

JUSTICE FOR CHILDREN

The situation for children in conflict with the law in Afghanistan



ACKNOWLEDGEMENTS

This report is the result of a collaboration between UNICEF and AIHRC. It builds on the continued efforts of UNICEF and AIHRC for the reform and development of the juvenile justice system in Afghanistan and on knowledge and experience gained from ongoing monitoring of the situation of children in conflict with the law.

Both organisations would like to recognise the support and facilitation of the Ministry of Justice, in particular Mohammad Seddiq Seddiq, Head of Juvenile Justice Department, as well as the management and staff in juvenile detention facilities.

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Hasan Faiz, Abdul azim Akid, Rahima Halimi, Sakina Sharifi, Parwiz Ahang, Najib babrakzay, Shamsuldin Tanwir, Ghulam Hussain Bewas, Salamat Azimi, Zamin Sabire, Addul Rauoof Moallem, Spojmay Saeed and Norozali Rahimi.

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The opinion expressed are those of the authors and editors and do not necessarily reflect the policies or views of UNICEF.

FOREWORD

There has been increasing attention by the government of Afghanistan and civil society to juvenile justice reform in Afghanistan in recent years. The adoption of the Afghan Juvenile Code in 2005 is the first major step in the development of the administration of juvenile justice in the country. Yet, there remain gaps between the Juvenile Code and the international standards and norms on children in conflict with the law. Afghanistan still has a long way before achieving full compliance with the Convention on the Rights of the Child regularly in the areas of prevention of juvenile offending, diversion and the use of deprivation of liberty only as a measure of last resort.

The study was initiated in order to assist the Government of Afghanistan in fulfilling their duties towards children in conflict with law and also to urge for full implementation of the Juvenile Code.

The study shows that children in detention face various rights violations- including maltreatment, lack of access to education and health services. Also, lack of due process in juvenile justice system appears to be a serious concern. A punitive and retributive approach to juvenile justice seems to be still predominant in Afghanistan. We strongly advocate for measures to prevent and reduce detention or imprisonment of children and prevention programmes involving vulnerable families, communities and children at risk- we need to invest more to prevent children coming into conflict with the law than just to assist children already in detention.

We hope that the present study will offer a basic dataset and tool to further develop assessment, evaluation and service and policy for children in conflict with the law in Afghanistan.

Dr. Sima Samar
Chair Person
Afghanistan Independent Human Rights Commission

Catherine Mbengue
Representative
UNICEF Afghanistan

I. INTRODUCTION

State Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

UN Convention on the Rights of the Child, Article 40

Juvenile justice, as opposed to criminal justice, recognises children who come into conflict with the law as victims. It takes into account the fact that children lack the maturity of adults (morally and cognitively, physically and emotionally). It recognises the vulnerability of children to experimentation, victimisation, and to becoming involved in crime and that the problems experienced in childhood or adolescence can have life-long implications. The overwhelming majority of children coming into conflict with the law are victims of neglect, exploitation, and social and economic hardship. These children need and have a right to proper care, guidance, protection and the opportunity of social reintegration – needs on which the juvenile justice system should be based.

In this spirit the Government of Afghanistan adopted the *Juvenile Code – Procedural Law for Dealing with Children in Conflict with the Law* in March 2005 incorporating the basic principles of juvenile justice as expressed in the CRC.ⁱ Following the enactment of this legislation, awareness-raising, training and capacity-building programmes were undertaken with law enforcement and judicial bodies as well as other stakeholders. However, monitoring visits by AIHRC have highlighted that many of the provisions laid out in the legislation have not been implemented and that two years after the adoption of the Juvenile Code many of the authorities in charge of its implementation are even unaware of the rules stipulated. In the absence of a proper system, there is very little information available on how legal standards are being applied to children in conflict with the law throughout the country.

This study, undertaken in cooperation with UNICEF, endeavours to give a greater understanding of the situation of children in conflict with the law in Afghanistan and the juvenile justice system's treatment of them. It builds on the continued leadership and support that UNICEF has provided in the juvenile justice sector and in particular technical support to AIHRC in monitoring the situation of children in conflict with the law.

Greater knowledge and understanding is critical to developing appropriate interventions for prevention, protection and reintegration of children who are at risk or in conflict with the law. It is also essential for the development and promotion of alternative measures to the institutionalisation of children in the juvenile justice system.

This paper presents the findings of research with children in conflict with the law in 22 provinces of the country. It highlights the present implementation of legal standards for the administration of juvenile justice as expressed both in national and international legislation. Finally, urgent recommendations are made to key stakeholders for the protection and promotion of the rights of children in conflict with the law.

International Standards

International standards, ranging from prevention to disposal and social reintegration, provide a framework of agreed guidelines for the administration of juvenile justice:

- ✓ Convention on the Rights of the Child 1989 (CRC)
- ✓ UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing (Rules)
- ✓ UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 (JDLs)
- ✓ UN Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines)
- ✓ UN Rules for Non Custodial Measures (Tokyo Guidelines)
- ✓ Vienna Guidelines for Action on Children in the Criminal Justice System 1997
- ✓ International Covenant on Civil and Political Rights 1966 (ICCPR)
- ✓ Convention against Torture 1984 (CAT)

Internationally much research has been conducted into the nature of children coming into conflict with the law and consequently there is better understanding on the best ways to prevent young offending. Both child rights advocates and law enforcement officials recognise that the protection of children's rights is essential in preventing young offending and promoting a just and peaceful society.ⁱⁱ These issues and key international standards for the administration of juvenile justice are presented in more detail in throughout this document.

CONVENTION ON THE RIGHTS OF THE CHILD

The key international instrument related to children is the UN Convention on the Rights of the Child (CRC). The convention is an international treaty which is legally binding once ratified. It details the obligations of the State for the survival and development of the child. As well as specific provisions related to juvenile justice the CRC contains key cross-cutting principles:

- **Non-discrimination.** All rights apply to all children without exception (Article 2);
- **Best interests of the child.** All actions concerning the child should take full account of his or her best interests (Article 3);
- **Survival and Development.** The State's obligation to ensure the child's survival and development (Article 6);
- **Participation.** The child's right to express an opinion and to have that opinion taken into account in any matter or procedure affecting the child (Article 12);
- **Role of Parents:** Parents or legal guardians have primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern (Article 18);
- **Implementation of rights:** The State's obligation to implement the rights of the CRC (Article 4);

Article 37 addresses the issue of deprivation of liberty. Most importantly it states the principle that **deprivation of liberty should be a last resort** and for the shortest period of time possible. Specifically the Article:

- **Prohibits torture, cruel treatment or punishment,** capital punishment, life imprisonment, and unlawful arrest or deprivation of liberty of children.
- States that if a child is deprived of his or her liberty this must be done in a manner which takes account of the special needs of a person of their age and in a manner which is **respectful of the child's inherent human dignity.**
- Obligates the government to **separate children from detained adults**, to provide children contact with family, and to provide access to legal and other assistance.

Article 40 is the most detailed article of the CRC and addresses the administration of juvenile justice. It legally binds states to the following principles of juvenile justice:

- **Dignity:** the right of every child in conflict with the law to be treated with respect and dignity;
- **Consideration of Age:** the treatment of a child should take into account the child's age;
- **Reintegration:** the aim of juvenile justice system is to promote the reintegration and rehabilitation of the child;
- **Diversions:** Whenever appropriate, measures for dealing with children without resorting to judicial proceedings should be used, provided that human rights and legal safeguards are fully respected;
- **Minimum guarantees:** Article 40 provides for minimum guarantees of children's rights in the administration of juvenile justice, including presumption of innocence, access to legal support, confidentiality etc.

National Context

The Government of Afghanistan ratified the UN Convention on the Rights of the Child in 1994 and in 2005 passed the Juvenile Code enacting these international treaty obligations into national law. Since this time concerted efforts have been made for the development of the juvenile justice system in Afghanistan:

- In 2005 the Juvenile Justice Administration Department (JJAD) overseen by the Ministry of Justice was established with financial and technical support from UNODC and UNICEF
- Over 250 professionals have been trained (judges, prosecutors, police, and social workers)
- In Kabul, juveniles are housed in a newly constructed juvenile rehabilitation centre, however for the majority of provinces where juvenile rehabilitation centres exist these are located in a rented house outside of the compound of the adult prison. These centres are often only available for male juveniles while female juveniles are detained with adults in the women's prison. In Kandahar and Jalalabad the juvenile rehabilitation centre is a separate wing within the adult prison.
- Establishment of first 'open' juvenile rehabilitation centre in Kabul
- Specialised juvenile prosecutors' offices have been established in 5 provinces (Balkh, Herat, Kandahar, Kabul and Kunduz)

However, in reality, children in conflict with the law may have felt little impact from these changes. Reviews of the juvenile justice sector have highlighted the lack of coordination between implementing ministries and agencies, and the delayed implementation of juvenile courts, legal aid, and social support systems.ⁱⁱⁱ

To date only three Juvenile Primary Courts have been established (in Kabul, Mazar and Jalalabad) with two more provinces in the process of establishing these courts. 28 provinces remain with no formal plans, in spite of the fact that the Juvenile Code clearly stipulates that cases involving juveniles should be processed in specialised juvenile courts. As such justice for children in conflict with the law remains very much rooted in the criminal justice system.

These issues have been recognised in the National Justice Sector Strategy 2008 where juvenile justice has been identified as cross-cutting area for reform. The Strategy identifies three overarching goals: to improve institutional capacity to deliver sustainable justice services, to improve coordination and integration within the justice system and with other state institutions; and, to improve the quality of justice. With regard to juvenile justice, the strategy has set objectives for implementation of reform by 2010 including:

- Developing regulations, protocols, and manuals to implement the Juvenile Justice Code and international norms and standards on juvenile justice;
- Developing a common approach to re-integration of juveniles with their families, in cooperation with the Ministry of Social Affairs;
- Increasing the number of justice social service professionals with specialized training in juvenile issues; and
- Improving and expanding juvenile justice facilities and programs throughout the country, with a special attention to non-custodial measures such as community-based interventions.^{iv}

II. METHODOLOGY

This study aims to provide an assessment of the situation of children in the juvenile justice system in Afghanistan, and in particular has the following specific objectives:

- Assess the situation of children in juvenile rehabilitation centres;
- Assess implementation of procedural law for dealing with children in conflict with the law;
- Investigate the behaviour of different actors in the juvenile justice system towards children.

Research Methodology

Detailed structured questionnaires for interviewing the children were developed by AIHRC with the technical input of UNICEF.

Data collection was conducted in 22 provinces^y where there were existing juvenile rehabilitation centres for children over a period of one month by trained field researchers. All males and females encountered in the centres below the age of 18 years were approached to be interviewed. Only those children willing to participate were interviewed after signing a consent form.

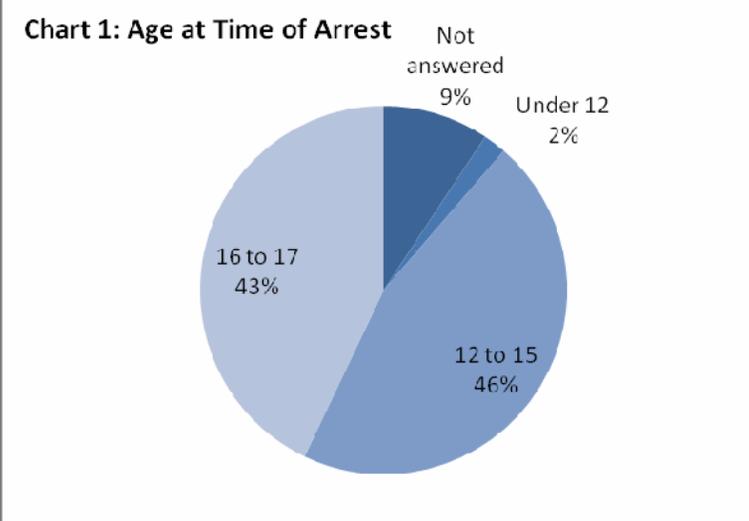
A total of 258 questionnaires were collected. 3 questionnaires were considered invalid due to incomplete information while a further 8 questionnaires of adults who were 18 years at the time of arrest were also removed. A total of 247 questionnaires were input for analysis.

Table 1: Age at Time of Interview

Age	Male	Female	TOTAL
Under 12	4	1	5
12 to 15	89	12	101
16 to 18	117	24	141
TOTAL	210	37	247

2% of respondents reported they were less than 12 years of age at the time of arrest, while 46% were between 12 and 15 years of age, and 43% 16 or 17 years of age.

The most significant number of respondents were in Kabul and Herat accounting for 30% and 18% of respondents. After these provinces Kandahar, Ningharhar and Balkh accounted for 4-6% of respondents.



Further information was collected from the findings and observations of the field research team and the collection of a total of 25 case studies from children in juvenile rehabilitation centres in six provinces. Selected case studies have been included in this report.

Limitations of the Study

The scope of this study is limited. The study, based on the information provided by children in structured questionnaires, is largely of a quantitative nature although case studies were collected to provide some basic qualitative information.

Data collection was limited to children in juvenile rehabilitation centres (formal and informal) and therefore was conducted in 22 out of 34 provinces. The study does not provide information about children who were not referred to rehabilitation centres.

Therefore, children who are kept in police facilities, children who are treated as adults by the justice system, and children who are not formally registered in the justice system have not been covered by this study. These are perhaps the most vulnerable groups of children in conflict with the law and future investigation should determine the extent of these issues.

In some instances it was not possible to maintain complete privacy for the duration of the questionnaire meaning that difficult or sensitive questions may not have been answered by all respondents.

III. KEY FINDINGS

Background of Children in Detention

Children’s socio-economic background and the environment they live in at school, work and in the community, influence their behaviour and the risk of them coming into conflict with the law. The role of society and environment is well acknowledged in the “Beijing Rules” and it is established that these factors could be taken into account in any response to children in conflict with the law (see Box 1).

When asked about the economic status of their family, 55% of children rated their family as poor or very poor with no significant difference between the economic situation of males and females. 42% of respondents rated their family as ‘medium’ economic status, while not one single respondent referred to their family as being rich.

Overall 69% of children reported that they were working before their arrest and detention (males 76%, females 32%).

In terms of educational status, notably the majority of females were illiterate (females 62%, males 36%). Only 8% of females and 28% of males had advanced beyond primary level.

Another 7 males had received a religious education and 1 male was able to read and write without receiving any formal schooling.

The mother tongue of the majority of respondents was Dari (64%), followed by Pashtu (31%) and Uzbek (4%).

Box 1: The Principle of Proportionality

The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions.

(Official Commentary of the “Beijing Rules” Rule 5

Chart 2: Self-Reported Economic Status

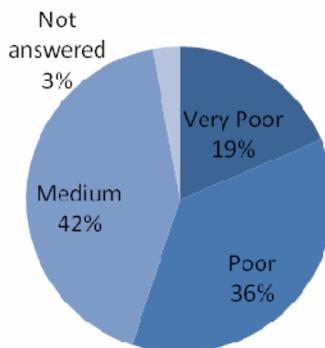


Chart 3: Educational Status



Legal Status of Children in Detention

The UN Convention on the Rights of the Child, international guidelines on juvenile justice and the Juvenile Code all clearly state that the deprivation of liberty (detention) of a child should be used as a means of last resort. This should be restricted to cases of serious acts of violence or in the case of persistent serious offenders and only when there are no other appropriate options. In the same way, given that an individual is presumed to be innocent until a judicial authority rules otherwise, the use of detention pending trial is highly discouraged.

Use of Pre-Trial Detention

This study revealed that at least 41% of respondents were in the juvenile rehabilitation centres awaiting trial or delivery of the verdict from the court, while 45% reported that they were serving their sentences. Another 3% of juveniles reported lack of guarantee as the reason for their detention.

Box 2: Deprivation of Liberty as a Last Resort

Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

Beijing Rule 13.1

Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.

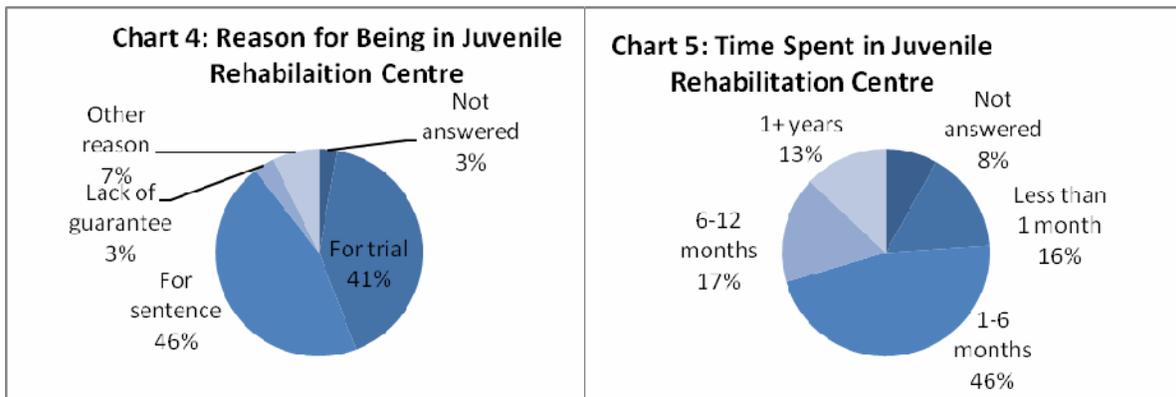
Beijing Rule 17.1

Confinement of a child is considered to be the last resort for rehabilitation and re-education of the child. The court shall consider minimum possible duration for confinement based on the provisions of this code.

Juvenile Code, Article 8

The juvenile court has the authority at the time of issuing pre-trial detention order to consider other appropriate alternatives instead of detention.

Juvenile Code, Article 10.3



According to the Juvenile Code the maximum amount of time a juvenile can be detained from arrest to completion of trial is 40 days. With 41% of respondents in the juvenile rehabilitation centres awaiting trial it is surprising that only 16% of respondents had spent less than 1 month in the juvenile rehabilitation centres, while 46% of respondents reported having been detained in the centre for a period of 1-6 months. In total 30% of respondents had spent more than six months in the juvenile rehabilitation centres.

DETENTION OF CHILDREN PENDING COURT DISPOSITION

According to the Juvenile Code, from arrest to completion of trial no child can be detained for more than 40 days:

<p>Arrest until Submission of Case to Prosecutor 1 day (Extendable to 2 days)</p>	<p>Completion of Investigation by Prosecutor 1 week (Extendable to 3 weeks)</p>	<p>Preparation and Submission of Indictment 1 week</p>	<p>Issuance of Decision by Court 10 days (from receipt of file)</p>
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Source: Juvenile Code and Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law (UNICEF)

UNLAWFUL PRETRIAL DETENTION
17 year old boy, Eastern Region

A 17 year old boy was arrested by police but was not told of any charge against him. He was taken to Shegal district office and then transferred to the juvenile home where he was classed as accomplice to murder. He was finally informed about his rights by a lawyer.

He says, "I am not satisfied with the judicial procedures. It is four months that I am here without trial. Even the primary court has not taken any decision about my case and no verdict has been issued. My parents come to visit me once or twice a week. We are all children and very sad about the lack of facilities."

Children below the Age of Criminal Responsibility

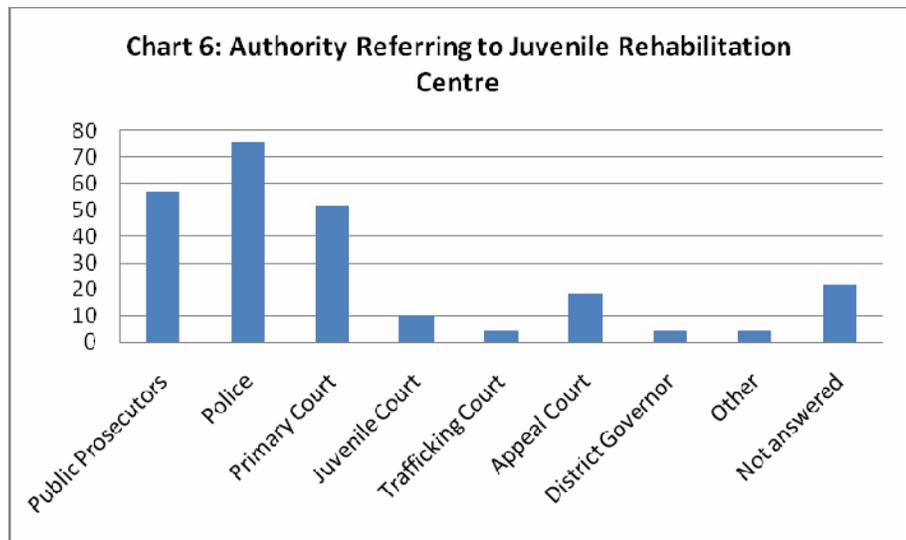
According to the Juvenile Code children below the age of 12 years old are not considered to be criminally responsible. However 5 children below the age of 12 years were found in the juvenile rehabilitation centres. Not one of these had been sentenced to detention and 4 of these children had spent more than 1 month in the juvenile rehabilitation centre. It is important to note that none of these children below the age of criminal responsibility were detained for their own protection but were detained in relation to cases of fighting, robbery/theft, and murder/kidnap.

Gender of Children in Juvenile Rehabilitation Centres

Only 15% of those children found in the juvenile rehabilitation centres were female. This reflects both that girls seem less likely to come into conflict with the law, given that they are restricted in movement outside of their homes but also that many girls are processed in the adult system. Many of the girls encountered in the facilities reported being first detained in female adult facilities before interventions to have them referred to the juvenile facilities. In some provinces juvenile rehabilitation centres existed only for boys.

Referring Authority

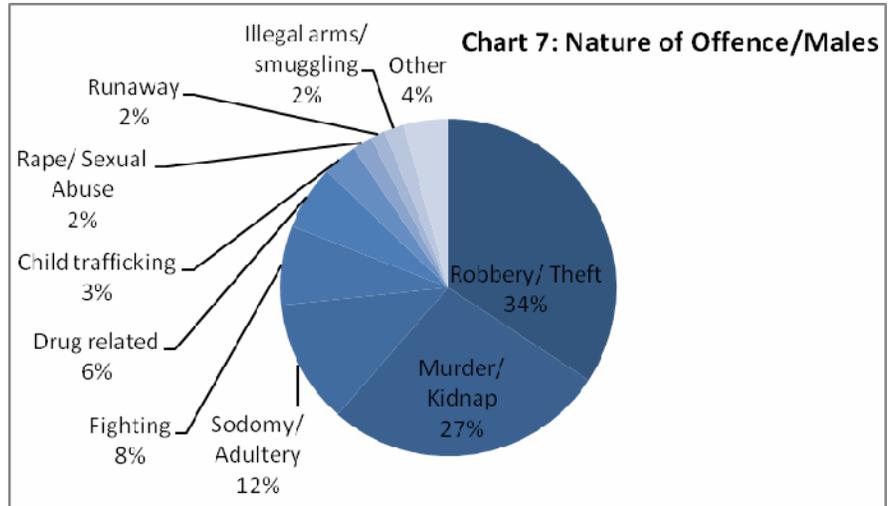
The majority of children were referred to the juvenile facilities by police (31%), public prosecutors (23%), and the primary court (21%). Only 4% of juveniles were referred from a special children's court, while 3% of juveniles were referred by extra-judicial authorities (including district governor and American forces).



The Nature of Juvenile Offences

Although children can be responsible for very serious crimes such as rape and murder, most of their offences tend to be of a less serious nature and usually property related. Given that the research for this study was conducted in the headquarters of provinces where there were juvenile rehabilitation centres it should be expected that in general there would appear to be a higher proportion of serious cases as these are more likely to be referred to the formal justice system as well as to the province headquarters. Less serious offences may often be dealt with outside of the formal justice system and in the locality of where the offence was committed.

For males, 34% of cases were related to robbery/theft while 27% of cases were related to murder or kidnap. However, in many of these cases the juvenile may not have been the sole or even the primary defendant. 12% of cases were related to sodomy or adultery while only 2% of cases were related to rape or sexual abuse. 8% of male



respondents had been charged in relation to fighting while a further 2% of cases were of boys who had run away from home.

Many juveniles charged with male to male sex or adultery are as young as 13 years of age, and even in one case registered in the Ministry of Justice data as young as 11 years old and therefore below the age of criminal responsibility. In many of these cases it appears that the juveniles are victims of child abuse and exploitation rather than having committed an offence. They are arrested and detained as offenders instead of being provided the protection and support that they need.

WHAT CRIME HAS BEEN COMMITTED? 15 year old boy, Northern Region

A 15 year old boy was charged with the kidnap of a friend.

The two boys had gone to Kabul to find work but were unable to find good wages so they decided to return to their village.

On the way back the friend decided to visit his uncle but never returned. The boy was charged with kidnapping him and taking him to Kabul.

He has been in detention for one month awaiting trial.

WHO IS THE VICTIM?

14 year old boy

A 14 year old boy was arrested on a charge of pederasty, allegedly spending 6 months as a passive sodomite with a man in a nearby village. The boy claims that he was threatened by the man with a pistol and forced to go and stay with him.

The man has been released on bail but the boy remains in the rehabilitation centre. The police and the attorney say that the case will be finalised according to law as soon as possible.

The cases for which females were prosecuted were significantly different. At least 56% of females were charged with so-called 'moral offences' including running away from home or adultery/sodomy. These included many cases where the girl was clearly a victim of abuse (see case study – Who is the Victim?).

Less than 30% of females were charged with a serious offence where they posed a threat to others – 11% with trafficking of children, 8% with murder or kidnap and another 11% with a variety of cases from forgery to fighting.

Another 14% of girls were in detention as they were lost or without shelter, rather than having committed a crime. In these cases detention appears to be used as a tool for protection and social control – no boys reported being in detention as a result of being lost or without shelter.

The prosecuted action of running away from home is not a crime under Afghan statutory law as such and has its base in customary practice. A girl might be accused of running away from home when she has left her family or spouse.^{vi} As soon as she leaves the house in the presence of a man it is assumed that she has committed adultery (*zina*) until proven otherwise.

According to a report by Medica Mondial, in most reported cases the accused female was trying to escape from an abusive family environment or to prevent being married against her will.^{vii} Under Afghan law it is prohibited to force a woman to get married against her will and therefore such cases should not be prosecuted. Although there are some boys who are arrested for adultery or running away from home the criminal justice system seems to place more emphasis on prosecuting girls for such crimes.

WHO IS THE VICTIM?

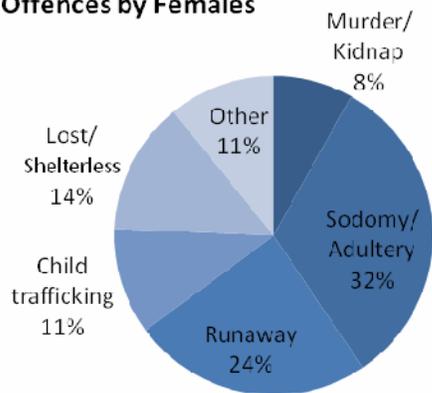
14 year old girl, Northern Region

A 14 year old girl was sold by her step-father for marriage to an 80 year old man for \$2000. She was then sold on to another man for \$5000.

When the man had sexual intercourse with her she went into a coma and was transferred to hospital where police began to investigate the case.

She was transferred after 3 days to the prosecution office and then to a rehabilitation centre. She remained there for 3 ½ months with the judge insisting she should marry the man. Only after intervention of AIHRC and the Child Protection Action Network was she finally released from illegal detention.

Chart 8: Nature of Offences by Females



**IN NEED OF PROTECTION NOT PUNISHMENT
14 year old girl, Western Region**

A 14 year old girl was arrested when trying to run away from her home as she would not accept her fiancé. She has been in detention for 3 months in the juvenile rehabilitation centre as part of a 1 year sentence.

She is below the legal age for marriage, yet she has still been sentenced. Her father has threatened to kill her and she does not know where she will go after she is released.

With regards to age, two children who had not reached the age of 12 years were charged with murder or kidnapping, two were in detention accused of robbery/theft while one child was in detention for fighting. According to the Juvenile Code no one under the age of 12 can be considered responsible for a crime yet all of these children had been charged with a crime. Not one child under the age of 12 was in the juvenile centres for welfare reasons.

Experiences of Physical Force, Abuse and Torture

Although juveniles are entitled to special measures for their protection in the criminal justice system many had been victims of physical force, abuse or even torture.

Torture is defined in the UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment as:

- Infliction of severe pain or suffering whether physical or mental;
- Intentionally inflicted;
- Inflicted for obtaining information or a confession or to punish for the act committed by him or any other;
- Done in consent or acquiescence of a public official or any other acting in an official capacity.

(UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment)

All juveniles interviewed were asked to describe their treatment during arrest. 48% reported being beaten and another 8% reported verbal abuse. Only 39% of juveniles reported 'normal treatment' during arrest. While 11% of females reported being beaten during arrest, the figure for males was 55%.

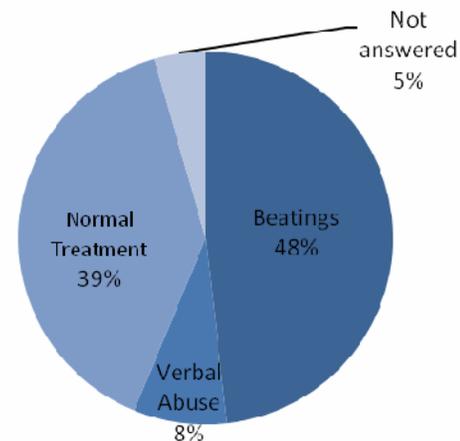
Although the Juvenile Code clearly states that juveniles may not be handcuffed unless there is a risk they will runaway or pose an imminent threat to themselves or others, 62% of respondents reported being handcuffed during arrest (72% of males and 5% of females). In many interviews children reported that they were handcuffed and shackled in the juvenile rehabilitation centres at night for security reasons or during transportation to court or hospital. The juvenile code does not permit the use of handcuffs or shackles in these circumstances.

Only 11% of females reported being arrested by female police personnel. 36% of respondents reported being ill-treated in police custody, while 21% reported not being ill-treated. 43% of juveniles did not want to answer the question.

It should be noted that there was not a significant difference in the proportion of juveniles reporting being beaten or ill-treated according to the age group. Children under 16 years of age were just as likely to report having been beaten as those in the older age group.

In police custody 53% of juveniles had been detained together with adults (49% of girls and 54% of boys).

Chart 9: Treatment during Arrest



VICTIM OF POLICE TORTURE 14 year old boy, Northern Region

A 14 year old cattle grazer was detained on alleged charge of committing sodomy with another child. He was arrested from the village and battered by the police harming his left ear resulting in loss of hearing.

The police did not communicate the charges against him and he was kept with adult inmates in police custody. During questioning he was beaten by the criminal investigation officer resulting him sustaining injuries to his legs.

The boy did not know the contents of the statement he was made to sign. He was transferred to the juvenile home after his case was registered with the prosecution office.

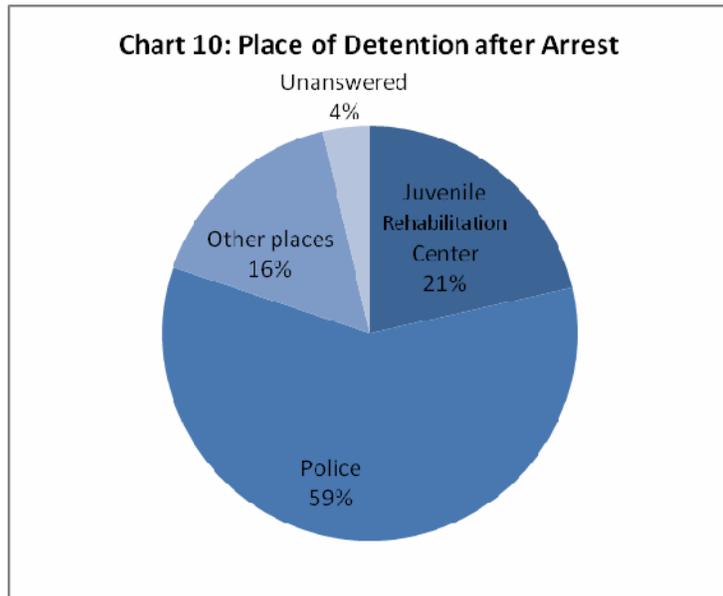
It is the first time he has been arrested. He is afraid of the police and is concerned about his future.

Older children were more likely to be detained together with adults – 40% of juveniles below 12 years, 47% of those between the ages of 12 and 15, and 58% of juveniles above 15 years were detained together with adults.

The situation in the prisons and the juvenile rehabilitation centres was different – 13% of respondents reported ill-treatment or abuse by jailors, adult inmates or security personnel (5% of females and 14% of males).

As is common in most countries, it is clear that during and immediately after arrest juveniles are most at risk of abuse or torture in the justice system and it is police personnel who are most likely to be perpetrators. It is also the time when children are placed most at risk of abuse from adults together with whom they are detained.

Although juvenile rehabilitation centres existed in all the provinces covered in this study, it remains the case for at least 59% of juveniles that they will experience police detention before being referred to the juvenile rehabilitation centre. Only 21% of juveniles were transferred or taken detained directly into the rehabilitation centres.



In addition in 32% of cases parents or guardians were not informed of the arrest of the child (36% boys, 8% girls) for a variety of reasons. 10% of respondents were actively denied from meeting their parents or guardians and so increasing their vulnerability.

**VICTIM OF POLICE TORTURE
13 year old boy, Western Region**

A 13 year old boy who worked as a carpet weaver accused of stealing Afs.1000 was arrested by police from hospital after he had drunken rat poison. Upon arrest he was handcuffed and slapped and beaten by police who intimidated and threatened him into making a confession statement. The boy also reported being beaten with the barrel of a gun.

After one day the boy was transferred to the juvenile home after which he reported no ill-treatment. Asked about the police the boy said, *"I hate and fear the police because they have beaten me."*

The Right of Due Process

Due process is the recognised right of any person accused of an offence to benefit from a fair trial. Many of the elements of due process come into force at the moment of arrest – presumption of innocence, right to be informed of exact charges, right to legal assistance, and the right not to be forced to confess or to give incriminating evidence. The trial is not deemed to be fair if these rights are violated.^{viii}

This study revealed a wide variety of rights infringements which meant that children were not receiving fair trials in the justice system. These infringements existed at all stages from the moment of arrest to the trial itself.

Many juveniles often sign documents involuntarily, which they do not understand and without the advice of a lawyer. Although the Afghan Constitution states that a voluntary confession is that given before an authorised court in a sound state of mind, in practice it is very difficult for juveniles to challenge and revoke forced statements when their case is brought before the court.

In particular, only 8% of juveniles were explained their rights upon arrest. 56% of respondents reported that they had not given their statement voluntarily, while only 38% of juveniles had seen 'their' statement.

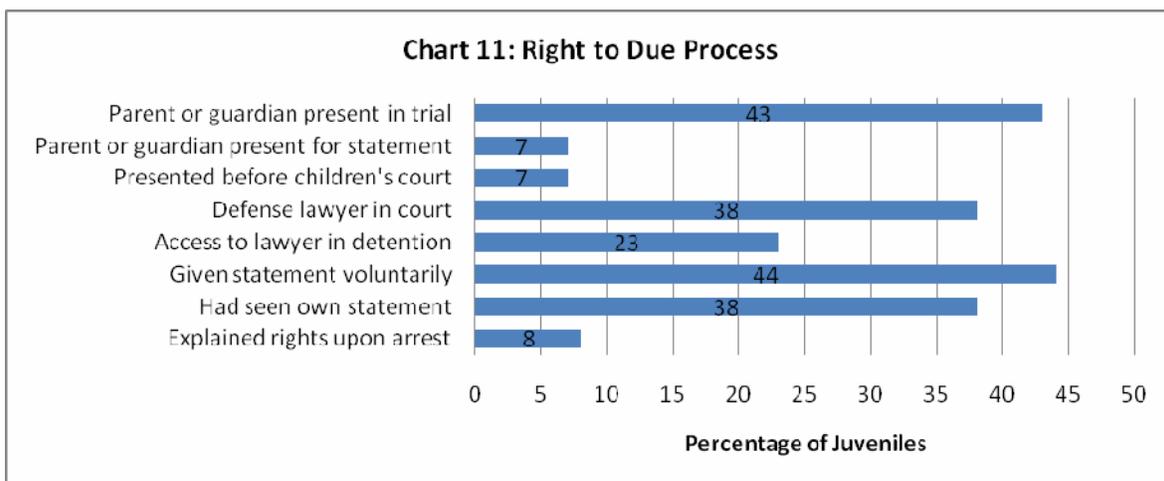
In detention only 23% of respondents had access to a lawyer (17% of males and 62% of females) while in court this increased to only 38% of juveniles having a defence lawyer. In relation to their status as juveniles, only 7% were presented before a children's court, while only 8% of children had a parent, guardian or social worker present when their statement was taken, and only 43% had a parent or guardian present during the trial. This is significant because the immediate assistance of family members and/or legal representatives is crucial in protecting children in the justice system and ensuring their access to rights. The risk of torture and abuse is reduced where family members, legal guardians and lawyers are actively involved in a juvenile's case.

However, to date there is not systematic national state-supported legal aid service in place. Those juveniles who do have access to a legal representative often complain about the service they receive (see case study – Victim of Injustice). Without legal standards or policies to which legal representatives must adhere there exist few options for juveniles to even register complaints against their legal representative.

Minimum Guarantees of a child alleged as or accused of having infringed penal law:

- (i) To be presumed innocent until proven guilty according to law;
- (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
- (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not in the best interests of the child, in particular, taking into account his or her situation, his or her parents or legal guardians;
- (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
- (v) If considered to have infringed penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
- (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
- (vii) To have his or her privacy fully respected at all stages of the proceedings.

(UN Convention on the Rights of the Child, Article 40b)



VICTIM OF INJUSTICE

14 year old boy, North-eastern Region

A 14 year old boy who worked as a domestic labourer was arrested by plain clothes police on charge of pick-pocketing. The boy claims he was arrested because a policeman had relations with someone who wanted to marry to the boy's sister. Since his family did not allow the marriage, the boy believes he was arrested.

In custody the boy reports he was beaten severely and also beaten with a cable. He was kept in police custody for 4 days. The boy has been explained by the person that if he gives his sister in marriage he will be released.

The boy's employer has visited him twice. He has a defence lawyer but complains that he does not follow-up his case. The boy also says that he was beaten in the prosecution office and was forced to make statements.

The boy has been in the juvenile rehabilitation centre since 2 months now without having been sentenced. The boy has never been arrested before and complains of the injustice which has been done against him.

Age Determination: Who is a Juvenile?

Age is a crucial determinant for the management of children coming into conflict with the law. A juvenile is understood as someone who has reached the age of criminal responsibility (12 years) but not reached the age of full adult majority (18 years). A child below the age of 12 years is not considered to be criminally responsible and therefore cannot be deemed to be in conflict with the law. A child below 12 years is deemed in need of care and protection and should be supported accordingly.

According to Article 39 of the Juvenile Code, special considerations exist for juveniles as such that a child who has completed 12 years of age but not reached 16 years if sanctioned will be liable to a maximum sentence of a third of that stipulated in the Penal Code for adults. Similarly, a child who has completed 16 years but not completed 18 years will be liable to a sentence which does not exceed half the maximum sentence stipulated for adults.

However, the determination of age is often difficult. Many children do not know their age or date of birth and do not have ID cards. An effective birth registration system is not in place and it is estimated that less than 10 per cent of births are registered.^{ix} This room for confusion increases the likelihood of simple mistakes happening and more significantly opportunity for abuse of the system by law enforcement officials, plaintiffs and defendants either processing children as adults (to avoid complications or secure a conviction) or adults as children (to benefit from leniency in sentencing and improved conditions in juvenile rehabilitation centres).

For a juvenile, to be wrongly identified as an adult can have life-changing consequences. In a situation where a child should be afforded consideration of his/her maturity and capacity and therefore special protection, guarantees of due process, and support for reintegration (if found guilty) to be processed as an adult puts the child at increased risk of abuse (in detention with adults) in a system which makes no consideration for the child's situation, age or maturity (principle of proportionality) and which is largely based on retributive justice. For a child under the age of twelve and therefore below the age of criminal responsibility and entitled to special care and protection, to be mistakenly identified as juvenile means entry into the formal juvenile (criminal) justice system when he or she should have been reunited with his/her family or supported into alternative arrangements. Therefore, realistic determination of age is vital to ensure that children and juveniles are identified and treated appropriately.

In this regard, Article 6 of the Juvenile Code stipulates that in cases where the child does not have a citizenship card or the physical appearance of the child indicates an age different from that indicated in the ID card, the opinion of a forensic doctor shall be sought. If the opinion of the forensic doctor or other doctors contradicts the background of the case and child's physical appearance, the issue of determining child's age shall be referred to a medical team of not less than three doctors.

However, the process defined by the Code is problematic both practically and theoretically. In practice, if a child (as opposed to an adult) is assigned the wrong age and wishes to contest this it assumes the fact that the child has legal representation and the resources to challenge this. In addition the range of ages provided by medical examination (such as between 15 and 17 years or 11 and 12 years) leaves room for dispute in a situation with critical consequences (the maximum sentence for a 15 year old is a third of the maximum adult sentence while for a 16 year old this is half, an 11 year old is not criminally responsible while a 12 year old is).

More importantly perhaps the process ignores the difference between legal age which is chronologic while any medical identification of age is largely based on physical maturity. Legal age has no relation to physical maturity, although the Juvenile Code underlines the importance of physical appearance in identifying or challenging reported age. It is widely recognised that there is no specific medical examination to determine age and that assessments based on bone density or pubic development (Tanner staging) are not appropriate if conducted in isolation of other assessments.^x

The underlying principle of juvenile justice is that children need special support and protection reduced physical, cognitive, moral and emotional maturity. In the absence of information to identify legal age (citizenship certificate, birth certificate, school certificate, or local testimony) any age determination process should be holistic, taking into account cognitive, moral and emotional maturity as well as physical development.

Royal College of Paediatrics and Child Health UK
X-Rays and Asylum Seeking Children: Policy Statement
19th November 2007

We accept the need for some form of age assessment in some circumstances, but there is no single reliable method for making precise estimates. The most appropriate approach is to use a holistic evaluation, incorporating narrative accounts, physical assessment of puberty and growth, and cognitive, behavioural and emotional assessments. Such assessments will provide the most useful information on which to plan appropriate management.

The proposal to use X-rays is flawed on two counts. Firstly, there are clinical and ethical issues associated with the use of ionising radiation for this purpose, particularly in the absence of informed consent, and a clinical benefit from the procedure. **Secondly, radiological assessment is extremely imprecise and can only give an estimate within two years in either direction. The information obtained would not contribute any greater accuracy to the assessment than the methods outline above – and indeed would be less clinically useful.**

<http://www.rcpch.ac.uk/Policy/X-Rays-and-Asylum-Seeking-Children-Policy-Statement>

The Right to Survival and Development

At the time of this study there existed separate juvenile rehabilitation centres in 22 provinces however in many cases these were informal facilities established with minimum resources.

The Juvenile Code stipulates various minimum standards for juvenile facilities but these are far from being a reality. Many researchers reported that children were unwilling to speak out about difficulties they faced in the detention centres; however the following information was provided:

While in custody, juveniles shall receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require in view of their age, sex and personality.
Beijing Rule 13.5.

The suspected and arrested child shall be detained in a special temporary location. The detention authority is obliged to provide access of the detained child to social, educational, vocational, psychological and health services considering the age and gender requirements of the child.
Juvenile Code, Article 12

- 46% of children reported that they were not provided with a medical check-up before being placed in detention;
- 58% of children reported they had been ill during their detention but only 42% of these stated they received medical attention;
- 12% of children complained that sleeping conditions were not adequate;
- 37% of children reported having nightmares frequently;
- Many children complained about the low quality of food, lack of recreation facilities, and the lack of educational facilities;

OUR SITUATION IS NOT GOOD, 13 year old boy

“Our situation in the rehabilitation centre is not good. A few days ago a child ran away from the centre and since then we, six remaining inmates are shackled from 8 at night until 9 o’clock in the morning. Due to fear from and intimidation by security guards and the head of rehabilitation centre, we do not dare to say anything to monitors. As well, there is no adequate space, sufficient food, education and vocational training in the centre.”

Observations at the juvenile rehabilitation centres showed that the facilities lacked basic equipment such as books, pens and writing paper. The national curriculum is not followed for education purposes and there appear to be weak links with the education sector. To date no Memorandum of Understanding has been signed between the Ministry of Justice and the Ministry of Education to ensure the adequate delivery of educational services to children in juvenile facilities.

The situation of girls is usually much worse than for boys. In many centres the outside space is reserved for boys meaning for example that girls in one juvenile centre were incarcerated 24 hours per day in their rooms with no access to outside space for exercise.

The information from the study highlights the dire conditions of the facilities for juveniles in many of the provinces. Not only does this have a negative impact on their development (e.g. lack of educational facilities), the children’s survival is also affected (e.g. denial of medical treatment). In a situation where the state is acting *loco parentis* or guardian for these children in its care these are issues of serious concern.

The Rehabilitation and Reintegration of Juvenile Offenders

Only 7% of respondents (all male) had been arrested or detained in the past. Therefore for 93% of children this was their first time in conflict with the law. This proportion reflects with international studies that approximately 90% of juveniles coming into contact with the law will be first time offenders, while 5-7% of children coming into contact with the law will be persistent offenders.

INTERNATIONAL CHARACTERISTICS OF JUVENILE OFFENDING:

- The majority of children in conflict with the law are first-time or minor offenders (93-97%)
- 80% of children in conflict with the law will commit only one offence in their lifetime
- Adolescence is the most common age period for law-breaking throughout the life span
- The majority of offending involves boys and consists of minor property offences
- Serious offending is infrequent – across many countries around 7% of young offenders are charged with violent offences
- A small number of offenders (6-7% of young males) are responsible for 50-70% of all crime and 60-85% of violent crime

(Source: *International Centre for the Prevention of Crime* based on studies in high and low income countries)

It is estimated that there is an 80 per cent likelihood of deterring “first offender” juveniles who come into contact with the police. However, this is dependent on how the child is processed and what intervention is adopted for the child. Observations of the field researchers during this study suggest that children’s behaviour got worse by the time they were in the juvenile rehabilitation centres and many had developed signs of more delinquent behaviour.

However, this is not surprising given the combination of abuse and torture, attacks on the dignity and respect of juveniles and the lack of rehabilitation process for them:

- **Abuse and Torture** – At least 48% of children experienced physical abuse or torture in the juvenile justice system.
- **Attack on Dignity and Respect** – 62% of children reported being handcuffed during arrest, 8% reported verbal abuse from police personnel.
- **Lack of Rehabilitation Process** – Juvenile centres provided very limited support for the rehabilitation and reintegration of the juveniles and many reported living in an atmosphere of fear. It was also reported that many juveniles were often rejected by their families upon release, especially in cases of moral offences. No social services are in place to facilitate the contact of juveniles with their families and reintegration after release.

REHABILITATION OR PUNISHMENT?

13 year old boy, Northern Region

“I studied in school and could not continue because of family economic problem. I started working a vendor in the bazaar.

One day I was working and the police arrested me and took me to police custody and kept me there with three adult inmates. The criminal officer explained nothing about my rights, and at the end of questioning they got my fingerprint without letting me know about the contents of my statements. During this period I hardly came to know that I was detained on charge of stealing a bicycle.

I was sent by the prosecution office to the rehabilitation centre. Later on I heard that my case has been filed with court and two courts summoned me three times with my father accompanying me. Eventually the appeal court sentenced me to three years confinement.

It is one year that I have been in rehabilitation centre and my indictment has remained with court of cassation for seven months waiting final verdict.”

The combination of these factors makes it very challenging to rehabilitate young offenders, instead promoting alienation and resentment against injustice from state and society.

NEED FOR REINTEGRATION

15 year old boy, Western Region

A 15 year old boy was arrested on charge of theft for the third time. Although his parents were informed of his arrest they refused to visit him. He was held for 8 days in prison separated from adults before being transferred to the juvenile centre.

The boy was explained the charge against him but not his rights – he signed a statement although he was not aware of the contents. He was not provided with a defence lawyer. The boy says he has understood he has made a mistake and must look for an occupation when he is released.

Use of Deprivation of Liberty in Sentencing

Furthermore the use of deprivation of liberty as a punishment is apparent in the judgements passed by the courts. Although the Juvenile Code stipulates reduced sentences for children in the 12-15 years and 16-17 age groups and that deprivation of liberty should only be used as a last resort and for the shortest time possible in practice this is only partially implemented.

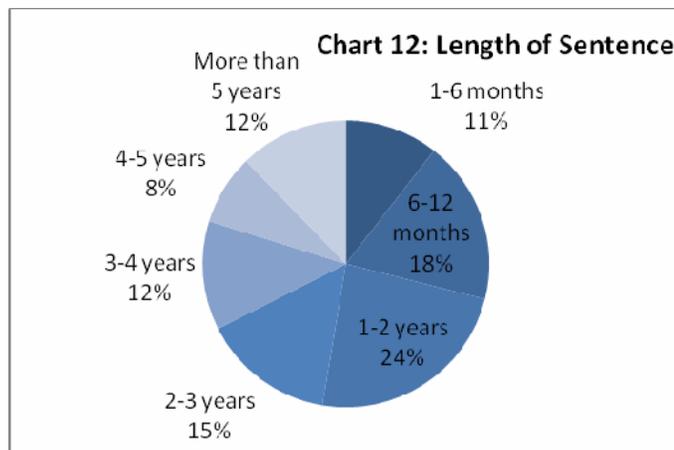
114 of the total number of 247 juveniles had been tried and were aware of the duration of their sentence. The majority of juveniles had been sentenced to more than 1 year detention (71% of respondents). Only 29% of juveniles were sentenced to less than 1 year detention. This is surprising given that over one third of cases were property-related (theft or robbery) and a significant number were ‘moral cases’

From many of the case studies it is clear that sentencing has been used purely as a punitive measure rather than for the rehabilitation of the juvenile.

The use of extended sentences of detention in situations where children do not have access to basic development support (education and training) as well as basic services (health support, basic nutrition) is of serious concern.

Diversion

At the time of this study, formal mechanisms for diversion of children away from the formal criminal justice system through community-based programmes were not available to decision-makers in the juvenile justice system. Other than direct mediation and settlement of the conflict between the juvenile’s parents and the victim no other options exist except for the detention of the juvenile where he or she is found



ARBITRARY SENTENCING

16 year old boy, North-eastern Region

A 16 year old boy found guilty of sodomy and adultery was sentenced by the court to 16 years confinement. Only after continuous follow-up by AIHRC Child Rights Unit was the decision reviewed by the court of appeal and the sentence was reduced to 7 years.

guilty of an offence. In cases where diversion is appropriate (in particular first time offenders where the offence is not serious or violent and where the juvenile is not judged to be a threat to society) it is widely recognised that deprivation of liberty and incarceration with more serious offenders can increase the chance of the individual reoffending in the future. In addition the processing of these juveniles through the formal justice system places greater burden on courts and juvenile facilities resulting in longer periods of pre-trial detention and over-stretched resources in juvenile rehabilitation centres.

The Special Situation for Girls in the Justice System

This study indicates that the number of girls in conflict with the law is often relatively small compared with the number of boys. Of the total number of 247 juveniles interviewed, 201 (85%) were male compared to only 37 (15%) who were female. However it should be taken into account the observation of field workers that girls are often more likely to be detained with adult female prisoners as in many regions juvenile facilities exist only for boys. Another factor may be that girls may prefer to be detained in adult female prisons as they feel more protected with female prisoners rather than in mixed juvenile rehabilitation centres where they do exist.

What is clear is that given the relatively small number of girls (compared with boys), girls are often treated without any consideration of their specific needs in the justice system.

When girls are detained with female adult prisoners it is often the case that they are not held in a separate part of the custodial facility. Experience shows that juveniles confined with adult prisoners are likely to be exposed to a higher risk of abuse. In addition, they do not have the same access to rights as boys in detention have in the juvenile facilities. In particular, they do not have access to the same educational or vocational training or other institutional support that boys may have access to.

'MORAL OFFENCE'

14 year old girl, Eastern Region

A 14 year old girl from a middle class family was accused of adultery and has been kept in the female adult prison as there is not a juvenile centre.

She was referred to forensic doctors to determine her age and to identify whether she was still a virgin. She refused to be examined claiming illegitimate demands by the doctors. She has had no access to a lawyer.

Girls accused of 'moral offences' have to undergo what are often humiliating or abusive examinations as part of the legal process with little measures for their protection. In addition, although the Interim Criminal Code for Courts (ICPC) makes clear that the prosecutor may authorise the release of an accused pregnant woman at any time during the investigation if continued detention does not further the interests of investigation or is not necessary for the protection of the community, these provisions are often not followed in reality.^{xi} It appears to be common practice that pregnant women or girls are kept in confinement and only brought to a hospital for delivery of their child and then sent back to prison. In some cases women deliver their child in the prison itself. Extra food and supplementary diet is not provided for pregnant or nursing women and girls nor is extra food and diet provided for children in prison with their mothers and malnourishment a serious concern.

Interviewees with custodial staff at juvenile rehabilitation centres reveal that girls who are pregnant or who are detained with their children pose a serious challenge to the management of the facilities and are therefore delivered for detention to the female adult prison.

IV. SUMMARY OF KEY FINDINGS

The study highlighted serious concerns for the protection and rehabilitation rights of juveniles within the present criminal justice system. These are summarised below. It should be noted that only those children who were referred to the juvenile centres were included in this study. Children who are most vulnerable and at risk – those in police facilities, those treated as adults by the justice system, those not formally registered in the justice system – could not be covered by this study.

PROFILE OF CHILDREN IN DETENTION

The majority of juveniles were male (85%), working before being arrested (69%) and aged 16 to 18 years (57%) at the time of the interview. There were high levels of illiteracy (40%) especially among girls (62%). The majority of children had not completed primary level education (92% of girls, 72% of boys). The majority of children rated their family as being poor or very poor (55%). 2% of children were under the age of criminal responsibility (below 12 years of age). Therefore for the majority of children their socio-economic circumstances should be taken into account in deciding an appropriate measure (principle of proportionality).

LACK OF SEPERATION OF CRIMINAL AND JUVENILE JUSTICE SYSTEMS

Although it is recognised that the criminal and juvenile justice systems should be separated, in practice this is far from becoming a reality. At the time of this study only two Juvenile Primary Courts had been established resulting that only 8% of children in this study had appeared before a juvenile court. The majority of children are still being processed in the formal criminal justice system. In addition, while 41% of those children found in the juvenile facilities were awaiting trial only 16% had spent less than one month in detention. This suggests that many juveniles are processed outside of the legal timeframe stipulated in the Juvenile Code.

USE OF JUSTICE SYSTEM FOR SOCIAL PROTECTION AND MORAL CONTROL

Although the Juvenile Code states the juvenile courts have jurisdiction to hear cases related to children with behavioural problems and related to children at risk and in need of care and protection until there is full separation of the juvenile and criminal justice systems this may not be appropriate. 56% of females were in detention charged with moral offences including adultery, sodomy, and running away from arranged marriage. Another 14% of girls were in detention because they were lost or without shelter. Although the juvenile justice system has the authority to deal with cases of juveniles in need of care and protection it is questionable whether these facilities are the most appropriate forms of support for girls in these situations.

In the cases of males, victims of sodomy and runaway boys were found to be in detention. Detained in juvenile centres with limited access to basic facilities and opportunities and where they may be at risk of violence and abuse, these children are neither benefitting from protection nor development.

USE OF PHYSICAL FORCE, ABUSE AND TORTURE COMMON

Use of physical force, abuse and torture were common during arrest and questioning – 48% reported being beaten by police personnel during arrest. 62% of juveniles reported being handcuffed during arrest and many interviews revealed the use of ‘shackles’ during detention to prevent escape at night, during transportation or even as a form of punishment. The majority of respondents were taken into police custody before being referred to the juvenile facilities (59%). Only 21% of juveniles reported that they were not ill-treated in police custody.

LACK OF DUE PROCESS FOR A FAIR TRIAL

The majority of children in conflict with the law did not have access to proper due process to allow them a fair trial. 62% of juveniles did not have a defence lawyer when they appeared in court, 56% of juveniles had not given their statement voluntarily, and only 38% of juveniles had seen 'their' statement.

LACK OF ALTERNATIVES TO DEPRIVATION OF LIBERTY

Although the Juvenile Code clearly states that detention shall be used as a last resort for the rehabilitation of a child and only then as for the shortest time possible this is clearly not the practice. 41% of children were in the juvenile rehabilitation centre pending trial. Of those sentenced to detention, only 29% had been sentenced to less than 1 year in detention. This is of concern given that many cases were property related and only 7% of juveniles had been arrested in the past. For 93% of juveniles this was their first incident of conflict with the law.

There exist no formal alternatives for deprivation of liberty in cases where the juvenile is found guilty. Without systems of diversion in place many children are sentenced to detention in juvenile rehabilitation centre where alternative measures to hold the child accountable may have been both more appropriate and more effective in preventing reoffending.

In addition, a total of 38% of girls were in detention for running away or being lost. Without appropriate alternatives for their protection and support these girls are detained in mixed juvenile facilities or together with adult female prisoners.

LACK OF REHABILITATIVE PROCESS

At the time of this study juvenile rehabilitation centres existed in only 22 provinces of the country and many of these facilities were only informally established. Field researchers reported an atmosphere of fear in many of the centres and in many cases children were unwilling to speak out. In some facilities shackles were used to restrain the children at night. In addition, many children complained about the low quality of food, lack of recreation or educational facilities, and lack of medical treatment. The whole process from arrest to trial to detention in the juvenile facilities seems more likely to promote alienation and resentment against society, reinforcing negative behaviour, rather than the rehabilitation of juveniles. In addition, children detained for a significant amount of time will have been limited by a lack of access to education, training, family support and other opportunities making their situation even more precarious.

THE VULNERABLE SITUATION OF GIRLS IN THE JUSTICE SYSTEM

Girls are more likely to be detained in relation to 'moral offences' than boys and in cases which do not necessarily have a legal basis under Afghan law. Once arrested girls are more likely to be detained with adult female prisoners than boys, due to the lack of juvenile facilities for females. They are therefore unable to access the facilities and protections that are entitled to juveniles and which in many cases are accessed by boys. In cases of 'moral offences' girls are expected to undergo humiliating and in some cases abusive medical examinations with little consideration for their psychosocial situation or measures for their protection. Furthermore, girls who are pregnant or have children are unlikely to receive any specialised support except for the possible opportunity to deliver the child in hospital before returning to detention.

*While a **child** who knows how to read is more likely to do his homework when given a sharp reminder to do so, not even the worst punishment can make a child read when he doesn't know how. You could shut him in his room for years on end, and he still would not **learn**.*

*Instead he needs to be given an opportunity to learn the **skills** that make reading possible. He also needs to be exposed to the **values** and **standards** that tell him reading is important, and why.*

*In the same way persistent young offenders need not only be held **accountable** for their **behaviour**, but to be exposed to **opportunities** to learn new behaviour, and the values that will help them to value that behaviour.^{xii}*

V. CONCLUSION

Protecting Children's Rights, Preventing Juvenile Offending

Juvenile justice shall be conceived as an integral part of the national development process of each country... contributing to the protection of the young and the maintenance of a peaceful order in society (Beijing Rules)^{xiii}

The objectives of juvenile justice are the *prevention* of offending and the *rehabilitation* of children into society. In this way juvenile justice is an integral part of the national development process and the maintenance of a peaceful order in society. The juvenile justice system differs from the adult criminal justice system because it takes into account the fact that children lack the maturity of adults (physically, cognitively, emotionally, and morally). Therefore the emphasis of juvenile justice is both on the *protection* of children and on the *social reintegration* of child offenders.

This does not mean taking a soft approach to offending by children. On the contrary it means replacing a predominantly punishment-based approach with an approach which supports children to become accountable for and take responsibility for their actions. Juvenile justice aims to encourage a process of behavioural change by helping the child to feel accountable for his or her actions and understand their impact on others. The formal justice system is reserved for the minority of children who commit very serious crimes and represent a serious threat to society.

For these reasons systems for diversion should be an integral part of the juvenile justice system. Diversion programmes provide formal opportunities to hold juveniles, in particular first-time offenders, accountable while working for their reintegration in their community. In the absence of diversion options decision-makers in the juvenile justice system have little option but the use of deprivation of liberty.

This is significant as this study reveals that children in the justice system will most likely be the victims of abuse and an approach aimed at punishing them with little support for their basic development or rehabilitation. Not only is this a violation of the inherent rights of the child it is also counterproductive in terms of crime prevention. Responses to children in conflict with the law which violate their rights and attack their dignity increase the likelihood of children who would not otherwise re-offend to do so. Good processing of young offenders, including fair and respectful treatment, make positive outcomes (reduced rate of reoffending) more likely.

The present system for juveniles, while providing some measure of protection for children by not placing them in detention with adults and entitling children to reduced sentences, is little different from the formal criminal justice system in terms of the rehabilitation and prevention of young offenders.

CORE PRINCIPLES OF JUVENILE JUSTICE:

- The principle of proportionality
- Emphasis on rehabilitation and reintegration (the best interests of the child)
- Deprivation of liberty as a measure of last resort
- Use of timely and appropriate interventions
- Special procedures for the protection of the rights of the child

DIVERSION in the 'Beijing Rules'

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

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

RECOMMENDATIONS

1. **Review and upgrade the Juvenile Code, develop rules and regulations for juvenile rehabilitation programmes and guidelines for social service providers of juvenile rehabilitation programmes:** the Juvenile Code should be reviewed in line with international norms and standards to ensure that it clearly separates cases of children in conflict with the law from protection cases for children “at risk”. Measures that address the prevention of children from coming into conflict with the law based on and in compliance with CRC should be stipulated in the Juvenile Code. There is the need for the introduction of appropriate diversion schemes for children in conflict with the law. Caution has to be given that diversion schemes operate as an alternative to the criminal justice system (not merely a sentencing option). The Juvenile Code should give clear guidance on rehabilitation, reintegration and after care policies.
2. **Focus on improving the quality of the administration of juvenile justice with the involvement of all stakeholders and in particular the concerned line ministries:** the focus of stakeholders should be on improving the quality of the administration of juvenile justice. The development and implementation of non-custodial measures, the improvement of care and rehabilitation interventions, and reintegration support upon exit from the juvenile justice system are all priorities. This will involve increasing coordination between line agencies and other stakeholders, the allocation of realistic resources, the development of skilled professionals and the development of management systems to ensure the effective implementation of juvenile justice.
3. **Establish Juvenile Prosecution Offices and Juvenile Special Courts in all Provinces:** Juvenile Prosecution Offices and Juvenile Special Courts should be established in all the provinces and the personnel should be trained in the administration of juvenile justice and the Juvenile Code.
4. **Develop and Promote Practical Alternatives to Detention:** The Ministry of Justice and concerned line ministries should develop practical alternatives to detention to support the diversion of juveniles admitting minor offences away from the formal justice system – at the police level, prosecution level and court level. Guidelines for promoting the release of children into parental care pending trial should also be developed and implemented.
5. **Establish National Support Network for Administration of Juvenile Justice:** To support the administration of juvenile justice and promote the rights of children in conflict with the law, international and national stakeholders should support the establishment of a national support network for the administration of juvenile justice providing:
 - i. Legal services for children in conflict with the law;
 - ii. Social support and assessments of children (social workers, psychologists, counsellors etc.);
 - iii. Alternatives to detention in juvenile rehabilitation centres for children awaiting trial or those who have been sentenced for non-serious non-violent crimes;
 - iv. Support for family tracing, counselling and mediation;
 - v. Interventions for diversion of children in conflict with the law;
 - vi. Monitoring of the situation of children in the juvenile justice system at the local level.
6. **Review Process for Age Determination:** The Ministry of Justice should review the procedures for age determination of children in conflict with the law and ensure that not only physical identifiers of age are assessed but also mental and emotional maturity by including social workers, teachers and psychologists in the process of age determination where it is contested by the child. In situations of doubt or inconclusive evidence, the child shall have the right to the benefit of the doubt.

In addition, measures should be taken to increase birth registration of children and to enable children and parents/guardians to have access to the child’s birth certificate free of charge whenever it is needed to prove the child’s age.

7. **Develop Police Standing Operating Procedures (SOP) for Dealing with Children in Conflict with the Law:** Afghanistan Police should develop clear internal procedures for working with children in conflict with the law. These SOP should provide a practical implementation framework for front line police based on legal standards.
8. **Establish Specialised Police Units for Juvenile Justice:** Afghanistan Police should establish specialised police units for dealing with children in conflict with the law in major urban centres where there are higher numbers of children coming into conflict with the law. These units should ensure an appropriate number of female police to make sure that all girls in conflict with the law are dealt with by female police personnel.
9. **Develop National Handbook on Juvenile Justice:** The Ministry of Justice should develop a handbook on juvenile justice and on working with children in conflict with the law. This handbook will detail practical guidelines and procedures to support police, prosecutors, judges, social workers and others working with children in conflict with the law and to ensure accountability.
10. **Develop Child-Friendly Notice of Rights and Entitlements for Children in Conflict with the Law:** Afghanistan Police and national stakeholders should develop a child-friendly notice of rights and entitlements to be given or explained to all children upon arrest. In particular, this notice should provide information on support services (such as legal aid) as well as detail the following information:
 - i. Right to legal support;
 - ii. Right to contact parents/guardian;
 - iii. Right to medical treatment;
 - iv. Right to age determination;
 - v. The juvenile justice process;
 - vi. Rights during investigation and detention;
 - vii. Procedure to register a complaint.
11. **Increase external monitoring of police custody and juvenile facilities:** In order to promote accountability, monitor progress, and respond to abuses external monitoring of police custody and juvenile rehabilitation centres at the provincial and local level should be established. This should be implemented together with programmes to increase awareness of the basic issues of juvenile justice and the rights of children in conflict with the law.

Endnotes

ⁱ The Juvenile Code was adopted on 14th February 2005 by the Cabinet, signed on 9th March 2005 by President Karzai and published in the Official Gazette issue no-846 on 23rd March 2005.

ⁱⁱ See in particular Kaye L McLaren (New Zealand, Ministry of Youth Affairs, 2000) *Tough is not Enough: Getting Smart about Youth Crime, A review of research on what work to reduce offending by young people* and information available on International Centre for Crime Prevention website (www.crime-prevention-intl.org)

ⁱⁱⁱ Information from United Nations Assistance Mission in Afghanistan, *Afghanistan Justice Sector Overview* (April 2007) and observations of AIHRC

^{iv} Islamic Republic of Afghanistan (Afghanistan National Development Strategy) *National Justice Sector Strategy* (2008)

^v The following provinces were covered by the study: Kabul, Kapisa, Parwan, Logar, Ghazni, Nangarhar, Laghman, Kunar, Takhar, Baghlan, Kunduz, Samangan, Balkh, Herat, Helmand, Kandahar, Zabul, Urozgan, Bamiyan, Sari Pool, Panjshir, Daikundi.

^{vi} Amnesty International, Re-establishing the rule of law in Afghanistan (AI: ASA 11/021/2003) p.40

^{vii} Medical Mondial, 2004, p.13, AI ASA 11/021/2003 p.42

^{viii} The Innocenti Digest: Juvenile Justice. UNICEF International Child Development Centre

^{ix} UNICEF press quote

^x See *X-Rays and Asylum-Seeking Children: Policy Statement* by Royal College of Paediatrics and Child Health (UK) www.rcpch.ac.uk/Policy/X-Rays-and-Asylum-Seeking-Children-Policy-Statement and also *Misuse of Tanner Puberty Stages to Estimate Chronological Age* in PEDIATRICS Vol.102 No.6 December 1998, pp.1494 – “Tanner staging, which was designed for estimating development or physiologic age for medical, educational, and sports purposes, in other words, identifying early and late maturers. The method is appropriate for this, provided chronologic age is known. It is not designed for estimating chronologic and, therefore, not properly used for this purpose.”

^{xi} Article 89 (1) of the Interim Criminal Code for Courts stipulates that the prosecutor when executing a sentence can grant conditional release for a woman from the time she is six months pregnant until four months after the delivery of her child. In addition it stipulates that a pregnant woman should only be detained for pre-trial detention where necessary for the investigation itself (i.e. evidence collection) or the protection of the community

^{xii} Kaye L McLaren (New Zealand, Ministry of Youth Affairs, 2000) *Tough is not Enough: Getting Smart about Youth Crime, A review of research on what work to reduce offending by young people* p.13

^{xiii} United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 1.4

VI. INTERNATIONAL STANDARDS

The basic principles and minimum standards for the administration of juvenile justice are expressed in three international instruments:

- UN Standard Minimum Rules for the Administration of Juvenile Justice (1985) '*Beijing rules*'
- UN Rules for the Protection of Juveniles Deprived of their Liberty (1990) '*JDLs*'
- UN Guidelines for the Prevention of Juvenile Delinquency (1990) '*Riyadh Guidelines*'

These rules and guidelines are non-binding in nature but present an international consensus on minimum standards and best practice for juvenile justice.

Fundamental Principles:

1. Delinquency

The prevention of juvenile delinquency is an essential part of crime prevention in society, *Riyadh Guideline 1*.

The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promoting of their personality from early childhood, *Riyadh Guideline 2*.

Youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood, *Riyadh Guideline 5 (e)*.

2. Juvenile Justice as part of Social Justice

Juvenile Justice should be seen as integral part of the national development process. It should be conceived within a comprehensive framework of social justice for all juveniles therefore contributing to both the protection of young people and the maintenance of a peaceful society, *Beijing Rule 1.4*.

States should work to develop conditions that will ensure that a juvenile has a meaningful life in the community fostering a process of personal development to develop as free from crime and delinquency as possible, *Beijing Rule 1.2*.

Sufficient attention shall be given to positive measures that involve the full mobilisation of all possible resources for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law, *Beijing Rule 1.3*.

3. Separation of Criminal Justice and Juvenile Justice Systems

States shall make efforts to establish a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice, *Beijing Rule 2.3*.

4. Reintegration and Rehabilitation

The well-being of the juvenile shall be the guiding factor in consideration of her or his case, *Beijing Rule 17.2 (d)*.

Restrictions on the personal liberty shall be imposed only after careful consideration and shall be limited to the possible minimum, *Beijing Rule 17.1 (b)*. This implies that strictly punishment-based approaches are not appropriate. In juvenile cases the consideration of punishment should always be outweighed by the interest of safeguarding the well-being and the future of the young person, *Beijing Rules Official Commentary on Rule 17.1*.

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

5. Due Process

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

6. Best Interests of the Child

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

7. Principle of Proportionality

The juvenile justice system shall emphasise the well-being of the juvenile and any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence, *Beijing Rule 5.1*.

The response to young offenders should be based on the consideration not only of the gravity of the offence (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions, *Beijing Rules Official Commentary on Rule 5.1*.

In all cases except those involving minor offences, before sentencing the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority, *Beijing Rule 16.1*.

8. Initial Contact

Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter, *Beijing Rule 10.1*.

A judge or other competent official or body shall, without delay, consider the issue of release, *Beijing Rule 10.2*.

9. Discretion and Diversion

Appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation. However, efforts should be made to ensure sufficient accountability at all stages, *Beijing Rules 6.1 & 6.2*.

Diversion may be used at any point of decision-making by the police, the prosecution or other agencies. It may be exercised by one authority or several or all authorities according to the rules and policies of the respective system and in line with the Beijing Rules. It need not necessarily be limited to petty cases. The Rules stress the important requirement of securing the informed and open consent of the young offender to the recommended diversion measures, *Beijing Rules Official Commentary on Rule 6*.

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

The rules also state that the competent authority shall have the power to discontinue the proceedings at any time, *Beijing Rule 17.4*. At any time circumstances may become known to the competent authority which would make cessation of the intervention appear to be the best disposition of the case, *Beijing Rules Official Commentary on Rule 17.4*.

10. Records

In every place where juveniles are detained, a secure and complete record of the following information should be kept concerning each juvenile received:

- a. Information on the identity of the juvenile;
- b. The fact of and reasons for commitment and the authority thereof;
- c. The day and hour of admission, transfer and release;
- d. Details of notification to parents and guardians on very admission, transfer or release of the juvenile in their care at the time of commitment;
- e. Details of known physical and mental health problems, including drug and alcohol abuse.

JDLs Rule 21

11. Privacy and Confidentiality

The juvenile's right of privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of a juvenile offender shall be published, *Beijing Rules 8.1 and 8.2*.

Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorised persons, *Beijing Rule 21.1*.

All personnel should respect the right of the juvenile to privacy, and in particular, should safeguard all confidential matters concerning juveniles or their families learned as a result of their professional capacity, *JDLs Rule 87 (e)*.

12. Child Participation

Young persons should have an active role and partnership within society and should not be considered as mere objects of socialisation or control, *Riyadh Guideline 3*.

Due respect should be given to the proper personal development of children and young persons and they should be accepted as full and equal partners in socialisation and integration processes, *Riyadh Guideline 10*.

13. Deprivation of Liberty as measure of last resort

Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time, *Beijing Rule 13.1*.

Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home, *Beijing Rule 13.2*.

Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response, *Beijing Rule 17.1*.

14. Conditions of Detention

The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles, *JDLs Rule 12*.

While in custody, juveniles shall receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require in view of their age, sex and personality, *Beijing Rule 13.5*.

Juveniles who are detained under arrest or awaiting trial are presumed innocent and shall be treated as such, *JDLs Rule 17*.

All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation, and should take immediate action to secure medical attention whenever required, *JDLs Rule 87 (d)*.

The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being, *JDLs 28*.

In all detention facilities juveniles should be separated from adults, unless they are members of the same family, *JDLs 29*.

Every child shall receive adequate medical care, *JDLs 49*.

Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice, *JDLs 18 (c)*.

15. Prevention

The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminal attitudes. Formal agencies of social control should only be utilised as a means of last resort, *Riyadh Guidelines 1 and 6*.

There should be close inter-agency cooperation (including between health, child-care, labour, education, social and law enforcement agencies) in taking concerted action to prevent juvenile delinquency and youth crime, *Riyadh Guideline 9 (g)*.

Programmes to prevent delinquency should be planned and developed on the basis of reliable, scientific findings, and periodically monitored, evaluated and adjusted accordingly, *Riyadh Guideline 48*.

16. Special Groups

Special attention should be given to children of families affected by problems brought about by rapid and uneven economic, social and cultural change, in particular the children of indigenous, migrant and refugee families. As such changes may disrupt the social capacity of the family to secure the traditional rearing and nurturing of children, innovative and socially constructive ways for the socialisation of children have to be designed, *Riyadh Guideline 15*.

Government agencies should take special responsibility and provide necessary services for homeless or street children; information about local facilities, accommodation, employment, and other forms and sources of help should be made readily available to young persons, *Riyadh Guideline 38*.

17. Status Offences

In order to prevent further stigmatisation, victimisation and criminalisation of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalised if committed by an adult is not considered an offence and not penalised if committed by a young person, *Riyadh Guidelines 56*.

18. Corporal Punishment

Juveniles shall not be subject to corporal punishment, *Beijing Rule 17.3*.

No child or young person shall be subjected to harsh or degrading correction or punishment measures at home, in schools or in any institutions, *Riyadh Guidelines 54*.

19. Use of Force

Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorised and specified by law and regulation. They should not cause humiliation and degradation, and should be used restrictedly and only for the shortest possible period of time. By order of the director of the administration, such instruments might be resorted to in order to prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property, *JDLs Rule 64*.

All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose, *JDLs 66*.

20. Police

Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case, *Beijing Rule 10.3*.

Involvement in juvenile processes itself can be "harmful" to juveniles. This is especially important in the initial contact with the law enforcement agencies, which might profoundly influence the juvenile's attitude towards the State and society. Moreover, the success of any further intervention is largely dependent on such initial contacts. Compassion and firm kindness are important in these situations, *Beijing Rules Official Commentary on Rule 10.3*.

In order to best fulfil their function, police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime shall be specially instructed and trained. In large cities, special police units should be established for that purpose, *Beijing Rule 12.1*.

As police are the first point of contact with the juvenile justice system, it is most important that they act in an informed and appropriate manner. An increase in juvenile crime has been associated with the growth of large cities, particularly with rapid and unplanned growth. Specialised police units would therefore be indispensable not only in the interest of implementing specific principles contained in the Beijing Rules but more generally for improving the prevention and control of juvenile crime and the handling of juvenile offenders, *Beijing Rules Official Commentary on Rule 12.1*.

Professional education, in-service training, refresher courses and other appropriate modes of instruction shall be utilised to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases, *Beijing Rule 22.1*.

Juvenile justice personnel shall reflect the diversity of juveniles who come into contact with the juvenile justice system. Efforts shall be made to ensure the fair representation of women and minorities in juvenile justice agencies, *Beijing Rule 22.2*.

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

21. Institutionalisation as last resort

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

22. Inspection

Qualified inspectors not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative. Inspectors should have unrestricted access to all persons employed or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities, *JDLs Rule 72*.

23. Coordination and Cooperation

Efforts should be made and appropriate mechanisms established to promote interaction and coordination between economic, social, education and health agencies and services, the justice system, youth, community and development agencies and other relevant institutions, *Riyadh Guideline 60*.

The exchange of information, experience and expertise gained through projects, programmes, practices and initiatives relating to youth crime, delinquency prevention and juvenile justice should be intensified at the national, regional and international levels, *Riyadh guideline 61*.

24. Planning, Monitoring and Evaluation

Efforts shall be made to review and appraise periodically the trends, problems and causes of juvenile delinquency and crime as well as the varying particular needs of juveniles in custody, *Beijing Rule 30.2*.

Efforts shall be made to establish a regular evaluative research mechanism built in the system of juvenile justice administration and to collect and analyse relevant data and information for appropriate assessment and future improvement and reform of the administration, *Beijing Rule 30.2*.

The delivery of services in juvenile justice administration shall be systematically planned and implemented as an integral part of national development efforts, *Beijing Rule 30.4*.