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International human rights standards in regard to youth crime law – sources, content, relevance*

1. Introduction: The level of awareness of standards has increased!

Seven years ago the Federal Ministry of Justice (BMJ) and the German Association of Juvenile Courts and Juvenile Court Assistance helped fund the publication of a book entitled *Internationale Menschenrechtsstandards zum Jugendkriminalrecht (*International Human Rights Standards in Regard to Youth Crime Law). The intention was thereby to draw attention to United Nations and Council of Europe documents that were difficult to access and in the majority of cases were not available in German, but of which an awareness appeared indispensable for the debate in Germany.[1] In the meantime, the level of awareness of these standards has considerably increased. There have been law dissertations written about them[2] and in 2004 another compilation was published with a similar objective that devoted itself to the relevant recommendations of the Council of Europe on deprivation of liberty.[3]

The breakthrough came in 2006 when the Federal Constitutional Court issued its judgment on the unconstitutionality of the juvenile justice system. The Federal Constitutional Court found as follows: "There can be indications that available findings have not been taken into consideration sufficiently as required under the

* Dedicated to Horst Schüler-Springorum, Munich, on the occasion of his 80th birthday, 15 Oct. 2008.

[1] Höynck/Neubacher/Schüler-Springorum, *Internationale Menschenrechtsstandards und das Jugendkriminalrecht. Dokumente der Vereinten Nationen und des Europarates* [International Human Rights Standards and Youth Crime Law. Documents of the United Nations and the Council of Europe], published by the Federal Ministry of Justice in cooperation with the German Association of Juvenile Courts and Juvenile Court Assistance, Berlin 2001.

[2] Kiessl, *Die Regelwerke der Vereinten Nationen zum Jugendstrafrecht in Theorie und Praxis. Eine empirische Untersuchung über ihre Anwendung hinsichtlich der freiheitsentziehenden Maßnahmen bei delinquenten Kindern und Jugendlichen in Südafrika* [The Bodies of Regulations of the United Nations on Youth Crime Law in Theory and Practice. An Empirical Study of their Application in Regard to Deprivation of Liberty Measures for Delinquent Children and Youth in South Africa], 2001; Morgenstern, *Internationale Mindeststandards für ambulante Strafen und Maßnahmen* [International Minimum Standards for Community Sanctions and Measures], 2002.

[3] *Freiheitsentzug. Die Empfehlungen des Europarates 1962-2003, mit einer wissenschaftlichen Einleitung und einem Sachverzeichnis von Hans-Jürgen Kerner und Frank Czerner* [Deprivation of Liberty. The Recommendations of the Council of Europe 1962-2003, with a scientific introduction and subject index by Hans-Jürgen Kerner and Frank Czerner], published by Germany, Austria and Switzerland, 2004.

Basic Law or that prisoners' concerns are not being given sufficient weight as required under the Basic Law when requirements under international law or international standards referring to human rights, as set out in the relevant directives and recommendations adopted by the United Nations or organs of the Council of Europe (...), have not been observed or they fall short of them."[4] The importance of this passage in regard to crime policy can hardly be overestimated, since the debate on youth crime law thereby gains an international perspective, and it requires of the legislature that it at least look into these standards in depth. In the scientific debate that accompanied the new draft laws of the Länder (states) on juvenile justice in the following period, the international standards were then often taken as the yardstick.[5]

The sources of these recommendations, fundamental principles and guidelines have by no means dried up. The Council of Europe in particular has over the past few years adopted further fundamental recommendations. These include the recommendations of the Committee of Ministers Rec(2003)20 concerning *new ways of dealing with juvenile delinquency and the role of juvenile justice* of 24 September 2003 and Rec(2006)2 *on the European Prison Rules* of 11 January 2006. On 5 November 2008, Rec(2008)11 the *European Rules for Juvenile Offenders Subject to Sanctions or Measures* were then adopted. These special principles applicable to young offenders and those subject to criminal law sanctions were intended to supplement general principles on the execution of sentences.[6]

But what are international standards? And what can be said about their content and their significance? In the following I will outline the key stages in the development of these standards and answer the question as to their legally binding force. Especial weight will be given to the significance of standards at international and national level. I will not only show that German youth crime law is in keeping with the spirit of international standards, but also that these requirements are scientifically well-founded and correct. Finally, I will demonstrate, based on a few examples, where improvements need to be made in regard to German law.

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[4] Federal Constitutional Court *NJW* 2006, 2093.
[5] See, e.g., Goerdeler/Pollähne, *Das Bundesverfassungsgericht als Wegweiser für die Landesgesetzgeber* [The Federal Constitutional Court as the Guide for the Land Legislatures], in: *ZJJ* 2006, p. 250 et seq.
[6] See Dünkel/Baechtold/van Zyl Smit in: Federal Ministry of Justice (ed.), *Das Jugendkriminalrecht vor neuen Herausforderungen? Jenaer Symposium* [Youth Crime Law Facing New Challenges? Jena Symposium], 2009, p. 297 et seq.

2. United Nations and Council of Europe standards 1955 – 2008

a) Objective: The protection of human rights and fundamental freedoms

In order to gain an understanding of international standards it is first essential to be clear about their beginnings. After World War II, both the United Nations and the Council of Europe were committed to the principle of international cooperation and to the protection and observance of human rights and fundamental freedoms. This clearly emerges from their statutes[7] and the preambles of the relevant resolutions and recommendations, which explicitly take up the international human rights instruments. By way of example I would like to quote from the Preamble to the Recommendation of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice of 2003: "The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe, (...) taking into consideration the European Convention on Human Rights, the European Convention on the Exercise of Children's Rights, the United Nations Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Recommends that governments of member states: (...)."[8] The *United Nations Convention on the Rights of the Child* is no doubt the most significant in regard to youth crime law.[9] A child is defined as every human being below the age of 18 years (Article 1), that is including youth, which means that the special requirements the Convention makes of all those institutions, services and facilities responsible for the care or the protection of children (in the areas of security, health, staff and supervision, see Article 3.3) also concern juvenile and family courts, juvenile assistance facilities, and juvenile prisons and juvenile detention facilities in Germany. Criminal law and the prison system are addressed in Articles 37 and 40: Whilst Article 37 reiterates the prohibition of torture

[7] See Article 1 no. 3 of the Charter of the United Nations of 26 June 1945; Article 1 (b) of the Statutes of the Council of Europe of 5 May 1949.
[8] Unauthorised translation by the BMJ, see *Kerner/Czerner*: *Freiheitsentzug Die Empfehlungen des Europarates 1962-2003* [Deprivation of Liberty. The Recommendations of the Council of Europe 1962-2003], 2004, p. 211 et seq. or the homepage of the DVJJ: www.dvjj.de/data/pdf.
[9] Federal Law Gazette 1992 II p. 122, see Dorsch*, Die Konvention der Vereinten Nationen über die Rechte des Kindes* [The United Nations Convention on the Rights of the Child], 1994.

and cruel, inhuman and degrading treatment[10] and rules out the death penalty[11] and life prison sentences, provides protection against arbitrary arrest[12] and re-affirms the principles of separate accommodation from adults[13], imprisonment as the measure of last resort and the right to legal assistance[14] for children, Article 40 contains guarantees applicable to the law of criminal procedure, such as the presumption of innocence until proven guilty according to law.[15]

The section of the Preamble cited in the above makes it clear that even the legally non-binding minimum principles, rules, regulations – in short: standards – are assigned the task of giving concrete shape to and further fleshing out legally binding international law requirements set out in human rights conventions. In addition, it shows the interplay between international and European standards, since it is the Council of Europe that makes reference to the principles of the United Nations in its recommendation. The standards are therefore doubly interwoven in an international network: First vertically, in that they correlate with international law treaties, and then horizontally, in that they are formulated by different international organisations that make reference to one another.

b) Actors: The United Nations and the Council of Europe

The UN was the pioneer. As early as 1955 it drew on the instrument of standards to spell out worldwide its ideas regarding the treatment of prisoners in a manner that was non-binding under international law.[16] The Council of Europe adopted these, with very few changes, in 1973 as the *European Prison Rules*.[17] The Council of Europe's youth crime law was also oriented to the UN's standards. In the mid-1980s the focus of attention had turned to the protection of juvenile offenders. In 1985 the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (known as the

[10] See also Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 10 December 1984 (Federal Law Gazette 1990 II p. 246) and Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), as well as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987 (Federal Law Gazette 1989 II p. 946).
[11] Already inadmissible for juveniles pursuant to Article 6 (5) of the ICCPR; also generally inadmissible pursuant to Article 1 of the Additional Protocol No. 6 to the ECHR on the abolition of the death penalty of 28 April 1983 (Federal Law Gazette 1988 II p. 663).
[12] See also Article 9 of the ICCPR and Article 5 of the ECHR.
[13] See Article 10 para. 2 b) and Article 10 para 3 second sentence of the ICCPR.
[14] See Article 14 para. 3 d) of the ICCPR; Article 6 para. 3 c) of the ECHR.
[15] Article 14 para. 2 of the ICCPR; Article 6 para. 2 of the ECHR.
[16] Standard Minimum Rules for the Treatment of Offenders.
[17] Rec(73)5. This Recommendation was revised in 1987 and replaced by the new European Prison Rules in 2006.

Beijing Rules) enhanced the position of juveniles in comparison to adults, for example by giving priority to measures of diversion.[18] Five years later the *UN Rules for the Protection of Juveniles Deprived of their Liberty* contained detailed provisions governing juvenile detention facilities, for example in regard to accommodation, training and work, healthcare, external contacts, complaints and staffing. The introductory part containing fundamental principles again emphasised that the imprisonment of juveniles could only be a measure of last resort and even then should be kept to a minimum.[19]

Although the UN set the example when it came to calling for rational youth crime policies, when its activities in regard to standards then waned after 1990, it handed over its role as leader to the Council of Europe.[20] The latter's recommendations were formulated more recently, were thus more attuned to recent developments, more concrete and more resolute. On the basis of the recommendations of the Council of Europe I will outline what makes a modern youth crime law as delineated by the UN's and the Council of Europe's standards.

c) Content: Guidelines for a modern youth crime law

In view of the heated debate on crime policy and the increasing willingness to impose repressive sanctions and measures in some member states[21], the Council of Europe in 2001 subjected its own recommendations to a review. After taking advice from international experts, however, it is now holding to its course of measured reactions and the avoidance of imprisonment wherever possible. Recommendation *(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice* was the outcome of these deliberations. Its especial significance is based on the fact that it was borne out of a conscious decision on what course to take. The Preamble emphasises that it was based on the insight that the conventional system

[18] See Schüler-Springorum, *Die Mindestgrundsätze der Vereinten Nationen für die Jugendgerichtsbarkeit* [The United Nations Minimum Standards for the Administration of Juvenile Justice] , in: *ZStW* 99 (1987), p. 809 et seq.
[19] See Dünkel, *Zur Entwicklung von Mindestgrundsätzen der Vereinten Nationen zum Schutze inhaftierter Jugendlicher* [On the Development of the United Nations Minimum Standards for the Protection of Juvenile Offenders], in: *ZStW* 100 (1988), p. 361 et seq.
[20] However, ECOSOC Resolution 1997/30 created the Interagency Panel on Juvenile Justice (IPJJ), which includes the Committee on the Rights of the Child, UNICEF and the UN Human Rights Commissioner. Its tasks include the coordination of technical advice and assistance and the dissemination of information, also on international standards.
[21] See Herz in: Albrecht/Kilchling (ed.), *Jugendstrafrecht in Europa* [Youth Crime Law in Europe], 2002, p. 81 et seq.

of the administration of justice as such could not offer any suitable solutions in regard to the treatment of young offenders, whose educational and social needs differed from those of adults. The principle aims of juvenile justice should be to prevent offending and re-offending, to (re)socialise and (re)integrate offenders and to address the needs and interests of victims (no. 1). Interventions with juvenile offenders should, as much as possible, be based on scientific evidence (no. 5), and expansion of the range of suitable alternatives to formal prosecution should continue (no. 7). It should be stressed that this call to expand innovative community sanctions explicitly also refers to serious, violent and persistent juvenile offenders (no. 8). The Council of Europe makes it clear that it would also not like to see this problematical group excluded from alternatives to imprisonment. No. 11 of the recommendations also contrasts with calls that are heard in Germany: it states that it should be possible for young adults under the age of 21 to be treated in a similar manner to juveniles and to be subject to the same interventions when the judge is of the view that they are not as mature and responsible for their actions as full adults. Here the Council of Europe is clearly defending the content of a regulation that has met with hostility in Germany – section 105 of the Juvenile Courts Act![22] No. 17 also in no uncertain terms criticises so-called apocryphal grounds and the "short sharp shock": "Where possible, alternatives to remand in custody should be used for juvenile suspects, such as placements with relatives, foster families or other forms of supported accommodation. Custodial remand should never be used as a punishment or form of intimidation or as a substitute for child protection or mental health measures."

And so the Council of Europe comes out against calls to tighten youth crime law. By finally calling for "strategies on juvenile delinquency" to increase public confidence, "using a wide range of outlets, including television and the Internet" (no. 25) it shows that it has a realistic idea of the conditions under which a modern crime policy will function properly.

Even given the debates of the past few years, a brief summary of the crime police guidelines of the Council of Europe and the UN in regard to youth crime law would

[22] See also no. 3.3 of the UN Minimum Standards for Juvenile Justice of 1985. Article 2.2-3 of the UN Model Law on Juvenile Justice at least proposes a special rule for young adults, see Höynck/Neubacher/Schüler-Springorum, *Internationale Menschenrechtsstandards und das Jugendkriminalrecht* [International Human Rights Standards and Youth Crime Law], 2001, p. 112, even if it is only meant in the sense of an obligatory reason for mitigating a sentence.

have to read as follows: Wherever possible, diversion, community interventions and the avoidance of imprisonment are to take priority over imprisonment, which can only be regarded as the measure of last resort. Where absolutely necessary, juveniles are to be accommodated separately from adults; the execution of punishment must be oriented to the basic principles of treatment and reintegration, and humane, non-degrading treatment is to be guaranteed.

d) Holding its course: The European Rules for Juvenile Offenders Subject to Sanctions or Measures

The *European Rules for Juvenile Offenders Subject to Sanctions or Measures* indicate that the Council of Europe is holding its previous course. This highly topical Recommendation (2008)11, which was adopted as recently as November 2008, closes a loophole, firstly because it refers specifically to juveniles (which is not the case with the *European Prison Rules* and the *European Rules on Community Sanctions and Measures* of 1992[23]) and secondly because it complements the *Recommendation concerning new ways of dealing with juvenile delinquency and the role of juvenile justice* that had omitted deprivation of liberty for juveniles. In this sense the new recommendations, which have their sights on all forms of deprivation of liberty, have the same function as the *UN Rules for the Protection of Juveniles Deprived of their Liberty* at UN level.[24]

The basic principles to be applied to the imposition and implementation of sanctions and measures are social reintegration, education and the prevention of re-offending (no. 2), that is special prevention measures. They are thus in line with previous standards and also with Germany's youth crime law (see section 2(1) of the Juvenile Courts Act, new version). Deprivation of liberty is to be the measure of last resort and imposed and implemented for the shortest period possible; pre-trial detention is to be avoided (no. 10), so-called apocryphal grounds are not permitted. Mediation and restorative measures are to be encouraged at all stages of dealing with juveniles (no.

[23] Nevertheless, these remain applicable when it is in the best interests of the young person (Preamble), see Council of Europe/European Committee on Crime Problems (CDPC), Draft Recommendation on the European Rules for Juvenile Offenders Subject to Sanctions or Measures, Doc. CDPC (2008) 17 – Addendum I (www.coe.int/t/e/legal_affairs/legal_co%2Doperation/steering_committees/cdpc/Documents, 21 Aug. 2008).

[24] Dünkel/Baechtold/van Zyl Smit, *Europäische Mindeststandards und Empfehlungen als Orientierungspunkte für die Gesetzgebung und Praxis* [European Minimum Standards and Recommendations as Points of Reference for the Legislature and in Practice], in: Goerdeler/Walkenhorst (ed.), *Jugendstrafvollzug in Deutschland* [Juvenile Justice in Germany], 2007, p. 118.

12). The same applies to a wide range of community sanctions and measures, where priority is to be given to those that may have an educational impact (no. 23.1 and 23.2). What is especially remarkable is that young adult offenders may "where appropriate, be regarded as juveniles and dealt with accordingly" (no. 17). One requirement of the 2003 recommendation is thus reaffirmed. It would go beyond the scope of this article to cite in detail the rules on the implementation of deprivation of liberty. Nevertheless, two requirements deserve particular mention from a German perspective as well. Firstly, juveniles are to be "encouraged" to take part in activities and interventions (no. 50.2). This choice of words rules out any confusion with the disputed duty to cooperate incorporated into some Land legislation on juvenile justice in Germany and is thus without a doubt programmatic in nature. Secondly, the principle of accommodation in individual bedrooms over night, which was already included in the 2006 European Prison Rules, has also been included in these recommendations (no. 63.2). Finally, the recommendations take up important and well-known concerns of the European Council in calling for sanctions and measures designed for juveniles to be developed on the basis of research and scientific evaluation (no. 135). The media and the public are to be informed about the purpose of these sanctions and measures, as well as of the work of the staff implementing them (no. 139.2).

The Council of Europe is thus sending an impressive signal! It is hard to overlook the fact that its recent recommendations do indeed "strictly follow the human rights tradition of previous bodies of regulations adopted by the Council of Europe and the United Nations", as Frieder Dünkel, a member of the group of experts, put it.[25]

3. The legally binding nature of standards

Recommendations of the Council of Europe, like the fundamental principles, rules and guidelines of the UN, are by definition not binding law. As mere standards, are they thus non-binding? The answer to that is: No. Despite the legal policy effect, namely the need for justification that kicks in when standards are not met, standards

[25] Dünkel/Baechtold/van Zyl Smit*, Europäische Mindeststandards und Empfehlungen als Orientierungspunkte für die Gesetzgebung und Praxis* [European Minimum Standards and Recommendations as a Point of Reference for the Legislature and in Practice], in: Goerdeler/Walkenhorst (ed.), *Jugendstrafvollzug in Deutschland* [Juvenile Justice in Germany, 2007, p. 137.

also develop legal effects when they become part of the obligatory nature of "hard" law, to which they give concrete shape.

Reference should here above all be made to the *European Convention on the Protection of Human Rights and Fundamental Freedoms* of 1950 and to the *International Covenant on Civil and Political Rights* of 1966. These are international law treaties the bodies responsible for the enactment of federal law in Germany have endorsed (Article 59 para. 2 of the Basic Law) and thereby given at least equal rank to federal law. The same applies to the *UN Convention on the Rights of the Child* of 1989, to the *UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* of 1984, and to the *European Convention for the Protection against Torture and Inhuman or Degrading Treatment or Punishment* of 1987. The latter provided the basis for the establishment of an instrument that points the way ahead, namely the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. This Committee is authorised at any time to visit the institutions responsible for implementing the deprivation of liberty and to review them in regard to their compatibility with the requirements under the Convention. Reports are compiled and published following these visits. The European Court of Human Rights has already made reference in its decisions to prison conditions in individual facilities described in these reports and has even appropriated the legal assessments the Committee reached based on its own standards.[26] The Committee's role model function is so great that the UN wants to follow its example: An optional protocol to the UN's anti-torture convention provides for a comparable prevention mechanism with visiting rights at international and national level.

And that is the crux of the matter: It is through such appeal procedures set out in international law treaties that international standards are increasingly having their effect. The European Court of Human Rights refers to them in its interpretation of Article 3 of the European Convention on Human Rights and Fundamental Freedoms, as does the UN Committee on the Rights of the Child in regard to reviews under the

[26] See the judgments in the cases of *Dougoz vs. Greece* 2001, *Mouisel vs. France* 2002 and *Kalashnikov vs. Russia* 2002, cf. Murdoch, The Treatment of Prisoners. European Standards, 2006, p. 46 et seq., 50.

convention of the same name.[27] Above all, however, it is the European Committee for the Prevention of Torture whose tasks are in particular focused on the European Prison Rules, because they give concrete shape to human rights requirements and permit their review. Regardless of that, national courts must draw on this "soft law" when interpreting prison law. The literature and case-law in Germany are in agreement on that.[28] For example, in February 2008 the Berlin Court of Appeal made reference both to the European Prison Rules and to comments made by the European Committee for the Prevention of Torture in regard to the question of what the minimum size of a cell with a separate shower cubicle must be.[29]

And so we can see that even without a directly binding legal effect the international standards are by no means non-binding. They develop their direct effect at political/moral level and via legal norms in national and international law. Two Swiss commentators of the Prison Rules managed to come up with a way of describing their effect that was as easy to remember as it was apt. According to them, the legal effect can be explained by means of the "mutual influencing of a politically binding catalogue and its application in practice to give concrete shape to binding human rights. They are, therefore, today generally classified as an expression of a pan-European legal understanding and thus as a frame of reference and yardstick for the execution of prison sentences in line with human rights. In that sense they represent an aid to interpreting the application of human rights in the specific environment of prisons."[30]

4. The international significance of standards

a) Youth crime law systems are developing in opposite directions

One means of doing justice to international standards is, naturally, to incorporate them into national law. The Lithuanian legislature took this path in 2003 when it

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[27] See the Recommendation on the Administration of Juvenile Justice (Doc. CRC/C/90, 22nd Session, September 1999) and the Committee on the Rights of the Child, General Comment No. 10 (2007): Children's rights in juvenile justice (Doc. CRC/C/GC/10 of 25 April 2007).

[28] See Walter, *Strafvollzug* [The Prison System], 2nd ed. 1999, § 356; Stenger, *Gegebener und gebotener Einfluß der Europäischen Menschenrechtskonvention in der Rechtsprechung der bundesdeutschen Strafgerichte* [Actual and Required Influence of the European Human Rights Convention in the Case-law of German Criminal Courts], 1991.

[29] Berlin Court of Appeal, order of 29 Feb. 2008, 2 Ws 529/08 (juris), § 25 with further references; accordingly the surface area of an individual cell must be at least 6 m^2, in the case of multiple occupancy 4 m^2 per inmate.

[30] Künzli/Achermann, *Mindestgrundsätze schützen Menschenrechte* [Minimum Standards Protect Human Rights], in: Federal Office of Justice, *Informationen zum Straf- und Maßregelvollzug* [Information on The Enforcement of Prison Sentences and Measures], info bulletin 2/2007, p. 5-7.

simply adopted parts of the European Prison Rules word for word.[31] But that is the exception rather than the rule. An international comparison of youth crime law systems shows that it is hard to ignore the inconsistent, even contrary trends.[32] It is astonishing that Central and Eastern European countries, which had difficulties contending with rising crime rates in the 1990s after the collapse of socialism, have not followed the lead, for example, of the United States by tightening conditions. The age limit of (relative) criminal responsibility is often higher than in the "old EU"; in the Czech Republic, Poland and Slovakia, for example, it is 15 years.[33] Some have followed the Council of Europe and its calls for extended community sanctions and measures. In the Czech Republic measures of diversion were introduced in the mid-1990s and extended by means of an independent juvenile courts act that entered into force in 2004. Poland has largely retained regulations passed in 1982. These are based on the concept of education and comparatively seldomly lead to imprisonment or detention.[34] A separate juvenile courts act entered into force in Serbia in 2006. It is oriented strongly to the German law on youth crime.

It is disconcerting to see that some of the former socialist states – formerly the "problem children" that were required to ratify the European Human Rights Convention when they joined the Council of Europe – are now more committed to European standards than some countries in "old Europe". Germany's youth crime law is at any rate better than its reputation at home, and some of those involved in German crime policy could learn to incorporate scientific knowledge more. It would be paradoxical if now of all times, after numerous European countries have followed Germany's example and introduced alternative sanctions in separate juvenile law regulations, for example in the form of victim-offender mediation[35], for the German legislature to demolish the Juvenile Courts Act, large parts of which are exemplary. As regards the debate in Germany there can hardly be any compromises when it comes to "warning shot detention", increasing the range of punishment, reducing the

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[31] Dünkel/Baechtold/van Zyl Smit, in: Goerdeler/Walkenhorst (ed.), *Jugendstrafvollzug in Deutschland* [Juvenile Justice in Germany], 2007, p. 115, with reference to Sakalauskas, *Strafvollzug in Litauen* [The Prison System in Lithuania], 2006.

[32] See Junger-Tas/Decker (eds.), International Handbook of Juvenile Justice, 2006; Albrecht, *Jugendfreiheitsstrafe und Jugendstrafvollzug im europäischen Ausland* [Deprivation of Liberty of Juveniles and Juvenile Justice in Europe] in: *RdJB* 2007, p. 204 et seq.

[33] Kilchling, *Zukunftsperspektiven für das Jugendstrafrecht in der erweiterten Europäischen Union* [Future Prospects for Youth Crime Law in the Enlarged European Union], in: *RdJB* 2003, p. 323 et seq., 325-326.

[34] See the contributions by Válková and Stando-Kawecka, in: Junger-Tas/Decker (eds.), International Handbook of Juvenile Justice, 2006, p. 351 et seq. and 377 et seq.

[35] See Mestitz/Ghetti (ed.): Victim-Offender Mediation with Youth Offenders in Europe. An Overview and Comparison of 15 Countries, 2005.

application of youth crime law for young adults, among other things. These are not only nuances but fundamental issues. The legislative amendments being called for are basically heading in the wrong direction and are a mistake.

b) Criminological findings in regard to youth crime law

There is hope for the youth crime law applicable in Germany today. On the one hand, the increase in the level of awareness and significance of international standards has exceeded expectations. In view of the ever more influential role of the European Court of Human Rights, it is not likely to lose any momentum. On the other hand, it clearly has the better arguments. Europe-wide studies[36] have for many years provided evidence that juvenile delinquency is largely normal and development-related misconduct that by no means heralds the start of a criminal career, but which stops of its own account with increasing age after peaking at age 16-17 (a phenomenon known as spontaneous probation). This principle of the episodic nature of delinquency only does not apply to a small percentage in each age group. These approximately 5%, for whom the term "multiple offender" has been coined in the crime policy debate, are held responsible for more than half of all offences committed by their age group. The hope held by those working in the field of crime policy, namely that crime can be considerably reduced by putting these problem youths into prison, is, however, unfounded. There are neither uniform criteria available for labelling them "multiple offenders" nor reliable diagnoses that permit these persons to be identified prospectively.[37] In particular, however, various findings from recent research indicate that the end of a multiple offender's criminal career is not the exception but the rule and that processes involved in spontaneous probation can be observed "in the early and middle juvenile phases".[38] But the actual question is this: How could the discussion on juvenile crime law shift its focus so strongly from episodic offending as the norm to the "multiple offender" as the exception?

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[36] See Junger-Tas/Haen-Marshall/Ribeaud, Delinquency in an International Perspective. The International Self-Report Delinquency Study, 2003; M. Walter, *Jugendkriminalität* [Juvenile Delinquency], 3rd ed. 2005, p. 216 et seq.

[37] Indicators are: entry age, duration of abnormal behaviour and psycho-social problems, see Naplava, *Junge Mehrfachtatverdächtige in der Polizeilichen Kriminalstatistik Nordrhein-Westfalen* [Young Suspected Multiple Offenders in the Police Crime Statistics of North Rhine-Westphalia], in: *BewHi* 2006, p. 272.

[38] Boers/Walburg/Reinecke, *Jugendkriminalität – Keine Zunahme im Dunkelfeld, kaum Unterschiede zwischen Einheimischen und Migranten* [Juvenile Delinquency – No Increase in the Rate of Unreported Cases, Hardly any Differences between Locals and Migrants] , in: *MschrKrim* 2006, p. 63, 75; see also Stelly/Thomas, *Die Reintegration jugendlicher Mehrfachtäter* [The Reintegration of Juvenile Multiple Offenders], in: *ZJJ* 2006, p. 45 et seq.

The beginning of criminal responsibility (14 years) was not chosen arbitrarily, but has become standard in most European countries. And that standard is borne out by developmental psychology studies.[39] The flexible young adult rule is gaining increasing interest at international level. Those involved in the crime policy debate that tend towards a purported rule-exception relationship that should always lead to the application of adult law are ignoring the dogmatic view of law at its core and the legislature's intention. It cannot be emphasised enough that the Council of Europe requires that its member states introduce a rational and scientifically founded crime policy.[40] In its judgment of 31 May 2006 the Federal Constitutional Court also obligated the legislature to introduce a concept of resocialisation that exhausts "the know-how available in prison practice" and that must be "oriented to the level of scientific knowledge".[41]

5. National importance of standards in Germany

Germany compares favourably with other countries in terms of its Youth Courts Act. The young adult rule, the comprehensive catalogue of possible orders, the high rate of measures of diversion (nearly 70%) and efforts to avoid pre-trial detention, for example, should be highlighted. Despite the shortage of resources in the prison system, the conditions are satisfactory in an international comparison (47 member states of the Council of Europe). The authorities are serious about developing and implementing treatment programmes.

Nevertheless, improvements could be made. Other countries are more consistent as regards maximum punishment and stay below the 10-year limit set in German youth crime law. Section 37 of the Juvenile Courts Act still does not ensure that all juvenile court judges and public prosecution offices have "educational competence" and "experience in bringing up children", to quote the law itself.[42] In comparison to the requirements formulated by the Council of Europe, the regulations governing

[39] See Hommers/Lewand, *Zur Entwicklung einer Voraussetzung der strafrechtlichen Verantwortlichkeit* [On the Development of a Precondition for Criminal Responsibility], in: *MschrKrim* 2001, p. 425 et seq.
[40] See no. 5 of Rec(2003)20 of the Council of Ministers: “Interventions with juvenile offenders should, as much as possible, be based on scientific evidence on what works, with whom and under what circumstances.”
[41] Federal Constitutional Court *NJW* 2006, 2093, 2097.
[42] See Drews, *Anspruch und Wirklichkeit von § 37 JGG* [Aspiration and Reality of Section 37 of the Juvenile Courts Act], in: *ZJJ* 2005, p. 409 et seq.

necessary defence (section 68 of the Juvenile Courts Act) and on the restriction of legal remedies (section 55 of the Juvenile Courts Act) do not come up to expectations.[43]

Deviations from international standards sometimes become apparent in the new juvenile justice laws of individual Länder. One crucial point, for example, is the relativisation of the objective of enforcement, namely resocialisation, on account of the "protection of the general public". The *European Prison Rules* state in regard to the "objective of the regime for sentenced prisoners", that it was to be "designed to enable them to lead a responsible and crime-free life" (no. 102.1). The *European Rules for Juvenile Offenders Subject to Sanctions or Measures* state that the sole goal of the imposition and manner of implementation of sanctions is education and social reintegration, as well as the prevention of re-offending (no. 2). The Commentary thereto states that this leaves a lesser place, and in some countries no place at all, for the principle of general deterrence or other (more punitive) aims that are the feature of the criminal justice system for adults. Further, the term "education" should not be misused by repressive forms of authoritarian education, for example military style detention regimes.

Furthermore, the establishment of the young offender's duty to cooperate appears problematical, as is the transferring of difficult offenders who are unwilling to cooperate to "basic units" without the right to treatment that is associated with that in some places. According to international standards, juvenile offenders, by contrast, are to be "*guaranteed* a variety of meaningful activities and interventions" (no. 50.1 of the *European Rules for Juvenile Offenders Subject to Sanctions or Measures*). In view of prison overcrowding, serious problems have arisen over the past few years in regard to the accommodation of prisoners. Most juvenile justice laws now grant offenders a legal right to accommodation in an individual room during rest periods in line with the Council of Europe's international standards (see no. 18.5 of the *European Prison Rules* and no. 63.2 of the *European Rules for Juvenile Offenders Subject to Sanctions or Measures*).

[43] See European Committee on Crime Problems (CDPC)/Council for Penological Co-operation (PC-CP), Commentary to the European Rules for Juvenile Offenders Subject to Sanctions or Measures, re Rule 13: “In cases where deprivation of liberty is possible, legal defence counsel must be allocated to the juveniles from the outset of the procedure. The rule makes it clear that there is no justification for giving juveniles lesser rights than adults. Therefore regulations that restrict the right to appeal or complaints procedures with arguments of education cannot be justified.”

The fact that deviations are becoming increasingly apparent is certainly connected to the greater density of rules. In its most recent Recommendations of 2006 and 2008 the Council of Europe has gone into far more detail than the UN has ever done. That is an important step towards guaranteeing international standards. However, no. 19, sentence 2 of the *European Rules for Juvenile Offenders Subject to Sanctions or Measures* (see also no. 4 of the European Prison Rules) is surely just as significant when it very clearly states: "Lack of resources shall never justify the infringement of the human rights of juveniles."