The case-law of the European Court of Human Rights concerning criminal juvenile justice

Judge Françoise Tulkens

Introduction

1. Juvenile criminal justice is a topic of growing importance and which, more than any other, calls for proper responses. An inappropriate criminal reaction may well put a young person's future at risk and contribute even more to feelings of insecurity. In this paper, I shall examine the contribution made by the jurisprudence of the European Court of Human Rights which directly affects minors in contact with the criminal justice system. I shall simply present this jurisprudence departing from the provisions of the European Convention on Human Rights, keeping in mind the chronological order of the criminal intervention, from its earliest stages to the point where sentences and measures are enforced.

I Context

2. Here I will not go into the nature, scope, possibilities and limitations of the different international texts (general or targeted) that children and young people can and must employ at both international and regional level.

This has been dealt with elsewhere. It is interesting to note, however, that the European Union is also developing a European strategy on the rights of the child based in particular on Article 24 of the Charter of Fundamental Rights, which recognises children's rights. Where fundamental rights are concerned, I believe that one approach does not exhaust the whole subject and that complementarities and synergies must be created between the different instruments.

3. Where children's rights are concerned, the European Convention on Human Rights possesses two characteristics that distinguish it from other instruments that protect fundamental rights. Firstly, unlike the United Nations Convention on the Rights of the Child, the 1950 European Convention on Human Rights has no provision relating specifically to children and young people, even if some rights, such as, for example, the right to education apply particularly to children. On the other hand, Article 1 of the Convention provides that states "shall secure" – and not "undertake to secure" as in most international treaties – to "everyone" the rights and freedoms defined therein. Children's rights are therefore human rights, and children are fully entitled to human rights.

Secondly, the supervision machinery set up by the Convention to ensure compliance with states' commitments under the Convention takes the form of a fully judicial body, the European Court of Human Rights. In line with Article 1 of the Convention, Article 34 provides that the Court may receive applications from "any person" claiming to be the victim of a violation of the rights set forth therein.
So there is no distinction in the text between man and women, foreigners and nationals; a child not of full age may apply directly to Court. Let us not forget that the Court also deals with interstate applications, that is, cases where a state refers to the Court an alleged breach of the provisions of the Convention by another state. Little use is made of this possibility in general, and no doubt even less where children’s rights are concerned, but it is useful sometimes to reactivate dormant provisions.

4. While it is important to restate the principle that everyone may apply to the European Court of Human Rights, we must avoid the fiction that children and young people can exercise fundamental rights in the same way as adults. As with many vulnerable categories, access to justice and, a fortiori, international justice is not a straightforward matter. There are legal as well as economic, social and cultural obstacles. It is precisely in this regard that proposals and suggestions will have to be made to ensure that children’s enjoyment of the rights safeguarded by the Convention is concrete and effective, and not purely theoretical. In this connection, the Court could or should possibly take a closer look at the possibility of accepting in some cases collective actions which would enable associations or groups not directly affected by the alleged violation to speak, as it were, on behalf of those who have no voice. More technically, the requirement that cases can only be brought before the Court once domestic remedies have been exhausted may in some cases represent an obstacle to minors being able to apply to the Court if they lack legal capacity in their own legal system.

In keeping with its case-law, the Court might therefore consider the possibility, in some situations, of waiving this condition for admissibility of applications. All these questions warrant consideration and in-depth study.

5. Where general principles are concerned, the following should be stressed: one of the golden rules guiding and aiding the European Court’s interpretative work is that the Convention is a living instrument which must adapt to the realities of the society in which we live. This is why the Court is obliged to adopt an open, dynamic, finalist and teleological method of interpretation, which may seem surprising, but which is essential. As Ricoeur put it, “the meaning of a text is not behind the text but in front of it”². In this connection, the development, alongside negative obligations, of positive obligations upon states and the horizontal application of the Convention, extending to and including relations between individuals, have played an important role in the field of children’s rights. As we shall see, the same applies to the extension of procedural safeguards. Moreover, it is interesting to observe, in both domestic and international law, that significant changes or innovations in justice systems often originate in the juvenile courts. It is as if this were a more open and more flexible area allowing new approaches to develop.

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¹ An application Center of Legal Resources, on behalf of Valentin Comanescu v. Romania is currently pending before the Grand Chamber. It concerns, in particular, the death in a psychiatric hospital of a young man of Roma origin who was HIV positive and severely mentally disabled. The application had been lodged on his behalf by a non-governmental organisation.

II Right to life 
6. The right to life, guaranteed by Article 2 of the European Convention of Human Rights, is an absolute, non-derogable right, not subject to any exception.

Death in custody 
7. The H.Y. and H vô. Y. v Turkey judgment of 6 October 2005 concerned the death of a minor after he had been placed in custody and transferred to a military hospital. The Court considered that the applicants' allegations that their son had died after being tortured by the security forces were not based on concrete and verifiable facts. It held that there had been no violation of Article 2 under its substantive limb but found a violation of Article 2 under its procedural limb: owing to the lack of thoroughness with which the investigation had been conducted, it had not been possible to establish with a higher degree of certainty the cause of the cranial trauma that had resulted in the death. 

Suicide in prison 
8. Generally speaking, suicide of detainees in prison is a growing source of concern and is intolerable. This concern is even greater in the case of minors. In the Cöşkal v. Turkey judgment of 9 October 2012, the Court found a violation of the right to life regarding a juvenile's suicide in an adult prison. The Court found that the Turkish authorities had not only been indifferent to the applicants' son's grave psychological problems, even threatening him with disciplinary sanctions for previous suicide attempts, but had been responsible for a deterioration of his state of mind by detaining him in a prison with adults without providing any medical or specialist care, thus leading to his suicide. 

III Prohibition of torture and inhuman or degrading treatment or punishment 
9. Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment, also enshrines an absolute, non-derogable right to which no exceptions are allowed under any circumstances whatsoever. In 1999, in the Selmioui v. France judgment which concerned acts referred to by the Court as torture, the Court expressed a general principle of interpretation: "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies". Furthermore, it is an established fact that, in assessing the seriousness of the treatment that has been inflicted, the Court takes account of the victims' personal characteristics, and particularly their age. Lastly, in the case of minors deprived of their liberty, the reports drawn up by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment should also be taken into account and carefully examined. These reports, based on the committee's on-the-spot visits, raise in a particularly pertinent way the serious problems posed by the detention of minors.

Police violence 
10. I will limit myself to the most important judgments. The Assenov and Others v. Bulgaria judgment of 26 October 1998 is a landmark judgment as far as procedural obligations are concerned. The applicant was a minor aged 14 when he was arrested and taken into police custody.
On the merits, the Court considered that it was impossible to establish on the basis of the available evidence whether or not the applicant's injuries had been caused by the police as he alleged. On the other hand, where an individual raises an arguable claim to have been ill-treated in breach of Article 3, the Court continued, that provision read in conjunction with Article 1 requires by implication that there should be an effective official investigation. So the Court held that there had been a procedural breach of Article 3 in the instant case based on the lack of an effective investigation.

11. In the Bati and Others v. Turkey judgment of 3 June 2004 the Court found a violation of the Convention in a situation where ill-treatments had been inflicted on young prisoners and a pregnant woman while in police custody. In the Court's view, this particularly violent and painful treatment harming not only the applicants' physical integrity but also their mental integrity had been intentionally meted out to them by agents of the State in the performance of their duties, with the aim of extracting a confession or information about the offences of which they were suspected. Taken as a whole and bearing in mind their duration and the aim pursued, these violent acts had been particularly serious and cruel and had been capable of causing "severe" pain and suffering. They had therefore amounted to torture.

12. The Okkali v. Turkey judgment of 17 October 2006 gave the Court the opportunity for further development of its case-law relating to the state's positive obligations in criminal proceedings against persons responsible for violations of Article 3 of the Convention against prosecuted minors. In the instant case, the applicant was a boy aged 12 who had suffered ill-treatment in a police station. His complaint resulted in the police officers receiving minimum sentences, with a stay of execution. Furthermore, his action for damages was dismissed as being time-barred. The Court considered that, as a minor, the applicant should have enjoyed greater protection and that the authorities had failed to take account of his particular vulnerability. Moreover, the proceedings had resulted in impunity for persons who had committed acts in breach of the absolute prohibition laid down in Article 3. In applying and interpreting national legislation, the judges had used their discretion to lessen the consequences of an extremely serious unlawful act rather than to show that such acts could in no way be tolerated. As it had been applied, the criminal-law system had had no dissonant effect capable of ensuring the effective prevention of unlawful acts such as those. In view of their outcome, the impugned criminal proceedings had failed to provide appropriate redress for an infringement of the principle enshrined in Article 3. The Court therefore held that there had been a violation of that provision.

13. In the case of Stoica v. Romania of 4 March 2008, a 14 year-old minor's allegations that he had been beaten by police officers because he was of Roma origin had not been followed up and the police officers concerned were not prosecuted. The Court found a violation of Article 3 as well as a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 3 of the Convention on the grounds that the applicant's injuries had been the result of inhuman and degrading treatment, that no effective investigation had been carried out into these abuses and that the police officers' behaviour had clearly been motivated by racism.

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7 Ibid., § 186.
8 ECHR, Bati and Others v. Turkey judgment of 3 June 2004, § 123.
9 ECHR, Okkali v. Turkey judgment of 17 October 2006, §§ 69-78.
Treatment in police custody
14. The Dushka v Ukraine judgment of 3 February 2011 concerned the unlawful detention and questioning without a lawyer and his parents of a 17-year-old. In this case the Court found that the fact that the applicant’s confession had been made in a setting lacking such procedural guarantees as the presence of a lawyer, and had then been retracted upon release, pointed to the conclusion that it might not have been given freely. It considered that such practice, especially given the applicant’s vulnerable age, qualified as inhuman and degrading treatment, in violation of Article 3 of the Convention11.

15. The Yağlı Yılmaz v. Turkey judgment of 1 February 2011 concerned a gynaecological examination of an unaccompanied minor girl in police custody. The Court considered that it could not agree with a general practice of automatic gynaecological examinations for female detainees, for the purpose of avoiding false sexual assault accusations against police officers. Such a practice did not take account of the interests of detained women and did not relate to any medical necessity. Thus, the lack of fundamental safeguards during the applicant’s police custody had placed her in a state of deep distress. The extreme anxiety that the examination might have caused her, and of which the authorities could not have been unaware given her age and the fact that she was not accompanied, enabled the Court to characterise the examination in the present case as degrading treatment12.

16. The Kuptsov and Kuptsova v. Russia judgment of 3 December 2011 concerned the pre-trial detention of and criminal proceedings against the first applicant, when he was a minor, on charges of several counts of robbery committed in conspiracy with others.

The Court held in particular that there had been a violation of Article 3 of the Convention on account of the inhuman conditions of the applicant’s detention in a police station for one week after his arrest13.

IV Right to liberty and security
According to its own wording, Article 5 of the European Convention on Human Rights, which safeguards the right to liberty and security, applies to “everyone”. The safeguard obviously extends to minors, and this is a point which does not lend itself to controversy.

Cases in which deprivation of liberty is allowed
18. The Convention allows the detention of a minor by lawful order for the purpose of educational supervision. It does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the imprisonment must be speedily followed by actual application of such a regime in a setting designed and with sufficient resources for the purpose. But, “the detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim”14. In the D.G. v Ireland judgment of 16 May 2002, the Court ruled that, in the absence of accommodation appropriate to a regime of educational supervision, the detention of a minor in prison for several months was unlawful15.

11 ECHR, Dushka v. Ukraine judgment of 3 February 2011, §§52-54.
12 ECHR, Yağlı Yılmaz v. Turkey judgment of 1 February 2011, §§52-54.
14 ECHR, Bouamar v. Belgium judgment of 29 February 1988, §§50 et seq.
15 ECHR, D.G. v. Ireland judgment of 16 May 2002, § 64.
In the Koniarska v. the United Kingdom inadmissibility decision of 12 October 2000, the Court found that deprivation of liberty for the purpose of protection was compatible with the Convention only if it served the aim of “educational supervision” within the meaning of Article 5 § 1 (d). Regarding the meaning of the words “educational supervision”, the Court considered that they should not be equated rigidly with notions of classroom teaching. In the context of a young person in local authority care, educational supervision must “embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned”.

In the case of Için and Others v. Ukraine of 21 December 2010, two boys, aged respectively 13 and 14, had been held in a juvenile holding facility for 30 days for stealing food and kitchen appliances from a school canteen, although they had already confessed to the theft and returned some of the stolen goods and were under the age of criminal responsibility. The Court held that the boys had been detained in an arbitrary manner, in a place that did not offer the required “educational supervision”, in violation of Article 5 § 1.10.

Length of pre-trial detention

In the Selçuk v. Turkey judgment of 10 January 2006, the applicant, who was a minor at the time of the events (aged 16), was remanded in custody for four months before being released. His trial was still pending. Having regard particularly to the fact that the applicant was a minor at the time, the Court found that the authorities had failed to convincingly demonstrate the need for the applicant’s detention on remand for that period and that Article 5 § 3 of the Convention of the Convention had therefore been breached17.

22. The Güveç v. Turkey judgment of 20 January 2009 concerned a minor aged 15 who had been tried before an adult court. Before he was found guilty of membership of an illegal organisation he had been held in pre-trial detention for more than four-and-a-half years in an adult prison, where he had not receive medical care for his psychological problems and made repeated suicide attempts. The Court found that the applicant’s detention had undoubtedly caused his psychological problems which, in turn, had led to his attempts to take his own life. Directly responsible for the applicant’s problems, the national authorities had failed to provide adequate medical care for him. Given the applicant’s age, the length of his detention in prison together with adults, and the failure to provide adequate medical care to him and to take steps with a view to preventing his suicide attempts, the Court concluded that there had been a violation of Article 5 § 3, as well as a violation of Article 3 of the Convention18.

V Right to a fair trial

The scope of Article 6 of the Convention

23. From a criminal-law standpoint, the protection system to which children in many countries have been subject obviously has some pernicious effects. In the R. v. the United Kingdom decision of 4 January 2007, the Court held that the warning given by the police to a minor who had indecently assaulted girls at his school did not fall within the scope of the guarantees of a fair trial since it did not involve the determination of a criminal charge.

Ability to participate in the proceedings

24. In the S.C. v. the United Kingdom judgment of 15 June 2004, the applicant, who was aged 11 at the time of the events, had been tried in an adult court and sentenced to two-and-a-half years’ detention. He alleged that, because of his youth and low intellectual ability, he had

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17 ECtHR, Selçuk v. Turkey judgment of 10 January 2006, §§ 30-37.
been unable to participate effectively in his trial. The Court considered it noteworthy that the two experts who had assessed the applicant before his court hearing had formed the view that he had a very low intellectual level for his age. The applicant seemed to have had little comprehension of the role of the jury in the proceedings or of the importance of making a good impression on them. Even more strikingly, the child did not seem to have grasped the fact that he risked a custodial sentence and, even once sentence had been passed and he had been taken down to the holding cells, he appeared confused and expected to be able to go home with his foster father. In the light of that evidence, the Court could not conclude that the applicant had been capable of participating effectively in his trial. The Court found that, when a decision was taken to deal with a child, such as the applicant, who risked not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than through proceedings directed primarily at determining the child’s best interests and those of the community, it was essential that he be tried in a specialist tribunal which was able to give full consideration to and make proper allowance for his particular difficulties and adapt its procedure accordingly.\textsuperscript{19}

\textit{Impartial tribunal}

25. In the \textit{Norrier v. the Netherlands} judgment of 24 August 1993, the Court found that there had been no violation of the Convention in a situation where a minor was disputing the impartiality of the juvenile judge. In effect – and here we are right at the heart of the protection-oriented model – the juvenile judge in the Netherlands at that time was the central actor in the investigation phase, in the trial stage, and in the judgment execution phase.

The applicant stressed that throughout the proceedings, i.e. during the pre-trial phase as well as at the trial, his case had been dealt with by one and the same judge who had taken all relevant decisions. The latter had acted as investigating judge and had decided on the applicant’s detention on remand. These decisions implied that the judge in question had reached the conclusion that there were serious indications; furthermore, he must also already have formed an idea of the sentence or measure to be imposed. The Government maintained that the applicant’s fears could not be held to be objectively justified, which was in line with the case-law of the Court\textsuperscript{20}. For reasons of fact connected to the actions performed by the judge, the Court found that there was not an objectively justified fear of a lack of impartiality.\textsuperscript{21}

26. The \textit{Adamkiewicz v. Poland} judgment of 2 March 2010 is important, especially in that it concerned the impartiality of a juvenile court on account of the presence on the trial bench of the judge who had directed the disputed investigation. More precisely, it concerned the successive performance by the same family-affairs judge of investigative duties and the functions of president of the juvenile court in a case concerning a fifteen-year-old who was accused of murder and was placed in a young offenders’ institution for six years by the judge. The Court’s conclusion was different from the one reached in \textit{Norrier v. the Netherlands} as to whether there had been an impartial tribunal, since during the investigation the family-affairs judge had made extensive use of the wide-ranging powers conferred on him by the law (deciding to institute proceedings of his own motion and conducting the procedure of gathering evidence), before committing the minor


\textsuperscript{20} ECHR, Foy v. Austria judgment of 24 February 1993, § 30.

\textsuperscript{21} As an example of procedural economy: “It is not necessary to go into the question raised ... whether Article 6 should be applied to juvenile criminal procedure in the same way as to adult criminal procedure” (§ 38 of the judgment).
for trial and sitting as a member of the trial court\textsuperscript{22}.

Rights of the defence

27. In the case of Salduz v. Turkey, the applicant, a minor, was arrested on suspicion of aiding and abetting an illegal organisation, an offence triable by the state security courts. Without a lawyer being present, he gave a statement to the police admitting that he had taken part in an unlawful demonstration and written a slogan on a banner. Subsequently, on being brought before the prosecutor and the investigating judge, the applicant sought to retract that statement, alleging it had been extracted under duress\textsuperscript{23}. In its judgment of 27 November 2008, the Grand Chamber of the Court held that, in order for the right to a fair trial under Article 6 § 1 of the Convention to remain sufficiently practical and effective, access to a lawyer had to be provided, as a rule, from the first police interview of a suspect, unless it could be demonstrated that in the particular circumstances there were compelling reasons to restrict that right. The significant number of relevant international law materials concerning legal assistance to minors in police custody shows the fundamental importance of providing access to a lawyer where the person in custody is a minor. In sum, even though the applicant had had the opportunity to challenge the evidence against him at his trial and subsequently on appeal, the absence of a lawyer during his period in police custody had irrevocably affected his defence rights\textsuperscript{24}.

VI Right to respect for private and family life

DNA profiles

28. The S. and Marper v. the United Kingdom Grand Chamber judgment of 4 December 2008 concerned in particular the retention by the authorities of fingerprints, cellular samples and DNA profiles taken from a minor charged with attempted robbery after criminal proceedings against him had been terminated by an acquittal. The Court held that there had been a violation of Article 8 of the Convention\textsuperscript{25}.

Foreign and immigrant minors

29. The Radovanovic v. Austria judgment of 22 April 2004 concerned the deportation of a foreign national who had lived in Austria since his childhood and had been convicted while still a minor of aggravated robbery and burglary. In addition to his sentence, an unlimited residence prohibition was issued against him. Without overlooking the gravity of the offences committed by the applicant, the Court noted that he had committed them while still a minor, that he had no previous criminal record and that part of his sentence had been suspended. The Court was not therefore convinced that the applicant constituted a serious danger to public order which necessitated the imposition of the measure concerned. Further, finding that the applicant’s family and social ties with Austria were much stronger than with Serbia and Montenegro, the Court considered that the imposition of a residence prohibition of unlimited duration was an overly rigorous measure. A less intrusive measure, such as a residence prohibition of a limited duration, would have sufficed.

\textsuperscript{22} ECHR decision in Adamskiwicz v. Poland, 2 March 2010, §§ 104 et seq.
\textsuperscript{23} ECHR (GC), Salduz v. Turkey judgment of 26 April 2007, §§ 23-24.
\textsuperscript{24} Ibid., §§ 56-63. This case-law has been confirmed in subsequent judgments (see, in particular, ECHR, Özüey v. Turkey judgment of 29 January 2009, §§ 131-133, and ECHR, Soykan v. Turkey judgment of 21 April 2009, § 57).
\textsuperscript{25} ECHR (GC), S. and Marper v. the United Kingdom judgment of 4 December 2008, §§ 125-126.
The Court concluded that the Austrian authorities, by imposing a residence prohibition of unlimited duration against the applicant, had not struck a fair balance between the interests involved and that the means employed had been disproportionate to the aim pursued, in violation of Article 8 of the Convention.  

30. Finally, to my mind, the Grand Chamber's *Maslov v. Austria* judgment of 23 June 2008 sets out fundamental principles. In this case, the applicant had been served an exclusion order at the age of 16, prohibiting him from living in the country for 10 years, as a result of convictions for offences committed when he was 14 and 15 years old. The Court considered the young age at which the applicant had committed these offences to be a determining factor.  

It also pointed out here that where expulsion measures against a juvenile offender are concerned, the obligation to take the best interests of the child into account includes an obligation to facilitate his or her reintegration into society. Such aim cannot be achieved by severing family or social ties through expulsion, which must remain a means of last resort in the case of a juvenile offender. The Court therefore concluded that the imposition of an exclusion order had been disproportionate to the legitimate aim pursued.

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27 *ECtHR (GC)*, Maslov v. Austria judgment of 23 June 2008, § 81.
