

**JUVENILE JUSTICE –  
PROCEDURAL GUARANTEES FOR CHILD OFFENDERS \***

*UDC 343.137.5*

**Nevena Vučković Šahović<sup>1</sup>, Ines Cerović<sup>2#</sup>**

<sup>1</sup>Faculty of Law, University Union, Belgrade, Republic of Serbia

<sup>2</sup>Institute for Comparative Law, Belgrade, Republic of Serbia

**Abstract.** *Juvenile justice is the field of children's rights extensively covered in international documents. It is obviously a very sensitive field where child rights violations are numerous, where violence in the course of proceedings and while in penitentiary institutions is amply proven, and where the response is not always child-friendly and does not always favor individual child development. It is moreover a domain where the State exerts force in response to child behavior contrary to the criminal law and where State's interference also represses non-criminal behavior, such as actions which would not come under law if committed by an adult (status offences): running away from home, breaking disciplinary rules, breaking curfews or rude behavior. Juvenile justice accounts for violations of children's rights at the arrest phase, in administrative detention, during the judicial proceedings, in the execution of judiciary sentences, but also in institutional care.*

**Key words:** *children, conflict, criminal responsibility, criminal proceedings, offenders.*

INTRODUCTION: WHY GUARANTEES

Juvenile justice is the field of children's rights extensively covered in international documents. It is obviously a very sensitive field where child rights violations are numerous, where violence in the course of proceedings and while in penitentiary institutions is amply proven, and where the response is not always child-friendly and does not always favor individual child development. It is moreover a domain where the State exerts force in response to child behavior contrary to the criminal law and where State's interference also represses non-criminal behavior, such as actions which would not come under law if

---

Received May 4<sup>th</sup>, 2016 / Accepted August 3<sup>rd</sup>, 2016

**Corresponding author:** Nevena Vučković Šahović, LL.D.

Faculty of Law, University Union, Belgrade, Goce Delčeva 36, 11000 Belgrade, Republic of Serbia

E-mail: vnevena17@yahoo.com

<sup>#</sup> External associate

\* There is the editor's consent to share the article with Facta Universitatis: Law and Politics, Issue Number 2, 2016, with the request to indicate that it will be published within an IDE publication (Institut International des Droits de l'Enfant, Sion, Switzerland) under the title: "The Essentials and Juvenile Justice", summer 2016.

committed by an adult (status offences): running away from home, breaking disciplinary rules, breaking curfews or rude behavior. Juvenile justice accounts for violations of children's rights at the arrest phase, in administrative detention, during the judicial proceedings, in the execution of judiciary sentences, but also in institutional care.<sup>1</sup>

In many countries, the system of juvenile criminal justice substitutes the protection and welfare system for children in difficulty, as well as for poor, orphaned, or abandoned children. In a large number of countries, millions of girls and boys spend their childhood not under the care of parents, but rather under the supervision of facilities related to the criminal justice system, and yet they belong to welfare institutions. For manifold and various reasons, many children are detained in administrative detention, finding themselves in closed facilities unlikely to ensure their reintegration and rehabilitation. Such environment induces the repetition of the offence rather than recovery of the child.

No matter whether children are exposed to criminal proceedings for being alleged as, accused of or recognized as having infringed the penal law or to administrative proceedings due to their behavior or just circumstantially, they do have rights to a fair proceedings, first of all the rights to a fair trial. Due to different definitions of the child throughout the world, different understanding of childhoods and also different level of respect for human rights and rights of the child, the child that is involved in any proceedings has very different position. His or her position depends on the definition or gravity of the offence, on the laws and practices applicable to children facing a justice system and also on attitudes of those who implement laws guaranteeing children's rights in the course of any proceedings.

In view of holistic approach to child rights, attention of international law guaranteeing procedural rights extends to children in conflict with the law as well as to children in contact with the law. Namely, the concern is with child offenders and their position in the criminal justice system, but also with child victims and witnesses of criminal acts. Outside of criminal justice, there is a broad "grey zone"; a labyrinth of civil and administrative law proceedings where children also take part, with very little or no guarantees at all. One of the examples is children that are below the age of criminal responsibility. In case they have done something that is defined as a criminal act, but since they are not under criminal law protection, often they do not benefit from any procedural guarantees in administrative proceedings.

For the sake of the focus, this chapter will outline the procedural rights guaranteed to children in criminal justice system under international law. It will focus on the key issues of juvenile justice related to fair proceedings and safeguarding of the right to a fair trial for children in conflict with the law. The right to participation and minimum age of criminal responsibility will be assessed as two important issues that determine to whom right to a fair trial belongs and to which extent children, being the main actors, have saying in criminal proceedings when they are involved in as offenders.

Children are guaranteed the same rights related to a fair trial as adults but, because of their young age and evolving capacity, they need a higher level of protection. There are some core juvenile justice principles essential for children in conflict with the law such as that the treatment of children has to take into account the child's sense of dignity and worth, age and maturity, intellectual and emotional capacity, promotion of the child's reintegration and helping him/her to take a constructive role in society. Also, as indicated in the Committee

---

<sup>1</sup> Vuckovic Sahovic, Doek and Zermatten: *The Rights of the Child in International Law*, Staempfli Publishers, 2012, p. 295.

n the Rights of the Child General Comment No. 10 on the Children’s Rights in Juvenile Justice (GC 10): *a comprehensive policy for juvenile justice must deal with the ... the prevention of juvenile delinquency.*<sup>2</sup>

The major aim of this chapter is to assess the results of international efforts to build relevant standards and influence national laws and practices so as to provide procedural guarantees for child offenders. Since such guarantees are now obligations for the States, maybe it is possible to roughly assess whether and to what extent is position of the child that is undergoing a trial improved. This aim will be achieved through overview of international standards and guarantees and through an insight into CRC Committee’s respective jurisprudence.

### 1. International Standards: How to guarantee

National legal systems differ considerably in regulating this issue due to differences in cultural backgrounds, traditions and customs. Recognizing these differences, the international community initiated setting up standards regulating the juvenile justice system. There is now a wide range of international instruments offering special protection to children in juvenile justice system. Conversely, it should be noted, international child rights standards related to juvenile justice have been further shaped and refined based on developments on national juvenile justice systems.<sup>3</sup>

The enactment of universal human rights standards started with the creation of the United Nations (“UN”) and the adoption of the **Universal Declaration of Human Rights (UDHR)** in 1948<sup>4</sup> which provides for special care and assistance for children in its article 25. Children in conflict with the law are entitled to all procedural guarantees provided by non-child specific international documents.<sup>5</sup> Specific rights of children in the system of juvenile justice were for the first time incorporated in an international human rights treaty with the **International Covenant on Civil and Political Rights (ICCPR)**, adopted in 1966. It provides rules related to fair trial, including the exception to the rule of a public trial and judgment in a criminal case where the interests of juvenile require so and that the procedure shall take into account their age and desirability to promote their rehabilitation<sup>6</sup>, punishment<sup>7</sup> and deprivation of liberty.<sup>8</sup> The main aim of the penitentiary system shall be social rehabilitation and reformation of children.<sup>9</sup> Although providing only broad guidelines, the provisions of the ICCPR are obliging States parties to implement procedures that include rehabilitation of juvenile offenders and the treatment different from those relating to adults.<sup>10</sup>

<sup>2</sup> Committee on the Rights of the Child: General Comment No. 10(2007): Children’s rights in juvenile justice, CRC/C/GC/10, Para 15

<sup>3</sup> Liefwaard, T., ‘Juvenile justice from an international children’s rights perspective’ in: Vandenhoe, W., Desmet, E., Reynaert, D. and Lembrechts, S., (Eds.), *Routledge international handbook of children’s rights studies* (Routledge) (2015) at 236

<sup>4</sup> Goldson, B. and Muncie, J., ‘Towards a global ‘child friendly’ juvenile justice?’, 40 *International Journal of Law, Crime and Justice* 47, 2012, at 47

<sup>5</sup> Zilli, L., ‘Children’s Right to a Fair Trial under International Law’, 5 *Trinity C.L. Rev.* 224, 2002, at 238

<sup>6</sup> International Covenant on Civil and Political Rights, art. 14 and 15

<sup>7</sup> Ibid., art. 6 and 7

<sup>8</sup> Ibid., art. 9 and 10

<sup>9</sup> Ibid., art 10 (3)

<sup>10</sup> Levesque, R., ‘Future Visions of Juvenile Justice: Lessons from International and Comparative Law’, 29 *Creighton L. Rev.* 1563, 1996, at 3

The principal internationally binding treaty that addresses administration of juvenile justice more in detail is the most ratified treaty in the world, the 1989 **Convention on the Rights of the Child (CRC)**.<sup>11</sup> The CRC encompasses the whole spectrum of civil, political, economic, social, and cultural rights of the child, emphasizing the holistic approach of interdependence, indivisibility and interrelation of all human rights.<sup>12</sup> The leitmotif of the CRC is the principle of the best interest of the child, and the novelties in the area of juvenile justice are related to promotion of child's sense of dignity and worth and the application of alternatives to formal judicial proceedings, such as use of diversionary measures when that is in accordance with the child's best interests.<sup>13</sup> The CRC's articles 37 and 40, in particular, deal with involvement with the criminal justice system of every child alleged as, accused of, or recognized as having infringed the penal law. It requires States parties to promote a distinctive system of juvenile justice for children which is of positive, rather than punitive nature. The CRC's articles 1 and 39 require that children have the right to be treated in a manner consistent with the child's age and with desirability to promote the child's reintegration into society, while respecting for their human rights and fundamental freedoms of others. This treatment applies from the moment an allegation was made against a child in conflict with the law, through arrest, investigation charge, pre-trial, trial and sentence phase of the criminal proceedings.<sup>14</sup>

The CRC has been further interpreted and explained by the adoption by the Committee on the Rights of the Child (CRC Committee) of numerous General Comments on different issues, *inter alia*, on juvenile justice and the right of the child to be heard<sup>15</sup> which provide States parties with elaborated guidance and recommendations for introducing and amending their legislative and other measures with a view of making them in full compliance with international standards. Also, in its Concluding Observations, the CRC Committee has repeatedly recommended to States parties to establish holistic juvenile justice systems, including juvenile courts and comprehensive law on juvenile justice, provide for specialization of all professionals involved in the juvenile justice system, in particular judges, prosecutors, police, and to respect the right to a fair trial at all stages of the proceedings, including at the investigative stage. Apart from its Concluding Observations that present a growing source of interpretation of different CRC's provisions and their translation into national laws, policies and practices, the CRC Committee now, with entry into force of the Optional Protocol to the CRC on a Communication Procedures (OPIC) has the possibility of examination of individual complaints on child's rights violations which can potentially be a very powerful enforcement tool for full implementation of this important treaty.

In addition to the CRC, as specifically focused binding document containing elaborated provisions regarding juvenile justice, there are three non-binding, international standard setting instruments that together represent a detailed framework concerning the child's

<sup>11</sup>Until 2015 all 196 countries in the world have become parties to this treaty, with the exception of the United States of America.

<sup>12</sup>United Nations Office at Vienna, International Review of Criminal Policy, Nos. 49 and 50, 1998-1990, *The United Nations and Juvenile Justice: A Guide to International Standards and Best Practice*, II para. 21

<sup>13</sup>Van Bueren, G., 'Article 40: Child Criminal Justice' in: Alen, A., Vande Lanotte, J., Verhellen, E., Ang, F., Berghmans, E. and Verheyde, M. (Eds.), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, Boston)(2006) at 7

<sup>14</sup> UNICEF, *Implementation handbook for the Convention on the Rights of the Child*, 2007, at 602

<sup>15</sup> CRC Committee, General Comment No. 10 on Children's Rights in Juvenile Justice CRC/C/GC/10, 25 April 2007, and CRC Committee, General Comment No. 12 on the Right to the Child to be Heard CRC/C/GC/12, 1 July 2009.

involvement in the criminal justice process, prevention of crime, and conditions under which children may be deprived of liberty. Even though they are not legally binding, these documents are used for the interpretation and implementation of the above mentioned child-specific provisions of the CRC.

First, the **UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)**, adopted by the UN General Assembly in 1985, provide guidance for the development of a separate and specific juvenile justice system, set minimum standards to be observed when dealing with juvenile offenders and present a model for States of fair and humane treatment of children in conflict with the law.<sup>16</sup> They provide that “basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings”.<sup>17</sup>

Second, the **UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)**, adopted by the UN General Assembly in 1990, emphasize diversionary and non-punitive approach when addressing the early protection and prevention of antisocial behavior of children and consider particularly children in situation of social risk.<sup>18</sup>

Third, the **UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)**, adopted by the UN General Assembly in 1990, apply to all children deprived of their liberty in any institution, and to anyone under the age of 18,<sup>19</sup> while clearly emphasizing that deprivation of liberty should be a measure of last resort, because of its detrimental impacts on juvenile offenders.

Another important document developed under the auspices of the UN, is the **Principles and Guidelines on access to legal aid in criminal justice systems (Principles on Legal Aid)**, adopted by the UN General Assembly in 2012. The Principles on Legal Aid provide guidance to all states in setting up an effective system of legal aid, which is essential to ensure the right to a fair trial and equality before the law. This document contains specific principles concerning children in the justice system.

The issue of child criminal justice has been also dealt with at the regional level. The **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)** adopted by the Council of Europe (CoE) in 1950 guarantees the right to a fair trial in both criminal and civil matters before an independent and impartial tribunal and provides for a set of related fair trial rights that are equally applicable to adults and children. The ECHR has only two direct references to children in conflict with the law (i.e. ‘minors’ or ‘juveniles’, as stated by the ECHR). The first reference is related to the right to liberty and security, providing for detention of a minor “for the purpose of educational supervision or for bringing him before the competent tribunal”.<sup>20</sup> The second reference is made in art. 6 of the ECHR which deals with the right to a fair trial and it specifically provides that the press and public may be excluded from all or part of the trial in the interest of the juvenile.<sup>21</sup> It should be immediately noted, however, that this

<sup>16</sup>*The United Nations and Juvenile Justice: A Guide to International Standards and Best Practice, loc.cit, supra, n. 13, II para. 34*

<sup>17</sup>The Beijing Rules, Rule 7(1)

<sup>18</sup>*The United Nations and Juvenile Justice: A Guide to International Standards and Best Practice, loc.cit, supra, n. 13, II para. 50*

<sup>19</sup>The Havana Rules, Rule 11 (a)

<sup>20</sup>European Convention on Human Rights and Fundamental Freedoms, art. 5 (1)(d)

<sup>21</sup> *Ibid.*, art. 6 (1)

little reference to children does not automatically reduce the relevance of this important document to protection of the child's rights in the juvenile justice system since the European Court of Human Rights (ECHR) has constantly been referring to child-specific instruments, in particular the CRC and the Beijing Rules, using them for the interpretation of the ECHR when deciding on violation of child's rights issues in its jurisprudence.<sup>22</sup>

In addition, the CoE adopted a number of recommendations relevant for children in juvenile justice system, such as the **Recommendation concerning new ways of dealing with juvenile delinquency and the role of juvenile justice** in 2003<sup>23</sup> and the **European Rules for juvenile offenders subject to sanctions and measures** in 2008.<sup>24</sup> The former calls for education instead of punishment, for prevention and reintegration, minimum intervention, use of diversionary measures and giving priority to alternatives to youth imprisonment whereas the latter gives the member states a detailed guidance on how to enforce sanctions and measures against children in conflict with the law. Another very important document specifically dealing with children in justice system are the **Guidelines on Child Friendly Justice**, adopted by the Committee of Ministers in 2010, which were prepared based on the ECHR and the rich case law developed by the ECtHR as well as relevant decisions, reports and other documents of the CoE institutions and bodies. These Guidelines provide a detailed set of recommendations to the member states on rights and needs of children in the justice system, ensuring that child rights to participation, information, representation, protection, respect for private and family life, integrity and dignity and other important rights are fully respected.<sup>25</sup>

The most comprehensive child rights document at the African continent is the **African Charter on the Rights and the Welfare of the Child**, adopted under the auspices of the Organisation of African Unity (now the African Union) which entered into force in 1999. It applies to all children under the age of 18, however it does not oblige States parties to establish specialized juvenile institutions and personnel.<sup>26</sup> In addition, the African Commission adopted the **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principles on Fair Trial in Africa)** in 2003. The above mentioned CoE Guidelines on Child Friendly Justice were used as a basis for development of the **Guidelines on Action in the Justice System for Children in Africa** and the **Munyonyo Declaration on Justice for Children in Africa**, adopted in Uganda in 2011.<sup>27</sup>

In the Americas, the most important human rights document is the **American Convention on Human Rights "Pact of San Jose, Costa Rica"**, adopted under the auspices of the Organization of American States in 1969, also providing for the separation of "minors" from adults and conducting the trial procedure before "specialized tribunals", according to their specific status.<sup>28</sup> The Inter-American Court of Human Rights and Inter-American Commission on Human Rights have also developed their case law on juvenile justice, deprivation of liberty, detention etc.

<sup>22</sup> Kilkelly, U., 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on Human Rights in the Light of the UN Convention on the Rights of the Child', 2 *Human Rights Quarterly* 23, 2001, at 311

<sup>23</sup> Rec(2003)20, 2003

<sup>24</sup> Rec(2008)11, 2008

<sup>25</sup> Guidelines of the Committee of Ministers of the CoE on child-friendly justice, 2010, Part I - Scope and Purpose

<sup>26</sup> Van Bueren, G., *loc.cit. supra*, n. 13 at 8

<sup>27</sup> Liefwaard, T., *loc.cit. supra*, n.3 at 238

<sup>28</sup> American Convention on Human Rights, art. 5

There is also a whole range of documents and literature developed by different bodies and organizations that have further elaborated procedural guarantees of children in the justice system and which serve as an important tool and guidance for States parties to the CRC to improve their legislation, practice and measures for implementation of child rights in this area. One such document is the 2006 **UN Secretary General Study on Violence Against Children**, providing practical recommendations for the establishment of a comprehensive, child-centered and restorative juvenile justice system, based on international standards, as well as the **Implementation handbook for the CRC**, prepared by UNICEF in 2007, providing explanation and commentary of each CRC article, corroborated by important examples from CRC Concluding Observations. Also, a very important document is the **Justice in Matters Involving Children in Conflict with the Law - Model Law on Juvenile Justice and Related Commentary**, prepared in 2013 by the UN Office on Drugs and Crime (UNODC) with the aim to provide legal guidance to member states in the process of drafting juvenile justice legislation and reforming their juvenile justice systems in general. Another recent document is the **Child-friendly justice – Perspectives and experiences of professionals and children’s participation in civil and criminal judicial proceedings in 10 EU Member States**, prepared by the European Union Agency for Fundamental Rights in 2015. It is worth mentioning a DCI document adopted in 2016: **Practical Guide: Monitoring places where children are deprived of liberty**<sup>29</sup>.

All these standards refer to each other and provide for their mutual reinforcement. The CRC does not regulate procedural guarantees of children in juvenile justice system in detail, but rather, some of its key provisions are wide in scope. This is in contrast to the soft law standards, that provide detailed guidelines and rules, but they do not have the strength of a binding instrument. However, some of the rules have become binding by being directly included into the CRC, whereas others can be treated as elaborating rights contained in other instruments more in detail.<sup>30</sup> In addition, these instruments are leaving a lot of ‘free space’ to States parties on how to deal with and interpret juvenile justice issues, and that is the main reason for a huge variety of adopted solutions.

This international body of law was enacted with two main purposes, first, to promote the well-being of children, and, secondly, to deal with children in a manner that is proportionate both to their circumstances and to the offence committed.<sup>31</sup> This is clearly emphasized in the Beijing Rules, providing that “the reaction taken should be proportionate to the circumstances, to the gravity of the offence, to the circumstances and needs of juvenile and to the needs of the society”.<sup>32</sup>

## 2. The right of the child to a fair trial: What is guaranteed

Article 40 (2) of the CRC sets out a minimum list of specific rules and principles that must be guaranteed to children alleged or accused of criminal acts, meaning that States parties can and should try to reach higher standards.<sup>33</sup> Many of the CRC provisions reflect those of general human rights instruments, such as ICCPR (e.g. art. 40 of the CRC

<sup>29</sup><http://www.childrensrightsbehindbars.eu>

<sup>30</sup>Van Bueren, G., *The International Law on the Rights of the Child* (The Hague, Martinus Nijhoff Publishers) (1998) at 170

<sup>31</sup>*Ibid.*, at 172

<sup>32</sup>The Beijing Rules, Rule 17.1 (a)

<sup>33</sup>CRC General Comment No. 10, para. 40

and art. 14 of the ICCPR). However, the CRC breaks new ground by providing children with further special care and protection through child-specific rights related to a fair trial and by codifying for the first time the right of the child to be heard in all proceedings affecting the child.

For the purpose of this chapter, the fair trial guarantees are presented as general and child-specific rights.<sup>34</sup>

**A. General fair trial rights that are equally applicable to children and adults  
(as per Article 40 of the CRC and, where applicable, other laws and standards):**

1) **The principle of legality** (art. 40 (2)(a) CRC) – provides that offences must have been defined in international or national law at the time when they were committed (the principle “*nullum crimen sine lege*”). This principle also implies that children should not be accountable for actions that would not be criminal offences if committed by adults i.e. “status offences”, such as vagrancy, truancy, running away from home etc. which should be addressed by application of protective measures and interventions focusing on child’s family and roots of the antisocial behavior.<sup>35</sup>

This principle is enshrined in art. 11 (2) of the UDHR and art. 15 of the ICCPR. In addition, the ICCPR provides the prohibition of imposing a heavier penalty than the one that was applicable at the time when the offence was committed, as well as that in case that the law provides for the lighter penalty upon committing the offence, the offender shall benefit from the change of legislation. This right was further elaborated by the CRC General Comment No. 10.<sup>36</sup>

Also, some specific recommendations related to status offences can be found in the CRC Committee Concluding Observations concerning, e.g. Egypt (2001): “... the Committee recommends that the State Party repeal “status offences” such as begging and truancy;” (CRC/C/15/Add.145, para. 54) and Nigeria (2005): “(h) Some children are detained for “status offences” such as vagrancy, truancy or wandering, or at the request of parents for ‘stubbornness or for being beyond parental control’” (CRC/C/15/Add.257, para. 78).

2) **The presumption of innocence** – provides that everyone shall be considered innocent until proven guilty according to the law (art. 40 (2)(b)(i) CRC) and that the burden of proof of the charge brought against the child is on the prosecution.

This principle is also stipulated by art. 11 of the UDHR and art. 14 (2) of the ICCPR and further elaborated by the CRC General Comment No. 10.<sup>37</sup>

In its Concluding Observations concerning, for instance, Colombia (2006), the CRC Committee stated: “... Furthermore, investigations should be carried out promptly while ensuring that the principles relating to the presumption of innocence and the right to a fair trial are guaranteed.” (CRC/C/COL/C/3 para. 93).

<sup>34</sup> The CRC Committee’s jurisprudence on the issue of procedural guarantees is huge. For the purpose of this chapter, the authors have identified some examples. Further research is recommended through a search tool: [www.universalhumanrightsindex.org](http://www.universalhumanrightsindex.org)

<sup>35</sup> *Ibid.*, para. 9.

<sup>36</sup> *Ibid.*, para. 41

<sup>37</sup> *Ibid.*, para.41



3) **The right to be tried before a competent, independent and impartial authority or judicial body** (art. 40 (2)(b)(iii) CRC) – providing that the tribunal in charge of making decisions in a case must be established by law and must be competent, independent and impartial.

This right is also provided by art. 14 (1) of the ICCPR.

4) **The right to prompt and direct information on the charges**(art. 40 (2)(b)(ii) CRC) – provides that the child needs to be informed promptly of his/her rights and the charges against him/her in understandable language and in a manner appropriate to the child’s age and maturity.

This right is not limited to formal, written charges but rather it requires that the information on the rights and charges should be accompanied with understandable, oral explanation and that the authorities should make sure that the child understands each of the charges that he/she is faced with. In addition to informing the child, the CRC requires that the child’s parents/legal guardians should also be informed about the rights and charges brought against the child, meaning that this information should not be an alternative to communicating this information to the child.<sup>38</sup>

The right to be informed is also stipulated by art. 9 (2) of the ICCPR which provides that anyone who is arrested shall be informed, at the time of the arrest, of the reasons for it, and art. 14 (3)(a) adds that everyone charged with criminal offence shall be “informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”.

5) **The right to legal representation** – provides guarantees for legal or other appropriate assistance needed for the preparation and presentation of the defense(art. 40 (2)(b)(ii) CRC) and during the hearing (40 (2)(b)(iii) CRC), and should be more than a formal right.<sup>39</sup> The assistance should be free of charge and provided by a trained expert lawyers or paralegal professionals.<sup>40</sup> Children should have access to legal aid under the same or more lenient conditions than the adults and legal aid provided to children should be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.<sup>41</sup> The communication between the child and the legal assistant should take place under conditions which ensure respect of confidentiality (art. 40 (2)(b)(vii) CRC) and the child’s privacy and correspondence, either in writing or orally, shall be protected from arbitrary and unlawful interference (art. 16 CRC). The child and his/her legal assistant should have adequate time and facilities for the preparation of the defence. Special attention should be paid to girls and children members of minority and indigenous communities, and legal aid providers working with children should be specially trained on the rights and needs of children and their development.<sup>42</sup>

This right is also guaranteed by art. 14 (3)(b) of the ICCPR which stipulates that anyone charged with a criminal offence should have adequate time and facilities for the preparation of his defence and to communicate with a counsel of his own choosing,

<sup>38</sup> Ibid., para. 48

<sup>39</sup> Van Bueren, G., *Child rights in Europe, Convergence and divergence in judicial protection*(Council of Europe Publishing) (2007) at 107

<sup>40</sup> CRC General Comment No. 10, para. 49

<sup>41</sup> UN Office on Drugs and Crime, Vienna, *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, 2012, Principle 11, paras. 34 and 35

<sup>42</sup> Ibid, Guideline 9, para. 58(d)

which is also free of charge, “if he does not have sufficient means to pay for it” (art. 14 (3)(d)).

Some specific recommendations related to legal representation can be found in the CRC Committee Concluding Observations concerning, for instance, France (2009): “... The Committee urges the State party to... (g) Ensure that persons below 18 years of age in conflict with the law have access to free legal aid as well as to an independent and effective complaints mechanisms;” (CRC/C/FRA/CO/4, para. 97), Belgium (2010): “... The Committee... urges the State party to: ...b) Ensure that children have a lawyer and a trusted adult present at all phases of a proceeding, including during questioning by a police officer; c) Provide legal basis for children to start legal proceedings with the assistance of a juvenile law attorney;” (CRC/C/BEL/CO/3-4, para. 83), and Zambia (2003) – “... The Committee... remains concerned that: d) Children are not guaranteed legal representation in judicial proceedings” (CRC/C/ZMB/CO/2-4, para. 63).

6) **The right to be tried “without delay”** (art. 40 (2)(b)(iii) CRC) or “promptly”, in cases where the child is deprived of liberty (art. 37 (d) CRC) means that the proceedings should be urgent in order not to fail to achieve educational and pedagogical effects of the whole juvenile justice process but also sufficient to provide the child with the time and facilities to prepare and present the defence.<sup>43</sup>

The language of the CRC is stronger than the one of the ICCPR, which provides trial “without undue delay” (art. 14 (3)(c)) which means that children are entitled to a speedier trial than adults. The African Charter on the Rights and Welfare of the Child stipulates that the child’s matter shall be determined “as speedily as possible”.<sup>44</sup>

7) **The right not to incriminate oneself** (art. 40 (2)(b)(iv) CRC) – providing that the child should not be compelled to give testimony (the right to remain silent) or to confess guilt (no compulsory self-incrimination). This freedom from compulsory self-incrimination is to be interpreted in relation to art. 37(a) of the CRC, which provides that forced admissions or confessions, such as those acquired by torture, cruel, inhuman or degrading treatment is a grave violation of the rights of the child. No such admission or confession can be admissible as evidence (art. 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). This right is also stipulated by art. 11 of the UDHR and art. 14 (3)(g) of the ICCPR which requires that everyone shall be entitled “not to be compelled to testify against himself or to confess guilt”.

As further elaborated the CRC General Comment No. 10, the term “compelled” should be interpreted broadly and should not be limited to physical force or other clear violations of human rights since the child’s young age, development, circumstances of deprivation of liberty, lack of understanding, insecurity and length of interrogation can also be causes for the child to give a confession that is not true.<sup>45</sup> The child should therefore not be questioned without the presence of legal or other appropriate representative or parents/guardians. Police officers should be well trained to avoid interrogation techniques and practices that result in coerced or unreliable confessions or testimonies and all the factors mentioned above should be taken into account by the court when assessing the voluntary nature and reliability of the confession given by the child.<sup>46</sup>

<sup>43</sup> CRC General Comment No. 10, para. 52

<sup>44</sup> The African Charter on the Rights and Welfare of the Child, art. 17 (2)(c)(iv)

<sup>45</sup> CRC General Comment No. 10, para. 57

<sup>46</sup> *Ibid.*, para. 58

8) **The right to examine witnesses** (art. 40 (2)(b)(iv) CRC) – guaranteeing that the principle of equality of arms should be observed in juvenile justice system.<sup>47</sup> That means that the child is entitled to examine or have examined (by lawyer or other appropriate representative) the adverse witnesses and to be able to obtain participation and examination of his/her own defence witnesses. As elaborated by the CRC Committee, it is necessary that the lawyer or other representative informs the child of this possibility to examine witnesses and to allow him/her to express his/her views in that regard.<sup>48</sup>

This right is also guaranteed by art. 14 (3)(e) of the ICCPR.

9) **The right to appeal** (art. 40 (2)(b)(v) CRC) – providing that the child has the right to appeal against the decision by which he/she is found guilty of the charge brought against him/her and against the measures imposed as a consequence of the guilty verdict. This appeal should be decided by a higher, competent, independent and impartial authority or judicial body, meeting the same standards as the one of the first instance. This right should be applied to all offences and not limited only to serious ones.

This right is similarly formulated in art. 14 (5) of the ICCPR, requiring that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law.

10) **The right to free assistance of interpreter** (art. 40 (2)(b)(vi) CRC) means that the child who cannot understand or speak the language used in the proceedings is entitled to assistance of an interpreter free of charge at all stages of the justice process. The CRC General Comment No. 10 emphasizes that this right should not be limited solely to the court trial but rather it should be available at all stages of the juvenile justice process and should be provided by a specially trained interpreter in order to adjust the language to the child's personal circumstances and developmental level.<sup>49</sup> Also, this right should not be limited to children who speak a different language but also to children with disabilities such as speech impairment or other disabilities. This includes written translation and oral information given to the child, which allows him/her to effectively participate in the proceedings and express his/her views freely.<sup>50</sup>

This right is also stipulated by art. 14 (3)(f) of the ICCPR.

## **B. Child-specific fair trial rights:**

1) **The right to participation** (art. 40 (2)(b)(iv) and art. 12 (2) CRC) – provides for extra protection applicable to children than that of adults, on account of their age, guaranteeing that the child has the opportunity to effectively participate in the proceedings. This implies that the child needs to understand the charges and potential consequences of the proceedings, to express his/her views freely, directly or through a representative or an appropriate body if it is in the child's best interests, and to make decisions about evidence, testimony and measures to be imposed at all stages of the proceedings.<sup>51</sup> The child's views should be given due weight according to the child's age and maturity.

The 2009 CRC General Comment No. 12 on the child's rights to be heard further encourages States parties to develop a child-friendly justice system by providing that the

---

<sup>47</sup> Ibid., para. 59

<sup>48</sup> Ibid.

<sup>49</sup> Ibid., para. 62

<sup>50</sup> Ibid., para. 63

<sup>51</sup> Ibid., para. 46

child should be heard in an environment which is not intimidating, hostile or inappropriate to child's age and maturity, that child-friendly information should be provided by trained staff, and the court rooms should be modified to provide for a child-friendly environment.<sup>52</sup> If the child's right to be heard is violated in the proceedings, the child must have access to appropriate appeal procedure in order to provide for the remedies.<sup>53</sup>

In addition, the **Charter of Fundamental Rights of the EU**, which entered into force in December 2009 as part of the Treaty of Lisbon, contains the fundamental rights protected in the EU in a unique document. Its art. 24 reinforces the provisions of the CRC by stipulating the right of the child to express his/her views freely and that these views will be taken into consideration in accordance to their age and maturity and that the child's best interests will be of primary consideration.

2) **The right to privacy** (art. 40 (2)(b)(vii) and art. 16 CRC) – providing that the child's privacy shall be fully respected in all phases of the proceedings, from the moment he/she is apprehended. This implies that the public should be excluded in juvenile justice cases and that the judgment should not be disclosed to the public. Therefore, only a limited circle of professionals and other experts should be present during the proceedings and they should be under the oath of confidentiality. This also applies for the court records on child offenders which should not be revealed to third parties except for those directly and officially involved in the proceedings. According to the Beijing Rules, the records on child offenders should not be used in subsequent adult cases involving the same offender (rules 21.1 and 21.2).

As emphasized by the CRC Committee in its General Comment No. 10, the criminal records on child offenders should be also kept confidential and no information shall be disclosed that could lead to the identification of a child offender in order to avoid further consequences and stigmatization.<sup>54</sup> This is particularly important for the media which tends to reveal the information on the child for the reasons of publicity and sensationalism, in particular in cases of more serious criminal offences, and this should be avoided by providing the media professionals with additional child sensitive training and should be sanctioned appropriately.

Also, art. 14 (1) of the ICCPR provides a general rule on public trial, indicating limited cases where the public may be excluded, such as where the interest of juvenile persons requires so. The right to a fair trial and the right to privacy contained in the ECHR are also relevant as they have been applied in a number of cases before the ECtHR.

Related to the child's right to privacy, the CRC Committee, in its Concluding Observations concerning, for instance, United Kingdom (2002) stated: "... (d) The privacy of children involved in the criminal justice system is not always protected and their names are, in cases of serious offences, often published;" and "... In particular, the Committee recommends that the State party: ... (d) Ensure that the privacy of all children in conflict with the law is fully protected in line with article 40 (2) (b) (vii) of the Convention;" (CRC/C/15/Add. 188, paras. 60 and 62). Also, in its Concluding Observations related to the report of Canada (2003), the Committee is concerned: "... that public access to juvenile justice records is permitted and that the identity of young offenders can be made public." and "... In particular, the Committee urges the State party: ... (c) To ensure that the privacy

---

<sup>52</sup> CRC General Comment No. 12, para. 34

<sup>53</sup> *Ibid.*, para. 47

<sup>54</sup> CRC General Comment No. 10, para. 64

of all children in conflict with the law is fully protected in line with article 40, paragraph 2 (b) (vii) of the Convention;”(CRC/C/15/Add. 215, paras. 56 and 57).

3) **The right to have child’s parents involved**(art. 40 (2)(b)(iii) CRC) – meaning that States parties should provide for the maximum possible involvement of the parents or legal guardians in the proceedings against the child because they can provide general psychological and emotional assistance and support to children. Therefore, the police should notify the parents or legal guardians of the apprehension of the child as soon as possible, and invite them to be present at any further interrogation, either by the police, prosecutor or investigative judge. This also applies at the later phases of the proceedings, in particular during the main hearing. However, the CRC also allows that parents and legal guardians can be excluded from the proceedings in certain situations, at the request of the child or his/her legal or other assistant or because it is not in the child’s best interests, taking into account the child’s age and all other circumstances.

### **3. Definition of the child and the minimum age of criminal responsibility (MACR): who is guaranteed procedural rights?**

The MACR is very much related to the general definition of the child in the CRC. For the purposes of the CRC, one becomes an adult on his/her 18<sup>th</sup> birthday, unless, under the law applicable to the child, maturity is attained earlier. As noted in a study: *“This inability of the States to agree on a universal definition of the child and to allow that in many countries traditional norms based on long histories of prejudice, ignorance and injustice against children remain cemented.”*<sup>55</sup> Soon after the CRC Committee was established and started its monitoring work, it also began promoting the opinion that rights of the CRC belong to all children below eighteen, regardless of capacities and responsibilities that may make them appear as adults. The fact that children below eighteen sometimes share competences or are assigned duties similar to those of adults should not mean that the States parties can treat them as adults and derive them of the enjoyment and protection of their rights recognized in the CRC. The CG 10 (Para 37) the States parties are reminded: *that they have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of article 40 of CRC. This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice. Furthermore, the Committee, therefore, recommends that ...States parties ...change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years* (Para 38). So, the main message is: even though age of criminal responsibility is set at an age lower than 18, it is 18 that is a standard for general protection of the child in conflict with the law.

The establishment of a minimum age of criminal responsibility is considered as one of the cornerstones of child-specific criminal justice system.<sup>56</sup> Children who have not reached the minimum age of criminal responsibility should be considered as incapable of infringing the penal law and they should not be formally charged with an offence or be involved in the criminal justice system due to their too young age and maturity. Children

<sup>55</sup> Melchiorre, A and Atkins, Ed: *At what age? ...are school-children, employed, married and taken to court?* Right to Education Project. ActionAid International, 2011, p.3.

<sup>56</sup> Van Bueren, G., *loc.cit. supra*, n. 39 at 106

below the age of criminal responsibility should be dealt with through special protective measures if that is in their best interests.<sup>57</sup> However, many States parties have not paid sufficient attention to this issue, leaving children without special legal protection and guarantees in the proceedings, such as, for instance, is the case of administrative proceedings.

The CRC does not expressly define the minimum age of criminal responsibility, neither does the ICCPR, but the CRC Committee, in its General Comment No. 10, has requested that the States parties do not lower the minimum age of criminal responsibility below the age of 12 which is considered to be the absolute minimum and to continue to raise it to a higher age level. Furthermore, the Committee emphasizes that a higher minimum age, such as that of 14 or 16 years, “contributes to a juvenile justice system which, in accordance to article 40 (3) (b) of the CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child’s human rights and legal safeguards are fully respected.”<sup>58</sup>

Related to minimum age of criminal responsibility, the CRC Committee, in its Concluding Observations concerning, for instance, Australia (2012) stated the following: “... in particular the Committee is concerned that: a) No action has been undertaken by the State party to increase the minimum age of criminal responsibility” (CRC/C/AUS/CO/4, para. 82). Similarly, when considering the report of Bulgaria (2008) the Committee recommends: “...that the State party: ... b) Make a clear definition of legal age of criminal responsibility in order to guarantee that children under the age of fourteen years are totally treated outside of the criminal justice system on the basis of social and protective measures;” (CRC/C/BGR/CO/2, para. 69). Furthermore, in its Concluding Observations related to the reports of Singapore (2003), the Committee is concerned that “...the minimum age of criminal responsibility (7 years)... are too low.” (CRC/C/15/Add.220) and United Kingdom (2002): “... The Committee is particularly concerned that the age at which children enter the criminal justice system is low with the age of criminal responsibility still set at 8 years in Scotland and at 10 years in the rest of the State Party and the abolition of the principle of *doli incapax*.” (United Kingdom CRC/C/15/Add. 188, para. 59).

#### CONCLUSIONS: BETWEEN PARAGRAPHS AND REALITY

As indicated in the introduction to this chapter, the major aim here was to assess the results of international efforts to build relevant standards and influence national laws and practices so as to provide procedural guarantees for child offenders. So, to what extent is position of the child that is undergoing a trial improved?

First of all, there is a rich body of international standards requesting States to guarantee children all procedural rights. States can hardly argue that they do not have international laws to implement and different standards to help them interpret binding laws. And as a result of more than two decades, it is safe to say that most of the States parties to the CRC have substantially changed their legislation in order to guarantee procedural rights to children in conflict with the law. Yet, there are more States that need to refine their legislation and to refrain from permanent challenges to lower standards.<sup>59</sup>

<sup>57</sup> CRC General Comment No. 10, para. 31

<sup>58</sup> Ibid, para. 33

<sup>59</sup> For example, the authors are concerned that a new Draft law on juvenile justice in Serbia proposes lowering the standard of appointment of legal representative to all children in contact with the law, even though that was

Many States parties have also made substantial effort to make those procedural rights reality. However, the implementation remains the weakest point in most of the States. That is quite visible in the CRC Committee's jurisprudence. The question remains how to further encourage States parties to improve legislation and fully implement all procedural guarantees to children. It seems that States still fight burden of attitudes towards children in conflict with the law. Besides, States often believe it requires lots of financial resources in order to implement procedural guarantees, whilst it is more often questions of lack of organizational and human resources. The last but not least, it is a lack of political will to simply implement what already is international and national obligation.

Many States parties now have some sort of statutory independent human rights bodies that can monitor implementation of the rights of the child and receive complaints. Even though it is hard to expect that such bodies can interfere in the work of judiciary, they can nevertheless, influence laws and point out to grave breaches of child rights. It is actually even easier for them to address administrative proceedings and lacunae within.

We can conclude with the overall impression that States have made significant efforts to implement procedural rights of children, much more still needs to be done. In order to fully implement procedural rights of children in juvenile justice system, more international cooperation is needed but also a bigger support of international mechanisms within UN, EU and other international and regional organizations. There is also a permanent need of civil society to have their respective work in protection of rights of children in judicial proceedings supported, respected, assisted and made possible (with no interference whatsoever).

## **MALOLETNIČKO PRAVOSUĐE – PROCEDURALNE GARANCIJE ZA DETE PRESTUPNIKA**

*Maloletničko pravosuđe je oblast prava deteta koja je sveobuhvatno regulisana međunarodnim dokumentima. To je izuzetno osetljiva oblast gde postoje brojni dokazi o kršenju prava deteta i nasilju kome je dete izloženo u toku postupka kao i u kazneno-popravnim ustanovama, ali gde odgovor države nije adekvatan i usmeren ka obezbeđivanju dobrobiti deteta, i gde se ne daje prednost individualnom razvoju deteta. To je takođe oblast gde država pribegava primeni sile, koja predstavlja odgovor na ponašanje deteta koje u suprotnosti sa krivičnim zakonom, i gde je državna intervencija u funkciji sprečavanja ne-delinkventnog ponašanja, kao što su radnje (disciplinske povrede od strane maloletnika) koje ne bi došle pod udar zakona da su izvršene od strane punoletnih učinilaca: bežanje od kuće, nepoštovanje disciplinskih pravila, nepoštovanje policijskog časa, ili nepristojno ponašanje. Maloletničko pravosuđe obuhvata kršenje prava deteta u toku hapšenja, administrativnog pritvora, sudskog postupka, izvršenja sudskih presuda, kao i kršenje prava deteta na institucionalnu negu.*

Ključne reči: *deca, konflikt, krivična odgovornost, krivični postupak, učinilac.*

---

a standard in the current Juvenile Justice Act. Also, in Kyrgyzstan, there were attempts in 2015 to lower the age of criminal responsibility from 14 to 12 but following discussions organized by UNICEF and other joint international efforts, the respective Parliamentary Committee eventually withdrew its proposal.