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**The Treatment of Children Involved in the Traffic  
of Illicit Drugs in Respect of International Human  
Rights Law in Colombia:  
Victimisation or Criminalisation?**

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## **Abstract**

Children involved in production, trafficking or sale of drugs are victims of circumstances as well as law offenders. Drug trafficking is a ‘global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws’ The purpose of this study is to investigate whether children who have fallen into drug-related delinquency in Colombia should be treated as victims or as criminals.

This study extensively examined international human rights law, including the Convention on the Rights of the Child, and national law instruments to determine how children involved in illicit drug trafficking should be treated. Having ratified the Convention on children’s rights and given the Colombian legal framework, Colombia demonstrates a clear commitment to protect the rights of children regardless of the nature of crimes that they commit.

In conclusion, it was found that both international and national human rights laws tend to favour the victimisation of children involved in drug trafficking. Thus, it can be argued that children trafficking drugs be considered victims rather than as criminals. It is firmly believed that this study would contribute to the respect of human rights in the treatment of children.

Key words: children, drug trafficking, human rights, Colombia, victimisation, criminalisation.

***“Por un país al alcance de los niños.”***

Gabriel Garcia Marquez

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## **Acronyms**

CIA	Code of Infancy and Adolescence
CoRC	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
IAIRC	Inter-American Institute for the Rights of the Child
ICBF	<i>Instituto Colombiano de Bienestar Familiar</i> (Colombian Institute for Family Welfare)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LPS	Law on Public Safety
NSND	National Statute on Narcotic Drugs ( <i>Estatuto Nacional de Estupefacientes</i> )
OAS	Organisation of American States
UN	United Nations
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime

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## Chapter 1: Introduction

Children trafficking drugs raises a dilemma in the way these children should be treated by law. When compared to adults, children are more vulnerable and they are less able to defend themselves. Children, as individuals transiting towards adult age, are also less able to understand the consequences of their acts because they are inexperienced and lack maturity<sup>1</sup>. The dilemma in treating children trafficking drugs lies in the fact that they are infringing the law by committing a criminal offence but they also need special protection against being used by adults to commit such offences. The approach to children trafficking drugs should differ from adults trafficking drugs based on the analysis of children's own characteristics. The question is therefore to differentiate when children who traffic drugs are considered as victims and when they are considered as criminals; as to when they are subjects of rights and when they are duty bearers.

In Colombia, children are affected by an internal conflict very much linked to the drug trade. The Committee on the Rights of the Child (CoRC) has been concerned about the consequences of the Colombian conflict on children for some years now. Already in 1994, the CoRC raised the concern about the difficult implementation of the Convention on the Rights of the Child (CRC)<sup>2</sup> in Colombia because of the armed conflict resulting in 'drug-related terrorism, violence and poverty'<sup>3</sup>. In 1995, it added that political problems arising from this drug-related terrorism and violence had very serious consequences on children<sup>4</sup>.

However, the extent of the problem remains difficult to demonstrate because of the lack of the exact number of child delinquents in drug trafficking. It could be explained by the following reasons. The first reason could be that the conflict is still ongoing and every drug-related issue is extremely sensitive. It means that it remains difficult to investigate on human rights violations in Colombia, especially on violations directly committed by armed forces taking part in the

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<sup>1</sup> Declaration on the Rights of the Child, preamble.

<sup>2</sup> Convention on the Rights of the Child, 20 November 1989, ratified by Colombia on 28 January 1991.

<sup>3</sup> Committee on the Rights of the Child, *Preliminary Observations of Committee on the Rights of the Child, Colombia*, 1994, CRC/C/15/Add.15, para. 5.

<sup>4</sup> CoRC, *UN Committee on the Rights of the Child: Concluding Observations, Colombia*, 1995, CRC/C/15/Add.30, para. 7.



conflict. The second reason could be that almost 20% of children are not registered at birth in Colombia<sup>5</sup>. It could be assumed that the unregistered children are those born in rural and poor regions where they will be likely to traffic drugs for survival. The CoRC also notes that unregistered children are ‘extremely vulnerable to all kinds of abuse and injustice regarding the family, work, education and labour, particularly within the juvenile justice system’<sup>6</sup>. It enhances the need to raise possible human rights abuses that might be encountered in the treatment of child delinquents. The international human rights framework is an inspiration for human rights protection and can therefore be set as a foundation for national human rights law.

### 1.1. Scope of research question

“The Treatment of Children Involved in the Traffic of Illicit Drugs in Respect of International Human Rights Law in Colombia: Victimisation or Criminalisation?” sets children in a unique setting. It is unique because, firstly, it is based in a single country’s socio-legal context: Colombia. Secondly, it does not involve criminal responsibility in general but specific to children’s criminal responsibility as minors entitled to a special treatment. In other words, this treatment should be directed by principles that take into account the specific characteristics of children in contrast to adult offenders.

The CRC and the CoRC’s generated a comprehensive orientation of this special treatment of juvenile offenders<sup>7</sup>. Based on the principle of the best interest of the child<sup>8</sup> stated by the CRC, the CoRC justified the necessity for a comprehensive policy which states that: ‘Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in

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<sup>5</sup> European Commission, *Colombia Country Strategy Paper 2007-2013*, 28 March 2007, E/2007/484, p. 12; Economic and Social Council, *Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant - Concluding Observations of the Committee on Economic, Social and Cultural Rights*, 21 May 2010, E/C.12/COL/CO/5, para. 19.

<sup>6</sup> CoRC, General Comment no. 10, 25 April 2007, CRC/C/GC/10, para. 39.

<sup>7</sup> CRC/C/GC/10, 2007, para. 1: ‘the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort’; para. 4: ‘To encourage State parties to develop and implement a comprehensive juvenile justice policy to prevent and address juvenile delinquency based on and in compliance with CRC’.

<sup>8</sup> CRC, 1989, art. 3.

conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children’<sup>9</sup>.

The main objective of this paper is to analyse how Colombian legal system deals with children trafficking drugs. The undermining question is whether children trafficking drugs in Colombia are victimised or criminalised by law. In addition, it questions how they would have to be criminalised or victimised in accordance with international human rights law instruments and policies, notably the comprehensive policy of juvenile justice established by the CoRC. It will include the importance given to prevention and rehabilitation.

## **1.2. Definitions**

The key words used in this research have to be defined in relation to the research question. These definitions will allow better understanding of the analysis throughout the study.

### **1.2.1. Children**

The most appropriate legal definition of children is stipulated by the international instrument dedicated to children’s rights: the 1989 CRC. The first article considers that children include ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’. This definition of children suggests a reference to the appropriate national law, which in the case of Colombia establishes the age of majority at eighteen<sup>10</sup>. This paper will use the term ‘children’ as well as the term ‘minor’ (*menor de edad*).

Human beings aged below eighteen can be divided into categories corresponding to their different levels of physical and intellectual development. The UN Provisional Guidelines on International Age Classifications<sup>11</sup> divide children into four categories according to their age: the first category corresponds to new-borns from birth to one-year old children, the second to infants

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<sup>9</sup> CRC/C/GC/10, 2007, para. 10.

<sup>10</sup> Law no. 27 that fixes the age of majority at 18 (*Ley no. 27 de 1977 por la cual se fija la mayoría de edad a los 18 años*), 26 October 1977, available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=4965> (consulted on 12 March 2012).

<sup>11</sup> UN Department of International Social and Economic Affairs, *Provisional Guidelines on International age classifications*, 1982, ST/ESA/STAT/SER.M/74.

from one to four-year old, the third to young children from five to fourteen year-old and adolescents from fourteen to seventeen year-old. Since all categories of children cannot be criminally responsible, the research question will only focus on those who can be criminally accountable before the law. The criterion of criminal responsibility will have a major impact on the treatment of children trafficking drugs. For drug traffickers that are below fourteen, the question of victimisation or criminalisation is irrelevant because the age of criminal responsibility in Colombia is set at fourteen years<sup>12</sup>. Neither do children aged between fourteen and eighteen having psychic or mental disabilities are subject to the juvenile criminal system<sup>13</sup>. Therefore, this research will cover the fourth category of children under the UN classification: adolescents. Adolescents will also be referred to as child delinquents, juvenile criminals or juvenile offenders.

The research done by international institutions to identify the existence of children trafficking drugs is of great importance in assessing the underreported issue of children trafficking drugs. For instance, the CoRC raised concern over the use of street children to traffic drugs<sup>14</sup>. The default of birth registrations mentioned earlier most probably affects street children in great deal and needs to be recognised. It would enhance a better understanding of the realistic situation on ground. Also, the Committee on the Elimination of all forms of Discrimination Against Women called the State of Colombia to enhance awareness on the risks and consequences of the involvement of girls and women in drug trafficking and enhance alternative economic activities for them since they comprise girls and women living in rural areas<sup>15</sup>. The finding of the Committee would call for further investigation on this particular category of children involved in drug trafficking.

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<sup>12</sup> Code of Infancy and Adolescence (*Código de la Infancia y de la Adolescencia*), 8 November 2006, available at [http://www.secretariassenado.gov.co/senado/basedoc/ley/2006/ley\\_1098\\_2006\\_pr003.html#169](http://www.secretariassenado.gov.co/senado/basedoc/ley/2006/ley_1098_2006_pr003.html#169) (consulted on 1 June 2012), 8 November 2006, art. 169.

<sup>13</sup> CIA, art. 142, 143.

<sup>14</sup> CoRC, *United Nations Committee on the Rights of the Child: Concluding Observations, Colombia*, 8 June 2006, CRC/C/COL/CO/3, para. 88.

<sup>15</sup> Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Colombia*, 2 February 2007, CEDAW/C/COL/CO/6, paras. 20-21.

This research will exclude child soldiers in their specific status, although they are closely linked to Colombia's illicit drug trade. This study will focus on drug trafficking as committed by children and not as committed by child soldiers. In other words, the offence of drug trafficking will be examined regardless of the fact that the offender – child or child soldier – might have been recruited by armed groups in the context of the Colombian armed conflict. Child soldiers are often used by Colombian armed entities to traffic drugs but this offence is usually committed along with other serious crimes<sup>16</sup>. Considering a wider picture than drug trafficking alone would involve the analysis of other instruments such as the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict<sup>17</sup> (yet to be ratified by Colombia) which is not the aim of this research.

### **1.2.2. Trafficking offences**

According to the United Nations Office on Drugs and Crime (UNODC), drug trafficking is a 'global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws'<sup>18</sup>. A more precise definition can be found in the Colombian National Statute on Narcotic Drugs<sup>19</sup> (NSND). Article 32 sanctions the act of planting, growing or financing plants used to produce drugs such as marihuana or other addictive drugs without permission. This article considers drug trafficking to start at the very root of the drug trade process. Whereas Article 33 stipulates that general trafficking of these substances includes their transportation within the country or out of its frontiers, their elaboration, their sale, etc., which correspond to the common understanding on drug trafficking. Offences under Article 32 are very important because it is likely that children are used at the initial stage of planting and growing in rural peasant communities. Article 35 sanctions the distribution or stimulation to use illicit substances. Trafficking activities therefore include a wide range of offences, from

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<sup>16</sup> Grossman, 2007, p. 7.

<sup>17</sup> UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000.

<sup>18</sup> United Nations Office on Drugs and Crime, Introduction to drug trafficking, available at: <http://www.unodc.org/unodc/en/drug-trafficking/index.html> (consulted on 21 March 2012).

<sup>19</sup> Law no. 30 adopting the National Statute of Narcotics and other provisions (*Ley no. 30 de 1986 por la cual se adopta el Estatuto Nacional de Estupefacientes y se dictan otras disposiciones*), 31 October 1986, available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=2774> (consulted on 24 March 2012).

plantation to distribution of illicit substances. Trafficking is also defined precisely in the 1988 UN Convention against illicit traffic in narcotic drugs and psychotropic substances<sup>20</sup>. Thus, traffickers can be considered as facilitators of globalisation of the drug trade, without whom ‘the industry would consist of remote suppliers with no means to deliver goods to the consumer’<sup>21</sup>. This study is based on the legal analysis of treatment to which children trafficking drugs are submitted to.

The definitions of trafficking given by national and international law are applicable to children in the qualification of the offences because their criminal responsibility is based on adults’ Penal Code<sup>22</sup>. The difference will lie in their treatment following the commitment of these offences because, as it will be explained when stating why children can be considered as criminals, children are usually used to traffic drugs. It means that the intention or the initiative rarely comes from themselves, and that narcotraffickers are usually behind this type of criminal acts. Though drug consumption and drug trafficking are related topics, drug consumption will not be the main concern here. However, drug use will be mentioned because drug offenders do not generally only traffic drugs but they are also consumers<sup>23</sup>.

### 1.2.3. Illicit drugs

The UNODC ‘does not recognise a distinction between licit and illicit drugs’<sup>24</sup>. Nevertheless, this distinction will be made in this study with a focus on illicit drugs in order to determine the treatment of children’s criminal responsibility. They would only be responsible for the traffic of illicit drugs which are ‘subject to drug prohibition laws’<sup>25</sup>.

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<sup>20</sup> The 1988 Convention on illicit drugs was ratified by Colombia on 10 June 1994.

<sup>21</sup> Jenner, 2011, p. 906.

<sup>22</sup> United Nations Children’s Fund, CIA – Commented Version (*Código de la Infancia y de la Adolescencia – Versión comentada*), 2007, p. 89, available at: <http://www.unicef.org/colombia/pdf/codigo-infancia-com.pdf> (consulted on 3 March 2012): ‘offences committed established in the Penal Code’.

<sup>23</sup> International Labour Organisation – International Programme on the Elimination of Child Labour, Training manual to fight trafficking in children for labour, sexual and other forms of exploitation, 2009, p. 18, available at: [http://www.ilo.org/ipecc/areas/Traffickingofchildren/WCMS\\_111537/lang--fr/index.htm](http://www.ilo.org/ipecc/areas/Traffickingofchildren/WCMS_111537/lang--fr/index.htm) (consulted on 2 June 2012).

<sup>24</sup> UNODC, Information about drugs, available at: <http://www.unodc.org/unodc/en/illicit-drugs/definitions/index.html> (consulted on 15 March 2012).

<sup>25</sup> See *supra* note 18.

Though the UN drug Conventions are not part of the core human rights law as the CRC, a complete definition of illicit drugs should include definitions given within the international framework by these drug conventions and the definition of drug given at the national level in the Colombian law. Article 2 of the NSND defines a ‘drug’ as every substance that, when introduced in the human body, modifies its physiological functions. More precisely now, a ‘narcotic’ is defined as a non-medically prescribed drug that acts on the central nervous system, creating dependence, and a ‘psychotropic drug’ as a drug that acts on the central nervous system, producing psycho-physiological effects.

These definitions are detailed in the 1961<sup>26</sup> and 1971<sup>27</sup> UN Conventions regulating narcotics and psychotropic drugs. Both Conventions provide an exhaustive list of natural and synthetic substances in their attached schedules. It should be noted that medicines, alcohol and tobacco – which can be consumed legally – are therefore excluded from our scope of research which is centred on illicit drugs or substances, also referred to as illegal drugs or substances.

#### **1.2.4. Treatment: victimisation and criminalisation**

The treatment of juvenile offenders refers to the consequences that they must bear for breaking the law. Juvenile offenders, referred to as ‘children in conflict with the law’ by the CoRC<sup>28</sup>, might be criminally treated by States. This issue of drug trafficking raises a dilemma: whether law should treat child drug traffickers as victims or as criminals. It should be noted that victimising children does not necessarily mean that they are only protected for their rights or that criminalising children makes them exclusively duty bearers. However, victimising children does certainly privilege the guarantee of their rights and criminalising does hold them accountable towards the society. Whether they are considered to be victims or criminals does not make any exception to States’ obligation to respect human rights in the treatment of children trafficking drugs. Even when they are treated by juvenile justice administration, compliance with the CRC is mandatory.

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<sup>26</sup> United Nations Single Convention on Narcotic Drugs, 1961, art. 1 (j) (ratified by Colombia on 3 March 1975).

<sup>27</sup> United Nations Convention on Psychotropic Substances, 1971, art. 1 (e) (ratified by Colombia on 5 May 1981).

<sup>28</sup> CRC/C/GC/10, 2007, para. 1.

On the one hand, the analysis of international human rights instruments will illustrate the international human rights policy that tends to be more oriented towards victimisation of children trafficking drugs. In the international human rights' perspective, children trafficking drugs are considered as victims as they are used or encouraged by adults to get involved in the traffic of illicit drugs. The use of children could imply that they are manipulated for drug trafficking purposes because of their vulnerability. Two major instruments of international law set children trafficking drugs as victims. Firstly, Article 33 of the CRC considers that the use of children in drug production and trafficking should be prevented. Secondly, the International Labour Organisation (ILO) Convention no. 182<sup>29</sup> classifies 'the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs' as worst forms of child labour. Again, the terms used in the ILO Convention suggests that children are not responsible for drug trafficking offences when they are used by others to commit the offence. It can be assumed that the view of narcotraffickers who intentionally use children is mainly justified by the legal status of children and the special treatment they would benefit under law<sup>30</sup> if convicted. In general, children who are arrested risk less imprisonment and usually pay less than adults do<sup>31</sup>. In the context of the drug trade in the war situation of Colombia, the employment of children also involves complex factors including the use of their vulnerability along with material and psychological pressure<sup>32</sup>. One of the factors is that most children trafficking drugs are already drug dependent. The interest of the child in starting to traffic drugs is that consumption will then be easier and perhaps cheaper. Other factors related to their psychological development and immaturity mentioned earlier include risk taking and peer influence<sup>33</sup>. From children's perspective in the Colombian context, drug trafficking can be justified by unemployment and poverty that is prominent in the country. In a country where persons living in

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<sup>29</sup> ILO Convention no. 182, 1999, ratified by Colombia on 25 January 2005.

<sup>30</sup> This special treatment will be analysed more deeply in the international human rights framework and in national law further in the study.

<sup>31</sup> De Souza & Silva Urani, ILO-IPEC, 'Brazil Children in Drug Trafficking: A Rapid Assessment', 2003, p. 35, available at: <http://www.dreamscanbe.org/Research%20Page%20Docs/Souza%20e%20Silva%20and%20Urani%20-%20Brazil%20Children%20in%20Drug%20Trafficki.pdf> (consulted on 7 June 2012).

<sup>32</sup> Constitutional Court of Colombia, Case C-251, 2008, available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=43916> (consulted on 13 March 2012).

<sup>33</sup> Richards, 2011, p. 3-4.

poverty represent 46% of the total population, persons living in extreme poverty represent 17.8% and extreme poverty in rural areas is twice as much as the national average (32.6%)<sup>34</sup>, drug trafficking could be an alternative for children, whether they are living in the streets or not, on which they and their families rely on<sup>35</sup>. Again, the lack of data and the underestimation of the extent of the problem can be related to the fact that the use of children for trafficking drugs might be more rampant in rural areas where children are not necessarily registered and where it is difficult to establish reliable data.

On the other hand, considering children as criminals means that they have been declared criminally responsible by competent judicial authorities. Criminal responsibility involves a punishment ‘generally taken to have several purposes, including retribution, deterrence, protection of society through incapacitation, and rehabilitation.’<sup>36</sup> The Code for Infancy and Adolescence provides five types of sanctions<sup>37</sup>: admonishment, imposition of rules of conduct, community service, assisted freedom, placement in semi-closed centre, liberty deprivation in specialised institution of attention. This list of sanctions is in compliance with the CoRC which considers that ‘detention should be a measure of last resort’, that it should be ‘avoided as much as possible’ and that ‘alternatives must be developed and implemented’<sup>38</sup>. Detention can have some possible positive effects if the conditions of detention of the child are rehabilitative and ensure that detention does not stigmatise convicted children.

### 1.3. Methodology

This research is a socio-legal case study in two steps. The first step will consist of a legal analysis of international human rights instruments applicable to child delinquents involved in

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<sup>34</sup> United Nations Economic and Social Council, *Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant Concluding Observations of the Committee on Economic, Social and Cultural Rights*, 21 May 2010, E/C.12/COL/CO/5, para 20.

<sup>35</sup> Advocate of the People (*Defensoria del Pueblo*), ‘Caracterización de las niñas, niños y adolescentes desvinculados de los grupos armados ilegales: Inserción social y productiva desde un enfoque de derechos humanos’, November 2006, no. 9, p. 25, available at: <http://www.unicef.org/colombia/pdf/Boletin-defensoria.pdf> (consulted on 8 July 2012).

<sup>36</sup> Ash, 2012, p. 22.

<sup>37</sup> CIA, art. 177.

<sup>38</sup> Committee on the Rights of the Child, *Concluding observations: Nigeria*, 30 October 1996, CRC/C/15/Add.61, para. 40.



drug trafficking. International human rights instruments include binding and non-binding instruments adopted by States at the international level. The second step, and core of the case study, will consist of a socio-legal analysis of the Colombian national law and its context. The respect for human rights as set by international human rights law will be verified in observing how Colombian law treats children trafficking drugs. The Colombian legal instruments (Political Constitution, codes and laws) have been accessed mainly through Bogota City Council's website<sup>39</sup>. The translation of constitutional quotes will be based on the version provided by HeinOnline's World Constitutions Illustrated<sup>40</sup>. As no official versions of other documents are available in English, quotations have been translated with a reference to the version of the text in Spanish.

Due to time constraints and due to safety and security in the context of an armed conflict in Colombia, an empirical research to collect primary qualitative and quantitative data could not be carried out. Nevertheless, this analysis is based on secondary data and information obtained from an extensive literature review. During the literature review, edited books, academic articles from journals and reviews on the topics of child's rights, juvenile criminal justice, drug-related phenomenon in Latin America and the narcotics trade in Colombia were consulted. In addition, most data was directly extracted from official reports, commentaries and case-law issued by national and international institutions such as the International Labour Organisation (ILO), the United Nations Children's Fund (UNICEF), the CoRC and the Organisation of American States (OAS). It is explained by the fact that the interest of academia on the topic of children trafficking drugs is very recent<sup>41</sup> and almost inexistent in the case of Colombia. The research has been completed by journalistic articles and documentaries<sup>42</sup>. Most of the information is available on respective websites, particularly Ministry of Justice and Law<sup>43</sup>, the Colombian Institute of

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<sup>39</sup> *Régimen de Bogotá D.C. Compilación de Normatividad, doctrina y jurisprudencia*, available at: <http://www.alcaldiabogota.gov.co/sisjur/> (consulted several times).

<sup>40</sup> See in general Vellvé Torras, Ruchti & Gress, 2011.

<sup>41</sup> Barrett and Veerman, 2010, p. 71: 'the lack of attention to article 33 [of the CRC] is especially unusual from an international law perspective'.

<sup>42</sup> Flick, 2011, p. 124.

<sup>43</sup> *Ministerio de Justicia y del Derecho*, available at: <http://www.minjusticia.gov.co/Home/1> (consulted several times).

Family Welfare (ICBF)<sup>44</sup>, and international and regional organisations (UNODC, UNICEF, ILO, OAS, etc.). However, any quantitative data is ephemeral<sup>45</sup> and should thus be processed with caution. Also, as already mentioned, children involved in drug trafficking are difficult to trace and identify<sup>46</sup> so the information could be incomplete.

#### **1.4. Structure of thesis**

As this paper is human rights oriented, it will start by a scrutiny of international human rights law instruments that can be applied to children trafficking drugs (chapter 2). It will explore the international approach to children drug trafficking. This chapter will include the study of the law used to victimise and protect their rights in the context of drug trafficking. It will also consider how they must be treated when the national law criminalises them.

The following chapter will focus on Colombian law's consideration on how children trafficking drugs should be treated (chapter 3). It will include the analysis of provisions that victimise children trafficking drugs and those of juvenile criminal law that criminalises them. This will be supported by international human rights law as a basis of comparison to analyse how national law respects and guarantees international human rights throughout the analysis of the treatment of children trafficking drugs.

Finally, the analysis will be completed and concluded by highlighting the drawbacks and gaps observed at the international and the national level in ensuring an appropriate protection for children trafficking drugs in Colombia. A list of recommendations will be made, which could eventually improve the situation of children trafficking drugs (chapter 4).

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<sup>44</sup> *Instituto Colombiano del Bienestar Familiar*, available at: <https://www.icbf.gov.co/icbf/directorio/portel/libreria/php/03..html> (consulted several times).

<sup>45</sup> Walliman, 2006, p. 50.

<sup>46</sup> Porio & Crisol, ILO-IPEC, 'The use of children in the production, sales and trafficking of drugs: A synthesis of participatory action-oriented research Programs in Indonesia, the Philippines and Thailand', September 2004, p. 1, available at: [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_bk\\_pb\\_24\\_en.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_bk_pb_24_en.pdf) (consulted on 25 April 2012).

## **Chapter 2: Treatment of children trafficking drugs within the international human rights law**

International human rights law instruments applying to children trafficking drugs should be analysed to understand how they should be treated according to international human rights standards. These standards will be identified in international treaties and conventions, including regional instruments. International and regional instruments have the same status in international law: they are binding once they are ratified by the State parties. Therefore, they do not require to be analysed distinctly. It is to be noted that regional law in the area of drug trafficking is poorly developed. Consequently, regional institutions refer to international law and the standards set by international agencies and international independent bodies such as the CoRC. For example, the Inter-American Children's Institute, a regional organisation attached to the Organisation of American States, stated in its latest action plan<sup>47</sup> that there is a need for full compliance with international human rights norms and that human rights standards are yet to be attained. Drug trafficking leaves children in an ambiguous situation. Indeed, it is difficult to take a strict position on whether they should be treated like criminals or if they are victims because of the influence and coercion from adult drug traffickers who look to use and exploit them. In this way, they intend to escape from their own criminal responsibility. International law is clearly oriented towards a protective position since several instruments seemed to have anticipated the use of children for trafficking purposes (section 1). It will be discussed in the following chapter that national drugs law would also apply to children found to be trafficking drugs. When they are criminalised, children are submitted to the Colombian system of criminal responsibility for adolescents. In order to understand how children should be treated in respect of international human rights when they are criminalised, the international standards of juvenile justice must be identified (section 2).

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<sup>47</sup> Organisation of American States, Inter-American Children's Institute, Action Plan 2011-2015, 4 October 2011, pp. 21-24, available at [http://www.iinadmin.com/public/uploads/files/Action\\_Plan\\_2011-2015.pdf](http://www.iinadmin.com/public/uploads/files/Action_Plan_2011-2015.pdf) (consulted on 15 June 2012).

## **2.1. Victimisation of children trafficking drugs**

The reason why international human rights law's approach of children drug traffickers is mostly oriented towards their treatment as victims is because children are easy and vulnerable targets for narcotraffickers. The analysis of the main relevant instrument available for the victimisation of children trafficking drugs will need to be examined in order to identify the type of protective measures that are set in application of the rules that defend children to be treated as victims.

### **2.1.1. International human rights' approach**

Primarily, it is important to highlight that the protection of human rights is a general principle of the 1945 Charter of the United Nations (UN). Its preamble reaffirms its faith in fundamental human rights, in the dignity and the worth of the human person, in the equal rights of men and women and of nations large and small. This study reaffirms the necessity to protect the rights, the dignity, the value of every child of both genders in Colombia. In support of this need for protection, the Charter commends every State to ensure the protection of obligations arising from international instruments. In order to do so, States must fulfil the conditions of justice and respect. In the corpus of the Charter, an important clause is Article 55: it further reflects States' obligation to 'promote (...) the universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' Though the Charter was first a non-binding proclamation from the General Assembly of the UN, it constituted a basis for a protective orientation of international human rights.

The rights the Charter was referring to were soon proclaimed in the 1966 International Covenants on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights the same year. The principles contained in these two covenants are a base to underline that children trafficking drugs should be victimised, rather than criminalised, since human rights are oriented towards a protective spirit. The International Covenant on Economic, Social and Cultural Rights (ICESCR), the CRC and the ILO Convention no. 182 on the Worst Forms of Child Labour set the obligations arising from international instruments<sup>48</sup> that are relevant to the case of children trafficking drugs in Colombia. These instruments are analysed in

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<sup>48</sup> Charter of the UN, 1945, art. 55.

a chronological order that will reveal that international human rights law has had a positive evolution for the protection of children trafficking drugs. The different instruments are becoming more and more precise on the issue.

Firstly, Article 10 (3) of the 1966 ICESCR protects children from ‘economic and social exploitation’, especially those that could be ‘harmful to their morals and health or dangerous to life or likely to hamper their normal development should be punishable by law’. Children used by narcotraffickers to traffic drugs could easily fall under the scope of this article. Indeed, it is harmful to their morals because they are encouraged to break the law. It is harmful to their health and likely to hamper their normal development because they usually live in an environment of drug consumers. Consuming drugs at an age when children are growing can be detrimental to their health. It could also be dangerous to life because they are not only exposed to harmful drugs, also because they are also exposed to a violent environment of gangs and weapons. So far, though the protection of children trafficking drugs is not mentioned in clear words, this category of children could benefit from article 10.

Secondly, the 1989 CRC has brought an important innovation with its Article 33 that requires: ‘States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures (...) to prevent the use of children in the illicit production and trafficking of such substances [narcotic drugs and psychotropic substances as defined in the relevant international treaties]’. Preventing children against this risk is important since they are generally used by narcotraffickers who expect to lessen their own risks of being criminally responsible. Two important observations can be made here. Firstly, only the use of children is considered in the article, not the actual drug trafficking by children. Secondly, the list of non-exhaustive measures does not include criminal measures. They were either forgotten or ignored. In case criminal measures were forgotten from the list, it might be because the drafters of the Convention did not expect that children could be involved in drug trafficking voluntarily and therefore, be held accountable. In case criminal measures were omitted voluntarily from the range of measures that should be adopted by States, it could have been to ensure children’s protection by victimising them. Even if they could be criminals, given their age, they would still be considered victims. Drafters seem to have followed the fundamental principle of Article 3 (1)

of the CRC that is supposed to direct any measure affecting children: the best interest of the child. The best interest of the child must be prioritised in every decision taken by any institution or person. These decisions include plans, policies and laws. Thus, victimising children trafficking drugs seems to be of children's best interests.

It is probably not a coincidence that Article 33 is preceded by an article that deals with economic exploitation. Article 32 (1) of the CRC guarantees the right of children to be protected from 'economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'. Taking into account facts reported by a publication of the ILO-IPEC on 'The use of children in the production, sales and trafficking of drugs'<sup>49</sup>, the use of children trafficking drugs would fall perfectly under the scope of Article 32. The impact of drug trafficking on children according to the report is that 'dangers and risks faced by children engaged in the drug trade go beyond the physical, psychological and mental disorders prevalent among drug-addicted children' because they 'are exposed and initiated to the world of illegal activities and criminality' and once involved, they are 'inextricably linked to situations of tensions, fear, suspicion and conflicts and are quite vulnerable to harassment and exploitation by both drug dealers and the police'. All these facts related to children trafficking drugs are based on case studies in Indonesia, the Philippines and Thailand would be appropriate for Colombia. Nonetheless, the drafters of the CRC have dedicated an entire article to children and drugs. Though it is not within the scope of this study to analyse Article 32 in detail, this article could be an additional basis of protection for children used in drug trafficking activities. It also shows the necessity to point out that the specific issues of drugs affecting children should be underlined and specifically prevented by States.

Even in UNODC's perspective, that deals with criminal matters, the UN Guidelines for the Prevention of Juvenile Delinquency ('Riyadh Guidelines') 'should be interpreted and

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<sup>49</sup> Porio & Crisol, ILO-IPEC, 'The use of children in the production, sales and trafficking of drugs: A synthesis of participatory action-oriented research Programs in Indonesia, the Philippines and Thailand', September 2004, p. 1, available at, p. 1.

implemented within the broad framework of (...) the CRC'<sup>50</sup>. The Riyadh Guidelines state that 'legislation should be enacted and strictly enforced to protect children and young persons from drug abuse and drug traffickers.'<sup>51</sup> With UNODC's reasoning, this guideline should be interpreted and implemented according to the CRC's article focused on drugs, which is Article 33 mentioned earlier. Though Article 33 and the quoted guideline are not written in the same words, the latter adds a supplementary value to the protection of child delinquents as victims by supporting the preventive aspect of the treatment of children affected by drug trafficking.

Thirdly, the ILO's 1999 Convention on the Worst Forms of Child Labour adds a final and fundamental value to the victimisation of children trafficking drugs because it qualifies the use of children in the 'production and trafficking of drugs' as one of 'the worst forms of child labour'<sup>52</sup>. Article 3 (d) of the same Convention also qualifies 'work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children' as a worst form of child labour. Precisely, Article 36 of the CRC prohibits any 'other forms of exploitation prejudicial to any aspects of the child's welfare.' Article 3 (d) could be criticised for allowing the States a free hand to establish their own list of worst forms of labour<sup>53</sup>. It could have established a non-exhaustive list of forced labours in order to provide a more secure basis of protection for children victims of forced labour, to which States could add other types of forced labour that would prevail in their country. However, a vague but large definition has the advantage of incorporating more categories of exploitations that would have any kind of negative impact on children. It is therefore a sort of additional safety for children's protection: if exploiting children to traffic drugs could not exactly be qualified under economic exploitation, Article 36 and Article 3 (d) could apply to the use of children to traffic drugs in order to consequently face less sanctions. In the case of Colombia, detailed numbers are difficult to obtain but Colombia is found to be a country where 'the incidence of child labour is very high'.

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<sup>50</sup> UNODC, *Compendium of UN Standards and norms in crime prevention and criminal justice*, 2006, p. 79, para. 7.

<sup>51</sup> UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines")*: resolution adopted by the General Assembly, 14 December 1990, para. 59.

<sup>52</sup> ILO's Convention no. 182 on the Worst Forms of Child Labour, 17 June 1999, art. 3.

<sup>53</sup> ILO's Convention no. 182 on the Worst Forms of Child Labour, 17 June 1999, art. 4. The Ministry of Social Protection of Colombia established this list in Resolution no. 1677 of 16 May 2008, available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=30364> (consulted on 4 July 2012).

The types of child labour are the highest in relation to armed conflicts and sexual exploitation but there also exist other kinds of exploitation such as illicit cultivations and street trade<sup>54</sup>. Victimisation should apply to these children as well.

The international drug conventions have paid little attention to children during their drafting process<sup>55</sup>. The only drug convention that mentions children is the 1988 Convention on the traffic of illicit drugs. This Convention would not be expected to add any insight to the protection of children trafficking drugs as it is not part of the international human rights framework but some provisions of the 1988 Convention are surprisingly interesting. First, its non-binding preamble raises a deep concern over ‘the fact that children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity’. Second, Article 3 consequently takes into account this concern and makes the criminal offences in relation to drugs<sup>56</sup> ‘particularly serious’ if the factual circumstances comprise, for instance, ‘the victimisation or use of minors’<sup>57</sup>. These provisions are oriented towards a victimising treatment of children trafficking drugs even though the Convention is meant to criminalise drug offenders. As children’s protection is at stake in the process of victimisation, the main steps taken to victimise children should target prevention, as most international instruments require.

### **2.1.2. Prevention of the use of children to traffic drugs**

Back in 1988, the General Assembly of the UN<sup>58</sup> strongly condemned drug trafficking in all its forms, particularly those criminal activities which involve children in the (...) production and illicit sale of narcotic drugs and psychotropic substances. It urged the establishment of national and international programmes but failed to provide guidelines to do so. An interesting matter is

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<sup>54</sup> Nesi, 2008, p. 402, citing the Inter-institutional Comity for the Eradication of Child Labour and the Protection of Young Worker, ‘Third National Plan for Eradicating Child Labour and the Protection of Juvenile Work 2003–2006’, Publications of the Ministry of Social Welfare of Colombia, 2003, pp. 47-8, available at: <http://www.oit.org.pe/ippec/pagina.php?seccion=238 pagina=102>.

<sup>55</sup> Barrett & Veerman, 2010, p. 66, citing generally McAllister, William B., *Drug diplomacy in the twentieth century: an international history*. New York: Routledge, 2000.

<sup>56</sup> See 1988 Convention, art. 3 (1).

<sup>57</sup> See 1988 Convention, art. 3 (5) (f).

<sup>58</sup> GA, A/RES/43/121, 8 December 1988, paras. 1-2; 4.



that it called States to legislate on severe punishment to those responsible for drug-trafficking crimes that involve children. Enacting criminal laws against narcotraffickers using children could be a measure of criminalisation applicable to adults that could deter the use of children in drug trafficking.

Furthermore, UNICEF considers that ‘successful child protection begins with prevention’<sup>59</sup>. UNICEF advocates for child-sensitive approaches to social protection, including knowledge, motivation and support needed by families and by community members, teachers, health and social workers and police, in order to protect children. This would include a dialogue and advocacy with actors dealing with children. To ensure the physical and mental health of children, Articles 13 and 17 of the CRC highlight the right for children to receive appropriate information on drug use and drug risk, through confidential means, mass media, etc. For instance, children should be informed that they could be lured by requests by narcotraffickers and that they would incur sanctions if they get involved in drug-related activities. Also, they must be informed about the options available if they fear that they might be victims of narcotraffickers.

Barrett and Veerman discuss two possible roles of the drug conventions<sup>60</sup> in their relation to Article 33 of the CRC: the first is normative, the second is subjective<sup>61</sup>. The so-called subjective role of the drug conventions would be to qualify what substances are referred to by using the term ‘illicit drugs’ whereas the normative role of the drug conventions would be to ‘set out the kind of measures envisaged by the CRC in order to protect children from drugs’. The normative role of the drug conventions seems particularly appropriate to set the kind of multidisciplinary measures that arise from Article 33. There is a need to guide States in their implementation of measures preventing children from drug related offences. Nonetheless, no matter how numerous and clear instruments of international human rights law can be to encourage the victimisation of children and no matter the quality of the guidance provided to States, they often end up to be treated as criminals. The CoRC has an important role to play in this matter under Article 43 (1) of the CRC which holds the CoRC responsible for ‘examining the progress made by States

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<sup>59</sup> Economic and Social Council, *UNICEF Child Protection Strategy*, 20 May 2008, E/ICEF/2008/5/Rev.1, para. 3.

<sup>60</sup> 1961, 1971, 1988 drug Conventions.

<sup>61</sup> Barrett & Veerman, 2010, pp. 71-72.

Parties in achieving the realisation of the obligations undertaken in the (...) Convention'. The influence of the CoRC on the implementation of human rights in Colombia seem to be insufficient so far.

## **2.2. Criminalisation of children trafficking drugs**

Even if victimising children trafficking drugs seems to be the most recommended option in international human rights law, in reality when an individual is found to be an offender, he or she will be expected to bear the consequences of his or her action to the victim or, in the case of drug trafficking, to society. The best interest of the child would consider that even though children can be law offenders, efforts should be made to avoid subjecting them to criminal sentences and liberty deprivation<sup>62</sup>. If they still end up being convicted and deprived of their liberty, the conditions of deprivation should respect their rights stated under the CRC and they must be oriented towards rehabilitation. With the use of international human rights law instruments, the conditions of detention that can be imposed on children by States will be established and rehabilitation through criminalisation will be analysed in the following section.

### **2.2.1. Conditions of criminalisation**

The phrase 'children in conflict with the law' was stated by the General Comment no. 10 of the CoRC on Children's Rights in Juvenile Justice for 'children alleged as, accused of, or recognised as having infringed the penal law'<sup>63</sup>. Early in the development of its comment, the CoRC was guided towards a comprehensive policy<sup>64</sup> for children and adolescent's health and development in the context of the CRC. It refers to the distinction the Committee established between judicial and non-judicial proceedings<sup>65</sup>. Paragraph 10 of the Comment reiterates that protecting the best interest of the child is necessary because: 'Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences

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<sup>62</sup> Freeman, 2007, p. 56.

<sup>63</sup> CRC/C/GC/10, para. 1.

<sup>64</sup> Ibid., para. 1: 'the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort'; para. 4: 'To encourage State parties to develop and implement a comprehensive juvenile justice policy to prevent and address juvenile delinquency based on and in compliance with CRC'.

<sup>65</sup> Ibid., para. 22.

constitute the basis for the lesser culpability of children in conflict with the law. These differences are the reasons for a separate juvenile justice system and require a different treatment for children'. It is understood that when children are criminalised for trafficking drugs, they deserve a special treatment, differing from adults' treatment. Children will have to be treated according to their own specific characteristics because they are at an age of immaturity where they ought not to understand the extent of their demeanour. Imposing them a strict deprivation of liberty by putting them in prison is not a trivial decision to make. The age of the young offender is also important because below eighteen, individuals come to different stages of their development where their free-will might be more or less established. Individuals under 18 year-old benefit from a special status specifically because they are at a fragile age where their "common sense" and their evaluation of reality is not the same as an adult. This is why treating children trafficking drugs as criminals should be considered with care and caution.

At the same time, other factors should be taken into account, especially the existence of a real intention to traffic drugs or the influence of a third party in the commitment of a drug-related offence. The fact that criminal measures are not stated in the list of measures that by States should take to prevent the use of minors to traffic drugs under Article 33 of the CRC could mean that the Convention encourages States to take any "soft" measures before criminalising them. The problem with the CRC is that it has missed out cases of intentional trafficking as it has been regulated under the 1988 Convention<sup>66</sup>. Children may be used and exploited by narcotraffickers in most cases but the fact that children traffic drugs may not always be blamed on adults. Adolescents are sometimes very influenced by the outside world and they can be tempted to adopt risky or provocative behaviours<sup>67</sup>. In this case, how should these kinds of intentional behaviours be dealt with? The conditions for establishing criminal responsibility has been developed by the CoRC and the conditions of treatment of children arrested for drug trafficking will be illustrated with the help of articles of the CRC. They will help to consider what treatment could be required under the Convention concerning the treatment of children if convicted of drug trafficking.

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<sup>66</sup> 1988 drug Convention, art. 3: 'when committed intentionally'.

<sup>67</sup> See *supra* note 33.

The notion of special treatment of children in conflict with the law used by the CoRC is an echo to Article 10 of the International Covenant on Civil and Political Rights (ICCPR) which considers that ‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’. All persons must include children deprived of liberty for drug trafficking offences. The respect for dignity is a key concept that was already mentioned by the UN Charter and that should guide any measures taken to criminalise children. The fact that the CoRC Comment echoes Article 10 lies in the fact that in addition to the need for a separation between arrested and convicted persons, accused juveniles should be separated from adults<sup>68</sup>. When prisons are known to be places where drug trafficking is common, it is necessary for States to ensure that children will not mingle with adults and be tempted to get involved in the same types of activities they would have been convicted for. Moreover, they must benefit from an adapted treatment, according to their age and legal status. Child delinquents’ special treatment sometimes takes the form of an exception to general principles applicable to the treatment of adult criminals. It is the case under Article 14 (1) on the principle of publicity of judicial decisions: when children’s interests are at stake when they are concerned by a judgement or a suit at law, there can be exception to the principle of publicity. For example, when children are used to traffic drugs, it means that there is one or more persons behind the drug related offence: children would have been instigated or coerced to traffic drugs. In such cases, arrested or convicted children should be granted a special protection and should be able to speak freely without fearing reprisals from drugs rings to which he or she was linked to previously.

The CRC is fairly based on principles stated by the ICCPR but is logically more precise on the way child delinquents should be treated. Article 37 (c) and (d) of the CRC ensures that children are treated humanely and with respect with the same principle of human dignity as Article 10 of ICCPR protects, worthily and promptly. Article 39 of the CRC includes the prohibition of torture and cruel or inhuman treatment and a protection against liberty deprivation. This protection is necessary because torture is likely to be used on children when they are suspected of being involved in a drug ring in order to extricate information about the drug rings.

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<sup>68</sup> ICCPR, art. 10 (2).

The 1988 Convention on the traffic of illicit drugs has been shown to favour the victimisation of children trafficking drugs<sup>69</sup> but the problem is that from a criminal perspective, in which most States situate themselves, it lacks rules taking into account the specificity of minors. The 1988 Convention warns about the issue of using children in the drug trafficking process but it does not give any clue about the way these children, when facing criminal justice for drug offences, must be treated. It makes rules meant for adults applicable to children. It involves a very high risk for children to be victims of human rights abuses in the way they are dealt with in national justice systems, including in one like Colombia where, like in the international system, there are no rules adapted to children trafficking drugs. Early in 1998 the UN Commission on Human Rights called States for the protection of street children, including those who are involved in drug trafficking, by a ‘strict compliance with obligations under relevant international human rights instruments, (...) the reintegration of children working and/or living on the street into society’. It also urged States to protect them against ‘arbitrary deprivation of liberty, maltreatment or abuse’ and ‘effective international cooperation’ to improve their situation<sup>70</sup>. Punitive justice is not encouraged by international human rights principles again, with the intention of prioritising the best interest of the child. Children used to traffic drugs, as they might rarely be able to raise their voice against narcotraffickers in fear of reprisals will often have to face the criminal justice system. The best treatment that they should receive would correspond to a rehabilitative type of criminal justice.

### **2.2.2. Rehabilitation during the criminalisation process**

The principle of rehabilitation in juvenile justice is a core concept of children’s rights established by international instruments. Deprivation of liberty is the strictest type of punishment but should be used as a very last means of punishment for juvenile offenders<sup>71</sup> and it should be taken in a rehabilitative manner. Van Zyl Smit and Snacken<sup>72</sup> distinguish two types of approaches in the aims of deprivation of liberty as punishment. The first one, the retributivist approach, considers

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<sup>69</sup> See *supra* sect. 2.1.

<sup>70</sup> United Nations High Commissioner on Human Rights, Resolution 1998/76, 54th Session on Rights of the Child, para. 20, available at: <http://www.crin.org/Law/instrument.asp?InstID=1114> (consulted on 2 July 2012).

<sup>71</sup> As required by the CoRC throughout its comprehensive policy in CRC/C/GC/10.

<sup>72</sup> Van Zyl Smit & Snacken, 2009, p. 73-74.

that the legal order has been violated and must therefore be compensated through punishment for the loss experienced by society and/or the victims of the crime. The difficulty in our main area of interest is that children trafficking drugs are often themselves victims and do more harm to themselves than to others in the society. The second one, the utilitarian approach, is ‘consequentialist’. It considers that deprivation of liberty acts as a deterrent to commit future crimes. What possible positive impact can this have on the future behaviour of minor offenders when they are strictly and only deprived of their liberty? In order for deprivation of liberty to have a deterrent effect, children in conflict with the law would need special treatment. Rotman, suggests two models of rehabilitation, later called resocialisation<sup>73</sup>. Rehabilitation can either be ‘downgraded to a mere instrument of institutional discipline and tends to resort to brainwashing’ or it can seek to awaken in convicted prisoners a ‘deep awareness of their relationships with the rest of society, resulting in a genuine sense of social responsibility’. In order to ensure protective treatment of child delinquents, the second model should be favoured over the first one because raising awareness of prisoners lies in a comprehensive policy and seems to be more compatible with the human rights framework. In a victimisation perspective, a fair treatment would correspond to the placement of children in rehabilitative centres, which however should not be confused with rehabilitation in prison. Rehabilitative centres would imply monitoring procedures to help children find a financial independence, a stable family setting when possible, psychological cells, etc.

The special treatment that children must be provided should not only be adapted depending on their age and legal status but most of all, it should always, as for adults, keep the essential aim of ‘reformation and social rehabilitation’<sup>74</sup>. Children’s special treatment in the procedure depends on two elements: their age and their desirability of promoting their rehabilitation<sup>75</sup>. It means that child delinquents must be provided different treatments according to their age. Consequently, young children and adolescents will have to be treated differently. The notion of desirability of promoting their rehabilitation can raise question because the desire to promote its own rehabilitation can rely on many complex factors such as the necessity that children might have to

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<sup>73</sup> Rotman, 1986, p. 1025-1026.

<sup>74</sup> ICCPR, art. 10 (3).

<sup>75</sup> ICCPR, art. 14 (4).

thrive on drug trafficking activities to survive. Article 39 asks States to ensure that measures are taken to promote children's physical and psychological recovery and social reintegration when they are victims of armed conflicts, exploitation or torture for example. As it was explained above, the use of children trafficking drugs can be qualified as a form of exploitation but, if States still consider that these children are responsible for a criminal offence and should therefore be deprived of their liberty, their social reintegration should at least be ensured. The reintegration can be linked to the following Article 40 which is fundamental regarding the guarantees on criminal responsibility of children. Children having infringed penal law should be treated taking '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'. Again, the age of children is an important factor to be taken into account. It ensures the protection of the child in the process of sanctioning him or her for offences. Also, Article 40 (3) (a) requires States to enact legislation to establish a 'minimum age below which children shall be presumed not to have the capacity to infringe the penal law'. The Human Rights Council had confirmed that States are free to set the age of penal responsibility in their national law but that it should not be unreasonably low<sup>76</sup>. States are free and yet, Colombia has set a relatively high age for criminal responsibility. Article 40 (4) insists on the necessity to implement alternative solutions to institutional care to guarantee a proportionate and adequate treatment for children breaking the law, 'such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes'. According to the principles of proportionality and in compliance to the best interest of the child ('well-being'), even drug offenders should be treated according to the circumstances in which they acted, if they acted voluntarily or were influenced by adult(s) or feared reprisals, to the quantity they were producing or carrying, to who they were supplying the drugs, etc. Rehabilitation through criminalisation seems to be dominant in the CRC. It is therefore a principle that must be respected and State that comply with human rights principles will necessarily ensure rehabilitative measures to children trafficking drugs if they are convicted and deprived of their liberty.

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<sup>76</sup> Human Rights Council, *CCPR General Comment No. 17: Rights of the child (Art. 24)*, 4 July 1989, available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument) (consulted on 25 June 2012), para. 4.

Article 24 of the CRC focuses on the right to health. Though the right to health is not directly relevant to the research question, it is still important to take it into consideration in a wide picture of rehabilitative measures. Indeed, firstly the right to health is not only physical health but also mental health. It means that when a child falls into serious offences such as drug trafficking it might be for hidden reasons including mental health issues added to vulnerability. Secondly, though drug use is not necessarily accompanied with drug trafficking, on the contrary drug trafficking generally goes along with drug abuse. In this case, drug trafficking is an issue of physical and mental health. In either case, rehabilitation and preventive health care are important. In addition, Article 25 recommends a ‘periodic review of treatment provided to the child’ placed in a health care institution, which could be understood as a monitoring mechanism to ensure that rehabilitative treatment is followed up. This treatment should be provided by specialised professionals to help them get rid of their drug dependency and to understand the link between dependency and trafficking, as well as to ensure that they are well protected against those who coerced and exploited them into trafficking.

At the regional level, there is no legal instrument that aims at children trafficking drugs or even more generally at children. Nevertheless, regional institutions are playing an important role in ensuring that criminal justice measures with regard to children are oriented towards rehabilitation. The Inter-American Commission and the Inter-American Court of Human Rights are inspired by the principle of the best interest of the child in their interpretation of Article 19 of the American Convention on Human Rights<sup>77</sup> which states: ‘Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.’ The Commission and the Court considered Article 19 as a source of special attention of State parties that are obliged to guarantee child offenders’ rights in a rehabilitative manner<sup>78</sup> based on the consideration that children are vulnerable and incapable of personally ensuring the respect for their rights<sup>79</sup>. Additionally, the Special Rapporteur of the Organisation of

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<sup>77</sup> Ratified by Colombia on 28 May 1973.

<sup>78</sup> Inter-American Commission on Human Rights, Report no. 62/02, Case 12.285, Merits, *Michael Domingues* (United States), 22 October 2002, para. 83.

<sup>79</sup> In Inter-American Court on Human Rights, *Case of the ‘Street Children’ (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of 19 November 1999, para. 185, street children were specifically concerned.



American States on children's rights<sup>80</sup> published a recent report on the 'Juvenile Justice and Human Rights in the Americas'<sup>81</sup>. Similar to the jurisprudence cited above, the report also recommends a special protection including 'rehabilitation and reintegration'<sup>82</sup> should be provided to children and adolescents when they are deprived of their liberty. The Commission noted in this report that only four states, one of them being Colombia, have provided transparent information<sup>83</sup> concerning the budget allocated to the guarantee of rights of children involved with the juvenile justice system. The transparency of Colombian public policies shows that the government is progressing in terms of human rights, or at least has the intention to do so. The position of regional institutions to protect children in the juvenile justice system is fundamental. However, there is no specific provision addressing the issue of children trafficking drugs. This could be related to the fact that there is no specific Inter-American Convention on the rights of the child, which is criticisable. The African system of child protection could be set as an example. Firstly, Article 17(3) of the 1990 African Charter on the Rights and the Welfare of the Child considers 'reformation, re-integration into his or her family and social rehabilitation' as an essential aim of treatment during trial and the period of deprivation of liberty<sup>84</sup>. Secondly, the Charter considers that 'all juvenile offenders under eighteen years of age are entitled to the special protection offered to juveniles'<sup>85</sup>. This provision is very important, including for drug offenders. Indeed, it is the only instrument which securely entitles children involved in the juvenile justice system to protection until they attain eighteen. This is not the case of the CRC: although it entitles juvenile offenders under the age of eighteen to special protection, it accommodates the age of majority according to national law<sup>86</sup>. This can present a risk for children to be submitted to the adult criminal justice system at an earlier age if the age is set lower. Africa is a region where the issue of children trafficking drugs is rampant. The drafters of

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<sup>80</sup> The Special Rapporteur was appointed in 1998 to promote children's and adolescents' rights of children within the jurisdiction of the 35 member states of the Organization of American States.

<sup>81</sup> Inter-American Commission on Human Rights, Rapporteurship on the Rights of the Child, *Justicia juvenil y derechos humanos en las Américas*, 13 July 2011.

<sup>82</sup> *Ibid.*, para. 364.

<sup>83</sup> *Ibid.*, para. 593.

<sup>84</sup> Mzikenge, 2002, p. 166.

<sup>85</sup> Olowu, 2002, p. 130.

<sup>86</sup> CRC, art. 1.

the Charter apparently anticipated the need to ensure the protection of children in this context. It could be a precedent for the American region to adopt a document focusing on child's rights in which States' obligations on the treatment of children trafficking drugs would be mentioned. It would add an additional value and importance to the obligation to rehabilitate children trafficking drugs.

The international human rights framework for children trafficking drugs constitutes a good basis for protection of children's rights, regardless of being treated as victims or criminals by national law. In the victimisation perspective, the focus was made on prevention as a solution set by international human rights law to fight against violation of children's rights. In the analysis of the juvenile justice system applicable to detained or convicted drug traffickers, the focus was made on rehabilitation as a means of ensuring a minimum respect for children's rights. This framework is encouraging but its solidity and efficiency on the ground will be discussed further in the following chapter.

## **Chapter 3: Treatment of children trafficking drugs in Colombia**

Now that the international framework applicable to children trafficking drugs in matters of treating children in accordance to human rights is drawn, it will serve as a reference for national law through the comparative analysis on the treatment of children trafficking drugs. But before analysing what treatment children trafficking illicit drugs are subject to in Colombian law, it is necessary to understand the atypical setting of drug trafficking in Colombia (section 1). This preliminary step of the analysis on the issue of children trafficking drugs in Colombia will give a better understanding on how children are victimised (section 2) and how they are criminalised under Colombian law (section 3). In both aspects of treatment, a parallel between treatment provided by national law in accordance to international human rights will be discussed.

### **3.1. Drug trafficking in the Colombian context**

The reason for giving a quick overview of drug trafficking in Colombia is the understanding that illicit drug trade is closely linked to the respect of human rights. The way human rights are respected will impact the treatment of children drug traffickers, even if in theory the law will be found to be very protective of human rights. The ongoing and long-lasting internal conflict that Colombia has been facing for more than sixty years can be considered as the cause and the consequence of the drug trade. The conflict began with a civil war in 1946 and was followed by a low-intensity guerrilla insurgency against the State during which the main guerrilla and paramilitary groups were formed. It gradually transited to the current internal conflict between three main types of actors – guerrillas, paramilitaries and the Colombian state – that intensified during the 1990s<sup>87</sup>. A durable peace agreement<sup>88</sup> to end the conflict is yet to be found. The problem is that the illegal armed groups thrive on an economy based on the narcotics trade<sup>89</sup>. According to some paramilitary leaders, 40 to 70 per cent of their funds come from this illegal drug trade<sup>90</sup>. These armed groups also perpetrate massive human rights violations (‘massacres,

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<sup>87</sup> Chernick, 2007, p. 79-81.

<sup>88</sup> BBC News, ‘Colombia forces kill 35 Farc rebels in Meta’, available at: <http://www.bbc.co.uk/news/world-latin-america-17518200> (consulted on 28 March 2012).

<sup>89</sup> Rosin & Youngers, 2005, p. 8.

<sup>90</sup> Ramirez Lemus, Stanton & Walsh, 2005, p. 103.

extrajudicial executions and enforced disappearances<sup>91</sup>) along with the process of illicit drug trade. Drug trafficking is dominant not only because it is the main activity with important economic and political interests of Colombian armed groups, it is also because in Colombia, risks of the involvement in drug trade is low while profitability is high<sup>92</sup>. It can be explained by the fact that politically, Colombia is known to have a ‘triple character of a weak centralised state and autonomous political powers’ that let corruption grow<sup>93</sup>. It is an important advantage for cocaine entrepreneurs that buy the ‘necessary indifference, protection or collaboration from local authorities’<sup>94</sup>. Also, geographically, Colombia is situated at the main crossroads for illegal drug trade in the Americas because of its proximity to the United States to which most production is transported to from the Andean Region<sup>95</sup>. The flow of illicit migrants that can be observed from Colombia to the US may raise the question whether they are used for trafficking illicit drugs<sup>96</sup>. Today, Colombia remains one of the world's largest producers and exporters of cocaine<sup>97</sup> and the respect of human rights is still a big centre of attention. Even though peasant producers and local processors receive only a small portion of the profit from the cocaine market, the illegality of coca means that they reap substantially more from producing this commodity than from any other crop<sup>98</sup>. When it is known that by the mid-90s, coca production was a source of employment for thousands of peasants<sup>99</sup>, it would not be surprising that children were also employed to contribute to the process of illicit drug trafficking. They still are<sup>100</sup>. The beginning of this study demonstrated that children are vulnerable. Children, specifically street children, can be easy targets in this atmosphere of conflict and illegal migration to a country of major drug consumption where demand will be high such as the US. The conflict is therefore, to a certain

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<sup>91</sup> Ibid., p. 100.

<sup>92</sup> Zaitch, 2002, pp. 35-39.

<sup>93</sup> Rosin & Youngers, 2005, p. 8.

<sup>94</sup> Ramirez Lemus, Stanton & Walsh, 2005, p. 101.

<sup>95</sup> Coca producers of the Andean region include Bolivia, Colombia and Peru; see annex no. 1.

<sup>96</sup> See note 23.

<sup>97</sup> International Narcotics Board Control, Report of the International Narcotics Control Board for 2011, 2011, E/INCB/2011/1, paras. 479; 512.

<sup>98</sup> Peceny & Durnan, 2006, p. 99.

<sup>99</sup> Ibid., p. 109.

<sup>100</sup> Bo, ‘Colombian mulls decriminalising cocaine’, Al Jazeera, 28 May 2012, available at: [http://www.youtube.com/watch?v=Wo\\_-UbC9SfQ](http://www.youtube.com/watch?v=Wo_-UbC9SfQ) (consulted on 10 July 2012).

extent, a cause of the situation of children trafficking drugs because of their proximity to drugs and the presence of narcotraffickers brings them to traffic drugs. In this context, the State should ensure provisions to guarantee the rights of human rights defenders and other important actors who contribute to the protection of children's rights<sup>101</sup>. The international human rights' orientation towards victimisation rather than criminalisation supports the fact that Colombian law can be expected to place special attention on children used for the traffic of illicit drugs.

### **3.2. Colombian legal framework**

Blakesly considers that the 'war on drugs' launched by the United States to prevent drug trade and eradicate its production '*appears to have been developed from the analogy to wars or situations of national emergency in general*' and that '*the law (the Constitution) relating to liberty and due process is suspended*'<sup>102</sup> when it comes to drug courier profiles and suspects. With this perspective, the case of Colombia is interesting because it includes both the settings of the fight against illicit drug trafficking and the settings of war. Does this unique scenario impact the way the Colombian legal framework is shaped to treat minors trafficking drugs? Does it mean that the law protecting human rights is suspended? By exploring and analysing national law applicable to minors trafficking drugs, the main research question will be answered to whether these children are, and should, be victimised or criminalised. In order to help answer the research question, comparisons will be made between the set of national instruments such as the Constitution, the 2006 CIA and the 1986 NSND and international human rights law.

#### **3.2.1. Victimisation**

Victimisation of children trafficking drugs would be, in principle, the position taken by the government as illustrated in its legislation as respecting international human rights law. The accuracy of the guarantee of the treatment of children trafficking drugs as victims in Colombian law should be verified. The analysis of legal references will be supported by constitutional provisions, child law and drug law. Since this analysis is based on an international human rights

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<sup>101</sup> AMR 23/018/2011 cites the Colombian Vice-President Angelino Garzon, May 2011: 'If the threats against and killings of human rights defenders and social leaders do not stop, the [government's] human rights policy could end up being a farce.'

<sup>102</sup> Blakesley, 1991, p. 304.

law framework, it is necessary to observe the status of international law in national Colombian law. Article 224 of the Political Constitution requires international treaties to be approved by the Congress. Once they are approved, they acquire a superior value to every other norm such as laws or decrees. Moreover, Article 93 considers that international human rights treaties prevail in the domestic order and even that *‘rights and duties given by the Constitution will be interpreted in accordance with international treaties on human rights ratified by Colombia’*. It is beneficial to the protection of human rights because it makes each of the international norms as analysed in the previous chapter directly enforceable in the internal legal order. Even Article 44 of the Constitution which is entirely dedicated to children’s rights states that: ‘they [children] will also enjoy the other rights consecrated in the Constitution, the laws, and the international treaties ratified by Colombia’. As international treaties are referred to as a source of child law, the CRC was recognised as being part of the Colombian legislation in 1991<sup>103</sup>.

In the national law as well, the use of children for drug trafficking purposes could be qualified as a form of economic exploitation<sup>104</sup>. Firstly, Article 44 of the Constitution, devoted to the protection of children’s rights, considers that ‘children shall be protected from any form of (...) labour or economic exploitation, and dangerous work’. In addition, Article 53 considers that international treaties related to labour rights are included as part of the national legislation. This strongly supports the victimisation and protection of children used for drug trafficking purposes. Indeed, in the ILO Convention on Worst Forms of Child Labour mentioned earlier, the use of children to traffic drugs was considered as a worst form of labour. The Code of Infancy and Adolescence (CIA) incorporated the ILO provision by stating, in Article 20 (2), that children have the right to be protected from economic exploitation and recruitment or offer to be involved in activities promoting, producing, collecting, trafficking, distributing or commercialising psychoactive substances or narcotics. With the same spirit, Article 38 of the Colombian NSND doubles the minimum length of sanction applicable to adults convicted of trafficking offences when the offence has been committed using children under 16 years of age. All these provisions,

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<sup>103</sup> Law no. 12 approving the Convention on the Rights of the Child adopted by the General Assembly of United Nations on 20 November 1989 (*Ley no. 12 de 1991 por medio de la cual se aprueba la Convención sobre los Derechos Del Niño adoptada por la Asamblea General de las Naciones Unidas el 20 de noviembre de 1989*), 22 January 1991.

<sup>104</sup> Economic exploitation is protected under article 32 of the CRC.

more or less precise on the exploitation of children to traffic drugs clearly protects children against their use in drug trafficking, thus positioning them as victims, not as criminals.

The CIA is a more focused instrument on children's rights oriented towards a protective policy. It gives children's rights a fundamental value by stating in Article 5 that they are of public order, inalienable and a *lex specialis* in relation to other laws. It means that they cannot be violated for any reasons. If a conflict arises between another rule and a rule set by the Code, the best interest of the child will be respected. It is followed by Article 6 which includes international instruments on human rights, including the CRC, to the Code. It is a direct application of the previously mentioned Article 44 of the Constitution. Article 8 of the Code protects exclusively the best interest of the child. The principle is considered as an obligation which obliges every person to guarantee the integral and simultaneous fulfilment of all of his or her [the child] universal, prevalent and independent rights. This article demonstrates that it is child-friendly and in accordance with prevention through the right to receive information under the CRC<sup>105</sup>. This right to information could include a special initiative to inform street children and children living in rural areas who might not access primary school education<sup>106</sup> and to guarantee child-friendly environment. Prevention is also widely visible in the area of drug law: many articles of the NSND do insist on preventing drug trafficking. The second chapter of the Statute is entirely devoted to the set up of a legal framework for campaigns and educative programmes for the prevention of cultivation, production, consumption and trafficking of illegal substances, mainly under the supervision of the National Council for Narcotic Drugs (*Consejo Nacional de Estupefacientes*). The policies adopted under the Statute reflect the emphasis made by international law on the preventive aspect of the treatment of children trafficking drugs. They include actions through the mass media (the press, radio and television), the Ministry of Health especially with the National Narcotic Drugs Fund (*Fondo Nacional de Estupefacientes*) and the Ministry of Education (primary, secondary and high schools). Again, it follows the guidance

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<sup>105</sup> Art. 13, 17.

<sup>106</sup> UNICEF, 'Progress Evaluation of UNICEF's Education in Emergencies and Post-Crisis Transition Programme: Colombia Case Study', April 2011, p. 9, available at: [http://www.unicef.org/evaluation/files/Final\\_EEPCT\\_Colombia.pdf](http://www.unicef.org/evaluation/files/Final_EEPCT_Colombia.pdf) (consulted on 7 July 2012).

initiated by international law, which focuses on preventing children of being affected by drug trafficking.

As a matter of fact, two particular categories of child victims of drug trafficking have raised attention. Firstly, the use of street children to traffic drugs has raised concern as noted in the Concluding Observations of the CoRC on Colombia (2006)<sup>107</sup>. Secondly, the Committee on the Elimination of all forms of Discrimination Against Women (2007) called the State of Colombia to enhance awareness on the risks and consequences of the involvement of girls and women in drug trafficking and enhance alternative economic activities for them since they comprise girls and women living in rural areas<sup>108</sup>. But stereotypes such as street children presumed to be criminals in order to survive in their situation would lead to presumed culpability rather than their presumed innocence. The issue raised earlier on the poor level of birth registrations and proofs in Colombia<sup>109</sup> also places children in a very weak position. Not having a birth certificate poses a problem when it comes to being recognised as a subject of rights and claiming their rights. Even the Economic and Social Council raised attention on the difficulties faced by these unregistered children for their access and enjoyment to their rights under the Convention, especially article 10 which protects children from any form of economic and social exploitation, under which can fall the use of children for drug trafficking<sup>110</sup>. In order to avoid any risks of mistreatment of children, they should be victimised rather than criminalised. All these factors have made children more vulnerable. On the one hand, the context of violence in which they live are more likely to fall in the hands of dealers. On the other hand, the policy implemented in Colombia has been more repressive than protective and understanding.

Putting together the relevant Colombian constitutional provisions, the provisions of the Code of Infancy and Adolescents and even drug law in force in Colombia leads to the conclusion that the system of protection of children seems well oriented towards the victimisation of children trafficking drugs and in accordance with human rights requirements. However, in terms of real

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<sup>107</sup> CRC/C/COL/CO/3, para. 88.

<sup>108</sup> CEDAW/C/COL/CO/6, paras. 20-21.

<sup>109</sup> E/2007/484, p. 12.

<sup>110</sup> E/C.12/COL/CO/5, para. 19.



impact and efficiency, could these few provisions really ensure that children trafficking drugs are really victimised? With the long-lasting conflict and the ‘drug war’ the balance between protecting the most vulnerable that are affected by illicit drug trade and the interests that lie behind drug trade are too closely linked and complex to truly believe that children’s rights are the priority of the government, especially when children are involved in those kind of illicit activities. Nevertheless, this scepticism over a fair treatment of children – understood as their victimisation – cannot be complete before identifying the basis and the conditions on which children drug traffickers can be criminalised in Colombian law.

### **3.2.2. Criminalisation**

A better understanding of criminalisation applied to children trafficking drugs is required to identify the principles on which the juvenile justice system relies on. It will also give an insight on the pertinence of the criminal responsibility system in Colombia.

#### **3.2.2.1. Juvenile justice applied to children trafficking drugs**

The study of several aspects of criminalisation in Colombia such as the age of criminal responsibility and the conditions of detention of child offenders will be extended to illustrate the treatment of children trafficking drugs. It will also indicate whether human rights according to international human rights law instruments are respected. The recognition of the international convention dedicated to children’s rights as part of the national legal order involved reforms in the Colombian juvenile justice system. The government had to give minors a legal status in order to deal with diverse irregular situations in which they were involved, such as abandoned children or those with deviant behaviours. Since the juvenile justice system had to respect international human rights, especially the CRC, the CIA adopted in 2006 is more protective of children’s rights. It was adopted after an extensive consultation of government entities, international organisations and civil society and was considered a success since it took into account the respect of human rights and that it was based on the principles of restorative justice, the best interest of the child and its integral protection<sup>111</sup>. This Code was a major step in recognising

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<sup>111</sup> ICBF, General Office, *Boletín del Sistema de Responsabilidad Penal 2009*, 2010, p. 4, available at: <https://www.icbf.gov.co/icbf/directorio/portel/libreria/pdf/BOLETINANUALSRPAParte1ener25de2010.pdf> (consulted on 29 May 2012).

children and adolescents as real subjects of rights and duties. However, their treatment remains unclear when their use in illicit drug trafficking activities is not qualified as exploitation. Since no clause of the CIA is focused on minors committing offences of drug trafficking, the law applicable to child offenders is the one enacted for adults<sup>112</sup>. According to the Colombian government, children trafficking or carrying narcotics represented about 23% of convicted offenders<sup>113</sup>. So the applicable set of rules can be established with the help of the general principles stated in the Constitution, the Code of 2006 and the Law of 1986.

Giving a legal status to minors also involved regulating how they would be criminally responsible. The debate over minors' criminal responsibility is linked to their ability to understand the consequences of their acts. For example, are they capable of understanding how drug trafficking can be harmful to society? That question is at stake in the reasoning from adult drug traffickers' perspective. Their interest in the use of children would be that children are vulnerable and therefore easy to influence and who benefit from presumed innocence. In reality, children seem to be put in prisons for adults and thus probably treated the same way. Interestingly, the 'Action Plan 2011-2015 of the Inter-American Children's Institute'<sup>114</sup> has assigned Colombia to implement actions proposed for the thematic area of adolescent criminal justice. Some of the matters raised were the lack of separation between adults and children deprived of liberty. Therefore, when the OAS Observatory on Citizen Security<sup>115</sup> states that the rate of minors held in Colombian prisons in 2009 was 7,65% but that they are unable to provide data on the official capacity of correctional institutions for minors, the question of the existence of specialised institutions adapted to minors in conflict with the law can be questioned.

The 2011 Report on Citizen Security in the Americas recognises that in the Americas, youth, that represents more than half of the population, lives in 'socially fragmented, underdeveloped areas, with high social inequality and poverty'. The marginalisation of young boys and girls seems to

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<sup>112</sup> CIA, art. 140.

<sup>113</sup> Colombian Institute of Family Welfare, General Office, *Boletín del Sistema de Responsabilidad Penal 2009*, 2010, p. 6.

<sup>114</sup> OAS, Inter-American Children's Institute, Action Plan 2011-2015, 6 October 2011, p. 10.

<sup>115</sup> OAS, Observatory on Citizen Security, Data Repository, available at: <http://www.oas.org/dsp/Observatorio/database/countriesdetails.aspx?lang=en&country=COL> (consulted on 8 June 2012).

be a factor of violence, as a response to the feeling of exclusion. In response to it, there has been a strong tendency to criminalise youth and take regressive measures going against principles of the CRC, such as the decrease in the age of criminal responsibility<sup>116</sup>. The fact that the report refers to the CRC implies that children are included under ‘youth’. While some countries still set the age of children’s criminal responsibility at seven and most countries set it at twelve, the age at which a child can commit a penal offence in Colombia is one of the highest of the region<sup>117</sup> (fourteen). As to the question of to whom the Code applies, Article 3 includes minors both children between zero and eleven year-old and adolescents from twelve to seventeen year-old. But, as it was mentioned earlier when introducing this study, according to Article 139, young delinquents are criminally responsible for their reprehensible acts only from the moment they are committed when they reach fourteen year-old till the day before their eighteenth birthday. Following Article 149, if there is a doubt regarding the age of a suspected child, a younger age will always be privileged. This protective measure is welcome because it could decrease the cases of criminalisation. The reasons why criminal age responsibility is set at fourteen are unknown but as a matter of fact, it could be linked to the average age at which minors start getting involved in drug trafficking<sup>118</sup>. The minimum age of the first infraction found was seven for boys and ten for girls<sup>119</sup>. Children in Colombia seem to be starting to traffic drugs early and it is commendable that the age of criminal responsibility is not set too early.

The proximity of drugs can be related to the consumption of drugs<sup>120</sup>. And consumption of drugs can be related to drug trafficking: the ‘National Study on the Consumption of Psychoactive Substances by Adolescents in Conflict with Law’<sup>121</sup> has analysed how the consumption of drugs can be linked to the commitment of offences, especially drug trafficking. In addition to the

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<sup>116</sup> OAS, Report of Citizen Security 2011, June 2011, p. 46; 48, available at: [http://www.oas.org/dsp/alertamerica/Alertamerica\\_2011.pdf](http://www.oas.org/dsp/alertamerica/Alertamerica_2011.pdf) (consulted on 15 June 2012).

<sup>117</sup> Inter-American Commission on Human Rights, Rapporteurship on the Rights of the Child, *Justicia juvenil y derechos humanos en las Américas*, 13 July 2011, paras. 47-48.

<sup>118</sup> Government of the Republic of Colombia, *Estudio Nacional de Consumo de sustancias psicoactivas en adolescentes en conflicto con la ley en Colombia*, 2009, p. 54, available at: <http://www.descentralizadrogas.gov.co/Portals/0/Estudio%20Consumo%20adolescentes.pdf> (consulted on 24 February 2012).

<sup>119</sup> Ibid., p. 45

<sup>120</sup> Ibid, p. 33.

<sup>121</sup> Ibid., see in general.

recognition of the existence of a close link between the consumption of illicit substances and offences related to drug trade, the study distinguishes three different types of links that can exist between the use of drugs and the offences directly linked to it. The three types of links are the psychopharmacological link that includes offences committed under the influence of drugs, the economic-compulsive link that includes offences committed in order to get drugs and consume it and the systemic link includes offences resulting of the production and trade of drugs. The latter is the most relevant to our analysis. In 2006, 15% of reported judicial cases concerned the possession of illegal weapons, the possession and traffic of narcotics, revolt and sexual offences<sup>122</sup>. It does not raise the number of drug dealing offences to a very high rate but it should be noted that these are only the number of reported cases. We assume that not all cases of ‘narco-retail trade’ or ‘microtrafficking’<sup>123</sup> that involve trafficking by using children are reported. The ICBF conducted a major quantitative study conducted in 2009<sup>124</sup> about criminal cases involving minors during the period covering the phases of implementation of the new criminal system applicable to adolescents following the issuing of the CIA in 2006. In response to the Presidential Decree, the criminal justice system was gradually implemented in different judicial districts of the country. The study confirms that the cases concern mostly offenders from the male sex and that offences linked to the manufacture, traffic or possession of narcotics are among the ‘crimes of major occurrence’ in most districts. Along with robberies and personal injuries, drug related crimes represent the three highest rates of offences. The issue of children trafficking drugs is therefore a major concern for criminal law.

The CoRC has raised attention on the generalised discriminations against displaced children, Afrocolombian and indigenous children and those who live in rural areas<sup>125</sup>. This discrimination is illustrated by the fact that, due to lack of resources dedicated to them, they do not have access to education for example. The Committee also raised its concern over the risk for these vulnerable groups of children to be victims of illegal armed groups. The focus of this paper is

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<sup>122</sup> UNICEF, *Código de la Infancia y de la Adolescencia – Versión comentada*, 2007, p. 87.

<sup>123</sup> Gamboa Vega, ‘‘Narcomenudeo’ en colegios, nueva modalidad de traficantes’, Vanguardia, 9 February 2012, available at: <http://www.vanguardia.com/santander/bucaramanga/142627-narcomenudeo-en-colegios-nueva-modalidad-de-trafficantes> (consulted on 8 April 2012)

<sup>124</sup> ICBF, General Office, *Boletín del Sistema de Responsabilidad Penal* 2009, 2010.

<sup>125</sup> CRC/C/COL/CO/3, para. 35.

neither specifically on armed factions, nor on child soldiers. But it shows that firstly, discrimination in the treatment of children exists. Secondly, as for unregistered children or street children, they might be easily victims of human rights violations by a quasi-systematic criminalisation without respect to their rights. For example, the Committee on Human Rights was concerned by the ‘high incidence of arbitrary arrests and, in particular, the use of preventive administrative detention by the police and mass arrests by the police and the army’. Moreover, it reported that: ‘arrest warrants are frequently insufficiently substantiated by evidence and that arrests are used as a means of stigmatising certain groups, such as (...) youth, indigenous people, Afro-Colombians and *campesinos*’<sup>126</sup>. The Committee asked the Colombian government to take steps to eradicate such type of practices. The Committee was not targeting children specifically but if certain categories of children are more likely to be involved in drug trafficking and criminalised for this offence, the government of Colombia must ensure the respect for their rights. In other words, hasty criminalisation should not be a way leading to children’s rights violation under juvenile justice mechanisms.

This overview of the situation of children that are criminalised for drug trafficking was difficult because of the lack of data and their inaccuracy. The fact that data are not easily available may express a lack of interest in the protection of children offenders. In contrast, the theoretical analysis of the legal framework shows that children trafficking drugs can be well protected in accordance with international human rights, if the law is enforced.

### 3.2.2.2. Overview of juvenile justice principles

The current law regulating drug-related offences is the NSND of 1986<sup>127</sup>. It should be highlighted that this law was promulgated prior to the adoption of both the international conventions which are crucial for this study: the 1988 UN Convention against the traffic of illicit drugs and the 1989 UN CRC. However, the Statute cannot be considered as outdated *per say*. Indeed, provisions of the NSND are incorporated in the Penal Code<sup>128</sup> and can be modified by

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<sup>126</sup> CCPR/C/COL/CO/6, para. 20.

<sup>127</sup> Law no. 30, 1986.

<sup>128</sup> Law no. 599 adopting the Penal Code (*Ley no. 599 de 2000 por la cual se expide el Código Penal*), 24 July 2000, available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=6388> (consulted on 17 June 2012):

new laws. For example, the Law on Public Safety<sup>129</sup> that was recently adopted under the Santos government modified one of the articles related to drugs. In order for the analysis to remain in the settings of drugs law, only the NSND will be used and referred to in the paragraph. However, the new law will be used with a relevant purpose in the following section on decriminalisation of drugs. Illegal activities related to drugs, such as consumption or trafficking offences, are regulated by NSND but could be soon replaced as a whole new document. Indeed, the Ministry of Internal Affairs and Justice published a new National Statute of Drugs and Psychoactive Substances in July 2011<sup>130</sup>. These new rules have not yet come into force but they are likely to be adopted soon.

In addition to the guarantee of fundamental rights under the Political Constitution of Colombia previously mentioned under the victimisation treatment section, all rights related to criminal justice are stated under the CIA. The second book of the Code sets the criminal responsibility<sup>131</sup> system applicable to minors. It has been enacted as a *lex specialis* towards other laws. It means that the provisions found in the CIA prevail on general penal laws applicable to individuals above eighteen on the same issues. The reverse principle is however also applicable and does not always benefit children. For example, when the Code is not precise enough on the sanctions applicable to children, the judge will have to refer to the laws applicable to minors. Thus, to establish sanctions imposed on children trafficking drugs, provisions extracted from the NSND and the Code of Infancy have to be combined. The main offences are established under Article 32, 33 and 35 of the National Statute. Article 32 sanctions the act of planting, growing or financing plants used to produce drugs such as marihuana or other addictive drugs without

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provisions related to drug trafficking offences appear in chapter 2 on the trafficking of narcotics of title 8 on offences committed against public health.

<sup>129</sup> Law no. 1453 on Public Safety (*Ley no. 1453 de Seguridad Ciudadana por medio de la cual se reforma el Código Penal, el Código de Procedimiento Penal, el Código de Infancia y Adolescencia, las reglas sobre extinción de dominio y se dictan otras disposiciones en materia de seguridad*), 24 June 2011, available at : <http://wsp.presidencia.gov.co/Normativa/Leyes/Documents/ley145324062011.pdf> (consulted on 27 March 2012).

<sup>130</sup> New National Statute on Drugs and Psychoactive Substances (*Nuevo Estatuto Nacional de Drogas y Sustancias Psicoactivas*) (not yet adopted), July 2011, available at: <http://www.druglawreform.info/es/informacion-por-pais/colombia/item/245-colombia> (consulted on 27 March 2012).

<sup>131</sup> Though the Code uses the phrase '*responsabilidad penal*', it was translated as criminal responsibility for two reasons. It was firstly logical to establish an opposition between victimisation and criminalisation to build the research question. Secondly, since this study is about drug trafficking, which is considered as a serious crime, referring to the criminal responsibility of children was more accurate.

permission. This is when children from peasant families are likely to be used. Whereas Article 33 stipulates that general trafficking of these substances includes their transportation within the country or out of its frontiers, their elaboration, their sale, etc. This article makes an exception when the quantity carried is for personal use. This exception can raise a lot of debate and it will be discussed in detail in the final section of this study. Article 35 sanctions the distribution or instigation to use illicit substances. Each type of offence is linked to a sanction but they are only applicable to adults, as the Code provides its own rules on the sanctions that can be imposed on children. Article 177 gives a list of sanctions mentioned earlier: admonishment, imposition of rules of conduct, community service, assisted freedom, placement in semi-closed centres, liberty deprivation in specialised institutions of attention. Sanctions will take into account circumstances of each case however on condition that any sanction imposed on children is supervised by the ICBF<sup>132</sup>. The Family Ombudsperson must ensure that when children are sanctioned, they are enrolled in an educational institution. Admonishment consists of recrimination, includes courses on human rights education and coexistence in society, and the payment of fines depending on the prejudice caused by the child<sup>133</sup>. Rules of conduct will be imposed by a judicial authority that would regulate conditions of living of children for up to two years<sup>134</sup>. Community service consists of work of general interests under conditions regulated by Article 184. Assisted freedom will impose orientation, supervision and assistance on children through a specialised programme of attention<sup>135</sup> for maximum two years. The placement in semi-closed centre is also a mandatory specialised programme of attention for a maximum of three years<sup>136</sup>. Finally, a sanction imposing liberty deprivation in specialised institutions of attention is only applicable to adolescents between sixteen and eighteen years old and for offences that, according to criminal law applicable to adults, imply more than six years of prison<sup>137</sup>. In this case where most serious offences are at stake, such as trafficking more than the personal dose of drugs as defined under Article 33 of the Statute, children can be deprived of their liberty and placed in specialised

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<sup>132</sup> CIA, art. 177.

<sup>133</sup> CIA, art 182.

<sup>134</sup> CIA, art. 183.

<sup>135</sup> CIA, art. 185.

<sup>136</sup> CIA, art. 186.

<sup>137</sup> CIA, art. 187.

centres during one and five years. A minor who has been sanctioned before he or she has reached 18 years old will continue to benefit from the juvenile justice system till he or she completes the length of the sanction. In theory, the criminal treatment of children seems to be covering a gradual range of sanctions. They appear to be in compliance with the principles of rehabilitation and resocialisation. The principle is protected in international law in the ICCPR and in the CRC. It is mentioned at the beginning of the CIA, in Article 19, which recalls the nature of the rights aiming at guaranteeing the fulfilment, the protection and the reestablishment of children's and adolescents' rights as rights that have to be protected, respected and fulfilled by States. More focused on juvenile justice, Article 178 of the Code does not use the term rehabilitation but requires judicial sanctions to be oriented towards protection, education and reestablishment. Therefore, over-criminalising children could be going against both Article 11 and Article 178 of the Code.

Treating children as criminals will have to be guided by human rights principles, which are very dominant in the Code for infancy. The fundamental principle of best interest of the child prevails. Article 8 of the Code is entirely devoted to protect the best interest of the child, guiding principle of the CRC. The problem raised in UNICEF's Commentary of the Code<sup>138</sup> is that though the idea of 'best interest of the child' seems protective and in favour of human rights protection, it could be feared that the decision-making institutions use this principle as a large discretionary power for taking strict measures in response to the criminal regime applicable to minors. UNICEF's concern is that minors may be too easily internalised in institutions. In addition, it raised that these institutions might not be appropriate to minors' needs. The principle is again mentioned in the first article of the book on criminal responsibility, Article 140 considers that authorities should privilege the principle of the best interest of the child. The best interest of the child should take into consideration four principles: the principle of integral protection, and principles of pedagogy, specificity and differentiation. In a decision C-203 of 2005<sup>139</sup>, the Constitutional Court of Colombia acknowledged the three latter characteristics. What juvenile penal law usually aims to do is to adapt the law for minors to ensure that

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<sup>138</sup> UNICEF, *Código de la Infancia y de la Adolescencia – Versión comentada*, 2007, p. 89.

<sup>139</sup> Constitutional Court of Colombia, Case C-203, 24 March 2011, available at: <http://www.corteconstitucional.gov.co/relatoria/2011/C-203-11.htm> (consulted on 6 July 2012).



adolescents below the age of eighteen are not treated as adults because of their psychological immaturity to understand the extent of the consequences caused by their act(s) but that they are still punished in order to avoid impunity. Therefore, every step of criminal accountability must guarantee that they are treated specifically like children: all the relevant people intervening in the process must have had training on juvenile justice; they must be detained in special prisons separated from adults; the judicial procedure must take place in specific courts (requiring the presence of the Family Defender, the Family Commissioner or Police Inspector to establish the respect of each of children's rights, etc)<sup>140</sup>. In order to differentiate the criminal treatment applicable to children, the Code employs the word sanction (*sanciones*), rather than sentence (*penas*).

Most of these guarantees can be found in the Code where fundamental rights are more specific: due process and procedural guarantees (Article 150) include the presumption of innocence, the right to notification, the right to defence and the right to adversarial proceedings and others, the principle of legality (Article 152), the principle of immediacy (Article 155), etc. Articles on deprivation of liberty are adapted to adolescents as they are only applicable to children that are older than fourteen (Article 161) and that it will 'proceed as a pedagogic means'. Article 160 allows the internment of minors in public or private institutions following a judicial decision, from which the adolescent will not be able to leave on his or her own will. Article 162 is another protective measure required for adolescents when they are deprived of their liberty: it guarantees that adolescents are separated from adults while in detention. Articles 163 to 167 relate to the necessity that the judicial process and every entity that will have to deal with juvenile offenders are specialised in matters of juvenile criminal justice. These provisions are relevant because they indicate that minors, when they are criminalised, have to be treated apart from adults. It is an illustration of the right application of the principle of speciality. All these articles are guarantees for children's rights and are in compliance with international law. For example, the right of children to a special treatment was required by international human rights law under Article 10 (2) of the ICCPR.

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<sup>140</sup> UNICEF, *Código de la Infancia y de la Adolescencia – Versión comentada*, 2007, p. 88.

Though criminalising children by depriving them of their liberty and placing them in adapted institutions might have some constructive effect on them, it is clear that when comparing the benefits of criminalisation and those of victimisation, policies of victimisation are more in compliance with general principles of international human rights law. The overall legislation applicable to children that has been analysed till now looks complete. But reality might be very different with the influence of the armed conflict and its driving forces: the government, the paramilitaries and the guerrillas<sup>141</sup>.

### **3.2.3. The possible impact of decriminalisation on children trafficking drugs**

If decriminalisation was not defined in the introduction, it is because it is linked to criminalisation in a subtle way. Decriminalisation means that the law does not consider that the possession of a limited quantity of drugs needs to be sanctioned. Assuming that children are used to traffic small quantities of drugs, decriminalisation could encourage better treatment of children trafficking drugs. Whereas, legalisation of drugs means that drug use and possession are not criminal offences anymore and that they are freely traded on a market regulated by the States. Decriminalisation is relevant when considering that it is a step closer to legalisation of drugs, which would have a major impact on children trafficking drugs. Children would benefit from legalisation because, for drug traffickers, the use of children to traffic drugs would not be a major advantage anymore. Those who defend the legalisation or decriminalisation of drugs often think with the national framework in mind. ‘They see legalisation as an opportunity to reallocate police resources, free up prison space, reduce violent crime among drug dealers and consumers, and tax the industry’<sup>142</sup>. It could be added that decriminalisation would able the government to allocate more resources and funds on combating drug cartels and in implementing their policies on drug trafficking.

As stated above, the law that applies to children trafficking drugs is the same as the law applying to adults, which is the NSND. Therefore decriminalisation of drugs will also affect children in

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<sup>141</sup> As Taussig, 2005, p. 7 reported with a stroke of humour from a farmer living in this dramatic situation: ‘If the peasant owns 2 cows, he tells me, the state takes one, the guerrilla the other. If there’s a third, it goes to the paramilitaries! It is not possible to protest in Colombia, he adds, because of death threats and kidnapping, and that’s why the country is so screwed.’

<sup>142</sup> Jenner, 2011, p. 919.

the way they are criminalised. The Statute of 1986 might need to be reviewed as it is now 25 years-old, that human rights have evolved and that an international convention of the traffic of illicit substances has been adopted in the meanwhile. In July 2011, the New Statute on Narcotics and Psychotropic Substances was introduced by the current President of Colombia Juan Manuel Santos. The new Statute was highly criticised by the civil society for being too punitive. It gave rise to a counterproposition to the Statute<sup>143</sup> which suggest that the proposed Statute is going against the world trend that is looking for alternatives to drug policies. The recent Summit of the Americas that took place in Cartagena in Colombia in April 2012 demonstrated that drugs legalisation is a serious debate that reflects real needs to counter these long-lasting problems of drug abuse and drug trafficking. The counterproposition also criticised the fact that civil society representatives denounced a lack of pragmatism in the writing of the new Statute since it had been made without consulting neither consumers, nor local communities or academics, basically without consulting Colombian citizens. The task of the government is to listen to individuals affected by drugs issues on the ground and subjected to the law, as the law can be sometimes far from reality and therefore unsuitable to practical cases. Civil society criticised the fact that the proposal worsened the range of sanctions applicable to drug offenders, notably in relation to the debate on the personal dose, which resulted in the decisions of the Constitutional Court and the Supreme Court of Justice<sup>144</sup>. The civil society's counterproposal also questioned the fact that the new Statute did not incorporate the 'National Policy for the reduction of the consumption of psychoactive substances and its impact'<sup>145</sup> which considers the problem of drugs as a public health issue. And finally, civil society underlined the two matters related to international law that had to be considered. On the one hand, it should not accept the international doctrine of the 'War on Drugs', as it has higher costs than benefits. On the other hand, all activities in relation to the control of psychoactive substances should be used in total conformity with international norms.

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<sup>143</sup> See in general Vargas Lleras, *Solicitud de mesas de trabajo para diálogo y debate sobre el proyecto del nuevo Estatuto Nacional de Drogas y Sustancias Psicoactivas que modificará la ley 30 de 1986*, 6 October 2011, available at: <http://www.tni.org/sites/www.tni.org/files/Propuesta%20debate%20Estatuto%20drogas%20para%20Ministerio%20del%20Interior.pdf> (consulte don 29 May 2012).

<sup>144</sup> Constitutional Court of Colombia, Case C-221, 5 May 1994; Supreme Court of Justice of Colombia, Complaint no. 31531, Approved Act no. 209, July 2009.

<sup>145</sup> Ministry of Social Welfare, *La Política Nacional de Reducción del Consumo de SPA al alcance de todos: Una herramienta para socializar y construir política en lo local*, May 2008, available at: [http://odc.dne.gov.co/docs/publicaciones\\_nacionales/PNRCSPA.pdf](http://odc.dne.gov.co/docs/publicaciones_nacionales/PNRCSPA.pdf) (consulted on 30 May 2012).

The Green Party also proposed a legislation decriminalising drugs. As mentioned earlier, the Supreme Court of Justice and Constitutional Court continue to rule in favour of the authorisation to carry a ‘personal dose’<sup>146</sup>. This means that there is an optimistic counter-power to the overruling and over-criminalising offences related to drugs in Colombia. It appears that this claim was heard. Meanwhile, judicial institutions have given their word on the necessity to make the law progress. In 1994, the Constitutional Court had issued a decision stating that possessing drugs could not be subjected to any sanction when it did not affect others<sup>147</sup>. The judicial decision was based on the right to free development of one’s personality (Article 16 of the Constitution) and the limited intervention of the State on decisions related to one’s health. Though the health issue is only relevant because of the fact that children drug traffickers generally use drugs when they traffic it, the principle of non-intervention and the right to free development of one’s personality is important for the kind of treatment the justice system may impose on a child when depriving him or her of liberty. Children must have the right to grow away from criminality, may it be in the outside world or in detention centres. The decision of the Court was confirmed by the Supreme Court of Justice in July 2009<sup>148</sup>. It will be explained further how the Court is even today in favour of decriminalisation.

The New Statute on Narcotics and Psychotropic Substances kindled the debate on decriminalisation under the Santos government<sup>149</sup>. Before The Law on Public Safety (LPS) was enacted, Article 376 of the 2000 Law which issued the Penal Code<sup>150</sup> sanctioned those who transported, manufactured or carried illegal substances without authorisation and made no exception for those who transported, manufactured or carried a dose of these drugs for their

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<sup>146</sup> Constitutional Court of Colombia, Case C-221, 5 May 1994, available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=6960> (consulted on 13 March 2012); Supreme Court of Justice of Colombia, Complaint no. 31531, Approved Act no. 209, July 2009, available at: [http://www.semana.com/documents/Doc-1945\\_200999.pdf](http://www.semana.com/documents/Doc-1945_200999.pdf) (consulted on 23 March 2012).

<sup>147</sup> Constitutional Court of Colombia, Case C-221, 5 May 1994.

<sup>148</sup> Supreme Court of Justice of Colombia, Complaint no. 31531, Approved Act no. 209, July 2009.

<sup>149</sup> Pacheco, ‘*Revive pulso por la dosis personal*’, El Spectador, 13 March 2012, available at: <http://www.elspectador.com/impreso/temadeldia/articulo-332022-revive-pulso-dosis-personal> (consulted on 27 May 2012).

<sup>150</sup> Law no. 599, 24 July 2000, art. 376, available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=6388> (consulted on 17 June 2012): Article 376 of the law corresponds to the current Article 11 of the Law no. 1453 on Public Safety, 24 June 2011.

personal use<sup>151</sup>. In other words, any individual transporting, manufacturing or carrying drugs, regardless of the purpose of the use of these drugs, could risk detention or imprisonment. Since the sanction could take from eight to twenty years of prison, the cases where individuals carried drugs for their personal consumption and those who did it for other purposes, including trafficking, were not distinct. This length of imprisonment was not applicable to minors but seems excessive and disproportionate if applied to those who carried drugs for personal use. The LPS added this exception based on the dose for personal use and established a distinction at the same time. Very recently<sup>152</sup>, the Constitutional Court of Colombia approved Article 11 of LPS and confirmed decriminalisation of the possession of small quantities of marihuana and cocaine. Those caught in possession cannot be detained or imprisoned for transporting, manufacturing or carrying small quantities of drugs. This could be clearly demonstrating that the new law is more understanding towards drug users but more repressive than the previous law towards traffickers. Two observations can be raised on the application of this rule to children trafficking drugs. The rule could be regarded as impacting the treatment of children negatively if they are found to be transporting, manufacturing or carrying small quantities of illicit drugs for other purposes than their personal use. Indeed, as the length of imprisonment can be much higher under the new law<sup>153</sup> and though these sentences are not applicable to children, it may have an important influence on the court rulings. It means that judges could be more likely to impose the strictest sanctions applicable to children according to their own law. If the law is extremely strict with adults, why wouldn't it be with minors trafficking drugs if the law does not encourage their victimisation? This could include children who traffic small quantities of drugs when the purpose of the use of drugs is not established. The law could also be interpreted otherwise. As adults in the same situation, children who carry a dose of illegal drugs for his or her personal use will not risk any sanction. It might be positive in the case it is assumed that, firstly, children are more likely to traffic small quantities of drugs because narcotraffickers may not be willing to entrust

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<sup>151</sup> The quantity allowed is mentioned in Law no. 1453 and different for each illicit drug.

<sup>152</sup> The decision was issued on 29 June 2012 but has yet to be published. The decision was reported in Nadelmann, 'Colombia Decriminalizes Cocaine and Marijuana, As Latin American Momentum for Drug Policy Reform Continues', The Huffington Post, 2 July 2012, available at: [http://www.huffingtonpost.com/ethan-nadelmann/colombia-decriminalizes-c\\_b\\_1638395.html](http://www.huffingtonpost.com/ethan-nadelmann/colombia-decriminalizes-c_b_1638395.html) (consulted on 6 July 2012).

<sup>153</sup> Article 11 of Law no. 1453 states that 128 to 360 months of prison, which corresponds to 10 to 30 years of prison, can be incurred.

larger quantities to children as they would do with adults. Secondly, the assumption would be that it will be difficult to establish whether children possess this small quantity of drugs in order to use them or to traffic them. In case of any doubt, the judge would probably exempt children from criminal sanction, in the name of the best interest of the child.

This change in policy from the inefficient war on drugs could be very positive on the long term because decriminalisation of drugs could then lead to the drug legalisation. This could be expected to have a major negative impact on the drug trade. It would significantly reduce the black market and the illicit trade and would save children from being used for trafficking drugs<sup>154</sup>. It is observed that two wars are ongoing in Colombia: one against drugs and the other against armed groups. Putting an end to the illicit drug trade by legalising drugs would be a way to efficiently enforce the law and respect human rights in Colombia. It is necessary to ensure a treatment in compliance with human rights for children trafficking drugs. On a long term basis, it could even open up a process to end the internal armed conflict.

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<sup>154</sup> Bo, Teresa, Colombian mulls decriminalising cocaine, Al Jazeera, 28 May 2012, available at: [http://www.youtube.com/watch?v=Wo\\_UbC9SfQ](http://www.youtube.com/watch?v=Wo_UbC9SfQ) (consulted on 10 July 2012).

## **Chapter 4: Recommendations**

### **4.1. Recommendations to the international community**

The international community should, accordingly to human rights instruments, orient their policies towards prevention and victimisation of children trafficking drugs. The international community may wish to...

Encourage the drafting of a regional instrument dedicated to the rights of children under the principles of the CRC. It would encourage States to respect human rights and would also strengthen regional mechanisms and institutions thereby introducing a regional perspective of the victimisation of children trafficking drugs.

Reinforce the role of the CoRC cited under Article 43 (1) of the CRC which holds the CoRC responsible for ‘examining the progress made by States Parties in achieving the realisation of the obligations undertaken in the (...) Convention’. In this position, the CoRC can declare if Colombia fulfilled its obligations to protect children.

Encourage the drafting of a region specific instrument regulating drug trade and trafficking. It would be needed because the context of the golden triangle in Asia or the cultivation of poppy seeds in Afghanistan are not the same that in the Andean region. Therefore, a regional Convention for the Organisation of the American States countries, taking into account all the regional factors, under the general principles of the UN Conventions and with provisions focusing particularly on children would be an additional guarantee for children in Colombia. It could consider the regional setting of Latin American countries and specify the treatment that would be appropriate for minors trafficking drugs.

Publish a thematic report and a general comment on Article 33 of the CRC which suggest precisely the type of legislative, administrative, social and educational measures States should take to prevent the use of children in illicit drug trafficking. This would have to go along with the establishment of country monitoring mechanisms to draw concrete data, especially in regions where children are close to drugs, in order to identify the issues at stake and come up with an appropriate treatment for these children in their best interest.

Encourage and support prevention campaigns such as the World Drug Campaign and the International Day Against Drug Abuse and Illicit Trafficking. It would go along with the creation of a platform for more discussion on drugs legalisation, its benefits and disadvantages to ultimately launch decriminalisation programmes if they are beneficial to victims of illicit drug trade, such as children trafficking drugs in Colombia.

Introduce monitoring programmes to raise a special attention to address and prevent children from being employed in illicit crops of coca cultivation. Monitor the treatment of children during their criminalisation for trafficking drugs, including the act of cultivation of illicit crops. Introduce a dialogue with police and judicial institutions to make sure that children, during or after their detention, do not feel reprisal from the narcotraffickers. Dialogue with governmental authorities would also be a means of informing members of the police and judicial institutions on the investigation conducted on children trafficking drugs and the options that are available.

Provide funds for education in order to ensure access to school till they reach majority, especially in Andean peasant communities. Encourage education as a means of preventing the exploitation of children and provide work alternatives.

Implement a programme on Andean countries (Colombia, Peru and Bolivia) based on the model of the ILO's International Programme for the Elimination of Child Labour (ILO-IPEC) implemented in Indonesia, Philippines, and Thailand in September 2002<sup>155</sup>. The project aimed to develop and demonstrate an action-oriented research methodology that provided a better understanding and more information on the use of children in the production, sales, and distribution of illegal drugs in Indonesia, Philippines and Thailand.

Overall, every agency concerned by the issue of children trafficking drugs should collaborate to ensure a better protection of children. Attention on Colombia has even more reasons to be raised because the conflict has been long-lasting and, though the country is legally

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<sup>155</sup> See in general Porio & Crisol, ILO-IPEC, 'The use of children in the production, sales and trafficking of drugs: A synthesis of participatory action-oriented research Programs in Indonesia, the Philippines and Thailand', September 2004.



very developed, the data on the conflict is difficult to obtain due to the threats that still weigh on human rights defenders and members of the judicial system.

Barrett and Veerman recommend the creation of an UN interagency group similar to the model of the Interagency Panel on Juvenile Justice that would be dedicated to children and drugs<sup>156</sup>. More than each of these agencies working on the issue of children and drugs, this Panel would have a global idea of all the different aspects of drug trafficking related to minors: focusing on the prevention of drug trafficking, the need for a quality primary and secondary education, setting up remunerative and social alternatives for vulnerable categories of children, etc.

#### **4.2. Recommendations to the Government of Colombia**

The Government of Colombia may wish to...

Implement specific procedures to investigate on drugs manufacturers and traffickers' activities and on manufacturers and traffickers who could be suspected of using minors in their illegal activities. The government should ensure that the police is available for children and aware of dangers that children face. Monitor the role of the police and the judicial system in ensuring that the best interest of children is respected, not only at the preventive level but also when they have to deal with the criminal justice system.

Provide special protection for street children and children from low-class backgrounds as they might fall into the hands of traffickers more easily due to their economical needs and their higher vulnerability. In 2003, Luke Dowdney conducted an extended analysis of the children of the drug trade in Rio de Janeiro, Brazil. He thinks that 'without social investment in the community as a whole, the impact of specific projects aimed at preventing child participation in drug trafficking, or rehabilitating those already involved, will be limited'<sup>157</sup>. The context of favelas in Brazil is different than the Colombian framework but social investment could be used with street children and children belonging peasant families.

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<sup>156</sup> Barrett & Veerman, 2010, p. 81.

<sup>157</sup> Dowdney, 2003, p. 220.

Humanise solutions to drug problem by implementing rehabilitative and comprehensive measures, even for minors who are found to be trafficking illicit drugs. Stigmatising the children should be avoided because there is a risk that they are not resocialised and rehabilitated as soon as they are sanctioned. There is a risk that they may not ‘grow out of crime’<sup>158</sup>. Take necessary measures to amend and revise laws that constitute a barrier to privileging medical treatment as well physical and mental rehabilitation for child traffickers who are also drug addicts.

Ensure full compliance with children’s rights principles within penitentiary and custodial institutions by separating child offenders from adults in prisons if children would not benefit from sanctions established under the CIA. Provide funds to build special educative centres for juvenile offenders, provide separate institutions for children under fourteen and for male and female adolescents in respect of gender needs.

Encourage the development of a large cooperation between the institutions that are responsible for reporting, recording and investigating human rights violations<sup>159</sup>, such as the judicial authorities, the ICBF and the Family Welfare Ombudsperson. The more investigations will be made, the more findings will help identifying the needs of children trafficking drugs and the solutions that should be implemented.

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<sup>158</sup> Richards, ‘What makes juvenile offenders different from adult offenders?’ in Trends & issues in crime and criminal justice, Australian Institute of Criminology, No. 409, February 2011, p. 5, available at: <http://www.aic.gov.au/documents/4/2/2/%7B4227C0AD-AD0A-47E6-88AF-399535916190%7Dtandi409.pdf> (consulted on 7 July 2012).

<sup>159</sup> Amnesty International, ‘This is what we demand. Justice! Impunity for sexual violence against women in Colombia’s armed conflict’, September 2011, AMR 23/018/2011, p. 18.

## **Chapter 5: Conclusion**

The treatment of children trafficking drugs in Colombia is a difficult issue to tackle. Firstly, the interest over the problem linking drugs and children is very recent. Secondly, because the context of drug related war in Colombia makes it difficult for investigation. Most of the time, it is qualified as an issue of worst form of child labour in international human rights law, as well as in national Colombian law. The very common phrase found in several instruments ‘the use of children’ – by drug traffickers – makes children passive victims of human rights. The fact that the Colombian legal order refers to international human rights treaties very often strengthens the status of ‘victim’ of children trafficking drugs. However, drug trafficking being a very serious offence, the issue of children trafficking drugs also questions their criminal responsibility.

This analysis is an encouraging picture of the theoretical framework dedicated to the protection and guarantee of children’s rights in Colombia in the specific setting in which they are accused or convicted of trafficking illicit drugs. For a country where the priority would still focus on the respect for humanitarian principles, the combination of national and international laws provides a positive framework for children committing drug-related offences.

However, a darker picture would probably be drawn if consistent data of the reality on the ground and factual cases were available. Indeed, in the context of the Colombian armed conflict, the main issue remains political. If the drug trade is the main cause as well as the main consequence of the conflict, solutions to get out of this vicious circle are complex. Human rights would be regarded as secondary, even when they are affecting a vulnerable category of human beings such as children, because the priority of the government may be different. The overcrowded prisons and the mingling of adults and child delinquents go against the best interest of the child. There is a need for more monitoring mechanisms to ensure that a multi-disciplinary set of measures is implemented to protect of children from the impact of the drug trade in Colombia.

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