts by addressing less serious cases effectively outside the court process;
- Fairness in sentencing;
- Reduction in the high rate of youth incarceration;
- Effective reintegration of young persons;
- Clear distinction between serious violent offences and less serious offences.

The YCJA integrates all areas of young peoples' lives including their mental health, education and welfare, putting emphasis on the long-term protection of the public, while also focusing on the rehabilitation and reintegration of the young person (Tustin and Lutes, 2005).

This legislation states in its preamble that the youth justice system "reserves its most serious intervention for the most serious crimes." The Act implements a large array of extrajudicial measures and, when entering the formal system, encourages the use of a number of new community supervision options- including deferred custody, the community portion of custody and supervision orders, and an intensive support and supervision order.

The YCJA states that a youth court justice shall not commit a young person to custody unless:

- a. the young person has committed a violent offence;

- b. the young person has failed to comply with non-custodial sentences;
- c. the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt; or
- d. in exceptional cases where the young person has committed an indictable offence and the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38 (s.39 (1), YCJA).

Finally, in an effort to reduce the use of remand, (Department of Justice Canada: Youth Justice) the YCJA has two noteworthy requirements that must be taken into account before judges are able to place a young person in remand; remand cannot be used as a social measure, and it cannot be used if the young person could not be sentenced to custody if he/she were found guilty of the offence (s.29(1), YCJA).

Extrajudicial sanctions programmes may include, among other programmes: community service, personal service, an educational program, an apology, and/or a social skills improvement course. In Canada the administration of the youth justice system is the responsibility of the provinces and territories. Depending on the province or territory, the work of delivering formal diversion programmes to youth is carried out by three types of agencies: governmental agencies (e.g., probation services), non-governmental organizations, and Youth Justice Committees. Although all jurisdictions offer extrajudicial sanctions under the YCJA throughout their province or territory, they differ as to which programmes are available for extrajudicial sanctions.

Principles for Extrajudicial Measures

The Youth Criminal Justice Act contains many provisions to increase the appropriate use of extrajudicial measures for less serious offences, including the following principles:

- extrajudicial measures should be used in all cases where they would be adequate to hold the young person accountable.
- extrajudicial measures are presumed to be adequate to hold first-time, non-violent offenders accountable.
- extrajudicial measures may be used if the young person has previously been dealt with by extrajudicial measures or has been found guilty of an offence.

The YCJA also sets out clear objectives to guide the use of extrajudicial measures, including: repairing the harm caused to the victim and the community; providing an opportunity for victims to participate in decisions; ensuring that the measures are proportionate to the seriousness of the offence; and encouraging the involvement of families, victims and other members of the community.

4.3.2. Diversion Programs

Under the Youth Criminal Justice Act, extrajudicial sanction programmes allow young persons to be diverted from the court process. The YCJA puts additional emphases

on the use of diversion programmes by stating that they are “presumed to be adequate to hold a young person accountable for his or her behaviour” (s.4 (c)(d), YCJA). If the young person completes the requirements of the programme, all charges are dismissed.

Extrajudicial Measures for Police Officers

The YCJA requires police officers to consider the use of extrajudicial measures before deciding to charge a young person. Police and prosecutors are specifically authorized to use various types of extrajudicial measures such as:

- ***Taking no further action***
- ***Warnings*** are informal warnings by police officers.
- ***Police cautions*** are more formal warnings by the police. The YCJA authorizes provinces to establish police cautioning programmes. Based on the experience in some jurisdictions, it is expected that police cautions will be in the form of a letter from the police to the young person and the parents or they may involve a process in which the young person and the parents are requested to appear at a police station to talk to a senior police officer.
- ***Referrals*** are referrals of young persons by police officers to community programmes or agencies that may help them not to commit offences. The referral may be to a wide range of community resources, including recreation programmes and counseling agencies.

4.3.3. Pre-trial alternatives

Crown cautions are a pre-trial alternative measures given by prosecutors after the police refer the case to them. In one province in Canada where they are currently being used, the caution is in the form of a letter to the young person and the parents.

4.3.4. Alternative Sanctions to deprivation of liberty

Extrajudicial sanctions are the most formal type of extrajudicial measure. Unlike the other types of extrajudicial measures, they may be used only if the young person admits responsibility for the offence. The Attorney General of the province must determine that there is sufficient evidence to proceed with a prosecution of the offence. The sanctions must be part of an extrajudicial sanctions program designated by the Attorney General, these include letters of apology, essays, anti-shoplifting educational programs, victim-offender reconciliation programs, personal service to the victim, and community service. The young person agrees to be subject to the sanction. If the young person fails to comply with the terms and conditions of the sanction, the case may proceed through the court process.

Conditions for Extrajudicial Sanctions

An extrajudicial sanction may be used to deal with a young person alleged to have committed an offence only if the young person cannot be adequately dealt with by a warning, caution or referral because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances.

An extrajudicial sanction may be used only if:

- (a) it is part of a programme of sanctions that may be authorized by the Attorney General or authorized by a person, or a member of a class of persons, designated by the lieutenant governor in council of the province;
- (b) the person who is considering whether to use the extrajudicial sanction is satisfied that it would be appropriate, having regard to the needs of the young person and the interests of society;
- (c) the young person, having been informed of the extrajudicial sanction, fully and freely consents to be subject to it;
- (d) the young person has, before consenting to be subject to the extrajudicial sanction, been advised of his or her right to be represented by counsel and been given a reasonable opportunity to consult with counsel;
- (e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he or she is alleged to have committed;
- (f) there is, in the opinion of the Attorney General, sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

Restriction on use

An extrajudicial sanction may not be used in respect of a young person who:

- (a) denies participation or involvement in the commission of the offence; or
- (b) expresses the wish to have the charge dealt with by a youth justice court.

Admissions not admissible in evidence

Any admission, confession or statement accepting responsibility for a given act or omission that is made by a young person as a condition of being dealt with by extrajudicial measures is inadmissible in evidence against any young person in civil or criminal proceedings.

No bar to judicial proceedings

The use of an extrajudicial sanction in respect of a young person alleged to have committed an offence is not a bar to judicial proceedings under the Act, but if a charge is laid against the young person in respect of the offence,

- (a) the youth justice court shall dismiss the charge if it is satisfied on a balance of probabilities that the young person has totally complied with the terms and conditions of the extrajudicial sanction; and
- (b) the youth justice court may dismiss the charge if it is satisfied on a balance of probabilities that the young person has partially complied with the terms and conditions of the extrajudicial sanction and if, in the opinion of the court, prosecution of the charge would be unfair having regard to the circumstances and the young person's performance with respect to the extrajudicial sanction.

Determining Whether an Extrajudicial Measure Would Be Adequate to Hold a Young Person Accountable

In determining whether any of the following four extrajudicial measures are adequate to hold a young person accountable (withdrawal of the charge; referral to a community programme; Crown caution; or extrajudicial sanction), Crown counsel must consider sections 3, 4 and 5, of the Youth Criminal Justice Act and also assess:

(a) the seriousness of the offence; and (b) the nature and number of previous offences or any other aggravating circumstances.

Factors related to the seriousness of the offence, and the history of previous offences or any other aggravating circumstances:

- whether the offence is summary or indictable;
- whether the offence involved the use of, or threatened use of, violence reasonably likely to result in harm that is more than transient or trifling in nature. An offence involving bodily harm is not necessarily too serious to be dealt with by extrajudicial measures. However, the more serious the harm, the less likely that it should be dealt with by extrajudicial measures.
- the potential or actual harm or damage to the victim (physical, psychological or financial) and/or to society;
- whether the incident affected the sexual integrity of a person;
- whether a weapon was used or threatened to be used in the commission of the offence. As youth cases have demonstrated (water balloons and spit-balls have been found to be weapons), it is important to consider the actual danger represented by the weapon.
- whether the offence is a drug offence. If the offence is a drug offence, the nature and deleterious consequences of the drugs involved should be considered.
- if the drug trafficking or possession of the drug for the purpose of trafficking occurred in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of eighteen years old, this should be considered an aggravating factor ;
- whether the offence is a property offence. If so, did the young person intentionally cause or attempt to cause substantial property damage or loss? Should the young person have reasonably foreseen that substantial property damage would be caused by the offence?
- whether the offence is an administration of justice offence, such as breach of probation. If so, would the non-compliance (e.g., failure to attend school; violation of curfew) have been an offence outside the context of a probation order? If not, it should be considered less serious and more likely to be dealt with appropriately through extrajudicial measures or through a review of the original sentence to determine whether the conditions should be changed.
- the role of the young person in the incident. For example, if the young person was the leader who planned and directed the offence, then his/her degree of responsibility is greater. However, this factor is secondary to the seriousness of the offence.
- whether the young person was a victim in the commission of the offence (e.g., a sexually exploited juvenile prostitute; a young person committing a drug offence who is being directed or exploited by an adult drug dealer). If so, it is more likely that an extrajudicial measure should be used.
- whether the young person has a history of committing offences. If so, what is the nature and number of previous offences? Although a history of offences may indicate that a more serious consequence is required to hold the young person accountable, this factor is secondary to the seriousness of the current offence.
- whether the young person has already displayed remorse (e.g., through voluntary reparation to the victim or to the community) or agreed to do so.

- If the young person were to proceed through the court system, what is the likelihood that the sentence would be more severe than what is available through extrajudicial measures? If the sentence is expected to be less severe, Crown counsel should consider whether proceeding to court would be an effective use of Crown and judicial time and resources.

Acceptable programs of extrajudicial sanctions under the Youth Criminal Justice Act include the following:

- any program approved by the Attorney General of a province;
- any program approved by a territorial government;
- any program approved by the Attorney General of Canada;
- referral to a community, aboriginal or youth justice committee;
- community service work;
- victim-offender reconciliation;
- restitution or compensation in cash or services;
- mediation;
- referral to a specialized program (e.g. life skills, drug or alcohol treatment); and
- any other reasonable alternatives not inconsistent with the objectives of the Federal Prosecution Service policy.

Sentencing Options

The addition of new sentences in the YCJA provides youth court judges with more options to deal with the full range of youth crime. These include:

- **Reprimand.** A reprimand is expected to be essentially a stern lecture or warning from the judge in minor cases in which the experience of being apprehended, taken through the court process and reprimanded appears to be sufficient to hold the young person accountable for the offence.
- **Intensive support and supervision order.** This sentencing option provides closer monitoring and more support than a probation order to assist the young person in changing his or her behavior. It involves much smaller caseloads than probation and is particularly well suited for many offenders who under the previous YOA have been sentenced to custody.
- **Attendance order.** This order requires the young person to attend a programme at specified times and on conditions set by the judge. It can be crafted to address the particular circumstances of the young person. For example, it might be focused on specific times and days when a young person is unsupervised and tends to violate the law.
- **Deferred custody and supervision order.** This sentencing option allows a young person who would otherwise be sentenced to custody to serve the sentence in the community under conditions. If the conditions are violated, the young person can be sent to custody. This order is not available to the court if the young person has been found guilty of a serious violent offence.

Custody

Custody is reserved primarily for violent offenders and serious repeat offenders. A young person cannot be committed to custody unless:

- the young person has committed a violent offence;
- the young person has failed to comply with non-custodial sentences;

- the young person has committed a serious indictable offence and has a history that indicates a pattern of offences; or
- in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that it would be impossible to impose a sentence other than custody that would be consistent with the purpose and principles of sentencing. If a judge relies on this provision, the judge must give reasons as to why the case, in his or her opinion, is exceptional.

Before imposing a custodial sentence, the court must also have considered all reasonable alternatives to custody and must have determined that there is no reasonable alternative that would be capable of holding the young person accountable in accordance with the purpose and principles of sentencing discussed above. This means, for example, that although a young person has failed to comply with previous non-custodial sentences, he or she may receive another non-custodial sentence if the court determines that it would be adequate to hold the young person accountable.

Conferences

In many parts of Canada, there is an increasing use of conferences to assist in the making of decisions regarding young persons who are involved in the youth justice system. In general, "conference" refers to various types of processes in which affected or interested parties come together to formulate plans to address the circumstances generally operate in an informal manner. They can take the form of family group conferencing, youth justice committees, community accountability panels, sentencing circles, and inter-agency case conferences. Conferences provide an opportunity for a wider range of perspectives on a case, more creative solutions, better coordination of services, and increased involvement of the victim and other community members in the youth justice system.

The YCJA authorizes and encourages the convening of conferences to assist decision-makers in the youth justice system. Under the proposed legislation, a conference is defined as a group of people brought together to give advice to a police officer, judge, justice of the peace, prosecutor, provincial director or youth worker who is required to make a decision under the Act. A conference could give advice on decisions such as:

- appropriate extrajudicial measures;
- conditions for release from pre-trial detention;
- appropriate sentences; and
- plans for reintegrating the young person back into his or her community after being in custody.

A conference could be composed of a variety of people depending on the situation. It could include, for example, the parents of the young person, the victim, others who are familiar with the young person and his or her neighbourhood, community agencies or professionals with a particular expertise that is needed for a decision. A conference could be a restorative mechanism that is focused on developing proposals for repairing the harm done to the victim of the young person's offence. It could also be a professional case conference in which professionals discuss how the young person's needs may best be met and how services in the community can be coordinated to assist the young person.

Evidence that a young person has received a warning, caution or referral or that a police officer has taken no further action in respect of an offence, and evidence of the

offence, is inadmissible for the purpose of proving prior offending behaviour in any proceedings before a youth justice court in respect of the young person.

4.3.5. Indicators on alternatives to deprivation of liberty

The main indicators used for measuring the alternatives to the deprivation of liberty are the number of young people served by alternative measures, mediation, dispute resolution and diversionary programmes. These measures can be applied by criminal justice officials at various stages of the criminal justice system, from the point of police contact through to sentencing. Counts of the number of youths diverted by police and taking part in diversion or extrajudicial measures programmes are an indicator of workload for the police and these programs. It should be noted, however, that such programmes are administered differently from one jurisdiction to another and these differences can include variations in the types and number of programmes available and the requirements to render an individual eligible for extrajudicial measures.

An indicator of the workload of police in applying diversion is the number of adults and youths apprehended and diverted. Currently, data on this indicator are not available nationally, but will be available for youth in the future.

Depending on the province or territory, the work of delivering formal diversion programmes to youth is carried out by three types of agencies: governmental agencies (e.g., probation services), non-governmental organizations, and Youth Justice Committees. A prime indicator of the volume of work among these agencies is the number of persons participating in the programmes. Data for youths come from the Alternative Measures Survey, which is conducted annually.

Under the restorative justice approach, another form of diversion applied by police and the Crown is mediation (also known as dispute resolution or victim-offender reconciliation). This diversionary measures aims to restore the loss experienced by the victim and repair any harm. It involves the accused, victim, and neutral mediator in facilitating sharing and negotiating restitution. Some may also involve community members, family of the accused and the victim. While the type of restitution varies, it may involve financial compensation or another service either to the victim or the community. At the present time, data on the prevalence of mediation are not nationally available.

The type of alternative measure determines the nature and amount of commitment the agency administering the alternative measures programme must invest in the youth. For instance, personal service and community service orders can range in duration from 1 hour to 240 hours. In contrast, an apology to the victim is often a single event.

The national data requirements for the Alternative Measures Survey are:

Jurisdiction

The Jurisdiction is the Province/Territory in which the Alternative Measures / Extrajudicial Sanctions was given.

Case Type

Case type refers to whether the cases are a pre-charge or a post-charge alternative measure/extrajudicial sanction.

Categories: Total Pre-Charge Cases, Total Post-Charge Cases, Total Cases

Cases Reaching Agreement

Refers to the total number of authorized cases in which an agreement for participation in Alternative Measures/Extrajudicial Sanctions has been reached with the alleged offenders. An agreement is usually signed, although an agreement may be unsigned by the person, and more than one agreement can be reached for a case at one time. A person who has reached at least one agreement is counted as a case reaching agreement.

Categories: Unknown (not stated/missing), Total Number of Cases Reaching Agreement, Total Cases Not Reaching Agreement.

Age of Youth

Age of the youth alleged offenders at start date of Alternative Measure/Extrajudicial Sanction

Categories: Unknown (not stated/missing), Total Youth less than 12 years old, Total Youth 12 years old, Total Youth 13 years old, Total Youth 14 years old, Total Youth 15 years old, Total Youth 16 years old, Total Youth 17 years old, Total Youth 18 years old and older.

Gender

Male, female or unknown

Categories: Unknown (not stated/missing), Total Males, Total Females

Aboriginal/ Non-Aboriginal

Categories: Unknown (not stated/missing), Total Aboriginal Cases, Total Non-Aboriginal Cases

Most Serious Offence (MSO)

Refers to the seriousness of an offence according to its type and its potential impact on the person.

Categories: Unknown (not stated/missing), Total Homicide/Attempted Murder, Total Serious Assault, Total Assault Level 1, Total Sexual Assault, Total Robbery, Total Other Violent Offences, Total Break and Enter, Total Theft over \$5,000, Total Theft under \$5,000, Total Possession of Stolen Goods, Total Other Property Offences, Total Mischief, Total Disturb the Peace Offences, Total Other Criminal Code Offences, Total Drug Offences, Total Other Federal Statutes, Other.

Type of Alternative Measure/ Extrajudicial Sanction

Refers to all measures or interventions applied in cases reaching agreement. They are as follows (*note: the number of interventions may exceed the number of cases): Supervision (i.e., other than community service, personal services), Formal Caution Letter, Community Service, Personal Services to Victim (e.g., tasks), Restitution or Compensation to Victim, Counselling, Educational programme (e.g., stoplift), Apology (verbal or written), Charitable Donations, Essay or Presentation, Referral (e.g., to an agency offering specialized services such as AA or anger management), Social Skills

Improvement Course (Culturally specific measures), Other Alternative Measure/ Extrajudicial Sanction.

Categories: Unknown (not stated/missing), Total Supervision, Total Formal Caution Letter, Total Community Service, Total Personal Services to Victim, Total Restitution or Compensation to Victim, Total Counselling, Total Education Program, Total Apology, Total Charitable Donations, Total Essay or Presentation, Total Referral, Total Social Skills Improvement Course (Culturally Specific Measures), Total Other Alternative Measure/ Extrajudicial Sanction.

Case Outcome

Refers to the outcome of each case closed. One outcome is counted for each case reaching agreement. Outcome is counted as completed successfully, partially completed, not successful or not stated.

Categories: Unknown (not stated/missing), Total Cases Completed Successfully, Total Cases Partially Completed, Total Cases Not Successful, Total Not Applicable.

Cases Referred Back to Crown/ Original Referral Agent

Refers to cases that reached agreement and were either “partially completed”, “not successful”, or the outcome was “not stated” and the case was referred back to the Crown/ original referral agent to reactivate the charge(s) on recommence proceedings, whether or not the charge(s) was actually reactivated.

Categories: Unknown (not stated/missing), Total Cases Referred Back to Crown

4.3.6. Available statistical data

The following Youth Court Statistics for 2006/2007 are based on data collected through the Integrated Criminal Court Survey and the Youth Court Survey.

Fewer young people aged 12 to 17 have been appearing before a judge since the enactment of the Youth Criminal Justice Act (YCJA) in April 2003, and fewer are being sent to custody.

There were 56,463 youth court cases completed during the 2006/2007 fiscal year. Although virtually unchanged from the previous year, this amount was 26% lower than in 2002/2003, the year prior to the enactment of the new legislation.

The youth court caseload has declined in every province and territory since the introduction of the YCJA. There were five jurisdictions in which the caseload in 2006/2007 was at least 30% lower than in 2002/2003: the Northwest Territories (-52%), Newfoundland and Labrador (-47%), Yukon (-45%), British Columbia (-37%) and Ontario (-30%).

Over the same period, declines of between 21% and 24% occurred in Prince Edward Island, New Brunswick, Alberta and Nunavut. In the remaining provinces (Nova Scotia, Quebec, Manitoba and Saskatchewan), the youth court caseloads declined by less than 20%.

Since reaching a high of 70% in 1998/1999, the proportion of cases in which the young people either pleaded guilty, or were found guilty, has been gradually declining. In 2006/2007, the proportion was about 60%, the lowest

since 1991/1992 when youth court data became available for all provinces and territories.

One of the concerns with the Young Offenders Act (YOA), the predecessor of the YCJA, was overuse of custody. A key objective of the YCJA was to decrease the use of custody.

In line with that objective, fewer youth are being sentenced to custody. In 2006/2007, about 17% or 5,640 of all guilty cases resulted in a custodial sentence. This compares with 13,246 or 27% of all guilty cases in 2002/2003.

This decline was apparent in all provinces and territories. The largest impact occurred in Newfoundland and Labrador, Manitoba and the Northwest Territories, where the number of cases in which youth sentenced to custody in 2006/2007 was only about one-quarter of the number in 2002/2003. In all other jurisdictions, the number was less than half that in the last year of the YOA.

Historically, judges have sentenced convicted youth to probation more than any other type of sentence. This was still true in 2006/2007, as 59% of guilty youth cases resulted in probation. However, this proportion was 11 percentage points lower than in 2002/2003.

This drop may be due in part to the fact that under the YCJA, youth are subject to a period of mandatory community supervision following their release from custody. Under the previous Young Offenders Act, youth custody sentences were often followed by a probation order.

The YCJA introduced a number of new sentencing options for judges including, among others, intensive support and supervision orders, deferred custody and supervision orders, and orders to attend a non-residential program.

Since their introduction, the new sentences have not been commonly used.

In 2006/2007, deferred custody and supervision orders were handed down the most frequently in only about 3% of guilty youth court cases, or 1,080.

The statistical sources

Since 1981, the Federal, Provincial and Territorial Deputy Ministers responsible for the administration of justice in Canada, with the Chief Statistician, have been working together in an enterprise known as the National Justice Statistics Initiative. The mandate of the NJSI is to provide information to the justice community as well as the public on criminal and civil justice in Canada. Although this responsibility is shared among Federal, Provincial and Territorial departments, the lead responsibility for the development of Canada's statistical system remains with Statistics Canada.

Since the administration of the youth justice system is the responsibility of the provinces and territories, there are differences in the administration of youth justice across Canada and it is important to keep this in consideration when making jurisdictional comparisons. A significant factor that contributes to differing trends is the use of informal (e.g. police discretion) and formal diversions measures (e.g. extrajudicial sanctions) by police and Crown. Such diversion methods have an impact on both the court case-flow as well as admissions to correctional facilities and programs.

For the **Corrections Key Indicator Report for Adults and Young Offenders (KIR)**, Provincial, territorial and federal jurisdictions responsible for the delivery of adult and youth custody and probation services complete a set of standard data tables with

average daily custodial counts for each month and month-end community counts. Young offender data are provided for remand/temporary detention custody, sentenced secure custody, sentenced open custody, supervised probation, deferred custody, Intensive support and supervision programs and community portion of a custody sentence.

The Youth Custody and Community Services Survey generates data in order to provide information to the justice community on the nature and extent of youth corrections and community services for young offenders and to inform the public. The YCCS covers all occurrences relating to a youth who has commenced an uninterrupted period of time serving either a custodial and/or community-based disposition. It also collects information on youths being held in remand (non-sentenced custody while awaiting trial, sentencing, or transfer to and from an institution).

The objective of the Youth Court Survey (YCS) is to produce a national database of statistical information on charges, cases and persons involving accused who are aged 12 to 17 years (up to the 18th birthday) at the time of offence. The survey is intended to be a census of federal statute charges heard in youth courts in Canada. It includes information on the age and sex of the accused, case decision patterns, sentencing information regarding the length of prison and probation, and amount of fine, as well as case-processing data such as case elapsed time. These data on federal statute charges heard in youth courts in the reference period are collected by the Canadian Centre for Justice Statistics (CCJS) in collaboration with provincial and territorial government departments responsible for youth courts. The data are collected to respond to the needs of the provincial/territorial and federal departments of justice and attorneys-general, researchers and policy analysts, academics and the media, as well as to inform the public how youth are dealt with by youth courts in Canada.

4.3.7. Conclusion

a) *Do alternatives to deprivation of liberty like diversion, pre-trial alternatives or alternative sanctions exist?*

Yes alternatives to deprivation of liberty exist on all the above mentioned levels.

b) *Is there a variety of alternative measures?*

Available alternatives to the deprivation of liberty	Canada
Care, guidance and supervision orders	X
Probation	X
Community service orders	X
Financial penalties, compensation and restitution	X
Intermediate treatment and other treatment orders	X
Orders to participate in group counseling and similar activities	X
Orders concerning foster care, living communities or other educational settings	X
Other relevant orders	X

c) *Do national indicators exist?*

Yes, a wide range of national indicators exist.

d) *Do the national indicators mirror the international indicators?*

To a large extent national indicators do monitor the international indicators, however, not all 15 international indicators are tracked, formally measured and reported in all provinces and territories of Canada.

e) *Are there statistics to demonstrate that alternatives to deprivation of liberty exist and are nationally applied?*

Yes. See "Youth Court Statistics" for Canada in Annex 1.

f) *Are the statistics demonstrating that the alternatives prevail the deprivation of liberty?*

Yes, the statistics demonstrate that the youth court caseload has declined in every province and territory since the introduction of the YCJA. There were five jurisdictions in which the caseload in 2006/2007 was at least 30% lower than in 2002/2003: the Northwest Territories (-52%), Newfoundland and Labrador (-47%), Yukon (-45%), British Columbia (-37%) and Ontario (-30%).

Source:

Department of Justice Canada

<http://canada.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch14.html>

4.4. Germany

4.4.1. Outline of the legislation related to juveniles in conflict with the law

Juvenile Justice in Germany

The juvenile justice system in Germany is a compromise between the welfare and the justice approach. It combines elements of educational measures with legal guaranties and a procedural approach in general. The national law dealing with juvenile offenders who have committed a delinquent act prescribed by the general penal law (Strafgesetzbuch - StGB) is the Juvenile Justice Act (JJA). The JJA consists of a specific system of reactions and sanctions applicable to young offenders and of some specific procedural rules for the juvenile court and its proceedings. It does not create a new "juvenile penal law".

The age of criminal responsibility in Germany is 14 years (§ 19 StGB). Therefore, the JJA applies to all suspects who at the time of the offence had reached the age of 14 but not yet that of 18.

All young adults who at the time of the offence were 18, 19 or 20 years old are also transferred to the jurisdiction of juvenile courts independently of whether sanctions of the JJA or the general Penal Code (StGB) are to be applied (§ 108 (2) JJA). Juvenile law has to be applied if *"a global examination of the offender's personality and of his social environment indicates that at the time of committing the crime the young adult in his moral and psychological development was like a juvenile"* (§ 105 (1) No.1 JJA) or if it appears that the offence is a typical juvenile offence due to its circumstances and the motives (§ 10 (1) No. 2 JJA).

The regular sanctions system of the JJA

The sanction system of the German Juvenile Justice Act is ruled by two principles: the principle of "subsidiarity" and the principle of proportionality. According to the first principle, which is also called the principle of minimum intervention, penal action should only be taken if absolutely necessary. The second principle means that any sanction must be appropriate and necessary in order to achieve the objective which is intended and reasonable.

The formal sanctions of the juvenile court are educational measures (§ 5 (1) JJA, § 9 JJA), disciplinary measures (§ 5 (2) JJA, § 13 JJA) and youth imprisonment (§ 5 (2) JJA, § 17 JJA). According to § 5 (2) JJA, disciplinary measures and youth imprisonment can only be imposed if educational measures are not sufficient. Furthermore, youth imprisonment is considered a sanction of last resort ("ultima ratio"), if educational or disciplinary measures seem to be inappropriate (§ 5 (2) JJA, § 17 (2) JAA. "Dangerous tendencies" of the offender that are likely to exclude educational and disciplinary measures as inappropriate, or the "gravity of guilt" are preconditions for youth imprisonment (§ 17 (2) JJA). Therefore, the primary sanctions of the juvenile court are educational and disciplinary measures.

4.4.2. Diversion Programs

In Germany, diversion is only possible at the level of the juvenile court prosecutor or the juvenile judge. Police diversion is not allowed in order to avoid the abuse of police power. The police are strictly bound by the principle of legality and have to refer all offences to the public prosecutor. A restriction concerning the nature of offences doesn't exist. Under certain circumstances legal procedures can therefore also be avoided in the case of felony offences. However, the dismissal of the case without any sanction is the most important response to petty offences.

4.4.3. Pre-trial alternatives

At the level of the juvenile court prosecutor (before proceedings)

At the level of the juvenile court prosecutor three levels of alternative measures can be differentiated.

- In cases of petty offences, priority is given to diversion without any sanction (“non intervention”), § 45 (1) JJA.
- The second level is “diversion with education”, § 45 (2) JAA. In these cases, juvenile offenders are discharged because social and/or educational interventions have already been taken by other agencies (parents, the school, etc.) and because the prosecutor considers that the involvement of the juvenile judge and the prosecution of the juvenile offender are not needed. Sincere efforts of the juvenile offender to make reparation to the victim or to participate in victim-offender-reconciliation are put on a par with an educational measure.
- Finally, the juvenile court prosecutor can dismiss a case in co-operation with the judge (§ 45 (3) JJA) once the juvenile offender has fulfilled an obligation imposed by the juvenile court judge at the suggestion of the prosecutor. Such a possible obligation can be a warning, mediation, community service and participation in a training course for traffic offenders, or obligations like reparation / restitution, an apology to the victim, community service or a fine. Preconditions for such a “diversion with intervention” is that the juvenile offender has confessed and that the prosecutor considers the imposition of such a minor sanction as necessary but the prosecution as not needed.

Several Federal States (“Länder”) like for instance Bremen, Berlin, Hamburg, Saxony, Thuringia or Saarland have developed guidelines for diversion in the form of general administrative regulations. Each of those guidelines contains information about the objective of the diversion process. They also give orientations for the diversion process itself by introducing a catalogue of offences which are suitable for diversion and by describing the role and tasks of every actor who should be involved.

At the level of the juvenile court judge (during proceedings: remission)

According to § 47 JJA, the juvenile court judge can dismiss a case after the charge has been filed under the same conditions that apply to the juvenile court prosecutor (see three levels of diversion described above).

The judge can close the proceedings tentatively and grant the juvenile offender a six month period to fulfil the imposed obligations. Once the obligations are fulfilled, the judge will dismiss the case definitely. Otherwise the proceedings continue and a formal judgement is rendered.

4.4.4. Alternative Sanctions to deprivation of liberty

As mentioned above, there are two alternatives to youth imprisonment: educational measures and disciplinary measures. The juvenile court judge has to give priority to those measures. The combination of educational and disciplinary measures is possible (§ 8 (1) JJA).

Educational measures

According to § 9 JJA, educational measures of the juvenile court comprise different forms of directives concerning the everyday life of a juvenile offender aiming at education and prevention of dangerous situations or an educational assistance order applying measures of the Juvenile Welfare Act (JWA).

§ 10 JJA provides a non-exhaustive list of possible directives. The juvenile court judge can for instance forbid the juvenile offender contact with certain people and prohibit going to certain places (“whereabouts”); impose living in foster family or residential care, order to accept an apprenticeship training position / job or to participate at a traffic training course.

The legislative reform of the JJA in 1990 extended the catalogue of juvenile sanctions in § 10 JJA by introducing community sanctions like community service, the special care order which means that a social worker is attached to a juvenile offender like a mentor for a period of usually 6 to 12 months (this seen as an alternative to the classic probation sanction, but only considered useful if the parents agree), the social training course and mediation. In practice, mediation as a juvenile court educational directive is almost never used because suitable cases are dealt with in an informal proceeding prior to a court trial (at the level of diversion).

Finally, the juvenile court judge can impose with the parents’ consent therapy or a withdrawal treatment. If the juvenile offender has already reached the age of 16, such a directive should only be imposed with his own consent. In addition, it’s necessary to get an expert opinion before taking a decision (§ 10 No. 9 Guidelines to the JGG - RiJGG).

The duration of a directive is fixed by the juvenile court judge. In general, the maximum length is 24 months. Nevertheless, a special care order shouldn’t exceed 12 months and a social training course shouldn’t exceed 6 months. However, a directive can be modified, cancelled or extended to 3 years by the juvenile court judge for educational reasons.

If the juvenile offender does not respect a directive given by the juvenile court judge, the latter can impose detention up to four weeks in a special juvenile detention centre (Jugendarrest) under the condition that the juvenile offender has been informed of such a consequence beforehand (§ 11 (3) JJA).

Disciplinary measures

Disciplinary measures of the juvenile court (§ 13 (2) JJA) comprise of a formal warning as well as directives like an apology to the victim, damage restitution, community service or a fine. The detention of one or two weekends up to four weeks in a special juvenile detention centre (Jugendarrest) which is also called leisure-time, short-term or long-term detention is a disciplinary measure too, but not an alternative to detention.

According to § 15 (2) JJA, a fine should only be imposed if it can be assumed that the juvenile offender will be able to pay the fine with money which is at his disposal or if the juvenile offender shall be deprived of the benefits which result of the offence committed.

The JJA does not provide any specifications with regard to the maximum volume of community service. This aspect is therefore still the object of discussions in Germany. The prevailing opinion in literature as well as the 64th German Juristentag (a biannual meeting of German lawyers) suggests 120 hours as the maximum volume of community service.

The directives can be modified or cancelled by the juvenile court judge for educational reasons (§ 15 (3) JJA). If the directives are not respected and fulfilled by the juvenile offender, leisure-time, short-term or long-term detention can be imposed under the same condition which apply in these cases to educational measures.

Implementation and supervision of educational and disciplinary measures

According to § 38 (2) p. 5 JJA, the communal youth welfare departments are responsible to supervise the implementation of educational and disciplinary measures imposed by the juvenile court judge (except leisure-time, short-term or long-term detention, § 10 (2) No. 3 and § 16 JJA), as far as no probation officer has been assigned to do so. Consequently, those measures are monitored either by a probation officer or by a representative (e.g. a social worker) of the communal youth welfare department. They control if the juvenile offender fulfils the directive imposed and inform the juvenile court judge about important non-compliances.

However, there is still a debate, in practice, about whether the youth welfare departments are not only responsible for the supervision, but also for the implementation of educational and disciplinary measures ordered by the juvenile court judge.

In any case, the youth welfare departments play an important role in the juvenile justice system in Germany (§ 38 JJA, § 52 JWA). They have to be associated in all juvenile trials and this should happen as early as possible (§ 38 (3) p. 1 and 2 JJA). The participation of e.g. a social worker of the communal youth welfare department, the so-called social court assistant, is required in all juvenile trials (§ 38 (2) JJA). They assist the judge in finding the appropriate sanction by preparing a social report and participating in the court trial in order to give evidence about the personal background of the juvenile. Before an educational measure in form of a directive can be ordered, the representatives of the youth welfare departments must always be heard by the juvenile court judge.

All major questions related to the work of a probation officer like the required qualification for the job, the work field or his obligations and rights are regulated in the Probation Assistance Act. Orientations and provisions with regard to the monitoring and implementation of the educational and disciplinary measure by the communal youth welfare departments exist, if at all, only on the level of the community or the respective Federal State. Thus, monitoring indicators can vary from one region to another.

Youth prison sentences are executed and monitored according to the dispositions of the youth penal law. However, a uniform Federal Youth Penal Law doesn't exist in Germany as this sector is part of the legislative competence of the Federal States ("Länder"). Consequently, there are 16 different youth penal laws. Thus, the provisions and monitoring indicators vary, at least in detail, from one Federal State to another.

4.4.5. Indicators on alternatives to deprivation of liberty

In Germany, indicators in the field of juvenile justice exist, for instance in relation to the measurement and presentation of information about juvenile delinquency (number of juveniles in conflict with the law) and the execution of youth prison sentences (number of juveniles in detention, etc.). The information sources for these indicators are the police, juvenile courts and prisons for juveniles. They all collect the necessary relevant data, among others on:

- The number, gender, age and nationality of juveniles suspected of having infringed the penal law (per Federal State and city with a population of more than 200,000).
- The nature of the offences.
- The number, gender, age and nationality of juveniles sentenced to youth imprisonment as well as the length of the youth prison sentence.
- The number, gender, age, nationality and criminal record of juveniles in detention as well as the period of their detention.

National indicators measuring and presenting information on alternatives to deprivation of liberty are not available, or at least not for the whole range of possible alternatives which exist within the German juvenile justice system.

So, it's possible to make a statement regarding the use of pre-trial alternatives according to § 45 (3) JJA and § 47 JJA and of alternative sanctions that means the number and nature of educational or disciplinary measures imposed by the juvenile court judge or the juvenile court according to § 9 et seqq. JJA.

However, no information can be provided about the number of cases where the prosecutors have dropped investigation proceedings (possibly after imposing conditions, but without instituting formal court proceedings) or where the criminal offences investigated by the police have been dismissed by the judicial authorities because the suspicion of a criminal act couldn't be substantiated or because of existing formal obstacles to criminal prosecution. Thus, a declaration about the use of diversion and certain pre-trial alternatives at the level of the juvenile court prosecutor and the juvenile court judge cannot be made.

Consequently, an indicator for the measurement of the total number of juveniles diverted or sentenced who enter a pre-sentence diversion scheme such as proposed by UNICEF and UNODC in the “Manual for the measurement of juvenile justice indicators” does not exist in Germany.

4.4.6. Available statistical data

In Germany, police and judicial (court-based) data are available through the Federal Statistical Office.

The annually published Police Crime Statistics⁸ of Germany’s Federal Criminal Police Office provides information about the criminal offences that have become known to the police and have been recorded, and the suspects identified. Thus, it’s possible to get details with regard to the number, gender, age and nationality (German / non German) of the suspects identified, the nature of the offences and the crime rates per Federal State and city (with a population of more than 200,000). In the reference year 2007, 12.1% of the total of the recorded suspects above the age of criminal responsibility were juveniles aged from 14 to (under) 18 years.

The criminal prosecution statistics⁹ which are collected by the statistical offices provide information about the persons convicted. These compilations of data inform on how the cases investigated by the police have been assessed by the courts and what sanctions have been imposed. Thus, it’s possible to get details about e.g. the number and age of the persons convicted, the number of cases which have been dismissed (according to § 45 (3) JJA or § 47 JJA), the number and nature of educational and disciplinary measures which have been imposed as well as of the number and length of youth prison sentences which have been given.

However, statistical data are not available about the number of cases where the prosecutors have dropped investigation proceedings (possibly after imposing conditions, but without instituting formal court proceedings) or where the criminal offences investigated by the police have been dismissed by the judicial authorities because the suspicion of a criminal act couldn’t be substantiated or because of existing formal obstacles to criminal prosecution.

Finally, an analysis of the development of the juvenile crime situation in Germany as well as some data related to it are provided in the Periodical Report on Crime and Crime Control in Germany which is published by the Federal Government (1st report in 2001¹⁰, 2nd report in 2006¹¹). This report draws together the latest findings taken from official data pools, especially the Police Crime Statistics and the criminal justice statistics, and combines them with the results of scientific research.

⁸ See Annex II (1) for a summary of the Police Crime Statistics 2007. Download of the complete Police Crime Statistics 2007 possible via: <http://www.bka.de/pks/>

⁹ See Annex II (2) for German Criminal Prosecution Statistics 2006

¹⁰ Download of the 1st Periodical Report possible via:
http://www.bmj.bund.de/enid/6f2597e56c58027b209894b47a897043,33d0e45f7472636964092d0933303334/Studien__Untersuchungen_und_Fachbuecher/ss__Periodischer_Sicherheitsbericht_5q.html

¹¹ Download of the 2nd Periodical Report possible via:
http://www.bmj.bund.de/enid/d3ada4503d46730bbe3aa696695f2a6c,0/Kriminologie/Zweiter_Periodischer_Sicherheitsbericht_der_Bundesregierung_131.html

4.4.7. Conclusion

- a) *Do alternatives to deprivation of liberty like diversion, pre-trial alternatives or alternative sanctions exist?*

Yes. Alternatives to deprivation of liberty like diversion, pre-trial alternatives or alternative sanctions constitute an essential part of the juvenile justice system in Germany. However, diversion is only possible at the level of the juvenile court prosecutor or the juvenile court judge as police diversion is not allowed.

- b) *Is there a variety of alternative measures?*

This question can also be answered in the affirmative. The German juvenile justice system provides a variety of alternative measures in the form of educational or disciplinary measures (see table below). In addition, the German Juvenile Justice Act lists possible educational measures in a non exhaustive way, thus allowing the development of new innovative alternative measures.

Available alternatives to the deprivation of liberty	In Germany
Care, guidance and supervision orders	x
Probation	x
Community service orders	x
Financial penalties, compensation and restitution	x
Intermediate treatment and other treatment orders	x
Orders to participate in group counseling and similar activities	x
Orders concerning foster care, living communities or other educational settings	x
Other relevant orders	x

- c) *Do national indicators exist?*

In Germany, national indicators in the field of juvenile justice exist, for instance in relation to the measurement of juvenile delinquency, the execution of youth prison sentences or certain alternative sanctions to youth imprisonment. However, a national indicator is available neither for all the alternatives to deprivation of liberty together nor for each alternative individually.

- d) *Do the national indicators mirror the international indicators?*

Even though certain of the existing national indicators comply with some of the international juvenile justice indicators proposed by UNICEF and UNODC in their "Manual for the measurement of juvenile justice indicators", an equivalent to the here relevant international indicator No. 10 related to pre-sentence diversion does not exist in Germany.

- e) *Are there statistics to demonstrate that alternatives to deprivation of liberty exist and are nationally applied?*

The criminal prosecution statistics specify certain pre-trial alternatives as well as alternative sanctions to youth imprisonment and provide information about their use. However, the use of diversion and certain other pre-trial alternatives by the juvenile court prosecutor and the juvenile court judge is not mentioned (see explanations under point 1.6. above). Consequently, there is no evidence for the application of all the possible alternatives to deprivation of liberty.

- f) *Do the statistics demonstrate that the use of alternatives prevail the deprivation of liberty?*

Yes, they do.

Sources:

Juvenile Law (2007), Compilation of German legislation applicable to juveniles, 28th ed., Munich: C.H. Beck (dtv)

German Association for Juvenile Justice and Judicial assistance for Minors (www.dvjj.de)

Federal Statistical Office Germany (www.destatis.de)

Dünkel, F. (2005). *Juvenile Justice in Germany*, Internet publication (<http://www.rsf.uni-greifswald.de/fileadmin/mediapool/lehrstuehle/duenkel/JuvenileJustice.pdf>)

4.5. Kenya

4.5.1. Outline of the legislation related to Juveniles in conflict with the law

Kenya signed and ratified the Convention on the Rights of the Child (CRC) in 1991. Since Kenya follows the dualist system,¹² Kenya domesticated the CRC through the Children's Act in 2001. This Act was also intended to harmonise the previous laws that provided for children.

The Children Act is the most comprehensive law on juvenile justice in Kenya since it provides for the rights of children. According to the Act section 2 of the Children's Act a child is a person under the age of 18 years and they are dealt with by the juvenile court in Kenya also constituted under the same Act. The court is based only in Nairobi and in other parts of Kenya, children's courts are supposed to operate in the same courtrooms as adult cases, but at specifically different times. The court has jurisdiction to *inter alia* hear cases of child offenders apart from those charged with murder and those charged together with an adult.

Legal Procedures

The Children Act outlines ways of dealing with children who are in conflict with the law. In the absence of a specific legislation on Juvenile Justice in Kenya, The children's act alongside other sections of the law provide for the implementation of juvenile justice.

Every child accused of having infringed any law shall:¹³ -

- a) be informed promptly and directly of charges against him;
- b) if he/she is unable to obtain legal assistance the government will provide it
- c) have the matter determined without delay;
- d) not be compelled to give testimony or to confess guilt;
- e) have free interpretation services if child can't understand or speak the language used;
- f) if found guilty, have the decisions and any measures imposed and consequences thereof reviewed by a higher court;
- g) Have his privacy fully respected at all the proceedings;
- h) if he/she is disabled, be given special care and be treated with the same dignity as any other child.

Principles to be applied in Children's Court

- The best interests of the child shall be of primary concern.
- The Children's Court shall have a setting that is friendly to the child offender.
- The words "conviction" and "sentence" shall not be used in relation to a child. Instead the terms 'a finding of guilt' and 'an order upon finding of guilt' shall be used respectively.

The Children Act prohibits the following:

- Corporal punishment.

¹² International conventions ratified have to be domesticated into law as through an Act of Parliament unlike self-executing treaties which automatically become laws once the country has ratified.

¹³ Kenya: Children Act Article No. 8 cap 186

- Imprisonment or being put in a detention camp.
 - No child shall be sentenced to death.
- The offences committed by children are registered according to following categories;
- i) Criminal
 - ii) Protection and care
 - iii) Civil

Criminal

The criminal category includes; defilement, neglect, theft, breaking and entering among others.

If an adult defiles a child, it is registered as an Adult criminal act and the case is heard in regular court. The child is treated in a medical hospital immediately so that there is evidence, and the child is returned home. A protection and care file is opened. In cases of incest the court determines if the home is fit for the child to return to after the offender has been remanded into police custody. If the child is not receiving proper care, in the case of mistreatment and physical abuse, the court appoints a custodian either at a children's home or competent adult to look after the child.

If it is a child who has defiled another child, the offender is tried in the children's court.

Protection and care

This applies to street children who are collected by police during routine 'swoops', and children in need of care and protection. When the child is charged, he/she is taken for a plea and the child is placed in a remand home by order of the magistrate. If parents/ guardians are within the court's jurisdiction the child is released into their care by order of the magistrate

There are matters that are referred to the high court where the children's magistrate did not pay attention to provisions of the children's act, in this case the children had been convicted and sentenced to 2 years imprisonment for theft. The high court set aside the sentence and ordered the minors to be released to their parents because the trial magistrate failed to use the terms provided in the act, and had used terms such as "convicted" and "sentenced".

Civil

The case concerning a child offender is heard in the magistrate's chambers to allow for privacy and so that the child can be open. The children's officer is present during all cases. During sentencing the children's officer sends a recommendation to the magistrate. However, as stated earlier, sanctions placed are at the discretion of the magistrate. If a child is found guilty they are placed in the remand home for duration of the sentence, but if there is a competent adult, the magistrate is at liberty to make and order that the child is released into their care, or the child is placed in a borstal institution until he/ she turns 18.

Although it is not explicit in the children's act, the government recognises the child has a chance to rehabilitate. The child is placed under parental/ guardian care to facilitate rehabilitation.

If the child is remorseful, the children's officer can make a recommendation that the child be placed under a counsellor for further rehabilitation.

An advocate can bear a plaint if either parent of the child has sued for child maintenance. Parents are registered as plaintiff and defendant, and a file is opened. Once the child has reached 18 years the file is closed.

d.) The type and duration of the sanction is at the discretion of the magistrate. Usually the child is taken to an institution-remand home- until he/she turns 18 years or until time of release. The child can also be placed under probation where the child must periodically report to the probation officer who records the behavioural change.

f.) The offence can be settled out of court with the community elders and the chief. The offender is then given necessary punishment in accordance with the gravity of the offence or however the elders and chief see fit.

Institutions

These are differentiated by age:

If child is below 5 years he/ she is taken to a children's home- usually cases for protection and care. Children above 5 years are taken to remand home until further mention. After 2 weeks the magistrate mentions the case in the remand home.

4.5.2. Diversion Programmes

a) One objective of diversion in Kenya is seen as the possibility to eliminate the chances of stigmatization of children, which normally occurs when they go through the juvenile justice system.

b) It also reduces congestion in children's remand facilities and other institutions that temporarily hold children before determination of their matters. This is quite important for Kenya considering the street children situation.¹⁴

c) Diversion avoids criminal contamination of children, which may occur when children are kept in custody with criminals.

d) It saves time and resources as it avoids delays in the processing of matters at the juvenile courts

In light of these advantages, there has been an attempt to ensure that Diversion has a pride of place in the Kenyan legal system.

The Children Act does not expressly provide for Diversion, however some sections tacitly allude to the concept including:

Section 6, which reiterates that children should not be separated from their parents. For this reason, diversion can be deciphered since separation, even if the same is, on account of commission of offences is frowned upon.

In Section 18, the Act goes on to provide for deprivation of liberty of a child. It outlaws the unlawful arrest or deprivation of liberty, torture and cruel treatment of a child. It must be emphasized that this is the hallmark of diversion.

In Section 18 (3) justification is given for remand homes and Borstal institutions for children. Child offenders are not to be kept together with adults. Furthermore, it allows for the creation of children's cells and also child desks at the police station. The establishment of child protection units under the pilot project can, thus, receive legitimacy under this section.

¹⁴ Recent visits to remand homes reveal that street sweeps by police result in congestion at holding facilities. Young sex commercial workers are among those that are accompanying the street families. Some street offenders report to holding facilities with their innocent sibling for lack of alternative shelter and care.

In an attempt to introduce diversion under the Children's Act, the Kenya Law Reform Commission prepared part of the Children Law (Amendment Act) 2006.

The Bill envisages that Diversion will be operationalized at three levels to wit:

- a) Community based support system i.e. Area Advisory Committees convened at the Divisional level, The Police and The Judiciary

4.5.3. Pre-trial alternatives

Pre-trial Detention

It is essential that sanctions imposed on the children address rehabilitation and assist in reforming the behaviour of these children. However the Children's Act has not prioritised this aspect while considering which sanctions should be imposed on children and the aim they achieve.

Police Cells

Children in conflict with the law are in most cases held at the police cells before they are taken to court. According to Schedule 5 of the Children's Act, a child suspected of committing an offence should be arraigned before court not later than 24 hours after being arrested. The parents/guardians or Director of Children Services should be informed of the child's arrest as soon as possible and the police should only interview the child in the presence of the parents/guardians or a legal representative. While there is no provision under the Children Act for community service pending trial, it is reported that some children are exposed to 'community service' while they are still held at the police cells pending their arraignment in court.¹⁵ Further, while it is advocated that children are held separate from adults in practice this does not always happen in Kenya and children under police custody are held together with adults in congested cells. This can not only traumatise them but also expose them to abuse by the adults due to their vulnerable nature.

Children's Remand Home

The former Juvenile Remand Homes now act as Children Remand Homes

These are institutions that may be established by the Government for the reception of children (normally under 14 years) whose cases are still on going in court under section 50 of the Children's Act. According to section 51 the Director of Children Services shall be responsible for the supervision of all rehabilitation schools and children's remand homes and for this purpose shall periodically visit them or cause them to be visited

Rehabilitation Schools.

Section 47 of the Children's Act established the Rehabilitation Schools which were previously called the Approved Schools. These were established by the Government for the reception, maintenance, training and rehabilitation of children ordered to be sent there by the Children's Court.

Charitable Children's Institutions.

These are institutions that may be established by religious bodies, private individuals and NGOs in general to undertake programmes for the care, protection, rehabilitation

¹⁵ Street Children and Juvenile Justice in Kenya, Cradle, Undugu Society and the Consortium for Street Children, Spring 2004 pg 24

or control of children. Approval has to be granted by the National Council for Children Services to run this programme. The NGO or religious organization must first show proof of registration before applying for the approval.

4.5.4. Alternative Sanctions to Deprivation of Liberty

- a) Set the child free by discharging him; this is provided for under section 35 of the general penal Code
- b) Discharging the offender on his entering into a recognizance of guilt , with or without a sureties;
- c) Evoking the probation order against the offender under the provisions of the probations act;
- d) Committing the offender to alternative homes under a relative, guardian or a charitable children's institution willing to undertake his care;
- e) Committing the child to regular educational or vocational training institutions if they are roaming about school particularly if the child is between 10 and 15 years as suits their needs;
- f) *Placing the offender under the care of a qualified counselor for counseling and guidance;
- g) The probation as well as children's officers are trained on child counseling;
- h) **Ordering the offender to pay fine
- i) **Evoking a community services act (CSA)
- j) **Ordering the offender to pay a fine, compensation or costs.

4.5.5. Indicators on Alternatives to Deprivation of Liberty

The statistics and indicators on alternative sanctions in Kenya vary depending on who is giving them. For instance the children's court has some data on only children who have come through the court. The data is broken down by age and the type of alternative. However, this is inconsistent and in some cases not clear whether same criteria is used across the country. It is very difficult to access any sort of database on alternative sanctions in Kenya.

There are no national Indicators. Currently, Save the Children Sweden is working with Juvenile courts in order to support the establishment of national benchmarks on juvenile justice. It is not clear at this point if these benchmarks refer to the international indicators or how much they mirror them. It is also to be seen whether indeed there is a plan to incorporate them into the children's Act which would then pave way to the domestication of international indicators into the National Law.

4.5.6. Available statistical data

No credible updated statistics have been received from the various children's offices and courts at the time of writing this report.

4.5.7. Conclusion

a) *Do alternatives exist?*

Yes they do. As mentioned earlier these are mostly at the discretion of the children's magistrate or judge due to the absence of a Specific legislation on children.

b) *Do alternatives to deprivation of liberty like diversion, pre-trial alternatives Sanctions exist?*

Yes, they do (*as mentioned above*). Although the Children's Act includes payments of fines and community work as alternative sanctions, interviews with various actors indicate that there is controversy regarding these two types of alternative sanctions. It was pointed out that Community service and payment of fines by children is highly discouraged. This is due to the fact that it was not clear what would constitute child labour in community service and that payment of fine could be open to abuse and corruption.

c) *Is there a variety of alternative measures?*

Yes there are. In Kenya the practice is not necessarily in accordance with any of the recent international rules regarding alternative measures or guidelines but the Children's act does mirror the CRC to a great extent.

c) *Do national indicators exist?*

No, however there is some semblance of indicators in the practice but this is ad-hoc and largely dependent on the individual administering measures at a given time and place. There is not a national guideline as such and most officers interviewed admitted that the establishment of national standards would be useful.

Available alternatives to the deprivation of liberty	Kenya
Care, guidance and supervision orders	X
Probation	X
Community service orders	X
Financial penalties, compensation and restitution	X
Intermediate treatment and other treatment orders	X
Orders to participate in group counseling and similar activities	X
Orders concerning foster care, living communities or other educational settings	X
Other relevant orders	X

d) *Do the national indicators mirror the international indicators?*

To a less extent the national indicators mirror the international ones. Kenya has not specifically adopted the various recent Juvenile justice tools in its administration of Justice. A strong recommendation has been made for Kenya to update and adopt a legislation that emphasizes juvenile justice.

e) *Are there statistics to demonstrate that alternatives to deprivation of liberty exist and are nationally applied?*

Yes but I believe they are ad-hoc and inconsistent depending on the geographical location. Some districts are extremely underdeveloped; they lack the most basic facilities and are less likely to attract motivated and well educated staff.

f) *Are the statistics demonstrating that the alternatives prevail over the deprivation of liberty?*

Yes- This is quite clear.

Sources:

Report on Street Children and Juvenile Justice in Kenya, Cradle, Undugu Society and the Consortium for Street Children, Spring 2004 pg24

Grace Nduta Njenga, Process Server/ Court Clerk, Nakuru Children's Court

Lucy Chelang'at staff, Nakuru Children's Court

Lady Justice Martha Koome; Resident judge Nakuru law Courts

Probation Officers

Nairobi Children's court

4.6. Norway

4.6.1. Outline of the legislation related to Juveniles in conflict with the law

In Norway every person below the age of 18 is a child in accordance with the CRC art. 1. The Minimum Age of Criminal Responsibility is 15 years. There is no juvenile court in Norway and no separate juvenile law. If a child between 15 and 18 commits a crime the procedures are the same as for an adult offender. However, the penal sanctions are less severe for children, and detention is always the last resort.

If a child younger than 15 years commits a crime, there will be no penal reaction, but Child Protection authorities are in most cases warned if the crime is serious. For less serious crimes or conflicts involving children between 10 and 18 the offender is offered to meet the victim with the consent of the victim at the Mediation and Reconciliation Service in order to settle the case. Mediation can be used in both criminal cases and in matters not reported to the police. The mediation is voluntary and is not meant as a punishment. The idea is that the young offender gets to take responsibility for his or her actions and the victim gets reassured that the offender is not dangerous. Meeting the victim can prevent the adolescent from committing new offences in the future.

4.6.2. Diversion Programs

In Norway mediation is an important part of the administration of justice, both in civil cases and criminal cases. For young offenders between 12 and 18 the police can decide if mediation is appropriate on the condition that both the victim and the offender want to solve the case through mediation.

The principles for extrajudicial measures:

The criminal Code and the Mediation and Reconciliation Service law both refer to mediation as an alternative to other sanctions if all the involved parties accept mediation as an alternative.

- Extrajudicial measures are mostly adequate for young non-violent first-time offenders, but also older offenders with a criminal history can be included if reasonable.
- Extrajudicial measures are mostly used instead of a process in court.
- Extrajudicial measures are erasing the young offender's police record, and this is a huge motivation for mediation for most adolescents.
- The contract made during the mediation must be of some proportion to the offence. (e.g. stealing one chocolate can not actuate free work in a shop 10 hours a week for half a year.)

4.6.3. Pre-trial alternatives

The prosecutor can choose not to indict a person even though the prosecutor finds the person most likely to be guilty in committing a crime. Due to the law for criminal procedures § 69 the waiver of prosecution can be decided either conditionally or finally. This is not a privilege reserved only for young offenders, but can be used for all citizens in the country.

In 2005, official statistics indicate that 5460 children between 5 and 18 years were charged with crimes by police decision. Most of the 2209 cases were dismissed because the offender was not criminally responsible. Of the remaining 3251 cases only 147 were given a conditional waiver of prosecution. 889 children were transferred to the Mediation and Reconciliation Service. (See attached appendix, table 18 SSB) (The Mediation and Reconciliation Service have different numbers, see below.)

In most cases of less severity the penal consequence is a penalty notice or a fine. In cases involving children between 15 and 17 this is the result in almost 80 % of the cases (2005).

Due to different ways to register cases, the numbers from police and the Mediation and Reconciliation Service vary considerably. Statistic reports from The Mediation and Reconciliation Service show that there were 9120 cases mediated in 2007. Approximately half of these cases were criminal cases and the other half were civil cases. Mediations involving children below the age of criminal responsibility are registered as civil cases, even if the child has committed a crime. The Mediation and Reconciliation Service report that children between 15 and 17 are the most frequent users of the mediation service.¹⁶

Due to the Criminal Code § 53 h), the judge can decide that mediation through the Mediation and Reconciliation Service is a condition for the prosecution to be dropped. In 2007 this has only been done in 30 cases.¹⁷

4.6.4. Alternative Sanctions to deprivation of liberty

The official Norwegian judicial policy is not to imprison children. However this is still to some extent being done. Norwegian children in conflict with the law risk experiencing custody and some end up in jail. 765 children between 15 and 17 years were sentenced to prison, either with a deferred sentence (depending on a potential future criminal act) or as an unconditional sentence in 2006. (See attached appendix, table 1, SSB)

Statistics from 2006 show that the most common of all sanctions, approximately 70%, given to offenders between 15 and 17 are in fact economic rather than detention. Examples of economic sanctions are; "on the spot fine", "ticket fine", "fine" and "conditional imprisonment and fine".

Besides the economic sanctions, children are offered community sentence (5,3 %, according to SSB statistic) and mediation (usually given before trial). In approximately 5 % of cases the prosecution is conditionally dropped.

¹⁶ <http://www.konfliktraadet.no/Nyheter/Statistikk-for-2007/>

¹⁷ <http://www.konfliktraadet.no/upload/Sekretariatet/statistikk%202007%20tabeller.pdf>

The Norwegian Government has made a plan of action in relation to the problems related to young offenders. In 2006 the Government released a Parliamentary Report (St.meld 20, 2005-2006) entitled "Alternative Sanctions for Young Offenders".

The report focuses on means to avoid prison for young people, and is emphasizing several measures to succeed, for example:

- Contentious observation of children at risk of breaking the law.
- Quick reactions from police and other authorities in the society
- Restorative justice, mediation
 - The victim gets his/her rights restored
 - The young offender takes responsibility for his/her act.
 - The victim gets to tell the offender in a direct matter how the act affected him/her
- When it is reason to believe that a child has committed a crime the police can summon the child and the parents to a conversation. This is to indicate the concern for the child, and serves simultaneously as a warning.
- Developing alternatives to prisons, such as child protection institutions that meet the special needs children have.
- Individual examination of every child below 18, that is under suspicion of breaking the law. This examination is used in the whole process to adjust the prospective sanction to each young offender. The child will get his or her own mentor as long as he or she does the expiation.
- The report suggests a reform in the Criminal Code that instructs the judge to consider deferred sentences with certain conditions that will help rehabilitate the offender, such as mediation or education or special programmes.
- Community Service can hold activities such as work for public utility or individual therapy, medical treatment or mediation. Community work can be used instead of imprisonment.
- If deprivation of freedom is clearly necessary, children must always be in an open prison institution, but as soon as possible they are to be replaced with other and better adjusted sanctions.
- The Report suggests that young offenders are offered follow-up groups to ensure interdisciplinary help after they are released from prison or an institution.
- Youth Contracts have been tested in projects in some parts of the country. The offender commits to a contract with the police or the prosecutor to attend special activities and in return the prosecution is dropped. The project found that youth contracts were successful and should be carried on.
- Mediation should be used to a greater extent as an alternative to prison. This requires the Director of Public Prosecution to send a directive or a circular letter with instructions or a change in the law.
- Young offenders are a resource-demanding group, therefore more competent, educated and caring adults are required to ensure higher quality in the meeting the demands of this group.
- More research on young offenders and the effect of prison on young people is required
- Interdisciplinary teamwork
- Activate parents and other important relatives or social networks.

4.6.5. Indicators on alternatives to deprivation of liberty

There are statistics indicating to the state to what extent children are sentenced to detention and also alternative to detention. The statistics show the extension of imprisonment and different types of penalty reactions given to children. (See f.ex. appendix, table1, 13, 18, 19, 31, 43, 54, 55, 58, 59)

4.6.6. Available statistical data

Statistically reliable data is easily found. However, as with all statistics there is always the question on how the statistics are registered. This is well illustrated in the different numbers found in official statistics (SSB) and the statistics presented by The Mediation and Reconciliation Service in relation to the numbers on young offenders partaking in mediation.

4.6.7. Conclusion

a) *Do alternatives to deprivation of liberty like diversion, pre-trial alternatives or alternative sanctions exist?*

Yes they do, in accordance to international standards. Most of the violations of the law committed by people below the age of 18, are sanctioned economically. Not many children are sentenced to deprivation of liberty. Community service is frequently used to substitute prison. There are definite plans on enlarging the selection of alternative sanctions towards young offenders within a short period of time. Many changes have already started as projects.

b) *Is there a variety of alternative measures?*

Yes there is, in accordance with Beijing Rules, as the following table shows:

Available alternatives to the deprivation of liberty	Norway
Care, guidance and supervision orders	x
Probation	x
Community service orders	x
Financial penalties, compensation and restitution	x
Intermediate treatment and other treatment orders	x
Orders to participate in group counseling and similar activities	*
Orders concerning foster care, living communities or other educational settings	x**
Other relevant orders	x

* *This is suggested in the report mentioned above.*

***This is normally suggested by Child protection, and decided by a special court "Fylkesnemnda for sosiale saker"*

c) *Do national indicators exist?*

Yes.

d) *Do the national indicators mirror the international indicators?*

The fifteen indicators defined by UNICEF (chapter 3) are not in detail the same as the Norwegian indicators. E.g. are the indicators from UNICEF are much more detailed.

e) *Are there statistics to demonstrate that alternatives to deprivation of liberty exist and are nationally applied?*

Yes, ref. statistics in appendix.

f) *Are the statistics demonstrating that the alternatives prevail the deprivation of liberty?*

Yes.

Sources:

Gouvernemental home pages, The Department of Justice, The Mediation and Reconciliation Service home pages, The SSB (Statistisk Sentralbyrå), The Government made Parliamentary Report (St.meld 20, 2005-2006) called "Alternative sanctions for young offenders".

4.7. Switzerland

4.7.1. Outline of the legislation related to Juveniles in conflict with the law

Since January 1st, 2007 Switzerland has a new Juvenile Justice Law¹⁸. It is shaped in the form of a moderate welfare model. This means that the educative element prevails in the sanction system. Compared to the old model the new one is now dualistic. The judge always has to add a disciplinary measure to his educational measure if the child is criminally responsible for his act (Art. 11 JStG).

The Juvenile Justice Law is applicable to every person that has committed an offence before reaching the age of 18 years. The minimum age of criminal responsibility is set at 10 years (Art. 3 JStG). If a child has committed an offence before reaching the age of MACR, the parents of the child will be informed and if there are indicators that the child may be in need of help, the child protection service will be informed. The Juvenile Justice Law is not applicable to persons over 18 (for example young adults) except if they committed an offence before and after reaching the age of 18 years and these two offences are dealt jointly.

The law regulates the possible ways of sanctioning a juvenile for his offences. It is divided in either measures of protection (educational measures) or formal sanctions (disciplinary measures). Art. 10 JStG regulates, that the juvenile should get measures of protection, if he needs special educational or therapeutical care. So whenever the judge sees that there is a major lack of education or a psychological problem, the judge should impose on the child an educational measure. This can be in the form of a supervision, mentoring, ambulant therapy and placement outside the family:

- **Supervision** is an assistance of the family by a social worker who can guide the parents in their education of the children (Art. 12 JStG).
- **Mentoring** goes further then supervision. The social worker helps the parents in their education of the children and looks after the juvenile personally. This can lead to a restriction of the parental care (Art. 13 JStG).
- An **ambulant therapy** is ordered, when a Juvenile suffers of mental-health problems, lacks of personality development or is addicted to narcotics or other drugs. This measure can be combined with others like supervision or mentoring (Art. 14 JStG).
- If the education and treatment required can not be guaranteed otherwise the juvenile will be **placed** with foster parents or in an institution. As a last resort the judge has the competence to place a juvenile in a closed institution if it is needed for the personal protection of the child or if it is needed to treat its psychological problems or for the protection of a third party because the juvenile is a great danger for the society. This measure can only be disposed, after medical or psychological examination (Art. 15 JStG).

¹⁸ Bundesgesetz über das Jugendstrafgesetz, JStG, SR 311.1

The formal sanctions under the Swiss Juvenile Justice Law consist of reprimand, community service, fines and deprivation of liberty:

- A **reprimand** is a warning from the judge in minor cases in which the experience of being apprehended and taken through the court process seems sufficient to hold the young person accountable for the offence (Art. 22 JStG).
- **Community service** is a non-paid effort of the juvenile for welfare services for the community. The performance depends on the age and abilities of the juvenile. It can also be fulfilled by attending a course (for example the Anti-Aggression Programme). The maximum duration of community service is ten days and if the juvenile has reached the age of 15 and he has committed a serious offence, it can be extended up to 3 months (Art. 23 JStG).
- A **fine** of max. CHF 2000.—can be ordered if the juvenile has reached 15 years, which means that he usually should have finished school (Art. 24 JStG).
- As a measure of last resort the judge can sentence a juvenile to **deprivation of liberty** up to one year if the juvenile is less than 15 years old. For juveniles from 16 years onwards the deprivation of liberty can be raised up to four years if he has committed a serious crime.

All of these sanctions have to be pronounced by a juvenile judge. As far as the monitoring of the sanctions and measures are concerned, there are big differences within the country. In Switzerland there are still 26 different codes of criminal procedures. A unification of these codes of criminal procedures is planned for 2011. Up to this point the consequence is that there are 26 different administrations that execute and monitor the sanctions. It is these administrations that decide where the sanction will be executed and decide when the measure can be ended (Art. 17 Abs. 1 and 2 JStG). If a measure has been pronounced, the institution has to report regularly to the administration of execution, which reviews on a yearly basis if the measure can be terminated. A measure will be ended, when the purpose of the measure has been achieved or when it is clear that the measure does not have any educational or therapeutical effect anymore. All measures end with the age of 22 years (Art. 19 JStG).

4.7.2. Diversion Programs

In Switzerland diversion programmes without involvement of a judicial organ do not exist. The police have to report every claim to the juvenile judge.

4.7.3. Pre-trial alternatives

The juvenile judge has different possibilities to dismiss a case (Art. 21 JStG) such as:

- a) if the sentence would put the measure of protection in danger, that has been previously ordered
- b) based on the guilt of the juvenile and if the consequences of his behavior are little

- c) if the juvenile has repaired the damage himself as good as possible and if the expected sentence would only have been a reprimand and the community or the victim have no major interest in condemning the juvenile
- d) if the juvenile suffers so badly from the consequences of his behavior, that a sentence would be inadequate
- e) if the juvenile has been punished enough for his behavior by his parents or others
- f) if a longer time period has passed since the delinquent behavior of the juvenile and he has behaved correctly and the community or the victim have no major interest in condemning the juvenile.
- g) if a foreign juvenile has been sentenced already or will be sentenced by his state of origin.

Further, the Juvenile Judge has the possibility to mandate an organisation or a person to do mediation if certain requirements are fulfilled (Art. 8 JStG). The requirements are that there is no need for protection measures, the circumstances of the case are clear, it is not a case that will ask for deprivation of liberty and both parties are willing to do the mediation. These requirements do not explicitly ask the offender to plea guilty but without a certain notion of guilt from the offender the mediation is useless. If the mediation is successful and the offender and the victim have made an agreement, the court will dismiss the case.

As an example for pre-trial alternatives, some of the Juvenile Judges in Switzerland send “first-time” cannabis consumers to visit a drug counseling center. If they have attended the counseling for at least two times, the case will be dismissed consistent to Art. 21 lit. a JStG. The same is done with children who have committed a minor traffic violation. They have to visit a road safety education course.

4.7.4. Alternative Sanctions to deprivation of liberty

As mentioned above (see 3.1.) deprivation of liberty in the Swiss Juvenile Justice System can only be imposed to a juvenile, if no educational or therapeutic measures are needed. This leaves only reprimand, community service and a fine as alternative sanctions to deprivation of liberty.

The execution of the deprivation of liberty can be performed in different ways. A deprivation of liberty up to one month can be performed on a daily basis (for example on weekends) or up to one year can be performed in semi-liberty, which means that the juvenile must sleep in the institution but can attend work during the day (Art. 27 JStG).

The federal department of Justice and Police has been authorized by law to finance new ways of sanctions¹⁹. The focus of alternative sanctions should be: re-socialisation, respect of basic rights of persons in detention, avoidance of disadvantageous side effects of detention and financial benefits for the state. Most of the programmes are connected to children in institutions (for example special treatment against drug addiction, psychological support, help in schooling to integrate children from institutions in regular schools, etc.) and are educational measures and therefore not really alternative sanctions to deprivation of liberty.

¹⁹ Bundesgesetz über die Leistungen des Bundes für den Straf- und Massnahmenvollzug, SR 341

4.7.5. Indicators on alternatives to deprivation of liberty

The Swiss statistical data does not correspond with the 15 juvenile justice indicators defined by UNICEF. The Swiss data is based on indicators for measuring existing sanctions and penalties defined in the law. As far as pre-sentence diversion is concerned, there are only figures (in percentages and numerically) of how many juveniles have not been sentenced and their cases dismissed (or diverted as defined in the UNICEF Indicators). In the year 2006, 7% of all the juveniles that have been in a judicial proceeding had their cases dismissed. But detailed data on the kind of pre-sentence diversion scheme that was applied does not exist.

4.7.6. Available statistical data

Switzerland is collecting statistics about sentences of juveniles with the following criteria²⁰):

- Overview of juveniles in conflict with the law subdivided by sex, age, nationality, activity, violated law and pronounced sanctions
- Sentenced Juveniles, listed by gender, age and nationality
- Regional differences of sentenced juveniles
- Violated laws, divided into criminal law, narcotics law, traffic law, aliens act and other laws
- Sanctions pronounced, including suspension of sanctions and dismissed cases
- Recidivism of juvenile offenders, divided by the original crime and the crime of recidivism

The statistics only list the executions and measures mentioned by the law. New ways of alternative sanctions (ex. Electronic Monitoring) are not mentioned in the statistics. The figures of sentenced juveniles in 2006 show that out of 14'045 sentences pronounced, 212 are non-suspended deprivations of liberty²¹. Out of these non-suspended deprivations of liberty about 75% of the deprivations of liberty last less than a month²².

4.7.7. Conclusion

- a) *Do alternatives to deprivation of liberty like diversion, pre-trial alternatives or alternative sanctions exist?*

Alternatives to deprivation of liberty exist on the level of pre-trial and trial. Diversion does not exist, as corresponding to the Swiss Juvenile criminal law, every offence committed by a juvenile has to be reported to the judicial authorities.

²⁰ <http://www.bfs.admin.ch/bfs/portal/de/index/themen/19/03/04.html>

²¹ <http://www.bfs.admin.ch/bfs/portal/de/index/themen/19/03/04/key/sanktionen.html>

²² <http://www.bfs.admin.ch/bfs/portal/de/index/themen/19/03/04/key/sanktionen.Document.50685.xls>

b) *Is there a variety of alternative measures?*

Available alternatives to the deprivation of liberty	Switzerland
Care, guidance and supervision orders	x
Probation	x
Community service orders	x
Financial penalties, compensation and restitution	x
Intermediate treatment and other treatment orders	x
Orders to participate in group counseling and similar activities	x
Orders concerning foster care, living communities or other educational settings	x
Other relevant orders	x

c) *Do national indicators exist?*

In Switzerland some national indicators exist about juvenile justice, as mentioned in chapter 3.6. They mirror the alternatives to deprivation of liberty as they are mentioned in the law.

d) *Do the national indicators mirror the international indicators?*

The Swiss national indicators correspond partly to the quantitative indicators defined by UNICEF. Some of them exist but not in the way as defined by UNICEF (for example percentage, or per 100.000 child population). The Swiss indicators give numbers of children in conflict with the law (no. 1), children in pre-sentence detention in percentage (no. 3) duration of sentenced detention (no. 5), number of custodial sentencing (no. 9) and of pre-sentence diversion (no. 10). The policy indicators mentioned in no.12-15 do exist.

e) *Are there statistics to demonstrate that alternatives to deprivation of liberty exist and are nationally applied?*

Yes. See 3.6. and <http://www.bfs.admin.ch/bfs/portal/de/index/themen/19.html>.

f) *Are the statistics demonstrating that the alternatives prevail the deprivation of liberty?*

Yes.

Sources:

Bundesamt für Statistik, Bern,

www.bfs.admin.ch/bfs/portal/de/index/themen/19/03/04.html

4.8. The Netherlands

4.8.1. Outline of the legislation related to Juveniles in conflict with the law

The Juvenile Criminal Law

Following international standards, a child is every person below 12 years old and an adolescent everyone between 12 and 18. Accordingly, the minimum age of criminal responsibility is 12 years of age.

Special provisions relating to the treatment of juveniles under criminal law have been inserted into the Dutch code of criminal law (Criminal Code, Wetboek van Strafrecht, Sr) and the code of criminal procedure (Criminal Procedure Code, Wetboek van Strafvordering, Sv). The relevant articles of law are 77a-77g Sr and 486-509e Sr.

These provisions replace in part the regulations for adults. In 1995, a new amendment to juvenile criminal law was passed in the Netherlands. On the one hand, the amendment reinforced the legal basis for alternative penalties which, in practice, had operated until then. At the same time, provisions relating to juvenile criminal law were also tightened up: the maximum period of imprisonment for juvenile delinquents for imprisonment was raised from one to two years and restrictions barring the application of general criminal law to juveniles were eased.

The scope of Juvenile Criminal Law

Substantive law governing juvenile crime must be applied in cases where a juvenile is between 12-18 years old at the time when the crime was committed (Article 77a Sr). Children below 12 are deemed to be below the age of criminal responsibility (Article 486 Sv). If any action is taken under civil law, such as the appointment of a legal guardian, then this is permitted only on condition that it will benefit the juvenile.

Under certain conditions juveniles aged between 16 and 18 may also be subject to the general provisions of the criminal code (adult penal law). This depends on the personality of the offender, the circumstances surrounding the case and the gravity of the offence (Article 77b Sr). According to the former provisions of juvenile criminal law all of these conditions had to apply. However, since 1995, simply the gravity of the offence can suffice for the general provisions of the criminal code to be applied.

Nonetheless, the resultant legal proceedings are still bound by the provisions of juvenile criminal law.

Juvenile criminal law may be applied to adolescents aged between 18 and 21 - even though Dutch law does not recognise this notion - if the personality of the offender or the circumstances surrounding the case make this necessary (Article 77c Sr). This case is met if the juvenile displays signs of a mental disability or has committed typically juvenile offences. Criminal proceedings which arise under the provisions of juvenile criminal law are in line with general criminal law.

4.8.2. Alternative Sanctions to deprivation of liberty

Possibility of Diversion

The police can issue a warning or reprimand (police dismissal or reprimand) and take no further action. They can also refer a case to child support services. Cases involving vandalism or minor property offences should be referred to 'Halt', a diversion service for first offenders, where juveniles who confess guilt can carry out up to 20 hours of restorative or other types of activities, or possibly damage compensation. In other cases, the police issue a summons and send it to the public prosecution service for further handling. Many cases are (conditionally) dismissed by the public prosecutor, or are dealt with by imposing an alternative sanction, e.g. in an out-of-court-settlement. An indictment is only issued in a minority of cases.

Juvenile sentencing

The juvenile courts have several sentences at their disposal including alternative sanctions such as unpaid community service and educational programmes. In the case of an offence, for example shoplifting or illegal possession of fireworks, the child can be sentenced to a fine or community service. Deprivation of liberty can only be imposed when serious crimes are committed such as burglary, acts of violence, assault and battery, and homicide. The offences attract the following sentences: a prison sentence; youth detention; a fine; and community service. Penal youth measures include: placement in a Youth Care Institution for treatment (PIJ); confiscation; and damage compensation. Besides the principal sentences, additional punishments exist, such as confiscation of illegally obtained goods or sums of money.

Children can also be supervised by the rehabilitation service.

Alternative sanctions (Articles 77m-o Sr)

Both the public prosecutor and the juvenile judge have a large flexibility in the system. The system is guided by the principle of opportunity; the public prosecutor decides if prosecution is needed. Furthermore the judge has no minimum sentences. Both prosecutor and judge can decide to suspend prosecution or impose a suspended sentence.

Public prosecutor

Since the juvenile criminal law was reformed, the state prosecutor may drop charges (even without the consent of judge) providing that the following conditions are met:

- a guardian has looked after the juvenile for up to six months;
- up to 40 hours of community service; or
- up to 40 hours of work to make amends; or to participate in
- up to 40 hours attendance of a Learning Project.

The last three possibilities to dismiss preliminary procedures are also called alternative sanctions in accordance with the model proposed by the state prosecution service. The Alternative Sanctions Bureau within the Child Protection Board is responsible for the way they are carried out.

Judge

In place of penalties for young offenders or various fines, the judge can also impose so-called alternative sanctions which focus on reforming of the young offender. The law acknowledges the following three sanctions:

- community service
- work to pay for damages incurred
- attendance in a learning scheme

Alternative sanctions imposed by the juvenile judge may only be imposed with the express consent of the juvenile (Article 77n Paragraph 3 Sr). In fact, the law expressly requires that the young offender stipulate which kind of sanction is to be applied (Article 77m Paragraph 1 Sr). Even when it is likely that alternative sanctions are to be imposed, there is a high risk that the juvenile will not request them; consequently, he or she is provided with a defence lawyer. An alternative sanction may last for a maximum of 200 hours. If more than one sanction is to run concurrently, the maximum time is 240 hours. Any such work must be carried out during the period of one year. Learning schemes must be completed within six months. Even though the Child Protection Board (Raad voor de Kinderbescherming) in the form of the Alternative Sanctions Bureau does much of the preparatory work and supports the schemes (Article 77o Sr), ultimate responsibility lies with the state prosecution service.

Different forms of alternative sanctions

The Child Protection Board may be called upon to attend hearings on the practical and substantive issues of implementing alternative sanctions. A co-ordinating body for alternative sanctions (Coördinatiegroep Alternatieve Sancties) exists in every judicial district and is made up of representatives of the state prosecution service, judges of juvenile courts, lawyers, the Child Protection Board, the youth welfare services and the police. As part of its activities the co-ordinating body publishes guidelines on the implementation of individual sanctions and closely monitors the various Work- and Learning Schemes run by independent organisations as part of the youth welfare services. Outlined below are the different available forms of alternative sanctions:

Community Service

The work should appeal to the young offender's sense of responsibility with regard to the offence which has been committed. The communal nature of the work should change his or her social behaviour for the better. The kind of jobs done under this scheme should promote the needs of society at large and be of educational value.

Work to compensate for damages incurred

The nature of the connection between the crime and the damage done should be made explicit in the course of this scheme. This sanction is rarely administered in practice.

Learning Schemes

Learning schemes are there to provide practical and social skills. They are geared towards the provision of group-work as well as one-on-one care. Depending on the nature of the offence which has been committed, the juvenile is required to go on one of three different kinds of schemes which have been developed and made available throughout the Netherlands:

- The Focus on the Victim Learning Project (Slachtoffer in Beeld)

This project is suitable in cases of theft, robbery or assault. The scheme is aimed at ensuring that the young offender understands the consequences of his or her actions on the victim. The victim, however, does not physically take part in the project.

- The Sexual Education Learning Project (Seksuele Vorming)

This project may be useful in cases of sexual abuse where the client is a first-time offender and where violence was not involved. The scheme is aimed at helping the young offender to come to terms with his or her own sexuality and the sexuality of others.

- The Social Skills Learning Project (Sociale Vaardigheden). Here the young offender is taught to interact better with other people.

After the alternative sanction has been completed the Child Protection Board has to report. This is then reviewed by the state prosecution service. In practice, the Child Protection Board, the executive organizations and the state prosecution service place a high value on ensuring that all of the relevant contracts and undertakings have been rigorously maintained. Even slight infringements of existing agreements on the part of the juvenile offender can lead to his or her exclusion from the scheme.

If the state prosecutor believes that the sanction was carried out successfully he or she will inform the young offender and so close the criminal prosecution (Article 77q Paragraphs 2 and 3). Should this not be the case, he or she will request the judge of the juvenile court to impose a penalty for young offenders, a fine or another alternative sanction. In practice alternative sanctions are imposed far more frequently than fines or suspended sentences; recent figures show that they replace up to 30% of custodial sentences without probation.

4.8.3. Indicators on alternatives to deprivation of liberty

The following indicators are commonly used in the Netherlands:

- number of children (age 12-25) in conflict with the law
- gender
- occupation (education background, employment/unemployment, social assistance)
- nationality: A. autochthones B. western foreigners C. non-western foreigners
- types of crime: A. indictable offence B. summary offence

or

- A violence offence B. property offences C. destruction D. other types of offences
- nature and length of sentence pronouncements (custodial/ non-custodial sanctions, alternative measures; Stop- and Halt-procedures, community service, fines, work to compensate for damages incurred, learning schemes, Sexual Education Learning Project, Social Skills Learning Project)
- recidivism
- types of institution where the sentence will be served
- capacity and destination of the institutions
- population in institutions (number, gender, psychiatric impairment)
- education and health services provided to the minor; vocational training, ill-treatment, etc
- follow-up/ after-care programs
- effectiveness and quality of the programmes

- results and performance
- financing and costs

4.8.4. Available statistical data

Data on criminal proceedings are annually published by the public prosecution service and are further analyzed by the Research and Documentation Centre (WODC).

4.8.5. Conclusion

- a) *Do alternatives to deprivation of liberty like diversion, pre-trial alternatives or alternative sanctions exist?*

In the Netherlands there is a range of alternatives to the deprivation of liberty before (at the police level) and during the criminal proceeding.

- b) *Is there a variety of alternative measures?*

Available alternatives to the deprivation of liberty	The Netherlands
Care, guidance and supervision orders	X
Probation	X
Community service orders	X
Financial penalties, compensation and restitution	X
Intermediate treatment and other treatment orders	X
Orders to participate in group counseling and similar activities	X
Orders concerning foster care, living communities or other educational settings	X
Other relevant orders	X

In addition to the above there is a variety of alternatives that could be imposed to young people in conflict with the law, both pre-trial and by way of alternative sanctioning.

- c) *Are national indicators existing?*

There is a wide range of indicators used in the Netherlands.

- d) *Do the national indicators mirror the international indicators?*

The National indicators do mirror the international indicators more or less.

- e) *Are there statistics to demonstrate that alternatives to deprivation of liberty exist and are nationally applied?*

There are official, national crime statistics available in the Netherlands.

g) *Are the statistics demonstrating that the alternatives prevail the deprivation of liberty?*

Yes, however the sanctioning of young people in conflict with the law is increasing becoming more severe.

Sources:

Central Statistical Office The Netherlands – <http://www.cbs.nl>

Defence for Children- the Netherlands- <http://www.defenceforchildren.nl>

Defence for Children International- the Netherlands, 2008. *Violence Against Children in Conflict with the Law; A Study on Indicators and Data Collection in Belgium, England and Wales, France and the Netherlands*. The Netherlands: Defence for Children International

Ministry of Justice, 2006, *Handbook on the Legal Position of Juveniles in Juvenile Justice Centres*. The Hague: Sdu publishers b.v.

Scientific Research and Documentation Centre- <http://www.wodc.nl>

Scientific Research and Documentation Centre, 2007. *Criminality and Law Enforcement; developments and consistency*. Meppel: van Boom Juridische Uitgevers

A decorative graphic consisting of several horizontal bars of different colors (orange and grey) and a vertical orange bar that intersects them. The bars are arranged in a way that creates a sense of depth and structure.

Chapter 5:

Examples of Alternatives to Deprivation of Liberty

5. Examples of Alternatives to Deprivation of Liberty

5.1. Examples of Diversion Programs

5.1.1. The HALT-project in the Netherlands

In cases consisting of damage to property or petty theft the police can also refer the juvenile to a so-called HALT bureau (Het ALTERNatief, the alternative). The juvenile is given the choice of having the charges dropped in exchange for his or her participation in a HALT project.

A written offer is made to the juvenile with the reminder that he or she is not forced to participate in the scheme. If the juvenile is below 16 years the parents must give their consent. If the juvenile agrees to the offer, the police draw up a protocol and send it to a HALT bureau.

HALT bureaus have been set up by the local authorities in co-operation with the state prosecution service. The HALT bureau makes the juvenile an offer to participate in a particular project for which his or her consent is again required.

The possible measures on offer are work, damage compensation or a combination of the two. A HALT project may not last longer than 20 hours, although in practice it is rare for them to exceed 10 hours.

After the measures have been carried out the police conduct a review with the HALT team and subsequently decide whether further charges should be dropped. If the outcome of the HALT measure is positive, the police inform both the juvenile and the state prosecution service in writing of the result. By doing so, further criminal proceedings are dropped unless the injured party has made a successful complaint to the courthouse. If the results of the HALT project are negative, a file for the instigation of preliminary proceedings is opened and passed on to the state prosecution service. Certain officials have been entrusted by the state prosecution service to deal with the police in HALT matters.

Since 1995, the possibility of calling on the services of HALT bureaus, which were set up in 1981, is embodied in the criminal code. Further details regarding the way the HALT bureaus operate have been laid down in a legal regulation and in the unitary guidelines of the state prosecution service. For example, a HALT project can only be initiated if the juvenile has already confessed and has not already participated two other such projects. Moreover the juvenile must have been below 18 at the time the offence was committed. A HALT project is designed to deal with the following offenses:

- vandalism causing up to 700 euro worth of damage
- arson with danger to the public on objects causing up to 700 euro worth of damage
- simple theft and receiving stolen goods up to a value of 120 euro
- fraudulent labeling up to a value of 120 euro
- simple damage to property, including Graffiti, up to a value of 700 euro
- despoilment of streets and disorderly conduct up to a value of 700 euro
- unlawful entering of a restricted area
- firework misdemeanors

5.1.2. Restorative justice in Brazilian schools

In accordance with ECOSOC Resolution, the Brazilian Ministry of Justice, with support of UNDP, has decided to implement in 2005 three restorative justice pilot projects, two of them related to Juvenile Justice (Porto Alegre/RS and São Caetano do Sul/SP).

In São Caetano do Sul/SP, the project aimed at the creation of:

1. diversionary procedures and spaces for conflict resolution for school conflicts, which represented at that time one fourth of all files at the Court
2. diversionary procedures and spaces for conflict resolution for community conflicts involving juveniles as well as family related conflicts;
3. diversionary procedures for crimes committed by juveniles not related to the previous contexts.

The implementation strategy was designed with participation of the Tutorial Council, the Municipal Council for Children's and Adolescent's Rights, the Municipal Educational Secretary, the Bar Association, the Civil and Military Police and the Municipal Civil Guard.

All the public schools have been involved in the project, were heads of the schools have been trained to understand the impact of restorative practices in the school pedagogical project as well as the importance of non criminalization of conducts (Riyadh Guidelines, art. 1, "e" and "f").

At the same time, a neighborhood-to-neighborhood action has been developed in one community which had the worst indicators. The basic perspective is an invitation for reflection on the conditions of local social development of the neighborhood and of other community action roles in the resolution of its problems in partnership with the public powers. It is conceived then, that the communitarian spaces can provide more adequate conditions for the promotion of collective security conditions without creating social exclusion; by contributing to the involvement and empowerment of common citizens in the communitarian problems. This would be based on informal manifestations of social control and act with an approach to conflict and problem resolution confronting its social dimension. As schools are open on the weekends for community activities, facilitators specifically trained stay there on duty to help in the resolution of all conflicts presented to them or referred to them by the Juvenile Court or other public or non-governmental programmes.

Therefore people from the community have been trained as well as teachers, faculty, parents, students and court social workers as restorative and community facilitators in three different spaces: community, schools and at the Court itself.

The project was structured in three axes of action:

- I) restorative circles and practices that count on the participation of the ‘victim’, the ‘offender’, their stakeholders, significant people of the community – often including the Tutelary Council – and normally two facilitators.
- II) transformation of institutional practices (school, Judiciary system and network of public services), empowering all involved in the conflicts and the community itself to allow them, with special support and facilitation, to be; responsible for the conflict resolution, prioritizing non-judicial conflict resolution strategies, while preserving all legal guarantees, including the possibility of judicial revision of all plans of action if any human right is violated
- III) prevalence of prevention strategies, social inclusion and promotion of social rights, through the avoidance of conduct labeling. As well as the participation in programmes in restorative circles that could help all stakeholders to receive support for treatments or welfare services. If needed, a special system of referral can be implemented in order to provide the city’s attorney general of necessary information to demand, through class actions, the respect of those rights.

In three years of implementation the project has had the following results:

General view:

Number of restorative circles	Number of plans of action resulted from restorative circles	Number of accomplished plans	Percentage of plans in comparison with the total amount of circles	Percentage of accomplished plans among the total of plans
260	231	223	88,84%	96,53%

Number of people directly involved in the conflicts	Number of stakeholders that have participated in the circles	Total amount of participants
532	490	1022

The project spread to three different cities in the State of São Paulo (the capital, Guarulhos and Campinas, the major ones) and now is reference to its dissemination in the State of São Paulo as a whole.

5.2. Examples of Pre-Trial Alternatives

5.2.1. Mediation programme for juvenile offences in Neuquen Province / Argentina

This program was initiated in 2002 (in 2000, Neuquen Province approved its Law of Integral Protection for children and adolescents -Law 2302-, that incorporates CRC and other international instruments standards (such as Beijing Rules). This law separates and differentiates the issues of juvenile justice (offenders) and those related to the civil area (for protection of rights and tutelary actions). As in all mediation process, it aims to make the child aware of the offence committed as well as give an active role to the victim that is to solve the conflict which arose between them on a participatory basis.

It is administered by the Prosecutor's Office (Fiscalia) of the Juvenil Penal Justice together with the Centre for the Attention to the Victim of an Offence (Centro de Atención a la víctima del delito).

This programme has been positively recognized by the community and it has been used by different institutions, such as schools, even before making a complaint at the police station.

Characteristics of the penal mediation:

- 1) Voluntary basis: victim and perpetrator should agree to participate, there is no imposition of mediation and if someone decides not to participate, the mediation is suspended.
- 2) Confidentiality: what is said and discussed during the process of mediation should not be used in another instance, for example, in a judicial hearing in case the mediation was not successful. Only the fact that there is an agreement (for mediation) is made public.
- 3) Neutrality: the mediator will respect both parties.
- 4) Informal: it will not be formalized during its process. Only the final agreement will be formalized and signed by the involved actors.
- 5) Free of economical charges for the victim and perpetrator.
- 6) Prejudicial: even if there is a legal complaint, the Prosecutor's office derives it to the Centre and if the mediation is successful there will not be any other penal action.
- 7) Multidisciplinary as there is a team of four mediators: a teacher, a social worker, a psychologist and a lawyer. The role of the mediator is crucial as s/he will suggest offering possibilities to solve the conflict and to repair the damage; in cases of substances addiction or violence at the school or community, other organizations may be also invited to participate.

Phases in the penal mediation to be done timely:

- 1) Prosecutor's office selects the case and refers it to the Office for the Assistance to Victims of Offences. The case is initiated and the legal defender of the child is informed. The information of the case includes the offense done and what type of consequence it has had on the victim (material, psychological, etc.)
- 2) Letters to the offender and to the victim, informing that the case has been selected to go through a mediation process. A telephone number is provided in case they need further information.
- 3) Interview with child/ adolescent and his/her parents to ensure that there is an agreement and there will be a commitment to the process by them. This also provides the opportunity to assess child's attitude and at what extent s/he admits responsibility towards the offence. If the child agrees with the mediation process, s/he is asked to propose the repairing action. All this is done before discussing with the victim, to avoid false expectations from the victim, in case the child and his/her parents may not agree with the mediation process.
- 4) Interview with the victim to explain the extent and the characteristics of the penal mediation process and to inform child's agreement.
- 5) Meeting between victim and perpetrator. The mediator will assess if is necessary to work out the communication between the parties or if they are ready to write an act of commitment. This meeting is not compulsory (though is highly recommended due to its positive consequences) as there may be circumstances where this is not possible.
- 6) Act of commitment to register child's commitment to repair the offence. The child, his/her parents and the victim sign it. If there is no agreement, the file is sent to the Prosecutor's office who will continue the legal procedure.
- 7) Mediator's report that includes assessment of the child's attitude and to what extent the commitment was fulfilled; as much as possible the victim and the perpetrator will actively participate in this assessment. The report is sent to the prosecutor's office who requested the mediation process.
- 8) Evaluation of the mediation. The mediators will evaluate the whole process according to standards, applicable in all cases, and including information on statistics and community's acceptance towards it. The victim and the child will be asked to provide their own evaluations about the experience, to be included in the general evaluation.

Regarding the applicability of this alternative sanction, there is not a specific list of categories of offences eligible for mediation, instead what is assessed is whether the case is ready for mediation.

5.3. Example of Alternative Sanctions

5.3.1. Community Service in Norway

Community Service is a penalty reaction regulated in the penalty implementation act from 18.05.01 no 21, and is organized by The Norwegian Correctional Services.

Community sentences are meant as a reduction of liberty as an alternative to deprivation of liberty and are applied on adolescents as well as adults. According to Norwegian criminal policy, community sentences are the preferred penalty for children instead of prison.

Basic conditions to sentence community service:

- Community service is applicable for offences with a maximum sentence of six years imprisonment.
- The penalties purposed must not conflict with a possible freedom based penalty.
- The offender must be a Norwegian resident.
- The offender must concur.

The content of the community sentence:

- Service benefiting the community
- Variety of programmes
- Other measures suited to prevent new crime such as mediation, treatment, and individual follow-up.

The convicted person is required to be present at the time and place determined by the Correctional Services, without the influence of alcohol or other drugs. Other conditions can for example be that he/she attends an educational or treatment programme in addition to the community sentence. As a matter of course there is a condition not to break the law again.

The court must decide the alternative sentencing. If the offender breaks the conditions for doing the community service he/she must go to prison.

The number of hours the offender must partake in the community service is determined in the sentence. The amount of hours must be between 30 hours and 420 hours. The sentence must usually be served within one year.

5.4. Examples of Alternative Executions of Youth Prison Sentences

5.4.1. Project Seehaus in Germany

Legal and historical background

Generally, youth imprisonment is executed in separate juvenile prisons (see § 92 JJA). Those prisons are normally closed correctional facilities for juveniles. However, youth prison sentences do not necessarily need to be executed in such closed prisons. § 91 (3) JJA stipulates that the execution of youth prison sentences can also be organised in a more liberal and informal way in order to achieve the objective of education. Therefore, it is possible to create new innovative forms and alternatives for the execution of youth prison sentences which are neither closed correctional facilities nor open prisons.

As the legislative competence for the youth penal system lies with the Federal States (“Länder”), it depends on the Ministry of Justice of each Federal State whether alternatives to closed youth prisons are developed or not. In Lower Saxony and in Baden-Württemberg innovative measures for the execution of youth prison sentences have been introduced. Thus, a social therapeutic project called “Basis” which focuses on the release of the juvenile right from the beginning had been started in 2002 in Lower Saxony. In Baden Württemberg two innovative structures for juveniles sentenced to prison were launched in 2003: “Project CHANCE” in Creglingen and the Youth Farm “Seehaus” near Leonberg²³.

The example of the Youth Farm “Seehaus”²⁴

The Youth Farm “Seehaus” is a programme for juvenile offenders run by an NGO. The programme represents an alternative to the execution of youth prison sentences in closed prisons and is recognised as a youth penal structure in accordance with § 91 (3) JJA.

The programme admits boys at the age of 14 to 21 who are sentenced to youth prison without parole. The juvenile offenders who are first sent to a closed prison have to apply for the programme. Once they have been accepted, they stay in the Youth Farm “Seehaus” until their release.

During their stay, the juveniles live on the Youth Farm in groups of 5 to 7 together with a family or house parents. Their daily routine is strictly structured and regulated. From 5.45 to 22.00 the juveniles are engaged in an educational programme which comprises activities like house-cleaning, school, work and vocational preparation or training, community service, victim-offender-reconciliation-meetings, social training

²³ More information on: <http://www.projekt-chance.de/Jugendprojekte/Jugendprojekt.htm>

²⁴ More information on: <http://www.prisma-jugendhilfe.de>

courses, sports and leisure time activities. The transmission of Christian values and norms are also part of the concept.

The aim of the programme is a change of the juveniles' life style and that they learn to take on responsibility for themselves and for each other in order to reintegrate into society as responsible civilians. Interactions with the local community (Churches, youth groups, athletic clubs, NGOs and with the local economy), the programme staff and several volunteers during the stay on the Youth Farm shall facilitate this integration process.

5.4.2. Electronic Monitoring in Switzerland

The juvenile court of the canton of Basel has introduced the electronic monitoring (EM) for Juveniles. Instead of isolating the convicted in a prison, the person is kept in his social and professional environment. But the freedom of movement is restricted through the shackle. The consequence is that the convicted person has to be in his house at specified times (ex. Evenings and weekends).

The EM is used mainly as an alternative to the remand but it could also be used as an alternative to the execution of prison sentences. The need arose from the fact that often there are no institutions available immediately.

EM is only possible if the juvenile has a functioning daily structure, either professionally or at school. If this is not the case there are possibilities to offer the juvenile such a structure. Another premise is a telephone connection at the house of the juvenile. This way the juvenile can be controlled and if he is not at home at the fixed time, an alarm will be sent out by the telephone.

The time frame for the use of EM is between 4 and 8 weeks. This way the perpetrator can be kept away from the victim and he is forced to stay in at times of risk like in the evening and on weekends. The juvenile is looked after by a specially trained person that visits the juvenile and his family regularly.

If in a case of juvenile justice the use of EM seems adequate to the situation, and the requirements are fulfilled, the parents and the juvenile are informed about the use and way of functioning of EM and usually immediately installed. At the same time the times are set, at which the juvenile has to be in or out of the house. This means that the alarm will also go off, if the juvenile stays in house when he is supposed to be at work or at school.

EM can only be applied with an order of execution issued by the juvenile court. There is a possibility to appeal against this order at any time of the execution. The programme is monitored by the section execution and measures of sentences of the canton of Basel. They have specially trained staff in the use of EM which introduces the juvenile and his family to the EM system and they monitor the execution with regular visits to the family.

The introduction of EM has different advantages. The juvenile gets a clear message, that the society does not tolerate his behaviour and expects him to change it. The EM

is supposed to be seen as a timeout that should give the juvenile the occasion to reflect about his behaviour and find a new orientation. It is also seen as a last warning before he is sent to an institution or in detention. But not only the juvenile gets involved, his family too. They are forced to live a family life and deal with each others needs, as there is no way of running away.

With the use of EM the number of placements in institutions and prisons could be reduced. This is very helpful as there is still a lack of available institutions for juveniles in Switzerland. Another positive factor is certainly the big cost benefits that can be achieved with this sanction system. The results of EM have been very convincing. EM has been used 20 times up to now and there has not been any recidivism in such grave crimes.



Chapter 6:

Conclusions

6. Conclusions

Diversion, pre-trial alternatives and alternative sanctions are considered and suggested by international standards as the main response to juvenile delinquency. The respective provisions call for juvenile justice systems which aim at: avoidance of labeling, restriction of deprivation of liberty and promotion of the rights of juveniles who are alleged as, accused of, or recognized as having infringed the penal law.

The analysis of the countries' justice systems presented in this work demonstrates how these principles have been incorporated into national law:

- In Canada, Norway and the Netherlands the domestic laws contain provisions granting diversion programs outside the judicial system.
- Pre-trial alternatives at the level of the public prosecutor are possible according to the regulations in Brazil, Canada, Germany and Switzerland.
- Diversion (or remission) during proceedings is authorized by law in almost all of the eight countries subject to this analysis.
- Alternative sanctions are provided in the legislation of all the examined countries. They range from admonishment to community services and parole among others.

Nevertheless, the analysis of the existing national laws in itself does not permit to assess whether the respective legal provisions are actually implemented in a country. Hence it is difficult to determine if diversion is actually utilized with regard to children in the national justice systems and if it is the principal reaction to juvenile delinquency at the national level. The same can be said, at least with regard to some countries, in relation to the sanctioning practice. So, the question whether alternative sanctions prevail over youth prison sentences cannot always be answered.

This result is partly due to the fact that the indicators for measuring diversion and alternative sanctions rates are not always clear or defined. Most of the existing national statistics focus on deprivation of liberty and not, or at least not in a comprehensive way, on diversion and alternative sanctions which would be required to fulfill the criteria at the international level.

The priority given to diversion and alternative sanctions in the respective national legal frameworks remains nevertheless theoretical in most of the countries subject to this work. Still too little importance is accorded to these measures in practice. Apart from some exceptions, such as the Netherlands and Norway, there is a lack of research and evidence on how the juvenile justice system is actually organized in each country. This results in insufficient criteria for assessing whether children's rights are respected or granted and leaves to question which criteria the respective policies are established upon. And even if indicators for alternatives to deprivation of liberty exist, the lack of research and available statistical data in this area indicates a gap existing between the national legal frameworks and the actual priorities of the governments.

These observations demonstrate that the international standards are quite insufficient with regard to the establishment of national legal frameworks, which effectively grant children in conflict with the law rights because they do not contain guidelines for the implementation for these rights or indicators to monitor them. But if the international standards aim at providing such guidelines for implementation and monitoring at national and international level, it is fundamental to enable comparison of worldwide existing policies and experiences concerning this matter in order to sustain them and to promote their effectiveness and relevance.

Considering the actual current tendencies in juvenile criminal policy in the selected countries and worldwide, calling for harsher punishment for juvenile delinquents and for lowering the age of criminal responsibility, the preservation of the theoretical approach of privileging alternatives to deprivation of liberty and granting children in conflict with the law their rights becomes a major concern which makes it even more imperative to address the need for sufficient data in this field to show the positive affects of alternatives.

Therefore, diversion practices should be further correlated with prevention policies. In addition, many countries should increase their range of possible diversion and pre-trial alternatives. The different samples of alternatives to deprivation of liberty presented in this work, especially in Chapter 5, point out that a variety of diversionary practices and pre-trial alternatives exist. The suggestions concerning this matter provided by the international standards are in no way exhaustive.

We may wonder if the non-observation of international indicators demonstrates a lack of international cooperation with regard to the exchange and comparison of positive and negative results as well as of the impacts of each alternative, thus hindering an improvement of the international standards themselves.

In any case, the State Parties are not solely responsible for the apparent insufficiency in giving priority to diversion and pre-trial alternatives. The historical analysis of the existing international documents on juvenile justice show that the focus has generally been set on the rights of children deprived of liberty or the prevention of juvenile delinquency while neglecting the establishment of alternatives to judicial proceedings and alternative sanctions.

To date violations of children's rights are quite frequent in the national justice systems. The international community as well as the State Parties seem to lack the necessary experience and maturity to compare, evaluate and adopt good practices on the topics that are currently considered to be of prevalent importance: diversion, pre-trial alternatives and alternative sanctions to deprivation of liberty.

However, the research and the historical analysis carried out on alternatives to deprivation of liberty emphasize the importance of a more consistent effort which has to be made by the international community to prioritize all the respective provisions on alternatives for juveniles in conflict with the law. It is also necessary to demonstrate the efficacy of these provisions in order to promote a change of paradigms in this regard. The necessity of special treatment for children and the particularity of children's rights are internationally recognized today. But the lack of a specific international law on alternatives to deprivation of liberty for juveniles demonstrates how far the international community still is from a consistent protection of children's rights. In fact, it is not acceptable that the Tokyo Rules remain the only basis and reference in this field.

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Chapter 7:

Perspectives and Recommendations

7. Perspectives and Recommendations

The evolution of international law and standards related to Juvenile Justice and children in conflict with the law shows that diversion, pre-trial alternatives and alternative sanctions are considered being the main response to offences committed by juveniles.

The two main perspectives on which the evolution of human rights is based are widely known: universality on the one hand, and respect of diversity and singularities of human groups on the other hand. Children and especially adolescents alleged as, accused of, or recognized as having infringed the penal law represent a specific group whose particularities should be taken into account by separate provisions.

Therefore, one main recommendation is concerned with the necessity of a specific international law on diversion, pre-trial alternatives and alternative sanctions for juveniles. The international standards mentioned in Chapter 2, especially the Tokyo Rules, should be considered as a base for the improvement of legal and procedural guarantees of children in conflict with the law, leading to the edition of new and more detailed provisions. As already highlighted, in spite of a lack of consistent data in this matter, there are several interesting experiences worldwide that could help widening the perspectives on what should be regarded as diversion, pre-trial alternatives and alternative sanctions, and with a special relation to prevention policies.

The General Comment Number 10 suggests that the Minimum Age of Criminal Responsibility should be higher. However, this suggestion can only be promoted effectively among State Parties if a consistent base of comparison of experiences and initiatives worldwide can be provided, based on common and shared indicators. The same applies to the promotion of alternatives to deprivation of liberty.

Furthermore, the Committee on the Rights of the Child could incorporate the international juvenile justice indicators developed by other agencies such as UNICEF and UNODC into its guidelines for periodic reports from State Parties, and improve them further. If it is the Committee's task to monitor the implementation of the Convention on the Rights of the Child by State Parties, and thus the respect of rights granted to children in conflict with the law, a common base of indicators is essential to any kind of analysis.

Finally, it is the role of international agencies and the international community to improve and defend the respect of human rights as stated by the Charter of the United Nations Organization.

In conclusion, we therefore recommend the following:

1. *elaboration of a specific international law on diversion, pre-trial alternatives and alternative sanctions related to juveniles;*
2. *compulsory observation of common and shared international juvenile justice indicators by State Parties, with paying special attention to diversion, pre-trial alternatives and alternative sanctions*
3. *correlation of all analysis on diversion, pre-trial alternatives and alternative sanctions with prevention policies, including in the indicators*
4. *incorporation of international juvenile justice indicators already established by UNICEF and UNODC into the reporting guidelines of the Committee on the Rights of the Child as well as improvement of the indicators.*

We believe that with the accomplishment of these recommendations a great impact on the respect of children's rights will take place in the world, contributing thus to the historical movement that aims at changing cultural and social paradigms related to juvenile delinquency and human rights.

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Annex I:

International Standards on Alternatives to Deprivation of Liberty

I. Excerpts of International Standards on Alternatives to Deprivation of Liberty

I.1. The Convention on the Rights of the Child – 1989

...

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

...

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

...

Article 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 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

...

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

...

Article 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.

I.2. General Comment No. 10 (Children's Rights in Juvenile Justice) – 2007

...

B. Interventions/diversion (see also section E below)

22. Two kinds of interventions can be used by the State authorities for dealing with children alleged as, accused of, or recognized as having infringed the penal law: measures without resorting to judicial proceedings and measures in the context of judicial proceedings. The Committee reminds States parties that utmost care must be taken to ensure that the child's human rights and legal safeguards are thereby fully respected and protected.

23. Children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child's assuming a constructive role in society (art. 40 (1) of CRC). The arrest, detention or imprisonment of a child may be used only as a measure of last resort (art. 37 (b)). It is, therefore, necessary - as part of a comprehensive policy for juvenile justice - to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. These should include care, guidance and supervision, counselling, probation, foster care, educational and training programmes, and other alternatives to institutional care (art. 40 (4)).

Interventions without resorting to judicial proceedings

24. According to article 40 (3) of CRC, the States parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable. Given the

fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services (i.e. diversion) should be a well-established practice that can and should be used in most cases.

25. In the opinion of the Committee, the obligation of States parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies, but is certainly not limited to children who commit minor offences, such as shoplifting or other property offences with limited damage, and first-time child offenders. Statistics in many States parties indicate that a large part, and often the majority, of offences committed by children fall into these categories. It is in line with the principles set out in article 40 (1) of CRC to deal with all such cases without resorting to criminal law procedures in court. In addition to avoiding stigmatisation, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective.

26. States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children's human rights and legal safeguards are thereby fully respected and protected (art. 40 (3) (b)).

27. It is left to the discretion of States parties to decide on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, and to take the necessary legislative and other measures for their implementation. Nonetheless, on the basis of the information provided in the reports from some States parties, it is clear that a variety of community-based programmes have been developed, such as community service, supervision and guidance by for example social workers or probation officers, family conferencing and other forms of restorative justice including restitution to and compensation of victims. Other States parties should benefit from these experiences. As far as full respect for human rights and legal safeguards is concerned, the Committee refers to the relevant parts of article 40 of CRC and emphasizes the following:

- Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;
- The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years;
- The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination;
- The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure;

- The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as “criminal records” and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law.

Interventions in the context of judicial proceedings

28. When judicial proceedings are initiated by the competent authority (usually the prosecutor’s office), the principles of a fair and just trial must be applied (see section D below). At the same time, the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty, and in particular pretrial detention, as a measure of last resort. In the disposition phase of the proceedings, deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate period of time (art. 37 (b)). This means that States parties should have in place a well-trained probation service to allow for the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day report centres, and the possibility of early release from detention.

29. The Committee reminds States parties that, pursuant to article 40 (1) of CRC, reintegration requires that no action may be taken that can hamper the child’s full participation in his/her community, such as stigmatisation, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society.

...

E. Measures (see also chapter IV, section B, above)

Pre-trial alternatives

68. The decision to initiate a formal criminal law procedure does not necessarily mean that this procedure must be completed with a formal court sentence for a child. In line with the observations made above in section B, the Committee wishes to emphasize that the competent authorities - in most States the office of the public prosecutor - should continuously explore the possibilities of alternatives to a court conviction. In other words, efforts to achieve an appropriate conclusion of the case by offering measures like the ones mentioned above in section B should continue. The nature and duration of these measures offered by the prosecution may be more demanding, and legal or other appropriate assistance for the child is then necessary. The performance of such a measure should be presented to the child as a way to suspend the formal criminal/juvenile law procedure, which will be terminated if the measure has been carried out in a satisfactory manner.

69. In this process of offering alternatives to a court conviction at the level of the prosecutor, the child’s human rights and legal safeguards should be fully respected. In this regard, the Committee refers to the recommendations set out in paragraph 27 above, which equally apply here.

Dispositions by the juvenile court/judge

70. After a fair and just trial in full compliance with article 40 of CRC (see chapter IV,

section D, above), a decision is made regarding the measures which should be imposed on the child found guilty of the alleged offence(s). The laws must provide the court/judge, or other competent, independent and impartial authority or judicial body, with a wide variety of possible alternatives to institutional care and deprivation of liberty, which are listed in a non-exhaustive manner in article 40 (4) of CRC, to assure that deprivation of liberty be used only as a measure of last resort and for the shortest possible period of time (art. 37 (b) of CRC).

71. The Committee wishes to emphasize that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of CRC (see paragraphs 5-14 above). The Committee reiterates that corporal punishment as a sanction is a violation of these principles as well as of article 37 which prohibits all forms of cruel, inhuman and degrading treatment or punishment (see also the Committee's general comment No. 8 (2006) (The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment)). In cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.

72. The Committee notes that if a penal disposition is linked to the age of a child, and there is conflicting, inconclusive or uncertain evidence of the child's age, he/she shall have the right to the rule of the benefit of the doubt (see also paragraphs 35 and 39 above).

73. As far as alternatives to deprivation of liberty/institutional care are concerned, there is a wide range of experience with the use and implementation of such measures. States parties should benefit from this experience, and develop and implement these alternatives by adjusting them to their own culture and tradition. It goes without saying that measures amounting to forced labour or to torture or inhuman and degrading treatment must be explicitly prohibited, and those responsible for such illegal practices should be brought to justice.

74. After these general remarks, the Committee wishes to draw attention to the measures prohibited under article 37 (a) of CRC, and to deprivation of liberty.

...

I.3. The United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) – 1990

9. Comprehensive prevention plans should be instituted at every level of Government and include the following:
 - (e) Methods for effectively reducing the opportunity to commit delinquent acts;
 - (f) Community involvement through a wide range of services and programmes;
 - (g) Close interdisciplinary co-operation between national, State, provincial and local governments, with the involvement of the private sector representative citizens of the community to be served, and labour, child-care, health education, social, law enforcement and judicial agencies in taking concerted action to prevent juvenile delinquency and youth crime;

19. In ensuring the right of the child to proper socialization, Governments and other agencies should rely on existing social and legal agencies, but, whenever traditional institutions and customs are no longer effective, they should also provide and allow for innovative measures.

...

24. Educational systems should extend particular care and attention to young persons who are at social risk. Specialized prevention programmes and educational materials, curricula, approaches and tools should be developed and fully utilized.

...

26. Schools should serve as resource and referral centres for the provision of medical, counselling and other services to young persons, particularly those with special needs and suffering from abuse, neglect, victimization and exploitation.

...

33. Communities should provide, or strengthen where they exist, a wide range of community-based support measures for young persons, including community development centres, recreational facilities and services to respond to the special problems of children who are at social risk. In providing these helping measures, respect for individual rights should be ensured.

...

54. No child or young person should be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions.

...

57. Consideration should be given to the establishment of an office of ombudsman or similar independent organ, which would ensure that the status, rights and interests of young persons are upheld and that proper referral to available services is made. The ombudsman or other organ designated would also supervise the implementation of the Riyadh Guidelines, the Beijing Rules and the Rules for the Protection of Juveniles Deprived of their Liberty. The ombudsman or other organ would, at regular intervals, publish a report on the progress made and on the difficulties encountered in the implementation of the instrument. Child advocacy services should also be established.

58. Law enforcement and other relevant personnel, of both sexes, should be trained to respond to the special needs of young persons and should be familiar with and use, to the maximum extent possible, programmes and referral possibilities for the diversion of young persons from the justice system.

...

I.4. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) – 1985

....

5. Aims of juvenile justice

5.1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

...

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.

...

13. Detention pending trial

- 13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.
- 13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

...

17. Guiding principles in adjudication and disposition

- 17.1 The disposition of the competent authority shall be guided by the following principles:
 - (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
 - (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
 - (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
 - (d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

...

18. Various disposition measures

- 18.1 A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include:
 - (a) Care, guidance and supervision orders;
 - (b) Probation;
 - (c) Community service orders;
 - (d) Financial penalties, compensation and restitution;
 - (e) Intermediate treatment and other treatment orders;

- (f) Orders to participate in group counselling and similar activities;
- (g) Orders concerning foster care, living communities or other educational settings;
- (h) Other relevant orders.

18.2 No juvenile shall be removed from parental supervision, whether partly or entire l y, unless the circumstances of her or his case make this necessary.

19. Least possible use of institutionalization

19.1 The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

...

24. Provision of needed assistance

24.1 Efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process.

...

29. Semi-institutional arrangements

29.1 Efforts shall be made to provide semi-institutional arrangements, such as half-way houses, educational homes, day-time training centres and other such appropriate arrangements that may assist juveniles in their proper reintegration into society.

...

I.5. The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) – 1990

...

2. The scope of non-custodial measures

2.4 The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated.

2.5 Consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law.

...

8. Sentencing dispositions

8.1 The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.

8.2 Sentencing authorities may dispose of cases in the following ways:

- (a) Verbal sanctions, such as admonition, reprimand and warning;
- (b) Conditional discharge;
- (c) Status penalties;
- (d) Economic sanctions and monetary penalties, such as fines and day-fines;
- (e) Confiscation or an expropriation order;
- (f) Restitution to the victim or a compensation order;

- (g) Suspended or deferred sentence;
- (h) Probation and judicial supervision;
- (i) A community service order;
- (j) Referral to an attendance centre;
- (k) House arrest;
- (l) Any other mode of non-institutional treatment;
- (m) Some combination of the measures listed above.

...

10. Supervision

10.3 Within the framework of a given non-custodial measure, the most suitable type of supervision and treatment should be determined for each individual case aimed at assisting the offender to work on his or her offending. Supervision and treatment should be periodically reviewed and adjusted as necessary.

...

13. Treatment process

13.1 Within the framework of a given non-custodial measure, in appropriate cases, various schemes, such as case-work, group therapy, residential programmes and the specialized treatment of various categories of offenders, should be developed to meet the needs of offenders more effectively.

13.4 The competent authority may involve the community and social support systems in the application of non-custodial measures.

14. Discipline and breach of conditions

14.3 The failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure.

...

21. Policy formulation and programme development

21.1 Programmes for non-custodial measures should be systematically planned and implemented as an integral part of the criminal justice system within the national development process.

...

I.6. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules) – 1990

...

1. The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.

2. Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

...

17. Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.

...

30. Open detention facilities for juveniles should be established. Open detention facilities are those with no or minimal security measures. The population in such detention facilities should be as small as possible. The number of juveniles detained in closed facilities should be small enough to enable individualized treatment. Detention facilities for juveniles should be decentralized and of such size as to facilitate access and contact between the juveniles and their families. Small-scale detention facilities should be established and integrated into the social, economic and cultural environment of the community.

I.7. The United Nations Guidelines for Action on Children in the Criminal Justice System – 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.

...

18. The placement of children in closed institutions should be reduced. Such placement of children should only take place in accordance with the provisions of article 37 (b) of the Convention and as a matter of last resort and for the shortest period of time. Corporal punishment in the child justice and welfare systems should be prohibited.

...

42. To prevent further over-reliance on criminal justice measures to deal with children's behaviour, efforts should be made to establish and apply programmes aimed at strengthening social assistance, which would allow for the diversion of children from the

justice system, as appropriate, as well as improving the application of non-custodial measures and reintegration programmes. To establish and apply such programmes, it is necessary to foster close cooperation between the child justice sectors, different services in charge of law enforcement, social welfare and education sectors.

I.8. The United Nations Basic Principles on the use of Restorative Justice Programmes in Criminal Matters – 2002

...

6. Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law.

7. Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations.

...

15. The results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements. Where that occurs, the outcome should have the same status as any other judicial decision or judgement and should preclude prosecution in respect of the same facts.

...

20. Member States should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.

21. There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding and enhance the effectiveness of restorative processes and outcomes, to increase the extent to which restorative programmes are used, and to explore ways in which restorative approaches might be incorporated into criminal justice practices.

...

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Annex II:

Statistics of the Different Eight Countries

II. Statistics of the Different Eight Countries

The following documents are available on the CD:

II.1. Argentina

- II.1.1. Table 8: Number of existing alternative programmes to deprivation of liberty, disaggregated by provinces.
- II.1.2. Table 11: Number of children and adolescents (up to 21 years of age) deprived of liberty due to penal causes.
- II.1.3. Table 13: Number of children and adolescents (up to 21 years of age) deprived of liberty due to penal causes – Data disaggregated by gender
- II.1.4. General Statistics – National Registration for Recidivism, Ministry of Justice, Security and Human Rights
- II.1.5. Ordinary Penal Justice Statistics – Supreme Court and Judiciary Council, 2007

II.2. Brazil

- II.2.1. Population of alternative sanctions (only provincial capitals)

II.3. Canada

- II.3.1. Juristat Canadian Centre for Justice Statistics, Youth Court Statistics, 2006/2007, Statistics Canada- Catalogue no. 85-002-XIE, Vol. 28, no. 4
- II.3.2. Cases in Youth Court 2002 - 2007

II.4. Germany

- II.4.1. Excerpts of the German Police Crime Statistics 2007
- II.4.2. Excerpts of the German Criminal Prosecution Statistics 2006

II.5. Norway

- II.5.1. Statistics, The Mediation and Reconciliation Service
- II.5.2. Table 1: Prison, Sex and age 2006
- II.5.3. Table 16: Sanctions by type of sanction and category of offence 1997-2006
- II.5.4. Table 18: Persons charged with crimes by police decisions, sex and age 2006
- II.5.5. Table 19: Persons charged by number of offences, number of accessories, age and sex 2005
- II.5.6. Table 31: Sanctions, type of sanctions, sex and age 2006

- II.5.7. Table 43: Sentences to imprisonment, sex and age 2006
- II.5.8. Table 54: Prison population at the beginning of the year, by sex, sanction and age 2006
- II.5.9. Table 55: New imprisonments, type of sanction, sex and age 2006
- II.5.10. Table 58: Discharges by prison time, type of sanction and age 2006
- II.5.11. Table 59: Transfer from custody to serving sentence, age 2006

II.6. Switzerland

- II.6.1. Juvenile Justice 2006 – Overview – Important Figures
- II.6.2. Juvenile Justice 2002 till 2006 – Condemned – Sex, Age, Nationality
- II.6.3. Juvenile Justice 2002 till 2006 – Regional Differences
- II.6.4. Juvenile Justice 2002 till 2006 – Laws, Crimes
- II.6.5. Juvenile Justice 2002 till 2006 - Sanctions
- II.6.6. Juvenile Justice 2006 - Duration
- II.6.7. Indikatoren 2006 – Overview: Recidivism by Crimes, Age and kind of recidivism

II.7. The Netherlands

- II.7.1. Fact Sheet Crime Statistics The Netherlands 2007
- II.7.2. Fact Sheet Criminal Self Report The Netherlands 2007