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Chapter 10

The rights of the child in the administration of justice

Facilitator's Guide

Learning objectives

- To familiarize the participants with the 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 juveniles in the administration of justice
- To encourage the participants to develop ways to ensure that they routinely apply these rights and safeguards when confronted with juveniles in the course of the administration of justice

Questions I

- What particular problems have you encountered in your work with regard to children and juveniles in the course of the administration of juvenile justice?
- How did you try to resolve these problems?
- Did you try to invoke international legal rules such as the Convention on the Rights of the Child in order to resolve the problem(s)?
- What legal status does the Convention on the Rights of the Child have in your country? What legal impact has it had so far?

Questions II

- Does the notion of the “best interests” of the child exist in the domestic legal system where you are working? 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 where you are working? 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 are working?

Questions III

- What length of prison sentences, if any, can be imposed on children below 18 years of age in the country where you work?
- What non-custodial measures are available in response to offences committed by juveniles in your country?
- On what grounds can a child be separated from his or her parents in the country where you work?

Questions IV

- 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 I

Universal instruments (1)

- The International Covenant on Civil and Political Rights, 1966
- The Convention on the Rights of the Child, 1989
- The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000

- The Declaration of the Rights of the Child, 1959
- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 1985
- The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990
- The United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), 1990

Relevant legal instruments II

Universal instruments (2)

- Guidelines for Action on Children in the Criminal Justice System, annexed to Economic and Social Council resolution 1997/30 on the administration of juvenile justice (Vienna Guidelines)
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988
- The 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
- The Hague Convention on the Civil Aspects of International Child Abduction, 1980
- The Declaration on the Protection of All Persons from Enforced Disappearance, 1992

Relevant legal instruments III

Regional instruments

- The African Charter on Human and Peoples' Rights, 1981
- The African Charter on the Rights and Welfare of the Child, 1990
- The American Convention on Human Rights, 1969
- The Inter-American Convention on Forced Disappearance of Persons, 1994
- The Inter-American Convention on the International Return of Children, 1989
- The European Convention on Human Rights, 1950

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

The definition of a child

Article 1 of the Convention on the Rights of the Child reads:

For the purposes of the present 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.

The age of civil and criminal majority I

Unless otherwise decided, the age of *civil* majority is 18 years.

International norms determine the age for certain situations:

- The minimum age to take a direct part in hostilities is 18 years¹ if the State is a party to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts; or 15 years if the State is a party only to the Convention on the Rights of the Child²
- Age to be compulsorily recruited into their national armed forces: 18 years³
- Age for the voluntary recruitment of persons into their national armed forces: 15 years⁴

In any situation, the recruitment or enlistment of children under the age of 15 years into their national armed forces, or using them to participate actively in hostilities, is a war crime.⁵

In fixing minimum ages for marriage, work and military service, States are legally obliged to respect the best interests of the child and the principle of non-discrimination.

¹ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, article 1.

² Convention on the Rights of the Child, article 38 (2).

³ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, article 2.

⁴ Convention on the Rights of the Child, article 38 (3); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, article 3.

⁵ Rome Statute of the International Criminal Court, articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii).

The age of civil and criminal majority II

States shall establish the minimum age for *criminal* responsibility. This minimum age must not be unduly low and must respect the best interests of the child and the principle of non-discrimination. The age for *criminal* responsibility shall take into account the emotional, mental and intellectual maturity associated with a given age. Below such an age, children are presumed not to have the capacity to violate criminal law. Juveniles under 18 years of age should be able to benefit from the special protection provided by criminal law to children.

Basic principle No. 1:

Non-discrimination

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

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.

Basic principle No. 2: The best interests of the child

Article 3 (1) of the Convention on the Rights of the Child:

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.

Article 4 (1) of the African Charter on the Rights and Welfare of the Child:

1. In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration.

Basic principle No. 3:

The child's right to life, survival and development

Article 6 of the Convention on the Rights of the Child:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 5 of the African Charter on the Rights and Welfare of the Child:

1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties ... shall ensure, to the maximum extent possible, the survival, protection and development of the child.

Basic principle No. 4:

The child's right to be heard

Article 12 of the Convention on the Rights of the Child:

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.

Basic principles: Summing up

In the administration of justice, that is, in criminal proceedings as well as in proceedings concerning, for example, the separation of a child from his or her parents or in adoption proceedings, States are required to respect the following principles:

- The principle of non-discrimination
- The best interests of the child
- The child's right to life, survival and development
- The child's right to be heard
- The child's right to have his or her privacy fully respected at all stages of the proceedings

The aims of juvenile justice

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

The juvenile justice system should emphasize the well-being of the child and ensure that any action taken concerning a juvenile offender is in proportion to the nature of the offence and the circumstances of the offender.

The duty to create a juvenile justice system

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

The accused child and the administration of justice I

The right to freedom from torture

The child has at all times an absolute right not to be subjected to torture, or cruel, inhuman or degrading treatment or punishment (see Convention on the Rights of the Child, art. 37 (a)). This prohibition includes corporal chastisement 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 (see Convention on the Rights of the Child, art. 39).

The accused child and the administration of justice II

General treatment of the child

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

The accused child and the administration of justice III

Some fundamental procedural rights (1)

Every child alleged to have, 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 given treatment likely to promote his or her future reintegration into society
- The right to benefit from the principle *nullum crimen sine lege*
- The right to be presumed innocent until proved guilty

The accused child and the administration of justice IV

Some fundamental procedural rights (2)

Every accused child also has the following rights:

- The right 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
- The right to notify or require that the competent authority notify members of his or her family, or other appropriate persons of his or her choice, of the arrest, detention or imprisonment or of each transfer and place where he or she is kept in custody
- The right to be tried without delay by a competent, independent and impartial authority or judicial body guaranteeing the child a fair hearing

The accused child and the administration of justice V

Some fundamental procedural rights (3)

The procedural rights of every accused child also in particular include:

- The right not to be compelled to testify against himself or herself or to confess guilt, and the right to examine witnesses or have witnesses called under conditions of equality with the prosecution
- The right to free assistance of an interpreter whenever necessary
- The right to respect for his or her privacy
- The right to appeal

(See art. 40 (2) (a) and (b) of the Convention on the Rights of the Child, arts. 9, 10 and 14 of the International Covenant on Civil and Political Rights, and Principle 16 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment)

The child and deprivation of liberty

What it means

According to paragraph 11 (b) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty:

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.

The child and deprivation of liberty

Some fundamental principles I

The deprivation of liberty of juveniles should only be used as *a measure of last resort*, that is, 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.

The child and deprivation of liberty

Some fundamental principles II

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 interests 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 competent, independent and impartial authority.

The child and deprivation of liberty

Some fundamental principles III

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 in any system for the administration of justice.

The child and deprivation of liberty

Some fundamental principles IV

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.

The rights of the child and penal sanctions

International human rights law prohibits the imposition of capital punishment for crimes committed by persons below the age of 18.

Life imprisonment without the possibility of release may not be imposed on persons below 18 years of age.

Corporal punishment is contrary to international human rights law.

The accused child and the question of diversion: The obligations of States

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, 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.

Diversiónary measures: Three basic rules

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

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

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

The child as victim and/or witness I

It is important to be aware of the fact that the appearance of a child as victim or witness in criminal proceedings may have a traumatic effect on him or her. It is therefore the duty of the members of the legal profession to respect the rights and needs of the child concerned and to treat the child 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.

The child as victim and/or witness II

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.

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

Child victims and/or witnesses, due to their vulnerability, need special support and assistance throughout the legal proceedings in which they are involved; legal professionals should endeavour to ensure that their rights are fully protected.

The child as victim and/or witness III

When a child is the victim of a criminal offence, appropriate measures to protect the rights and best interests of the child shall be adopted at all stages of the criminal justice process, in particular by:

- Informing child victims of their rights, their role, and the scope, timing and progress of the proceedings as well as the disposition of their cases
- Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected
- Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims
- Providing, in appropriate cases, for the safety of child victims from intimidation and retaliation

Child-parent separation: The basic rules I

A child may in exceptional situations be separated from his or her parents, provided that this is in the best interests of the child. Situations that may justify such separation are, in particular, abuse or neglect (Convention on the Rights of the Child, art. 9 (1)).

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.

Child-parent separation: The basic rules II

The decision on separation must be taken by a competent authority acting in accordance with the 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 made their views known (Convention on the Rights of the Child, art. 9 (1) and (2)).

A child separated from his or her parents has a right to maintain regular and direct contact with his or her parents, unless it would not be in the child's best interests (Convention on the Rights of the Child, art. 9 (3)).

According to article 5 of the 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:

In all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration.

The rights of the child and adoption proceedings: The basic rules I

For States that recognize or permit adoption, paramount consideration shall be given to the best interests of the child (Convention on the Rights of the Child, art. 21).

Domestic legislation on adoption must ensure that the adoption of a child is authorized only

- By competent authorities that determine the permissibility of the adoption
- In accordance with applicable law and procedures and on the basis of all pertinent and reliable information
- After having obtained, if required by the law, the informed consent to the adoption of the persons concerned, which, according to the child's status, may be parents, relatives or legal guardians

The rights of the child and adoption proceedings: The basic rules II

According to the 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:

- The primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family (art. 13)
- The relationship between the child to be adopted and the prospective adoptive parents should be observed by child welfare agencies or services prior to the adoption. Legislation should ensure that the child is recognized in law as a member of the adoptive family and enjoys all the rights pertinent thereto (art. 16)

The rights of the child and intercountry adoptions

Article 21 (b) of the Convention on the Rights of the Child views international or intercountry adoption as a measure of last resort to provide care for a child.

A child concerned by intercountry adoptions has the right to enjoy “safeguards and standards equivalent to those existing in the case of national adoption” (Convention on the Rights of the Child, art. 21 (c)).

States must “take all appropriate measures to ensure that” intercountry adoption does “not result in improper financial gain for those involved in it” (Convention on the Rights of the Child, art. 21 (d)).

States must take “all appropriate national, bilateral and multilateral measures” to prevent the abduction, sale or trafficking of children (Convention on the Rights of the Child, art. 35).