



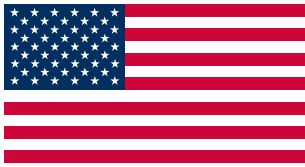
The International Institute for
Justice and the Rule of Law

**IJJ JUVENILE JUSTICE
PRACTITIONER'S NOTES**

Defence Counsel

*A publication under the
IJJ Juvenile Justice Initiative*





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The International Institute for Justice and the Rule of Law

Inspired by the Global Counterterrorism Forum (GCTF), the IJJ was established in 2014 as a neutral platform for training and capacity-building for lawmakers, judges, prosecutors, law enforcement, corrections officials, and other justice sector practitioners to share and promote the implementation of good practices and sustainable counter-terrorism approaches founded on the rule of law.

The IJJ is an intergovernmental organisation based in Malta with an international Governing Board of Administrators (GBA) representing its 14 members: Algeria, France, Italy, Jordan, Kuwait, Malta, Morocco, the Netherlands, Nigeria, Tunisia, Turkey, the United Kingdom, the United States, and the European Union. The IJJ is staffed by a dynamic international team headed by an Executive Secretary, who are responsible for the day-to-day operations of the IJJ.

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Preface

Children impacted by terrorism – whether as victims, witnesses, or alleged offenders – increasingly find themselves in criminal justice systems tasked with enforcing national counter-terrorism laws. These laws most often mandate severely restrictive measures and harsh penalties. Balancing the special rights and needs of children with the demands of counter-terrorism legal frameworks poses significant challenges for justice sector practitioners. Without specialised training and a working knowledge of the legal rights afforded to children under applicable international law, justice sector stakeholders – including investigators, prosecutors, judges, detention personnel and defence counsel – may find themselves ill-equipped to effectively handle terrorism matters involving children.

Given their inherent vulnerabilities, children are disproportionately impacted by offences committed by terrorist actors. In some cases, children are recruited against their will, or without fully understanding the consequences of their actions. They are easily manipulated by adults who prevail upon them to carry out violent attacks or who seek their involvement to provide support for terrorist organisations. This manipulation can also be driven by those who take advantage of religious, cultural, political, or economic conditions to encourage child involvement in terrorism-related offences.

To address the challenges that arise when handling child cases in the counter-terrorism context, the International Institute for Justice and the Rule of Law (IJJ), with funding from the Governments of Switzerland and the United States, embarked on the Initiative to Address the Life Cycle of Radicalization to Violence. The IJJ Juvenile Justice Initiative started with development by the International Institute for Justice and the Rule of Law (IJJ) of the Global Counterterrorism Forum (GCTF) *Neuchâtel*

Memorandum on Juvenile Justice in the Counterterrorism Context (hereafter *Neuchâtel Memorandum*), which sets out thirteen Good Practices designed to provide guidance for all relevant actors on the handling of terrorism cases involving children.¹

The *Neuchâtel Memorandum*, endorsed by the GCTF in September 2016, reinforces the obligations enumerated by the *United Nations Convention on the Rights of the Child (CRC)* to treat children involved with terrorism with “the respect, protection, and fulfillment of their rights as defined by the applicable international legal framework, as applied by national law”.² Since its entry into force on 2 September 1990, the *CRC* has been ratified by 196 countries and contains obligations on the handling of child cases in all matters, including terrorism. These obligations are binding under international law on all states that have ratified the *CRC*. (The United States has not ratified the *CRC*, but recognises the need to establish specialised juvenile³ justice systems that protect the rights of the child and ensure that the best interests of the child are a primary consideration in terrorism cases.)

The IJJ Juvenile Justice Initiative developed a strategy to promote visibility and implementation of the GCTF *Neuchâtel Memorandum*, including the development of the *IJJ Juvenile Justice Toolkit*⁴ (hereafter *IJJ Toolkit*). The latest phase of the IJJ Juvenile Justice Initiative has aimed at helping the countries served by the IJJ to implement the *Neuchâtel Memorandum* Good Practices. This phase started by raising awareness of the *Neuchâtel Memorandum* during a series of five regional workshops for practitioners from the Sahel, Middle East-North Africa (MENA), East Africa, Western Balkans and Southeast Asia. The workshops, conducted between October 2017 and November 2018 in Yaoundé, Cameroon, Valletta, Malta, and Bangkok, Thailand, welcomed participants from a total of 27 countries. Other participants, experts

¹ <https://www.thegctf.org/DesktopModules/DnnSharp/SearchBoost/FileDownload.ashx?file=356&sb-bhvr=1>

² GCTF, *Neuchâtel Memorandum*, Good Practice 1; See also The *United Nations Convention on the Rights of the Child (CRC)*, Articles 37 and 40.

³ In this one instance, we use the terminology of the United States (U.S.) system as we are making a specific reference to the U.S. specialised process for handling of juvenile criminal cases.

⁴ Available on the IJJ website at: <https://theijj.org/wp-content/uploads/2021/09/IJJ-TOOLKIT-JUVENILE-JUSTICE.pdf>

and facilitators included representatives from international organisations and non-governmental organisations (hereafter NGOs) such as the African Court of Human and People's Rights, the Association of Southeast Asian Nations (ASEAN), the Centre for Democracy and Development in Nigeria, the Council of Europe (CoE), the European Commission, Hedayah, the International Red Cross, the Organization for Security and Cooperation in Europe (OSCE), the Penal Reform International, the United Nations Office on Drugs and Crime (UNODC), the United Nations Development Programme (UNDP), the United Nations International Children's Emergency Fund (UNICEF), and the United Nations Interregional Crime and Justice Research Institute (UNICRI), as well as the Swiss and United States governments.

All five workshops utilised the *IJJ Toolkit*, which sets out the relevant international framework for each Good Practice of the *Neuchâtel Memorandum*, which includes case studies to illustrate how countries have responded to children involved in terrorism-related activities within international standards. Each section ends with a reflection exercise, permitting practitioners to consider their knowledge of standards and ways to implement the *Neuchâtel Memorandum*.

The IJJ organised each workshop around the five sections of the *IJJ Toolkit*, which mirror those of the *Neuchâtel Memorandum*, namely: (1) the status of children under international law; (2) preventing children's exposure to violent extremism and recruitment by terrorist groups; (3) justice for children; (4) rehabilitation and reintegration of children into society; and (5) capacity-building, monitoring, and evaluation of specialised child justice programmes. The *IJJ Toolkit's* exercises and assessments facilitated the discussions at the workshops and called for each delegation to describe how their national laws, regulations, and practices might respond to the specific issues raised by the hypothetical situations presented. Expert facilitators led open discussions in which participants freely exchanged national experiences, including challenges encountered, successes achieved, and solutions developed, in implementing the Good Practices of the *Neuchâtel Memorandum*.

The IJJ, assisted by consultants, incorporated feedback from participants at these events into the *IJJ Juvenile Justice Notes for Practitioners*, a set of five practice guides – one each for investigators, prosecutors, judges, defence counsel, and detention personnel. The principal purpose of the *IJJ Juvenile Justice Notes for Practitioners* (hereafter *IJJ Notes for Practitioners*) is to provide practical guidance to practitioners on how to implement the *Neuchâtel Memorandum*, and to provide examples of how countries have already implemented some of its principles. The *IJJ Notes for Practitioners* are consistent with the *United Nations Convention on the Rights of the Child* and are largely based upon the information shared during the five regional workshops, but also incorporate material published by international organisations, court decisions, and research conducted by the drafters.

Following the drafting of the *IJJ Notes for Practitioners*, the IJJ convened a Juvenile Justice Focus Group consisting of, in addition to the drafters, other child justice experts and practitioners from Africa, the Middle East, Europe, and the United States, who met in Valletta, Malta, in March 2019. Members of the Focus Group reviewed and discussed the draft *IJJ Notes for Practitioners* and offered suggestions for amendments aimed at making them as relevant as possible for all practitioners in the field. Following the incorporation of those suggestions, the IJJ submitted the draft *IJJ Notes for Practitioners* to peer review by practitioners and organisations with leading roles in the field of child justice. After incorporating comments and suggestions received from the peer reviewers, the IJJ finalised the *IJJ Notes for Practitioners* and is pleased to present them.

Introduction

The Global Counterterrorism Forum (hereafter GCTF) *Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context* (hereafter *Neuchâtel Memorandum*) reinforces the obligation imposed by the *United Nations Convention on the Rights of the Child* (hereafter *CRC*) for countries to treat children⁵ allegedly associated with or involved in terrorism-related acts with “the respect, protection, and fulfillment of their rights as defined by the applicable international legal framework, as applied by national law.” Consequently, parties to the *CRC* must strive to create “appropriate child-specific procedures for cases involving children”.⁶

The right to a lawyer or legal assistance is an important component of the right to a fair trial. The United Nations Committee on the Right of the Child urges States that have ratified the *CRC* to ensure that “the child is guaranteed legal or other appropriate assistance from the outset of the proceedings, in the preparation and presentation of the defence, and until all appeals and/or reviews are exhausted”.⁷ Due to the special rights accorded to children by international law and standards, the role of defending a child suspect or child charged with a terrorism offence becomes unique and delicate.

This *IIJ Juvenile Justice Note for Defence Counsel* (hereafter *IIJ Note for Defence Counsel*) offers “action points” regarding how defence counsel can employ and promote effective practices to defend children involved in terrorism-related offences. The *IIJ Note for Defence Counsel* aims to capture and build upon the discussions, presentations, and suggestions of practitioners participating in the five regional workshops and the focus group meeting implemented under the IIJ Juvenile Justice Initiative.⁸ This Note also highlights examples of how specific countries have implemented the guiding principles of the *Neuchâtel Memorandum*. These examples provide guidance on how states could successfully put the principles of the *Neuchâtel Memorandum* into practice.

⁵ The *CRC* defines a child as every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. In addition, some legal systems allow for special consideration for young adults above the age of 18 years. While this *IIJ Note for Prosecutors* refers to “children”, it does not preclude specific measures from applying to young adults above the age of 18, consistent with the *Neuchâtel Memorandum*.

⁶ *CRC*, Article 40 (3); *Neuchâtel Memorandum*, Section III, Good Practice 5 at p. 6.

⁷ United Nations Committee on the Rights of the Child (hereafter: Committee) General Comment No.24, para.49.

⁸ Prosecutors, judges, investigators and detention personnel in attendance at separate workshops and the focus group meeting also provided comments and suggestions that have been incorporated into the *IIJ Note for Defence Counsel*.

Action Point 1:

Counsel should use early contacts with a child client to build trust, establish rapport, and assess the child's position from a child development perspective

Assess and address the situation of children in a terrorism-related context from a child rights and child development perspective

GCTF Neuchâtel Memorandum, Good Practice 2

In any lawyer-client relationship, a positive initial contact is essential to the development of trust, without which the client may be unwilling or unable to cooperate in the defence effort. Establishing rapport is paramount in child cases, as children are understandably unlikely to trust unknown adults. From the early stages of representation, defence counsel should assess the child's physical, emotional, and mental well-being, ascertain educational status, and take care to explain case procedures more thoroughly than counsel might with an adult client.

To the extent possible, defence counsel should create a safe, comfortable, and private environment for legal meetings and dedicate ample time for client contacts and counselling. A detained child should be held in a specialised facility for children, such as a child detention centre or child protection centre, rather than an adult jail. Detention centres should provide appropriate space for confidential legal visits, allow regular access by members of the defence team, protect children from physical and/or psychological harm, and never use solitary confinement or other forms of torture⁹. Defence counsel should maintain regular contacts with detention personnel and arrange for authorities to immediately notify counsel if the child has been moved to another facility, or if an assault, accident, or suicide attempt has occurred. Defence counsel should also ensure that detention personnel records are kept confidential and only shared with authorised individuals, such as the defence counsel.¹⁰

⁹ See U.N. Standard Minimum Rules on the Treatment of Prisoners (hereafter Mandela Rules): Rule 43

1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:

(a) Indefinite solitary confinement;
(b) Prolonged solitary confinement; or
(c) Placement of a prisoner in a dark or constantly lit cell.

Rule 44

For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

Rule 45

1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorisation by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.
2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, continues to apply.

¹⁰ See U.N. Standard Minimum Rules (The Beijing Rules) Adopted by General Assembly resolution 40/33 (29 November 1985) 1.6 Juvenile justice services shall be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes; See also art. 21.1, Nov. 29, 1985, U.N. Doc. A/40/53; See also U.N. Rules for the Protection of Children Deprived of their Liberty (hereafter The Havana Rules) art. 19, Dec. 14, 1990, U.N. Doc. A/45/113.

Additionally, defence counsel should use age-appropriate language and offer balanced and objective advice to children they represent, even if that requires that they enlist the support of a sociologist, social worker, or psychologist¹¹. Finally, defence counsel and detention personnel should ensure that any conversations and correspondence between the child and counsel at the detention facility are kept confidential.

Highlighted Examples

Moroccan participants attending IJJ workshops shared that Morocco considers minors coming back from conflict zones as victims rather than perpetrators. Moroccan officials provide these children with early access to counsel and see reintegration into the community as the primary goal when handling child matters.

Jordan ratified the Convention on the Rights of the Child, which requires that counsel be appointed as early as possible to assist child clients¹². Jordan also protects confidentiality and requires that a case be dismissed if the appropriate procedures for protecting children are not followed.

¹¹ See CRC, art. 40; Directive on Procedural Safeguards for Children who are Suspects or Accused Persons in Criminal Proceedings art. 25, 35-9, May 11, 2016, EU/2016/800. Regarding the latter point, the EU directive establishes that each accused child has a right to an in-depth assessment by "competent authorities" as part of pre-trial proceedings. Arguably, a specialist such as a sociologist or psychologist would be the most competent authority in a given case to facilitate this assessment. See *also* ABA, Model Rules, Rule 1.4 (as amended August 2013); Julian Greenspun, *Role of the Attorney in Juvenile Court* (hereafter Greenspun article), 18 Cleveland-Marshall Law Review, 599, 606 (1969).

¹² See <https://www.unicef.org/jordan/child-protection>.

Action Point 2:

Counsel should be sensitive to the child's culture, age and gender and maintain a normal lawyer-client relationship regardless of the child's stage of development

Address children alleged to be involved in terrorism-related activities in accordance with international law and in line with international juvenile justice standards.

GCTF Neuchâtel Memorandum, Good Practice 1

Assess and address the situation of children in a terrorism-related context from a child rights and child development perspective.

GCTF Neuchâtel Memorandum, Good Practice 2

Develop targeted prevention strategies with a strong focus on the creation of networks to support children at risk.

GCTF Neuchâtel Memorandum, Good Practice 4

A child's religious beliefs, ideological views, ethnic background, trauma history, stage of development, and gender can affect his or her interactions with defence counsel. In representing child clients, therefore, counsel should tailor their engagement by considering each child's unique set of circumstances.

Counsel may also find that children charged with or suspected of committing terrorism offences have been indoctrinated with an extremist mindset¹³. Counsel should be cautious, however, not to assume that every recruited or indoctrinated child will behave the same way or share the same traumas. The reasons terrorist and violent extremist groups recruit children are complex and multifaceted and may vary depending on the situation¹⁴. Data also suggests that children are not merely recruited alongside adults, but are specifically targeted, as the use of children provides various advantages to the groups. Defence counsel should therefore be cognisant of these possibilities and recognise their implications, but not let them adversely affect their perceptions of the child client or their commitment to represent the child competently.

Furthermore, defence counsel have a duty to zealously and professionally represent the child regardless of the amount of compensation counsel receives. The judiciary, in turn, has a duty to ensure that all counsel appointed to represent a child client is trained in child-specific representation¹⁵.

¹³ See United Nations Handbook on Drugs and Crimes *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System* (hereafter UNODC Handbook). Discussion of why juveniles deserve special treatment in the criminal justice system, ch. 3, p. 70; See also, Cristina Martinez Squiers, "How the law should view child soldiers: does terrorism pose a different dilemma?" (2015) 68 SMU Law Review 567, 590.

¹⁴ UNODC Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System (2017) (hereafter UNODC Handbook), p.10-11

¹⁵ See IJJ Juvenile Justice Note for Judges, Action Point 4, (IJJ website).

Children charged with or suspected of committing terrorism offences may suffer from a diminished capacity to make decisions due to minority, stage of development, mental health impairment, intellectual disability, or some other reason. Should this be true, defence counsel should attempt to maintain a normal client-lawyer relationship with the child, even as counsel explores whether an evaluation to determine diminished capacity is required.¹⁶ A thorough exploration may require consultation with experts in physical or mental health issues, educational disabilities, or cultural issues more complex than counsel might anticipate. Counsel should also ask the court to have an expert determine if the child is capable of standing trial and understanding the proceedings and charges against him or her.

Another challenge counsel may face when representing a minor relates to the minimum age of criminal responsibility, that is, the minimum age at which a country's laws allow children to be subject to prosecution, whether as adults or children. National legislation should establish the minimum age below which the child is presumed not to have the capacity to infringe the criminal law.¹⁷ Counsel should ensure that children who are below the minimum age of criminal responsibility at the time of the commission of an offence are not held responsible in criminal law proceedings. To do so, it is of outmost importance that counsel determine the child's exact age in order to avoid situation in which a child under the minimum age of criminal responsibility is held responsible or a child under 18 is treated as an adult.¹⁸

Highlighted Examples

In **Mali**, minors under age 13 are deemed to have acted without discernment and cannot be prosecuted, while older children are tried in child court. In most cases, minors involved in terrorism are considered to be victims, rather than offenders.

In **Kuwait**, children under seven years of age are not subject to prosecution, while children between the ages of seven and 18 years, are tried in child court. Children between 15 and 17 years old are subject to imprisonment, but any prison term should not exceed 15 years, even for crimes normally punishable by death or life imprisonment.

In **Morocco**, children under 15 are typically not detained in a detention facility.

In **Senegal**, a separate minors' tribunal handles cases involving children, but unfortunately Senegal does not have separate facilities to hold detained children. Instead, children are held in separate sections at adult facilities. In **Senegal**, a separate minors' tribunal handles cases involving children, but unfortunately Senegal does not have separate facilities to hold detained children. Instead, children are held in separate sections at adult facilities.

In **Serbia**, a child under 14 years cannot be held criminally liable, and efforts are made to protect the rights of older children by hearing their cases in courts located close to the child's family. Further, the Serbian child justice system seeks alternatives to incarceration whenever possible.

¹⁶ CRC, art. 40(2)(b)(ii); Organisation for Security and Co-operation in Europe (hereafter OSCE) Mission to Skopje, *Lawyer's Ethics*, Michael G. Karnavas, (2016), pp. 49-50; ABA Model Rules, Rule 1.4.

¹⁷ CRC, art. 40(3); Committee General Comment No.24, para.21, see also *Terminology* on page 3.

¹⁸ UNODC Handbook, p.76-77

Action Point 3:

Counsel should diligently and promptly investigate the nature of the alleged terrorist act and the circumstances of its commission

Address children alleged to be involved in terrorism-related activities in accordance with international law and in line with international juvenile justice standards.

GCTF Neuchâtel Memorandum, Good Practice 1

Assess and address the situation of children in a terrorism-related context from a child rights and child development perspective.

GCTF Neuchâtel Memorandum, Good Practice 2

Understanding the nature of the alleged terrorist act and the circumstances of its commission is critical to providing an effective and holistic defence. Counsel should fully investigate the nature and circumstances of the alleged terrorist act to identify any viable defences¹⁹. Counsel should search in particular for facts favourable to the child client that can be used in making appropriate motions and arguments to the prosecutor, investigating magistrate, or judge, regarding possible dismissal of the case or reduction of a terrorism charge to a non-terrorism criminal charge.

Counsel should be aware here that according to the Paris Principles, no child shall be charged solely on the basis of his or her involvement with a terrorist group and no child recruitment can be considered as fully voluntary due to cognitive skills of children and forms of coercion or influence associated with recruitment methods. If the case goes forward, counsel should advocate on the child's behalf for favourable pre-charge and pre-trial release conditions, appropriate charges, and effective disposition measures, including diversion, to promote the child's rehabilitation and reintegration into society. Counsel's understanding of the child's familial and social history can also facilitate a positive relationship with the child and the family, because counsel will be able to better navigate sensitive issues often faced by defence counsel in terrorism cases. Counsel's ability to understand the background, gender²⁰, age, and needs of a child client will help to ensure that the client's due process and fair trial rights are protected²¹.

¹⁹ National Juvenile Defender Center, *Role of Juvenile Defense Counsel in Delinquency Court* (2009), J. Robin Walker Sterling (hereafter NJDC Sterling) (2009), p. 15.

²⁰ As well as the impact of gender-based differences, especially in cases of terrorism involving children.

²¹ See United Nations Office of Counter-Terrorism, *Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Terrorist Groups* (April 2019), at p. 5. See also ICCPR Article 14.

Defence counsel should conduct a thorough investigation of the facts and allegations that form the basis of the charges brought against the child client. In investigating the case, the defence counsel should attempt to find witnesses, examine forensic evidence, locate and inspect tangible objects and other evidence that may exculpate the child, lead to the exclusion of, or undermine, the prosecution's inculpatory evidence, or buttress the defence case²². If possible, counsel should go to the scene of the alleged crime and interview all witnesses. This may be extremely challenging in terrorism cases, especially when the alleged terrorist act is committed in a distant conflict zone, but it is important for the government to ensure that counsel has the ability to conduct such an investigation. Further, counsel should identify individuals, including parents/guardians, child court probation officers, teachers, coaches, and mentors, who can speak in favour of the child at bail, dispositional, or sentencing hearings. Counsel should also consider calling upon experts, such as forensic or other psychologists and mitigation experts, who can testify to the impact of environment and trauma history on the child's alleged terrorist actions. It is incumbent upon states to provide counsel with the resources necessary to have these witnesses available for court when appropriate.

²² See National Criminal Justice Reference Service, *Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, P. Puritz, S. Burrell, R. Schwartz, M. Soler, L. Warboys (2002), p.6.

Action Point 4:

Counsel should primarily consider a child client as a victim and not only as an alleged offender

Assess and address the situation of children in a terrorism-related context from a child rights and child development perspective.

GCTF Neuchâtel Memorandum, Good Practice 2

Address children's vulnerability to recruitment and/or radicalisation to violence through preventive measures.

GCTF Neuchâtel Memorandum, Good Practice 3

Develop targeted prevention strategies with a strong focus on the creation of networks to support children at risk.

GCTF Neuchâtel Memorandum, Good Practice 4

Defence counsel should carefully analyse all of the facts of the terrorism offence and the circumstances of the child's background to determine if the minor was a victim of adult manipulation, coercion, or influence that led to participation in the criminal conduct. Counsel should present to law enforcement agents, the prosecutor, investigating magistrate, and the court, at every opportunity, all the facts and evidence that support the conclusion that the child's involvement in the offence was forced and involuntary.

It is essential that all child justice actors recognise the reality that children are more vulnerable to involvement in terrorism-related activities because their reasoning and cognitive abilities are still developing and they rarely can escape their circumstances.²³ Many additional factors contribute to radicalisation in children: exclusion and discrimination; lack of access to education; domestic violence; lack of social relations; poverty and unemployment; prior petty offending; time in child custody; migrant or refugee status; vulnerability to kidnapping; and money offered by terrorist groups.²⁴ If these circumstances are present in a particular case, defence counsel should emphasise them to police, prosecutors, investigating magistrates, and judges when those officials make decisions about whether to arrest a child, whether to institute a criminal case or seek diversion, whether or where to detain a child during the proceedings, and what alternative dispositional measures are best suited to assist the child's rehabilitation and reintegration into society.

²³ See GCTF, *Neuchâtel Memorandum*, *Supra*, n. 1, footnote 11. The development of a child has various stages. Children's decision-making capacity, planning, judgement, expression of emotions and impulse control are under development until they have reached an age in their mid-twenties.

²⁴ *Id.*, p. 4.

When the evidence demonstrates that a child is a victim, defence counsel should argue against any prosecution and should seek to ensure the minor receives appropriate social, psychological, and protective services.²⁵ In cases in which a child, even though victimised, bears some responsibility for the terrorism offence, defence counsel should highlight the minor's vulnerability in seeking less restrictive measures at every stage of the criminal proceeding, including bail and other preliminary hearings, as well as the adjudicative stage of the case. Defence counsel can play a crucial role in helping to fashion a successful reentry plan for these children, which will help them return to society and become productive citizens.

Highlighted Examples

In **Mali, Nigeria** and **Chad**, in most cases, minors accused of terrorism are primarily considered as victims and efforts are made to deradicalise them and help them return to their homes when possible.

In 2011, the legislature in **Montenegro** adopted a specialised Act concerning the treatment of children in criminal proceedings that envisages alternative sanctions, like diversion. The goal is to avoid court proceedings when possible. The law created two alternatives:

1. For crimes that carry a maximum sentence of three years prison, the court may impose a reprimand if the child acknowledges guilt.
2. For crimes that carry up to 10 years of imprisonment, a court can impose any or all of the following measures:
 - a settlement with the victims;
 - regular attendance at school or a job;
 - participation in sports when appropriate;
 - community service;
 - drug rehabilitation when appropriate;
 - no contact with the victims; and
 - financial payments to humanitarian organisations.

Some states, including **Kenya, Mauritania**, the **Philippines**, and **Mali**, by law or local custom, require a child accused of terrorism to be assigned a social worker to verify living conditions and other facts relevant to bail, detention, or treatment and competency questions. The information social workers provide can be essential in determining that the child is in fact a victim whose involvement in terrorist activities may have been coerced or manipulated.

In **Mauritania**, if a prosecutor ultimately determines not to prosecute a child charged with terrorism, the minor is usually assigned a social worker to transport the child to a rehabilitation centre specifically designed for youth.

²⁵ Intl. Juv. Just. Observatory, *Children, the Justice System, Violent Extremism, and Terrorism: An Overview of Law, Policy, and Practice in Six European Countries*, at 11-13, 49 (2018).

Action Point 5:

Counsel should ensure that the child client's right to be heard is respected

Address children alleged to be involved in terrorism-related activities in accordance with international law and in line with international juvenile justice standards.

GCTF Neuchâtel Memorandum, Good Practice 1

Apply the appropriate international juvenile justice standards to terrorism cases involving children even in cases that are tried in adult courts.

GCTF Neuchâtel Memorandum, Good Practice 6

It is critical for defence counsel to keep the child suspect involved throughout the process, as effective communication is a key element of meaningful representation.²⁶ Defence counsel should inform the child client and family, if appropriate, of the case's progression and effectively seek the child's opinions in decisions regarding the proceedings.²⁷ This duty requires counsel to explain all options in the case and assist the child in understanding and choosing among these options for resolving the matter, whether by guilty plea or early disposition, diversion, sentencing, or some other resolution. Counsel's recommendations are important, but counsel should not be overbearing so as to interfere with the independent choice and expressed interests of the child. Counsel should also inquire as to the interests of the child's parents, guardian, and/or guardian *ad litem*, but defence counsel's role is to represent the expressed interests of the child client, not those of other parties.²⁸

Furthermore, it is important for counsel to be aware of situations in which the family may have abused or radicalised the child.²⁹ In such circumstances, defence counsel should seek to prevent family members from continuing to unduly influence the child. Counsel may wish to consider requesting the appropriate court to order family members to stay away from the child, or to order that the minor be placed with a foster family or in a facility suitable for children.

²⁶ See National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice*, Section 3.132 (Representation by Counsel - For the Juvenile) (1980); National Juvenile Defender Center, *Juvenile Defense Attorneys: A Critical Protection Against Injustice, The Importance of Skilled Juvenile Defenders to Upholding the Due Process Rights of Youth* (undated) (hereafter NJDC Study), p. 4.

²⁷ CRC, art. 12. See also the principle of the best interests of the child, as provided by article 3 of the CRC.

²⁸ See the Beijing Rules--Adopted by General Assembly resolution 40/33 (29 November 1985) 14.2 The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.

²⁹ The World Health Organization has created an international Adverse Childhood Experiences questionnaire (hereafter ACES questionnaire) designed to "cover family dysfunction; physical, sexual and emotional abuse and neglect by parents or caregivers; peer violence; witnessing community violence, and exposure to collective violence." Findings from ACE surveys can be of great value in advocating for increased investments to reduce childhood adversities, to inform the design of prevention programmes, and to help identify exposure to childhood radicalisation.

Action Point 6:

Counsel should maintain regular contact with the child and advocate that the client not be held in detention

Address children alleged to be involved in terrorism-related activities in accordance with international law and in line with international juvenile justice standards.

GCTF Neuchâtel Memorandum, Good Practice 1

Consider, and apply where appropriate, alternatives to arrest, detention, and imprisonment, including during the pre-trial stage and always give preference to the least restrictive means to achieve the aim of the judicial process.

GCTF Neuchâtel Memorandum, Good Practice 8

Consistent client contact builds rapport and trust, helps counsel to truly understand a child client's needs, and keeps the child engaged in the proceedings. If the child is detained pending trial, defence counsel should visit the child as often as possible at the detention facility, and, if consistent with the child's best interests, encourage the family to maintain contact with the child. This is often complicated by the fact that the child may be held in a location far away from defence counsel. It would be helpful in these situations to build legal networks of specialised defence counsel handling cases of children suspected of having committed terrorist acts so that those in close proximity to the detention centre can be appointed.

Counsel should also share with the client copies of motions filed with the court, as well as the results of counsel's meetings and communications with police, prosecutors, investigating magistrates, social workers, experts, and potential witnesses interviewed during the investigation. Additionally, if counsel has the proper training, counsel time should allocate time to assisting the child suspect with related proceedings that may affect the case, such as those involving immigration, housing, medical aid, education, or other benefits.

Article 37(b) of the CRC requires that no child be deprived of liberty unlawfully or arbitrarily; and that the arrest, detention, or imprisonment of a child shall be in conformity with the law and only be used as a measure of last resort and for the shortest time possible.³⁰ Academic research and empirical evidence support the conclusion that in most cases, incarcerating child offenders can be detrimental to their well-being and to their prospects for rehabilitation and reintegration into the community.³¹ Child suspects may be at an increased risk of cruel and inhumane treatment and gender-based violence due to the societal bias, sensationalism and exceptionalism associated with terrorism and violent extremism.³²

³⁰ CRC, art. 37 (b). See also, *IJJ Juvenile Justice Note for Detention Personnel*, (IJJ website).

³¹ Intl. Juv. Just. Observatory, *Children, the Justice System, Violent Extremism, and Terrorism: An Overview of Law, Policy, and Practice in Six European Countries*, at 40-1 (2018); Sarah Katherine Koon, *Prosecuting the Juvenile Justice System: An Argument Against Incarceration*, 19 *Adelphi L.J.* 29, 31-2, 43-4 (2014-2015).

³² *Children and Violent Extremism, International Standards and Responses from Criminal Justice Systems*, Penal Reform International, March 2017.

Holding children in facilities with others accused of terrorist acts, away from their support systems, could lead them to associate with detainees ready to influence them to engage more deeply with violent extremist groups and terrorist organisations³³. Radicalisation during incarceration may lead to increased violent behaviour upon release³⁴. This risk is further exacerbated when children are incarcerated with adults.

If the client is detained, defence counsel should monitor the conditions of confinement and challenge those that adversely impact the child suspect's rehabilitation and future reintegration. Research suggests that adolescents are resilient and very capable of rehabilitation when placement facilities encourage constructive trust-based relationships with staff members, foster a sense of optimism about the youth's future upon release through education, training, and employment prospects, and help maintain positive connections with families and friends³⁵. Defence counsel should advocate for conditions of confinement consistent with these principles. For this purpose, defence counsel should keep a record of any difficulties with, or failings by, probation officers, facilities, programmes, or other entities charged with providing service to the child in order to take necessary action against violations of the child's rights or other detrimental impacts on the child.

In States with strong regional differences in culture, custom, or language, the judges who appoint counsel to represent children charged with terrorist offenses, and defence counsel who are appointed, should be sensitive to how such differences may impact the child client and the case. Sometimes the differences are fundamental and dictate future actions. Does the child speak the native language, and if so, does the child speak the same dialect as the judge and appointed counsel, expected witnesses and other court actors, like social workers? It is essential to appoint a lawyer who speaks the same dialect or, if that is not possible, to have an appropriate interpreter available for all meetings and court appearances.³⁶

³³ Intl. Juv. Just. Observatory, *Children, the Justice System, Violent Extremism, and Terrorism: An Overview of Law, Policy, and Practice in Six European Countries*, at 40-1 (2018)

³⁴ *Id.*

³⁵ "Correcting the Course", *Advancing Juvenile Justice Principles for Children Convicted of Violent Extremism Offenses*, p.6. Global Centre and the International Centre for Counter-Terrorism, September 2017. See also, *IJJ Juvenile Justice Note for Detention Personnel* (IJJ Website).

³⁶ CRC art. 40(2)(b)(vi); *The Havana Rules* art. 6, Dec. 14, 1990, U.N. Doc. A/45/113.

Highlighted Examples

In 2001, **Yemen** established a pilot Child Care Facility in Aden with low walls, low security measures, enhanced openness and increased external support. The facility is part of a major overhaul of the child justice system endorsed by the Ministry of Interior and the Ministry of Social Welfare and supported by various international multi-lateral partners. The overall objective is to move children away from punitive adult facilities to an environment that provides a more supportive, rehabilitative and caring approach to child detention. The project used existing infrastructure, but operates the facilities more like boarding schools than detention centres. The Aden facility is characterised by brightly painted, decorated, clean, and orderly dormitories that are supervised 24 hours a day by child protection staff. Children are taught personal hygiene and – due to the lack of funds for ongoing maintenance of the facility, encouraged to keep their spaces clean. Routines include school lessons, group and individual counselling, play, sports, theater, art and vocational skills development.

In **Cameroon**, children are provisionally detained pre-trial in serious cases. Defence counsel may ask for review after six months and are sometimes successful in gaining release at that point. In the **Philippines**, minors can be held in investigatory detention for no more than eight hours. The child's family and guardians are automatically contacted and can be present during any interrogations.

In **Tunisia**, Defence and Social Integration Centres, established as public institutions under the supervision of the Ministry of Social Affairs, help with reentry by supporting children as they integrate into the social and economic life of their communities in coordination with other institutions. In addition, the centres empower families to help to overcome the difficulties they face as a result of their child's involvement in terrorism. Children are placed in these reform centres only if the terrorist act they committed or helped commit is considered dangerous and if there is no alternative measure that serves their best interests. The reform centres are established for reforming and educating children and preparing them for reentry into society, and are separate from prisons and detentions centres. While in the centres, all children must have the opportunity to study and learn a profession, as well as access to additional activities and exercises. They are also entitled to participate in field trips and family visitations.

In the **Netherlands**, the Dutch Family Support Unit, an independent organisation, supports aspects of post-release programmes for young offenders by providing family counselling and other services to support the reintegration of youth back into their families. **Tanzania** has strived to reduce pretrial detention for children and to place them in special homes, instead of in a prison-like setting. The goal is to place adjudicated children in approved schools emphasising education and reintegration into society.

In the Sahel, **Mali** and **Chad** have no dedicated detention centres for minors, but house them in jails that have special sections for children. For this reason, officials in those countries try to look for alternatives to incarceration, including release to parents or placement in specialised institutions for children.

Action Point 7:

Counsel should maintain confidentiality throughout and after criminal proceedings

Address children alleged to be involved in terrorism-related activities in accordance with international law and in line with international juvenile justice standards.

GCTF Neuchâtel Memorandum, Good Practice 1

Defence counsel in most countries have a duty of confidentiality to their child clients, regardless of the type of case.³⁷ This duty mandates that counsel preserve the confidentiality of their case-related communications with the child client, except with the permission of the minor or under very limited circumstances that are set out in established laws or required by a lawful court order. This duty applies equally to counsel in their relationships with children accused of terrorism-related offences. Confidentiality is crucial to maintaining trust and protecting a client's rights. Consequently, the defence counsel has an affirmative obligation to safeguard a child's privileged information from parents or guardians and the public. Interviews with the child should take place outside of the presence of the parents or guardians and law enforcement officials. Generally, parents or guardians do not have any right to inspect child defence counsel's file, notes, discovery, or any other case-related documents without the child's express consent.³⁸ In the absence of the child's consent or specific legal authority, defence counsel should never disclose information learned in the context of the child's defence.

Even in countries in which child proceedings are confidential, child defence counsel should be vigilant to make sure confidentiality is respected. This is especially important in jurisdictions where proceedings might be handled by judges who have little experience presiding over child prosecutions. A lawyer's normal deference to a court should never prevent him or her from informing a judge of a potential, or actual, breach of confidentiality.

In cases involving terrorism, intense media coverage³⁹ may further complicate matters. Even where child proceedings are not closed and confidential, defence counsel should not divulge information that unnecessarily exposes the child to public scrutiny. In this regard, many courts, by rule or case-specific order, dramatically limit lawyers from commenting on active criminal cases, especially involving children. Counsel has a duty to protect the child's right to privacy, as a breach may have a long-term adverse impact on the child's prospect of rehabilitation and reintegration into the society, due to public condemnation and stigmatisation.

³⁷ Federation of Law Societies of Canada, *Model Code of Professional Conduct* (as amended March 14, 2017).

³⁸ See generally, Institute of Judicial Administration–American Bar Association, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties* (1980), Part III, sections 3.1-3.3 (b).

³⁹ Recent research by the University of Alabama, for example, shows that terrorist attacks by Muslims receive an average of 105 headlines, others just 15. Mona Chalabi, Terror attacks by Muslims receive 357% more press attention, study finds, *The Guardian*, 20 Jul 2018.

Highlighted Examples

In **Nigeria**, authorities try to protect children who have associated with Boko Haram by avoiding prosecution when possible and sending them to facilities for deradicalisation. They also recognize that if the child is to have any hope of successfully reintegrating, it is important to protect confidentiality. Many girls kidnapped by Boko Haram in Nigeria are quite young and frequently are forced to try to carry out terrorist acts. Nigeria's deradicalisation efforts, including for these girls, involve vocational and educational training in locations far away from the influence of Boko Haram.

In **Ethiopia, Malta**, and the **Philippines**, the police and courts are required to redact the names of children from court files to protect the confidentiality of the child and the case. In **Kenya** and **Nigeria**, the court can order that the child's name be protected.

In **Jordan**, all cases involving children are closed to the public and the press.

In **Morocco**, even though the press has a right to request information about child cases, the courts consider it more important to protect the child's confidentiality.

In the **Philippines**, information relating to child criminal cases can only be released with a court order.

Many of the **Balkan countries** require all child proceedings to be closed and protect the names of child defendants from disclosure to the public. If a child is convicted, the criminal record is held in a closed database, not available to the public.

In **Cameroon, Chad, Mali** and **Senegal**, child court proceedings must be closed to the press and the public to protect the child's confidentiality.

Action Point 8:

Counsel should protect the child's rights at every stage of a proceeding

Assess and address the situation of children in a terrorism-related context from a child rights and child development perspective.

GCTF Neuchâtel Memorandum, Good Practice 2

Address children prosecuted for terrorism-related offenses primarily through the juvenile justice system.

GCTF Neuchâtel Memorandum, Good Practice 5

Consider, and apply where appropriate, alternatives to arrest, detention, and imprisonment, including during the pre-trial stage and always give preference to the least restrictive means to achieve the aim of the judicial process.

GCTF Neuchâtel Memorandum, Good Practice 8

Defence counsel have a duty to protect the child's pretrial due process rights.⁴⁰ This requires factual investigation demands for production of government evidence, and appropriate motions and arguments to protect the rights of the child at every stage. Defence counsel should conduct the necessary investigation to make two age-related determinations: is the client a minor, and is he or she above or below the minimum age for criminal responsibility. When investigation does not resolve these age questions, counsel should argue that the court presume the client is a minor and is below the age to be held criminally responsibility until it is proven otherwise.

The ICCPR requires that children have a fair hearing by a competent, independent, and impartial tribunal and the right to appeal any conviction.⁴¹ Defence counsel should not allow the child to plead guilty or accept alternative diversionary measures without first reviewing the prosecution's file, including the results of forensic examinations and tests, police reports, photographs, recorded interrogations, investigations, witness interviews, and other evidence, and challenging the validity of any of that evidence, when appropriate. Counsel should also pursue possible exculpatory investigative leads, review education and medical/mental health records, and provide the client with a fair and informed assessment of the strengths and weaknesses of the prosecution's case.⁴²

Counsel should consider the possibility to seek alternative measures to judicial proceedings as well as to pre-trial detention, such as diversion.⁴³ These measures can be sought at every stage of a proceeding and it should be kept in mind that diversion measures can only be applied following informed consent of the child.⁴⁴

⁴⁰ Article 10 of the Universal Declaration of Human Rights and Article 14 of the ICCPR, which both aim at ensuring the proper administration of justice, set out the bedrock norms applicable in all trials, whether of alleged terrorists or other accused individuals. See also, Julian Greenspun, *Role of the Attorney in Juvenile Court* (hereafter Greenspun article), 18 Cleveland-Marshall Law Review, 599, 606 (1969).

⁴¹ ICCPR, art. 14(1) and 14(5).

⁴² NJDC, Sterling, *Supra* n. 26, p. 15.

⁴³ CRC art. 40(4)

⁴⁴ Beijing Rules, Rule 11.3. See also UNODC Handbook, p. 83

At all stages of the proceeding, defence counsel should litigate the child's case vigorously and consistently and protect the presumption of innocence, regardless of counsel's opinions on guilt or innocence or on the client's need for social, educational, and other services.⁴⁵ Defence counsel should also adhere to and enforce the rules of evidence, challenge the child's competency to stand trial when appropriate, lodge evidentiary objections, examine witnesses, file written and oral motions, and challenge the credibility and admissibility of the government's evidence.

Many states, such as Nigeria, are required to record any questioning of child suspects. When counsel is invited to a questioning session, he or she should warn the child that the statements could be used against them. When the questioning is done in the absence of defence counsel, counsel should carefully review the recorded statement to ensure that it was not coerced or otherwise given involuntarily, and challenge its admissibility when not properly obtained. Counsel should be aware that child suspects are particularly vulnerable to coercive interrogation methods used by many law enforcement agencies, such as the Reid Technique.⁴⁶ This method can lead police to then look for facts to corroborate the confession rather than investigating the case objectively.⁴⁷

Defence counsel should be especially diligent in reviewing the validity of confessions obtained in terrorism case, given that police are under particularly high pressure to obtain a confession. Confessions are the least "reliable" evidence and when used, should always be complemented with other evidence admissible in court. Additionally, for in-court proceedings, child defence counsel should discuss and preview for the child each hearing before it happens, and review each hearing after it happens, providing an opinion as to how the specific hearing has affected the course of the overall case, and allowing the client ample opportunity to ask questions and raise concerns.⁴⁸ In any case, when there is a conflict between juvenile standards and terrorism law on investigation methods, arrest and police custody, the child's best interest should be manifest.

As part of their overall framework for handling children suspected of or charged with terrorist acts, States should consider creating and training a network of legal aid lawyers to ensure the children are represented effectively. Legal aid systems are recognized under international principles as one of the most effective ways to protecting the rights of child suspects in the criminal justice system.

Highlighted Examples

Serbian representatives at IJJ trainings indicated that **Serbia** has adopted all the requirements under international law concerning children in its child justice system. Completely different sanctions and procedures are available for children. In addition, judges and prosecutors are specially trained and designated for child proceedings, parents and defence counsel must be present for any hearing, the proceedings are closed to the public to protect the child's confidentiality, and counsel is available to the child from the very beginning.

Participants from **Montenegro** mentioned that all of its child laws are based on the CRC and when age cannot be proven conclusively, all presumptions flow in favour of the child.

In **Nigeria, Uganda, and Kenya**, counsel can challenge coerced confessions through a process known as a trial within a trial. If the court finds the police obtained the confession through physical force, emotional coercion, or some other form of duress, it will not be admissible against the child at trial.

⁴⁵ ICCPR article 14(2). See also CRC art. 40(2)(b)(i); Committee General Comment No.24, para.43.

⁴⁶ Janet E. Ainsworth, In a Different Register: The Pragmatics of Powerlessness in Police Interrogation, 103 YALE L.J. 259, 315-316 (1993); See also Saul Kassir, On the Psychology of Confessions: Does Innocence Put Innocents at Risk?, 60 AM. PSYCHOLOGIST 215, 218-21 (2005) (noting the Reid Technique emphasises three psychological processes- isolation, confrontation, and minimalisation-that increase risks of false confessions).

⁴⁷ "The Role of Confirmation Bias in Suspect Interviews: A Systematic Evaluation," in Legal and Criminological Psychology (2008), 13, 357-371, at 356-7, Carole Hill, Amina Memon and Peter McGeorge School of Psychology, University of Aberdeen, Aberdeen, UK. <https://pdfs.semanticscholar.org/5296/c3a28c8af08436fa86a68f0c774e721ef11d.pdf>.

⁴⁸ The United States Supreme Court has observed that "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the juvenile] has a defense and to prepare and submit it". *In re Gault*, 387 U.S. 1, 36 (1967).

Action Point 9:

Counsel should pursue diversion options and negotiate early disposition of cases

Consider and design diversion mechanisms for children charged with terrorism-related offences.

GCTF Neuchâtel Memorandum, Good Practice 7

Consider, and apply where appropriate, alternatives to arrest, detention, and imprisonment, including during the pre-trial stage and always give preference to the least restrictive means to achieve the aim of the judicial process.

GCTF Neuchâtel Memorandum, Good Practice 8

Diversion encompasses alternatives to detention, prosecution, formal adjudication of guilt and entry of judgment.⁴⁹ Defence counsel should seek diversion in any case in which the law permits it and the facts warrant it⁵⁰, but especially in cases in which the client faces a significant risk of a harsh penalty⁵¹. Diversion can be an effective method of protecting the developmental and rehabilitative needs of the child and supporting the child's successful reintegration into the community as a non-criminal.⁵²

Diversionary measures may be sought throughout the proceedings. In addition, diversion should be presented to the child as a way to suspend the formal court process, which will typically be terminated if the child complies with all the requirements of the diversion programme.⁵³ Many states *do* have legal authority for diversion. Some states permit prosecutor-led diversion and others allow judge-led diversion.⁵⁴ Regardless of who initiates it, however, diversion is less restrictive than detention or extended formal supervision and often results in a much lower chance of recidivism.

Other alternatives to detention and formal adjudication include counselling, probation, foster care, educational and vocational training programmes, mental health treatment, cognitive behavioral therapy, unlocked group home settings, and other options to ensure that the case is resolved in a manner appropriate to the child's well-being and proportionate both to the child's circumstances and the seriousness of the offence.⁵⁵ Probation supervision, for example, allows the close monitoring of the child's activities without interrupting existing education and living arrangements.⁵⁶

⁴⁹ See United Nations International Children's Emergency Fund (hereafter UNICEF) *Toolkit on Diversion and Alternatives to Detention 2009*, available at https://www.unicef.org/tdad/index_56399.html.

⁵⁰ CRC Art. 40(3)(b). The Committee on the Rights of the Child has elaborated by stating that diversion "should be the preferred manner of dealing with children in the majority of cases" (Committee General Comment No.24, para.16).

⁵¹ See GCTF's Life Cycle Initiative, specifically the GCTF's *Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses*.

⁵² UNODC Handbook, *Supra*, n. 13, p. 88.

⁵³ Committee General Comment No.24, para.72

⁵⁴ See IJJ Juvenile Justice Note for Judges, Action Point 8 (IJJ Website).

⁵⁵ GCTF, *Neuchâtel Memorandum, Supra*, n. 1, GPs 1, 2, 3, 4, 7, 9, 10. See also CRC Art. 40 (4).

⁵⁶ UNODC Handbook, *Supra*, n. 13, p. 96.

Highlighted Examples

While **Cameroon** has no formal legal authority for diversion, defence counsel have found some prosecutors and judges willing to resolve a case without subjecting a child to a criminal proceeding leading to a formal judgment and sentence. Such a result is generally accepted as being in the best interests of the child affected.

In the **Philippines**, the Juvenile Justice and Welfare Act authorises community-based, police-led, and prosecutor-led diversion agreements for children accused of crimes carrying maximum prison sentences of six years. Children who refuse to voluntarily enter diversion programmes, or fail to successfully complete them, will be referred to the Family Court for formal prosecution. In addition, children charged with offences punishable by maximum prison sentences of more than six, but fewer than 12 years, can be placed on diversion only by child court judges. In both circumstances, child judges must determine before arraignment whether diversion is appropriate. Those determinations are aided by reports and recommendations from Diversion Committees consisting of clerks of court, prosecutors, public defenders, and assigned social workers.

If a Committee recommends a diversion plan and both the child and any complainant agree to it, a court will set a hearing with all parties present at which it will decide whether or not to accept the plan. If a court agrees to order diversion, an assigned social worker will serve as a programme monitor and must report to the court on the child's progress in the programme. Once a child successfully completes the terms of a diversion order, a judge may order the case closed. If a case involves a crime punishable by more than 12 years' imprisonment, a court must determine the child's guilt or innocence in accordance with established child justice procedures. If the child is found guilty, the court will impose a judgment and sentence. Nevertheless, the child judge must suspend the sentence and order one or more statutory non-imprisonment measures, as indicated in a binding Supreme Court rule. If the child successfully complies with the alternative measures, the case can be discharged. Only if a child refuses to participate in, or fails to comply with, a court-ordered alternative measures programme, will a judge execute the suspended sentence.

Thailand has instituted a procedure that requires police, within 24 hours of arrest, to send children to an Observation and Protection Centre for a determination of whether diversion measures should be pursued immediately or whether cases should be referred to the Juvenile and Family Court, where diversionary measures can be ordered by child judges.⁵⁷

In **Japan**, judges before whom children are accused may make one of the following decisions: (1) dismiss the case; (2) refer the case to the governor of the prefecture or the chief of the child guidance centre in the child's hometown; (3) place the child under probation, in a support facility, or child training school; or (4) refer the case to the public prosecutor. A referral for prosecution can be made only when a child is 14 years or older at the time of the criminal acts and a judge finds it is appropriate for the child to be treated under the regular criminal procedure.⁵⁸

Albania's *Code of Criminal Justice for Children, Law 37/2017*, Article 14 (1), states that "priority shall be given to the alternative measures of diversion from criminal prosecution" in cases involving children. Article 56 (2) provides that "[d]iversion against the child in conflict with the law may be applied upon initiative of the prosecutor or upon request of the child in conflict with the law or child's representative". Children, assisted by their representatives, may not only accept or reject prosecutors' diversion offers, but may make diversion proposals of their own. If a prosecutor rejects a child's proposal, the child and legal representative may appeal to a court within 15 days for an order to implement it. The statute also regulates what diversion measures may be offered to children, as well as the procedures and considerations that all judicial actors must use when deciding whether to enter into a diversion agreement.

⁵⁷ Thailand's *Juvenile and Family Court and Juvenile and Family Procedure Act* (hereafter Thailand, JFCJFP), BE 2553 (1991), as amended, article 50, et seq.

⁵⁸ Nobuhito Yoshinaka, *Recent Changes in Youth Justice in Japan*, Hiroshima Hogaku, Vol. 33, No. 4 (2010), p. 89 (describing Japan's Juvenile Law 1949 (as amended) (2010)).

Action Point 10:

In determining how best to resolve a case, counsel should advocate non-custodial sentences that are individualised, proportional, and prioritise reintegration

Apply the principle of individualisation and proportionality in sentencing.

GCTF Neuchâtel Memorandum, Good Practice 9

Hold children deprived of their liberty in appropriate facilities; support, protect, and prepare them for reintegration.

GCTF Neuchâtel Memorandum, Good Practice 10

Develop rehabilitation and reintegration programmes for children involved in terrorism-related activities to aid their successful return to society.

GCTF Neuchâtel Memorandum, Good Practice 11

In determining the best way to defend a child charged with a terrorist act, counsel should be aware that the manner in which the case is resolved can have long-term collateral consequences that can be severe for children, particularly in terrorism cases.⁵⁹ These consequences could include social stigma for the child and his or her family, as well as being barred from living in certain areas, holding certain jobs, and attending school or college. Defense counsel should warn their clients about these potential collateral consequences and advocate for resolutions that avoid them if at all possible.

If the national law allows plea bargaining, defence counsel should discuss reasonable plea offers with the child, help the child make an informed decision on whether to accept or reject the offer, any work with the child to craft a counter-offer where appropriate.⁶⁰ In considering any plea offer, defence counsel should always try to negotiate the case to a non-terrorism charge when possible. In all cases, counsel should strive to fashion a resolution of the case that protects the child's rights at all stages, including ensuring that the case is given individual consideration. If the child suspect is adjudicated guilty of any crime, counsel should advocate for an evidence-based proportional disposition that will help prevent future terrorist activity and help the child successfully reintegrate back to society.

⁵⁹ NJDC, Sterling, *Supra* n. 26, p. 23.

⁶⁰ See Greenspun article, *Supra* n. 40, p. 607.

Defence counsel should also be aware that lengthy imprisonment may “harden terrorist defendants ... and contribute to the development or entrenchment of terrorist networks [as there is] a correlation between prison and extremism”⁶¹. In accordance with international legal instruments and child justice standards, counsel should advocate for a resolution that does not involve imprisonment, even in those cases in which the child is prosecuted and subject to final judgment.⁶²

Highlighted Examples

In the **United Kingdom**, a procedure known as a Goodyear Hearing is available prior to the trial to help ensure defence counsel have properly informed child clients of their rights. In such hearings, for example, the accused are allowed to ask judges what their maximum likely sentences would be if they plead guilty, rather than proceeding to trial. This hearing occurs without prejudice and is not mentioned within the trial if the defendant decides to go to trial.

In **Kuwait**, courts can exempt a penalty for certain crimes if all the relevant parties agree.

Morocco has ratified child protection laws following the basic principles of the *Neuchâtel Memorandum*, including by providing specialised training for the judiciary and police. The police are trained to explain to children their rights under the child protection laws. If at all possible, the policy is to leave children in the care of their families. When minors are detained, officials provide protected areas for defence counsel to meet with their clients and allow the children to communicate with their parents.

⁶¹ Christina Parajon Skinner, ‘Punishing Crimes of Terror in Article II Courts’ (2013), 31 Yale Law and Policy Review 309, 371, cited in Sameer Ahmed, ‘Is history repeating itself? Sentencing Young American Muslims in the War on Terror’ (2017), 12 The Yale Law Journal 1520, 1566.

⁶² CRC, Article 37 (b).

Action Point 11:

Counsel should receive specialised training to effectively defend the rights of children involved in terrorism offences

Design and implement specialised programs for terrorism cases to enhance the capacity of all the professionals involved in the juvenile justice system.

GCTF Neuchâtel Memorandum, Good Practice 12

Design and implement monitoring programmes to ensure the effective implementation of international juvenile justice standards.

GCTF Neuchâtel Memorandum, Good Practice 13

Effective child defence practice is nuanced, complex, and textured; therefore, it is incumbent upon States to train defence counsel to help them fully understand the background and experiences of their child clients and the protections they are afforded under law. An effective child terrorism prevention strategy should further ensure that defence counsel are adequately compensated and empowered with subject matter expertise sufficient to advocate for their clients with judges, prosecutors, and other child justice actors. Many countries have recognised the need to establish specialised child judges and prosecutors' units. States are also reminded that specialised counsel are an equally important element of an effective child justice system, especially in terrorism matters. Ensuring that all of these key players are well-trained and supported will help ensure that the special protections for children envisioned by international human rights law will be appropriately respected.

Specialisation and high-quality training in child defence will also help counteract the pervasive misconception among many justice actors that the child court imposes inappropriately lenient treatment for terrorists. Defence counsel would further benefit from information during their training regarding the root causes of child involvement in a terrorism offence in their countries.⁶³

To be effective, a child counterterrorism defence system should also require defence counsel to receive training on international law concerning the rights of children, the differences between the adult and child systems, child and adolescent development, the impact of trauma, and effective and tailored dispositional alternatives.⁶⁴ Defence counsel should also be trained to address the legal, educational, and social needs of the child, as children's needs are different from those of adults. In order to fully understand the child's needs, it is essential that counsel have the ability to request and review records concerning the child's education, mental and medical health, and trauma history, including trauma caused by terrorists⁶⁵, abuse, neglect, or abandonment, parental incarceration, or exposure to violence. These records should immediately be made available to the defence.

⁶³ Committee General Comment No.24, para.52 and 112.

⁶⁴ UNICEF, *Justice for Children Manual*, at 77; Children's Rights in Juvenile Justice, Comm. on the Rights of the Child, CRC sec. 97.

⁶⁵ The World Health Organization has created an international Adverse Childhood Experiences questionnaire (hereafter ACES questionnaire) designed to "cover family dysfunction; physical, sexual and emotional abuse and neglect by parents or caregivers; peer violence; witnessing community violence, and exposure to collective violence." Findings from ACE surveys can be of great value in advocating for increased investments to reduce childhood adversities, to inform the design of prevention programmes, and to help identify exposure to childhood radicalisation. See https://www.who.int/violence_injury_prevention/violence/activities/adverse_childhood_experiences/en/.

Counsel should also have a solid understanding of child justice laws and standards in the relevant jurisdiction to ensure that the child is kept out of pre-trial detention, and ensure that incarceration is used as a measure of last resort.⁶⁶ In addition, counsel should be familiar with child court procedures, the available detention facilities, and community-based alternatives to incarceration, to assist in advocating for the child defendant's pre-trial release. For all of these reasons, it is imperative to have specialised counsel available.

It is also critical that child counsel recognise that a lack of brain development in children and adolescents impacts their ability to fully comprehend the long-term consequences of their behaviour. Adolescent development research indicates that adolescents are more likely to engage in risky behaviours because the brain's prefrontal cortex, which is responsible for executive functioning and complex reasoning, does not fully mature until the mid-twenties.⁶⁷ It is imperative that defence counsel recognise that children and adolescents do not possess the same emotional, cognitive, behavioral, or decision-making capacities as adults, and educate the prosecutor and judge on this reality during the resolution of the case.⁶⁸

It is also essential that counsel possess a working knowledge of, and maintain contacts with, experts in related areas of law, such as the collateral consequences of adjudication and conviction of a terrorism offense, adolescent and child development, record expungement, confidentiality, special education, abuse, neglect, and abandonment, mental health, cultural competency, child welfare, entitlements, and immigration.

Highlighted Examples

Many countries, including **the Philippines, Macedonia, Serbia, Kuwait, Mauritania** and **Jordan**, have developed written child justice manuals intended for prosecutors and/or judges. Such manuals can be helpful for defence counsel. Unfortunately, unique aspects of defence practice are frequently not included in such materials. Inexperienced child defence counsel should seek the advice of experienced counsel to deepen their understanding of the intricacies of the child justice system. States should consider developing similar manuals specific to their own national laws and policies for child practitioners, including a manual specifically designed for child defence counsel handling terrorism cases.

In **Kenya**, lawyers working for the National Legal Aid and Awareness Programme (NALEAP) are offered specific initial training on access to justice and legal aid. This one-week training course, offered by the government, is individualised to fit the particular programme in which the lawyer is working, for example, child justice cases. Besides this initial training course, continuous training is offered to the lawyers working for NALEAP.⁶⁹

The **Mauritania** criminal justice system requires all practitioners involved in the child justice process to have specialised training.

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⁶⁶ As noted in the *United Nations rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)*, child detention, regardless of the criminal offence committed, shall be only a measure of last resort. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Counsel shall always advocate for a non-custodial measure and the adoption of a protection measure, an alternative to detention.

⁶⁷ See UNICEF, *The Adolescent Brain: A Second Window of Opportunity*, at 12, 31-3 (2017); Steinberg, L., Albert, D., Cauffman, E., Banich, M., Graham, S., & Woolard, J. (2008). Age differences in sensation seeking and impulsivity as indexed by behaviour and self-report: Evidence for a dual systems model, *Developmental Psychology*, 44(6), 1764-1778.

⁶⁸ See e.g. *Roper v. Simmons*, 543 U.S. 551 (2005) (noting that adolescents and adults are developmentally different in critical areas, including impulse control and understanding the consequences of their actions. The Court grounded its decision in developmental and scientific research demonstrating that children possess a greater capacity for rehabilitation than adults, are more susceptible to negative peer pressure and are immature and impaired in their judgment and decision-making because their brains are not fully developed).

⁶⁹ Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors. *A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society*, https://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihl_study_final.pdf (December 2011).

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In **Senegal**, child judges assigned to adjudicate cases involving children accused of terrorism offenses are specially trained in both terrorism issues and child justice.

In **Tanzania**, all stakeholders in the child justice system are trained that the rights and interests of children are paramount.

In **Algeria**, law enforcement agents receive specialised training on how to handle child matters. Algeria requires police to record all interviews of children and enforces special procedures that require the presence of counsel and a guardian during questioning.

In **Thailand**, police receive specialised training in how to respond to violence against children. A voluntary training programme educates prosecutors in international and Thai laws on child protection. It is imperative that states provide similar training for defence counsel.

Action Point 12:

Counsel should maintain good relations and collaborate with other child justice actors

Develop targeted prevention strategies with a strong focus on the creation of networks to support children at risk.

GCTF Neuchâtel Memorandum, Good Practice 4

Develop rehabilitation and reintegration programmes for children involved in terrorism-related activities to aid their successful return to society.

GCTF Neuchâtel Memorandum, Good Practice 11

Design and implement specialised programs for terrorism cases to enhance the capacity of all the professionals involved in the juvenile justice system.

GCTF Neuchâtel Memorandum, Good Practice 12

The child justice system often involves social work experts, teachers, investigators, probation officers, mental health professionals, and medical personnel. Defence counsel have an important role to play in encouraging close cooperation between professionals working with children so that all those concerned have a full understanding of the child and his or her needs and work together to deliver their rights. Counsel should also be aware of service providers that help children and the services they offer and be a link between other professionals and the child.

The best way to address all of the needs of an at-risk child is for the court to create specialised local networks, sometimes known as child protection teams, to address the needs of children in a holistic manner. These groups are tasked with addressing each case individually to help ensure the best outcome. The degree and manner in which defence counsel interacts with these groups, or their individual members, can have a significant impact on counsel's efforts to successfully defend the child's interests and help the child reintegrate. Additionally, cultivating relationships with group members may assist not simply one individual child client, but may provide helpful resources for future child cases.

Many states have created structures in which social workers, psychologists, counterterrorism experts and others become involved in child cases to help inform the court about outcomes that would be in the best interest of the child. If any such assessment or recommendation involving the child is undertaken, defence counsel should be informed to ensure it is appropriately factored into the defence strategy for resolving the case.

Highlighted Examples

In **Kenya**, for example, the law requires that a separate social welfare file be created at the inception of each child case to address the social and psychological needs of the child. This file then accompanies the criminal file and permits a child court judge to order specific evaluations to help the court make better decisions about the child's best interests. It is important for defence counsel to work with these evaluators to understand the child's needs and to provide records and other information to help inform the evaluations.

In addition, in 2002, as a result of the *Child Protection Team Act No. 8 of 2001*, Kenya began creating child protection teams as an enhancement to the child court structure. These teams work to determine the best interests of the child and to help empower the child court to enforce international and national child protection laws. High level law enforcement representatives serve on the teams and become more aware of the need to protect all children, even those charged with acts of terrorism.

In **Morocco**, when a minor is involved in a criminal case for any reason, the court invites a social worker or other professional to follow the case and make recommendations to the court to serve the child's best interests.

Participants at IJJ training reported that all countries of the **Western Balkans** have social workers available to assist children in terrorism cases. In **Montenegro**, expert teams are required to be well-acquainted with children's needs and the details of their cases. In specific cases, the team is in contact with the child on a daily basis and monitors his or her physical and mental health. Although Montenegro does not have specialised courts for minors, certain judges, prosecutors, and defence counsel receive specialised training in handling child matters.

Conclusion

In a child justice system, defence counsel plays a unique role in defending the rights of an accused child and facilitating a fair and efficient court process. Fundamental fairness requires that counsel be made available to child suspects in all cases, as early as possible in the process, but especially before any questioning occurs.

In situations where children are accused of terrorism or related offences, lawyers need to have a strong professional commitment, solid communication skills, knowledge of due process rights, cultural competence, and an understanding of adolescent development and the impact on the child of traumatic experiences. Many countries have recognised that a public defender or legal aid system that guarantees all children have counsel available to them at every stage of the process, even when the family cannot afford counsel, is a highly effective way to guarantee the rights of children accused of terrorism and other offenses. States should assess the most effective way to guarantee representation to indigent children. Well-trained defence counsel can also play a vital role in helping to facilitate the deradicalisation of children involved in terrorist activity by advocating for treatment that can help the rehabilitated child successfully reenter society.

Throughout the process, counsel should regularly communicate with the child, try to keep the child out of detention, protect the child's confidences, defend the child's expressed interests, challenge coerced confessions, effectively investigate and understand the root causes of the alleged terrorist activity, advocate for the least restrictive outcomes, work to preserve the child's wellbeing and rehabilitation, and assist in the preparation of a plan for successful reentry into society. The child should always be presumed innocent unless proven otherwise. Counsel should also investigate the case to establish whether the child was forced, coerced, or manipulated to participate in a terrorism offence. If there is a question as to the child's age and the government does not have definitive proof, counsel should advocate that the client be presumed to be a minor in the absence of evidence to the contrary.

Children, even those accused of terrorist activity, should be released to family members or placed in a safe location whenever possible, rather than incarcerated. If detention is the only alternative, children should be held in a secure facility, segregated from adults, and housed only with members of their own gender. Counsel should pursue diversion away from the court system or other early dispositional options whenever appropriate. If the matter goes to trial, counsel must protect the child's rights during the pre-trial and adjudicatory hearings and maintain positive relationships with other child justice actors to achieve the best outcomes for their child clients. Finally, if the child is determined to be culpable for the terrorist activity, counsel should advocate for a proportional disposition that fairly addresses the crime, as well as the needs of the child in terms of rehabilitation and reentry into the community.

The *CRC*, the *ICCPR*, and other international documents require these protections. Many countries around the world have adopted some or all of these action points. Numerous examples are highlighted throughout this note to illustrate how this is being done. The international community has recognised the best way to achieve an effective and fair child justice system, that both provides accountability and appropriately addresses the root causes of children's involvement in terrorism-related activities, is to ensure that every nation fully implements these protections by providing well-trained and resourced defence counsel.



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