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.....Chapter 10  
**THE RIGHTS OF THE CHILD  
IN THE ADMINISTRATION  
OF JUSTICE** .....

*Learning Objectives*

- *To familiarize participants with the main international legal rules concerning the rights of the child in the administration of justice and their main purposes;*
- *To specify the procedural safeguards which should be accorded to the child in the administration of justice;*
- *To encourage participants to develop ways of ensuring that they routinely apply these rights and safeguards when confronted with children in the course of the administration of justice.*

*Questions*

- *What particular problems have you encountered in your work with regard to children and juveniles in the course of the administration of justice?*
- *How did you try to solve these problems?*
- *Did you try to invoke international legal rules such as the Convention on the Rights of the Child in order to solve the problem or problems concerned?*
- *What legal status does the Convention on the Rights of the Child have in your country? What legal impact has it had so far?*
- *Does the notion of the “best interests” of the child exist in the domestic legal system within which you work? If so, what does it mean, and how is it applied?*
- *To what extent is the child allowed to participate in decisions concerning him or her in the legal system within which you work? Examine the situation from the point of view of criminal, separation and adoption proceedings.*
- *What is the age of criminal responsibility in the country where you work?*
- *Can prison sentences be imposed on children below 18 years of age in the country where you work, and if so, of what duration?*

## Questions (cont.d)

- *What non-custodial measures are available in response to offences committed by children or juveniles in your country?*
- *On what grounds can a child be separated from his or her parents in the country where you work?*
- *Are adoptions authorized in the country where you work? If so, does the child have a right to express his or her views on the desirability of the adoption?*
- *What measures have been taken in the country/ countries where you work in order to familiarize the legal professions with the legal principles contained in the Convention on the Rights of the Child and other relevant legal instruments?*

## Relevant Legal Instruments

### Universal Instruments

- International Covenant on Civil and Political Rights, 1966
  - Convention on the Rights of the Child, 1989
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- Declaration of the Rights of the Child, 1959
  - United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985
  - United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990
  - United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), 1990
  - Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1986
  - Guidelines for Action on Children in the Criminal Justice System, Annex to Economic and Social Council resolution 1997/30, on Administration of juvenile justice

## *Relevant Legal Instruments (cont.d)*

### Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- African Charter on the Rights and Welfare of the Child, 1990
- American Convention on Human Rights, 1969
- European Convention on Human Rights, 1950

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- Recommendation No. R (87) 20 of the Committee of Ministers of the Council of Europe to Member States on Social Reactions to Juvenile Delinquency

## 1. Introduction

As its title indicates, the present chapter will not deal with the subject of the rights of the child as such, but will be limited to explaining the principal international legal standards concerning *the rights of the child in the administration of justice*.<sup>1</sup> Although the general human rights treaties such as the International Covenant on Civil and Political Rights and the regional conventions are equally applicable to children, the point of departure for the analysis in this chapter will be the Convention on the Rights of the Child, which entered into force on 2 September 1990, and which, as of 8 February 2002, had been ratified by 191 States. This Convention has developed into an essential world-wide legal tool for the enhancement of the rights of the child in general and, inter alia, those children who are affected by the administration of justice through criminal, separation or adoption proceedings. The Convention was an overdue response to the urgent need to elaborate a legally binding document that would focus exclusively on the specific needs and interests of the child, which, as will be seen below, differ in important respects from those of adults. Prior to the adoption of this Convention, the child had been at the centre of the brief 1959 Declaration of the Rights of the Child, which does not, however, cover the various issues relating to the administration of justice per se.

This chapter will also examine the rules contained in particular in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines). Although these instruments do not as such create legally binding obligations, some of the rules contained therein are binding on

<sup>1</sup>For a complete and useful resource book on the rights of the child, see *Implementation Handbook for the Convention on the Rights of the Child* (New York, UNICEF, 1998), 681 pp. (hereinafter referred to as *Implementation Handbook*).

States since they are also contained in the Convention on the Rights of the Child, while others can be considered to provide “more details on the contents of existing rights”.<sup>2</sup> They are also consistently invoked by the Committee on the Rights of the Child when it considers the reports of the States parties under articles 37, 39 and 40 of the Convention. Lastly, regional legal rules as well as both universal and regional jurisprudence will be referred to whenever relevant.

After briefly describing current concerns relating to the administration of juvenile justice, this chapter will consider the meaning of the term “child”, some basic principles governing the administration of justice, the aims of juvenile justice and the duty to create a juvenile justice system. The chapter will also explain in some detail the rules relating to both the accused child and the child deprived of liberty. Finally, the chapter will in turn consider the rights of the child and penal sanctions, the rights of the child in connection with separation and adoption proceedings, and the role of the legal professions in guaranteeing the rights of the child in the course of the administration of justice.

## 1.1 Terminology

To avoid confusion it should be pointed out that the expression “juvenile justice” will refer to criminal proceedings, while the term “administration of justice” will encompass all proceedings, such as criminal, separation and adoption proceedings.

## 2. The Administration of Justice and Children: Persistent Concerns

Although the Convention on the Rights of the Child has proved a major milestone in the universal promotion and protection of the rights of the child, numerous challenges remain to be overcome in many countries before the rights of the child can become a living reality, including in particular in situations where children come into conflict with the law. Police violence against children is not uncommon; nor are involuntary disappearances, arbitrary detentions and the use of imprisonment for minor infringements of the law by very young children, despite the fact that imprisonment should be used only as a means of last resort. Contrary to international law, children are also often detained in unacceptable conditions, subjected to violence while in detention, including corporal punishment as a disciplinary measure, and in some countries even executed for offences committed when they were below the age of 18. Young female offenders are particularly vulnerable and their needs must be effectively addressed. The challenges ahead are thus considerable, and in order to make

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<sup>2</sup>See statement as to the Beijing Rules, “The United Nations and Juvenile Justice: A Guide to International Standards and Best Practice”, in *International Review of Criminal Policy*, Nos. 49 and 50, 1998-1999 (New York, United Nations, 1999), p. 5, para. 38 (hereinafter referred to as *The United Nations and Juvenile Justice*).

progress in this important field of legal protection, vigorous, concerted and effective efforts are required at both the international and national levels.<sup>3</sup> The effective implementation of the rights of the child is thus the responsibility of all Governments and members of the legal professions as well as of all adults who deal with children, such as parents, relatives, friends and teachers.

## 3. The Definition of “Child”

### 3.1 The age of majority in general

Article 1 of the Convention on the Rights of the Child provides that, for the purposes of the Convention, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. With regard to *the beginning of childhood*, the Convention does not take a position as to whether it begins at birth or at some other particular point, such as the moment of conception. However, this is an issue that does not need to be considered further for the purposes of this chapter.<sup>4</sup>

As to the *end of childhood*, while the Convention contains some inherent flexibility, it must be presumed that States parties are not allowed to set the age of majority unduly low in order to avoid their legal obligations under the treaty. It is clear from the work of the Committee on the Rights of the Child, the body set up under the Convention to monitor its implementation, that the setting of minimum ages for, inter alia, marriage and employment must respect the Convention as a whole, and in particular the basic principle of the best interests of the child and the principle of non-discrimination.<sup>5</sup>

### 3.2 The age of criminal responsibility

As concerns the *age of criminal responsibility*, the Convention on the Rights of the Child fixes no limit, but provides in article 40(3)(a) that the States parties shall in particular seek “the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”. The Committee on the Rights of the Child has therefore noted with concern the “*lack of a minimum age* below which children are presumed not to have the capacity to infringe penal law” and recommended that such an age be fixed by law.<sup>6</sup> It has also expressed concern with regard to penal codes which set the age of criminal responsibility at, for instance, *seven*

<sup>3</sup>For a survey of violations of the rights of the child, see e.g. Eric Sottas and Esther Bron, *Exactions et Enfants*, Geneva, OMT/C/SOS Torture, 1993, 84 pp.

<sup>4</sup>For a more detailed discussion of this issue see *Implementation Handbook*, pp. 1-4.

<sup>5</sup>UN doc. CRC/C/15/Add. 9, *Concluding Observations of the Committee on the Rights of the Child: El Salvador*, para. 10; and UN doc. CRC/C/15/Add.44, *Concluding Observations: Senegal*, paras. 11 and 25.

<sup>6</sup>UN doc. CRC/C/15/Add.44, *Concluding Observations: Senegal*, paras. 11 and 25; emphasis added.

or **ten years**, which, in its view, is “very low”.<sup>7</sup> When examining the South African draft legislation aimed at increasing the legal minimum age of criminal responsibility from seven to ten years, the Committee noted that it remained concerned because this was “still a relatively low age for criminal responsibility”.<sup>8</sup> In spite of the concern expressed several times at these very low ages of criminal responsibility at the domestic level, the Committee has not suggested what an appropriate minimum age might be.

The Committee has expressed particular concern when children aged 16 to 18 years are treated as adults for purposes of application of criminal law. In the view of the Committee the States parties to the Convention should extend to all minors under 18 years of age the special protection provided by penal law to children.<sup>9</sup>

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It is noteworthy in this respect that, in its General Comment No. 17 on article 24 of the International Covenant on Civil and Political Rights, the Human Rights Committee emphasized that the age limit for purposes such as civil matters, **criminal responsibility** or labour law, “should not be set unreasonably low and that in any case a State party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law”.<sup>10</sup>

In General Comment No. 21 on article 10 of the Covenant, the Committee then noted that this article “does not indicate any limits of juvenile age”, adding that, while “this is to be determined by each State party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice”.<sup>11</sup> It is noteworthy in this respect that, according to article 6(5) of the International Covenant, death sentences “shall not be imposed for crimes committed by persons below eighteen years of age”.

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Rule 4(1) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter referred to as the Beijing Rules) provides that “in those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity”. The *Commentary* to this provision reads as follows:

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<sup>7</sup>As to India (7 years), see UN doc. CRC/C/94, *Committee on the Rights of the Child: Report on the twenty-third session (2000)*, para. 58 and as to Sierra Leone (10 years), see *ibid.*, para. 143.

<sup>8</sup>*Ibid.*, para. 430.

<sup>9</sup>See e.g. as to the Maldives in UN doc. CRC/C/79, *Report on the eighteenth session (1998)*, paras. 219 and 240; as to the Democratic People’s Republic of Korea, *ibid.*, paras. 83 and 98; as to Fiji, *ibid.*, paras. 125 and 145, and as to Luxembourg, *ibid.*, para. 263.

<sup>10</sup>See *United Nations Compilation of General Comments*, p. 133, para. 4. See also *Implementation Handbook*, pp. 4-14. Article 24 of the Covenant prohibits, *inter alia*, discrimination against children and proclaims the right of every child to special measures of protection, to be registered immediately after birth, to have a name and to acquire a nationality.

<sup>11</sup>*United Nations Compilation of General Comments*, p. 143, para. 13.

“The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.”

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However, there continue to be wide discrepancies between countries even at the regional level; in Europe, for instance, the age of criminal responsibility varies from seven to eighteen years of age. Considering that there is not “at this stage any clear common standard amongst the member States of the Council of Europe”, the European Court of Human Rights has concluded that, although “England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States”.<sup>12</sup> The attribution of criminal responsibility to such a young child did not therefore per se constitute a breach of article 3 of the European Convention on Human Rights, which inter alia provides protection against inhuman and degrading treatment and punishment.<sup>13</sup> However, to judge from the work of the Committee on the Rights of the Child as described above, the age of ten would appear to violate the Convention on the Rights of the Child.

*Unless otherwise decided, **the age of civil majority** is eighteen years. In fixing minimum ages for marriage, labour and military service, States are legally obliged to respect the best interests of the child and the principle of non-discrimination.*

*States shall establish **the minimum age for criminal responsibility**. Such minimum age must not be unduly low and must respect the best interests of the child and the principle of non-discrimination. Juveniles below eighteen years of age should be able to benefit from the special protection provided by criminal law to the child.*

<sup>12</sup>*Eur. Court HR, Case of T. v. the United Kingdom, judgment of 16 December 1999, para. 72; the text of this judgment can be found at [www.echr.coe.int](http://www.echr.coe.int).*

<sup>13</sup>*Ibid., loc. cit. See also Eur. Court HR, V. v. the United Kingdom, judgment of 16 December 1999, Reports 1999-IX, p. 144, para. 74.*

## 4. The Rights of the Child in the Administration of Justice: Some Basic Principles

International human rights law provides a number of general principles which condition the consideration of all issues relating to the rights of the child, including the administration of juvenile justice. This section will deal with four of the most important of these principles, namely, (1) the principle of non-discrimination, (2) the best interests of the child, (3) the child's right to life, survival and development, and (4) the duty to respect the views of the child. These general principles are consistently considered by the Committee on the Rights of the Child in connection with its examination of periodic reports: the States parties must ensure that these principles “not only guide policy discussion and decision-making, but are also appropriately integrated in all legal revisions, as well as in judicial and administrative decisions and in projects, programmes and services which have an impact on children”.<sup>14</sup>

### 4.1 The principle of non-discrimination

Article 2 of the Convention on the Rights of the Child provides that:

“1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”

The Committee on the Rights of the Child has in general expressed concern with regard to certain vulnerable groups of children, such as *children in the juvenile justice system*.<sup>15</sup> During the general discussion on the administration of juvenile justice organized by the Committee on 13 November 1995, particular concern was aired “about instances where criteria of a subjective and arbitrary nature (such as with regard to the attainment of puberty, the age of discernment or the personality of the child) still prevailed in the assessment of the criminal responsibility of children and in deciding upon the measures applicable to them”.<sup>16</sup> Lastly, the Committee has expressed concern “at the insufficiency of measures to prevent and combat discrimination practised against Roma children, disabled children and children born out of wedlock” in Bulgaria.<sup>17</sup>

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<sup>14</sup>See e.g. as to Vanuatu, in UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 149.

<sup>15</sup>See e.g. as to Belize, in UN doc. CRC/C/84, *Report on the twentieth session (1999)*, para. 75.

<sup>16</sup>UN doc. CRC/C/46, *Report on the tenth session (1995)*, para. 218.

<sup>17</sup>UN doc. CRC/C/15/Add.66, *Concluding Observations: Bulgaria*, para. 12.

The principle of non-discrimination is also, *inter alia*, contained in article 3 of the African Charter on the Rights and Welfare of the Child and Rule 2(1) of the Beijing Rules. The provisions on non-discrimination and equality in other human rights instruments of a general nature also remain equally valid when applied to children (e.g. arts. 2(1) and 26 of the International Covenant on Civil and Political Rights, art. 2 of the African Charter on Human and Peoples' Rights, arts. 1 and 24 of the American Convention on Human Rights and art. 14 of the European Convention on Human Rights).

More detailed information on the principle of equality and non-discrimination is to be found in Chapter 13 of this Manual.

## 4.2 The best interests of the child

Article 3(1) of the Convention on the Rights of the Child is the key provision on the principle of best interests and reads as follows:

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

The Committee on the Rights of the Child examines whether the States parties have given due consideration to the principle of the best interests of the child in their domestic legislation and its application in such areas as the legal definition of the child, in particular as regards the minimum age for marriage, employment and military service.<sup>18</sup> It has for instance expressed concern with regard to Bulgaria at “the insufficient consideration of the principle of the best interests of the child in tackling situations of detention, institutionalization and abandonment of children, as well as in relation to the right of the child to testify in court”.<sup>19</sup>

The fact that the best interests of the child “shall be a *primary* consideration” (emphasis added) in the decision affecting the child is an indication that “the best interests of the child will not always be the single, overriding factor to be considered”, but that “there may be competing or conflicting human rights interests, for example between individual children, between different groups of children and between children and adults”.<sup>20</sup> However, the child’s interest “must be the subject of active consideration”, and “it needs to be demonstrated that children’s interests have been explored and taken into account as a primary consideration”.<sup>21</sup>

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<sup>18</sup>See e.g. UN doc. CRC/C/15/Add.9, *Concluding Observations: El Salvador*, para. 10.

<sup>19</sup>UN doc. CRC/C/15/Add. 66, *Concluding Observations: Bulgaria*, para. 12.

<sup>20</sup>*Implementation Handbook*, p. 40.

<sup>21</sup>*Ibid.*, loc. cit.

Article 4(1) of the African Charter on the Rights and Welfare of the Child also provides that “in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration”. Although the principle of the best interests of the child is not expressly included in the International Covenant on Civil and Political Rights, the Human Rights Committee has emphasized that “the paramount interest of the children” must be borne in mind in connection with the dissolution of the marriage of the parents.<sup>22</sup>

### 4.3 The child’s right to life, survival and development

Article 6 of the Convention on the Rights of the Child provides that “States Parties recognize that every child has the inherent right to life” (para. 1) and that they “shall ensure to the maximum extent possible the survival and development of the child” (para. 2). Article 5 of the African Charter on the Rights and Welfare of the Child guarantees to every child “an inherent right to life”, which “shall be protected by law” (para. 1). The States parties further undertake to “ensure, to the maximum extent possible, the survival, protection and development of the child” (para. 2).

A child’s right to life is of course also equally protected under article 6 of the International Covenant on Civil and Political Rights, article 4 of the African Charter on Human and Peoples’ Rights, article 4 of the American Convention on Human Rights and article 2 of the European Convention on Human Rights.

The wording of article 6(2) of the Convention on the Rights of the Child also makes it clear that the States parties may have to take *positive measures* in order to maximize “the survival and development” of the children within their jurisdiction. It may thus be necessary for States to “take appropriate measures”, inter alia “to diminish infant and child mortality”, or to provide children with “necessary medical assistance and health care” (cf. art. 24 of the Convention on the Rights of the Child). Other measures that States may have to take in order to protect the child’s inherent right to life may be, among many others: to provide adequate nutritious food and clean drinking water, to prohibit the death penalty, and to prevent and prohibit extrajudicial, arbitrary or summary executions and enforced disappearances.<sup>23</sup> It may further be necessary for States parties to take effective measures to protect children against the negative effects of armed confrontations and to establish rehabilitation measures for child victims of such confrontations.<sup>24</sup>

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<sup>22</sup>See General Comment No. 17 on article 24 of the International Covenant on Civil and Political Rights, in *United Nations Compilation of General Comments*, p. 133, para. 6; see also General Comment No. 19 on article 23, *ibid.*, p. 138, para. 9.

<sup>23</sup>*Manual on Human Rights Reporting 1997*, p. 424 (also in *Implementation Handbook*, p. 87).

<sup>24</sup>As to Mexico, in UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para.179.

As pointed out by the Human Rights Committee in General Comment No. 6 on article 6 of the International Covenant, “the right to life has been too often narrowly interpreted”; in its view, “the expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures”.<sup>25</sup> It would therefore “be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics”.<sup>26</sup>

## 4.4 The child’s right to be heard

Another important general principle is found in article 12 of the Convention on the Rights of the Child, according to which:

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

The Committee on the Rights of the Child has consistently promoted children’s participatory rights and emphasized the duty of the States parties “to guarantee their effective enjoyment of the fundamental freedoms, including those of opinion, expression and association” as contained in articles 13, 14 and 15 of the Convention.<sup>27</sup> This is an expression of the fact that the child must be regarded as a person in its own right or “as an active subject of rights”.<sup>28</sup>

Article 12(2) of the Convention, indeed, covers “a very wide range of court hearings and also formal decision-making affecting the child, in for example, education, health, planning, the environment and so on”.<sup>29</sup>

A child’s right to be heard under article 12 of the Convention does not mean, however, that the child has “a right to self-determination”, but only that it has a right “to involvement in decision-making”.<sup>30</sup> This participation must be genuine and cannot be reduced to a formality. Moreover, the older and maturer the child is, the more weight will be given to its views. This means that juveniles’ views must be given particular weight in the course of proceedings concerning their person.

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<sup>25</sup> *United Nations Compilation of General Comments*, p. 115, para. 5.

<sup>26</sup> *Ibid.*, loc. cit.

<sup>27</sup> As to Mexico, in UN doc. CRC/C/90, *Report on the twenty-second session, 20 September-8 October 1999*, para. 181.

<sup>28</sup> *Implementation Handbook*, p. 145.

<sup>29</sup> *Ibid.*, loc. cit.

<sup>30</sup> *Ibid.*

With regard to *the adjudication and disposition of juveniles*, Rule 14(2) of the Beijing Rules also provides that

“The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.”

The right to be heard in judicial proceedings concerning oneself is, as has been seen in Chapters 5 to 7 of this Manual, recognized for adults and constitutes an important procedural safeguard. It is however a right that acquires particular emphasis where children are concerned, as special efforts may be needed in order to ensure that a child is genuinely heard.

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The four above-mentioned general principles identified by the Committee on the Rights of the Child have to be borne in mind throughout this chapter, because they qualify the proceedings linked to the administration of juvenile justice, which consequently must respect the principles of non-discrimination, the best interests of the child, the child’s inherent right to life and the child’s right to be heard.

*In the administration of justice, i.e. in criminal proceedings as well as in proceedings concerning inter alia the separation of a child from its parents or in adoption proceedings, States are required to respect the following basic principles:*

- *the principle of non-discrimination;*
- *the best interests of the child;*
- *the child’s right to life, survival and development; and*
- *the child’s right to be heard.*

## 5. The Aims of Juvenile Justice

The declared aim of the juvenile justice system as a whole in international human rights law is *the child’s rehabilitation and social reintegration*. This is in particular clear from article 40(1) of the Convention on the Rights of the Child, which reads:

“1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and *the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society*” (emphasis added).

In connection with its consideration of the reports submitted by States parties, the Committee on the Rights of the Child has expressed concern at the insufficient number of facilities and programmes for the physical and psychological recovery and social reintegration of juveniles,<sup>31</sup> “the lack of rehabilitation measures and educational facilities for juvenile offenders”, as well as “the placement of ‘potential delinquents’ in detention centres instead of care institutions for their rehabilitation”.<sup>32</sup>

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Article 10(3) of the International Covenant on Civil and Political Rights also provides, *inter alia*, that “the penitentiary system shall comprise treatment of prisoners ***the essential aim of which shall be their reformation and social rehabilitation***” (emphasis added).

As stated by the Human Rights Committee, “no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner”.<sup>33</sup>

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According to Rule 5.1 of the Beijing Rules,

“The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.”

According to the accompanying *Commentary*, this rule “refers to two of the most important objectives of juvenile justice”.<sup>34</sup> The ***first objective*** is thus “the promotion of the well-being of the juvenile”, which should not only be emphasized by those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but also “in those legal systems that follow the criminal court model” in order that they contribute “to the avoidance of merely punitive sanctions”.<sup>35</sup>

The ***second objective*** is the principle of proportionality, which in this particular context means that “the response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances”, such as “social status, family situation, the harm caused by the offence or other factors affecting personal circumstances”.<sup>36</sup> Such circumstances “should influence the proportionality of the reactions (for example, by having regard to the

<sup>31</sup>As to Guinea, UN doc. CRC/C/84, *Report on the twentieth session, 11-29 January 1999*, para. 126 and as to South Africa, UN doc. CRC/C/94, *Report on the twenty-third session, 10-28 January 2000*, para. 445(h).

<sup>32</sup>See as to Yemen, UN doc. CRC/C/84, *Report on the twentieth session, January 1999*, para. 184 on the lack of centres for rehabilitation of children in conflict with the law; see also as to Nicaragua, UN doc. CRC/C/87, *Report on the twenty-first session, 17 May-4 June 1999*, para. 247.

<sup>33</sup>General Comment No. 21 in *United Nations Compilation of General Comments*, p. 143, para. 10.

<sup>34</sup>UN doc. ST/HR/1/Rev.4 (vol. I/Part 1) *Human Rights – A Compilation of International Instruments*, vol. I (First Part), Universal Instruments, p. 360 (hereinafter referred to as *Human Rights – A Compilation of International Instruments*).

<sup>35</sup>*Ibid.*, loc. cit.

<sup>36</sup>*Ibid.*

offender's endeavour to indemnify the victim or to her or his willingness to turn to wholesome and useful life)".<sup>37</sup>

The principle of proportionality must however also be safeguarded in ensuring the welfare of the young offender so that the measures taken do not go beyond what is necessary, failing which the fundamental rights of the young offender may be infringed.<sup>38</sup>

In other words, Rule 5 "calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime. The issues combined in the rule may help to stimulate development in both regards: new and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles."<sup>39</sup>

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The primary focus on the rehabilitation of the juvenile offender is also present in article 17(3) of the African Charter on the Rights and Welfare of the Child, according to which "the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her **reformation, re-integration into his or her family and social rehabilitation**" (emphasis added). Although not limited to juvenile offenders, article 5(6) of the American Convention on Human Rights stipulates that "punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners". The European Convention on Human Rights is silent on this issue, but in Recommendation No. R (87) 20 on Social Reactions to Juvenile Delinquency, the Committee of Ministers of the Council of Europe expresses its conviction "that the penal system for minors should continue to be characterized by its objective of education and social integration and that it should as far as possible abolish imprisonment for minors".<sup>40</sup>

*Under international human rights law the overall aim of the juvenile justice system must be to promote the child's rehabilitation and social reintegration, including the child's sense of the dignity and worth of its own person as well as his or her respect for the fundamental rights of others.*

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<sup>37</sup>Ibid.

<sup>38</sup>Ibid.

<sup>39</sup>Ibid.

<sup>40</sup>For the text of this recommendation, see Council of Europe web site: <http://cm.coe.int/ta/rec/1987/87r20.htm>.

## 6. The Duty to Create a Juvenile Justice System

In order to be able to give effect to their obligations deriving from the many international legal rules governing the administration of juvenile justice, States are required to pass specific laws and regulations at the national level. According to article 40(3) of the Convention on the Rights of the Child, “States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law”. In particular they shall seek to establish a minimum age of criminal responsibility, as well as measures to deal with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected (art. 40(3)(a) and (b)).

The Committee on the Rights of the Child has had occasion to express its serious concern at the absence of such a system of juvenile justice, and in particular the absence of laws, procedures and juvenile courts.<sup>41</sup> On other occasions it has stated its concern at the lack of an efficient and effective administration of juvenile justice and in particular its lack of compatibility with the Convention, as well as with other relevant United Nations standards.<sup>42</sup>

*States have a legal duty to set up a specific legal system of juvenile justice, including juvenile courts, to deal with young offenders and to establish a minimum age for criminal responsibility.*

## 7. The Accused Child and the Administration of Justice

The procedural safeguards in relation to arrest, detention, criminal investigation and trial proceedings dealt with in Chapters 5 to 7 above are of course equally valid when children are suspected of having committed a criminal offence. In other words, *children must be granted the same rights as adults at all relevant stages of the criminal procedure*, and the Committee on the Rights of the Child has expressed concern where due process has not always been so guaranteed.<sup>43</sup>

Because of the peculiarities of juvenile justice, the procedural safeguards take on additional importance since they must, inter alia, protect the best interests of the child and ensure respect for its rights to be heard and to social reintegration. In this section some of the most fundamental rights of the accused child will be highlighted,

<sup>41</sup>As to Armenia, UN doc. CRC/C/94, *Report on the twenty-third session (2000)*, para. 350.

<sup>42</sup>As to Grenada, *ibid.*, para. 411(a) and as to South Africa, *ibid.*, para. 455(a).

<sup>43</sup>As to Nicaragua, see UN doc. CRC/C/87, *Report on the twenty-first session (1999)*, para. 247.

without any attempt to provide an exhaustive analysis of these important rights. Emphasis will be laid on those rules that are derived from the specific needs of the accused child.

## 7.1 The right to freedom from torture and from cruel, inhuman or degrading treatment or punishment

According to article 37(a) of the Convention on the Rights of the Child, “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”; while article 17(2)(a) of the African Charter on the Rights and Welfare of the Child stipulates that the States parties “shall ... ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment”.

The child does of course also benefit from the general protection against physical and mental abuses found in article 7 of the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the African Charter on Human and Peoples’ Rights, article 5 of the American Convention on Human Rights and article 3 of the European Convention on Human Rights. This prohibition is *absolute* and cannot in any circumstances be derogated from.

The prohibition on ill-treatment is of course particularly relevant to children deprived of their liberty but it also concerns those children who, for instance, are being investigated by the police without being arrested or detained. Indeed, the most critical periods for a child suspected or accused of having committed a crime are the police investigation and pre-trial detention, when he or she is most likely to be subjected to ill-treatment and other forms of abuse. *It is important to be aware that acts which may not be considered to constitute unlawful treatment of an adult might be unacceptable in the case of children because of their specific sensitivity and particular vulnerability.* During the Day of General Discussion on the administration of juvenile justice organized by the Committee on the Rights of the Child, “it was suggested that serious consideration be given to the development of independent mechanisms, at the national and international levels, to ensure periodic visits to and an effective monitoring” of institutions where children are held.<sup>44</sup> Such visits would be an important tool in preventing maltreatment of children. Another important measure to prevent unlawful treatment of children by law enforcement officials, for instance, would be the organization of courses to train these professionals in methods of dealing with young persons constructively.

When considering the periodic report of India, the Committee on the Rights of the Child expressed concern about the “numerous reports of routine ill-treatment, corporal punishment, torture and sexual abuse of children in detention facilities, and alleged instances of killings of children living and/or working on the streets by law enforcement officials”.<sup>45</sup> The Committee therefore recommended “that the registration of each child taken to a police station be mandatory, including time, date

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<sup>44</sup>UN doc. CRC/C/46, *Report on the tenth session (1995)*, para. 229.

<sup>45</sup>UN doc. CRC/C/94, *Report on the twenty-third session (2000)*, para. 70.

and reason for detention, and that such detention be subject to frequent mandatory review by a magistrate”. The Committee also encouraged the State party to amend the Code of Criminal Procedure “so that medical examination, including age verification, is mandatory at the time of detention and at regular intervals”.<sup>46</sup> Lastly, it also recommended that the Juvenile Justice Act be amended “to provide for complaints and prosecution mechanisms for cases of custodial abuse of children”.<sup>47</sup>

According to article 39 of the Convention on the Rights of the Child, the States parties have a legal duty to “take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of ... torture or any other form of cruel, inhuman or degrading treatment or punishment... . Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child”. In the view of the Committee on the Rights of the Child, this article “deserves greater attention”, and programmes and strategies should therefore be developed to promote the physical and psychological recovery and social reintegration of, inter alia, children in the system of administration of justice.<sup>48</sup>

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On the interpretation of article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee has held that the prohibition on ill-treatment “must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure”, emphasizing, moreover, that this article “protects, in particular, children, pupils and patients in teaching and medical institutions”.<sup>49</sup> For more details on the issue of corporal punishment, see also Chapter 8, subsection 2.3.3.

*The child has at all times an absolute right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This prohibition includes corporal punishment imposed as punishment for an offence or as an educative or disciplinary measure.*

*A child victim of abuse has the right to appropriate measures to promote his or her physical and psychological recovery and social reintegration.*

## 7.2 General treatment of the child/the child’s best interests

According to both articles 3(1) and 40(1) of the Convention on the Rights of the Child, the best interests of the child shall be the basic principle guiding all institutions and authorities, including courts of law in all actions concerning children. A child “alleged as, accused of, or recognized as having infringed the penal law” has the

<sup>46</sup>Ibid., para. 71.

<sup>47</sup>Ibid., para. 72.

<sup>48</sup>UN doc. CRC/C/15/Add.34, *Concluding Observations: United Kingdom*, para. 39.

<sup>49</sup>General Comment No. 20, in *United Nations Compilation of General Comments*, p. 139, para. 5.

right “to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society” (art. 40(1)) of the Convention).

Article 17(1) of the African Charter on the Rights and Welfare of the Child provides that “every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others”. The question of the child’s social reintegration is dealt with in article 17(3), according to which “the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.”

On the question of the best interests of the child, see also subsection 4.2 above.

*The notion of the “best interests” of the child must guide all institutions and authorities, including courts of law, in all actions concerning children, with the ultimate aim of promoting his or her social reintegration.*

## 7.3 Some fundamental procedural rights

Every child alleged as, or accused of, having infringed the penal law shall have, *as a very minimum*, the guarantees enumerated in article 40(2)(a) and (b) of the Convention on the Rights of the Child. While some of these guarantees are principles generally established in international human rights law, others are designed to meet the specific needs and interests of children.<sup>50</sup> At the same time it must be borne in mind that, whenever relevant, the procedural rights contained in other international human rights treaties must also be ensured during the administration of juvenile justice. However, since those procedural rights have been dealt with in some depth in Chapters 5 to 7, they will not be repeated here.

### 7.3.1 The principle of *nullum crimen sine lege*

The principle of *nullum crimen sine lege* is a fundamental principle guaranteed by article 40(2)(a) of the Convention on the Rights of the Child, according to which “no child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed”. This is such an important legal principle that it has been made non-derogable under article 4(2) of the International Covenant on Civil and Political Rights, article 27(2) of the American Convention on Human Rights and article 15(2) of the European Convention on Human Rights. On this principle see also Chapter 7, section 3.11.

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<sup>50</sup>Implementation Handbook, p. 547.

### 7.3.2 The right to be presumed innocent

The right of the child “to be presumed innocent until proven guilty according to law” is contained in article 40(2)(b)(i) of the Convention on the Rights of the Child, while article 17(2)(c)(i) of the African Charter on the Rights and Welfare of the Child guarantees the right of the child to be “presumed innocent until duly recognized guilty”.

The Committee on the Rights of the Child expressed concern that the United Kingdom’s Criminal Evidence (N.I.) Order 1988 “appears to be incompatible with” article 40 of the Convention and, “in particular with the right to presumption of innocence and the right not to be compelled to give testimony or confess guilt”; according to this law “silence in response to police questioning can be used to support a finding of guilt against a child over 10 years of age in Northern Ireland. Silence at trial can be similarly used against children over 14 years of age.”<sup>51</sup> The Committee therefore recommended “that the emergency and other legislation, including in relation to the system of administration of juvenile justice, ... in operation in Northern Ireland should be reviewed to ensure its consistency with the principles and provisions of the Convention”.<sup>52</sup> On the right to be presumed innocent until proved guilty see also Chapter 6, section 5.

### 7.3.3 The right to prompt information and the right to legal assistance

Article 40(2)(b)(ii) proclaims the right of the child “to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence”. If compared with other similar international legal provisions, such as articles 9(2) and 14(3)(a) of the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child differs, first, in that “if appropriate”, the child may be informed through his or her parents or legal guardians; secondly, in that the reference to the right of the child “to have legal *or other appropriate assistance*” (emphasis added) in the preparation and presentation of his or her defence is a modification compared to general human rights law.<sup>53</sup> The reference to “other appropriate assistance” makes it possible for a child to have his or her defence assured by non-lawyers. However, it must be presumed that, in the best interests of the child and for reasons of justice, such assistance should only be resorted to in cases of minor infringements of the law.

The African Charter on the Rights and Welfare of the Child provides in this respect that every child accused of infringing penal law “shall be informed promptly in a language that he understands and in detail of the charge against him” (art. 17(2)(c)(ii)) and “shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence” (art. 17(2)(c)(iii)).

<sup>51</sup>UN doc. CRC/C/15/Add. 34, *Concluding Observations: United Kingdom*, para. 20.

<sup>52</sup>*Ibid.*, para. 34.

<sup>53</sup>As to the first requirement, cf. *Implementation Handbook*, p. 548.

### 7.3.4 The right to be tried without delay

Article 40(2)(b)(iii) provides that the child has the right “to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians”. Article 17(2)(c)(iv) of the African Charter on the Rights and Welfare of the Child more laconically proclaims that the accused child “shall have the matter determined as speedily as possible by an impartial tribunal ...”.

As was seen in Chapter 7, international human rights treaties guarantee the right to be tried “without undue delay” (art. 14(3)(c) of the International Covenant on Civil and Political Rights) or “within a reasonable time” (art. 6(1) of the European Convention on Human Rights). *With regard to children, however, the question of swiftness of the proceedings is particularly important and the child must therefore be tried “without delay”, the adjective “undue” having been omitted from article 40 of the Convention on the Rights of the Child.*

Article 40(2)(b)(iii) otherwise reflects the fundamental principle that the adjudication of persons accused of having committed a criminal offence must be made by a **competent, independent and impartial** body which must guarantee the accused a **fair bearing**. For more details about these fundamental principles, see Chapters 4 and 7.

This provision also implies that there may be cases when it is considered to be in the best interest of the child concerned to exclude his or her parents or legal guardians from the proceedings. On this same issue Rule 15.2 of the Beijing Rules provides that

“The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.”

According to the *Commentary* to Rule 15.2, the right of parents or guardians to participate in the proceedings “should be viewed as general psychological and emotional assistance to the juvenile – a function extending throughout the procedure”.<sup>54</sup> The *Commentary* provides the following explanation of the possibility of excluding parents or legal guardians from the procedure:

“The competent authority’s search for an adequate disposition of the case may profit, in particular, from the co-operation of the legal representatives of the juvenile (or, for that matter, some other personal assistant who the juvenile can and does really trust). Such concern can be thwarted if the presence of parents or guardians at the hearings plays a negative role, for instance, if they display a hostile attitude towards the juvenile, hence, the possibility of their exclusion must be provided for.”<sup>55</sup>

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<sup>54</sup> *Human Rights – A Compilation of International Instruments*, p. 368.

<sup>55</sup> *Ibid.*, pp. 368-369.

It is reasonable to conclude that the same ground could also justify exclusion of the child's parents or legal guardian under article 40(2)(b)(iii) of the Convention on the Rights of the Child.

It is of course particularly important that children have *prompt* access to legal counsel.<sup>56</sup>

### 7.3.5 The right not to incriminate oneself and the right to examine and have witnesses

Article 40(2)(b)(iv) of the Convention on the Rights of the Child contains two separate rights namely, the right of the child “not to be compelled to give testimony or to confess guilt”; and, second, the right “to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality”.

As noted above, the Committee on the Rights of the Child expressed concern about a law authorizing the police to use silence in response to questioning to support a finding of guilt against a child over ten years of age, since such a rule appeared to be incompatible *inter alia* with the right not to be compelled to give testimony or confess guilt.<sup>57</sup> It must also be emphasized in this context that international human rights law prohibits the use of confessions obtained by illegal means, and this prohibition holds true *a fortiori* in the framework of the administration of juvenile justice.

As to “the right not to be compelled to testify against oneself or to confess guilt”, see also Chapter 7, section 3.7.

### 7.3.6 The right to review

If a child has been found to have infringed penal law, article 40(2)(b)(v) prescribes that he or she has the right “to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law”. The right to “an appeal by a higher tribunal” is also guaranteed by article 17(2)(c)(iv) of the African Charter on the Rights and Welfare of the Child.

The right to appeal against conviction and sentence is further contained in article 14(5) of the International Covenant on Civil and Political Rights, article 8(2)(h) of the American Convention on Human Rights and article 2 of Protocol No. 7 to the European Convention on Human Rights, although the latter authorizes exceptions *inter alia* “in regard to offences of a minor character”.

The Committee on the Rights of the Child encouraged Denmark to withdraw its reservation to article 40(2)(b)(v), whereby it justified a limitation on the right to appeal in certain circumstances.<sup>58</sup>

<sup>56</sup>UN doc. CRC/C/15/Add.66, *Concluding Observations: Bulgaria*, para. 34.

<sup>57</sup>UN doc. CRC/C/15/Add.34, *Concluding Observations: United Kingdom*, paras. 20 and 34.

<sup>58</sup>UN doc. CRC/C/15/Add.33, *Concluding Observations: Denmark*, paras. 8 and 16.

### 7.3.7 The right to free assistance of an interpreter

According to article 40(2)(b)(vi) of the Convention on the Rights of the Child, the child has the right “to have the free assistance of an interpreter if [he or she] cannot understand or speak the language used”. The same rule is contained in article 17(2)(c)(ii) of the African Charter on the Rights and Welfare of the Child.

This is yet another rule that also exists in other international human rights treaties, such as in article 14(3)(f) of the International Covenant on Civil and Political Rights, article 8(2)(a) of the American Convention on Human Rights and article 6(3)(e) of the European Convention on Human Rights. This rule is important not only for children who speak a different language but also for those who are disabled.<sup>59</sup>

### 7.3.8 The right to respect for privacy

The accused child has the right “to have his or her privacy fully respected at all stages of the proceedings” (art. 40(2)(b)(vii)). This right is further developed in Rule 8 of the Beijing Rules, according to which “the juvenile’s right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of a juvenile offender shall be published” (Rule 8.1 and 8.2).

As explained in the *Commentary*, this rule “stresses the importance of the protection of the juvenile’s rights to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as ‘delinquent’ or ‘criminal’”.<sup>60</sup> Secondly, Rule 8 “stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted).” Thus, “the interest of the individual should be protected and upheld, at least in principle”.<sup>61</sup>

The need to protect the juvenile’s right to privacy justifies an exception to the basic rule that court proceedings shall be held in public, as established in particular in article 14(1) of the International Covenant on Civil and Political Rights, article 8(5) of the American Convention on Human Rights and article 6(1) of the European Convention on Human Rights. Such an exception is also foreseen by article 14(1) of the International Covenant, according to which “the Press and the public may be excluded from all or part of a trial for reasons of morals ... in a democratic society, or when the interest of the private lives of the parties so requires ...”. It is further stipulated that “any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”.

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<sup>59</sup> *Implementation Handbook*, p. 549.

<sup>60</sup> *Human Rights – A Compilation of International Instruments*, p. 362.

<sup>61</sup> *Ibid.*, loc. cit.

Article 6(1) of the European Convention on Human Rights does not make any exception for juveniles with regard to the public pronouncement of judgements, but allows for *in camera* proceedings “where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”. Article 8(5) of the American Convention on Human Rights is more laconic on the issue of publicity and provides only that “criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice”. Since it is normally considered to be in the best interests of juveniles that they should enjoy the benefit of closed proceedings, that would logically also seem to be implied by article 8(5) of the American Convention. Article 17(2)(d) of the African Charter on the Rights and Welfare of the Child categorically affirms that the States parties “shall ... prohibit the press and the public from the trial”.

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In order to protect the juvenile’s right to privacy, Rule 21 of the Beijing Rules also regulates *the handling of records of juvenile offenders* in the following terms:

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

21.2 Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.”

According to the *Commentary*, this rule “attempts to achieve a balance between conflicting interests connected with records or files: those of the police, prosecution and other authorities in improving control versus the interests of the juvenile offender”.<sup>62</sup> As to the reference to “other duly authorized persons”, it “would generally include, among others, researchers”.<sup>63</sup>

In its report on the general discussion on the administration of juvenile justice held in November 1995, the Committee on the Rights of the Child emphasized that “the privacy of the child should be fully respected in all stages of proceedings, including in relation to criminal records and possible reporting by the media”.<sup>64</sup>

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As can be seen from the above provisions, the right of the accused child/juvenile to enjoy respect for his or her privacy in connection with criminal proceedings is far-reaching, extending far beyond the protection from which adult offenders have a right to benefit.

<sup>62</sup>Ibid., p. 373.

<sup>63</sup>Ibid., p. 374.

<sup>64</sup>UN doc. CRC/C/46, *Report on the tenth session (1995)*, para. 227.

*Every child alleged as, or accused of, having infringed penal law has the right to full due process guarantees. In particular, every child has:*

- *the right to have his or her best interests taken into consideration throughout the legal proceedings and to be accorded treatment likely to promote his or her future reintegration into society;*
- *the right to benefit from the principle of **nullum crimen sine lege**;*
- *the right to be presumed innocent until proved guilty;*
- *the right to prompt information and prompt legal assistance;*
- *the right to be tried **without delay** by a competent, independent and impartial authority or judicial body guaranteeing the child a fair hearing;*
- *the right not to incriminate himself or herself and the right to examine witnesses or have witnesses called under conditions of equality with the prosecution;*
- *the right to appeal;*
- *the right to free assistance of an interpreter whenever necessary;*
- *the right to respect for his or her privacy.*

## 8. The Child and Deprivation of Liberty

Deprivation of the liberty of a child poses a special problem in that the child, who is still at a very sensitive stage of development, may suffer serious and even irreversible adverse psychological effects if removed from its family for purposes of detention. For this reason, international human rights law tries to reduce the deprivation of liberty of children to a minimum. In order to mitigate the negative effects of the deprivation of liberty when it occurs, international law likewise provides special rules based on the best interests of the child concerned. The principal legal sources referred to in this section are the Convention on the Rights of the Child, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the African Charter on the Rights and Welfare of the Child. Although the United Nations Rules for the Protection of Juveniles (hereinafter referred to as the United Nations Rules) are not, as such, binding on Governments, many of the rules contained therein are binding either because they are also found in the Convention on the Rights of the Child or because they constitute “facets of rights enshrined in the Convention”.<sup>65</sup>

<sup>65</sup>*The United Nations and Juvenile Justice: A Guide to International Standards and Best Practice*, p. 24, para. 243.

*Although the present chapter primarily concerns the rights of children suspected of having committed a criminal offence, the rules described below are applicable to all forms of deprivation of liberty irrespective of the grounds invoked in support thereof (suspected crime, welfare of the child, mental health reasons and so forth).*

## 8.1 The meaning of deprivation of liberty

The notion of deprivation of liberty as applicable to children and juveniles is not defined in article 37 of the Convention on the Rights of the Child, but according to Rule 11(b) of the United Nations Rules,

“The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.”

Consequently, the rules are “applicable to all forms of deprivation of liberty in whatever type of institution the deprivation of liberty occurs”.<sup>66</sup>

## 8.2 Deprivation of liberty: a measure of last resort

Article 37(b) of the Convention on the Rights of the Child provides, first, that “no child shall be deprived of his or her liberty unlawfully or arbitrarily”. Secondly, it specifies in this respect that

“The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.

In order to be consistent with international standards, the deprivation of liberty of a child must consequently:

- ❖ be lawful and not arbitrary;
- ❖ be imposed as a measure of last resort, i.e. when no other appropriate alternative measures are at the authorities’ disposal to deal with the child concerned; and finally,
- ❖ last only “for the shortest appropriate period of time”.

The rule that the deprivation of liberty of a juvenile shall be a measure of last resort is confirmed in Rules 1 and 2 of the United Nations Rules. Rule 2 further provides that the deprivation of liberty “should be ... for the minimum necessary period and should be limited to exceptional cases”. Lastly, according to this rule, “the length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release”.

<sup>66</sup>Ibid., para. 240.

In its report on the general discussion on the administration of juvenile justice, the Committee on the Rights of the Child emphasized that “deprivation of liberty, in particular pre-trial detention, should never be unlawful or arbitrary and should only be used once all other alternative solutions would have proved inadequate”.<sup>67</sup> During its consideration of the States parties’ reports, the Committee has several times expressed concern at the fact that deprivation of liberty is not (systematically) used as a measure of last resort<sup>68</sup> and for the shortest possible period of time.<sup>69</sup> The Committee has also complained of “extended periods of pre-trial detention of juvenile detainees at the discretion of the Procurator” in the Russian Federation.<sup>70</sup> In line with these concerns, the Committee has emphasized the need for strengthening and increasing efforts to develop alternatives to deprivation of liberty.<sup>71</sup>

According to Rule 30 of the United Nations Rules, open detention facilities should be established, “with no or minimal security measures. The population in such detention facilities should be as small as possible. The number of juveniles detained in closed facilities should be small enough to enable individualized treatment”.

In accordance with article 2 of the Convention on the Rights of the Child, deprivation of liberty must also be resorted to in a non-discriminatory manner.

## 8.3 The rights of the child deprived of liberty

While the civil rights of detained persons as explained in Chapters 5 to 7 are also applicable to children, the arrested, detained or imprisoned child has additional rights on account of his or her young age, which requires that the treatment of the child be adjusted so as to meet his or her specific needs. In other words, the treatment of the child must at all times be defined according to his or her best interests.

### 8.3.1 The right to humane treatment

Article 37(c) of the Convention on the Rights of the Child complements the prohibition on ill-treatment in article 37(a) by providing that “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, *and in a manner which takes into account the needs of persons of his or her age*” (emphasis added). The positive right to humane treatment is in general also expressly guaranteed by article 10(1) of the International Covenant on Civil and Political Rights and article 5(2) of the American Convention on Human Rights, while article 17(1) of the African Charter on the Rights and Welfare of the Child, as already noted, stipulates that “every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others”.

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<sup>67</sup> UN doc. CRC/C/46, *Report on the tenth session (1995)*, para. 227.

<sup>68</sup> See e.g. as to Venezuela, in UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 61(b) and as to Mexico, *ibid.*, para. 192(b).

<sup>69</sup> See as to Iraq, in UN doc. CRC/C/80, *Report on the nineteenth session (1998)*, para. 86.

<sup>70</sup> UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 130.

<sup>71</sup> See as to Peru, in UN doc. CRC/C/94, *Report on the twenty-third session (2000)*, para. 381(c), and as to Honduras, in UN doc. CRC/C/87, *Report on the twenty-first session (1999)*, para. 130.

### 8.3.2 The right of the child to be separated from adults

Article 37(c) provides in this respect that “in particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so”, while, according to article 17(2)(b) of the African Charter on the Rights and Welfare of the Child, the States parties “shall ... ensure that children are separated from adults in their place of detention or imprisonment”.

Article 10(2)(b) of the International Covenant on Civil and Political Rights confines itself to stating that “accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication”. Article 5(5) of the American Convention on Human Rights stipulates in this respect that minors “while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors”.

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The Committee on the Rights of the Child has expressed concern about the fact that some States parties have found it necessary to make reservations to the provision obliging them to separate children from adults in the course of detention or imprisonment, and has recommended that such reservations be withdrawn.<sup>72</sup> The Committee has also several times expressed concern about the fact that juveniles are detained with adults.<sup>73</sup> With regard to Sweden, it suggested that “further consideration should be given to ensuring that children in detention are separated from adults, taking into account the best interests of the child and alternatives to institutional care”.<sup>74</sup> The Committee deplored the fact that, in Jordan, untried children have been kept in the same premises as convicted persons.<sup>75</sup> It is clear from the work of the Committee that the requirement that juveniles be separated from adults applies to *all institutions*, including psychiatric establishments.<sup>76</sup>

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The Committee against Torture has recommended that juveniles in the United States “are not held in prison with the regular prison population”.<sup>77</sup>

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According to article 10(2)(a) of the International Covenant, accused persons shall, furthermore, “save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as

<sup>72</sup>See e.g. UN doc. CRC/C/15/Add.37, *Concluding Observations: Canada*, paras. 10 and 18.

<sup>73</sup>See as to Guinea, in UN doc. CRC/C/84, *Report on the twentieth session (1999)*, para.126; as to Bolivia, see UN doc, CRC/C/80, *Report on the nineteenth session (1998)*, para. 117, and as to Mexico, see UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para.192(c), concerning detention in police stations.

<sup>74</sup>UN doc. CRC/C/15/Add.2, *Concluding Observations: Sweden*, para. 12.

<sup>75</sup>UN doc. CRC/C/15/Add.21, *Concluding Observations: Jordan*, para. 16.

<sup>76</sup>UN doc. CRC/C/15/Add.53, *Concluding Observations: Finland*, paras. 16 and 27.

<sup>77</sup>UN doc. GAOR, A/55/44, p. 32, para. 180(e).

unconvicted persons”. A similar provision is contained in article 5(4) of the American Convention on Human Rights. Rule 17 of the United Nations Rules provides that “untried detainees should be separated from convicted juveniles”.

### **8.3.3 The right of the child to remain in contact with his or her family**

According to article 37(c), every child deprived of liberty “shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances”. These exceptional circumstances must be examined in the light of the basic principles underlying the Convention, including, in particular, the best interests of the child.<sup>78</sup>

The Committee has on several occasions expressed its concern with regard to children’s right of access to their parents and families during detention,<sup>79</sup> and has for instance recommended to the Government of Benin that it “ensure that children remain in contact with their families while in the juvenile justice system”.<sup>80</sup>

Rules 59 to 62 of the United Nations Rules contain more detailed instructions with regard to the right of the detained or imprisoned child to contacts with the wider community, including family and friends.

### **8.3.4 The child’s rights to prompt access to legal assistance and to legal challenge of detention**

In the words of article 37(d) of the Convention on the Rights of the Child,

“Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

Rule 18(a) of the United Nations Rules adds to this that juveniles should also “be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications.”

The fundamental rights to legal assistance as well as to legal challenge of one’s deprivation of liberty have been explained in some detail in sections 6 and 7 of Chapter 5 and need not be repeated here. Two differences exist, however, between article 37(d) of the Convention on the Rights of the Child and the rules laid down in general international human rights law. In the first place, article 37(d) refers to “legal *and* other appropriate assistance” (emphasis added), an addition that may for instance cover a social assistant in whom the juvenile has particular confidence. The help of such an assistant in addition to a practising lawyer may well be in the best interests of the child.

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<sup>78</sup>Cf. *Implementation Handbook*, p. 502.

<sup>79</sup>UN doc. CRC/C/15/Add.4, *Concluding Observations: Russian Federation*, para. 14 and UN doc. CRC/C/15/Add.61, *Concluding Observations: Nigeria*, para. 23.

<sup>80</sup>UN doc. CRC/C/87, *Report on the twenty-first session (1999)*, para. 165.

The second difference relates to the right to challenge the legality of the deprivation of liberty. In accordance with article 9(4) of the International Covenant on Civil and Political Rights, for instance, the decision on the lawfulness of the deprivation of liberty shall be taken by a “court”, while under article 37(d) of the Convention on the Rights of the Child it is either a “court *or* other competent, independent and impartial authority” (emphasis added). Reference can in this respect also be made to Rule 10(2) of the Beijing Rules, according to which “a judge or other competent official or body shall, without delay, consider the issue of release” of a juvenile upon his or her apprehension. According to the *Commentary* to this rule, the term “competent official or body” “refers to any person or institution in the broadest sense of the term, including community boards or police authorities having power to release an arrested person”.<sup>81</sup>

*The question arises, however, whether community boards or police authorities possess the requisite independence and impartiality to rule on the question of lawfulness of the detention and/or the release of the juvenile concerned.*

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The Committee on the Rights of the Child has expressed concern about the fact that juveniles in Mexico “have insufficient access to legal assistance”.<sup>82</sup>

### 8.3.5 The child and the general conditions of detention

The duty of States to provide special treatment to detained and imprisoned children adjusted to their needs is an expression of the “best interests” approach which permeates the entire Convention. This is also a fundamentally logical rule given that the juvenile justice system “should uphold the rights and safety and promote the physical and mental well-being of juveniles” (Rule 1 of the United Nations Rules), and, further, that the legal rules taken together are aimed at “counteracting the detrimental effects of all types of detention and ... fostering integration in society” (Rule 3 of the United Nations Rules).

This specifically child-oriented approach implies, furthermore, that “juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society” (Rule 12 of the United Nations Rules).

According to article 24(1) of the Convention on the Rights of the Child, moreover, children are entitled to enjoy “the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health”. Further, “States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services”. This provision is thus also applicable to children in detention. Rule 31 of the United Nations Rules provides, furthermore, that “juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of

<sup>81</sup> *Human Rights – A Compilation of International Instruments*, p. 363.

<sup>82</sup> UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 192(f).

health and human dignity”. These Rules contain details not only on medical care (Rules 49-55), but also on the physical environment and accommodation (Rules 31-37), education, vocational training and work (Rules 38-46), recreation (Rule 47) and religion (Rule 48).

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The question of access to *education* is, of course, of particular importance in preparing a detained or imprisoned juvenile for his or her release. Rule 38 of the United Nations Rules provides in this respect that

“Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education.”

As to juveniles *above* compulsory school age who wish to continue their education, they “should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes” (Rule 39 of the United Nations Rules). Needless to say, “diplomas or educational certificates awarded to juveniles while in detention should not indicate in any way that the juvenile has been institutionalized” (Rule 40).

Any juvenile deprived of his or her liberty should also “have the right to receive vocational training in occupations likely to prepare him or her for future employment” (Rule 42), and, “with due regard to proper vocational selection and to the requirements of institutional administration, juveniles should be able to choose the type of work they wish to perform” (Rule 43).

It is essential that the right to education of the detained child or juvenile should be guaranteed *throughout* his or her deprivation of liberty.

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The Committee on the Rights of the Child has often had occasion to express concern about the treatment to which juveniles are subjected while detained or imprisoned, and also about conditions of detention in general, inter alia in educational institutions in the Russian Federation.<sup>83</sup> Another recurring concern is that of overcrowding of detention facilities.<sup>84</sup>

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<sup>83</sup>See as to Russian Federation, UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 130.

<sup>84</sup>See as to South Africa, in UN doc. CRC/C/94, *Report on the twenty-third session (1999)*, para. 455, and as to Belize, in UN doc. CRC/C/84, *Report on the twentieth session (1999)*, para. 89.

The Committee has likewise repeatedly expressed concern about the insufficiency of facilities and programmes for the physical and psychological recovery and social reintegration of juveniles,<sup>85</sup> means which should constitute the cornerstone of any system for the administration of justice.

### 8.3.6 *The rights of the child and disciplinary measures*

Recourse to disciplinary measures against juveniles deprived of their liberty is legitimate for the purpose of maintaining “the interest of safety and an ordered community life”, but “should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person” (Rule 66 of the United Nations Rules). According to Rule 67, this means that the following measures “shall be strictly prohibited”:

- ❖ measures constituting cruel, inhuman or degrading treatment;
- ❖ corporal punishment;
- ❖ placement in a dark cell;
- ❖ closed or solitary confinement;
- ❖ any other punishment that may compromise the physical or mental health of the juvenile concerned.

Moreover, the following measures “should” also be prohibited:

- ❖ the reduction of diet and the restriction or denial of contact with family members “for any purpose”;
- ❖ labour, since it “should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction”;
- ❖ more than one sanction for the same disciplinary infraction; and
- ❖ collective sanctions.

States should adopt legislation or regulations establishing norms concerning the following matters, “taking full account of the fundamental characteristics, needs and rights of juveniles”: (1) conduct constituting a disciplinary offence; (2) type and duration of disciplinary sanctions that may be inflicted; (3) the authority competent to impose such sanctions; and (4) the authority competent to consider appeals (Rule 68).

The juvenile should be disciplined only “in strict accordance with the terms of the law and regulations in force”, and only after “he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile and given a proper opportunity of presenting his or her defence”. The juvenile should have “the right of appeal to a competent impartial authority”, and “complete records should be kept of all disciplinary proceedings” (Rule 70).

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<sup>85</sup>See as to Benin, in UN doc. CRC/C/87, *Report on the twenty-first session (1999)*, para. 165 (f).

The Committee on the Rights of the Child *inter alia* recommended that Grenada prohibit and eradicate the use of corporal punishment such as whipping in the juvenile justice system, and it expressed particular concern regarding “the use of physical punishment, including flogging, and torture in detention centres” in Yemen.<sup>86</sup> It is not clear whether the physical ill-treatment in these cases was imposed for the purpose of discipline or as a penal sanction, but in either case the measures would be unlawful. The Committee expressed concern, however, about “the recourse to whipping as a disciplinary measure for boys in Zimbabwe.”<sup>87</sup>

On the question of corporal punishment see also Chapter 8, sub-section 2.3.3 of this Manual.

*The deprivation of liberty of juveniles should be used only as a measure of last resort, i.e. when no other appropriate measures are available to deal with the child concerned.*

*A child deprived of liberty has the right to be treated with humanity in a manner that takes into account his or her specific needs.*

*A child deprived of liberty has the right to be separated from adults and, if not convicted, he or she has the right not to be detained with convicted persons.*

*A child deprived of liberty has the right to remain in regular contact with his or her family, unless such contact would not be in the best interest of the child.*

*The child deprived of liberty has the right to prompt access to legal assistance and to challenge the lawfulness of his or her detention before a court or other competent, independent and impartial authority.*

*The child deprived of liberty has the right to conditions of detention that will promote his or her physical and mental well-being as well as foster his or her reintegration into society. In this respect, effective access to **continuous education** during the deprivation of liberty is a cornerstone of any system for the administration of justice.*

*A child deprived of liberty may not be subjected to disciplinary measures involving either physical chastisement or solitary confinement.*

*Disciplinary measures must respect the right of the child to his or her inherent dignity.*

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<sup>86</sup>See as to Grenada, in UN doc. CRC/C/94, *Report on the twenty-third session (2000)*, para. 412(b) (whipping), and as to Yemen, in UN doc. CRC/C/84, *Report on the twentieth session (1999)*, para. 184 (physical punishment, flogging and torture in detention centres).

<sup>87</sup>UN doc. CRC/C/15/Add.55, *Concluding Observations: Zimbabwe*, para. 21.

## 9. The Rights of the Child and Penal Sanctions

International human rights law sets certain limits on the kind of penal sanctions that can be imposed on a child found guilty of having committed a criminal offence. Article 37(a) of the Convention on the Rights of the Child stipulates, for instance, that “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age”.

As to *capital punishment*, article 6(5) of the International Covenant on Civil and Political Rights outlaws its imposition “for crimes committed by persons below eighteen years of age”. At the regional level, article 4(5) of the American Convention on Human Rights inter alia forbids capital punishment “upon persons who, at the time the crime was committed, were under 18 years of age”.

With regard to the prohibition of *life sentences without the possibility of release*, this is a principle which is fully logical given that, under article 37(b) of the Convention on the Rights of the Child, the detention or imprisonment of a child “shall be used only as a measure of last resort and for the shortest appropriate period of time”. A life sentence would ipso facto be contrary to this rule and also to the notion of the bests interest of the child, which implies that a child shall be given a chance of psychological recovery for the purposes of social reintegration (cf. inter alia art. 39 of the Convention on the Rights of the Child). Consistent with the rule that imprisonment of a child shall be only for the shortest possible time, the Committee on the Rights of the Child expressed concern with regard to Zimbabwe about “the lack of a clear legal prohibition of life imprisonment without possibility of release and indeterminate sentencing”.<sup>88</sup>

Similarly, the Committee has expressed concern where the possibility of imposing the *death penalty* has not been expressly prohibited by law,<sup>89</sup> and where the law allows for young persons between 16 and 18 years of age “to be tried as adults and thereby face the imposition of a death sentence or a sentence of life imprisonment”.<sup>90</sup> Further, in respect of China, where the national legislation permits the imposition of a two-year suspension of death sentences on persons aged 16 to 18, the Committee is of the opinion that such sentencing of children “constitutes cruel, inhuman or degrading treatment or punishment”.<sup>91</sup> The Committee was also “deeply concerned” about the fact that in Guatemala the national legislation prohibited neither capital punishment nor life imprisonment without the possibility of release.<sup>92</sup>

<sup>88</sup>Ibid., loc. cit.

<sup>89</sup>Ibid.

<sup>90</sup>UN doc. CRC/C/15/Add.38, *Concluding Observations: Belgium*, para. 11.

<sup>91</sup>UN doc. CRC/C/15/Add.56, *Concluding Observations: China*, para. 21.

<sup>92</sup>UN doc. CRC/C/15/Add.58, *Concluding Observations: Guatemala*, para. 15.

As pointed out in the preceding section, *corporal punishment* such as whipping and flogging is also prohibited inter alia under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. It will further be recalled that, in the *Tyrer* case, the European Court of Human Rights ruled that the corporal punishment – consisting of three strokes with a cane – imposed by a juvenile court in the Isle of Man, constituted degrading treatment within the meaning of article 3 of the European Convention on Human Rights (cf. Chapter 8, subsection 2.3.3).

*International human rights law prohibits the imposition of capital punishment for crimes committed by persons below the age of eighteen.*

*Life imprisonment without the possibility of release may not be imposed on persons below eighteen years of age.*

*Corporal punishment is contrary to international human rights law.*

## 10. The Accused Child and the Question of Diversion

### 10.1 The meaning of the term “diversion”

As explained in the *Commentary* to Rule 11 of the Beijing Rules, the term *diversion* means “removal from criminal justice processing and, frequently, redirection to community support services” and “is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence)”.<sup>93</sup>

The question of diversion is dealt with in article 40(3)(b) of the Convention on the Rights of the Child, which reads as follows:

“3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

...

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”

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<sup>93</sup>Human Rights – A Compilation of International Instruments, pp. 364-365.

This alternative approach is confirmed in Rule 11(1) of the Beijing Rules, according to which “consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority...”. The *Commentary* to this Rule explains that “in many cases, non-intervention would be the best response”, that is to say, “diversion at the outset and without referral to alternative (social) services”.<sup>94</sup> This is in particular the case “where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner”.<sup>95</sup>

Article 40(4) of the Convention on the Rights of the Child gives some other examples of non-institutional measures that “shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence”. In addition to the non-interventionist approach which may be the most appropriate alternative in many situations, the following measures, among others, should be envisaged instead of criminal proceedings, which should always be used only as a last resort:

- ❖ care;
- ❖ guidance and supervision orders;
- ❖ counselling;
- ❖ probation;
- ❖ foster care;
- ❖ education and vocational training programmes.

On the issue of viable diversionary measures, Rule 11.4 of the Beijing Rules emphasizes the importance of community-based alternatives to juvenile justice processing, by stipulating that “in order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims”. As noted in the *Commentary* to this provision, “programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended. The merits of individual cases would make diversion appropriate, even when more serious offences have been committed”, such as, for instance, in the case of a first offence or when the juvenile has committed an unlawful act under peer pressure.<sup>96</sup>

## 10.2 Diversion and the responsible authorities

According to Rule 11(2) of the Beijing Rules, “the police, prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules”. This means that “diversion may be used at any

<sup>94</sup>Ibid., p. 365.

<sup>95</sup>Ibid., loc. cit.

<sup>96</sup>Ibid.

point of decision-making” by the responsible authorities, and may be exercised by one, several or all of them.<sup>97</sup> Moreover, recourse to diversion in relation to juveniles “need not necessarily be limited to petty cases, thus rendering diversion an important instrument” in dealing with juveniles in trouble with the law.<sup>98</sup>

### 10.3 Diversion and consent of the child

Rule 11.3 of the Beijing Rules requires the consent of the juvenile, or her or his parents or guardian before referring the juvenile to appropriate community or other services; a decision to resort to diversion shall however “be subject to review by a competent authority, upon application”. The *Commentary* underlines the importance of securing the consent of the young offender or his or her parent or guardian to the recommended diversionary measure or measures, one reason being that diversion to community service without such consent would contradict the ILO Abolition of Forced Labour Convention.<sup>99</sup> The consent of the person concerned by the diversionary measure is of course also essential for its success.

Such consent should not however be left unchallengeable, since, as noted in the *Commentary*, “it might sometimes be given out of sheer desperation on the part of the juvenile”.<sup>100</sup> The idea behind the Rule is, in other words, that “care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process. Juveniles should not feel pressured (for example in order to avoid court appearance) or be pressured into consenting to diversion programmes.”<sup>101</sup>

When considering the reports of the States parties to the Convention on the Rights of the Child, the Committee on the Rights of the Child consistently examines what alternatives to deprivation of liberty exist in the country concerned to deal with juvenile offenders, and it has repeatedly called for the strengthening of such measures.<sup>102</sup>

*Whenever appropriate and desirable, juvenile offenders shall be diverted away from the ordinary criminal proceedings towards alternative services and care.*

*Such diversionary measures can be taken by the competent authorities at any stage of the decision-making.*

*The juvenile concerned, or her or his parents or guardian, shall consent to the diversion and may bring an appeal to the competent authority in case of disagreement.*

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<sup>97</sup>Ibid.

<sup>98</sup>Ibid.

<sup>99</sup>Ibid.

<sup>100</sup>Ibid.

<sup>101</sup>Ibid.

<sup>102</sup>See as to Honduras, in UN doc. CRC/C/87, *Report on the twenty-first session (1999)*, para. 130; as to Kuwait, in UN doc. CRC/C/80, *Report on the nineteenth session (1998)*, para. 150; and as to Peru, in UN doc. CRC/C/94, *Report on the twenty-third session (2000)*, para. 381.

## 11. The Child as Victim or Witness in Judicial Proceedings

The appearance of a child as a victim or witness in judicial proceedings causes special problems since he or she is at a sensitive age when contact with the justice system might be deeply traumatic. Yet in spite of the negative impact that criminal proceedings can have on child victims or witnesses, this serious question has only recently been accorded attention at the international level, for example in the Guidelines for Action on Children in the Criminal Justice System, annexed to Economic and Social Council resolution 1997/30, on Administration of juvenile justice (hereinafter referred as the “Guidelines”). Although not legally binding on States, these Guidelines provide some useful principles which should inspire the work of police, prosecutors, lawyers and judges at the domestic level.

Basing itself on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which will be further considered in Chapter 15 of this Manual, paragraph 43 of the Guidelines stipulates that “States should undertake to ensure that child victims and witnesses are provided with appropriate access to justice and fair treatment, restitution, compensation and social assistance. If applicable, measures should be taken to prevent the settling of penal matters through compensation outside the justice system, when doing so is not in the interests of the child”.

As regards *child victims*, more specifically, paragraph 45 of the Guidelines provides that they “should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered”. Child victims should further “have access to assistance that meets their needs, such as advocacy, protection, economic assistance, counselling, health and social services, social reintegration and physical and psychological recovery services. Special assistance should be given to those children who are disabled or ill. Emphasis should be placed upon family- and community-based rehabilitation rather than institutionalization” (para. 46).

Furthermore, “judicial and administrative mechanisms should be established and strengthened where necessary to enable child victims to obtain redress through formal or informal procedures that are prompt, fair and accessible. Child victims and/or their legal representatives should be informed accordingly” (para.47). The competent authorities thus have a positive duty to provide the necessary information to the victims.

According to paragraph 48 of the Guidelines, “access *should*” (emphasis added) also “be allowed to fair and adequate compensation for all child victims of violations of human rights, specifically torture and other cruel, inhuman or degrading treatment or punishment, including rape and sexual abuse, unlawful or arbitrary deprivation or liberty, unjustifiable detention and miscarriage of justice. Necessary legal representation to bring an action within an appropriate court or tribunal, as well as interpretation into the native language of the child, if necessary, should be available.”

*It is noteworthy that the wording of this paragraph is weaker than that contained in the legally binding human rights treaties, all of which grant the right to an effective remedy to victims of human rights violations. That right is, of course, equally applicable to children who are victims of such violations. For further details on this right, see Chapter 15 of this Manual.*

In order to be able to deal with cases involving child victims, “police, lawyers, the judiciary and other court personnel should receive training”, a need that is recognized in paragraph 44 of the Guidelines. In addition, according to the same provision, “States should consider establishing, if they have not yet done so, specialized offices and units to deal with cases involving offences against children”. Lastly, “States should establish, as appropriate, a code of practice for proper management of cases involving child victims”.

With regard to *child witnesses*, paragraph 49 of the Guidelines states that they “need assistance in the judicial and administrative process”. Consequently, “States should review, evaluate and improve, as necessary, the situation for children as witnesses of crime in their evidential and procedural law to ensure that the rights of children are fully protected. In accordance with the different law traditions, practices and legal framework, direct contact should be avoided between the child victim and the offender during the process of investigation and prosecution as well as during trial hearings as much as possible. The identification of the child victim in the media should be prohibited, where necessary to protect the privacy of the child. Where prohibition is contrary to the fundamental legal principles of Member States, such identification should be discouraged.”

According to paragraph 50 of the Guidelines, States should also consider, “if necessary, amendments of their penal procedural codes to allow for, inter alia, videotaping of the child’s testimony and presentation of the videotaped testimony in court as an official piece of evidence. In particular, police, prosecutors, judges and magistrates should apply more child-friendly practices, for example, in police operations and interviews of child witnesses”.

Lastly, paragraph 51 provides that “the responsiveness of judicial and administrative processes to the needs of child victims and witnesses should be facilitated by:

- (a) Informing child victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved;
- (b) Encouraging the development of child witness preparation schemes to familiarize children with the criminal justice process prior to giving evidence. Appropriate assistance should be provided to child victims and witnesses throughout the legal process;
- (c) Allowing the views and concerns of child victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and in accordance with the relevant national criminal justice system;

(d) Taking measures to minimize delays in the criminal justice system, protecting the privacy of child victims and witnesses and, when necessary, ensuring their safety from intimidation and retaliation.”

Given the increasing number of children who appear in court proceedings as victims and witnesses, in particular in cases of abuse, it is of primordial importance that members of the legal professions focus on ways and means of respecting these children’s rights and needs, while at the same time also respecting the rights and needs of the accused, who must be granted due process.

*It is important to bear in mind that the appearance of a child as victim or witness in criminal proceedings may have a traumatizing effect. It is therefore the duty of the members of the legal profession to respect the rights and needs of the child and to treat him or her with understanding and sympathy.*

**Child victims** are entitled to prompt redress for the harm suffered and, to this end, they have the right of access to various kinds of assistance to meet their needs during the legal proceedings and thereafter.

*Child victims should be able to obtain redress through formal or informal procedures that are prompt, fair and accessible, and they and/ or their legal representatives should be informed about the availability of such procedures.*

*Children who are victims of human rights violations have a right under international human rights law to an effective remedy for the harm suffered.*

**Child witnesses** need special assistance in the judicial and administrative process and the members of the legal profession must ensure that their rights are fully protected.

*The police, prosecutors, magistrates and judges should endeavour to apply more child-friendly practices in their work with child witnesses.*

*Both child victims and witnesses need special assistance throughout the legal proceedings in which they are involved.*

## 12. The Child and His or Her Parents: When Separation May be Justified

Judges and lawyers may have to deal with children not only in the administration of criminal justice and diversionary proceedings, but also in connection with proceedings concerning the separation of a child from its parents and adoption, the latter question being briefly considered in the next section.

Article 9 of the Convention on the Rights of the Child provides for the exceptional separation of children from their parents in the following words:

“1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.”

### 12.1 The best interests of the child

Given the child-oriented approach adopted by the Convention, it is logical that the basic principle flowing from this provision is that the separation must be “necessary for the best interests of the child”. It is noteworthy, however, that the words “against their will” refer “either to the parents’ will or to the parents’ and the child’s will together”, but clearly do not mean only the child’s will.<sup>103</sup> This is a plausible interpretation given that children are not able to choose their caregivers, but “are dependent on their family, community and the State to make that choice for them”.<sup>104</sup>

### 12.2 The grounds justifying separation

Article 9(1) expressly refers to parental “abuse or neglect of the child” as a first ground that might justify the separation of a child from his or her parents; as a second ground it mentions the situation where parents are living apart and a decision must be made as to where the child should live. However, as indicated by the words “such as”, these possible grounds of separation are illustrative and not exhaustive, and there may be other situations in which domestic judges could be called upon to settle residential disputes, for instance, if the parents have themselves agreed where the child should live, but the child itself is unhappy with the agreement.<sup>105</sup> In such cases States might have an important role to fulfil as arbitrator in order to solve the dispute between the child and

<sup>103</sup> *Implementation Handbook*, p. 121.

<sup>104</sup> *Ibid.*, loc. cit.

<sup>105</sup> *Ibid.*

his or her parents, if only by “establishing judicial machinery for the child to make a case for arbitration”.<sup>106</sup>

## 12.3 The legal safeguards

Article 9 refers to three legal safeguards aimed at providing protection against abuses and which will ensure fairness of the proceedings. Consequently, the decision to separate a child from his or her parents must:

- ❖ be taken by “competent authorities” applying existing law and procedures (art. 9(1));
- ❖ be subject to judicial review to determine the lawfulness thereof (art. 9(1)); and
- ❖ be taken only after all interested parties have had “an opportunity to participate in the proceedings and make their views known” (art. 9(2)).

The notion of *competent authorities* means in this context organs having both the legal authority to determine whether a separation is in the best interests of the child and the necessary skills to do so.<sup>107</sup>

The requirement that the decision on separation must be taken *in accordance with applicable law and procedures* means that States must legislate in this area in order carefully to define the grounds and circumstances that may justify such a drastic measure. However, since no law can be so precise as to provide guidance sufficiently detailed to foresee the wide range of individual situations which may necessitate intervention, the competent authorities and the courts may need a certain degree of discretion allowing social workers, judges and lawyers to seek alternatives conforming to the best interests of the child.

*Laws on separation must not be discriminatory and must not be applied in a discriminatory manner* (cf. art. 2 of the Convention); consequently, homelessness, poverty or ethnic origin must not per se be grounds for removing a child from his or her parents.<sup>108</sup> The Committee on the Rights of the Child expressed concern with regard to Croatia that “children might be removed from their families because of their health status or the difficult economic situation faced by their parents”.<sup>109</sup> With regard to the United Kingdom, it expressed concern that “children of certain ethnic minorities appear to be more likely to be placed in care”.<sup>110</sup> When examining the report of Belgium, the Committee pointed out that “children belonging to the disadvantaged groups of the population appear more likely to be placed in care”, and it recalled in this regard “the importance of the family in the upbringing of a child”, emphasizing its view “that the separation of the child from his or her family must take the child’s best interest as a primary consideration”.<sup>111</sup>

<sup>106</sup>Ibid.

<sup>107</sup>Ibid., p. 124.

<sup>108</sup>Ibid., p. 125.

<sup>109</sup>UN doc. CRC/C/15/Add.52, *Concluding Observations: Croatia*, para. 17.

<sup>110</sup>UN doc. CRC/C/15/Add.34, *Concluding Observations: United Kingdom*, para. 12.

<sup>111</sup>UN doc. CRC/C/15/Add.38, *Concluding Observations: Belgium*, para. 10.

The requirement of *judicial review* of the decision taken by the competent authority in turn ensures a determination of its lawfulness, on the basis of existing law and procedure, by an independent and impartial body applying due process guarantees and rendering a reasoned decision. Such review should include an examination of any discretion that the competent authorities may have had in deciding on the question of separation so as to ensure that the discretion has been applied carefully, in the best interests of the child.

Article 9(2) of the Convention adds an additional guarantee to the fairness of the proceedings relating to separation in that “all *interested* parties shall be given an opportunity to participate in the proceedings and make their views known” (emphasis added). The words “interested parties” are not defined in the Convention but include, in the first place, the child himself or herself. This follows from a reading of article 9(2) in the light of article 12(2) of the Convention, according to which “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”. The views of the child shall be “given due weight in accordance with the age and maturity of the child” (art.12(1)). Furthermore, the reference to “interested” parties also means that both parents must be heard although they may not live together; other members of the child’s extended family might also have a right to be heard on the basis of this provision, as well as “professionals with a specialist knowledge of the child”.<sup>112</sup>

## 12.4 The child’s right to remain in contact with his or her parents

Article 9(3) of the Convention provides that “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with *both* parents on a regular basis, except if it is contrary to the child’s best interests” (emphasis added). The stress here is on the child’s right to remain in contact with both parents, and not on the parents’ right to maintain contact with their child. It enables a child to stay in touch not only with the residential parent but also with the non-residential father or mother.<sup>113</sup>

*A child may in exceptional situations be separated from his or her parents, provided that this is in the child’s best interests. Situations that may justify such separation are, in particular, abuse or neglect.*

*Laws on separation must not be discriminatory and must not be applied in a discriminatory manner. Homelessness, poverty or ethnic origin, for instance, must not **per se** be grounds for removing a child from his or her parents.*

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<sup>112</sup>Implementation Handbook, p. 126.

<sup>113</sup>Ibid., p. 127. As to the rights of children, parents and other family members to receive “essential information” concerning the whereabouts of a parent or child, see also article 9(4) of the Convention and Implementation Handbook, p. 127.

*The decision on separation must be taken by a competent authority acting in accordance with law and it must be subject to judicial review. A decision to separate a child from his or her parents shall be taken only after all interested parties have been able to take part in the proceedings and make their views known.*

*A child separated from his or her parents has a right to maintain regular contact with them, unless it would not be in the child's best interests to do so.*

## 13. The Rights of the Child and Adoption Proceedings

The final area to be dealt with in this chapter where judges and lawyers will be called upon to intervene is that of *adoption*.<sup>114</sup> Article 21 of the Convention on the Rights of the Child provides some basic rules, which are applicable to “States Parties that recognize and/or permit the system of adoption”.<sup>115</sup> Article 20 mentions adoption as one of several ways of caring for children deprived of a family environment, but the Convention, as such, does not take a position on the desirability of adoption. However, wherever it exists, adoption shall be regulated by domestic law, which must give paramount consideration to the best interests of the child, to the exclusion of other interests such as economic gain.<sup>116</sup> The legislation on adoption must also respect the following minimum rules :

*First*, it must “ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary” (art. 21(a)).

As to the notion of *competent authorities*, this covers both judicial and professional authorities who are qualified to decide what is in the best interest of the child and ensure that proper consent has been given;<sup>117</sup> as recommended by the Committee on the Rights of the Child with regard to Panama, adequate training should be provided to the professionals concerned.<sup>118</sup>

<sup>114</sup>This section will be exclusively based on the Convention on the Rights of the Child and will leave aside other international treaties dealing with the question of adoption.

<sup>115</sup>States applying Islamic law, for instance, do not recognize adoption: *Implementation Handbook*, p. 271.

<sup>116</sup>On the notion of best interests in connection with adoption, see *Implementation Handbook*, p. 272.

<sup>117</sup>*Ibid.*, p. 273.

<sup>118</sup>UN doc. CRC/C/15/Add.68, *Concluding Observations: Panama*, para. 31.

The requirement that an adoption must be based on the *informed consent* of the persons concerned was inserted in order to prevent children from being “wrongfully removed from their parents”, although the Convention leaves it to each State party to include this requirement or not in its domestic legislation.<sup>119</sup> Notwithstanding the failure of domestic law to contain a proper consent clause, a lack of informed consent to an adoption might in any event violate the right of both the child and his or her natural parents as guaranteed by in particular articles 7 and 9 of the Convention, which are based on the presumption “that children’s best interests are served by being with their parents wherever possible”.<sup>120</sup> As to the views of the child itself, they are, as previously mentioned, required under article 12 of the Convention and must be considered essential also in connection with adoption procedures envisaged under article 21.<sup>121</sup> It is worthy of note that some countries require the child’s own consent to adoption as from a certain age: in Mongolia, the agreement of the child has to be secured if he or she is nine years old or more;<sup>122</sup> in the Canadian province of Nova Scotia the law provides that in situations where the person proposed to be adopted is twelve years of age or more, “written consent must be obtained”,<sup>123</sup> and in Croatia “the attitude of the child over 10 is relevant with respect to his or her agreeing to adoption”.<sup>124</sup> The Committee on the Rights of the Child has recommended that States parties ensure that their domestic legislation is in conformity in particular with articles 3, 12 and 21 of the Convention<sup>125</sup> and that, accordingly, children be granted broadened involvement in family decisions affecting them, including in proceedings relating to family reunification and adoption.<sup>126</sup>

*Second*, article 21(b) recognizes that “inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin”. As indicated by the Committee on the Rights of the Child in its recommendations to Mexico, inter-country adoptions should be seen as a measure of last resort to provide care for a child,<sup>127</sup> and the States parties are not, consequently, obliged to permit such adoptions. The Committee has on various occasions expressed its concern about the lack of a normative framework or sufficiency of measures to implement the provisions of the Convention concerning adoption in general and in particular in the field of inter-country adoptions and the consequential risk of illegal inter-country adoptions and trafficking in children.<sup>128</sup> With regard to Denmark and

<sup>119</sup> *Implementation Handbook*, p. 273.

<sup>120</sup> *Ibid.*, loc. cit.

<sup>121</sup> *Ibid.*

<sup>122</sup> UN doc. CRC/C/3/Add.32, *Initial reports of States parties due in 1992: Mongolia*, para. 136.

<sup>123</sup> UN doc. CRC/C/11/Add.3, *Initial reports of States parties due in 1994: Canada*, para. 1129.

<sup>124</sup> UN doc. CRC/C/8/Add.19, *Initial reports of States parties due in 1993: Croatia*, para. 103.

<sup>125</sup> UN doc. CRC/C/15/Add.43, *Concluding Observations: Germany*, para. 29; and UN doc. CRC/C/15/Add.24, *Concluding Observations: Honduras*, para. 26.

<sup>126</sup> UN doc. CRC/C/15/Add.43, *Concluding Observations: Germany*, para. 29.

<sup>127</sup> UN doc. CRC/C/15/Add.13, *Concluding Observations: Mexico*, para. 18.

<sup>128</sup> See e.g. UN doc. CRC/C/15/Add.27, *Concluding Observations: Paraguay*, para. 11; UN doc. CRC/C/15/Add.36, *Concluding Observations: Nicaragua*, para. 18; and UN doc. CRC/C/15/Add.42, *Concluding Observations: Ukraine*, para. 11.

Sweden the Committee also recommended that steps be taken to monitor the situation of foreign children adopted by families in these countries.<sup>129</sup>

**Third**, the States parties shall “ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption”. This means that “every international adoption must be authorized as being in the best interests of the child by competent authorities of the child’s State, on the basis of proper investigation and information and with proper consents (with counselling, if necessary) having been obtained” (cf. art. 21(a)).<sup>130</sup> The Committee on the Rights of the Child has recommended in this respect that the States parties consider ratifying the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993, which lays down details on this subject.<sup>131</sup>

**Fourth**, the States parties shall “take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it” (art. 21(d)). This provision is aimed at preventing “the sale of or traffic in children for any purpose or in any form”, as required by article 35 of the Convention on the Rights of the Child. It is evident that, while “payments by adoptive couples may be made in good faith and without harm to the child, a system that puts a price on a child’s head is likely to encourage criminality, corruption and exploitation”.<sup>132</sup>

**Finally**, the States parties recognizing or permitting adoption shall “promote, where appropriate, the objectives of [article 21 of the Convention] by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs” (art. 21(e)). The principal treaty to be considered in this respect is the aforementioned Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, which is based on article 21 of the Convention on the Rights of the Child as well as the 1986 United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.<sup>133</sup> It is recalled that the Committee on the Rights of the Child consistently encourages those countries that have not yet ratified the Hague Convention to do so.

<sup>129</sup>UN doc. CRC/C/15/Add.33, *Concluding Observations: Denmark*, para. 27; and UN doc. CRC/C/15/Add.2, *Concluding Observations: Sweden*, para. 13.

<sup>130</sup>*Implementation Handbook*, p. 275.

<sup>131</sup>UN doc. CRC/C/15/Add.68, *Concluding Observations: Panama*, para. 31; and UN doc. CRC/C/15/Add.33, *Concluding Observations: Denmark*, para. 27. For more information about the Hague Convention, see “*Proceedings*”, a CD published by the Hague Conference on Private International Law, on the children’s conventions concerning child abduction, adoption co-operation and protection of children. The text of the Convention can also be found at <http://www.hcch.net>.

<sup>132</sup>*Implementation Handbook*, pp. 275-276.

<sup>133</sup>*Ibid.*, p. 276.

*For States that recognize or permit adoptions, paramount consideration shall be given to the best interests of the child.*

*The domestic legislation on adoption must also ensure that the adoption of a child is authorized only:*

- *by competent authorities who determine the permissibility of the adoption;*
- *in accordance with applicable law and procedures and on the basis of all pertinent and reliable information;*
- *and after having obtained, if required by the law, the informed consent to the adoption of the persons concerned.*

*International or inter-country adoptions are considered to be a measure of last resort to provide care for a child.*

*A child concerned by inter-country adoptions has the right to enjoy safeguards and standards equivalent to those existing in the case of national adoption.*

*States must take all appropriate measures to ensure that inter-country adoptions do not result in improper financial gain for those involved in them.*

*The sale of, or trafficking in, children for any purpose or in any form is strictly prohibited by international law.*

## 14. The Role of Judges, Prosecutors and Lawyers in Guaranteeing the Rights of the Child in the Course of the Administration of Justice

As seen throughout Chapters 4 to 8 of this Manual, the role of judges, prosecutors and lawyers is essential for the protection of the human rights of all persons suspected or accused of having committed criminal offences. The responsibility of these legal professions is particularly great when the judicial proceedings concern children under age, who are in trouble with the law or involved in separation or adoption proceedings. Such proceedings require special knowledge and skills on the part of judges, prosecutors, lawyers and other professionals concerned, and the Committee on the Rights of the Child has therefore often recommended that States parties introduce or strengthen training programmes on relevant international standards for all professionals involved in the juvenile justice system.<sup>134</sup> It has also consistently suggested that the States parties consider seeking technical assistance in the

<sup>134</sup>See as to Venezuela, in UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 61, and as to Mexico, *ibid.*, para. 192.

area of juvenile justice, including the police, from the Office of the United Nations High Commissioner for Human Rights and the United Nations Children's Fund (UNICEF), among other organizations.<sup>135</sup>

## 15. Concluding Remarks

The present chapter has provided a survey of some of the important international legal principles relevant to the rights of the child in the administration of justice. This legal system takes as its point of departure the fact that children are persons in their own right and possess rights and obligations which have to be considered and respected by both administrative and judicial authorities. Furthermore, children have special rights, needs and interests which must be considered. The administration of justice, whether criminal or otherwise, must also at all times be guided, *inter alia*, by the overriding principles of non-discrimination, the best interests of the child, the child's right to life and development and its right to be heard.

However, in order to make these principles a reality for the children of the world, States must incorporate all relevant international rules into their own domestic legal systems, as well as providing proper training and financial means to the legal professions, police and social authorities, enabling them to acquire the necessary knowledge and skills to carry out their duties in conformity with States' legal undertakings.

Furthermore, more generally, States have to do their utmost to eradicate poverty, social injustice and widespread unemployment, failing which even the best of intentions with regard to social reeducation and reintegration of juvenile delinquents may be of little real help.

Without such wholehearted and concerted efforts on the part of humankind, which "owes to the child the best it has to give",<sup>136</sup> the problems confronting the world's growing population of children may pose well-nigh insurmountable challenges.

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<sup>135</sup>See references in preceding note.

<sup>136</sup>Fifth preambular paragraph of the Declaration of the Rights of the Child.

