

BOFAXE

Too Young to Be a Criminal? (Part 1)

What International Law Has to Say About Lowering the Minimum Age of Criminal Responsibility

— Tragic incidents and shocking crimes such as the recent murder of a 12-year-old girl in Germany (suspectedly) by her 12 and 13-year-old friends draw the public's attention to a difficult social dilemma: how should society deal with children becoming perpetrators of serious crimes? Most countries worldwide have adopted a minimum age for criminal responsibility (MACR) with only a few exceptions such as Mauritius and several States of the United States of America. However, the concrete threshold for MACR varies considerably from 7-8 (e.g. Trinidad and Tobago, Indonesia, India), up to 16 years (e.g. Cuba, Argentina) (for an overview, see also here). Since the MACR precludes penal consequences for young perpetrators, serious crimes committed by children aged below the domestic MACR repeatedly lead to heated claims on lowering or even abolishing such strict age restrictions. As this piece will show, despite the international disagreement on the concrete threshold for MACR, international law provides some legal boundaries for such claims.

At the Heart of the Issue: The Childrens Best Interest

Before getting into details, let us keep in mind the core obligation that must guide us during the following assessment: Art. 3(1) of the Convention on the Rights of the Child (CRC) provides that in "all actions concerning children [...] the best interests of the child shall be a primary consideration". While the determination of the MACR is undoubtedly a difficult balancing act between the protection of the child and the protection of the victim's interests as well as the state prosecution, it cannot be denied that criminal law measures are hardly ever in the best interest of the child. They should always be the ultima ratio, giving preference to measures aiming at therapeutical treatment, social integration and behaviour education. As was highlighted in 1990 in the United Nations Guidelines for the Prevention of Juvenile Delinquency "labelling a young person as 'deviant' or 'delinquent' or 'predelinquent' often contributes to the development of a consistent pattern of undesirable behaviour" (para. 5(f)), being not less than in absolute contradiction to the children's best interest. In this regard, it will be shown that international law requires the establishment of MACR as a non-rebuttable presumption of children's immaturity to protect them from the vicious circle they would highly likely face if prosecuted.

From Vagueness to (Un)Clear Guidance? The Convention on the Rights of the Child

The topic of MACR entered the international agenda in 1985 with the United Nations (UN) Standard Minimum Rules for the Administration of Juvenile Justice, the so-called 'Beijing Rules', adopted by the UN General Assembly. Regrettably, the relevant Rule No. 4.1 was formulated in an extremely vague manner: „*In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.*" The commentary noted that there are drastic differences worldwide with regard to the specific age threshold and instructs states "to agree on a reasonable lowest age limit that is applicable internationally."

The widely ratified Convention on the Rights of the Child (CRC), which entered into force in 1990, developed this approach further and explicitly obliges states in Art. 40(3)(a) CRC to set a minimum age of criminal responsibility in domestic law. While the Convention itself does not provide any further guidance on the concrete age, the Committee on the Rights of the Child addressed the issue in more detail for the first time in 2007 in General Comment No. 10 on Children's Rights in Juvenile Justice (GC 10) and recommends a MACR of 14-16 years (para. 33). Further, the Committee noted that a MACR below 12 is "internationally unacceptable" (para. 32). In 2019, the Committee replaced GC 10 with General Comment No. 24 on Children's Rights in Juvenile Justice (GC 24) following severe criticism by international stakeholders who claimed that a MACR of 12 would be too low while referring to several incidents of states who misused GC 10 by lowering their MACR from a higher age to the age of 12 (e.g. Georgia and Panama). GC 24 now explicitly encourages States to increase their MACR to at least 14 years and simultaneously recommends that State parties should under no circumstances reduce the minimum age of criminal responsibility if its current penal law sets the minimum age of criminal responsibility at an age higher than 14 years (para. 33).

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— Universal Agreement or Fragmentation?

Regional human rights systems have not been silent on the issue of MACR either. However, Article 1(4) of the African Charter on the Rights and Welfare of the Child is the only regional human rights instrument that explicitly addresses the issue of MACR and obliges states to establish a MACR in domestic legislation, without providing specific details. In General Comment No 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection, the African Committee of Experts on the Rights and Welfare of the Child states that the MACR should not be lower than 12 years of age and States must endeavor to raise this progressively to at least 15 years of age. This recommendation is based on the African Union Principles on the Rights to a Fair Trial and Legal Assistance in Africa, which explicitly provides for a MACR of 15 years, and on the Guidelines on Action for Children in the Justice system in Africa of 2011, endorsed by the Commission (para. 46).

While the European Convention on Human Rights does not explicitly address MACR, the jurisprudence of the European Court of Human Rights highlights at least that a child charged with an offence must be treated in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities (Adamkiewicz v. Poland, para. 52). However, no legally binding statements have yet been made on the (in)admissibility of certain age limits, and it is therefore not surprising that the MACR varies from 10 (e.g. UK) to 16 years (e.g. Portugal) within the member states. Additionally, the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice state that the minimum age of criminal responsibility should not be too low and should be determined by law (para. 23), abstaining from elaborating on any concrete thresholds while highlighting how complex the issue and how divergent the state practice is (para. 79).

The Inter-American Commission on Human Rights has taken a rather progressive and comprehensive stance on the issue. In a 2011 report on Juvenile Justice and Human Rights, the Commission re-emphasised the interpretation of the ACHR as a 'living instrument' and authoritatively incorporated the statements of the Committee on the Rights of the Child regarding the unacceptability of a MACR below 12 in its interpretation of the American Convention (para. 49). The Commission reiterates that initiatives in domestic systems to lower the MACR are incompatible with the principle of non-retrogression (para. 50). In sum, the Commission calls on states to gradually raise the minimum age at which children can be held accountable in juvenile justice to an age approaching 18 (para. 59).

Soft Law or Binding Standards?

At first glance, there seems to be an international consensus that a MACR must be prescribed, but there is a paucity of guidance as to the exact minimum age. Nonetheless, already these obligations highlight one important finding that is regularly challenged in national debates: international law requires the setting of a specific age, categorically precluding criminal prosecution for anyone below this age and thus rules out approaches which focus on the circumstances of the individual case (e.g. the maturity of the child and the seriousness of the crime). Although some states have provided for several age limits in their legislation, some of them allow for additional considerations of the specific circumstances, *inter alia* rebuttable presumptions on the maturity of the child (e.g. Australia). This approach was vehemently criticized by the CRC Committee in General Comment No. 10 who described this practice as confusing and leaving much discretion to the court, thus favouring discriminatory practices (para. 30).

Furthermore, the lack of specific hard law instruments seems to be alleviated by an increasing amount of soft law instruments, both on the international and the regional level. Given the strong stance of CRC Committee in its General Comments 10 and 24 that have been widely implemented by other (regional) bodies, an internationally binding MACR of 12 years can arguably be assumed. Additionally, in line with the "living instrument doctrine" and Art. 31(3) Vienna Convention on the Law of Treaties, special attention should be paid to subsequent state practice, including public statements, and agreements. Although there are still states with a MACR below 12 years in place, numerous states from all regions have however changed their legislation in the last decades with the ratification of the CRC and the vast majority has a MACR over 12 years of age in place. Additionally, the criticism against Australia by more than 100 states before the Human Rights Council in 2021 on Australia's MACR of 10 years shows a clear trend in emerging state practice concerning the official opinion of States on MACR.

Finally, claims to lower an existing MACR as currently made in Germany, are arguably rendered legally futile in line with the argumentation of the Inter-American Commission on Human Rights and supported by GC 24 due to the principle of non-retrogression which generally prohibits lowering already established human rights standards.

Conclusion

As already stated in the commentary to the Beijing Rules, if the age of criminal responsibility is fixed too low, the notion of responsibility would become meaningless. Instead of repeatedly reconsidering lowering the domestic MACR, States should remember their core obligation under the CRC: to protect the best interest of the child and its incompatibility with children being caught in the vicious circle of criminal prosecution. Thus, in line to comply with its obligations under the CRC, states should refrain from lowering their MACR and must never have a MACR below 12 in place.